

Chapter XI

Exclusion and Block Formation (1918 – 1945)

The Peace Agreements 1919/1920 and the Foundation of the League of Nations

The governments of the Austria-Hungarian Dual Monarchy, France, the German Empire, Russia and the UK managed as a game of black jack the crisis that emerged in July 1914 from the murder of the Austria-Hungarian Crown Prince Franz Ferdinand (1863 – 1914) and his wife Sophie Countess Chotek (1868 – 1914) at Sarajevo on 28 June 1914. They played the game in such a manner that all of the participating governments jointly expected war to happen but that one of them would receive the blame for beginning it. Already early in July 1914, the German government urged its Austria-Hungarian alliance partner to take a harsh stance against the Serbian government assuming, without evidence and even without robust indications, that the Serbian government was supporting the quickly arrested murderer. The Austrian army invented an incident in which Serbian troops were wrongly accused of having opened fire at an Austrian ship travelling on the Danube. The claim was soon proved false, but served as the pretext for an Austrian attack.¹ Following the German advice, the Austria-Hungarian government filed a stiff ultimatum demanding compensation from the Serbian government. Even though the Serbian government agreed to fulfill almost all demands, the Austria-Hungarian government declared war on Serbia on 28 July 1914, thereby provoking the partial mobilisation of Russian armed forces. When the Russian government stepped up its preparations for war, ordering a general mobilisation, the German government declared war on Russia. In doing so, the German government gave articulation to its conviction that it had, jointly with its alliance partner, taken the initiative to launch the war and claimed to have done so in accordance with the law of war. Sharp-minded contemporaries, such as jurist and peace activist Otfried Nippold, early on recognised the joint responsibility of both governments for the beginning of the war and the combat actions that were soon to follow, and did so merely through careful reading of newspapers.² They arrived at this conclusion on the basis of the argument that the law of war did not justify the declaration of a war in response against the mere mobilisation of armed forces by the government of another state. Hence, the pretext by which the German government claimed that a general mobilisation was equivalent of a declaration of war was not supported by the law of war. Moreover, the German government quickly filed a declaration of war against France and violated Belgian neutrality by invading Belgian territory without having been attacked from there. Thus, between August and November 1914 two opposing camps of belligerents emerged, Austria-Hungary and Germany as the main allies of the so-called “Axis Powers” together with Bulgaria, Italy and Turkey on the one side, France, Japan, Russia and the UK as the “Allies” on the other. In logical consequence following from this modality of the launching of the war, the “Allies” acted upon the conviction that the “Axis powers” bore the sole responsibility for the war, and took this conviction as the basis for the peace negotiations, once the German government had asked for a truce on 11 November 1918 and thereby appeared to have acknowledged its defeat. The law of war identified a belligerent as the “loser” that had first declared the war and then had first asked for a truce. In November 1918, the “Axis Powers” merely consisted of Austria-Hungary and the German Empire together with Bulgaria and Turkey as their allies, while Italy had left the “Axis” in 1915. The “Allies” had received support through the entry of the USA into the war on their side. By contrast, Russia and Ukraine had concluded separate peace treaties with “Axis Powers” early in 1918.³

¹ Manfred Rauchensteiner, *Der Tod des Doppeladlers. Österreich-Ungarn und der Erste Weltkrieg* (Graz, 1993), p. 92 [second edn (Graz, 1994)].

² Otfried Nippold, “*Die Ursachen des Europäischen Krieges*” [1915], edited by Harald Kleinschmidt, Introduction by Akio Nakai (Munich, 2005), pp. 51-112.

³ Treaty Austria-Hungary/ Bulgaria/German Empire/Turkey – Ukraina, 9 February 1918, in: *CTS*, vol. 223, pp. 43-48; Supplementary Treaty, 9 February 1918, *ibid.*, pp. 49-55. Treaty German Empire – Russia, Brest-Litowsk, 3 March 1918, in: *CTS*, vol. 223, pp. 97-105.

When US-President Woodrow Wilson (1856 – 1924, in office 1913 – 1921) laid down his conditions for a peace with the “Axis Powers” in his address to Congress on 8 January 1918 in fourteen points,⁴ it became clear that the US government was sharing the main war aims with its alliance partners. Accordingly, the war could only be concluded through a defeat of the “Axis Powers”, namely the Austria-Hungarian Dual Monarchy and the German Empire. Specifically, Wilson demanded from the “Axis Powers” the surrender of contested colonial dependencies (Point 5), the evacuation of Russian territory that had been occupied by “Axis” forces, (Point 6), the restoration of Belgium (Point 7), the evacuation of France and Alsace-Lorraine (Point 8), the expansion of Italian state territory (Point 9), the granting of autonomy to the nations under Austrian-Hungarian rule (Point 10), the evacuation of Serbia, Rumania and Montenegro (Point 11), autonomy for nations under Turkish rule and the internationalisation of the Dardanelles for maritime traffic (Point 12) as well as the restoration of the state of Poland (Point 13). The remaining demands were clad in general terms, thereby being directed at the “Allies” as well: that all diplomatic negotiations and treaties under international law should be public (Point 1); that the freedom of the seas should be guaranteed (Point 2); that trade restrictions should be abolished (Point 3); and that disarmament should be accomplished (Point 4). Wilson’s concluding demand concerned the establishment of the League of Nations (Point 14). Through his specific demands directed at Austria-Hungary, Germany and Turkey, Wilson became the spokesperson for allied war aims; but with his general demands he pursued the goals of establishing a new global system of relations among states and bringing about a new way of managing international law to the end of promoting peace through an international organisation above sovereign states. The novelty of Wilson’s international system consisted, he assumed, in the rejection of the maintenance of the balance of power as a guideline of foreign-policy making; like others, he believed to have identified the desire for the maintenance of the balance of power as the main cause of the war.⁵ Wilson envisaged the new international organisation as the bearer of general competences extending beyond specific technical matters such as the exchange of postal letters and telegraph messages. In the sense of the arguments proposed by the international peace movement, he hoped that this organisation would restrain government sovereign decision-making capability. His commitment against secret diplomacy came in response against similar demands that Vladimir Il’ič Lenin, the leader of the Russian revolutionary movement, had previously articulated. However, in 1917, Lenin had not confined himself to mere demands but, once he obtained control over government, had actually made public existing secret treaties, much to the dismay of the “Allies” on the European side. Moreover, Lenin’s government policy of promoting the establishment of a Marxist International of the working class was received as the plea for the establishment of an international organisation above sovereign states. Already in 1916, Lenin had campaigned for international cooperation of the working class in the struggle against imperialism and colonialism.⁶ Hence, Wilson acted under pressure both from the “Allies”, whose war aims he shared, and from Lenin, whose influence in the international arena he sought to contain.

With its acceptance on 3 /4 October 1918 of Wilson’s Fourteen Points as the basis for the truce and the ensuing peace negotiations, the German government under Prince Max von Baden (1867 – 1929, in office October to November 1918) also agreed to support the demand for the establishment of an international organisation. The Austria-Hungarian government under Heinrich Lammasch followed suit at the end of October 1918. Both in the emerging Republic of German-Austria (Republik Deutsch-Österreich) and in the German Empire, working groups were

⁴ Woodrow Wilson, ‘[Address to Congress, 8 January 1918]’, in: Wilson, *The Public Papers*, edited by Ray Stannard Baker and William F. Dodd, vol. 5 (New York and London, 1927), pp.155-162 [reprint (New York, 1970)].

⁵ Woodrow Wilson, ‘[Address to Congress, 22 January 1917]’, in: Wilson, *The Public Papers*, edited by Ray Stannard Baker and William F. Dodd, vol. 4 (New York and London, 1927), pp. 407-414 [reprint (New York, 1970)]. Wilson, ‘[Address to Congress, 11 February 1918]’, in: *ibid.*, vol. 5, pp. 177-184, at pp. 182-183. Philip Henry Kerr, Eleventh Marquis of Lothian, ‘Political Relations between Advanced and Backward Peoples’, in: Kerr, Arthur James Grant, Arthur Greenwood, J. D. Hughes and F. F. Urquhart, *An Introduction to the Study of International Relations* (London, 1916), pp. 183-199, at p. 190.

⁶ Vladimir Il’ič Lenin, *Imperialism. The Highest Stage of Capitalism* [1916], edited by Norman Lewis and James Malone (London and Ann Arbor, MI, 1996), pp. 106-108.

formed and given the task of submitting proposals for the international organisation that was then already called “League of Nations”. In Germany, a commission of the German Association of International Law (Deutsche Gesellschaft für Völkerrecht) created a committee under Theodor Niemeyer’s chairpersonship and, on 8 January 1919, filed its draft proposal for the covenant of the League. In Austria, Lammasch had published his own proposals in 1917, that is, long before Wilson became active.⁷ According to the German proposal, the future League of Nations was not only to be given the task of imposing further regulations of the law of war⁸ and to restrict armament,⁹ but should also guarantee the “freedom of traffic” on the open seas as well as on all roads, railways and in air corridors.¹⁰ Moreover, it was to provide for the equality of legal treatment of all nationals of any state,¹¹ to ensure general “equality of economic treatment”,¹² and to lay upon “colonising states” the duty of protecting indigenous peoples.¹³ In the view of the German Association of International Law, the League was to become capable of interfering deeply into the sovereign rights of its member states, with the inclusion of the right to regulate the principles determining the relations between nationals and their governments. A special “Committee on the Freedom of Traffic”, with Niemeyer himself in the chair, argued that the fulfillment of the demand for the general “freedom of traffic” was the core “condition for the peaceful and fruitful development of the community of the League of Nations” (Voraussetzung für friedliche und fruchtbare Entwicklung der Völkerbundsgemeinschaft),¹⁴ thereby taking up the ancient *ius peregrinationis* and styling it as a means for securing peace. The Association’s draft was watered down and then accepted as the basis for the official German government proposal, which granted to the League far-reaching rights of intervention into sovereign government decision-making but omitted the demand for the “freedom of traffic”.¹⁵ Nevertheless, the demand remained on the agenda of debates among international lawyers during the 1920s.¹⁶

It is therefore not appropriate to claim that Wilson’s League of Nations proposal, anyway not his original creation,¹⁷ was forced upon the governments of Austria-Hungary and the German empire towards the end of the war and in the course of the ensuing peace negotiations. In both states, the process of drafting a League of Nations covenant took place before the opening of the Paris Peace Conference on 18 January 1919. The conference concluded with five bilateral peace treaties which were placed before the governments of the “Axis Powers” between 28 January 1919 and 10 August 1920. The Conference implemented most of Wilson’s Fourteen Points, even though the “Allies” turned down the demand for granting the general freedom of the seas (Point 2). Yet the Conference acknowledged some “right of self-determination” of nations, thereby supporting the quests for autonomy and the recognition of new states in territories formerly under Austria-Hungarian, Russian, Swedish and Turkish control. Hungary, now in existence as a sovereign

⁷ Heinrich Hugo Edwin Lammasch, *Das Völkerrecht nach dem Kriege* (Publication de l’Institut Nobel, 3) (Oslo, 1917).

⁸ Theodor Niemeyer, ed., *Der Völkerbundsentswurf der Deutschen Gesellschaft für Völkerkunde*, Art. 3, 4, 8, 14, 15 (Monographien zum Völkerbund, 1) (Berlin, 1919), pp. 3, 5, 7.

⁹ *Ibid.*, Art. 22, p. 9.

¹⁰ *Ibid.*, Art. 24, 25, p. 9.

¹¹ *Ibid.*, Art. 27, p. 10.

¹² *Ibid.*, Art. 28, 29, p. 10.

¹³ *Ibid.*, Art. 32, pp. 11-12.

¹⁴ *Ibid.*, p. 19.

¹⁵ David Hunter Miller, *The Drafting of the Covenant*, Nr 35, vol. 2 (New York and London, 1928), pp. 745-761 [reprint (New York and London, 1969)].

¹⁶ Charles Dupuis, ‘Liberté des voies de communication; relations internationales’, in: *Recueil des cours* 2 (1924), pp. 125-444.

¹⁷ For earlier and contemporary plans of a similar scope see: Ludwig Quidde, ‘Die Idee des Völkerbundes in der deutschen Friedensbewegung während des ersten Weltkrieges’, in: *Die Friedenswarte* 44 (1944), pp. 299-315, at pp. 300, 303, 304, 305, 307, 310, 313-314. Walther Max Adrian Schücking, *Der Weltfriedensbund und die Wiedergeburt des Völkerrechts* (Leipzig, 1917). Schücking, *Der Bund der Völker. Studien und Vorträge zum organisatorischen Pazifismus* (Leipzig, 1918), pp. 1-34 [partly reprinted in: *Die Friedenswarte* 35, nr 5 (1935)]. Hans Wehberg, ‘Verkehrsfreiheit und Völkerbund’, in: *Weltwirtschaftliches Archiv* 15, Ergänzungsheft (1919/20), pp. 468-480. Wehberg, *Wilson’s Völkerbundsplan. Die Akte der Pariser Konferenz vom 14. Februar 1919* (Deutsche Liga für Völkerbund, Flugschrift 5) (Berlin, 1919).

state of its own, lost about two thirds of its territory. Armenia, formerly part of the Ottoman Turkish Empire, accomplished recognition as a sovereign state, after large parts of its population had fallen victim to genocide in territories controlled by the Turkish army during the war. The former Ottoman Turkish provinces in Mesopotamia, the Arabian Peninsula and Egypt, that had come under British and French colonial rule towards the end of the nineteenth century, severed their ties with the government of the Sultan, until Turkey turned into a republic under the government of Kemal Pasha (1881 – 1938), the Atatürk. In Southeast and Eastern Europe, new states came into existence in the Baltic area with Estonia, Latvia and Lithuania, moreover in Belarus, the Czecho-Slovak Republic (ČSR), Poland, Ukraine and the Kingdom of Yugoslavia with Serbia as its centre. The western part of the Finnish settlement area was turned into a sovereign state, whereas the eastern part remained under Russian (Soviet) control. Alsace-Lorraine, annexed into the German Empire after the Franco-Prussian War of 1870/71, was returned to France, Eupen and Malmédy on the western fringes of Germany came under Belgian rule. Gdansk was converted into a Free City under League of Nations supervision, Upper Silesia became Polish and an international administration was established over the Saar area. Contrary to the Austria-Hungarian Dual Monarchy, the German Empire was affected only on its fringes by the shifts of territorial control but had to accept severe restrictions of the size of its land and naval forces as part of the peace deal.

