
An International Lawyer in Democracy and Dictatorship – Re-Introducing Herbert Kraus

Heiko Meiertöns*

Abstract

Herbert Kraus (1884–1965) is among the forgotten international lawyers of the 20th century. Kraus took part in a number of developments of great importance for the shaping of modern international law: he participated in the drafting process of the Versailles Peace Treaty and the Treaty on the European Coal and Steel Community and acted as defence counsel at Nuremberg. The founding director of the Institute for International Law at the University of Göttingen was forced to retire between 1937 and 1945 due to his criticism of National Socialism. The post-war perception of his work was coined by his forced retirement. However, his work between 1933 and 1937 sheds light on the dilemma of choosing between opposition and adjustment that Kraus was faced with during that period. This article re-introduces Kraus – a complex German character of international law – and the main features of his work.

1 Introduction

The phrase ‘history is written by those who have hanged heroes’ opens a largely fictional dramatization of the life of the 13th century Scottish warrior William Wallace.¹ These words encapsulate the dilemma one faces when analysing the history of political conflicts. Yet political reality is often far less dramatic but far more complicated than fiction. Suppressing an academic’s work and historical role may be achieved much more easily than physically killing him. In turn the academic may well be anything

* Dr. iur., M.Litt., Adjunct Faculty Member at the Munich School of Political Science (*Hochschule für Politik*). For comments on earlier drafts the author would like to thank Tom Burri, Christian Djefal, and Miriam J. Anderson. The author also thanks the Institute of International Law of the Ludwig-Maximilians-University Munich for its hospitality. The views expressed in this article are solely those of the author. Email: heiko.meiertöns@gmail.com.

¹ R. Wallace, *Braveheart* (1995), at 7.

but a hero. More likely he is a rather complicated character; at times ‘daring greatly’ at times ‘coming short again and again’.²

In various periods of history international lawyers may have faced the moral dilemma of whether they should justify the actions of a government or speak up in the name of law and justice and thus risk repression. The historical period of the Third Reich raises moral questions of international law scholarship in a far more drastic way than periods with more gradual and subtle degrees of right and wrong. The difficult task of confronting the intellectual history of the Third Reich has been approached by German academia – at first slowly, then eagerly.³ This task can probably never be completed but only go through different stages. Since the early 1990s, as those who lived through that period have become fewer, the subject of international law under National Socialism has drawn greater attention.⁴

Attention has centred on either international lawyers who opposed the Nazi regime⁵ or those supporting its policy with legal arguments.⁶ Servants and staunch opponents of the system are a lot easier to discuss than people walking the tightrope between opposition and adjustment, at times valiantly adhering to ethical values, at times falling short. Discussing these types of people requires constant checking if one has not grown too accustomed to the person examined. It requires, furthermore, distancing oneself from the issues at hand, while avoiding an attitude of self-righteousness.⁷ Writing with concentration on an individual person is only one mode of examining and understanding international law in historical terms, and this biographical approach has obvious limits and methodological problems linked to it.⁸ Without writing an iconographic text it is also a very tangible approach that has a certain appeal to it as compared to discussing abstract ideas.

Ideas developed in the context of National Socialist political and legal thought, influenced particularly by Carl Schmitt, are still of great interest and discussed by post-war audiences up to the present day.⁹ Works of authors like Wilhelm Grewe, strongly influenced by Schmitt’s ideas like ‘thinking in terms of concrete order’, have

² T. Roosevelt, Speech at the Sorbonne, 23 Apr. 1910, ‘Citizenship in a Republic’, printed in: S. McIntire (ed.), *Book of Great American Speeches* (2001), at 125–126.

³ E.g., L. Gruchmann, *Justiz im Dritten Reich* (1988); E.-J. Säcker (ed.), *Recht und Rechtslehre im Nationalsozialismus* (1992).

⁴ Vagts, ‘International Law in the Third Reich’, 84 *AJIL* (1990) 661; Fassbender, ‘Stories of War and Peace – On Writing the History of International Law in the “Third Reich” and After’, 13 *EJIL* (2002) 479.

⁵ E.g., Wengler, ‘Helmuth James von Moltke (1906–1945)’, 48 *Friedens-Warte/J Int'l Peace and Org* (1948) 297; S. Link, *Ein Realist mit Idealen – Der Völkerrechtler Karl Strupp (1886–1940)* (2003).

⁶ E.g., G. Stuby, *Vom “Kronjuristen” zum “Kronzeugen”*, *Friedrich Wilhelm Gaus: ein Leben im Auswärtigen Amt der Wilhelmstraße* (2008); J. Bendersky, *Carl Schmitt, Theorist for the Reich* (1983).

⁷ Fassbender, ‘A Novel, Germany’s Past and the Dilemma of Civilised Germans’, 128 *Contemp Rev* (1994) 236.

⁸ Koskenniemi, ‘Why History of International Law Today?’, 4 *Rechtsgeschichte* (2004) 61, at 64.

⁹ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 415–424; Carty, ‘Schmitt’s Critique of Liberal International Legal Order Between 1933 and 1945’, 14 *Leiden J Int'l L* (2001) 25; Gattini, ‘Sense and Quasi-sense of Schmitt’s Großraum Theory in International Law: A Rejoinder to Carty’s Critique of Liberal International Legal Order’, 15 *Leiden J Int'l L* (2002) 53.

been universally disseminated and debated.¹⁰ Yet, the one author who actually wrote a reply to Carl Schmitt's understanding of international law¹¹ at a crucial point in time, shortly after the Nazis' seizure of power – Herbert Kraus¹² – is hardly ever noted, even in the small expert community of international lawyers. Herbert Kraus, the founder and first director of the Institute for International Law at the University of Göttingen, forced to retire between 1937 and 1945, is one of the forgotten international lawyers of this period.

Initially Kraus was not entirely unsympathetic to a number of the ideas of the new regime. In this respect he did not constitute an exception to the by and large highly conservative German professoriate of the interwar period.¹³ Much unlike his better known contemporaries who were in conflict with the regime, he was through and through part of the German establishment.¹⁴ Unlike a number of other German scholars of international law he was not immediately alienated for religious or political reasons,¹⁵ and endorsing Nazi ideology would have been a possible course of action. As he was a scholar of international reputation, endorsement probably would have been highly welcomed by the regime during its early period when it was yearning for international acceptance. At exactly the point in time when other scholars joined the NSDAP in large numbers, decided to remain silent, withdrew to matters of purely academic interest,¹⁶ or continued their work regardless of political changes,¹⁷ he decided to join the debate. In 1934 he published a text on the crisis of inter-state thought, calling the newly elected chancellor indirectly 'a fool'.¹⁸

It is not only his writings prior and during the Third Reich that make Kraus' work controversial and difficult to assess, but also his scholarship after 1945. Grappling with his life and work is in many ways a challenging task, as it requires a balancing of political controversies, of perceptions in their historical contexts, and the legal arguments which resulted from them.

Unlike other German speaking international lawyers of the 20th century like Alfred Verdross, Hans Kelsen, Max Huber, Karl Strupp, and Walter Schücking, whose works were assessed in monographs¹⁹ and symposia of *EJIL*,²⁰ Kraus is today almost completely forgotten. Certainly Herbert Kraus has not shaped international law remotely

¹⁰ Fassbender, *supra* note 4, at 496–500.

¹¹ C. Schmitt, *Nationalsozialismus und Völkerrecht* (1934).

¹² Kraus, 'Carl Schmitt, Nationalsozialismus und Völkerrecht', 50 *Niemeyers Zeitschrift für internationales Recht* (1935) 151.

¹³ Vagts, *supra* note 4, at 670.

¹⁴ On the situation of an 'outsider' see Tams, 'Re-Introducing Walther Schücking', 22 *EJIL* (2011) 725, at 732–734.

¹⁵ Vagts, *supra* note 4, at 671–678. On, e.g., Arthur Nussbaum see Cheatham *et al.*, 'Arthur Nussbaum: A Tribute', 57 *Columbia L Rev* (1957) 1.

¹⁶ M. Stolleis, *History of Public Law in Germany* (2004), at 408–431.

¹⁷ Stuby, *supra* note 6.

¹⁸ H. Kraus, *Die Krise des zwischenstaatlichen Denkens: Eine Bilanz* (1933), at 26.

¹⁹ Link, *supra* note 5, on Karl Strupp.

²⁰ 6 *EJIL* (1995) 32 (Alfred Verdross); 9 *EJIL* (1998) 287 (Hans Kelsen); 18 *EJIL* (2007) 69 (Max Huber); 22 *EJIL* (2011) 723 (Walter Schücking).

in the same way these eminent scholars have. However, Kraus was eager to link his academic work to the practice of international law and influence it to some effect. He participated in the drafting process of the Versailles Peace Treaty, the Treaty of Brest-Litovsk, and the Treaty on the European Coal and Steel Community. Among his students was Adam von Trott zu Solz, who was involved in the 20 July plot.²¹ He acted as defence counsel in Nuremberg and educated a considerable number of post-war Federal German diplomats in his seminars.²² There are only a few contemporary international lawyers of the period whose life and work were as deeply influenced and driven by the political developments of the first half of the 20th century and, like Kraus, reflected these developments in their works. Ignoring his work all in all would be an unwarranted long-term effect of his forced retirement.

2 A Biographical Sketch of Herbert Kraus (1884–1965)²³

Herbert Kraus was born in 1884 in Rostock, the son of a professor of mathematics.²⁴ After his father was called to a chair in Dresden in 1888 the family moved there and Kraus grew up in Saxony. After studying philosophy, history, and history of art for a short time, Kraus took up legal studies in 1904, which he conducted first in Heidelberg, then in Leipzig and Berlin. It was at the *Friedrichs-Wilhelms-Universität Berlin*, that he obtained the degree of *Doctor juris* in 1907 with a work in criminal law on the nature of false allegations,²⁵ supervised by Franz von Liszt. Between 1907 and 1911 Kraus was a law clerk (*Referendar*). In October 1911 he passed the Second State Law Examination and was admitted to the German Bar.²⁶ Like Franz von Liszt, Kraus turned from criminal law to public international law.²⁷ On Liszt's recommendation he conducted research in the USA from 1911 to 1913. Initially Kraus was at Columbia University where he was supported by John Basset Moore.²⁸ He then transferred to

²¹ Kraus also acted as co-supervisor of Trott's PhD thesis: A. von Trott zu Solz, *Hegels Staatsphilosophie und das internationale Recht* (1932). On Kraus' influence on von Trott zu Solz see A. Schott, *Adam von Trott zu Solz: Jurist im Widerstand. Verfassungsrechtliche und staatspolitische Auffassungen im Kreisauer Kreis* (2001), at 25.

²² Läufer, 'Das Völkerrecht im Umbruch: Herausforderungen an den International tätigen Juristen', in C. Calliess, G. Nolte, and P. Stoll (eds), *Von der Diplomatie zum kodifizierten Recht – 75 Jahre Institut für Völkerrecht der Universität Göttingen (1930–2005)* (2006), at 10–11.

²³ For further details see Rauschnig, 'Herbert Kraus (1884–1965)', in D. Rauschnig and D.V. Nerée (eds), *Die Albertus-Universität zu Königsberg und ihre Professoren* (1994), at 371–381; a CV of Kraus can be found in 50 RdC (1934-IV) 315; G. Keiper (ed.), *Biographisches Handbuch des deutschen Auswärtigen Dienstes 1871–1945* (2005), ii, at 635–636.

²⁴ On Kraus' father, Professor Martin Krause (1851–1920), see O. Volk, 'Martin Krause', 12 *Neue Deutsche Biographie* (1979) 683.

²⁵ H. Kraus, *Zum Wesen der sog. falschen Anschuldigung (§ 164 RStGB)* (1909).

²⁶ Date of the Second State Law Exam: 7 Oct. 1911; Keiper, *supra* note 24, at 635.

