
Autorité oblige: *The Rise and Fall of Hans Kelsen's Legal Concept of International Institutions*

Jochen von Bernstorff*

Abstract

Hans Kelsen and his Vienna School in International Law developed a highly original legal concept of international institutions. It originated in the Interbellum and aimed at bolstering the new institutional structures created in the League era by promoting egalitarian legal structures and strong judicial controls of both member states and the organs of the institution. Against the background of this new approach to international organization, Kelsen, after World War II, developed a first and particularly harsh critique of the UN Charter.

1 Introduction

The law of international institutions was decisively shaped in the first half of the 20th century. After the foundation of the League of Nations, scholarly debates, on the basis of entrenched 19th-century discursive structures, grappled with the legal foundations and contested legitimacy of the new world organization. And against the background of this League-centred body of scholarship, international lawyers later reacted to the creation of the United Nations (UN) in the first decades after World War II. Hans Kelsen and his followers were eminent protagonists in these interwar and post-war international legal debates. Against the background of a shared notion of ideal legal structures for a 20th-century world organization, Kelsen and Josef L. Kunz developed an approach to international institutional law that was highly original, empowering and, at the same time, bearing considerable critical potential. Revolting against the late 19th-century continental international legal literature, dominated at the time by German public law concepts, Kelsen and Kunz established a new approach to the phenomenon of international organization (IO).

* Chair of International Law and Human Rights, University of Tübingen, Germany. Email: vonbernstorff@jura.uni-tuebingen.de.

German and Italian 19th-century scholars had – in a somewhat idiosyncratic way – attempted to integrate the phenomenon of treaty-based organized cooperation in the first administrative unions and international commissions into a general public law of unions of states. This body of scholarship was the direct offspring of German debates about the legal nature of the various formations of German federalism in the 19th century. Methodologically, it was shaped by the central assumptions of German voluntaristic positivism (*Staatswillenspositivismus*) and its theory of juridical organs.¹ While French and Russian publications by authors like Gustave Moynier, Édouard Descamps and Pierre Kazansky provided a technocratic, universalist and, at times, missionary legitimation of the activities of the first administrative unions,² influential German and Italian authors like Georg Jellinek, Siegfried Brie and, after the turn of the century, Dionisio Anzilotti added the first basic doctrinal contours of a law of organized international non-state entities. German and Italian positivist doctrine operated with inherent doctrinal limitations of the autonomy and responsibility of the new organized entities deduced from state sovereignty. In their conceptual focus on the sovereign ‘will’ of member states as the basis of all legally relevant undertakings of the organization, scholars were extremely reluctant to grant any legal, as well as political, autonomy to the new institutions. In short, for these scholars, international institutions, legally, were not more than the sum of the sovereign wills of the member states.

In the interwar period, the German debate on international institutions became more existential and openly politicized. Inevitably, the most important contributions focused on the League of Nations, which, as the first treaty-based world organization, aspired to guarantee peace and the new *status quo* after a traumatizing global war. The new institution in Geneva combined technical and social cooperation with high politics, or, in other words, the tradition of the 19th-century administrative unions combined with formalized concert diplomacy under the roof of a single and permanent institutional entity. While, in 1919, German *Staatswillenspositivismus* still provided the central doctrinal building blocks to the law of international institutions, German scholarship witnessed ever more centrifugal tendencies. On one side of the spectrum, a pacifist and cosmopolitan modernization movement became more vocal and attacked absolutist notions of the sovereign will of the (member) states as a basis for post-war international law. International legal theory and doctrine in the view of this modernization movement, which included Kelsen and Kunz, had to reflect the revolutionary changes in international relations brought about by the creation of the League as an allegedly autonomous political actor alongside or even above existing nation-states. Yet, in the eyes of Carl Schmitt and the conservative German mainstream, the attempts of this movement to doctrinally empower the League as a distinct entity were an only slightly concealed attempt to disguise British and French hegemony in Europe and elsewhere.³

Despite these centrifugal tendencies and the political demise of the League in the late 1930s, cosmopolitan liberal scholarship in the interwar period successfully

¹ M. Stolleis, *Public Law in Germany 1800–1914* (2001).

² On this early phase of the literature with references to further contemporary protagonists, cf. Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’, 26(9) *European Journal of International Law* (2015) at 36–39.

³ See Part 2.D below.

helped to construct international institutions as legally independent authorities by at least destabilizing the notion of state sovereignty as a foundational concept.⁴ These doctrinal developments led to the creation of international institutions as potentially independent legal entities, which arguably came with an active and a passive dimension: on the active side, it consisted of the recognition of a separate legal personality, separate organs, majority voting, treaty-making capacity and the right to enact secondary legislation and administrative decisions that were directly binding on individuals. Much more reluctantly, on the passive side, it came with a potentially separate responsibility of international institutions, albeit coupled eventually with the concept of functional immunities for IO action. These doctrinal developments thus empowered IOs as separate personified actors with rights and obligations while, at the same time, reducing the concrete and enforceable liability of IOs and international civil servants through functional immunities. Moreover, the liability of member states for their contributions to international cooperation receded into the background. As a result, forms of international public authority were constructed, which not only allowed strong member states to 'hide' politically and legally behind the new international corporate veil but also excluded direct liability of IOs and their personnel.⁵

While Kelsen and his followers, who called themselves the Vienna School, participated in removing doctrinal obstacles for this constructive move to institutions, they also propagated strong legal controls and an internal rule-of-law culture in international institutions. Revisiting their writings on international institutions reveals that they were well aware of the risk of great powers using institutions as a vehicle to entrench hegemonic rule by hiding particular preferences behind a universalist corporate facade. Contrary to Schmitt's position, however, they believed that egalitarian structures and more law could tame existing power asymmetries in international institutions.

The remainder of this article is organized as follows. I will first sketch the constructive scholarly contributions of Kelsen and Kunz aimed at strengthening the autonomy and legal authority of international institutions in the interwar period. In a second step, I will refer to the problem of hegemony within and through IOs in Schmitt and in the interwar legal debates in general. As a last step, I will refer to the predominantly negative reactions of Kelsen and Kunz to the Charter of the newly founded UN, which in their view entrenched hegemonic structures and lacked sufficient internal and external legal controls.

2 From German *Staatswillenspositivismus* to International Institutions as Personified Legal Entities

A *International Institutions as a Bundle of Sovereign Wills*

Robert von Mohl and Lorenz von Stein in the mid-19th century had been the first German scholars to recognize the legal significance of international administrative

⁴ See Part 2.B below.

⁵ On the concept of international public authority, see A. von Bogdandy *et al.* (eds), *The Exercise of International Public Authority* (2010).

cooperation. The starting point for these reflections in von Mohl had been the recognition of the growing economic and social interdependence of states. Hence, society included for him also the ‘international, legal relations to order the coexistence of simultaneous, inherently interdependent national organisms and to communally promote the kind of shared tasks that the individual state cannot accomplish on its own’.⁶ Influenced by a liberal belief in progress, von Mohl saw the goal of state action as promoting not only the existential purposes of one’s own people but also those of humanity as a whole. With a view towards this task, he sought to systematize more precisely the external powers of the state.⁷ He attempted to establish a systematic connection between the external powers of the state and international law for a sphere of international administration. The public law doctrine was to be expanded through the addition of an administrative sphere of the international community. Thus, at this point, von Mohl had already arrived at the assumption that treaty-based unions of states could have international legal personality as subjects of international law alongside the states.⁸

Yet, for the new generation of late 19th-century publicists led by Georg Jellinek, international law could never become a legal order above the state, and, therefore, an international treaty as the product of the sovereign will of various states could not create a personified entity above these states.⁹ This highly influential premise was articulated by Jellinek as follows: ‘For by way of a treaty one cannot bring forth a higher will above oneself and no independent will alongside oneself.’¹⁰ On this premise, Jellinek, dean of the Heidelberg law faculty and the towering figure of German public law in the late 19th century, developed an approach to treaty-based cooperation in international law that provided the central doctrinal categories through which international institutions were classified in the mainstream German literature. The prior progressive mid-19th-century endeavours by von Mohl (Tübingen) and von Stein (Kiel) on behalf of an international administrative law as a dynamic subfield of international law were now confined by the rigorous doctrinal structures imposed by Jellinek. As a consequence, IOs, based on a treaty, could not have international legal personality and could not build a ‘will’ that obliged the member states without their approval.¹¹ Moreover, they could conceptually never directly create obligations or rights of individuals since this would

⁶ Von Mohl, ‘Die Pflege der internationalen Gemeinschaft als Aufgabe des Völkerrechts’, in R. von Mohl (ed.), *Staatsrecht, Völkerrecht und Politik I* (1860) 579, at 583 (my translation).

⁷ On this, see Bülck, ‘Zur Dogmengeschichte des europäischen Verwaltungsrechts’, in G. Arbeitskreis (eds), *Recht im Dienste der Menschenwürde, Festschrift für H. Kraus* (1964) 29, at 43. The ‘cultivation of the international community’ is the duty of the external administration and should take place through ‘the recognition of the law and the elimination of the existing obstacles to an intercourse beneficial to all’. R. von Mohl, *Das Staatsrecht des Königreiches Württemberg* (2nd edn, 1846), at 233 (my translation).

⁸ Von Mohl, *supra* note 6, at 583; on international legal personality as a general concept, see J.E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004).

⁹ On the historical origins of positivist thinking in international law, see the contributions in D’Aspremont and Kammerhofer (eds), *Positivism in International Law*.

¹⁰ G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882), at 257 (my translation).