The Paris Peace Conference worked out the treaties without the participation of the “defeated” “Axis Powers”. These governments received the treaties as the Conference had agreed upon them. In distributing multilateral peace agreements on five bilateral treaties, the Conference adhered to the long-established procedure of peace-making. Each of the five bilateral treaties was phrased as an agreement between one state of the wartime “Axis Powers” and Hungary on the one side and the “Allies” collectively on the other. The German government signed its treaty in Versailles on 28 June 1919,¹⁸ the Republic of Austria at Saint-Germain-en-Laye on 10 September 1919,¹⁹ Bulgaria at Neuilly-sur-Seine on 27 November 1919,²⁰ Hungary at Trianon on 4 June 1920 and the government of the Ottoman Sultan at Sèvres on 10 August 1920. The German Empire ratified the Versailles treaty on 10 January 1920, but not the USA on the side of the “Allies”; the German Empire and the USA made out a special peace agreement in Berlin on 28 August 1921. Turkey did not ratify the treaty of Sèvres but agreed on a modified version through the agreement of Lausanne of 1923.²¹ Upon Wilson’s insistence, each treaty was prefixed by the League Nations Covenant, as the Paris Peace Conference had approved of it on 28 April 1919. For Austria and the German Empire, the Covenant went into force through the ratifications of their treaties, even though both states were initially not admitted as League members. Failing to sign the Versailles treaty, the USA did not become a member of the League. Obliging the Conference to prefix the Covenant to the bilateral peace treaties with the “defeated” states, Wilson put into practice Heinrich Triepel’s late nineteenth-century theory according to which agreements setting new international law were to be styled as declarations of the wills of the contracting state parties ready to transfer these declarations into state law. Yet Wilson did not take into consideration the condition, explicitly stated by Triepel, that the wills of the contracting states, agreeing on new law, were to be directed towards the same goals. However, the peace treaties could not make good on this condition, precisely because the “defeated” “Axis Powers” had been excluded from the negotiations. Wilson’s choice of the procedure of enforcing the League of Nations Covenant therefore had the necessary consequence that the League remained part of the agreements that the Paris Peace Conference had approved. Hence, the sharp distinction between the victors and the vanquished that the Peace Conference had enforced shaped the work and the impact of the League. The League was given a Covenant, in the composition of which only a small minority of its eventual members had actually taken part. At the global level, then, the formation of the League enforced the premise which international legal theorists, such as Johann Caspar Bluntschli,²² as well as diplomats as managers of international

¹⁸ Treaty of Versailles, 28 June 1919, in: *CTS*, vol. 225, pp. 189-406.

¹⁹ Treaty of Saint-Germain-en-Laye, 10 September 1919, in: *CTS*, vol. 226, pp. 9-169.

²⁰ Treaty of Neuilly-sur-Seine, 27 November 1919, in: *CTS*, vol. 226, pp. 333-435.

²¹ Treaty of Lausanne, 24 July 1923, in: Lawrence Martin, ed., *The Treaties of Peace 1919 – 1923*, vol. 2 (New York, 1924).

²² Johann Caspar Bluntschli, ‘Die Organisation des europäischen Staatenvereines’, in: Bluntschli, *Gesammelte kleine*

relations²³ had envisaged in the second half of the nineteenth century, namely that the integration of states could come about only under the leadership of self-appointed “big powers”.

Moreover, with regard to competences ascribed to the League of Nations, the Covenant remained far behind earlier draft proposals, specifically those that the German side had submitted early in 1919. The Covenant converted into legal diction Wilson’s Fourteen Points and was thus to focus on the issues of avoiding war, enforcing arms reductions, establishing the International Court of Justice as an institution of international arbitration, the publication of treaties between states through registration with the League Secretariat and the regulation of the transfer of rights to colonial rule.²⁴ In addition, the preamble to the Covenant obliged all League members not to launch a war as a means of international politics,²⁵ but this obligation was considered imperfect specifically among League supporters. According to contemporary as well as later conviction, the preamble contained the renunciation of a war of aggression only against League members.²⁶ Early attempts to supplement the Covenant preamble were condensed into the Geneva Protocol on the prevention of wars of aggression of 2 October 1924.²⁷ But the British government quickly notified the League that it would not acknowledge the protocol as an instrument to restrict its right to conduct war in its colonial dependencies.²⁸ British government refusal to agree to the application of the protocol with regard to military conflicts in colonial dependencies ushered in the failure of the enforcement negotiations. Nevertheless, on 27 August 1928, a formal multilateral agreement entered into force that obliged its signatories to renounce certain kinds of war.²⁹ The treaty, which Aristide Briand (1862 – 1932) and Frank Billings Kellogg (1856 – 1937), French and US foreign ministers, had jointly prepared, established the general renunciation of war as an instrument of state policy in terms of an international legal norm (Art. I) and in general terms mandated the peaceful arbitration of inter-state conflicts (Art. II).³⁰ The pact on the renunciation of war took a step beyond the League of Nations Covenant preamble in admitting only two types of war, namely a war that was not an instrument of state policy, and a war of defense against states violating the pact.³¹ The pact thus allowed war only against law breakers, thus operating within the confines of the theory of the just war as St Thomas Aquinas had outlined it already in the thirteenth century. But the pact cast just war theory into the form of positive international law, thereby identifying the legal war as the just war.³²

Yet, the problems plaguing the League of Nations did not end with the inconsistencies of the procedure through which it had come into existence. As Article 231 of the Versailles treaty

Schriften, vol. 2 (Nördlingen, 1881), pp. 279-312 [reprint (Libelli, 75) (Darmstadt, 1962); first published in: *Die Gegenwart* (1878)].

²³ Bernhard von Bülow, ‘[Mitteilung an den deutschen Botschafter in Paris, Georg Herbert Graf zu Münster, 12 May 1899]’, in: Johannes Lepsius, Albrecht Mendelssohn-Bartholdy and Friedrich Thimme, eds, *Rings um die Erste Haager Friedenskonferenz*, nr 4256 (*Die Grosse Politik der Europäischen Kabinette*, 15) (Berlin, 1924), pp. 189-192.

²⁴ Miller, *Drafting* (note 15), vol. 2, nr 34, pp. 721-741.

²⁵ *Ibid.*, vol. 2, nr 34, p. 721.

²⁶ Hans Kelsen, *Principles of International Law* (New York, 1952), pp. 39-42 [second edn, edited by Robert W. Tucker (New York, 1967)].

²⁷ Walther Max Adrian Schücking, *Das Genfer Protokoll* (Frankfurt, 1924). Hans Wehberg, ‘Le Protocole de Genève’, in: *Recueil des cours* 7 (1925, Part II), pp. 1-150. Wehberg, *Das Genfer Protokoll betr[effend] die friedliche Erledigung internationaler Streitigkeiten. Eine Vorlesung an der Haager Völkerrechtsakademie aus dem Sommer 1925* (Berlin, 1927).

²⁸ Bernhard Roscher, *Der Briand-Kellogg-Pakt von 1928* (Baden-Baden, 2004), pp. 46-49.

²⁹ Hans Wehberg, *Die Ächtung des Krieges. Eine Vorlesung an der Haager Völkerrechtsakademie und am „Institut Universitaire de Hautes Etudes Internationales“ (Genf)* (Berlin, 1930) [first published in: *Recueil des cours* 24 (1928, Part IV), pp. 147-306]. Wehberg, ‘La contribution des Conférences de la Paix de la Haye au progrès du droit international’, in: *Recueil des cours* 37 (1931, Part III), pp. 527-669.

³⁰ Treaty: The Briand-Kellogg-Pact [The Paris Peace Pact on the Renunciation of War], 27 August 1928 [www.jura.uni-muenchen.de/fakultaet/lehrstuehle/satzger/materialien/kellogg1928.pdf.]

³¹ Kelsen, *Principles* (note 26), pp. 42-43.

³² Thus already: Edwin Montefiore Borchard, ‘The Multilateral Treaty for the Renunciation of War’, in: *American Journal of International Law* 23 (1929), pp. 116-120, at p. 117.

determined the “war guilt” of the German Empire.³³ In the view of German nationalists, who rejected the treaty as the “dictate of Versailles”, the regulation fomented resistance against the agreement as a whole. In nationalist perspective, the Versailles treaty turned the League of Nations into an institution of the victors. By consequence, resistance against the Versailles treaty could come along in Germany as resistance against activities of the League.³⁴ Similar uneasiness about the League arose in the Republic of Austria, after the “Allies” had banned a referendum for “entry” (Anschluss) into the German Empire in 1919. Likewise, in Hungary, an ideology flourished under the label of “Turanism”, whose adherents not only demanded the cancellation of the Trianon treaty but also campaigned for the formation of a wide-ranging system of alliances between Hungary on the one side, Turkey, Fenno-Hungarian population groups in Siberia, Mongolia and Japan. “Turanism” was a term derived from the name for the Turan Plateau in Central Asia, which nineteenth-century ethnographic and linguistic research gave out as the alleged “aboriginal home” of speakers of Fenno-Hungarian and Ural-Altai languages in Northern Eurasia.³⁵

The League was also troubled by fluctuations in membership. Its original members consisted of the victors of the war on the “Allied” side. There were no detailed rules about access to the League by further states as well as by fully self-governing dominions and colonies.³⁶ Austria came into the League in 1920, the German Empire was accepted in 1926, the Soviet Union, replacing the Russian Empire in 1923, followed in 1934. In 1920, the League invited twelve states to join that had stayed neutral during the war (Albania, Argentina, Chile, Columbia, Denmark, the Netherlands, Norway, Paraguay, Persia, Sweden, Spain and Venezuela). Further states acceded to the League after 1920. But Japan, one of the founding members, left the League in a row about the policy of expanding government control over East Asia in 1933, the German Empire followed in the same year and Italy in 1937. Further, mainly Latin American states quit during the 1930s and the League expelled the Soviet Union in 1939. More problematic than the instability of membership was the determination of the League Secretariat, not to restrict membership to fully sovereign states but to invite the so-called “Dominions” as self-governing settler colonies that had emerged from the British Empire, namely Australia, Canada and New Zealand. At the same time, the League also admitted the British colonial government of India. As the British government maintained control over its branch in South Asia and kept close ties with the governing authorities in the “Dominions”, it could control several votes in the various League agencies. The US government, although not directly involved in League affairs, used the organisation to solidify its position of priority over states elsewhere in the American Continent. It did so by way of pressuring the Paris Peace Conference to insert into the Covenant a reference to the Monroe Doctrine as a peace-preserving

³³ Treaty of Versailles (note 18), p. 286.

³⁴ Most articulate in: Carl Schmitt, *Die Kernfrage des Völkerbundes* (Völkerrechtsfragen, 18) (Berlin, 1926).

³⁵ Anton Boller, ‘Nachweis, dass das Japanische zum ural-altaischen Stamme gehört’, in: *Sitzungsberichte der Kaiserlichen Akademie der Wissenschaften*, Philos.-Hist. Cl. (1857), pp. 393-481. Ziya Gökalp [= Gök Alp, Dija], *The Principle of Turkism* [first published (Istanbul, 1940)], edited by Robert Devereux (Leiden, 1968), pp. 1, 5, 21. Jūjirō Imaoka, *Tsuran minzoku undō to wa nanika*, vol. 1 (Tokyo, 1933) [new edn (Tokyo, 1935)]. Imaoka, *Tsuran minzoku-kenkyū* (Tokyo, 1942). Imaoka, *Tsuran minzoku kenkyū* (Tokyo, 1942). Imaoka and Auno A. Kaina, *Han tsuranshugi to dai tō-A chitsujo* (Tokyo: Nihon Tsuran Kyōryūkukai, 1944). Imaoka, *Tsuran shibungaku zenshū. Tsuran minyō to shi* (Tokyo, 1958). Friedrich Max Müller, *Lectures on the Science of Language*, Series 1 (New York, 1863) [reprint, edited by Roy Harris (London and Tokyo, 1994)]. Friedrich Max Müller, *Lectures on the Science of Language*, Series 1 (New York, 1863) [reprint, edited by Roy Harris (London and Tokyo, 1994)]. Alajos Paikert, ‘Der turanische Gedanke’, in: *Turan*, vol. 4/5 (1917), pp. 182-191, vol. 6/7 (1917), pp. 291-301. Philipp Franz Balthasar Siebold, ‘Verhandeling over de afkomst der Japanners’, in: *Verhandeligen van het Bataviaasch Genootschap van Kunsten en Wetenschappen* 13 (1832), pp. 183-275. Heinrich Winkler, *Japaner und Altaier* (Berlin, 1894). Winkler, *Die altaischen Völker und Spachenwelt* (Osteuropa-Institut in Breslau, Quellen und Studien, Abteilung 6, Heft 1) (Leipzig, 1921), pp. 30-31.

³⁶ League Nations Covenant, in: Miller, Drafting (note 15), Art. I, Nr 2, pp. 720-743, at p. 721 [first printed edn: *The Treaty of Peace between the Allied and Associated Powers and Germany* (London, 1919). Reprinted in: Hans Wehberg, ed., *Die Pariser Völkerbundsakte nebst den Urkunden über die Pariser Verhandlungen*, second edn (Berlin, 1919); Wilhelm Georg Carl Grewe, ed., *Fontes historiae iuris gentium*, vol. 3, part 2 (Berlin and New York, 1995), pp. 810-822].

instrument.³⁷ Through its insertion into the Covenant, the Monroe Doctrine acquired the potential for recognition as a legal norm, although it had originally been conceived solely as the unilateral declaration of the political will of the US government. In its practical application, the Doctrine remained a political device allowing interference into the external relations of mainly Latin American states.³⁸ However, the Covenant, including its reference to the Monroe Doctrine, did not bind the US government itself, as the USA had stayed away from the League. Hence, the League of Nations was essentially a club of American and European states, even though with Afghanistan, China, Egypt, Ethiopia, Iraq, Japan, Liberia, Siam and Turkey, some states in Africa and Asia were members. Membership in the “international legal community”, as manifested in the League, continued to be considered as the prerequisite for the ascription of subjecthood under international law and the prime condition for the application of the public law of treaties among states.³⁹ In the practical conduct of its affairs, the League of Nations came close to the prewar theoretical concept of the colonial “family of nations”.

The League of Nations and the Soviet Union

Indeed, the negotiations about the establishment of the League of Nations were by no means consensual. Specifically the Japanese government, actively engaged in the Paris Peace Conference and taking responsibility for the implementation of the peace agreements, specifically the treaties with Austria and the German Empire, voiced demands that were incompatible with positions held by its wartime allies. The Japanese delegation in Paris restated its explicitly anti-colonialist position that it had articulated already in the early phase of the war at the time of the sack of the German colonial stronghold at Kiautschou in China. In August 1914, the Japanese government declared war on Germany after the German government had failed to respond to an ultimatum demanding the immediate German withdrawal from China.⁴⁰ During the Paris Peace Conference, the Japanese delegation came forward with a draft proposal requesting “to accord, as soon as possible, to all aliens nationals of states Members of the League equal and just treatment in every respect, making no distinction, either in law or in fact, on account of their race or nationality”.⁴¹ The proposal grew out of the consciousness of the discrimination to which the Japanese government had been subjected in consequence of the nineteenth-century non-reciprocal treaties, together with concerns about the practices used by the Australian and US governments to curtail immigration from Japan on racialist grounds. Yet the proposal met with staunch resistance from the Australian delegation and found no support among the British and French delegations. These three delegations persuaded the US representatives to withdraw their initially shown approval for the proposal.⁴² The rejection meant a

³⁷ Ibid., Art. XXI, Nr 6, p. 735.

³⁸ Hans Joachim Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Frankfurter Abhandlungen zum Kriegerverhütungsrecht, 12) (Leipzig, 1929), pp. 107-109.

³⁹ Alejandro Álvarez, *La codification du droit international, ses tendances, ses bases* (Paris, 1912), p. 57. Viktor Bruns, ‘Völkerrecht als Rechtsordnung’, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 1 (1929), pp. 1-56, vol. 3 (1931), pp. 445-487, at p. 35 [denies the possibility of the conclusion of treaties by international law, if one party does not have legal subjectivity; but this statement stands against the continuing British practice of concluding treaties by international law, for example with Bunyoro, a state within the British Uganda Protectorate, in 1933: Treaty Bunyoro – UK, 23 October 1933, in: Neville Turton, John Bowes Griffin and Arthur W. Lewey, eds, *Laws of the Uganda Protectorate*, vol. 6 (London, 1936), pp. 1412-1418]. Frederick Charles Hicks, *The New World Order. International Organization, International Law, International Cooperation* (New York, 1920), p. 100.

⁴⁰ Max Beer, *Das Regenbogenbuch* (Bern, 1915), pp. 369-370.

