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BETWEEN POLITICS AND MORALITY: HANS KELSEN'S CONTRIBUTIONS TO THE
CHANGING NOTION OF INTERNATIONAL CRIMINAL RESPONSIBILITY

by

JASON REUVEN KROPSKY

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the
requirements for the degree of Doctor of Philosophy, The City University of New York

2019

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International Criminal Responsibility

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This manuscript has been read and accepted for the Graduate Faculty in
Political Science in satisfaction of the dissertation requirement for the degree of
Doctor of Philosophy.

Date

John Wallach

Chair of Examining Committee

Date

Alyson Cole

Executive Officer

Supervisory Committee:

John Wallach
Bruce Cronin
Peter Romaniuk

THE CITY UNIVERSITY OF NEW YORK

ABSTRACT

Between Politics and Morality: Hans Kelsen's Contributions to the Changing Notion of International Criminal Responsibility

by

Jason Reuven Kropsky

Advisor: John Wallach

The pure theory of law analyzes the legal normative basis of jurisprudence. According to its author, Hans Kelsen (1881-1973), the study of law as a science can only arise once “alien elements” associated with sociology, politics, ethics and psychology are extracted from strict legal cognition. But what happens when the international sphere of law that possesses the special quality of holding state officials accountable for core international crimes requires intrusion by extra-legal sources? Does Kelsen’s structural edifice collapse? Or is it reconstituted? In examining how international criminal responsibility, a test case for Kelsen’s positive law claims derives its legitimacy, this dissertation affirms the moral underpinnings of imputation at the highest level of legal cognition. The central legal concept of imputation as an otherwise “de-personalized” or “de-psychologized” notion of responsibility under national legal conditions is conceptually transformed through analysis of offenses of the magnitude of crimes against humanity and genocide. The capacity for moral agency otherwise rejected as a term of legal cognition under Kelsen’s general theory of law and state, under the conditions of international criminal law are assumed to act on the willing state agent.

Through a combination of theoretical and case study analysis, I argue that critics misrepresent Kelsen's position on international criminal responsibility by conflating it with a political realist or classical legal positivist defense of the immunizing acts of state doctrine, which protects state officials from prosecution by parties other than their own government. The advice Kelsen dispensed to US Supreme Court Justice and Nuremberg Prosecutor Robert H. Jackson in advance of the London International Military Tribunal (IMT) charter conference, demonstrates the most convincing rationale used to date in formulating the modern conception of individual (fault-based) responsibility in international law. While he violates his doctrinal commitment to the separation of law from morality in justifying international prosecution, Kelsen nevertheless establishes a unified description of a sphere of coercion based on the principle *non sub homine sed sub lege* ("not under man, but under law").

Modified to adapt to judicially adventurous opinions since 1993 with the creation of the International Criminal Tribunal for Yugoslavia (ICTY), Kelsen's dynamic analysis of responsibility for core international crimes remains under-studied, and hence under-valued. A revisionist account of Kelsen's major writings on humanitarian law is necessary to promoting a theory of international criminal responsibility inspired by the democratic values of compromise, tolerance and relative peace. Despite his own emphatically contrary claims to purity, Kelsen's legal philosophy retains an implicit commitment to moral normative values in determining culpability at the highest level of adjudication. His emphasis on the validity of retroactive legal technique, arguably his greatest contribution to the study of international criminal responsibility, defines the theoretical and practical scope of this term's historically-modified definition.

Acknowledgements

In a way this dissertation began in Fall 2000 in West Philadelphia in the upper rows of a heavily populated lecture hall at the University of Pennsylvania Law School with the course *Law and the Holocaust* taught by Australian international law scholar Harry Reicher. I would be remiss, then, not to insist on the debt of gratitude owed to Professor Reicher, deceased in 2014, who permitted me to enroll in his class as an undergraduate. His intellectual guidance on matters related to the legal effort to exterminate European Jewry provided a series of landmark discussions on the perils of fascist-leaning governance. Professor Reicher arranged a veritable canon of jurisprudential writings related to the Holocaust, and I am especially thankful for Professor Reicher's support in my initial application for doctoral study at the CUNY Graduate Center.

Marshall Berman, a reader at my PhD prospectus defense in 2010, was an early, pivotal influence on my course of study in political theory. He taught wonderful classes on modernity in the Political Science department at the CUNY Graduate Center that I was fortunate to attend, including courses on *Marxism* and *The Politics of Irrationality*. His modernist philosophy where the man in the street is knocked down but gets right back up, where the force of *humanizing* creative change is far stronger than, say, Robert Moses bulldozing the Bronx, where the history of consciousness is towards ever greater liberation from Faustian excess, resonated with me. I wanted to be part of his urban adventure. His classic *All That is Solid Melts into Air* was a blueprint for how I wished to act politically in the world—alive, joyous, free. Marshall's death on September 11, 2013 was indeed a doubly-sad day.

Throughout this dissertation process, long by the standards of doctoral study, I have turned for guidance to John Wallach, chair of my committee, who provided the initial impetus to research cases from Nuremberg to the Hague. Although this project deviates at points from its initial conception, I have been fortunate to have had an adviser who has supported a rather unconventional account of responsibility in international law focused on a critical assessment of the contributions of Hans Kelsen, author of the Pure Theory of Law. I am deeply indebted for his role as advisor, and for his willingness to continue to mentor me even during a rather extensive medical leave. In addition to his role as Professor of Political Science at Hunter College & The Graduate Center—CUNY, Professor Wallach was Founder & Chair (2010 - 2013) of the Hunter College Human Rights Program.

Bruce Cronin, Professor of Political Science and Department Chair at the Colin Powell School for Civic and Global Leadership at the City College of New York, introduced me to the *Basic Concepts and Theories of International Relations* at the CUNY Graduate Center. In past years, Prof. Cronin, my first reader, has been immensely helpful in adding me to the roster at City College in his role as CCNY Political Science Chair. Associate Professor of Political Science and Associate Director of the Center on Terrorism at John Jay College of Criminal Justice, Prof. Peter Romaniuk, my second reader, is also a Senior Fellow at the Global Center on Cooperative Security. In transitioning from full-time student of political theory to ICL researcher, Prof. Romaniuk has been extremely helpful in making room for me at John Jay in the International Criminal Justice (ICJ) program. I am grateful to both Prof. Cronin and Prof. Romaniuk for their constructive suggestions.

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As this project neared completion, I received word of the passing of my closest friend, Saul Moshe Friedman. A scholar of symbolic currency in ancient Judea, especially knowledgeable in Semitic languages, Saul taught Hebrew at UC Berkeley and Syriac at the Jewish Theological Seminary. He introduced me to hiking, wine making, bird watching, wood working, mandolin and guitar, the poetry of Rilke and Celan. His wide-ranging interests extended to my own research—and we made it a point to hit up as many libraries as we could in the Hudson River Valley when Saul returned to New York from his stint in Northern California. The many shabbos mornings we played blocks with your son Avner now in his Bar Mitzvah year, the many cold nights we shared around the fire pit in the old house on Hillel Court

watching the stars, follows a memory path that leads all the way back to our first high school encounter at Torah Academy of Bergen County when you asked me who I was—and I replied to your amusement— “Me...well I’m a friend of Lubavitch.”

Mom and Dad, thank you so much for all the home cooked meals and the bed to crash on whenever I returned to Jersey. I love you very much. My two sisters and brother, Alexandra, Leslie-Ann, and Lev—and my eleven wonderful nieces and nephews—I’m sorry I was so preoccupied that I sometimes neglected birthdays along the way. Thank you to my aunts, uncles and cousins. Jacob Fine, Yakov Fleischmann, Ben Hassid, Ephie Stempler Joshua Bartosiewicz, and Dov Friedman, your friendships, as Ben Franklin says, is “the best possession.” Karim Shumaker, your help was inestimable, especially use of the computer lab at the Gold Beach division of Southwest Oregon Community College.

Most of all, I thank MarVi Shumaker-Pruitt for her encouragement in life, and the home she’s made with me at the most westerly point in Oregon near the Cape Blanco Lighthouse. The sun shines when I see you.

Table of Contents

Chapter 1: The Transatlantic Influence of Hans Kelsen	1
Chapter 2: The Mirror of Legal Science: Moral and Political Conceptions of Individual Criminal Responsibility Under International Law	41
Chapter 3: Beyond Just War Theory and Crimes Against Peace as the “Class A” Charge: The Pure Theoretical Validation of Retroactive Prosecution at Nuremberg	113
Chapter 4: Twilight of the Acts of State Doctrine: Ex Post Facto Lawmaking and the Making of ‘Moral Responsibility’ at the Jerusalem Trial of Adolph Eichmann	165
Chapter 5: Judgment in the Post-Cold War Era: The Decline of Formalism in the Mirror of Pure Theory	208
Chapter 6: The Sovereignty of Conscience: Concluding Remarks on Hans Kelsen’s Conception of International Criminal Responsibility	265
Bibliography	280

Chapter 1 The Transatlantic Influence of Hans Kelsen

I. The “Homeless Ghost” of International Criminal Law?

To political theorist Judith Shklar (1928-1992), the “homeless ghost” of law as “an isolated block of concepts that have no relevant characteristics or functions apart from their possible validity or invalidity within a hypothetical system” is exemplified by the formalism of a certain positive or “human-made” legal philosophical tradition: the pure theory of law.¹

What makes pure theory a “homeless ghost,” according to Shklar, is the denial of the *substance* of norms or rules as the dominant concern of legal practitioners. Since the pure theory of law ignores “the content, aim, and development of the rules that compose it,”² she insists that pure theory affirms that the actual application of law is a relatively predictable ordering of legal rules free of moral and political ideas encompassing the continuous negotiation between its practitioners. For Shklar, cognition of law cannot be separated from politics and morality, since legal application invariably follows from the ideology of legal practitioners who profess a wide range of moral and political convictions that impact the final articulation of legal opinions. Shklar's view, therefore, follows in the vein of legal realism, the dominant twentieth century tradition in American jurisprudence.³

Hans Kelsen (1881-1973), author of the pure theory of law, argues that a strict cognition

¹“The idea of treating law as a self-contained system of norms that is 'there,' identifiable without any reference to the content, aim, and development of the rules that compose it, is the very essence of formalism...It consists...in treating law as an isolated block of concepts that have no relevant characteristics or functions apart from their possible validity or invalidity within a hypothetical system. But what aim is served by this 'homeless ghost'?” Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1964), 33-34.

²Ibid.

³See: D.A. Jeremy Telman, *A Path Not Taken: Hans Kelsen's Pure Theory of Law in the Land of Legal Realists*, in Hans Kelsen Anderswo/Hans Kelsen Abroad 353 (Robert Walter, Clemens Jabloner & Klaus Zeleny eds., 2010): https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1091&context=law_fac_pubs

of positive legal norms insures that certain ideological interests do not prejudice our understanding of the legal cognition of imputable subjects, in accordance with momentary moral or political appeals. Thus, the normative legal realm is predicated on generally prospective terms of cognition, rather than, for example, a series of seemingly arbitrary decisions that have not yet already been expressed legislatively, customarily, through judicial decisions, or, in the international sphere, by the particular means of ratified treaties. The concept of the coercive *or legal* norms, Kelsen argues in opposition to Shklar and the realist tradition, is the reason there is a distinct sphere of cognition denominated “jurisprudence”.

Nevertheless, while Shklar succeeds in demonstrating some of the failings of formalism, including an over-veneration for rule-following that impedes justice, she is wrong to claim that Kelsen's philosophy does not incorporate consideration of the “content, aim and the development of the rules.” One example alone should suffice: the “crimes” committed by Nazis. According to Kelsen, core international crimes deserved punishment, in spite of the fact that no laws existed to penalize individual (fault-based) humanitarian offenses at the time they were committed.⁴ Given the abject nature of Nazi offenses, the International Military Tribunal (IMT) at Nuremberg in 1945-46 necessitated the application of a criterion of justice that may be described as “extra-legal”. Even though Kelsen criticized various procedural faults of the IMT prosecution,⁵ he

⁴ This point is thoroughly documented in chapter two.

⁵ “[The London Agreement’s] greatest merit is that it puts into force the idea of individual criminal responsibility for violations of international law and thus improves—though not in general but for some particular cases—the primitive technique of general international law with its collective responsibility. But, at the same time, the London Agreement authorizes the International Military Tribunal to declare ‘groups or organizations’ as criminal, and confers upon the competent national authorities of any signatory ‘the right to bring individuals to trial for membership therein before national military or occupation courts.’ That means that an individual may be subjected to a criminal sanction not because he, by his own behavior, committed a crime, but because he belonged to an association declared as criminal. That means collective responsibility.” Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent,” *International Law Quarterly* 153, no. 1(2) (1947) in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (Oxford: Oxford University Press, 2008), 285. On this count, Kelsen opposes the imputation of criminality to any organization or group, and argues that the Nuremberg IMT especially superseded its discretionary authority. The tribunal’s claim that “criminal guilt is personal, and that mass

nevertheless remained unwavering in his support for the validity of the proceedings⁶.

Contravention of the continental European maxim *Nullum crimen, nulla poena sine praevia lege poenali* (Latin, "[There exists] no crime [and] no punishment without a pre-existing penal law

punishments should be avoided" does not obviate the fact that "if satisfied of the criminal guilt of any organization or group, this tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality is new, or because it might be unjustly applied by some subsequent tribunals.'" See: *Trial of the Major War Criminals Before The International Military Tribunal* 12 (1947), 256 in M. Cherif Bassiouni, *Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011), 491. Kelsen's commitment to individual responsibility is no more apparent than here where he claims that "these provisions constitute a regrettable regress to the backward technique of collective criminal responsibility, in open contradiction to the progress made by the [London] Agreement in establishing the opposite principle in its provisions..." Kelsen, "Precedent," 285. Quincy Wright, a naturalist who assumed a significant role as Robert Jackson's legal advisor in the drafting of the IMT charter, like Kelsen opposed "guilt by association" on the grounds that "advanced systems of criminal law accept the principle that guilt is personal. Guilt is established by evidence that the acts and intentions of the individual were criminal." Quincy Wright, "International Law and Guilt by Association," *American Journal of International Law* 43, no. 4 (1947): 746-747. Wright further comments that "criminal responsibility is based upon psychological considerations and ought therefore to be a responsibility only of individuals. We should, therefore, recognize that the individual is criminally responsible when he commits an act which is an offense against the law of nations, and that a state cannot cover such an act with a blanket immunity if it is itself under an international obligation." *Ibid.*, 748-749. Wright deviates from Kelsen's argument (see: chapter three) that the judgment of the Nuremberg Tribunal was authorized by the IMT charter at London on August 8, 1945, not preexistent laws putatively criminalizing core international offenses, including the Kellogg-Briand Pact. In this respect, the idea that the individual is criminally sanctionable based on an "international obligation" at the time of the offense is incorrect from a Kelsenian standpoint. Nevertheless, Kelsen and Wright are in agreement with respect to the problem of "guilt by association," which reflects "primitive" and "politicized" judgment under autocratic rule. How Kelsen establishes individual criminal responsibility based on the *immorality* of the offense without also acknowledging "fair warning" principles, must mean either that Kelsen presumes (a) the authority of ICL courts to hold individuals responsible while maintaining the primacy of the power of legal norms of the national legal order (or "state") in the regulation of behavior beyond the capacity of the individual to choose between "right" and "wrong" with respect to offenses of the magnitude of crimes against humanity and genocide, or else (b) Kelsen acknowledges an intrinsic moral quality that reflects "agency" even under a positive legal structuring like the pure theory of law that otherwise excludes the psychological and moral motivations of the individual from legal cognition.

⁶ Despite endorsing the *ad hoc* and retroactive judgment of the IMT prosecution at Nuremberg, Kelsen was vocal in his commitment to the ideal of a neutral court based on his model for a permanent compulsory international court adjudicating core international crimes. He writes, "If the principle applied in the Nuremberg trial were to become a precedent—a legislative rather than a judicial precedent—then, after the next war, the governments of the victorious States would try members of the governments of the vanquished States for having committed crimes determined unilaterally and with retroactive force by the former. Let us hope there is no precedent." Kelsen, "Precedent," 289. As with Kelsen's decision to embrace a higher principle of justice—"principles of civilization"—as the *legal* reason for why major Nazi war criminals *ought* to be punished, the author of the pure theory of law recognizes that the moral foundation of ICR animates an institutional goal reflecting Kelsen's core concern: the modern legal description of imputation as pertains to individual responsibility. Rather than adhering to the principle of legality rule against *ex post facto* lawmaking, Kelsen endorses this exceptional methodology, especially in prosecution of core international crimes, despite reservations, and therefore any argument propounded by Kelsen suggesting that he does not endorse retrospective laws, in adherence of a strict construction of acts of state provisions, is necessarily unwarranted. For a higher order account of Kelsen's position on the *legitimacy* of the trial, see: Hans Kelsen, "The Rule against Ex Post Facto Laws and the Prosecution of Axis War Criminals," *Judge Advocate Journal* 2, no. 3 (1945).

[appertaining]"⁷ does not prove the violation of positive law precepts, Kelsen insists, since the principle of non-retroactivity itself licenses exceptions. Furthermore, since there is no general principle of international law that prohibits retroactive laws, Kelsen endorses this highly irregular approach as a positive law claim to validity.

Given that the individual was not subject to penalizing norms for core international crimes prior to the Nuremberg proceedings, Kelsen's account of *ex post facto* lawmaking as a valid methodological choice affirms the actual pattern of ICL in following a retroactive logic. The effort to insure the valid application of international law in the adjudication of humanitarian crimes by separating law from morality ("the separation thesis"), a key tenet of legal positivism,⁸ however, is contravened by the function of international legal theorists and practitioners throughout the history of ICL in establishing a criterion for "principles of humanity" (or "principles of civilization" in the Kelsenian lexicon), as well as other adventurous, if retroactive, morally-laden methodological means to shore up gaps in the law. The problem of the relationship between time and culpability persists throughout the history of this discipline—and Kelsen's legal philosophy helps "structure" a *valuable* conception of agency amidst the imposition of new, if retroactive, standards of legality.

This dissertation highlights the dissonance between Kelsen's efforts to define ICR in accordance with a strictly legal positivist doctrine while readily promoting moral principles traditionally associated with the school of natural law. This is especially the case when the "legal

⁷See *generally*: Beth Van Schaack "Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals," *Georgetown Law Journal* 97 (2008): 119-192.; See *generally*: Jerome Hall, *General Principles of Criminal Law* (Indianapolis, The Bobbs-Merrill Company, 1947), 35-64.

⁸ See *generally*: *The Stanford Encyclopedia of Philosophy*, "Legal Positivism," last modified January 3, 2003, <http://plato.stanford.edu/entries/legal-positivism/>. Chapter two provides an extensive appeal to the major legal positivist jurists, including John Austin and HLA Hart, especially as contrasting champions of "the separation thesis".

subject,” who is otherwise *generally* reduced in Kelsen’s particular vocabulary to a fictional personification of a “bundle of legal norms,” as imputed “rights” and “duties” in accordance with the “de-personalized” or “de-psychologized” account of “law,” is recreated as a point of imputation (or responsibility) invested with “personal” or “psychological” characteristics. When no future-oriented guide to sanctioned conduct exists, Kelsen nevertheless argues that state officials retain the capacity to make moral choices, which reaffirm “principles of civilization/humanity” or “principles of tolerance”. The particular meaning of these principles, and their implications for Kelsen’s general moral conception, must be bracketed until the conclusion, chapter six. After assessing both the philosophical value of Kelsen’s contributions to the pure theoretical cognition of ICR (chapter 2), this investigation draws on empirical evidence to demonstrate the progressive confluence between Kelsen’s contributions to the study of ICR and the advancement of this institution through case study analysis of the pure theoretical methodology applied to three stages of ICL history (chapters 3-5).

In foreshadowing the construction of an international criminal court as early as 1944 with his design for a permanent compulsory international court adjudicating both matters between states and individual criminal violations of international law, Kelsen blueprints a system of adjudication, which, despite its post-modern fragmentation, has nevertheless succeeded in operationalizing an International Criminal Court (ICC) in The Hague. Even under contemporary *ad hoc* conditions, Kelsen’s writings continue to benefit those who value a designated criterion of validity. Why, then, did the author of the pure theory of law, the object of Shklar’s polemic, argue for the merit of this highly irregular methodology, if not to state his unequivocal recognition of the moral source animating positive *legal* claims at the highest level of imputation? Does his express introduction of moral standards (i.e., “principles of civilization”)

not obviate his commitment to strictly positive legal analysis? Or is there another way to reconcile the positivity of ICR with a changing *moral* cognition sharing democratic-affinities with, for example, Roscoe Pound's legal sociology?⁹ Is there a way to reimagine, as an emerging group of Kelsen scholars have, the moral-normative core of the pure theoretical philosophy, one that points to an explanation for Kelsen's "extra-legal" resort to moral terms as justification for ICL prosecution? The placement of Kelsen within the relativist/absolutist moral continuum, however, is postponed until the concluding chapter—six.

This dissertation consequently embarks on a three-fold quest: (a) to distinguish the pure theory of law as the most consistent positive or human made legal articulation of a valid international law system adjudicating humanitarian crimes, (b) to demonstrate how even the strictest positive theoretical application of ICL ends up incorporating morality, albeit through formal, legal means, and (c) to show how legal practitioners engaged Kelsen's philosophy of international criminal responsibility beginning with US Supreme Court Justice Robert H. Jackson. Even before he assumed his assignment as chief US prosecutor at the International Military Tribunal (IMT) at Nuremberg, Jackson was instrumental in incorporating Kelsen's definition of ICR in Jackson's other seminal role as US representative at the London IMT Charter Conference from June 26-August 8, 1945.¹⁰ The next section considers Kelsen's direct role in helping to establish the definition of individual criminal responsibility in international law prior to the constitution of this new (fault-based) system of adjudication.

While many of the points made here resurface in subsequent chapters, this introductory account emphasizes biographical notes (section II), a general overview of the philosophy of ICR

⁹ For a general overview of Roscoe Pound's description of "civilization, see his commentary on jural postulates in Roscoe Pound, *Outlines of Lectures on Jurisprudence*, 5th edition (Cambridge: Harvard University Press, 1943), 168, 179, 183-184.

¹⁰ This point will be expanded upon in the biographical notes (section II).

in the context of ICL history (section III), and a chapter-by-chapter outline reaffirming the general methodological application of an historicized-account of the pure theory of law (section IV). While Kelsen's own students in his “Viennese Circle of Legal Positivists,”¹¹ such as Alfred Verdross (1890-1980), later turned to a medieval scholastic interpretation of international criminal responsibility based on the naturalist concept of *jus cogens*,¹² and Hersch Lauterpacht (1897-1960), a judge on the International Court of Justice (ICJ), to a neo-Grotian view of ICR,¹³ Kelsen claimed an express commitment to a thoroughly positive law notion of ICR. *Is this even possible? If it is not, why is it not? And what are its implications for the general understanding of the relationship between law, politics and morality from the perspective of the test case of international criminal law?*

II: Biographical Notes

According to legal theorist W.B. Stern in a 1936 issue of *The American Political Science Review*, “Among legal philosophers the time-honored dispute between natural law schools and legal positivists arouses ever new interest. On the side of the positivists, the 'pure theory of law' gains more and more ground.”¹⁴

Stern laments that, in contrast to the favorable reception that the pure theory of law received in continental European circles, no American publication took account of its author Hans Kelsen's book, *Reine Rechtslehre* (1934), or *The Pure Theory of Law*, translated into

¹¹Clemens Jabloner, “Kelsen and his Circle: The Viennese Years,” *European Journal of International Law* 9 (1998): 368-385, <http://www.ejil.org/pdfs/9/2/1496.pdf>.

¹²*Jus cogens* (from Latin: compelling law; English: peremptory norm) refers “to certain fundamental, overriding Principles of international law, from which no derogation is ever permitted,” *Legal Information Institute*, “*Jus Cogens*,” https://www.law.cornell.edu/wex/jus_cogens.

¹³See: Hersch Lauterpacht, “The Grotian Tradition in International Law,” *British Yearbook of International Law* 23, no. 1 (1946).

¹⁴W. B. Stern, “Kelsen's Theory of International Law,” *The American Political Science Review* 30, no. 4 (1936): 736-41.

English in 1967. Kelsen's project aimed at "cognition focused on the law alone,"¹⁵ separating out political ideology and moralizing, as well as methodologies that reduced the law to natural or social scientific study.¹⁶ In its purity Kelsen's approach aimed to validate and unify national and international legal orders on grounds that accounted for positive law free of 'alien elements'. Other methods of evaluation structurally distinguishable from jurisprudence, including ethics, sociology, political science and psychology, according to Kelsen, introduced categorically separate objects of cognition. In introducing 'alien elements' into the study of law, the so-called jurisprude violates cognition within a delineated "coercively-authorized" frame, No matter the ultimate merit—or even consistency—of such an approach, Kelsen's study of imputation or the "de-personalized" or "de-psychologized" notion of responsibility provides relatively neutral ground in which to evaluate the object of this thesis: theoretical and practical implications of a pure theoretical conception of international criminal responsibility.

Kelsen, an Austrian-Jewish¹⁷ refugee who arrived on North American shores in 1939 at the age of 58, was mainly overlooked in his adopted country. A 2014 interdisciplinary conference entitled "Hans Kelsen in America" aimed to "explor[e] the reasons for Kelsen's lack of influence in the United States, and proposed ways in which Kelsen's approach to legal, political and international relations theory could be relevant to current debates in the U.S. academy in those areas."¹⁸ The biographical notes on Kelsen are not merely of passing interest. Much can be

¹⁵ Hans Kelsen, *The Pure Theory of Law* (Berkeley: University of California, 1967), 7.

¹⁶ Andrei Marmor. "The Pure Theory of Law," *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/lawphil-theory/>.

¹⁷ Although twice-converted, first in 1905 to Catholicism, and, again, in 1912 to Lutheranism, after the Second World War Kelsen affirmed his personal identity as a Jew. According to legal scholar Reut Yael Paz, Kelsen "confess[ed], for instance, in 1932 that 'Eretz Israel is my miserable love'. After his immigration to the United States, Kelsen considered himself a Jew." Reut Yael Paz, "Kelsen's *Pure Theory of Law* as 'a Hole in Time', *Monde(s)* 1, no. 7 (2015), 89. See also: Nathan Feinberg, "Hans Kelsen Veyaado" in *Massot Besheelot Hazman* (Jerusalem: Magnes Publishing House/The Hebrew University, 1973).

¹⁸ Proceedings of Interdisciplinary Conference: Kelsen in America, Lutheran School of Theology, Chicago, Illinois, June 2014. <http://www.valpo.edu/law/kelsen-in-america>. The Chicago conference, organized by Valparaiso Law

learned in chronicling, for example, the opposition of natural law philosopher Lon Fuller to Hans Kelsen's legal philosophy, since Fuller represented a major force in modern natural law theory. Although Harvard Law School Dean Roscoe Pound supported Kelsen in his quest for U.S. employment, there remains doubt as to whether Fuller may have directly opposed Kelsen's nomination to the Harvard Law School faculty,¹⁹ of which Fuller was a member. Such an appointment likely would have meant a far more influential role for Kelsen within the U.S. legal academy. After a very prominent European career, Kelsen, generally ignored in American legal

School Dean Jeremy Telman, included leading experts in Weimar studies, including historians Peter Caldwell and William Scheuermann; legal theorists Scott Shapiro and Brian Leiter; and some of the foremost Kelsen scholars worldwide, including Jochen von Bernstorff, Jorg Kammerhoffer, Clemens Jabloner and Thomas Olechowski, the latter two, co-directors of the Hans Kelsen Institute-Vienna. Notably absent, however, was the “Dean of North American Kelsen Studies,” Stanley Paulson. At the September 27-29, 2018 IVR German-section Freiburg conference on Kelsen where nearly three hundred scholars from four continents and twenty-eight countries gathered to discuss “Hans Kelsen’s Pure Theory of Law: Conceptions and Misconceptions,” Telman presented on Kelsen’s views of judicial interpretation. While his IVR presentation could not be integrated into the present study outside of a few brief remarks, Telman affirms a Kelsenian “free law” interpretation similar to views expressed in the present project, especially in chapter five. See: Jeremy Telman, “Problems of Translation and Interpretation: A Kelsenian Commentary on Positivist Originalism” (paper presented at the Annual IVR German Section Conference, Freiburg, Germany, September 29, 2018). The second largest contingent of Kelsen scholars represented at the Freiburg IVR, it should be noted, were from Brazil, mostly from Sao Paulo, where Kelsen has assumed a central place in jurisprudential study. See: Carlos Eduardo de Abreu Boucalt, “Hans Kelsen - A Recepção da "Teoria Pura" na América do Sul, Particularmente no Brasil,” *Sequência (Florianópolis)* no.71 (July/Dec. 2015), <http://dx.doi.org/10.5007/2177-7055.2015v36n71>. Boucalt notes the widespread reception of Kelsen’s writings throughout Latin America, including Uruguay, Colombia, Argentina and Brazil in “Hans Kelsen - The Reception of ‘Pure Theory’ in South America, Particularly in Brazil“.

¹⁹ The Russian-trained scholar of international law, George Mazur, is confident that Fuller opposed Kelsen’s appointment. In an email correspondence with Kelsen scholar Jeremy Telman on November 12, 2018, Telman writes: “I talked with Fred Schauer about this. I have no information about this issue. George Mazur is convinced that Fuller blackballed Kelsen and made sure that he not only did not get a position at Harvard but could not get a position anywhere. I cannot discount that possibility, but there are so many other reasons why Kelsen could not land a position, I am not inclined to accept George's theory when there is no evidence.” Frederick Schauer of the University of Virginia, a leading constitutional law expert, does not see proof of Fuller’s effort to prevent Kelsen from obtaining work at Harvard, which, in any event, he claims, cannot be determined insofar as Harvard continues to embargo documents that could shed light on this relationship. See: Frederick Schauer, “Fuller on Kelsen; Fuller and Kelsen” (paper presented at the Annual IVR German Section Conference, Freiburg, Germany, September 28, 2018). For evidence that Fuller merely took a critical position but did not work to block Kelsen’s appointment, Nicola Lacey references a letter from Fuller to Dean Paul William Brosman of Tulane University “recommending” Kelsen: “I have found Kelsen very stimulating as a colleague. He is conversationally very entertaining, and not at all the heavy Teutonic type of scholar. His lectures have been pretty abstract, and I’m afraid most of our men got little out of them. His English is quite good now, and, though there are slips in idiom, is easy to understand.” See: “Letter from Fuller to Dean Paul William Brosman, Tulane University of Louisiana College of Law, January 10th 1942; The Papers of Lon Fuller, Harvard Law School Library, box 2, folder 1 in Nicola Lacey “Out of the ‘Witches’ Cauldron’?: Reinterpreting the Context and Re-assessing the Significance of the Hart-Fuller Debate,” *London School of Economic: Law, Society and Economy Working Papers* 18/2008, 11.

circles with no school of law offering full time appointment to the recent émigré, assumed a position as a political science instructor at the University of California-Berkeley in 1942.²⁰ In a 1948-49 issue of *The Journal of Legal Education*. Fuller wrote:

I share the opinion of Jerome Hall²¹...that jurisprudence should start with justice. I place this preference not on exhortatory grounds, but on a belief that until one has wrestled with the problem of justice one cannot truly understand the other issues of jurisprudence. Kelsen, for example, excludes justice from his studies (of practical law) because it is an 'irrational ideal' and therefore 'not subject to cognition.' The whole structure of his theory derives from that exclusion. The meaning of his theory can therefore be understood only when we have subjected to critical scrutiny its keystone of negation.²²

But is this a correct assessment of Kelsen's contributions to the study of justice? Fuller, who would later engage in one of the most notable debates in legal theory in the twentieth century with HLA Hart, in which Fuller argues against Hart's division between law as it *is* and law as it *should be*,²³ would have gained from a sustained encounter with Kelsen. While it is certainly true that Kelsen's legal philosophical project considers “justice an 'irrational ideal' and therefore 'not subject to (legal) cognition',” it is Kelsen rather than Fuller who engages in a comprehensive account of the legal basis for the 1945-46 International Military Tribunal (IMT)

²⁰ See especially: D.A. Jeremy Telman, “The Reception of Hans Kelsen’s Legal Theory in the United States: A Sociological Model, *Law Faculty Publication*, Paper 7 (January 2008), http://scholar.valpo.edu/law_fac_pubs/7.; D.A. Jeremy Telman, “A Path Not Taken: Hans Kelsen’s Pure Theory of Law in the Land of Legal Realists” in *Hans Kelsen Anderswo/Hans Kelsen Abroad*, eds. Robert Walter, Clemens Jabloner and Klaus Zeleny (Manz: Schriftenreihe Des Hans Kelsen-Instituts, 2010),

https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1091&context=law_fac_pubs

²¹Jerome Hall, an authority on American criminal justice and jurisprudence, provides a thorough account of this principle. Chapter two revisits Hall’s writings on retroactivity with respect to the distinction made between what Roscoe Pound refers to as “the humanitarian path” and “the totalitarian path.” See: Jerome Hall, *General Principles of Criminal Law* (Indianapolis: Bobbs-Merrill, 1960); Roscoe Pound, *New Paths of the Law: First Lectures in the Roscoe Pound Lectureship Series* (Clark, NJ: The Lawbook Exchange, 2006).

²²Lon Fuller, “The Places and Uses of Jurisprudence in the Law School Curriculum,” *Journal of Legal Education* 1, no.4, (1949): 496.

²³ H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958): 593-629; Lon Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart." *Harvard Law Review* 71, no. 4 (1958): 630-72.

of major Nazi war criminals at Nuremberg.²⁴ His numerous publications devoted to the interpretation of criminal responsibility for crimes against peace, war crimes and crimes against humanity—the core international criminal law (ICL) charges at the creation of the modern ICL “system” at Nuremberg—suggests the extent of Kelsen's concern *for* justice. Unlike John Austin’s nineteenth century command theory, and Hart’s neo-positivist critique of Austin a century later, Kelsen’s positive law approach provides comprehensive justification of international law as a valid “system” of legal norms providing for collective *and* individual responsibility.²⁵ His early influence on the ICL system, for instance, has been documented with respect to the inauguration of the quasi-constitutional IMT Charter.²⁶ The exact route that Kelsen took from exclusion within the confines of the American legal establishment to a leading, if generally unacknowledged, role in outlining United Nations (UN) legal philosophy, as well as in establishing *international criminalization* of heads-of-state and other state officials post-WWII, can only be briefly retold.

US Supreme Court Justice Robert H. Jackson, chief US prosecutor at the International Military Tribunal (IMT) at Nuremberg, stated in a July 5, 1945 memorandum addressed to members within the Office of the US Chief of Counsel for the Prosecution of Axis Criminality—

²⁴ See: Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals," *California Law Review* 31, no. 5 (December 1943): 530-71.; Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944).; Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law" in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 274-89.; Hans Kelsen. *The Judge Advocate Journal* 2, no. 3 No. 3 (Fall-Winter 1945): 8-13.; Hans Kelsen, "Collective and Individual Responsibility for Acts of State in International Law," *Jewish Yearbook of International Law* 226 (1948): 226-239.

²⁵ See: John Austin. *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (London: Weidenfeld and Nicolson, 1954).; John Austin, Robert Campbell, and Sarah Austin. *Lectures on Jurisprudence; Or, The Philosophy of Positive Law* (London: J. Murray, 1885).; Hart, HLA. *Concept of Law* (Oxford: Oxford University Press, 1961).

²⁶ Guénaél Mettraux, "Judicial Inheritance: The Value and Significance of the Nuremberg Trial to Contemporary War Crimes Tribunals," in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 599-617.

Sidney Alderman, Francis Shea and Colonel Murray C. Bernays²⁷—that “Hans Kelsen is worried over the absence of any international law on the subject of individual responsibility. He thinks a definite declaration is essential. I think it may be desirable.”²⁸

In commenting on Jackson’s report to President Harry S. Truman²⁹ in preparation for the London IMT Charter conference, where Jackson served as chief-US delegate, Kelsen was adamant that a distinction be made between newly authorized treaties retroactively determining ICR and the assumption of an already-criminalized designation of responsibility in advance of the August 8, 1945 ratification of the London Charter. To assume that the law had already been created when only collective forms of responsibility applicable to states were part of the international legal lexicon, Kelsen maintained, threatened the legitimacy of this newly-constituted ICL authority. In distinguishing between what Jackson believed to be “desirable” and Kelsen’s view of the “essential” effort to declare individual responsibility, Jackson frames the debate over what is preferable or recommendable against what is vital or indispensable.

Before concluding the memo with the words, “I think it may be worth including to stop

²⁷ The connection of Murray Bernays, Sigmund Freud’s nephew through marriage, to Kelsen, an old Viennese friend of Freud’s, is yet to be explored. But as with other transatlantic connections, it is necessary to account for the small circle of scholars working on war crimes issues from both sides of the Atlantic. “Murray Bernays, Lawyer, Dead; Set Nuremberg Trials,” *New York Times*, September 22, 1970, <https://www.nytimes.com/1970/09/22/archives/murray-bernays-lawyer-dead-set-nuremberg-trials-format.html>. The subject heading of Bernays, July 6, 1945 memorandum to Justice Jackson read “Kelsen Recommendation for Declaration of Individual Responsibility.” In referencing Jackson’s July 5th response to Kelsen’s advice, Bernays writes: “Professor Kelsen was formulating language in the abstract.” Bernays recommends renumbering paragraphs in the U.S. 30 June Annex to read: “Individuals who have committed, instigated, been responsible for, or taken a consenting part in acts in violation of International Law as declared by this instrument shall be subject to trial and punishment thereof.” This he suggests could be “tie[d] in...under the general heading “Substantive Provisions for Liability and Defense.” Clearly Kelsen had made a mark on the original “substantive” conception of *individual* responsibility in international criminal law. Murray Bernays, “Memorandum to Mr. Justice Jackson: Kelsen Recommendation for Declaration of Individual Responsibility,” July 6, 1945, email correspondence with Patrick Kerwin, Manuscript Reference Librarian, Library of Congress, August 26, 2014.

²⁸ Hans Kelsen, ‘Report’ untiled text by typewriter, ‘Robert Houghwout Jackson Papers in the Library of Congress, Manuscript Division, Library of Congress, Washington, D.C. in Monica Garcia Salmones-Rovira, *The Project of Positivism in International Law*, 364.

²⁹ *Ibid.*

the argument about whether the law does so provide,”³⁰ Jackson references Kelsen’s definition that:

Persons who, acting in the service of any state (of one of the Axis powers) or on their own initiative, have performed acts by which any rule of general or particular international law forbidding the use of force, or any rule concerning warfare, or the generally accepted rules of humanity have been violated, as well as persons who have been members of voluntary organizations whose criminal character has been established by the court, may be held individually responsible for these acts or for membership in such organizations and brought to trial and punishment before the court. 31

The final text of the IMT Charter corresponds directly with Kelsen’s definition of individual culpability in ICL. As international law scholar Mónica García-Salmones Rovira indicates:

Kelsen’s hand is clearly visible in respect of the issue of ‘individual responsibility’. The final text (Article 6) used a very similar formulation to that proposed by Kelsen in his report, which Jackson later recommended. The legal point about the individual criminal responsibility of members of the Nazi government appears sufficiently clear: that ‘persons’, who had committed any of the three crimes defined in the article (i.e., crimes against peace, war crimes and crimes against humanity), as ‘individuals or as members of organizations’ acting in the interests of a state (Kelsen suggested ‘in the service of any state’) and within which countries, ‘Axis countries’ (Kelsen, ‘of any state (of one of the Axis powers)’) will be held ‘individually responsible.’³²

Rovira writes that “[J]udging from the documents kept among Jackson’s papers from the period before and immediately after WWII, it appears that the advice given by Hans Kelsen caused individual criminal responsibility to become part of international law, and that, therefore, it is thanks to him that international law could be efficiently employed during the Nuremberg Trials.”³³

³⁰ Ibid.

³¹ Ibid.

³² Ibid., 365.

³³ Ibid, 364.

While Rovira's claims tend to be overstated, given Jackson's indebtedness to other leading scholars of the day, including Kelsen's disciple, Hersch Lauterpacht, who, according to Jackson's son, William, was instrumental in defining Article 6 of the IMT charter (i.e., the definitions of crimes against peace, war crimes and crimes against humanity),³⁴ Harvard criminologist Sheldon Glueck, whose writings licensed a novel common law approach to ICL,³⁵ or Jackson's legal advisor, Quincy Wright³⁶, an adherent of the natural law tradition, she is nevertheless correct in pointing to Kelsen's contributions as a spur towards greater positive law emphasis on individual (fault-based) culpability within a sphere that had traditionally conceived of the state as the lone subject of international law. Rovira states that due to his stature as "one of the world's most renowned legal theorists...particularly noted for his defence of the principle of individual criminal responsibility in international law," it only makes sense that "Jackson and, more generally the American executive turned to him for advice from 1942 onwards...and specifically asked him to advise on the preparation of the American draft for the London Charter."³⁷

Many of the most prominent scholars of public international law in the twentieth century, including Lauterpacht, Josef Laurenz Kunz³⁸ and Alfred Verdross^{39,40} were disciples of Kelsen's.

³⁴ See: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2002).

³⁵ Sheldon Glueck, *War Criminals, Their Prosecution & Punishment* (New York: A.A. Knopf, 1944).; Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York: A.A. Knopf, 1946).

³⁶ See generally: Quincy Wright, "The Law of the Nuremberg Judgment," *American Journal of International Law* 42, no. 1 (January 1947).; On Wright's criticism of the legal positivist basis of the Nuremberg proceedings, see: Quincy Wright, "Legal Positivism and the Nuremberg Trial," *American Journal of International Law*, 42, no 2 (1948).

³⁷ Rovira, *The Project of Positivism in International Law*, 365-366.

³⁸ For Kunz's most comprehensive assessment of pure theory in relation to international law, see: Josef Laurenz Kunz, *The Changing Law of Nations: Essays on International Law* (Columbus: Ohio State University Press, 1968).

³⁹ The Vienna School of Jurisprudence established in the intermezzo between WWI and WWII as a counter to the dominant 19th century state-centric Hegelian trend in central European international legal theory was inspired by pure theory. See: Clemens Jabloner, "The European Tradition in International Law: Hans Kelsen. Kelsen and His Circle: The Viennese Years." *European Journal of International Law* 9, no. 2 (1998): 368-85.

⁴⁰ Javier Trevino writes in the introduction to an updated edition of Kelsen's *General Theory of Law and State* that "we would do well to consider the juridical principles put forth by the most important legal theorist of the twentieth century, in endeavoring to achieve a genuine and enduring peace in the world of the twentieth century." See: Hans

Hans Morgenthau, author of the political realist classic *Politics among Nations*,⁴¹ received substantial support from Kelsen on his 1934 habilitation dissertation.⁴² Morgenthau dedicated an anthology of his writings to Kelsen, who he wrote “has taught us through his example how to speak Truth to Power.”⁴³ Another former student, political realist John Herz, who championed the notion of the “security dilemma,”⁴⁴ co-authored a critical introductory account of international justice with Kelsen soon after the latter’s arrival in the United States.⁴⁵ Former dean of Harvard Law School Roscoe Pound stated that “Kelsen is the leading jurist of our time.”⁴⁶ While HLA Hart, whose concept of the law has often been cited as having been influenced by

Kelsen, *General Theory of Law and State* (New Brunswick, NJ: Transaction, 2009), Introduction. Kelsen's influence on the theory of public international law is reflected in a 1998 issue of the *European Journal of International Law* devoted to Kelsen’s writings. See: Clemens Leben, "The European Tradition in International Law: Hans Kelsen and the Advancement of International Law." *European Journal of International Law* 9, no. 2 (1998): 287-305; Danilo Zolo, "Hans Kelsen.: International Peace through International Law." *European Journal of International Law* 9, no. 2 (1998): 306-24.; Francois Rigaux, "The European Tradition in International Law: Hans Kelsen. Hans Kelsen on International Law," *European Journal of International Law* 9, no. 2 (1998): 325-43.; Carty, Anthony. "The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law." *European Journal of International Law* 9, no. 2 (1998): 344-54.

⁴¹ Hans J. Morgenthau, *Politics among Nations: the Struggle for Power and Peace* (New York: Knopf, 1967).

⁴²According to Kelsen biographer, Rudolf A. Metall, *Hans Kelsen: Leben und Werk* (Wien, 1969), 64 in Christoph Frei, *Hans Morgenthau: An Intellectual Biography* (Baton Rouge: Louisiana State University Press, 2001), 49, Morgenthau was especially indebted to Kelsen for advocating on his behalf during a contentious defense of his habilitation dissertation, “If it had not been for Kelsen, my academic career would probably have come to a very premature end.” Morgenthau, Johnson Interview, HJM B2-08 in Frei, *Hans Morgenthau*, 49. See also: Hans Morgenthau, *La Réalité des normes en particulier des normes du droit international: Fondements d'une théorie des normes*, (Paris: Alcan, 1934) or *The Reality of Norms and in Particular the Norms of International Law: Foundations of a Theory of Norms* has yet to be translated into English. From Hans Kelsen’s evaluation, 15 February 1934-HJM B65: “It augurs well for the seriousness and vigor of Herr Morgenthau’s scholarly effort that he chose what may be the most difficult problem in normative theory. And he has tackled this problem not only with outstanding knowledge of the extensive literature, not only with the deepest insight into the many related questions, but also with great independence and thoroughly original ideas. This study demonstrates Herr Morgenthau to be one of the rare minds that may have something important to contribute to an exact science of jurisprudence.” Frei, *Hans Morgenthau*, 49.

⁴³ Hans J. Morgenthau, *Truth and Power: Essays of a Decade* (London: Pall Mall Press, 1970) in William E. Scheuerman, *Morgenthau* (Cambridge, UK: Polity Press, 2009), 230.

⁴⁴ See generally: John H. Herz, *Political Realism and Political Idealism* (Chicago: University of Chicago Press, 1951). Herz describes the “security dilemma” as “a structural notion in which the self-help attempts of states to look after their security needs tend, regardless of intention, to lead to rising insecurity for others as each interprets its own measures as defensive and measures of others as potentially threatening,” Herz, *Political Realism and Political Idealism*, 157.

⁴⁵ Hans Kelsen and John H. Herz, “Essential Conditions of International Justice,” *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, Vol. 35 (APRIL 24-26, 1941): 70-98.

⁴⁶Roscoe Pound, "Law and the Science of Law in Recent Theories," *The Yale Law Journal* 43, no. 4 (February 1934): 525-36.

Kelsen's early attack on the foundations of classical legal positivism, remarked that he is "the most stimulating writer on analytical jurisprudence of our day."⁴⁷

Kelsen's integrity extends to his support of Carl Schmitt's candidacy for a law faculty position at the University of Cologne, despite Schmitt's highly offensive previous attacks on Kelsen, and Schmitt's soon-to-be decision to remain the only member of the Cologne faculty not to sign a letter in support of Kelsen, who had been targeted at the time of the Nazi seizure of power. Both the debate between Kelsen and Schmitt over "who rules?" that embodied the Weimar constitutional crisis, wherein Schmitt vested power in the executive branch, while Kelsen argued for the final authority of a judiciary with the right of constitutional review, and the general account of Schmitt's offenses as "crown jurist of Nazism," which warranted his investigation for war crimes by US prosecutor Robert Kempner in 1947,⁴⁸ indicates an inextricable division between Schmitt's and Kelsen's distinct legal philosophies. The first devised a legal philosophy whose purpose was particularly amenable to fascist governance; the latter produced a legal philosophy that he called "science," which correlated with democratic "principles of tolerance". Schmitt's embrace of Kelsen's prospectively-designated defense of the acts of state doctrine (AoSD) as a weapon against allied prosecution, though certainly an act of "bad faith," points however to the stature that Kelsen had assumed in the legal philosophical world in 1946 even amongst his foremost critics.

Kelsen's major professional achievements consisted of his role as legal advisor to the Austro-Hungarian Minister of War during the First World War; authorship of the 1920 Austrian Republican Constitution; professor of state and administrative law at the University of Vienna

⁴⁷ Stanley L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," *Oxford Journal of Legal Studies* 12, no. 3 (1992), 311.

⁴⁸ Schmitt was a potential defendant in subsequent Nuremberg trials under Control Council Law No. 10. See: Joseph W. Bendersky, "Carl Schmitt at Nuremberg," *Telos: Critical Theory of the Contemporary* 72 (1987).

between 1919 and 1929; constitutional court judge in Vienna beginning in 1920 and ending in 1930; professor from 1930 to 1933 at the University of Cologne until his removal by the Nazis; international law professor from 1934-1940 at the Graduate Institute of International Studies in Geneva, Switzerland; keynote at the 1940 Oliver Wendell Holmes Lectureship at Harvard University (later published as *Law and Peace in International Relations* [1942]); an assignment with the Office of Wartime Economic Affairs' Liberated Areas Division in Washington D.C. in 1944; legal advisor, albeit in an unofficial, if highly impactful, capacity, to delegates at the United Nations conference in San Francisco that helped frame a new international system; consultant to the US War Crimes Commission in 1946. His commentary on the new international organization culminated in the 1950 publication, *The Laws of the United Nations*.

In 1952, Kelsen completed *Principles of International Law*, which drew on his many years of research in the area of international law—and included sections devoted exclusively to the application of criminal responsibility. His major publications on international criminal responsibility, include “Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Criminals (1943),” *Peace Through Law* (1944), especially “Peace Guaranteed by Individual Responsibility for Violation of International Law (Part II); “The Rule Against *Ex Post Facto* Law and the Prosecution of the Axis War Criminals (1945),” “Will the Judgment In the Nuremberg Trial Constitute a Precedent In International Law? (1947),” and “Collective and Individual Responsibility for Acts of State in International Law (1948).” Few extant non-English publications attest to Kelsen’s interest in international criminalization prior to his US-relocation after 1939.⁴⁹ As a result, due to Kelsen’s virtual

⁴⁹ Kelsen initially arrived in the United States in 1939, seeking full-time employment. He briefly moved back to Europe to be with his family, though he soon left for good with his wife and two daughters in 1940.

absence from contemporary American legal philosophical debate⁵⁰ and the paucity of sustained contemporary interest in Kelsen's conception of ICR amongst German-language scholars, this towering figure in the continental tradition has been otherwise neglected as seminal interlocutor on the modern origin and dissemination of this term.

In an incident that took place at the German University at Prague in 1936, a group of National Socialist students occupied a building where Kelsen was speaking and shouted: "Down with the Jew, all non-Jews must leave the hall." Soon after, Kelsen "received several anonymous letters signed with the swastika, which threatened [his] life in case [he] did not give up [his] work at the university."⁵¹ At the Eichmann proceedings in Jerusalem in 1961, Robert Servatius, Nazi SS-Obersturmbannführer Adolph Eichmann's defense counsel, who had drawn on pure theory in defense of his client, noted that Kelsen "had suffered personally from National Socialist persecution and had been compelled to emigrate to the United States. Therefore it would only be human and absolutely understandable if...Kelsen would have tried to reject or to weaken the validity of [the Acts of State] doctrine in international law. It bears witness to the human integrity and the juristic impartiality of this scholar that, being under the influence of obvious and only too understandable resentments, he has not succumbed to this temptation..."⁵²

Much like a small but influential group of contemporary international legal scholars who attribute Kelsen's discussion of "fault-based" international criminal responsibility to a nineteenth century "statist" logic, Servatius has completely misread Kelsen's interest in furthering the

⁵⁰ For an exception, see: D.A. Jeremy Telman, *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence* (Switzerland: Springer International Publishing, 2016).

⁵¹ H. Kelsen, Autobiography in M. Jestaedt (ed.), *Hans Kelsen Werke*, 85-86.

⁵² Eichmann Trial, District Court Defense Submission, www.nizkor.org/hweb/people/e/eichmann-adolf/.../Defence-Submission-01-02.html.

adoption of models of criminalization that can account for the punishment of traditional acts of state. Kelsen continues to be a point of reference for judges, prosecutors and defense counsel at ICL trials. After a brief historical survey of the development of ICL after the First World War, and general philosophical reflections on ICR within the taxonomy of guilt, section IV further outlines the research problem, including tracking general questions and sub-questions addressed within the context of each of the four major chapters, as well as reaffirming the value of this study and research objectives.

III. The Philosophy of International Criminal Responsibility

“The essence of sovereignty,” noted former U.S. Secretary of State Robert Lansing in 1918, “[is] the absence of responsibility.”⁵³

In response to the Paris Peace Conference to adjudicate the century’s first international war crimes tribunal after World War I for the “crimes” of German Kaiser Wilhelm II, as well as former Turkish Interior Minister Mehmed Talaat and Turkish Minister of War Enver Pasha, Lansing maintained the incompatibility between sovereignty and responsibility. To be sovereign is to never be judged accountable for actions perpetrated in defense of what Lansing believed to be the highest right to order and protection.

Lansing, according to President Woodrow Wilson’s advisor Edward House, used sovereignty as a way to excuse humanitarian abuses.⁵⁴ How can a state *be* sovereign, Lansing insisted, at the same time that it is called upon to punish its officials under universal principles of

⁵³ See: Michael Robert Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (Boston: Bedford Books, 1997), 8-10; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), 14.

⁵⁴ “Worse Than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity,” WNET/13, 2009.

justice? Logically, it is impossible to both *be* and *not be* sovereign. If Lansing were right in 1918 in his narrow configuration of the relationship between sovereignty and responsibility, ICL perhaps would have remained still-born. Theorists and practitioners would have had a difficult time defending the legitimacy of a supra-sovereign international order later-convened at the Paris Peace Conference to find individuals criminally responsible for humanitarian violations, if the traditional notion of sovereignty—and the sovereign state as the primary subject of international law—were to dictate definitions of international criminal responsibility.⁵⁵

ICL as an institution, therefore, starts with the creation of the IMT Charter at London. Philosophical reflection on the degree to which the acts of state doctrine (AoSD) no longer automatically avails state officials of immunity from core international crimes, however, begins even earlier, around World War I.⁵⁶ The text of the Report presented to the preliminary Peace Conference by the Commission on Responsibility of the Authors of the War on March 29, 1919 distinguished “two classes of culpable acts: (a) Acts which provoked the world war and accompanied its inception; (b) Violations of the laws and customs of war and the laws of humanity.”⁵⁷ The formulation ‘laws of humanity’ was probably not a reference to general principles of law, *per se*, but [a] more nebulous idea of what ‘humanity’ required.”⁵⁸ Such rules were “too subjective to admit of criminal liability,” according to positive law skeptics.⁵⁹

While “naturalistic assertions of what ‘humanity’ wanted or needed” was contested by US representatives during WWI, the Second World War established the precedent of the

⁵⁵ See: Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (The Hague: Asser Press, 2004).

⁵⁶ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP, 2005), Chapter 1.

⁵⁷ Kelsen, *Peace Through Law*, 88.

⁵⁸ *Ibid.*

⁵⁹ Robert Cryer, “The Philosophy of International Criminal Law” in *Research Handbook on the Theory and History of International Law*, ed. Alexander Orakhelashvili (Cheltenham, UK: Edward Elgar, 2011), 233.

Nuremberg IMT, confirmed by President Truman's October 27, 1946 description of the trial as "the first international criminal assize in history." The President remarked:

I have no hesitancy in declaring that the historic precedent set at Nuremberg abundantly justifies the expenditure of effort, prodigious though it was. This precedent becomes basic in international law in the future. The principles established and the results achieved place International Law on the side of peace as against aggressive warfare.⁶⁰

Three days later, Warren R. Austin, Chief Delegate of the United States, in his opening address to the General Assembly of the United Nations, confirmed President Truman's commitment to international criminal adjudication from the perspective of the American chief-executive. Austin stated:

Besides being bound by the law of the United Nations Charter, twenty-three nations, members of the Assembly, including the United States, Soviet Russia, the United Kingdom and France, are also bound by the law of the Charter of the Nuremberg Tribunal. That makes planning or waging a war of aggression a crime against humanity for which individuals as well as nations can be brought before the bar of international justice, tried and punished.⁶¹

Rather than assuming, as representative ICL scholars and practitioners have,⁶² that

⁶⁰ *Department of State Bulletin*, Vol. 15, 776 (Oct. 27, 1946) in Quincy Wright, "The Law of the Nuremberg Trial," *American Journal of International Law* 38, vol. 1 (January 1947) in *Perspectives on the Nuremberg Trial*, ed. Guenael Mettraux (Oxford: Oxford University Press, 2008), 320.

⁶¹ *Ibid.*, 321.

⁶² Hans Lasterner, for example, a German expert on Anglo-American law and defense counsel for Erich von Masten, a commander of Nazi Germany's World War II army, writes of Kelsen's conservative position on the prosecution of crimes against peace: "One seeks in vain for... a previously worked-out statute which would have declared aggressive war to be a crime in the sense of criminal law, a crime from which criminal responsibility ensues. It is not to be denied that a war waged under a breach of the Briand-Kellogg pact represents a violation of international law. One cannot, however, waive the proof found in the Briand Kellogg pact's introduction of a crime, traditionally within the criminal law, into the international law as a reaction to the violation of the law's principles. This proof has not been seen in either the judgment of the International Military Tribunal or anywhere else. On the contrary, the opinions of American professors of international law, such as Kelsen... do not impute such a meaning to the Briand-Kellogg pact." Hans Lasterner, "Looking Back at the Nuremberg Trial with Special Consideration of the Processes against Military Leaders," *Whittier Law Review* 557, no. 8 (1985) in Mettraux, *Perspectives on the Nuremberg Trial*, 486.

Kelsen's criticisms make him a positive law skeptic rather than a leading supporter of prosecution of crimes of the magnitude of crimes against humanity, it is best to briefly note these criticisms, including Kelsen's skepticism of the moral formulation made in the Paris Peace Conference report, as well as Kelsen's worry over the description of Nuremberg as a "precedential" ruling based on the presumption of "victor's justice."

Kelsen, as legal adviser to the last Minister of War of the Austro-Hungarian Empire was privy to much of the decision-making process at the end of WWI. In a telling anecdote in his autobiography, Kelsen writes:

I can still vividly remember one of my last conversations with the minister. I had been summoned to the minister via phone in the middle of the night. He received me in his dressing gown in his private office in the official residence he had in the building of the Ministry of War. He handed me the text of a telegram that President Wilson had sent in response to the offer of the Austro-Hungarian government to grant the nationalities of the monarchy the right of self-determination, and he asked me to comment on Wilson's statement. While I was reading Wilson's response, the minister put on his uniform jacket and invited me to go into his office. On the way there we had to pass the ballroom that was part of the minister's residence. At that point the minister said to me that it was embarrassing to live in such splendid chambers during such a terrible time. "Especially, your excellency, if one knows that one is the last Minister of War of the monarchy." "You are crazy," he responded, "how can you say something so awful!" To the very last moment, the old officer, even though he had no illusions about the magnitude of the military defeat, could not believe it possible that an empire of four hundred years could simply vanish from the stage of history. When I took my leave in person a short time later, he stood there in his office deathly pale. On the drive into the Ministry, the mob had pelted his car with stones, a shard of glass had injured him on the cheek. He shook my hand and said with emotion: "You were right. I am the last Minister of War of the monarchy."⁶³

Jochen von Bernstorff, a leading scholar of Kelsen's public international law theory,

⁶³ Autobiography in M. Jestaedt (ed.) *Hans Kelsen Werke* (Tübingen: Mohr Siebeck, 2007) in Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, trans. Thomas Dunlap (Cambridge: Cambridge University Press, 2010), 276. For a biographical account of Kelsen's life and philosophy, see: R.A. Metall, *Hans Kelsen: Leben und Werk* (Vienna: Deuticke, 1969).

writes that “Kelsen himself, through his position in the ministry, was directly involved in the various plans to save, reform, and liquidate the Hapsburg monarchy. He composed an internal, and in the end unsuccessful, memorandum intended to persuade the Emperor to transform the monarchy into a federation of independent nation states on the basis of the right of self determination of nations.”⁶⁴

In “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals (1943),” a sustained argument *for* the legitimacy of war crimes tribunals, Kelsen questioned the formulation of Article 227 of the Peace Treaty of Versailles, which reads:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.⁶⁵

Kelsen writes that the formula used was inexact. “The true reason for the ex-Kaiser’s demanded submission to a criminal court was that he was considered the main author of the war and resorting to this war was considered a crime. Article 227 speaks of ‘an offence of international morality’ in order to avoid speaking of a violation of international law.”⁶⁶ Kelsen argues that this is a “legal” offense based on two points, modified under the circumstances of WWII. First, he endorses the position that wars of aggression are acts contrary to positive law. Second, the retroactive nature of Article 227, legal according to the general principles of

⁶⁴ Bernstorff, *The Public International Law Theory of Hans Kelsen*, 276.

⁶⁵ “The Versailles Treaty June 28, 1919: Party IV,” *The Avalon Project: Documents in Law, History and Diplomacy*, accessed November 27, 2018, <http://avalon.law.yale.edu/imt/partvii.asp>.

⁶⁶ *Ibid.*

international law, licensed such prosecution.

The Paris Peace Treaty confirmed the doctrine of just war theory. “The principle of *bellum justum*,” according to Kelsen, is considered by outstanding authors as a rule of positive international law,”⁶⁷ and since the Kaiser was “the main author of war,” he—and he alone—could be held accountable. Neither was there any “reason to renounce a criminal charge made against the persons morally responsible for the outbreak of World War II.”⁶⁸In his 1943 article, Kelsen, however, limits the scope of individual criminal prosecution for crimes of aggression.

In so far as this is also a question of constitutional law of the Axis Powers, the answer is simplified by the fact that these States were under more or less dictatorial regimes, so that the number of persons who has the legal power of leading their country into war is in each of the Axis States very small. In Germany it is probably the Fuehrer alone; in Italy, the Duce and the King; and in Japan, the Prime Minister and the Emperor. If the assertion attributed to Louis XIV ‘l’Etat c’est moi’ is applicable to any dictatorship, the punishment of a dictator amounts almost to a punishment of the State.⁶⁹

Kelsen assumed the opposite position of the most famous of modern natural law theorists, Hugo Grotius, who affirmed that heads-of-state were always immune from prosecution. And yet Kelsen’s limitations reflect a purely legal emphasis on positive law technique, which always means the valid transfer of authority from the home country to a jurisdictional court that has a vested international interest in prosecuting the legal organ. Since in 1943 no official legal document existed that indicated the willingness of parties to affirm humanitarian rather than parochial values *vis a vis* international *criminalization*, Kelsen suggested a relatively conservative approach to head-of-state prosecution. At the time of the London Agreement,

⁶⁷Hans Kelsen, Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals,” *California Law Review* 31, no. 5 (December 1943): 545.

⁶⁸ *Ibid.*, 546.

⁶⁹ *Ibid.*

however, as the previous section affirms, Kelsen expanded categories of criminalization to other high-level officials within the normative legal hierarchy of delegation.

The point of departure for this dissertation, therefore, is a challenge posed to contemporary ICL scholars, such as University of Padua international law scholar Andrea Gattini, a leading expert on Kelsen's contributions to the conception of ICR, who claims that the author of pure theory was committed to a strict estimation of the acts of state doctrine, and thus immunized state officials against a progressive cognition of ICR. Gattini writes that "Kelsen's scathing criticism of the Nuremberg trial as 'victors' justice' was not only due to his disappointment with the Trial's shortcomings. The reasons can also be found in Kelsen's adherence to a traditional view of 'act of State', which had already been challenged at that time, and, in the end, a nineteenth century state-centric conception of law."⁷⁰

Even in his earliest writings on ICL, Kelsen recognized that the Kaiser's guilt could be established according to positive legal rules, and that his trial was not based on an "offense of morality" but rather valid international law. Thus, the acts of state doctrine did not *even* apply to the Kaiser, according to Kelsen. Through a "sleight-of-hand" implicit to this test case, we begin to piece together the true meaning of a general theory of legal responsibility in accordance with a pure theoretical model. Kelsen writes:

But if a legal norm—such as a norm established by an international treaty—attaches punishment to an offense of morality, a punishment to be inflicted upon the offender by a court, the offense assumes *ex post facto* the character of a violation of law.⁷¹

⁷⁰ See: Andrea Gattini, "Kelsen's Contributions to International Law," *Journal of International Criminal Justice* 2, no. 3 (2004): 795.

⁷¹ Kelsen, 545.

As with the IMT at Nuremberg, Kelsen supports the Kaiser's prosecution on retroactive grounds through a *legerdemain* where the moral offense—*mala in se*—becomes the defining factor in instituting a novel retroactive methodology.

In the last chapter of his 1905 doctoral thesis on *Dante Alighieri's Divine Comedy*,⁷² Kelsen recognizes a counter-example to the theory of the "two swords doctrine" of Pope Gelasius: Niccolò Machiavelli's political realist advice for would-be dictators. For Kelsen, Machiavelli represented an executive operating without effective legal restraints on responsible conduct. The later Weimar constitutional debate between Hans Kelsen and Carl Schmitt over guardianship of the constitution, briefly examined in chapter two, argues for the author of pure theory's commitment to the principle *non sub homine sed sub lege* (or "not under man, but under law"). The extent to which Kelsen resolves the problem of sovereign authority in estimating the meaning of ICR from the vantage point of a valid system of adjudication extending to the "commander-in-chief" is the main theme of chapter two's overarching analysis of the relationship between legal, political and moral valuations of this critical term of cognition.

Questioning the general rejection of *tu quoque* defenses⁷³ in later Nuremberg trials held under Control Council Act, no. 10, Reinhard Merkl, a Nuremberg defense attorney and retired professor of criminal law and philosophy of law at the University of Hamburg, writes of Kelsen and victor's justice:

If anything, the term 'victors' justice,' hissed through clenched teeth for years after the

⁷² Hans Kelsen, *Di Staatslehre des Dante Alighieri*, Wiener Staatswissenschaftliche Studien, ed. E. Bernatzik and E. von Philippovich (Vienna and Leipzig: F. Deuticke, 1905) in Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge: Cambridge University Press, 287).

⁷³ "Tu Quoque, meaning 'you too,' amounts to the argument: Since you have committed the same crime, why are you prosecuting me?" The argument is usually not recognized as a defense on the basis that reciprocity of wrongdoing is irrelevant to international humanitarian law obligations, 'which have an absolute and non-derogable character.'" *Defense Perspectives on International Criminal Justice*, eds. Colleen Rohan and Gentian Zyberi (Cambridge: Cambridge University Press, 2017), 513.

Nuremberg Trial, has gained a certain justification from this circumstance. Hans Kelsen, who perhaps understood more clearly than any of his contemporaries what was at stake, demanded already in 1944 an independent, impartial, and genuinely international criminal court that was to be established according to an international treaty which was to be signed by all the involved parties, including the defeated: ‘Only if the victors subject themselves to the same law which they seek to apply to the defeated, will the idea of justice remain unscathed.’⁷⁴

Merkel completes his assessment of the ideal of neutrality by stating that Kelsen’s position “remained an unheeded and unthinkable warning.”⁷⁵

But like Gattini, whose writings on Kelsen are the most pointed secondary English-language commentary on the author of pure theory’s description of ICR, Merkel undermines a key, enduring fact: Kelsen ultimately approves, despite his well-known criticism, the conduct of the IMT at Nuremberg. The philosophy of international criminal law attests to the multi-disciplinary reading of liability for heads-of-state and other state officials. While neither existentialists Karl Jaspers, nor his student Hannah Arendt, for example, is technically a *legal* philosopher, each provides a general statement about the taxonomy of this highly irregular term. Jaspers introduced four types of guilt: (a) criminal, (b) political, (c) moral, and (d) metaphysical. The first resembled a “fault-based” description; the second represented “guilt” for offenses of a collective nature applicable to all citizens of a state for the offenses of certain state officials; the third encompasses a recognition that even when the law does not apply coercive measures, there is still an internal responsibility to abide by a certain standard of behavior that the law may not concern itself with; and the fourth, metaphysical ‘guilt’, applies to a general sense of

⁷⁴ Reinhard Merkel, “Das Recht des Nürnberger Prozesses—Gültig Fragwürdiges, Überholtes/“The Law of the Nuremberg Trial: Valid, Dubious, Outdated, in *Nürnberg Menschenrechtzentrum (Hrsg.). Von Nürnberg nach Den Haag, Menschenrechtsverbrechen vor Gericht—Zur Aktualität des Nürnberger Prozess Nuremberg*” Europäische Verlagsanstalt, 1996: 68-92, in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (Oxford: Oxford University Press, 2008), 566.

⁷⁵ *Ibid.*, 572.

responsibility for the humanitarian crimes committed anywhere even when individuals feel no specific legal or moral compulsion and otherwise have retain no national allegiance.⁷⁶ Arendt's famous court report that diagnosed the 'banality of evil' in a man considered to be one of the architects of the genocide of European Jewry followed in the train of many earlier reflections on the Nuremberg and Tokyo tribunal by some of the world's most eminent political and legal theorists.⁷⁷ After the Eichmann case, the Frankfurt Auschwitz trial followed with commentary.⁷⁸ "This trial, which found considerable difficulty reconciling norms of individual responsibility strongly embedded in German criminal law, led German criminal law theoreticians to attempt to conceptualiz[e]...forms of responsibility that accurately portray the nature of mass crimes."⁷⁹ Alain Finkelkraut in France, covering the 1987 trial of Klaus Barbie, contested Arendt's "banality" thesis, whereas Argentinian philosopher and politician Carlos Santiago Nino recommended an expressly naturalist approach to the trial of the *junta*.⁸⁰

While the major dividing line in the early conception of ICR is between those ICL commentators endorsing the natural law tradition, including, on the one hand, Quincy Wright, legal advisor to US Chief Prosecutor Robert Jackson, Lord Wright, President of the United Nations War Crimes commission, and Hersch Lauterpacht, an advisor to the British government, and on the other hand, legal positivists, including George Schwarzenberger, Manfred Lachs and George Manner, more recent philosophical inquiries, including by adherents of critical legal studies (CLS), feminism and third world (TMAIL) approaches have only had limited impact on

⁷⁶ See: Karl Jaspers, *The Question of Original Guilt* (New York: Putnam Capricorn Book, 1961) in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 673.

⁷⁷ See generally: *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 673.

⁷⁸ Robert Cryer, "The Philosophy of International Criminal Law" in *Research Handbook on the Theory and History of International Law*, ed. Alexander Orakhelashvili (Cheltenham, UK: Edward Elgar, 2011), 237.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, 238.

the ICL discourse. “It is worth bearing in mind,” writes ICL scholar Robert Cryer, “that these approaches tended to arise after international criminal law had established itself as an academic enterprise in and of its own right as a subject worthy of study, i.e., in the 1990s.”⁸¹

In the *Oxford Companion to International Criminal Justice*, edited by first President of the International Criminal Tribunal for Yugoslavia (ICTY) Antonio Cassese, Andrea Bianchi in “State Responsibility and Criminal Responsibility” writes:

Kelsen looked at this concept of ‘collective responsibility’, prevailing in international law, as a typical manifestation of primitive societies. He envisaged a progressive shift towards a fault-based individual responsibility, which over time would replace entirely the causality-based collective responsibility of states. Kelsen’s speculation, strongly influenced by the idea that the international legal order would gradually converge, together with domestic legal systems, towards the organic unity of a universal legal community, has proved to be wrong. Individual responsibility has certainly coupled state responsibility but is far from replacing it.⁸²

The notion that Kelsen’s conception of *individual* responsibility in ICL did not align with a realistic assessment of states under *ad hoc* ICL conditions must be tested. Much like Shklar’s position that Kelsen retained a “legalist” or rules-based ideological approach even to the study of ICR, Bianchi assumes that Kelsen was incapable of defending a modern, dynamic conception of individual criminal responsibility in a period of international fragmentation. This dissertation holds that Kelsen’s conception of ICR is especially notable for its durability under *ad hoc* conditions. A fault-based individual responsibility could develop, in accordance with a plausible reading of Kelsen’s major works on ICR, through the application of a system of valid judicial rulings.

⁸¹ Ibid., 259

⁸² Andrea Bianchi, “State Responsibility and Criminal Liability of Individuals,” 17.

Case study analysis, therefore, is integral to understanding the role of judges in the development of this concept.

IV. Outline

What is the source of ICR? What makes ICR valid? What is the main object of ICR—the norm or the act? In establishing how these formal questions are answered at different periods of ICL, the object of legal cognition is reconfigured to reflect a historically-resonant ICR discourse. The *ad hoc* judge within the normative hierarchy assumes a major contributing role in the development of this term. Under different historical circumstances key doctrinal features of the law are emphasized. However, despite the title of this project—“Between Politics and Morality: The Pure Theory of Law and the *Changing Notion of International Criminal Responsibility*”—modifications registered here are not necessarily developed beyond a general recognition of new patterns for thinking about this concept under historically-evolved circumstances.

The second chapter reconciles pure theory with political and moral sources of imputation under the immunizing acts of state doctrine, on the one hand, and principles of civilization, on the other, through the moralized claim of positive legal validity for *ex post facto*/retroactive lawmaking. This chapter shows the way in which Kelsen reconciles *non sub homine sed sub lege*/"not under man but under law" with a theory that otherwise legitimates the validity of autocratic, even totalitarian rule. Kelsen reconciles the conception of judicial review, associated with his position in the Weimar constitutional debate against the decisionism of Carl Schmitt, a subject previously noted.

Chapter two is not meant to be either a definitive account of Kelsen's work on ICR, nor is the pure theory of law in its conception of imputation, or the "de-personalized" or "de-psychologized" notion of responsibility, the only theoretical model that can be used to assess the degree to which cognition of ICR has evolved over time. The distinct advantage of this approach, however, is that it presents a conception of ICR, which permits a strictly positive or human-made assessment free of adulteration by "extra-legal" elements. Sociological, political, psychological or moral conceptions of responsibility are set aside in comprehension of an autonomous legal inquiry. Neutral or objective criterion bolstering the creation of a dynamic institution derived from its own relatively predictable, hierarchically delegated, legitimating *legal* sources, thus, animates the pure theoretical blueprint.

Yet despite the unity of cognition associated with a pure theoretical description of ICR, Kelsen cannot so easily remove moral-normative reasoning from within the boundary of "law". Even as the structure of the legal order is shaped by authorized legal normative sources, including state parties delegating authority to courts adjudicating core international crimes through treaty law, the validation of the violation of the principle of legality when acts of state amount to offenses of the magnitude of core international crimes, requires, Kelsen argues, the attachment of retroactive sanctions to once-legal acts. By creating an order sourced in such persistent indeterminacy, the author of pure theory forces readers to question whether the various scholars who categorize the author of the pure theory of law as "conservative" in his support of the AoSD are not in fact mistaken regarding the legacy of perhaps the most prominent jurist of the twentieth century. The reader is asked both to follow Kelsen in his train of logic, which describes the architecture of a "system" able to authorize the prosecution of state officials for these crimes, and to join me in considering the implications of Kelsen's "moral-turn."