¹¹ B. Baron von Toll, *Die Internationalen Bureaux der allgemeinen völkerrechtlichen Verwaltungsvereine* (1910), at 114.

theoretically always require an additional act of domestic legislation. In a way, this approach reflected the original blueprint of the 19th-century administrative unions, according to which all of the important decisions were supposed to be taken by the assembly or conference of member states, whereas the bureau would only render technical assistance in preparing and implementing decisions. For Jellinek, international law could not bring about any other legal subjects than the state.¹²

Administrative unions in Jellinek's terminology were organized unions of states (*organisierte Staatenverbindungen*), which for him had their own organs but could not have international legal personality. As Jellinek saw it, contrary to Lorenz von Stein, Robert von Mohl and Albert Haenel, endowing a treaty-based union of states with a legal personality of its own contradicted the concept of sovereignty.¹³ The majority of German international lawyers followed this view through to World War I.¹⁴ The various theories of legal organs (*Organlehre*) by German constitutional law scholars, according to which acts committed by public organs could legally be attributed to the state as an abstract legal person, were not transferred to interstate organizational forms, not least because of the great influence exerted by Jellinek's doctrine of the unions of states.¹⁵ Likewise, Baron von Toll in 1910 in his doctoral dissertation on administrative unions, supervised by Heinrich Triepel in Tübingen, concluded: 'We see that the Bureau (of the World Postal Union) has no rights of imperium (*Herrschaftsrechte*) of any kind. It is not situated above the Members of the union, but between them and therefore does not exercise any authority over them.'¹⁶

Through the conference character of the meetings of administrative unions, it could also be upheld, in practice, that the IO had no life of its own and that it was legally not more than the sum of the joint sovereign wills of the member states. After the turn of the century, the Italian scholar Anzilotti took up and popularized the most radical strand of this voluntaristic approach – as previously developed in the German debates by Brie – in his theory of *organi communi*. The organs of international institutions had no legal life of their own; they were only joint or common organs of the member states. Each union of states thus possessed as many organs as there were member states.¹⁷

¹² Jellinek, *supra* note 10, at 178. This was also apparent in Jellinek's restrictive understanding of the federal power in the confederation: 'Rule over sovereign states is a contradiction in terms and both theoretically and practically impossible. ... However, the notion of the ruling position of the federal power can be justified only if one elevates the treaty, which admittedly forms the legal ground of the union, above the union and thereby turns it into something completely different' (at 178) (my translation).

¹³ On von Mohl and von Stein, *cf.* K. Dicke, *Effizienz und Effektivität internationaler Organisationen. Darstellung und kritische Analyse eines Topos im Reformprozeß der Vereinten Nationen* (1994), at 52.

¹⁴ G.J. Ebers, *Die Lehre vom Staatenbunde* (1910), at 206; this was in 1924 still the view of Nawiaski, 'Staatenbund und Bundesstaat', in K. Strupp (ed.), *Wörterbuch des Völkerrechts und der Diplomatie* (1925) 2, at 577, with further references.

¹⁵ The idea that the organs of a federal state could represent an independent will of that legal entity was not transferred to the international level; on these early debates, see K. Dicke, *Effizienz und Effektivität internationaler Organisationen. Darstellung und kritische Analyse eines Topos im Reformprozeß der Vereinten Nationen* (1994), at 52.

¹⁶ Von Toll, *supra* note 11, at 114–115 (my translation).

¹⁷ Anzilotti, 'Gli organi comuni nelle società di Stati', 8 *Rivista di Diritto Internazionale* (1914) 156, at 156; on this theory, see Faßbender, 'Die Völkerrechtssubjektivität internationaler Organisationen', 37 *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* (1986) 17, at 20.

And, yet, both doctrinal deductions and appearances can be deceiving. Contemporaries soon began to sense that the reality of strong and very influential bureaus often did not correspond to the overall conceptual framework provided by German *Staatswillenspositivismus*. For one, majority voting became institutionalized in some administrative unions, and the bureaus employed their first international civil servants in an effort to become more independent from member state influences in practice. Moreover, most unions acquired legal personality at least under the private law of their host states in order to empower them legally in private law proceedings.¹⁸ A further aspect not accounted for doctrinally was the considerable participation of major business actors and private technical expertise in the unions. It should not be forgotten that the driving force behind the creation of the 19th-century administrative unions was European economic and imperialist expansion leading to what is called the first globalization.¹⁹ All of these deviations from conceptual purity, if at all recognized in the German and Italian literature, would generally be justified by the alleged merely ‘technical’ and non-political nature of such forms of participation. It was this restrictive late 19th-century theoretical apparatus of German *Staatswillenspositivismus* against which Hans Kelsen and Josef L. Kunz developed their own theory of international institutions at the end of World War I.

B International Institutions as Organized Legal Communities above the State

Many international legal scholars in the Interbellum directed their attention at the new organizational forms that international politics had given itself, especially through the League of Nations. Although the term ‘international organization’ can be traced back to the late 19th century,²⁰ it was not yet a widely used concept in legal scholarship in the 1920s. The legal discussions surrounding the nature of the League of Nations, meanwhile, were carried out largely on the basis of the traditional theory of unions of states (*Staatenverbindungen*).²¹ In the international law theory of the Vienna School, the state as the main legal subject was joined by other organized communities as new actors of the ‘universal community of world law’.²² Kelsen had worked out the basic outlines of a cosmopolitan theory of unions of states as early

¹⁸ On the administrative unions, see Peters and Peter, *International Organizations between Technocracy and Democracy*; B. Fassbender and A. Peters, *The Oxford Handbook of the History of International Law* (2013), at 174–176.

¹⁹ Cf. G.F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017), at 20.

²⁰ Potter, ‘The Origin of the Term International Organisation’, 39 *American Journal of International Law* (AJIL) (1945) 803, at 803–806; Potter, ‘Le développement de l’organisation internationale 1815–1914’, 64 *Collected Courses of the Hague Academy of International Law* (RCADI) (1938) 71, at 71ff.

²¹ From the founding of the North German Union, at the latest, at the centre of this legal subject matter, highly controversial especially in Germany dating back to the founding of the German Confederation, was the demarcation between the concept of the federal state and the confederation of states. On the contemporary debate in the literature, see Stolleis, *supra* note 1, at 341–344.

²² H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1960), at 280–294.

as 1920 in his *The Problem of Sovereignty and the Theory of International Law* and had developed it further in his *General Theory of Law and State* in 1925.²³ As he saw it, the entire theory of unions of states was to be reworked ‘from the perspective of a pure theory of law’.²⁴ This new jurisprudential methodology was to allow legal scholars to engage with law as a subject of study in a non-political, and, thus, purely ‘scientific’, way. Starting from his strict separation of is and ought, Kelsen had – already in his ‘constructivist’ phase – criticized the ‘dogma of the will of the state’ in jurisprudence as the result of a blending of psychological and sociological ‘is’ considerations and normative ‘ought’ considerations.²⁵ In fact, from a strict normative perspective, the ‘will’ of the assumed personified state (*willensfähige Staatspersönlichkeit*) was nothing other than the central point of imputation for all acts of the organs of the particular state.²⁶ In this way, Kelsen had tried, already in his *Habilitation* thesis, to replace the ‘state as a legal person of will’ with the concept of formal imputation.²⁷ Kelsen developed this approach further in *The Problem of Sovereignty and the Theory of International Law* and arrived at the assumption of the complete identity of state and law from a legal scholar’s perspective. The ‘identity thesis’ became the pivotal point in the sought-after revision of the conceptual apparatus of international law.

The provocative assumption that the state and the law were congruent terms for the legal scholar was based on two different strands of justification, though Kelsen often intertwined them in *The Problem of Sovereignty and the Theory of International Law*. The first strand was the demand for methodological dualism described above, according to which the state can be represented in jurisprudence not as an ‘is’ or causal construct but, rather, exclusively as a normative order.²⁸ The second strand was Kelsen’s theory or critique of ‘juristic fictions’ (*Juristische Fiktionen*). This was already part of Kelsen’s critical methodology in his work *The Problem of Sovereignty and the Theory of International Law*. According to this theory, the notion of the state as a ‘person’ and ‘bearer’ of the law was a ‘personifying fiction’ (*personifikative Fiktion*) used by the prevailing doctrine.²⁹ With reference to Vaihinger’s *Die Philosophie als Ob*, Kelsen recognized in the

²³ H. Kelsen, *Allgemeine Staatslehre* (1925), at 163–180.

²⁴ Kelsen, *supra* note 22, at 275.

²⁵ H. Kelsen, *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatz* (2nd ed. with added preface, 1923) at 162ff; see C. Heidemann, *Die Norm als Tatsache. Zur Normentheorie Hans Kelsens* (1997), at 35.

²⁶ Kelsen, *supra* note 25, at 189; on the notion of imputation and its origins in 19th-century German legal thought, see Paulson, ‘Kelsen’s Earliest Legal Theory: Critical Constructivism’, in S. L. Paulson and B. L. Paulson (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (1998), at 23ff. 33ff, and generally MacCormick, ‘Persons as Institutional Facts’, in O. Weinberger and W. Krawietz (eds), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (1988) 371.

²⁷ Paulson, *supra* note 26, at 33; Paulson calls this early phase of Kelsen’s legal theory the constructivist phase; on this phase, see also Heidemann, *supra* note 25, at 23–33.

²⁸ Kelsen, *supra* note 25, at xvi.