⁴¹ Nobuaki Makino, ‘Racial Equality [Address to the Plenary Meeting of the Paris Peace Conference, 28 April 1919]’, in: Alfred Eckard Zimmern, ed., *Modern Political Doctrines* (London, 1939), pp. 234-236, at pp. 235-236.

⁴² Billy Hughes, ‘Notes in His Capacity as Prime Minister of Australia’, 1919 (National Library of Australia, Hughes Papers, Series 24/2, Folder 11: 1538/24/902): “The proposition is this: either the Japanese proposal means something or it means nothing. If the former, out with it; if the latter, why have it.”; partly printed in: Margaret Macmillan, *Peacemakers. The Paris Peace Conference of 1919 and Its Attempt to End War* (London, 2001), p. 328 [further edn (New York, 2002)]. Naoko Shimazu, *Japan, Race and Equality. The Racial Equality Proposal of 1919*

severe setback for the internationalism that had gained currency in Japan during and after the war and had boosted strong support for the League of Nations. After the rejection of its proposal, the Japanese government began to take a distanced position vis-à-vis the League already during the latter phase of the conference,⁴³ and retained its policy of removing racial discrimination to the end of World War II.⁴⁴ Even before it began its activities, the League of Nations thus stood under the impact of ideologies of colonialism.

The League was equally bound by ideologies circulating in France, the UK and the USA concerning its relationship with Lenin's government and subsequently the Soviet Union. When a migration process out from the Russian Empire occurred during the revolutions of 1917 and the ensuing domestic warfare, the League ranked the process as a mass exodus and placed it on its agenda at a time when Lenin's government was not involved in the League. It concluded that Lenin's government was not capable of executing rule under the law, sought to intervene on behalf of the emigrants, whom it treated as refugees, and demanded from Lenin's government the recognition of the right of emigration. In 1921, the League established the office of the High Commissioner for Refugees. The office received the task of extending legal protection to the emigrants both towards Russian government agencies and vis-à-vis agencies in destination states. The office was aware of the likelihood that, in consequence of its activities, the number of migrants out from Russia might increase and that, in turn, the increase might destabilise Lenin's government.⁴⁵

The League migration policy thus revealed a lack of toleration of the internationalist and anti-colonialist ideology to which Lenin's and subsequent Soviet Union governments subscribed. Within the Soviet Union, international legal theorists responded to hostile League attitudes towards Soviet ideology in establishing what they portrayed as a distinctly Soviet position regarding international law. Evgenij Aleksandrovič Korovin (1892 – 1964), who had published a handbook on international law in 1923,⁴⁶ produced a revised survey in 1926. In the latter text, he claimed that there was no “intellectual community” between “states of bourgeois and of socialist culture” and that, by consequence, “the complex of legal norms” appropriate for that community had been lost.⁴⁷ Korovin assumed that the “intellectual community”, in order to be able to operate as the framework for the establishment and endorsement of legal norms, presupposed the existence of “a certain degree of communality of values together with uniform legal, ethical and political convictions”. Korovin structured his “intellectual community” as non-institutional and with potential extension across the globe.⁴⁸ Given the variety of types of “convictions” constituting Korovin's “intellectual community”, he had to postulate that extralegal “ideas” could have an impact on positive international law. For example, he posited that states, whose governments justified colonial rule, could not exist in a “community” with states, whose governments stood against any form of colonialism.⁴⁹ Korovin thus took up the nineteenth-century conception that an “international legal community”, in order to be able to generate positive international law, should be a global community of states. To that extent, Korovin agreed with the Wilsonian conception that informed League ideologies. Yet he rejected the demand that the Soviet government should regard the Soviet Union as belonging to the club of states forming that community as it was in existence under League auspices.

(London, 2006) [first published (London, 1998)].

⁴³ Arata Ninagawa, *Les reclamations Japonaises* (Paris, 1919).

⁴⁴ Masatoshi Matsushita, *Japan in the League of Nations* (Studies in History, Economics and Public Law, 314) (New York, 1929), pp. 162, 164. Mamoru Shigemitsu, '[Address to the National Diet, 17 June 1943]', in: Shigenitsu, *Addresses before the Diet*. Print (Tokyo, 1943), pp. 1-4 (Tokyo: Gaimushō Shiryōkan, A1.0.0.14), at pp. 1, 3. Shigemitsu, '[Address to the National Diet, 27 October 1943]', in: *ibid.*, pp. 6-11, at pp. 7, 10.

⁴⁵ Madeleine de Bryas, *Les peuples en marche. Les migrations politiques et économiques en Europe depuis la guerre mondiale* (Paris, 1926), p. 210. Gabriel Albert Auguste Hanotaux, 'Préface', in: Bryas (as above), p. V. Timothy Andrew Taracouzio, *The Soviet Union and International Law* (New York, 1935) [reprint (New York, 1972)]. Taracouzio, *War and Peace in Soviet Diplomacy* (New York, 1940) [reprint (Westport, CT, 1975)].

⁴⁶ Evgenij Aleksandrovič Korovin, *Sovremennoe meždunarodnoe publičnoe pravo* (Moscow, 1926).

⁴⁷ Evgenij Aleksandrovič Korovin, *Das Völkerrecht der Übergangszeit*, edited by Herbert Kraus (Internationalrechtliche Abhandlungen, 3) (Berlin, 1929), pp. 9, 12-13 [first published (Moscow, 1923); second edn (Moscow, 1925); reprint of the first Russian edn (Berlin, 1971)].

⁴⁸ *Ibid.*, p. 9.

⁴⁹ *Ibid.*, pp. 9-10.

By contrast, Korovin specified the Soviet international legal theory by admitting not only states as international legal subjects but also churches, “migrating tribes and savage peoples”, trading companies, “nations not organised as states, the organised proletariat”.⁵⁰ Through his admission of a pluralism of types of international legal subjects, Korovin returned to theories of the law among states of the seventeenth and eighteenth centuries, while remaining within the nineteenth-century terminology of “civilisation”. That broad concept of international legal subjecthood, however, was to be valid only within the law of peace. Regarding the law of war, Korovin was ready to apply the narrow concept of war enshrined in the Hague Conventions of 1899 and 1907 and followed the then predominantly German theoretical conviction that in a war, only states were enemies, not the “remaining mass of the ‘peaceful population’”.⁵¹ Moreover, regarding the sources of international law, he radicalised Bergbohm’s, Jellinek’s and Triepel’s nineteenth-century positions by denouncing the presumption of the binding effect of customary law as an element of “bourgeois international law”, and claimed that Soviet international law was based on the “contract presumption”, that is the recognition of the priority of positive international law.⁵²

Korovin thus stated the lack of “intellectual community” between “bourgeois” and “socialist” culture as a matter of fact. From the proclaimed Soviet government goal of promoting world revolution, he drew the conclusion that, given the lack of an “intellectual community”, any international legal norm could only be valid for a “period of transition” until the completion of world revolution under Soviet leadership. During this period, international law could regulate relations among states in different “intellectual communities”. Using the formula of the “period of transition”, Korovin took up the tradition of Muslim law of war and peace, as it had been established in the eighth century. Like Muslim legal theorists, Korovin maintained that legal relations among states with different legal systems, religious faiths and cultural values could not exist indefinitely but that valid treaties had to be honoured unconditionally as they had been agreed upon. However, Korovin actually shifted the principle of Muslim legal theory from the arena of law, religion and culture into that of ideology. He insisted that the Soviet government had always subjected itself to the “contract presumption” and adduced empirical cases in support of his claim, such as the Soviet government’s faithful implementation of the German-Russian peace agreement of 1918 and the German-Russian treaty of 1922. He also noted that the Soviet government was cooperating with League of Nations agencies, including the High Commissioner for Refugees, even without being a League member.⁵³ He left no doubt that the Soviet government felt legally bound in its commitment to honour multilateral treaties and to contribute to the work of international organisations resulting from them.⁵⁴

But, following the 1930 Convention of the Communist Party of the Soviet Union, Korovin came under pressure from Josef Stalin’s (1879 – 1953) ideology watchdogs. They read into Korovin’s texts the argument that various national legal norms existed in international law. They interpreted this argument, for which there is actually no record in Korovin’s writings, as a rebuttal of Stalin’s statement at the party convention that Soviet foreign policy was peace policy. Korovin was forced to revoke his theories and arguments in general terms and to practice self-criticism without reference to details.⁵⁵ But he remained in office.⁵⁶

The harsh stance of Soviet international legal theorists against colonialism met with skepticism and contempt outside the Soviet Union. For one, Vladimir Emmanuilovič Grabar (1865 – 1956), then teaching international law at the University of Tartu, was even ready to confess that he

⁵⁰ Ibid., pp. 19-22. Vladimir Emmanuilovič Grabar, ‘Das heutige Völkerrecht vom Standpunkte der Sowjetunion’, in: *Zeitschrift für Völkerrecht* 14 (1928), pp. 188-214, at p. 193.

⁵¹ Korovin, *Völkerrecht* (note 47), p. 121.

⁵² Ibid., p. 24.

⁵³ Ibid., p. 13.

⁵⁴ Ibid., p. 13.

⁵⁵ Evgenij Aleksandrovič Korovin, ‘[Declaration of self critique, 9 May 1935]’, in: Aleksandr N. Makarov, ‘Die Völkerrechtswissenschaft in Sowjetrussland’, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 6 (1936), pp. 486-487, at pp. 486-487.

⁵⁶ Sergej Krylov, ‘Les notions principales du droit des gens (La doctrine soviétique du droit international)’, in: *Recueil des cours* 70 (1947, part I), pp. 407-476, at p. 425.

was “bewildered to see that wandering tribes and savage peoples as well as nations not organised as states were listed as collectives of the ruling classes”.⁵⁷ Alfred Verdroß Edler von Drossberg (1890 – 1980), public lawyer at Vienna, ranked Korovin among the deniers of international law, without discussing the details of Soviet international legal theory and despite Korovin’s explicit commitment to the “contract presumption”. Verdroß assumed that this was so simply because the Soviet government was determined “to replace the existing order among states ... by a Socialist world state”.⁵⁸

The League of Nations and Colonial Rule

Moreover, the League of Nations allowed itself to become involved in transfers of colonial rule. Jan Christiaan Smuts, representing the Union of South Africa as its Prime Minister (in this office 1919 – 1924) at the Paris Peace Conference, presented a draft proposal the aim of which was to restructure control over colonial dependencies under the roof of the new League and in accordance with Point 5 of Wilson’s conditions for peace. There was no controversy among conference participants that the German Empire was to lose its dependencies. But participants did not at all take into consideration the option of recognising new sovereign states from the former German “Protectorates”, thereby effectively excluding the populations of these territories from exercising their “right of self-determination”. Wilson himself did not think of using the League for the purpose of ending colonial rule but was one of its ardent propagators,⁵⁹ jointly with contemporary senior US diplomats.⁶⁰ However, participants dispatched to the conference by colonial governments could not reach agreement about the procedure of redistributing among themselves control over the former German “Protectorates”. Hence Smuts came up with what he considered to be a compromise proposal, namely to first transfer these dependencies to the League of Nations which would then “mandate” some of its members to administer them, and to do so without any involvement of resident populations in the transfer procedure. In his draft proposal for the League of Nations Covenant of 16 December 1918, Smuts claimed, expanding on nineteenth-century concoctions of alleged lack of governmentality, that the former German “Protectorates” were inhabited by “barbarians, who cannot possibly govern themselves” and “to whom it would be impractical to apply any idea of political self-determination in the European sense”.⁶¹ Therefore, the League of Nations should, in his view, provide rule, control and administration over the populations of these territories.⁶² Smuts thus argued completely within the conventions of international legal theory that had been used to legitimise colonial rule at the turn towards the twentieth century. He saw no reason not apply that theory to League Nations activities.

Smuts’ proposal found acceptance among conference participants and became the basis of Article XXII of the League Covenant. The Article “mandated” League members to conduct their administration on behalf of the League and to the benefit of populations placed under their control. Article XXII thus reflected the same paternalism as nineteenth-century colonialist ideology. Nevertheless, it set the standard for the implementation colonial rule to the end of World War II, not

⁵⁷ Grabar, ‘Völkerrecht’ (note 50), pp. 193, 211.

⁵⁸ Alfred Verdross, *Völkerrecht* (Enzyklopädie der Rechts- und Staatswissenschaften. Abteilung Rechtswissenschaft, 30) (Vienna, 1937), p. 27.

⁵⁹ Marc Frey, ‘Selbstbestimmung und Zivilisationsdiskurs in der amerikanischen Außenpolitik. 1917 – 1950’, in: Jörg Fisch and Elisabeth Müller-Luckner, eds, *Die Verteilung der Welt. Selbstbestimmung und das Selbstbestimmungsrecht der Völker* (Schriften des Historischen Kollegs, Kolloquien 79) Munich, 2011), pp. 157-172. Erez Manela, *The Wilsonian Moment. Self-determination and the International Origins of Anticolonial Nationalism* (Oxford, 2007), pp. 215-225 [reprint (Oxford, 2009)].

⁶⁰ Paul Samuel Reinsch, *Colonial Government. An Introduction to the Study of Colonial Institutions* (New York and London, 1902) [further edns (New York, 1905; 1911; 1924; 1926); reprint of the edn of 1902 (Freeport, NY, 1970)]. Reinsch, *Colonial Administration* (New York, 1905).

⁶¹ Jan Christiaan Smuts, ‘The League of Nations. A Practical Consideration [16 December 1918]’, in: Miller, *Drafting* (note 15), vol. 2, nr 5, pp. 23-60, at p. 28 [first printed (London, 1918)].

⁶² *Ibid.*, pp. 30, 32.

only for “Mandatory Territories” but for other types of dependencies as well.⁶³ According to that standard, only governments of “civilised” states effectively could guarantee citizens’ rights and thus could be entitled to rule. This was the principle that induced theorists to support demands for extraterritoriality rights still in the 1920s.⁶⁴ Only states acknowledged as “civilised” were to be classed as “well organised”⁶⁵ and had the potential for admission into the League. The Covenant officially determined that some of the groups inhabiting “Mandatory Territories” were living under conditions distant from “civilisation”,⁶⁶ whereby the League, like colonial governments, styled its “mandating” policy as a civilising mission. The mission could comprise such practical measures as the reduction of alcohol consumption among the “natives” settling in the “Mandatory Territories”.⁶⁷ Implementing its Covenant, the League, immediately after its establishment, transferred titles to colonial rule, creating a special commission to supervise the execution of the “mandates”. League members entrusted with “mandates” had to file annual reports to the commission about their activities. The League rewarded Smuts for his services with a “mandate” over former German Southwest Africa, transferred under British and French joint rule those parts of the Cameroons that had been under German control, “mandated” France with Togo, in the vicinity of French Dahomey, German East Africa (the continental part of current Tanzania) came under the sway of the British government that now controlled all of East and Southeast Africa, while Rwanda and Burundi were entrusted to Belgium as “Mandatory Territories”. The German part of the islands in the South Pacific north of the Equator passed on to Japanese, the German part of New Guinea to Australian and the German part of Samoa to New Zealand government control. The holders of the “mandates” were obliged not to amalgamate the territories placed under their rule with other dependencies.

But no holder of a League of Nations “mandate” took this obligation to mean that the paternalistic practices of control should deviate in any way from the fancies of “civilising” missions that applied to other colonial dependencies as well.⁶⁸ Quite on the contrary, some holders of “mandates” launched measures with the goal of fostering ties between their “Mandatory Territories” and their nearby other colonial dependencies. The minority government in the Union of South Africa went furthest in treating its “Mandatory Territory” as if it was an integral part of the state. But also the British government issued proposals during the 1920s according to which its colonial dependencies in East and Southeast Africa should be merged into something termed “Closer Union” with what was then called “Tanganyika Mandatory Territory”.⁶⁹ The project, which arose from an attempt to reduce the costs of colonial administration, failed in 1931. Yet it was not the League of Nations that stopped this project. By contrast, the project met with severe objections both from

⁶³ Donald Cameron, *The Principles of Native Administration and Their Application* (Lagos, 1934). Cameron, *Native Administration in Nigeria and Tanganyika* (Journal of the Royal African Society, vol. 36 Supplement) (London, 1937).