While this study concludes with an assessment of Kelsen’s position on the separation between law and morality, or “separation thesis” (see: chapter 6), the reasons Kelsen marshals for incorporating “principles of civilization” as the “principle of justice” or primary criterion for assessing responsibility animates the rest of this study. The liminal point of Pure Theory—the examination of imputation at the international level—produces a fascinating claim on legality, one that has the potential to make sense of its current fragmented vision. While Kelsen often affirms that behind law resides “the gorgon head of power,” such power can only be applied *if* the offense normally protected under the AoSD *is* so immoral as to constitute an international crime.

Contemporary international law scholar Reut Yael Paz, representative of the conventional view, asserts that law and morality are two distinctive modes of inquiry for Kelsen:

[Kelsen’s] theory dismisses the law’s requirement to be just. Justice is a moral and/or political question that should not be answered by the law. Ergo Kelsen’s genius lies in enabling a totally new legal question; namely is law valid? In brief, law is not about justice...It is instead all about the legal norm’s validity.⁸³

Paz follows, as chapter two describes, the formal understanding of “science” as object-creation from a mind-centered epistemology. Kelsen draws on both the philosophical position of Immanuel Kant (1724-1804)—and David Hume (1711-1776) before him—in asserting that “is” and “ought” cognition must be distinguished. In the realm of “ought,” however, a distinction

⁸³ Reut Yael Paz, “Kelsen’s Pure theory of Law as ‘A Hole in Time,’” *Monde(s)* 1, No. 7 (2015): 75-94., https://www.cairn-int.info/article-E_MOND1_151_0075--kelsen-s-pure-theory-of-law-as-a.htm.

must be made between “the science of law” (jurisprudence) and “the science of morals” (ethics). This particularly legal *or* juristic mode of inquiry provides the clearest designation of the positive law criminalization of state officials for acts of state. Alternatively, jurisprudence must be distinguished from actual rules of law. The first describes what “ought” to be; the second, what “is”. That the judge at any level of the legal normative hierarchy produces a decision that deviates from a strictly positive legal assessment of all the legal norms pertinent to the case at hand does not mean that the decision is invalid. The Pure Theory of Law as a strictly positive or human-made legal cognition must accept that, provided the rest of the hierarchy of normative legal delegation authorizes the judge’s ruling, the judge’s ruling, no matter if it incorporates extra-legal elements, *is* also legal. Kelsen therefore differentiates between a scientific conception of a self-creating and dynamic social order based on coercion and judges who deviates from the “scientific” frame of *legal* normativity. Although a judge’s decision may extend beyond the “frame” of analysis specific to “science,” the decision, given the judges preeminent role in the hierarchy of imputation, nevertheless remains “authentic”.⁸⁴

The judge *is* law to the extent that, authorized to apply the function of judicial decision-making by those belonging to tribes, nations or the international community, the judge transforms—at every stage—the nature of law. While she does not typically supersede the source of her authority, which generally guides the judge’s interpretation of custom, statutes, treaties, et al, including preconceived, prescribed, future-oriented or prospective rules of law that reflect the core characteristic of “legalism” or the “ideology of rules,” she nevertheless *may* do so. Without

⁸⁴ On the distinction between “scientific” and “authentic” interpretations of ICR, the latter associated with discretionary judicial rulings, see: Stanley Paulson, “Formalism, ‘Free Law’, and the ‘Cognition’ Quandary Hans Kelsen’s Approaches to Legal Interpretation,” *The University of Queensland Law Journal* 27, no. 2 (2008): 25-27, <http://classic.austlii.edu.au/au/journals/UQLawJl/2008/12.pdf>.

judges there can be no such thing as ICR. Unlike exclusively political, moral or metaphysical descriptions of ‘guilt’ in the sense ascribed by Jaspers, Kelsen’s designation of responsibility for core international crimes relies on an exclusively individual assessment of liability.

This thesis, therefore, presents the judge as the foremost inventor of criminal responsibility. In an international law setting, as Kelsen indicates, the judge may turn to “principles of civilization” or not, though a valid source. At the liminal point—the study of individual responsibility in international criminal law—the legal scholar must justify the course of imputation, despite the prevailing state-centered (and, hence, politicized) view of the author of pure theory’s conservatism on this subject. This dissertation argues for the centrality of the judge as the maker of ICR. Not only, however, does the judge make this term, but she must, in turn, presuppose a “natural person” with “agency,” two *legal* markers traditionally extinguished from Kelsen’s pure theoretical conception of imputation. Here, as we will find, Kelsen is intent on granting judges a central role in creating a moral subject, constituted by the “will” of the “international community,” whose “consensus” upholds “principles of civilization” or “principles of humanity.”

Time is the major component factor in the study of ICR. Without recognition of the role time plays in constituting the individual moral agent from the perspective of a future international communal consensus informing judgment, then Kelsen’s project would inevitably fall apart. That pure theory has been designated formal, and its concept of imputation devoid of substantive concern, is irreconcilable with the doctrinal flexibility that Kelsen insists upon in relation to ICR. Kelsen’s progressive contributions to the changing notion of ICR as manifested in three distinct stages of ICL insists upon history’s shaping force. New political, economic, technological and other impactful changes, notwithstanding, the technique associated with a pure

theoretical methodology must be understood to retain structural features that shape the legal discourse at stages of ICL history.

Fundamental to the conception of ICR is the idea, according to Kelsen, that culpability is predicated on the coercive nature of law. In a section of *General Theory of Law and State* entitled “Legal Norm and Rule of Law in a Descriptive Sense,” Kelsen writes: “If ‘coercion’...is an essential element of law, then the norms which form a legal order must be norms stipulating a coercive act, i.e. a sanction.”⁸⁵ Since international law is an order that sanctions criminal acts, coercion constitutes a defining feature of the conception of criminal responsibility in this sphere. ICR, therefore, corresponds to the development of humanitarian cognition of liability, including state and collective forms of responsibility, on the one hand, and individual responsibility, on the other. Chapter two consequently frames the debate over the *validity* of ICR, in order to bolster the efficacy of an order devoted to sanctioning core international crimes.

Chapter three evaluates Kelsen's contributions to our understanding of the Nuremberg proceedings. In contesting international law scholars Scott Shapiro and Oona Hathaway's recent claim that Kelsen is responsible for helping to promote the enduring legacy of the Kellogg Briand Pact,⁸⁶ I take the position that Kelsen's recommendations to Jackson about the inclusion of a definition of (“fault-based”) individual responsibility prior to the London International Military Tribunal conference was wedded to his distinct belief that this was something completely new, a turn away from the traditional application of collective forms of responsibility. Kelsen’s affirmation of a retroactive legal technique in violation of principles of

⁸⁵ Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge: Harvard University Press, 1945), 45.

⁸⁶ Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon and Schuster, 2017).

legality applicable to *all* core international crimes, proves the limitations of Shapiro's and Hathaway's strong claims for the merit of the Nuremberg trial as derivative of the international effort to banish war through collective security agreements. However, the crimes against peace charge was not validly *or* legitimately instituted *because of* the Kellogg-Briand Pact, Paris Pact or General Treaty for Renunciation of War as an Instrument of National Policy (1928). The law of Nuremberg was necessarily new, as Kelsen attests. Through his correspondence with Jackson (see section II), it is clear that Kelsen's finger was on the wording of the IMT charter, which became a basis for later multilateral treaties designating substantive jurisdiction. In addition, this chapter considers problems associated with the crimes against peace charge from a Kelsenian perspective, focusing on problems associated with the just war theoretical framework.

Chapter four periodizes the second stage in the modern articulation of criminal responsibility in ICL. In analyzing the Eichmann proceedings, the second case study investigates ways in which formal descriptions of the rule of law were disposed of in a case that chronologically follows the Nuremberg and Tokyo proceedings. Since the 1961 trial bookends cases against major Nazi officials and other axis officials for core international crimes, especially crimes against humanity committed during the Second World War period, the proceedings are valuable in determining the progress of ICR conceptualization from the time of the creation of the modern ICL system with the introduction of a definition of individual responsibility at the IMT conference at London in 1945. Amongst others, Eichmann's stature in the hierarchy of delegated authority was recognized early on by Jackson. In his closing address before the IMT, Jackson claimed that:

Adolf Eichmann, the sinister figure who had charge of the extermination program, has estimated that the anti-Jewish activities resulted in the killing of six million Jews. Of these, four million were killed in extermination institutions, and two million were killed

by Einsatzgruppen, mobile units of the Security Police and SD which pursued Jews in the ghettos...and slaughtered them by gas wagons, by mass shooting in anti-tank ditches, and by every device which Nazi ingenuity could conceive. So thorough and uncompromising was this program that the Jews of Europe as a race no longer exist, thus fulfilling the diabolic "prophecy" of Adolf Hitler at the beginning of the war.⁸⁷

Jackson recognized Eichmann's role as a chief architect of the Nazi genocide against the Jews. In this respect, the Jerusalem trial of Eichmann is often said to play the role of an appendix to the Nuremberg IMT. Dieter Wisliceny, SS- (Captain), responsible for the ghettoization and extermination of Jews in the Nazi campaign focused on Greece, Hungary and Slovakia, testified before the IMT on January 3, 1946, stating that:

Eichmann told me that the words "final solution" meant the biological extermination of the Jewish race... I was so much impressed with this document which gave Eichmann authority to kill millions of people that I said at the time: "May God forbid that our enemies should ever do anything similar to the German people". He replied: "Don't be sentimental – this is a Führer order".⁸⁸

The changing notion of international criminal responsibility cannot be separated from this historic trial. Although other cases that occurred during the Cold War period (1945-1989), such as the Auschwitz Trial (1964), or the case against Klaus Barbie (1987), represented key points in the jurisprudence of ICL, the Eichmann case—amongst Cold War cases—produced a series of especially important legal philosophical appeals to the notion of agency under superior orders.

In focusing once again on the core challenge presented by Kelsen—application of the acts of state doctrine under *ad hoc* conditions—what is revealed is the extent to which the author

⁸⁷ Robert H. Jackson, "Closing Arguments for the Conviction of Nazi War Criminals," *Robert H. Jackson Center*, https://www.roberthjackson.org/wp-content/uploads/2015/01/Closing_Argument_for_Conviction_of_Nazi_War_Criminals.pdf

⁸⁸ Stuart Stein, "Affidavit of Dieter Wisliceny," *Nazi Conspiracy and Aggression*, Volume VIII (Washington: USGPO, 1946) 606–619.

of pure theory's conception remains applicable to the effort to establish the legitimacy of the trial in a way that paralleled Arendt's work. While Arendt, given her later writings on the operations of judgment, remains far more receptive to the possibility that conscience is nevertheless cultivable under superior orders, her "banality" thesis shares space with Kelsen's pure theoretical embrace of relatively determined human behaviors under the law.⁸⁹ Even if doctrinally barring such psychological considerations, from the vantage point of strictly positive legal cognition,

⁸⁹ Seyla Benhabib notes that "...although Arendt, like Kelsen, was a critic of national sovereignty, she remained skeptical that international institutions established in the wake of World War II, such as the United Nations, the Universal Declaration of Human Rights (UDHR), or even legal instruments such as the Geneva Conventions on the Status of Refugees, could ever satisfactorily resolve the[] paradoxes of the modern nation-state. Kelsen and Hersch Lauterpacht, by contrast, as international jurists, insisted that unless the rights enumerated in the Universal Declaration of Human Rights were protected by an International Human Rights Court, they would remain ineffectual. For Kelsen, in particular, sovereignty was not the actual or mystical expression of the will of a people, of an actual *demos*, but rather a *Grundnorm* of the international system of states, which accepted that national law would be based upon the authority of some institution or instance recognized as the final arbiter.... What is the source of the authority of law: human will or reason? Or some more fundamental order that precedes human acts of law-giving? Does the law express principles of human justice, or is the law grounded in some other order that precedes but nevertheless contains human justice? And if the law derives its authority from an act of will that is not bound by reason but expresses the decision of a mythical lawgiver or a collectivity called the nation, then how can the rights of the individual be secured? It is doubtful whether Kelsen himself could successfully resolve the 'decisionist' challenge posed by Carl Schmitt. Rather, Kelsen admits that the *Grundnorm* of the law must itself be posited and cannot be further justified; at its limits law encounters *the political*." Seyla Benhabib, *Exile, Statelessness and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin* (Princeton: Princeton University Press, 2018), 20, 22-23.

This long quote from Benhabib establishes the significant role that Kelsen is beginning to play amongst a leading U.S. public intellectual and political scholar of modern German history, whose writings on Carl Schmitt dominates her analysis of the Weimar constitutional crisis. On Benhabib's commentary on Schmitt, see *generally*: Seyla Benhabib, "Carl Schmitt's Critique of Kant: Sovereignty and International Law," *Political Theory* 40, no. 6 (2012): 688-713; Seyla Benhabib, "Defending a Cosmopolitanism without Illusions. Reply to My Critics," *Critical Review of International Social and Political Philosophy* 17, no. 6 (2014): 697-715. We will again encounter Benhabib's writings in chapter four on the Eichmann trial and Kelsen's and Arendt's corresponding description of agency under the acts of state doctrine (AoSD). Since, according to Kelsen, the "international community" through "consensus" determines "principles of civilization" as historically-dependent markers on the beltway to a more refined notion of international criminal responsibility, Benhabib's claim that "at its limits law encounters *the political*" must be interrogated. In focusing on the record or chronicle of ICL cases from 1945-present, judgement for heads-of-state and other high-ranking officials, especially, indicates that while the rights of individuals may not always be protected, especially under autocratic rule, Benhabib is wrong to endorse the dominance of the political. From the perspective of a burgeoning international criminal legal order, even one whose judges and prosecutors have been threatened with arrest by the Trump administration, the authority of "law" supersedes decisionism, as the leader who once-ordered with seeming impunity acts amounting to crime against humanity and genocide, has become a ready subject—if *ex post facto*—of prosecution for core international crimes. That Kelsen was a leading advocate of "consensus" forms the final estimation of Kelsen's progressive legacy as a challenging critic of state sovereignty, who, as Benhabib correctly notes, endorsed the positive law legitimacy of international human rights enforcement mechanisms (see: chapter six).

coercive powers, according to Kelsen, shape judgment. Although fear and other psychological components are formally excluded from pure theoretical legal conceptualization, Kelsen nevertheless recognizes that the technique of law is efficacious or effective in regulating behavior. Consequently, one must infer that the law plays a role in psychologically modifying behaviors that might otherwise be different if no coercive sanction were in place. As a result, Kelsen's conception of freedom, discussed with respect to the archetypal case of the bureaucratic "desk murder," presents a limited—reductionist or causal—view of human behavior. Within the scope of the pure theoretical conception of ICR, Eichmann is nevertheless assumed to possess the ability to decide between acts of state that are moral or immoral, and thus legal or illegal, dependent on the time and jurisdiction under which liability is assessed.

Emphasizing the place of Kelsen's "moral-turn," this chapter finds agreement with international legal scholar Noora Arajärvi, who claims that Kelsen made a significant impact on the conception of ICR at the Eichmann trial through the "sleight-of-hand" of retroactive lawmaking.⁹⁰ While the Jerusalem trial retained firmer prospective legal ground than the Nuremberg proceedings, from a Kelsenian perspective, the defendant, given the proliferation of multilateral treaties, especially the 1945 United Nations Charter, the UN-sponsored International Law Commission's 1947 Nuremberg Principles, the 1948 Genocide Convention, and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, was provided fairer warning than in earlier trials. But none of these major international documents represented prospective laws for Eichmann. On what legal basis then, can we best envision ICR under superior orders and the Fuhrer or Leader Principle?

⁹⁰ Noora Arajärvi, *The Changing Nature of Customary International Law* (New York: Routledge, 2014).

The last case study on ICTY proceedings against Duško Tadić, *inter alia*, introduces a description of judicial interpretation that deviates from Kelsen's perceived "formalism." The ICTY was chosen as a representative tribunal, due to its emphasis placed on customary international law, the fundamental source of international law, according to Kelsen. Custom, typically unwritten, registers the practice of states through the acts of state officials. The AoSD as immunizing doctrine, however, is now subordinated to more methodologically-inventive developments affirmed by ICL judges in the post-Cold War period. The ICTY constitutes an *ad hoc* jurisdictional order where judges assume roles as interpreters of new humanitarian law informed by the efforts of non-governmental organizations (NGOs), amongst other subjects of international legal discourse. The accumulation of "precedential" or other court decisions, as well as a general recognition by the "international community" that certain acts, even if in accordance with rules of a specific national legal order are prohibited by *jus cogens* or peremptory international norms, points to a deeper recognition of the effort to institute more sophisticated justifications for "fault-based" proceedings in the post-Cold War era. While earlier tribunals point to the impact Kelsen made on the early period of this modern institution, especially from 1945 to 1947, Kelsen's legacy of progressive investment in the development of a conception fitting for international prosecution, is further defined in this period with the expansive articulation of new humanitarian efforts to reduce the role of the immunizing state.

“If international law is in some ways at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law...”⁹¹

Chapter 2

The Mirror of Legal Science: Moral and Political Conceptions of Individual Criminal Responsibility under International Law⁹²

I. Introduction

According to international law scholar Jochen von Bernstorff, Hans Kelsen, author of the Pure Theory of Law, aimed “(1) to establish a non-political method for the field of international

⁹¹ Hersch Lauterpacht, “The Problem of the Revision of the Law of War,” *British Yearbook of International Law* 29 (1952): 382. Lauterpacht, a leading expert of international law at the time of the Second World War and a student of Kelsen’s, whose definition of “crimes against humanity” entered into the ICL lexicon through the IMT Charter, recognizes morality as *the* source of international law. Hersch Lauterpacht, “The Grotian Tradition in International Law” in *The British Yearbook of International Law*, ed. Hersch Lauterpacht (London: Oxford University Press, 1946), 1-53. The degree to which Kelsen subscribes to Lauterpacht’s non-essential theory of natural law is explored in later chapters. On Lauterpacht’s international law theory, see: Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960—Hersch Lauterpacht Memorial Lectures* (Cambridge: Cambridge University Press, 2004), 353-412, and Wolfgang Friedmann, *Legal Theory* (London: Stevens and Sons, 1953), 124.

⁹² This phrase is taken from the title of Kelsen’s skilled description of legal justice based on relative ontology. Hans Kelsen, *What is Justice? Justice, Law and Politics in the Mirror of Science* (Berkeley: University of California Press, 1957). Kelsen’s position on the principle of tolerance—introduced in Part IV—is based on Kelsen’s commentary in *What is Justice?* While Kelsen is generally consistent with respect to the separation of law from morality, and thus tolerance remains an unnecessary moral ideal constituting a valid legal conception, the purpose of this interrogation of Kelsenian doctrinal requirements in cognition of ICR is nevertheless to point to the implied moral source of this term. Furthermore, it is a contestable proposition anyway, since, as Andrea Gattini correctly points out, Kelsen’s *What is Justice?* does not necessarily assume an amoral position with regard to the principle of tolerance. Gattini states that Kelsen, in order to be true to the relativist standard of “legal science,” must not take a position on the rightness or wrongness in supporting the principle or standard of tolerance. Furthermore, Gattini insists that Kelsen reveres intellectual and public freedoms, and regards democracy as the only social order in which to protect these necessary values. Andrea Gattini, “Kelsen’s Contribution to International Criminal Law,” *Journal of International Criminal Justice* 2, no. 4 (September 2004): 795–809; Andrea Gattini, “Kelsen, Hans,” in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (New York: Oxford University Press, 2009), 401-403.

law, and (2) to promote the political project, which originated in the inter-war period, of a thoroughly legalized and institutionalized world order.”⁹³

Notwithstanding Kelsen’s progressive contributions to the legal architecture of a federated world state and the establishment of a permanent and compulsory international court⁹⁴, Bernstorff’s first point of analysis is critical to the estimation of Kelsen’s impact on the changing notion of international criminal responsibility (ICR). This chapter identifies how “non-political” doctrines of the pure theory of law (PTL), including the separation of norms from social facts (“the normativity thesis”) and law from morality (“the separation thesis”) are contravened by Kelsen in an effort to define ICR under *ad hoc* conditions.

⁹³ Jochen Von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge: Cambridge University Press, 2010).

⁹⁴ Prior to the end of the Second World War and the creation of the United Nations (UN), Hans Kelsen invented a rival institutional design—the Permanent League for the Maintenance of Peace (PLMP). Central to the PLMP was a permanent and compulsory international court adjudicating cases against states and individuals, fifty-five years in advance of the Rome Statute of the International Criminal Court (ICC) (1998). On Kelsen’s blueprint for the PLMP, see: Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944). Although resembling Kelsen’s design, the structural advances of the International Criminal Court (ICC) do not demonstrate the scope of ICR, which presumably would be resolved under an efficaciously centralized, federated, permanent and compulsory legal order. Provisions related to the principle of legality rule against *ex post facto* laws, including Articles 22-24 of the ICC Statute, neither encompasses a monopoly on authorized force in the ICL sphere, nor shapes our understanding of the latitude by which culpability traditionally is determined under *ad hoc* conditions. The degree to which retroactivity remains relevant to the discussion of international criminal prosecution in the era of the ICC will be evaluated in the conclusion, Chapter Six. The ICC—it should be noted—encompasses a jurisdictional advancement but not the final determination on the scope of ICR interpretation. “Article 22 Nullum crimen sine lege 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute; Article 23 Nulla poena sine lege A person convicted by the Court may be punished only in accordance with this Statute; Article 24 Non-retroactivity *ratione personae* 1.No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute; 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person be investigated, prosecuted or convicted shall apply.” For an extended discussion on the legal interpretation of these articles, see: William A. Schabas, *The International Criminal Court: Commentary on the Rome Statute* (Oxford: Oxford University Press, 2016): 539-550.

Kelsen classifies international criminal law (ICL) as a valid legal order instituting justice for crimes of the magnitude of core international crimes, including crimes against peace (CAP) or crimes of aggression, war crimes (WC), crimes against humanity (CAH), and genocide (GEN).⁹⁵ While the acts of state doctrine (AoSD) traditionally immunizes legal organs or officials performing duties on behalf of national legal orders, retroactive licensing of core international crimes, according to Kelsen, are based on “principles of justice” that reflect a necessary movement in the evolution of law to a stage of international juridical sovereignty.⁹⁶

The jurisprudential conception of sovereignty associated with John Austin’s command theory presents the dominant positive law view prior to the London Conference and the ratification of the International Military Tribunal (IMT) charter at London on August 8 1945.⁹⁷ The transformation of the AoSD—and with its sovereign immunity—through Article 7, affirms international juridical sovereignty over the acts of *all* state officials, including heads-of-state. Article 7 reads:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.⁹⁸

⁹⁵ The introductory chapter affirmed Kelsen’s support of retroactive lawmaking for crimes against peace, war crimes and crimes against humanity. With the promulgation of the Genocide Convention on December 9, 1948, the international community affirmed through multilateral treaty the *jus cogens* status of this offense. But while genocide encompassed a customary offense, the severity of which placed it under the rubric of crimes against humanity, Kelsen makes scant mention of it in his writings. By deduction, we can assume that if Kelsen had assumed an advisory role as he did at the time of the Nuremberg International Military Tribunal (IMT), he would have made similar recommendations for the retroactive licensing of genocide cases. See: “Convention on the Prevention and Punishment of the Crime of Genocide; December 9, 1948,” The Avalon Project: Documents in Law, History and Diplomacy, accessed on July 3, 2018, http://avalon.law.yale.edu/20th_century/genocide.asp. For reference to Kelsen’s brief commentary on genocide, see: Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952), 334.

⁹⁶ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” *The International Law Quarterly* 1, No. 2 (Summer, 1947):165.

⁹⁷ For the most representative description of Austin’s position on the relationship between sovereignty, command and duty, see: John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1861); John Austin, *Lectures on Jurisprudence, Or, the Philosophy of Positive Law* (New York: Henry Holt and Co., 1875).

⁹⁸ “Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal,” The Avalon Project:

While the conversion of morality into a source of legality under *ad hoc* ICL conditions is, with few exceptions, considered an aberration by Kelsen scholars, the author of Pure Theory's reconciliation of the principle *non sub homine sed sub lege* or "not under man, but under law" requires such doctrinal deviation.⁹⁹ Kelsen writes:

Even if [international] atrocities are covered by municipal law, or have the character of acts of State and hence do not constitute individual criminal responsibility, *they are certainly open violations of the principles of morality generally recognized by civilized peoples and hence, were at least, morally not innocent or indifferent when they were committed...* There can be little doubt that, according to the public opinion of the civilized world, it is more important to bring the war criminals to justice than to respect, in their trial, the rule against *ex post facto* law.¹⁰⁰ (*my emphasis*)

Andrea Gattini in "Kelsen's Contributions to International Criminal Law," one of the few sustained interrogations of Kelsen's position on ICR, neglects to sufficiently address the reality of the author of Pure Theory's "moral-turn".¹⁰¹ While he writes that, "in my view, it is through his personal perspective on justice and morality that Kelsen, although critical of the Nuremberg Tribunal, eventually came to terms with international criminal law....and international criminal

Documents in Law, History and Diplomacy, accessed on July 20, 2018, <http://avalon.law.yale.edu/imt/imtconst.asp>.

⁹⁹ Kelsen's conceptions of validity, sovereignty and agency in relation to ICR, however, also implicates a "relativist" ontology of international law associated with classical and neo-legal positivist traditions. Kelsen demonstrates that at the highest level of imputation, moral cognition must be resorted to through the *legerdemain* of *ex post facto* lawmaking based on "civilizational" criterion of ICR. Kelsen's endorsement of the retroactive capacity of the accused to choose between immoral legal and morally illegal acts, as well as recognition of international judicial independence, including non-formal retroactive application of moral criterion in the vein of the Free Law Movement, disproves Shklar's fierce polemic against "the homeless ghost" of Pure Theory. Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1986), 34. Since Kelsen formulates the most significant methodological answer to the structural problem of applying only prospective legal norms in imputing international responsibility, his philosophy remains the primary object of discussion.

¹⁰⁰ Kelsen, "The Rule against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," 10-11.

¹⁰¹ Andrea Gattini, "Kelsen's Contribution to International Criminal Law," *Journal of International Criminal Justice* 2, no. 4 (September 2004): 795-809

justice,¹⁰² he neglects to consider how a retroactive methodology conforms to the *ex post facto* logic of *ad hoc* tribunals. This chapter is an effort to respond to those scholars like Gattini who associate Kelsen with a predominantly state-centered, if at times morally-syncretic, conception of ICR.

Part II begins with a general overview of Kelsen's jurisprudential contributions from the perspective of a reviled “formalism”. Unlike Bentham's imperativist approach, which rejected the imposition of penalties for sovereign officials;¹⁰³ Austin's command theory, which in addition to obligating obedience discounted international law “as being at most a set of principles of morality or etiquette that lack binding force,”¹⁰⁴ or HLA Hart's neo-positivist¹⁰⁵ concept of law based on a rule of recognition whose scope of validity is specific to domestic law,¹⁰⁶

¹⁰² Ibid., 796.

¹⁰³ Jeremy Bentham, who first introduced the term “international” with respect to “jurisprudence” in 1789, replacing the traditional terminology *ius gentium* or law of nations, writes that “The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes under the name of law of nations: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence.” Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J.H. Burns and H.L.A. Hart (London: Athlone Press, 1970), 296. By “internal jurisprudence” he means that “law of nations” does not designate space outside the domestic law of diverse nations (i.e., *between* nations). Although Bentham deserves credit for instigating theoretical inquiry into the utilitarian or greatest happiness principle applied to the international sphere, his imperativist theory affirms sovereign-centered conceptions associated with Austin's command theory. The will of the sovereign is the foundation of law and “cannot be illegal”. Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, ed. P. Schofield. Oxford: Oxford University Press, 2010), 38. Bentham's recognition of the legal limitation of the sovereign that requires “the whole political community...to be in a disposition to pay obedience,” notwithstanding, reaffirms a Hobbesian notion of sovereignty as a monopoly of power within a given territory, wherein a sovereign is immunized as his authority is always “legal”. Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*, ed. J. H. Burns and H. L. A. Hart. (Oxford: Oxford University Press, 1977), 18, and Thomas Hobbes, *Leviathan* (Oxford: Clarendon Press, [1661] 1965), 133.

¹⁰⁴See: Stephen C. McCaffrey, *Understanding International Law*. (Newark, NJ: Matthew Bender, 2006).; Austin, John, Robert Campbell, and Sarah Austin. *Lectures on Jurisprudence; Or, The Philosophy of Positive Law* (London: J. Murray, 1885), 188-190.

¹⁰⁵ See: Anthony D'Amato, "The Neo-Positivist Concept of International Law," *American Journal of International Law* 59, no. 2 (1965): 321-24.; Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," *The European Journal of International Law* 21, no. 4 (2010):95.

¹⁰⁶Hart asserts that“...to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.” The rule of recognition is based on a convention made within a given system, by which Hart means a domestic order. For example, the rule of recognition in the United States is that a bill must be passed by the legislature and assented to by the President. Congress—or

Kelsen's theoretical approach is doctrinally plausible as a positive law justification of war crimes prosecution. In order to accomplish doctrinal purity, however, Kelsen must obscure the core value of his contribution to the study of ICR: the introduction of the temporally-unbound method of retroactive prosecution in violation of the principle of legality. Kelsen must endorse a moral criterion, which he calls “principles of civilization” that judges must draw on to determine whether a certain act—once legal—is later fit for prosecution.

As the third component of the dialectic triad of ICR, which incorporates a legal (Part II) and political (Part III) perspective, *moral* principles applied retroactively to aberrant acts of state (Part IV) demonstrate the invalidity of a strictly positive law cognition of responsibility based on the separation of law from morality. Part II introduces a conception of imputation or the “de-personalized” or “de-psychologized” form of responsibility that aligns with Immanuel Kant’s *a priori* transcendental methodology. Although the principle of legality of delicts and sanctions, as well as its corollary the principle of non-retroactivity, corresponds with a pure theoretical commitment to the *prospective* delegation of hierarchically-administered legal norms, the prosecution of humanitarian offenses, as “acts which were illegal though not criminal at the time they were committed,”¹⁰⁷ assumes higher ordinal value. These offenses, Kelsen writes, were “certainly... morally most objectionable.”¹⁰⁸ *Ex post facto* lawmaking based on a moral criterion of justice, therefore, takes supreme authority, according to Kelsen, in the designation of individual responsibility for core international crimes (see: Part IV).

the rule makers—recognize this as the legitimate process for law creation. H. L. A. Hart, *Concept of Law* (Oxford: Clarendon Press, 1994), 103.

¹⁰⁷ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?,” *The International Law Quarterly* 1, no. 2 (Summer, 1947): 153-171 in *Perspectives on the Nuremberg Trial*, ed. Guenael Mettraux (Oxford: Oxford University Press, 2008), 284.

¹⁰⁸ *Ibid.*

Even if the pure theory of law could be used to validate autocratic rule (Part III), retroactive sanctions applied to acts that were not “indifferent in itself,”¹⁰⁹ according to Kelsen, is what *legitimately* prevents Hitler—and those Nazis “obligated” to act in accordance with the *grundnorm* or basic norm of the Fuhrer Principle—from claiming post-war immunity. Kelsen’s retroactive defense of humanitarian prosecution, in consequence, is what insures doctrinal commitment to international juridical sovereignty.¹¹⁰ That the conception of law must be reconfigured to incorporate a moral mandate does not preclude recognition that law, not “persons” or “facts,” is sovereign.

In emphasizing the centrality of moral normativity to cognition of ICR, however, Kelsen’s retroactive methodology neither upholds a pure theoretical description of imputation as “de-psychologized” (Part II), nor protects high-level state officials from prosecution through command-centered jurisprudence (Part III). After briefly outlining legal positivist and natural law approaches to the principle of legality, Part IV argues against the consistency of Kelsen’s positive law justification of this irregular method.

¹⁰⁹ *Ibid.*, 8.

¹¹⁰ Kelsen’s justification of the IMT, as argued in chapter three, requires an initial transgression of “the separation thesis”. As case studies on the Jerusalem trial of Adolph Eichmann (chapter four) and post-Cold War trials before the ICTY (chapter five) demonstrate, Kelsen’s licensing of *ex post facto* lawmaking approximates purity by transfiguration of illegal acts into criminalizable ones with penalties imputed to individuals. The testament to the illegality of the acts is demonstrated by international court decisions. The precedent of Nuremberg was expressed in its continued resonance, albeit interrupted, in the period between the end of the Second World War trials and the UN Security Council-sponsored ICTY and International Criminal Tribunal for Rwanda (ICTY). In contrast, Kelsen justifies prosecuting *all* core international crimes at the IMT, including crimes against peace (CAP) and crimes against humanity (CAH), despite these charges retaining questionable pedigrees. Given state violations of the Kellogg–Briand Pact (or Pact of Paris, officially General Treaty for Renunciation of War as an Instrument of National Policy), collective security arrangements were in desuetude or a state of disuse. Even the claimed “illegality” of aggressive warmaking, according to Kelsen, was therefore contestable. By deduction, CAH, which had never been made *illegal* either by a multi-lateral treaty agreement, nor in accordance with customary international law (CIL), was *purely* retroactive, requiring a moral “sleight-of-hand” based on “civilizational” standards in justification of its usage.

Part IV provides a general framework for future case studies built on a refutation of those scholars who wrongly claim that Kelsen endorses the amoral positive law prescription “you ought to commit genocide,”¹¹¹ and likewise would “embrace an extermination camp operated according to such norms.”¹¹² Kelsen’s normative commitment to “principles of morality generally recognized...according to the public opinion of the civilized world”¹¹³ negates an alternative commitment to prospective positive legality founded on neutral cognition of human-made acts, a hallmark of positive analytical jurisprudence.

The morality of criminalizing officials traditionally immunized under the AoSD, illustrates the conflict between principles of justice. Part IV asks that Kelsen’s description of ICR be understood as a modification of an otherwise unified neo-Kantian epistemological cognition of imputation. The “exception” that Kelsen introduces is necessary to hold accountable any individual committing immoral acts in an official capacity. “What someone did in the past,” writes Kelsen, “we may evaluate according to a (legal) norm, which assumed validity only after it had been done.”¹¹⁴ Whether it is possible to justify international prosecution from the vantage point of positive law for cases in which state officials were not apprised of the illegality of an act in advance of its commission, structures the following argument.

By incorporating social facts, legal positivism typically emphasizes law’s political dimension by “recogniz[ing] political rulers as the only source of valid law and adopt[ing] the

¹¹¹Jorg Kammerhofer, “Hans Kelsen’s Place in International Law,” in *Research Handbook on the Theory and History of International Law*, ed. Alexander Orakhelashvili (Northampton, MA: Edward Elgar Publishing, 2011), 146.

¹¹²Iain Stewart, “Kelsen Tomorrow,” *Current Legal Problems* 51 (1998): 189.

¹¹³Hans Kelsen, “The Rule against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” *Judge Advocate Journal* 2 (1945): 10.

¹¹⁴Kelsen, *General Theory of Law and State*, 43.

will of the political ruler as its validity standard.”¹¹⁵ Legal positivists Jeremy Bentham¹¹⁶, John Austin¹¹⁷ and H.L.A. Hart¹¹⁸ all share the belief that “persons,” not “norms,” ought to define the validity standard of any legal regime. While Kelsen agrees that autocratic rulers, for example, assume a legally authorized position of power (see: section III), he excludes the possibility that sovereign leader(s) are entitled to *immunity* from ICL prosecution under a state-centered conception of legality.

More expansive than the psychological delineation between “command” and “obedience,” Kelsen proposes a purely normative designation of imputation that is neither reliant on “morality” nor “social facts”. Unlike John Austin’s conception of duty in *The Province of Jurisprudence Determined* (1832), where a “future-oriented” conception is inherent to the factual relationship between commander and commanded, Kelsen de-links from the fact of obligation, conceptualizing responsibility even for those who may not have directly committed an offense. Since a command implies that individuals must obey at a later point in time, the concept of retroactivity is necessarily excluded from classical legal positivist cognition.

While Austin does not deny the legitimacy of discretionary action by a sovereign, the following account endorses the position of leading North American Kelsenian Stanley Paulson, whose article “Classical Legal Positivism at Nuremberg” (1975) argues that traditional positive

¹¹⁵ “Validity,” *Internet Encyclopedia of Philosophy*, accessed June 26, 2018, <https://www.iep.utm.edu/legal-va/>.

¹¹⁶ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Oxford University Press, 1970); M.W. Janis, “Jeremy Bentham and the Fashioning of “International Law,” *The American Journal of International Law* 78, No. 2 (Apr., 1984): 405-418.

¹¹⁷ John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1861); John Austin, *Lectures on Jurisprudence, Or, the Philosophy of Positive Law* (New York: Henry Holt and Co., 1875).

¹¹⁸ Even Hart’s rule of recognition must “be effectively accepted as common public standards of official behavior by its officials.” If only officials accept a system’s criteria of legal validity, it “might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.” H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 113- 114.

law defenses based on the principle of legality rule against *ex post facto* laws are rooted in the Austinian proposition that those commanded can logically only obey future orders.¹¹⁹ Carl Schmitt, “Nazi crown jurist”,¹²⁰ interrogated for eighteen months after the war as a potential defendant in the subsequent Nuremberg Trials under American auspices, presents a description of national law deviating from Paulson’s view of Austin as endorsing a “future-oriented,” presumably non-discretionary or non-retroactive position.

This chapter frames case studies (chapters 3-5) on Kelsen’s contributions to the changing notion of ICR. Kelsen’s strictly positive legal conception of ICR (Part II), which validates political regimes headed by autocratic heads-of-state (Part III), nevertheless licenses retroactive lawmaking for those officials responsible for core international crimes (Part IV).

II. Overview of the Pure Theoretical Conception of International Criminal Responsibility

a. “Pure” Epistemology: Neo-Kantian Expression of Valid Legal Normativity

Kelsen writes:

The pure theory of law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms; but it offers a theory of interpretation.

As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law *is*, not how it ought to be. It is a science of law (jurisprudence), not legal politics.

¹¹⁹ Stanley L. Paulson, “Classical Legal Positivism at Nuremberg,” *Philosophy & Public Affairs* 4, No. 2 (Winter, 1975).

¹²⁰ Michael Salter “Methodological Issues within the Nuremberg War Crimes Trials”, *Law and History Current Legal Issues* vol. 6, (2003), 375, 388-389 in Susan Mary Twist, “Retrospectivity at Nuremberg: The Nature and Limits of a Schmittian Analysis” (PhD dissertation, University of Central Lancashire, June 2012), 19.

It is called a “pure” theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.¹²¹

In his search for a universal definition of law based on a strictly positive or human-made legal description, Kelsen draws on the epistemological rather than ethical writings of philosopher Immanuel Kant¹²². Like Kant’s transcendental or critical idealist methodology, Kelsen’s pure theoretical approach affirms concepts structuring the perception of legal reality. Whereas the study of causality in the natural scientific realm is distinguishable from normative cognition in the social scientific sphere, for Kelsen each possesses a similar function: the *a priori* conceptualization of objects of understanding free of “alien elements” or categories extraneous to a particular disciplinary understanding. The specific effort to create a valid, objective and unified description of normativity in the legal sphere in the mode of transcendental idealism thus animates Kelsen’s methodological goal.

While I do not wish to press Kantian elements too far, given that Kelsen's relationship to a transcendental idealist epistemology has been the subject of an intractable debate between legal scholars,¹²³ for present purposes I draw on Kelsen's attempt to describe “legal science” as a

¹²¹ Hans Kelsen, *Pure Theory of Law*. (Berkeley: University of California Press, 1967).

¹²² Immanuel Kant, *Metaphysical Foundations of Natural Science* (Indianapolis: Bobbs-Merrill, 1970). Kelsen dismisses Kant's ethical view as a form of natural law, including “meaningless tautologies like the categorical imperative, that is, Kant's doctrine that one's acts should be determined only by principles that one wills to be binding on all men.” Hans Kelsen, *General Theory of Law and State*, 10.

¹²³ See: Stanley Paulson, “The Neo-Kantian Dimension of Kelsen's Pure Theory of Law,” *Oxford Journal of Legal Studies* 12, no. 3 (1992): 311-32, doi:10.1093/ojls/12.3.311; Stanley Paulson, “Some Issues in the Exchange Between Hans Kelsen and Erich Kauffman” <http://www.scandinavianlaw.se/pdf/48-17.pdf>. For example, Paulson writes that “At some points in his work, Kelsen treats imputation as a Kantian or Neokantian category by analogy to the category of causation. The transcendental argument that Kelsen adduces in the name of imputation *qua* category, however, is not sound.” Hans Kelsen, “The Very Idea of Legal Positivism,” *Revisita Brasileira de Estudos Politicos*, no. 102 (Jan./June, 2011), 162. Regardless of Paulson’s criticism of Kelsen’s “Kantian or Neokantian” conception of imputation, Kelsen means the connection, in accordance with a pure theoretical model, of “two acts of human behavior with each other: the behavior of one individual with the behavior of another, as, for instance, in the

science of norms, in order to provide a framework of Kant-inspired fundamental concepts, including that of imputation or responsibility. Kelsen writes:

It is...true that, according to Kant's epistemology, the science of law as cognition of the law, like any cognition, has constitutive character—it 'creates' its object insofar as it comprehends the object as a meaningful whole. Just as the chaos of sensual perceptions becomes a cosmos, that is, 'nature' as a unified system, through the cognition of natural science, so the multitude of general and individual legal norms, created by the legal organs, becomes a unitary system, a legal 'order,' through the science of law. But this 'creation' has a purely epistemological character. It is fundamentally different from the creation of objects by human labor or the creation of law by the legal authority.¹²⁴

Materials or objects of reality, according to Kant, are molded by the senses under forms of thought. "We can have *a priori* knowledge by means of the categories, only if the categories are due to the nature of the mind and are imposed by the mind on the objects which it knows."¹²⁵

These pure concepts of understanding (*Verstand*) condition the possibility of objects. The transcendental categories of cognition in *The Critique of Pure Reason*, including "quantity," "quality," "relation," and "modality" can be compared to "imputation" (*Zurechnung*), which structures understanding of primary legal datum. The "delict" or offense is conditioned by "sanctions" or coercive measures, which comprise two component parts necessary for cognition

moral law providing for reward in case of merit or in the legal law providing for punishment in the case of crime..." Hans Kelsen, "Causality and Imputation" *Ethics* 61, no. 1 (Oct., 1950), 1-11. This chapter focuses on Kelsen's contention that his pure theory is transcendental, steering between "fact-based" sociological, political or psychological approaches to the study of law, and a morally-centered natural law theory. The problem of the former, especially the political effort to provide immunity under a sovereign or state-centered conception of ICR, creates a "vacuum" of justice. The autocratic form of governance is a discretionary point of imputation that fills the vacuum. "Violation of the principle of legality rule against *ex post facto* lawmaking, therefore, conforms with the arbitrary command-centered description associated predominantly with principles of autocracy. Even with Kelsen's inability to resolve the conflict of norms or forms of imputation in law from a prospective positive law—or perspective—he nevertheless attempts to provide a conception of imputation that is "de-personalized" in the mode of "Kantian or Neokantian" transcendental philosophy.

124 Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967), 72.

125 H.J. Paton, *Kant's Metaphysic of Experience* (London: G. Allen & Unwin, 1936), 258.

of the distinctive category—or legal normative concept—of imputation.¹²⁶ The relationship between these datum—based on a conception of “ought” (*Sollen*) propositions (i.e., “if one murders, then one ought to be punished”) creates an ordering of coercive norms. The order that is created is based on pure cognition of the relationship between delicts and sanctions; the introduction of extraneous categories, on the other hand, does not comprehend law.

Kelsen distinguishes an “ought” (*Sollen*) that describes “a legal proposition” (*Rechtssatz*) from “an ethical proposition (*Satz der Ethik*).¹²⁷ While a “law of law” (*Rechtsgesetz*) is distinguished from a “law of morality” (*Moralgesetz*), the study of legal or moral *norms* can be divided from the natural scientific study of physical connections or causal relationships under a “law of nature” (*Naturgesetz*), which are “is” or “factual,” rather than “ought” propositions. While the ordinary meaning of normativity is prescriptive, Kelsen introduces imputation designated by *legal norms* in a descriptive sense. A “science of law” is meant to reflect “the material produced by the legal authority in the law-making procedure, in the form of statements to the effect that ‘if such and such conditions are fulfilled, then such and such a sanction shall follow.’”¹²⁸

“Imputation means ‘every connection of a human behavior with the condition under which it is commanded or prohibited in the norm.’”¹²⁹ *A priori* cognition of the relationship between delicts and sanctions as applied to “legal persons” as objects of imputation correspond

¹²⁶ On Kelsen’s idea of imputation, (*Zurechnung*) “as the specific connection of the delict with the sanction” as “implied in the juristic judgment that an individual is, or is not, legally responsible (*zurechnungsfähig*) for his behavior,” see: Hans Kelsen, “Causality and Imputation,” 3.

¹²⁷ Iain Stewart, “The Critical Legal Science of Hans Kelsen,” *Journal of Law and Society* 17, no. 3 (Autumn, 1990): 279.

¹²⁸ Kelsen, *General Theory of Law and State*, 54.

¹²⁹ Hans Kelsen, *The Pure Theory of Law*, trans. M. Knight (Berkeley, CA: University of California Press, 1967), 92 in “The Critical Legal Science of Hans Kelsen,” 280.

with Kelsen's view of normative delegation under the acts of state doctrine (AoSD). An "organ of the State" as an "organ of the law," or a "legal person," fulfills a norm-creating or norm-applying function determined by the legal order. Legal protection against prosecution of state officials defines a view of imputation in international law between the anarchy of international relations, whereby no state can adjudge the collective illegality of any other state, and the identity of the international legal order as commonly imputing responsibility to individuals for acts of state. The transformation of ICR, and with it the conception of the AoSD under international law into an efficacious jurisdictional sphere prosecuting individual for acts that were legal under national laws, requires justified validity claims.

From the perspective of a "science of law," however, the state official is merely the point of imputation of a "bundle of legal norms."¹³⁰ Jurisprudence as a distinctive field of legal cognition, therefore, derives the concept of *imputation* from a unity, which encompasses the "de-personalized" or "de-psychologized" description of responsibility as relations between legal norms. Psychological states, including motivations caused by fear of coercive action, must never enter into a strictly positive analysis of normative validity. In an effort to establish the legal validity of ICR, Kelsen introduces a purely normative legal technique that excludes the reasons or intentions of individuals for choosing a particular course of action.

Like sociologist Georg Simmel (1858-1918), who responded to Kant's declaration that additional categories could exist by introducing the innate form of "ought" (*Sollen*), Kelsen transforms this new "ought" category into the basis for conceptualizing imputation. But while his

¹³⁰ Stewart, "Kelsen Tomorrow," 190.

relativist epistemology strictly adheres to Kant's methodological framework, Kelsen nevertheless deviates from Kant's approach with respect to moral philosophy. He writes:

The struggle which this philosophical genius, supported by science, waged against metaphysics, which earned him the title of the "all-destroyer," was not actually pushed by him to the ultimate conclusion....The role which the "the-thing-in-itself" plays in his system reveals a good deal of metaphysical transcendence...So it happens that Kant, whose philosophy of transcendental logic was preeminently destined to provide the groundwork for a positivistic legal and political doctrine, stayed, as a legal philosopher, in the rut of the natural-law doctrine. Indeed, his *Principles of the Metaphysics of Ethics* can be regarded as the most perfect expression of the classical doctrine of natural law as it evolved in the seventeenth and eighteenth centuries on the basis of Protestant Christianity.¹³¹

Chapter four analyzes the AoSD in relation to the question of human agency by demonstrating the movement from a moral relativist conception of pure legal normativity to a discussion of the intrinsic moral criterion used to determine ICR. Kant's ethically informed legal argument is introduced in order to conceptualize the degree to which Kelsen accepts the prospect of "free will" linked to moral choice under superior orders.¹³² While, Kelsen does not reduce his conception of human behavior to causally determined lines, or "the idea that every event is necessitated by antecedent events and conditions together with [fixed] laws of nature."¹³³¹³⁴ based on,

¹³¹ Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell Co., 1961), 444-445.

¹³² "Kant's Account of Reason," The Stanford Encyclopedia of Philosophy, accessed July 2, 2018, <https://plato.stanford.edu/entries/kant-reason/>.

¹³³ "Causal Determinism," The Stanford Encyclopedia of Philosophy, accessed July 2, 2018, <https://plato.stanford.edu/entries/determinism-causal/>.

¹³⁴ While relevant to the general discussion of the relationship between law and morality in legal positivism, the study of 'inclusive' and 'exclusive' positivism entails a philosophical investigation that expands the scope of this dissertation well beyond its modest goal: to demonstrate the impact of pure theory on the notion of criminal responsibility in international law. Insofar as I show that Kelsen's attempt to describe international law according to a "science of law," fails to uphold a vision of ICR in conformity with its stated purpose of "eliminate[ing] from the

From his morally-inspired conception of ICR based on retroactive lawmaking, which accounts for “civilizational” standards that deviate from national law extant at the time of the commission of an international crime, one may infer that Kelsen recognizes the possibility of acting in accordance with a “higher principle of justice”.¹³⁵ While the focus of Part IV of this chapter is on Kelsen’s “moral-turn,” reaffirming the limitations of a morally relativist conception of imputation under the strictest positive law conditions, an interrogation of the fundamental datum of ICR must not exclude a purely normative reflection of the legal scope of cognition.

In addition to constituting law as a uniquely autonomous sphere of understanding separate from the realm of moral cognition, Kelsen separates normative analysis from the study of social facts, which he argues must not factor into a positive understanding of law.¹³⁶ This neo-Kantian concern is therefore different than the traditional definition of legal positivism. For instance, according to a traditional definition, “legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits...According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.); as we might say

object of [its] description everything that is not strictly law,” including moral principles that are a cornerstone of judicial decision-making in ICL, I hope to add to the jurisprudential discussion over the relationship between law and morality. Inclusive positivism considers that it is possible that within a given legal system there may be necessary overlap between law and morality; whereas, as Joseph Raz, an exclusive positivist concludes, there is no possibility of necessary overlap. See: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979); Kenneth Einar Himma, “Inclusive Legal Positivism” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002); Matthew H Kramer, *In Defense of Legal Positivism Law without Trimmings* (Oxford: Oxford University Press, 1999); Scott J. Shapiro, “Law, Morality, And The Guidance of Conduct,” *Personal Relationships* 6, no. 2 (2000): 127-70. doi:10.1017/S1352325200062017.; and Kramer’s reply to Shapiro in Matthew H. Kramer, *Where Law and Morality Meet*. Oxford: Oxford University Press, 1999.

¹³⁵ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?,” 164–65. ¹³⁶ “In 1927 [Kelsen] recognized his debt to Kantianism on this methodological point that determined much of his pure theory of law: ‘Purity of method, indispensable to legal science, did not seem to me to be guaranteed by any philosopher as sharply as by Kant with his contrast between Is and Ought. Thus for me, Kantian philosophy was from the very outset the light that guided me.’” See: Sandrine Baum, *Hans Kelsen and the Case for Democracy*, trans. John Zvesper. (Colchester, UK: ECPR Press, 2012), 5.

in a more modern idiom, positivism is the view that law is a social construction.”¹³⁷ The overlap between “the social fact thesis” of legal positivism and Kelsen's “pure” determination of law's positivity is explored in further detail in Part III on the political conception of ICR associated with sovereign or statist claims to immunity.

b. Norms, Basic Norms and the Structure of the International Law

Even a “legal person” or “legal subject,” according to Kelsen, is merely a “de-psychologized” bundle of norms, the point of imputation at which duties and rights are directed. Kelsen writes that “the legal person is not a separate entity besides ‘its’ duties and rights, but only their personified unity—or since duties and rights are legal norms—the personified unity of a set of legal norms.”¹³⁸ The physiological and psychological human being associated with the general conception of “natural person” is thus contrasted with the artificial construct called “legal person” or “juristic person”. A human being or the personified “state” can each be imputed legal responsibility, since both are technically, according to Kelsen, “legal persons”. But even this terminology is a duplication of the relationship between “legal persons” as purely normative associations.

A self-enclosed legal system is constituted by both “legal norms” and “legal facts”, says Kelsen. While a legal norm constitutes a rule, Kelsen defines it more specifically as “the meaning of an act of will.”¹³⁹ A legal norm is created or posited by an individual or group of individuals and directs its attention towards the behavior of another individual or group of individuals. A legislative act, for instance, is a “fact” of human will; it creates the norm. But the

¹³⁷ Legal Positivism, " Stanford Encyclopedia of Philosophy, accessed January 3, 2018, <http://plato.stanford.edu/entries/legal-positivism/>.

¹³⁸ Kelsen, *General Theory of Law and State*, 93.

¹³⁹ Hans Kelsen, “On the Basic Norm,” *California Law Review* 47, no. 1 (March 1959): 108.

act itself only receives its “meaning” through the prescription, permission or authorization granted by the norm.

The act of will that creates the norm is differentiated from the norm itself, which conforms to the logical principle that no descriptive or “is” statement can be derived from a prescriptive or normative “ought” statement. Likewise, what “ought” to be cannot be derived from what “is”. Although individuals may decide to disregard legal norms, making a particular norm inefficacious, the norm, if generally effective, is considered valid in regulating behavior. Responsibility for international crimes, for Kelsen, is not derived from a social fact or psychological components, but from the statement that one *ought*, for instance, to obey an authorized norm.¹⁴⁰ This point is critical in distinguishing Kelsen’s from Austin’s description of duty and responsibility, which will be discussed in the next section.

Each legal norm is “built” upon a hierarchy of legal normative delegation. All the combined general and individual legal norms amount to a unified order, or legal “system”. Legal “organs”, such as judicial bodies, derive their legitimacy from prior norm-conferring sources, such as legislative enactments, which in turn derive their legitimacy from even higher normative sources in a chain extending back to a *grundnorm*, or basic norm. Even if several constitutions exist, an original—or first—constitution is considered the primary justification for a legal order. Its validity is based on the basic norm that “*the original constitution is to be obeyed.*”¹⁴¹ The US Constitution and the customary norms that comprise the British common law system are examples of a *grundnorm*. While the reasoning is circular, the *grundnorm* must be presupposed,

¹⁴⁰ Ibid.

¹⁴¹ Legal Positivism." Stanford Encyclopedia of Philosophy, accessed January 3, 2018, <http://plato.stanford.edu/entries/legal-positivism/>.

according to Kelsen, to insure a unified conception of a legal order where “ought” is never derived from “is” but only from valid, higher “ought” statements grounded in a presupposed basic norm.

Kelsen grounds the conception of international law in a basic norm superior to the basic norm of all independent states, thus affirming the importance of cognition of a unified international legal order where domestic law retains a subordinate role in the hierarchy of norms. What, then, is the *grundnorm* of international law? For Kelsen, this is the customary rule that “states ought to behave as they have customarily behaved.”¹⁴² This gives license to the next stage, which is formed by norms created by international treaties based on the Latin dictum *pacta sunt servanda* (lit: “agreements must be kept”).¹⁴³

As in municipal law, freedom of contract exists on the international plane. Legal organs (or state officials) may sign treaties subordinating their lower legal normative order (domestic or municipal) to a higher one (international). This has the capacity to enable the transformation of state organs into subjects of a higher legal order with the implication that protections afforded under the AoSD remain subject to the will of future governments. Once a relatively decentralized international legal order is formed, according to Kelsen, it moves towards ever greater degrees of centralization¹⁴⁴.

¹⁴² Hans Kelsen, *General Theory of Law and State*, 369.

¹⁴³ With respect to international treaties, the Vienna Convention on the Law of Treaties, signed at Vienna on May 23, 1969, and entered into force on January 27, 1980 in article 26 states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” This suggests that states cannot claim, contrary to treaty obligations, that provisions in their municipal laws trump “good faith” agreements. “Vienna Convention on the Law of Treaties (1969),” The United Nations Treaty. Accessed December 6, 2014. http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹⁴⁴ See: Hans Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944); Jurgen Busch, Judith von Schmädell and Kamila Staudigl-Ciechowicz, “Peace Through Law’: Kelsen’s (and his School’s) Struggle for Universal Peace” in *Legal, Political and Social Theory Yearbook*, ed. Péter Cserne and Miklós Könczöl (Frankfurt: Central and Eastern European Forum for Legal, Political and Social Theory Yearbook, 2011), 161–180,

The sovereign value of international law resolves the dilemma over standards of validity between different temporal periods in recognizing normative legal growth patterns. According to Kelsen, the unity of the international legal system reflects the structural evolution from the predominant nineteenth century conception of imputation associated with statist, state-centered or political notions of sovereignty to the development in the twentieth century of a purely normative conception of international law with the creation of multilateral treaties licensing the prosecution of international crimes committed by state officials. Treaties imputing individual responsibility, even for acts not yet regulated by international law (i.e., retroactive treaty norms), create the standard of validity for the study of ICR.

Through greater concentration of coercive power, Kelsen believed that international law would begin to resemble national law with the establishment of a permanent court to both adjudicate disputes between states, and to try individuals for international offenses. An international court would be the first—and most significant—contribution to the establishment of a federalized world state. Admittedly, a *civitas maxima* like that advocated by eighteenth century philosopher Christian Wolff, might never be created. Nevertheless, Kelsen’s introduction of the concept of ICR was initially premised on the idea that only a world court as a precursor to a world state could adequately insure unbiased judgment.

Likening international law to law practiced before the birth of the modern centralized state, Kelsen saw what he called the “primitive” nature of international law as merely a stage on the beltway towards ever greater concentration of powers. As in the tribal period of human

https://www.univie.ac.at/kelsen/files/peacethroughlaw_1.pdf; Judith von Schmädell, “Kelsen's Peace through Law and its Reception by his Contemporaries,” *Hitotsubashi Journal of Law and Politics* 39 (Feb. 2011): 71-83, <https://hermes-ir.lib.hit-u.ac.jp/rs/bitstream/10086/19009/1/HJlaw0390000710.pdf>.

development where retribution against an offender's family through “blood-feud” or “vendetta” preceded the creation of neutral and independent courts to adjudicate individual culpability, Kelsen believed that in the “modern” era the establishment of a permanent court with coercive sanctioning powers would eventually supersede the “primitive” application of international justice through collective security arrangements and *ad hoc* jurisdictional authority.¹⁴⁵

A permanent judicial body comprised of representatives of different states would determine which states had committed international offenses by, for example, resorting to wars in violation of multilateral collective security agreements. This would replace the *ad hoc* determination of crimes against peace (CAP), for example, which, as chapter three concludes, creates a bias in favor of what Kelsen recognized to be “imperial” interests. Once this structural reformation took place, the accusation of “victors' justice” would be excised from international discourse. Centralization of the international system through the implementation of a neutral, compulsory international court would staunch criticisms like those lodged at the victorious powers after the Second World War when nations that conducted the trial of major war criminals at Nuremberg, including the United States, Great Britain, France and the former USSR, were accused of conducting “a sham trial for the sake of vengeance”.¹⁴⁶

¹⁴⁵ Hans Kelsen, *General Theory of Law and State*, 338-341.

¹⁴⁶Hans J. Morgenthau and Anthony F. Lang. *Political Theory and International Affairs: Hans J. Morgenthau on Aristotle's the Politics* (Westport, CT: Praeger Publishers, 2004), 98. In this collection of Morgenthau's lectures from 1970 to 1973 at the New School for Social Research in New York, Morgenthau answers a student's question speculating on how Aristotle would have voted if he were to have the capacity to time travel to the Nuremberg trials. After determining that Aristotle would have “had no conception of a supranational principle of justice that one state could apply to another state,” Morgenthau rejected Nuremberg as prejudicial. “I am fully aware,” Morgenthau commented, “of the popularity of the principles of Nuremberg that have been applied only once under extraordinary circumstances and are not likely to be applied again except when a victorious nation or group of nations can apply them against a defeated nation...The question of right in the Nuremberg case is that of might.” Like Kelsen, Morgenthau had reservations about the implementation of the IMT at Nuremberg, due to jurisdictional questions. While Morgenthau saw little possibility of implementing a neutral system of international adjudication, Kelsen's international law project was largely dependent on his political vision of a world state with a compulsory international court at its center. This would insure the end of “victor's justice”. Nevertheless, the argument made by

Kelsen writes in *Peace through Law* that:

It is quite possible that the idea of a universal World Federal State will be realized, but only after a long and slow development equalizing the cultural differences between the nations of the world, especially if this development is furthered by conscious political and educational work in the ideological field... The constitution of a World State with a world government and a world parliament, however, although international law as the contents of an international treaty, is at the same time national law, since it is the basis of the law of the World State.¹⁴⁷

Kelsen's preference was clearly for a world state spearheaded by national legal orders that subsumed law to higher world bodies through international treaties. His political desire was to create a "World State with a world government and a world parliament,"¹⁴⁸ which could legitimately hold accountable state officials in accordance with a legal structure that paralleled codified national legal orders. His political project therefore aimed to create new international institutions, such as a permanent compulsory international court through treaties subordinating state authority.

However, in granting states the right to protect citizens from international prosecution in the belief that eventually, through delegation of authority to neutral international bodies, a higher law would transform acts of state into prosecutable offenses, Kelsen minimizes the real prospect that a *civitas maxima* might never come about. Structural impediments to the application of

Andrea Gattini to the effect that Kelsen's description of the AoSD precluded a vital description of *ad hoc* jurisdictional authority is controverted by Kelsen's identification of retroactive lawmaking based on moral criterion as essential to trying Nazis—and future war criminals. Andrea Gattini, "Kelsen's Contribution to International Criminal Law," *Journal of International Criminal Justice* 2, no. 4 (September 2004): 795–809; Andrea Gattini, "Kelsen, Hans," in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (New York: Oxford University Press, 2009), 401–403.

¹⁴⁷ Hans Kelsen, *Peace Through Law*, 12–13.

¹⁴⁸ *Ibid.*

international legal norms, resulting from lack of a neutral world body, necessitated a theory of positive law that could also justify *ad hoc* jurisdictional authority over humanitarian prosecution.

Part IV returns to the subject of valid *ad hoc* prosecution under international law.

c. Collective and Individual Responsibility in International Law

“[T]he science of law describes its object by propositions in which the delict is connected with the sanction by the copula 'ought',” writes Kelsen.¹⁴⁹ He designates this relationship “imputation.” “The statement that an individual is *zurechnungsfahig* (“responsible”) means that a sanction can be inflicted upon him if he commits a delict. The statement that an individual is *unzurechnungsfahig* (“irresponsible”)—because, for instance, he is a child or insane—means that a sanction cannot be inflicted upon him if he commits a delict.”¹⁵⁰

The criminal law element of *mens rea* (Latin for “guilty mind”) used to determine whether an accused is capable of distinguishing between legality and illegality corresponds with the differentiation Kelsen makes between categories of individuals. In this sense, “responsible” and “irresponsible” does not correspond to the intention of a particular act but rather to the category of “legal persons”. Children and the mentally insane, according to Kelsen, since they do not possess sufficient rational judgment, cannot possess *mens rea*, and therefore cannot be denominated “legal persons”.¹⁵¹ The Pure Theory of Law only requires that a norm be imputed to an individual *capable* of distinguishing legal from illegal acts in general. Those designated by international treaties as “legal persons” subject to prosecution are not required, according to Kelsen, to have known about the actual offense, only to know that in the instance for which a

¹⁴⁹ Hans Kelsen, "Causality and Imputation." *Ethics* 61, no. 1 (1950): 1. doi:10.1086/290742., 2

¹⁵⁰ *Ibid.*, 3

¹⁵¹ Hans Kelsen. *General Theory of Law and State* (New York: Russell & Russell, 1961), 5.

subordinate violated international humanitarian laws that the act committed *would have constituted* an offense.¹⁵² Therefore, the only formal requirement is that an international treaty stipulates those “legal persons” subject to prosecution.

To apply, for instance, collective responsibility or absolute liability for crimes against peace to all citizens of a national legal order precludes the criterion of *mens rea* entirely. Those who had nothing to do with the decision to go to war are still to be held legally responsible for acts of state committed by officials in an administrative capacity. Even when the *mens rea* requirement is construed in terms of the *capability* of adhering to a legal norm, a distinction must be made between individual and collective responsibility. While the first category requires the ability to distinguish legal from illegal acts, the second does not. Children and the mentally insane, lacking the rational wherewithal to consistently make decisions in conformity with legal norms, however, may still be held responsible. Much like members of a corporation held liable for the delinquencies of specific employees, *all* citizens are collectively held responsible for the actions of state officials that would otherwise have constituted individual responsibility. As typically construed, *mens rea*, therefore, is not a necessary element of the collective description of ICR. The “legal person” in such cases is the personified “state”. Kelsen writes:

The statement that according to international law the State is responsible for its acts means that the subjects of the State are collectively responsible for the acts of the organs of the State; and the statement that international law imposes duties on States and not on individuals means, in the first place, that the specific sanctions of international law,

¹⁵² Article 8 “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” “United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”), 8 August 1945”, The Avalon Project: Documents in Law, History and Diplomacy, accessed on July 5, 2018, <http://avalon.law.yale.edu/imt/imtconst.asph tml>.

reprisals and war, are applied in recognition of collective, not individual, responsibility.¹⁵³

The primary sanctions of international law—war and reprisals— are applicable as collective punishment against *all* subjects of a state for offenses committed by state officials. Kelsen’s interest in maintaining a valid conception of an international legal order that shares the same formal requirements as national law consequently provokes serious inquiry as to the appropriateness of such a comparison. If in most instances “subjects of the State are collectively responsible for the acts of the organs of the State,” then international law admittedly is more similar to “primitive” law, which emphasizes “blood revenge”. Kelsen’s effort to establish the legal grounds in which to impute individual responsibility for core international crimes must therefore be understood as an attempt to incorporate forms of responsibility traditionally found under national law into the international sphere.

d. The Problem of Psychological “Command” to the Theoretical Conception of ICR

Before turning in Part III to an interrogation of the politicization implied by Kelsen’s validation of autocratic rule, and Part IV to the author of the Pure Theory of Law’s most important contribution to the study of ICR—*ad hoc* licensing of retroactive lawmaking predicated on a *moral* criterion of responsibility—it is first necessary to understand how Kelsen’s strictly positive legal normative conception of ICR is differentiated from a psychologized understanding of this term. Here, Austin’s theory of sovereign, command and duty is most instructive.

¹⁵³ Kelsen, Hans. *Peace through Law*, 74-75.

In his article “Classical Legal Positivism at Nuremberg” (1975), contemporary North American Kelsenian Stanley Paulson analyzes the relationship between Austin’s command theoretical doctrine and defenses based on the acts of state doctrine, superior orders and retroactive laws. Although Paulson mentions Kelsen as accepting the legitimacy of the Nuremberg judgment based on the *ex post facto* prosecution of acts of state of the magnitude of core international crimes, he neglects to interrogate this point for its doctrinal contradictions.¹⁵⁴ Rather, Paulson focuses entirely on Austin’s psychologized reading of responsibility as the main justification used by Nazi defendants at Nuremberg. Disregarding both the use of Pure Theory by ICL practitioners to clarify points of jurisprudence, and the doctrinal implications of Kelsen’s transgression of the “separation thesis,” Paulson reduces his examination of legal positivism, more generally, to only the clearest example of immunizing positive law doctrine: the theory of sovereign command.

Since command theory implies a psychological rendering of responsibility reduced to a conception of duty or direct obligation under the threat of coercion, Austin’s conception does not correspond to the categories of responsibility imputed to individuals, who may not have been directly liable for the commission of an act. While norm application only refers to two people in the Austinian account (i.e., the commander and commanded), for Kelsen duty and responsibility may, though need not, coincide. A third and fourth “legal person” may be imputed responsibility for acts of other legal organs obligated to uphold the law. The distinction between duty or obligation, on the one hand, and responsibility, on the other, therefore corresponds with an artificial designation based on the juristic assignment of “legal persons”.

¹⁵⁴ Paulson, “Classical Legal Positivism at Nuremberg”, 140.

Kelsen describes “legal persons” in a “de-personalized” or “de-psychologized” fashion, not as someone that ‘has’ legal duties and rights, not as in the primitive mythological or animistic way of thinking of “an invisible spirit who is the master of the object, who ‘has’ the object in the same way as the substance has ‘its’ qualities, the grammatical subject its predicates.”¹⁵⁵ Rather, Kelsen wishes to distinguish between Austin’s way of conceiving of duty as a factual relationship between “legal persons” possessing natural qualities, and Kelsen’s wholly normative analysis. “The legal person,” Kelsen writes, “is the legal substance to which duties and rights belong as legal qualities. The idea that the person ‘has’ duties and rights involves the relation of substance and quality. In reality, however, the legal person is not a separate entity beside ‘its’ duties and rights, but only the personified unity or—since duties and rights are legal norms—the personified unity of a set of legal norms.”¹⁵⁶

Paulson’s discussion enforces the point that Austin’s theory must be accounted for in terms of the “factual” nature of the relationship between “legal persons”. Austin describes the power relation that psychologically motivates obedience through fear of sanction in terms of “superiority,” which represents “might,” or else “the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one’s wishes.”¹⁵⁷

Hobbes’ account of the state of nature and the resolution of anarchy in civil society under the sovereign *Leviathan*¹⁵⁸ resembles the central psychology of fear and self-preservation instrumental to the analysis of coercive social relations (i.e., law) in Austin’s writings. Only if a ruler has the capacity to induce fear is a subject considered obligated to obey the command.

¹⁵⁵ Kelsen, *General Theory of Law and State*, 93.

¹⁵⁶ *Ibid.*

¹⁵⁷ John Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (London: 1954), 24 in Stanley Paulson, “Classical Legal Positivism at Nuremberg,” *Philosophy & Public Affairs* 4, no. 2 (Winter, 1975), 135.

¹⁵⁸ *Leviathan on Fear*

Kelsen, on the other hand, counters the actuality of power relations by freeing the imposition of sanctions from a direct assessment of psychological motivations.

That “coercion” as “the practice of persuading someone to do something by using force or threats,”¹⁵⁹ entails a future-oriented notion of legality, deserves further investigation. Part III introduces the psychologically coercive conception of duty associated with Austin’s command-centered approach alongside Kelsen’s pure theoretical licensing of autocracy, only to dismantle in Part IV the notion of future-oriented “human-made” claims to sovereignty through the use of retroactive imputation against state officials for core international crimes.

III: The Political Construction of ICR: Statism and the Prospect of Immunity

a. Validating the “Uncommanded Commander

Having worked to demonstrate why the Pure Theory of Law” is critical to a strictly legal conception of International Criminal Responsibility (ICR), Part III turns to an exploration of *political* challenges to a “pure” cognition of ICR. International adjudication for ruling officials remains philosophically tested in Kelsen’s legal theory by what “Nazi crown jurist” Carl Schmitt claims is the “helpless formalism”¹⁶⁰ of pure theory based on a scientific or value-free notion of authority. Schmitt writes that Kelsen’s legal theoretical attempt to subject the state to liberal or individualistic values allows “legislative officials” the right to “empower themselves for anything if...given the form of a statute.”¹⁶¹ Under a decentralized international legal authority,

¹⁵⁹*Oxford Dictionary of English*, 3rd ed, s.v. “Coercion,” ed. Angus Stevens (Oxford: Oxford University Press, 2010), 337.

¹⁶⁰ Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham and London: Duke University Press, 2008), 187.

¹⁶¹ *Ibid.*

in consequence, the rule of law would seem to “exercise[] no meaningful constraint on the state” and its leaders.¹⁶²

Schmitt’s sociology of law especially endorses the position that the existential moment generated by the emergency situation requires a sovereign distinction between friend and foe.¹⁶³

Schmitt writes:

All law is "situational law." The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most dearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.¹⁶⁴

Like Austin, whose notion of the “uncommanded commander” insures authority without simultaneously obligating “sovereign” officials, Schmitt correctly diagnoses the potential for arbitrary rule, which he deems applicable to Kelsen’s neutral structuring of legal orders. Kelsen writes:

“Even in a[n] [autocratic State], there are many “tyrants,” many people who impose their will upon others. But only one is essential to the existence of the State. Who? The one who commands “in the name of the State.” How then do we distinguish between commands “in the name of the State” and other commands? Hardly otherwise than by means of the legal order which constitutes the State...The ruler of a State is that individual who exercises a function determined by this order. It is hardly possible to

¹⁶² David Dyzenhaus, “The Morality of Legality,” (Draft), 2, https://www.law.berkeley.edu/files/The_Morality_of_Legality_DDyzenhaus.pdf

¹⁶³ See: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. Georg Schwab (Chicago: Chicago University Press, [1922] 2005).

¹⁶⁴ *Ibid.*, 13.

define the concept of a ruler functioning as “organ of the State” without presupposing the legal order constituting the community we call State. The concept of a “ruler of the State” thus implies the idea of a valid legal order.”¹⁶⁵

Even as Kelsen licenses autocratic rule in accordance with a legal rather than political notion of authorization, discretionary command by a ruler bears a similar function to that determined by prospective notions of legality: the ordering of social relations. The moral quality of a regime is clearly not a problem for the validation of a regime, according to Kelsen. “Many ‘tyrants’ ...impose their will upon others” under autocracy.¹⁶⁶ No operative difference consequently exists between the concept of a ruler functioning as a delegated “organ of the State,” on the one hand, and as the embodiment of prerogative sovereign power or *dictat*, on the other. For Schmitt, however, “the political is not simply distinct from the legal but prior to it in that no system of norms can be developed or applied without a moment of decision that exceeds the regulation of those norms. Thus the state as the political actor cannot be reduced to a legal system.”¹⁶⁷

Although Kelsen endorses autocracy as a valid form of governance subject to pure jurisprudential cognition, the path to validity requires legal authorization of delegated responsibilities. Kelsen’s support of international legal norms sanctioning the conduct of autocrats, therefore, precludes the notion of a “sovereign” ruler in the sense that Schmitt describes. Perfectly compatible with a pure conception of imputation (even under democratic conditions), the state of emergency, Kelsen implies, is regulated by (a) principles of tolerance

¹⁶⁵ Kelsen, *General Theory of Law and State*, 186-187.

¹⁶⁶ *Ibid.*

¹⁶⁷ Andrew Norris, “Carl Schmitt on Friends and the Political, *Telos* 112 (Summer 1998): 68-69.

prohibiting persecution of vulnerable populations, and (b) the prospect of imposing international punishment on rulers for violation of principle of tolerance. The moral principle or standard by which Kelsen retroactively imputes responsibility for core international crimes, as Part IV indicates, is “civilizational,” protective of the right to be free of persecution.