²⁹ Kelsen, *supra* note 24, at 18; Kelsen, ‘Zur Theorie der juristischen Fiktionen’, in H. Klecatsky, R. Marcic and H. Schambeck (eds), *Die Wiener Rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl und Alfred Verdross*. Vol. II (1968), 1215ff.; on the following in more detail, see J. von Bernstorff, *The Public International Law Theory of Hans Kelsen* (2010), at 50–53.

jurisprudential use of the concept of the ‘*willensfähige Staatsperson*’ a doubling or ‘hypostatization’.³⁰ The real function of the legal person as a unifying point of imputation of norms became in traditional legal scholarship a living, human-like figure – a state organism. The latter was mythically transfigured and endowed with primal omnipotence:

Legal thinking is a thoroughly personifying one and – to the extent that it hypostatizes the persons it creates – can be compared to mythological thinking, which, anthropomorphically, suspects a dryad behind every tree, a spring god behind every spring, Apollo behind the sun, thus doubling nature as an object of cognition.³¹

The construction of the legal person, an achievement of 19th-century legal thought, was reduced by Kelsen down to its normative core. In Kelsen’s eyes, this was merely a metaphor for the unity of a system of legal norms. The notion of a dualism of state and law, according to which the ‘unbounded Leviathan’ had to be tamed by the law, was to be abolished by the identity thesis.³² Kelsen saw the identity thesis as a fundamental break with the existing German legal scholarship of the state and international law, as represented, above all, by Jellinek’s *Allgemeine Staatslehre*.

In addition, as a political individual, Kelsen developed during the interwar period – probably influenced by his experiences in World War I – into a committed internationalist, who saw the creation of an institutionalized legal community of states as the only path towards a more peaceful world order. As part of the movement to modernize international law, Kelsen and Kunz also sought to provide a scholarly foundation for the League of Nations as a legal entity and its capacity to act authoritatively. New experiments in international law-making and institutional reform during the interwar period could be carried out only under the aegis of a united and neutral institutional actor. The international organization endowed with the authority of the law became the rallying point for hopes in a post-nationalist, more peaceful world order. This general political identification with the League project did not stop Kelsen from criticizing specific norms of the League Covenant as being poorly drafted, legally inconsistent and too weak to bring about an effective and judicially controlled pacification of mankind.³³

³⁰ Kelsen, *supra* note 22, at 18.

³¹ *Ibid.*

³² Horst Dreier speaks of a ‘profanization’ of the state in Kelsen. H. Dreier, *Rechtslehre. Staatssoziologie und Demokratietheorie bei Hans Kelsen* (1986), at 208–213.

³³ Kelsen, ‘Contribution à l’étude de la révision juridico-technique du Statut de la Société des Nations’, 45 *Revue Générale de Droit International Public* (1938) 5. As to the politics of Kelsen’s positivism, Monica Garcia-Salmones Rovira, in her book on German early 20th-century positivism, has convincingly labelled Lassa Oppenheim’s positivist approach as imperial ‘economic positivism’, referring to his Anglo-American political agenda. M. Rovira, *The Project of Positivism in International Law* (2013). What is problematic about Rovira’s monograph, however, is her attempt to subsume Kelsen’s approach under the same label. As I have argued elsewhere, Oppenheim’s blend of German *Staatswillenspositivismus* and British foreign policy pragmatism, on the one hand, and Kelsen’s pure theory approach to international law, on the other, both in terms of methodology and their political projects, are almost diametrically opposed forms of scholarship. Von Bernstorff, ‘World Order through Law: The Politics of Kelsenian Positivism in International Law’, in R. Schütze (ed.), *Globalisation and Governance: International Problems, European Solutions* (2018) 41, at 59–62. Covenant of the League of Nations 1919, 13 AJIL Supp. 128 (1919).

It goes without saying that this was also a highly political and contested project. Generally, the writings of the Vienna School on international law, even in their critical interventions, mirrored the great hopes that the authors were projecting onto the new organizational forms and their future development. Building on Kelsen's fundamental critique of the conventional notion of sovereignty and the doctrine of the primacy of international law, Josef L. Kunz and Alfred Verdross developed their own approaches to the law of international institutions in the 1920s. In 1929 – that is, nearly half a century after Jellinek's groundbreaking work on this issue³⁴ – Kunz published (as part of Fritz Stier-Somlo's series of handbooks on international law) another comprehensive monographic analysis of basically all legal questions relating to the issue of unions of states.³⁵ Although he distanced himself from Kelsen on a number of specific theoretical points, his monograph was grounded in the fundamental positions of the Vienna School.

For Kelsen, the starting point for a theory of unions of states (*Staatenverbindungen*) was the assumption of a monistic legal system based on the primacy of international law. Kelsen understood sovereignty as a formal attribute in the sense of being the highest layer of norms of a legal system. And under the assumption of a monist legal universe and the primacy of international law, this attribute of being 'sovereign' in his view should be assigned to the international legal system.³⁶ Proceeding from the primacy of international law and the earlier-mentioned 'identity thesis', this gave rise to a universal legal cosmos in which the order of international law represented the highest and therefore sovereign edifice. The notion of a community of international law meant for Kelsen that 'polities described as states' are 'legally connected' through precisely that edifice.³⁷ Even if only a few states come together to constitute themselves as a common legal entity, it is done via the system of international law:

The legal concept of a union of states specifies that there exists a legal relationship between polities categorised as states; meaning that such polities – which are themselves only personifications of legal orders – are constituted as a unified entity through a higher legal order; whereby the higher legal order can either be the universal legal order of international law and constitute the general legal relationship of all the states which make up the international community of states, or even be a partial or specific legal order, valid by virtue of the international legal order, and constitute a special connection between only select states. Of course, the legally decisive link to the international legal order has always to be maintained theoretically as the last 'source', the highest principle, the highest legal order from which the binding nature of the partial legal order is derived.³⁸

³⁴ Jellinek, *supra* note 10.

³⁵ J.L. Kunz, *Die Staatenverbindungen* (1929).

³⁶ On the concept of sovereignty in Kelsen, see von Bernstorff, *supra* note 29, ch. 2.C.I.

³⁷ Kelsen, *supra* note 22, at 276.

³⁸ *Ibid.* (my translation), in the German original: 'Der Rechtsbegriff einer Staatenverbindung besagt, dass als Staaten bezeichnete Gemeinwesen in einer rechtlichen Verbindung stehen; und das bedeutet nichts anderes, als daß solche Gemeinwesen – selbst nur Ordnungspersonifikationen – durch eine höhere Rechtsordnung zu einer Einheit konstituiert werden; dabei kann diese höhere Rechtsordnung die Universalrechtsordnung des Völkerrechts sein und die allgemeine Verbindung aller Staaten der Völkerrechtsgemeinschaft konstituieren; oder aber eine kraft der Völkerrechtsordnung gültige Teil- oder

These legal communities thus arose by way of treaty law, through which the theory of unions of states became a theory of the typical content of such treaties.³⁹ As Kelsen saw it, the specific treaty order established by a group of states was part of the superordinated edifice of international law and was thus able to constrain, in any way it desired, the regulatory competencies of states in their capacity as delegated legal systems.

In his *Allgemeine Staatslehre*, Kelsen invoked the concepts of confederation and federal state to illustrate his own theory of unions of states and international institutions: ‘Confederation and federal state, these two main types of state unions differ only in the degree of centralization and decentralization.’⁴⁰ For Kelsen, there was no qualitative, but only a quantitative, difference between the two types of unions. The entire theory of state unions, he argued, was a theory of forms of unions that could be differentiated merely by their divergent degrees of centralization. In this context, a legal community that was – conceptually – completely centralized was one whose order consisted exclusively of norms that claimed validity for the entire legal sphere.⁴¹ By contrast, the completely decentralized legal order consisted of legal norms that were only valid for partial areas. The federal state differed from the confederation or a union of states (including IOs) only in that the federal government in the federal state possessed a greater number of centralized powers. And, in this setup, the transitions from the less centralized IO to the more strongly centralized federal state were fluid. Every form of legal union between territorially demarcated territories, Kelsen argued, could be described as a particular stage of centralization situated between the two extremes:

Likewise, the connection of individual states to the system of international law as such, as well as to individual, particular communities such as confederacy, union, and federal state, can be assessed only from the perspective of centralization and decentralization. In fact, the international legal community does not even represent the greatest possible degree of decentralization. So-called general international law, the product of customary law, is a stock of enacted norms that are valid for the entire geographic area of the international legal system.⁴²

Through Kelsen’s eyes, the international legal order in 1925 was still a fairly decentralized legal community. Within the legal system construed as a single entity (monism), the various forms of unions were, in this theoretical approach, distinguished only in terms of their legal content and the herewith prescribed stage of centralization and, thus, different only by degree. The Kelsenian theory of decentralization and centralization was an open concept, one that did not link the transition from a less centralized form to a more or highly centralized one (like the state) to any formal or doctrinal

Spezialrechtsordnung konstituiert eine besondere Verbindung nur zwischen gewissen Staaten. Stets muß natürlich die juristisch entscheidende Beziehung zur Völkerrechtsordnung als dem letzten ‚Quell‘, dem obersten Prinzip, der höchsten Rechtsordnung, aus der die ‚verbindende‘ Kraft der Teilrechtsordnung stammt, theoretisch aufrecht erhalten bleiben.’

³⁹ By way of the example of the problem of federal state/confederation of states, see Kelsen, *supra* note 22, at 280ff.

⁴⁰ H. Kelsen, *Allgemeine Staatslehre* (1925), at 194.

⁴¹ *Ibid.*, at 164.