⁶⁴ Rodney Yonkers Gilbert, *The Unequal Treaties. China and the Foreigner* (London, 1929), p. VII. Raymond Leslie Buell, *International Relations* (New York, 1925), pp. 461-464 [second edn (New York, 1929); third edn (New York, 1932)].

⁶⁵ Thomas Erskine Holland, ‘The Rights of States [1875 x 1910]’, in: Holland, *Lectures on International Law*, edited by Thomas Alfred Walker and Wyndham Legh Walker (London, 1933), pp. 101-169, at p. 117.

⁶⁶ Covenant, ed. Miller, *Drafting* (note 15), Art. XXII, nr 6, p. 737. Buell, *Relations* (note 64), p. 355. Inazō Nitobe, ‘What the League of Nations Has Done and Is Doing’ [Lectures Delivered in the International University of Brussels, 13 / 14 September 1920], in: *Nitobe Inazō. From Bushido to the League of Nation*, edited by Teruhiko Nagao (Sapporo, 2006), pp. 4- 25, at p. 20 [first published (London, 1921); also in: Nitobe, *The Works*, vol. 15 (Tokyo 1969), pp. 371-400].

⁶⁷ Japan, Nan’yō Chō, ‘[Edict of the South Sea Bureau, 11 October 1922]’, in: *Annual Report to the League of Nations on the Administration of the South Sea Islands under Japanese Mandate for the Year 1926* (Tokyo, 1927), Annex (s. p.).

⁶⁸ For an example, see: Cameron, *Administration* (note 63).

⁶⁹ Edward Hilton Young, *Report of the Commission of the Dependencies in Eastern and Central Africa* (Cmd, 3234) (London, 1929) [partly edited in: Donald Sylvester Rothchild, ed., *Politics of Integration. An East African Documentary* (EAPH Political Studies, 4) (Nairobi, 1968), pp. 26-34]. William George Arthur Ormsby-Gore, *East Africa. Report of the East Africa Commission* (Cmd, 2387) (London, 1925) [partly edited in: Rothchild (as above), Ppp. 20-21]. Samuel Wilson, *Report of Sir Samuel Wilson on His Visit to East Africa, 1929* (Cmd, 3378) (London, 1929) [partly edited in: Rothchild (as above), pp. 34-35].

African population groups as well as from the side of British settlers in East Africa. The British government did not even consult the League about the implementability of its project.⁷⁰ By actively bolstering the legitimacy of colonial rule, the League of Nations thus purposefully contributed to the exclusion of large parts of humankind from the validity of international law. Colonial governments which, in consequence of League of Nations measures, were no longer to be found in Europe only, but, with the exception of Australia, upon which the British government had nominally transferred control over the southeastern part of New Guinea, also in America, the South Pacific and South Africa, could then proclaim their colonial rule as stable and in full accordance with international law.⁷¹ Against well recorded protests mainly by South Asian intellectuals, who called into question the legitimacy of colonial rule, Oliver Stanley (1896 – 1950), British Colonial Secretary, could still categorise British colonial rule as a matter of long duration, as late as in 1943.⁷²

Outside the framework of the League, but with impacts on its activities, an international conference took place in Washington D.C. between 21 November 1921 and 6 February 1922 to which governments of Belgium China, France, Italy, Japan, the Netherlands, Portugal, the UK and the USA dispatched delegations.⁷³ The conference closed the Anglo-Japanese alliance and sought to regulate issues that would on principle have belonged to League agenda. But the issues appeared to involve the USA and could, therefore, not be discussed within the League as the USA was not a member. The conference eventually approved several agreements, a treaty on the limitation of naval capacity between France, Italy, Japan, the UK and the USA, an instrument through which France, Japan, the UK and the USA reciprocally acknowledged their entitlements to colonial rule in the South Pacific, an agreement between France, Italy, Japan the UK and the USA about the renunciation of the deployment of submarines and the outlawing of the use of poisonous gas, and the Nine Powers Pact obliging all participant states to respect the sovereignty of the Chinese state while forcing the Chinese government to grant “equal opportunity” to all other signatory parties and their citizens on Chinese territory. The Japanese delegation interpreted the naval agreement as its diplomatic defeat, because it implied the ranking of states according to the permitted upper limit of naval tonnages; Japan was placed at the lowest level of this ranking scheme.⁷⁴ The Chinese side found that the Nine Powers Pact followed the tradition of the non-reciprocal discriminatory treaties in that it denied “equal opportunity” to the Chinese government.⁷⁵ The Washington Conference thus

⁷⁰ Daudi Chwa II., Kabaka von Buganda, ‘[Letter dated September 1927 to William George Arthur Ormsby-Gore, Under-Secretary of State for the Colonies]’, in: *Papers Relating to the Question of Closer Union of Kenya, Uganda and the Tanganyika Territory* (Colonial, 57) (London, 1931), pp. 79-80 [partly edited in: Rothchild, *Politics* (note 69), pp. 21-22]. Daudi Chwa II, Kabaka of Buganda, ‘Memorandum on the Proposed Federation of the British East African Dependencies, Its Effects on the Constitution of Buganda Kingdom [undated; attached to the Kabaka’s letter, dated 29 October 1927, to William George Arthur Ormsby-Gore]’, in: *Papers Relating to the Question of Closer Union of Kenya, Uganda and the Tanganyika Territory* (Colonial, 57) (London: HMSO, 1931), pp. 80-85. Daudi Chwa II, Kabaka of Buganda, ‘[Letter to the Secretary of State for the Colonies, 8 May 1929]’, in: *Papers Relating to the Question of Closer Union of Kenya, Uganda and the Tanganyika Territory* (Colonial, 57) (London: HMSO, 1931), pp. 85-89.

⁷¹ For examples, see: Arthur James Balfour, ‘[Address to the Imperial Conference 1921 on the Building of a Base for the Royal Navy at Singapore, Eighth Meeting, 28 June 1921]’, Ms. Canberra: Australian Archives Offices, CAB 23/26; partly printed in: Ian Hamill, *The Strategic Illusion. The Singapore Strategy and the Defence of Australia and New Zealand. 1919 – 1942* (Singapore, 1981), p. 26. Arthur Pole Nicholson, *Scraps of Paper. India’s Broken Treaties, Her Princes and the Problem* (London, 1930).

⁷² Oliver Stanley, ‘[Address to the House of Commons, 13 July 1943]’, in: *Hansard Parliamentary Debates*, vol. 391 (London, 1943), col. 48-69 [partly printed in: Andrew N. Porter and A. J. Stockwell, eds, *British Imperial Policy and Decolonization. 1938-64*, vol. 1 (Basingstoke, 1987), pp. 156-166]. For early twentieth-century refusals of the legitimacy of colonial rule see: Kavalam Madhava Panikkar, *An Introduction to the Study of the Relations of the Indian States with the Government of India* (London, 1927). Panikkar, *Indian States and the Government of India* (London, 1930) [second edn (London, 1923); reprint (Delhi, 1985)].

⁷³ Roger Dingman, *Power in the Pacific. The Origins of Naval Arms Limitation. 1914 – 1922* (Chicago and London, 1976). Erik Goldstein and John Mawer, eds, *The Washington Conference 1921-22. Naval Rivalry, East Asian Stability and the Road to Pearl Harbor* (Ilford, 1993).

⁷⁴ Kiyoshi Karl Kawakami, *Japan and World Peace* (New York, 1919), pp. 45-62.

⁷⁵ Johnson Long, *La Mandchourie et la doctrine de la porte ouverte* (Paris, 1933), pp. 63-65, 79, 98-99. Sakutarō

appeared to have restored the old practice of applying international law for the purpose of discriminating against states in Asia.

The Practical Implementation of Colonial Rule during the 1920s and 1930s

The modalities of the practical implementation of colonial rule during the 1920s and 1930s become apparent specifically with regard to Japanese institutions that were newly created at this time on the basis of the League of Nations “mandate”. Associations, lobbying for the expansion of colonial rule since the turn towards the twentieth century, demanded the widening of Japanese trade relations towards the South Pacific and Southeast Asia with active support from geographer Shigetada Shiga (1863 – 1927) and industrialist Eiichi Shibuzawa (1840 – 1931).⁷⁶ However, neither the naval command nor the government of Japan showed concern about the exploitation of the South Pacific islands and trade issues, even after the islands had come under Japanese military occupation. The report on the administration of the islands that the Ministry of Education (Monbushō) released in 1916, did not feature any information concerning natural resources and potential for emigration. Nevertheless, the naval command, in charge of controlling the islands, established elementary schools on Saipan and four further islands already in December 1915.⁷⁷ The government itself sent out a fact-finding mission in 1921, whose research reports were published between 1925 and 1927.⁷⁸ Therefore it is not possible to argue that successive Japanese governments were pursuing a consistent long-term strategy of expansion in search for merely economic gains since the 1890s.⁷⁹ This economic interpretation of Japanese colonial policy is untenable, even though it had already been proposed by Inazō Nitobe (1862–1933), who had worked for the Japanese administration of Taiwan from 1901 to 1903.⁸⁰

Under the renewed Anglo-Japanese alliance treaty of 1911, the Taishō government (1912 – 1926) provided support for the British navy in its struggle against German submarines from 1917 and obtained in return the British recognition of its colonial control over the South Pacific islands. The deal was placed under secrecy, which the British side strictly applied. By consequence, the British government informed only the belligerents among its allies, but not the US government which had not entered the war when the arrangement was made.⁸¹ The deal became public only when the Japanese delegation at the Paris Peace Conference, with British support, demanded confirmation of its rule over territories in the South Pacific together with the recognition of its control of Shandong Province in China.⁸² The conference accepted the demand and placed the former German colonial dependencies of the Carolinas, Marianas and Marshall Islands under a “Class-C mandate” for Japan with full sovereignty over these territories.⁸³

With regard to Shandong (Kiautschou), the Taishō government had, soon after the beginning of the war, used the political weakness of the new republican government under General Shi-kai Yuan in order to avoid returning to the Chinese government the territory formerly under German rule, as had been promised, but to keep it under Japanese control. The government declared

Tachi, *The Principles of the Open Door in China and Manchukuo* (Tokyo, 1937), pp. 8-10.

⁷⁶ Shigetada Shiga, *Nan'yō jiji* (Tokyo, 1887) [further edns (Tokyo 1889; 1891); newly edited (Tokyo, 2007)].

⁷⁷ Japan, Monbushō, *Nan'yō shinsen ryōchi shisatsu kōkoku* (Tokyo, 1916).

⁷⁸ Japan, *Nan'yō guntō chōsa shiryō* (Tokyo, 1927).

⁷⁹ William Gerald Beasley, *Japanese Imperialism. 1894 – 1945* (Oxford, 1987), pp. 251, 254, 258. Hyman Kublin, ‘The Evolution of Japanese Colonialism’, in: *Comparative Studies in Society and History* 2 (1959), pp. 67-84. Mark R. Peattie, ‘Japanese Attitudes toward Colonialism’, in: Peattie and Ramon Hawley Myers, eds, *The Japanese Colonial Empire. 1895 – 1945* (Princeton, 1984), pp. 80-127, at pp. 91-92.

⁸⁰ Inazō Nitobe, ‘Japanese Colonization’, in: *Asiatic Review*, Fourth Series, vol. 16 (1920), pp. 113-121 [first published in: *Proceedings. The Japan Society of London* (1919); also in: Nitobe, *The Works*, vol. 23 (Tokyo; 1972), pp. 111-120, at p. 113].

⁸¹ Peter Carel Pauwels, *The Japanese Mandate Islands*. LLD Diss. (Batavia, 1936), pp. 28-30.

⁸² *Ibid.*, p. 28.

⁸³ Elizabeth van Maanen-Helmer, *The Mandates System in Relation to Africa and the Pacific Islands* (London, 1929). Pauwels, *Mandate* (note 81), pp. 30-73.

its intention jointly with the submission of “Twenty-one Demands” relating to the extension of railroad concessions in Manchuria and Inner Mongolia, the transfer under Japanese control of the highly indebted mining complex of Han Ye-ping, the prohibition of the filing of new concessions to foreign governments as well as a number of further requests tantamount of interventions in Chinese domestic policy. This latter group comprising eight demands was dropped at the recommendation of the State Council (Genrō), but the remaining “Thirteen Demands” formed part of an international treaty that both sides signed on 25 May 1915.⁸⁴ Immediately after the end of the war, journalist Kiyoshi Karl Kawakami (1873 – 1949) commented that the “Twenty-one Demands” had been a diplomatic disaster for Japan due to the rude style in which the demands had been presented. Also, Kawakami noted, the Taishō government had naively expected that the Chinese side would honour its pledge to keep the demands secret.⁸⁵ Yet, according to a rumor, which US Ambassador in China Paul Samuel Reinsch (1869 – 1923) reported, Yuan had not merely approved of the original „Twenty-one Demands“ before they had been submitted, but had even drafted them with the intention of obtaining Japanese support for his recognition as the supreme ruler of China.⁸⁶ As Japanese control over Shandong was based on the bilateral treaty of 1915, it did not become the subject of a League of Nations “mandate”.

With its policy of the expansion of government control on to continental East Asia and the South Pacific, the Taishō government lost the credit that it had acquired among reformist intellectuals in China.⁸⁷ As self-proclaimed “modernisers”, these intellectuals had been initially ready to follow the Japanese model during and after the revolution of 1911, but turned against Japan from 1915. Likewise, aggressive government policy resulted in Chinese-Japanese inter-government conflict during the period of domestic warfare in China in the 1920s and 1930s.

At the same time, the Taishō government launched a policy of confrontation with the revolutionary government in Russia peaking in the military intervention of Siberia in 1917. From August 1918, three divisions of the land army were deployed in the Russian Far East. The goal of the intervention was the acquisition of land for settler colonies, the declared reasons were the restoration of security for Japanese citizens in revolutionary Russia and the compensation for debts that had not been repaid.⁸⁸ These arguments were directly drawn on the logic of the expansion of rule by European colonial governments. Initially, the Taishō government conducted the intervention on its own but began to cooperate with the US government under Woodrow Wilson, who dispatched a military contingent to Siberia in 1918. All intervention forces were withdrawn unilaterally and unconditionally in 1922.⁸⁹

The failure of the invasion of Siberia occurred while the “racial equality proposal” was rejected at the Paris Peace Conference and when the Washington naval conference appeared to position Japan as a secondary military power. The army command blamed the failure of the invasion of Siberia on the lack of determination in the Taishō government that appeared to give in to US demands. The army had had to intervene in Siberia at government request and had then been forced to withdraw without any presentable success. After the Japanese armed forces had been able to make gains in the war against China (1894/95), Russia (1904/05) and the German Empire (1914/18), the end of the Siberian campaign came close to a military defeat. In the perspective of the army, the Taishō government had lost the prestige that the army appeared to have awarded to it prior to the Paris Peace Conference. The considerable engagement in international affairs to which the government subscribed in the aftermath of the conference, did not seem to be convertible either into

⁸⁴ Treaty China – Japan, 25 May 1915, in: *CTS*, vol. 221, pp. 75-90. Masamichi Rōyama, *Foreign Policy of Japan. 1914 – 1939* (Tokyo, 1941), pp. 19-21 [reprint (Westport, CT, 1975)].