But *retroactive* freedom from persecution cannot guarantee protection from actual persecution under a despot. Only the despot’s *future* criminal status can create a retributive, as opposed to deterrent sense of justice, insuring victims—and their allies—that civilizational standards promoted by a plurality of “humanity” does not permit crimes against humanity, genocide, et al, even if that means negation of the principle of legality rule against *ex post facto* laws. Notwithstanding Kelsen’s realism with regard to the international community’s lack of police enforcement powers, he places faith in the legitimizing process of treaties ratifying foreign prosecution of acts of state. Although later deemed core international crimes, acts of state, are typically protected by sovereign right derived from the personified “state,” which is the national legal order, or unified object of cognition of imputation. The “state,” albeit the primary “legal person” or “subject” of imputation in international law, however, does not encompass all forms of “persons”. Nevertheless, if there is to be efficacy in the prosecution of individuals in international law, statist demonstrations of immunity must be theoretically disposed of. This includes the endorsement of the validity and efficacy of a despotic, if “legal,” order.

Kelsen’s theoretical consideration of efficacy or the effectiveness of states or national legal orders relates to his position that as long as a certain societal population generally adheres to the pronouncements of its leaders, even those acting in a tyrannical fashion by persecuting oppositional and minority factions, the “state” may be described as a valid authority. This creates problems not only for the direct prosecution of that individual but for all those within the

hierarchy of power over which he rules. Since subordinate legal organs can claim that each adheres to valid legal norms originating in the presupposed *grundnorm* or basic norm of an autocrat, a system of immunity is constituted through doctrinal means.

Such a view, however, neglects to consider implications to the principle *non sub homine sed sub lege* (“not under man but under law”), a principle of Pure Theory integral to the conception of an impersonal norm regulating human behavior in a society.¹⁶⁸ The primacy of law over man, or normativity over facticity, renders the Fuhrer (or Leader) Principle, for instance, void. Insofar as Hitler cannot claim in the Austinian sense that he has a right as “uncommanded commander” to total immunity, he remains subject to punishment under international law. As such, Part III delineates the threat to the principle *non sub homine sed sub lege*, a perennial challenge to the prospect of war crimes adjudication. Through the assertion of an even more foundational principle of justice championed by Kelsen—*ex post facto* lawmaking in cases where state officials acting *immorally* are to be held responsible for offenses committed in conformity with state law, Part IV rebuts political claims introduced in Part III, including the categorical immunization of heads-of-state. But to reach this goal it is first necessary to examine problems associated with the idea that Kelsen maintains an ineluctable commitment to the legitimacy of any authority that maintains efficacy, even under autocratic rule.

b. Efficacy

Legal philosopher Andrei Marmor describes Kelsen's notion of efficacy as follows:

A norm is efficacious if it is actually (generally) followed by the relevant population. Thus, “a norm is considered to be legally valid”, Kelsen writes, “on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious”.¹⁶⁹ So the

¹⁶⁸ *Ibid.*, 36.

¹⁶⁹ Kelsen, *General Theory of Law and State*, 42.

relationship here is this: efficacy is not a condition of legal validity of individual norms. Any given norm can be legally valid even if nobody follows it...However, a norm can only be legally valid if it belongs to a system, a legal order that is by and large actually practiced by a certain population. And thus the idea of legal validity, as Kelsen admits, is closely tied to this reality of a social practice; a legal system exists, as it were, only as a social reality, a reality that consists in the fact that people actually follow certain norms.¹⁷⁰

Efficacy implies the protection of state officials from international prosecution under the supremacy of state authority. If a population decides that it no longer wishes to abide by the rules of its legal order, then the system of legal norms is no longer valid. Insofar as this is the case, then the domestic order in which norms exist are either replaced by another system of norms constituting the government of a state, or else anarchy ensues for a period before a new legal order replaces the vacuum that arises when a population disregards the law. Yet as long as laws of the legal order are generally obeyed, even if those laws emanate from an “uncommanded commander” who assumes the authority of the *grundnorm*, then the order is considered valid in accordance with a pure theoretical account.

But as legal scholar Michael Green asserts, once law is reduced to “factual” statements—efficacy or the “will of men”—then there is little difference between Kelsen's and Hart's approach to law. To fall back on “social facts,” as Hart does in order to demonstrate law's validity, Green asserts, undermines Kelsen's belief in a “transcendental-logical presupposition,”¹⁷¹ or condition of knowledge associated with any autonomous system. At all levels, including the international, the cognition of imputation must be unimpeded by ideological

¹⁷⁰Andre Marmor, “The Pure Theory of Law,” *Stanford Encyclopedia of Philosophy*, January 4, 2016, accessed January 19, 2017, <http://plato.stanford.edu/entries/lawphil-theory/>.

¹⁷¹Michael Green, “Hans Kelsen and the Logic of Legal Systems,” *Alabama Law Review* 53 (2003): 365-413

interests. To endorse an autocratic order only on structural grounds as valid *because* it is efficacious, presupposes that “the human being appears in the legal order,” not “as the personified bundle of legal norms, establishing duties and rights, that is counted as a ‘person’,”¹⁷² but as an actor free of normative restraint.

Kelsen writes that “human behavior is enacted, provided, or prescribed by a rule of law without any psychic act of will. Law might be termed a ‘depsychologized’ command.”¹⁷³ Even when law is obeyed by citizens out of fear or some other psychological influence, Kelsen refuses to consider this an object of normative jurisprudence¹⁷⁴. Rather, to go beyond the cognition of human behavior in terms of a “personified bundle of legal norms” is to practice “sociological jurisprudence.”¹⁷⁵ The former is concerned with the validity of law; the latter, with efficacy. As Kelsen often asserts, “what must be avoided under all circumstances is the confounding—as frequent as it is misleading—of cognition directed toward a legal ‘ought’, with cognition directed toward an actual ‘is’.”¹⁷⁶

If Kelsen does indeed, as Marmor suggests, validate the law in terms of efficacy, then how different in the end is Kelsen’s legal philosophy from the “social fact thesis,” which asserts that “it is a necessary truth that legal validity is ultimately a function of certain kinds of social facts”? (see: Part II) Green is right to suggest that if Kelsen actually endorses efficacy, then the whole enterprise of international law is potentially at stake, since international law develops through an accretion of treaties and customary norms based on transcendental presuppositions,

¹⁷² Iain Stewart, “Kelsen Tomorrow,” *Current Legal Problems* 51 (1998): 190.

¹⁷³ Hans Kelsen, “The Pure Theory of Law and Analytical Jurisprudence,” *Harvard Law Review* 55, no. 1 (Nov. 1941), 56.

¹⁷⁴ Kelsen, *General Theory of Law and State*, 72.

¹⁷⁵ Stewart, “Kelsen Tomorrow,” 194.

¹⁷⁶ Kelsen, “The Pure Theory of Law and Analytical Jurisprudence”, 52.

which, in pyramidal fashion, allows states to subsume their laws to higher international legal norms (“the primacy thesis”). This is especially problematic with regard to the study of ICR, since any legal order—especially an autocracy—can act to protect state officials from international prosecution by claiming that social facts affirm the validity of that particular social order, and that any claim to regulate the behavior of officials threatens the effectiveness of the order.

Like Marmor, Wolfgang Friedmann asserts that Kelsen’s statement that “the efficacy of the total legal order is a necessary condition for the validity of every single norm of the order”¹⁷⁷ implies that Kelsen does not clearly state what constitutes minimal adherence. He argues that Kelsen does not specify the point at which, for example, the laws of the German Republic were replaced by those of the Nazi legal order. Did Nazi law replace that of the German Republic in 1933 with Hitler’s ascension to power? Did German Republican law continue to exist between 1933 and 1945? How about after 1945? Would the Czarist constitution after 1917 or the German Republican constitution after 1933 be considered valid? Without a legal process abrogating laws of the previous legal order (i.e., Czarist and Weimar Republican), what formal or normative criterion can Kelsen turn to in order to indicate the validity of the basic norm of each national legal order?

Friedmann’s criticism of Kelsen’s inability to clearly identify the relationship between efficacy and validity bears on the theoretical discussion of ICR in relation to command and obedience. The prospect of state officials claiming immunity for core international crimes when a regime under autocratic rule licenses errant legal behavior ought to at least signify the time in

¹⁷⁷ Wolfgang Friedmann, *Legal Theory* (London: Stevens & Sons Limited, 1953), 114; See also: *The Changing Structure of International Law* (New York: Columbia University Press, 1964).

which that order is valid. Beyond temporal ambiguity in designating when a regime is efficacious, Friedman further criticizes Kelsen's relativism with regard to his inability to distinguish whether a *grundnorm* is "good" or "bad". A valid legal order, according to Kelsen, is predicated exclusively on cognition of the relationship between higher and lower legal norms. But establishing a designation of validity between structurally incompatible forms of governance neglects to account for substantive moral claims. "That Parliament is sovereign in England," writes Friedmann, "is a fundamental norm, no more logically deducible than that the command of the Fuhrer was the supreme legal authority in Nazi Germany or that native tribes obey a witch doctor."¹⁷⁸

c. The Fuhrer Principle

In the Nazi hierarchy, the Fuhrer Principle granted Hitler the right to administer authority as "uncommanded commander". At the pinnacle of the Nazi regime, "all members swore an oath of 'eternal allegiance' to [Hitler]."¹⁷⁹ Hermann Jahreiss, IMT defence counsel for Nazi Alfred Jodl, Chief of the Operations Staff of the Armed Forces High Command during World War II, describes Hitler's position *vis a vis* superior orders: "The functionaries," Jahreiss said, "had neither the right nor the duty to examine the orders of the monocrat to determine their legality. For them these orders could never be illegal at all."¹⁸⁰ In his closing address, Jahreiss referenced the following statement made by Kelsen:

¹⁷⁸ Ibid.

¹⁷⁹Nuremberg Trial, Judgment, *Cmd.* No. 6964, 5 in Yoram Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* (Oxford: Oxford University Press, 2012), 474. Every Nazi took this oath: "I pledge eternal allegiance to Adolf Hitler. I pledge unconditional obedience to him and the Fuehrers appointed by him" (1893-PS) in "Nuremberg Trial Proceedings Volume 19," The Avalon Project: Documents in Law, History and Diplomacy, accessed July 3, 2018, <http://avalon.law.yale.edu/imt/07-26-46.asp>.

¹⁸⁰Nuremberg Trial, Closing Speech for the Defence by Jahreiss, IMT, vol, 17, 489.

The number of persons who ha[ve] the legal power of leading their country into war is in each of the Axis States is very small. In Germany it is probably the Fuehrer alone.¹⁸¹

Legal scholar Yoram Dinstein argues that “unquestionably, according to the AoSD, the Head of State, not less than any other organ of the State, is immune from prosecution before a foreign court for acts committed by him in that capacity.”¹⁸² He quotes Kelsen from various sources to this effect,¹⁸³ affirming that the author of pure theory could never have endorsed Hitler’s prosecution under the AoSD.

Robert Jackson, however, presents a scenario in which all Nazis, including Hitler, could claim immunity through various defense mechanisms, including the AoSD. For example, A could claim he is not legally responsible for an act because B is superior. Since B ordered A to perform the act, B is responsible under the doctrine of *respondeat superior* where a party is liable vicariously for acts of their agents. But if B is the head-of-state, he cannot use the defense of superior orders, even as he is able to impute his act to the state under the AoSD. Jackson considers such a circumstance patently absurd, since nobody could then be held responsible.¹⁸⁴ This is the basic pattern of thinking associated with classical legal positivist command theory, and sociological approaches at the time, like Schmitt’s, that retained a state-centered conception of law.

¹⁸¹Ibid. 493; Hans Kelsen, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944), 91; Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals”, *California Law Review* 31, no. 5 (1943): 556.

¹⁸² Yoram Dinstein, *The Defence of "Obedience to Superior Orders" in International Law* (Leyden: A.W. Sijthoff, 1965), 67.

¹⁸³ Hans Kelsen, “Collective and Individual Responsibility for Acts of State in International Law,” *Jewish Yearbook of International Law* 1, no. 1 (1948), 231; Hans Kelsen *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944), 84-85; Kelsen, Hans. Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals,” 541-542.

¹⁸⁴ Paulson, “Classical Legal Positivism at Nuremberg,” 149.

Kelsen's position in *General Theory of Law and State* that the Nazi regime was indeed legitimate like any other coercive legal system,¹⁸⁵ accounts for the possibility that the same *decisionism* that Schmitt advocated under the state of emergency (German: *Ausnahmezustand*), in which a sovereign could suspend the law for the sake of the public good, could indeed be reconciled with Kelsen's aforementioned statement regarding unconditional obedience to a leader in wartime. Even though Hitler's absolute leadership, according to Kelsen, amounted to a 'gangster's-state',¹⁸⁶ and Kelsen's preference was certainly for democracy, he does not clearly reject the validity claims of autocracy.¹⁸⁷ Nevertheless, as Francois Rigaux insists, "a veil of legality was intended to cover up the anarchical character of the power to defeat any norm through an individual decision."¹⁸⁸ The Nazi regime was therefore a 'prerogative' rather than 'normative' state.¹⁸⁹ Rigaux states that:

Indeed, positing an individual decision above any rule, the *Fuhrerprinzip* subverted the Kelsenian hierarchy between the rule and particular acts or decisions which had to conform to a superior rule right up to the ultimate subordination of the Grundnorm.¹⁹⁰

¹⁸⁵“Ever since the rise of Bolshevism, National Socialism, and Fascism, one speaks of Russian, German and Italian ‘law’...From the standpoint of (legal) science, free from any moral or political judgment of value, democracy and liberalism are only two possible principles of social organization, just as autocracy and socialism are. There is no scientific reason why the concept of law should be defined so as to exclude the latter.” While Kelsen's preference is for “a legal order [with] a certain minimum of freedom and the possibility of private property,” he still considers National Socialism (Nazism) a valid positive legal order. Kelsen. *General Theory of Law and State*, 5.

¹⁸⁶Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992), 59-60; Frank Haldemann, "Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law," *Ratio Jurisprudence* 18, no. 22 (June 2005), 169.

¹⁸⁷ See: Hans Kelsen and Nadia Urbinati, *The Essence and Value of Democracy*. (Lanham: Rowman & Littlefield, 2013); Hans Kelsen, "The Foundation of Democracy" *Ethics* 66, no. 1 (1955): 1-101.

¹⁸⁸Francois Rigaux. "Hans Kelsen on International Law," *European Journal of International Law* 9, no. 2 (1998), 330.

¹⁸⁹ Ernst Fraenkl, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941).

¹⁹⁰ Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992), 330.

The unity of the legal order, Rigaux contends, requires that the law follow a clear procedural path with the delegation of legal norms from one level to another.¹⁹¹ This insures that those in command are obligated to adhere to higher legal norms. But in spite of Rigaux's necessary clarification, he does not sufficiently counter Kelsen's endorsement of a prerogative state or autocratic rule, since a higher legal norm can license *any* type of legal order, even one where the prerogative decision under the Fuhrer Principle transforms the arbitrary decrees of the highest leader into the *grundnorm*. The only way out of this impasse is to find a legal means by which to hold an autocrat like Hitler accountable even when his words constitute the highest law under a certain juridical order.

e. *Non Sub Homine Sed Sub Lege*

Before turning in Part IV to an examination of the retroactive methodology used to insure the culpability of seemingly "prerogative" decision-makers under higher laws adjudicating core international crimes, this section clarifies Kelsen's position in relation to the principle *non sub homine sed sub lege*. The debate between Kelsen and Schmitt¹⁹² over judicial review attests to Kelsen's commitment to liberal practice, which conforms to the belief that all laws, even those promulgated by autocrats, ought to be regulated by constitutional authority, in accordance with the aforementioned principle. Despite the fact that autocrats, by definition, are prone to arbitrary decision-making, Kelsen's advocacy of the rule of law regulating the behavior of all individuals

¹⁹¹For a more detailed discussion of Kelsen's general theoretical framework, see chapter two.

¹⁹² See: Charles E. Frye, "Carl Schmitt's Concept of the Political," *The Journal of Politics* 28, no. 4 (Nov. 1966): 818-830, Cambridge University Press; Peter M.R. Stirk, *Carl Schmitt, Crown Jurist of the Third Reich: On Preemptive War, Military Occupation, and World Empire* (Lewiston, NY: E. Mellen Press. 2005).

under democratic forms of governance,¹⁹³ cannot be disassociated from his embrace of judicial review as a means of preventing discretionary authority.

Whereas Schmitt rejected judicial review on the grounds that “liberal constitutionalism...abstract[ed] from the substantive and pre-legal political identity of a people that can alone provide constitutional legitimacy and...distinguish between friend and enemy,”¹⁹⁴ Kelsen assumed that an executive branch with unrestricted powers of emergency undermined a liberal commitment to the neutralization of conflict. Since modern societies are comprised of multi-ethnic, religious and racial orders, the idea of granting authority to a leader representing the “political identity of a people” created the ever-present threat of violence, and by extension, the structural underpinnings of genocide.

For Schmitt, the enemy is “existentially something different and alien, so that in the extreme case conflicts with him are possible.”¹⁹⁵ The state of exception is the moment when the rule of law is suspended by an authoritative figure freed of legal restraint, acting in a decisive manner against enemies. Dictatorial violence approved by the constitution, Schmitt asserts, resolves democratic conflict, even if at the expense of minority protections. In contrast, a constitutionally-sanctioned court with the power of judicial review has the capacity to insure greater social harmony, as an independent judiciary acts as a check on societies represented by demagogic rule.

¹⁹³ See: Hans Kelsen and Nadia Urbinati, *The Essence and Value of Democracy*. (Lanham: Rowman & Littlefield, 2013); Hans Kelsen, “The Foundation of Democracy,” *Ethics* 66, no. 1 (1955): 1-101.

¹⁹⁴ Lars Vinx, “Carl Schmitt and the Analogy between Constitutional and International Law: Are Constitutional and International Law Inherently Political?” *Global Constitutionalism* 2, no. 1: 100; see also: Hans Kelsen, “The Nature and Development of Constitutional Adjudication” in Lars Vinx (ed.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015), 22-79; Carl Schmitt, “Guardian of the Constitution” in Vinx, “Guardian of the Constitution,” 79-125.

¹⁹⁵ Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996), 27.

Judicial review is antithetical to laws like Article 48, the emergency decree of July 20, 1932 initiated by the conservative federal government of Franz von Pappen and signed by President Paul von Hindenberg, used to license the usurpation of executive authority. After the Reichstag fire of February 27, 1933, Hitler, as the new German chancellor, claimed authority to curtail constitutional rights. While Kelsen's commentary on judicial review does not preclude his support of efficacy as a means of assessing the validity of an autocratic regime like Hitler's, nor does it prove that the Fuhrer Principle, for example, does not conform to the concept of the *grundnorm*, it confirms Kelsen's preference for the juridical regulation of societies. As such, the prospect of holding accountable strong leaders is maximized through a structural choice liberal in orientation. Even if a national legal order that institutes robust powers of judicial review, by definition, is irreconcilable with autocratic rule, as Kelsen cautions, the distinction between autocratic and democratic forms of governance are only ideal types in the Weberian sense.¹⁹⁶ Democracies, though traditionally less militant, can also produce war criminals.

In reference to problems associated with Austin's identity of the commanding and commanded (see: Part II), Kelsen affirms that democratic laws could not exist if conceived of merely as "commands". Kelsen writes:

If we compare [a democratic form of governance] to commands, we must by abstraction eliminate the fact that these 'commands' are issued by those at whom they are directed. One can characterize democratic laws as "commands" only if one ignores the relationship between the individuals issuing the command and the individuals at whom the command is directed, if one assumes only a relationship between the latter and the "command" considered as impersonal, anonymous authority. That is, the authority of the law, above

¹⁹⁶ See: See: Hans Kelsen and Nadia Urbinati, *The Essence and Value of Democracy*. (Lanham: Rowman & Littlefield, 2013); Hans Kelsen, "The Foundation of Democracy," *Ethics* 66, no. 1 (1955): 1-101 and Max Weber, trans. Hans Gerth, "The Three Types of Legitimate Rule," *Berkeley Publications in Society and Institutions* 4, no. 1: 1-11.

the individual persons who are commanded and who command. This idea that the binding force emanates, not from any commanding human being, but from the impersonal anonymous “command” as such, is expressed in the famous words *non sub homine sed sub lege*. If a relation of superiority and inferiority is included in the concept of command, then the rules of law are commands only if we consider the individual bound by them as subject to the rule. An impersonal and anonymous “command”—that is the norm.¹⁹⁷

Kelsen affirms that with respect to democracy, a distinction must be made between a psychologized and de-psychologized notion of “norm” as distinguished from “command”. The principle *non sub homine sed sub lege*, however, can only be characterized in normative terms, if a further distinction is made between autocracy and democracy, Kelsen’s two-fold, as opposed to Aristotle’s three-fold, description of forms of regime-types.¹⁹⁸ Kelsen’s dichotomization of types

¹⁹⁷ Kelsen, *General Theory of Law and State*, 36.

¹⁹⁸ Aristotle bases his classification of states on two principles. These include both the number of individuals exercising sovereignty or supreme power and whether the goal is to serve self-interest or social welfare. Rule by one, few or many describes the numerical three-fold classification. Each category corresponds with either normal forms of governance, including monarchy, aristocracy and polity, which may be perverted into tyranny oligarchy or democracy. The category—democracy—belongs to the rule of the masses or “the crowd”. For Kelsen, in contrast, there is only a two-fold distinction: autocracy and democracy. Whereas autocracy violates the principle of tolerance under structural organizational conditions, creating a constitutional crisis and a general undermining of faith in a rule of prospective law beneficial to *all* citizens, democracy, which is generally based on principles of legality, especially due process and the rule of law forbidding *ex post facto* lawmaking, insures tolerance through contestation of powers. Democracy produces a space in which, through vote and public assembly, contestation of power reaffirms the prospect that a minority may one day assume majoritarian status. As a result, communal benefits, which entail generally equal protections to all citizens through a structuring of governance that provides for an equal status in voting and assembly, produce the greatest prospect for tolerance. Since the “principle of tolerance” instantiates “the principle of civilization” (the positivized translation of “the principle of humanity”), only a democracy can fulfill this general goal. Autocracy exists where majority and minority rights are potentially compromised, even to the point of extinction (i.e., the *Shoah*), due especially to sovereign rule by discretionary authority (“the uncommanded commander”). We cannot know if Kelsen recognized that the international criminal form of social order or governance derived (or delegated) from states committed to a “civilized” standard of conduct prohibiting crimes against humanity, genocide, et al *meant* that the democratic process necessarily occurs at the level of international juridical authority. Through bilateral and multi-lateral treaties, states authorized the trial of war criminals based on *moral* principles. Since the principle of tolerance guides the determination of responsibility, which is defined *ex post facto* for state officials who committed prospectively legal offenses amounting to crimes against humanity, genocide, et al, merely implies that a “moral-turn” is necessary to prevent the sovereignty of rulers transgressive of the principle of tolerance. See: Aristotle, *The Politics of Aristotle*, ed. and trans. Ernest Barker (Oxford: Oxford University Press, 1958); Hans Kelsen, “The Foundation of Democracy,” *Ethics* 66, no. 1 (1955): 1-101.

of governance only substantiates the purity of law on one end of the spectrum. Democracy conforms to “the ‘command’ considered as impersonal, anonymous authority.” But how can Kelsen maintain such a distinction in describing autocratic rule, which must subvert a commitment to the principle *non sub homine sed sub lege*? How can he claim to remain de-psychologized in cognition, when autocratic rule implies an un-commanded, discretionary commander?

The only way to resolve the problem of authority under a pure theoretical approach is to recognize the possibility that even if Kelsen’s description of law initially finds common ground with Austin’s command theory, Kelsen is nevertheless able to maintain the principle *non sub homine sed sub lege* under international law. Once an autocratic head-of-state is recognized as having performed acts for which he is “morally responsible,” including core international crimes, and a state is authorized to transfer powers to a jurisdictional authority instituting ICL, he may then be subject to prosecution, since his past commands are no longer sovereign. To do so, however, Kelsen recommends the transgression of his own doctrinal commitment to the separation of law from morality. Part IV—on the use of *ex post facto* methodology in relation to humanitarian criminal prosecution—demonstrates how a normative conception of authority can be retained, albeit at the expense of a pure doctrinal commitment to “the separation thesis”.

IV. The Moral Construction of ICR: Ex Post Facto Lawmaking and the “Higher” Principle of Justice

a. The Rule against Ex Post Facto Law: Positive or Natural?

This irregular methodological choice, a moral “sleight-of-hand” utilized at the ICL level, is distinguished from cognition of discretionary “commands” under domestic conditions. Acts warranting prosecution of core international crimes represent the abolition of the principle of legality rule against *ex post facto* laws in accordance with certain “civilizational” prerequisites. Retroactive lawmaking in the international sphere for offenses that were not “indifferent in itself” (i.e., violent or harmful), according to Kelsen, are essential to prosecution of core international crimes.¹⁹⁹

Kelsen writes:

Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crimes of the [S]econd World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.²⁰⁰

The difference between the use of retroactive legislation by ICL practitioners, on the one hand, and autocrats, on the other, is predicated on *the way* each makes use of the same technique. Retroactivity used to promote the human rights of victims of crimes against humanity and genocide is unlike retroactivity utilized for the purpose of repressing minority populations and other vulnerable religious, ethnic, racial, gender and class groups under autocracies, including fascist and totalitarian regimes. While one can imagine scenarios in which the prosecution of

¹⁹⁹ Hans Kelsen, “The Rule against *Ex Post Facto* Laws,” 8.

²⁰⁰ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” *The International Law Quarterly* 1, no. 2 (Summer, 1947), 153, 164-65.

core international crimes is politicized, there is a difference in kind between offenses committed at the behest of an autocrat with the intention of protecting parochial norms, even if it means persecuting minorities, and the general consensus of the international community that genocide is a peremptory norm in which no deviation is permitted. Kelsen must therefore violate his commitment to the separation of law from morality or “the separation thesis,” in order to construct a methodology that can hold Hitler accountable for “commands” that, at the time of their promulgation, in accordance with Austin’s command theory, were free of imputation from any higher international law.

Before addressing the philosophical implications of Kelsen’s rationale for holding state officials retroactively accountable for acts of state, it is necessary to first define the parameters of the principle of legality expressed through the Latin phrase *nullum crimen sine lege, nulla poena sine lege*, meaning “no crime or punishment without a law.”²⁰¹ Since Kelsen emphasizes the “positivity” of cognition of *ex post facto* laws, it is first necessary to situate the debate between positive and natural lawyers on the question of retroactive application in the international sphere. The next section considers *how* Kelsen validates retroactivity through a legal positivist frame of reference before turning in Part IV, Section C, to the central place of moral normativity as the basis for justifying international prosecution.

Although a basic maxim of continental European legal thought,²⁰² the Anglo-American common law traditions²⁰³ likewise embrace the prohibition of retroactive lawmaking associated

²⁰¹See: Beth Van Schaack, “Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals” (2007), Santa Clara Univ. Legal Studies Research Paper No. 07-47 in *Georgetown Law Journal* 97 (2008), <https://ssrn.com/abstract=1056562>.

²⁰² The French Declaration of the Rights of Man (1789), the French Code (1810), the Bavarian Code (1813), the Prussian Constitution (1850), the Prussian Code (1851), and the Reich Code (1870), *inter alia*, affirmed the principle of non-retroactivity.

²⁰³ The Constitution of Clarendon (1164) and the Charter of Henry I or Magna Carta (1215) established the rule of

with the principle of legality, either through the custom-dominated criminal laws of Great Britain, or else the increasingly codified norms of American criminal law.²⁰⁴ Under the U. S. Constitution, Article I, Section 9, Clause 3 prohibits Congress from passing *ex post facto* laws, and Article I, Section 10, Clause 1 prohibits states from passing retroactive laws.²⁰⁵ Before the Fourteenth Amendment²⁰⁶, this was one of the few restrictions imposed by the US Constitution on both powers of federal and state governments. In international affairs, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the

law in England. The development of parliamentary rule in England “transformed what might only in a very vague style be termed *nulla poena* into some real approximation to the rule.” Jerome Hall “Nulla Poena Sine Lege,” *The Yale Law School Journal* 47, no. 2 (December 1937): 167-168. The English jurist Jeremy Bentham, who founded the classical legal positivist tradition alongside Austin, writes of the rule against *ex post facto* lawmaking: “This is one of the noblest characteristics of the English tribunals: they have generally followed the declared will of the legislator with scrupulous fidelity, or have directed themselves as far as possible by previous judgments . . . This rigid observance of the laws may have had some inconveniences in an incomplete system, but it is the true spirit of liberty which inspires the English with so much horror for what is called an *ex post facto* law.” Jeremy Bentham, *The Works of Jeremy Bentham* (London, Simpkin, Marshall & Co., 1838), 326, quoted in Jerome Hall, *Nulla Poene Sine Lege*, *The Yale Law School Journal* 47, no. 2 (December 1937):171 and Jerome Hall, *General Principles of Criminal Law* (Clark, N.J.: The Lawbook Exchange, 2005), 59.

²⁰⁴ John Routledge, delegate to the 1787 Philadelphia Convention, chairman of The Committee of Detail responsible for drafting a text reflecting agreement by the Convention, first Governor of South Carolina and second Chief Justice of the U.S. Supreme Court, remarked that Sir Edward Coke’s (1552-1634) *Institutes* was “almost the foundations of our law.” Gerald P. Bodet, “Sir Edward Coke’s Third Institutes: A Primer for Treason Defendants,” *The University of Toronto* 20, no. 4 (1970): 469–77, doi:10.2307/824886. ISSN 0042-0220; Edward Coke, *Institutes of the Laws of England: Concerning High Treason and other Pleas of the Crown and Criminal Causes* (London: E. and R. Brooke, 1797), https://books.google.com/books?id=dhjuAAAAMAAJ&printsec=frontcover&dq=coke+institutes&hl=en&sa=X&ved=0ahUKEwi2_pLVzYTcAhUN0FkKHQYCCEMQ6AEIKTAA#v=onepage&q=coke%20institutes&f=false (accessed July 3, 2018).

²⁰⁵ Article 1, Section 9, Clause 3 reads: “No bill of attainder or *ex post facto* law shall be passed; Article 1, Section 10, Clause 1 specifies that “No state shall...pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.” “U.S. Constitution: Article I,” The Avalon Project: Documents in Law, History and Diplomacy, accessed on July 3, 2018, http://avalon.law.yale.edu/18th_century/art1.asp.

²⁰⁶ The Fourteenth Amendment of the Constitution ratified on July 9, 1868 provides due process and the equal protection of laws. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.” “U.S. Constitution : Amendments XI – XXVII,” The Avalon Project: Documents in Law, History and Diplomacy, accessed on July 3, 2018, http://avalon.law.yale.edu/18th_century/amend1.asp#14.

European Convention on Human Rights, the Geneva Convention and Rome Statute, *inter alia*, affirm this principle.²⁰⁷

“[C]riminal law by integrating the rules of the principle of legality within itself,” according to contemporary positive international law scholar Dov Jacobs,²⁰⁸ “has actually explicitly integrated some of the basic tenets of positivism in its daily functioning.” The debate

²⁰⁷ “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” “UN International Covenant on Civil and Political Rights (ICCPR) Article 15(1),” The United Nations, accessed July 10, 2018, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>; “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”; “UN Universal Declaration of Human Rights (UNDHR) Article 11(2),” The United Nations, accessed July 10, 2018, <http://www.un.org/en/universal-declaration-human-rights/>; “No punishment without law: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.” “European Convention on Human Rights (ECHR) Article 7,” European Union, accessed July 10, 2018, https://www.echr.coe.int/Documents/Convention_ENG.pdf; “No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.” “Geneva Convention Additional Protocol I to the 1949 Geneva Conventions, art. 75(4)(c)(1977), International Committee of the Red Cross, accessed July 10, 2018, https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf; “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.” “Additional Protocol II to the 1949 Geneva Conventions, art. 6(2)(c)(1977),” International Committee of the Red Cross, accessed July 10, 2018, <https://ihl-databases.icrc.org/ihl/WebART/470-750096?OpenDocument>; “Article 22 Nullum crimen sine lege 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute. Article 23 Nulla poena sine lege A person convicted by the Court may be punished only in accordance with this Statute. Article 24 Non-retroactivity ratione personae 1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.” “Rome Statute of The International Criminal Court (1998),” International Criminal Court, accessed July 10, 2018, http://legal.un.org/icc/statute/99_corr/cstatute.htm.

²⁰⁸ Jacobs is a member of the International Criminal Court defense team for Laurent Gbagbo, former President of Côte d'Ivoire.

between legal positivists and natural lawyers is “resolved in favour of positivism,” and a “jurist necessarily needs to be a positivist if he wants to study criminal law.”²⁰⁹ In upholding the principle of legality in the international sphere, Jacobs asserts, ICL practitioners maintain a positive law orientation.

Legal positivist Kenneth Gallant in his comprehensive survey of the principles of legality as applied to international law lists a set of eight positive law criteria. Jacobs’ summarizes the rules comprising Gallant’s survey as follows:

1. No act that was not criminal under a law applicable to the actor (pursuant to a previously promulgated statute) at the time of the act may be punished as a crime;
2. No act may be punished by a penalty that was not authorized by a law applicable to the actor (pursuant to a previously promulgated statute) at the time of the act;
3. No act may be punished by a court whose jurisdiction was not established at the time of the act;
4. No act may be punished on the basis of lesser or different evidence from that which could have been used at the time of the act;
5. No act may be punished except by a law that is sufficiently clear to provide notice that the act was prohibited at the time it was committed;
6. Interpretation and application of the law should be done on the basis of consistent principles;
7. Punishment is personal to the wrongdoer. Collective punishments may not be imposed for individual crime;
8. Everything not prohibited by law is permitted.²¹⁰

Gallant emphasizes other purposes of legality beyond foreseeability, including constraint on arbitrary governance and the legitimization of constitutional democratic as opposed to autocratic regimes.²¹¹ ICL as a particular demonstration of criminal law based on the principle of

²⁰⁹ Dov Jacobs, “Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories” (Draft version submitted for publication) in *International Legal Positivism in a Post-Modern World*, ed. Jean D’Aspremont and Jorg Kammerhofer (Cambridge: Cambridge University Press, 2014): 9. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046311.

²¹⁰ Kenneth Gallant, *The Principles of Legality in International and Comparative Law* (Cambridge: Cambridge University Press, 2009), quoted in Dov Jacobs, “Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories,”

²¹¹ William Thomas Worster, “Review of *The Principles of Legality in International and Comparative Law* by Kenneth Gallant,” *Journal of International Criminal Justice* 9, no. 4 (2014), 6.

legality may also be motivated by the goals of deterrence, retribution, rehabilitation and incapacitation.²¹² Restorative justice, restitution and reconciliation—and for our purposes—accountability, are also reasons for which legality is sought after.²¹³ While the demand of foreseeability with its correlate purpose of deterrence is the preeminent characteristic of the legality principle, Gallant recognizes the indeterminacy of language, which necessarily implies law's unforeseeability.²¹⁴

Like Gallant, Lon Fuller, representing a secular or procedural version of natural law theory, describes the principle of legality as follows: (1) that decisions not be decided on an *ad hoc* basis (or that rules should be existent or “there”), (2) that rules be publicized widely rather than selectively, (3) that prospective or future-oriented rather than retrospective legislation insures integrity of rules, which guides action, (4) that rules be stated with clarity and be detailed, (5) that law in all its forms (i.e., family law, criminal law, etc) be consistent with one another, (6) that law must be possible to obey, (7) that rules be constant and enduring, and (8) that rules be applied and administered as stated.²¹⁵

To assert that natural law theory precludes the doctrinal possibility of deviation from principles of legality, as Kelsen does (Part IV, Section B), is to associate natural law theory exclusively with a procedural version of natural law, rather than a conceptual natural law notion that emphasizes substantive moral constraints on the content of law.²¹⁶ Lord Wright, a prominent natural lawyer at the time of the Nuremberg proceedings, following a procedural

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Kenneth Gallant, *The Principles of Legality in International and Comparative Law* (Cambridge: Cambridge University Press, 2009), 40.

²¹⁵ Lon Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1964), 39.

²¹⁶ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); John Finnis, "The Truth in Legal Positivism," in Robert P. George, *The Autonomy of Law* (Oxford: Clarendon Press, 1996), 195-214.

version of natural law writes that “[t]he period of [international law] growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind.”²¹⁷ According to William Blackstone, who Kelsen associated with the former tradition, “This law of nature, being co-eval with mankind...is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.”²¹⁸ While Kelsen points to Blackstone’s seemingly explicitly statement regarding the rule against *ex post facto* lawmaking, he also recognizes Blackstone’s recognition that this applies to laws “indifferent in itself,” not to criminal offenses.²¹⁹ If criminal offenses under conditions presented by national law do not necessarily benefit from the requirement that all prosecution be based on prospective laws, Blackstone certainly would not have accepted a strict imposition of the principle of legality for crimes against humanity and genocide.

²¹⁷ Lord Wright, “War Crimes Under International Law,” *Law Quarterly Review* 62 (1946), 51.

²¹⁸ William Blackstone, *Commentaries on the Laws of England, Volume 1* (New York: E. Duyckinck, G. Long, Collins & Co, 1827), 27. Kelsen in “The Rule Against *Ex post Facto* Laws and the Prosecution of the Axis War Criminals” claimed that Blackstone represented a natural law tradition opposed to retroactive lawmaking. The aforementioned quotation emphasizes substantive, rather than procedural, claims of natural law. This signifies a distinction between a “law of nature...coeval with mankind...[and] binding over all the globe,” on the one hand, contrasted with procedural natural law that bears a resemblance to the correlative sovereign-positivist alignment that preferences the rule of the national legal order above that of international law. Part III described the claim that Kelsen was “statist” in his orientation in subscribing to a belief in the validity of all legal orders based on a presupposed, authoritative *grundnorm*, which potentially encompassed the Fuhrer Principle. Part IV denies this prospect, reconciling *non sub homine sed sub lege* (or “not under man, but under law”) with the *ex post facto* prosecution of war criminals, including heads-of-state. In this respect, Kelsen certainly deviates from a traditional positive law alignment with a state-centered theory of criminal responsibility. As the next section makes clear, the substantive (moral) criterion that Kelsen requires for retroactive lawmaking for core international crimes, mirrors Blackstone’s description of laws binding throughout the world, obligating individuals to uphold moral principles, even if acts of state. Hans Kelsen, “The Rule Against *Ex Post Facto* Laws,” 8.

²¹⁹ Hans Kelsen, “The Rule against *Ex Post Facto* Laws,” 8.

Fuller's procedural conception of natural law, in contrast, emphasizes law's essential function in modifying behavior, in accordance with prospective legal norms of a specific national legal order. Fuller implicitly excludes international law as a system responsive retrospectively. The object, writes Fuller, is to achieve "[social] order through subjecting people's conduct to the guidance of general rules by which they may themselves orient their behavior."²²⁰ His allegory of King Rex, who in order to gain assent from those ruled needed to prove that the legal order that he presided over provided procedural benefits to those who would authorize his rule, testifies to Fuller's focused concern with prior warning through generalizable rules that could be known, et al. Fuller's principles, therefore, operates internally, not as moral ideals in the sense described by Blackstone and Wright. While Kelsen, like Fuller, claims that *ex post facto* lawmaking is an exception, the legal positivist (Kelsen), not the natural law theorist (Fuller), produces a novel justification for retroactive lawmaking for a broad range of humanitarian offenses.

In the classic 1958 *Harvard Law Review* debate between HLA Hart and Fuller, both conclude that, while not ideal, in certain cases *ex post facto* lawmaking ought to be allowed. In *Legalism*, Judith Shklar insists that though differing over the meaning of the moral ideal of "fidelity to law," both are nevertheless in agreement that retroactive *judicial* decisions ought to be averted. Questioning the distinction that Hart and Fuller make between *ex post facto* legislation and retroactive judicial decision-making, Shklar writes:

One of the subjects of disagreement (between Hart and Fuller) was the right policy of courts in regard to a woman who had denounced her husband to the Nazis and so caused

²²⁰ See: The fable of King Rex in *The Morality of Law* where Fuller describes the component part of law's "inner morality" by showing what a good intentioned ruler might be resolved to include in the conception of law to make it palatable to the ruled. Legitimacy, as Fuller shows, would include all the elements of the principles of law, including generality, publicity, non-retroactivity, et al. Failure to observe these requirements would delegitimize a legal system. Fuller, *The Morality of Law*, 33-39.

his death. Both Professors Hart and Fuller agreed that retroactive judicial decisions are, on the whole, undesirable, though both seemed to feel that if a retroactive statute had been passed by the Bonn parliament, this would have been far less disturbing. It is, of course, true that almost any new law upsets someone's expectations based on existing rules, but it is difficult to see why legislative retroactivity is any better than judicial, unless one has a strong prior notion as to the ends and functions of the law courts.²²¹

In neglecting to distinguish between retroactive judicial decisions and retroactive legislation in determining ICR, Shklar ignores the role of states, which Kelsen recognizes as essential to validating this form of responsibility. As traditional subjects of international law, states (through their organs) are tasked with ratifying treaties. Once transfer of authority takes place, the procedure endorsed by courts adjudicating core international crimes depends on a lawful conception. To assume, as Shklar does, that there is no difference between retroactive judicial and legislative pronouncements ignores the role of states in authorizing the process of war crimes adjudication. Legislation that formally licenses the jurisdictional right to try the accused, though retrospective, provides security of expectation for states that the authority under which judicial decisions take place is indeed authorized by parties to a dispute.

The application of *ex post facto* lawmaking, however, only makes sense if a moral criterion is also agreed upon.²²² Although a relativist ontological position cannot resolve the

²²¹ Shklar, *Legalism*, 107.

²²² Does "primitive" tribal consciousness like the fascist distinction between "friend" and "foe" used to justify "organic" forms of twentieth century totalitarianism, not dictate the level by which international law should adjudicate the capacity for responsibility? Kelsen argues that it is not consciousness or psychology, but the degree of the offense inherent in acts of state, which makes retroactive imputation valid. How can an international legal norm retrospectively adjudicating core international crimes be based on a purely legal, rather than a moral standard?

A moral standard implicates more than the "community" (i.e., a "tribe," a "state," etc). When acts of state are immunized or shielded from prosecution, the "individual" is collectivized—part of a web of amoral (i.e., legal) ordering. Whether the "legal person" who committed the act belongs to "primitive" or "civilized" culture, for Kelsen, matters no more than the ethnic, racial, religious or other spiritualized qualities of the accused. Kelsen does not require an assessment of personal psychology or consciousness, only an analysis in the spirit of Austin's analytical approach, of positive legal norms. "The bundle of legal norms" that signifies "legal persons" and associated "responsibilities" are the methodological abstraction that create the object of jurisprudential cognition.

Kelsen's introduction of a "civilized" moral standard by which ICL judges assess whether an act ought to

problem presented by “bad” laws, a commitment to standards of human conduct can.²²³ By retroactively agreeing as signatories to an ICL treaty that a particular offense is immoral, parties to a conflict rectify an injustice caused by wrongly-conceived prospective laws. In chapter five, the “purposive” interpretive methodology introduced in the post-Cold War era is examined in an effort to clarify the application of retroactive judicial decision-making based on moral criterion.

be made illegal retroactively does not, however, apply to the perpetrator’s capacity to know the difference between right and wrong, only whether *the act* amounted to a violation of crimes of the magnitude of crimes against humanity, genocide, et al. In assessing the capacity of state officials from less “civilized” cultures to understand the illegality of core international crimes, one creates an infinite *psychological* regression. By “civilized,” Kelsen imparts a two-fold meaning linked to (1) structural or organizational features of a national legal order or personified “state”, and (2) levels of consciousness. The introduction of individual responsibility as a form of imputation bridges (1) and (2). “Primitive” de-centralized social orders based on collective forms of liability and an animistic view of social and natural reality forge a consciousness different from that which came with early forms of individual adjudication, and, subsequently, with the individuation of consciousness associated with a causal conception of reality. That “civilizational” standards are introduced by Kelsen to claim priority for the *status quo* of imperial powers in adjudging the distinction between just and unjust wars, and punishment for crimes against peace perpetrated by revolutionary anti-colonial forces, reaffirms the fact that “civilization” also has the capacity to be unbiased.

“Civilization” can also be used to destroy the concept of a tolerant organization of humans—or “humanity” through colonial wars. The utilitarian challenge is always a question of greatest peace. For what is more pleasurable—in the aggregate— than peace or security from fear of harm—for both colonizer and colonized? None of this is to suggest that Kelsen does not distinguish between relative capacities of the accused. The power differential between the colonizer and colonized creates an inherent bias. Kelsen’s blueprint for (relative) world peace, therefore, in order to be most effective, necessitates a neutral legal normative ordering for colonizer and colonized to be judged equally with respect to the commission of core international crimes.

It is necessary to recognize the limits of a deterministic—or causal—conception of individual responsibility under the law in evaluating the capacity to choose between immorally legal acts and morally illegal ones (see: chapter four). Those Germans integrated into the Hegelian universal of the *Fuehrerstaat* where Hitler “represent[ed] that rational will, [and] must alone be judge” were to be treated no differently than those belonging to a liberal republican order of governance under international criminal adjudication. Responsibility’s “depersonalization” requires that no distinction be made as to the performance of acts, only the relationship between the norms authorizing or prohibiting certain behaviors. The delict or offense in violation of international law is what constitutes the condition for the imposition of a sanction, not the personality or psychology of the individual who must answer to the charges. From the perspective of the “science of law,” neither the natural person, nor the cause of his actions, matter to the question of imputation. As conditioning element of the sanction, the delict is typically described by a legal rule in advance. In the study of ICR, and the particular notion of responsibility described here, imputation can no longer be “de-psychologized,” especially—and perhaps ironically—*because* Kelsen introduces a retroactive methodology. The methodology itself presumes a psychological ability to decide between moral and legal norms.

²²³ The case of Laurent Gbagbo, former President of the Ivory Coast, transferred to the Hague to stand trial before the ICC for four counts of crimes against humanity, including murder, rape, persecution and other inhumane acts, resulting from his alleged orchestration of post-electoral violence in Ivory Coast between December 16, 2010 and April 12, 2011, is illustrative. In this case, Gbagbo refused to accept defeat to rival Alassane Ouattara. To what extent was Gbagbo’s arrest and transfer politically motivated? Reuters Staff, “Former Ivory Coast president Gbagbo to remain in detention for trial: ICC,” *Reuters*, September 26, 2017, <https://www.reuters.com/article/us-warcrimes-ivorycoast/former-ivory-coast-president-gbagbo-to-remain-in-detention-for-trial-icc-idUSKCN1C1296>

But the imprint made in early stages of ICR with demonstration of the validity of retroactive legislation, from the ratification of the London Agreement (1945) to the creation of the ICTY (1994), reveals a unified trajectory. First comes the subordination of states to the ICL regime through retroactive legislation based on a moral (arguably naturalist) identification of criminality; next, the introduction of a refined interpretive methodology that recognizes judicial independence; and, last, retroactive judicial decisions granted license to freely decide penumbra cases.²²⁴

Shklar, however, never even evaluates Kelsen's contravention of the "separation thesis" in the context of war crimes prosecution. This is noteworthy considering that the second part of *Legalism* concerns the limits of an "ideology of rules" as pertains to international criminal trials. As the apotheosis of a purely normative jurisprudential method of cognition free of "alien

²²⁴ The impressive work of Aharon Barak, former chief justice of Israel's Supreme Court and a leading innovator in the area of purposive lawmaking, inspires chapter five's analysis of Kelsen's contributions to ICL decision-making based on principles, not norms. Canadian Supreme Court Justice Rosalie Abella in a speech given on April 9, 2018 at Hebrew University, credits Barak with upholding an independent judiciary in Israel against "public opinion, in its splendid indeterminacy, [which] is a fluctuating, idiosyncratic behemoth, incapable of being cross-examined about the basis for its opinion and susceptible to wild mood swings." Rosalie Abella, "Without An Independent Judiciary, Israel's Cherished Democracy Will Be At Risk," *The Times of Israel*, April 19, 2018, <https://www.timesofisrael.com/without-an-independent-judiciary-israels-cherished-democracy-will-be-at-risk/>. Although this dissertation does not comment on the threat of majoritarian sentiment, the neutral composition of a permanent and compulsory court adjudicating international cases presumes independence from the political will of either state officials or citizens intent on undermining the legitimacy of international criminal jurisdiction. Despite Judith Shklar's conflation of Kelsen's "formal" cognition of law and judicial construction, the author of the Pure Theory of Law grants ICL judges especially broad discretion, resulting from structural fluidity of a sphere of lawmaking that has not yet attained the degree of centrality found under national legal orders (or personified "states"). Shklar writes, "Formalism, on the level of history, is thus also an effort to say 'is' about a legal system where 'ought to be' would be more appropriate. It is necessary to emphasize this because it makes so much of its own 'purity' and freedom from morals and political ideology...[] the creators of the theory of 'legal science,' especially Kelsen and his followers,...are again and again said to be distinguished by a perfect remoteness from 'external' influences." Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge: Harvard University Press, [1964] 1986). 35-36. For now, the distinction between retroactive legislation and retroactive judicial decision-making must be made. Shklar is twice-wrong in her diagnosis, as she ignores Kelsen's anti-formal contributions to the changing notion of ICR through both retroactive legislation and judicial decision-making. The latter will be explored in-depth in Chapter Five.

elements,” especially political terminology like “states,” Kelsen remains a primary object of Shklar’s polemic against legalism.

Shklar’s failure to factor in what must be considered the critical element of Kelsen’s retroactive methodology, a “higher principle of justice,”²²⁵ aligns with Kelsen’s own obfuscating relativist or amoral claim to structural completeness in conformity with positive lawmaking. Shklar, therefore, neglects to consider the implications of Kelsen’s “moral-turn” likely *because* Kelsen himself obscures the places in which his theory contravenes its purity.

The next section addresses these structural claims bracketing the moral foundation of Kelsen’s cognition of ICR. Kelsen argues that legal positivism alone licenses *ex post facto* lawmaking. His position that “according to the public opinion of the civilized world it is more important to bring the war criminals to justice than to respect, in their trial, the rule against *ex post facto law*”²²⁶ is set aside for the moment. Part IV, Section B, therefore, reaffirms the “pure” or “neutral” conception of imputation found in Part II, while the final section—Part IV, Section C—demonstrates the limits of a traditional positive law conception.

b. Pure Theoretical Licensing of Ex Post Facto Lawmaking

In “The Rule against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” Kelsen differentiates between legal positivist and natural law approaches to retroactive lawmaking for humanitarian offenses. His doctrinal endorsement of *ex post facto* lawmaking along positive legal lines, plausible from the perspective of structural completeness,

²²⁵ Hans Kelsen, “The Rule against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” *Judge Advocate Journal* 2 (1945).

²²⁶ Hans Kelsen, “The Rule against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” *Judge Advocate Journal* 2 (1945): 11.

recognizes the principle of legality as a principle of justice derived from natural law.²²⁷ Kelsen writes:

...[T]he rule of law as formulated by legal positivism refers to the conduct of, at least, two individuals; the organ authorized to execute a sanction and the subject against whom, on behalf of his illegal conduct, the sanction is directed. The rule of law as formulated by the natural law doctrine refers only to one individual: to the subject whose legal conduct is prescribed by the rule. This rule of law cannot be retroactive; but the rule of law providing sanctions can: not, of course, with respect to the action of the organ, the execution of the sanction; this action can be prescribed only for the future; but with respect to the conduct of the subject which is the condition of the sanction. A rule of law can attach a sanction to be executed in the future, that is to say after the rule has been enacted, to human conduct which has been performed in the past, that is to say before the rule was enacted... The postulate not to enact retroactive laws cannot be derived from the nature of law in the sense of legal positivism, as it can be derived from the nature of law in the sense of natural law doctrine. *Within the system of legal positivism the rule against retroactive legislation is not an absolute principle as the corresponding rule of the natural law doctrine is, expressing a logical necessity.* (my emphasis)²²⁸

Unlike legal positivism, which refers to the conduct of two individuals—officials responsible for applying coercive measures to offenses designated by legal norms and

²²⁷ Stanley Paulson, the foremost contemporary North American Kelsenian, in “Classical Legal Positivism at Nuremberg,” presents Kelsen’s application of retroactive lawmaking as the reason that Kelsen cannot be classified as immunizing Nazi defendants, as per the argument of IMT defense counsel Hermann Jahreiss. Paulson writes: “Associate defense counsel Jahreiss cited Kelsen’s paper (Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals,” *California Law Review* 31 (1943): 530, 533) as authority for the position that ‘in questions of breach of the peace, the liability of individuals to punishment does not exist according to the general international law at present valid.’” 17 IMT 478. Kelsen however was not in sympathy with Jahreiss’s defense. Anticipating the prosecution of Axis war criminals, Kelsen had argued that in their case the enactment of rules to establish individual criminal liability retroactively would be justified on moral grounds.” Stanley Paulson, “Classical Legal Positivism at Nuremberg,” *Philosophy & Public Affairs* 4, no. 2 (Winter, 1975): 140. See also: Hans Kelsen, *Peace Through Law* (Chapel Hill, 1944), 87-88 and Hans Kelsen, “The Rule against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” *Judge Advocate Journal* 2 (1945): 8-12.

²²⁸ Hans Kelsen, “The Rule against *Ex post Facto* Laws and the Prosecution of the Axis War Criminals,” *Judge Advocate Journal* 8, no. 2 (1945): 8.

individuals sanctioned for deviating from legal norms—natural law, Kelsen writes, stipulates only the individual whose behavior is regulated by prescribed rules.²²⁹ Kelsen claims that the natural law doctrine emphasizes the “logical necessity” of the rule against *ex post facto* laws, since “to regulate human conduct which has taken place in the past is impossible,” and therefore only future, not past conduct, can be prescribed.²³⁰

The same holds true, however, for Austin’s command theory. Contrary to the claim that legal positivism permits the enactment of measures to be applied to acts performed before the rule was enacted, Kelsen ignores the power relations inherent to classical legal positivism’s command doctrine.²³¹ Austin, for example, presupposes an “obligation [which] regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms.”²³² When a past action is sanctioned after-the-fact, no possibility of compliance exists. The command doctrine requires that those in a subordinate role in a hierarchy emanating from the sovereign comply with directives. Compliance entails a future-oriented application of legal norms, since duty-bound obedience to an imperatival pronouncement implies the capacity to follow commands. Compliance with a directive to perform a *past* act is nonsensical.

Sanctions are essential to the legal positivist description of law. A specific organ is designated by the community to execute coercive actions. While the norm is prescribed, it is the organ, not the individual accused of committing an act whose conduct is “undesirable” that makes something illegal. According to Kelsen, there is no reason, even if “such

²²⁹Ibid.

²³⁰ Ibid.

²³¹ Stanley L. Paulson, “Classical Legal Positivism at Nuremberg,” *Philosophy and Public Affairs* 4, no. 2 (1975), 136.

²³² John Austin, *Lectures on Jurisprudence* (London: John Murray, 1863), 125.

retroactivity....may not be morally or politically desirable,”²³³ that the prescription cannot be introduced through the valid delegation of sanctions by an order. This includes one constituted by parties to a conflict that ratify an international treaty to past acts, which were not sanctioned at the time of the alleged offense.

“Retroactive laws,” Kelsen asserts, “are held to be unjust because it hurts our feelings of justice to inflict upon an individual a sanction which he did not foresee...”²³⁴ But if a law repeals another law that disadvantaged a subject or provides a lighter sanction to a previous law, it is not retroactivity, but “the fact that the individual had no chance to avoid a sanction or a more severe sanction provided by a subsequent law.”²³⁵ Likewise, notification or publicizing the law, a core tenet of the principle of legality, implies that the law must be known in advance in order to be applicable. This principle of justice associated with the rule against *ex post facto* legislation, is “not less generally recognized” than the counter-principle “that ignorance of law is no excuse.”²³⁶

Once the law is applied it is up to the individual to become knowledgeable of a potential sanction. If ignorance of the law were to become a defense, then those accused of illegalities could in all cases claim immunity. Such would lead to an interminable psychologization of the intent of the delinquent. Consequently, “the rule against against retroactive legislation is the result of the necessary restriction of the rule against the application of laws unknown to the subject.” There is no impunity for those who could *possibly* know. The principle that laws must be known by an individual to be applicable is not only restricted by the rule that ignorance of the

²³³ Hans Kelsen, “The Rule against *Ex post Facto* Laws, 8.

²³⁴ *Ibid.*, 9.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

law is no excuse, however, but also by omission of a sanction that is “considered as a violation of morality or another higher rule, although not illegal.”²³⁷ Here, as the next section demonstrates, Kelsen introduces a moral criterion for retroactive lawmaking through “sleight-of-hand.” He uses, for example, the theft of electricity, where no punishment is provided in advance. Although the legislator may not have anticipated that electrical power would be stolen, the enactment of a law punishing this act would nevertheless be just.²³⁸

Although Kelsen’s structural account remedies gaps in Austin’s conception of non-retroactivity, it is questionable whether a legal positivist approach can ever license contravention of the principle of legality. “In the opposite case—that is, if Kelsen had not identified the principle of legality as a principle of justice derived from natural law,” writes legal philosopher Sévane Garibian[,] “his line of reasoning would have run as follows: (1) the principle of legality falls within the province of positive law; (2) the Nuremberg Tribunal consequently found itself confronting a conflict between two principles of different provenance (the principle of legality, which falls under international positive law vs. the principle of justice or morality, which falls under natural law); and (3) since, from the standpoint of positive law, morality does not exist, or, more precisely, does not count in a system of valid norms, the IMT judges would have had no choice but not to condemn the accused out of respect for legality.”²³⁹

Garibian’s recognition of Kelsen’s influence on the changing notion of ICR through justification of *ex post facto* lawmaking, however, generally concedes the positivity of Kelsen’s contributions. There is much to be said for Garibian’s acknowledgment of what she refers to as

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Sévane Garibian “Crimes against Humanity and International Legality in Legal Theory after Nuremberg,” *Journal of Genocide Research* 9, no. 1: 108, footnote 69.

“a legality restricted by the superior principle of morality.”²⁴⁰ But Garibian’s choice to elude a further examination of the peculiar “moral-turn” attached to Kelsen’s violation of the “separation thesis” produces the general sense that the author of Pure Theory remained true to positive law principles. A similar problem is introduced by Andrea Gattini, who believes that Kelsen’s conservative endorsement of the acts of state doctrine (AoSD) denied the value of Kelsen’s moral application of retroactive lawmaking.²⁴¹

The next section interrogates the implications of Kelsen’s violation of the separation of law from morality. Part III described the Fuhrer Principle, for instance, as immunizing Hitler from any higher laws, and *a fortiori* lending protection to all state officials under Nazi rule. To free Kelsen of the accusation that he endorses a version of Austin’s command theory, which precludes prosecution of core international crimes, it is therefore necessary to introduce a “moral” source determining international imputation. Once a state official is transferred to an authority like that at Nuremberg, the principle *non sub homine sed sub lege* (“not under man but under law”) is returned to its rightful place as an operative force dictating the validity of law as a normative, albeit morally-structured, rules-based conception.

c. The Moral Authority of Law

The problem of metaphysical absolutism remains a significant challenge for ontological skeptics like Kelsen. He correctly acknowledges the many ways in which natural law has been used to justify conflicting ideological positions, writing that “since humanity is divided into

²⁴⁰ Ibid., 99.

²⁴¹ Andrea Gattini, “Kelsen’s Contribution to International Criminal Law,” *Journal of International Criminal Justice* 2, no. 4 (September 2004): 795–809; Andrea Gattini, “Kelsen, Hans,” in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (New York: Oxford University Press, 2009), 401-403.

many nations, classes, religions, professions and so on, often at variance with one another, there are a great many very different ideas of justice; too many for one to be able to speak simply of 'justice'.²⁴² His decision to reject “justice” as a moral idea conforms to his realistic assessment of the nature of opposing “ideological” factions within any centralized, “modern” or “civilized,” social order. Kelsen writes: “[This] goes hand in hand with the tendency to withdraw the problem of justice from the insecure realm of subjective judgments of value, and to establish it on the secure ground of a given social order.”²⁴³ Kelsen associates “subjective judgments of value...with a wish or a feeling of the judging subject,”²⁴⁴ including “the tendency of ideological groups or interests to justify or absolutize their beliefs.”²⁴⁵

Kelsen's criticisms of the natural law doctrine are consequently based on an overarching concern with establishing the peace of a given social order through a technique that “seeks to achieve a compromise between opposing interests.”²⁴⁶ Metaphysical dualism as a “subjective judgment[] of value” only confuses matters. To assume an imperfect positive law and a perfect natural law that is absolutely just is akin to the classic division between reality and Platonic idealism²⁴⁷ where “the world is divided into two different spheres: one is the visible world perceptible without senses, that which we call reality; the other is the invisible world of ideas. Everything in this visible world has its ideal pattern or archetype in the other, invisible world.”²⁴⁸ The “imperfect copies” or “shadows” in Plato's philosophy or any other metaphysical interpretation of reality, says Kelsen, are only a “reduplication of the world,” which undermines

²⁴² Kelsen, *General Theory of Law and State*, 8.

²⁴³ *Ibid.*, 14.

²⁴⁴ *Ibid.*, 14.

²⁴⁵ *Ibid.*, 14.

²⁴⁶ *Ibid.*, 13.

²⁴⁷ *Ibid.*, 12.

²⁴⁸ *Ibid.*, 12.

the effort of positive law to create a true estimation of formal delegated powers.²⁴⁹ Natural law doctrine, insofar as it encourages an ideal description of a world that can only be known in an empirical sense, is based on a “wish or feeling of the judging subject.”

Natural law, Kelsen writes, may be invoked by liberals or conservatives; capitalists who advocate private property or communists who recognize only public property; materialists or idealists.²⁵⁰ The subjectivity of the natural law doctrine, Kelsen believes, could only mean that the person invoking natural law has an ideological agenda that he prefers to dress in the trappings of absolute right. However, as Kelsen's contemporary, Gustav Radbruch, a German legal philosopher who prior to Hitler's ascension to power held a positive law viewpoint similar to Kelsen's conceded after the war, some laws indeed transgress “higher” moral principles.

Radbruch's shift to a concept of natural law through his “jurisprudence of values” attests to this fact.²⁵¹ As in the exchange between Hart and Fuller where Hart argued for the validity of the Nazi regime, despite acknowledgment of its predations, against Fuller's contention that the regime was manifestly illegal *because of* its immoral actions, “Radbruch contested the purely formalistic (“value-free”) view of legal validity as expressed by the founders of positivist legal philosophy—notably Hans Kelsen.”²⁵² The “Radbruch Formula” stated that “when statutory rules reach a level of extreme injustice, so that the contradiction between positive law and justice becomes intolerable, they cease to be law.”²⁵³

²⁴⁹ *Ibid.*, 12.

²⁵⁰ *Ibid.*, 6.

²⁵¹ Gustav Radbruch “Statutory Lawlessness and Supra-Statutory Law” (1946), *Oxford Journal of Legal Studies* 26, no. 1 (March 2006): 1–11.

²⁵² Frank Haldemann, “Gustav Radbruch vs Hans Kelsen: a Debate on Nazi Law,” *Ratio Juris* 18, no. 2 (June 2005): 162-178.

²⁵³ *Ibid.* 163. See: H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71, no. 4 (1958): 593–629; Lon L. Fuller, “Positivism and Fidelity to Law — A Reply to Professor Hart”. *Harvard Law Review* 71, no. 4 (1958); Frank Haldemann, “Gustav Radbruch vs Hans Kelsen: a Debate on Nazi Law,” *Ratio Juris*

There is no *mala in se* or conduct which is evil in itself, according to Kelsen, only *mala prohibita* or evils prohibited by the norms of a positive social order.²⁵⁴ Aristotle in the *Nicomachean Ethics* distinguishes between the “natural” and “legal,” which corresponds with the division between *mala in se* and *mala prohibita*. “The natural: that which everywhere has the same force and does not exist by people’s thinking this or that; the legal: that which is originally indifferent, but when it has been laid down, is not indifferent.”²⁵⁵ In contrast, Kelsen writes that “before the sanction is provided...the behavior is no *malum* in a legal sense, no delict...This is nothing but the consequence of the principles generally accepted in the theory of criminal law: *nulla poena sine lege, nullum crimen sine lege*—no sanction without a legal norm providing this sanction, no delict without a legal norm determining that delict.”²⁵⁶

Kelsen, however, contradicts this statement in licensing retroactivity for prosecution of core international crimes. Here, Kelsen finds agreement with Radbruch in distinguishing “higher” and “lower” conceptions of justice. Kelsen writes in “The Rule against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals” (1945) that “even if the atrocities are covered by municipal law, or have the character of acts of State and hence do not constitute individual criminal responsibility, they are certainly open violations of the principle of morality

18, no. 2 (June 2005): 162–78. Taking the example of the “grudge informer,” the case where a woman reported her husband to German authorities for speaking out against Hitler, in accordance with the Nazi anti-sedition laws of 1934 and 1938, Radbruch, Fuller and Hart were in agreement that the woman ought to be held responsible for her instrumental role in her husband being assigned to the front lines in the East. After the war, the husband sued and won the case. Hart’s and Kelsen’s general sentiment that, insofar as rules like the Nazi anti-sedition laws were passed in a procedurally sound manner they remained applicable, nevertheless confirmed “exceptions”. Retroactive lawmaking must be conceived, however, along a continuum of exceptionality.

²⁵⁴ Jerome Hall, “Prolegomena to a Science of Criminal Law,” *University of Pennsylvania Law Review* 89 (1941): 549-580.

²⁵⁵ Aristotle, *Nicomachean Ethics* (1134b) in Kelsen, *General Theory of Law and State*, 52.

²⁵⁶ *Ibid.*, 52-53.

generally recognized by civilized peoples and hence were, at least, morally not innocent or indifferent when they were committed.”²⁵⁷

Like Aristotle’s notion of “the legal [as] that which is originally indifferent,” and Blackstone’s claim that retroactive lawmaking is an “unreasonable method” only when an offense is “indifferent in itself,”²⁵⁸ Kelsen emphasizes the moral criterion in stating that since the atrocities perpetrated by the Nazis “were, at least, morally not innocent or indifferent when they were committed,” they made the major Nazi war criminals at Nuremberg ideal candidates for prosecution.

Beginning with “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals” (1943), Kelsen writes:

The principle forbidding the enactment of norms with retroactive force as a rule of positive national law is not without many exceptions. Its basis is the moral idea that it is not just to make an individual responsible for an act if he, when performing the act, did not and could not know that his act constituted a wrong. If, however, the act was at the moment of its performance morally, although not legally wrong, a law attaching *ex post facto* a sanction to the act is retroactive only from a legal, not from a moral point of view....*Morally they were responsible for the violation of international law at the moment when they performed the acts constituting a wrong not only from a moral but also from a legal point of view. The treaty only transforms their moral into a legal responsibility.*²⁵⁹(my emphasis)

The metamorphosis from a moral to legal conception of liability occurs at the liminal point when acts performed by state officials are so egregious as to warrant coercive measures.

Although unnecessary as a deterrent for individuals for whom a sanction is proposed *ex post*

²⁵⁷ Kelsen, “The Rule against Ex Post Facto Laws,” 10-11.

²⁵⁸ Aristotle, *Nicomachean Ethics* (1134b) in Kelsen, *General Theory of Law and State*, 52.

²⁵⁹ Kelsen, “Collective and Individual Responsibility in International Law,” 544.

facto, the application of retroactive laws does not mean that prosecution, according to Kelsen, lacks a deterrent effect for future war criminals. Officials may begin to realize, writes Kelsen, that “the violation of international law at the moment when they performed the acts constitute a wrong not only from a moral but also from a legal point of view.”²⁶⁰

In *Peace Through Law* (1944), where Kelsen advocates for the creation of a permanent and compulsory international court adjudicating core international crimes, he writes that “an international treaty authorizing a court to punish individuals for acts they have performed as acts of their State constitutes a norm of international criminal law with retroactive force, if the acts at the moment when they were committed were not crimes for which the individual perpetrators were responsible.”²⁶¹ An international treaty may be introduced “authorizing a court to punish the persons morally responsible for the Second World War.”²⁶² While the phrase “persons morally responsible for the Second World War” can be interpreted in the narrow sense of those responsible for crimes against peace or crimes of aggression, the broader interpretation encompassing prosecution of those responsible also for crimes against humanity during the Second World War is reconcilable with Kelsen’s recommendations to Jackson in his correspondence prior to the International Military Tribunal conference at London held between June 22 and August 2, 1945. (see: chapter one)

Kelsen then reaffirms the same phraseology from the previous year, writing in *Peace Through Law* that “If...the act was at the moment of its performance morally, although not legally wrong, a law attaching *ex post facto* a sanction to the act is retroactive only from a legal

²⁶⁰ Ibid.

²⁶¹ Kelsen, *Peace Through Law*, 87-88.

²⁶² Ibid.

not from a moral point of view...The treaty only transforms their moral into a legal responsibility.”²⁶³ Likewise, in “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? (1947),” Kelsen further asserts the validity of retroactive prosecution on moral grounds. Although claiming that a retroactive law should “provid[e] individual punishment for acts which were illegal though not criminal at the time they were committed,”²⁶⁴ Garibian points out that crimes against humanity, which was certainly not *illegal* prior to the ratification of the London agreement, was nevertheless prosecutable. A broad interpretation of retroactivity that encompasses “crimes” that were not even “illegal” must mean that what was not illegal is not necessary to denominate criminality. Only the immorality of an act mattered. A prior notion of illegality was not relevant to the determination of legality at Nuremberg.

Kelsen writes:

Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. *Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.*²⁶⁵ (my emphasis)

We know from the introductory chapter that Kelsen’s recommendation to Jackson was to transfigure collective responsibility into individual criminal responsibility through the London Agreement, and that this extended to *all* core international crimes ratified *ex post facto*, including

²⁶³ Ibid.

²⁶⁴ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?,” 165.

²⁶⁵ Ibid.

crimes against humanity, which had no pedigree of illegality. We must consequently recognize Kelsen's prioritization of immoral acts, which "the persons who committed" were "certainly aware of." Notice or forewarning in the sense of "illegality" was *not* essential. By "morally most objectionable," he means that "the retroactivity of the law applied to [those individually responsible] can hardly be considered as absolutely incompatible with justice."²⁶⁶ Although based on a circular logic, Kelsen's invention of an agent who is "certainly aware" of the immorality of an act of state, creates the condition for legal imputation. (The question of agency and free will is a subject of discussion in chapter four on the trial of Adolph Eichmann in Jerusalem).

While Kelsen's relativist ontology as described in his 1952 Berkeley lecture "What is Justice?"²⁶⁷ affirms the impossibility of deciding on any absolute standard of justice, democracy rather than autocracy is still the form of governance Kelsen believes most suitable to realizing the goal of justice in the sense of insuring peace or social stability, protecting freedom of expression and upholding the principle of tolerance. Kelsen's major English-language forays into democratic theory—the publication of his book *The Essence and Value of Democracy* (year of publication) and his 100-page article in the October 1955 issue of *Ethics*, and "Foundations of Democracy"—demonstrate his preference for democracy. While a coercive action is a valid object of legal cognition, whether democratic or autocratic, the structural logic of pure theory must disregard "facticity" based on the discretionary powers of autocrats as immunizing of acts committed by the putative "sovereign" commander. The principle *non sub homine sed sub lege*

²⁶⁶ Ibid.

²⁶⁷ Hans Kelsen, *What is Justice? : Justice, Law, and Politics in the Mirror of Science* (Clark, NJ: Lawbook Exchange, 2013).

(“Not under man, but under law”) otherwise is contravened, insofar as an autocrat can decide to make arbitrary rules immunizing all state officials, including himself, for humanitarian violations.

The distinction that criminologist Jerome Hall makes between democratic and autocratic approaches to the principle of legality is instructive. He writes:

For the abolition of *nulla poena* provides a sieve through which can flow not only humanity and science but also repression and stupidity. Dictatorship will not brook interference by law (unless in particular instances the goal can be achieved nonetheless); the wise and humane community seeks the freedom to utilize its resources to aid the weak and the maladjusted. Only by careful study of the actual results of the abandonment of law can one arrive at a valid judgment. (Hall *Nulla Poena Sine Lege*/1937)

While democracy can certainly be unwise and inhumane, democracy, not autocracy, is the best assurance of the principle of tolerance. Without general adherence to this principle, no protection against the suspension of rights, foremost, the implicit right within any democracy to live free of the threat of annihilation, can be assured. With protections for those most vulnerable to the predations of regimes responsible for aggressive wars, war crimes, crimes against humanity and genocide, ICL abolishes the rule against *ex post facto* laws to “aid the weak and maladjusted.”

“In the remote past,” writes Kelsen in *General Theory of Law and State* (1945), “it was a religious duty to sacrifice human beings to the gods, and slavery was a legal institution. Today we say that these human sacrifices were crimes and that slavery, as a legal institution, was immoral. We apply moral norms valid in our time to these facts, though the norms which forbid

human sacrifices and slavery came into existence long after the facts occurred that we judge now, according to these new norms, as crimes and immoral.²⁶⁸

Like Hall, Kelsen recognizes that retroactivity can apply to immoral acts, such as human sacrifices and slavery, but may also apply to circumstances where a legal system promotes state-sponsored murder. “A special example,” writes Kelsen, “is the German law by which certain murders, committed by order of the head of the State June 30, 1934, were retroactively divested of their character of delicts.”²⁶⁹ Human sacrifice and slavery, however, could be deemed not only immoral but criminal, with the application of “moral norms valid in our times to these facts.”²⁷⁰ New norms are therefore transformed into criminalizable sanctions. Imputation, which would have been forbidden when the offense occurred, assumes a punishable form free of any future-oriented notion of “coercion”.

The artificial or human-made creation of the object of legal imputation out of a normative, albeit retroactive, conception of the immorality of a past action that at the time was perfectly legal, can be employed, says Kelsen, to criminalize past action. Even as Hitler’s mission to destroy European Jewry was protected by German law through discretionary provisions, the author of pure theory recognizes that “it would also have been possible retroactively to give the character of sanctions to these acts of murder.”²⁷¹

V. Conclusion

²⁶⁸ Kelsen, *General Theory of Law and State*, 43.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

The classical legal positivist idea of an “uncommanded commander,” free of legal limitation in exercise of powers, sovereign and therefore “above the law,” is confirmed by Austin’s statement that “subjects must be in the habit of obeying [the commander] because of his coercive power to impose sanction.”²⁷² The will of the ruler is the standard of validity. While Hart’s *Concept of Law*, a sociological critique of Austin’s “command theory,” has achieved superior status in Anglo-American jurisprudential circles, Kelsen’s analysis of Austin’s conception of “duty” or “obligation” is certainly of greater value to international legal scholarship. Despite Austin’s inability to account for sources of law separate from the “state,” including indigenous laws, normative functions that are not “commands,” and legal responsibilities of states, “the theory persists as a conceptual picture of law, ‘accepted,’ as Ronald Dworkin puts it, ‘in one form or another by most working and academic lawyers who hold views on jurisprudence.’”²⁷³

The designation of the concept “duty” to a psychological compulsion to act in accordance with fear-inducing commands (Austin) must be distinguished from the “de-psychologized” notion of responsibility derived from a purely theoretical legal cognition of the “impersonal” sanction (Kelsen). Even though Hart encourages a robust debate about the grounds for validity of a unified national legal order, since Austin’s description of sovereignty introduces a direct line of criticism of the legitimacy of international prosecution, the latter is chosen as representative of legal positivism. While Austin did not actually say anything specifically applicable to the

²⁷² John Austin, *The Province of Jurisprudence Determined, Volume 1* (London: John Murray, Albermarle Street, 1861), 171.