⁴² *Ibid.*

preconditions, hereby paving the way for a theory of international law that was ‘integration friendly’.⁴³ In Kelsen’s view, this approach eliminated the doctrinal barriers for new forms of international integration on a regional or universal level. Opening the theory of international law to the phenomenon of various processes of integration, understood as centralization through law and international legal organs, is the essence of the Kelsenian theory of international institutions. From this theoretical basis, the Vienna School could support and explain a separate international legal personality of international institutions equipped with their own organs, treaty-making capacities as well as international legislative and administrative capacities.⁴⁴

C *The League of Nations as a Universal Legal Entity*

As an utterly novel union of various sovereign states, the League of Nations stood at the centre of scholarly attention during the interwar period. Once international politics had created a new kind of legal text with the Covenant of the League of Nations, international law experts around the world began to discuss the legal nature of the new political entity.⁴⁵ The new institution in Geneva offered a first screen onto which progressive international lawyers could project their hopes for a system of international law endowed with its own organs and central coercive authority. The international law discourse of the interwar period initially sought to classify the League of Nations doctrinally.⁴⁶ To that end, scholars had recourse primarily to the traditional theories about unions of states (*Staatenverbindungen*). Georg Jellinek had subsumed the confederation, the international administrative unions and the real union (*Realunion*) under the term ‘organized state unions’.⁴⁷ Demarcating the confederation from the international administrative unions, Jellinek had defined the confederation (*Staatenbund*) as an organized state union that was highly political in nature.⁴⁸ Because of the highly political purpose of the League of Nations, which was characterized above all by the goal of securing world peace, only a small group of authors now resorted to drawing a theoretical parallel with the supposedly technical international administrative unions,⁴⁹ while the majority relied on the concept of confederation (*Staatenbund*) as a political union of states, which had been the central concept in German public law scholarship to describe looser unions of states, such as the German Confederation (1815–1866).

⁴³ H. Kelsen, *Reine Rechtslehre* (1934), at 154.

⁴⁴ On this theoretical basis, Kunz in the 1920s wrote a more than 500-page-long monograph comparing unions of states (*Staatenverbindungen*). See Kunz, *supra* note 35, at 500. Unlike Reinsch, Kunz also included classic confederations and the legal structures of the British Empire; on the comparative method used by Reinsch and later Schermers, see Klabbers, ‘Schermers’ Dilemma’, 31 *European Journal of International Law (EJIL)* (2020) 565.

⁴⁵ With a good overview of the literature from the early years of the League of Nations, see Corbett, ‘What Is the League of Nations?’, 5 *British Yearbook of International Law* (1924) 119.

⁴⁶ *Ibid.*

⁴⁷ Jellinek, *supra* note 10, at 158ff.

⁴⁸ On the confederation, see *ibid.*, at 172–194.

⁴⁹ On the proponents of this view, see Kunz, *supra* note 35, at 500–501.

It was the inherited technical/political distinction that made the doctrinal categorization of the League a tricky and contested issue.⁵⁰ Through the Covenant of the League of Nations, the members of the League had transferred to the organs of the League a number of competencies that they had previously exercised on the level of the nation-state. Both the General Assembly of the League as well as the smaller Council operated on the basis of unanimous decision-making. According to Pacifist movements and many governments represented in Versailles, the most urgent substantive goal of the League was to preserve the peace.⁵¹ To achieve that goal, all members of the League agreed to respect the territorial integrity and political independence of all other members (Article 10). Yet the League also attempted to merge the idea of functional sectorial cooperation with the normative ideal of world peace.⁵² The founders of the League, like the earlier-mentioned first generation of scholars, including the US scholar Paul Reinsch, who joined the debate in the early 20th century, saw in the constant development and expansion of pragmatic and sectorial cooperation a means to ensure peace among nations.⁵³ According to Article 24 of the League Covenant, all existing international bureaus and commissions were supposed to be put under the direction of the League. The provision also foresaw a general responsibility of the Secretariat for all matters of international concern regulated by general conventions.⁵⁴

Following upon the unprecedented degree of obligations imposed upon the member states by an international legal text, the discussion over the nature of the League revolved around the question of the relationship of the individual states to the newly created entity. Was the organization in Geneva an independent legal subject or merely a continuation of the 19th-century European concert structures, excluding Germany and the Soviet Union? Was the transfer of powers – some of them highly political – to the organs of the League at all compatible with the existence of sovereign nation-states? On the one hand, the League of Nations differed from the political alliances of the 19th century by having its own, legally established organs. On the other hand, it was also distinct from the international administrative unions that had always been limited to a specific administrative sphere by virtue of its highly political purpose. At the same time, the assumption that the League was a world state in the making contradicted statements from diplomats and high-ranking politicians, who during the founding phase had repeatedly emphasized that the new institution was not to be a ‘*super-état*’ (super-state).⁵⁵

⁵⁰ On this debate, see Tams, ‘League of Nations’, in *Max Planck Encyclopedia of Public International Law*, para. 36; Peters and Peter, *supra* note 18; Fassbender and Peters, *supra* note 18, at 184–186.

⁵¹ W. Schücking and H. Wehberg, *Die Satzung des Völkerbundes* (2nd edn, 1924), at 91.

⁵² Kennedy, ‘The Move to Institutions’, 8 *Cardozo Law Review* (1987) 841, at 841.

⁵³ On functionalism, see I.L. Claude, *Swords into Plowshares: The Problems and Progress of International Organizations* (3rd edn, 1964), at 385ff; with a critical reconstruction of functionalist thinking à la Reinsch, see Klabbers, *supra* note 2.

⁵⁴ As to the international ‘welfarist’ spirit in the early 1920s embodied also in the founding of the autonomous International Labour Organization, see Sinclair, ‘C. Willfred Jenks and the Futures of International Organizations Law’, 31 *EJIL* (2020) 525.

⁵⁵ The delegate Hymann declared during the first session of the Assembly of the League: ‘Il est bon de l’affirmer une fois de plus, la Société des Nations n’est et ne saurait être un super-État qui absorberait les souverainetés ou méditerait de les réduire en tutelle.’ Quoted in Kunz, *supra* note 35, at 499.

The overwhelming majority of German scholars therefore described the organization in Geneva as a confederation of states.⁵⁶ In spite of the repeated assertion that the League of Nations was a unique institution, this theoretical designation proved especially capable of establishing a consensus view. According to the previously described doctrine that went back to Jellinek, a confederation of states was precisely not a state but, rather, a union of states under international law: 'The confederation is the lasting, agreement-based union of independent states for the purpose of protecting the federal territory externally and securing the peace internally between the allied states, to which end the pursuit of other goals can also be agreed upon. This union requires a lasting organization to realize the purposes of the confederation.'⁵⁷ According to this view, the confederation was a union of sovereign states that usually also served highly political purposes and had its own organs. Herbert Kraus was the first author who, on the basis of the traditional German doctrine of state unions, qualified the new organization in Geneva as a confederation of states.⁵⁸ Walther Schücking and Hans Wehberg followed suit.⁵⁹ However, behind the seemingly uniform doctrinal classification as a confederation, to which – as we shall see – the authors of the Vienna School also had recourse, there stood varying theoretical conceptions of the new organization. The diverse positions mirror the various political-ideological and theoretical approaches to international law during the interwar period.

Building on Kelsen's doctrine of state unions, Kunz classified the League of Nations as follows: 'The League of Nations is a genuine union of states, a permanent, organized political union of sovereign states that retain their *Völkerrechtsunmittelbarkeit* and of certain non-state legal communities. It is in its essence a confederation of states (*Staatenbund*).'⁶⁰ With the theoretical consequences that flowed from this classification, the writers of the Vienna School took a position opposed to the conventional doctrine and in line with their theory of the primacy of international law. The League of Nations did not embody the world legal order but, rather, represented merely a particular order of international law. The members of the League thus remained *völkerrechtsunmittelbar* and, therefore, sovereign since their legal relationships were not regulated exclusively by the Covenant but, in addition, also by general international law.⁶¹ In this context, Kunz referred to the preamble of the Covenant, in which the members of the League accepted the obligation to abide by general international law. Kunz explicitly

⁵⁶ *Ibid.*, at 501–504, with extensive references. Another group described the League as a union of states 'sui generis'. On the general debate over its legal nature, see Corbett, *supra* note 45; Kunz, *supra* note 35, at 498–506.

⁵⁷ G. Jellinek and W. Jellinek, *Allgemeine Staatslehre* (3rd rev. edn, incorporating the handwritten notes, 1922), at 762.

⁵⁸ H. Kraus, *Vom Wesen des Völkerbundes* (1920), at 12ff.

⁵⁹ W. Schücking and H. Wehberg, *Die Satzung des Völkerbundes* (2nd rev. edn, 1924), at 103–104.

⁶⁰ Kunz, *supra* note 35, at 505; see also A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), at 111–112.

⁶¹ Kunz, *supra* note 35, at 498; Verdross, *supra* note 60, at 112.

opposed the notion of Hermann Jahrreiß, who argued that only those states who were not members of the League of Nations, such as the USA, Russia and Turkey, remained sovereign states.⁶² Kunz maintained that the member states of the League did not lose their sovereignty because of the competencies yielded by the League.⁶³ Interestingly, prominent French, Swiss and British scholars, including Lassa Oppenheim, Thomas Lawrence, Paul Fauchille, Ferdinand Larnaude and Max Huber, refrained from associating the League with any pre-existing form of cooperation or union between states and classified the League as an unprecedented treaty-based entity *sui generis*.⁶⁴

To the Vienna School, however, the League of Nations was a subsystem of international law in a monist juridical universe. Like any other legal order, it could be legally personified.⁶⁵ And since the personality of a particular international legal order was for the Vienna School not tied to a state entity of whatever kind, it was possible – in deviation from Jellinek’s doctrine – to describe the League of Nations as a subject of international law.⁶⁶ In contrast to Jellinek’s conception, the League of Nations for Kunz represented a partial legal order, which, like any other bundle of rights and obligations, could readily be thought of as a legal person. On a different theoretical basis, Schücking and Wehberg and other more progressive German authors had come to the same conclusion. For Kunz, the fact that the League, according to the Covenant, protected the free state of Danzig and acted as a trustee of the Saar region and a guardian of minority rights as well as a sovereign over the new League mandates proved that the League was a subject of rights and duties distinct from those of its members.⁶⁷ He forcefully rejected Huber’s view according to which the League was only a society of sovereign members (*Gesellschaft*) and not a corporate legal entity (*Körperschaft*).