²⁷ Von Liszt initially worked on criminal law but later turned to international law and authored the most widely used German textbook on international law of the period: F. von Liszt, *Völkerrecht* (5th edn, 1907). On von Liszt's work see F. Herrmann, *Das Standardwerk. Franz von Liszt und das Völkerrecht* (2001); Koskeniemi, *supra* note 9, at 225–228.

²⁸ H. Kraus, *Die Monroedoktrin in ihren Beziehungen zur amerikanischen Diplomatie und zum Völkerrecht* (1913). Kraus even devoted his higher doctorate (*Habilitation*) to John Basset Moore: *ibid.*, at 1. On John Basset Moore see Borchard, 'In Memoriam: John Basset Moore', 42 *AJIL* (1948) 98.

Harvard University where he worked under George Grafton Wilson²⁹ and completed his post-doctoral thesis (*Habilitation*) on the Monroe Doctrine and US foreign policy³⁰ in May 1913. Kraus spent the 1913/14 winter term in Paris at the Sorbonne. A few months before the outbreak of World War I, in February 1914, Kraus obtained his university teaching credentials (*venia legendi*) for public law, public international law, and colonial law at the University of Leipzig.

His academic career was interrupted by the outbreak of World War I. From December 1914 to May 1917 Kraus served as Legal Adviser in the German Civilian Administration in Belgium. Between 1917 and 1919 he worked in the Law Department of the German Foreign Office (*Auswärtiges Amt*) and took part in the preparation of the Treaty of Brest-Litovsk and the Versailles Peace Treaty³¹ – a fact which would haunt him later in his career.

Resuming his academic career after the war, he briefly taught in the 1919 winter term as a lecturer (*Privatdozent*) at the University of Leipzig before he moved to Königsberg where he became an extraordinary professor in 1920 and an ordinary professor in 1921. Eager to revive pre-war academic relations with academics in the US, Kraus taught in 1923 in a summer programme at the University of Chicago and at the Franklin Institute of Philadelphia.³² A report of a discussion at Chicago is telling both about academic culture and Kraus' temper: 'the Gentlemen of the institute do not argue, they merely fail to agree'.³³

The Institut de Droit International elected Kraus an *Associé* in 1927 and a full member in 1934. In 1927 and 1934 he taught at the Hague Academy of International Law,³⁴ and in 1932 at the Geneva Graduate Institute of International Studies.³⁵ In 1928 Kraus was offered a chair of public law concentrating on Anglo-American law at the University of Göttingen. Based on an initiative by Kraus,³⁶ the Prussian Minister for Science, Art and Education agreed in June 1930 to the founding of an institute for public international law and diplomacy (the predecessor of the current 'Institut für Völkerrecht und Europarecht') at the *Georg-August-Universität Göttingen*, with Kraus as its founding director. Kraus established the institute's international contacts and in 1932 spent several months at Princeton.³⁷

²⁹ For a CV of George Grafton Wilson (1863–1951) see 1 *RDC* (1923) 125. See further Myers 'In Memoriam: George Grafton Wilson', 45 *AJIL* (1951) 549.

³⁰ Kraus, *supra* note 28.

³¹ The biographical handbook of the Foreign Service dates his service in the Foreign Office from 1 Apr. 1917 to 8 Aug. 1919; Keiper, *supra* note 23, at 636.

³² A report by Kraus on his journey to the USA is partly printed in Calliess, Nolte, and Stoll, *supra* note 22, at 94.

³³ *Time*, 'Education: At Chicago', 28 July 1924.

³⁴ Kraus, 'La Morale Internationale', 16 *RdC* (1927-I) 383; Kraus, 'Système et fonctions des traités', 50 *RdC* (1934-IV) 315.

³⁵ A. Szabo, *Vertreibung, Rückkehr, Wiedergutmachung – Göttinger Hochschullehrer im Schatten des Nationalsozialismus* (2000), at 153.

³⁶ Reprint of the letter from Kraus to the Prussian Ministry of Science suggesting the foundation of a 'Seminar für Völkerrecht und Diplomatie' can be found in Calliess, Nolte, and Stoll, *supra* note 22, at 88–91.

³⁷ Szabo, *supra* note 35, at 153–154.

Soon after the Nazis' seizure of power Kraus was confronted with strong opposition by the new regime. In 1937 Kraus was removed from his chair and forced to retire.³⁸ He left Göttingen and moved to his hometown of Dresden. There he undertook work commissioned by Columbia University (New York) on the German practice with regard to international treaties and started working on a monograph on Georg Friedrich von Martens, an early positivist, the first professor of international law at the University of Göttingen, and founder of Martens' *Recueil des traités*.³⁹ He managed to complete a manuscript of the work commissioned by Columbia University, but it never went into print, and other manuscripts were destroyed with most of Kraus' private possessions in the Dresden bombing of 12/13 February 1945.⁴⁰ Kraus and his family fled from Dresden to Bavaria where they stayed until the end of the war.

Immediately after the end of the war Kraus applied to be reinstated in his chair in Göttingen. At the beginning of the 1945/1946 winter term Kraus was reinstated as full professor at the University of Göttingen, the only university in Germany which continued teaching uninterrupted by the war, even during the 1945 summer term.⁴¹ However, Kraus did not resume his teaching work until 1947 because he obtained leave of absence in order to act as defence counsel at the International Military Tribunal in Nuremberg. As an international lawyer not tainted by involvement with the Nazi regime, Kraus soon became a sought-after adviser in post-war Germany. The German government made him chairman of the advisory board for the Treaty on the European Coal and Steel Community.⁴²

After his retirement, which he managed to postpone by arguing that he had been forced to retire before his seventieth birthday in 1953, Kraus devoted most of his time to the *Göttinger Arbeitskreis* – a circle of academics in Göttingen from universities in the former eastern territories of the German Reich.⁴³ Herbert Kraus died on 15 March 1965 in Göttingen.

3 Features of Kraus' Work

The short biographical sketch outlined above already provides an impression of the upheavals and drastic political changes Kraus experienced in his lifetime. Consequently earlier presentations of Kraus' work focused mainly on the ups and downs of his turbulent life, rather than on the actual content of his work.⁴⁴ Naturally the focus of his

³⁸ See below sect. 3B2.

³⁹ On Martens see W. Habenicht, *Georg Friedrich von Martens. Eine Biographische und völkerrechtliche Studie* (1934); Koskeniemi, 'Georg Friedrich von Martens (1756–1821) and the Origins of Modern International Law', in Calliess, Nolte, and Stoll, *supra* note 22, at 13–29.

⁴⁰ H. Kruse and H. Seraphim (eds), *Mensch und Staat in Recht und Geschichte, Festschrift für Herbert Kraus* (1954), at 462.

⁴¹ Bird, 'The Universities', in A. Hearnden (ed.), *The British in Germany. Educational Reconstruction after 1945* (1978), at 146–157.

⁴² Rauschnig, *supra* note 23, at 379–380.

⁴³ Kruse and Seraphim, *supra* note 40, at 462–463.

⁴⁴ Rauschnig, *supra* note 23.

academic work changed over time. His work is diverse, and even with the benefit of hindsight it is difficult to recognize any academic consistency. Probably the only persistent feature of his work is the legal assessment of controversial political events of the day and his attempt to link philosophical principles of ‘*Staatsethos*’ to international law in different contexts. Kraus’ work will thus be discussed in chronological order, with a focus on certain periods of time.

A Research in the United States and Inter-War Period

It was highly unusual for a young German international lawyer to conduct research in the US in the politically conflict-ridden time of the build-up to World War I. During these formative years from 1911 to 1913 Kraus developed strong personal ties to the US, and repeatedly travelled to America in the inter-war period. At this early stage of his career he also became a member of the American Society of International Law,⁴⁵ founded in 1906. Kraus later recalled the period of time he spent in the US as ‘happy years’.⁴⁶ It was also there that he started working on international law.

1 Early work: the Monroe Doctrine

The first work by Kraus on international law⁴⁷ is his post-doctoral thesis on the Monroe Doctrine.⁴⁸ Given the prominence the Monroe Doctrine would later acquire among German scholars of international law in the Third Reich,⁴⁹ who made frequent references to it,⁵⁰ the choice of this subject seems farsighted. Unlike later works on this subject it is free of any ideas of a *Großraum* with a prohibition of intervention for states considered ‘alien’ to that area.⁵¹ Scholars like Carl Schmitt tried to draw on the Monroe Doctrine to justify this concept.⁵² Schmitt considered the Monroe Doctrine a

⁴⁵ As one of a dozen German international lawyers, Kraus remained an ASIL member throughout World War I: 11 *ASIL Proceedings* (1917) 200. Though Kraus is not listed in the annual lists of members between 1939 and 1954, his membership ended with his death in 1965: 58 *ASIL Proceedings* (1964) 285; in 1966 Kraus was simply listed as ‘Member since 1913’: 60 *ASIL Proceedings* (1966) 171.

⁴⁶ Kraus, ‘The Accomplished Senator’, 26 *ASIL Proceedings* (1932) 242; Kraus also met his first wife, Katherine Hobson-Kraus, in the US, and got married to her shortly after his arrival in the USA on 3 Dec. 1911; Keiper, *supra* note 23, at 635. On Katherine Hobson-Kraus see Hoffmann, ‘Katherine Hobson-Kraus’, in T. Weber-Reich, ‘*Des Kennenlernens werth*’: *bedeutende Frauen Göttingens* (1995), at 349–351.

⁴⁷ A work written in 1911 on the application of German criminal law in the German colonies can best be attributed to the branch of colonial law: H. Kraus, *Reichsstrafrecht und Deutsche Schutzgebiete* (1911).

⁴⁸ For an excerpt of some of the study’s findings in English see Kraus, ‘What European Countries Think of the Monroe Doctrine’, 54 *Annals of the American Academy of Political Science* (1914) 107.

⁴⁹ On this see P. Steck, *Zwischen Volk und Staat, Das Völkerrechtssubjekt in der deutschen Völkerrechtslehre (1933–1941)* (2003), at 230–237.

⁵⁰ See, *inter alia*, Scheuner, ‘Die Sicherheitszone des amerikanischen Kontinents (Die Erklärung von Panama vom 3. Oktober 1939)’, 24 *Zeitschrift für Völkerrecht* (1941) 180; Scheuner, ‘Der Gedanke der Sicherheit Amerikas auf den Konferenzen von Panama und Habana und die Monroedoktrin’, 24 *Zeitschrift für Völkerrecht* (1941) 273. On this see H. Meiertöns, *The Doctrines of US Security Policy – An Evaluation under International Law* (2010), at 47–50.

⁵¹ On this see in detail M. Schmoeckel, *Die Großraumtheorie. Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit* (1994), in particular at 64–67.

⁵² C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte* (4th edn, 1941).

unique precedent and ‘so far [the] most successful example of a Großraum-Principle in international law’ with a ‘prohibition of intervention for forces alien to an area’.⁵³ By contrast Kraus attempted a positivist legal discussion of an essentially political, even highly politicized, ideological subject as a doctrine: ‘in particular, the work makes at no point political statements. Expressing a political opinion about the Monroe Doctrine has been strictly avoided, just as issuing a judgement with regard to its wisdom or “doability”, decency, likeliness, possibilities and the like or the contrary has been avoided’.⁵⁴ Kraus came to the conclusion that the Monroe Doctrine was no rule of international law, in particular no rule of an American international law.⁵⁵ Thus it was not possible to justify interventions by reference to the doctrine and its Roosevelt Corollary.⁵⁶ His conclusion mirrored the state of historical scholarship and international law scholarship at that point in time.⁵⁷

The book received positive reviews in the USA and Germany,⁵⁸ being commended for the thorough study of sources and its detached viewpoint, probably only possible for a non-American author.⁵⁹ Given his work on the Monroe Doctrine, hardly any other author would have been more qualified to speak about references to it and the way it was interpreted by scholars in the Third Reich. Yet, this issue area is absent from Kraus’ work between 1933 and 1937. This is only logical, since Schmitt did not publish most of his outlining of the *Großraumtheorie* until 1939.⁶⁰ Quite a number of German international lawyers did not participate in the discussion of the *Großraumtheorie*. Likewise, Kraus remained silent on this particular issue – or rather he was silenced by being removed from his chair.⁶¹ Achieving a chair was, however, complicated by the historic events of the day and the outbreak of World War I in June 1914.