⁸⁵ Kawakami, *Japan* (note 74), pp. 166-169.

⁸⁶ Paul Samuel Reinsch, *An American Diplomat in China* (New York and London, 1922), pp. 146-147 [reprint (Taipei, 1967)].

⁸⁷ Noriko Kamachi, *Reform in China. Huang Tsun-hsien and the Japanese Model* (Harvard East Asian Monographs, 95) (Cambridge, MA, 1981).

⁸⁸ Japan: ‘Minryūmin hogo no tame Kyōkutō Rōryō ni tai-suru ha-hei keiryō’, in: *Sanbō Honbu*, vol. 1 (Tokyo, 1972), p. 213.

⁸⁹ Chihiro Hosoya, ‘Japanese Documents on the Siberian Intervention 1917 – 1922’, in: *Hitotsubashi Journal of Law and Politics* 1 (1960), pp. 30-53.

military power or into diplomatic influence. The rejection of the “racial equality proposal” appeared to be the case in point. Internationally minded anti-colonialist intellectuals had, since the beginning of the twentieth century, campaigned for the global enforcement of the principle of the equal treatment of all individuals, and the Meiji government had, on the basis of the Anglo-Japanese alliance, successfully pressured the Australian government to accept its stance. At the Paris Peace Conference, not only the European colonial governments but also the US government immediately sensed the anti-colonial push behind the proposal and thwarted it. The Washington conference had buried the Anglo-Japanese alliance, replacing it by a framework of multilateral treaties which appeared to leave no option for displays of military strength. The Taishō government seemed to act in accordance neither with the interests of nationalistically minded military officers nor with the concerns of internationally minded intellectuals. All three decisions together weakened the political base for internationalism for which Inazō Nitobe campaigned in Japan, who was League of Nations Deputy Secretary General from 1919 to 1926.⁹⁰ Instead, drives for the expansion of Japanese government control gained the upper hand since the second half of the 1920s.

The Taishō government responded to the domestic pressure with the gradual establishment of offices in charge of the administration of the “Mandatory Territories”. Article XXII of the League of Nations Covenant obliged Japan as well as the other “mandate” holders to provide the best possible “material and moral welfare and social progress” to inhabitants of territories under their control (nr II), to prevent slave trade, to act against the distribution of weapons and ammunition, not to tolerate the consumption of intoxicating beverages by “natives”, not to subject them to military training except for purposes of police surveillance and local defense, to permit the freedom of practice of all kinds of religious service, to allow immigration by citizens of all League of Nations members and to submit an annual report of their activities.⁹¹ Implementing these rules of administration under the “mandate” system, an Imperial Edict, dated 30 March 1922, created the Nan’yō Chō, the South Sea Bureau, which was placed under the Prime Minister and had branches in Saipan, Palau, Yap, Truk, Ponape and Jaluit. The Nan’yō Chō was advised by the Takumu Kyoku, the Colonial Office, which was upgraded to the Takumu Shō, the Colonial Ministry, in 1929.⁹² In 1937, the Nan’yō Chō had 737 employees. Initially, the US government had claimed Yap for itself but recognised the “mandate” for Japan at the Washington Conference in 1922. The Imperial navy remained present in the South Pacific but left the administration to civilian officials. Following European models, the administrators appointed village “chiefs” as liaison men to the local populations. Some of these “chiefs” were recruited from the traditional elites, when their members showed willingness to collaborate. As in European colonial dependencies, the “chiefs” were responsible for the collection of the poll tax, the communication of the contents of new laws and the implementation of administrative orders. They also received the tasks of spreading “industry, culture and civilization” and of promote loyalty towards Japan among the “natives”.⁹³ The government commissioned ethnological research.⁹⁴ Inhabitants of the South Pacific, unlike those of Korea and Taiwan, were not drafted into military service for the Japanese armed forces.⁹⁵

⁹⁰ Thomas W. Burkman, ‘The Geneva Spirit’, in: John F. Howes, ed., *Nitobe Inazō. Japan’s Bridge across the Pacific* (Boulder, 1995), pp. 177-214. Hiroharu Kobayashi, ‘Rōyama Masamichi’s Perception of International Order from the 1920s to the 1930 and the Concept of the East Asian Community’, in: Dick Stegewerns, ed., *Nationalism and Internationalism in Imperial Japan* (Abingdon, 2006), pp. 135-167 [first published in: *Nihonshi Kenkyū* 424 (1997)]. Dick Stegewerns, ‘The Dilemma of Nationalism and Internationalism in Modern Japan. National Interest, Asian Brotherhood, International Cooperation or World Citizenship’, in: Stegewerns (as above), pp. 1-16.

⁹¹ League of Nations, [‘“Class C” Mandate for Colonial Administration to Japan, 17 December 1920’], in: Pauwels, *Mandate* (note 81), pp. 147-149.

⁹² Pauwels, *Mandate* (note 81), pp. 75, 79-80.

⁹³ Nan’yō Chō, Edict (note 67). Pauwels, *Mandate* (note 81), p. 78. Tadao Yanaihara, *Pacific Islands under Japanese Mandate* (Shanghai, 1939), pp. 263-266, 268-271.

⁹⁴ Shizuo Matsuoka, *Mikuroneshia go no sōgō kenkyū* (Tokyo, 1937). Matsuoka, *Taiheiyō minzoku shi* (Tokyo, 1941). Matsuoka, *Mikuroneshia minzoku shi* (Tokyo, 1943).

⁹⁵ Mark R. Peattie, ‘The Nan’yō. Japan in the South Pacific. 1885 – 1945’, in: Peattie and Ramon Hawley Myers, eds, *The Japanese Colonial Empire. 1895 – 1945* (Princeton, 1984), pp. 172-210, at pp. 198-203. Peattie, ‘The Japanese Colonial Empire. 1895 – 1945’, in: Peter Duus, ed., *The Cambridge History of Japan*, vol. 6 (Cambridge, 1988), pp. 217-270, at p. 249.

As the German Empire was then not a member of the League of Nations, all German nationals left the South Pacific upon the enforcement of “mandate” administration. Because the German colonial administration had established only one school in the South Pacific dependencies, had reserved it for the children of German officials stationed there and had left to missionaries the organisation of schools for the local population, the entire educational sector had to be rebuilt from scratch from the onset of “mandate” administration. That took place swiftly. Already in 1924, there were altogether twenty schools for 2858 pupils. By 1933, the numbers had increased to 40 schools and 6035 pupils.⁹⁶ Catholic missionaries from Spain succeeded the Germans, while the Congregational Church of Japan dispatched Protestant missionaries.⁹⁷ In 1927, German Protestant missionaries returned, their number rose to seven in 1933, of whom five belonged to the Liebenzeller Mission, the German branch of the China Inland Mission.⁹⁸ The German colonial administration neglected the educational but also the health sector. When the Japanese navy occupied the territory during the war, only one hospital was in operation, reserved for the treatment of patients of German origin. Under Japanese “mandate” administration, healthcare improved quickly. In 1935, 18,412 patients were treated in hospitals on the seven largest islands.⁹⁹

The “mandate” administration also took interest in the economic exploitation of the territory, promoting the use of phosphor and copra as well as the growth of sugar cane. The economic exploitation triggered settler colonisation from Japan to facilitate mining and the operation of agricultural plantations. In 1924, 4718 Japanese settler colonists were registered on Saipan, Palau, Yap and Truk. By 1937, the number of settlers grew to 52,218 only on Yap and Saipan, as against 3143 local Chamorro residents on the latter island. The proportion between Japanese settlers and local Chamorro residents on Saipan was more than 10:1 at this time.¹⁰⁰

Elsewhere in territories under Japanese control, the felt diplomatic defeats of Paris and Washington ushered in the rise of revisionist movements seeking to advance the expansion of Japanese control and to sever ties with the League of Nations.¹⁰¹ Revisionist officers staged an incident in 1931, which the government in the name of the new Shōwa Tennō (1926 – 1989) used as a pretext for the occupation of large territories in Northeast China and to establish there the state of Manchukuo, which did not receive international recognition. The League of Nations established a commission to investigate the incident. The commission filed a report concluding that the Japanese side had not been justified in blaming the incident on Chinese nationalist activists and demanded that citizens from other states should not be excluded from pursuing their activities in Northeastern China. The League considered its response as moderate, and the US government shared this view.¹⁰² In its response, the Shōwa government drew on privileges that it had accumulated in Northeastern China since the war of 1894/95 and classed them as legal entitlements to rule. It then ranked these entitlements as superior to mandatory commitments flowing from League of Nations membership, and concluded that it was unjust to apply League of Nations rules to the end of restricting alleged Japanese privileges. It claimed that the promulgation of a new state on Chinese territory and against the declared will of the Chinese government belonged to these concocted rights, because, in Japanese rendering, the Chinese government appeared not to be capable of guaranteeing the integrity

⁹⁶ Pauwels, *Mandate* (note 81), p. 97.

⁹⁷ Japan, *Annual Report to the League of Nations on the Administration of the South Sea Islands under Japanese Mandate for the Year 1924* (Tokyo, 1925), pp. 10-11.

⁹⁸ Heinrich Hertel, ‘Die Missionsarbeit in Japan’, in: *Chinas Millionen* 38 (1939), pp. 50-51, at p. 50.

⁹⁹ Yanaihara, *Islands* (note 9), p. 253.

¹⁰⁰ Japan, *Annual Report* (note 97), p. 42 (for 1924). Yanaihara, *Islands* (note 93), p. 30 (for 1937).

¹⁰¹ Sven Saaler, *Zwischen Demokratie und Militarismus. Die Kaiserlich-Japanische Armee in der Politik der Taishō-Zeit (1912 – 1926)* (Bonn, 2000).

¹⁰² Even Stanley Kuhl Hornbeck, in charge of East Asian affairs in the US State Department, who supported plans for an “economic boycott” of Japan and agreed not to recognise Japanese penetration into China, nevertheless took the Japanese defence seriously and late in 1931 played with the idea to use the penetration as a “peaceful outlet for the expansive energies of populous, narrowly bounded, militant, industrial Japan” rather than facing “Japanese ambitions in some other part of the world, where they may do less good and more mischief”. See: Stanley Kuhl Hornbeck, *The Diplomacy of Frustration. The Manchurian Crisis of 1932-1933 as Revealed in the Papers of Stanley K. Hornbeck*, edited by Justus Drew Doenecke (Hoover Press Publication, 231) (Stanford, 1981), pp. 61, 94, 115.

of the Chinese state.¹⁰³ Following Chinese protests against the logic of this argument,¹⁰⁴ the League of Nations adopted the doctrine that US Foreign Minister Henry Lewis Stimson (1867 – 1950) had issued on 7 January 1932, namely that the US government would not recognise a situation, a treaty and an agreement that had come into existence in ways incompatible with the Paris Pact on the Renunciation of War of 1928.¹⁰⁵ With its approval of the Stimson Doctrine, the League put on record that it regarded the establishment of the state of Manchukuo as a breach of international law and would impose sanctions against Japan. The Shōwa government evaded the sanctions by leaving the League in 1933. Despite harsh criticism in the public press, specifically in the German Empire and in the USA, the League decided not to revoke the “mandate” for the South Pacific islands. German and US media accused the Shōwa government of treating the “mandated” islands as territory under its direct rule, wishing to retain control over them as a war prey and planning to build fortifications there. As the building of fortifications would have been a violation of the Covenant, the League came under pressure to withdraw the “mandate”. But the League Secretariat ignored the criticism. Still in 1935, the League confirmed that the Shōwa government was fulfilling its obligations under “mandate” rules, specifically that it was not erecting fortifications. Moreover, the Secretariat insisted that the Covenant contained no provision restricting the execution of “mandates” to League members. Instead, the Secretariat insisted that “mandates” could be retained as long as their holders were acting in accordance with their duties under Article XXII of the Covenant, namely to operate as caretakers of the “native” populations and to report regularly.¹⁰⁶ Indeed, the Shōwa government implemented its duties meticulously until 1935. In its *Observations Relating to the Reporting on the Administration of the Islands under Japanese Mandate* (Observations de la Commission Permanente des Mandats au sujet du rapport sur l’administration des Iles sur Mandat Japonais) of 1934, submitted to the Japanese diplomatic representative in Warsaw on 5 November 1935, the Permanent Commission on Mandates of the League praised the accomplishments of the Japanese administration, specifically mentioning efforts towards the accomplishment of equal treatment of “natives” in economic terms and successes in the combat against the consumption of alcohol.¹⁰⁷ Moreover, the Shōwa government continued to work in non-political League committees to 1938, that is, beyond the period of two years, during which states having departed from the League were bound to cooperate by Covenant stipulation. In keeping ties with the League, the Shōwa government followed the suggestion by Dōichi Matsuda (1876 – 1946), one of its senior diplomats. Already in 1933, Matsuda argued that Japan had left the League solely for reasons of controversy over its China policy and not due to some basic disagreement over principles of League Nations activities.¹⁰⁸

The League of Nations and the Theory of International Law and International Relations

Contemporaries in the Americas and Europe were hardly aware of the bias of the League of Nations towards the practice of colonial rule, which they took for granted. But they did take notice of other defects of international organisation as represented by the League. An easily recognisable defect,

¹⁰³ Inazō Nitobe, ‘Japan and the Peace Pact [Radio Address, 20 August 1932]’, in: Nitobe, *The Works*, vol. 4 (Tokyo, 1972), pp. 240–250. Masamichi Rōyama, *Japan’s Position in Manchuria* (Tokyo, 1929), pp. 21–25. Carl Walter Young, *Japan’s Jurisdiction and International Position in Manchuria*, 3 vols (Baltimore, 1931). Louise Young, *Japan’s Total Empire. Manchuria and the Culture of Wartime Imperialism* (Berkeley, 1998).

¹⁰⁴ K. Wellington Koo [= Weijun Gu], *Memoranda Presented to the Lytton Commission*, vol. 2 (New York, 1932).

¹⁰⁵ Henry Lewis Stimson, ‘[Note, dated 7 January 1932]’, in: *Papers Relating to the Foreign Relations of the United States. Japan 1931 – 1941*, vol. 1 (Foreign Relations of the United States, Diplomatic Papers 1932, Bd 3) (Washington, 1943), p. 8.

¹⁰⁶ Japan, *Report* (note 97). J. Snellen van Vollenhoven, ‘Notes on the Japanese Mandate Islands’, in: *Bulletin of the Colonial Institute of Amsterdam* 1 (1937), pp. 69–74, at p. 74.

¹⁰⁷ Japan, Gaimushō, Gaikō Shiryōkan, *Nihon Gaikō bunsho*, nr 49 (Shōwa 8-nen tai ōbei kokusai kankei), section II, vol. 2, part 4 [1935] (Tokyo, 1999), pp. 83–87.