Kelsen came to this debate with his earlier-mentioned critical theory of legal personality aiming at demystifying the German public law doctrine of legal personality as a ‘fictitious’ and ‘metaphysical’ concept.⁶⁸ From the perspective of his pure theory, the legal person thus was not more than a possible doctrinal expression for the systemic unity of a set of legal norms serving as a point of attribution of legal rights and obligations.⁶⁹ For international law, this meant above all that legal personality was not an exclusive privilege of the state but, rather, could be used to describe any particular legal order, such as the one erected by a treaty founding an IO.⁷⁰ The effects of granting legal personality in this formal sense always remained confined to the concrete content of the legal norms

⁶² Kunz, *supra* note 35, at 498.

⁶³ *Ibid.*, at 500.

⁶⁴ For further references, see *ibid.*, at 502–503.

⁶⁵ *Ibid.*, at 505.

⁶⁶ *Ibid.*; Jellinek had still strictly denied that a confederation (*Staatenbund*), let alone an international administrative union, constituted a legal person. Jellinek, *supra* note 10, at 179.

⁶⁷ Kunz, quoting Corbett’s view affirmatively. Kunz, *supra* note 35, at 505.

⁶⁸ Kelsen, *supra* note 22, at 18; von Bernstorff, *supra* note 29, at 50–53; on the ‘ambivalent’ and, ultimately, political significance of legal personality, cf. Klabbers, ‘Legal Personality: The Concept of Legal Personality’, 11 *Ius Gentium* (2005) 35.

⁶⁹ Kelsen, *supra* note 22; on this demystification of the state in the Austrian context, cf. Nijman, *supra* note 8, at 179–192; von Bernstorff, *supra* note 29, at 56–60.

⁷⁰ Kelsen, ‘Théorie Générale du Droit International Public’, 42 *Recueil des Cours de l’Académie de droit international de la Haye (RCADI)* (1932) 128, at 142–144.

that were being unified through this intellectual operation. In that way, personality, if not granted in a general clause by the treaty, followed from specific legal competences given to organs of an IO, not the other way around.⁷¹ And behind any such legal personification, Kelsen insisted, acted individual human beings as the final addressees of these legal norms rather than an anthropomorphic collective super organism.

Moreover, the League of Nations for Kelsen and Kunz also had its own unified organs. By contrast, Robert Redslob, Arrigo Cavaglieri and Huber, influenced by Anzilotti's theory of *organi communi*, held that under the still prevailing unanimity rule both the League Assembly and the Council could only be regarded as joint or common organs of the member states.⁷² It was indeed difficult to construct an international legal entity, including distinct personality and unified organs, for the League if one followed the central premises of 19th-century German *Staatswillenspositivismus*, particularly since the League Covenant remained silent on issues of international legal personality and the legal nature of its organs. In their famous League commentary, Schücking and Wehberg only managed to square this circle by somewhat arbitrarily relying on German private law analogies, such as the concept of the community of joint ownership (*Gemeinschaft zur gesamten Hand*), which came out of German private law and had been transferred to the confederation concept first by Godehard Ebers:⁷³

Only this concept, which has sprung from the wealth and depth of the German idea of law, is able to explain the seeming contradiction that, on the one hand, no new state above the individual states has been created in the League of Nations, and, on the other hand, a unity exists with a special legal sphere which, as a common sphere, is sharply distinct from the special sphere to which each individual state is entitled.⁷⁴

The way in which Kelsen and Kunz classified the League of Nations shows the repercussions of their understanding of international law as a potentially unrestricted social technique of international relations. Independent of ideological (nationalist) barriers, the Vienna School wanted the system of international law to be thought of as open to progressive centralization and new institutional experiments.⁷⁵ Limitations on the authority of the League to act were to be laid down exclusively through the organization's Covenant. To the school, the Covenant, like any treaty, had a dual function: 'It is the treaty by which the League of Nations is constituted, and it is the constitution of the thusly constituted confederation.'⁷⁶ From the perspective of Kelsen's

⁷¹ On doctrinal ambivalences regarding the relationship between competences and personality, see Klabbers, 'Legal Personality: The Concept of Legal Personality', 11 *Ius Gentium* (2005) 35, at 45–50.

⁷² With references to those positions, see Kunz, *supra* note 35, at 504–505.

⁷³ Following an essay by Heilborn, Ebers, in his monograph *Die Lehre vom Staatenbunde*, had offered a comprehensive justification for this approach. See Ebers, *supra* note 14, at 303ff.

⁷⁴ Schücking and Wehberg, *supra* note 51, at 109–116.

⁷⁵ Nicolas Politis went so far as to argue that, since the founding of the League of Nations, state sovereignty was an outdated concept that, like a long-extinguished star, was still sending its light to earth. Politis, 'Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux', 6 *RCADI* (1925) 5, at 10.

⁷⁶ Kunz, 'Die intrasystematische Stellung des Art. XI des Völkerbundpaktes', 21 *Frankfurter Abhandlungen zum modernen Völkerrecht* (1931) 1, at 1; on the emerging constitutional hermeneutic regarding international organizations (IOs) in the 1920s, see G.F. Sinclair, *To Reform the World. International Organizations and the Making of Modern States* (2017), at 68–71.

concept 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.⁷⁷ Because of the Vienna School's new concept of 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 systems 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.

Given the unitary construction of universal law under the presupposed primacy of international law, the organs of the League of Nations could also, in Kunz's view, enact norms *vis-à-vis* the members of the League that were valid both directly (without the requirement of ratification or transformation) and indirectly.⁷⁸ Moreover, for Kunz, administrative measures, including those with a direct effect on individuals enacted by League organs were not ruled out in principle.⁷⁹ In 1945, Kunz proposed a systematic taxonomy of administrative rule-making and decision-making for IOs. Verdross, for his part, in 1937, had already called these administrative rules *Staatengemeinschaftsrecht*, a term translated by Kunz into international administrative ordinances.⁸⁰ Kunz distinguished four groups of such ordinances: first, those issued by non-plenary organs directly binding upon states (regulations or *règlements*); second, those directly binding on individuals such as ordinances of the authorities of the river commissions; third, internal procedural rules of organs of IOs (rules of procedure); and, lastly, rules regarding the status, rights and obligations of the personnel of IOs. In his sensitivity for the lack of judicial controls and the rule of law, Kunz approvingly points to the fact that within the International Labour Organization and the League, at least for personnel-related rules and decisions, internal administrative tribunals had been created in the interwar period.⁸¹

While the Vienna School and the cosmopolitan reform movement through their theoretical and doctrinal contributions helped to construct international institutions as potentially universal legal entities, the question of responsibilities and liability of these new institutions remained somewhat underdeveloped and under-theorized. Considering the enormous hopes projected by cosmopolitan scholars on new forms of IOs in the explosive and hyper-nationalist interwar atmosphere, it is not surprising that the idea of holding these new actors to account was not particularly high on

⁷⁷ On the discussion over Article 15, paragraph 8, of the Covenant of the League of Nations and the problem of domestic jurisdiction, see von Bernstorff, *supra* note 29, ch. 3.C.IV.

⁷⁸ The question of whether decisions by the organs of the League of Nations would be binding even without ratification was the subject of debate at the first Assembly meeting with respect to the decision about the establishment of a world court. On this point, Nicolas Politis had argued that the Assembly was unquestionably capable of making directly binding decisions, as long as the matter in question fell within the jurisdiction defined by the treaty, see *Actes de la première Assemblée, Séances des Commissions* (1921), at 300ff; Schücking and Wehberg, *supra* note 51, at 112.

⁷⁹ Kunz, *supra* note 35, at 506.

⁸⁰ Kunz, 'Experience and Techniques in International Administration', 31 *Iowa Law Review* (1945) 40, at 53.

⁸¹ *Ibid.*, at 56–57.

the academic agenda. And, as we will see, the validity and desirability of IOs as distinct legal entities in the 1920s and 1930s as such was far from settled amongst international lawyers.

D The Construction of a Universal Legal Entity and Hegemony: Critical Reactions to the Vienna School's Theory of International Organization

The attempt by the Vienna School and by the pacifist movement in international law to construe the League of Nations as a legal entity that was autonomous *vis-à-vis* its members was sharply rejected by Carl Schmitt in his first monograph on international law.⁸² He was opposed to all scholarly attempts to construct the League as a unified legal entity. As a 'hegemonic' project of the allies, the League for him did not deserve a distinct and universal legal status. Hence, the 'hair-splitting' about the question of the legal nature of the League of Nations, he asserted, missed the 'core question' of the problem.⁸³ When the attempt was made to construe the League of Nations as a legal order, the literature failed to consider the question of whether there was in fact an order that could be described as a League (*Bund*):

The core question of the League of Nations, however, concerns precisely the question about the specific nature of the legal order embodied in it. It is the question of whether it can be regarded at all as the embodiment of a legal order that takes the status quo of Versailles as its basis, or merely as a political-practical purposive entity (*politisches Zweckgebilde*).⁸⁴

International law, Schmitt maintained, did not exist in a vacuum but was tied to the political situation. Thus, a *Bund* could be posited only where an ordering principle (*Ordnungsprinzip*) encompassed a system of states.⁸⁵ With his sociological perspective, Schmitt picked up a pattern of argumentation that was common in Germany in the interwar period. The League of Nations, it was argued, represented a purposive political entity of the allied powers.