⁵³ *Ibid.*, at 13. Author’s translation of ‘bisher erfolgreichstes Beispiel eines völkerrechtlichen Großraumprinzips’ and ‘Interventionsverbot für raumfremde Mächte’: Schmitt, ‘Großraum gegen Universalismus. Der völkerrechtliche Kampf um die Monroedoktrin’, 6 *Zeitschrift der Akademie für Deutsches Recht* (1939) 333, at 333.

⁵⁴ Author’s translation of ‘[i]nsbesondere gibt die Arbeit in keinem Punkte politische Erörterungen. Es ist streng vermieden worden, eine politische Ansicht über die Monroedoktrin, ein Urteil in Bezug auf Weisheiten oder “Tunlichkeiten”, Anstand, Wahrscheinlichkeiten, Möglichkeiten und der gleichen oder ihr Gegenteil zu äußern.’: Kraus, *supra* note 28, at 8.

⁵⁵ *Ibid.*, at 351.

⁵⁶ For a similar view see Wright, ‘The Outlawry of War’, 19 *AJIL* (1925) 76, at 90–91; H. Bingham, *The Monroe Doctrine, An Obsolete Shibboleth* (1913), at 54–55.

⁵⁷ H. Schatzschneider, *Die neue Phase der Monroedoktrin* (1957), at 61; Meiertöns, *supra* note 50, at 52–54.

⁵⁸ Shepherd, ‘Review: Die Monroedoktrin in ihren Beziehungen zur Amerikanischen Diplomatie und zum Völkerrecht’, 30 *Political Science Q* (1915) 522; T.S.W., ‘Review: Die Monroedoktrin in ihren Beziehungen zur Amerikanischen Diplomatie und zum Völkerrecht’, 19 *Am Historical Rev* (1914) 657; Beyer, ‘Review: Die Monroedoktrin in ihren Beziehungen zur Amerikanischen Diplomatie und zum Völkerrecht’, 70 *Zeitschrift für die gesamte Staatswissenschaft/J Institutional and Theoretical Econ* (1914) 738.

⁵⁹ Shepherd, *supra* note 59, at 522. It is noteworthy that Kraus devoted his Hague Lecture in 1927 to Alejandro Alvarez, who advocated a very different understanding from Kraus of the Monroe Doctrine and considered it a rule of ‘American International Law’: A. Alvarez, *The Monroe Doctrine – Its Importance in the International Life of the States of the New World* (1924). On this see further Meiertöns, *supra* note 50, at 44–46, 52–54.

⁶⁰ Schmoeckel, *supra* note 51, at 20–21.

⁶¹ Besides Kraus, Schmoeckel lists, *inter alia*, Victor Bruns, Wilhelm Grewe, and Stephan Verosta: *ibid.*, at 158.

2 German government service, the Versailles Peace Treaty and the League

From December 1914 to April 1917 Kraus served in the German Civil Administration in Belgium, initially as an administrator (*Zivilkommissar*) in the city of Hasselt,⁶² and then as legal adviser on international law to the German Governor General. Supreme authority of the German occupying administration was vested in the Governor General who acted as representative of the occupying power.⁶³ The German occupation tried to keep the pre-war Belgian administrative system largely intact and attempted to control it through small groups of German officials with adequate lingual and administrative skills. Though the German occupying power tried to exploit ethnic tensions between the Flemings and the Walloons,⁶⁴ it also gave consideration to the application of the new 1907 Hague Convention and in particular Articles 42–56. The directions for the conduct of the Governor General in Belgium of 29 August 1914 contained the order that, in the exercise of the power delegated to the Governor General, the Regulations respecting the Laws of War on Land, Annex to the Hague Convention of 18 October 1907, be applied.⁶⁵ His service in the Civilian Administration in combination with his pre-war qualifications earned Kraus a position in the Legal Division of the Foreign Office from May 1917 onwards. In the Foreign Office Kraus was posted to the section responsible for international law and treaty law.⁶⁶ A full appreciation of Kraus' work in the Foreign Office would require further in-depth research, but *inter alia* he worked on the drafting of the Treaty of Brest Litovsk.⁶⁷ Certainly, the years 1917 to 1919 were challenging times for international lawyers in the German Foreign Office, with the conclusion of the Versailles Peace Treaty as the crucial and most important event. However, the German influence on the peace terms and the final version of the treaty was extremely limited: the German delegation in Versailles was given only three weeks in May 1919 to present its observations in writing. As the subsequent exchange of notes led to only marginal changes in the peace terms,⁶⁸ Kraus' actual contribution to the drafting process can only have been minimal. However, it was Kraus who proofread the final version of the treaty the morning before it was signed on 28 June 1919.⁶⁹

Most of his work on the treaty started after its actual conclusion. After formally leaving the Foreign Service in August 1919, Kraus maintained close links with the

⁶² Kraus, 'The Monroe-Doctrine as Germans See It', 3 *Current History* (1916) 159, at 159.

⁶³ L. von Köhler, *The Administration of the Occupied Territories, Vol. I, Belgium* (2007), reprint of a translation for the Carnegie Endowment for International Peace (1942) of Köhler's book, *Die Staatsverwaltung der besetzten Gebiete, Erster Band, Belgien* (1927); C. de Visscher, *Belgium's Case: A Juridical Enquiry* (1916).

⁶⁴ L. Reuter, *The German Occupation of Belgium during the First World War and the Flemish Movement* (1989).

⁶⁵ P. Chrysant, *Die rechtliche Stellung des Generalgouverneurs in Belgien* (1917), at 15.

⁶⁶ Keiper, *supra* note 23, at 636.

⁶⁷ Boniece, 'Brest Litovsk, Peace of (1918)', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), i, at 1051–1054.

⁶⁸ Schorkopf, 'Versailles Peace Treaty (1919)', in *ibid.*, x, at 657, 659.

⁶⁹ H. Kraus, *Tagebuchaufzeichnungen über die Unterzeichnung des Vertrags von Versailles am 28. Juni 1919* (1954), at 7, limited edition printed on the occasion of Kraus' 70th birthday (a copy is on file with the author).

Foreign Office: he taught consular law to attachés in the Senior Foreign Service and edited an annotated collection of relevant laws and internal Foreign Office regulations at the request of the Foreign Office.⁷⁰ Kraus acted furthermore as Assistant Editor (*Schriftleiter*) of the eight-volume commentary on the Versailles Peace Treaty issued by Walter Schücking.⁷¹ Together with Gustav Rödiger,⁷² an East-Frisian Upper Foreign Service diplomat, he published the supplementary materials to the commentary. These supplementary materials consisted of a collection of documents⁷³ and a chronicle of the negotiation of the Versailles Peace Treaty.⁷⁴

Like nearly all German international lawyers of the period, Kraus remained fundamentally opposed to the Versailles Peace Treaty.⁷⁵ Repeatedly – particularly after the Nazis' seizure of power – he re-emphasized the need to overturn the treaty. In this context Kraus saw Article 38 of the statute of the Permanent Court of Justice and the inclusion of principles of justice common to civilized nations as a promising change, but argued that they should not just be subsidiary sources.⁷⁶ The minor changes introduced by the German side during the negotiation of the treaty was enough in his opinion for one not to consider the Versailles Peace treaty an entirely 'dictated peace' (*Diktatfrieden*),⁷⁷ the common nationalist buzz-word of the day when referring to the treaty.⁷⁸

In spite of his criticism of the Versailles Peace Treaty he did not reject the treaty completely. Articles 1–26 comprised the covenant of the League of Nations, and Kraus devoted special attention to that organization during the inter-war period.⁷⁹ Kraus favoured German membership of the League as a way to overcome an atmosphere of suspicion in favour of a 'League atmosphere ... and the beginning of European peace'.⁸⁰ Kraus joined the *Deutsche Liga für den Völkerbund* (German League of Nations Union),

⁷⁰ H. Kraus, *Der Auswärtige Dienst des Deutschen Reiches* (1932). This book also contained advice on preparation for the Foreign Service exam (at 171–179), a practice today continued in: E. von Münchhausen, *Lernskript: Auswärtiges Amt-Fachtest Recht* (2006).

⁷¹ W. Schücking (ed.), *Kommentar zum Friedensvertrag* (1920).

⁷² For a CV of Rödiger see Keiper, *supra* note 23, iii, at 695–696. See further E. Conze et al., *Das Amt und die Vergangenheit-Deutsche Diplomaten im Dritten Reich und in der Bundesrepublik* (2010), at 186.

⁷³ H. Kraus and G. Rödiger, *Urkunden zum Friedensvertrage von Versailles vom 28. Juni 1919* (1920).

⁷⁴ H. Kraus and G. Rödiger, *Chronik der Friedensverhandlungen nebst einer Übersicht über die Diplomatie des Weltkrieges* (1920). Beginning with the assassination of Archduke Franz Ferdinand on 28 June 1914 in Sarajevo and ending with the signing of the peace treaty between Germany, Austria, and the allied powers at St Germain-en-Laye on 10 Sept. 1919 this book provides a day-to-day listing of the legally relevant actions during World War I.

⁷⁵ Vagts, *supra* note 4, at 664–665; Koskenniemi, *supra* note 9, at 237–238.

⁷⁶ Kraus, 'Revision of Peace Treaties ex aequo et bono', 1 *New Commonwealth Q* (1935–1936) 33, at 37. Kraus also served on the Advisory Research Committee of the *New Commonwealth Q*, edited by the Commonwealth Institute, based in London.

⁷⁷ Kraus, 'Friedensverträge (vom juristischen Standpunkt)', in L. Elster, A. Weber, and F. Wieser (eds), *Handwörterbuch der Staatswissenschaften* (1926), iv, at 410, 416–417.

⁷⁸ See Koskenniemi, *supra* note 9, at 249.

⁷⁹ H. Kraus, *Der Völkerbund und die Friedensverträge* (1920); Kraus, 'Zur Frage des Eintritts Deutschlands in den Völkerbund', 79 *Zeitschrift für die Gesamte Staatswissenschaft* (1925) 173.

⁸⁰ Kraus, 'Die Militärkontrolle des Völkerbundes', 30 *Deutsche Juristenzeitung* (1925) 618, at 623.

considered part of organized pacifism. This organization promoted the spirit of the League of Nations and campaigned for German membership of it.⁸¹ As a representative of the *Deutsche Liga für den Völkerbund* in close coordination with the *Auswärtige Amt* he attended the first meeting of the Assembly of the League of Nations in November 1920.⁸² Kraus' criticism of the League was more pronounced than that of other pacifists. For example, Hans Wehberg had a more favourable view of the League as a promising foundation for international peace, worth improving.⁸³ In contrast to that view, Kraus criticized the League as a missed opportunity due to its initial exclusion of defeated states.⁸⁴ He also remained critical of structural weaknesses and single acts of the League, like its exercise of military investigations in the Rhineland.⁸⁵

Kraus' rejection of the Versailles Peace Treaty and particularly its 'war guilt clause', contained in article 231 was not merely based on current political considerations but dogmatically much deeper rooted in his understanding of international law based on Kant.⁸⁶

3 International ethics – Kraus' concept of 'Staatsethos' according to Kant

A recurring feature of Kraus' work is the discussion of a 'Staatsethos',⁸⁷ a subject he chose for his Hague Lecture in 1927⁸⁸ and for a panel discussion at ASIL's annual meeting in 1932.⁸⁹ This concept is based on an in-depth discussion of Kant's social philosophy as applied to international law.⁹⁰ The starting point is the doctrinal question of the normative basis of international order. From Kant's work Kraus derived the concept of 'Staatsethos': the central issue and starting point for Kant is the individual and his freedom, based on reason.⁹¹ Hence the individual human being and his rights ought to be the decisive criteria also in international affairs for the behaviour of states. Based on Kant, Kraus rejected the Machiavellian theory that representatives of a state are driven in their international actions by moral standards quite different from those of the inter-individual level, and consequently accused proponents of that theory of double standards and labelled them as anti-moralist.⁹²

⁸¹ On the *Deutsche Liga für den Völkerbund* see J. Wintzer, *Deutschland und der Völkerbund 1918–1926* (2006), at 47–50, 185–188. Germany was a member of the League of Nations from 1926 to 1933: Tams, 'League of Nations', in Wolfrum (ed.), *supra* note 67, vi, at 760, 762–763.