²⁷³ Ronald M. Dworkin, “The Model of Rules,” *University of Chicago Law Review* 35 (1967): 14 in Paulson, “Classical Legal Positivism at Nuremberg,” 137.

subject,²⁷⁴ he is the seminal interlocutor in the study of ICR from the perspective of positive law's political dimension. His description of sovereign command provides theoretical justification for immunizing ICL defenses based on acts of state and superior orders (see: Chapter Four).

On the question of authority, Austin is in agreement with social contractarian Thomas Hobbes, whose *Leviathan* describes an ontologically relativist conception of political society where self-preservationist human inclinations dominate. In international relations theory, political realism endorses Hobbes' skeptical view of natural law theory, which denies a divine, moral or reasonable source of authority. Like the tradition of political realism, Austin's command theory introduces the prospect that the source of legitimacy, not only is power, but power devoid of any legal normative regulation.

“Non sub homine sed sub lege ("Not under man but under the law") is a well-known principle of democracy,” Kelsen writes. “It is a principle of any legal order.”²⁷⁵ To subscribe to this principle, according to Kelsen, sovereignty must be re-conceptualized as the “de-personalized” or “de-psychologized” unity of legal norms regulating behavior in any social order. Kelsen resolved the conflict that arises with the introduction of sovereign claims by identifying a pure path to the conception of international criminal responsibility. At the same time, contrary to Gattini's claims, Kelsen's project is an effort to demonstrate the impossibility of creating a system of rules regulating the behavior of state officials for humanitarian crimes

²⁷⁴ Austin died in 1859. The first significant modern laws of war treaty—the Lieber Code—was promulgated on April 24, 1863. “General Orders No. 100 : The Lieber Code INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD,” The Avalon Project: Documents in Law, History and Diplomacy, accessed on July 5, 2018, http://avalon.law.yale.edu/19th_century/lieber.asp

²⁷⁵ Hans Kelsen and Robert W. Tucker, *Principles of International Law* New York: Holt, Rinehart and Winston, 1967), 104.

without turning to a dynamic moral source. In defining ICR from a moral vantage point, Kelsen saves law from the idea that the sovereign, at the highest level of international adjudication, is immune from prosecution.

Chapter 3

Beyond Just War Theory and Crimes against Peace as the “Class A” Charge: The Pure Theoretical Validation of Retroactive Prosecution at Nuremberg

I. Introduction

In his opening address at the Nuremberg proceedings, Supreme Court Justice Robert H. Jackson, in his role as lead US prosecutor for the International Military Tribunal (IMT), stated that:

Any resort to war—to any kind of a war—is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defense the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes.²⁷⁶

Although Jackson’s philosophical justification for criminalizing aggressive war was largely influenced by Hans Kelsen’s former student, University of Cambridge Professor Hersch Lauterpacht²⁷⁷, Kelsen’s theoretical contributions to Jackson’s argument were nevertheless

²⁷⁶Robert Jackson, “Nuremberg Trial: Excerpts from the Opening Statement of Mr. Justice Robert H. Jackson,” in *The Holocaust: An Encyclopedia and Document Collection [4 volumes]*, ed. Paul R. Bartrop and Michael Dickerman (Santa Barbara, California: ABC-CLIO, 2017), 1377; See also: Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 277; Hans Kelsen, *Peace Through Law* (Union, N.J.: Lawbook Exchange, 2008 [1944]), 91.

²⁷⁷Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017), 267. On Hersch Lauterpacht’s direct impact in providing a draft of speeches related to count no. 2 on the waging of aggressive wars to lead-British IMT Prosecutor Sir Hartley Shawcross, see: Hersch Lauterpacht and Elihu Lauterpacht. *International Law: Being the Collected Papers of Hersch Lauterpacht. Vol. 5, Parts IX-XIV Vol. 5, Parts IX-XIV* (Cambridge: Cambridge University Press, 2004).

significant.²⁷⁸ This chapter is an effort to reframe the dialogue between Kelsen, the international criminal law (ICL) theorist, and Jackson, the practitioner. While it does not purport to establish a causal linkage between Jackson's and Kelsen's estimation of crimes against peace (CAP), a revisionist account identifies a common purpose with respect to criminalizing aggressive wars.

Defined in Article 6(a) of the IMT Charter, the subject matter jurisdiction of crimes against peace (CAP) is:

planning, preparation, initiation or waging of 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.²⁷⁹

In December 1940, Lauterpacht consulted with then-US Attorney General Jackson on the legality of President Roosevelt's vow to provide allied powers with "all assistance short of war."²⁸⁰ He authored a memorandum on neutrality that claimed that the prohibition of war as a method for enforcing legal rights, in accordance with the multilateral Kellogg-Briand Pact or Paris Peace Pact, officially designated the General Treaty for Renunciation of War as an

²⁷⁸ Mónica García-Salmones Rovira writes that: "...judging from the documents kept among Jackson's papers from the period before and immediately after WWII, it appears that the advice given by Hans Kelsen caused individual criminal responsibility to become part of international law, and that, therefore, it is thanks to him that international law could be efficiently employed during the Nuremberg Trials." Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2014), 364.

²⁷⁹ Article 6(a) of the International Military Tribunal Charter (1945), "Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal" *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, <http://avalon.law.yale.edu/imt/imtconst.asp>.

²⁸⁰ Robert H. Jackson, *Report of Robert H. Jackson, United States Representative, to the International Conference on Military Trials* (Washington, DC: US Department of State, 1949), 299; Richard Moe, *Roosevelt's Second Act: The Election of 1940 and the Politics of War* (Oxford: Oxford University Press, 2015), 14.

Instrument of National Policy (1928)²⁸¹, allowed neutral states to distinguish between aggressors and harmed nations.²⁸²

The main provisions of the Kellogg-Briand Pact reads:

ARTICLE I:

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.

ARTICLE II:

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.²⁸³

On March 27, 1941, in his Havana speech before the Inter-American Bar Association, Jackson borrowed from Lauterpacht's memo, referring to the outlawry of war and the creation of an international regime intent on establishing peace between nations.²⁸⁴ Lauterpacht, therefore, is rightly credited with providing a leading argument against isolationist skepticism.

But while he directly inspired Jackson's effort to establish that neutrality does not depend on impartiality, and later lent assistance in preparing the order of charges for the July 1945 IMT

²⁸¹ "Kellogg-Briand Pact," *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/kbpact.asp.

²⁸² Lassa Oppenheim, *International Law: A Treatise*, Vol. 2, 5th ed., ed. Hersch Lauterpacht (London, Longmans, Green & Co., 1935), 517.

²⁸³ "Kellogg-Briand Pact," *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/kbpact.asp.

²⁸⁴ Oona Hathaway and Scott Shapiro, *The Internationalists*, 247.

conference at London²⁸⁵, Kelsen's contributions, underestimated,²⁸⁶ and even regarded as immaterial,²⁸⁷ are perhaps of greater consequence. In addition to corresponding with Jackson over the distinction between collective and individual forms of liability,²⁸⁸ Kelsen's views on retroactive lawmaking, vital to the application of the crimes against peace charge at Nuremberg, provides an under-reported exchange that fundamentally alters our understanding of the changing notion of international criminal responsibility.²⁸⁹ (For a detailed discussion of Kelsen's contested positive law justification of *ex post facto* lawmaking, see: chapter two).

In preparation for the London conference, which established a quasi-constitutional²⁹⁰ framework for ICL with the ratification of the IMT charter, Jackson, acting as chief negotiator

²⁸⁵ When Jackson conferred with Lauterpacht during the London proceedings, that latter suggested three categories for subject matter jurisdiction—crimes against peace, war crimes and crimes against humanity—all of which became the model for proceedings at Nuremberg. Hathaway and Shapiro, *The Internationalists*, 267; On Lauterpacht's advisement to the British government on the definition of crimes against humanity, see: Martti Koskeniemi, "Hersch Lauterpacht and the Development of International Law," *Journal of International Criminal Justice* 2 (2004): 810; On Lauterpacht's natural law thinking, see: Hersch Lauterpacht, "The Law of the United Nations and the Punishment of War Crimes," *British Yearbook of International Law* 21 (1944), 58; Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* 23 (1946): 1.

²⁸⁶ Thomas Olechowski, co-director of the Hans Kelsen Institute, while recognizing Kelsen's contributions to the study of international criminal responsibility, is skeptical of his influence on Jackson's designation of ICR for crimes against peace. Olechowski writes, "It is hard to say whether Kelsen's work was an academic or political success. Some developments were disappointing. For example, his memorandum on the concept of aggressive war was forwarded to Justice Jackson, but at the Nuremberg Trials, Jackson made only passing references to the meaning of "aggression," which were obviously not influenced by Kelsen's thesis." "Kelsen, the Second World War and the US Government," in D.A. Jeremy Telman, ed., *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence* (Switzerland: Springer Verlag, 2016), 110.

²⁸⁷ Andrea Gattini, "Kelsen's Contributions to International Criminal Law," *Journal of International Criminal Justice* 2, no. 3 (2004): 795-809.

²⁸⁸ See: Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals," *California Law Review* 31 (1943): 533. According to Hathaway and Shapiro, Jackson cited this article in his papers. Hathaway and Shapiro, *The Internationalists*, 521.

²⁸⁹ See: Hans Kelsen, "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," *Judge Advocate Journal* 2, no. 3 (Fall/Winter 1945): 10. Hathaway and Shapiro assume that Jackson read this article, key to the argument made in Part IV of this case study, since Kelsen included reference to the subject of retroactive lawmaking in his correspondence with Weir. See: Hathaway and Shapiro, *The Internationalists*, 521.

²⁹⁰ Guénaél Mettraux writes that "in some respects, the law of Nuremberg constitutes a *sui generis* source of law for modern-day war crimes tribunals, which serves an almost *constitutional* function." Guénaél Mettraux, "Judicial Inheritance: The Vale and Significance of the Nuremberg Trial to Contemporary War Crimes Tribunals," in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 609.

for the Truman administration, circulated a memorandum to staff attorneys²⁹¹. The message reads:

Hans Kelsen is worried over the absence of any international law on the subject of individual responsibility. He thinks a definite declaration is essential. I think it may be desirable. The language he suggests is as follows:

“Persons who, acting in the service of any state (of one of the Axis powers) or on their own initiative, have performed acts by which any rule of general or particular international law forbidding the use of force, or any rule concerning warfare, or the generally accepted rules of humanity have been violated, as well as persons who have been members of voluntary organizations whose criminal character has been established by the court, may be held individually responsible for these acts or for membership in such organizations and brought to trial and punishment before the court.”

I think it may be worth including to stop the argument about whether the law does so provide.²⁹²

As a consultant in the Judge Advocate General’s office under the direction of General John Weir, Kelsen made a critical contribution in recognizing an error in a document about to be introduced at London. The draft reads: “The Tribunal shall be bound by this declaration of the Signatories that the following acts are criminal violations of International Law.”²⁹³

To suggest that the domestic law principle of individual responsibility was comparable to modes of punishment in the international sphere, Kelsen asserted, was an error in construction. Acts cannot be “criminal violations of International Law,” since there was no individual in the

²⁹¹ Francis M. Shays, Sidney Alderman and Colonel Murray Bernays. Shapiro and Hathaway in the *Internationalists* (269) mistakenly refer to Kelsen’s correspondence as “composed of eight memos *on the crime of aggression*.” (my emphasis) Thomas Olechowski, director of the Hans Kelsen Institute, lists these memos as: 1. On the Draft Executive Agreement Relating to the Prosecution of European Axis War Criminals, 2. On the Agreement for the Prosecution of European Axis War Criminals, 3. On the Rule against Ex Post Facto Laws, 4. On the Definition of Aggression, 5. On the Question: “Is Launching a War of Aggression a Crime?”, 6. On the Instrument of Surrender Signed by the Japanese Government, 7. On the Punishment of War Criminals and the Charter of the United Nations, 8. On War Crimes as Related to the Preparation, Launching, and Opening of Hostilities without Previous Warning. Thomas Olechowski, “Kelsen, the Second World War and the US Government,” 106.

²⁹² Memorandum of Hans Kelsen, July 5, 1945, box 104, reel 10, pp. 4-5, RJP LOC

²⁹³ Jackson, *Report of Robert H. Jackson*, 121; Amendments proposed by the United Kingdom Delegation to the United States Draft Protocol,” June 28, 1945, in *ibid.*, 86, “Minutes of Conference Sessions of June 29, 1945,” in *ibid.*, 99, in Hathaway and Shapiro, 269.

international sphere who could be punished for war offenses. This meant that only collective responsibility could be imputed. Because no treaty had yet stipulated criminality, retroactively administered law would first need to create a legal subject that could be held criminally accountable. Kelsen even drafted the language that would become Article Six of the IMT charter, recommending that those who violated “international law...may be held individually responsible for these acts,”²⁹⁴ which aligned with the charter statement that “the following acts, or any of them are crimes coming within the jurisdiction of the Tribunal for which *there shall be individual responsibility...*”²⁹⁵ (my emphasis)

“Kelsen conceded,” according to international law theorists Oona Hathaway and Scott Shapiro, “that this provision would create new law....In that sense, the law would be *ex post facto*. But, Kelsen pointed out, this retroactivity, would be innocuous. For retroactive legislation is unjust when it surprises defendants, but here there would be no element of unfair surprise.”²⁹⁶

Hathaway and Shapiro, however, misinterpret the rationale behind Kelsen’s inclusion of retroactive lawmaking. While correctly diagnosing Kelsen’s determination that if *all* Germans were liable for crimes against peace, then certainly imputing individual responsibility would be a more moral outcome, since the nation would not have to answer to the crimes of a few, the authors, nevertheless, incorrectly claim that the reason *ex post facto* legislation was justified was that Nazis would have known that the Kellogg-Briand Pact was already-illegal.²⁹⁷ But if the main

²⁹⁴ See: Memorandum of Hans Kelsen, n.d., box 104, reel 10, pp. 4-5, RJP LOC; Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals,” *California Law Review* 31 (1943): 533. Oona Hathaway and Scott Shapiro, *The Internationalists*, 270.

²⁹⁵ International Military Tribunal Charter, Article 6(b), “Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal,” *The Avalon Project: Documents in Law, History and Diplomacy*, Accessed November 9, 2017, <http://avalon.law.yale.edu/imt/imtconst.asp>.

²⁹⁶ Hathaway and Shapiro, *Internationalists*, 270.

²⁹⁷ *Ibid.*

reason Kelsen justified retroactive lawmaking was that a multilateral peace treaty denouncing war stipulated illegality, and hence collective responsibility, why did he extend retroactive prosecution to the other two core international charges—war crimes and crimes against humanity—the latter of which had no similar normative pedigree?²⁹⁸ Through retroactive legal construction incorporating a criterion of “moral responsibility,” where “persons who committed these acts were certainly aware of their immoral character,”²⁹⁹ Kelsen exhibits a methodological approach suitable, not only to the prosecution of crimes against peace, the “class A” or supreme international charge, but to the other two core international charges, as well. As with subsequent case studies, this chapter builds on the argument laid out in the Literature Review (chapter two), where “syncretic” or “alien” elements, including morality and politics, infiltrate Kelsen’s ostensibly “pure” conception of ICR.

Before turning to the chapter outline, it is necessary to underscore that though representatives from each of the allied countries, including the United Kingdom, United States, France and the USSR emphasized varying degrees of culpability for aggressive war³⁰⁰, Jackson's was arguably the most strident defense along positive legal lines. Jackson stated that:

²⁹⁸ Why does he emphasize that “since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice,” if not to acknowledge that international criminal responsibility is based on a moral criterion free of any cognizance of a prior international agreement? Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 284; For an argument for prosecution of crimes against humanity, where no prior treaty agreement is necessary, and incorporating Kelsen’s retroactive methodology, see: Sevane Garbian, “Crimes against Humanity and International Legality in Legal Theory after Nuremberg,” *Journal of Genocide Research* 9, no. 1 (2007): 93-111.

²⁹⁹ Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?”, 284.

³⁰⁰ The four articles referenced indicate a general reluctance amongst the four-powers, including the United States, to try war criminals. However, while the other three nations’ representatives marshalled skepticism, Jackson was unwavering in his commitment from the London Conference through the Nuremberg Tribunal to prosecuting Nazis for crimes against peace. It should be noted that FDR, while endorsing the Moscow Declaration’s Statement of Atrocities (1943) where Nazis were to be “judged and punished according to the laws of...liberated countries and of free governments,” considered the “Napoleonic Precedent” (punishment without trials) endorsed by Winston

[T]he way Germany treats its inhabitants...is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war.³⁰¹

Above all, Jackson desired to prove that the commencement of aggressive war was the supreme international offense, of which axis officials alone were to be held responsible. Even if allied powers committed traditional war crimes under Article 6(a), including “murder, ill-treatment or deportation to slave labor...or ill-treatment of prisoners of war or persons on the seas, killing of hostages...wanton destruction of cities, towns or villages, or devastation not justified by military necessity,”³⁰², Jackson only affirmed the right to prosecute other international crimes based on an initial determination of aggressive war making.³⁰³ By first

Churchill, and the Morgenthau Plan, which would have reduced Germany to an agrarian society, while imposing summary execution on high Nazi officials, viable options. “The American commitments to ‘aggression’...found the US pressing against the boundaries of existing international law.” Jackson was its foremost advocate. Raymond W. Brown, “The American Perspective on Nuremberg: A Case of Cascading Ironies,” in *The Nuremberg Trials: International Criminal Law Since 1945 : 60th anniversary International Conference*, eds. Herbert R. Reginbogin, Christoph Johannes Maria Safferling and Walter R. Hippel (München: K.G. Saur, 2006) 2006, 25; In addition to the general reluctance among British officials in applying the trappings of legalism to Nazi war criminals, “when accusing the Germans of conspiring to wage aggressive war the British could only reflect uncomfortably on their part in the dismemberment of Czechoslovakia in 1938.” David Cesarani, “The International Military Tribunal at Nuremberg: British Perspective,” in *The Nuremberg Trials: International Criminal Law Since 1945*, 36; Telford Taylor, assistant to Jackson at the Nuremberg IMT and later Chief Counsel for the remaining twelve trials before the U.S. Nuremberg Military Tribunals, writes that “Neither the Russians nor the French took kindly to declaring aggressive war *per se* a crime under international law. The latter were disturbed by *ex post facto* worries, and Professor [Leo] Gros [the French representative] observed that ‘the Americans want to win the trial on the ground that the Nazi war was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits.’” Telford Taylor, “The Nuremberg Trials,” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 383.

³⁰¹ Robert H. Jackson Jackson-London Conference, “International Conference on Military Trials : London, 1945 Minutes of Conference Session of July 23, 1945,” ,” *The Avalon Project: Documents in Law, History and Diplomacy*, Accessed November 6, 2017, <http://avalon.law.yale.edu/imt/jack44.asp>.

³⁰² “WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”. International Military Tribunal Charter, Article 6(b), “Nuremberg Trial Proceedings,” *The Avalon Project*, <http://avalon.law.yale.edu/imt/imtconst.asp>.

³⁰³ “Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with

insisting that the other side had contravened collective security agreements, Jackson's intention was to validate allied prosecution on positive legal grounds, while simultaneously immunizing allied offenses.

Unlike the crimes against peace charge, crimes against humanity possessed an even more tenuous positive law foundation, as the term "humanity" remains foreign to classical legal positivist vernacular.³⁰⁴ Article 6(c) of crimes against humanity is defined as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.³⁰⁵

atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern." American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, reprinted in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 22, doc. IV (1945). Jackson further explained, "We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state." Minutes of Conference Session of July 23, 1945, reprinted in JACKSON REPORT, supra note 41, at 328, 331, doc. XLIV in Beth Van Schaack, "The Definition of Crimes Against Humanity: Resolving the Incoherence," *Columbia Journal of Transnational Law* 37, no. 3: 799-800.

³⁰⁴ "Contemporary legal positivists have generally not acknowledged the legitimacy of international legal norms, let alone universal or *jus cogens* norms. Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge, UK: Cambridge University Press, 2005), 29.

³⁰⁵ The IMT Charter specified that crimes against humanity could take place "before or during the war". The Nuremberg judgment, on the other hand, concluded that since crimes against humanity possessed a weaker link to customary international practice than CAP the Court could only prosecute for crimes that ensued *after* the Nazi attack on Poland in September 1939. This formulation, referred to as the "war-nexus" requirement, justified the extension of international prosecution into what normally constituted domestic jurisdiction, while retaining the doctrine of state sovereignty. Beth Van Schaack, "The Definition of Crimes Against Humanity," 791. This coincided with Jackson's own effort at Nuremberg to make war illegal following the pronouncement of former US Secretary of State Henry Stimson, who stated in 1932 that "War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world...an illegal thing." Francis Biddle, "The Nurnberg Trial," in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 205.

Jackson minimized the crimes against humanity charge relative to crimes against peace, due to a traditional belief that a country's internal affairs were not subject to outside interference. When Andre Gros, the French representative at the London conference, insisted that Article 6 (a) could be used for that purpose, Jackson argued that crimes against peace created a sovereign barrier against humanitarian intervention.³⁰⁶ Since Jackson had no intention of allowing other nations to interfere in Jim Crow policies of racial discrimination, he was especially adamant to prove that Nazi wars were unjust or illegal, and therefore warranted the allied right of *ad hoc* prosecution.³⁰⁷

Jackson consequently affirms three inter-dependent propositions in making his case: (a) that violations of just war theory through aggressive warfare incurs the collective responsibility of axis powers, (b) that Nazi officials are subject to individual criminal responsibility for the commission of unjust wars, and (c) that the allies at Nuremberg operated a neutral court. Although Kelsen agreed with Jackson with respect to the first two constituent elements, parting ways as a leading critic of "victor's justice," he nevertheless insisted that (b) was not dependent on (a). And even though critical of *ad hoc* jurisdictional authority, he remained confident of the validity of the judgment at Nuremberg (c).

This chapter is divided into three parts. Part II situates Kelsen's and Jackson's statements on *bellum justum* within the orbit of a moral, if politicized, theory of international law. Despite

³⁰⁶ David Luban, "The Legacies of Nuremberg," in Guénaël Mettraux (Oxford: Oxford University Press, 2008), 644.

³⁰⁷ Robert H. Jackson, *International Conference on Military Trials, London, 1945*. Department of State Publication No. 3080 (Washington: US Government Printing Office, 1945), pp. 331, 333: "It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems...We have some regrettable circumstances at times in our own country in which minorities are unfairly treated."

the impartiality each invests in the abstract claims of just war theory, their views on the subject demonstrate partisanship towards imperial interests prior to the post-colonial effort to assure self-determination in the aftermath of the Second World War. The *status quo* logic embedded in Kelsen's theoretical construct, and Jackson's declarations, confirm such partiality. In addition to revealing problems inherent in the justificatory grounds for imputing responsibility based on the theory of *bellum justum*, this section draws a further correspondence by introducing a phrase that each adopts to signal supremacy: "Christian civilization". Exploring the paradox in criminalizing those possessing "primitive" rather than "civilized" consciousness, this section points to reasons why Kelsen's anthropological view of stages of societal evolution may have contributed to his hesitation to ground international prosecution on the distinction between just (legal) and unjust (illegal) actions.

Part III explores Kelsen's well-known criticism of the Nuremberg tribunal predicated on the claims of "victor's justice,"³⁰⁸ while simultaneously questioning these evaluations given Kelsen's overarching endorsement of the integrity of the trial. While sharing a preference for a permanent and compulsory court to adjudicate war crimes proceedings, Kelsen's departure from Jackson's support of a tribunal controlled by the victorious allied powers must not be interpreted as a rejection of the proceedings. If Kelsen is content to endorse collective responsibility under just war theory, notwithstanding a lack of impartial juridical authority to determine if the action was indeed just, why would he hesitate to endorse *ad hoc* prosecution? This section suggests that Kelsen's denunciation of "victor's justice" is irrelevant. Despite scattershot criticism of jurisdictional authority at Nuremberg, his choice to de-link *bellum justum* theory from the

³⁰⁸ Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent?" in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008).

prosecution of individuals for crimes against peace may be regarded as a further acknowledgement by this foremost international publicist that a more convincing methodology would be necessary to provide the legal authority for international criminal prosecution.

Having demonstrated the reasons for (a) Kelsen's hesitance to endorse the theory of *bellum justum* as the basis for prosecuting individuals (*contra* Jackson), and (b) his acknowledgement of the validity of *ad hoc* trials, Part IV evaluates why Kelsen recommended that Jackson endorse retroactive lawmaking. In addition to demonstrating correspondence between the court's decision and Kelsen's *ex post facto* approach, this section shows how Jackson was forced to concede the priority of Kelsen's methodology.

Retroactive lawmaking based on the criterion of "moral responsibility" as the methodological basis for designating international culpability, however, creates an antinomy for a philosopher whose legal doctrine is based on the separation of law from morality (see: Chapter Two). The shift from a positive law emphasis on "justice as peace" to a general recognition of justice as an inherently moral element recognizable as part of the criterion of retroactive lawmaking confirms Kelsen's cardinal concern for the protection of victims of human rights atrocities. By de-linking from the theory of *bellum justum* and the criminalization of aggressive war as stipulated in prior international agreements, Kelsen's retroactive endorsement proved of enduring value with the advent of a crimes against humanity-centered ICL discipline.

II. Just War Theory—Law or Morality?

At the inaugural 1940-41 Oliver Wendell Holmes lectures at Harvard Law School, which became the basis for his book *Law and Peace in International Relations*³⁰⁹, Kelsen stated that

³⁰⁹ Hans Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-41*

“whether or not international law can be considered as true law depends upon whether it is possible to interpret international law in the sense of the theory of *bellum justum*.”³¹⁰

Collective responsibility or absolute liability resulting from just wars, according to Kelsen, resemble tribal forms of justice for the murder of kinfolk.³¹¹ In the primitive analogy, the relatives of the person killed, in an entirely decentralized manner, since there is no court, nor centralized administrative authority, initiates a *vendetta* or “blood feud.” An individual whose father has been murdered, for example, can exact revenge, but only as an organ of the community.³¹² To kill under different circumstances would make the act illegal. “The relatives of the murdered person, the mourners, must themselves decide whether an avenging action should be undertaken, and if so, against whom they should proceed.”³¹³

In the international realm, states similarly interpret the legality of the social order based on the right of self-help. A state’s sphere of interest is protected through the mechanism of sanction—war—insuring a measure of security against the threat of violence. “If any state is at liberty to resort to war against any other state,”³¹⁴ international law’s “law-ness” would be jeopardized. War is therefore “in principle forbidden, being permitted only as a sanction, that, is as a reaction against a delict.”³¹⁵ While wars conducted without the benefit of a neutral body to arbitrate matters may appear unjust, the very act of presenting reasons for attacking another

(Cambridge, Massachusetts: Harvard University Press, 1942).

³¹⁰Ibid., 52.

³¹¹ Ibid., 40-43

³¹² Ibid., 49.

³¹³ Ibid., 49

³¹⁴ Ibid., 52

³¹⁵ Ibid., 53

nation, writes Kelsen, is an evolutionary advancement over the state of anarchy or *bellum omnium contra omnes*, the “war of all against all.”³¹⁶

The justification of war creates an antinomy for a philosopher whose ontologically relativist theory is predicated on the separation of law from morality (see: chapter two).³¹⁷

Reluctant to admit its moral underpinnings, Kelsen claims that *bellum justum* theory can be found in “highly important” positive international law documents, including the Treaty of Versailles (1919)³¹⁸, the Covenant of the League of Nations (1919)³¹⁹ and the Kellogg-Briand Pact (1928)³²⁰. But even without these documents, Kelsen affirms that national and international public opinion customarily “disapproves of war and permits it only exceptionally as a means to realize a good and just cause.”³²¹ He asserts that:

Even if such justification is of moral rather than strictly legal significance it is of great importance; for, in the last analysis, international morality is the soil which fosters the growth of international law. It is international morality which determines the general direction of the development of international law. Whatever is considered ‘just’ in the sense of international morality has at least a tendency of becoming ‘law’.³²²³²³

³¹⁶ “To this warre of every man against every man...nothing can be Unjust. The notions of Right and Wrong, Just and Injustice have no place. Where there is no common Power, there is no Law: where no Law, no Injustice.” Thomas Hobbes, *Leviathan, Or The Matter, Forme & Power of a Commonwealth Ecclesiasticall and Civill* (London: Andrew Crooke, 1651), 63.

³¹⁷ *Ibid.*, 37.

³¹⁸ “Treaty of Versailles,” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/kbpact.asp

³¹⁹ “Covenant of the League of Nations,” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/leagcov.asp

³²⁰ “Kellogg-Briand Pact,” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/kbpact.asp

³²¹ *Ibid.*

³²² *Ibid.*, 37-38.

³²³ Danilo Zolo, “Hans Kelsen: International Peace through International Law,” *European Journal of International Law* 9, (1998): 318. Zolo writes that “Here too Kelsen displays a normative contamination between morality and law from which he should have been barred by the assumption of the ‘purity’ of his theory of law.”

Kelsen quotes Coleman Phillipson's *The International Law and Custom of Ancient Greece and Rome*: "No war was undertaken without the belligerents alleging a definite cause considered by them as a valid and sufficient justification thereof."³²⁴ Marcus Tullio Cicero (106 BC-43 BC) remarks: "Wars undertaken without reason are unjust wars, for except for the purpose of avenging or repulsing an enemy, no just war can be waged."³²⁵ Christian writers, such as Saint Augustine (354-430)³²⁶ and Isidoro de Sevilla (560-636)³²⁷, influenced by Cicero's just war theory, in turn inspired Thomas Aquinas (1225-1274) to write on the subject in the *Summa Theologiae*.³²⁸ Spanish writer Alberico Gentili (1552-1608)³²⁹ and Dutch international law scholar Hugo Grotius (1583-1645) formally introduced just war theory into the canon of modern public international law.³³⁰

Until the end of the eighteenth century, determining a "just cause" was, according to Kelsen, a prerequisite for war-making.³³¹ Only during the nineteenth century, writes Kelsen, was war conceived as a reflection of a state manifesting its sovereignty. "Undoubtedly, any norm

³²⁴ Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London: MacMillon & Co., 1911), Vol. II, 179. In comparing descriptions of ancient to modern international law, Phillipson endorses the same imperialist tendencies implicating Kelsen and Jackson for the theory of *bellum justum*. Phillipson writes: "No doubt the Greeks sometimes acted or spoke as though the law was applicable only to themselves and not to barbarians...but a large body of the law was extended to all alike. And even if it were not so extended and applied to the Hellenes alone, its international character would still remain. We do not regard our modern law of nations to be divested of its international character simply because we do not include uncivilized races—savages, *barbarians*—in the family of nations." Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 31. See: Hans Kelsen, *General Theory of Law and State*, (New York: Russell & Russell, 1961), 335.

³²⁵ Marcus Tullio Cicero, *De Republica*, III, xxiii in Kelsen, *General Theory of Law and State*, 335.

³²⁶ Augustine of Hippo, *The City of God*, (Edinburgh: T. & T. Clark, [426CE] 1934)

³²⁷ Isidore of Seville, *Isidore of Seville's Etymologies Vol. 2. Books XI-XX* (Charlotte, VT: Medieval MS, [600-625CE] 2005)

³²⁸ Thomas Aquinas, *Politics and Ethics*. (New York: W.W. Norton & Co., 1988)

³²⁹ Alberico Gentili, *The Wars of the Romans: A Critical Edition and Translation of De Armis Romanis*, eds. Benedict Kingsbury and Benjamin Straumann, trans. by David Luper (Oxford: Oxford University Press, [1599] 2011)

³³⁰ Hugo Grotius, *De Jure Praedae Commentaries* [Commentary on the Law of Prize and Booty], transl. Gwladys L. Williams (Oxford: Clarendon Press, [1603] 1950); Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* [The Law of War and Peace in Three Books], trans. Francis Kelsey (Oxford: Clarendon Press, [1625] 1925).

³³¹ Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-41* (Cambridge, Massachusetts: Harvard University Press, 1942), 43-45.

which forbids a state to resort to war against another state, save as a reaction against a wrong suffered by it, is contrary to the idea of the sovereignty of a state.”³³² But is Kelsen’s historical description accurate?

Grotius, “The Father of International Law,” for instance, was far from the anti-war thinker he has been made out to be. Unlike Salmon O. Levinson (1865-1941) and James T. Shotwell (1874-1965)³³³, prominent Americans who lobbied members of the Hoover and Roosevelt administrations before the passage of the Kellogg-Briand Pact in an effort to outlaw aggressive war, Grotius exemplified what critics have described as the program of an “interventionist.”³³⁴ Grotius, writes Hathaway and Shapiro, “argued that war was a legitimate method for enforcing rights in the absence of a world government...and constructed an intellectual foundation for a legal order built on war.”³³⁵

Rather than “internationalists,” who believe that the best way to resolve conflicts between states is through international institutions, interventionists like Grotius granted states primacy. Even as he indicated principles prohibiting the killing of women, children, prisoners of war and

³³² Hans Kelsen, *Law and Peace*, 45.

³³³ Salmon O. Levinson, *Outlawry of War* (Chicago: American Committee for the Outlawry of War, 1921). Levinson convinced his friend John Dewey to write a foreword to the pamphlet and petition the influential Republican United States Senator William Borah to lead the movement to outlaw war. See: Dewey to Borah, March 6, 1922, No. 04891. The Correspondence of John Dewey, 1871-1952, Electronic Edition. Levinson and Dewey’s plan to outlaw the war system through peaceful means contrasted with “outlawry ‘with teeth’,” a view encouraged by historian and State Department official James T. Shotwell, who promoted what he called “a practical plan” for “forceful sanction” with aggression “deemed forbidden by international law.” James T. Shotwell, “A Practical Plan for Disarmament,” *International Conciliation* 10, no. 201 (August 1924): 318. See: Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017), 112-119. Hathaway and Shapiro do a commendable job introducing these important figures in the outlawry movement. In concert with Kelsen’s theory of *bellum justum* as positive law, Shotwell’s position conformed, according to Shapiro and Hathaway, with American foreign policy after Lend-Lease. While their thesis mistakenly conflates the outlawry of war with the thrust of international criminal law—and the methodological construction of the concept of international criminal responsibility at Nuremberg—their historical contributions to the subject of outlawry nevertheless proves critically important.

³³⁴ Hathaway and Shapiro, *The Internationalists*.

³³⁵ *Ibid.*, Xx.

slaves, he also affirmed in *The Law of War and Peace* (1625) that “might makes right,” since “it is evident that the sources from which wars arise are as numerous as those from which lawsuits spring.”³³⁶ While just wars, according to Kelsen and Jackson, are considered a mandatory legal sanction granted the discretion of members of the international community, if they are (a) an act of defense, including a reprisal, retaliation or reparation, and (b) applied by those states victims of aggression or states seeking to assist the victims of such injustice,³³⁷ Grotius described just wars in a more circumscribed fashion.

Hathaway and Shapiro write that “for Grotius...war is a morally acceptable way to prevent or remedy the violation of rights,”³³⁸ including the rights of individuals, states, native peoples and trading companies. ‘War’ is an “armed execution against an armed adversary...A war is said to be ‘just’ if it consists in the execution of a right, and ‘unjust’ if it consists in the execution of an injury.”³³⁹ But an unjust war is not subject to coercion through licensed collective security action, as it is in Kelsen’s theoretical construct. If the stronger side wins, according to Grotius, then the legal claim belongs to the victor, not the aggrieved. Parties to a dispute were considered sovereign with no higher authority required to resolve conflicts. States, therefore, could use any means necessary to gain advantage without recourse.

To claim that an international society not only exists but that just wars are objectively determinable when states decide to attack one another, writes the English School’s Hedley Bull

³³⁶ Grotius, *De Jure Belli ac Pacis Libri Tres*, 2.2.2.1, in Hathaway and Shapiro, *The Internationalists*, 23.

³³⁷ See: Robert H. Jackson, “Nuremberg in Retrospect: Legal Answers to International Lawlessness,” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 354-371; Hans Kelsen, *Peace Through Law* (Union, N.J.: Lawbook Exchange, 2008 [1944]).

³³⁸ Hathaway and Shapiro, *The Internationalists*, 10.

³³⁹ Grotius, *De Jure Praedae Commentaries* [Commentary on the Law of Prize and Booty], transl. Gwladys L. Williams (Oxford: Clarendon Press, 1950), 50, quoted in Hathaway and Shapiro, *The Internationalists*, 10.

in “Hans Kelsen and International Law,” “strains against the facts.”³⁴⁰ Even if Chapter VII of the United Nations Charter grants the United Nations Security Council (UNSC) the authority to determine the existence of an international offense³⁴¹, replacing right by duty, organizational deficiencies associated with limitations imposed by the veto powers of the five permanent members of the Council demonstrate the endurance of “self-help”.³⁴² Bull writes:

It is not the case that there is normally agreement in international society as to which side in an international armed conflict represents the law-breaker and which the law-enforcer. There is commonly disagreement on this matter, or there is agreement that the conflict should be regarded as a political one in which each side is asserting its interests, and its rights as it sees them, and neither can be said to represent international society as a whole. Kelsen’s doctrine excludes the category of wars that are neither delicts nor sanctions, the category in which neither side has a just cause, and the category in which both have just causes.”³⁴³

Notwithstanding Bull’s compelling criticism, which shares with political realism an emphasis on “interests...and rights as it sees them”³⁴⁴, pointing to the tendency of states to rationalize the justness of their cause, Kelsen draws on historical sources, including declarations of war and treaties between states to maintain that state representatives agree that acts are to be “permitted only as a reaction against a wrong suffered.”³⁴⁵ The technical condition of international law means that “the only possible reaction that can be provided by general

³⁴⁰ Hedley Bull, “Kelsen and International Law,” in *Essays on Kelsen*, eds. Richard Tur and William Twining, (New York: Oxford University Press, 1986), 329.

³⁴¹“United Nations Chapter VII, Article 39,” Charter of United Nations, accessed January 20, 2016 , <http://www.un.org/en/sections/un-charter/chapter-vii/index.html>. Article 39 reads: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken...to maintain or restore international peace and security.” <http://www.un.org/en/sections/un-charter/chapter-vii/index.html>

³⁴² Hans Kelsen, *Principles of International Law*, ed. Robert W. Tucker (New York: Holt, Rinehart and Winston, 1967), 47-51.

³⁴³ Bull, “Kelsen and International Law,” 329-330.

³⁴⁴ *Ibid.*

³⁴⁵ Hans Kelsen. *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-41* (Cambridge, Massachusetts: Harvard University Press, 1942), 37.

international law against an unpermitted war is war itself, a kind of ‘counter-war’ against the state which resorted to war in disregard of international law.”³⁴⁶ While acknowledging that it is “logically impracticable to prove the thesis of the *bellum justum* theory,”³⁴⁷ since it is of equal formal value to its opposite interpretation where war may be fought “against any other state on any ground without violating international law,”³⁴⁸ Kelsen nevertheless makes a political choice with moral resonance. The problem in making such a choice, as it relates to a *status quo* logic that benefits the most powerful and putatively most ‘civilized’ nations under imperialist conditions, will be examined later in this section.

Like Kelsen, Jackson agreed that “aggressive wars are civil wars against the international community.”³⁴⁹³⁵⁰ In his March 1941 Havana Speech at the First Conference of the Inter-American Bar Association, Jackson could not deny the moral characteristics associated with just war theory, even as he attempted to reinforce the positive validity of the trial. The Lend-Lease

³⁴⁶ Ibid., 36

³⁴⁷ Kelsen. *Law and Peace*, 36. See: Literature Review—chapter two—for a general description of Kelsen’s separation of law from morality or the ‘separation thesis’ *vis a vis* a pure theoretical conception of international criminal responsibility.

³⁴⁸ Ibid.

³⁴⁹ Robert H. Jackson, “Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941,” *The American Journal of International Law*, 35, no. 2 (Apr., 1941): 348-359; Georg Schwarzenberger, “The Judgment of Nuremberg,” in *Perspectives on the Nuremberg trial*, ed. Guénaël Mettraux (Oxford: Oxford University Press, 2008), 347-348.

³⁵⁰ Former US Secretary of War Henry L. Stimson (1867-1950) had similarly determined that belligerent aggression was unlawful. Stimson writing in 1947, stated that “it is clear that until quite recently any legal judgment against a war-maker would have been absurd. Throughout the centuries, until after World War I, the choice between war and peace remained entirely in the hands of each sovereign state, and neither the law nor the ordinary conscience of humanity ventured to deny that right. The concept of just and unjust wars is of course as old at least as Plato. But in the anarchy of individual sovereignties, the right to fight was denied to no people and the right to start a fight was denied to no ruler.” Henry L. Stimson. “The Nuremberg Trial: Landmark in Law,” in Guénaël Mettraux (Oxford: Oxford University Press, 2008), 619.

Act,³⁵¹ passed at the time of Jackson’s address³⁵² was based on the premise that comprehensive aid to one belligerent party—in this case the United States to the United Kingdom in the Second World War— was neither an act of war, nor “incompatible with the obligations which international law imposes upon a state, not a belligerent in the war.”³⁵³ Jackson asserted that the nineteenth century doctrine of impartial neutrality associated with The Hague Conventions had been transformed by the events of the Second World War, and that that doctrine wrongly assumed that since there was “no legal duty to any other nation...all wars are legal and all wars must be regarded as just.”³⁵⁴ English positive international law scholar William Edward Hall concurred. Writing in 1904, Hall asserted that “International law has...no alternative but to accept war, independently of the justice of its origin.”³⁵⁵ Invoking the “return to earlier and more healthy prospects,”³⁵⁶ Jackson, in contrast, drew on the seventeenth and eighteenth-century natural law distinction between just and unjust wars. He insisted that “members of the international society, bound by the ties of solidarity of Christian civilization,” had a duty to “discriminate against a state engaged in an unjust war.”³⁵⁷

According to Jackson, Grotius asserted that when one nation was in violation of another’s territorial rights, neutrality—or impartial treatment—could be dispensed with.³⁵⁸ Grotius wrote

³⁵¹ Lend-Lease Agreement, “A Decade of American Foreign Policy 1941-1949 Master Lend-Lease Agreement,” *The Avalon Project: Documents in Law, History and Diplomacy*, Accessed November 9, 2017, http://avalon.law.yale.edu/20th_century/decade04.asp; Franklin D. Roosevelt, “Four Freedoms Speech,” FDR Presidential Library and Museum, accessed November 9, 2017, <https://fdrlibrary.org/four-freedoms>. President Roosevelt in his message to Congress on January 6, 1941 stated that “such aid is not an act of war”.

³⁵² Jackson, “Inter-American Bar Association,” 348-359.

³⁵³ Lend-Lease Agreement, “A Decade of American Foreign Policy 1941-1949 Master Lend-Lease Agreement,” *The Avalon Project: Documents in Law, History and Diplomacy*, Accessed November 9, 2017, http://avalon.law.yale.edu/20th_century/decade04.asp

³⁵⁴ Jackson, “Inter-American Bar Association,” 348-359.

³⁵⁵ William Edward Hall, *International Law* (Oxford, UK: Clarendon Press, 1904), 61 in Jackson, “Inter-American Bar Association,” 348-359.

³⁵⁶ Jackson, “Inter-American Bar Association,” 348-359.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

that “it is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war.”³⁵⁹ However, as Shapiro and Hathaway affirm, Grotius likewise “argued that war was a legitimate method for enforcing rights in the absence of a world government.”³⁶⁰ The decision to justify Lend-Lease as a preliminary right of sanction prior to the United States’ official declaration of war against axis powers must consequently be deemed a moral decision with political ramifications. To claim the “ties of the solidarity of Christian civilization,” as Jackson does, is to insist upon the moral superiority of a certain segment of humanity.

III. “Christian Civilization”: The Paradox of Retributive Justice

Jackson’s statement about “Christian civilization” is indeed peculiar. Understood in the context of Kelsen’s anthropological discussion of primitive consciousness, which Pure Theory’s author attributes to tribal societies, the preference Jackson reserves for “Christian civilization,” however, is not particularly anomalous. The higher form of mental acuity that Kelsen links with ego-development under “civilized” conditions, described in detail in *Society and Nature* (1943)³⁶¹ and “Causality and Imputation” (1951)³⁶² creates a paradox: if the retributive conception of punishment is only fully-formed under civilized conditions, what use is there in imputing guilt to those who do not belong to “Christian civilization”?

Despite atrocities wrought in the Second World War period, Kelsen places high hopes in a revolution of consciousness born of catastrophe. Kelsen writes in the preface to *Peace through*

³⁵⁹Hugo Grotius, *Grotius on the Rights of War and Peace*, trans. William Whewell (Cambridge, UK: John W. Parker, [1625] 1853), 401.

³⁶⁰Hathaway and Shapiro, *The Internationalists*, 20.

³⁶¹Hans Kelsen, *Society and Nature: A Sociological Inquiry* (Chicago: The University of Chicago Press, 1943).

³⁶²Hans Kelsen, “Causality and Imputation,” *Ethics*, 61, no. 1 (Oct., 1950): 1-11.

Law (1944) “have we men of a Christian civilization really the right to relax morally?”³⁶³³⁶⁴The construction of a system of international criminal adjudication reflects civilizational advances, according to Kelsen, insuring the best chance of creating the foundation for a peaceful international order after the cessation of war.³⁶⁵ However, before this can happen the assumption is that a transformation in consciousness must first take place. “[M]en of a Christian civilization” it is assumed can spearhead such changes.

In contrast to “civilized” consciousness, says Kelsen, “primitive” consciousness emphasizes the prevalence of the emotional component. “The consciousness of primitive man is essentially characterized by the fact that with him the rational component, which is aimed at objective cognition, lags far behind the emotional component, which arises from feeling and volition; originally this emotional component almost exclusively dominated the mind of early man.”³⁶⁶ Kelsen insists that primitive consciousness is bound by an inability to think in causal

³⁶³ Kelsen, *Peace Through Law*, Preface.

³⁶⁴ “Amongst the ancient Hebrews, it was the duty of the *goel*, the nearest of kin of a murdered man, to pursue and slay the murderer. The *goel*... is ‘the person authorized to obtain blood for blood as an act of justice in the east.’...[T]he prevailing error in the Western mind’ [is] ‘confounding justice with punishment.’...[T]he term *goel* is not—as erroneously assumed—‘avenger’ or ‘revenger’. ‘His mission was not vengeance, but equity. He was not an avenger but a redeemer, a restorer, a balancer.’ In other terms, blood revenge was a legal and moral institution.” Kelsen, *Society and Nature*, 57. Crediting the “Hebrews” with contributing to legal and moral evolution, Kelsen claims that the *goel* provided “equity,” a moral attribute. His decision to “pursue and slay the murderer, a coercive—legal—measure, proved that the *goel* recognized that his “nearest of kin” was murdered not necessarily because of sins the victim committed, but due to the conduct of the murderer himself. Such a distinction must be recognized as part of the legal-evolutionary process, as it distinguishes between causality and retribution, a change in consciousness that Kelsen attributes, in part, to the “Hebrews.” Restoring the balance demonstrates an evolution from collective to individual forms of imputation. Even if “blood revenge” remained decentralized, it was an improvement on collective forms of justice, where the entire tribe, not just the murderer, was the object of coercion. Like the *goel*, who operated without a neutral court, *ad hoc* jurisdiction at Nuremberg, even if resembling a form of *victor’s justice* (see: Part III), ought to be seen as an improvement over collective forms of responsibility that impute an entire nation for the predations of certain officials.

³⁶⁵ “[A]n international tribunal established after the conclusion of peace [is]...in a position to fulfill its task in an atmosphere which is not poisoned by the passions of war.” Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals”. *California Law Review* 31, no. 5 (1943): 551.

³⁶⁶ Kelsen, *Society and Nature*, 1.

terms. Fear of retribution by unseen forces, rather than sober evaluation, dictates action. “Upon these ideas are based concepts of value: of what is useful because desired, of what is harmful because feared, of what is morally good and bad because it is the expression of a group, rather than an individual interest.”³⁶⁷ Decisions are dominated, not by rational cognition able to relate cause and effect, but rather by attribution of retributive powers associated with the gods or some other animating spirit. Assigned meaning based on accounting, not causality, a person murdered must have angered a supernatural force, either god(s) or nature. Violence perpetrated against the victim must have been prompted by spiritual misdeeds committed by him or his family, rather than derived from the caused actions of his pursuer. The conception of “will” can be deduced from such causal recognition, even if, as the case of Adolph Eichmann demonstrates (see: chapter four), freedom under coercive orders is circumscribed, compelling obedience that must be accounted for with any conceptualization of responsibility.

Kelsen’s anthropological investigations demonstrate his belief that a graduated consciousness consonant with predictable, coercive organizational principles leads in the direction of the full development of a neutral legal order where not just collective—but ultimately individual—responsibility can be imputed.³⁶⁸ First, however, human consciousness must develop from an early, primitive stage where no predictable coercive mechanism (i.e., anarchy) prevails to an intermediate stage where collective forms of responsibility based on the

³⁶⁷ Ibid.

³⁶⁸ “[G]iven [Kelsen’s] conception of international law as a primitive legal order, it is not inadmissible to transfer the basic tenets of his findings in ‘Causality and Retribution’ to the area of international criminal law.” Andrea Gattini, “Kelsen’s Contribution to International Criminal Law,” *Journal of International Criminal Justice* 2, no. 3, (September 2004): 799. While Gattini correctly interprets Kelsen’s primitive analogy to international law, he nonetheless neglects to consider the full import of (a) Kelsen’s historic role in advising Jackson on the definition of individual responsibility for international crimes, (b) the legacy of Kelsen’s interpretive validation of *ex post facto* lawmaking, and (c) the permission Kelsen grants ICL judges to draw on principles of humanity for customary international law (CIL) construction.

customary practice of vengeance or “blood feud” is commonly employed. The difference between this earliest and intermediate phase is far more pronounced than the progressive evolution from the stage of primitive vengeance to a period where retributive punishment based on the pronouncements of an impartial court prevail. Kelsen writes:

The degree of progress from primitive vengeance to the higher social technique of retributive punishment is indeed great. It consists in the fact that the reaction against the delict no longer has solely the character of self-help; it must not be exercised anymore by the individual directly or indirectly injured but by an impartial authority. Nevertheless, the difference between the essentially social reaction of primitive vengeance and the retributive punishment is purely a quantitative one, whereas the difference between vengeance and the instinctive reflex of defense is qualitative. One should not overlook the fact that even today a very important branch of law, namely international law, still remains, for the most part, in the technically primitive state of self-help.”³⁶⁹

To hold accountable those individuals who have yet to attain a level of consciousness that differentiates between responsibility attributable to retributive gods and human-caused actions neglects to account for disparate states of cognitive development. Even if primitive and international social orders share decentralized structures, consciousness under tribal laws is certainly, according to Kelsen, not on a parallel level to that of the cosmopolitan world. This temporal differentiation must likewise not preclude a plurality of levels of consciousness at any given moment in time. But who can determine the level of civilizational evolvment, and with it the degree of responsibility that ought to be attributed, first to the collective, and afterwards, individuals, but those who have the power to claim such enlightenment? This leads to a vicious cycle of moral justification.

³⁶⁹ Hans Kelsen, *Society and Nature*, 57.

By invoking “Christian civilization” neither Kelsen nor Jackson avoids Bull’s criticism of the “doctrine [which] excludes the category of wars that are neither delicts nor sanctions, the category in which neither side has a just cause, and the category in which both have just causes.”³⁷⁰ Rather, as the next section reaffirms, the choice to invoke the theory of *bellum justum* to prove the right of the allies to try Nazis for crimes against peace, founders on the *status quo* logic used by Jackson to justify his case. That Kelsen de-linked *bellum justum* theory from the prosecution of core international crimes, especially crimes against peace, perhaps is an acknowledgment of the limitations he detected in holding axis war criminals accountable according to a criterion laden with prejudice.

IV. The Status Quo Logic and Justice as (Imperially-Administered) Peace

As early as 1941 at the annual meeting of the American Society of International Law, Kelsen and international relations scholar and former student, John Herz, presented the paper “Essential Conditions of International Justice,” in which the theory of *bellum justum* was relativized to such an extent that the prospect of designating even Nazi aggression an illegal offense became nearly impossible. Kelsen writes:

To the extent that the opposition between the right of all peoples to self-determination and the claim of certain peoples to *Lebensraum* rests upon different ideas of the value of the peoples this conflict is not capable of being decided by science. It is not so even if the claim to *Lebensraum* and the correlative claim to domination of one people by another presents itself with the argument that the domination is exercised in the interest of the people that is not able to govern itself, with the argument that it is only a question of a special way different from self-determination, in this case a better way to assure the welfare of the dominated people. For, this justification, too, rests on a judgment of value which cannot be objectively verified.³⁷¹

³⁷⁰ Bull, “Kelsen and International Law,” 329-330.

³⁷¹ Hans Kelsen and John Herz. “Essential Conditions of International Justice,” (presentation, Proceedings of the American Society of International Law at its Annual Meeting, Washington, D.C., April 24-26, 1941): 70-86.

The policy of *Lebensraum* (“Living Space”) based on the racial theory that Aryans were entitled to farmland and trade in the east, especially Russia’s, since the German people, according to Hitler, were superior to Slavs, was certainly antithetical to Kelsen’s views as both a Jew and humanist.³⁷² But as an advocate of “legal science,” the author of the Pure Theory of Law admits that in “a judgment of value which cannot be objectively verified,” *Lebensraum* “and the correlative claim to domination of one people by another” is comparable “to the right of all people to self-determination.”³⁷³ His moral relativism on the matter—as the following discussion of imperialism in relation to the status quo logic employed by Jackson demonstrates—proves the limitations of any judgment that elevates crimes against peace to a supreme position in the hierarchy of charges.

Much like *Lebensraum*, if excised of racialist overtones, *Grossraum* (“Greater Space”) theory, emphasized a sphere of influence for Germany protected from external interference. Introduced by Carl Schmitt, Kelsen’s (1888-1985) rival in the Weimar debate over whether supreme powers ought to be delegated to a dictatorial Reich president under Article 48 (Schmitt) or a constitutional court (Kelsen),³⁷⁴ *Grossraum* theory was used as propaganda for Nazi aggression. Hitler instructed Nazi Foreign Minister Joachim von Ribbentrop to inform United States Undersecretary of State Sumner Welles on his visit to Germany on March 1, 1940 that

³⁷² Adolph Hitler, *Mein Kampf*, transl. Ralph Manheim (Boston: Houghton Mifflin, 1971 [1927]), 652. In *Mein Kampf*, Hitler writes that “National Socialists must hold unflinchingly to our aim in foreign policy, namely, to secure for the German people the land and soil to which they are entitled on this earth.” See also: Hathaway and Shapiro, *The Internationalists*, 240.

³⁷³ Kelsen and Herz, 70-86.

³⁷⁴ Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge, UK: Cambridge University Press, 2015); Carl Schmitt, *Dictatorship* (Cambridge, UK: Polity Press, 2015); Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, Mass: MIT Press, 2000).

“[j]ust as on the basis of the Monroe Doctrine the United States would firmly reject any interference by European governments in Mexican affairs, for example, Germany regards the Eastern European area as her sphere of interest.”³⁷⁵

In “Essential Conditions of International Justice,” Kelsen described justice as indeterminable by rational cognition. Though the object of justice is to assure peace between varying interests, and in turn provide “social happiness,” he asks how any society can decide, for example, that the equality of all individuals ought to be preferenced over personal freedom, or materialist interests over spiritual ones? Since social science, writes Kelsen, cannot demonstrate the means by which to achieve ends that optimally benefit societies, the problem of justice is reliant on subjective, emotionally-driven, ideological judgment rather than objective insight. The same holds true, he argues, with respect to the contradictory impulses of international justice with regard to “regulation of the territorial problem.”³⁷⁶ He writes:

According to one formula...the principle of self-determination of peoples...all nations, races and religions are equal, and hence have an equal right to exist, to maintain their own culture, and to determine their own fate. The other formula is the claim to Lebensraum [or] living space. It proceeds from the supposition that there are superior and inferior peoples, and that the former, and only they, have the right to dominate a territory whose extent and natural resources suffice to assure a satisfactory, i.e., self-sufficient existence of its people, and that even at the expense of the inferior peoples. It is a principle which was applied in previous centuries only to the relation between Christian and heathen, between civilized and primitive peoples, but which today is invoked to justify the imperialistic claims of certain totalitarian states vis-d-vis other civilized nations. To the extent that the opposition between the right of all peoples to self-determination and the claim of certain peoples to Lebensraum rests upon

³⁷⁵ Adolph Hitler, Memo of February 29, 1940 in *Speeches and Proclamations, 1932-1945*, ed. Max Domarus, trans. Mary Fran Gilbert (Wauconda: Bolchazy-Carducci, 1990), 1942; See also: Hathaway and Shapiro, *The Internationalists*, 242. While Welles responded to von Ribbentrop by emphasizing that the American sphere of influence in Latin America had waned with Roosevelt’s Good Neighbor Policy (1933), which amounted to a rejection of the Monroe Doctrine, the United States, nevertheless, had difficulty defending itself against the accusation of aggressive policy when it had conducted its own imperialist ventures throughout the previous century.

³⁷⁶ Hans Kelsen and John Herz. “Essential Conditions of International Justice, 81.

different ideas of the value of the peoples this conflict is not capable of being decided by science.³⁷⁷

Kelsen's legitimization of *Lebensraum* as a valid principle of international justice on par with the principle of self-determination, and his acknowledgment that this aggressive approach to international relations had been the common practice of imperialism with respect "to the relations between Christian and heathen, between civilized and primitive peoples," demonstrates a deficiency in Kelsen's reasoning. With this statement, Kelsen claims that the "international community" is not even able to decide on a valid criterion for sanctioning breaches of the peace. For what does the theory of *bellum justum* even matter, if any nation can claim *Lebensraum*—or *Grossraum*—theory as equal to the values embedded in the United Nations Charter, which states that the charter's purpose is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"?³⁷⁸

Kelsen confounds those seeking a clear and consistent understanding of his position on international criminal responsibility. With the formulation of "justice as peace", Kelsen evidently does not mean "universal peace" in the sense of an ordering that would discourage the gross violations of human rights associated with *Lebensraum*, which he relativizes. Still, he writes in "Essential Conditions of International Justice" that:

International justice means international peace, peace secured by international law. The international legal order is to be maintained, especially in the sense that necessary

³⁷⁷ Ibid., 71.

³⁷⁸ United Nations Charter (1945), "United Nations Charter; June 26, 1945," *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, <http://avalon.law.yale.edu/wwii/moscow.asp>.
http://avalon.law.yale.edu/20th_century/unchart.asp

changes in the legal relations among states are to take place peaceably, not by the use of force. International justice means prevention of war.³⁷⁹

He, of course, does not mean *all* wars. Like Jackson, Kelsen asserts that defensive wars are certainly allowable as collective security measures to restore the state of peace in international relations. Since international law is a social order, states that commit acts of aggression must be treated like violent individuals under national law, sanctioned by other states. While peace, of course, is a moral prerequisite for civil relations and may coincide with human rights concerns, it is not necessary for implementing humanitarian protections. The Nuremberg trial proves this point. If just war theory, an antidote against the threat of aggressive war, is proven to be not only detrimental but inessential to the cognition of international criminal responsibility, another methodological approach deprived of the presupposition of peace is warranted.

As with Kelsen's moral relativism as regards the territorial problem, Jackson, in his opening address at Nuremberg, was even more conspicuous in his endorsement of imperial interests. He stated, "Our position is that whatever grievances a nation may have, however objectionable it finds the *status quo*, aggressive warfare is an illegal means for settling those grievances or for altering those conditions."³⁸⁰ Indian Justice Radhabinod Pal at the International Military Tribunal for the Far East (IMTFE) condemned the U.S. led prosecution for this reason.

He wrote in his dissenting opinion:

³⁷⁹Hans Kelsen and John Herz, "Essential Conditions of International Justice, 72.

³⁸⁰ *Opening Address for the United States Robert H. Jackson*, The Department of State Bulletin, n° 335; vol. XIII; publication 2432, November 25. 1945, 850-860; See also: David Luban, "The Legacies of Nuremberg," in Guénaél Mettraux (Oxford: Oxford University Press, 2008), 643; David Luban, *Legal Modernism: Law, Meaning and Violence* (Ann Arbor: University of Michigan Press, 1997), 341.

Certainly dominated nations of the present day *status quo* cannot be made to submit to eternal domination only in the name of peace. International law must be prepared to face the problem of bringing within juridical limits the politico-historical evolution of mankind which up to now has been accomplished chiefly through war. War and other methods of *self-help by force* can be effectively excluded only when this problem is solved, and it is only then that we can think of introducing criminal responsibility for efforts at adjustment by means other than peaceful. Until then there can hardly be any justification for any direct and indirect attempt at maintaining, in the name of humanity and justice, the very *status quo* which might have been organized and hitherto maintained only by force by pure opportunist 'Have and Holders'....The part of humanity which has been lucky enough to enjoy political freedom can now well afford to have the deterministic ascetic outlook of life, and may think of peace in terms of political *status quo*. But every part of humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is faced with not only the menace of totalitarianism but also the ACTUAL PLAGUE of imperialism.³⁸¹

Pal disagreed with the chief prosecutor of the IMTFE Joseph Keenan, and the similarly conservative sentiment held by Jackson regarding the maintenance of geographical boundaries.³⁸²

The *status quo* meant merely the most convenient rationale, according to Pal, to keep at bay aspirations by subaltern populations under western colonial domination.³⁸³ As with Jackson's and Kelsen's determination that just wars ought to be decided by "Christian civilization" where an evolved conception of individual responsibility was implied, a *status quo* logic, said Pal, granted imperial powers, including the allied nations, "eternal domination...in the name of peace."³⁸⁴

A *status quo* logic that insisted that those countries that wished to vie for their independence were committing acts of aggression by changing the outlines of the world map implied that the *crimes against peace* charge distorted fair proceedings against the accused. Since a number of

³⁸¹ Radha Binod Pal, *International Military Tribunal for the Far East: Dissident Judgment of Justice R.B Pal, M.A., LL.D.* (Calcutta: Sanyal, 1953), 114-115 in Luban, "Legacies of Nuremberg," 643.

³⁸² Pal, *Dissentient Judgment*, 114-115 in Luban "Legacies of Nuremberg," 643

³⁸³ Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, Mass.: Harvard University Press, [1964] 1986), 186.

³⁸⁴ Pal, *Dissentient Judgment*, 114-115 in Luban "Legacies of Nuremberg," 643

countries at the time, especially in the East (including Pal's own nation, India) were under colonial domination, the western architects of the IMTFE were imposing their notion of right on the vanquished Japanese.³⁸⁵ He concluded, therefore, "that every one of the accused must be found not guilty of every one of the charges in the indictment and should be acquitted on all those charges."³⁸⁶ Although he included war crimes and crimes against humanity in his general denunciation, he took special issue with the crimes against peace charge.³⁸⁷

The choice to focus on crimes against peace was certainly political. Like U.S. Secretary of War Henry Stimson, who wished to vindicate America's position on the Neutrality Act and Lend Lease,³⁸⁸ Jackson felt it imperative that the trial determine that the Nazis were the ones who began aggressive action, and, thus, were in violation of collective security measures meant to insure peace. Similarly, Japanese officials, albeit in accordance with a deliberately natural law approach devised by Kennan,³⁸⁹ were to be held responsible for acting in an unjust manner in breaching the peace of nations. Pal's criticism of Kennan extended to Japanese involvement in

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ The majority judgment at the International Military Tribunal for the Far East (IMTFE) stated that "aggressive war was a crime at international law long prior to the date of the Declaration at Potsdam." However, according to Bert V.A. Roling, a fellow member of the IMTFE bench, Pal's "Dissentient Judgment" concluded that aggressive war had not been criminalized at the time of the post-Second World War tribunals. Although, said Roling, the IMTFE majority decision did not repeat the Nuremberg judgment, the IMTFE still professed "unqualified adherence" to the decision of its predecessor. Accordingly, the emphasis placed on aggressive war at the IMT was just as problematic when applied to the case against Japanese war criminals at the IMTFE. Bert V.A. Roling, "The Nuremberg and the Tokyo Trials in Retrospect," in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 465. Technically, however, the IMTFE was not implementing *ex post facto law*, since the emperor, as signatory to the Potsdam Declaration, (Proclamation Defining Terms for Japanese Surrender, 26 July, 1945), unconditionally accepted criminal proceedings against accused Japanese war criminals. The emperor stated, "I could not bear the sight...of those responsible for the war being punished...but I think that now is the time to bear the unbearable." Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008), 81.

³⁸⁸ Lend-Lease Agreement, "A Decade of American Foreign Policy 1941-1949 Master Lend-Lease Agreement," *The Avalon Project: Documents in Law, History and Diplomacy*, Accessed November 9, 2017, http://avalon.law.yale.edu/20th_century/decade04.asp

³⁸⁹ Shklar, *Legalism*, 186.

the Nanking Massacre, which, though brutal, was not the “product of government policy” for which Japanese officials were to be held directly responsible under the conspiracy to commit an aggressive war. He claimed that there is "no evidence, testimonial or circumstantial, concomitant, prospectant, retrospectant, that would in any way lead to the inference that the government in any way permitted the commission of such offenses".³⁹⁰ He added, however, that neither from the beginning of the six-week assault on Nanjing by the Japanese starting on December 13, 1937, nor at any point after, was conspiracy to wage aggressive war illegal. Pal’s decision, however, to place the Japanese in the same category as his colonized home country, India, remains inappropriate. Having colonized several countries, including Manchuria and eastern Mongolia, which the Japanese invaded in 1931, and subsequently turned into the puppet state of Manchukuo, and having committing gross violation of human rights,³⁹¹ the Japanese were more like Nazi aggressors than India, ruled by the British Crown from 1858 to 1947.

If a similarity did exist it was in the fact that Japan traditionally had not been considered civilized by European states.³⁹² The problem is that two sets of rules for European and non-European, colonizer and colonized, existed. While the Victorian era that coincided with the period of Queen Victoria’s rule (1837-1901) was a period of relative peace amongst the great European powers, colonial expansion in Asia and Africa made the British Empire, for example, the largest empire in history. Martti Koskenniemi in *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* chronicles a plural, if heavily-weighted social Darwinian “anthropological” view of gradations of civilization. He writes that “by the 1870s the

³⁹⁰ Timothy Brook, "The Tokyo Judgment and the Rape of Nanking", *The Journal of Asian Studies* 60, no. 3 (2001): 673-700.

³⁹¹ Iris Chang, *Rape Of Nanking : The Forgotten Holocaust Of World War II* (New York: Basic Books, 2014).

³⁹² Rotem Kowner, *From White to Yellow: The Japanese in European Racial Thought 1300-1735*, (Montreal: McGill-Queen’s University Press, 2014).

assumption of human development proceeding by stages from the primitive to the civilized had come to form the bedrock of social anthropology and evolutionary sociology that provided much of the conceptual background for cultivated European reflection about what Europeans often sweepingly termed the Orient.”³⁹³ The Japanese, though assuming control over their sphere of influence, were considered less civilized in the estimation of European imperialists. Nowhere was this more apparent than in the decision of signatories to the Kellogg-Briand Pact not to recognize Japanese rule over Manchukuo, whereas the Italian invasion in the Second Italo-Ethiopian War, a colonial war that took place from October 1935 to May 1936 did not delegitimize Italian conquest. This double-standard reflected preferential treatment granted to a fellow European colonial power.³⁹⁴

Although Kelsen continued to uphold *bellum justum* theory in his last major work on the subject, *Principles of International Law* (1967), he acknowledged the “equally serious...objection [to just war theory] resting on the argument that only a state which is stronger than its adversary state is in a position to use war as a legitimate instrument of coercion.”³⁹⁵ Still, the theoretical foundation he provided for a *status quo* logic preferencing an international order

³⁹³ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, UK: Cambridge University Press, 2004), 101.

³⁹⁴ Two sets of laws existed—one for the civilized, imperial nations, the other for the primitive and subjugated. Montesquieu (1689-1755) in *On The Spirit of Laws* (1748), surveying the variety of human societies, distinguished between laws in general and those particular to certain nations. The first, based on human reason, applied to all nations; the second, emphasizing society and culture, was acknowledged to be irreconcilable with universal principles. Montesquieu writes of laws in particular “that [they] should be in relation to the nature and principle of each government...to the climate of each country, to the quality of its soil, to its situation and extent...to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners and customs.” Baron de Montesquieu, *On The Spirit of Laws*, Thomas Nugent transl. (New York: Hafner & Collier, 1949 [1748]), 6 in Koskenniemi, *The Gentle Civilizer of Nations*, 100.

³⁹⁵ Hans Kelsen, *Principles of International Law*, ed. Robert W. Tucker (New York: Holt, Rinehart and Winston, 1967), 29-33.; See also: Danilo Zolo, “Hans Kelsen: International Peace through International Law,” *European Journal of International Law* 9, (1998): 315.

dominated by western imperial nations, aided Jackson's effort to establish the allied right of prosecution.

Part III describes the reasons Kelsen, though skeptical of *ad hoc* jurisdictional authority, believed the Nuremberg proceedings to be internally affair.

V. Victor's Justice

Those who focus on Kelsen's skepticism towards the Nuremberg proceedings³⁹⁶ have determined that he was uncompromising with respect to prosecution under *ad hoc* jurisdictional authority. While his preference was certainly for a neutral, permanent and compulsory international court adjudicating humanitarian crimes, there is no reason to believe that he was not just as likely to endorse the imputation of individual responsibility under less-than-ideal conditions as he was to impute collective responsibility for unjust—or aggressive—warfare when no impartial international body had yet been established to decide on such matters. Kelsen nonetheless writes that:

If the principles applied in the Nuremberg Trial were to become a precedent, then, after the next war, the governments of the victorious States would try the members of the governments of the vanquished States for having committed crimes determined

³⁹⁶ Robert Cryer, "The Philosophy of International Criminal Law," in *Research Handbook on the Theory and History of International Law*, ed. Alexander Orakhelashvili (Cheltenham, UK: Edward Elgar, 2011), 234-235; Andrea Gattini, "Kelsen's Contributions to International Criminal Law," 795-809; Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection: A Judge's Recollection* (Oxford, UK: Oxford University Press, 2012), 205; Monica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013), 233; ; Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads: Philosophical Reflections on the Principles of the International Legal Order* (Vienna: Springer, 2003); Danilo Zolo, "Peace through Criminal Law?," *Journal of International Criminal Justice* 2 (2004): 727-734; Danilo Zolo, "Who is Afraid of Punishing Aggressors? On the Double-Track Approach to International Criminal Justice," *Journal of International Criminal Justice* 5 (2007): 799-807; Danilo Zolo, *Victors' Justice: From Nuremberg to Baghdad* (New York: Verso, 2009)

unilaterally and with retroactive force by the former. Let us hope that there is no such precedent.³⁹⁷

The Italian philosopher Danilo Zolo, critical of the undercurrent of imperialism in Kelsen's writings on just war theory, nevertheless affirms Kelsen's status as a leading critic of the Nuremberg proceedings. Zolo asserts that:

The severest critique of all, what has found almost universal consensus, is the one formulated by Kelsen. The punishment of war criminals—not only Nazis—was supposed to be an act of justice and not the continuation of hostilities by means purporting to be judicial, but in fact betraying the desire for revenge. For Kelsen, it was incompatible with the function of justice that only the defeated nations were obliged to submit their citizens to the jurisdiction of a criminal court. The victorious nations should also have accepted that citizens of theirs who had committed war crimes should be brought to trial.³⁹⁸

That Kelsen preferred that an international law system be established that conformed to his blueprint for a Permanent League for the Maintenance of Peace (PLMP) with a compulsory international court deciding on the merit of claims to just warfare and individual criminality (as described in chapter two), he also recognized the importance of trying war criminals, even under *ad hoc* conditions. The remainder of this section argues that despite his enduring criticism of *ad hoc* jurisdictional authority—and the prospect of “victor's justice”—Kelsen understood that without a permanent international court, justice still recommended the prosecution of major Nazi war criminals.

³⁹⁷ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 289. For a recent iteration of this subject, see: Petar Bojanić, “Will the Judgment in the Hague Trial Constitute a Precedent in International Law?,” *Sociological Review* no. 1 (2006): 93–114.

³⁹⁸ Danilo Zolo, *Victors' Justice: From Nuremberg to Baghdad* (New York: Verso Books, 2009), 28

Due to the composition of the Nuremberg tribunal, and the fact that Germany was not a signatory to the IMT charter, Kelsen held that the trial was suspect. The London Agreement concluded by the four victorious powers and “adhered to by other states of the United Nations,”³⁹⁹ provided the legal basis for the trial, said Kelsen, not a legislative act of the four occupant nations as “the legitimate successors of the German government.”⁴⁰⁰ Without Germany as a signatory to the agreement or else jurisdictional licensure under *debellatio*, Pure Theory’s author questioned the authority of the allies to impose justice.⁴⁰¹

Debellatio, as one modern writer has described it, occurs when “one party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue to challenge its enemy militarily on its behalf”.⁴⁰² In the case of Germany, most of its territory before the *Anschluss* (i.e., the annexation of Austria into Nazi Germany that occurred on March 12, 1938) had not been integrated under the dominion of the Allied Control Council. The German state, therefore, *de jure* continued to exist. When the Federal Republic of Germany was established at the end of the Allied occupation, a continuous claim of sovereignty was maintained.⁴⁰³ As legal successor to the Third Reich, the Federal Republic confirmed this jurisdictional problem, which Kelsen argued contravened the public international law principle

³⁹⁹Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (Oxford: Oxford University Press, 2008), 288.

⁴⁰⁰*Ibid.*

⁴⁰¹ Hans Kelsen, “The Legal Status of Germany according to the Declaration of Berlin,” *The American Journal of International Law* 39 (1945): 518–526.