In the final analysis, it was nothing other than the continuation of the Versailles peace conference. Bernhard von Bülow, in his famous book *Der Versailler Völkerbund* (*The League of Nations of Versailles*), made the instrumentalization of the League of Nations by the victorious European powers, with the goal of 'oppressing' Germany, the chief point of criticism of the new organization in Geneva.⁸⁶ Schmitt also raised the question about the political legitimacy of the League of Nations and linked it to his concept of the *Bund* in the German name of the League of Nations (*Völkerbund*). A real confederation (*Bund*) for him presupposed concrete guarantees for a substantive political order and a certain degree of homogeneity amongst its members. According to

⁸² On these reactions in more detail, see von Bernstorff, *supra* note 29, at 143–145.

⁸³ C. Schmitt, *Die Kernfrage des Völkerbundes* (1926), at 18.

⁸⁴ *Ibid.*, at 17–18.

⁸⁵ *Ibid.*, at 18.

⁸⁶ B.W. von Bülow, *Der Versailler Völkerbund* (1924), introduction; C. Schmitt, *Die Kernfrage des Völkerbundes* (1926), at 22; referring to Schmitt with a similar view. Billfinger, 'Betrachtungen über politisches Recht', 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1929) 57, at 57–76.

Schmitt, however, the outcome of his political inquiry should also predetermine the question about the League of Nations as a legal order. Where there was no *Bund* in the political sense, there was, for Schmitt, also no legal order. And so his answer to the ‘core question’ in the year Germany joined the League of Nations was negative, even though he did regard it as open for the future.⁸⁷ In this way, Schmitt sought to prevent an increase in the authority of the League of Nations through its theoretical juridification by the Vienna School and other authors in the Interbellum. The concept of the *Bund* was defined by Schmitt’s own political criteria, but the argumentative conclusions he drew from the negated suitability of the term for the new organization, however, were of a legal nature. His goal was the complete deconstruction of the attempt of the reform movement in international law to construct the new institution as an international legal entity.

Schmitt’s argumentation was thus aimed at the most vulnerable part of the League of Nations project. Dealing with the complex problems of the interwar period presupposed the construction of a uniform authority that was autonomous from the individual wills of the member states. It was only as long as the organs of the League of Nations were not perceived exclusively as a hegemonic instrument of France and the United Kingdom (UK), but were regarded as representatives of an existing community of states, that the clashing national interests and conflicting political principles could possibly be managed case by case within the organs of the League of Nations.⁸⁸ As Schmitt carved out diligently, the problem of disguised imperial rule in the name of a universal corporate veil was particularly acute in the mandate system of the League, which had transformed the former German and Turkish colonies into, *inter alia*, French- and British-controlled League of Nations mandates. While sovereignty over these territories officially lay with the League, France and the UK, according to Schmitt, controlled and exploited these nations at will. Both the European distinction between Christian and non-Christian states in the 16th century and the distinction between civilized and non-civilized (half-civilized) peoples in the 19th century constituted for Schmitt discursive strategies to justify hegemonic colonial intervention and exploitation outside of the Western hemisphere. The mandate system of the League of Nations and the League Covenant, which defined the further development of the former German and Turkish colonies as the ‘sacred trust of civilization’, was for him the ‘most concise example of the legitimizing function of the dichotomy of civilized and non-civilized nations, which is used by the civilized nations to give themselves the right to “educate”, i.e. to control, the less civilized nations in the form of mandates, protectorates and colonies’.⁸⁹

Carl Schmitt was not the only critical voice that pinpointed the gap between a neutral corporate veil for the League and the way strong member states made use of it

⁸⁷ Schmitt, *supra* note 83, at 80–82.

⁸⁸ Berman, ‘Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and “Peaceful Change”’, 65 *Nordic Journal of International Law (NJIL)* (1996) 421, at 421ff.

⁸⁹ Schmitt, ‘Völkerrechtliche Formen des modernen Imperialismus’, in C. Schmitt (ed.), *Positionen und Begriffe, im Kampf mit Weimar – Genf – Versailles 1923–1939* (1940; reprinted 1988), at 164.

in the interwar period. In 1939, the famous international relations scholar Edward Hallet Carr, in his book *The 20 Years Crisis*, explained: “The utopia of 1919 was hollow and without substance. ... Like all utopias which are institutionalised, the post-War utopia became the tool of vested interests and was perverted into a bulwark of the status quo.”⁹⁰ The enthusiasm for the League of Nations among the cosmopolitan elites of the European public and within the modernization movement of international law had made a crucial contribution to stabilizing the League’s institutions in the 1920s. However, this authority could be upheld only as long as the post-war territorial *status quo* guaranteed by the League of Nations via Article 10 of the Covenant and the Versailles Treaty, including the mandate system, could claim a certain political legitimacy.⁹¹ For this very reason, political elite support for the League of Nations in Germany and Austria depended on its continued ability to function as a projection screen for the hopes that the Versailles settlement, which was seen as being lopsided and too harsh, could eventually be changed through the League.⁹²

3 Kelsen and Kunz on the UN Charter

A *The Turn to Pragmatic Functionalism*

After their emigration, both Kelsen and Kunz were heavily involved in the scholarly debates on the new UN. They had hoped for a constitutive treaty that would create a thoroughly juridified universal legal entity and were disappointed about the outcome of the Dumberton Oaks and San Francisco diplomatic conferences. During the foundational period of the UN, debates over the legal nature of international organization had changed in tone and substance. The demise of the League and, with it, the loss of the more legalist Geneva atmosphere led to a more functionalist and pragmatic understanding of international institutions. Cold War New York proved to be an altogether different place from the more high-minded cosmopolitan Geneva of the 1920s. Kunz retrospectively points to this change of spirit after 1945:

The strong emphasis which was placed upon international law in the League of Nations has been replaced by a subordinate role given to international law in the United Nations. Both the Assembly of the League and the General Assembly of the United Nations had, or has, six main committees. It is, perhaps, symbolic that in the League the first committee dealt with constitutional and legal questions and the last one with political problems, whereas in the United Nations, exactly to the contrary, the first committee handles security and political and the last committee, legal questions. But even so the Legal Committee plays no particular role.⁹³

⁹⁰ E.H. Carr, *The Twenty Years' Crisis 1919–1939* (1939), at 287–289.

⁹¹ Versailles Peace Treaty 1919, 225 Parry 188.

⁹² The possibility for a later revision laid down in Article 19 of the Covenant still served in the 1920s to absorb these hopes and to postpone the final resolution of the conflicting political principles to a later point in time; on this, see Berman, *supra* note 88, at 432ff.

⁹³ J.L. Kunz, *The Changing Law of Nations* (1968), at 594.

Kunz condemned the fact that the Sixth Committee from the very beginning only played a minor role within the organization as well as the UN practice of assigning legal issues to non-legal committees without involving legal experts.⁹⁴ Both Kelsen and Kunz, who had been active supporters of new and stronger forms of treaty-based cooperation in the interwar period, deeply resented the new trend towards a perceived lawlessness inside and around the UN. For them, authority obliged those who exercised it, thus requiring strong legal controls and a legalist culture within international institutions based on the idea of formal equality. From that perspective, the UN Charter was a nightmare and the pragmatic, great power-dominated spirit in the first decade of the UN's existence did not really help to rectify the grievances of the two émigrés now living permanently in the USA.⁹⁵ Within the UN only for a short period after its foundation, the New York sense of lawlessness caused real headaches among the older generation of international lawyers and met with considerable resistance from the majority of member states. As early as 1947, the UN General Assembly in Resolution 171(II)(A) advised the organs of the UN to use the advisory competence of the International Court of Justice (ICJ) whenever unresolved legal issues regarding the UN Charter and the constitutions of the specialized agencies should come up. How to verify the legality of acts of UN organs for a short while was an important issue in the deliberations of the Sixth Committee of the General Assembly.⁹⁶ With the USA dominating the main organs of the institution in its first 10 years of existence, however, these legalistic sensibilities became ever more sidelined and marginalized.

As is well known, the new UN was in many respects the old League in new vesture; however, with fewer legal controls and a new Security Council with revolutionary privileges for the five victorious World War allies. The new institution also abandoned the League concept to bring together security, economic, social and humanitarian issues in one centralized and powerful political executive body and, instead, erected a highly decentralized system of fairly unconnected main organs and specialized agencies. With respect to the issue of a distinct legal entity, the UN Charter, like the League Covenant, did not contain clear stipulations on international legal personality. When this question was brought before the ICJ in the 1949 *Reparation for Injuries* advisory opinion, the Court – while confirming the international legal personality of the organization – turned to pragmatic functionalism as its main justification.⁹⁷

As is well known, the ICJ in its 1949 *Reparation for Injuries* advisory opinion had been given the opportunity to pronounce itself on the issue of the international legal personality of the UN. It used this opportunity to assign an 'objective' international legal personality to the organization and the right to request compensation for losses and damages suffered by the organization itself and, most controversially, also for

⁹⁴ *Ibid.*, at 595–596.

⁹⁵ For biographical information on the two scholars, see von Bernstorff, *supra* note 29, at 272–285.

⁹⁶ On these unsuccessful early attempts, see Bedjaoui, 'Introduction', in N. Blokker and S. Muller (eds), *Essays in Honour of Henry G. Schermers* (1994), vol. 1, 1, at 23.