⁸² The attendance of two German observers did not go unnoticed by other delegations and the League secretariat. A note by the League of Nations secretariat on this matter states that Kraus 'appears to be very sincere about the League and a moderate and liberal minded man': quoted from Wintzer, *supra* note 82, at 201, n. 1.

⁸³ *Ibid.*, at 188.

⁸⁴ H. Kraus, *Das Wesen des Völkerbundes* (1920).

⁸⁵ Kraus, *supra* note 80.

⁸⁶ Kraus, *supra* note 77, at 432–433.

⁸⁷ H. Kraus, *Gedanken über Staatsethos im internationalen Verkehr* (1925), reviewed by Bradley, *5 Books Abroad* (1931) 26.

⁸⁸ Kraus, *supra* note 34, at 383.

⁸⁹ Kraus, *supra* note 46.

⁹⁰ Kraus, *Das Problem Internationaler Ordnung bei Immanuel Kant* (1931), reviewed by Geiser, *26 AJIL* (1932) 231.

⁹¹ B.S. Byrd and J. Hruschka, *Kant's Doctrine of Right: A Commentary* (2010), at 279–293.

⁹² Kraus, *supra* note 90, at 6–7.

Though Kant's ethics are based on individuals, the state has a limited, specific function as an agent of individual freedom, and in order to act in this capacity has certain rights, among which Kraus particularly emphasized the equality of states. The inter-individual categorical imperative should also apply to states. From this he concluded that a matter of collective guilt must not be considered at the end of a war. His overall conclusion on what ought to be the normative guiding principle for state behaviour was formulated by Kraus in the following words: 'a single standard of morality for the individual and the state'⁹³ – this ought to constitute the ethos of a state, the '*Staatsethos*'. '*Staatsethos*' is associated with conservative theories of the state, as promoted during the Weimar Republic.⁹⁴

Kraus' strong focus on Kant's work – besides being an obvious subject for a professor of international law in Königsberg – can only be explained in the context of the dispute on methods and premises of law that unfolded in the Weimar Republic.⁹⁵ Kraus was not just well aware of that dispute and acquainted with its main protagonists,⁹⁶ but conscious of writing in this context. Kraus' writing is very much in line with the early anti-positivist critiques of the 'Newkantian' positivism, articulated for example by Erich Kaufmann,⁹⁷ in search of reasoning for law beyond positive law. Unlike most anti-positivist critiques of contemporaneous positivism,⁹⁸ Kraus – though not uncritical of the Weimar constitution – lacked their strong anti-republican tendencies.

His concept of '*Staasethos*', though never fully elaborated, was by and large well received in the USA. John Brown Scott, acting as toastmaster of the American Society of International Law's annual dinner in 1932, followed Kraus' presentation on international morals with the remark: '... I beg to assure you that the wish of our organization at the present moment would be "more power to your elbow"'.⁹⁹

4 Kraus and the Weimar Constitution

Though '*Staatsethos*' featured prominently in Kraus' lectures in the inter-war period he did not limit his lectures in the US to this topic. In his lecture to the Harris Foundation given in July 1924, entitled 'Germany in Transition',¹⁰⁰ Kraus endeavoured to explain the German position on the League of Nations, the reparations question, the new Weimar Constitution, and separatist tendencies to an American audience.

⁹³ Kraus, *supra* note 34, at 245.

⁹⁴ R. Walkenhaus, *Konservatives Staatsdenken – Eine wissenssoziologische Studie zu Ernst Rudolf Huber* (1997), at 265.

⁹⁵ M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Bd. III: Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914–1945* (1999), at 153 ff; A. von Ungern-Sternberg and U. Schröder (eds), *Zur Aktualität der Weimarer Staatsrechtslehre* (2011).

⁹⁶ In 1922 Kraus was one of the 42 founding members of the *Vereinigung Deutscher Staatsrechtslehrer* at its founding conference in Berlin: see Triepel, 'Die Vereinigung der deutschen Staatsrechtslehrer', 43 *Archiv des öffentlichen Rechts* (1922) 349.

⁹⁷ E. Kaufmann, *Kritik der neukantianischen Rechtsphilosophie* (1921).

⁹⁸ M. Stolleis, *Recht im Unrecht – Studien zur Rechtsgeschichte des Nationalsozialismus* (1994), at 130–132.

⁹⁹ Kraus, *supra* note 34, at 245.

¹⁰⁰ H. Kraus, *Germany in Transition – Lectures on the Harris Foundation* (1924), reviewed by Graham, 19 *American Political Science Rev* (1925) 401.

His explanation of the Weimar Constitution as compared to its predecessors was certainly more than a lukewarm acceptance of the republican constitution. Kraus commended the constitution for its inclusion of fundamental rights (*Grundrechte*) but criticized it for its imperfect regulations in this regard, indicating a compromise between the parties of a disunited parliamentary majority.¹⁰¹ He observed, 'When studying the new constitution one sometimes has the impression that its authors were frightened by their own courage in this and that question.'¹⁰² He included an analysis of political tendencies and conditions in Germany, in which he attributed the attempted Hitler–Ludendorff Coup in 1923 to 'a lack of leadership' on the national level.¹⁰³ All in all, his attitude towards the Weimar Constitution, though not uncritical, was – compared to his contemporaries' – rather moderate and generally positive. His endorsement of the Weimar Constitution was more than that of a mere '*Vernunftrepublikaner*'.¹⁰⁴ In dealing with the question to what degree the new German Constitution was accepted by the German people, he held that 'if the German people were asked today the question whether the Weimar Constitution should be fundamentally altered or abolished, the majority would probably answer "No"'.¹⁰⁵

Though the Weimar Constitution formally remained in force throughout the Third Reich, not long after Kraus wrote these lines, in March 1933 the German electorate made the Nazi Party the strongest party in parliament with 43.9 per cent of the vote, resulting ultimately in the virtual abolition of the Weimar Constitution.¹⁰⁶

B *International Lawyer in a Totalitarian State*

Kraus' employment in the Foreign Office, his work on the Versailles Peace Treaty, and his international work in general made him politically unsuitable to act as a professor after 1933 in the eyes of his opponents at the University of Göttingen. Organized protests against him did not reach the same level as they did in some other cases,¹⁰⁷ but Kraus clearly was no longer accepted by all of his students or the entire faculty. One of his main opponents in the faculty, the newly appointed dean, Karl Siegert,¹⁰⁸ considered him a 'downright democrat and protagonist of the League of Nations idea'.¹⁰⁹

¹⁰¹ Kraus, *supra* note 100, at 164–165.

¹⁰² *Ibid.*, at 165.

¹⁰³ *Ibid.*, at 20.

¹⁰⁴ According to the biographical handbook of the German Foreign Service Kraus was a member of the liberal Deutsche Staatspartei, which existed from 1930 to 1933; Keiper, *supra* note 23, at 636. See further Frye, 'The German Democratic Party 1918–1930', 16 *Political Research Q* (1963) 167.

¹⁰⁵ Kraus, *supra* note 100, at 185.

¹⁰⁶ I. Kershaw, *Weimar. Why did German Democracy Fail?* (1990), at 468 ff.

¹⁰⁷ In Munich, e.g., National Socialist students in July 1931 staged protests against Hans Nawiasky (1880–1961, Professor of Constitutional Law) because he compared the Versailles Peace Treaty to peace treaties between Germany and occupied states between 1914 and 1918. The subsequent riots forced the University to close for several days: see Behrendt 'Hans Nawiasky und die Münchner Studentenkrawalle von 1931', in E. Kraus (ed.), *Die Universität München im Dritten Reich* (2006).

¹⁰⁸ Karl Siegert (1901–1988, Professor of Criminal Law in Göttingen 1933–1945): see Szabo, *supra* note 35, at 146.

¹⁰⁹ Quoted from Halfmann, 'Eine "Pflanzstätte bester nationalsozialistischer Rechtsgelehrter": Die juristische Abteilung der Rechts- und Staatswissenschaftlichen Fakultät', in H. Becker, H.-J. Dahms, and C. Wegeler (eds), *Die Universität Göttingen unter dem Nationalsozialismus* (1987), at 88, 101.

1 *Debating National Socialist doctrine of international law*

Unlike several other scholars who chose not to get involved in the controversial debate on the relationship between the new regime's ideology and international law, Kraus opted for active participation. Conflicts with younger German lawyers, manoeuvring for personal advantage, were inevitable. Kraus' work between 1933 and 1937 bears some of the characteristic features and deals with controversial issues of the international law literature produced at this period in Germany.¹¹⁰ These works were not easy to decipher, with basically incoherent premises, and not well received among international lawyers outside the Reich.¹¹¹ Earlier Kraus had written about early Soviet understanding of international law.¹¹² Discussing the National Socialist understanding of international law thus did not seem far-fetched. In November 1933, in an article in the *Juristische Wochenschrift*, Kraus outlined his view of the new regime's understanding of international law.¹¹³ This article was also noted abroad and led Charles C. Hyde to assume that Kraus had lately 'become at least a moderate national socialist', as he wrote in 1939 in the *American Journal of International Law*.¹¹⁴ Besides the contradictory term, if not the oxymoron, 'moderate national socialist', if one takes a closer look at the contents of the article and places the article which led Hyde to assume that Kraus had adopted certain features of national socialist ideology in its historical context, the result is inconclusive. The article was published in November 1933, one month after Germany had declared it would leave the League of Nations.¹¹⁵ It is not at all a rejection of Nazi ideology but appears to be an attempt to accommodate consequences of Germany leaving the League with positive international law. Kraus tries to do so by taking – in hindsight very naïvely – statements of the Nazi leadership regarding their desire for peace at face value, quoting a number of statements which paid lip service to international peace and understanding. In hindsight this article may serve as a tragic example of an author's attempt to attribute meaning to the actual wording of statements instead of dismissing them as the propaganda they were.¹¹⁶ Actually all of Kraus' interpretations of National Socialism and international law were soon to be proven wrong: Kraus argued for example that the principle of non-intervention

¹¹⁰ Vagts, 'National Socialism and International Law', in Wolfrum (ed.), *supra* note 67, vii, at 483–485.

¹¹¹ Gott, 'The National Socialist Theory of International Law', 32 *AJIL* (1938) 704; Herz 'The National Socialist Doctrine of International Law and the Problems of International Organization', 54 *Political Science Q* (1939) 536.

¹¹² Kraus, 'Introduction', in E.A. Korowin, *Das Völkerrecht der Übergangszeit, Grundlagen der völkerrechtlichen Beziehungen der Union der Sowjetrepubliken* (1929), reviewed by Zaitzeff, 90 *Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics* (1931) 1969.

¹¹³ Kraus, 'Das zwischenstaatliche Weltbild des Nationalsozialismus', 44 *Juristische Wochenschrift* (1933) 2418.

¹¹⁴ Hyde, 'The Nazi Proscription of German Professors of International Law', 33 *AJIL* (1939) 112, at 117; Hyde, however, pointed out that Kraus' articles could never have been published in the German periodical after its '*Gleichschaltung*' (co-ordination).

¹¹⁵ In the context of the journal it was printed in, the article stands in contrast to a self-congratulatory article by a young Legal Officer published on the page before: Schraut, 'Mit Adolf Hitler zu Gleichberechtigung und Frieden', 44 *Juristische Wochenschrift* (1933) 2417.