⁴⁰² Eyal Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012), 161

⁴⁰³ Detlef Junker *et al.* (2004). *The United States and Germany in the Era of the Cold War, 1945-1990: A Handbook (Vol 2)*, (Cambridge, UK: Cambridge University Press, 2004), 104.

that “one sovereign power cannot exercise jurisdiction over another sovereign power [which] is the basis of the act of state doctrine and sovereign immunity.”⁴⁰⁴

Although “in the realm of law the formal aspect [was] essential,” Kelsen said, “the objection against the Nuremberg trial arising out of this deficiency [was] not the most serious one.”⁴⁰⁵ For Kelsen, the tribunal judgment was even more problematic because it imposed the will of the victorious powers on the vanquished. Notwithstanding these valid concerns, Kelsen provides compelling reason for why *ad hoc* jurisdiction, even as practiced at Nuremberg, was a viable option in the absence of a permanent and compulsory international court. While he would have preferred an “international court endowed with the competence to try individuals...for those grave violations of international law which of necessity will have the character of acts of state” he recognized the “studiously general terms in which the judgment of the International Military Tribunal was cast.”⁴⁰⁶ In recognizing the effort to afford defendants’ rights guaranteed under domestic jurisdiction, including the right to a fair trial, the presumption of innocence, the fair chance to present a defense, including access to counsel and evidence to counter claims made against Nazis, including alibi evidence, the equity of the case could not be dismissed.

Even Kelsen’s fiercest critics, including Judith Shklar in *Legalism: Law, Morals and Political Trials*, who concludes that the Pure Theory of Law’s structural account remains devoid of political and moral qualities, and therefore is of little use to understanding how the law

⁴⁰⁴ “Par in Parem Non Habet Imperium,” *Oxford Reference*, accessed January 22, 2017, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100306400>

⁴⁰⁵Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 288.

⁴⁰⁶ Hans Kelsen, *Principles of International Law*, ed. Robert W. Tucker (New York: Holt, Rinehart and Winston, 1967), 219.

actually works, is in agreement on this point.⁴⁰⁷ She writes that “what distinguishes most, though not all, political trials is that...to some degree most political trials [do] not begin with the idea of law, but with the idea that this man must go. The judge will be subservient to the prosecution, the evidence false, the accused bullied, the witnesses perjured, and rules of law and procedure ignored. This is, as it were, the classical model of a political trial.”⁴⁰⁸ At Nuremberg, despite the retroactive creation of criminal laws applicable to the defendants, “the Trial,” she writes, “was internally fair. Each defendant [had] a German counsel of his own choice, the guilt of each was individually established before punishment, two of the defendants were acquitted entirely, and several were acquitted of one or more charges.”⁴⁰⁹

Kelsen stated that contravention of the rule of law should not be reduced to the rule against *ex post facto* lawmaking alone. While the US Constitution under Article 1, Section 10, Clause 1 asserts that “No state shall...pass any...ex post facto law...,” retroactive lawmaking, Kelsen states, is “an absolute principle expressing a logical necessity. Its value is highly relative and the sphere of its validity restricted.”⁴¹⁰ Therefore, the decision of the International Military Tribunal to affirm retroactive lawmaking is not a violation of a general rule applicable under all jurisdictional authority, rather, claims to fairness, where every person is subject to the same law, whether head-of-state or low-level state official, must be considered in accordance with a higher normative principle

⁴⁰⁷ For more on Shklar’s highly regarded, if uneven critique of Kelsen, see chapter two.

⁴⁰⁸ Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, Massachusetts: Harvard University Press, 1964), 149.; See also: Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, NJ: Princeton University Press, 1961), 319-338. Kirchheimer distinguishes between the Nuremberg proceedings and traditional political trials, emphasizing that the International Military Tribunal upheld standards of justice lacking, for instance, in Soviet show trials.

⁴⁰⁹ *Legalism*, 168

⁴¹⁰ Hans Kelsen, “The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” *Judge Advocate Journal* 8, no. 2 (Fall 1945): 8-9.

Once Kelsen's view of international criminal responsibility with its emphasis on prosecution of individuals for having committed core international crimes is accounted for, a fundamental moral expectation rather than "justice as peace" becomes the central pivot of a philosophy of law that otherwise is assumed to banish "alien elements". In refocusing our attention on the meaning of international criminal responsibility for this leading twentieth century legal positivist, "the moral minimum" that Kelsen himself claims must be kept separate from a pure legal cognition⁴¹¹ appears impossible to exclude.

Kelsen makes this clear when he writes:

Even if atrocities are covered by municipal law, or have the character of acts of State and hence do not constitute individual criminal responsibility, they are certainly open violations of the principles of morality generally recognized by civilized people and hence were, at least, morally not innocent or indifferent when they were committed.⁴¹²

The next section (Part IV) explores the method of *ex post facto* lawmaking. Often neglected in the effort to prove the positivity of the case, prosecution, if for different reasons than the courts, subscribed to a retroactive logic. While difficult to prove that Kelsen caused allied practitioners to assert a retroactive line of reasoning, the view, for example, that Kelsen's student, Hersch Lauterpacht, deserves greater credit than Kelsen for influencing Jackson's

⁴¹¹ Kelsen writes: "[W]e by no means accept the theory that law essentially represents a 'moral minimum', that for a coercive order to be able to figure as law, it must fulfill a minimum requirement of morality. For this requirement presupposes an absolute morality of determinate content, or at least a content common to all positive moral systems, and for the most part, indeed, it postulates the ideal of peace as the requirement of an absolute morality, or as a content common to all positive moral systems." Hans Kelsen, "Law and Morality, in *Essays in Legal and Moral Philosophy*, ed. Ota Weinberger (Dordrecht, Holland: D. Reidel Publishing Company, 1973), 89. With the introduction of retroactive lawmaking for offenses in which state officials were to be held "morally responsible," Kelsen proves that he indeed subscribes to a "moral minimum," notwithstanding, his claim to "purity".

⁴¹² Hans Kelsen, "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," *Judge Advocate Journal* 8, no. 2 (Fall 1945): 10-11.

methodological approach must be reconsidered.⁴¹³ While Lauterpacht insisted on the criminality of treaty laws banishing war, Kelsen asserted a mode of reasoning independent of prospective international legal norms. In this respect, not only should the recent claims of Hathaway and Shapiro that the trial proved “that those who waged aggressive war could be put in the dock” deserve qualification, but denominating “Hersch The Great...the father of the New World Order” detracts from a sober assessment of his teacher’s role in the formation of the concept of international criminal responsibility at this early stage. While Hathaway and Shapiro are certain that Lauterpacht’s “legacy...was nothing less than [validating] a system of rules embodying the idea that war is an illegitimate tool for establishing or enforcing legal right,”⁴¹⁴ Kelsen in licensing retroactivity created the legal foundation in the post-war era for *ad hoc* international tribunals that would place crimes against humanity at the forefront of subject matter jurisdiction.⁴¹⁵

VI. Criticism of the Application of Crimes Against Peace at Nuremberg

The Hague Convention of 1899 and 1907, which established the rules of war, including prohibitions on the use of poisons and the attack or bombardment of undefended towns, as well as the Geneva Conventions of 1929 regulating the treatment of war prisoners, were “signposts on the road toward a growing conviction that aggressive war must somehow be abolished.”⁴¹⁶

⁴¹³ On Lauterpacht’s influence, see: Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017).

⁴¹⁴ *Ibid.*, 303-305.

⁴¹⁵ For a skeptical account of Kelsen’s contributions to the Nuremberg proceedings, written by a scholar who otherwise places the author of the Pure Theory of Law in a central position as a major proponent of “peace through law,” see: Jochen von Bernstorff, “Peace and Global Justice through Prosecuting the Crime of Aggression? Kelsen and Morgenthau on the Nuremberg Trials and the International Judicial Function,” in *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence*, ed. D.A. Jeremy Telman (Switzerland: Springer International Publishing, 2016), 90-104.

⁴¹⁶ Sheldon Glueck, “The Nuernberg Trial and Aggressive War,” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 82.

Jackson remarked in his opening address at Nuremberg that “any resort to war—to any kind of war—is a resort to means that are inherently criminal.”⁴¹⁷ He insisted that defendants were aware that at the time of commission of illegal wars, they were committing a criminal act. In “Nuremberg in Retrospect: Legal Answer to International Lawlessness,” Jackson stated that after Germany violated treaties of friendship and non-aggression with “a dozen unprepared countries,” “came a series of unequivocal warnings that the course of its leaders was regarded as outside the bounds of modern warfare and criminal.”⁴¹⁸

These warnings included the St. James Declaration (1942) by representatives of nine occupied “governments-in-exile” meeting in London, who stated that their principle war aim was “punishment, through the channels of organized justice, of those guilty of or responsible for these crimes...”⁴¹⁹; the Moscow Declaration (1943), signed by the foreign secretaries of the United States, United Kingdom, the Soviet Union and Nationalist China, which insisted that “fascist chiefs and army generals known or suspected to be war criminals shall be arrested and handed over to justice”⁴²⁰; and the United Nations War Crimes Commission (1943-48), comprised of seventeen nations⁴²¹ tasked with collecting evidence of war crimes perpetrated by axis officials.

⁴¹⁷ Opening Address by Robert H. Jackson, “Nazi Conspiracy & Aggression, Volume I, Chapter VII, Office of the United States Chief Counsel for Prosecution of Axis Criminality, United States Government Printing Office, Washington, 1946.” *Nizkor*; 1991-2012, <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-01/tgmwc-01-02-08.html>.

⁴¹⁸ Robert H. Jackson, “Nuremberg in Retrospect: Legal Answer to International Lawlessness,” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 356.

⁴¹⁹ St. James Declaration (1941), “1941: The Declaration of St. James’ Palace,” *United Nations*, <http://www.un.org/en/sections/history-united-nations-charter/1941-declaration-st-james-palace/index.html>

⁴²⁰ Moscow Declaration (1943), “Moscow Conference; October 1943,” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, <http://avalon.law.yale.edu/wwii/moscow.asp>.

⁴²¹ United Nations War Crimes Commission, “United Nations War Crimes Commission (UNWCC) Records,” *United Nations Archive*, 1942-1949, <https://search.archives.un.org/united-nations-war-crimes-commission-unwcc-records-new-series-s-1848-please-see-notes>.

In addition, Jackson made use of the Draft Treaty of Mutual Assistance (1923) sponsored by the League of Nations, which declared in Article 1 “that aggressive war is an *international crime*,” and that more than a dozen parties to the treaty obligated themselves to “undertake that no one of them will be guilty of its commission”⁴²²; the preamble to the League of Nations’ Protocol of the Settlement of International Disputes or ‘Geneva Protocol’ (1924), accepted by 48 Members of the League of Nations, which stated that “a war of aggression constitutes a violation of...[the solidarity of the members of the international community] and an ‘international crime’”⁴²³; the Locarno Pact or Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy (1925)⁴²⁴; the Eighteenth Plenary Meeting of the Assembly of the League of Nations (1927)⁴²⁵ pronouncing a Declaration Concerning Wars of Aggression; the Unanimous Resolution of the twenty-one American Republics at the Sixth (Havana) Pan-American Conference (1928) stating that “wars of aggression constituted *international crimes against the human species*”⁴²⁶; the International Conference of American States on Conciliation and

⁴²² Draft Treaty of Mutual Assistance (1923), “League of Nations Reduction of Armaments. Report of the Third Committee to the Fourth Assembly,” *Northwestern University Library*, <http://digital.library.northwestern.edu/league/le000168.pdf>

⁴²³ Geneva Protocol (1924), “League of Nations, Protocol for the Pacific Settlement of International Disputes, 2 October 1924,” *United Nations Refugee Agency*, November 5, 2017, <http://www.refworld.org/docid/40421a204.html>.

⁴²⁴ The Locarno Pact (1925), “The Locarno Pact or Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/locarno_001.asp.

⁴²⁵ Eighteenth Plenary Meeting of the Assembly of the League of Nations (1927), “Resolutions and Recommendations adopted on the Reports of the Third Committee,” *League of Nations Official Journal*, 2013, <http://www.derechos.org/peace/dia/doc/dia11.html>

⁴²⁶ Unanimous Resolution of the twenty-one American Republics at the Sixth (Havana) Pan-American Conference (1928), “The Sixth Pan-American Conference,” *CQ Press Library*, 2017, <http://library.cqpress.com/cqresearcher/document.php?id=cqresre1928011200>.

Arbitration (1929)⁴²⁷; and the Anti-War Treaty of Non-Aggression and Conciliation (1933)⁴²⁸ ratified by 25 states.

The 1927 US Senate Resolution introduced by Idaho Senator William E. Borah stated “that it is the view of the Senate of the United States that war between nations should be outlawed as an institution or means of the settlement of international controversies by making it *a public crime under the law of nations*”⁴²⁹ Finally, the Kellogg-Briand Pact, the Treaty of Paris, or more formally, the General Treaty for Renunciation of War as an Instrument of National Policy (1928), ratified by representatives of nearly all the nations of the world, demonstrated “a widely prevalent juristic climate which has energized a spreading custom among civilized peoples to regard a war of aggression as not simply ‘unjust’ or ‘illegal’ but downright criminal.”⁴³⁰

Kelsen disagreed. He contended that neither Kellogg-Briand, nor any of the other treaties, did anything more than designate certain wars as illegal, granting the right of reprisal and war directed against states violating the agreement. Thus, the pact did not constitute individual criminal responsibility, only collective responsibility. While it confirmed a general conviction among States to resolve conflicts peacefully, Kelsen considered it problematic to deduce individual criminal responsibility from acts denominated illegal under the Pact, as the

⁴²⁷ International Conference of American States on Conciliation and Arbitration (1929), “Proceedings of the International Conference of American States on Conciliation and Arbitration Held at Washington December 10, 1928-January 5, 1929,” United States Government Printing Office Washington, 1929, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015073399993;view=1up;seq=5>.

⁴²⁸ Anti-War Treaty of Non-Aggression and Conciliation, “Anti-war Treaty of Non-aggression and Conciliation (Saavedra Lamas Treaty); October 10, 1933,” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/intam01.asp.

⁴²⁹ SEN. RES. NO. 45, 70th Cong., 1st Sess. (1927) in Sheldon Glueck, “The Nuernberg Trial and Aggressive War,” in *Perspectives on the Nuremberg trial*, ed. Guénaël Mettraux (Oxford: Oxford University Press, 2008), 84.

⁴³⁰ *Ibid.*, 85.

International Military Tribunal did in its judgment “that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.”⁴³¹ It “is in contradiction,” says Kelsen, “with positive law and generally accepted principles of international jurisprudence.”⁴³² He remarks in “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” (1947) that:

The treaties for whose violation the London Agreement establishes individual criminal responsibility are in the first place the Briand-Kellogg Pact of 1928, and certain non-aggression pacts concluded by Germany with States against which Germany, in spite of these treaties, resorted to war. All these treaties forbade only resort to war, and not planning, preparation, initiation of war or conspiracy for the accomplishment of such actions. None of these treaties stipulated individual criminal responsibility.⁴³³

Still, Kelsen did not criticize Jackson for emphasizing the crimes against peace charge, only his reliance on treaty law to prove the right to try Nazis. In “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals” (1943), Kelsen, writes that “the demand to punish the war criminals is, or should be, above all, the demand to punish the authors of the second World War, the persons morally responsible for one of the greatest crimes in the history of mankind.”⁴³⁴ Kelsen uses moral normative language (i.e., “persons morally responsible”) to demonstrate that crimes against peace was to be the

⁴³¹ IMT Judgment, “Judgment: The Law of the Charter,” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, <http://avalon.law.yale.edu/imt/judlawch.asp>.; See also: Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 276.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals”. *California Law Review* 31, no. 5 (1943): 531.

preeminent charge.⁴³⁵ Yet his endorsement of the primacy of the crimes against peace charge *does not necessitate* agreement with the method used to prove its criminality.

Retroactive lawmaking, according to Kelsen, is the only other choice when no international treaty stipulates criminality.⁴³⁶ Whether retroactive legislation ought to be introduced is therefore dependent on the state of development of the international law system. While it is not ideal to apply retroactive laws, an *ad hoc* order may require prosecution of offenses that under national law would certainly be criminalizable. With time, the development of legal norms applicable prospectively, heralding a federated world state with a permanent compulsory international court adjudicating cases against war criminals, would, he believed, replace *ad hoc* international justice. However, as long as international law remained in a decentralized form, retroactive lawmaking based on substantive criterion would need to be enforced.

Kelsen writes, “since the internationally illegal acts for which the London Agreement established individual criminal responsibility *were certainly also morally most objectionable*, and the persons who committed these acts *were certainly aware of their immoral character*, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with

⁴³⁵ Kelsen distinguishes between crimes against peace and aggressive war. Not all aggressive wars are crimes against peace; all crimes against peace, however, are aggressive wars. Kelsen writes: “‘A war waged in violation of treaties prohibiting resort to war, especially in violation of the Briand-Kellogg Pact, is certainly illegal. It is not necessarily a ‘war of aggression’, as the London Agreement assumes. A war of aggression is a war on the part of the State which is the first to enter hostilities against its opponents. Such action may be legal as well as illegal. When France and Great Britain, in 1939, resorted to war against Germany without being attacked by her, their war was technically a war of aggression but in complete conformity with the Briand-Kellogg Pact, and, hence, legal.’” Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 276.

⁴³⁶ See: chapter two of this dissertation for a discussion of Kelsen’s problematic designation of retroactivity as positive law.

justice.”⁴³⁷ (my emphasis). The application of retroactive legislation does not necessitate an evaluation of the preeminence of the allied cause, only whether the act was ‘morally most objectionable’.

After determining that “in the second place, the crimes for which retribution may be claimed are breaches of the rules of international law regulating the conduct of war”⁴³⁸—or war crimes—Kelsen hesitated to implicate crimes against humanity, which he referred to under the rubric of “principles of humanity”. He writes:

The demand for retribution is sometimes extended to violations of the principles of humanity, that is to say, to acts which, though not illegal from the point of view of international or national law, are breaches of the norms of morality against which neither international nor national law provides any sanction, and for which no legal responsibility is established.⁴³⁹

Despite remarking in his correspondence with Jackson that such violations did not constitute law,⁴⁴⁰ “it was Kelsen’s conviction that on the eve of the intended prosecution of Nazi criminals the legal basis ought to be re-established in order to be able to try former members of the German government for having started the war and for their violations of the principles of humanity.”⁴⁴¹ Kelsen’s recommendation that this charge be designated an offense by which retroactive lawmaking be employed under the London Agreement proves that, statements to the contrary, he confirmed that crimes against humanity were not only valid, but “morally most

⁴³⁷ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 284.

⁴³⁸ *Ibid.*

⁴³⁹ Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals”. *California Law Review* 31, no. 5 (1943): 532.

⁴⁴⁰ Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013), 364.

⁴⁴¹ *Ibid.*

objectionable.” With the post-Second World War ratification of humanitarian treaties applicable to internal atrocities, such as the Genocide Convention (1948) and Geneva IV (1949), subsequent case studies demonstrate Kelsen’s intensified support for sanctions with respect to violations of “principles of humanity”.

While Kelsen rejected Kellogg-Briand as criminalizing core international offenses, violations of state practice were not the reason for his dismissal. George Schwarzerberger, a political realist and scholar on international criminal law at the time of the Second World War, claimed that neither Kellogg-Briand nor any of the other pronouncements on aggressive warfare were legally binding, because state practice proved that prior agreements were void. In addition to Nazi aggression towards Poland (1939), Schwarzenberger included the invasion of Manchuria by the Soviet Union (1929), and later by Japan (1931), as well as the Soviet Winter War against Finland (1939-40) to demonstrate that state practice could not be established in advance of the proceedings.⁴⁴² This is important to any discussion of Kelsen’s contributions in the post-Cold War era (see: chapter five), where the construction of customary international law has been based, in part, on a far less rigid determination of state practice.

Kelsen also disagreed with the rationale of judges. According to the IMT Judgment (as quoted by Kelsen):

In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing...But 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

⁴⁴² Georg Schwarzenberger, “The Judgment of Nuremberg,” in *Perspectives on the Nuremberg trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 347-348.

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 dates of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor 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. 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.⁴⁴³

Kelsen was critical of the court's analogy. While the Hague Convention regulating the conduct of war had been transformed into positive national criminal law, the Kellogg-Briand Pact had not. No state had changed the rules of international law into sanctionable criminal offenses after the ratification of Kellogg-Briand. Moreover, no individual had been tried or punished by a military tribunal for having resorted to an illegal war prior to the London Agreement. Therefore, "neither by the doctrine of the American prosecutor," writes Kelsen, "nor by the doctrine of the tribunal is it possible to prove that existing international law, especially the Briand-Kellogg Pact, has already established individual criminal responsibility for acts by which a State resorts to an internationally illegal war...For the tribunal they were criminal, and that means punishable, only under the law created by the London Agreement, which is the only legal basis of the judgment."⁴⁴⁴

⁴⁴³ Hans Kelsen, *Principles of International Law*, ed. Robert W. Tucker (New York: Holt, Rinehart and Winston, 1967) 216-217.; See also: Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent?" in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 280. "Kelsen writes that "Article 3 of the [Hague] Convention stipulates only that a belligerent party which violates the provisions of the regulations respecting the laws and customs of war on land 'shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'. Hence also acts not performed at the command or with the authorisation of the government. Under general international law, a belligerent party may resort to reprisals against the enemy which has violated the Convention." Hence, only collective, not individual, responsibility is stipulated by the Hague Convention.

⁴⁴⁴ Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent?" in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 281.

While prosecution and court reasoned that aggressive war was criminalizable based on previous international agreements, especially Kellogg-Briand, a review of Jackson's writings and the IMT judgment demonstrate that retroactive lawmaking assumed primacy, and thus Kelsen's rationale dominated the consensus opinion amongst practitioners. Jackson writes:

If no moral principle is entitled to application as law until it is first embodied in a text and promulgated as a command by some superior effective authority, *then it must be admitted the world was without such a text at the time the acts I have recited took place*. No sovereign legislative act to which the Germans must bow had defined international crimes, fixed penalties and set up courts to adjudge them. From the premise that nothing is law if not embraced in a sovereign command, it is easy to argue that the Nuremberg trial applied retroactive, or *ex post facto* law.⁴⁴⁵ (my emphasis)

While Jackson admits that the common law tradition, based on the inductive logic of general rules developed from particular decisions, preferences a less text-bound approach, he nevertheless "does not deny the authority of the London charter."⁴⁴⁶ "The judge reaches a decision more largely upon consideration of the inherent quality and natural effect of the act in question...[in] what has sometimes been called a natural law that binds each man to refrain from acts so inherently wrong and injurious to others that he must know they will be treated as criminal."⁴⁴⁷ In so doing, Jackson admits to the same substantive prerequisite of retroactive justice that Kelsen used to determine international criminal responsibility.

The Literature Review (chapter two) described Kelsen's positive law rationale for retroactive lawmaking. While Kelsen's position contradicted Austin's classical legal positivist approach, which contended that command was always future-oriented, since commanding a past

⁴⁴⁵ Robert H. Jackson, "Nuremberg in Retrospect: Legal Answer to International Lawlessness," in Guénaél Mettraux (Oxford: Oxford University Press, 2008), 368.

⁴⁴⁶ Ibid., 369.

⁴⁴⁷ Ibid.

event would be a contradiction in terms, Kelsen nevertheless asserts that retroactivity is a legitimate, if exceptional, positive law approach to criminalization. By claiming that natural law theory prohibited *ex post facto* lawmaking on the grounds that individuals subject to the rule of law, “whose legal conduct is prescribed by the rule,”⁴⁴⁸ are protected from prosecution, Kelsen assumes that those natural lawyers who describe the “inner morality” of law as protecting individuals from the predations of dictatorships and other forms of government that flout the inviolability of human freedom, represent the totality of natural law thinking.⁴⁴⁹ Rather, natural law thinking, as Jackson noted, retroactively “binds each man to refrain from acts so inherently wrong and injurious to others that he must know they will be treated as criminal.”⁴⁵⁰ Thus, it is the substantive nature of an act that is the condition of prosecution. Even Kelsen, who argues along structural lines for the positive validity of retroactive lawmaking, admits as much.

IMT judges stated that “the maxim *nullem crimen sine lege* (Latin: “no crime without law”) is not a limitation of sovereignty, but is in general a principle of justice.”⁴⁵¹ Kelsen similarly remarks that state constitutions often prohibit *ex post facto* lawmaking, a reflection of a more centralized legal order insuring legal protections for individuals. General international law, however, does not prohibit retroactivity. While IMT judges attempted to anchor their view in

⁴⁴⁸ Hans Kelsen, “The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” *Judge Advocate Journal* 8, no. 2 (Fall 1945): 8.

⁴⁴⁹ When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretense of legality,” then society has compromised the rule of law to autocratic principles. Lon Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart,” *Harvard Law Review* 71, no. 4 (1958): 660. See also: Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

⁴⁵⁰ Robert H. Jackson, “Nuremberg in Retrospect: Legal Answer to International Lawlessness,” in Guénaél Mettraux (Oxford: Oxford University Press, 2008), 369.

⁴⁵¹ IMT Judgment, “Judgment: The Law of the Charter,” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, <http://avalon.law.yale.edu/imt/judlawch.asp>.

legal positivism, like Kelsen they ended up endorsing a line of reasoning centered around “a higher-ranking principle of natural justice.”⁴⁵² As Kelsen writes:

In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exception.⁴⁵³

VII. Conclusion

Since the Nuremberg Tribunal was heavily weighted in the direction of criminalizing aggressive war making, this chapter reviewed the ways in which just war theory was applied to favor “Christian civilization” and a *status quo* logic benefitting imperial nations. While Kelsen’s endorsement of the theory of *bellum justum* provides a legal rationale for assigning collective responsibility, the author of the Pure Theory of Law indicates a general recognition of the problems associated with the application of this theory as the grounds for imputing *individual* criminal responsibility. In contrast, Jackson’s reluctance to concede bias creates the foundation for victor’s justice, as allied powers were *a priori* considered innocent of war offenses.

Despite questioning the authority of the allies to conduct a trial without German ratification of the IMT charter, Kelsen nevertheless fundamentally considered the *ad hoc* proceedings valid, since the trial was internally fair. Moreover, while Kelsen is often assumed to advocate an unyielding view of “justice as peace” (see: chapter two), he is nevertheless committed to developing a conception of ICR that prioritizes protections for victims of human rights abuses separate from any value placed on the peaceful resolution of conflict. In this respect, his decision to endorse *ad hoc* jurisdiction at Nuremberg, based on a moral criterion associated with

⁴⁵² Ibid.

⁴⁵³ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?” in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (Oxford: Oxford University Press, 2008), 284.

retroactive lawmaking ought to be viewed, not as anomalous, but integral to his pure theoretical project.

Since every German was collectively responsible for crimes against peace, in accordance with traditional rules of international law, Kelsen's recommendations related to individual responsibility, which Jackson integrated into what became the final draft of the IMT, advancing the cause of international law. If the focal point of all law, according to Kelsen, is imputation, as designated in the Literature Review (Chapter II, Part I), then international criminal responsibility, even if assigned through a creative juridical methodology (retroactivity) rather than a more conservative one (prospective lawmaking) bolsters the prospect of a more centralized legal authority, since centralized organization is gauged based on the degree to which a society has moved away from collective forms of responsibility towards imputing individual responsibility.

While Jackson insisted that the Kellogg-Briand Pact gave fair warning to the suspects, and was the preeminent reason crimes against peace assumed a central place in the hierarchy of subject matter jurisdiction, like IMT judges, he acknowledged the distinct possibility that Nazi were responsible for their actions *because of* offenses committed in the past, despite no normative law in place to sanction those offenses. In examining how retroactive lawmaking based on moral estimations of responsibility shifted attention away from this "Class A" charge, "which protects the sovereignty of all states, even criminal states, so long as they do not launch wars,"⁴⁵⁴ it is possible to re-think the place of crimes against peace relative to more human rights-oriented international charges.

⁴⁵⁴ David Luban, "The Legacies of Nuremberg," in Guénaél Mettraux (Oxford: Oxford University Press, 2008), 642.

The defense would apparently have preferred [Adolph Eichmann] to plead not guilty on the grounds that under the then existing Nazi legal system he had not done anything wrong, that what he was accused of were not crimes but ‘acts of state,’ over which no other state has jurisdiction (*par in parem imperium non habet*)⁴⁵⁵, that it had been his duty to obey and that, in [Defense Attorney] Servatius’ words, he had committed acts ‘for which you are decorated if you win and go to the gallows if you lose.’⁴⁵⁶

—Hannah Arendt—

Chapter 4

Twilight of the Acts of State Doctrine: Ex Post Facto Lawmaking and the Making of ‘Moral Responsibility’ at the Jerusalem Trial of Adolph Eichmann

I. Introduction

This chapter analyzes the evolving theory and practice of international criminal responsibility (ICR) using Hans Kelsen’s pure theory of law (PTL) as a continuing point of reference. Whereas the last case study reflected on the tension between Kelsen’s licensing of just war theory and his criticism of the approach introduced by the allied prosecution to justify the application of crimes against peace at the International Military Tribunal (IMT) at Nuremberg, this chapter analyzes rival claims in the 1961-62 Jerusalem trial of Nazi SS-*Obersturmbannfuhrer* (Lieutenant Colonel) Adolph Eichmann. On the one hand, Eichmann’s defense counsel Robert Servatius attributed to Kelsen a convincing rationale for immunizing his client on the basis of the acts of

⁴⁵⁵The phrase is translated as “an equal cannot exercise power and jurisdiction over an equal.” Frank Anthony Mantello, *Medieval Latin an Introduction and Bibliographic Guide* (Washington, DC: Catholic Univ. of America Press, 1999), 260. Legal scholar Gaml M. Badr writes, “The origin of the absolute theory of state immunity is usually traced to the maxim *par in parem non habet imperium*. Far from being a Delphic pronouncement or an expression of Socratic wisdom,” writes Badr, “it comes from the pen of the fourteenth century Italian jurist Bartolus. Cited in full it reads ‘*Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*’. The mention of *civitas* would indicate that what Bartolus had in mind were state-to-state relationships, probably the only kind of a state’s transnational relations which was of any importance in his time. Every state is doubtless the peer of every other state at the level of the interaction of supreme political authorities, not to say sovereignties, and no jurisdiction may, or indeed can, be exercised by one state over another at that level.” Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (The Hague: M. Nijhoff, 1984), 89.

⁴⁵⁶ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994), 21-22.

state doctrine (AoSD), and on the other, Israel's prosecutor, Gideon Hausner, and judges in the case, turn to Kelsen in support of retroactive lawmaking based on moral criterion.

While no direct evidence of Kelsen's view of Eichmann's culpability exists, read in the context of his moral licensing of *ex post facto* lawmaking, Pure Theory's author arguably would have accepted the judgment rendered by Israel's court. Kelsen's brief, if inconclusive, reference to the Eichmann case in a footnote in *Principles of International Law* (1967) does not deny the possibility that he would have endorsed prosecution. "As for the retroactive aspect of the Israeli law," he writes, "the Court stated 'the penal jurisdiction of a state with respect to crimes committed by 'foreign offenders' insofar as it does not conflict on other grounds with the principles of international law, is not limited by the prohibition of retroactive effect.'"⁴⁵⁷ This chapter is an exercise in thinking through Kelsen's position on *ex post facto* lawmaking as the higher form of justice in cases where an act of state does not immunize an official from assuming "moral responsibility".⁴⁵⁸

As with other case studies, chapter four confronts the main obstacle at a given moment in ICL history to realizing a moral conception of ICR. A seemingly unlikely candidate to guide us along this path to recognition, given his express commitment to the separation of law from morality or "the separation thesis" (see: chapter two), Kelsen is nevertheless critical to proving the limits of ICR as an object of positive legal cognition. Acts of State were defined by Kelsen as "acts performed by individuals in their capacity as organs of the State and therefore acts imputed to the State."⁴⁵⁹ In Eichmann's trial, these 'protections' proved to be useless. Both Israel's

⁴⁵⁷ Hans Kelsen and Robert Warren Tucker, *Principles of International Law* (New York: Holt, Rinehart and Winston, 1967), 311.

⁴⁵⁸ *Ibid.*, 310-311.

⁴⁵⁹ Hans Kelsen, "Collective and Individual Responsibility for Acts of State in International Law," *Jewish Yearbook of International Law* 1, no. 1 (1948), 228.

district court and appeals chamber held that previous case law, including the IMT charter and judgments, invalidated the AoSD. The “penal provisions of international law would be a mockery,”⁴⁶⁰ the Supreme Court of Israel adjudged, if states immunized offenses that under normal circumstances would constitute a breach of national law. Since Eichmann’s acts could not be sheltered by the “character of [his] task or mission,”⁴⁶¹ the Supreme Court determined that he was no longer protected by sovereign right.

Head of the Central Office for Jewish Emigration, Adolph Eichmann was responsible for the deportation of European Jewry to ghettos and extermination camps of German-occupied Eastern Europe during the Second World War period, which made him a prime target after his post-war escape from Germany to South America.⁴⁶² Assuming the identity Ricardo Klement, a foreman at an Argentine Mercedes Benz dealership, the Austrian-born Eichmann escaped detection until 1960 when he was abducted in a suburb of Buenos Aires by operatives of Israel’s intelligence agency, Mossad. Brought to Jerusalem without the permission of Argentina’s government, and perhaps in violation of international law, to stand trial for 15 counts of crimes against the Jewish people, war crimes, crimes against humanity, and membership in a hostile organization, the case brought worldwide attention as the most significant war crimes trial since

⁴⁶⁰ Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2013), 655.

⁴⁶¹ Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int’l L. Rep., vol. 36, 309-310, 1968 (English translation).

⁴⁶² Eichmann assumed a principal role in the deportation of Hungarian Jewry in 1944 through the creation of the *Sonderkommando Eichmann*, a special SS unit trained at the Mauthausen concentration camp in Austria and deployed on March 19, 1944, the same day as the Jewish holiday of Purim (a traditional celebration commemorating Persian Jewry’s ‘miraculous’ escape from genocidal destruction by King Ahasuerus’s royal vizier Haman). Approximately 560,000 of a pre-war Hungarian Jewish population comprising 725,000 were deported to extermination camps under Eichmann’s administration. While the vast majority of Jews were sent to Auschwitz, Eichmann was also responsible for overseeing mass deportations to Sobibor, Treblinka and Belzec extermination camps in Poland. See: David Patterson and Alan L. Berger, *Encyclopedia of Holocaust Literature* (Westport, CT [etc.]: Oryx Press, 2002), 106

the IMT.⁴⁶³ Due to the high profile status of the accused, the clandestine nature of the operation, The Jewish State's role in trying a representative of a regime responsible for the genocide of two-thirds of European Jewry, and several enduring debates about the culpability of this "desk murderer"⁴⁶⁴, the case against *Obersturmbannführer* Eichmann remains a significant reference point for any study of ICR. Louis Henkin in *How Nations Behave* (1968) speculated that "one may expect that the Eichmann case will [one day] be cited as some authority for 'universality' for the crime of genocide, and...as a basis of jurisdiction..."⁴⁶⁵

The judgments of the District Court in Jerusalem and Israel's Supreme Court's judgment in appeal differed. While the District Court was mostly concerned with the specific atrocities perpetrated against European Jewry, the Supreme Court focused on the "universal dimensions of the Holocaust."⁴⁶⁶ The Nazi and Nazi Collaborators (Punishment) Law (NNCL) passed by Israel's Knesset in 1950 was the basis for the indictment. The NNCL stated that:

⁴⁶³Eichmann was the most high-profile Nazi to be tried after the IMT. Proceedings against Nazi war criminals, such as the infamous "Doctor's Trial" of Karl Brandt and twenty-two others implicated for human experimentation in Nazi concentration camps, were tried under the American-directed Control Council Law No. 10. Presumably, if Eichmann had been caught after the commencement of the IMT but before subsequent American-led proceedings, he would have been indicted as a co-defendant, rather than as the sole appellant, as was the case in his Jerusalem trial.

⁴⁶⁴ Amongst the most contentious assessments of Eichmann's culpability was Arendt's *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994). While some admirers like Henry Schwartzschild of the Anti-Defamation League of B'nai Brith praised Arendt's portrayal of Eichmann as "Kafkaesquely normal," while warning the writer of ensuing attacks (see: Henry Schwartzschild, Letter to Arendt, Arendt Archive, Library of Congress, March 6, 1963), others provided rebuttals to Arendt's thesis in the immediate aftermath of the publication of *Eichmann*: Jacob Robinson, *And the Crooked Shall Be Made Straight: The Eichmann Trial, the Jewish Catastrophe, and H. Arendt's Narrative* (New York: Macmillan, 1965); Gideon Hausner, *Justice in Jerusalem* (New York: Holocaust Library: distributed by Schocken Books, 1977); Norman Podhoretz, "Hannah Arendt on Eichmann: A Study in the Perversity of Brilliance," *Commentary*, 36, No. 3 (September 1963): 201-208. For a comprehensive account of the debate, see: Daniel Maier-Katkin, "The Reception of Hannah Arendt's Eichmann in Jerusalem in the United States 1963-2011," *Journal for Political Thinking*, November 2011, <http://www.hannaharendt.net/index.php/han/article/view/64/84#ftn23>

⁴⁶⁵ Louis Henkin, Louis. *How Nations Behave: Law and Foreign Policy*. (New York: Columbia University Press, 1979), 277.

⁴⁶⁶ Orna Ben-Naftali, "Eichmann," in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese. (Oxford: Oxford University Press, 2009), 654.

A person who has committed one of the following offences - (1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people(2)...an act constituting a crime against humanity;(3)...an act constituting a war crime, is liable to the death penalty...(7) "crime against humanity" means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds...⁴⁶⁷

The Supreme Court, for example, classified the charge of crimes against the Jewish people (section 1)⁴⁶⁸ as a *particular* type of crimes against humanity that symbolized the interdependence of all the categories under the NNCL. These also included crimes against humanity as a *general* offense (section 2). By grouping categories together, the Supreme Court affirmed that the differences between them were only artificial distinctions. Despite focusing on the specific crimes Eichmann perpetrated against Jews, Israeli law nevertheless affirmed that it was indeed guided by the universalizing thrust of international law.⁴⁶⁹

The AoSD, however, did play a significant role in the case—and Kelsen has often been introduced as a leading defender of this doctrine. International law scholar Andrea Gattini in his entry on Kelsen in the *Oxford Companion to International Criminal Justice* writes:

If it is true that Kelsen's theory was open to the idea of recognizing the individual as a subject of international law, it is also true that Kelsen remained throughout his life faithful to a traditional and strict view of legal responsibility and its consequences. Every act performed by an individual in command or with the authorization of his government is ipso facto an 'act of state,' over which no other state can claim jurisdiction, regardless of its being characterized as a crime under domestic or international law.⁴⁷⁰

⁴⁶⁷ Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, 4 LSI 154 (1950-1951) (Isr.), available at http://www.mfa.gov.il/MFAyMFAArchive/1950_1959/Nazis+and+Nazi+Collaborators+-+Punishment-+Law-+571.htm.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ben-Nafthali, 654.

⁴⁷⁰ Andrea Gattini, *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2013), 655.

While Gattini is correct to point to the traditionally narrow scope of Kelsen’s description of the AoSD, he neglects to consider that categories of humanitarian offenses committed against a state’s own citizens, for example, expanded in the years from the end of the Second World War to the Eichmann trial in Jerusalem (1961-62), as a result of the multilateral ratification of the Genocide (1948)⁴⁷¹ and Geneva IV⁴⁷² (1949) conventions.⁴⁷³ Kelsen also acknowledges the prospect of *ad hoc* jurisdiction when he states that a “number of writers contended during and after World War II that ‘universality of jurisdiction extended to war crimes and that any state—even neutrals—might apprehend and punish war criminals found within their jurisdiction.’”⁴⁷⁴

After introducing a discussion of Kelsen’s view of the AoSD and the principle of universal jurisdictional right in the first part of this chapter, the second part considers Kelsen’s philosophical critique of the court’s criterion of “manifest illegality” where alleged war criminals were expected to draw on their “conscience” to distinguish legal from illegal acts under superior orders. Kelsen’s description of how “conscience” is produced by legal norms parallels Hannah Arendt’s thesis in *Eichmann in Jerusalem: A Report on the Banality of Evil*⁴⁷⁵ as each considers the impact of the Nazi legal order on the formation of Eichmann’s behavior. Both question Immanuel Kant’s philosophical claim—invoked by the courts—that inclination and obedience to the law ought to be distinguished. What if one is *inclined*, however, to obey the law but the law

⁴⁷¹ “Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948),” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/genocide.asp

⁴⁷² “Convention (IV) Relative to the Protection of Civilian Persons in Time of War (August 12, 1949),” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/geneva07.asp

⁴⁷³ Hans Kelsen and Robert Warren Tucker, *Principles of International Law*. (New York: Holt, Rinehart and Winston, 1967), 145.

⁴⁷⁴ *Ibid.*, 311

⁴⁷⁵ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994).

licenses immoral acts? This section explores Kelsen and Arendt's shared critique of the court's criterion of manifest illegality.

After determining shortcomings in the court's estimation of standards for subordinate prosecution, this case study examines Kelsen's support of retroactive lawmaking for acts for which Eichmann ought to have been held "morally responsible," including the subject matter jurisdiction of crimes against humanity. The gravity of Nazi offenses presumably forced Kelsen to shift his doctrinal position on the separation of law from morality, as the previous chapter confirms. This section argues that Jorg Kammerhofer's claim that Kelsen would affirm that since there are no moral absolutes the normative imperative "You ought to commit genocide" is a statement irreconcilable with pure theoretical cognition.⁴⁷⁶ The application of *ex post facto* lawmaking based on moral criterion, in spite of Kelsen's doctrinal commitment to the separation of law from morality, disconfirms Kammerhofer's position.

The last section explores Eichmann's *capacity* to judge. According to legal scholar William Ebenstein, Kelsen retained a causal conception of human behavior throughout his life. Ebenstein writes that:

In the perspective of a normative order, man is free to the extent that sanctions are imputed to certain types of behavior, although in the perspective of causality such behavior must be presumed to be causally determined. Far from excluding causality, the linking of freedom and imputation presupposes it.⁴⁷⁷

While Arendt remarks that Eichmann possessed an 'inability to think' from the

⁴⁷⁶ Jorg Kammerhofer, "Hans Kelsen's Place in International Law," in *Research Handbook on the Theory and History of International Law*, ed. Alexander Orakhelashvili (Northampton, MA: Edward Elgar Publishing, 2011), 146.

⁴⁷⁷ Ebenstein, 636

standpoint of someone else,⁴⁷⁸ and ‘blind obedience’⁴⁷⁹ impeded his ability to judge due to the compulsion of his ‘oath’,⁴⁸⁰ she nevertheless indicates that he made a choice. In contrast to Arendt’s belief that Eichmann’s initial decision to join a criminal regime made him culpable, Kelsen diminishes the capacity for ‘agency’ by virtue of his belief that *any* social order instituting coercive legal norms predominantly structures thought patterns. Eichmann’s choice to join the Nazis, for Kelsen, would not be the reason he was guilty; he was guilty because he committed a universally condemnable act: genocide.

Like the previous chapter on the theme of peace, the object here is to reconcile Kelsen’s notion of freedom associated with “induc[ing] men to be motivated by ideas in accordance with the conduct indirectly prescribed by the legal order”⁴⁸¹ with an endorsement of retroactive lawmaking for acts deemed ‘immoral’. The central paradox of this thesis is that Kelsen both supports a causal-deterministic description of human agency, while implicitly recognizing the choice to disobey immoral commands by virtue of his retroactive methodological licensing.

Part I

II. The Acts of State Doctrine

That Kelsen is seldom referenced in contemporary ICL proceedings should not serve to diminish his importance as a leading international publicist who spurred evolved practice.

Defense counsel Robert Servatius writes that:

Kelsen, a scholar of international law, respected all over the world, has recently given [The Acts of State] doctrine its most lucid expression. In this context, a personal remark has to be added immediately namely, that Kelsen, formerly a professor teaching at the University of Vienna, had suffered personally from National Socialist persecution and had been compelled to emigrate to the United States. Therefore it would only be human

⁴⁷⁸ Hannah Arendt, *Eichmann in Jerusalem*, 48.

⁴⁷⁹ *Ibid.*, 145-147.

⁴⁸⁰ *Ibid.*, 54.

⁴⁸¹ *Ibid.*

and absolutely understandable, if, owing to the effect of the “Acts-of-State-Doctrine”... turning out in favour of the main German war criminals...Kelsen would have tried to reject or to weaken the validity of this doctrine in international law. It bears witness to the human integrity and the juristic impartiality of this scholar that, being under the influence of obvious and only too understandable resentments, he has not succumbed to this temptation, but has affirmed time and again the validity of [the Acts of State Doctrine] with forceful determination.⁴⁸²

The deference Servatius showed Kelsen was equally matched by associate IMT defense counsel Hermann Jahreiss’s favorable remarks on the Pure theory of Law at Nuremberg.⁴⁸³ Even Carl Schmitt, appealed to his Weimar legal rival in his own defense during allied interrogation after World War II, after Schmitt was almost tried for his role as “crown jurist” of the Nazi regime.⁴⁸⁴⁴⁸⁵

Critical of the view of the AoSD associated with Kelsen, lead-IMT U.S. Prosecutor Robert H. Jackson, recognized that if those in lower ranks were protected from prosecution by orders of their superiors, and superiors were protected because their commands were sheltered by

⁴⁸²The Nizkor Project, “The Eichmann Trial (First Instance), Defense Submission,” B’nai Brith Canada. <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Defence-Submission-01-02.html> (accessed February 1, 2015).

⁴⁸³Jahreiss quotes Kelsen as an authority on the matter, noting that “in questions of breach of the peace, the liability of defendants to punishment does not exist according to general international law at present valid.” Trial of German Major War Criminals One Hundred and Seventy-First Day: Thursday, 4th July, 1946 <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-18/tgmwc-18-171-03.shtml> See: Kelsen, Hans. "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals." *California Law Review* 31, no. 5 (December 01, 1943): 530-71.

⁴⁸⁴ Carl Schmitt and Timothy Nunan, *Writings on War* (Oxford: Wiley, 2014), 40; William E. Scheuerman, *Carl Schmitt: The End of Law* (Lanham, Md: Rowman & Littlefield, 1999), 176. According to Schmitt’s estimation, Kelsen’s constitutional theory was a Jewish creation that began with Baruch Spinoza and extended through the writings of Moses Mendelssohn and Friedrich Stahl. On the international plane, Schmitt’s theory of the *grossraum* (“the large space” or “wider space” of German domination) was contrasted with what he considered Kelsen’s Jewish “universalism”. Enzo Traverso, *The Origins of Nazi Violence* (New York, NY: New Press, 2003), 140. See also: Peter M.R. Stirk, *Carl Schmitt, Crown Jurist of the Third Reich: On Preemptive War, Military Occupation, and World Empire* (Lewiston, N.Y.: E. Mellen Press, 2005).

⁴⁸⁵The difference between the motivation of the author of the pure theory of law for limiting war crimes’ prosecution and Schmitt’s, however, must not be confused. While Schmitt clearly denied the prospect of a robust system of ICL, Kelsen retained a liberal commitment to international criminal law through the establishment of a Permanent League for the Maintenance of Peace (PLMP) with a compulsory international court adjudicating war crimes. Schmitt believed in the division of the world into spheres of influence mirroring the United States’ control over the western hemisphere through the Monroe Doctrine (1823). See: Carl Schmitt and G.L. Ulmen, *The Nomos of the Earth in the International Law of the Jus Publicum Europeum* (New York: Telos Press, 2006).

the acts of state doctrine, then no one could be held responsible for their actions. “These twin principles working together have heretofore,” as Jackson noted in his opening address, “resulted in immunity for practically everyone concerned...”⁴⁸⁶ Article 7 of the IMT Charter reads:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment. 487

The authority to decide whether to hold axis officials responsible was determined by the allied powers under the London Agreement. Article 8 of the IMT Charter, in contrast, accounted for mitigating factors related to the severity of an order taken under superior command. The Article reads:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires. 488

⁴⁸⁶ Justice Jackson’s opening address at the International Military Tribunal at Nuremberg. The Nizkor Project, “International Military Tribunal at Nuremberg,” November 21, 1945, B’nai Brith Canada. <http://www.nizkor.org/hweb/imt/nca/nca-01/nca-01-05-opening-address-usa-15.html>

⁴⁸⁷ Avalon Project at Yale Law School, “International Military Tribunal Charter, August 8, 1945,” Lillian Goldman Law Library. <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed December 15, 2014). <http://avalon.law.yale.edu/imt/imtconst.asp>

⁴⁸⁸ Avalon Project at Yale Law School, “International Military Tribunal Charter, August 8, 1945,” Lillian Goldman Law Library. <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed December 15, 2014). <http://avalon.law.yale.edu/imt/imtconst.asp>

His commitment to this doctrine, however, seems to have wavered.⁴⁸⁹ Before taking into account how acts committed by state officials under superior order were deemed contrary to international law and subject of inquiry by foreign states, it is necessary to engage the view that Kelsen indeed affirmed the AoSD. In “Collective and Individual Responsibility for Acts of State in International Law” (1948), Kelsen defines the doctrine as follows:

Acts of State are acts of individuals performed by them in their capacity as organs of State, especially by that organ which is called the Government of the State. These acts are performed by individuals who belong to the Government as the head of State, or members of the cabinet, or are acts performed at the command or with the authorization of the Government. It is within the competence of the national legal order, the law of the State (or municipal law), to determine under what conditions a certain individual is acting as an organ of the State, or, in other terms, what acts of human beings are imputable to the State and hence have the character of acts of State. Since the contents of the obligations, responsibilities and rights established by International Law are acts of State, International Law does not directly determine the individuals whose acts are prescribed or authorized by International Law. It leaves the determination of these individuals to the national legal orders.⁴⁹¹

⁴⁸⁹ Despite acknowledging the limits of the acts of state doctrine, the last edition of *Principles of International Law* in certain passages reaffirm a traditional view he consistently held throughout the majority of his career. He writes, “No state is allowed to exercise through its own courts jurisdiction over another state unless the other state expressly consents... Since a state manifests its legal existence only through acts performed by human beings in their capacity as organs of the state, that is to say, through acts of state, the principle that no state has jurisdiction over another state must mean that a state must not exercise jurisdiction through its own courts over acts of another state unless the other state consents. Hence the principle applies not only in case a state as such is sued in a court of another state but also in case an individual is the defendant or the accused and the civil or criminal delict for which the individual is prosecuted has the character of an act of state.” Hans Kelsen and Robert Warren Tucker, *Principles of International Law*. (New York: Holt, Rinehart and Winston, 1967), 358. Kelsen does not revise earlier assessments of the AoSD in Hans Kelsen “Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Criminals,” *California Law Review* 31, no. 5 (1943), 530-571; Hans Kelsen, *Peace Through Law* (Chapel Hill, University of North Carolina Press, 1944); and Hans Kelsen, “Collective and Individual Responsibility for Acts of State in International Law,” *Jewish Yearbook of International Law* 1, no. 1 (1948)

⁴⁹⁰ Kelsen died on April 19, 1973 near Berkeley, California. See: Reut Yael Paz, *A Gateway Between a Distant God and a Cruel World: The Contributions of Jewish German-Speaking Scholars to International Law* (Leiden, Martinus Nijhoff Publishers, 2013), 183

⁴⁹¹ Hans Kelsen, “Collective and Individual Responsibility for Acts of State in International Law,” *Jewish Yearbook of International Law* 1, no. 1 (1948), 228.

Individuals performing acts of state are *indirect* subjects of international law; only a state is a *direct* subject. While each state delegates responsibility to officials in roles specified by their normative legal order, any offense committed on behalf of a state is sanctioned by international law *indirectly* through a ‘primitive’ form of ‘blood-revenge’ attributable to the state as a social group. Like a family or tribe, which in ancient times was considered the locus of political responsibility, the state is directly sanctioned through wars and reprisals for international offenses.⁴⁹² This correspondence between tribal and international law has already been discussed with reference to just war theory (see: chapter three).

With few exceptions (i.e., espionage and treason), the state is solely responsible to repair damages caused by their legal organs.⁴⁹³ Meaning, both officials of the state and ordinary citizens are subject to sanction under a form of collective responsibility, even if certain state officials and the citizenry did not personally commit acts in violation of international law. While the violation of international norms independent of an act of state, such as the self-governing commission of breach of blockade, carriage of contraband or piracy can be tried under general international law (i.e., customarily), no authority, without explicit permission of the home state may adjudicate over acts (i.e., with the exception of espionage and treason) that an official performs in his authorized role. Only the nation from which the alleged offender hails retains this right.⁴⁹⁴

Since consent between states is necessary for adjudication of offenses committed on behalf of a state, self-help, including war and reprisals, are the common form of punishment.⁴⁹⁵

⁴⁹² Ibid. 227

⁴⁹³ Ibid. 231

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid. 229

The Kellogg-Briand Pact (1928), for example, is a collective treaty that reflects the customary right to ‘self-help’ against countries that breach the peace.⁴⁹⁶ Even those officials who have “violated the laws and customs of war (so-called war crimes),” according to Kelsen, are sanctioned under “rules obliging States to punish their own subjects.”⁴⁹⁷ This presumably creates a different problem of ‘neutrality’ than the punishment of state offenders by *ad hoc* international courts, since biased judgment accompanies any national court adjudicating its own state officials.⁴⁹⁸

Notwithstanding this restrictive reading, there is proof that Kelsen’s view on the AoSD evolved at the time of the final publication of *Principles of International Law* (1967). He writes:

Whatever the position taken toward this principle—commonly termed the acts of state doctrine—‘that the courts of one state are not entitled to question the validity of acts of another state performed with its jurisdiction,’ the courts of most states...may and occasionally do refuse to give effect to, that is, refuse to recognize and to enforce, the laws of another state if these laws are considered contrary to the state’s public policy.⁴⁹⁹

If the courts of one state decide not to endorse acts of another state that are contrary to public policy, Kelsen insists that a state may also refuse to implement acts of another state if they

⁴⁹⁶ The Kellogg-Briand Pact (1928) was also known as the Pact of Paris or the General Treaty for Renunciation of War as an Instrument of National Policy. Signed by representatives from Australia, Belgium, Canada, Czechoslovakia, France, Germany, British India, the Irish Free State, Italy, Japan, New Zealand, Poland, South Africa, the United Kingdom and the United States, the Kellogg-Briand Pact is a main subject of discussion in chapter three—“Legal Positivism and the Common Law Application of Criminal Responsibility at Post Second World War Tribunals”)

⁴⁹⁷ Hans Kelsen, “Collective and Individual Responsibility for Acts of State in International Law,” *Jewish Yearbook of International Law* 1, no. 1 (1948); Andrea Gattini, *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 654.

⁴⁹⁸ The classic example is the Leipzig Trial after World War I. See: *War Crimes and War Crime Trials: From Leipzig to the ICC and Beyond: Cases, Materials and Comments*, ed. John C. Watkins, Jr. and John Paul Weber (Durham, NC: Carolina Academic Press, 2006).

⁴⁹⁹ Hans Kelsen and Robert Warren Tucker, *Principles of International Law* (New York: Holt, Rinehart and Winston, 1967), 362.

contradict international law. “It is quite true,” he writes, “that by refusing to give effect to acts of another state because these acts are deemed contrary to international law, the courts of a state necessarily judge the conformity of the acts with international law and thereby question the international validity of acts of another state.”⁵⁰⁰ Kelsen endorses the expansive right of states to determine if states have contravened international law, in which case, not only are states not required to implement acts of another state, but those acts that violate international law presumably would be subject to prosecution.

The previous chapter affirms—against Gattini’s judgment—that Kelsen was far less concerned with upholding the AoSD than in finding legal, albeit retroactive, grounds for trying individuals responsible for core international crimes. In fact, he introduced *individual* criminal responsibility into the lexicon of ICL. In his correspondence with Jackson prior to the London Conference, he recognized that drafts of the IMT charter assumed that individual rather than collective responsibility had already been defined by international law. Rather than quibble about procedural concerns related to the AoSD, the allies he suggested ought to create *new* law to be applied *ex post facto*. The imputation of individual responsibility was clearly preferable, since it identified the exact perpetrators, who were equally subject to penalty under collective responsibility. Was not Hermann Goring “well aware that the Allies could drop a bomb on him as a result of his country’s violation of the law—[so] what complaint could he then have if they decided to hang him from a gibbet instead?”⁵⁰¹

III. The Right to Universal Jurisdiction

⁵⁰⁰ Ibid., 363.

⁵⁰¹ Oona Hathaway and Scott Shapiro, *The Internationalist: How a Radical Plan to Outlaw War Remade the World*, 270

According to the *Oxford Companion to International Criminal Justice*, “universal jurisdiction is the criminal jurisdiction exercised on the basis of the universality principle. This...jurisdiction entitles states to prosecute specific crimes regardless of the place of commission, the nationality of the perpetrator, and the nationality of the victims.”⁵⁰² ‘Third-states invoke the principle of universal jurisdiction as a rule of customary international law when core international crimes are either not prosecuted by the state of commission, which may be unable or unwilling to prosecute its own public officials for state crimes or else an international court, which due to issues of capacity, is incapable of assuming authority.

While piracy, terrorism, drug trafficking and torture are deemed by some subject to universal jurisdiction, none of these crimes technically fall under this principle. Piracy, which typically is defined as a crime that takes place on the high seas⁵⁰³ outside the jurisdiction of any state for obvious reasons is an offense that can be prosecuted anywhere without violating the AoSD. Alternatively, terrorism, drug trafficking and torture are more appropriately classified under the active nationality principle, which entitles states to exercise jurisdiction over their nationals. These offenses are based on inter-party agreements between signatory states.

The response of the Court was four-fold to the complaint that Israel was exercising extra-territorial jurisdiction when no *national* connection existed between the victims and Israel, and that Germany (or any of the eighteen states where Eichmann was alleged to have committed

⁵⁰² Orna Ben-Nafthali, 555. In a rejoinder to Henry Kissinger’s defense of sovereign immunity in the “Pitfalls of Universal Jurisdiction, Kenneth Roth, Executive Director of Human Rights Watch in a 2001 essay entitled “The Case for Universal Jurisdiction,” asserted that the Eichmann Trial necessitated such a right: “The exercise by U.S. courts of jurisdiction over certain heinous crimes committed overseas is an accepted part of American jurisprudence, reflected in treaties on terrorism and aircraft hijacking dating from 1970. Universal jurisdiction was also the concept that allowed Israel to try Adolf Eichmann in Jerusalem in 1961.

⁵⁰³Article 101 of the United Nations Convention on the Law of the Seas.
http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

crimes) could have assumed jurisdiction.⁵⁰⁴ First, under the ‘passive nationality principle,’ which is based on the nationality of the victim, a link did in fact exist between the Jews that were Eichmann’s victims and the State of Israel. Since Israel retained an historical, internationally recognized connection with the Jewish people as the national homeland of the Jews, it asserted its ‘natural right’ to determine its own fate.⁵⁰⁵ Second, without a specific rule restricting extra-territorial jurisdiction, every state retains jurisdictional power over its ‘people’.⁵⁰⁶ Third, only states, not the accused, have the right to protest extra-territorial jurisdiction. Since no state either protested Israel’s case against Eichmann or petitioned to bring the accused to trial, Israel was granted tacit right to adjudication.⁵⁰⁷ Last, if only a permanent compulsory criminal court was sufficient to hold hearings against Eichmann, he never would have been tried.⁵⁰⁸

According to the judgment in the Eichmann case, “crimes of the magnitude of Eichmann’s offenses, “struck the whole of mankind and shocked the conscience of nations,” granting Israel the right to punish these acts, which “[shook] the international community to its very foundation.”⁵⁰⁹ “The countries of the world” were therefore mandated, according to the Supreme Court of Israel, “to mete out punishment for the violation of its provisions.”⁵¹⁰ While there was no clear legal claim only a moral one, given the undeveloped nature of methodological construction in 1961-62, judges merely *declared* custom in Eichmann’s case, in accordance with natural law theory.⁵¹¹

⁵⁰⁴ This follows Ben-Nafthali’s designation. Orna Ben-Nafthali, 555.

⁵⁰⁵ *Ibid.*, 555.

⁵⁰⁶ *SS Lotus Case*, PCIJ Rep., Series A, No. 10 (1927)

⁵⁰⁷ Orna Ben-Nafthali, 555.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Eichmann Trial (first instance)

<http://www.nizkor.org/ftp.cgi/people/k/ftp.cgi?people/e/eichmann.adolf/transcripts/Judgment/Judgment-003>

⁵¹⁰ Eichmann Trial (second instance)

<http://www.nizkor.org/ftp.cgi/people/e/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-07-03>

⁵¹¹ Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (New York: Routledge, 2014), 42-48.

Although Kelsen granted states the right to prosecute those “acts which are directly forbidden by general international law and for which...law provides individual responsibility,”⁵¹² including “the right to punish individuals for acts of piracy,” he nevertheless was skeptical of ICL scholars and practitioners who invoked the right of universal jurisdiction.⁵¹³ That, however, does not *necessarily* mean that he was opposed to universal jurisdiction.

Unlike Germany, Israel could not claim a direct sovereign relationship to the offender or his crimes. Servatius held firm to this line of reasoning. In the defense submission, he drew on Kelsen’s description of acts of state:

If the wording of the [Acts of State Doctrine] adopted by Kelsen...will serve as a point of departure for the examination of the question, no Israeli tribunal has jurisdiction over the Accused. The exceptions from the [Acts of State Doctrine] considered as permitted by Kelsen (espionage and treason in times of war) do not apply in Eichmann’s case.

...The exception permitted according to [the restrictive theory of immunity] doctrine...does not apply in Eichmann’s case: for a state of war does not exist—and has not existed—between the State of Israel and Germany, and the State of Israel keeps him in custody not by virtue of a capture made in the course of military operations—and therefore as a prisoner of war—but as a result of his abduction from the territory of a foreign state.

It must therefore be emphasized...that already the ‘Acts of State Doctrine’ excludes the existence of any claim for criminal jurisdiction of the State of Israel over the accused Eichmann. If nevertheless he would be tried by an Israeli tribunal, this would amount to a violation of international law.⁵¹⁴

Formal restrictions, following Kelsen’s instructions, did not permit the Jerusalem court to try Eichmann, since he was kidnapped from a foreign territory, in this case Argentina, nor would

⁵¹²Hans Kelsen and Robert Warren Tucker, *Principles of International Law*. (New York: Holt, Rinehart and Winston, 1967), 358.

⁵¹³ *Ibid.* 311

⁵¹⁴ Eichmann Trial (first instance) Defense Submission: <http://www.nizkor.org/hweb/people/e/eichmann/adolfo/transcripts/Sessions/Defence-Submission-01-04.html>

a pure theoretical definition of acts of state⁵¹⁵ permit Eichmann's trial to take place in Israel rather than Germany unless he was captured as part of a military operation.⁵¹⁶ While it is questionable whether Eichmann even retained German citizenship after he assumed the status of non-state national after the war⁵¹⁷, other biases and impairments would also need to be accounted for, including the role of ex-Nazis in West German government⁵¹⁸; the memory of the ill-fated national trials conducted by Germany against its First World War veterans at Leipzig⁵¹⁹; and Germany's lack of experience in handling proceedings after WWII, which had been the purview of Americans and other allied powers.⁵²⁰

Kelsen's student, the international law publicist Hersch Lauterpacht's wrote an article, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens," that Hausner introduced to affirm Lauterpacht's position that territoriality "is not a requirement of justice or a necessary postulate of the sovereign state."⁵²¹ The reconstitution of sovereignty by Lauterpacht evidently contrasted Kelsen's ambiguous pronouncements with respect to a state's binding right to assume responsibility over its nationals to Lauterpacht's explicit embrace of the universal

⁵¹⁵ Hans Kelsen and Robert Warren Tucker, *Principles of International Law* (New York: Holt, Rinehart and Winston, 1967), 211.

⁵¹⁶ Eichmann Trial (first instance) Defense Submission: http://www.nizkor.org/hweb/people/e/eichmann_adolff/transcripts/Sessions/Defence-Submission-01-04.html

⁵¹⁷ "[Eichmann] had been a national of Germany but may have forfeited that nationality, at least the right of its protection, by passing himself as a stateless refugee; Germany, too, then may have had no basis for objecting to Israel's exercise of jurisdiction." Henkin, 273.

⁵¹⁸ Ralf Beste, Georg Bönisch, Thomas Darnstaedt, Jan Friedmann, Michael Fröhlingsdorf, and Klaus Wiegrefe, "From Dictatorship to Democracy: The Role Ex-Nazis Played in Early West Germany," *Der Spiegel*, March 6, 2012, www.spiegel.de/international/germany/from-dictatorship-to-democracy-the-role-ex-nazis-played-in-early-west-germany-a-810207.html

⁵¹⁹ Gary Jonathan Bass. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), 3. See also: Robert B. Kane *Disobedience and Conspiracy in the German Army: 1918 – 1945* (Jefferson, N.C.: McFarland, 2002).

⁵²⁰ Frank M. Buscher. *The U.S. War Crimes Trial Program in Germany, 1946-1955* (New York: Greenwood Press, 1989).

⁵²¹ Hersch Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens," *The Cambridge Law Journal* 9, no. 3 (1947): 330-48 quoted in Eichmann Trial (second instance).

[http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/](http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-02-04)

jurisdictional right associated with natural law theory.⁵²² The nature of the crimes becomes the basis for prosecution, not the fact that those crimes were committed *terra nullius* (on land belonging to no one).⁵²³

While the Jerusalem District Court claimed that “universality of the right to punish refers to criminal acts which cannot be dealt with due to the absence or non-availability of a competent court,”⁵²⁴ the Supreme Court maintained a more nuanced position, acknowledging that a competent German court did in fact exist. Hugo Grotius, according to the Supreme Court, “refers to a universality [that] can only be applied as an alternative [under] the principle...aut dedere aut punire.”⁵²⁵ In its modernized form as *aut dedere aut judicare*, the principle denotes the requirement that a state either “exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or...extradite the person to a State able and willing to do so or...surrender the person to an international criminal court with jurisdiction over the suspect and the crime.”⁵²⁶ Although certainly more restrictive than the District Court’s opinion, the Supreme Court’s reading affirmed the naturalist right of universal jurisdiction, insofar as no other state requested Eichmann’s extradition, and no international criminal court as-yet existed.

⁵²² For more on Lauterpacht’s natural law-turn, see Hersch Lauterpacht, *The Grotian Tradition in International Law* (Oxford: Oxford University Press, 1946).

⁵²³ Anthony Sammons, "The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts," *Berkeley Journal of International Law* 21, no. 1 (2003): 111-142

⁵²⁴ Eichmann Trial (first instance)

<http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Pleading-01-01>

⁵²⁵ Ibid.

⁵²⁶ “Aut Dedere Aut Judicare,” The United Nations, accessed October 8, 2017,

<http://unterm.un.org/DGAACS/unterm.nsf/8fa942046ff7601c85256983007ca4d8/866bbccb3ff6e9e885256e5c0069b0c8>

Part II

IV. Superior Orders

Kelsen distinguishes acts performed under superior command from that of acts of state. He writes:

The fact that an act is an act of State constitutes, in the first place, a problem of general international law, which, as a rule, excludes individual responsibility for an act of State. The fact that an act is performed at a superior command constitutes a problem of national criminal law.⁵²⁷

Individuals accused of crimes committed under superior command are held responsible only, it would seem, if acted out independent of an official state role. The critical issue here is whether obligations to superior orders *and* acts of state can be assessed on the *same* plane by a court of a foreign state acting under international law. "Responsibility for acts performed at superior command [remain] a specific problem of criminal law, not of international law."⁵²⁸ A two-edged defense would therefore remain a viable option under pure theory, which could potentially immunize those in high ranking positions, who claim absolution under the AoSD, while simultaneously protecting those in subordinate positions who plead immunity from prosecution under the superior orders defense.⁵²⁹ Another possible outcome is that no liability could *ever* be attributable to those in lower rankings following the instructions of their immediate superiors, since those in higher ranking positions already absolved those lower down in the organizational

⁵²⁷Hans Kelsen, "Collective and Individual Responsibility for Acts of State in International Law," *Jewish Yearbook of International Law* 1, no. 1 (1948), 228; Hans Kelsen, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944), 104; Hans Kelsen "Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Criminals," *California Law Review* 31, no. 5 (1943), 556; Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" in Guenael Mettraux, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008), 284.

⁵²⁸ Hans Kelsen and Robert Warren Tucker, *Principles of International Law* (New York: Holt, Rinehart and Winston, 1967), 136.

⁵²⁹ Nuremberg Trial, Opening Speech for Prosecution (by Jackson), *I.M.T.*, vol. 2, 150.

hierarchy under the AoSD. Even in exceptional cases, such as treason, a subordinate would seemingly be absolved from international prosecution.⁵³⁰ Nevertheless, as has been described in the previous case study, Kelsen's application of retroactive lawmaking in instances where offenses were so egregious as to make state officials "morally responsible," and hence criminally culpable, warrants a re-evaluation of his position on superior orders prosecution.

The Trial chamber suppressed the plea of obedience to superior orders under Article 8 of the NNCL⁵³¹. While the court of first instance made passing references to the denial of this defense in the London Charter and Control Council Law No. 10⁵³², for example, the Supreme Court of Israel embarked on a detailed survey of international law, including its relationship to the AoSD, to justify the NNCL's denial of the superior orders defense. The Supreme Court of Israel resolved that the reason for the strict application of Article 8 was predicated on two distinct arguments against the application of the superior orders defense: (a) the Fuhrer Principle or 'leadership principle', which granted Hitler's will the force of law, created a *reductio ad absurdum*, and (b) 'criminal consciousness' could be deduced from Eichmann's commission of

⁵³⁰ The decision of Kelsen's student, Hersch Lauterpacht, editor of the sixth edition of Lassa Oppenheim's classic manual of international law, *International Law: A Treatise*, to license criminal responsibility for both soldiers and their commanding officers for violations of the rules of warfare, in addition to the international right to try members of a foreign state for violations of rules committed by order of their government, Kelsen asserted, were "more than questionable." In the fifth edition, Oppenheim retained a traditional view that only a commanding officer could be found guilty for war crimes; acts of state were solely the purview of national courts. Although Lauterpacht's entry can be read as endorsing a limited application of the superior orders' defense to a domestic setting, one can also interpret his revised statement in the sixth edition as loosening jurisdictional restrictions on foreign prosecution for acts committed on behalf of superior orders. Notwithstanding Kelsen's commentary in this instance, multiple references to the gravity of Nazi crimes licensing retroactive lawmaking indicate that Kelsen's criticism of Lauterpacht must be interpreted to apply to low-level offenses, not crimes of Eichmann's nature. Lassa Oppenheim, *International Law: A Treatise*, 6th ed., ed. Hersch Lauterpacht (New York: Longmans, Green and co., 1940).

⁵³¹ Yoram Dinstein, *The Defence of "Obedience to Superior Orders" in International Law* (Leyden: A.W. Sijthoff, 1965), 207.

⁵³² The Nizkor Project, "The Eichmann Trial (First Instance)," B'nai Brith Canada. <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-114-05.html> (accessed December 15, 2014).

atrocities on the magnitude of crimes against the Jews and crimes against humanity.⁵³³

These two arguments were famously subject to forceful criticism in *Eichmann in Jerusalem*. The claim, according to Arendt, that Hitler's "oral pronouncements...were the basic law of the land," and hence "within this 'legal' framework, every order contrary in letter or spirit to a word spoken by Hitler was by definition, unlawful,"⁵³⁴ indicated that Eichmann considered it his duty to obey Hitler's law, even when his more immediate superiors commanded otherwise. Since "these crimes undeniably took place within a 'legal' order,"⁵³⁵ according to Arendt, "it was not [his] fanaticism but his very conscience that prompted Eichmann to adopt his uncompromising attitude."⁵³⁶ In this case, Eichmann's "conscience" required that he not deviate from the rules of the legal order in which he found himself. The court's determination that Eichmann possessed "criminal consciousness" of the "magnitude of crimes against the Jews and...humanity,"⁵³⁷ ignored the fact that his "conscience," according to Arendt, was arguably also heavily influenced by Hitler's decrees. His belief that the source of law or Hitler's pronouncements caused him to "always act[] against his 'inclinations' whether they were sentimental or inspired by interest, that he had always done his 'duty'"⁵³⁸ bears on a fuller assessment of Eichmann's culpability. The correspondence between Arendt's and Kelsen's emphasis on 'inclination' and 'duty' will be discussed after a general evaluation of the court's test of manifest illegality.

V. The Test of Manifest Illegality

The Supreme Court of Israel "indirectly added its voice to the chorus of proponents of the manifest illegality principle as the generally acceptable criterion for establishing criminal

⁵³³ Ibid.

⁵³⁴ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994), 148.

⁵³⁵ Ibid., 292.

⁵³⁶ Ibid., 146.

⁵³⁷ Ibid.

⁵³⁸ Ibid., 137.

responsibility under international law in case of compliance with orders.”⁵³⁹ While the Supreme Court found Eichmann “fully conscious at the time that he was a party to the perpetration of the most grave and horrible crimes,”⁵⁴⁰ it nevertheless was impelled to ‘add its voice’ to the issue of “whether moral choice was in fact possible”⁵⁴¹ under international law.

Choosing a middle path between, on the one hand, the doctrine of *respondeat superior*, which categorically relieved soldiers of responsibility to superior orders by attributing culpability solely to the commanding officer, and on the other, absolute responsibility, or imputation of ICR to those on the receiving end of orders,⁵⁴² the Supreme Court recognized the difficulties both of maintaining “good order in the disciplinary body” and “the damage that [would] be caused to the public by the offence involved in carrying out the order...”⁵⁴³ Subject to two jurisdictions, a soldier risked the possibility that he might face a court martial for disobeying the orders of his commanding officer or else if he carried out orders and they proved to be illegal, “he would be liable to punishment under...general criminal law.”⁵⁴⁴ According to Section 11 of the NNCL:

In determining the punishment of a person convicted of an offence under this Law, the court may take into account, as grounds for mitigating the punishment, the following circumstances: (a) that the person committed the offence under conditions which...would have exempted him from criminal responsibility or constituted a reason for pardoning the

⁵³⁹ Yoram Dinstein, *The Defence of "Obedience to Superior Orders" in International Law* (Leyden: A.W. Sijthoff, 1965), 67.

⁵⁴⁰ Recounting Eichmann’s reply to District Court of Jerusalem Judge Halevi: “...I already at that time realized that this solution by the use of force was something illegal, something terrible, but to my regret, I was obliged to deal with it in matters of transportation, because of my oath of loyalty from which I was not released.” The Nizkor Project, “The Eichmann Trial (Second Instance),” B’nai Brith. <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/ftp.cgi?people/e/eichmann.adolf//transcripts/Appeal/Appeal-Session-07-07> (accessed December 15, 2014)

⁵⁴¹ Ibid.

⁵⁴² Yoram Dinstein, *The Defence of "Obedience to Superior Orders" in International Law* (Leyden: A.W. Sijthoff, 1965), 8.