⁹⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174.

injuries suffered by its personnel. In its answers to the two questions posed by the General Assembly, the Court thus confirmed the separate legal personality of the young institution. Despite the absence of an express Charter provision granting international legal personality, it held not only that the UN was a legal person but also that this personality existed *vis-à-vis* non-member states.⁹⁸ In this part of the opinion, the Court seemed to follow the trend in progressive interwar scholarship to deduce legal personality from existing international rights and duties in order to dethrone the state as the sole international legal person;⁹⁹ however, it did so by overstretching this argument with the assumption of the UN as an 'objective' legal person.

Answering the second question posed by the General Assembly, it provided the UN with a right to exercise diplomatic protection for its agents analogous to this classic right of states. The decision became famous for its somewhat unconcerned use of the implied powers doctrine to justify the more controversial bits of the two answers. Yet, in the context of the debates on the legal nature of the UN, the advisory opinion can also be seen as the judicial expression of a general post-World War II trend towards pragmatic functionalism in IO scholarship and practice. Whatever is needed to perform will be legally granted to the institution, and formalist concerns were being brushed aside. As the dissenting opinions of Judge Green Hackworth, Judge Badawi Pacha and Judge Sergei Krylov critically pointed out, in particular, the right of the organization to claim reparation for injuries of agents *vis-à-vis* non-member states had no express foundation in international law; claiming its existence and objective validity thus was a rather bold assertion to make: 'The Court is not entitled to create a right of functional protection which is unknown in existing international law.'¹⁰⁰ Judge Krylov was one of the judges who sensed the ambivalences of the majority's move to a functionalist interpretation of the UN Charter with the aim of fortifying the international legal personality of the UN beyond its legal basis. In his dissent, he referred to the imbalance created by this move to functionalist deductions of rights of the organization analogous to a state without new duties.¹⁰¹ There may be situations, the Russian judge insisted, in which the UN may also do harm to individuals and in which these individuals then might require diplomatic protection by their home states against the organization:

The majority of the Court has in view the functional protection of an agent of the United Nations Organization, even as against the national State of the agent. But it has not borne in mind, for example, the opposite – and possible – situation in which the said State may find it desirable and necessary to protect the agent against the acts of the Organization itself.¹⁰²

Kelsen in his UN Charter commentary also was very reluctant, if not dismissive, of the general trend towards such functionalist interpretations of the provisions of the

⁹⁸ *Ibid.*, at 179.

⁹⁹ Cf. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', 36 *Virginia Journal of International Law* (1996) 275, at 368–370.

¹⁰⁰ *Reparation for Injuries*, *supra* note 97, 217, at 217.

¹⁰¹ On the analogy in general, see Bordin, *The Analogy between States and International Organisations* (2018).

¹⁰² *Ibid.*, at 219.

UN Charter. In the section on the legal status of the UN, Kelsen contended that, in the absence of an express provision conferring general legal capacity, the organization 'has only those special capacities as conferred upon it by particular provisions'.¹⁰³ As a consequence, its legal capacity was restricted to those provisions in the Charter in which specific legal capacities were granted, such as the right of the Organisation to conclude trusteeship agreements in Articles 55, 57 and 59. Even though Kelsen and his school had been part of the general interwar modernization movement to open up new legal horizons for international institutions, he was not willing to infer new rights to the UN that had not been explicitly inserted in the text of the Charter in Dumberton Oaks and San Francisco.

Regarding the passive side of the new universal legal entity, the turn to pragmatic functionalism displayed a certain one-sidedness. While through its legal personality the institution could now at least theoretically be held responsible for wrongful acts, the UN and its member states stopped short of establishing a substantive liability regime for the organization's acts. Instead, the debates focused on erecting a functional immunity regime for the organization and its personnel. A further problem was that unlike approximately 10 years later in the European Communities, the member states could not bring a case against the organization to the ICJ.¹⁰⁴ Kelsen, in particular, was highly critical of the limited role granted to the ICJ in matters related to the UN as a legal entity. It was in his view an inherent contradiction to grant the UN the right to enter into international legal treaties with other states while, at the same time, removing disputes that might arise in these contexts from the control by the ICJ through Article 34 of the ICJ Statute.¹⁰⁵

An additional hurdle to invoke the responsibility of the UN and to effectively claim damages was the idea that the organization shall enjoy in the member states those jurisdictional immunities that were necessary to perform its functions (Article 105 of the UN Charter). As Kunz astutely observed in a 1945 seminal article on privileges and immunities of IOs, a shift from diplomatic or state-like immunities for IOs to a functional understanding had taken place in the 1940s, a development that had led to Article 105 of the UN Charter. This meant that the issue of immunities of the organization and its personnel had become an issue of negotiations between the organization and the member states and could thus even go beyond the jurisdictional immunities granted to states in international customary law.¹⁰⁶ As a result of the recognition as a universal legal entity, the organization could qua theory be held responsible as a distinct entity for wrongful acts, but, in practice, both in international and domestic courts, claims against the UN would usually face insurmountable procedural hurdles. Hence, the constructed corporate veil would allow strong member states to hide behind the separate legal personality of the organization both legally

¹⁰³ H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), at 330.

¹⁰⁴ Cf. the analysis of the role of Paul Reuters in the creation of early European Communities structures in Lagrange, 'Functionalism According to Paul Reuter: Playing a Lone Hand', 31 *EJIL* (2020) 543.

¹⁰⁵ Kelsen, *supra* note 103, at 484. Statute of the International Court of Justice 1945, 33 UNTS 993.

¹⁰⁶ Reprinted in Kunz, *supra* note 93, at 540–542.

and politically, while, at the same time, the absence of a substantial and procedural liability regime coupled with a broad functional understanding of ‘necessary’ immunities made the UN itself almost invulnerable on the passive side of its legal personality.

In 1945, it was Kunz who critically sketched the contours of the new legal regime for the privileges and immunities of IOs. While generally endorsing the trend towards functional privileges and immunities as a more appropriate approach than the state analogy, he cautioned against a one-sided regime: ‘The functional principle must also protect the states against too high demands and too great an extension of international immunities.’¹⁰⁷ He also insisted that the UN, as a subject of international law, was bound by general international law, which continued to exist alongside the Charter.¹⁰⁸ Generally, the issue of establishing a regime of legal responsibility for the UN system was not high on the agenda in the first two decades of the UN’s existence. Because of political Cold War blockades within the institution and the new specialized agencies, Western scholarship focused on the rights and capacities of the organization and, again, not on obligations and responsibilities. An aggravating factor in this context for Kunz was the new decentralized institutional organizational set-up of the post-1945 world order. Law was not only absent as a controlling factor in the UN Charter, but it also lost a great deal of its transformative potential through a highly fragmented institutional system, in which the new special agencies all had their own disconnected legal constitutions.¹⁰⁹ Unsurprisingly, most of these IOs founded after World War II, with the exception of the EU, erected a corporate legal entity with a strong structural imbalance between the active and the passive dimension of legal personality. Only very few foundational documents put a substantive and procedural liability regime for IO action in place. It is noteworthy that it took another 35 years for the ICJ to confirm the assumption that international organizations are bound by general international law and by obligations that they had assumed under international agreements.¹¹⁰ And, up until today, the issue of whether at least the member states have to take the form of a subsidiary responsibility for IO violations of international law has been left unresolved as a matter of international law.¹¹¹

B Great Power Hegemony and the UN

Kelsen and Kunz reviewed not only the realist and pragmatic spirit of the UN Charter and its early interpreters but also the privileges accorded to the five victorious allies

¹⁰⁷ *Ibid.*, at 532.

¹⁰⁸ *Ibid.*, at 493–494.

¹⁰⁹ Kunz, in this context, refers to Jenk’s work on the new problem of coordination in IO. Kunz, ‘General International Law and the Law of Nations’, in Kunz, *supra* note 93, 498; on Jenks and the law of IOs, see Sinclair, *supra* note 54.

¹¹⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, at 89, para. 37; on the post-Tin Council debate on responsibility, see J. Klabbers, *An Introduction to International Institutional Law* (2nd edn, 2002), at 276–293.

¹¹¹ On the respective debates on the Articles on the Responsibility of International Organizations, with Commentaries, see Brölmann, ‘Member States and International Legal Responsibility: Developments of the Institutional Veil’, 12 *International Organizations Law Review* (2015) 358.

as permanent members of the Security Council. In doing so, both Kelsen and Kunz claimed that the Charter had to be analysed as a legal text, which, for international lawyers, had to be interpreted legally. In this vein, Kelsen's commentary on the UN Charter, the first of its kind published in 1950, can be read as a long list of critical observations on where and why the Charter provisions failed to realize an organization and world order based on clear legal rules, formal equality and effective judicial controls of both the organization and its member states. In substance, this single-authored monograph, which was more than 900 pages long, was an encompassing legal analysis of all of the main articles of the constituent document of the new world organization. Methodologically, one of the main tasks of a legal commentary for Kelsen was to review the internal consistency of a legal document. To that end, all conceivable interpretations of individual norms with their respective repercussions for other statutory prescriptions had to be presented and placed side by side as equal. The conventional procedure of working up a single interpretation as the correct one for him was based on the untenable fiction of one right interpretation of inherently indeterminate legal norms.¹¹² He also rejected the ingenious use of interpretative methods or recourse to the spirit of the Charter to smooth out inconsistencies and ambiguities. When in doubt, his various formal interpretations that hewed close to the wording of the provisions decided against a competence-expanding interpretation of the Charter in the sense of the doctrine of implied powers.¹¹³

Abraham Feller, the director of the UN Legal Department, was especially critical of Kelsen's Charter Commentary:

It may well be unfortunate from a *scientific* standpoint that legal obligations must carry with them so much extraneous baggage – but such is the nature of constitutions which live in the minds of people and are adaptable to growth along with the societies they are intended to govern. The consequence of this failure to appreciate the basic nature of the instrument is a tendency towards narrow and restrictive interpretation which in effect says that if it is not written explicitly in the Charter, it is illegal.¹¹⁴

He insisted that Kelsen had failed to understand that the Charter 'is not just a legal text' but, rather, 'a political document', a critique, which inspired Kelsen to the following ironic reply in a footnote: 'Perhaps Director Feller considers his office a political rather than a legal one.'¹¹⁵ While relentlessly exposing that norms or parts of norms of the UN Charter were 'superfluous', 'meaningless', 'unclear' or 'contradictory',¹¹⁶

¹¹² Kelsen, *supra* note 103, at xiv–xv.