¹¹⁶ Kraus, e.g., quotes a statement from a speech of the newly elected chancellor on 23 Mar. 1933 and wrongly deduces from that a 'rejection of revanchist thinking': *supra* note 113, at 2419.

in general had been strengthened by German statements on non-involvement in matters considered domestic affairs. In support of this assumption Kraus quoted a statement by Foreign Secretary von Neurath, denying any competence of the League concerning the treatment of German Jews. Based on this statement he assumed that National Socialist policy would in turn exercise the same restraint, expected from the League with regard to its involvement in Austria.¹¹⁷ Kraus argued furthermore that 'violation of other people' was not a part of the international programme of National Socialism.¹¹⁸ Quoting a number of statements by prominent representatives of the regime to the effect that Germany desired peace and 'rejected all policy of force', he deduced a limited willingness to use force as a means of preserving rights and linked it to the concept of *bellum iustum* as stated by Thomas Aquinas.¹¹⁹ On each of these claims he could not have been more wrong. It is perhaps no coincidence that Kraus in his judgement on the likeliness of a war was as wrong as was his academic teacher Liszt with regard to World War I. Liszt confessed in 1917 that in view of positive pre-war developments in the field of international institutions he had believed war would be impossible until the moment it was declared.¹²⁰

Kraus pointed out that in his view National Socialism did not deny the quality of international law as law, thereby contradicting the more extreme German lawyers of the day. Some National Socialist theorists of the time argued that ultimately international law had no binding quality. As the *Volk* was considered the highest institution in international life it could not be bound by rules created among inferior subjects such as states. Hence according to that theory there was nothing higher than the foreign relations law of the *Volk*, which had to prevail when in conflict with international law. This thought, stated prominently in a book by Ludwig Schecher entitled *Deutsches Aussenstaatsrecht (Germany's Exterior Public Law)*¹²¹ was explicitly rejected by Kraus.¹²² In this rejection of Schecher he found himself in line with a very diverse set of other scholars of the time. Schecher's argument was rejected by National Socialist theory of international law,¹²³ as National Socialism could not openly reject the notion of international law,¹²⁴ and also provoked a massive rejection among internationalists.¹²⁵

On a more theoretical level Kraus noted a turn towards thinking in terms of natural law. Whereas the National Socialistic doctrine of international law argued against positivism and emphasized the 'political character' of international law,¹²⁶

¹¹⁷ *Ibid.*, at 2420.

¹¹⁸ *Ibid.*, at 2421.

¹¹⁹ *Ibid.*, at 2423.

¹²⁰ F. von Liszt, *Vom Staatenverband zur Völkerrechtsgemeinschaft: Ein Beitrag zur Neuorientierung der Staatspolitik und des Völkerrechts* (1917).

¹²¹ L. Schecher, *Deutsches Aussenstaatsrecht* (1933).

¹²² Kraus, *supra* note 113, at 2420.

¹²³ E.g., Wolgast, 'Nationalsozialismus und internationales Recht', 4 *Deutsches Recht* (1934) 196.

¹²⁴ J. Herz, *Die Völkerrechtslehre des Nationalsozialismus* (1938), at 65–71. John Herz published this work under the pseudonym 'Eduard Bristler' in order to protect his family in Germany; Herz, *supra* note 111, at 539–540; Vagts, *supra* note 4, at 690–692.

¹²⁵ E. Buza, *Das Nationalsozialistische Deutschland und das Völkerrecht* (1936) with further references.

¹²⁶ Schmitt, 'Völkerrechtliche Formen des modernen Imperialismus' (1932), in C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939* (1940, reprinted 1988), at 162, 168.

Kraus – though not at all opposed to a natural law based approach to international law – tried to highlight that positive law could not simply be ignored based on a changed legal conviction. Instead certain criteria had to be fulfilled in order for a treaty to be considered void. In his reply to Schmitt’s outlining of a national socialist understanding of international law,¹²⁷ he thus criticized the desire to see discontinuity in almost every aspect of international law, which impaired the possibility of a permanent international order.¹²⁸ Kraus defended the work of German international lawyers since 1918 against Schmitt’s reproach that they had uncritically adhered to the positivist Vienna School of Kelsen,¹²⁹ and in doing so merely attained a ‘specious prosperity’ (*Scheinblüte*).¹³⁰ Kraus’ perception of the National Socialist understanding of international law was not well received amongst ardent supporters of the regime.¹³¹

Would it be correct to assume Kraus had become a National Socialist international lawyer after 1933? John Herz, writing under the pseudonym ‘Eduard Bristler’, treats Kraus’ work between 1933 and 1937 in his contemporaneous, still leading work on National Socialism and international law at some length.¹³² Herz discussed Kraus’ work particularly with regard to his argument that international law knows no real community interest but is merely constituted by ‘parallel interests of states’.¹³³ He criticized his concept of a pre-set state ethos as the basis for rules of equity that supported German claims for a revision of the Versailles Peace Treaty. Kraus had supported his argument by drawing an analogy to colonialist ‘unequal treaties’,¹³⁴ a popular argument within the National Socialist doctrine of international law.¹³⁵ Consequently Herz placed Kraus’ work in his list of ‘National Socialist’ authors and listed him among authors like Friedrich Berber, Viktor Bruns, Otto Forsthoff, and Alfred Verdross.¹³⁶ However, he added that other scholars might differ on the placing of Kraus among National Socialist authors.¹³⁷ This placing ultimately comes down to a matter of definition and depends on the criteria required to count an international lawyer as a ‘National Socialist’ author. Lawrence Preuss, for example, required adherence to a conception based on race as the decisive criterion for a lawyer to be considered ‘National Socialist’, and thus placed Kraus in a different category of lawyers with a more traditional understanding of international law.¹³⁸ Preuss also acknowledged obvious resemblances between Kraus’ anti-positivist views on the fundamental

¹²⁷ C. Schmitt, *Nationalsozialismus und Völkerrecht* (1934).

¹²⁸ Kraus, *supra* note 12, at 156.

¹²⁹ Schmitt, *supra* note 127, at 16 ff.

¹³⁰ Kraus, *supra* note 12, at 159–161.

¹³¹ Richter, ‘Völkerrecht’, 9 *Deutsches Recht* (1933) 206.

¹³² Herz (Bristler), *supra* note 124, at 101–103.

¹³³ Kraus, ‘Interesse und Zwischenstaatliche Ordnung’, 49 *Niemeyers Zeitschrift für Internationales Recht* (1934) 22, at 57.

¹³⁴ Kraus, *supra* note 76.

¹³⁵ On this see Vagts, *supra* note 4, at 688, 692–693.

¹³⁶ Herz (Bristler), *supra* note 124, at 102–103.

¹³⁷ *Ibid.*, at 109.

¹³⁸ Preuss, ‘National Socialist Conceptions of International Law’, 29 *Am Political Science Rev* (1935) 594, at 597–600.

nature of international law and those of Erich Kaufmann,¹³⁹ as set out in his monograph¹⁴⁰ *Das Wesen des Völkerrechts und die clausula rebus sic stantibus*.¹⁴¹ Unlike other authors who used Kaufmann's work on the *clausula rebus sic stantibus* as a vehicle to justify specific German claims of power,¹⁴² Kraus makes more specific references to the legal concept of estoppel and principles of equity.¹⁴³

Kraus' works in the years 1933 to 1937 can either be considered as mere manoeuvres¹⁴⁴ in order not to be removed or as an actual attempt to endear himself to the regime.¹⁴⁵ To evaluate to what degree the adjustments in his work were based on real convictions, or rather tactical moves to keep his chair, would require an act of clairvoyance. It is only possible to place them in the context of Kraus' work. Kraus' texts on the National Socialist understanding of international law were written in the first years of the Third Reich, when German science of international law 'had not yet completely deteriorated into propaganda'.¹⁴⁶ Kraus' Hague Lecture of 1934, for example, contrasts sharply with the works in which he discussed the National Socialist doctrine of international law. In this lecture he neither dealt with the change of government which had taken place in Germany, nor did he mention the intended revision of the Versailles Peace Treaty or deal with any other aspect of the National Socialist doctrine of international law.¹⁴⁷

Hyde, writing in 1939, did not mention Kraus' further publications on the same issue, notably his work *Die Krise des zwischenstaatlichen Denkens (The Crisis of Interstate Thought)*,¹⁴⁸ published in May 1933, which is considered to be one of the main reasons for his forced retirement.¹⁴⁹ In this work, addressed to a general audience, he commended the Permanent Court of International Justice for its contribution to the settlement of disputes, warned against leaving the League of Nations,¹⁵⁰ and reiterated his criticism of the Versailles Peace Treaty. The text reads in large part more as a pamphlet than as a work intended for academic discussion. He states that equality, non-intervention, and adequate balancing of interests still formed the pillars of international order.¹⁵¹ As the internationalism and international system of the post-war order had not sufficiently accommodated these principles, a new international system would have to take these principles into account, as any international order would always

¹³⁹ On Erich Kaufmann's life and work see Mosler: 'Erich Kaufmann zum Gedächtnis', 32 *ZaöRV* (1972) 235.

¹⁴⁰ E. Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus* (1911).

¹⁴¹ Preuss, *supra* note 138, at 600. Writing in the *AJIL*, Virginia L. Gott also made some limitations when linking Kraus to National Socialist doctrine: Gott, 'The National Socialist Theory of International Law', 32 *AJIL* (1938) 704, at 708–709.

¹⁴² On this see Koskeniemi, *supra* note 9, at 179–181.

¹⁴³ Kraus, *supra* note 134, at 33–43.

¹⁴⁴ Vagts, *supra* note 4, at 677; Halfmann, *supra* note 109, at 101–103.

¹⁴⁵ Herz (Bristler), *supra* note 124, at 101–103.

¹⁴⁶ Fassbender, *supra* note 4, at 490.

¹⁴⁷ Kraus, *supra* note 34, at 312–400.

¹⁴⁸ Kraus, *supra* note 18, reviewed by Colombos, 'Review: Die Krise des zwischenstaatlichen Denkens', 12 *Int'l Aff* (1933) 808.

¹⁴⁹ Rauschnig, *supra* note 23, at 376–377.

¹⁵⁰ Kraus, *supra* note 18, at 14–16.

¹⁵¹ *Ibid.*, at 19.

have to be adaptable to the ideas of a certain period of time. In this context Kraus cautioned, 'Whoever proclaims today, for today, an empire of a thousand years is a fool; and a statesman who does not correctly include the time factor in his considerations thus becomes unfaithful to his oath'.¹⁵² This could clearly be read as a reference to the newly elected chancellor, who had done just that in his speech on 23 March 1933 to the Reichstag, printed in part as an Annex to the work.¹⁵³ Kraus warned that a new formative thinking was needed by the world, 'today more than ever before, if not a thunderstorm, much worse than the World War shall break out'.¹⁵⁴ This text is hardly the writing of an international lawyer who fully endorsed the National Socialist doctrine of international law. However, Kraus very much agreed with the general aim of revising the Versailles Peace Treaty.

The National Socialist party and state authorities of the National Socialist state clearly did not consider him a lawyer who adhered to their ideology. It seems rather unlikely that details of his arguments counted for those set on removing Kraus from his chair, based on his prior life. Evidently the undeniable concessions which he made to the regime¹⁵⁵ and attempts to fit its ideology into a traditional framework of international law were not sufficient to save him from the proscriptive policy of a totalitarian regime which demanded a comprehensive and complete acceptance of its positions. No matter how diffuse the positions of the regime have been, there was no such thing as the gradual acceptance of a totalitarian ideology.¹⁵⁶

2 Forced retirement

From 1934 onwards Kraus' ability to travel and participate in conferences abroad was limited by the Prussian Ministry of Science and the university. The local Nazi party of Göttingen in particular opposed him.¹⁵⁷ He was still allowed to give his lecture on the law of treaties at the Hague Academy of International law in 1934 and attend the Annual Meeting of the *Institut de Droit International* in Madrid the same year in spite of attempts by local party groups to prevent him from attending.¹⁵⁸

To consider the election of Kraus as a full member of the *Institut de Droit International* in 1934 as sending a clear signal of disapproval to the new German government of the day would certainly overstate the meaning of this gesture. Yet, the acceptance of this membership was not at all in line with, if not contrary to, the prevailing political

¹⁵² *Ibid.*, at 26. Author's translation of 'wer heute, für heute, das tausendjährige Reich proklamiert, ist ein Narr; und ein Staatsmann, welcher den Faktor der Zeit nicht richtig in sein Kalkül einsetzt, verkennet grundlegend seine Aufgabe und wird seinem Eid untreu'.