⁵⁴³ The Nizkor Project, “The Eichmann Trial (Second Instance),” B’nai Brith. <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/ftp.cgi?people/e/eichmann.adolf//transcripts/Appeal/Appeal-Session-07-07> (accessed December 15, 2014)

⁵⁴⁴ Ibid.

offence, and that (b) he did his best to reduce the gravity of the consequences of the offence⁵⁴⁵.

The District Court determined, based on the defendant's own testimony, that he had seen "in this murder, in the extermination of Jews, the gravest crimes in the history of humanity."⁵⁴⁶ Eichmann, therefore, "did not do his best to reduce the gravity of the consequences of the offence," and admittedly knew that his acts were "unlawful, something terrible."⁵⁴⁷ Section 11 stipulating mitigation of punishment therefore did not apply, according to the pronouncement of the District Court judges, since Eichmann was fully aware of the immorality of his actions.⁵⁴⁸

The District Court confined its analysis of the manifest illegality test chiefly to local rulings. The massacre at the Arab village of Kfar Kassem, for instance, underscores the limits by which soldiers claiming *respondeat superior* could invoke an absolute defense.⁵⁴⁹ The case hinged on the orders of Israel Defense Forces brigade commander Colonel Issachar Shadmi, who insisted that Israeli border police officers and soldiers in a district comprised of a complex of twelve villages, including Kfar Kassem, institute a new nightly curfew to begin at 5PM and end at 6AM at the start of the 1956 Suez War. Concerned that Jordan would join forces with Egypt in attacking Israel as part of the war effort, and that Arab villagers from the Central District or "Triangle" in the Jordanian border region of Israel might link up with enemy troops, Shadmi

⁵⁴⁵ The Jewish Virtual Library, "Basic Laws of Israel: Nazi and Nazi Collaborators (Punishment) Law (1950)," American-Israeli Cooperative Enterprise. <http://www.jewishvirtuallibrary.org/jsource/Politics/nazilaw.html> (accessed November 30, 2014)

⁵⁴⁶ The Nizkor Project, "The Eichmann Trial (First Instance)," B'nai Brith. <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/ftp.cgi?people/e/eichmann.adolf/transcripts/Judgment/Judgment-066> (accessed December 15, 2014).

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ See: Shira Robinson, "Local Struggle, National Struggle: Palestinian Responses to The Kafr Qasim Massacre And Its Aftermath, 1956-66," *International Journal of Middle East Studies* 35, no. 3 (2003): 393-416; Tom Segev, *The Seventh Million: The Israelis and the Holocaust*. (New York: Hill and Wang, 1993); Leora Bilsky, *Transformative Justice: Israeli Identity on Trial*. (Ann Arbor: University of Michigan Press, 2004), 169-197.

gave the order to enforce the new curfew on October 29, 1956 at 3:30 PM when several hundred villagers of Kfar Kassem were still out in the fields unaware that an order had been put into effect.

One Palestinian witness described the situation, which resulted in the deaths of 49 Arab civilians, including men, women and children:

We talked to them. We asked if they wanted our identity cards. They didn't. Suddenly one of them said, 'Cut them down' - and they opened fire on us like a flood.⁵⁵⁰

No villagers outside of Kfar Kassem were shot, because local commanders ordered their platoons to hold fire, breaching the instructions set by Shadmi. Even in Kfar Kassem, only one unit followed Shadmi's order, which resulted in 1958 in charges brought against eleven border police men and soldiers, including Shadmi and Major Shmuel Malinki, the latter directly responsible for overseeing the village curfew.

Quoting the judgment, the District Court in Jerusalem acknowledged that for manifest illegality to exist there must be "a black flag over the order...as a warning reading 'Prohibited!'" Cases where a belligerent opened fire on its enemy's sick conveyed by an International Red Cross (IRC) ambulance where the sign of the cross was clearly visible would constitute, for instance, a 'black flag'. "[A] certain and imperative unlawfulness appearing on the face of the order or of the acts ordered, an unlawfulness which pierces the eye and revolts the heart, if the eye is not blind and the heart not obtuse or corrupted"⁵⁵¹ was the natural human response to the illegality of positive orders.⁵⁵²

⁵⁵⁰Yoav Stern, "50 years after Massacre, Kafr Qasem Wants Answers," *Haaretz*, October 2006.

⁵⁵¹The Nizkor Project, "The Eichmann Trial (First Instance)," B'nai Brith. <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/Session-112-05.html> (accessed December 15, 2014).

⁵⁵² The Supreme Court of Israel in establishing a parallel between the NNCL and principles of international law on the question of obedience to superior orders turned to various sources. Until World War II, no rule existed that

The compulsion to act under the threat of persecution to a subordinate's own life was the standard that the Appeals Chamber interpreted as the test by which an accused could be granted mitigation of punishment. The danger to his life, however, would need to be imminent, and he could have no method of saving himself from direct punishment.⁵⁵³ The test amounted to a question of *mens rea*, defined as the criminal intent or "the state of mind indicating culpability, which was required by statute as an element of a crime."⁵⁵⁴ Was the defendant coerced to act a certain way or did he know that what he was doing was wrong when he was ordered to act? The Supreme Court stated that "when the will of the doer merges with the will of the superior in the execution of the illegal act, the doer may not plead duress under superior orders."⁵⁵⁵

recognized the defense of superior orders, especially as pertained to the laws of war. The British and American Military Code of 1914 assigned responsibility solely to the commanding officer under *respondeat superior*. Only in the 1921 *Llandovery Castle* case, did the Supreme Court of Germany rule on the lawfulness of obeying patently illegal orders setting in motion the compromise between *respondeat superior* and absolute responsibility. In the case, the German submarine, the *U-86*, torpedoed a British hospital ship, the *Llandovery Castle*. Lieutenant Helmut Patzig, the submarine commander, acted against the known-interests of his superiors, instructing his crew to open fire not only on the vessel conveying sick patients, but several lifeboats that had managed to be launched after the attack. While Patzig was not apprehended, two of his officers, Ludwig Dithmar and John Boldt, faced prosecution. The defendants' claimed that they were merely following Patzig's orders. The court in turn responded that in most instances the military subordinate must not question the order of his superior officer, "but that no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law." From a theoretical vantage point, assessing the defendant's guilt within the context of having followed superior orders without knowledge of their mental state would have resulted in acquittal. However, if the acts of state of doctrine were applied in defense of Dithmar and Boldt, each would have been found guilty, since the order given by Patzig was not an act of state. The Supreme Court of Israel saw the murder of defenseless people in lifeboats as analogous to the accused's offenses. *Llandovery Castle* case, *A.J.I.L.*, vol. 16 (1922), 721-722 in Yoram Dinstein, *The Defence of "Obedience to Superior Orders" in International Law* (Leyden: A.W. Sijthoff, 1965), 61.

⁵⁵³ US v Ohlendorf in The Nizkor Project, "The Eichmann Trial (Second Instance)," B'nai Brith.

<http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-07-07> (accessed December 15, 2014).

⁵⁵⁴ Legal Information Institute. "Mens Rea," Cornell University Law School

https://www.law.cornell.edu/wex/mens_rea (accessed December 2, 2014)

⁵⁵⁵ Ibid.

⁵⁵⁶ Until the 1996 Draft Code of Crimes against Peace and Security of Mankind, which reverted to the absolute liability doctrine under the IMT Charter, few occasions arose in ICL where manifest illegality would have even been considered, due to the scarcity of war crimes cases during the Cold War period. The 1996 Draft Code of Crimes against Peace and Security of Mankind in article 5 notes that "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires."

Mankind http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf

⁵⁵⁷The test of manifest illegality, however, was once again re-introduced into Article 33 of the ICC Statute. The

VI. Critique of ‘Manifest Illegality’

Does the criterion of manifest illegality apply to crimes legalized by the state? Neither was Eichmann a common soldier, nor had he acted within a normal legal framework. What was illegal under ordinary circumstances was legal under Hitler’s rule. Moreover, the Jerusalem court, according to both Kelsen and Arendt, confused intention, inclination or desire with behavior or action. A Kantian description that granted “no true moral worth”⁵⁵⁸ to actions performed out of inclination, distorted a conception of ICR based on the perceived lawfulness of the orders delegated to Eichmann. Arendt writes:

And just as the law in civilized countries assumes that the voice of conscience tells everybody ‘Thou shalt not kill,’ even though man’s natural desires and inclinations may at times be murderous, so the law of Hitler’s land demanded that the voice of conscience tell everybody: ‘Thou shalt kill,’ although the organizers of the massacres knew full well that murder is against normal desires and inclinations of most people. Evil in the Third Reich had lost the quality by which most people recognize it—the quality of temptation.⁵⁵⁹

Informed by the law of Nazi Germany, which was decidedly *not* “civilized”⁵⁶⁰ and where only exceptional men and women could withstand the behavioral pressures of fascist rule, a

Rome Statute of the International Criminal Court: <http://legal.un.org/icc/statute/rome.htm>

⁵⁵⁸Immanuel Kant, *Fundamental Principles of the Metaphysics of Ethics* (London: Longmans, Green and co., 1929), 16.

⁵⁵⁹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994), 150.

⁵⁶⁰ See: Chapter Three on Kelsen’s distinction between primitive and civilized modes of thinking. Kelsen’s Pure Theory of Law is meant to provide a neutral methodology to deliver social orders from ideological and/or identitarian threats to minority rights associated with autocracy, and to stress ontological and political skepticism, the latter associated with liberal democracy. “Freedom” associated with “civilized” societies results from the cognitive recognition of the *a priori* category of imputation designating individual responsibility. Paradoxically, since the law intrudes in a causal fashion, causality of imputation is a relation between two points—the cause (delict) and the effect (sanction)—rather than an infinite train of causality, which means that only in “civilized” societies is freedom recognized as a value of positive law. In contrast, “primitive” societies do not forge individual consciousness of the causal train of imputation, since all punishments, in animistic fashion, are derived from a supernatural source. Left unanswered is the degree to which the Nazi social order that forged Eichmann’s consciousness is a reflection of Kelsen’s distinction between ‘primitive’ and ‘civilized’ modes of thinking. See: Hans Kelsen, “Foundations of Democracy,” *Ethics* 66, no. 1, (Oct., 1955): 1-101.

Nazi's conscience, according to Arendt, could not so easily distinguish "manifest illegality." The court's criterion presupposed the doctrine associated with Kant's moral philosophy, which, according to Kelsen, meant "that only conduct directed against inclination or egoistic interest is of any moral value."⁵⁶¹ "Bound up with man's faculty of judgment, which rules out blind obedience,"⁵⁶² and does not license through the categorical imperative "theft or murder...because the thief or murderer cannot conceivably wish to live under a legal system that would give others the right to rob or murder him,"⁵⁶³ Kant nevertheless, according to Kelsen, obscures the fact that "this crime [was] not an ordinary murder but what [Arendt] calls an 'administrative massacre.'"⁵⁶⁴ As such, "this is a new crime, one that depends less on being able to establish psychological intentions than on describing politically organized modes of uncritical obedience. In this sense, Eichmann himself is a new kind of person or an unprecedented sort of criminal, and so the mechanisms and terms of justice have to be rethought and remade in order to address this new situation."⁵⁶⁵

Before entering into a discussion of how Kelsen's retroactive methodology is relevant to Arendt's determination that Eichmann, in spite of his "uncritical obedience" to Nazi regulations, was to be found guilty, it is necessary to linger on the question of the relationship between law and intentionality. The question, writes Arendt, is whether "a feeling of lawfulness [lies] deep within every human conscience...A striking feature of the Israeli court's line of argument is that the concept of a sense of justice grounded in the depths of every man is presented solely as a

⁵⁶¹Hans Kelsen, "Law and Morality," in *Essays in Legal and Moral Philosophy*, ed. Ota Weinberger (Boston: Reidel, 1974), 85.

⁵⁶²Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994), 16.

⁵⁶³ *Ibid.*, 136.

⁵⁶⁴ Judith Butler, "Hannah Arendt's Death Sentences," *Comparative Literature Studies* 48, No. 3 (2011): 288.

⁵⁶⁵ *Ibid.*

substitute for familiarity with the law.”⁵⁶⁶

Eichmann understood the rules of the Nazi legal order. Any decision to turn to conscience was therefore superfluous. In accordance with the court’s expectation that a soldier be capable of distinguishing regular from irregular rules, Eichmann knew legally what his conscience only confirmed. For example, in clear violation of *Reichsführer* of the *Schutzstaffel* (Protection Squadron SS) Adolph Himmler’s order to stop the deportation of Hungary’s Jews from Budapest to Auschwitz in July 1944, Eichmann, on the pretext that Hitler would have supported furtherance of the extermination process, ignored Himmler’s more immediate orders.⁵⁶⁷ “He did not abide by Himmler’s orders,” writes Arendt, “but rather followed a “version of Kant ‘for the household use of the little man’”⁵⁶⁸ based on the will of the Fuhrer. For Eichmann, adherence to Hitler’s words meant identifying his own will with the principle source of law in Nazi Germany—the Fuhrer Principle (or *grundnorm* in Kelsenian terminology). As Arendt describes it, “he had always acted against his ‘inclinations’ whether they were sentimental or inspired by interest, that he had always done his duty.”⁵⁶⁹

Eichmann operated under a criminal, if legal, regime where “a huge shower of regulations and directives, all drafted by expert lawyers and legal advisers...”⁵⁷⁰ followed the Fuhrer’s orders for the Final Solution. By shifting the focus from motivation to behavior, Kelsen asserts, “each is able to insist that a person, who acts “‘from duty’ or ‘respect for law’, acts from inclination; for he acts in this way because he finds an inner pleasure in obeying the law, because the consciousness of acting lawfully or dutifully gives him ‘inner pleasure’.”⁵⁷¹ Kant’s assertion

⁵⁶⁶ Ibid., 293.

⁵⁶⁷ Ibid., 147.

⁵⁶⁸ Ibid., 136.

⁵⁶⁹ Ibid., 137.

⁵⁷⁰ Ibid., 149

⁵⁷¹ Hans Kelsen, “Law and Morality,” in *Essays in Legal and Moral Philosophy*, ed. Ota Weinberger (Boston:

that an individual act “from inclination [who] finds [inner] pleasure” in acting a certain way,⁵⁷² does not, therefore, preclude the prospect of “inner pleasure” in obeying the law. Morality is inner directed, according to Kant, “insofar as [the laws of freedom] are directed to mere external actions and the lawfulness of such action...are called *juridical*.”⁵⁷³ Kelsen insists that “this means that ‘legality’, too, is agreement with moral laws. Legal norms are moral norms; and so moral norms refer to external actions; there is, however, a moral norm prescribing that one should act, not from inclination, but from respect for the law.”⁵⁷⁴

VII. Retroactive Methodology

Although Kelsen claims that law does not represent a “moral minimum,”⁵⁷⁵ and contemporary Kelsenian Jorg Kammerhofer affirms that since there are no moral absolutes the normative imperative “You ought to commit genocide”⁵⁷⁶ is a statement reconcilable with a pure theoretical cognition of law, there is nevertheless convincing reason to believe that Kelsen would have licensed Eichmann’s prosecution. Even if murder is “performed against [ones] inclination,” it is forbidden, *if* the social order deems it illegal. Kelsen writes:

It is not any conduct you please that can be moral, so long as it is carried out contrary to inclination or egoistic interest. If somebody obeys another’s order to commit a murder, his act can have no moral value, even though performed against his inclination or egoistic interest, so long as the murder is forbidden, i.e., deemed of negative value, by the social order assumed to prevail.⁵⁷⁷

Since Kelsen entitled IMT judges, for example, to enforce retroactive laws criminalizing

Reidel, 1974), 94.

⁵⁷² Immanuel Kant, *Fundamental Principles of the Metaphysics of Ethics* (London: Longmans, Green and co., 1929), 16.

⁵⁷³ *Ibid.*, 12-13.

⁵⁷⁴ Hans Kelsen, “Law and Morality,” 94.

⁵⁷⁵ *Ibid.*, 89.

⁵⁷⁶ Kammerhofer, 146

⁵⁷⁷ Kelsen, “Law and Morality,” 85.

Nazi offenses based on a criterion of “moral responsibility,” presumably he would have similarly licensed Eichmann’s prosecution. Did his commentary on the Nuremberg trial not suggest the illegality of crimes against humanity? Even if he did not believe that at the time of the Eichmann proceedings the scope of illegality had expanded to incorporate international licensing of prosecution for crimes of the magnitude of Eichmann’s acts as manifested in provisions associated with the Genocide convention (1948)⁵⁷⁸, Kelsen would certainly have granted Israel the right to judge Eichmann’s immoral acts on retroactive grounds.

Chapter three argued that Kelsen deserves credit for de-linking the Nuremberg trial from criminalization of the Kellogg-Briand Pact, and in turn placing international criminal law on a firm legal foundation free of the war-nexus requirement. The same can methodological innovation can likewise be applied to this case. *Ex post facto* lawmaking is the means by which Kelsen intercedes against objections based on his own strict evaluation of the AoSD and superior orders defense. While Kammerhofer may have a point with regard to a national legal order’s licensing of individual responsibility for genocidal acts at the time of their commission, there is no reason to assume that state officials will not eventually be held accountable in accordance with international law for such acts. Kelsen repeatedly makes this point.⁵⁷⁹ Kelsen writes:

Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also *morally most objectionable*, and *the persons who committed these acts were certainly aware of their immoral character*, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the

⁵⁷⁸“Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948),” *The Avalon Project: Documents in Law, History and Diplomacy*, 2008, http://avalon.law.yale.edu/20th_century/genocide.asp

⁵⁷⁹ See: Hans Kelsen, “The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” *Judge Advocate Journal* 8, no. 2 (Fall 1945); Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” in Guenael Mettraux, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, [1947] 2008), 284; Hans Kelsen, *Principles of International Law*, ed. Robert W. Tucker (New York: Holt, Rinehart and Winston, 1967), 216.

fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force.⁵⁸⁰ (my emphasis)

While Servatius described Kelsen's position as clearly supporting his client's immunity, Attorney General Gideon Hausner argued before the Appellate Court that:

In 1947, Hans Kelsen...the last important survivor of the conservative approach, concludes that the principle of individual responsibility for crimes committed within the framework of the state is a loftier expression of justice than reliance on laws which ostensibly allowed those crimes to be perpetrated.⁵⁸¹

The Attorney General thus countered Servatius' claim that Kelsen would find the Eichmann proceedings illegitimate. While according to a formal logic any illegal acts that Eichmann may have committed could not be considered a violation of international law because no punishment for individuals was specified in a treaty signed by Germany, Kelsen also asserted that if an "act was at the moment of its performance morally, although not legally wrong,"⁵⁸² an *ad hoc* court like Nuremberg's ought to have the right to prosecute.

Hausner states that "[Kelsen] admits that where two principles collide, the principle of basic justice on the one, and formalism on the other, justice must gain the upper hand."⁵⁸³ This statement of course runs counter to a traditional reading of pure theory. For how could Kelsen implicate those responsible for core international crimes when he repeatedly implores jurists to separate law from morality⁵⁸⁴ in constructing the AoSD?

⁵⁸⁰ Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" 284.

⁵⁸¹ The Nizkor Project, "The Eichmann Trial (Second Instance)," B'nai Brith Canada. <http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-02-06> (accessed December 15, 2014).

⁵⁸² Hans Kelsen, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944), 87

⁵⁸³ *Ibid.*

⁵⁸⁴ Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" *International Law Quarterly* 152, no. 1 (1947): 164

The argument that was introduced earlier focused on the centrality of Kelsen's description of the AoSD in defense of Eichmann. However, Kelsen recognized that, though exceptional, "acts which were illegal though not criminal at the time they were committed,"⁵⁸⁵ such as international offenses that were "certainly...morally most objectionable," were subject to prosecution.⁵⁸⁶ The District Court was therefore right to speculate that it was "possible [that] even according to Kelsen...there [was] no longer any basis for pleading 'act[s] of State'"⁵⁸⁷. In judging that there was "clearly no principle of international law embodying the maxim against retroactivity of criminal law,"⁵⁸⁸ the Jerusalem court reaffirmed Kelsen's major doctrinal contribution to the changing notion of ICR. Kelsen wrote that no rule of general customary international law existed "forbidding the enactment of norms with retrospective force...,"⁵⁸⁹ and therefore war criminals could be tried retrospectively since the "act was at the moment of its performance morally, although not legally wrong." Notwithstanding Kammerhofer's statement, there is no reason to suggest that Eichmann would have been protected from prosecution.

Like Kelsen, Arendt states that "what [Eichmann] had done was a crime only in retrospect..." and that his offenses "violate[d]... only formally, not substantially, the principle *nullum crimen, nulla poena sine lege*."⁵⁹⁰ As with the 1945 London Agreement, which produced the IMT charter, Israel's Nazis and Nazi Collaborators (Punishment) Law of 1950 was valid, she claimed, because of the type of crime: genocide.⁵⁹¹ As a consequence of its application to

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid.

⁵⁸⁷ International Committee of the Red Cross https://www.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule151

⁵⁸⁸The Nizkor Project, "The Eichmann Trial (Second Instance)," B'nai Brith

Canada. <http://www.nizkor.org/ftp.cgi/people/e/ftp.cgi?people/e/eichmann.adolf/transcripts/Appeal/Appeal-Session-07-01> (accessed December 15, 2014); Julius Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-law, Supplement 1953-1958* (Sydney: Maitland Publications, 1959), 369.

⁵⁸⁹ Hans Kelsen, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944), 87.

⁵⁹⁰ Arendt, *Eichmann in Jerusalem*, 254.

⁵⁹¹ Ibid.

persecutions of national minorities, crimes against humanity encompassed a similar subject matter jurisdiction at Nuremberg as the genocide charge. The substantive element of Eichmann's crimes, consequently, warranted the attribution of international criminal responsibility under universal jurisdiction.⁵⁹² As with Kelsen's earlier criticism of the jurisdictional authority of allies at Nuremberg, Arendt's polemic against the Jewish state as creating a form of victor's justice⁵⁹³ in prosecuting Eichmann was superfluous. She already believed that Eichmann deserved to be prosecuted due to the gravity of his offense; a retroactive methodology similar to the one articulated by Kelsen was the means by which the court, according to Arendt, could legitimately hold him accountable.

VII. Freedom and Causality

This last section speculates on Kelsen's view of Eichmann's guilt, given his circumscribed notion of 'agency'. Given that the phrase 'banality of evil' is so enmeshed with the case against Eichmann, Arendt's approach to judgment must be considered, if briefly, alongside Kelsen's. The intention is not to provide a definitive account of Arendt's views on Eichmann's capacity to judge, but to furnish a deeper understanding of Kelsen's much-neglected contributions to this case.

As "the normative relations between the two elements of the legal norm—delict and sanction,"⁵⁹⁴ imputation possesses a degree of precision, according to Kelsen, that responsibility does not.⁵⁹⁵ "Whereas the concept of responsibility links the behavior to the person, imputation,

⁵⁹² Ibid., 275.

⁵⁹³ Ibid., 169-171.

⁵⁹⁴ William Ebenstein, "The Pure Theory of Law: Demythologizing Legal Thought," *California Law Review* 59, no. 3 (May 1971): 635.

⁵⁹⁵ Ibid., 635.

by contrast, links a certain behavior, the delict, to the sanction.”⁵⁹⁶ Therefore, as with his structural account of the “concept of ‘imputation’ [which] removes the notion of ‘the criminal’—with its existential and moralizing undertones—and replaces it with the morally neutral concept of a set of circumstances or specific delict that ought to be followed by a sanction,”⁵⁹⁷ judgment is circumscribed by societal regulation. Similarly, ‘freedom’ must be understood as separate from the ‘willing’ element traditionally associated with ‘agency’.⁵⁹⁸ Kelsen writes:

Freedom is ordinarily understood to be the opposite of causal determinacy. That which is not subject to the law of causality is held to be free. That the human will is free is understood to mean that it is not causally determined...It is understood to assume that only man’s freedom, the fact that his will is not subject to the causal law, makes it possible to hold him to account. But the very opposite is the case. Man is not held to account because he is free; he is free because he is held to account. Accounting and freedom are indeed essentially connected with each other.⁵⁹⁹

A legal order that performs its function effectively channels the ‘will’. It motivates or induces individuals under threat of coercion to behave in accordance with conduct indirectly prescribed by the legal order. Though still part of the chain of causality, behavior is effectively regulated, so that individuals are inclined or desire to ‘will’ what the coercive social order specifies as right legal conduct. Consequently, individuals “‘will’ what they legally ought to do, and their will thus become a cause of their actions in conformity with the law.”⁶⁰⁰

Having no choice but to be born into a coercive order pre-structured by a set of *legal* values that strictly regulate human behavior, Kelsen diminishes the capacity for human agency.

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid., 635-636.

⁵⁹⁸ Ibid.

⁵⁹⁹ Hans Kelsen, “Causality and Accounting,” in *Essays in Legal and Moral Philosophy*, ed. Ota Weinberger (Boston: Reidel, 1974), 163.

⁶⁰⁰ Ebenstein, 636.

Arendt, in contrast, emphasizes the practice of thinking, a cognate of judgment, which though distinguishable in her later writings,⁶⁰¹ is here used interchangeably to indicate a “broadened way of thinking”⁶⁰² or “enlarged mentality.”⁶⁰³ Reconciling Kelsen and Arendt’s divergent views on the capacity to judge, this section closes with a shared affirmation of the “principle of tolerance,” which Eichmann violated in his attack on the “plurality of humanity”⁶⁰⁴.

While Arendt’s critique of the court’s criterion of “manifest illegality” aligns with Kelsen’s, including criticism of the Kantian differentiation between inclinations, interests and desires, on the one hand, and the law on the other, she states that “[Eichmann] functioned in the role of prominent war criminal as well as he had under the Nazi regime; he had not the slightest difficulty in accepting an entirely different set of rules. He knew that what he had once considered his duty was now called a crime; and he accepted this new code of judgment as though it was nothing but another language rule.”⁶⁰⁵ While agreeing with Kelsen that the law’s function is “to induce men to be motivated by ideas in accordance with the conduct indirectly prescribed by the legal order,”⁶⁰⁶ Arendt “faults Eichmann for his failure to be critical of positive law, that is, his failure to take distance from the requirements that law and policy imposed on

⁶⁰¹ See: Hannah Arendt, “Thinking and Moral Considerations: A Lecture,” *Research* 38, no. 3 (Autumn 1971); Hannah Arendt, *The Life of the Mind* (San Diego: Harcourt Brace Jovanovich, 1981); Hannah Arendt, *Lectures on Kant’s Political Philosophy*, ed. Ronald Beiner (Chicago: University of Chicago Press, 1982); Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003). See also: Gisela T. Kaplan, *Hannah Arendt: Thinking, Judging, Freedom*, ed. Clive Kessler (Crows Nest, Australia: Allen & Unwin, 1990).

⁶⁰² Christopher Horner, “The Fate of Judgement: Hannah Arendt, The Third Critique and Aspects of Contemporary Political Philosophy” (Ph.D. diss., University of Roehampton, 2012), 225.

⁶⁰³ *Ibid.*, 86.

⁶⁰⁴ Judith Butler, “Hannah Arendt’s Death Sentences,” *Comparative Literature Studies* 48, No. 3 (2011): 291.

⁶⁰⁵ Arendt, “Thinking and Moral Considerations: A Lecture,” 417.

⁶⁰⁶ *Ibid.*

⁶⁰⁶ Ebenstein, 636.

him; in other words, she faults him for his obedience, his lack of critical distance, or his failure to think.”⁶⁰⁷

In contrast, Kelsen assumes that to be effective, positive law must not only regulate behavior in a certain manner but must influence the faculty of judgment. But adhering to law, even bad laws, as Kelsen writes, can also be construed as a moral act, since the peaceful ordering of a given society (i.e., “justice as peace”) is of supreme value.⁶⁰⁸ While judgment may be *caused* by other moral or religious social norms, it is preponderantly derived from the threat of coercive measure—or the law. The capacity to judge is consequently informed by a chain of causality stemming from the structured, often legal, norms of a given society.

Like Kelsen, Arendt recognizes that causality and freedom are not easily disassociated.⁶⁰⁹ But she does not agree with Kelsen’s position that “man is free because, and to the extent that, he is ‘imputable,’ that is, because legal consequences can be attached to his actions.”⁶¹⁰ Such causal reductionism is irreconcilable with her distinction between practical reason and obedience. Notwithstanding her critique of Eichmann’s claim that his duty derived from Kant’s universal moral precept that the principle of his will could become the principle of general laws, which she asserted “was outrageous, on the face of it, and also incomprehensible, since Kant’s moral philosophy is so closely bound up with man’s faculty of judgment, which rules out blind obedience,”⁶¹¹ she nevertheless departs from Kant’s notion of practical reason.⁶¹² Rather than

⁶⁰⁷ Butler, “Hannah Arendt’s Death Sentences,” 280.

⁶⁰⁸ Hans Kelsen, *General Theory of Law and State*, (New York: Russell & Russell, 1961), 13.

⁶⁰⁹ See: “What is Freedom?” in Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (New York: Viking Press, 1963), 143-171.

⁶¹⁰ Ebenstein, “The Pure Theory of Law: Demythologizing Legal Thought,” 637.

⁶¹¹ Arendt, *Eichmann*, 136.

⁶¹² Seyla Benhabib, “Judgment and the Moral Foundations of Politics,” *Political Theory* 16, no. 1 (Feb., 1988): 36. See also: Richard Bernstein, “Judging-the Actor and the Spectator,” in *Philosophical Profiles* (Philadelphia: University of Pennsylvania Press, 1986), 221-238. This is not to assert that Kant did not assume a significant role in

subscribing to Kant's idea of judgment, "as the faculty of thinking the particular under the universal," where a universal morality is known in advance and the particular follows,⁶¹³ Arendt describes Socrates' tentative approach⁶¹⁴ as a 'model'⁶¹⁵ of the thinking man, who engages his fellow citizens in conversations about 'perplexing'⁶¹⁶ matters. In *Thinking and Moral Considerations: A Lecture*, Socrates is set up as the anti-Eichmann. Arendt comments:

Socrates...who is commonly said to have believed in the teachability of virtue, seems indeed to have held that talking and thinking about piety, justice, courage, and the rest were liable to make men more pious, more just, more courageous, even though they were not given either definitions or 'values' to direct their further conduct.⁶¹⁷

Arendt uses three similes—the gadfly, the midwife and the electric ray—to describe Socrates⁶¹⁸ and his method of social inquiry. The gadfly attempts to awaken his fellow citizen slumbering in the dark, to examine the unexamined life; the midwife, whose main function in ancient Greece was to decide on whether a baby should live or die just as Socrates was known to “purge[] people of their ‘opinions,’ that is, of those unexamined prejudgments which prevent

Arendt's later account of judgment, in particular with respect to Kant's determination of judgment in the realm of aesthetics. For illustration's sake, the Socratic method of thinking is introduced as a counter-point, not only to Eichmann, but to the constraints imposed on thinking through a pure conception of imputation or legal responsibility.

⁶¹³ Immanuel Kant, *Critique of Judgment*, trans. J. C. Meredith (Oxford: Clarendon Press, 1964), 10 in Seyla Benhabib, 37

⁶¹⁴ Arendt writes: “The trouble is that few thinkers ever told us what made them think and even fewer have cared to describe and examine their thinking experience...In brief, I propose to use a man as our model who did think without become a philosopher, a citizen among citizens, doing nothing, claiming nothing that, in his view, every citizen should do and had a right to claim. You will have guessed that I intend to speak about Socrates, and I hope that no one will seriously dispute that my choice is historically justifiable.” Hannah Arendt, “Thinking and Moral Considerations: A Lecture,” 427.

⁶¹⁵ Ibid.

⁶¹⁶ Ibid., 432.

⁶¹⁷ Ibid., 431.

⁶¹⁸ Ibid., 432

thinking”⁶¹⁹; and the electric ray, which ‘paralyzes’, as opposed to ‘arouses’ like the gadfly, reaffirms the importance of “remain[ing] steadfast with [one’s] own perplexities.”⁶²⁰

Arendt insists that ‘banality of evil’ was not meant as a ‘thesis’ or ‘doctrine’ but to indicate a distinction from the common use of the word ‘evil’ as signifying radical forms of depravity.⁶²¹ While traditionally associated with the sins of ‘pride’ and ‘envy’, ‘weakness’, ‘the powerful hatred wickedness feels for sheer goodness’ or ‘covetousness’, Eichmann’s ‘evil’ “was quite ordinary, commonplace, and neither demonic nor monstrous.”⁶²² When confronted with routines that deviated from the normal course of acting, he resorted to standard bureaucratic language, clichés. “It was not stupidity,” she writes, “but *thoughtlessness*.”⁶²³

Standardized expressions immunize us to a reality full of surprise; Eichmann’s habitual use of stock phrases protected him from the arduous task of thinking. Arendt asks:

Might the problem of good and evil, our faculty for telling right from wrong, be connected with our faculty of thought?... Could the activity of thinking as such, the habit of examining whatever happens to come to pass or attract attention, regardless of results and specific contents, could this activity be among the conditions that make men abstain from evildoing or even actually 'condition' them against it?⁶²⁴

The capacity for critical distance, and, with it, moral judgment, coincides with Arendt’s phenomenological inclination, where, circumspect of traditional political, moral and legal theoretical ‘concepts’, she instead prefers to return to “to the things themselves” (zu den Sachen selbst).⁶²⁵ Kelsen’s pure theoretical methodology—with its formal conceptualization of

⁶¹⁹ Ibid.

⁶²⁰ Ibid., 433.

⁶²¹ Arendt, *The Life of the Mind*, 4.

⁶²² Ibid.

⁶²³ Ibid.

⁶²⁴ Ibid., 5.

⁶²⁵ Edmund Husserl, *Logical Investigations* (New York: Routledge [1900/1901] 2001), xxiii.

imputation or legal responsibility would therefore seem ill-fitted to Arendt's approach. By presupposing legal norms as predominating the faculty of thought, Kelsen's structural approach indicates a lack of agency.

To locate the agent one must search specifically in Kelsen's writings on war crimes prosecution. In "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," he writes:

Even if the atrocities are covered by municipal law, or have the character of acts of State and hence do not constitute individual criminal responsibility, they are certainly open violations of the principles of morality generally recognized by civilized peoples and hence were, at least, morally not innocent or indifferent when they were committed... There can be little doubt that, according to the public opinion of the civilized world, it is more important to bring the war criminals to justice than to respect, in their trial, the rule against *ex post facto* law, which has merely a relative value, and consequently, was never unrestrictedly recognized.⁶²⁶

With this statement, Kelsen affirms a 'moral minimum', which he otherwise denies.⁶²⁷ He begins by focusing on 'the atrocities', which are "open violations of the principles of morality generally recognized by civilized peoples."⁶²⁸ But Kelsen does not discount that the acts were also "morally not innocent or indifferent when they were committed."⁶²⁹ This suggests agency that Kelsen generally excludes from his pure description. "In defining imputation as the normative relation between delict and sanction, according to Ebenstein, "Kelsen... removes an element of morality and natural law thinking implied in the traditional concept of responsibility."⁶³⁰ But the evaluation of whether an act is "morally... indifferent when they were

⁶²⁶ Kelsen, "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," 10-11

⁶²⁷ Hans Kelsen, "Law and Morality, in *Essays in Legal and Moral Philosophy*, ed. Ota Weinberger (Dordrecht, Holland: D. Reidel Publishing Company, 1973), 89.

⁶²⁸ Kelsen, "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," 12.

⁶²⁹ *Ibid.*

⁶³⁰ Ebenstein, 635.

committed,”⁶³¹ presupposes someone ought to know that he is acting in violation of “principles of morality generally recognized by civilized peoples.”⁶³²

At the end of Eichmann in Jerusalem, Arendt suggests that even if it “was nothing more than misfortune that made [Eichmann] a willing instrument in the organization of mass murder,”⁶³³ he still ought to be punished for the crimes of genocide. She writes:

[T]here still remains the fact that...just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world—we find that no one, that is, no member of the human race, can be expected to want to share the earth with you.⁶³⁴

The principles of morality that Kelsen invokes depends on civilizational ‘standards’. Genocide—and the principle of tolerance that prevention necessitates—must be the ‘moral minimum’. But it is not clear if agency can be fully restored to Kelsen’s interpretation of the parameters of judgment or if the atrocity is what makes a war criminal like Eichmann culpable.

IX. Conclusion

This case study focused on pure theoretical contributions to the changing notion of international criminal responsibility at the trial of Adolph Eichmann in Jerusalem. At the time of the 1961 proceedings, Kelsen’s prodigious commentary on international criminal law and his legacy as a scholar who influenced practice at the International Military Tribunal at Nuremberg, had been well-documented. However, aside from an unresolved footnote in *Principles of International Law* (1967), he left no direct evidence regarding the case.

⁶³¹ Kelsen, “The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals,” 12.

⁶³² Ibid.

⁶³³ Arendt, *Eichmann in Jerusalem*, 279.

⁶³⁴ Ibid.

In analyzing trial transcripts where Kelsen is invoked by court practitioners as a leading international publicist, it is possible to recreate a pure theoretical view of Eichmann's culpability. He is both drawn upon by defense counsel in order to reaffirm a traditional notion of the acts of state doctrine, and prosecutors and judges as an advocate of a higher principle of justice based on retroactive lawmaking for acts deemed morally irresponsible. The significance of re-visiting this case is not only important in terms of filling a historical gap but provides insight into the philosophical question of agency with respect to Hannah Arendt's commentary on the 'banality of evil' where under conditions of terror most comply with the norms of the national legal order.

Like Arendt, Kelsen would certainly have contested the court's criterion of "manifest illegality." Individuals accused of war crimes were expected to disregard the orders of their superiors when those orders patently deviated from the law in conformity with Kant's ethical doctrine that only conduct directed against 'inclination' is of any moral value. But what if an individual's inclination is to observe the law of his legal order, even if the *grundnorm* is the Fuhrer Principle?

As Kelsen often observed, if the law is to be effective it must forge behaviors that conform to the coercive norms of a given social order. Freedom, normally understood to be the opposite of causal determinacy, is the end point to a chain of causality or imputation that consists of a delict and sanction. Rather than accepting the traditional view that acts of state, a personification of the duties that officials are ordered to perform, comprises the sum total of Kelsen's vision—mechanistic or deterministic—Kelsen also affirms that when acts are "morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice."

This case study followed from a reconceptualization of the acts of state doctrine to a Kelsenian exploration of agency under superior orders arguing that while Kelsen would not have subscribed to the court's criterion of "manifest illegality," like Arendt he would have found Eichmann guilty for having committed core international crimes.

In the history of international criminal law, international tribunals have done more than merely give jural *imprimatur* to norms in waiting and have been much more than mere ‘evidential sources’ of customary law. In effect, taking advantage of the...indeterminacy of customary law, international courts and tribunals, not least the *ad hoc* Tribunals, have often acted as ‘customary midwives’...so that international criminal law may owe more to judges than any other part of international law.⁶³⁵

Chapter 5

Judgment in the Post-Cold War Era: The Decline of Formalism in the Mirror of Pure Theory

I. Introduction

As with previous case studies on Hans Kelsen’s contributions to the changing notion of ICR, including the author of pure theory’s validation, based on retroactive lawmaking in violation of principles of legality, of international criminal prosecution at the Nuremberg IMT (chapter three), and the universal jurisdictional application, in accordance with pure theory, of standards ascribed to “the international community” at the trial of Adolph Eichmann in Jerusalem for acts of state of the magnitude of crimes against humanity (chapter four),⁶³⁶ this chapter emphasizes how a purposive judicial logic, which focuses on the core humanitarian element instantiating the purpose or intention of the ICL regime, may be reconciled with Kelsen’s structural account of imputation.

Kelsen’s endorsement of discretionary powers for ICL judges, in accordance with a hierarchically-delegated normative schema, is especially pronounced in the post-Cold War era where customary international law, a traditionally indeterminate international law source, has

⁶³⁵ Guenael Mettraux *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2006), 14

⁶³⁶ “Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations.” *Attorney General of Israel v. Eichmann*, Israel Supreme Court, *ILR* 26 (1968), 304.

been mandated by the United Nations Security Council (UNSC) as sponsor of the International Criminal Tribunal for Yugoslavia (ICTY). Although this chapter does not claim to be an exhaustive account of judicial lawmaking at the ICTY, the choice to emphasize this tribunal, as representative of the turn to expressly purposive hermeneutics in the post-Cold War era, animates the broader narrative arc. Application of Kelsen's theoretical approach, once again demonstrates a progressive commitment to the regulation of barbarous acts of state.

In the Report of the Secretary-General on the establishment of the ICTY, judges were instructed to only apply those legal norms that were beyond doubt part of customary international law⁶³⁷. In contrast, the International Criminal Tribunal for Rwanda (ICTR) was empowered to also use treaty law, regardless of whether it conformed to existing custom.⁶³⁸ As a result, the ICTR is a less compelling test case than the ICTY for flexible construction, since decision-making at Arusha has not demonstrated the same potential for extracting the moral claim on responsibility that an unwritten identification of law dealing exclusively with custom would.

The Report of the Secretary General states that:

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some, but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.⁶³⁹

⁶³⁷ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3.5 1993, (S/25704), para. 34.

⁶³⁸ Comprehensive Report of the Secretary-General on Practical Arrangements for the Effective Functioning of the International Criminal Tribunal for Rwanda, Recommending Arusha as the Seat of the Tribunal, UN Doc. S/1995/134 (13.2. 1995), para. 12)

⁶³⁹ Report of the Secretary-General Pursuant to Paragraph 3 of Security Council Resolution 808 UN Doc. S.25704, paras 18-30.

Part II reviews Kelsen's theoretical contributions to customary international law application. In the modern approach, *opinio juris* emphasizes statements rather than actions, depending on the “intention” of states to elicit the meaning of custom. The author of Pure Theory’s neo-Kantian epistemological project, in contrast, endorses state practice as the exclusive element of customary international law, in accordance with a de-psychologized description of responsibility that is meant to disregard the legal subject’s “intention”. Those critics who assert that Kelsen viewed international law as inevitably progressing away from the use of custom as a determinant source, however, are incorrect.⁶⁴⁰ Part II endorses the claim that Kelsen champions the supremacy of this highly flexible “meta-norm” in order to shore up structural limitations associated with this sphere.⁶⁴¹ As a result, Part II focuses on why Kelsen remains relevant as a seminal international legal publicist for the post-Cold War era where customary construction, vital to the development of ICR, is employed in a highly creative fashion.⁶⁴²

⁶⁴⁰ David J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010).

⁶⁴¹ Jörg Kammerhofer “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems,” *European Journal of International Law* 15, no. 3: 538-539.

⁶⁴² In arguing, against the admonition of the UN Secretary General that “the problem of adherence of some, but not all States to specific conventions [must] not arise,” that state practice does not in fact require adherence by *all* states, Kelsen opens the door to debate over the degree of compliance. As such, judicial decisions can be used to reconcile the determination of state practice that was already confronted, for example, at Nuremberg when state practice deviated from collective security commitments that had defined the League of Nations system. Even though the validity of the Nuremberg IMT was based, according to Kelsen, on retroactive lawmaking, not prospective multilateral treaties, such as Kellogg-Briand (see: chapter two), there was nevertheless an effort to justify widespread adherence to prospective agreements. In distinguishing the high bar set by the UNSG from his own more realistic proposal of general compliance, Kelsen introduces criticism from a more conservative perspective. For a more recent estimation of Kelsen’s contributions to the law of the United Nations and the topic of “international consensus by a leading contemporary foreign policy expert, J. Peter Pham, Vice President of the Atlantic Council, see: J. Peter Pham, “The Perils of “Consensus”: Hans Kelsen and the Legal Philosophy of the United Nations” (August 7, 2003). bepress Legal Series. bepress Legal Series. Working Paper 17.

<http://law.bepress.com/expresso/eps/17>. Pham’s criticism will be explored, more generally, in chapter six.

⁶⁴² Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, trans. Thomas Dunlap (Cambridge: Cambridge University Press, 2010), 139.

The tension observed in previous chapters between, on the one hand, Kelsen's general advocacy of the principle of legality's rule against *ex post facto* lawmaking, and on the other, his endorsement of retroactive laws based on principles of morality for crimes of the magnitude of crimes against humanity and genocide, reasserts itself anew at the ICTY. Although Kelsen's moral emphasis seems counter-intuitive, as pure theory limited the customary scope of judicial interpretation to the "frame" derived from an examination of actual state practice, Part III nevertheless emphasizes how Kelsen's theory is reconcilable with extra-legal judicial decision-making.

Historian and legal scholar Jeremy Telman writes that:

Within the law of interpretation, Kelsen acknowledges that the norm is but a frame. Legal norms provide the frame within which various interpretations can arise, but those interpretations do not involve cognition and application of higher norms but exercises of will in the furtherance of legal policy. Judges resolve issues within the framework of the legal norm by consulting non legal normative systems.⁶⁴³

In recognizing international judges, including representatives of national or hybrid courts as authorized by state parties to decide on the degree of culpability for once-valid acts of state, Part III emphasizes Kelsen's view on the supremacy of discretionary judicial interpretation. Unlike Judith Shklar's position that Kelsen's legal philosophy remains thoroughly "formalist,"⁶⁴⁴ this section, follows Kelsen scholar Stanley Paulson's distinction between the "scientific" frame of legal normativity conforming with pure theoretical cognition, and non-formal or "authentic"

⁶⁴³ Jeremy Telman, "Problems of Translation and Interpretation: A Kelsenian Commentary on Positivist Originalism" (IVR German Section Conference, University of Freiburg, Freiburg Germany, September 29, 2018).

⁶⁴⁴ Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1964), 33-34.

judicial interpretation, which Kelsen readily endorses. Kelsen's embrace of Hermann Kantorowicz's "free law" methodology resembles the broad interpretive scope professed by American legal realism, a camp that Shklar professes to admire.⁶⁴⁵

While "scientific" legal cognition provides a frame for valid interpretation of international law sources, these sources are informed by the structural position of the judge in the *stupenfau* or hierarchy of delegation described in chapter two. Once judges of core international crimes are authorized to decide cases introduced through treaty ratification by state parties, acts of state are subsequently deprived of their immunizing quality. This would include tribunals sponsored by the UNSC and authorized by the implied consent of all members of the United Nations. The UNSC is further animated by the normative authority of Chapter VII of the UN Charter.⁶⁴⁶ The judicial ruling, whether it deviates from the pure theoretical "frame" of cognition or not, in consequence, legitimately delegates responsibility.

Part IV reconciles Kelsen with the prevailing purposive interpretive methodology used in post-Cold War cases before the ICTY. Through his support of "Free Law," Kelsen grants judges' wide scope for interpreting humanitarian violations specific to the material jurisdiction of this sphere. In addition to providing theoretical legitimacy for the application of a purposive approach, the particular problem of how to expand the parameters of international criminal responsibility to incorporate "non-international armed conflict" is also reconciled by Kelsen

⁶⁴⁵ For early influences on legal realism, see *generally*: Oliver Wendell Holmes, jr., "The Path of the Law," *Harvard Law Review* 10, no. 457 (1897); John Chipman Gray, (New York: Columbia University Press, 1909).; Roscoe Pound, *Outlines on Lectures in Jurisprudence* (Cambridge: Harvard University Press, [1920] 2010); Benjamin Cordozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1922). For the legal realist "movement", see *generally*: Herman Oliphant, "A Return to Stare Decisis", *American Bar Association Journal* 14 (1928).; Jerome Frank, *Law and the Modern Mind* (New York: Routledge [1930] 2017); Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, NY: Oceans Publications [1930] 1951).

⁶⁴⁶United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS VII, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 8 October 2018].

through theoretical endorsement of an expanded conception of “international legal subjects”. Perpetrators of humanitarian crimes, for example, who belong to the same state as victims, can be tried, according to Kelsen, in accordance with new descriptions of “substantial relations” based on “ethnic affiliation”. In addition to justifying the now-commonplace proposition that ICL applies to non-international armed conflict, Kelsen furthers the prospect that “principles of humanity” may be used as a purposive interpretive remedy, not in defiance of positive law commitments, but in conjunction with permitted discretionary judgment.

II. Customary International Law from a Pure Theoretical Perspective

Customary international law is not a special department or area of public international law: it *is* international law.”⁶⁴⁷

a. Traditional and Modern Approaches to CIL

“[W]hat distinguished custom amongst nations in public international law?” asks legal philosopher David Bederman. “An answer may lie in the sheer volume, breadth, and density of [customary international law] norms. Custom—as distinct from treaty obligations or the application of inchoate ‘general principles of law’—continues to dictate broad swathes of

⁶⁴⁷ Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (The Hague: Nijhoff, 1998), 18. Brownlie (1932-2010), a highly regarded public international law scholar, was perhaps best known for arguing before the International Court of Justice in *Nicaragua v. United States*; *Bosnia and Herzegovina v. Serbia, Montenegro*; and *Democratic Republic of the Congo v. Uganda*. He worked on the extradition trial of former Chilean dictator Augusto Pinochet in 1999 in England, where he represented Amnesty International on behalf of Chilean victims of human right abuse. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice (ICJ), 27 June 1986, available at: <http://www.refworld.org/cases,ICJ,4023a44d2.html> [accessed 11 October 2018]; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, International Court of Justice (ICJ), 11 July 1996, available at: <http://www.refworld.org/cases,ICJ,4040ba0c4.html> [accessed 11 October 2018]; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*; *Request for the Indication of Provisional Measures*, International Court of Justice (ICJ), 1 July 2000, available at: <http://www.refworld.org/cases,ICJ,3ae6b6e14.html> [accessed 11 October 2018]; “Regina -v- Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2); HL 15 Jan 1999 - swarb.co.uk”. *swarb.co.uk*. 2015-06-30.

international legal obligation.”⁶⁴⁸

Much of the post-World War II project of ensuring states protect the human rights and dignities of their citizens, and that they observe restraint in their treatment of non-combatants in war time, has been elucidated through customary international law. Yet “some jurisprudes,” Bederman notes, “most famously Hans Kelsen—have maintained that, over time, treaty-based sources of international norms will dominate over customary principles...” because of “a natural tendency, as in any ‘mature’ legal system, for legislation to crowd out custom. One might, therefore, believe that custom is actually waning as an influential or legitimate source for international legal obligation.”⁶⁴⁹

While Bederman’s analysis underestimates the central role that custom plays for Kelsen in validating international law, he is right to conclude that Kelsen saw treaties rather than customary principles as the source of international law that would transform international law from a “primitive” to a more “mature” system. The proof for this is the fact that Kelsen believed that in time state legal organs would likely delegate their powers through treaties to international organizations—creating the blueprint for a “a thoroughly legalized and institutionalized world order.”⁶⁵⁰

Before examining the pure theoretical application of custom, which in addition to treaty law is considered the only other valid source, according to Kelsen, in cognition of ICR⁶⁵¹, this

⁶⁴⁸ David J. Bederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2010), 136.

⁶⁴⁹ Ibid.

⁶⁵⁰ Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, 2.

⁶⁵¹ Kelsen notably denies that general principles of international law are valid international law sources. Of course, Kelsen’s embrace of “principles of civilization” in pursuit of retroactive justice against state officials who have committed core international crimes presumes a general principle adhered to by the majority of states. In this sense, as the concluding chapter (six) argues, Kelsen’s theoretical description of ICR ought to be placed alongside his student, the equally eminent international legal theorist Hersch Lauterpacht, who recognizes general principles of law as necessary tools in assigning criminal responsibility for core international crimes.

chapter briefly reviews the distinction between “traditional” and “modern” approaches to this enduring source of international criminalization. Legal scholar Anthea Roberts, for example, considers the fault line between, on the one hand, those approaches that elevate state practice to a supreme position in the hierarchy of customary interpretation (“traditional”), and, on the other, those that recognize that state practice, hard to detect and easy to renege, requires a more subjective, extra-legal interpretive element (“modern”)⁶⁵².

While the traditional approach to custom, says Roberts, is based on an inductive process that is evolutionary and “derives from specific instances of state practice,”⁶⁵³ a modern approach uses deduction that starts with a general statement—or principle shared by states—rather than particular instances of practice.⁶⁵⁴ *Opinio juris* is emphasized in the modern approach to custom where statements rather than actions often become the basis of interpretation in determining the “intention” of states. Whereas the traditional approach is typically associated with an inductive method and the consent of state parties, a modern consideration of customary international law is linked with a deductive method and substantial principles of justice.⁶⁵⁵

Article 38 of the Statute of the International Court of Justice (ICJ) defines international custom “as evidence of a general practice accepted as law.”⁶⁵⁶ The phrase can be broken into

⁶⁵²Anthea Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation,” *American Journal of International Law* 95 (2001): 7.

⁶⁵³Ibid.

⁶⁵⁴Ibid.

⁶⁵⁵ Koskeniemi's oft-referenced distinction between 'apology' and 'utopia' corresponds to the use of an inductive rather than deductive method, as the former encouraged state immunization for humanitarian abuses provided states claimed non-consent, while the latter highlighted the incorporation of human rights principles *a priori*. See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2015).

⁶⁵⁶ Article 38 reads: “The Court shall apply: 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States; 2. International custom, as evidence of a general practice accepted as law; 3. The general principles of law recognized by civilized nations; 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.” League of Nations, *Statute of the Permanent Court of*

two distinct units: (a) “evidence of a general practice” associated with state practice or “usage,” and (b) “accepted as law” or the element concerned with *opinio juris*.⁶⁵⁷

Roberts describes modern customary international law as part of a deductive process that emphasizes *opinio juris*—or the “accepted as law” element in Article 38. *Opinio juris* begins with general statements of rules rather than specific instances of practice.⁶⁵⁸ *The Merits decision*

International Justice, 16 December 1920, available at: <http://www.refworld.org/docid/40421d5e4.html> [accessed 11 October 2018].

⁶⁵⁷ Separate decisions before the International Court of Justice (ICJ), and its precursor the Permanent Court of International Justice (PCIJ), the judicial branch of the League of Nations, highlight the diverging application of custom in an international law setting.

The 1927 *Lotus* case before the PCIJ, for example, involved a French Steamship, the SS *Lotus*, and a Turkish vessel, the S.S. *Boz-Kourt*, in a dispute that crystallized the traditional understanding of customary formation. The issue revolved around the right of Turkish jurisdiction over a French officer responsible for the death of eight Turkish sailors aboard the S.S. *Boz-Kourt*. Turkish officials arrested the officer as he sailed into Istanbul. As a result of the incident, France lodged a formal complaint before the PCIJ challenging Turkey's exercise of jurisdiction.

The PCIJ ruled that Turkey was allowed to try the French official, because France had not shown evidence of state practice where criminal cases against foreign nationals aboard flag ships on the high seas was prohibited. The court placed a high burden of proof on France. The PCIJ required that France show instances in which a *Turkish* vessel had in the past collided with a foreign ship, *Turkey* had protested the prosecution of its national before a foreign court, and in turn had had its official exonerated for an incident similar to the misconduct of the French officer. The case, in short order, demonstrated that international law was a fully permissive system where, unless an action was explicitly prohibited, states were allowed to do whatever they deemed appropriate.

Since the PCIJ placed such a high bar on proof of a general practice, the *Lotus* case, however, was far from representative of approaches to state practice. In contrast, the 1900 *Paquette Habana* case was a far more common representation of reasoning based on evidence that proved uniform, consistent and of long usage. In *Paquette Habana*, the U.S. Supreme Court decided in favor of two Cuban fishing boat owners, whose vessels were seized by U.S. naval forces during the Spanish-American War as “prizes” of war. The attorney for the boat owners, J. Parker Kirlin, was able to demonstrate that over a period of two centuries, an earlier 1798 precedent from the English High Court of Admiralty that had deemed the seizure of vessels an act of “comity” or “courtesy” rather than a rule of law that immunized fishing craft had been overturned. Kirlin demonstrated that the legal practice of protecting fishing craft was binding on the United States. He based his argument on a variety of sources, including treaties between European nations, English royal ordinances, the opinion of international legal publicists, and instances in which the U.S. Navy had received instructions in earlier conflicts to abstain from similar practices. Kirlin won the case.

Paquette Habana proves to be salient as an example of customary interpretation based on state practice that resembles *opinio juris* in the sense of licensing a broad scope of sources to reaffirm practice (even non-practice). The distinction between *usus* or “practice” and the personified *mens rea* or “intent” of “states” produces a region of blurriness. Do moral idealizations contained in non-binding statements of support for the criminalization of humanitarian offenses, expressed by legal “organs” or state representatives in an official capacity, for instance, amount to “state practice”? The *Paquette* case was a major customary interpretive advancement over statist-immunizing elements that foreshadowed the broadened scope of customary construction, especially in post-Cold War cases. *Lotus Case*, (1927), P.C.I.J. Series A, No. 10; *The Paquete Habana Case*, 175 U.S. 677 (1900).

⁶⁵⁸ The 1969 North Sea Continental Shelf judgment by the ICJ defined *opinio juris* as the “belief that...a practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief...is implicit in the very notion of *opinio juris sive necessitatis*. The States concerned must...feel that they are conforming to what amounts to a legal obligation.” North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Rep. 1969 (Feb. 20), p. 3. See also: Roberts, 7. Maurice Mendelson, “The Subjective Element in Customary International Law,” *British Yearbook of International Law* 66

*in Military and Paramilitary Activities in and Against Nicaragua*⁶⁵⁹ before the ICJ exemplifies the thrust of this deductive approach, which becomes central to the moralization of customary application in ICL beginning with the *Tadic* appeals court judgment⁶⁶⁰. Like Roberts, legal scholar Anthony D'Amato distinguishes state practice as a form of action as opposed to *opinio juris*, which he considers akin to statements, such as treaties and declarations about the legality of action.⁶⁶¹ The *Filartiga v. Pena-Irala* case⁶⁶², in which the Second Circuit of the U.S. Court of Appeals relied on UN General Assembly resolutions to determine violations of the “law[s] of nations” confirming the right of the court to jurisdiction under the Alien Tort Claims Act,⁶⁶³ the *Nicaragua* judgment derived customs of non-use of force and nonintervention from General Assembly resolutions. The *Nicaragua* opinion determined that “In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of State should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”⁶⁶⁴ The assumption of the court was that a state practice that deviated from the

(1995), 177, 206-207 objects to ICJ decisions like the North Sea Continental Shelf judgment, because he considers proof of *opinio juris* where there is a “well established practice” to be the “superfluous.” Yet as Brian D. Lepard insists, *opinio juris* is a requirement of Article 38—and consequently the subjective element must be considered an essential component of customary formation. Brian D. Lepard *Customary International Law: a New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2011).

⁶⁵⁹ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Rep. 1986 (June 27).

⁶⁶⁰ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <http://www.refworld.org/cases,ICTY,40277f504.html> [accessed 11 October 2018].

⁶⁶¹ Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971), 74-75.

⁶⁶² The case set the precedent for prosecuting non-US citizens in American courts for tortious acts. The Federal Court wrote that: “The torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.” *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

⁶⁶³ Alien Tort Claims Act (ATCA), is a section of the United States Code that reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Alien Tort Claims Act, US Code 28 (1789) § 1350.

⁶⁶⁴ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Rep. 1986 (June 27), 98.

general statement condemning the non-use of force and nonintervention was not “recognition of a new rule.” Similarly, in the *Filartiga v. Pena-Irala* case, since states—even those that practiced torture—voted in the UN General Assembly for resolutions condemning state-sponsored torture, the assumption was that *opinio juris* carried more weight than practice that diverged from the articulations of those states' responsible for such abuse.

Legal scholar Frederick Kirgis re-orientes the debate between traditional and modern approaches by viewing each method along a sliding scale where “[t]he more destabilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decisionmakers will substitute one element for the other...”⁶⁶⁵ Kelsen, who determines in a uniform manner the parameters of custom based on what states actually “do” rather than pronouncements of “belief”, alters his method in its application to human rights violations—specifically core international crimes—as opposed to other international delicts. Chapter two argued that in order for retroactive lawmaking to take full effect, a distinction would need to be made between laws pertaining to what Blackstone describes as acts “indifferent in itself” and offenses on the magnitude of core international crimes. Kelsen uses this statement of acts “indifferent in itself” to justify the prosecution of acts which were not. Kirgis' sliding scale approach in consequence mirrors Kelsen’s concern for the distinctively debased acts that comprise the substantive jurisdiction of ICL.

b. The Pure Theory of Law and Custom

“Custom is, just like a legislative act, a mode for *creating* law,” writes Kelsen.⁶⁶⁶ The

⁶⁶⁵Frederick L. Kirgis, “Custom on a Sliding Scale,” *American Journal of International Law* 81(2012): 149.

⁶⁶⁶ Hans Kelsen, “Theorie du droit international coutumier,” (N.S.) *Revue internationale de la theorie du droit* (1939) 253, at 263.

equivalence drawn by Kelsen between custom and legislation is qualified by the fact that in legislation lawmakers are “conscious and deliberate,”⁶⁶⁷ whereas in the creation of custom “men do not necessarily know that they create by their conduct a rule of law, nor do they necessarily intend to create law.”⁶⁶⁸ Custom encompasses the effect of conduct (i.e., state practice) that individuals subject to the law create unconsciously through a decentralized process; whereas, legislation is made through a centralized process by an organ that is “more or less” distinguishable from those subject to the law.⁶⁶⁹

Treaties, or contracts between nations, resemble both legislation and custom. Similar to the legislative process, a treaty is “conscious and deliberate” lawmaking. However, while a legislative enactment is made by special organs who legislate in a stable legal environment, those subject to treaties are the contracting parties themselves, which includes officials who transfer responsibility to the “state”. While “conscious and deliberate,” treaties, which create law applicable to the contracting parties only, are not the predominant source of international law. “With respect to its validity,” treaty law, writes Kelsen, “is inferior to customary international law.”⁶⁷⁰

Bederman's assessment of pure theoretical contributions are therefore misguided, especially when he suggests that for Kelsen “there can be no real legal obligations for states in following CIL rules.”⁶⁷¹ *Pacta sunt servanda* (“agreements must be kept”), attributed to

⁶⁶⁷ Hans Kelsen, *Principles of International Law*, 2nd ed., ed. Robert Warren Tucker (New York: Holt, Rinehart and Winston, 1967): 441.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibid., 446; Hans Kelsen, *General Theory of Law and State* (New York: Russell, 1945), 369.; Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2011), 40.; Jörg Kammerhofer, “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems,” *European Journal of International Law* 15, no. 3 (2004): 548.

⁶⁷¹ Bederman, 161.

international treaty law, is a norm, according to Kelsen, subordinate to the customary idea that states ought to behave the way they customarily do in practice.⁶⁷² Treaties alone do not constitute a basic norm, or presupposed source from which international law derives, says Kelsen. What grants each legal normative order or personified “state” the right to make treaties is the fact that “agreements must be kept”; and “agreements must be kept” because a higher norm dictates that “states ought to behave as they have customarily behaved.” Custom, for Kelsen, constitutes general international law.

Bederman contests the accusation of contemporary critics of customary international law like Jack Goldsmith and Eric Posner,⁶⁷³ who use game-theoretical and rational choice models to prove that there is no legal obligation for states to follow customary rules of international law. “For Goldsmith and Posner,” Bederman writes, “to follow a [customary international law] norm because of its inherent value (coincidence), or out of self-interest (cooperation and coordination), or even because of fear of negative consequences (coercion) is inimical with its being a legal rule.”⁶⁷⁴

These writers endorse a description that suggests that these norms are adhered to, not out of a sense of legal obligation, but because it is beneficial to follow a customary norm. This implies that Goldsmith and Posner elevate sovereign right above the requirements of international society, and are in fact, according to Bederman, political realists.⁶⁷⁵ Bederman

⁶⁷²Hans Kelsen. *Principles of International Law* (New York: Rinehart & Company, 1952), 417-418.; See also: Francois Rigaux, “Hans Kelsen on International Law,” *European Journal of International Law* 9 (1998): 328.

⁶⁷³ Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

⁶⁷⁴ Bederman, 102.

⁶⁷⁵ Like classical political realists Hans Joachim Morgenthau and Georg Schwarzenberger, who consider international law to have limited powers to constrain states in their actions, and neo-realist Kenneth Waltz, whose structural or neo-realist theory of international relations denies international law any significant role, Goldsmith and Posner grant state interests a decisive quality. See: Jack Goldsmith and Eric A. Posner, *The Limits of International Law*, 6-9.; Hans J. Morgenthau, “Positivism, Functionalism, and International Law,” *American Journal of International Law* 34 (1940).; Hans J. Morgenthau and Kenneth W. Thompson, *Politics Among Nations*, 7th ed.

consequently attributes their critique to a skepticism towards customary international law rooted in “Hans Kelsen and H.L.A. Hart’s two-edged attack on international law.”⁶⁷⁶

“Kelsen and Hart famously argued that, to the extent that custom plays any role in international legal obligation, it is a sign of a ‘primitive’ legal order and, even worse, a thinly disguised naturalist one based on inchoate notions of ‘international morality’.”⁶⁷⁷ While Hart’s view of customary international law may affirm such a view, since Hart dismisses the customary validity of international law (see below), given that Kelsen grounds his basic norm of international law in a customary source, and values customary international law as methodologically useful in determining ICR, Bederman is incorrect when he attributes to Kelsen the sentiment that “there can be no real legal obligations for states in following [customary international law]...”⁶⁷⁸ Bederman obscures the fact that Kelsen, unlike Hart, turns to custom to validate international law as a “system” in which states pattern behavior on customary practice.

Unlike Kelsen, Jeremy Bentham, an early critic of naturalism in legal theory⁶⁷⁹ associated custom with ‘barbarism.’ John Austin in *Province of Jurisprudence Determined* also provided limited guidance for the determination of custom.⁶⁸⁰ Austin certainly did not consider it

(New York: Random House, 2006).; Georg Schwarzenberger, *The Frontiers of International Law* (London: Stevens, 1962).; Kenneth Waltz, *The Theory of International Politics* (Berkeley, CA: University of California Press, 1979).

⁶⁷⁶Bederman, 161.

⁶⁷⁷Ibid.

⁶⁷⁸Bederman, 162

⁶⁷⁹Legal positivist Jeremy Bentham writes: “[I]f the laws of a barbarous age are not changed in an age of civilization, the tribunals will depart in degrees from the ancient principles, and insensibly substitute new maxims. Hence will arise a kind of combat between the law which grows old, and the custom which is introduced, and in consequence of this uncertainty, a weakening of the power of the laws over expectation.” Jeremy Bentham, *Works of Jeremy Bentham*, Part 1, “Power Over Expectation” (London: Simpkin, Marshall & Co., 1843), 325, <https://books.google.com/books?id=oZ1EAAAACAAJ&pg=RA1> (accessed June 15, 2018).

⁶⁸⁰John Austin writes of custom: “At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force it can be said to

legitimate for the purpose of international legal obligation, which to Austin was no more than ‘positive morality’ classified alongside the laws of fashion and honor.⁶⁸¹⁶⁸²

While Hart’s “neo-positivist” legal philosophy would seem to be a good candidate for endorsing international law and the criminalization of humanitarian offenses, since like Kelsen he shared a post-Austinian view of law that granted legal norms validity free of sovereign-backed commands, he, too, creates obstacles to prosecution.⁶⁸³ Even as he devotes a chapter of *The Concept of Law* to the subject⁶⁸⁴ of international law, he considers it to be a system that contains only primary rules⁶⁸⁵. Primary rules govern conduct, while secondary rules “serve, among other purposes, the vital function of establishing procedures for identifying the primary rules that bind people. The ‘rule of recognition’ [being] the master rule for such a purpose” functions similar to Kelsen’s basic norm.⁶⁸⁶

With regard to Kelsen’s belief that the basic norm of the international system is that “states should behave as they customarily behaved,”⁶⁸⁷ Hart rejects this on the grounds that there

possess, from the general disapprobation falling on those who transgress it.” John Austin, *The Province of Jurisprudence Determined: Being the First Part of a Series of Lectures on Jurisprudence, or, The Philosophy of Positive Law*, Vol 1, Second Edition (London: John Murray Albemarle Street, 1861), 23. See also: Austin, *The Province of Jurisprudence Determined*, 23-25, for a more extensive discussion on the place of the judge in relation to custom, and custom as positive law.

⁶⁸¹ *Ibid.*, 2.

⁶⁸² *The Legacy of John Austin’s Jurisprudence*, ed. Michael Freeman and Patricia Mindus (Dordrecht, Netherlands: Springer, 2013), 99. Freedman and Mindus write that “Austin...[has]...been associated with the Thrasymachian slogan ‘Might is Right’. Such accusations are hard to die: for instance, Austin has recently been portrayed as a ‘realist’ (not in the sense of legal realism, but in the Hobbesian and Machiavellian tradition of political realism). ‘Austin’s theory is (...) a theory of the ‘rule of men’: of government using law as an instrument of power.” See also: Roger Cotterrell, *Scholar in Law: English Jurisprudence from Blackstone to Hart* (New York: NYU Press, 1996), 70.

⁶⁸³ On the relationship between Hart’s and Kelsen’s positive theoretical framework, see: Brian H. Bix, “Kelsen, Hart and Legal Normativity,” *Revus— Journal for Constitutional Theory and Philosophy of Law* 24 (2018), <file:///C:/Users/Jason%20Reuven%20Kropsky/Downloads/revus-3984.pdf>.

⁶⁸⁴ HLA Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, [1961] 2012), 213-238.

⁶⁸⁵ See: *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy*, edited by Mathew H. Kramer, Claire Grant, et al, 2nd ed. (Oxford: Oxford University Press, 2013).

⁶⁸⁶ Andrew Altman, *Critical Legal Studies: a Liberal Critique* (Princeton: Princeton University Press, 1993), 81.

⁶⁸⁷ Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952), 146. In the 1952 edition,

can be no secondary rule of recognition in international law. Hart writes with reference to the aforementioned phrase that:

[I]t says nothing more than that those who accept certain [customary] rules must also observe a rule that the rules ought to be observed. This is a mere useless reduplication...⁶⁸⁸

“What Hart overlooks,” writes Neil MacCormick, “is that *his* theory of a ‘rule of recognition’ is a theory concerning a rule about the standards which it is obligatory for *judges* [as state officials] to observe. In that case, it is no mere useless reduplication to say that certain judges, when states voluntarily refer disputes to them, must decide according to the standards of ‘international custom, as evidence of a general practice of law accepted as law...’⁶⁸⁹

This standard is found in Article 38 of the statute of the Permanent International Court of Justice. Judges merely follow the standards set forth by the international community in Article 38 that specifies sources that judges must follow in order to maintain the validity of the system. These sources, in addition to custom, include treaties, general principles of law, judicial rulings and the scholarship of international publicists.⁶⁹⁰

Notwithstanding the fact that Kelsen validates international law according to the principle

of *Principles of International Law* Kelsen focuses on the distinction “between responsibility based on fault (culpability) and absolute responsibility, [which] is characteristic of a relatively progressive legal order. It is unknown to primitive law, where, together with collective responsibility, absolute responsibility prevails.” Hans Kelsen, *Principles of International Law* (1952), 12. The transfer of power to *ad hoc* or permanent jurisdictional authorities produces the validity-defining aspect of ICR. States reaffirm customary state practice by transferring authority to presumably neutral or relatively neutral judicial bodies in determination of core international crimes. From the vantage point of conceptualizing the responsibility of individuals as culpability or fault, international law incorporates customary international law as a source, highly effective in discriminating between collective and individual forms of responsibility, due to the flexibility of this “meta-norm”.

⁶⁸⁸ Hart, 230.

⁶⁸⁹ Neil MacCormick, *HLA Hart* (Stanford: Stanford University Press, 2008), 114.

⁶⁹⁰ League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920, available at: <http://www.refworld.org/docid/40421d5e4.html> [accessed 11 October 2018].

that “states should behave as they customarily behaved,” which Hart dismisses as mere “reduplication,” the issue is still what is meant by this phrase. Does it not also include what is “accepted as law” even when there is scant evidence of state practice? While contemporary legal positivists like G.J.H. van Hoof⁶⁹¹ enunciated a sentiment that Kelsen could not but agree with—the notion that *opinio juris* was far too vague and general to constitute a “rule of recognition” in the Hartian sense—⁶⁹² Kelsen does indeed incorporate custom—*contra* Hart—as a valid source of international law.

In Kelsen’s “Theorie Du Droit International Coutumier” or “Theory of Customary law,”⁶⁹³ Kelsen rejected what he called the “metaphysical doubling” of the law. Since customary law was created by state organs through their conduct, any reference to *opinio juris sive necessitatis* would have already been confirmed through state practice. Kelsen consequently believed that such a conviction only adulterated—in a metaphysical sense—the purity of international legal norms.

Like a dryad behind a tree, a nymph behind a river, or sun god behind the sun, from an epistemological vantage point none could be proved.⁶⁹⁴ Likewise, *opinio juris* created an unwarranted dualism between what the state did in fact and what it was assumed to believe. It, too, could not be proved, he suggested. To try and elicit the real intention of states beyond what was already confirmed in state practice, said Kelsen, was wholly redundant.

But how could state practice, for example, determine customary judgment when violations of international rules so frequently occur? Such violations would seem to “constitute a law-

⁶⁹¹ G.J.F. Van Hoof, *Rethinking the Sources of International Law* (Deventer, Netherlands: Kluwer, 1983).

⁶⁹² HLA Hart *The Concept of Law* (Oxford: Clarendon Press, 1961).

⁶⁹³ Hans Kelsen, “Theorie du droit international coutumier,” *Revue internationale de la theorie du droit* (1939).

⁶⁹⁴ Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (New York: Russell & Russell, [1945] 1961), 191.

destroying exercise...”⁶⁹⁵ Without the added element of *opinio juris*, each “Is” act—or state practice—would be given equal weight in the determination of norms. Furthermore, as suggested previously, modern international law demonstrates that *opinio juris* has played a substantive role in international judicial rulings when state practice is contrary to moral principles that states have simultaneously upheld through declarations constituting *opinio juris*.

However, Kelsen denies this psychological element effective power. He writes:

To be sure, the psychological element of custom, the [*opinio juris sive necessitates*], may be inferred from the constancy and uniformity of state conduct. Indeed, in practice it appears that the *opinio juris* is commonly inferred from the constancy and uniformity of state conduct. But to the extent that it is so inferred it is this conduct and not the particular state of mind accompanying conduct that is decisive.⁶⁹⁶

Conduct, not the particular “state of mind” of the state, which Kelsen considered a personification impossible to access, was the essential element of custom. To introduce *opinio juris* in concrete cases, especially in a deductive manner as per the modern method of customary interpretation, was tantamount to filling “gaps” with moral or political elements. This ignored the fundamental principle that subjects (in this case, states) were legally permitted to do all that was not legally forbidden. Lawmaking organs therefore could not fill “gaps” under the guise of creating new international law where none existed. Insofar as neither treaties, nor a “long-established practice of states”⁶⁹⁷ under customary international law could be located, the introduction of *opinio juris*, in accordance with deductive methods of customary interpretation, was considered invalid.

The wording of Article 38 that international custom is “evidence of a general practice...”

⁶⁹⁵ Bernstorff, 170.