¹¹³ *Ibid.*, at 330; on this, see the critique by Schachter, 'Review of *The Law of the United Nations* by Hans Kelsen', 60 *Yale Law Journal* (1951) 189, at 192; Feller, 'Review of *The Law of the United Nations* by Hans Kelsen', 51 *Columbia Law Review* (1951) 537, at 538; Sohn, 'Review of *The Law of the United Nations* by Hans Kelsen', 64 *Harvard Law Review* (1950–1951) 517, at 518.

¹¹⁴ Feller, *supra* note 113, at 538.

¹¹⁵ Kelsen, 'What Happened to the Security Council?', 27 *The New Leader* (1951) 10, at 12.

¹¹⁶ For an example, see the commentary on Article 35 of the Charter. Kelsen, *supra* note 103, at 422–424; on these debates in more detail, see von Bernstorff, *supra* note 29, at 225–228; Bardo Fassbender contends that Kelsen in his legalistic approach to the Charter misunderstood both the political context in which it came into existence and the functions of the organization. Fassbender, 'Kelsen und die Vereinten

Kelsen was particularly critical of the extensive functions granted to the P5-controlled Security Council and the absence of judicial controls of this most powerful organ of the UN: 'The veto right of the five permanent members of the Security council places them above the law of the United Nations, establishes their legal hegemony over all the other members, and thus stamps the Organization with the mark of an autocratic regime.'¹¹⁷

Reading Kelsen's early critical publications on the UN Charter, one gets the impression that the constitution of the young organization for him had stopped halfway in creating a strong and judicially controlled universal legal entity as envisaged by cosmopolitan interwar legal scholarship: *Autorité oblige!* The Charter had betrayed the principle of formal equality and deliberately put an 'autocratic' body like the Security Council in a deciding position, outside of any form of judicial control or binding judicial influence on its decision-making:

Thus, the Security Council may settle a dispute in a way different from the decision of the Court. That the Charter confers upon the Security Council this power is certainly one of its most objectionable provisions. It places the Court, the 'principal judicial organ of the United Nations', under the political control of the Council, a thoroughly political agency.¹¹⁸

To make things worse, Chapter VII of the UN Charter violated the fundamental rule-of-law principle that no legal person should act as a judge in its own case, allowing permanent members to veto Chapter VII resolutions regarding situations in which they were politically or militarily involved.¹¹⁹ Institutionalized powers over war and peace, including enforcement measures, necessarily required specific and judicially enforceable legal rules on the use of violence in international relations, binding all legal subjects alike.¹²⁰ Institutionalized hegemony, such as the one involving the permanent members of the Security Council, was for Kelsen more problematic than having no centralized institutions in the first place.¹²¹ Here, interestingly with hindsight, Kelsen and Schmitt, the great Weimar adversaries, seem to concur in their

Nationen, in *Völkerrecht als Wertordnung*', in P.M. Dupuy (ed.), *Festschrift für Christian Tomuschat* (2006) 763, at 777. In my reading of Kelsen's approach, his critique of the UN Charter not only was a direct consequence of his methodological and cosmopolitan convictions but, as such, also encapsulated an unmatched and highly valuable scholarly distance *vis à vis* hegemonic political usurpations of the specific rules and organs of the Charter.

¹¹⁷ Kelsen, 'Organization and Procedure of the Security Council of the United Nations', 59 *Harvard Law Review* (1946) 1087, at 1121.

¹¹⁸ Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations', 42 *AJIL* (1948) 783, at 790.

¹¹⁹ Kelsen, *supra* note 117, at 1119; Kelsen was not the only author who early on saw an urgent need to reform the UN Charter in order to have more checks and balances; on the reform proposals developed by the influential US scholar Louis B. Sohn, see Johnstone, 'Louis Sohn's Legacy', 31 *EJIL* (2020) 583.

¹²⁰ Younger international legal scholars like G.A. Saab tried to balance their formal inclinations with a pragmatic and less sceptical approach to new political initiatives taken by the Council and the Secretary General, including peacekeeping operations, in the 1950s and 1960s; on G.A. Saab, see Öszü 'Organizing Internationally: Georges Abi-Saab, the Congo Crisis and the Decolonization of the United Nations', 31 *EJIL* (2020) 601.

¹²¹ Kelsen, *supra* note 118, at 790.

critiques of hegemonic states instrumentalizing international institutions by claiming to represent a universal legal community. Of course, Kelsen would not have approved of Schmitt's interwar writings on the League, and in his post-World War II publications, Schmitt only mentions the UN Charter in passing. And, yet, in many areas of legal theory, Kelsen's realist formalism and Schmitt's anti-formalist realism seem to converge in their analytical findings – as in their unadorned assessment of legalized forms of hegemony.¹²² For Kelsen, however, a concrete realization of the ideal of legal equality and compulsory jurisdiction in the new world organization would have been possible in 1945, whereas, for Schmitt, hegemonic forces inevitably constitute or reconstitute the international legal order in line with the vital needs of the hegemon.

Kelsen's in-depth critique of those legal structures that allowed the UN to be potentially instrumentalized by hegemonic states as a legally uncontrolled universalist facade did not resonate with the pragmatic Western post-war *Zeitgeist*. Instead, Western scholars in the 1950s and 1960s regarded the Cold War antagonisms as the main threat to the UN. Inaction and political blockades were considered the central problem of the UN and not hegemonic structures and a lack of legal responsibility or judicial controls. It took another 40 years for the issue of UN responsibility to reappear in international legal debates.¹²³ In 1994, Mohammed Bedjaoui, president of ICJ, recapitulated the history of the limping construct of international legal personality for the UN as follows:

The United Nations international legal personality, the establishment of which was the happy outcome of some anxious expectations, cannot carry full weight with states unless the Organization itself features ways and means whereby they in turn can satisfy themselves as to the conformity of its acts with the Charter, not to mention international law.¹²⁴

For Bedjaoui, it appeared 'illogical' that states were responsible for their unlawful acts, whereas the organization they had created was supposed to remain immune from any judicial control. In this, Bedjaoui saw an 'unhealthy persistence of a lopsided construction which many recent events have served to expose'.¹²⁵

4 Conclusion

Reading the history of the scholarly construction of international institutions as legal entities through the writings of Kelsen and Kunz from 1920s to the 1950s tends to conjure a rise and fall narrative. The 1920s as a moment of a transformative opening in legal scholarship, perhaps the first moment of radical re-imagination

¹²² On their approaches to judicial decision-making, see also von Bernstorff, *Hans Kelsen's Judicial Decisionism versus Carl Schmitt's Concept of the One 'Right' Judicial Decision*, 6 June 2018, available at <https://www.modernlawreview.co.uk/bernstorff-paulson/>.

¹²³ On more recent debates about the 'accountability' of IOs with further references, see Klabbers and Sinclair, 'On Theorizing International Organizations Law: Editors' Introduction', 31 *EJIL* (2020) 489.

¹²⁴ Bedjaoui, 'Introduction', in N. Blokker and S. Muller (eds), *Essays in Honour of Henry G. Schermers* (1994), vol. 1, 1, at 2, 18; the issue of accountability and procedural controls of IOs became an issue of greater concern in the early 2000s. B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law* (2005); A. von Bogdandy et al., *The Exercise of International Public Authority* (2010).

¹²⁵ *Ibid.*, at 18.

of modern international law as an institutionalized community based on the ideal of legal equality and compulsory jurisdiction. Despite the imperfect realization of the new League of Nations as a universal legal entity and its complicity in continuing exclusion, colonialism and empire,¹²⁶ the protagonists of the interwar modernization project were sincere about the aim of erecting judicially controlled international institutions as legal subjects with both rights and obligations transforming international law. From this perspective, the creation of the great power-dominated UN and its decentralized institutional landscape 25 years later constituted the demise of this scholarly project. In the turn to pragmatic functionalism after World War II, the Geneva spirit was not only betrayed but also, to a certain extent, turned into the dystopia evoked by its realist interwar critiques.

While the construct of a distinct universal legal entity in the late 1940s was fortified on the active side through an ever-shallower functionalist discourse, the issue of responsibility of both the organization itself and the member states, using the institution for at times disastrous IO policies, would for a long time become frozen in an immature state. It became much easier to use the universal corporate veil as a convenient facade for hegemonic policy-making and scandalous inaction by the strongest member states. With that in mind, the decentralized and judicially uncontrolled institutional set-up created after 1945, and the associated scholarly turn to pragmatic functionalism in the law of IOs, appear as a lost historical opportunity and may also be more complicit in the desolate state of the world today than we usually tend to think. The Viennese legacy is a longing for law as an egalitarian and transformative medium in international organization, enforcing legal responsibilities of the strongest actors for the dire *status quo*. As such, it certainly is one of the more timeless scholarly contributions to international institutional law.

¹²⁶ A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2007); on the UN in the decolonization era, see J. von Bernstorff and P. Dann (eds), *The Battle for International Law in the 'Decolonization Era'* (forthcoming).