¹⁵³ The annex to *ibid.* also contained the Mussolini Memorandum of 1933 (at 43), a speech and draft by the British Prime Minister MacDonald to the Conference on Disarmament of 16 Mar. 1933 (at 43–53), and a Foreign Policy Memorandum by President Franklin D. Roosevelt of 15 May 1933 (at 54).

¹⁵⁴ *Ibid.*, at 5. Author's translation of 'heute mehr denn je, wenn nicht ein Gewitter niederbrechen soll, viel schwerer als der Weltkrieg es war'.

¹⁵⁵ Like, e.g., Verdross, Kraus joined the National Socialist 'Rechtswahrerbund' in 1934: Halfman, *supra* note 109, at 124.

¹⁵⁶ H. Arendt, *The Origins of Totalitarianism* (2nd edn, 1958), at 389 ff.

¹⁵⁷ On Kraus' correspondence with the Ministry see Halfmann, *supra* note 109, at 101–102.

¹⁵⁸ Rauschnig, *supra* note 23, at 378.

direction, as most German members had already left the Institute, which was felt to have taken a pro-Versailles attitude, in the 1920s.¹⁵⁹

In May 1937 the Ministry of Science, in search of a pretext to force Kraus to retire, informed him that, given his membership of the *Deutsche Friedensgesellschaft* and the *Pro-Palästina-Komitee*, he was deemed unfit to teach National Socialist law. Kraus explained that he had been a member of the *Deutsche Friedensgesellschaft* only in order to benefit from the reduced fees for the *Friedens-Warte*, a journal which was of scientific relevance to him. Furthermore he had only maintained contacts with the pro-Palestine-Committee because these were needed for research purposes when working on the law of minorities.¹⁶⁰ In a final attempt to keep his chair, he (over-)emphasized his criticism of the Versailles Peace Treaty and tried to give his criticism of the League of Nations a more nationalistic ring than it actually had. One particularly cringes at Kraus' assurance that he considered himself 'absolutely competent to teach successfully the law of the national socialist state and its relations to other states'.¹⁶¹

Kraus' replies made it possible for him to postpone his removal for several months, but ultimately could not save him from being dismissed. The Law Faculty at the University of Göttingen did not care much about the legal reasons for getting rid of Kraus, and with the backing of the Ministry of Science in Berlin opted for a financially disadvantageous solution and forced Kraus to retire for reasons of health at the age of 53 with effect from 31 December 1937,¹⁶² denying him the status of emeritus professor.

One possible course of action would have been to emigrate. For Kraus, who had spent several years in the US and was married to an American citizen, the sculptor Katherine Hobson-Kraus,¹⁶³ it would have been a much smaller step to emigrate than for other German lawyers who decided to leave Germany.¹⁶⁴ No personal statement from Kraus reveals his reasons for deciding against this option. No doubt, his work between 1933 and 1937 would have made him an outsider among US-American or British international lawyers just as he had been an outsider among German international lawyers since 1933.

After 1937 Wilhelm Grewe acted for a short period as a replacement (*Lehrstuhlvertreter*) for Kraus.¹⁶⁵ In April 1940 Ulrich Scheuner¹⁶⁶ became Kraus'

¹⁵⁹ Münch, 'Das Institut de Droit International', 28 *Archiv des Völkerrechts* (1990) 76.

¹⁶⁰ Kraus, *Das Recht der Minderheiten* (1927), reviewed by Burchfield, 22 *AJIL* (1928) 216.

¹⁶¹ Kraus in a letter to the Ministry for Education, 30 June 1937. Author's translation of: 'einschränkungslos für geeignet halte, das Recht des nationalsozialistischen Staates und seiner Beziehungen zu anderen Staaten erfolgreich zu lehren', quoted from Halimann, *supra* note 109, at 102.

¹⁶² Reprint of the letter by Kraus asking to retire: Calliess, Nolte, and Stoll, *supra* note 22, at 104.

¹⁶³ At the time of his forced retirement in 1937 his wife, Katherine Hobson-Kraus, was a resident of New York: see Hoffmann, *supra* note 46, at 349–351. She left Germany in 1935 and they divorced in 1939. Kraus re-married Mathilde Nagel in 1940, with whom he had two sons: Jaeger, 'Herbert Kraus', 12 *Neue Deutsche Biographie* (1979) 683.

¹⁶⁴ E.C. Stiefel and F. Mecklenburg, *Deutsche Juristen im Amerikanischen Exil (1933–1950)* (1991).

¹⁶⁵ Martinez and Prill, 'Geschichte der Völkerrechtsforschung und -lehre und der Georg-August-Universität Göttingen', in Calliess, Nolte, and Stoll, *supra* note 22, at 51, 58.

¹⁶⁶ On Scheuner's work see Tomuschat, 'Ulrich Scheuners völkerrechtliches Werk', in C. Tomuschat (ed.), *Ulrich Scheuner – Schriften zum Völkerrecht* (1984), at xi–xxxi. Scheuner's work on the Monroe Doctrine in particular stands in sharp contrast to Kraus' work on this subject: Meiertöns, *supra* note 50, at 48–51.

successor, but Scheuner left Göttingen as early as in July 1941 for Strasbourg, to participate in the formation of a law school to serve as a role model for national socialist faculties, just like the role model established in Kiel.¹⁶⁷ Mainly on the initiative of the University President, Rudolf Smend, the University tried to hire as a successor to Kraus Ulrich von Hassell, a diplomat without a PhD, who was later executed due to his involvement in the 20 July plot.¹⁶⁸ Von Hassell politely declined the offer for personal reasons.¹⁶⁹ Further attempts during the war to find a successor for Kraus failed, and so Göttingen remained until 1945 without a professor of international law.¹⁷⁰

Forced retirement went along with the loss of other functions: Between 1931 and 1935 Kraus had acted as one of the editors of *Niemeyers Zeitschrift für Internationales Recht*. In 1937 this task was taken over by Gustav Walz, who is considered the role model of a National Socialist international lawyer.¹⁷¹ Walz merged the journal with the *Zeitschrift für Völkerrecht*, formerly edited by Walther Schücking and Karl Strupp, into the new journal *Völkerbund und Völkerrecht*.¹⁷² During the period of academic inactivity forced upon him, Kraus took to writing fiction and wrote some historical novels, of which only a few were published.¹⁷³

C Post-War Work

The end of the war in May 1945 found Kraus in Berchtesgarden, where he had moved his family after the Dresden bombing in February 1945. Kraus did not lose any time and in June 1945 applied to be reinstated as a professor at the University of Göttingen,¹⁷⁴ achieving the revocation of his retirement with effect from October 1945.¹⁷⁵ A letter of recommendation for the required de-nazification procedure¹⁷⁶ was written by his former colleague, Gerhard Leibholz, by then a professor at Oxford.¹⁷⁷ Kraus, however, did not resume his work in Göttingen before the 1947/1948 winter term because he

¹⁶⁷ Eckert, 'Was war die "Kieler Schule"', in Säcker, *supra* note 3, at 37–70.

¹⁶⁸ This attempt to hire von Hassell got Smend noticed by the secret state police (Gestapo) after the 20 July 1944 plot: Halfmann, *supra* note 109, at 113. On von Hassell see Conze *et al.*, *supra* note 72, at 16, 36–37.

¹⁶⁹ Letter from von Hassell to Smend rejecting the offer, printed in Calliess, Nolte, and Stoll, *supra* note 22, at 109.

¹⁷⁰ Martinez/Prill, *supra* note 165, at 57–59.

¹⁷¹ C. Schmelz, *Der Völkerrechtler Gustav Walz – Eine Wissenschaftskarriere im Dritten Reich* (2011).

¹⁷² Stolleis, *supra* note 95, at 393–394.

¹⁷³ H. Kraus, *Kleine Welt und großes Glück. Eine romantische Erzählung aus Alt-Berlin um 1900* (1940); H. Kraus, *Köpplings Vermächtnis* (1963); Jaeger, *supra* note 163, at 684.

¹⁷⁴ Halfmann, *supra* note 109, at 115. Letter from Kraus requesting his reinstatement, printed in Calliess, Nolte, and Stoll, *supra* note 22, at 115.

¹⁷⁵ The faculty, Rudolf Smend in particular – two years older than Kraus – did however voice reservations based on Kraus' age and an obscure story that, according to the housekeeper of Gerhard Anschütz (1867–1948, Professor of Constitutional Law in Heidelberg), Kraus had tried to speak to Anschütz, dressed in the uniform of a major in the US Army. This rumour was soon quelled. On this episode see Szabo, *supra* note 35, at 155.

¹⁷⁶ Printed in Calliess, Nolte, and Stoll, *supra* note 22, at 114.

¹⁷⁷ On Leibholz see further Wiegandt: 'Gerhard Leibholz', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted – German Speaking Emigré Lawyers in Twentieth-century Britain* (2004), at 535–583.

became one of the defence counsel of the former president of the Reichsbank, Hjalmar Schacht, at the Nuremberg tribunal.¹⁷⁸

1 Defence counsel in Nuremberg

The historian Percy Schramm, official staff diarist of the German High Command, claimed that he recommended Kraus as a suitable defence lawyer for Hjalmar Schacht.¹⁷⁹ Kraus acted as associate counsel while the Attorney (*Rechtsanwalt und Notar*) Rudolf Dix, Chairman of the German Bar Association from 1931 to 1933,¹⁸⁰ acted as the main counsel for the defendant. His main task was the drafting of memoranda, which was not unusual for associate counsel, as some associate counsel did not speak at all before the tribunal. He did, however, take part in the questioning of witnesses, and directly questioned Albert Speer¹⁸¹ and Herman Göring on behalf of the absent defence counsel for the former Foreign Secretary, von Neurath.¹⁸²

Schacht, President of the Reichsbank from 1923 to 1930 and Minister of the Economy from 1933 to 1937, was indicted for crimes against peace (planning and waging wars of aggression), but not for war crimes and crimes against humanity. While the Soviet judges of the tribunal argued in favour of convicting Schacht, the opinion of the British judges of the tribunal prevailed and Schacht was acquitted.¹⁸³

For Kraus, the most important leap forward in international criminal law in the statute of the tribunal was that guilt was no longer considered something that could be attributed to a whole nation collectively, as was the case in Article 231 of the Versailles Peace Treaty, but had to be assessed on an individual basis.¹⁸⁴ Despite being critical of individual points of the indictment, particularly the prohibition of wars of aggression, with regard to the *nulla poene sine lege* principle, he praised the tribunal for its adherence to principles of fair trial and its political warning function for the future.¹⁸⁵ In his view the enormity of the human harm it addressed helped to overcome any technical legal deficiencies and imperfections of the tribunal.¹⁸⁶ Furthermore, Kraus wrote a

¹⁷⁸ Wilhelm Grewe acted again as his stand-in (*Lehrstuhlvertreter*) until 1947: Martinez/Prill, *supra* note 165, at 60.

¹⁷⁹ Schramm, 'Die Treibstoff-Frage vom Herbst 1943 bis Juni 1944', in Kruse and Seraphim (eds), *supra* note 40, at 394–422. Schramm also described how he and Kraus – both pre-war professors in Göttingen – met by coincidence and to each other's surprise in the summer of 1945 on a road in Berchtesgarden, Kraus looking for shelter away from Dresden. Percy Schramm as a major and staff member of the High Command. One cannot help but wonder what the two men might have discussed. On Schramm see Bak, 'Percy Ernst Schramm', in H. Damico and J. Zavadil (eds), *Medieval Scholarship. Biographical Studies on the Formation of a Discipline* (1995), at 247–262.