⁶⁹⁶ Kelsen, *Principles of International Law*, 450-451.

⁶⁹⁷ Kelsen, *Principles of International Law*, 441.

is of particular interest to Kelsen, as he considered the idea that “custom was created by another fact than custom”⁶⁹⁸ (i.e., “evidence”) to contravene the legal positivist notion that custom can only have a constitutive, not a declaratory character. The idea “that the true creator of law stands—so to speak—behind custom” were the “assumptions of social theorists, who...attempt[] to present moral-political postulates as objectively valid principles when, in fact, they are neither verified, nor verifiable.”⁶⁹⁹ Kelsen implicates those advocates of the German doctrine of the *Volkgeist* (national spirit)⁷⁰⁰, as well as the French doctrine of the *solidarite social* (social solidarity),⁷⁰¹ in accordance with his general disapproval of all doctrines that affirm that “there exists, behind and above the positive law, customary or statutory, an absolutely just law which can be deduced from nature—the nature of man, the nature of society, or even the nature of things...”⁷⁰² *Opinio juris* as a “psychological” element dependent on “belief” thus contradicted Kelsen's commitment to banishing moral and political ideas that “inferr[ed] from that which is that which ought to be...”⁷⁰³

Towards the end of his life, Kelsen still acknowledged that problems associated with customary international law could be resolved through a permanent compulsory international court, but he reluctantly conceded that a court might never be established. In his book *Principles of Public International Law*, he wrote:

It may be readily granted that for the most part these uncertainties would not arise if international tribunals had the same role in the interpretation and development of international law that national courts have in the interpretation and development of national

⁶⁹⁸ Ibid., 442.

⁶⁹⁹ Ibid.

⁷⁰⁰ For a representative description of the nineteenth century school of *Volkgeist*, see: Friedrich Karl von Savigny, *System of the Modern Roman Law*, trans. William Holloway (Farmington Hills, MI: Gale, 2013).

⁷⁰¹ On a representative description of the French school of sociological jurisprudence, see: Léon Duguit, *The Law and State*, trans. Frederick J. de Sloovère. (Cambridge, Mass.: Harvard University Press, 1917).

⁷⁰² Kelsen, *Principles of International Law*, 443.

⁷⁰³ Ibid.

law. But in the absence of a system of compulsory jurisdiction the many uncertainties attending customary law must be expected to persist.⁷⁰⁴

According to Kelsenian Jörg Kammerhofer, commenting on Kelsen's contributions to the study of customary international law, “a deduction of norms means that these are not the result of a human act of will, a human legislation in the widest sense.”⁷⁰⁵ At international tribunals, however, norms have been followed, not because they were considered legislation based on a human act of will steeped in a valid procedural method, but “out of a sense of legal or moral obligation.”⁷⁰⁶ Contrary to Kelsen's narrow observation of the limits of customary international law based on *opinio juris*, which he weds to a deductive methodology that ICL judges have often turned to in order to constitute “principles of humanity,” he nevertheless counter-intuitively provides justification for the introduction of a far more robust customary element than is normally associated with the author of the pure theory of law.

Kelsen's preference for “consensus,” as legal scholar and diplomat J. Peter Pham notes, points to Kelsen's role in promoting the interests of the international community” over, for instance, defectors from the “consensus.”⁷⁰⁷ Strict interpretation of state practice as requiring “unanimity” of “opinion” is offset by Kelsen's introduction of the “will” of the “international community”. “What Kelsen proposes,” writes Pham, “is a sociological circle wherein the norm ought to reflect the conduct of the members of the group. This ‘consensus’ is interpreted to be the expression of a ‘general will,’ that is then obligatory on all as a norm.”⁷⁰⁸ Pham quotes

⁷⁰⁴ Ibid., 451-452.

⁷⁰⁵ Kammerhofer, 542.

⁷⁰⁶ Larry May, *Crimes Against Humanity: a Normative Account* (Cambridge: Cambridge University Press, 2005), 50.

⁷⁰⁷ ⁷⁰⁷ J. Peter Pham, “The Perils of ‘Consensus’: Hans Kelsen and the Legal Philosophy of the United Nations,” *Indiana International and Comparative Law Review* 14, no. 3: 565.

⁷⁰⁸ Ibid.

Kelsen to this effect:

At first the subjective meaning of the acts that constitute the custom is not an ought. But later, when these acts have existed for some time, the idea arises in the individual member that he ought to behave in the manner in which the other members customarily behave, and at the same time the will arises that the other members ought to behave in that same way. If one member of the group does not behave in the manner in which the other members customarily behave, then his behavior will be disapproved by the others, as contrary to their will. In this way the custom becomes the expression of a collective will whose subjective meaning is an *ought*.⁷⁰⁹

Despite Kelsen's emphasis on long-standing state practice, his concern for the "general will" of "the international community" creates a progressive model for customary international law interpretation, relaxing strict hermeneutical standards to promote [morally-informed] "consensus". (The next, concluding chapter, engages Pham's argument in detail to express implications to the changing notion of international criminal responsibility derived from a pure theoretical model that embraces "consensus" as "the will" of "the international community").

Notwithstanding Kelsen's effort to grant custom a defining role as a binding source of international law free of moral attributions, pure theory licenses ICL adjudication that has become dependent on the moral element associated with post-Cold War "gap-filling". His acknowledgement that "many uncertainties" abound in relation to the interpretation of customary international law is, at the very least, an important first step to communicating a problem resolvable under Kelsen's general approach to judicial law making.

III. Judicial Discretion and The Purposive Method in ICL

⁷⁰⁹ Hans Kelsen, *Principles of International Law* (New York: Rinehart & Co, 1952), 9 in Pham, "The Perils of Consensus," 565.

Despite retaining a critical approach to the use of *opinio juris* as an element of customary construction, Part III demonstrates how the author of the Pure Theory of Law reconciles a hierarchically-ordinal interpretive approach accommodating purposive methodological construction with “formal” rules of legal cognition. Kelsen’s contributions to the changing notion of ICR in the post-Cold War era must therefore be understood as fundamental to reconstructing the general imagery of Kelsen as an arch-formalist.⁷¹⁰ As Paulson notes, Kelsen agrees with nineteenth century legal philosopher Rudolf von Jhering’s criticism of the notion of the judge as a “juridical slot machine” (*Rechtsautomat*).⁷¹¹ Responding to the widespread accusation amongst German legal scholars that Kelsen promoted a “jurisprudence of concepts” (*Begriffsjurisprudenz*),⁷¹² Kelsen writes that “to want to belittle the Pure Theory of Law as *Begriffsjurisprudenz*—a charge not uncommonly made—is a truly pathetic misunderstanding.”⁷¹³ The importance of distinguishing “the process of discovery, where the idea is to arrive at a suitable reading of the premises of the legal argument” (i.e., non-formal legal interpretation) with “the process of justification, where the task is a *post hoc* reconstruction of the legal argument with an eye to showing its legal validity”⁷¹⁴ (i.e., formal legal cognition), according to Paulson, places Kelsen outside the bounds of “logicistic” thinking.⁷¹⁵ Judges, as the

⁷¹⁰ See: Stanley Paulson, “Formalism, ‘Free Law’, and the ‘Cognition Quandary’: Hans Kelsen’s Approaches to Legal Interpretation,” *University of Queensland Law Journal* 27, no. 2 (2008).

⁷¹¹ Rudolf von Jhering, *Der Zweck im Recht*, 2nd ed 1884) vol 1, 294 in Paulson, “Formalism,” 16.

⁷¹² For a list, see: Paulson, “Formalism,” 16.

⁷¹³ Hans Kelsen, “Juritischer Formalismus und reine Rechtslehre,” *Juristische Wochenschrift* 58 (1929) in Paulson, 16.

⁷¹⁴ Paulson, “Formalism,” 7.

⁷¹⁵ See: Hermann Heller, “Die Krisis der Staatslehre,” *Archiv für Sozialwissenschaft und Sozialpolitik* 55 (1926); Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, Mass.: MIT Press, 2010); Rudolph Smend, *Verfassung und Verfassungsrecht* (1928); Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence,” *Harvard Law Review* 24 (1911). References from Paulson, “Formalism, ‘Free Law,’ and the Cognition Quandary,” 9-16. Section II of Paulson’s essay, “The Charge of Formalism or Logicism” thoroughly reviews the main lines of criticism of Kelsen’s putatively “formal” approach based on the aforementioned sources. Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, Mass.: Harvard University Press, 1964), although left unmentioned, ought to be incorporated in this general critique along with, most notably, Lon Fuller’s polemic against Kelsen. Lon Fuller, “The Place and Uses of Jurisprudence in the Law School Curriculum,” *Journal*

last delegated authority in the hierarchy determining legal accountability, are free to deviate from “juridico-scientific” interpretation. “[T]he interpretation by the law applying organ,” according to Kelsen, “is always authentic.”⁷¹⁶

Paulson writes in “Formalism, ‘Free Law’, and the ‘Cognition’ Quandary: Hans Kelsen’s Approaches to Legal Interpretation” that:

Always authentic, [Kelsen] adds, for [the interpretation of judges] creates law. To be sure, legal cognition imposes constraints on what the judge or official can decide, for—so the standard Kelsenian line—the scope or frame of the general norm sets limits on what will count as possible interpretations of the general norms. That is, the judge, say, can ‘cognize’ individual norms *qua* possible interpretations of the general norm only if they fall within the scope of the general norm. At the same time, Kelsen grants the point that the judge’s choice from among the possible individual norms—the judges ‘authentic’ interpretation, handed down as law—may well be guided by the judge’s standpoint on politics and ideology.⁷¹⁷

Paulson provides a general framework for a rejoinder to those who claim that Kelsen’s “formalism” denies the possibility of purposive ICL construction. While Paulson emphasizes Kelsen’s radical skepticism towards legal interpretation, including Kelsen’s denial of all standard approaches in the mode of Hermann Kantorowicz, a leading figure in the Free Law Movement, Paulson nevertheless introduces a range of options to interpretation that *could* include purposiveness. Kantorowicz’s position in *The Struggle for Legal Science*⁷¹⁸ inaugurated a

of Legal Education (1948-1949): 496. For a comprehensive analysis of the American response to Kelsen’s putative “formalism,” see: D.A. Jeremy Telman, “A Path Not Taken: Hans Kelsen’s Pure Theory of Law in the Land of Legal Realists,” in *Hans Kelsen Anderswo/Hans Kelsen Abroad*, eds. Robert Walter, Clemens Jabloner & Klaus Zeleny (Vienna: Hans Kelsen Institute/Manzsche Verlags-und Universitätsbuchhandlung, 2010), 353-376. Amongst contemporary North American legal and political theorists, Telman has been immensely active in promoting Kelsen’s transatlantic influence. See: *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence*, ed. D.A. Jeremy Telman (Basel, Switzerland: Springer International Publishing, 2016), esp. D.A. Jeremy Telman, “Introduction: Hans Kelsen for Americans,” 1-13.

⁷¹⁶ Hans Kelsen, *Reine Rechtslehre* [Pure Theory of Law], 2nd edition (1960), in Paulson, “Formalism,” 25.

⁷¹⁷ Paulson, “Formalism,” 26.

⁷¹⁸ Gnaeus Flavius (Hermann Kantorowicz), *Der Kampf um die Rechtswissenschaft* (1906), 7 in Paulson,

challenge to judicial formalism that Kelsen, through his student Fritz Schreir⁷¹⁹, would consequently come to endorse.

For scholars who wish to uphold the ideal of pure theoretical cognition within a frame of possible positive law meanings the problem is particularly acute. Since scholars are prohibited from turning to “politics and ideology” (a particularly nebulous phraseology)⁷²⁰ to resolve possible meanings of legal norms, and since Kelsen denies traditional canons of interpretation, legal scholars are encouraged to banish political and ideological views “on pain of violating the purity postulate”.⁷²¹ Drawing on Max Weber’s separation between scientific and value judgment, on the one hand, and Weber’s embrace of value-reference (*Werbeziehung*)⁷²², on the other, Paulson champions “the legal community” as instrumental for the legal scholar “in arriving at a spectrum of possible meanings.”⁷²³ Although the legal scholar cannot introduce his own value judgment, value-reference means that the “legal scholar is not cut off from the political and ideological views current in the legal community.”⁷²⁴

Paulson, however, does not engage with the humanitarian frame specific to ICL judgment. As with his general neglect of Kelsen’s contributions to the conception of ICR, which Paulson overlooks in his otherwise masterfully written “Classical Legal Positivism at Nuremberg,”⁷²⁵ Paulson’s comprehensive analysis of Kelsen’s approaches to legal interpretation

“Formalism,” 17.

⁷¹⁹ Fritz Schreir, *Die Interpretation cr Gesetz und Rectsgeschafte* (1927), 26, 48-55, 71-3 in Paulson 20. See also: Hans Kelsen “Juritischer Formalismus und reine Rechtslehre” (1929) *Juristische Wochenschrift* 58 in Paulson, “Formalism,” 16.

⁷²⁰ Paulson, “Formalism,” 26.

⁷²¹ *Ibid.*

⁷²² Paulson references Heinrich Rickert, *The Limits of Concept Formation in Natural Science: A Logical Introduction to the Historical Sciences*, trans Guy Oakes (Cambridge: Cambridge University Press, 2009), who influenced Weber’s embrace of value-reference. Paulson, “Formalism,” 26.

⁷²³ *Ibid.*

⁷²⁴ *Ibid.*, 27.

⁷²⁵ See: chapter two for an extensive discussion of Paulson’s position in Stanley Paulson, “Classical Legal Positivism at Nuremberg,” *Philosophy & Public Affairs* 4, no. 2 (Winter, 1975): 132-158.

do not link up with the author of Pure Theory's particular concern for imputation at the highest level of criminal concern. The legal community that Paulson alludes to may be different at different levels of interpretive valuation. The spectrum changes in the international sphere. Here, unlike at the national level, ICL judges must turn to what Kelsen constitutes as "principles of civilization," to determine "the political and ideological views current in the legal community."⁷²⁶ For now, the question of what these "principles" *are*, must be left to the concluding discussion, which summarizes Kelsen's position on the relationship between law, politics and morality at the level of international criminality (see: chapter six).

Turning to the purposive methodological choice incorporated in the post-Cold War era, it is possible to detect correspondence between Kelsen's conferring of discretionary interpretive powers over customary interpretation once state's license ICL courts. Before determining how this is possible, it is necessary to engage with a leading contemporary figure advocating for the use of purposive methodology. In a 2007 review of Aharon Barak's book *Judge in a Democracy*⁷²⁷ in *The New Republic*⁷²⁸—and again in *How Judges Think* (2009)⁷²⁹—Richard Posner, the most-cited legal philosopher today⁷³⁰, wrote that "Barak is a world-famous judge who dominated his court as completely as John Marshall dominated our Supreme Court. If there were a Nobel Prize for law, Barak would probably be an early recipient."⁷³¹ Yet his detractors are many, including Posner himself. Like the late Robert Bork⁷³², an originalist and strong critic

⁷²⁶ Paulson, "Formalism," 39.

⁷²⁷ Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006).

⁷²⁸ Richard Posner, "Enlightened Despot," *The New Republic*, April 22, 2007, <https://newrepublic.com/article/60919/enlightened-despot>

⁷²⁹ Richard Posner, *How Judges Think* (Cambridge, Mass: Harvard University Press, 2010), 367-368.

⁷³⁰ Fred R. Shapiro, "The Most-Cited Legal Scholars," *The Journal of Legal Studies* 29, no. S1 (January 2000): 409-426.

⁷³¹ Posner, "Enlightened Despot," *The New Republic*.

⁷³² "To Judge Bork, Justice Barak was 'the worst judge on the planet'...The Israeli Supreme Court displayed an 'addiction to universal values' that was subverting the Jewish character of the Israeli state, Judge Bork complained." Linda Greenhouse, "Robert Bork's Tragedy," January 9, 2013

of Barak's, Posner, an economist in legal methodology, finds in Barak's writings a tendency towards "judicial hubris".⁷³³

Much of this has to do with the fact that Barak's method steers away from authorial intention towards a high level of abstraction⁷³⁴ in order to integrate the 'enlightened' values of judicial interpreters. This is an especially egregious usurpation of power by the judiciary in a system with "separation of powers", according to Posner. In the U.S. judicial system, judges must "make some effort to tether [decisions] to orthodox legal materials, such as the constitutional text."⁷³⁵ In contrast, Barak's judicial approach has been hailed by Supreme Court Justice Elena Kagan. "In 2006, while dean of Harvard Law School, Ms. Kagan introduced Judge Barak during an award ceremony as 'my judicial hero.' She added, 'He is the judge or justice in my lifetime whom, I think, best represents and *has best advanced the values of democracy and human rights, of the rule of law and of justice.*'"⁷³⁶ US Supreme Court Justice Stephen Breyer makes multiple references in *Active Liberty*, which summarizes Breyer's judicial philosophy, to Barak's position that "law is tied to life".⁷³⁷

While Barak's method in *Purposive Interpretation in Law*, which sets out his views on the integration of elements of justice that move beyond the bounds of strict construction focuses

<https://opinionator.blogs.nytimes.com/2013/01/09/robert-borks-tragedy/>. Bork devoted a chapter of his 2003 book *Coercing Virtue: The Worldwide Rule of Judges* to criticizing Barak's judicial application. See: Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2003).

⁷³³ While Posner quotes Bork, who claims that "Barak establishes a world record for judicial hubris," it is clear from the text of Posner's book that he is in full agreement. Posner, "How Judges Think," 363, 367.

⁷³⁴ Ronald Dworkin's theory of "law as integrity" resembles Barak's approach in the sense that he, too, emphasizes the prominent role of judges as interpreters of consistent moral principles, including justice and fairness. See: Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

⁷³⁵ Posner, "Enlightened Despot," *The New Republic*.

⁷³⁶ Sheryl Gay Stolberg, "Praise for an Israeli Judge Drives Criticism of Kagan," *New York Times*, 24 June 2010, Politics section.

⁷³⁷ Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution—The Tanner Lectures on Human Values* (New York: Alfred A. Knopf, 2005), 139, 146-147.

exclusively on domestic law⁷³⁸, international scholar Mia Swart has drawn extensively on Barak's purposive hermeneutic to explain changes in decision-making in the post-Cold War era of ICL.⁷³⁹ (Part IV integrates Swart's analysis with respect to key ICTY judgments). Barak rejects a hard textualist approach⁷⁴⁰ that excludes "reasonable" authorial intent, or what judges understand to be contextual factors "implicit" in the text and mirrored by societal norms, including "social goals (like the public interest), proper modes of behavior (like reasonableness and fairness), and human rights",⁷⁴¹ and on the other hand, the radical invention of new texts⁷⁴² with little or no consideration of the "explicit" authorial intent, which "the author of the text sought to actualize."⁷⁴³ Moving back and forth between text and context, purposive interpretation is thus, according to Barak, able to approximate a "reasonable" judicial intent. Judges do this either consciously or unconsciously, and their judicial opinions reflect "the horizon of the author and the horizon of the interpreter" simultaneously.⁷⁴⁴

⁷³⁸ In an email correspondence with former Israel Supreme Court Justice Aharon Barak on July 2, 2012, Barak states that "I am not an expert on International Criminal Law, and my theories on interpretation implied to the National Law, though I myself think it is applicable."

⁷³⁹ Mia Swart, "Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and 'Adventurous Interpretation,'" *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 70 (2010): 459-486.; Mia Swart, "Is There a Text in this Court? The Purposive Method of Interpretation and the ad hoc Tribunals," *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 70 (2010): 767-787.

⁷⁴⁰ A hard textualist is an originalist who gives primary weight to the text, seeking the ordinary meaning and excluding intention and other non-textualist approaches. While Kelsen, as Part II states, excludes "intention" from pure theoretical legal cognition as a psychologized adulteration of a strictly positive legal conception of imputation, he admits "intention" through the back-door of judicial decision making, which, as this chapter argues, is a supreme, legitimate creation of new law in accordance with the pure theoretical doctrinal commitment to *stufenfau* or hierarchy of normative legal delegation. Antonin Scalia, a hard-textualist writes that "[it] is the law that governs, not the intent of the lawgiver." Howard Abadinsky, *Law, Courts, and Justice in America*, 7th Ed. (Long Grove, IL: Waveland Press Inc., 2014), 154.

⁷⁴¹ Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005), xiii-xiv.

⁷⁴² On the relationship between critical legal studies and international law, see: Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016), 135-163.

⁷⁴³ Barak, *Purposive Interpretation in Law*, xiii.

⁷⁴⁴ *Ibid.*, 137.

Barak emphasized the importance of “pre-interpretation” in rendering legal judgment.

He asserts:

The interpreter does not try to enter the shoes of the text’s author, a task made impossible by the gap in time. The interpreter and the text’s author live in different time periods. Each has his or her own pre-understanding. The interpreter therefore does not try to relive the experience of creating the text. He or she tries to combine his or her modern understanding with the understanding at the core of the text. This blending of horizons, central to purposive interpretation, expresses the proper hermeneutic perspective.⁷⁴⁵

Context matters. Fundamental values and human rights norms change over time, says Barak. In addition to the “explicit” text or “subjective” intent of the author it is also necessary for judges to entertain “the social values prevalent at the time the text is interpreted, including values of morality and justice” or ‘the objective component of purpose’.⁷⁴⁶ The “blending of horizons”⁷⁴⁷ is an apt metaphor for the methodological effort in “the intellectual history of dignity,” as Barak puts it,⁷⁴⁸ to elicit the humanitarian purpose or intent of the originating legal norm.

⁷⁴⁵ Ibid.

⁷⁴⁶ Ibid., xiii-xiv.

⁷⁴⁷ The “fusion of horizons” or “blending of horizons” are Gadamerian terms that Barak invokes. While an analysis of the relationship between Gadamer and Barak is of intellectual historical value, in the effort to forge an interpretive Kelsenian conception of ICR within the Barakian purposive tradition, an investigation of Gadamer’s hermeneutic approach would likely confuse historically-situated descriptions of law in application to “principles of humanity”. Gadamer writes: “Every finite present has its limitations. We define the concept of ‘situation’ by saying that it represents a standpoint that limits the possibility of vision. Hence essential part of the concept of situation is the concept of ‘horizon.’ The horizon is the range of vision that includes everything that can be seen from a particular vantage point... A person who has no horizon is a man who does not see far enough and hence overvalues what is nearest to him. On the other hand, ‘to have an horizon’ means not being limited to what is nearby, but to being able to see beyond it...” Hans-Georg Gadamer, *Truth and Method* (New York: Continuum, 1997), 302; Barak, *Purposive Interpretation in Law*, 137.

⁷⁴⁸ Aharon Barak, “Justice Aharon Barak: Human Dignity and Constitutional Law” (Lecture, Moot Court Room in Baier Hall, Indiana University School of Law-Bloomington, November 10, 2016)

In Kelsen's "The Principle of Sovereign Equality of States as a Basis for International Organization" (1944), it is possible to glean a purposive endorsement of judge-created international law. In analyzing the Moscow Declaration (1943), which proclaimed "the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security,"⁷⁴⁹ the author of Pure Theory stresses the international judge's primary position in defining the parameters of sovereignty. This is especially necessary given the lack of executive and legislative functions at the international level. Rather than conceive of sovereignty as "supreme authority" in the sense of the unlimited right of each nation to act how it wishes, Kelsen interprets the Moscow Declaration to mean "the existence of an international law which imposes duties and confers rights upon States."⁷⁵⁰ The goal of the United States, United Kingdom, Soviet Union and China—the four signatory powers at Moscow—was to create law and order "for the purpose of inaugurating a system of general security, [which] can only be the Law of Nations, the international legal order as a set of norms binding upon the States."⁷⁵¹ The Moscow Declaration, the first public pronouncement of the intent of the allied powers to try the heinous acts of Nazis under international jurisdiction, must be recalled with respect to "a system of general security".

U.S. President Franklin D. Roosevelt, British Prime Minister Winston Churchill and Soviet Premier Joseph Stalin noted that "evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have

⁷⁴⁹ "The Moscow Conference; October 1943," The Avalon Project at the Yale Law School, (accessed on October 12, 2018), <http://avalon.law.yale.edu/wwii/moscow.asp>

⁷⁵⁰ Ibid.

⁷⁵¹ Hans Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization," *The Yale Law Journal* 53, no. 22 (Mar. 1944): 208.

overrun and from which they are now being steadily expelled"⁷⁵² required justice. Nazis would either be returned to the countries where they had committed their crimes and "judged on the spot by the peoples whom they have outraged,"⁷⁵³ or else, for those Germans whose criminal offenses had no geographical localization, they would be prosecuted under international jurisdiction. Although Winston Churchill is often associated with the position that summary execution was the most fitting punishment for Nazi crimes,⁷⁵⁴ he was instrumental in drafting the "Statement of Atrocities," which led, in turn, to the formation of the European Advisory Committee, a body instrumental in drafting—with the consent of state parties—the IMT Charter.

In arranging the legal limits of sovereignty, judges dealing with core international crimes, as Kelsen avers, may go beyond the parameters of positive law. Purposive construction follows from the valid delegation of powers by states to neutral international judges to try state officials for core international crimes. First, however, it is necessary to once again de-link Kelsen's position on cognition from interpretation. Kelsen writes:

⁷⁵² "The Moscow Conference; October 1943".

⁷⁵³ Ibid.

⁷⁵⁴ Ian Cobain, "Britain Favoured Execution over Nuremberg Trials for Nazi Leaders," *The Guardian*, October 25, 2012, <https://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders>. At the February 1945 Yalta Conference, two years after the Moscow Declaration, according to declassified documents obtained by *The Guardian*, Winston Churchill recommended summary execution for major Nazi war criminals. Like President Roosevelt, who wavered between summary execution and trial, Churchill ultimately endorsed the International Military Tribunal (IMT) at Nuremberg. Roosevelt had earlier been swayed in the direction of summary execution by both his Secretary of State Cordell Hall, who remarked that "If I had my way, I would take Hitler and Mussolini and Tojo and their accomplices and bring them before a drumhead court martial, and at sunrise the following morning there would occur an historic incident," as well as Secretary of Treasury Henry Morgenthau, whose Morgenthau Plan called for transforming Germany forever into an agricultural economy, so it lacked the capacity to ever wage war again, and to summarily execute German leaders. On the other hand, Secretary of War Henry Stimson, in a letter to Roosevelt dated September 5, 1944, writes that "It is primarily by the thorough apprehension, investigation, and trial of all the Nazi leaders...with punishment delivered as promptly, swiftly, and severely as possible, that we can demonstrate the abhorrence which the world has for such a system..." Michael Bazylar, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford: Oxford University Press, 2016), 70-71.

The establishment of compulsory adjudication of international disputes is a means—perhaps the most effective means—of maintaining positive international law. It may be doubted, however, whether a court endowed with compulsory jurisdiction always will apply only and exclusively positive international law to the disputes submitted to its decisions, even though the court is not expressly authorized by its statute to apply other norms. It is probable that a court which has the power to decide all disputes without any exception will, in cases in which a strict application of positive law seems unsatisfactory to the judges, *adapt the positive law to their idea of justice and equity*. (my emphasis)⁷⁵⁵

Like Barak, Kelsen maintains the right of judges to introduce conceptions of justice that may not comport with “orthodox legal material”.⁷⁵⁶ Judges, as Kelsen notes, will “adapt the positive law to their idea of justice and equity,”⁷⁵⁷ since “it is difficult...to prevent a court endowed with compulsory jurisdiction from applying other norms than those of positive international law....”⁷⁵⁸ Kelsen, therefore, disputes the notion that international judges, under the principle of sovereign equality, assume a “declaratory” rather than “constitutive” role, once assigned powers by states subject to a dispute. “According to traditional doctrine,” writes Kelsen, “the law to be applied by the judicial decision exists prior to the decision; this preexisting law is disputed only in respect to the relationship between the parties to the conflict.”⁷⁵⁹ Whether the dispute is based on questions of fact or law, interpretation is necessitated.⁷⁶⁰ Disputed facts or disputed rules of law are therefore resolved by judicial decision.⁷⁶¹

⁷⁵⁵ Kelsen, “The Principle of Sovereign Equality of States,” 217.

⁷⁵⁶ Posner, “How Judges Think,” 367.

⁷⁵⁷ Kelsen, “The Principle of Sovereign Equality of States,” 217.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

⁷⁶⁰ “This means that the individual norm, the concrete duty or right is disputed [between state parties], which can, or cannot, be derived from the general rule depending upon the existence of the facts. Traditional doctrine maintains that a judicial decision applying positive law does not create law; it merely ends the dispute by establishing in an authoritative way the law valid for the case at hand.” Hans Kelsen, *Peace Through Law* (Chapel Hill: University of North Carolina Press, 1944), 46.

⁷⁶¹ “There is, to be sure, a certain difference between a judicial decision applying an undisputed rule of positive law to a disputed fact or a disputed rule of positive law to an undisputed fact, and a judicial decision applying a new, that is, not preexisting rule, thus altering existing law and adapting it to changing circumstances. But the difference is not so strongly marked as it seems to be, because the interpretation of positive law, necessarily connected with every act of applying law, always implies more or less an alteration of law.” Hans Kelsen, “The Principle of Sovereign Equality of States,” 218.

Courts rather than legislative organs, as chapter two describes in relation to the architecture of the international system Kelsen envisions, are more compatible with this principle of sovereign equality, according to Kelsen. Courts impose new obligations or duties, including those applicable to state actors, in an objective or neutral fashion, which is slower than legislation, and therefore less apt to impose “political decrees issued according to the principle that might goes before right, which is a negation of law.”⁷⁶² Once states submit disputes to international judgment (and for our purposes, national or hybrid courts deciding cases of core international crimes), “it is the fact that judgments, even if not the strict application of a preexisting legal rule, are based on the idea of law, that is, on a rule which, although not yet positive law, should, according to the conviction of independent judges, become law and really becomes positive law for the case settled by the judicial decision.”⁷⁶³ Kelsen therefore premises his position related to international legal validity, and *inter alia*, international *criminal* law, on the ability of judges to move outside the range of predetermined positive law, in accordance with their “idea of justice and equity”.

“International criminal law rules,” writes Swart, “because of their essentially unwritten nature, are relatively indeterminate, adaptable to new circumstances and possess a certain ‘malleability’ and ‘flexibility’”.⁷⁶⁴ While this may create the international public perception of “adventurous” judicial decision-making, Kelsen’s approach to interpretation and the process of discovery legitimizes such a role. Kelsen’s strict interpretation of customary international law, notwithstanding, he remains committed to a position that mirrors Barak’s. Although this is not readily apparent, as Paulson notes, Kelsen’s skeptical approach to legal interpretation in the

⁷⁶² Ibid., 219.

⁷⁶³ Ibid.

⁷⁶⁴ Swart, “Is there a Text?,” 771.

mode of Kantorowicz's "free law movement" points to the latitude Kelsen grants judges. To claim that Kelsen is agnostic on the question of legal interpretation in the ICL sphere is neither born out either by earlier case studies, or Kelsen's insistence that there be limits to inhumane conduct under the guise of "acts of state".

IV. The Acts of State Doctrine Revisited: 'Substantial Relations or Formal Bonds?'

In the first trial before the ICTY, the defendant Dusko Tadic, a former member of the paramilitary forces supporting the attack on the district of Prijedor, and a Bosnian Serb involved in mistreatment and killings at the Omarska, Trnopolje and Keraterm detention camps,⁷⁶⁵ was convicted in 1997 of crimes against humanity, grave breaches of the Geneva Conventions, and violations of the customs of war.

In reviewing the case, the *Tadic* Appeals Chamber did not always explicitly reference the Vienna Convention on the Law of Treaties (VCLT)⁷⁶⁶, which provided ample instructions on the

⁷⁶⁵*Prosecutor v. Dusko Tadic aka "Dule" (Indictment)*, IT-94-1-I, International Criminal Tribunal for the former Yugoslavia (ICTY), February 13, 1995, available at: <http://www.icty.org/x/cases/tadic/ind/en/tad-ii950213e.pdf> [accessed 13 October 2018].

⁷⁶⁶The trial chamber in *Delalic* would turn to The Vienna Convention on the Law of Treaties (VCLT) in order to set out progressive principles of interpretation. The VCLT, which had never before applied its guidelines to a Statute, nor been invoked in war crimes proceedings prior to the UN Security Council-sponsored tribunals, was ruled applicable to *ad hoc* proceedings, because the latter was a creation of a primary organ of the United Nations. The *Delalic* decision insisted that the VCLT was therefore applicable to the ICTY Statute.

The case focused on the responsibility of guards at the Celebici prison camps located in the Konjic municipality in central Bosnia and Herzegovina. The four accused were implicated for cruel treatment of inmates in violation of the the Geneva Conventions of 1949 under Article 2 of the governing statute of the ICTY (Statute), and with violations of the laws or customs of war under Article 3 of the Statute. The Chamber applied Vienna Convention rules, which established that in cases where statutory words are clearly defined, the "ordinary meaning" of words—or literal approach—should be followed. Next, the golden rule of interpretation ought to be put into effect where the grammatical sense of a phrase would otherwise be distorted. This measure was used to "avoid injustice, absurdity, anomaly or contradiction as clearly not to have been intended by the legislature."

The Trial Chamber in *Delalic* commented on judicial "gap-filling" distinguishing between, on the one hand, "the doctrine of the separation of powers" that clearly defined judicial lawmaking as "an abuse of the legislative function of the judiciary," and on the other, "courts...established to ascertain and give effect to the intention of the

scope of interpretation, but, noted Swart, "...applied the principles set out in that instrument".⁷⁶⁷

Nowhere was contextual balancing more apparent than in (a) the effort to characterize the conflict in Bosnia-Herzegovina as international based on the purpose, or intention, of the grave breaches regime under the Geneva Conventions, and (b) the decision to expand the meaning of crimes against humanity to include other categories besides 'persecutory crimes' as contained in Article 5 of the ICTY Statute.⁷⁶⁸ While the next section engages with the ever-changing description of crimes against humanity, this section considers the way ICL further eroded the distinction between international and internal conflicts through contextual 'balancing' of Article 2.

Article 2 reads:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) willful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) willfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

legislature." Although the latter may be in violation of a strict adherence to the principle of legality, it insures that under a system where ambiguity of language, due to the politicized nature of multilateral treaty negotiations and unwritten customary norms is prevalent, the "intention" of ICL authors is taken into consideration. This "intention" mirrors the purpose of the ICL sphere, which is to extract a generally accepted, if changing, notion of "humanitarianism" as manifested in the evolving conception of international criminal responsibility.

The Trial Chamber in *Delalic* succeeded in establishing the legitimate basis for "modifying a rule of law contained in its statutory form." By adopting VCLT guidelines and a purposive hermeneutic similar to Aharon Barak's interpretive method, judges in *Delalic* insisted on the importance of weighing context "and including it as a relevant factor for their judgment.") United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 8 October 2018]; *Prosecutor v. Zdravko Mucic aka "Pavo, Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Appeals Judgement)*, IT-96-21-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 20 February 2001, available at: <http://www.refworld.org/cases, ICTY, 3ae6b7590.html> [accessed 8 October 2018].

⁷⁶⁷ Swart, "Is there a Text?," 773.

⁷⁶⁸ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on May 17, 2002)*, May 25, 1993, available at: <http://www.refworld.org/docid/3dda28414.html> [accessed October 12, 2018]

- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.⁷⁶⁹

In order for the Geneva Convention to apply⁷⁷⁰, not only would the conflict in the former Yugoslavia need to be conceptualized as an international armed conflict, but the victims of the conflict would need to be categorized as “protected persons”.⁷⁷¹ The test of effective control (i.e., the nationality requirement), established by the International Court of Justice (ICJ) in the *Nicaragua* case,⁷⁷² did not apply in this case because, according to defense counsel, the Republika Srpska (Bosnian Serb Republic) and Bosnian Serb army, of which Tadic was a member, was not formally controlled by the Federal Republic of Yugoslavia (FRY).⁷⁷³ A cross-

⁷⁶⁹ Ibid.

⁷⁷⁰ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 http://avalon.law.yale.edu/20th_century/geneva07.asp [accessed October 14, 2018]

⁷⁷¹ ICTY Appeals, para. 80 reads: Article 2 of the Statute embraces various disparate classes of offences with their own specific legal ingredients. The general legal ingredients, however, may be categorised as follows.

(i) The nature of the conflict. According to the interpretation given by the Appeals Chamber in its decision on a Defence motion for interlocutory appeal on jurisdiction in the present case,¹⁰¹ the international nature of the conflict is a prerequisite for the applicability of Article 2.

(ii) The status of the victim. Grave breaches must be perpetrated against persons or property defined as “protected” by any of the four Geneva Conventions of 1949. To establish whether a person is “protected”, reference must clearly be made to the relevant provisions of those Conventions. *International Law Reports*, Vol. 124, ed., Elihu Lauterpacht, C.J. Greenwood, A.G. Oppenheimer (Cambridge: Cambridge University Press, 2003), 96.

⁷⁷² *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice (ICJ), 27 June 1986, available at: <http://www.refworld.org/cases,ICJ,4023a44d2.html> [accessed 14 October 2018].

⁷⁷³ In a separate opinion (section XI of the Appeals Chamber Judgment), Judge Shahabuddeen wrote, “I agree with the Appeals Chamber, and with Judge McDonald, that there was an international armed conflict in this case. I also appreciate the general direction taken by the judgement of the Appeals Chamber, but, so far as this case is concerned, I am unclear about the necessity to challenge *Nicaragua* (*I.C.J Reports 1986*, p. 14). I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and that on this point it was both right and adequate.”

Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <http://www.refworld.org/cases,ICTY,40277f504.html> [accessed 14 October 2018].

appeal by the prosecution nevertheless argued that the Defense was wrong to formulate the test according to the question: “Were the Bosnian Serbs acting as ‘organs’ of another State?”⁷⁷⁴

“The Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska (“VRS”) had a “demonstrable link,” the prosecution argued, “with the Federal Republic of Yugoslavia (Serbia and Montenegro) (“FRY”) and the Army of the FRY (“VJ”). It was not a situation of mere logistical support by the FRY to the VRS.”⁷⁷⁵ While the Appeals Chamber did not endorse the prosecution’s “demonstrable link” test, it did demonstrate that the VRS acted as a proxy force—and that “effective control” could be proven.

The Appeals Chamber concluded that the Third Geneva Convention implicitly referred to a test of control by providing in Article 4 the requirement of “belonging to a Party to the conflict”:

This conclusion, based on the letter and the spirit of the Geneva Conventions, is borne out by the entire logic of international humanitarian law. This body of law is not grounded on formalistic postulates. It is not based on the notion that only those who have the formal status of State organs, i.e., are members of the armed forces of a State, are duty bound both to refrain from engaging in violations of humanitarian law as well as - if they are in a position of authority - to prevent or punish the commission of such crimes. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible. It follows, amongst other things, that humanitarian law holds accountable not only those having formal positions of authority but also those who wield *de facto* power as well as those who exercise control over perpetrators of serious violations of international humanitarian law. Hence, in cases such as that currently under discussion, what is required for criminal responsibility to arise is some measure of control by a Party to the conflict over the perpetrators.⁷⁷⁶

⁷⁷⁴ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <http://www.refworld.org/cases,ICTY,40277f504.html> [accessed 14 October 2018], para 75.

⁷⁷⁵ *ibid.* para. 72.

⁷⁷⁶ *Ibid.*, para. 96

Even if the Appeals Chamber deferred to the defense’s “test of effective control,” claiming that members of the VRS were taking orders from the FRY, judges deviated from a formal reading. Not only the letter, but also the spirit of the Geneva Conventions, would need to be considered. Those “who wield *de facto* power as well as those who exercise control over perpetrators of serious violations of international humanitarian law (IHL)” were just as culpable as those in traditional positions of authority. In order to remain a “realistic body of law”, the Appeals Chamber acknowledged its need to expand the meaning of “effective control” to “the maximum extent possible” in “order to deter deviation from its standards...”

But what are ‘standards’? Do they not entail purposive consideration, which accounts for ‘objective’ needs like “social goals (the public interest), proper modes of behavior (like reasonableness and fairness), and human rights”⁷⁷⁷? The Geneva Convention (1949) provided a framework. There was “authorial intent” but a lack of forecasting. A new variant of allegiance pertaining to *de facto* power dictated a different notion of “effective control”. By implicating non-traditional entities, including proxies like the Bosnian Serb Army, the *Tadic* Appeals Chamber conceived of customary international law in a way that expanded the meaning of “belonging to a Party in the conflict” beyond traditional associations with “organs of state”.

In addition to establishing that the conflict was international, The Appeals Chamber also needed to prove that Bosnian Muslims were “protected persons”. However, if nationality rather than ethnicity were to be the primary criterion of “protected persons”, then Bosnian Muslims targeted by Bosnian Serb forces (VRS) could not assume a separate status. Formally they belonged to the same nation—Bosnia.

⁷⁷⁷ Barak, *Purposive Interpretation in Law*, xiv.

The Appeals Chamber thus decided to use a purposive logic to draw on exceptional categories of victims who assumed “protected persons” status under the Geneva Convention like refugees and neutral nationals.⁷⁷⁸ Although the *Tadic* case did not involve victims who fell into either of these categories, judges decided to abandon a literal interpretation of “protected persons” by appealing to the general purpose, or intention, of the nationality requirement. The “lack of allegiance to a state and diplomatic protection by this state were” ultimately “considered...more important than the formal link to nationality.”⁷⁷⁹

The Appeals Chamber wrote:

This legal approach, hinging on substantial relations rather than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that of the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance.⁷⁸⁰

“Substantial relations” informed a more contextualized ruling. Inter-ethnic conflict took on the role that war *between* states traditionally had. The *Tadic* Appeals Chamber decided that in order for Art. 2 of the ICTY Statute to fulfill its purpose—the moral rather than strictly legal instructions contained in the Geneva Convention—the Tribunal had to find a way of classifying the conflict as international. The Appeals Chamber showed fidelity to international provisions by demonstrating that even if formally the parties belonged to same nation (Bosnia), they were essentially fighting a war between parties independent of one another—one of which acted as a

⁷⁷⁸ See: Fourth Geneva Convention, Arts. 4 (2), 44 and 70 (2). International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <http://www.refworld.org/docid/3ae6b36d2.html> [accessed 14 October 2018]

⁷⁷⁹ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, para 165.

⁷⁸⁰ *Ibid.*, para. 168.

proxy for another nation. “In order to make Art. 2 of the ICTY Statute functional,”⁷⁸¹ the “subjective intent” of the authors would need to be interpreted as if licensing new configurations of inter-party conflict. Acknowledging that context had changed nearly half a century after the ratification of the Geneva Accords (1949), the Appeals Chamber “return[ed] to the text with a ‘correction’ and ‘improvement’ in [their] preliminary understanding.”⁷⁸²

Kelsen’s dynamic approach to law recognizes the inherent mutability of circumstances. Judges who may be separated by generations from the promulgation of constitutional norms, are licensed to re-interpret, in the mode of Kantorowicz’s “Free Law” approach to juridical construction, elements of ICR, including the scope of the acts of state doctrine. As with legal realism’s emphasis on judicial discretion, Kelsen’s appeal to the process of discovery rejects *Begriffjurisprudenz* or a “jurisprudence of concepts”. Paulson’s description of Kelsen’s skeptical interpretive position, notwithstanding, there is reason to question Kelsen’s agnosticism towards juridical construction. Like Kirgis’s sliding scale theory, Kelsen acknowledges that core international crimes produce a different set of criteria in the ICL sphere than in other areas of law. The moral criterion associated with “principles of civilization” (see: chapter two) *is* the reason why Kelsen initially endorses retroactive lawmaking.

But this does not mean that the methods initially endorsed are applicable under circumstances forbidding retroactive lawmaking. In an era when the UN Secretary General admonishes judges in cases before the ICTY to adhere to preexisting customary international law, or the Rome Statute, where the legal basis for the ICC, prohibits retroactive lawmaking, “prospective” methodology emphasizing “intent” or “purpose” is the optimal means in which to

⁷⁸¹ Swart, “Judicial Lawmaking,” 483.

⁷⁸² Barak, *Purposive Interpretation in Law*, 136.

reconcile the functional needs of a sphere that must defend the valid grounds on which state officials are tried. While contradicting what Andrea Gattini describes as Kelsen's appeal to nineteenth century statist (positive law) protections⁷⁸³, this new interpretive gloss on Kelsen's position on AoSD immunities insists on an implied licensing of moral criterion associated with higher principles of justice.

Kelsen's position on new actors of universal law, especially international organizations, produces a pure theoretical conception of ICR that has caught up with the times. Turning to Kelsen's commentary on the League of Nations as a model for re-conceptualizing the relationship between international and state law⁷⁸⁴, we may deduce an equally similar position on the scope of power associated with the United Nations⁷⁸⁵—and especially the United Nations Security Council (UNSC). Bernstorff writes:

The Vienna School's theory of international law regarded the newly created organization in Geneva as the organ of a particular community of international law capable of taking action. The limitations on the authority of the League to act were to be laid down exclusively through the organization's Covenant. From the perspective of universal law, it was precisely the constituent treaty that could endow the organization with whatever competencies it wished. That could also include material areas of regulation that had previously been dealt with exclusively within states. Because of the new conception of state sovereignty, the latter did not act as an a priori barrier to integration. Rather, the international treaty instrument was able to restrict the competencies of the state legal system at will. The supraordinated edifice of international law thus decided—in a sovereign and flexible manner—on the allocation of competencies between international law and national law.⁷⁸⁶

⁷⁸³ Andrea Gattini, "Kelsen's Contributions to International Criminal Law," *Journal of International Criminal Justice* 2, no 3 (2004), 795-809.

⁷⁸⁴ See generally: Hans Kelsen, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944). See also: Danilo Zolo, "Hans Kelsen: International Peace Through International Law"

⁷⁸⁵ See generally: Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: With Supplement* (Clark, New Jersey: The Lawbook Exchange, [1950] 2011). For a critical review by the eminent United Nations scholar, Oscar Schachter, see: Oscar Schachter, "The Law of the United Nations," *The Yale Law Journal* 60, no. 1 (Jan., 1951):189-193. Also, see: J. Peter Pham, "The Perils of "Consensus": Hans Kelsen and the Legal Philosophy of the United Nations" (August 7, 2003). bepress Legal Series. Working Paper 17. <http://law.bepress.com/expresso/eps/17>.

⁷⁸⁶ Bernstorff, 139.

Josef Laurenz Kunz, a student of Kelsen's and one of the most prominent orthodox expositors of the Pure Theory of Law, neither precluded the possibility of the League of Nations pressing members to adhere to norms enacted with or without ratification by the entire body (i.e., unanimity'), nor rejected the introduction of laws applicable to individuals.⁷⁸⁷ Bernstorff's study of Kelsen's international law theory emphasizes the pure theoretical position that an "international treaty instrument [is] able to restrict the competencies of the state legal system at will."⁷⁸⁸ Although state officials are traditionally protected under the AoSD, international organizations, beginning with the League of Nations, have been granted wide-ranging competencies with regard to its members. The creation of international courts, either *ad hoc* or permanent, in this case by the United Nations Security Council (UNSC), adhered to the custom associated with "the supraordinated edifice of international law".⁷⁸⁹

As final arbiter of matters related to the Geneva Conventions, the UNSC is licensed by the UN Charter. Article 25 of the UN Charter states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."⁷⁹⁰ While the UNSC seldom authorizes coercive measures over state actions in violation of the Geneva Conventions, obligations to this constituent treaty assumes primary status over regional treaties and national laws. Since the UNSC licensed *ad hoc* tribunals for the former Yugoslavia and Rwanda, the Geneva Convention's codes, as adjunct to UN-sponsored treaties,

⁷⁸⁷ Ibid., 140.

⁷⁸⁸ Ibid., 139.

⁷⁸⁹ Ibid.

⁷⁹⁰ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS VII, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 8 October 2018].

could be modified to incorporate new conceptions of state sovereignty, in accordance with formal requirements.

The order of delegation that licenses the final purposive interpretation of “substantial relations” with respect to the “test of effective control” and “protected persons,” therefore, begins with the customary *grundnorm*, licensed by 193 member states of the United Nations. The invocation of contextually-licensed interpretations of the Geneva Convention is mandated by the UNSC in its licensed adjudication of ICTY and ICTR under UNSC Resolution 827 and Chapter VII provisions of the UN Charter.⁷⁹¹ Since member states subscribing to the UN Charter license all acts of normative delegation by UNSC member states, including collective security intervention in accordance with forms of collective responsibility, as well as the delegation of powers to international courts to try individuals for acts of state in contravention of international peace (and Chapter VII), Kelsen’s structural hierarchical analysis of a valid legal normative order licenses the ICTY. Those *ad hoc* judges who chose to expand our understanding of custom, albeit seemingly contrary to Kelsen’s strict understanding of custom as based on state practice, nevertheless were permitted to act in accordance with *their* mandate. Pure Theory, therefore, accommodates discretionary interpretation by international judges that leads to the reconceptualization of “legal persons”. Bernstorff writes:

The Pure Theory of Law regarded the application of the law as a process that, while prestructured could not, in the final analysis, be completely grasped jurisprudentially in its creative dimension. For example, Kelsen regarded the decision of a court not as a formalistic and immediate application of the law, but as the creative generation of an individual norm.

⁷⁹¹ UN Security Council, *Security Council resolution 827 (1993) [International Criminal Tribunal for the Former Yugoslavia (ICTY), 25 May 1993, S/RES/827 (1993)*, available at: [http://refworld.org/docid/3b\)f21b1c.html](http://refworld.org/docid/3b)f21b1c.html) [accessed 7 October 2018]; United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS VII, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 8 October 2018].

And that was the reason why, according to Kelsen, the Pure Theory of Law could not be associated with a formalistic legal practice.⁷⁹²

V. Principles of Humanity? A Test of the ‘Separation Thesis’

The author of the Pure Theory of Law endorses “principles of humanity”—termed “principles of civilization” in the Kelsenian lexicon—as a standard by which to determine the gravity of an offense meriting suspension of protections under the acts of state doctrine (AoSD). Kelsen’s doctrinal commitment to the separation of law from morality, transgressed under a pure theoretical conception of ICR, subjects international crimes to penalty *for* moral offenses committed in the past. This section analyzes the prospect of reconciling Kelsen’s approach with the court’s emphasis on an expanded notion of crimes against humanity.

The transfer of powers to ICL judges in the post-Cold War era implies broad interpretive range. Judges now “make” law—but they do so based on a contextual apprehension of “civilizational” changes compatible with a deepening emphasis on the purpose at the core of this sphere. The difference between the post-Cold War era and previous iterations of ICL, including (a) the proto- or pre-modern effort to establish an order of war crimes retribution after the First World War, (b) the modern era encompassing the immediate post-Second World War international trials at Nuremberg and Tokyo, and (c) *ad hoc* national trials against war criminals, most notably, the Cold War era case against Adolph Eichmann in Jerusalem, is that the post-Cold War period, encompassing *inter alia* cases before the ICTY, ICTR and ICC, reflect an acceleration in consciously developed purposive juridical construction.⁷⁹³

⁷⁹² Bernstorff, 237.

⁷⁹³ This period is distinguished by the burgeoning threat of inter-ethnic and inter-religious violence that followed the end of the Cold War, which had previously secured a relatively stable, binary international order, which, generally

Against the constrained results of his cognition of valid customary construction based solely on *state practice* (Part II), the skeptical or discretionary interpretive position Kelsen assumes with respect to judicial decision-making is of a higher ordinal value than any general framing used to determine pure theoretical cognition. As with the tension between principles of morality (which may be retroactive) and principles of legality (which may not), Kelsen again places, in this case judges, as “midwives” of a higher principle.

Even if Kelsen rejects the customary element of *opinio juris* for reasons described in Part II, the latitude he grants judges in determining responsibility for core international crimes is valid *because of* the nature of the act. Thus, acts of state that cannot be criminalized according to international law standards, such as housing or labor policy, must be distinguished from policies of widespread murder, especially for the furtherance of genocidal goals. What is *purposive* in the court’s licensing of customary interpretation resembles the criterion necessary for retroactive lawmaking: “principles of civilization”/“humanity”. Here, Kelsen’s broad account of the process of discovery serves to animate “pure theoretical” claims on the power of judges as guardians of civilization.

In a reversal of the Trial Chamber’s ruling that all crimes against humanity must be committed with a discriminatory intent and only applied to ‘persecution type’ crimes, The *Tadic* Appeals Chamber followed a purposive line of reasoning to expand the ambit of crimes against

speaking, managed to curtail collectivist inter-ethnic and inter-religious aspirations in opposition to US and Soviet domination. During the Cold War period, the Socialist Federal Republic of Yugoslavia under the rule of Josip Broz Tito, represented a relatively stable multi-ethnic regime. With Tito’s death in 1980, and the collapse of the Yugoslav economy, increased unemployment and inflation instigated ethnic conflict, which in turn led to war in the early nineties. Leslie Benson, *Yugoslavia: a Concise History*; (New York: Palgrave Macmillan, 2001).

humanity.⁷⁹⁴ Was this an unprincipled form of discretion, as some critics argued,⁷⁹⁵ or was the method, as part of the process of discovery, valid in accordance with pure theoretical construction? Article 5 of the ICTY Statute reads:

Crimes against humanity—The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.⁷⁹⁶

Writing on behalf of the International Committee of the Red Cross (ICRC), legal experts Marco Sassoli and Laura M. Olson argued that the decision of the *Tadic* Appeals Chamber to reject the Report of the UN Secretary General along with the *travaux préparatoires* (preparatory works) or statements made by the United States, the Russian Federation and France as UN

⁷⁹⁴ In reversing the Trial Chamber's ruling, the *Tadic* Appeals chamber stated that it "[Finds] the Trial Chamber erred in finding that all crimes against humanity require discriminatory intent and HOLDS that such intent is an indispensable legal ingredient of the offence only with regard to those crimes for which it is expressly required, that is, for the types of persecution crimes mentioned in Article 5(h) of the Tribunal's Statute." *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <http://www.refworld.org/cases,ICTY,40277f504.html> [accessed 14 October 2018].

⁷⁹⁵ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on May 17, 2002)*, May 25, 1993, available at: <http://www.refworld.org/docid/3dda28414.html> [accessed October 14, 2018].

⁷⁹⁶ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, July 17, 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed October 14, 2018].

Security Council members,⁷⁹⁷ was a form of illegitimate legal construction.⁷⁹⁸ Both the Report of the Secretary General and the *travaux préparatoires* associated crimes against humanity exclusively with ‘discriminatory intent’.⁷⁹⁹ The decision to limit the scope of interpretation to what the Chamber considered an unambiguous (or ordinary) reading of Article 5 of the ICTY Statute, consequently minimized, according to Sassoli and Olson, the Report of the Secretary General and the dissenting views of the three Security Council members.

The *Tadic* Appeals Chamber concluded that a “clear and unambiguous”⁸⁰⁰ or “ordinary”⁸⁰¹ interpretation of Article 5 in the ICTY Statute supported the view that “[discriminatory] intent is only made necessary for one sub-category of those crimes, namely ‘persecutions’ provided for in Article 5 (h).”⁸⁰² Otherwise, Article 5 (h) would be a residual provision applicable to all crimes against humanity⁸⁰³, which would have made Article 5 (i) (“other inhumane acts”) superfluous. The only logical explanation for the inclusion of “other inhumane acts” was that the “statutory framers” wished to demonstrate that the list was non-exhaustive and “persecutions on religious, racial and religious grounds” were only applicable to one sub-category of article 5, ‘persecution-type’ crimes requiring discriminatory intent. “It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless:

⁷⁹⁷ Provisional Verbatim Record, UN Doc. S/PV.3217 (May 25, 1993) in Marco Sassòli and Laura M. Olson, “Prosecutor v. Tadić (Judgement). Case No. IT-94-a-A. 38 ILM 1518 (1999),” *The American Journal of International Law* 94, no. 3 (Jul., 2000): 574.

⁷⁹⁸ Marco Sassòli and Laura M. Olson, “The judgment of the ICTY Appeals Chamber on the merits in the *Tadic* case,” *International Review of the Red Cross*, no. 839, available at: <https://www.icrc.org/eng/resources/documents/article/other/57jqqc.htm> [accessed October 14, 2018].

⁷⁹⁹ *Ibid.*

⁸⁰⁰ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <http://www.refworld.org/cases,ICTY,40277f504.html> [accessed 14 October 2018], para. 296.

⁸⁰¹ *Ibid.*, para. 283.

⁸⁰² *Ibid.*

⁸⁰³ *Ibid.*, para. 276.

the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.”⁸⁰⁴

Barak recommends that judges move back and forth between ‘text’ and ‘context’. The context in which the norm is to be applied plays a significant role in determining the goals or aims of the promulgated rule after all effort to elicit ‘authorial intention’ has been exhausted. Even a seemingly ‘clear and unambiguous’ norm requires interpretation. In what way did the *Tadic* Appeals Chamber introduce the “humanitarian goals of the framers of the statute”⁸⁰⁵? In filling ‘normative lacunae[s]’ with the *opinio juris* of the “international community,”⁸⁰⁶ ICTY judges deviated from pure theoretical concerns only in terms of the *cognitive* commitment to banishing this “alien” psychological element (i.e., *opinio juris*). In coupling Kelsen’s emphasis on higher principles of justice (i.e., “principles of civilization”) with judicial latitude, the courts followed the implied purposive reasoning of the author of the Pure Theory of Law.

The *Tadic* Appeals Chamber did not confine itself to a literal, ordinary or unambiguous definition of ‘persecutory crimes’. Following an earlier decision in Trial Chamber II in *Furund`ija* acknowledging the legal weight granted to the Rome Statute, which at the time was a non-binding international treaty⁸⁰⁷ adopted by the majority of States attending the Rome Diplomatic

⁸⁰⁴ Ibid., para. 284.

⁸⁰⁵ Ibid., para. 285

⁸⁰⁶ To the contrary, the *Tadic* Appeals Chamber argued that there were “no significant normative lacunae.” Ibid., para. 277.

⁸⁰⁷ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), December 10, 1998, available at: <http://www.refworld.org/cases,ICTY,40276a8a4.html> [accessed October 14, 2018], para. 227 in *Prosecutor v. Anto Furundzija (Appeal Judgement)*, IT-95-17/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), July 21, 2000, available at: <http://www.refworld.org/cases,ICTY,402768fc4.html> [accessed 14 October 2018], para. 223.

Conference,⁸⁰⁸ the Appeals Chamber in the *Tadic* case commented that "...[The Rome Statute] is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States."⁸⁰⁹ Article 7 of the Rome Statute, in consequence, represented the drafters' denial of discriminatory intent as the exclusive element of crimes against humanity. Quoting the Rome Statute, the *Tadic* Appeals Chamber wrote that:

"For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder [...]." Article 7(1) of the Statute of the International Criminal Court thus articulates a definition of crimes against humanity based solely upon the interplay between the *mens rea* of the defendant and the existence of a widespread or systematic attack directed against a civilian population.⁸¹⁰

The Defense argued that it would "be unjust if a perpetrator of a criminal act guided solely by personal motives was...to be prosecuted for a crime against humanity."⁸¹¹ The Appeals Chamber rejected this assertion. Basing its opinion, in part, on the Nuremberg Charter and Control Council Law No. 10, which distinguished between 'murder type' crimes such as murder, extermination and enslavement, and 'persecution type' crimes committed on political, racial or religious grounds,⁸¹² the Appeals Chamber suggested that a distinction was made very early on in the creation of the ICL system with regard to these two categories. Article 7, paragraph 1, of the ICC

⁸⁰⁸ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 14 October 2018].

⁸⁰⁹ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <http://www.refworld.org/cases,ICTY,40277f504.html> [accessed 14 October 2018], para. 291.

⁸¹⁰ *Ibid.*

⁸¹¹ *Ibid.*, para. 246.

⁸¹² George Andreopoulos, "Genocide, War Crimes, and Crimes against Humanity" in *International Crime and Justice*, ed. Mangai Natarajan (Cambridge: Cambridge University Press, 2011), 295-306.

Statute, which lacked any specific mention of discriminatory intent,⁸¹³ by omission reaffirmed views contained in the Nuremberg Charter and Control Council Law No. 10. The Prosecution contended that:

...the object and purpose of the [ICTY's] Statute support the interpretation that crimes against humanity may be committed for purely personal reasons, arguing that the objective of the Statute in providing a broad scope for humanitarian law would be defeated by a narrow interpretation of the category of offences falling within the ambit of Article 5.

What the Appeals Chamber in the *Tadic* case maintained was that (a) the opinions of the three dissenting states amounted to a minority sentiment akin to the occasional violation of rules through state practice, and (b) that the *travaux préparatoires* and the Report of the Secretary General played a subordinate role in determining 'authorial intent'. While the Appeals Chamber was willing to concede that each could be drawn upon to assess authorial intent, as "for instance, when interpreting Article 3 of the Statute...pronouncing on the question whether the International Tribunal could apply international agreements binding upon the parties to the conflict," the Chamber concluded that the *travaux préparatoires* and the Report of the Secretary General did not apply in this instance.⁸¹⁴

In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of "crimes against

⁸¹³ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 14 October 2018], Article 7, para. 1.

⁸¹⁴ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, available at: <http://www.refworld.org/cases,ICTY,40277f504.html> [accessed 14 October 2018], para. 304.

humanity”, thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity.⁸¹⁵

Judges turned to historical examples to demonstrate how even ‘persecution-type’ crimes ought not to be limited to the charges specified under Article 5 (h). In Nazi Germany, those with physical and mental disabilities, deviant sexual preferences and infirmity were targeted. In the Soviet Union, ‘class enemies’ were singled out. And under the rule of the Khmer Rouge, the urban educated were forced out of their homes and made to work in labor camps where the prospect of death was ever-present. Through a more purposive reading of the Appeals Chambers judgment, one may presume that failing to protect any group targeted would run counter to the humanitarian goals of the original authors and community of interpreters. Even “lacking a discriminatory intent,” however, should not “prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population.”⁸¹⁶

As with the *Tadic* Appeals Chamber decision, judges in the *Kupreskic* Trial similarly concentrated on the “purposes of persecution” and the category of “other inhumane acts,” which allowed courts flexibility in determining criminal responsibility for crimes against humanity.⁸¹⁷ Reprisal attacks, a focal point of the *Kupreskic* Judgment, evaluated the capacity of state agents to distinguish between legitimate acts of war and gross humanitarian violence in the shelling of

⁸¹⁵ *Ibid.*, para. 285.

⁸¹⁶ *Ibid.*

⁸¹⁷ *Prosecutor v. Kupreskic et al. (Trial Judgement)*, IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 January 2000, available at: <http://www.refworld.org/cases,ICTY,40276c634.html> [accessed 14 October 2018], para. 623.

population bases. Some reprisals, according to international law, are considered legitimate acts of war; others, because they are “random and indiscriminate,” prosecutable. The Martens Clause acted as a customary tool critical to ‘humanizing humanitarian law’ in the Kupreskic case.⁸¹⁸ A preamble to the 1899 Hague Convention II-Laws and Customs of War on Land, the clause was named after the Russian delegate to The Hague Peace Conference, Fyodor Fyodorovich Martens.⁸¹⁹ “The Martens Clause,” according to international lawyer Mia Swart⁸²⁰, “has had an important influence on the unconventional determination of custom at the Tribunals.”⁸²¹ The code reads:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.⁸²²

⁸¹⁸ Ibid. 525-526.; International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: <http://www.refworld.org/docid/4374cae64.html> [accessed 14 October 2018]; For a debate between former presidents of the ICTY on the use and abuse of the Martens Clause, see also: Theodor Meron, “The Martens Clause, Principles of Humanity and Dictates of Public Conscience”, *American Journal of International Law* 1, no. 94 (2000): 78-89 and Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, *European Journal of International Law* 11, no.1 (2000): 187-216.

⁸¹⁹ Vladimir Pustogarov, “Fyodor Fyodorovich Martens (1845–1909) – a humanist of modern times,” *International Review of the Red Cross* no 312 (June 1996): 300–314, doi: <https://www.icrc.org/eng/resources/documents/article/other/57jn52.htm>.

⁸²⁰ Swart, “Judicial Lawmaking,” 465.

⁸²¹ Ibid., 465 See: *Prosecutor v. Kupreskic et al. (Trial Judgement)*, IT-95-16-T, para. 527.

⁸²² The Martens Clause would be slightly modified in the 1907 Hague conventions, and, though it did not appear in the 1949 Geneva Conventions, it was included in the additional protocols of 1977.

See: International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, October 18, 1907, available at: <http://www.refworld.org/docid/4374cae64.html> [accessed October 14, 2018]; International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, 1125 UNTS 3, available at: <http://www.refworld.org/docid/3ae6b36b4.html> [accessed October 14, 2018].

Antonio Cassese, an Italian jurist who specialized in public international law and the first President of the International Criminal Tribunal for the former Yugoslavia, stated that the *Martens Clause* can be used as an equally valid historical source of international law as “usages of States”, or state practice.⁸²³ “It is logically admissible,” Swart asserted, “to infer that the requirement of state practice [*usus*] may not be strictly required for the formation of a principle or rule based on the laws of humanity. The *Martens Clause*, in [Cassese’s] view, loosens the requirement of *usus* while at the same time elevating *opinio juris* to a rank higher than normally acknowledged.”⁸²⁴

Likewise, international legal scholar Guénael Métraux remarked that *opinio juris* played a disproportionate role relative to state practice in ICTY rulings. Whereas Kelsen advocated an inductive method in which to locate customary norms “based on an analysis of a sufficiently extensive and convincing state practice,” Métraux asserted that deduction⁸²⁵ was the more common approach at post-Cold War proceedings. Although the result has been that judges have often “been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion,”⁸²⁶ they have also been instrumental in “turn[ing] the customary process on its head” by introducing principles of humanity. The Kupreskic Trial Chamber wrote:

This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the ... *Martens Clause*. In the light of the way States and courts have

⁸²³ See *generally*: Antonio Cassese, “The *Martens Clause*: Half a Loaf or Simply Pie in the Sky?”, *European Journal of International Law* 11, no.1 (2000): 187-216 and Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003).

⁸²⁴ Mia Swart, “Judicial Lawmaking,” 465.

⁸²⁵ Guénaël Métraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2006), 13.

⁸²⁶ *Ibid.*, 15.

implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.⁸²⁷

“Principles of civilization” are central to Kelsen’s theoretical justification of retroactive lawmaking for core international crimes (see: chapter 2, Part IV). The Martens Clause affirms what Kelsen accepts as “legal”: the prosecution of immoral acts amounting to core international crimes. Although problems associated with Kelsen’s banishment of *opinio juris* from pure theoretical cognition persist, and while he traditionally refused to recognize “morality” as a legitimate criterion for assessing the “validity “of law as a sanction-oriented enterprise, Kelsen’s emphasis on “consensus” rather than unanimous assent by state parties, permits judges to assess deviation from state practice in light of the “the pressure of the demands of humanity.”

VI. Conclusion

North America’s foremost contemporary Kelsen scholar, Stanley Paulson⁸²⁸, creates the theoretical framework for a rejoinder to those like Judith Shklar who claim that Kelsen’s “formalism” denies the possibility of purposive ICL construction. Paulson’s emphasis on Kelsen’s embrace of “free law”—or radical skepticism towards legal interpretation—does not deny the

⁸²⁷*Prosecutor v. Kupreskic et al. (Trial Judgement)*, IT-95-16-T, para 527. See also: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, 226, International Court of Justice (ICJ), July 8, 1996, available at: <http://www.refworld.org/cases,ICJ,4b2913d62.html> [accessed October 14, 2018].

⁸²⁸ Michael Steven Green describes Paulson as “the dean of Kelsen studies (arguably not just in this country but in the world).” Michael Steven Green, “Why No Kelsen?” October 3, 2007, <http://prawfsblawg.blogs.com/prawfsblawg/2007/10/why-no-kelsen.html>. For a formal reading of Kelsen that runs at cross-purposes to this study’s emphasis on the syncretism inherent to the Kelsenian account of ICR, see: Michael Steven Green, “Hans Kelsen and the Logic of Legal Systems,” *Alabama Law Review* 53 (2003): 365-413.

possibility of purposiveness. Rather, Paulson identifies Kelsen as licensing discretionary judgments by ICL judges, which complements Kelsen's clear statements on the matter in "The Principle of Sovereign Equality of States as a Basis for International Organization" (1944). In affirming the judge's role in the hierarchy of delegated legal normative authority, Kelsen emphasizes how ICL judges as representative of the "international community" are authorized to pronounce on the intended purpose of this sphere. Substantive in orientation and therefore exceeding a traditionally-conceived "frame" of pure theoretical legal cognition, Kelsen nevertheless provides the theoretical "tools" for an expanded notion of ICR exceeding the immunizing preferences of classical legal positivism.⁸²⁹

If the strictest legal positivist licensing the "scientific" analysis of imputation in the international sphere must turn to "principles of civilization" to justify prosecution of core international crimes, then presumably the same reasoning Kelsen used to identify ICR in the period around the time of the promulgation of the IMT Charter could be extended to the case of former Yugoslavian war criminals. But the post-Cold War era presents new challenges. If at the time of the alleged humanitarian offense no customary norms existed to regulate acts of state, then the ICTY required that retroactive lawmaking be prohibited, in accordance with "principles of legality." This, of course, was not the case at the inauguration of the modern ICL system where Kelsen justified retroactivity in *all* ICL cases where no general rule of international law existed to prohibit *ex post facto* lawmaking (see: chapter 2, part IV, for a detailed discussion). Since the ICTY mandated what would be enshrined in the 1998 Rome Statute as a prohibition against

⁸²⁹ See: Stanley Paulson, "Classical Legal Positivism at Nuremberg," *Philosophy & Public Affairs* 4, no. 2 (Winter, 1975): 132-158.

retroactive lawmaking, a new, more refined method of legal construction, would need to be introduced.

Although Kelsen does not recognize psychological factors as relevant to cognition of law, and explicitly denies that “intention” matters with respect to customary construction, he nevertheless recognizes the importance of this flexible source of ICL interpretation. Kelsen’s affirmation of state practice and his denial of *opinio juris* must not be construed, therefore, as a general infringement on purposive legal application. Rather, the effort to demonstrate the significance of (unwritten) customary law, to Kelsen, produces a less-formal estimation of permitted sources of ICL construction. He does not circumscribe the potential for what former ICTY President Theodor Meron refers to as “the humanization of humanitarian law,” even as he seemingly remains unwavering in his rejection of the psychological element of *opinio juris*.

In what ways, then, is a purposive application aided by Kelsen’s theoretical model? In addition to the contested role of state practice, J. Peter Pham, associates Kelsen’s theory of international law with “[the] drive to subsume national sovereignty within [a] single ‘multilateral’ consensus.”⁸³⁰ Pham writes that international law “derives its theoretical foundations from the legal philosophy of Hans Kelsen, one of the most important jurists of the twentieth century, if not the most preeminent.”⁸³¹ The “consensus” Pham criticizes relates to state practices, especially those of non-signatory states that contest the customary assumption by international officials and NGO’s that an “international community”

⁸³⁰ J. Peter Pham, “The Perils of ‘Consensus’: Hans Kelsen and the Legal Philosophy of the United Nations,” *Indiana International and Comparative Law Review* 14, no. 3: 557.

⁸³¹ *Ibid.*

promoting “principles of civilization” indeed exists.⁸³².

Pham’s skepticism is not unwarranted from a state-centered perspective. But Kelsen’s approach, consistent with the “consensus” model, is better suited to maintaining an efficacious order adjudicating core international crimes. Reconfiguring the identity of legal subjects and reconceptualizing the parameters of crimes against humanity, as the *Tadic* appeals court did, reflects a purposiveness compatible with Kelsen’s otherwise putatively ‘formalist’ or ‘logician’ approach to legal cognition. In introducing “substantial relations “based on “ethnicity” the courts affirmed a dynamic conception of the “legal subject”. The Appeals Chamber demonstrated fidelity to Geneva IV by asserting that even if formally the parties belonged to the same nation (Bosnia), they were essentially fighting a war between parties independent of one another—one of which acted as another state’s proxy. This is fully reconcilable with Kelsen’s position that the identification of “legal subjects” may be reconfigured with time as conforms with the dynamism of pure theory.

Moreover, the ICTY’s position on the expanded notion of crimes against humanity is reconcilable with the validity requirements of Pure Theory. Here, Pham’s criticism of Kelsen’s embrace of the “consensus” of the “international community” is pertinent to a broader conception of this charge. Kelsen’s recognition of changing customary law—as identified by “the international community”—justifies ICTY judges in the *Tadic* appeals court decision in altering the interpretation of crimes against humanity to reflect the current moment. The next chapter engages in a historically-informed discussion of Kelsen’s conception of “principles of civilization” as rendered by the “international community,” was, as Pham puts it, was informed

⁸³² See: Kofi Annan’s stated that: “More than ever, a robust international legal order, together with the principles and practices of multilateralism, is needed to define the ground rules for an emerging global civilization” Kofi A. Annan, *‘We The Peoples’: The Role of the United Nations in the 21st Century* (New York: United Nations Department of Public Information, 2000), 13 in Pham, *The Perils of Consensus*, 557.

by Kelsen's theoretical vision, [which] lay[s] the intellectual foundations for the world body's overall ideology as to the binding nature of its 'consensus.'"⁸³³

⁸³³ Pham, 560.

Chapter 6

The Sovereignty of Conscience: Concluding Remarks on Hans Kelsen's Conception of International Criminal Responsibility

I. Hans Kelsen, Humanist

International law scholar J. Peter Pham argues that “the jurisprudence of the United Nations” is an artificial construct of states, the UN and affiliate bodies, including NGOs. It represents “the Orwellian corpus produced by the legal hodgepodge of overlapping conventions, commissions, committees, and other ‘deliberative’ bodies.”⁸³⁴ In implicating the author of the Pure Theory of Law, Pham writes, “...it is the role that Kelsen’s theoretical vision plays in laying the intellectual foundations for the world body’s overall ideology as to the binding nature of its ‘consensus’ that is of capital importance.”⁸³⁵ For Kelsen, the *Alleszermalmer* or “universal destroyer,” according to Jochen von Bernstorff, “the instrument of the treaty...opened up for international politics quasi-unrestricted spheres of action.”⁸³⁶ Bernstorff, an expert on Kelsen’s role in public international law, confirms the flexibility of international treaty law, which could apply to third party states and individuals. Once the national legal order transfers authority to another national legal order, or a hybrid or international jurisdiction, for example, customary laws and prior decisions assume pivotal roles as sources of ICL. This is confirmed especially in a Bernstorff’s recent writings on Kelsen’s interpretation of sources of international law.⁸³⁷

⁸³⁴ Pham, 560

⁸³⁵ Ibid.

⁸³⁶ Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, trans. Thomas Dunlap (Cambridge: Cambridge University Press, 2010), 179.