¹⁰⁸ Dōichi Matsuda, ‘Renmei dattai tsūkokoku made ni keika narabi ni sono igi’, in: *Renmei dattai-go no Nihon* (Tokyo, 1935), pp. 3–11, at pp. 7–8 [first published in: *Gaikō jihō* 681 (15 March 1933), pp. 104–110].

which was the object of repeated complaints, was the absence of all legally viable instruments to enforce League of Nations decisions, joined with skepticism that League sanctions might not have their intended effects.¹⁰⁹ However, awareness of these defects did not principally call into question the League as a whole. This was so because the League was a manifest institution with competence to watch over the application of the Hague peace conventions of 1899 and 1907. In this respect, the League did convey the impression as if it could transcend the limitations characteristic of nineteenth-century practices of the conduct of international relations. Not only President Wilson but also a significant number of legal and political theorists perceived of these practices as having been confined to the management of some apparently uneasy balance of power among self-proclaimed “big powers”. Against these retrospective images of the nineteenth century, the League of Nations stood out as a veritable instrument for the preservation of peace.¹¹⁰ The League even appeared to be capable of facilitating the expansion of the reach of international law, with the codification of regulations relating to intellectual property, international migration, airborne traffic, international monetary transactions and even international criminal law.¹¹¹ Among international legal theorists, the League had the reputation of an international organisation that had had a predecessor in ancient Chinese history,¹¹² was seemingly implementing the demand for international organisation attributed to Grotius¹¹³ and was contributing to the strengthening of the law of peace.¹¹⁴ Moreover, the permanent International Court of Justice (World Court), which was established through the statute of 13 / 16 December 1920 to complement the international court of arbitration in existence since 1899, bore the brunt of the expectations. The permanent court was in charge of settling disputes arising between states on a voluntary basis. Article 38, nr 1 of its statute bound the court to consider as international legal sources the positive law, as it had been agreed upon in treaties among states, the existing written or unwritten customary law, legal norms current among “civilised” nations as well as the opinions of seemingly preeminent jurists.¹¹⁵ Contemporaries were concerned about the prospect that the international court might creatively interpret existing treaties between states with the implicit danger that governments could become obliged to accept authoritatively pronounced court interpretations against their own will.¹¹⁶ They also viewed the inclusion of legal norms current among “civilised” nations as a significant and controversial innovation in the existing

¹⁰⁹ Walther Max Adrian Schücking and Hans Wehberg, eds, *Die Satzung des Völkerbundes* (Kommentar zum Friedensvertrage, Veröffentlichung 2) (Berlin, 1921) [second edn (Berlin, 1924); third edn (Berlin, 1929); revised edn (Berlin, 1931)]. Hans Wehberg, *Grundprobleme des Völkerbundes* (Berlin, 1926).

¹¹⁰ Otfried Nippold, ‘Le développement historique du droit international depuis le Congrès de Vienne’, in: *Recueil des cours* 2 (1924, part I), pp. 5-121, at p. 86.

¹¹¹ James Wilford Garner, ‘Le développement et les tendances récentes du droit international’, in: *Recueil des cours* 35 (1931, part II), pp. 605-720, at pp. 644-660, 676-693.

¹¹² Cornelis van Vollenhoven, *The Law of Peace* (London, 1936), p. 22 [first published (The Hague, 1932)]. Likewise: Georges Goyau, ‘L’Eglise catholique et le droit des gens’, in: *Recueil des cours* 6 (1925, part I), pp. 123-239, at pp. 190-205. Louis-Erasmus Le Fur, ‘La théorie du droit naturel depuis de XVIIIe siècle et la doctrine moderne’, in: *Recueil des cours* 18 (1927, part III), pp. 263-441, at pp. 278-281, 357-358.

¹¹³ Cornelis van Vollenhoven, ‘Grotius and Geneva’, in: *Bibliotheca Visseriana dissertationes ius internationale illustrantium*, vol. 6 = 13-16 (Leiden, 1926), pp. 1-81 [reprinted in: Vollenhoven, *Mr. C. van Vollenhoven’s Verspreide Geschriften*, edited by Frederik Mari van Asbek, vol. 1 (Haarlem, 1934), pp. 406-460]. Andrew Dickson White, ‘[Address to the Grotius Memorial, Delft, 4 July 1899]’, in: Frederick William Holls, ‘The Hugo Grotius Celebration at Delft, July 4, 1899’, in: Holls, *The Peace Conference at The Hague and Its Bearing on International Law and Policy* (New York, 1900), Appendix III, pp. 538-552, at p. 550.

¹¹⁴ Cornelis van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (The Hague, 1919) [first published (The Hague, 1918); Microfiche reprint (Zug, 1985)]. Max Huber, ‘The League of Nations as the Codification of Practical Needs [1920]’, in: Alfred Eckard Zimmern, ed., *Modern Political Doctrines* (London, 1939), pp. 279-283, at pp. 280-281.

¹¹⁵ Alfred Verdross and Bruno Simma, *Universelles Völkerrecht*, third edn (Berlin, 1984), pp. 348, 382-383 [first published (Berlin, 1976)]. Hugh Thirlway, ‘The Sources of international Law’, in: Malcolm D. Evans, ed., *International Law*, third edn (Oxford, 2010), pp. 95-121, at pp. 98-111 [first published (Oxford, 2003)].

¹¹⁶ Yi-Ting Chang, *The Interpretation of Treaties by Judicial Tribunals*. Ph. D. Thesis. Columbia University (New York, 1933). Tsune-Chi Yu, *The Interpretation of Treaties*. Ph. D. Thesis. Columbia University (New York, 1927). Morgenthau, *Rechtspflege* (note 38), pp. 29-36.

system of sources of international law. This was so because these norms appeared to emphasise the binding force of legal norms, upon which governments of states had not voluntarily agreed in treaties. It was thus possible to interpret these norms as having originated in natural law. They did differ from the norms included in the ancient Roman *ius gentium* that had more or less randomly comprised legal norms common among various groups subjected to rule in different states. But the norms allegedly current in “civilised” nations did seem to suggest that international legal norms could bind states, although they might not have been approved by or even known to their governments. The inclusion of such untested norms might, in the view of political decision-makers, reduce the willingness of governments of states to submit cases to the court, as the court might use legal sources of which parties were unaware.¹¹⁷ Nevertheless, some theorists insisted that the League of Nations as a whole was the institutional manifestation of Christian Wolff’s *civitas maxima*, which they posited as a “fictive republic of nations”, within which the International Court of Justice was bound to consider untested legal norms as sources of the law.¹¹⁸ Hence, the statute went into force despite queries against its operability and shaped the twentieth-century theory of international legal sources. The court acted in execution of its statute meticulously and remained within the logic informing the League of Nations Covenant. In a verdict promulgated in 1928, the court denied legal validity to agreements with “native princes or chiefs of peoples not recognized as members of the family of nations” on the ground that these instruments “are not in an international law sense treaties or conventions capable of creating rights and obligations”.¹¹⁹ With this judgment, the court cast the colonialist concept of the “family of nations” into positive international law.

Diplomacy added its own contribution to the regularisation of relations among states. The legal basis of the conduct of diplomacy, specifically the inviolability of emissaries, the waiving of extraterritoriality rights and consular justice as well as the schemes for the ranking of regularly appointed diplomatic staff in standing embassies became hardly questioned standards of diplomatic intercourse, even though some of these norms, like the public law of treaties among states, continued to remain parts of unwritten customary law and could spark controversy. This was the case first and foremost with regard to the principle of extraterritoriality. Some theorists claimed that the League of Nations had boosted the revision of non-reciprocal treaties among members of the “family of nations”, but continued to exempt states under colonial rule from the norms of the law of treaties, others.¹²⁰ Moreover, further fields of activity became open for diplomatic practice, as governments acquired new competences to regulate international political issues beyond classical foreign policy characteristic of nineteenth-century practice. Noteworthy new fields of activity related to international economic and cultural policy, wherein career diplomats entered into competition with corporate institutions and even private persons as actors in international relations, who were not bound by government instructions. Specifically the German government was quick in poking into foreign economic and cultural policy during the 1920s to its own strategic advantage, as these policy fields appeared to open venues for the circumvention of the strict limitations imposed upon German

¹¹⁷ Elihu Root, ‘[Comments on the Rules for the Permanent Court of Law, 1920]’, in: *Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16 – July 24, 1920* (The Hague, 1920), pp. 308-310 [partly printed in: V. G. Degan, *Sources of International Law* (Development of International Law, 27) (The Hague, Boston and London, 1997), p. 47].

¹¹⁸ Otfried Nippold, ‘Einleitung’ [written in 1917], in: Christian Wolff, *Jus gentium methodo scientifica pertractatum*. Reprint, edited by Otfried Nippold, vol. 1 (Oxford, 1934), pp. XIII-LVI., at p. XLVI-LI. 181 Jesse S. Reeves, ‘La Communauté Internationale’, in: *Recueil des cours* 3 (1924, part II), pp. 1-94, at p. 35.

¹¹⁹ International Court of Justice, ‘Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925, between the United States of America and the Netherlands Relating to the Arbitration over The Island of Palmas, April 4, 1928’, in: *American Journal of International Law* 22 (1928), pp. 867-920, at pp. 897-898.

¹²⁰ Raymond Leslie Buell, *International Relations* (New York, 1925), pp. 328-330 [second edn (New York, 1929); third edn (New York, 1932)]. Buell, ‘The Termination of Unequal Treaties’, in: *Proceedings. American Society of International Law* 21 (1927), pp. 90-93, at p. 90. William P. Ker, ‘Treaty Revision in Japan. A Survey of the Steps by which the Abolition of Foreign Privilege Was Accomplished in the Island Empire’, in: *Pacific Affairs*, vol. 1, issue [7] (November 1928), pp. 1-10. Arthur Pole Nicholson, *Scraps of Paper. India’s Broken Treaties, Her Princes and the Problem* (London, 1930). Albert H. Putney, ‘The Termination of Unequal Treaties’, in: *Proceedings. American Society of International Law* 21 (1927), pp. 87-90, at p. 88.

foreign and military policy through the Versailles treaty.¹²¹

However, international legal theorists of the 1920s and 1930s were overly optimistic regarding the significance of the statutory regulation of the use of international legal sources by the International Court of Justice. Theorists failed to appreciate that the court statute still excluded the majority of the world's population from all influence on international adjudication. Theorists had no scruples about equating the "legal norms of civilised nations" with international law as such.¹²² In taking this equation for granted, theorists remained not merely confined to the limitations of the nineteenth-century European concept of international law, but even insisted that legal norms enshrined in traditions of "civilised" nations could alone serve as a source of international law to be applied universally.¹²³

Implementing the recommendation by the Paris Peace Conference of 30 May 1919 to establish institutes for research in international relations, the British government founded the British Institute of International Affairs in 1920, while in the USA, the Council on Foreign Relations emerged from private initiative in 1921. The British Institute obtained a royal privilege in 1926 and has henceforth conducted its work as the Royal Institute of International Affairs. The French government created the Institut des Hautes Etudes Internationales at the University of Paris (Sorbonne) in 1921. At Hamburg, the city government attached the Institute of Foreign Policy (Institut für Auswärtige Politik) to the local university in 1923. A private foundation launched the Graduate Institute of International Studies (currently: Graduate Institute of International and Development Studies / Institut de Hautes Etudes Internationales et du Développement) in Geneva near the headquarters of the League of Nations with a mandate to monitor the activities of that international organisation. Much of the research work conducted at these institutes during the 1920s was devoted to general historical matters as well as to the history of foreign policy and diplomacy. For one, the jurist Albrecht Mendelssohn-Bartholdy (1874 – 1936, in office 1923 – 1933), Director of the Institute, focused on German foreign policy during the period between 1870 and 1914 and was thus not concerned in the main with postwar politics. Likewise, the Royal Institute stood under the dominant influence of historian Arnold Joseph Toynbee (1889 – 1975), a specialist in Byzantine and Modern Greek history. Under the Institute's "auspices", Toynbee produced his speculative analysis of world history as a sequence of 21 "civilizations"¹²⁴ and, in doing so, contributed to the Institute's mandate at best indirectly. Much more conducive to the Institute's mandate was the work by the social scientist David Mitrany (1885 – 1975), who taught at the London School of Economics and Political Science from 1923 and devoted himself to research in the possibilities of developing what he called an "international government". The starting point of Mitrany's research was the observation of the early twentieth-century international peace movement that governments of sovereign states would be compelled to accept control by the League of Nations and other international organisations as a consequence of ever intensifying world communication. However, Mitrany concretised this observation by the prediction that the advance of large technological projects would enhance the need for governments to cooperate, strengthen the competence of international organisations and eventually strengthen the stability of peace.¹²⁵ On the basis of this expectation, though under the impression of the rise of National Socialism and Fascist movements, Mitrany reviewed his prediction in 1943 through a research project that he conducted at the Royal

¹²¹ Alexander Chanoch, 'Die wirtschaftliche Lage Japans', in: *Yamato* 1 (1929), pp. 15-25. Fritz Haber, 'Rede gehalten bei der Eröffnung des Japaninstituts im Festsaal der Kaiser-Wilhelm-Gesellschaft am 4. Dezember 1926', in: *Institut zur Förderung der wechselseitigen Kenntnis und der öffentlichen Einrichtungen in Deutschland und Japan* (Berlin, 1926), pp. 19-24. Kurt Düwell, *Deutschlands auswärtige Kulturpolitik. 1918 – 1932* (Cologne and Vienna, 1976).

¹²² Hicks, *World Order* (note 39), pp. 11-12. Joseph Laurenz Kunz, 'Zum Begriff der "nation civilisée" im modernen Völkerrecht', in: *Zeitschrift für öffentliches Recht* 7 (1928), pp. 86-99.

¹²³ Raghunandan Swarup Pathak, 'The General Theory of the Sources of Contemporary International Law', in: *Indian Journal of International Law* 19 (1979), pp. 483-495; Pathak as Indian Supreme Judge did, however, render the "legal norms of civilized nations" into "General Principles of Law".

¹²⁴ Arnold Joseph Toynbee, *A Study of History*, 12 vols (London 1934-1961).

¹²⁵ David Mitrany, *The Progress of International Government* (London, 1933), pp. 48-52 [Dodge Lectures at Yale University].

Institute of International Affairs. The aim of the research project was to establish a plan for peace and a postwar world order with a new international organisation at its core replacing the League of Nations. Mitrany equipped the new international organisation with the competence to strengthen international cooperation among its member states, thereby reducing the economic and political significance of international borders of states and contributing to the maintenance of peace.¹²⁶ This goal, Mitrany expected, could be accomplished if the new international organisation could focus its activities upon all issues of general interest on the globe at large.

The research institutions contributed significantly to the growth of research literature in international law and international relations since the end of World War I.¹²⁷ Research institutions specialising in international law existed at the University of Kiel (Seminar, later Institute of International Law, Institut für internationales Recht, since 1914), at the University of Bonn (Institute of International Private Law, Institut für internationales Privatrecht, since 1911), at the University of Göttingen (Institute for International Law and Diplomacy, Institut für Völkerrecht und Diplomatie, since 1930), in Moskau (the Moscow State Institute of International Relations, Moskovskij Gosudarstvenn'ij Institut Meždunarodnyh Otnošennij, MGIMO, since 1944), as well as professorships, among others, at Columbia University (New York, since 1891), the Universities of Rome (since 1921), Oxford (since 1922), Vienna (since 1924), Frankfurt (since 1926), Cologne (since 1930), Paris (since 1932), Innsbruck (since 1934). Moreover, the research Institute of Foreign Public Law and International Law (Institut für ausländisches öffentliches Recht und Völkerrecht) was established in Berlin outside the institutional framework of the university in 1924.