¹⁸⁰ Dr Rudolf Dix (1884–1952) from Apr. 1931 to May 1933 was chairman of the German Bar Association (*Deutscher Anwaltverein*) before he was replaced by an NS party member and the association dissolved the same month: see www.anwalts-geschichte.de/fotogalerie/dav_biographie.html. Dix was, *inter alia*, the lawyer for resistance member Hans von Dohnanyi: E. Chowanec, *Der "Fall Dohnanyi" 1943–45* (1991), at 55.

¹⁸¹ 160th day of the Trial, Friday 21 June 1946, Nuremberg Trial Proceedings, xvi, at 512–513.

¹⁸² 84th day of the Trial, Monday 18 Mar. 1946, Nuremberg Trial Proceedings, ix, at 395–398.

¹⁸³ T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992), at 564–565.

¹⁸⁴ Kraus, *Gerichtstag in Nürnberg* (1947), at 12.

¹⁸⁵ Kraus, *Das Urteil von Nürnberg 1946* (1961), at 5–8.

¹⁸⁶ Kraus, 'The Nuremberg Trial of the Major War Criminals: Reflections after Seventeen Years', 13 *De Paul L Rev* (1964) 333.

commentary on the Allied Control Council Law No. 10,¹⁸⁷ which formed the basis for the 12 subsequent trials in Nuremberg after the trial of the German major war criminals.¹⁸⁸ He also participated in these trials: he wrote an expert's opinion, commissioned by the defence and submitted in the Flick case against major industrials¹⁸⁹ in which he discussed the subjectivity of individuals under international law and argued that only officials but no private persons could *a priori* violate international law, as private individuals were no subjects under international law.¹⁹⁰

The main work on the Nuremberg Tribunal commenced for Kraus with the end of his stay in Nuremberg: the International Military Tribunal gave him the task of editing the official German collection of the materials of the tribunal. When returning to Göttingen, Kraus thus brought this material, consisting of about 1.5 million printed pages, with him. The Institute of International Law at the University of Göttingen subsequently edited indices and registers of these materials.¹⁹¹

2 *The European Coal and Steel Community and the Oder–Neisse Line*

Kraus' work on the development of international criminal law helped him to regain international attention and respect.¹⁹² Consequently, the German government appointed him as chairman of the advisory board on the implementation of the Schuman Plan of 9 May 1950. In speedy negotiations – given the task and novelty of the approach – the initial suggestion of placing the French and German coal and steel industries under a common 'supranational authority' led to the Treaty on the European Coal and Steel Community (ECSC), signed on 18 April 1951.¹⁹³ Supranational elements of the ECSC¹⁹⁴ were very much in line with Kraus' claim of transferring inter-individual ethical standards to the international realm, and hence he welcomed the early European integration process.¹⁹⁵ Again Kraus considered editing of the relevant material in German to be of foremost importance, and thus he published a collection of relevant materials on the early European integration process.¹⁹⁶ In his publications on the European integration movement Kraus returned to the positivist approach of his early works: he described fundamental early developments

¹⁸⁷ H. Kraus, *Kontrollratsgesetz Nr. 10* (1948).

¹⁸⁸ G. Werle, *Principles of International Criminal Law* (2009), at 8.

¹⁸⁹ Friedrich Flick *et al.*, US Military Tribunal, judgment of 22 Dec. 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, v, at 88 ff.

¹⁹⁰ S. Jung, *Die Rechtsprobleme der Nürnberger Prozesse* (1992), at 181–184.

¹⁹¹ A special section of the institute categorized and administered the materials between 1949 and 1958 when this task was transferred to the national archives of state: Martinez/Prill, *supra* note 165, at 60–62.

¹⁹² Rauschnig, *supra* note 23, at 379 ff.

¹⁹³ On this see Mosler, 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl', 13 *ZaöRV/HJIL* (1951) 1.

¹⁹⁴ Von Borries, 'European Coal and Steel Community (ECSC)', in Wolfrum (ed.), *supra* note 68, iii, at 767, 775.

¹⁹⁵ Kraus, 'Betrachtung über die rechtliche Struktur der Europäischen Gemeinschaft für Kohle und Stahl', in E. Kaufmann, U. Scheuner, and W. Weber (eds), *Rechtsprobleme in Staat und Kirche – Festschrift für Rudolf Smend zum 70. Geburtstag* (1952), at 189, 199 ff.

¹⁹⁶ H. Kraus and K. Heinze, *Völkerrechtliche Urkunden zur Europäischen Friedensordnung* (1953).

including differences between ‘functionalists’ and ‘constitutionalists’ without advocating a specific position.¹⁹⁷

Another strong focus of Kraus’ later post-war work was on the legal status of the former eastern territories of the German Reich, to which he devoted considerable attention. In his first work on this issue he considered the Polish and Soviet exercise of control over these areas as acts of illegal annexation, arguing that the prohibition of wartime annexations had acquired the status of customary law prior to World War II.¹⁹⁸ Furthermore, in his view it violated the right to self-determination, and he emphatically concluded his analysis with the line: *ex iniuria ius non oritur*.¹⁹⁹ He repeated and expanded this controversial thesis in several works.²⁰⁰ Based on his long-standing research interest, Kraus linked this problem to the concept of ‘*Staatsethos*’: Candidly he conceded that Germany had violated the moral imperative of ‘*Staatsethos*’ but that this violation could not justify or legalize acts of retaliation.²⁰¹

Kraus’ rejection of the Oder–Neisse Line was very much in line with the early opposition by the Federal Republic of Germany to the Agreement of Görlitz, in which the German Democratic Republic (GDR) accepted the Oder–Neisse Line.²⁰² However, his publications on this issue changed the international perception of Kraus’ work considerably. Unlike his other post-war work, his writings on this subject were not at all well received outside Germany.²⁰³ A review in the *American Journal of International Law* by Samuel L. Sharp of a work by Kraus on that issue was quite frank and considered it ‘a representative sample of the prodigious amount of research and publications currently issuing from West German universities, institutes, and study groups, in which tools of scholarship are used in support of national claims and grievances’.²⁰⁴ Furthermore the reviewer made it clear that in his view it was not quite clear ‘what is gained by the type of legal analysis offered by Professor Kraus, unless the argument serves to reinforce the feeling of the Germans that justice is on their side’.

Yet, at the national level his reputation did not suffer: the Federal German Government honoured him by awarding him one of Germany’s highest decorations.²⁰⁵ His controversial opinion on the Oder–Neisse Line remains Kraus’ last major work. He died in 1965, before the beginning of the ‘New Eastern Policy’ under the social-liberal coalition government (1969–1982). Though this belongs to the realm

¹⁹⁷ H. Kraus, *Probleme des Europäischen Zusammenschlusses* (1956), at 51–60, reviewed by Ruhm von Oppen, 32 *Int’l Aff* (1956) 503.

¹⁹⁸ H. Kraus, *Die Oder-Neisse-Linie – Eine völkerrechtliche Studie* (1954), at 15–21.

¹⁹⁹ *Ibid.*, at 21–27 and 41.

²⁰⁰ Kraus, ‘Polish–German Frontier from the Standpoint of International Law’, 36 *Int’l Aff* (1960) 419; H. Kraus, *Der völkerrechtliche Status der deutschen Ostgebiete* (1964).

²⁰¹ Kraus, ‘Staatsethische Betrachtungen zum Ringen um die deutschen Ostgebiete’, 11 *Jahrbuch der Albertus-Magnus-Universität zu Königsberg/Preußen* (1961) 3.

²⁰² See further Eitel, ‘Oder-Neisse-Linie’, in Wolfrum (ed.), *supra* note 68, vii, at 944–948.

²⁰³ Wiskemann, ‘Review: Herbert Kraus, Die Oder Neisse-Linie’, 31 *Int’l Aff* (1955) 243.

²⁰⁴ Sharp, ‘Review: Herbert Kraus, Die Oder-Neisse-Linie’, 49 *AJIL* (1955) 284.

²⁰⁵ The *Große Verdienstkreuz des Verdienstorden der Bundesrepublik Deutschland*, awarded in Nov. 1957; see http://archiv.preussische-allgemeine.de/1957/1957_11_30_48.pdf; *Große Verdienstkreuz mit Stern des Verdienstorden der Bundesrepublik Deutschland*, awarded in Apr. 1964; Rauschning, *supra* note 23, at 381.

of speculation, it is not certain how he would have evaluated these developments. As his opposition to the Oder–Neisse Line seems motivated not by politics but by legal doctrine, it is uncertain whether he would have condemned or welcomed these developments – another point, not easy to pin down, when discussing Kraus’ work today.

4 Re-engaging with Kraus’ Work

Already a cursory look at Kraus’ work makes it clear that he was a generalist international lawyer. From today’s perspective his method of deducing specific arguments from broad principles, not uncommon among German international lawyers of his time,²⁰⁶ can make for difficult reading. However, the constant practice of attempting to link current legal problems to philosophical fundamentals can be a refreshing experience for readers used to overly-specialized literature. Though some more technical detail at times might have benefited Kraus’ work, the fact that he did not always make a strict distinction between legal work on the one hand and philosophical reflection on the other makes his work interesting for those deploring today’s lack of fruitful proximity between the two.²⁰⁷

In many ways Kraus’ faith and work can be seen to a certain degree as exemplary for a traditionalist branch of German international lawyers of the first half of the 20th century: from positivism to anti-positivism and back. Whereas Kraus’ early work prior to World War I is characterized by a positivist approach, he developed an anti-positivist inclination in the 1920s. The Versailles Peace Treaty seems to have been the turning point at which he realized that he had to look beyond positive law for an extra-legal foundation²⁰⁸ to evaluate the validity and effectiveness of the international legal order. At the centre of this anti-positivist approach was his concept of ‘*Staatsethos*’. As this construction was an ‘open’ concept it was highly vulnerable to being utilized to advance a political interpretation of law. Unlike Schmitt’s also ‘open’ concept of ‘concrete order’, however, it did not subject law entirely to changing political developments.²⁰⁹ Instead it went back to a Kantian understanding of inter-individual ethics and tried to transfer these to the international level. From an early 21st century perspective Kraus’ discussion of Kant gives the impression of anticipating later conflicts between proponents of political realism and liberalism. Kraus’ work on ‘*Staatsethos*’ thus can be seen as an early attempt to link Kant’s political philosophy to the theory

²⁰⁶ Tams, *supra* note 14, at 730.

²⁰⁷ Ley, ‘Review: S. Besson & J. Tasioulas (eds), *The Philosophy of International Law*’, 22 *EJIL* (2011) 1180, at 1182.

²⁰⁸ As Heinrich Triepel wrote as early as in 1899, ‘one will always invariably reach the point where a legal explanation of the obligatory character of law becomes impossible itself. The legal basis of the validity of law is extra legal’, which is M. Byers’ translation of ‘*Immer und überall wird man an den Punkt gelangen, an dem eine rechtliche Erklärung der Verbindlichkeit des Rechtes selbst unmöglich wird. Der “Rechtsgrund” der Geltung des Rechts ist kein rechtlicher*’: H. Triepel, *Völkerrecht und Landesrecht* (1899), at 82, to be found at M. Byers, *Custom, Power, and the Power of Rules* (1999), at 7.