⁸³⁷ Jochen von Bernstorff, “Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: A Theory of Global Judicial Imperialism?” *European Society of International Law (ESIL) 2015 Annual Conference (Oslo)*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709624.

The traditional nineteenth century methodological vision of George Wilhelm Hegel, which culminates in spiritual (and actual) rule by the Prussian state, is subverted by Kelsen, who reinterprets the personified “state” as the unity of legal norms. A national legal order under the authority of a system of international law creates the space, according to Kelsen, for validity claims that aid in the legal functioning of this sphere. Conservative objection to universal legal cognition is reflected in the intensity of the Hegelian rejection of sovereignty beyond the aegis of the Prussian state with its rigid assignment of administrative roles. “[State’s] rights are actualized only in their particular wills,” writes Hegel, “and not in a universal will with constitutional powers over them. This universal proviso of international law therefore does not go beyond an ought-to-be, and what really happens is that international relations in accordance with treaty alternate with the severance of these relations.”⁸³⁸

Hegel’s approach to imputation denies a “supra-state” model of a federated world state, or even a universal moral “consensus” that does not require centralization of authority, but a fragmented, primarily-*ad hoc*, system of international criminal law adjudication. Hegel shares with Austin’s “command” skepticism an unwarranted rebuttal, according to Kelsen, of the rule of international law. This last chapter interrogates a subject that has been bracketed throughout this dissertation: “agency” beyond an exclusively normative conception of legal responsibility. Overcoming the politicization of the state through a putatively, but ultimately inaccurately, applied Kelsenian conception of the acts of state doctrine (AoSD) is revealed in the bold initial assertions by Kelsen of (a) the necessity of differentiating traditional collective forms of international responsibility imputed to states with a modern, individual or fault-based,

⁸³⁸ Georg Wilhelm Hegel, *Hegel’s Philosophy of Right*, transl. T.M. Knox (Oxford: Clarendon Press, [1820] 1958), 213.

conception of international criminal responsibility, and (b) the development of a positive law analysis of retroactive lawmaking in violation of the principle of legality rule against *ex post facto* laws. Kelsen understood that the magnitude of Nazi offenses warranted prosecution.

Part II demonstrates what I have found out in the course of my research and what I believe to be original contributions to a subject area that matters especially in a period of accelerated technological and political change. Part III points to recommendations, specific to the evidence of this study and what I believe to be healthy areas for future research. After describing the merits of Kelsen’s theoretical and empirical analysis of this term, I proceed to propose a conception of imputation in international law that reflects the logical path of Kelsen’s “extra-legal” or moral assumption that “choice” can indeed be made under heavily-influenced legal or coercive conditions (see: chapter four). Kelsen reveals his true feelings regarding “agency” when he writes that “Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.” (*my emphasis*).⁸³⁹ In addition to recognizing that “internationally illegal acts” retroactively created “were also morally most objectionable” by a standard— “the consensus” of the “international community,” Kelsen further acknowledged that the individual was “certainly aware of their immoral character”. Recommendations for further exploration, in the mode of Erich Fromm’s

⁸³⁹ Hans Kelsen, “Will the Judgment in the Nuremberg Trial Constitute a Precedent?,” *International Law Quarterly* 153, no. 2 (1947) in *Perspectives on the Nuremberg Trial*, ed. Guenael Mettraux (Oxford: Oxford University Press, 2008), 284.

humanistic psychological diagnoses of democratic and autocratic characterology, is briefly discussed in Part III.

II. Research Objectives

Chapter 1 introduced Kelsen's practical contributions to the development of an individual (fault-based) conception of responsibility expressed in retroactive terms as applicable to state officials, including heads-of-state. Kelsen's recommendations to Jackson on the necessity of including a definition of individual criminal responsibility in the London IMT charter produced a wholly new conception for jurisprudence. Whereas Kelsen endorses protections for most acts of state closely linked to the collective unit as a national legal order (or state"), he denies the automatic right to immunity for officials who committed acts of the magnitude of crimes against humanity and genocide. By the standards or "principles of civilization," these acts were manifestly immoral, even if legally valid, Kelsen maintains, and state officials ought to have known this. The correspondence between Kelsen's advice and the wording of the text of the IMT Charter was explored in this chapter along with Kelsen's general transatlantic influence on the development of ICR.

Chapter Two examined the primary philosophical point of inquiry animating the correspondence between Kelsen's pure theoretical approach and progressive methodological choices necessary to the development of ICR. Dueling principles of justice, including the principle of legality rule against *ex post facto* lawmaking, on the one hand, and a higher moral principle of justice retroactively determined by judges, on the other, is reconciled in accordance with a "formal" determination of this term.

Chapter Two also described the ways in which Kelsen's neo-Kantian theory of ICR, predicated on a strictly positive legal description of the relationship between legal norms as conditioning offenses, and coercive, normatively authorized sanctions, frames our understanding at the highest level of imputation. In addition, this chapter addresses acts of state, or legally-authorized acts immunized under state-centered protections. In introducing the Fuhrer Principle as a legitimate constitutional ordering within a national legal order in which the leader *is* the law, where total authority resides in "decrees" or "words" that cannot be countermanded, Kelsen abides by his doctrinal position that responsibility ought to be "depersonalized" or "depsychologized". To understand coercive normativity as the command ("act" or "fact") of the autocrat is to recognize that legal responsibility is ontologically relativist. Under such an order, legal by Kelsen's standards, the prospect of future liability nevertheless abounds.

The last part of Chapter Two consequently reconciles Kelsen's position that acts *once-legal* can also have the capacity for prosecution under a retroactive methodological model unique to ICL based on "principles of civilization," including recognition from a legal vantage point of the immorality of core international crimes. Thus, Kelsen is finally able to reconcile his commitment to the principle *non sub homine sed sub lege* (or "not under man, but under law"), a central concern of jurisprudence and political theory, which otherwise is undermined by acts of state immunity under autocratic rule.

Chapter Three established, against the view of international law scholars Oona Hathaway and Scott Shapiro, that Kelsen, regardless of his effort to establish "peace through law" and the priority he seemingly places over the "Class A" charge of crimes against peace, nevertheless created a retroactive methodological description of ICR applicable *equally* to all core

international crimes. Additionally, Kelsen's endorsement of just war theory, the basis for determining crimes against peace, and how it reflected the classical colonial model of international criminal law that presumed European dominance in the world, is interrogated here.

Chapter Four shifted the historical focus fifteen years from the 1945-46 IMT Nuremberg to the 1961 trial of Adolph Eichmann in Jerusalem. Wolfgang Friedmann in his classic *The Changing Structure of International Law* (1966) recounted that international society had “undergone fundamental transformations which, though far from completed...already profoundly modified the substance and structure of international law.”⁸⁴⁰ While attention is paid to the Jerusalem court's instrumental role in restructuring the notion of crimes against humanity as not merely an adjunct to the crimes against peace charge and the “war-nexus” requirement, the introduction of a series of major multilateral treaty agreements after the Second World War furthered the transformation of the ICL sphere.

Chapter Four also examined the progressive transformation of the acts of state doctrine through universal jurisdictional principles and a deepened reflection on superior orders under the acts of state doctrine. Andrea Gattini's conservative description of Kelsen's philosophical contribution to the changing notion of ICR neglected to consider the Cold War implications of pure theoretical application. I argue that customary international law application in the Eichmann case once again endorsed an *ex post facto* logic that granted judges the progressive latitude in which to counter the immunizing acts of state doctrine. Additionally, Arendt's famous “banality of evil” thesis is engaged in the last part of the chapter. Here I contended that Arendt's approach

⁸⁴⁰ Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1966), 1.

to superior orders found common ground with Kelsen's insight into the heavy influence that law, especially under the Fuhrer Principle, assumes in a state official's decision-making process. Despite the importance in recognizing the role that law assumes over every day social life, the methodological approach to ICR Kelsen licensed implied moral agency. The next—and final—section briefly draws out this point.

Chapter Five shifted attention from the mainly personified “individual” (who otherwise is merely the point of imputation in the relationship of a “bundle of legal norms”) to the judge, analyzing the way in which the post-Cold War era re-shapes the concept of imputation. Although Kelsen died in 1973, his approach remains useful. What made post-Cold War tribunals especially fertile for progressive interpretation was the imprimatur granted by the United Nations Security Council and UN General Assembly. Not only could the “international community” be said to endorse a significant role at the ICTY in customarily expanding, for example, the conception of state allegiance for the purpose of determining official immunity, but the “international consensus” invested such powers to judges who could, in turn, in accordance with pure theoretical doctrine, flexibly account for restrictions associated with the customary nature of lawmaking in this period. While Kelsen presented a view of customary international law seemingly limited in its value, his conviction that international judges ought to be afforded a discretionary role in determining ICR indicates his commitment to a judge-centered institution progressive in orientation.

III. Recommendations

Initially, Kelsen's writings animated one small part of my project on the genealogy of international criminal responsibility. Kelsenian Stanley Paulson's minor account of Kelsen in

“Classical Legal Positivism at Nuremberg” coupled with Andrea Gattini’s seemingly definitive assessment in “Kelsen’s Contributions to International Criminal Law” as a “nineteenth century statist” closed the door on further interrogation of Kelsen’s notion of ICR. But in reading through key texts written by Kelsen during the period of his relocation to the U.S. as a refugee from Nazi Germany along with his sustained interrogation of this concept throughout the Forties, the notion propagated by Gattini and others of Kelsen’s conservatism did not conform to the reality of Kelsen’s conception of a dynamic international institution that, not only validated ICR, but nurtured the strictest attempt at a positive legal construction. I found that Kelsen’s contributions consequently produced a progressive vision of an ICL sphere that skeptics like Gattini have as-yet failed to consider a serious object of research.

Kelsen’s theory about the nature of authority is based on moral “principles of civilization”. These “principles” are connected to general “principles of humanity” as “principles of tolerance,” which animates the international community’s implied “consensus” about the limits of depravity under contemporary international conditions. While setting aside an analysis of Kelsen’s direct impact on the philosophy of “consensus,” which Pham argues “derives its theoretical foundations from the legal philosophy of Hans Kelsen, one of the most important jurists of the twentieth century,⁸⁴¹” the social construction of morality is implied in the politicized debate over the limits of ICL adjudication. In the mode of Rawls’ interpretation of Kantian constructivism, this socially-derived moral construction is categorically different than the absolutist description of natural law theory based on God, nature or reason.⁸⁴² Social

⁸⁴¹ J. Peter Pham, “The Perils of ‘Consensus’: Hans Kelsen and the Legal Philosophy of the United Nations,” *Indiana International and Comparative Law Review* 14, no. 3 (2004): 557.

⁸⁴² John Rawls, “Kantian Constructivism in Moral Theory,” *The Journal of Philosophy* 77, no. 9 (Sept. 1980): 515-572.

construction associated with “international consensus” produces a relative scheme of morality that changes over time, investing legal normativity, from Kelsen’s perspective, with its most important feature: transparency.

Having described Kelsen’s theory as vital to comprehending the changing notion of ICR, it is necessary to explore the prospect for future research. The present evaluation contains only a partial account of Kelsen’s overarching contributions to the conception of imputation or responsibility in international law, including three representative case studies that could be expanded to include further analysis of ICL proceedings, especially an expanded consideration of Justice Radhabinod Pal’s integration of Kelsen’s writings in his comprehensive dissent at the International Military Tribunal for the Far East (for a brief account of Pal’s position, see Chapter Two).

The “international consensus” is a *political* statement, always ideological in its claim to regulate unjust, previously enacted, national laws. Under a historically-generated organizational and technological framework specific to the time in which adjudication of cases of core international crimes takes place, the unyielding “nineteenth century statism” attributed to Kelsen by Gattini is refuted by the validity Kelsen imputes to retroactive prosecution of core international crimes. Neither Gattini’s conservative statement regarding Kelsen’s unyielding support of the AoSD as a statist-politicization of ICR, nor J. Peter Pham’s position that the author of *Pure Theory* is responsible for an unfettered commitment to “supra-nationalism” whose denouement is *necessarily* a centralized legal order, are correct.⁸⁴³

⁸⁴³ Ibid.

Kelsen endorses a judge-centered, *ad hoc* “system” of international criminal justice. His theory not only adapts to the discretionary role assumed by judges within this order, he also validates the record or chronicle of judicial decisions comprising *all* cases of international criminal law, including national, hybrid and international, *ad hoc* and permanent jurisdictions adjudicating cases of core international crimes. Much like the common law system practiced in England, the international criminal law system, which Kelsen endorses, is heavily based on the customary practice of using prior judicial decisions as a basis for determining present cases. Bernstorff has recently confirmed this configuration as structurally legitimate.⁸⁴⁴

Kelsen’s legacy resides in his acknowledgment that the individual as state official is subject to the command of *law*, which masquerades as legitimate, retroactively-authorized command authority under the Fuhrer principle, but also, and in ordinal value, as the substantive normative jurisdictional locus of a future-existent warning of international criminal law to all state officials. Kelsen realized that principles of humanity or principles of civilization must be realized through the act of imagination beyond the prospective rule. Here, in the future, where there is knowledge that the once-legal act of state influenced the decision-making apparatus responsible for the conscience of would-be genocidists, the ICL judge must nevertheless assess the prospect of “choice”.

Kelsen writes in “What is Justice?”: “Relativism imposes upon the individual the difficult tasks of deciding for himself what is right and what is wrong.”⁸⁴⁵ Despite claiming that only

⁸⁴⁴ Bernstorff, “Hans Kelsen on Judicial Law-Making,” *European Society of International Law (ESIL) 2015 Annual Conference (Oslo)*.

⁸⁴⁵ Hans Kelsen, *What is Justice?: Justice, Law, and Politics in the Mirror of Science* (Berkeley: University of California Press, 1957), 22.

legal norms ought to be the object of *legal* cognition, Kelsen does not reject the possibility of moral choice. As Kelsen scholar Drury Stevenson correctly notes, the law is addressed to legal organs, since the central concern of law is the sanction.⁸⁴⁶ If a state official does not proceed with her responsibilities, she can expect a coercive action to be applied. At the most modest end, this means termination of position; in the extreme scenario, death resulting from non-compliance. Moral responsibility, Kelsen concedes, is difficult because we possess no absolute blueprint. There is no universal moral law that is a continuous source animating social life. Rather, an official's choice "implies a serious responsibility," writes Kelsen, "the most serious moral responsibility a man can assume."⁸⁴⁷ The "weaknesses" of "men who turn to an authority above them, to the government and, in the last instance to God" for answers to life's existential dilemmas demonstrates Kelsen's belief that law must be distinguished from the sovereignty of conscience.⁸⁴⁸

Kelsen's response to Sigmund Freud's social theoretical approach in *Group Psychology and the Analysis of the Ego* discounts the general psychoanalytic contention that the same basic mental processes exist in transient and more permanent groupings.⁸⁴⁹ Kelsen's theory intimates that law is the predominant organizing force in everyday social life, the technique that best balances divided social interests, producing a distinctive rule-bound mentality. The regression of those who identify with aggressive leadership, especially under autocracy, is discounted by Kelsen in his criticism of Freud. Rather than emphasizing the place of the aggressive instinct, as

⁸⁴⁶ Dru Stevenson, "Kelsen's View of the Addressee in the Law. Primary and Secondary Norms," in *Hans Kelsen in America-Selected Affinities and the Mysteries of Academic Influence* (Switzerland: Springer, 2016), 219-319.

⁸⁴⁷ Kelsen, *What is Justice?*, 22.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ See generally: Sigmund Freud, *Group Psychology and the Analysis of the Ego*, trans. and ed. James Strachey (New York: Norton & Co., (1921) 1975); Hans Kelsen, *The Conception of the State and Social Psychology with Special Reference to Freud's Group Theory*, *International Journal of Psychoanalysis* 5: 1-38, [s://www.scribd.com/document/182003970/Kelsen-H-1924-the-Conception-of-the-State-and-Social-Psychology](https://www.scribd.com/document/182003970/Kelsen-H-1924-the-Conception-of-the-State-and-Social-Psychology)

Freud does, Kelsen chooses instead to identify group psychology with general obedience to the legal norms that organize, on a relatively permanent basis, social behavior. Democracy, rather than autocracy, insures such an ordering.

But where does this leave the prospect for individual freedom or agency? According to psychologist Erich Fromm, humanistic ethics,” in contrast to authoritarian ethics, which encompasses limitations on rights protections, is “*formally*...based on the principle that only man himself can determine the criterion for virtue and sin, and not an authority transcending him. *Materially*, it is based on the principle that ‘good’ is what is good for man and ‘evil’ what is detrimental to man; *the sole criterion of ethical value being man’s welfare.*”⁸⁵⁰ Any agreement with Fromm’s position, however, is obscured by Kelsen’s general unease in introducing moral decision-making into jurisprudential consideration. Nevertheless, Kelsen scholar Monica Zalewska points out the humanistic psychological elements conducive to independent decision-making under democracies. She writes:

Although Hans Kelsen’s Pure Theory of Law is arguably one of the most influential theories of law in Europe, it has been occasionally misunderstood. One of the most common misunderstandings is the claim that Kelsen’s concept of the *Rechtstaat* (the rule of law) legitimizes any regime, the Nazi one included. This misunderstanding stems from the fact that Kelsen ascribed a double meaning to the concept of *Rechtsstaat*. While in a broad sense, Kelsen identified every legal order and state with *Rechtsstaat*...he also recognized the classical meaning of the *Rechtsstaat* in the narrow sense, which corresponds with the concept of the rule of law.⁸⁵¹

⁸⁵⁰ Erich Fromm, *Man for Himself* (Holt, Rinehardt & Winston, 1947), 22.

⁸⁵¹ Monika Zalewska, “Some Misunderstandings Concerning Hans Kelsen’s Concept of Democracy and the Rule of Law,” 105, <http://dx.doi.org/10.18778/8088-410-6.07>.

Zalewska is right to recognize the impossibility that Kelsen could ever endorse the legitimacy of Nazism from the vantage point of the liberalism animating pure theory. Zalewska correctly identifies Kelsen's commitment to moral relativism as an identifying mark of his liberal allegiance, encouraging democratic social compromise, a scientific outlook, and the rule of law. Kelsen argues that "Only freedom directed towards the equality relationship defined by Me — You, which entails a sense of responsibility, recognition of the other, and which directs I not into Myself but rather You, can be the basis of democracy."⁸⁵² Clemens Jabloner, co-director of The Hans Kelsen Institute, reaffirms this point. Jabloner writes:

Since the basic principle of democracy is that freedom is desired also for other human beings who are regarded as essentially equal, equality joins freedom and thus justifies the majority principle. Kelsen looks for a particular type of characteristic and finds it in the human being whose basic experience is expressed by a famous formula of Sanskrit philosophy, the *tat wam asi*—the human being with whom, when he faces another, a voice says: that is you. Kelsen says this person has a "relatively diminished" ego; he is sympathizing, peace-loving, and not aggressive; he is a human being whose primary aggressive instinct is directed inwards with an inclination to self-criticism and an increased sense of guilt and responsibility. Democracy, therefore, is not a fertile ground for the authoritarian principle."⁸⁵³

Further exploration of how autocratic and democratic forms of law impact the conception of ICR could provide a more useful psychological framework for ICL judges determining culpability under conditions specific to each regime.

⁸⁵² Hans Kelsen, *Staatsform und Weltanschauung*, *Recht und Staat in Geschichte und Gegenwart* Series (Tübingen: J.C.B. Mohr, 1933) (reprinted: Hans R. Klecatsky, René Marcic, Robert Schambeck (eds.), 1979 in Zalewska, "Some Misunderstandings," 113.

⁸⁵³ Clemens Jabloner, "Legal Techniques and Theory of Civilization-Reflections on Hans Kelsen and Carl Schmitt," in *Hans Kelsen and Carl Schmitt: A Juxtaposition*, eds. Dan Diner and Michael Stolleis (Tel Aviv: Bleicher Verlag, 1999), 56.

Since the 1964 publication of Shklar's *Legalism: Law, Morals and Political Trials*, the range of the transnational intellectual enterprise has evolved to include participants from international organizations, including the United Nations and its sub-departments, states and their representatives, and non-governmental organizations, especially NGOs concerned with human rights issues. The range of participants has expanded far beyond the structural limitations imposed by a Cold War divide. Technological improvement of communication capabilities throughout the globe has especially created a "global consciousness" of the prospect of political interconnection through the application of jurisdictional authority over core international crimes.

As a result of the internet, instantaneous news of state-sponsored killings throughout the world may be consumed. The same could be said of international criminal cases, including trials conducted under conditions that generally preserve the rule of law. This prospect of global communication over the meaning of international criminal responsibility, according to Kelsen, is a *necessary* element of the dynamic construction of this term. Kelsen does not prohibit international judges from incorporating "principles of civilization." In fact, his claim that *only* cases that are not "indifferent in themselves" can be retroactively determined are structured by an "international community" that changes over time. Therefore, Shklar's polemic against Kelsen as formal, and hence "a-historical," is incorrect. Kelsen's philosophy, I argue, not only can accommodate, but necessarily warrants, historical investigation.

Kelsen is perhaps the most significant theorist of ICR, a founding father of the twentieth century discipline of ICL, who marshalled the legal-technical resources to mount a challenge in defense of the legal validity of a system whose purpose is the determination of individual responsibility by state officials. Kelsen's pure theory licenses a Kantian constructivist approach

to metaethics compatible with cognition of the relationship between once-valid and now-invalid legal rules with respect to the application of ICR. Kelsen's general theory of law and state discounts individual agency; his conception of international criminal responsibility—the highest authoritative understanding of imputation—returns it to its rightful place. The individual now has choice.

At its most beneficial, law is a *transparent* medium. It maps the reasons that legal norms or rules are coercively authorized, even when retroactively enacted. Transparency about the conversion of moral into legal norms within a system reliant on customary laws, judicial decision-making, and, early on, the positive law defense of *ex post facto* lawmaking, according to Kelsen, produces the clearest description of the entry points to “the humanization of humanitarian law”. Through extensive study of trial transcripts and Kelsen's academic writings on international criminalization in relation to key doctrinal statements of the pure theory of law, I have argued that it has become possible to understand the structure of ICR, in accordance with an otherwise judge-allowable purposive articulation.

Bibliography

- Abadinsky, Howard. *Law, Courts, and Justice in America*. 7th ed. Long Grove, IL: Waveland Press Inc., 2014.
- Abella, Rosalie. "Without An Independent Judiciary, Israel's Cherished Democracy Will Be At Risk." *The Times of Israel*. April 19, 2018, Accessed November, 1 2018.
<https://www.timesofisrael.com/without-an-independent-judiciary-israels-cherished-democracy-will-be-at-risk/>.
- Altman, Andrew. *Critical Legal Studies: a Liberal Critique*. Princeton: Princeton University Press, 1993.
- Andreopoulos, George, "Genocide, War Crimes, and Crimes against Humanity." In *International Crime and Justice*. Edited by Mangai Natarajan. Cambridge: Cambridge University Press, 2011.
- Annan, Kofi A. *'We The Peoples': The Role of the United Nations in the 21st Century*. New York: United Nations Department of Public Information, 2000.
- Aquinas, Thomas. *Politics and Ethics*. New York: W.W. Norton & Co., 1988.
- Arajarvi, Noora. *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*. New York: Routledge, 2014.
- Arendt, Hannah. "Thinking and Moral Considerations: A Lecture." *Research* 38, no. 3 (Autumn 1971): 417-446.
- Arendt, Hannah. *Between Past and Future: Eight Exercises in Political Thought*. New York: Viking Press, 1963.
- Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: Penguin, 1994.
- Arendt, Hannah. *Lectures on Kant's Political Philosophy*. Edited by Ronald Beiner. Chicago: University of Chicago Press, 1982.
- Arendt, Hannah. *Responsibility and Judgment*. Edited by Jerome Kohn. New York: Schocken Books, 2003.
- Arendt, Hannah. *The Life of the Mind*. San Diego: Harcourt Brace Jovanovich, 1981.
- Aristotle. *The Politics of Aristotle*. edited and translated by Ernest Barker. Oxford: Oxford University Press, 1958.
- Augustine of Hippo. *The City of God*. Translated by Marcus Dodd. Edinburgh: T. & T. Clark, [426CE] 1934.

- Austin, John. *Lectures on Jurisprudence, Or, the Philosophy of Positive Law*. New York: Henry Holt and Co., 1875.
- Austin, John, Robert Campbell, and Sarah Austin. *Lectures on Jurisprudence; Or, The Philosophy of Positive Law*. London: J. Murray, 1885.
- Austin, John. *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*. London: Weidenfeld and Nicolson, 1954.
- Badr, Gamal Moursi. *State Immunity: An Analytical and Prognostic View*. The Hague: M. Nijhoff, 1984.
- Barak, Aharon. "Justice Aharon Barak: Human Dignity and Constitutional Law." Lecture at Indiana University School of Law-Bloomington, November 10, 2016.
- Barak, Aharon. *Purposive Interpretation in Law*. Princeton, NJ: Princeton University Press, 2005.
- Barak, Aharon. *The Judge in a Democracy*. Princeton, NJ: Princeton University Press, 2006.
- Bass, Gary Jonathan. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton, NJ: Princeton University Press, 2000.
- Bassiouni, M. Cherif. *Historical Evolution and Contemporary Application*. Cambridge: Cambridge University Press, 2011.
- Baum, Sandrine. *Hans Kelsen and the Case for Democracy*. Translated by John Zvesper. Colchester, UK: ECPR Press, 2012.
- Bazyler, Michael. *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World*. Oxford: Oxford University Press, 2016.
- Bederman, David. *Custom as a Source of Law*. Cambridge: Cambridge University Press, 2010.
- Bendersky, Joseph W. "Carl Schmitt at Nuremberg." *Telos* 72, no. 1 (1987): 91-96.
- Benhabib, Seyla, "Carl Schmitt's Critique of Kant: Sovereignty and International Law." *Political Theory* 40, no. 6 (2012): 688-713.
- Benhabib, Seyla, "Defending a Cosmopolitanism without Illusions. Reply to My Critics." *Critical Review of International Social and Political Philosophy* 17, no. 6 (2014): 697-715.
- Benhabib, Seyla, "Judgment and the Moral Foundations of Politics," *Political Theory* 16, no. 1 (Feb., 1988): 29-51.
- Benhabib, Seyla. *Exile, Statelessness and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin*. Princeton: Princeton University Press, 2018.
- Ben-Naftali, Orna, "Eichmann." In *The Oxford Companion to International Criminal Justice*, edited by Antonio Cassese. Oxford: Oxford University Press, 2009.

- Benson, Leslie. *Yugoslavia: a Concise History*. New York: Palgrave Macmillan, 2001.
- Bentham, Jeremy. *A Comment on the Commentaries and A Fragment on Government*. Edited by J. H. Burns and H. L. A. Hart. Oxford: Oxford University Press, 1977.
- Bentham, Jeremy. *Introduction to the Principles of Morals and Legislation*. Edited by J.H. Burns and H.L.A. Hart. London: Athlone Press, 1970.
- Bentham, Jeremy. *Of the Limits of the Penal Branch of Jurisprudence*. Edited by P. Schofield. Oxford: Oxford University Press, 2010.
- Bentham, Jeremy. *Works of Jeremy Bentham*. London: Simpkin, Marshall & Co., 1843.
<https://books.google.com/books?id=oZ1EAAAACAAJ&pg=RA1> (accessed June 15, 2018).
- Jeremy Bentham. *The Works of Jeremy Bentham*. London, Simpkin, Marshall & Co., 1838.
- Benvenisti, Eyal. *The International Law of Occupation*. Oxford: Oxford University Press, 2012.
- Bernstein, Richard. "Judging-the Actor and the Spectator." In *Philosophical Profiles*. Philadelphia: University of Pennsylvania Press, 1986.
- Beste, Ralf, Bönisch, Georg, Darnstaedt, Thomas, Friedmann, Jan, Fröhlingsdorf, Michael, and Wiegrefehhttp, Klaus. "From Dictatorship to Democracy: The Role Ex-Nazis Played in Early West Germany." *Der Spiegel*. March 6, 2012. www.spiegel.de/international/germany/from-dictatorship-to-democracy-the-role-ex-nazis-played-in-early-west-germany-a-810207.html.
- Bianchi, Andrea. "State Responsibility and Criminal Liability of Individuals." In *The Oxford Companion to International Criminal Justice*, edited by Antonio Cassese, 17-27. Oxford: Oxford University Press, 2009.
- Bianchi, Andrea. *International Law Theories: An Inquiry into Different Ways of Thinking*. Oxford: Oxford University Press, 2016.
- Biddle, Francis, "The Nurnberg Trial." In *Perspectives on the Nuremberg Trial*, edited by Guénaël Mettraux, 200-212. Oxford: Oxford University Press, 2008.
- Bilsky, Leora. *Transformative Justice: Israeli Identity on Trial*. (Ann Arbor: University of Michigan Press, 2004.
- Bix, Brian H. "Kelsen, Hart and Legal Normativity." *Revus— Journal for Constitutional Theory and Philosophy of Law* 34, no. 1 (June 2018): 1-16. doi: 10.4000/revus.3984.
- Blackstone, William. *Commentaries on the Laws of England, Volume I*. New York: E. Duyckinck, G. Long, Collins & Co, 1827.
- Bodet, Gerald P., "Sir Edward Coke's Third Institutes: A Primer for Treason Defendants," *The University of Toronto* 20, no. 4 (1970): 469–77. doi:10.2307/824886. ISSN 0042-0220.

- Boister, Neil and Cryer, Robert, eds. *Documents on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgments*. Oxford: Oxford University Press, 2008.
- Bojanić, Petar. "Will the Judgment in the Hague Trial Constitute a Precedent in International Law?" *Sociological Review*, no. 1 (2006): 93–114.
- Bork, Robert. *Coercing Virtue: The Worldwide Rule of Judges*. Toronto: Vintage Canada, 2003.
- Boucault, Carlos Eduardo de Abreu. "Hans Kelsen - The Reception of 'Pure Theory' in South America, Particularly in Brazil." *Sequência (Florianópolis)*, no.71 (2015): 95-106. doi.org/10.5007/2177-7055.2015v36n71.
- Breyer, Stephen. *Active Liberty: Interpreting Our Democratic Constitution—The Tanner Lectures on Human Values*. New York: Alfred A. Knopf, 2005.
- Brook, Timothy. "The Tokyo Judgment and the Rape of Nanking." *The Journal of Asian Studies* 60, no. 3 (2001): 673-700.
- Brown, Raymond W. "The American Perspective on Nuremberg: A Case of Cascading Ironies." In *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference*, edited by Herbert R. Reginbogin, Christoph Johannes Maria Safferling and Walter R. Hippel. München: K.G. Saur, 2006.
- Brownlie, Ian. *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*. The Hague: Nijhoff, 1998.
- Bull, Hedley. "Kelsen and International Law." In *Essays on Kelsen*. Edited by Richard Tur and William Twining. New York: Oxford University Press, 1986.
- Busch, Jurgen, von Schmädell, Judith and Staudigl-Ciechowicz, Kamila. "'Peace Through Law': Kelsen's (and his School's) Struggle for Universal Peace." In *Legal, Political and Social Theory Yearbook*. Edited by Péter Cserne and Miklós Könczöl. Frankfurt: Central and Eastern European Forum for Legal, Political and Social Theory Yearbook, 2011. <https://www.univie.ac.at/kelsen/files/peacethroughlaw1.pdf>
- Buscher, Frank M. *The U.S. War Crimes Trial Program in Germany, 1946-1955*. New York: Greenwood Press, 1989.
- Butler, Judith. "Hannah Arendt's Death Sentences." *Comparative Literature Studies* 48, no. 3 (2011): 288.
- Carty, Anthony. "The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law." *European Journal of International Law* 9, no. 2 (1998): 344-54.
- Cassese, Antonio. "The Martens Clause: Half a Loaf or Simply Pie in the Sky?" *European Journal of International Law* 11, no.1 (2000): 187-216.
- Cassese, Antonio. *International Criminal Law*. Oxford: Oxford University Press, 2003.
- Cassese, Antonio. *The Oxford Companion to International Criminal Justice*. Oxford: Oxford University Press, 2013.

- Cesarani, David. "The International Military Tribunal at Nuremberg: British Perspective." In *The Nuremberg Trials: International Criminal Law Since 1945*, edited by Herbert R. Reginbogin and Christoph Safferling, 31-38. Munich: K.G. Saur Verlag, 2006.
- Chang, Iris. *Rape Of Nanking: The Forgotten Holocaust Of World War II*. New York: Basic Books, 2014.
- Cicero, Marcus Tullio, *De Republica*, III, xxiii, in Hans Kelsen, *General Theory of Law and State*. translated by Anders Wedberg. Cambridge: Harvard University Press, 1945.
- Cobain, Ian. "Britain Favoured Execution over Nuremberg Trials for Nazi Leaders." *The Guardian*. October 25, 2012. <https://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders>.
- Coke, Edward. *Institutes of the Laws of England: Concerning High Treason and other Pleas of the Crown and Criminal Causes*. London: E. and R. Brooke, 1797.
https://books.google.com/books?id=dhjuAAAAMAAJ&printsec=frontcover&dq=coke+institutes&hl=en&sa=X&ved=0ahUKEwi2_pLVzYTcAhUN0FkKHQYCCEMQ6AEIKTAA#v=onepage&q=coke%20institutes&f=false (accessed July 3, 2018).
- Cordozo, Benjamin. *The Nature of the Judicial Process*. New Haven: Yale University Press, 1922.
- Cotterrell, Roger. *Scholar in Law: English Jurisprudence from Blackstone to Hart*. New York: NYU Press, 1996.
- Cryer, Robert. "The Philosophy of International Criminal Law" In *Research Handbook on the Theory and History of International Law*, edited by Alexander Orakhelashvili, 232-267. Cheltenham, UK: Edward Elgar, 2011.
- Cryer, Robert. *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*. Cambridge: Cambridge University Press, 2005.
- D'Amato, Anthony. "The Neo-Positivist Concept of International Law." *American Journal of International Law* 59, no. 2 (1965): 321-24.
- D'Amato, Anthony. *The Concept of Custom in International Law*. Ithaca: Cornell University Press, 1971.
- de Montesquieu, Baron. *On the Spirit of Laws*. Translated by Thomas Nugent. New York: Hafner & Collier, 1949.
- Dinstein, Yoram, *The Defence of "Obedience to Superior Orders" in International Law*. Leyden: A.W. Sijthoff, 1965.
- Duguit, Léon. *The Law and State*. Translated by Frederick J. de Sloovère. Cambridge, MA: Harvard University Press, 1917.
- Dworkin, Ronald. "The Model of Rules." *University of Chicago Law Review* 35, no. 1 (1967): 14-46.

- Dworkin, Ronald. *Empire*. Cambridge, MA: Harvard University Press, 1986.
- Dyzenhaus, David, "The Morality of Legality," (Draft): 1-63.
https://www.law.berkeley.edu/files/The_Morality_of_Legality_DDyzenhaus.pdf.
- Ebenstein, William. "The Pure Theory of Law: Demythologizing Legal Thought." *California Law Review* 59, no. 3 (May 1971): 635.
- Feinberg, Nathan. "Hans Kelsen Veyaado." *Massot Besheelot Hazman*. Jerusalem: Magnes Publishing House The Hebrew University, 1973.
- Finnis, John, "The Truth in Legal Positivism," in Robert P. George, *The Autonomy of Law*. Oxford: Clarendon Press. (1996): 195-214.
- Finnis, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980.
- Fraenkl, Ernst. *The Dual State: A Contribution to the Theory of Dictatorship*. New York: Oxford University Press, 1941.
- Frank, Jerome, *Law and the Modern Mind*. New York: Routledge [1930] 2017.
- Frei, Christoph. *Hans Morgenthau: An Intellectual Biography*. Baton Rouge: Louisiana State University Press, 2001.
- Freud, Sigmund. *Group Psychology and the Analysis of the Ego*, translated and edited by James Strachey. New York: Norton & Co., (1921) 1975.
- Friedmann, Wolfgang. *Legal Theory*. London: Stevens & Sons Limited, 1953.
- Friedmann, Wolfgang. *The Changing Structure of International Law*. New York: Columbia University Press, 1964.
- Fromm, Erich. *Man for Himself*. Holt, Rinehardt & Winston, 1947
- Frye, Charles E. "Carl Schmitt's Concept of the Political." *The Journal of Politics* 28, no. 4 (Nov. 1966): 818-830.
- Fuller, Lon. "Positivism and Fidelity to Law — A Reply to Professor Hart." *Harvard Law Review* 71, no. 4 (1958): 630-72.
- Fuller, Lon. "The Places and Uses of Jurisprudence in the Law School Curriculum." *Journal of Legal Education* 1, no.4 (1949): 496.
- Fuller, Lon. *The Morality of Law*. New Haven: Yale University Press, 1964.
- Gadamer, Hans-Georg. *Truth and Method*. New York: Continuum, 1997.

- Gallant, Kenneth. *The Principles of Legality in International and Comparative Law*. Cambridge: Cambridge University Press, 2009.
- Garbian, Sevane. "Crimes against Humanity and International Legality in Legal Theory after Nuremberg." *Journal of Genocide Research* 9, no. 1 (2007): 93-111.
- Gattini, Andrea. "Kelsen's Contribution to International Criminal Law." *Journal of International Criminal Justice* 2, no. 4 (2004): 795-809.
- Gattini, Andrea. *The Oxford Companion to International Criminal Justice*, Edited by Antonio Cassese. Oxford: Oxford University Press, 2013.
- Gentili, Alberico, *The Wars of the Romans: A Critical Edition and Translation of De Armis Romanis*, Editors Benedict Kingsbury and Benjamin Straumann. Translated by David Lupher. Oxford: Oxford University Press, [1599] 2011.
- Glueck, Sheldon. *The Nuremberg Trial and Aggressive War*. New York: A.A. Knopf, 1946.
- Glueck, Sheldon, "The Nuremberg Trial and Aggressive War," in *Perspectives on the Nuremberg Trial*, Edited by Guénaél Mettraux. 72-119. Oxford: Oxford University Press, 2008.
- Glueck, Sheldon. *War Criminals, Their Prosecution & Punishment*. New York: A.A. Knopf, 1944.
- Goldsmith, Jack and Posner, Eric A. *The Limits of International Law*. Oxford: Oxford University Press, 2005.
- Green, Michael Steven. "Hans Kelsen and the Logic of Legal Systems." *Alabama Law Review* 54, no. 2 (2003): 365-413.
- Green, Michael Steven, "Why No Kelsen?" Accessed October 3, 2017.
<http://prawfsblawg.blogs.com/prawfsblawg/2007/10/why-no-kelsen.html>.
- Greenhouse, Linda, "Robert Bork's Tragedy." Accessed January 9, 2013
<https://opinionator.blogs.nytimes.com/2013/01/09/robert-borks-tragedy/>.
- Grotius, Hugo. *Grotius on the Rights of War and Peace*. Translated by William Whewell. Cambridge, UK: John W. Parker, [1625] 1853.
- Grotius, Hugo. *De Jure Praedae Commentaries [Commentary on the Law of Prize and Booty]*. Translated by Gwladys L. Williams. Oxford: Clarendon Press, [1603] 1950.
- Grotius, Hugo. *De Jure Belli ac Pacis Libri Tres [The Law of War and Peace in Three Books]*. Translated by Francis Kelsey. Oxford: Clarendon Press, [1625] 1925.
- Haldemann, Frank. "Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law." *Ratio Juris* 18, no. 2 (2005): 162-178.
- Hall, Jerome. "Nulla Poena Sine Lege." *The Yale Law School Journal* 47, no. 2 (1937): 165-193.
- Hall, Jerome. "Prolegomena to a Science of Criminal Law." *University of Pennsylvania Law Review* 89, no. 5 (1941): 549-580.

- Hall, Jerome. *General Principles of Criminal Law*. Indianapolis, The Bobbs-Merrill Company, 1947.
- Hall, Jerome. *General Principles of Criminal Law*. Clark, N.J.: The Lawbook Exchange, 2005.
- Hall, William Edward. *International Law*. Oxford, UK: Clarendon Press, 1904.
- Hart, H.L.A. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, no. 4 (1958): 593-629.
- Hart, H.L.A. *The Concept of Law*. Oxford: Clarendon Press, [1961] 1994).
- Hart, H.L.A. *The Concept of Law*. 3rd ed. Oxford: Oxford University Press, [1961] 2012.
- Hathaway, Oona A. and Shapiro, Scott J. *The Internationalists: How a Radical Plan to Outlaw War Remade the World*. New York: Simon & Schuster, 2017.
- Hausner, Gideon. *Justice in Jerusalem*. New York: Holocaust Library: distributed by Schocken Books, 1977.
- Hegel, Georg Wilhelm. *Hegel's Philosophy of Right*. Translated by T.M. Knox. Oxford: Clarendon Press, [1820] 1958.
- Heller, Hermann. "Die Krisis der Staatslehre." *Archiv fur Sozialwissenschaft und Sozialpolitik* 55 (1926).
- Henkin, Louis. *How Nations Behave: Law and Foreign Policy*. New York: Columbia University Press, 1979.
- Herz, John H. *Political Realism and Political Idealism*. Chicago: University of Chicago Press, 1951.
- Himma, Kenneth Einar. "Inclusive Legal Positivism." *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Edited by Jules L. Coleman and Scott Shapiro. Oxford: Oxford University Press, 2002.
- Hitler, Adolph. *Mein Kampf*. Translated by Ralph Manheim. Boston: Houghton Mifflin, 1971 [1927].
- Hitler, Adolph. "Memo of February 29, 1940." In *Speeches and Proclamations, 1932-1945*. Edited by Max Domarus. Translated by Mary Fran Gilbert. Wauconda: Bolchazy-Carducci, 1990.
- Hobbes, Thomas. Oxford: Clarendon Press, [1661] 1965.
- Holmes, Jr., Oliver Wendell. "The Path of the Law." *Harvard Law Review* 10, no. 457 (1897).
- Horner, Christopher. "The Fate of Judgement: Hannah Arendt, The Third Critique and Aspects of Contemporary Political Philosophy." Ph.D. dissertation, University of Roehampton, 2012.

- Husserl, Edmund. *Logical Investigations*. New York: Routledge [1900/1901] 2001.
- Isidore of Seville. *Isidore of Seville's Etymologies Vol. 2. Books XI-XX*. Charlotte, VT: Medieval MS, [600-625CE] 2005.
- Jabloner, Clemens. "Kelsen and his Circle: The Viennese Years." *European Journal of International Law* 9, no. 2 (1998). Accessed January 30, 2019. <http://www.ejil.org/pdfs/9/2/1496.pdf>.
- Jabloner, Clemens. "Legal Techniques and Theory of Civilization-Reflections on Hans Kelsen and Carl Schmitt." In *Hans Kelsen and Carl Schmitt: A Juxtaposition*. Edited by Dan Diner and Michael Stolleis (Tel Aviv: Bleicher Verlag, 1999), 56.
- Jackson, Robert H. "Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba, March 27, 1941." *The American Journal of International Law* 35, no. 2 (1941): 348-359.
- Jackson, Robert H. "Closing Arguments for the Conviction of Nazi War Criminals." *Robert H. Jackson Center*. https://www.roberthjackson.org/wp-content/uploads/2015/01/Closing_Argument_for_Conviction_of_Nazi_War_Criminals.pdf
- Jackson, Robert H. "Nuremberg in Retrospect: Legal Answers to International Lawlessness." In *Perspectives on the Nuremberg Trial*. Edited by Guénaél Mettraux. Oxford: Oxford University Press, 2008.
- Jackson, Robert H. "Nuremberg Trial: Excerpts from the Opening Statement of Mr. Justice Robert H. Jackson." In *The Holocaust: An Encyclopedia and Document Collection [4 volumes]*. Edited by Paul R. Bartrop and Michael Dickerman. Santa Barbara, California: ABC-CLIO, 2017.
- Jackson, Robert H. *International Conference on Military Trials, London, 1945*. In Department of State Publication No. 3080. Washington: US Government Printing Office, 1945.
- Jackson, Robert H. "International Conference on Military Trials: London, 1945 Minutes of Conference Session of July 23, 1945." *The Avalon Project: Documents in Law, History and Diplomacy*. Accessed November 6, 2017. <http://avalon.law.yale.edu/imt/jack44.asp>.
- Jackson, Robert H., *Report of Robert H. Jackson, United States Representative, to the International Conference on Military Trials*. Washington, DC: US Department of State, 1949.
- Jacobs, Dov. "Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories." (Draft version submitted for publication) In *International Legal Positivism in a Post-Modern World*. edited by Jean D'Aspremont and Jorg Kammerhofer. Cambridge: Cambridge University Press, 2014. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046311.
- Janis, M.W. "Jeremy Bentham and the Fashioning of International Law." *The American Journal of International Law* 78, no. 2 (1984): 405-418.
- Jaspers, Karl. "The Question of Original Guilt." In *Perspectives on the Nuremberg Trial*. Edited by Guénaél Mettraux. Oxford: Oxford University Press, 2008.

- Junker, Detlef. *The United States and Germany in the Era of the Cold War, 1945-1990: A Handbook (Vol 2)*. Cambridge, UK: Cambridge University Press, 2004.
- Kammerhofer, Jörg. "Hans Kelsen's Place in International Law." In *Research Handbook on the Theory and History of International Law*. Edited by Alexander Orakhelashvili. Northampton, MA: Edward Elgar Publishing, 2011.
- Kammerhofer, Jörg. "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" *European Journal of International Law* 15, no. 3: 538-539.
- Kane, Robert B. *Disobedience and Conspiracy in the German Army: 1918 – 1945*. Jefferson, N.C.: McFarland, 2002.
- Kant, Immanuel. *Critique of Judgment*. translated by J. C. Meredith. Oxford: Clarendon Press, 1964.
- Kant, Immanuel. *Fundamental Principles of the Metaphysics of Ethics*. London: Longmans, Green and co., 1929.
- Kant, Immanuel. *Metaphysical Foundations of Natural Science*. Indianapolis: Bobbs-Merrill, 1970.
- Kantorowicz, Hermann, *Der Kampf um die Rechtswissenschaft*. In Paulson, Stanley. "Formalism, 'Free Law', and the 'Cognition' Quandary Hans Kelsen's Approaches to Legal Interpretation." *The University of Queensland Law Journal* 27, no. 2 (2008): 7-39. <http://classic.austlii.edu.au/au/journals/UQLawJl/2008/12.pdf>.
- Kaplan, Gisela T. *Hannah Arendt: Thinking, Judging, Freedom*. Edited by Clive Kessler. Crows Nest, Australia: Allen & Unwin, 1990.
- Kelsen, Hans. "Causality and Imputation." *Ethics* 61, no. 1 (Oct. 1950): 1-11. doi:10.1086/290742.
- Kelsen, Hans. "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals." *California Law Review* 31, no. 5 (1943): 530-71.
- Kelsen, Hans. "Collective and Individual Responsibility for Acts of State in International Law." *Jewish Yearbook of International Law* 226, no. 1 (1948): 226-239.
- Kelsen, Hans, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law." In *Perspectives on the Nuremberg Trial*, edited Guenael Mettraux (Oxford: Oxford University Press, 2008), 274-89.
- Kelsen, Hans, 'Report' untitled text by typewriter, "Robert Houghwout Jackson Papers". In the Library of Congress, Manuscript Division, Library of Congress, Washington, D.C.
- Kelsen, Hans. "Causality and Accounting." In *Essays in Legal and Moral Philosophy*. Edited by Ota Weinberger. Boston: Reidel, 1974.

- Kelsen, Hans. "Law and Morality." In *Essays in Legal and Moral Philosophy*. Edited by Ota Weinberger. Dordrecht, Holland: D. Reidel Publishing Company, 1973.
- Kelsen, Hans. "On the Basic Norm." *California Law Review* 47, no. 1 (1959): 108.
- Kelsen, Hans. *The Conception of the State and Social Psychology with Special Reference to Freud's Group Theory*, *International Journal of Psychoanalysis* 5: 1-38.
www.scribd.com/document/182003970/Kelsen-H-1924-the-Conception-of-the-State-and-Social-Psychology
- Kelsen, Hans. "The Foundation of Democracy." *Ethics* 66, no. 1 (1955): 1-101.
- Kelsen, Hans. "The Legal Status of Germany according to the Declaration of Berlin." *The American Journal of International Law* 39, no. 3 (1945): 518–52. doi.org/10.2307/2193527
- Kelsen, Hans. "The Nature and Development of Constitutional Adjudication." In *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*. Edited by Lars Vinx. Cambridge: Cambridge University Press, 2015.
- Kelsen, Hans. "The Principle of Sovereign Equality of States as a Basis for International Organization." *The Yale Law Journal* 53, no. 22 (1944): 208.
- Kelsen, Hans. "The Pure Theory of Law and Analytical Jurisprudence." *Harvard Law Review* 55, no. 1 (1941): 56.
- Kelsen, Hans. "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals." *Judge Advocate Journal* 2, no. 3 (1945): 10.
- Kelsen, Hans. "The Very Idea of Legal Positivism." *Revisita Brasileira de Estudos Politicos*, no. 102 (2011): 162.
- Kelsen, Hans. "Will the Judgment in the Nuremberg Trial Constitute a Precedent?" In *Perspectives on the Nuremberg Trial*. Edited by Guénaél Mettraux. Oxford: Oxford University Press, 2008.
- Kelsen, Hans and Herz, John. "The Essential Conditions of International Justice," In Proceedings of the Thirty-fifth Annual Meeting of the American Society of International Law. Washington, D.C., April 24-26, 1941: 70-86. doi.org/10.1012/S0272503700059097.
- Kelsen, Hans, and Tucker, Robert W. *Principles of International Law*. New York: Holt, Rinehart and Winston, 1967.
- Kelsen, Hans, and Urbinati, Nadia. *The Essence and Value of Democracy*. Lanham: Rowman & Littlefield, 2013.
- Kelsen, Hans. "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals." *California Law Review* 31, no. 5 (1943): 530-571.

- Kelsen, Hans. *Di Staatslehre des Dante Alighieri*. Vienna and Leipzig: F. Deuticke, 1905 in Jochen von Bernstorff. *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, translated by Thomas Dunlap. Cambridge, UK: Cambridge University Press, 2010.
- Kelsen, Hans. *General Theory of Law and State*. translated by Anders Wedberg. Cambridge, MA: Harvard University Press, 1945.
- Kelsen, Hans. *General Theory of Law and State*. New York: Russell & Russell, 1961.
- Kelsen, Hans. *General Theory of Law and State*. New Brunswick, NJ: Transaction, 2009.
- Kelsen, Hans. *Hans Kelsen Werke*. ed. M. Jestaedt. Tübingen: Mohr Siebeck, 2007.
- Kelsen, Hans. *Introduction to the Problems of Legal Theory*. Oxford: Clarendon Press, 1992.
- Kelsen, Hans. *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940-41*. Cambridge, MA: Harvard University Press, 1942.
- Kelsen, Hans. *Peace through Law*. Chapel Hill: University of North Carolina Press, 1944.
- Kelsen, Hans. *Peace Through Law*. Union, N.J.: Lawbook Exchange, 2008 [1944].
- Kelsen, Hans. *Principles of International Law*. New York: Rinehart & Company, 1952.
- Kelsen, Hans. *Principles of International Law*. ed. Robert Warren. 2nd ed. New York: Holt, Rinehart and Winston, [1952] 1967.
- Kelsen, Hans. *Society and Nature: A Sociological Inquiry*. Chicago: The University of Chicago Press, 1943.
- Kelsen, Hans. *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: With Supplement*. Clark, New Jersey: The Lawbook Exchange, [1950] 2011.
- Kelsen, Hans. *The Pure Theory of Law*. Translated by M. Knight. Berkeley, CA: University of California Press, 1967.
- Kelsen, Hans. *What is Justice? Justice, Law and Politics in the Mirror of Science*. Berkeley: University of California Press, 1957.
- Kelsen, Hans. *What is Justice?: Justice, Law, and Politics in the Mirror of Science*. Clark, NJ: Lawbook Exchange, [1957] 2013.
- Kirchheimer, Otto. *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton, NJ: Princeton University Press, 1961.
- Kirgis, Frederick L. "Custom on a Sliding Scale." *American Journal of International Law* 81, no. 1 (1987): 146-151.

- Köchler, Hans, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads: Philosophical Reflections on the Principles of the International Legal Order*. Vienna: Springer, 2003.
- Koskeniemi, Martti. "Hersch Lauterpacht and the Development of International Law." *Journal of International Criminal Justice* 2, no. 3 (Sept. 2004): 810-825.
- Koskeniemi, Martti. *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press, 2015.
- Koskeniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*. Cambridge: Cambridge University Press, 2002.
- Kowner, Rotem. *From White to Yellow: The Japanese in European Racial Thought 1300-1735*. Montreal: McGill-Queen's University Press, 2014.
- Kramer, Matthew H. *In Defense of Legal Positivism Law without Trimmings*. Oxford: Oxford University Press, 1999.
- Kramer, Matthew H. *Where Law and Morality Meet*. Oxford: Oxford University Press, 1999.
- Kunz, Josef Laurenz. *The Changing Law of Nations: Essays on International Law*. Columbus: Ohio State University Press, 1968.
- Lasternser, Hans, "Looking Back at the Nuremberg Trial with Special Consideration of the Processes against Military Leaders," *Whittier Law Review* 557, no. 8 (1985).
- Lauterpacht, Hersch and Lauterpacht, Elihu. *International Law: Being the Collected Papers of Hersch Lauterpacht, Vol. 5, Parts IX-XIV Vol. 5, Parts IX-XIV*. Cambridge: Cambridge University Press, 2004.
- Lauterpacht, Hersch. "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens." *The Cambridge Law Journal* 9, no. 3 (1947): 330-48.
- Lauterpacht, Hersch. "The Grotian Tradition in International Law." *The British Yearbook of International Law*, ed. Hersch Lauterpacht. London: Oxford University Press, 1946): 1-53.
- Lauterpacht, Hersch. "The Law of the United Nations and the Punishment of War Crimes." *British Yearbook of International Law* 21 (1944).
- Lauterpacht, Hersch. "The Problem of the Revision of the Law of War," *British Yearbook of International Law* 29 (1952).
- Leben, Charles. "The European Tradition in International Law: Hans Kelsen and the Advancement of International Law." *European Journal of International Law* 9, no. 2 (1998): 287-305.
- Lepard, Brian D. *Customary International Law: a New Theory with Practical Applications*. Cambridge: Cambridge University Press, 2011.

- Levinson, Salmon O. *Outlawry of War*. Chicago: American Committee for the Outlawry of War, 1921.
- Llewellyn, Karl. *The Bramble Bush: On Our Law and Its Study*. Dobbs Ferry, NY: Oceans Publications [1930] 1951.
- Luban, David. "The Legacies of Nuremberg." *Social Research* 54, no. 4. (Winter 1987): 779-829.
- Luban, David. *Legal Modernism: Law, Meaning and Violence*. Ann Arbor: University of Michigan Press, 1997.
- MacCormick, Neil. *HLA Hart*. Stanford: Stanford University Press, 2008.
- Maier-Katkin, Daniel. "The Reception of Hannah Arendt's Eichmann in Jerusalem in the United States 1963-2011." *Journal for Political Thinking*. HannahArendt.Net. Accessed January 20, 2018. <http://www.hannaharendt.net/index.php/han/article/view/64/84#ftn23>.
- Mantello, Frank Anthony. *Medieval Latin an Introduction and Bibliographic Guide*. Washington, DC: Catholic Univ. of America Press, 1999.
- Marmor, Andrei. "The Pure Theory of Law." *Stanford Encyclopedia of Philosophy*. Last Modified January 4, 2016, <http://plato.stanford.edu/entries/lawphil-theory/>.
- Marrus, Michael Robert. *The Nuremberg War Crimes Trial, 1945-46: A Documentary History*. Boston: Bedford Books, 1997.
- May, Larry. *Crimes Against Humanity: A Normative Account*. Cambridge, UK: Cambridge University Press, 2005.
- McCaffrey, Stephen C. *Understanding International Law*. Newark, NJ: Matthew Bender, 2006.
- Mendelson, Maurice, "The Subjective Element in Customary International Law," *British Yearbook of International Law* 66, no. 1 (Jan., 1996). 177-208.doi.org/10.1093/bybil/66.1.177
- Merkel, Reinhard, "The Law of the Nuremberg Trial: Valid, Dubious, Outdated." In *Perspectives on the Nuremberg Trial*, edited by Guénaél Mettraux, 555-576. Oxford: Oxford University Press, 2008.
- Meron, Theodor. "The Martens Clause, Principles of Humanity and Dictates of Public Conscience." *American Journal of International Law* 1, no. 94 (2000): 78-89.
- Metall, R.A. *Hans Kelsen: Leben und Werk*. Vienna: Deutike, 1969.
- Mettraux, Guénaél. *International Crimes and the Ad Hoc Tribunals*. Oxford: Oxford University Press, 2006.
- Mettraux, Guénaél. "Judicial Inheritance: The Value and Significance of the Nuremberg Trial to Contemporary War Crimes Tribunals." In *Perspectives on the Nuremberg Trial*. edited by Mettraux, Guénaél. Oxford: Oxford University Press, 2008.

- Moe, Richard. *Roosevelt's Second Act: The Election of 1940 and the Politics of War*. Oxford: Oxford University Press, 2015.
- Morgenthau, Hans J. and Lang, Anthony F. *Political Theory and International Affairs: Hans J. Morgenthau on Aristotle's the Politics*. Westport, CT: Praeger Publishers, 2004.
- Morgenthau, Hans J. *Politics among Nations: the Struggle for Power and Peace*. New York: Knopf, 1967.
- Morgenthau, Hans J. and Thompson, Kenneth W. *Politics Among Nations: the Struggle for Power and Peace*. 7th ed. New York: Random House, 2006.
- Morgenthau, Hans J. "Positivism, Functionalism, and International Law." *American Journal of International Law* 34, no. 2 (Apr., 1940): 260-284 doi: 10.2307/2192998
- Morgenthau, Hans J. *Truth and Power: Essays of a Decade*. London: Pall Mall Press, 1970.
- Morgenthau, Hans. *La Réalité des normes en particulier des normes du droit international: Fondements d'une théorie des normes*. Paris: Alcan, 1934.
- Nijman, Janne Elisabeth. *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law*. The Hague: Asser Press, 2004.
- Norris, Andre. "Carl Schmitt on Friends, Enemies and the Political." *Telos* 112 (Summer 1998): 68-88.
- Olechowski, Thomas. "Kelsen, the Second World War and the US Government." In *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence*, edited by D.A. Jeremy Telman, 101-114. AG Switzerland: Springer Verlag, 2016.
- Oliphant, Herman. "A Return to Stare Decisis." *American Bar Association Journal* 14, no.2 (February, 1928): 71-76.
- Oppenheim, Lassa. *International Law: A Treatise*, 5th ed. Edited by Hersch Lauterpacht. London: Longmans, Green & Co., 1935.
- Oppenheim, Lassa. *International Law: A Treatise*. 6th ed., Edited by Hersch Lauterpacht. New York: Longmans, Green and co., 1940.
- Pal, Radhabinod. *International Military Tribunal for the Far East: Dissident Judgment of Justice R.B Pal, M.A., LL.D* Calcutta: Sanyal, 1953.
- Paton, H.J. *Kant's Metaphysic of Experience*. London: G. Allen & Unwin, 1936.
- Patterson, David and Berger, Alan L. *Encyclopedia of Holocaust Literature*. Westport, CT: Oryx Press, 2002.
- Paulson, Stanley. "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law." *Oxford Journal of Legal Studies* 12, no. 3 (1992): 311-32. doi:10.1093/ojls/12.3.311.

- Paulson, Stanley. "Classical Legal Positivism at Nuremberg." *Philosophy & Public Affairs* 4, no. 2 (1975): 135.
- Paulson, Stanley. "Formalism, 'Free Law', and the 'Cognition' Quandary Hans Kelsen's Approaches to Legal Interpretation." *The University of Queensland Law Journal* 27, no. 2 (2008): 7-39. <http://classic.austlii.edu.au/au/journals/UQLawJl/2008/12.pdf>.
- Paulson, Stanley. "Some Issues in the Exchange Between Hans Kelsen and Erich Kauffman." Stockholm Institute for Scandinavian Law: 269-290. <http://www.scandinavianlaw.se/pdf/48-17.pdf>.
- Payandeh, Mehrdad. "The Concept of International Law in the Jurisprudence of H.L.A. Hart." *The European Journal of International Law* 21, no. 4 (2010): 95.
- Paz, Reut Yael. "Kelsen's Pure Theory of Law as 'a Hole in Time'." *Monde(s)* 1, no. 7 (2015): 75-94. <https://www.cairnint.info/article-EMOND11510075-kelsen-s-pure-theory-of-law-as-a.htm>.
- Paz, Reut Yael. *A Gateway Between a Distant God and a Cruel World: The Contributions of Jewish German-Speaking Scholars to International Law*. Leiden, Martinus Nijhoff Publishers, 2013.
- Pham, J. Peter. "The Perils of 'Consensus': Hans Kelsen and the Legal Philosophy of the United Nations." *Indiana International and Comparative Law Review* 14, no. 3: 557-565.
- Phillipson, Coleman. *The International Law and Custom of Ancient Greece and Rome*. London: MacMillon & Co., 1911.
- Podhoretz, Norman. "Hannah Arendt on Eichmann: A Study in the Perversity of Brilliance." *Commentary* 36, No. 3 (1963): 201-208.
- Posner, Richard. "Enlightened Despot." *The New Republic*. April 22, 2007. <https://newrepublic.com/article/60919/enlightened-despot>.
- Posner, Richard. *How Judges Think*. Cambridge, MA: Harvard University Press, 2010.
- Pound, Roscoe. "Law and the Science of Law in Recent Theories." *The Yale Law Journal* 43, no. 4 (1934): 525-36.
- Pound, Roscoe. "The Scope and Purpose of Sociological Jurisprudence." *Harvard Law Review* 25, no. 2 (Dec., 1911): 140-168. doi: 10.2307/1324392.
- Pound, Roscoe. *New Paths of the Law: First Lectures in the Roscoe Pound Lectureship Series*. Clark, NJ: The Lawbook Exchange, 2006.
- Pound, Roscoe. *Outlines of Lectures on Jurisprudence*, 5th ed. Cambridge: Harvard University Press, 1943.
- Power, Samantha. *A Problem from Hell: America and the Age of Genocide*. New York: Basic Books,

2002.

Pustogarov, Vladimir. "Fyodor Fyodorovich Martens (1845–1909) – a humanist of modern times" *International Review of the Red Cross*, no. 312 (1996): 300–314.
<https://www.icrc.org/eng/resources/documents/article/other/57jn52.htm>.

Radbruch, Gustav. "Statutory Lawlessness and Supra-Statutory Law." (1946), *Oxford Journal of Legal Studies* 26, no. 1 (2006): 1–11.

Rawls, John. "Kantian Constructivism in Moral Theory," in *The Journal of Philosophy* 77, no. 9 (1980): 515-572.

Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 1979.

Rickert, Heinrich. *The Limits of Concept Formation in Natural Science: A Logical Introduction to the Historical Sciences*. Translated by Guy Oakes. Cambridge: Cambridge University Press, 2009.

Rigaux, Francois. "Hans Kelsen on International Law." *European Journal of International Law* 9, no. 2 (1998): 325-43.

Roberts, Anthea. "Traditional and Modern Approaches to Customary International Law: A Reconciliation." *American Journal of International Law* 95, no.1 (Oct., 2001): 757-791.

Robinson, Jacob. *And the Crooked Shall Be Made Straight: The Eichmann Trial, the Jewish Catastrophe, and H. Arendt's Narrative*. New York: Macmillan, 1965.

Robinson, Shira. "Local Struggle, National Struggle: Palestinian Responses to The Kafr Qasim Massacre and Its Aftermath, 1956–66." *International Journal of Middle East Studies* 35, no. 3 (2003): 393-416.

Roling, Bert V.A. "The Nuremberg and the Tokyo Trials in Retrospect." In *Perspectives on the Nuremberg Trial*. Edited by Guénaél Mettraux. Oxford: Oxford University Press, 2008.

Roosevelt, Franklin D. "Four Freedoms Speech." FDR Presidential Library and Museum. Accessed November 9, 2017. <https://fdrlibrary.org/four-freedoms>.

Rovira, Monica García-Salmones. *The Project of Positivism in International Law*. Oxford: Oxford University Press, 2013.

Salter, Michael. "Unsettling Accounts: Methodological Issues within the Reconstruction of the Role of a US Intelligence Agency within the Nuremberg War Crimes Trials." In *Law and History: Current Legal Issues 2003 Volume 6*. Oxford: Oxford University Online, 2012.
doi:10.1093/acprof:oso/9780199264148.003.0017

Sammons, Anthony. "The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts." *Berkeley Journal of International Law* 21, no. 1 (2003): 111-142.

- Sassòli, Marco and Olson, Laura M. “The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case.” *International Review of the Red Cross*: 733-769.
<https://www.icrc.org/eng/resources/documents/article/other/57jqqc.htm>.
- Schabas, William A. *The International Criminal Court: Commentary on the Rome Statute*. Oxford: Oxford University Press, 2016.
- Schachter, Oscar. “The Law of the United Nations.” *The Yale Law Journal* 60, no. 1 (1951):189-193.
- Schauer, Frederick. “Fuller on Kelsen; Fuller and Kelsen” Lecture at the Annual IVR German Section Conference, Freiburg—Germany, September 28, 2018.
- Scheuerman, William E. *Carl Schmitt: The End of Law*. Lanham, Md: Rowman & Littlefield, 1999.
- Scheuerman, William E. *Morgenthau*. Cambridge, UK: Polity Press, 2009.
- Schmitt, Carl and Nunan, Timothy. *Writings on War*. Oxford: Wiley, 2014.
- Schmitt, Carl and Ulmen, G.L. *The Nomos of the Earth in the International Law of the Jus Publicum Europeum*. New York: Telos Press, 2006.
- Schmitt, Carl, “Guardian of the Constitution,” In *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, translated by Lars Vinx, 79-125. Cambridge: Cambridge University Press, 2015.
- Schmitt, Carl. *Constitutional Theory*. Translated by Jeffrey Seitzer. Durham and London: Duke University Press, 2008.
- Schmitt, Carl. *Dictatorship* Cambridge, UK: Polity Press, 2015.
- Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by Georg Schwab. Chicago: Chicago University Press, [1922] 2005.
- Schmitt, Carl. *The Concept of the Political*. Chicago: University of Chicago Press, 1996.
- Schmitt, Carl. *The Crisis of Parliamentary Democracy*. Translated by Ellen Kennedy. Cambridge, MA: MIT Press, 2010.
- Schwartzschild, Henry. *Letter to Arendt*, Arendt Archive, Washington, DC: Library of Congress, March 6, 1963.
- Schwarzenberger, Georg. “The Judgment of Nuremberg” In *Perspectives on the Nuremberg Trial*, edited by Guénaél Mettraux, 167-189. Oxford: Oxford University Press, 2008.
- Schwarzenberger, Georg. *The Frontiers of International Law*. London: Stevens, 1962.

- Segev, Tom. *The Seventh Million: The Israelis and the Holocaust*. New York: Hill and Wang, 1993.
- Shahabuddeen, Mohamed. *International Criminal Justice at the Yugoslav Tribunal: A Judge's Reflection*. Oxford, UK: Oxford University Press, 2012.
- Shapiro, Fred R. "The Most-Cited Legal Scholars." *The Journal of Legal Studies* 29, no. 1 (2000): 409-426.
- Shapiro, Scott J. "Law, Morality, And the Guidance of Conduct." *Personal Relationships* 6, no. 2 (2000): 127-70. doi:10.1017/S1352325200062017.
- Shklar, Judith. *Legalism: Law, Morals and Political Trials*. Cambridge, MA: Harvard University Press, 1964.
- Shotwell, James T. "A Practical Plan for Disarmament." *International Conciliation* 10, no. 201 (1924): 318.
- Stein, Stuart, "Affidavit of Dieter Wisliceny," In *Nazi Conspiracy and Aggression, Volume VIII* , 606-619. Washington: USGPO, 1946.
- Stern, W. B. "Kelsen's Theory of International Law." *The American Political Science Review* 30, no. 4 (1936): 736-41.
- Stern, Yoav. "50 years after Massacre, Kafr Qasem Wants Answers." *Haaretz*, October 29, 2006. <https://www.haaretz.com/1.4926055>.
- Stevenson, Dru. "Kelsen's View of the Addressee in the Law. Primary and Secondary Norms," in *Hans Kelsen in America-Selected Affinities and the Mysteries of Academic Influence* (Switzerland: Springer, 2016), 219-319.
- Stewart, Iain. "Kelsen Tomorrow." *Current Legal Problems* 51 (1998): 181-204.
- Stewart, Iain. "The Critical Legal Science of Hans Kelsen." *Journal of Law and Society* 17, no. 3 (1990): 273-308.
- Stimson, Henry L. "The Nuremberg Trial: Landmark in Law." in *Perspectives on the Nuremberg Trial*, edited by Guénaél Mettraux, 617-625. Oxford: Oxford University Press, 2008.
- Stirk, Peter M.R. *Carl Schmitt, Crown Jurist of the Third Reich: On Preemptive War, Military Occupation, and World Empire*. Lewiston, NY: E. Mellen Press, 2005
- Stolberg, Sheryl Gay. "Praise for an Israeli Judge Drives Criticism of Kagan." *New York Times*, June 24, 2010, <https://www.nytimes.com/2010/06/25/us/politics/25kagan.html>.

- Stone, Julius. *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War law, Supplement 1953-1958*. Sydney: Maitland Publications, 1959.
- Swart, Mia. "Is There a Text in this Court? The Purposive Method of Interpretation and the ad hoc Tribunals." *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 70 (2010): 767-787. http://www.zaoerv.de/70_2010/70_2010_3_a_459_486.pdf
- Swart, Mia. "Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and 'Adventurous Interpretation.'" *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 70 (2010): 459-486. http://www.zaoerv.de/70_2010/70_2010_3_a_459_486.pdf
- Taylor, Telford. "The Nuremberg Trials." In *Perspectives on the Nuremberg Trial*. Edited by Guénaél Mettraux. Oxford: Oxford University Press, 2008.
- Telman, D.A. Jeremy. "A Path Not Taken: Hans Kelsen's Pure Theory of Law in the Land of Legal Realists." In *Hans Kelsen Anderswo/Hans Kelsen Abroad*, edited by Robert Walter, Clemens Jabloner & Klaus Zeleny, 353-376. Manz'sche: Wien, 2010. https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1091&context=law_fac_pubs
- Telman, D.A. Jeremy. "The Reception of Hans Kelsen's Legal Theory in the United States: A Sociological Model, *Law Faculty Publication*, Paper 7 (January 2008): 1-25. http://scholar.valpo.edu/law_fac_pubs/7.
- Telman, D.A. Jeremy. *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence*. Switzerland: Springer International Publishing, 2016.
- Telman, Jeremy. "Problems of Translation and Interpretation: A Kelsenian Commentary on Positivist Originalism." Lecture at the Annual IVR German Section Conference, Freiburg, Germany, September 29, 2018.
- Traverso, Enzo. *The Origins of Nazi Violence*. New York, NY: New Press, 2003.
- Twist, Susan Mary. "Retrospectivity at Nuremberg: The Nature and Limits of a Schmittian Analysis." Ph.D. dissertation, University of Central Lancashire, June 2012.
- Van Hoof, G.J.F., *Rethinking the Sources of International Law*. Deventer, Netherlands: Kluwer, 1983.
- Van Schaack, Beth. "Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals." *Georgetown Law Journal* 97, no.1 (2008): 119-192.
- Van Schaack, Beth. "The Definition of Crimes Against Humanity: Resolving the Incoherence." *Columbia Journal of Transnational Law* 37, no. 3: 799-800.
- Vinx, Lars. "Carl Schmitt and the Analogy between Constitutional and International Law: Are Constitutional and International Law Inherently Political?" *Global Constitutionalism* 2, no. 1: 100.
- Vinx, Lars. *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*. Cambridge, UK: Cambridge University Press, 2015.

- von Bernstorff, Jochen. "Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: A Theory of Global Judicial Imperialism?" In *The Law and Practice of International Courts and Tribunals* 14, no. 1 (April 2015): 35-50. doi.org/10.1163/15718034-12341284
- von Bernstorff, Jochen. "Peace and Global Justice through Prosecuting the Crime of Aggression? Kelsen and Morgenthau on the Nuremberg Trials and the International Judicial." In *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence*, edited by D.A. Jeremy Telman, 85-100. AG Switzerland: Springer Verlag, 2016.
- von Bernstorff, Jochen, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*. translated by Thomas Dunlap. Cambridge: Cambridge University Press, 2010.
- von Savigny, Friedrich Karl, *System of the Modern Roman Law*. translated by William Holloway. Farmington Hills, MI: Gale, 2013.
- von Schmädell, Judith. "Kelsen's Peace through Law and its Reception by his Contemporaries." *Hitotsubashi Journal of Law and Politics* 39, (2011): 71-83. doi.org/10.15057/19009.
- Waltz, Kenneth. *The Theory of International Politics*. Berkeley, CA: University of California Press, 1979.
- Weber, Max. "The Three Types of Legitimate Rule." Translated by Hans Gerth. *Berkeley Publications in Society and Institutions* 4, no. 1: 1-11.
- Worster, William Thomas. "Review of *The Principles of Legality in International and Comparative Law* by Kenneth Gallant." *Journal of International Criminal Justice* 9, no. 4 (2014): 6.
- Wright, Lord. "War Crimes Under International Law." *Law Quarterly Review* 62 (1946): 51.
- Wright, Quincy. "International Law and Guilt by Association." *American Journal of International Law* 43, no. 4 (1947): 746-747.
- Wright, Quincy. "Legal Positivism and the Nuremberg Trial." *The American Journal of International Law* 42, no. 2 (Apr., 1948): 405-414. doi: 10.2307/2193683
- Wright, Quincy. "The Law of the Nuremberg Trial." *American Journal of International Law* 42, no. 1 (Jan., 1947): 38-72 doi.org/10.2307/2193853.
- Zalewska, Monika. "Some Misunderstandings Concerning Hans Kelsen's Concept of Democracy and the Rule of Law." (2017): doi.org/10.18778/8088-410-6.07.
- Zolo, Danilo. "Hans Kelsen: International Peace through International Law." *European Journal of International Law* 9, no. 2 (1998): 306-24.
- Zolo, Danilo. "Peace through Criminal Law?" *Journal of International Criminal Justice* 2, no. 2 (2004): 727-734.

Zolo, Danilo. "Who is Afraid of Punishing Aggressors? On the Double-Track Approach to International Criminal Justice." *Journal of International Criminal Justice* 5, no.5 (2007): 799-807.

Zolo, Danilo. *Victors' Justice: From Nuremberg to Baghdad*. New York: Verso Books, 2009.