The Impact of the League of Nations on International Legal Theory during the 1920s

The increasing number of professorships and research institutes, established with a specific mandate to focus on international law, contributed to the professionalisation of that legal discipline, not merely deepening reflection about the sources of international law but also its philosophical foundations and research methodology. Already in 1911, Hans Kelsen (1881 – 1973), then publicist and legal philosopher at the University of Vienna, launched a scathing criticism of Triepel's, Jellinek's and Bergbohm's theory of the sources of international law. The theory, Kelsen noted, positioned the postulated "will of states" outside the sphere of the law, thereby removing it from legal control. In Kelsen's rendering, the theory supported the claim that government action in the international arena, in the last resort, did not stand under the rule of law but followed the dictates of power.¹²⁸ In his voluminous study of "Sovereignty and the Theory of International Law" (*Souveränität und die Theorie des Völkerrechts*), published shortly after the end of World War I, Kelsen then took up again the frequently asked question, whether international law was a perfect "legal ordering system" with the capability of enforcing legal norms, and arrived at the conclusion that the question had always been asked the wrong way. Kelsen believed that this was so, because the crucial question about international law as a whole was not about the effectiveness of its enforcement mechanisms, but about its rank vis-à-vis other legal fields. Put appropriately, the question thus should be, whether international law ought to be positioned above or below state law.¹²⁹ In asking this question, Kelsen assumed that there was a hierarchy of legal fields, which he

¹²⁶ David Mitrany, *A Working Peace System*, edited by Hans Joachim Morgenthau (Chicago, 1966), pp. 62-63, 82. [first published (London: Royal Institute of International Affairs, 1943); also in: Brent F. Nelson and Alexander C.-G. Stubb, eds, *The European Union. Readings on the Theory and Practice of the European Union* (Boulder, 1994), pp. 77-97; also in: Mitrany, *The Functional Theory of Politics* (London, 1975), pp. 123-134].

¹²⁷ Already documented in: David Playfair Heatley, *Diplomacy and the Study of International Relations* (Oxford, 1919). Otfried Nippold, *The Development of International Law after the World War* (Oxford, 1923).

¹²⁸ Hans Kelsen, *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatze* (Tübingen, 1911) [second edn (Tübingen, 1923); reprints (Aalen, 1960; 1984)].

¹²⁹ Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, 1920), p. 103 [reprints (Tübingen, 1928); (Aalen, 1960; 1981)]. Kelsen, *Reine Rechtslehre* (Leipzig and Vienna, 1934), pp. 129-130 [English version (Oxford, 1996; 2007); second edn (Vienna, 1960); reprints (Vienna, 1967; 2000); another reprint, edited by Stanley L. Paulson (Aalen, 1985); student edn, edited by Matthias Jestaedt (Tübingen, 2008)].

described as “ordering systems” (Ordnungen), and concluded that international law had to occupy the highest rank in this hierarchy, as basic legal norms were moving from international law by “delegation” or “transfer” into other legal fields.¹³⁰ Accordingly, the state was not in itself the “generator” (Erzeuger) of a “legal order” (Rechtsordnung) but identical with it.¹³¹ This “legal order” would have to be “delegated” from a higher “source” which, by consequence, had to be positioned above the state. The “delegation” would not affect all norms of state law but merely “the entitlement for the enforceability of an ordering system” (den Grund für die Soll-Geltung einer Ordnung), which would constitute the state as such a system.¹³² Kelsen referred to this entitlement as the “basic norm” (Grund-Satz¹³³ or Grundnorm¹³⁴) and defined it as the legal “manifestation generating the order to which the actual behaviour of human beings corresponds to a certain degree” (Tatbestand, in dem jene Ordnung erzeugt wird, der das tatsächliche Verhalten der Menschen, auf die sich diese Ordnung bezieht, bis zu einem gewissen Grad entspricht).¹³⁵ International law was thus required for the legitimation of “any power actually establishing itself” (eine sich tatsächlich etablierende Macht) and, in doing so, “delegated” the “mandatory ordering system to the extent to which it was actually becoming effective” (so die von ihr gesetzte Zwangsordnung in dem Umfang, als sie effektiv wirksam wird).¹³⁶ This “basic norm”, Kelsen postulated, was not set but existed as a given.¹³⁷ In other words, Kelsen posited that state law could not obtain its capability of regulating human behaviour “to a certain degree” only through “state will”. Were there no “source” of the law outside the state, he argued, any legal “ordering system” could only be based on the legislative power of the agent willing to set the law as valid. Instead, Kelsen assumed that the “basic norm” as the fundamental means of establishing the legality of a “legal ordering system” was a “source” in its own right, not the state.¹³⁸ In advocating this assumption, Kelsen operated in proximity of the theorists who had opted for natural law theory at the turn towards the twentieth century.¹³⁹ At the same time, Kelsen took a step beyond the work of these theorists in distinguishing conceptually between law and justice. The “basic norm” above the state had, in his view, to be the benchmark for the determination of the justice of what was to be considered as valid and enforceable law.

At the same time, Kelsen moved away from Max Weber’s (1864 – 1920) sociological theory of law and rule. Weber derived the legitimacy of the “legal ordering system”, in the perception of acting persons, from three sources, tradition, as the believed “validity of what has always existed” (Geltung des immer Gewesenen), religion as the believed “validity of what has newly been revealed and of what is exemplary” (Geltung des neu Offenbarten oder des Vorbildlichen), and “what is postulated as absolutely valid” (als absolut gültig Erschlossenen). Weber thus would derive the enforceability of a “legal ordering system” from positive law only as long as acting persons accepted the legality of that system.¹⁴⁰ Thus Weber did derive the legality of a “legal ordering system” from its legitimacy and positioned the belief in that legitimacy outside the “legal ordering system”. But Weber identified the “basic norm” he postulated as an element of some religious belief or tradition, not as a legal norm in its own right. It was at this point that jurist Kelsen

¹³⁰ Kelsen, *Problem* (note 129), pp. 111-119. Kelsen, *Rechtslehre* (note 129), pp. 144-150.

¹³¹ Kelsen, *Problem* (note 129), p. 131. Kelsen, *Rechtslehre* (note 129), pp. 132-133.

¹³² Kelsen, *Problem* (note 129), p. 105. Kelsen, *Rechtslehre* (note 129), pp. 66-72.

¹³³ Kelsen, *Problem* (note 129), p. 105.

¹³⁴ Kelsen, *Rechtslehre* (note 129), p. 66.

¹³⁵ *Ibid.*, p. 68.

¹³⁶ *Ibid.*, p. 71.

¹³⁷ *Ibid.*, p. 72.

¹³⁸ Kelsen, *Problem* (note 129), p. 106.

¹³⁹ Ludwig von Bar, ‘Grundlage und Kodifikation des Völkerrechts’, in: *Archiv für Rechts- und Wirtschaftsphilosophie* 6 (1912), pp. 145-158, at pp. 145-146, 155. Ernst von Beling, *Die strafrechtliche Bedeutung der Exterritorialität. Beiträge zum Völkerrecht und zum Strafrecht*, Breslau 1896, pp. 12-13. Henri Bonfils, *Manuel de droit international public (droit des gens)*, sixth edn (Paris, 1912), p. 18 [first published (Paris, 1894); second edn (Paris, 1898); third edn (Paris, 1901; 1904); fourth edn (Paris, 1905); fifth edn (Paris, 1908); seventh edn (Paris, 1914); eighth edn (Paris 1921-1926)]. Hugo Krabbe, *De modern staatsidee* (The Hague, 1915), S. 180, 183 [further edn (The Hague, 1918)].

¹⁴⁰ Max[imilian] Weber, *Wirtschaft und Gesellschaft*, fifth edn, student edn, chap. I/7, edited by Johannes Winckelmann (Tübingen, 1980), p. 19 [first published (Tübingen, 1922)].

departed from Weber's position as a social scientist, as Kelsen had to postulate that the "basic norm" had to be derived from the law. He had to take this position because, otherwise, he could not have derived the coerciveness of the law from a legal "source", but would have had to commit himself to the conclusion, he regarded as erroneous, that law, in the last resort, was secondary to power. He defended his postulate that the "basic norm" was a legal "source" in its own right, with formal logic. According to this logic, which he regarded as applicable not only to international law but to all legal fields, only a legal norm could be a "source" of law, neither a state institution, seemingly equipped with a "will", nor a person. This was so because neither the "will" of a state nor the "common will" generated from a pluralism of state "wills" could coerce the legitimacy of a "legal ordering system",¹⁴¹ and the acknowledgement of the legitimacy of coercive positive law was not a matter of mere religious beliefs but of mandatory action. Coercive set law could thus never become legitimate on the grounds of religious beliefs or the power of states, but had to follow from "its merely hypothetical, formal foundation through the basic norm" (die bloß hypothetische, formale Fundierung durch die Grundnorm), with this norm being part of inalterable non-coercive natural law positioned above the state as the "perfect form" for positive law.¹⁴² From his assumption which located the "basic norm" in the realm of natural law above positive state law,¹⁴³ Kelsen reached the conclusion that states as legal institutions of coercion, perceived as legitimate by their citizens, could only be derived from international law. This had to be so because state institutions could derive their claims for legitimacy as means of coercion and for independence and equality as sovereigns only from the "ordering system" of international law above the states.¹⁴⁴ Put differently: Kelsen, like the natural law theorists at the turn towards the twentieth century, would only admit a general, unset norm, pertaining to international law and per se valid everywhere in the world, as the basis for the sovereignty of the "legal ordering systems" of states.¹⁴⁵

With the reformulation of the concept of the "source" of international law, in conjunction with his request for the acknowledgement of the existence of a hierarchy of "ordering systems" peaking in natural law, Kelsen thereby challenged the doctrine of legal "sources" enshrined in the statute of the International Court of Justice and denied the viability of the older theories, according to which international legal norms should have resulted from the apparent self-obligation of states (Bergbohm), from the alleged "entry" into some community of inter-state communication mandating states to honour legal obligations (Jellinek), or from "agreement" on some purported "common will" (Triepel).¹⁴⁶ Specifically, Kelsen rejected Triepel's theory as a seeming "dualism", because Triepel appeared to have juxtaposed the state "legal ordering system" against international law. This approach, Kelsen believed, constituted the problem of determining how that "dualism" could come into existence. In Kelsen's rendering of the "dualistic approach", Triepel had based the "common will" on an apparently voluntary inter-state "agreement", but had, in doing so, positioned the state "legal ordering system" as the source of international law. Thus, Kelsen concluded, Triepel had, in fact, not admitted the co-existence of two separate legal fields but a "monism" ranking the state "legal ordering system" above international law and "delegating" the latter from the former. In using the word "monism", Kelsen applied to Triepel's theory a slogan, which critics of Woodrow Wilson often used against his League of Nations policy.¹⁴⁷ According to Kelsen, Triepel's declared "dualist", but actually "monist" approach could no better than Bergbohm and Jellinek derive the binding force of the "international legal ordering system" and explain, why it had a coercive force at all.¹⁴⁸ By contrast, Kelsen's own approach essentially consisted in the "delegation" of *pacta sunt servanda* as a "basic norm" from natural law. Accordingly, the recognition of the legal equality of sovereigns was

¹⁴¹ Kelsen, *Problem* (note 129), p. 106. Kelsen, *Der soziologische und der juristische Staatsbegriff* (Tübingen, 1928) [reprints (Aalen, 1962; 1981); first published (Tübingen, 1922)].

¹⁴² Hans Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (Philosophische Vorträge, 31) (Berlin, 1928), pp. 9, 10, 12-14.

¹⁴³ Kelsen, *Problem* (note 129), pp. 252-253. Kelsen, *Rechtslehre* (note 129), pp. 153-154.

¹⁴⁴ Kelsen, *Rechtslehre* (note 129), pp. 140-141, 150-153.

¹⁴⁵ Kelsen, *Problem* (note 129), p. 149.

¹⁴⁶ *Ibid.*, p. 139. Kelsen, *Rechtslehre* (note 129), pp. 129-130.

¹⁴⁷ William Barry, 'Mr Wilson's Monism', in: *National Review* 73 (1919), pp. 337-345.

¹⁴⁸ Kelsen, *Problem* (note 129), pp. 121, 138. Kelsen, *Rechtslehre* (note 129), p. 129.

not only not capable of providing reason to call into question or even deny international law, but sovereignty as a mandatory feature of statehood could not at all exist without international law. Kelsen thereby also contradicted Jellinek's¹⁴⁹ older claim that there could be non-sovereign states or states without subjecthood under international law.¹⁵⁰ Yet at the same time, Kelsen argued against the expectation cherished by the international peace movement that the increasing frequency specifically of multilateral treaties was reducing the sovereignty of contracting parties. This expectation, Kelsen believed, was unfounded because treaties setting international law could generally interfere with state sovereignty as little as peace treaties could stipulate the annihilation of a defeated sovereign state.¹⁵¹ By contrast, a peace treaty demanded the continuing existence of a defeated sovereign state because only the governments of sovereign states could be considered capable of implementing the treaty stipulations. Therefore, the concession of the legal equality of sovereign states by no means stood against the binding force of international law; instead, international law alone provided the platform on which the recognition of the legal equality of sovereign states could become possible at all.¹⁵² In fine, Kelsen insisted that the sovereignty and legal equality of states could only be "delegated" from a norm pertaining to a higher "legal ordering system", not from self-obligations or through an "agreement" among state "wills". In presenting his argument, Kelsen referred¹⁵³ not merely to Christian Wolff's *civitas maxima*, but also to theorists who had relied on natural law theory at the turn towards the twentieth century.¹⁵⁴ In doing so, Kelsen advocated a "monism" that was directed against Triepel, Jellinek and Bergbohm and positioning international above state law.

In a journal article published in 1914, Kelsen's Vienna student Alfred Verdross had placed international law under the primacy of state law, while, like Schücking, acknowledging the constraining effect that treaties among states could have on government decision-making.¹⁵⁵ In a monograph written after World War I, Verdross then followed Kelsen, denying that international law could result from the self-obligation or the "wills" of states and demanding that unset natural law should be accepted as the "source" of international law. Like Kelsen, Verdross turned to natural law theories of the late nineteenth and early twentieth century, but radicalised Kelsen by positing international law as the generator of the international community of states¹⁵⁶ and elevated *pacta sunt servanda* to the rank of the "highest scientific hypothesis beyond which no questions are possible" (*wissenschaftliche Hypothese, über die nicht weiter hinaus gefragt werden kann*).¹⁵⁷ He expanded on Kelsen's criticism of Triepel's approach by claiming that Triepel's indications for the alleged separation between state and international law were not cogent. According to Verdross, Triepel assumed that international law applied to states as municipal law did to persons. However, Verdross claimed that the same distinction between various types of addressees of legal norms applied to state law as well. His evidence was that the law of one state could become addressed to other states without falling apart into distinct "legal ordering systems". Moreover, whereas Triepel had derived international law from the "common will" of contracting states, Verdross reiterated Kelsen's position

¹⁴⁹ Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna, 1882), p. 37 [reprint, edited by Walter Pauly (Bibliothek des Öffentlichen Rechts, 3) (Goldbach, 1996)].

¹⁵⁰ Kelsen, *Problem* (note 129), p. 53. Likewise: Eduard Reut-Nicolussi, *Zur Problematik der Heiligkeit der Verträge. Eine Studie über die Clausula de rebus sic stantibus im Völkerrecht* (Schriften des Instituts für Sozialforschung in den Alpenländern an der Universität Innsbruck, 7) (Innsbruck, 1931), p. 22.

¹⁵¹ Kelsen, *Problem* (note 129), p. 267.

¹⁵² *Ibid.*, p. 272. Likewise: Max Huber, 'Die Gleichheit der Staaten', in: Fritz Berolzheimer, ed., *Rechtswissenschaftliche Beiträge. Juristische Festgabe des Auslandes zu Josef Kohlers 60. Geburtstag* (Stuttgart, 1909), pp. 88-118 [reprint (Aalen, 1981)].

¹⁵³ Kelsen, *Problem* (note 129), p. 192, 241-248. Kelsen, *Rechtslehre* (note 129), pp. 71-72.

¹⁵⁴ Karl Theodor Pütter, *Beiträge zur Völkerrechts-Geschichte und Wissenschaft* (Leipzig, 1843), p. 241. Carl Kaltenborn von Stachau, *Kritik des Völkerrechts nach dem jetzigen Standpunkte der Wissenschaft* (Leipzig, 1847), pp. 242-244. Bar, 'Grundlage', p. 155. Lammasch, *Völkerrecht* (note 7).