²⁰⁹ Messerschmidt, ‘Revision, Neue Ordnung, Krieg: Akzente der Völkerrechtswissenschaft in Deutschland 1933–45’, 5 *Militärgeschichtliche Mitteilungen* (1969) 37, at 71–74.

of international law and an early, though rather vague, predecessor of democratic peace theory.²¹⁰

The perception and reception of Kraus' work have changed over the years: Whereas Herz, writing in 1938, considered the conflict between Kraus and Schmitt on how to evaluate the positivism of the interwar period as a mere sideshow among pro-Nazi international lawyers,²¹¹ Kraus' rejection of Schmitt was very much emphasized in the few post-war discussions of his works.²¹² The German post-war reviews of his work in the 1950s and 1960s have never been critically questioned. Even today an overwhelming focus on his forced retirement continues to be the kaleidoscope through which Kraus' work is perceived. This also caused a focus on his rather remote links to the German resistance: Adam von Trott zu Solz was his student²¹³ and there were plans to hire Ulrich von Hassell as his successor.²¹⁴ Whereas Trott zu Solz is frequently mentioned, PhD candidates supervised by Kraus who joined the Nazi party enthusiastically in 1933²¹⁵ and were subject to criminal investigations and prosecution due to their role in the Foreign Office and its involvement in the Shoa during the Third Reich,²¹⁶ are never mentioned. Thus, Trott zu Solz appears rather as an exception than the rule. However, as no supervisor can be held responsible for career-driven opportunism which may befall his former students later in life, it can also not be confirmed that Kraus guided his students towards a pro-regime standpoint. It seems rather that these students did not hear or follow his arguments to the end: Only the first anti-positivist feature on the need to change and abandon certain elements of the international order caught on; the second feature on how to replace existing legal regulations in accordance with the concept of 'Staatsethos', however, was not taken on board.

Kraus was perhaps more important as an editor than he was as an author. In our time in which broadband internet connection and online library access have become indispensable tools for legal research, it is hard fully to appreciate the importance of this editing work in the 20th century. In terms of his short time stand-in, Wilhelm Grewe, Kraus taught and analysed international law in three different epochs of international law: the British Age (1815–1919), the age of an 'Anglo-American Condominium' (1919–1944), and the 'age of American–Soviet rivalry' (1945–1990).²¹⁷ Close to the

²¹⁰ Doyle, 'Kant, Liberal Legacies and Foreign Affairs', 12 *Philosophy and Public Affairs* (1983) 205.

²¹¹ Herz (Bristler), *supra* note 124, at 156–157.

²¹² Meiertöns, *supra* note 50, at viii–x.

²¹³ Halfmann, *supra* note 109, at 123, who incorrectly considers Kraus the supervisor of Solz's PhD thesis.

²¹⁴ Skordas, 'Review of Calliess/Nolte/Stoll, *Von der Diplomatie zum kodifizierten Recht- 75 Jahre Institut für Völkerrecht der Universität Göttingen (1930–2005)*', 19 *EJIL* (2008) 864; Szabo, *supra* note 35, at 152–156.

²¹⁵ Ernst Kutscher (1909–1972), served from 1936 to 1945 in the Foreign Office. From 1949 to 1953 he was Principal Private Secretary to Ludwig Ehrhardt, from 1956 to 1972 again in the Foreign Service, and his final posting was as Consul-General in Madras: his PhD thesis was *Abrüstung und Völkerbund* (1932). On Kutscher see Conze *et al.*, *supra* note 72, at 198–199, 575–576.

²¹⁶ Eberhardt von Thadden (1909–1962), served from 1943 to 1945 as 'Judenreferent' in the Foreign Office, his PhD thesis was *Der vorbehaltene Betätigungsbereich der Staaten (domaine réservé)* (1932). On von Thadden see Conze *et al.*, *supra* note 72, at 94–95, 163–164, 197–199, 247–250, 389, 481, 666.

²¹⁷ W. Grewe, *Epochs of International Law* (trans. M. Byers, 2000).

two turning points of 1918/1919 and 1944/1945 he was involved in work on some major codifications of international law and contributed to the accessibility of supporting material in the German-speaking world. His editorial work at different points in time clearly enhanced the academic discussion of the Versailles Peace Treaty, the Nuremberg judgments, and the ECSC Treaty, and is worth returning to today when discussing these subjects.

The main part of his work is in German, but some relevant samples of his work are available in English or French.²¹⁸ Yet, the fact that these samples are few may explain the little attention that Kraus' work has received so far.

5 Conclusion

Kraus was a highly nationalistic individual whose political consciousness was strongly formed by World War I. Contemporaries considered him an old fashioned conservative who 'had an aversion against any kind of mass-movement'.²¹⁹ Based on his work it is difficult to place him precisely in terms of his politics. He was not among the very few convinced pacifists of the interwar-period like Schücking and Wehberg, though he maintained close working relations with them. Yet, Kraus was certainly more than a mere '*Vernunftrepublikaner*', who accepted the Weimar Constitution only half-heartedly as something that had to be worked with. The development of his work after 1933 illustrates how National Socialist and German nationalist (*Deutschnational*) agendas at first overlapped, and that discrepancies became obvious only later on. Hence the new regime could count on the general willingness of nationalist lawyers to endorse it.²²⁰ Yet Kraus' willingness to adjust to the new system did not go as far as to abandon academic prudence and his positivist approach entirely in favour of a purely utilitarian understanding of international law. Nonetheless, Kraus was certainly not among the staunchest defenders of positivism.²²¹

His work was based strongly on philosophical ideas of injustice, articulated in his highly vulnerable concept of '*Staatsethos*', based on Kant. Convinced that recourse to philosophy could not liberate him from the necessity of evaluating current events, he repeatedly expressed his legal opinion on political questions. In hindsight his evaluations seem at times naïve, or at least oblivious to political realities – a characteristic occasionally noted in academics more concerned with theory than political reality and yet involved with the latter.²²² When writing on the Oder–Neisse Line, for example, Kraus was clearly missing out on how ironic his argument of insisting on legality must have sounded to Polish and other non-German international lawyers. Under a politically more stabilized dictatorial regime – perhaps after the Röhm Putsch

²¹⁸ Kraus, *supra* note 48; Kraus, *supra* note 89; Kraus, *supra* note 100; Kraus, *supra* note 76; Kraus, *supra* note 34, at 383–431; Kraus, *supra* note 34.

²¹⁹ Wolfgang Kunkel (Professor of Roman and Civil Law in Göttingen 1929–1936), quoted from Halfmann, *supra* note 111, at 103 (author's translation of '*jede Massenbewegung ein Graus war*').

²²⁰ Vagts, *supra* note 4, at 673–675.

²²¹ See Gruchmann, *supra* note 3, at 497–534.

²²² E.g., J. Gaddis, *George F. Kennan – An American Life* (2011), at 696–698.

of 1934²²³ – the consequences of publishing a text like *Die Krise des zwischenstaatlichen Denkens* probably would have been far more drastic than merely being removed from a chair. Kraus wrote neither out of pure naïveté nor with an intention to provoke. The intention seems to have been rather to fulfil the very essential duty of an international lawyer: to issue a normative, legal evaluation of political facts of life.²²⁴

As a practitioner and a legal theorist, he can neither be associated with the resistance nor can he be neatly counted as part of the group of uncritical supporters of the regime between 1933 and 1945. His attitude towards the regime was more complex. Kraus was always more closely involved with the matters of international law relevant to day-to-day politics than most of his contemporary scholars. He dared to venture where others shied away from controversy and discussion of current issues. Naturally, this brought with it the danger of being falsely connected with these controversial concepts.²²⁵

This eagerness to be in touch with current political developments, their legal foundation and evaluation under international law constitute his specific brand of scholarship of international law. Kraus is credited with being one of the founders of a 'Göttingen School' of international law, distinguished by searching a proximity to the day-to-day practice of international law, while maintaining a strict scientific standard.²²⁶ To assume the existence of such a school might be slightly over-enthusiastic, but there is little doubt that he formed a nucleus out of which such a school could have emerged. The founding and rebuilding of the Institute for Public International Law and European Law at the University of Göttingen clearly added to the scientific discussion of international law in Germany. Through the Göttingen Institute Kraus' work also had effects beyond academia, and his teaching was the framework for the approach of a number of German practitioners of international law.²²⁷ Though little is known about his teaching ability, his few former students, still alive almost 50 years after his death, remember the older Kraus as an exceedingly polite and, in spite of his standing, unpretentious person.²²⁸

The desire to be in touch with the day-to-day practice of international law ultimately cost Kraus his chair in 1937. Emigration, though probably a feasible course of action, would not have been in line with this approach, combined with his internationalist attitude and yet deeply national conservative convictions. He chose a path that was more diffuse and complicated than what is commonly termed as 'inner emigration' by deciding to discuss National Socialist understanding of international law.

²²³ Stolleis, *supra* note 95, at 331–333; P. Maracin, *The Night of the Long Knives: 48 Hours that Changed the History of the World* (2004).

²²⁴ P. Mastronardi, *Juristisches Denken. Eine Einführung* (2001), at 1–3.

²²⁵ For a controversial published work of his later years see H. Kraus, *Die im Braunschweiger Remerprozess erstatteten moraltheologischen und historischen Gutachten nebst Urteil* (1953), at 8.

²²⁶ Calliess, Nolte, and Stoll, *supra* note 22, 'Vorwort', at v.

²²⁷ H. Kraus, *Teaching Methods and Curriculum in International Law – Address delivered at the 4th Conference of Teachers of International Law and Related Subjects* (1929).

²²⁸ Personal conversation of the author with Dr Werner Bischof at the annual meeting of the 'Göttinger Verein zur Förderung des Internationalen Rechts', Göttingen, 7 June 2008.

It seems as if he did not address any reproaches to his opponents between 1933 and 1937, nor did opponents of the regime address any reproaches to him. He did not object to publishing after World War II a work on the freedom of navigation on international rivers together with his successor at Göttingen University, Ulrich Scheuner.²²⁹ The authors of the two *liberi amicorum* edited in his honour for his seventieth and eightieth birthdays and the people included in the *tabula gratulatorum* cover the full range between ardent supporters and staunch opponents of the regime.²³⁰

Kraus never saw a need to distance himself from parts of his work: no word of regret of what he wrote between 1933 and 1937 can be found. Kraus clearly did not consider himself a National Socialist international lawyer, but an international lawyer within a National Socialist state who had to deal with the state's understanding of international law. In the course of this discussion he became closely involved with the conceptions and premises of National Socialist theory and partially accommodated these ideas. To a certain degree he could adjust them to his thoughts, as they fitted neatly into his views, particularly his conviction that the Versailles Peace Treaty needed revision.

Kraus did not publish a single line on international law between the age of 53 and 61, usually a rather productive period in the life of most academics. The subjects of international law he occupied himself with during his period of forced retirement, like his work on Georg Friedrich von Martens, would have left little room for discussion of the National Socialist doctrine of international law. Yet, it is a tempting question how Kraus' writing between 1937 and 1945 would have evolved had he not been removed from his chair. His reputation would probably not stand as unimpaired as it stands now. The removal from his chair spared him from further proceeding on a dubious path he had embarked on and saved him from making more morally difficult and perhaps questionable choices.

Sometimes – at least for sake of their own reputation – it is better for heroes, if not to be hanged, then at least to be removed.

Appendix: Chronological List of Herbert Kraus' published work:

Kraus, H., *Zum Wesen der sog. falschen Anschuldigung* (§ 164 RStGB) (1909).

Kraus, H., *Reichsstrafrecht und Deutsche Schutzgebiete* (1911).

Kraus, H., 'Prolegomena zum Begriff der öffentlichen Meinung', in Schüler und frühere Mitglieder des Berliner kriminalistischen Seminars (eds), *Festschrift für Franz Liszt zum 60. Geburtstag* (1911).

Kraus, H., *Die Monroe doktrin in ihren Beziehungen zur amerikanischen Diplomatie und zum Völkerrecht* (1913).

²²⁹ H. Kraus and U. Scheuner, *Rechtsfragen der Rheinschiffahrt* (1956), reviewed by Honig, 6 ICLQ (1957) 588 and Hirsch, 53 AJIL (1959) 482.

²³⁰ The authors included, *inter alia*, Laun, Leibholz, Wehberg, Wolgast, von der Heyde (Kruse and Seraphim, *supra* note 41, at vi–vii), and Quincy Wright: Göttinger Arbeitskreis (ed.), *Recht im Dienste der Menschenwürde, Festschrift für Herbert Kraus zum 80. Geburtstag* (1964), reviewed by Mann, 28 MLR (1965) 626.

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