¹⁵⁵ Alfred Verdross, 'Zur Konstruktion des Völkerrechts', in: *Zeitschrift für Völkerrecht* 8 (1914), pp. 329-359, at pp. 333-334, 343-354.

¹⁵⁶ Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf der Grundlage der Völkerrechtsverfassung* (Tübingen, 1923), pp. 8-10, 62-76.

¹⁵⁷ Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna, 1926), S. 29, 31.

that the freedom of the decision-making of governments of sovereign states was “nothing else than the sphere of free discretion conceded to every state under international law” (nichts anderes als eine den Staaten vom Völkerrechte zugestandene Sphäre freien Ermessens). Against Triepel, who insisted that an act of state incompatible with international law could not have limited validity, Verdross restated his argument that such conflicts could also occur within state law and would, if they did, not dissolve the state “legal ordering system”.¹⁵⁸ Like Kelsen, Verdross and other jurists considered *pacta sunt servanda* as a “basic norm”,¹⁵⁹ positioned states under the rule of international law and equated state “legal ordering systems” with “delegated parts of the international legal ordering system”.¹⁶⁰ Verdross added that *pacta sunt servanda* could alone convert even customary legal practices into law,¹⁶¹ referring for this claim to pre-World War I natural law theories.¹⁶² Further theorists concurred with this theory, among them Hersch Lauterpacht (1897 – 1960) in Cambridge,¹⁶³ James Leslie Brierly (1881 – 1955)¹⁶⁴ and Sir John Fischer Williams (1870 – 1947) in Oxford,¹⁶⁵ Georges Scelle (1878 – 1961) in Paris,¹⁶⁶ Ji-yan Wang in Shanghai,¹⁶⁷ and Kisaburō Yokota (1896 – 1993) in Tokyo.¹⁶⁸ Specifically Brierly argued the demand, drawn on natural law, that individuals should be admitted as international legal subjects. Brierly even restated the Augustinian paradigm by defining war as the extraordinary, temporary, peace-breaking condition of conflict among states.¹⁶⁹ Philosopher Max Scheler (1874 – 1928) agreed with Brierly on the observation that war was not “a feature of human nature” (im Wesen der Menschennatur) and ascribed to perpetual peace an unconditionally positive value. Yet, Scheler did not share Brierly’s confidence that the League of Nations was capable of guaranteeing peace. Instead, he confessed support for some “instrumental militarism”, promoting peace through the self-defense capability of states.¹⁷⁰

During the 1920s and 1930s, Kelsen and Verdross gave expression in legal diction to ideas, with which some scholars explained the League of Nations Covenant at the same time. Among them

¹⁵⁸ Verdross, *Einheit* (note 156), pp. 34-38.

¹⁵⁹ *Ibid.*, p. 29. Likewise: Josef Laurenz Kunz, ‘Zur Hypothese vom Primat des Völkerrechts’, in: *Revue de droit international, de sciences diplomatiques et politiques* 5 (1927), pp. 3-15, at p. 14. Rudolf Aladár Métall, ‘Skizzen zu einer Systematik der völkerrechtlichen Quellenlehre’, in: *Archiv für öffentliches Recht* 11 (1931/32), pp. 416-428, p. 419.

¹⁶⁰ Kunz, ‘Hypothese’ (note 159), S. 14. Métall, ‘Skizzen’ (note 159), p. 423.

¹⁶¹ Verdross, *Einheit* (note 156), p. 29. Verdross, ‘Grundlagen und Grundlegungen des Völkerrechts. Ein Beitrag zu den Hypothesen des Völkerrechtspositivismus’, in: *Niemeyers Zeitschrift für internationales Recht* 29 (1921), pp. 65-91, at p. 83.

¹⁶² Dionisio Anzilotti, *Corso di diritto internazionale*, vol. 1 (Rome, 1912), pp. 26-27 [second edn (Rome, 1923); third (Rome, 1928); fourth edn (Anzilotti, *Opere*, vol. 1) (Padua, 1964)]. Beling, *Bedeutung* (note 139), p. 12.

¹⁶³ Hersch Lauterpacht, *Private Law Sources and Analogues of International Law* (New York, 1927), pp. 56, 58 [reprint (Hamden, 1970)]. Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), pp. 418, 433-434 [reprints (Hamden, CT, 1966); edited by Isidore Silver (New York, 1973); (Union, NJ, 2000); (Oxford, 2011; 2012)].

¹⁶⁴ James Leslie Brierly, *The Law of Nations* (Oxford, 1928), pp. 37-38 [second edn (Oxford, 1936); reprints (Oxford, 1950; 1955); sixth edn, edited by Humphrey Waldock (Oxford, 1963); reprint of this edn (Oxford, 1980); seventh edn, edited by Andrew Clapham (Oxford, 2012)].

¹⁶⁵ John Fischer Williams, *Chapters on Current International Law and the League of Nations* (London, 1929), p. 23.

¹⁶⁶ Georges Scelle, *Précis de droit des gens*, vol. 1 (Paris, 1932), p. 41 [reprints (Paris, 1984; 2008)].

¹⁶⁷ Ji-Yan Wang, *Bu-ping deng tiao yue shih* (Shanghai, 1935), pp. 1-13. Stefan Kroll, *Normgenese durch Re-Interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Studien zur Geschichte des Völkerrechts, 25) (Baden-Baden, 2012), p. 183.

¹⁶⁸ Kisaburō Yokota, ‘Begriff und Gliederung der Verfassung der Völkerrechtsgemeinschaft’, in: Alfred Verdross, ed., *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre* [Festschrift for Hans Kelsen on the occasion of his fiftieth birthday] (Vienna, 1931), pp. 390-416, at pp. 395, 397 [reprinted in: Yokota, *Junsui hōgaku ronshū*, vol. 2 (Tokyo, 1977), pp. 324-297 (sic!)]. Yokota, ‘Keruzen “shūken to kokusaihō”’, in: Yokota, *Junsui* (as above), pp. 137-157.

¹⁶⁹ Brierly, *Law* (note 164), pp. 42-48, 109-118.

¹⁷⁰ Max Scheler, *Die Idee des Friedens und der Pazifismus* (Berlin, 1931), pp. 12, 33 [second edn (Berne and Munich, 1974)].

were political scientist Alfred Eckhard Zimmern (1879 – 1957),¹⁷¹ historians Albert Frederick Pollard (1869 – 1948)¹⁷² and Veit Valentin (1885 – 1947)¹⁷³ and jurists Joseph Thomas Delos (1891 – 1974),¹⁷⁴ Walther Schücking (1876 – 1935)¹⁷⁵ and Hans Wehberg (1885 – 1962).¹⁷⁶ To all of them, the League was an international organisation that could and would restrain the decision-making capability of governments of sovereign states to the end of preserving peace. However, not all academics in the field shared that optimism at the time, but stuck to Triepel's "dualist" approach.¹⁷⁷ Foremost among them was Dionisio Anzilotti (1867 – 1950), who, towards the end of the 1920s, repeated Triepel's assumption that international law came into existence "through agreements concluded among states". He did admit though that *pacta sunt servanda* was a "primordial norm" above all other legal norms. As a "primordial norm", *pacta sunt servanda* did generate the binding force of treaties between states, and no norm above it "could be found" (sich keine andere finden). But only states could be international legal subjects.¹⁷⁸ Therefore, collections of treaties between states and codifications of international legal norms had a high significance for the "ordering of relations among states", Anzilotti believed like several contemporary jurists.¹⁷⁹ However, Anzilotti followed nineteenth- and early twentieth-century mainstream theorists in excluding those population groups from the reach of international law, "which, due to their conditions of life and level of civilisation do not participate in the generation of international legal norms" (die wegen ihrer Lebensbedingungen und der Stufe ihrer Zivilisation nicht an Übereinkommen zur Schaffung von Völkerrechtsnormen beteiligt sind). He defended this observation, draped as a description of facts, with the conventional colonialist argument that these population groups were "nomads or savage tribes" (um die Nomaden oder wilde Völkerschaften), purportedly "incapable of understanding and, by consequence, of willing the norms establishing international law" (Unfähigkeit, die Normen, die das Völkerrecht bilden, zu verstehen, und sie daher zu wollen). This alleged lack of willingness served Anzilotti as the reason "why they are not involved in making agreements [on the setting of international law] and will not accede to them later" (daß sie an den Übereinkommen nicht beteiligt sind, noch ihnen später beitreten).¹⁸⁰ Anzilotti ignored the well-attested fact that the allegedly "savage tribes" were tied to League of Nations members through numerous treaties by international law, in force at the time of his writing.

Theorists, who were determined to admit only positive law as international law, such as the Basle jurist Edward Wiegand, even accused Verdross and other adherents to natural law theory of justifying abuse and even breach of international law. Wiegand postulated that followers of natural law theory were claiming that "the unilateral scrapping of a treaty and the increase of arms in breach of treaties were under general legal principles, if only they become accompanied by a sufficient touch of ethics, and uncomfortable treaties can become void because they are positioned as inconvenient for the highly subjective and possibly even changeable moral conscience of the

¹⁷¹ Alfred Eckhard Zimmern, *The League of Nations and the Rule of Law* (London, 1936).

¹⁷² Albert Frederick Pollard, *The League of Nations in History* (London, 1918).

¹⁷³ Veit Valentin, *Geschichte des Völkerbundsgedankens in Deutschland* (Berlin, 1920).

¹⁷⁴ Joseph Thomas Delos, *La société internationale et les principes du droit* (Publication de la Revue générale de droit international public, 1) (Paris, 1929), pp. 63-122.

¹⁷⁵ Schücking, *Satzung* (note 109). Schücking, 'Der Völkerbund', in: Moritz Julius Bonn, ed., *Das Werden in der Weltwirtschaft* (Berlin, 1926), pp. 9-36. Schücking, 'Le développement du Pacte de la Société des Nations', in: *Recueil des cours* 20 (1927, part V), pp. 353-457.

¹⁷⁶ Wehberg, *Grundprobleme* (note 109). Wehberg, *Deutschland und die Friedensbewegung* (Berlin, 1929). Wehberg, *Ächtung* (note 29). Wehberg, 'Contribution' (note 29).

¹⁷⁷ Karl Strupp, *Grundzüge des positiven Völkerrechts* (Der Staatsbürger, Bd 2, Heft 3) (Bonn, 1921) [third edn (Bonn, 1926); fourth edn (Bonn, 1928); fifth edn (Bonn, 1932)]. Dionisio Anzilotti, *Lehrbuch des Völkerrechts*, vol. 1 (Berlin, 1929).

¹⁷⁸ Anzilotti, *Lehrbuch* (note 177), pp. 48-50, 89-91.

¹⁷⁹ *Ibid.*, pp. 50-53. Denys Peter Myers, *Manual of Collections of Treaties and of Collections Relating to Treaties* (Harvard Bibliographies, Library Series 2) (Cambridge, MA, 1922). Walther Max Adrian Schücking, 'Die Kodifikation des Völkerrechts', in: *Frankfurter Zeitung* (12 April 1925). Karl Strupp, 'Völkerrechtskodifikation', in: *Zeitschrift für öffentliches Recht* 7 (1928), pp. 1-58. Antonio Truyol y Serra, 'Théorie du droit international public', in: *Recueil des cours* 173 (1981, part IV), pp. 9-443, at pp. 242-248.

¹⁸⁰ Anzilotti, *Lehrbuch* (note 177), p. 94.

interpreter" (die einseitige Vertragslösung und vertragswidrige Aufrüstung seien durch allgemeine Rechtsgrundsätze gedeckt, wenn man ihnen nur einen tüchtigen ethischen Beigeschmack gibt und unbequeme Verträge als nichtig, weil dem höchst subjektiven und vielleicht auch wandelbaren sittlichen Empfinden des Auslegers nicht genehm hinstellt).¹⁸¹ Wiegand's argument was appropriate as a criticism of the perversion of natural law theory to which Nazi jurists professed in Germany.¹⁸² Yet Wiegand applied it to Verdross on whose theory it had no effect. In an article on "challengeable and void treaties between states", Verdross had intervened into the debate about the validity of the Saint-Germain-en-Laye and Trianon treaties, and Wiegand made his comments in response to that article. Indeed, Verdross believed that it was principally possible that treaties might be void if they had not come into existence through due process.¹⁸³ In taking this stand, he alluded to the fact that Austria and Hungary had not been admitted to the negotiating table at the Paris Peace Conference. But Verdross could not possibly grant to anyone a general license for the breach of treaties, because he placed the "basic norm" of *pacta sunt servanda* as the unmet highest obligation above all other legal commitments.

The Concept of the State in International Legal Theory, "Pan Europe" and the League of Nations

The League of Nations was only of limited help for those theorists who were willing to position international law above state law and profess their adherence to natural law theory. Although proclaimed as a "non-contractual", "organic" and "objective" international organisation,¹⁸⁴ it had, in fact, come into existence through treaties among states, which did not even fulfill the conditions that Triepel had demanded for an "agreement" setting new international law. As the League of Nations Covenant had been inserted into peace treaties, it had resulted not from unidirectional, but from opposing state "wills". Consequently, the League did not accord with Triepel's theory that the "common will" apparently manifest in it, should be unalterable and thus not subject to changes at the request of the "wills" of this or that state. League members unwilling to act in accordance with League decisions simply left the organisation, thereby rendering the Covenant ineffective. Even Kelsen had not taken into account the practical possibility that League members might evade sanctions by moving out. Neither he nor Triepel commented on this problem, although, even before some governments withdrew with media pomp in the early 1930s, academics entered the stage immediately after world War I insisting that the League of Nations was no more than a conventional club of states and existed next to a non-institutional "Society of Nations" regulating, on the basis of natural law and without attachment to the League, diplomacy and international arbitration as essential legal factors of the conduct of relations among states.¹⁸⁵

The lack of theoretical penetration into the intricate relationship between state and international law was mainly due to the concept of the state, which legal and political theorists used at the time. Verdross, it is true, declared the "meta-legal" state, that is an institution positioned above the law, as a "creation of fancy", thereby subjecting the formation of the concept of the state to the rule of international law.¹⁸⁶ But, like Anzilotti, Verdross conceived of the state as the embodiment of the unity of the population settling on the territory of the state.¹⁸⁷ Both theorists thereby approved of the corporatist theory of the state, according to which the constitution of the state ought to serve as an instrument for the promotion of the "integration" of the state population into a united „state

¹⁸¹ Edward Wiegand, '[Review of: Alfred Verdross, 'Anfechtbare und nichtige Staatsverträge', in: *Zeitschrift für öffentliches Recht* 15 (1935), pp. 289-299]', in: *Zeitschrift für Theorie des Rechts* 9 (1935), pp. 310-311.

¹⁸² For example: Hans-Helmut Dietze, *Naturrecht in der Gegenwart* (Bonn, 1936), pp. 302-306, who concocted some "natural law of the peoples" (Völkernaturrecht).

¹⁸³ Alfred Verdross, 'Anfechtbare und nichtige Staatsverträge', in: *Zeitschrift für öffentliches Recht* 15 (1935), pp. 289-299.

¹⁸⁴ Joseph Thomas Delos, *La société internationale et les principes du droit* (Publication de la Revue générale de droit international public, 1) (Paris, 1929), pp. 120, 122.

¹⁸⁵ Hicks, *World Order* (note 39), pp. 11-13.

¹⁸⁶ Verdross, *Einheit* (note 156), p. 70.

¹⁸⁷ Anzilotti, *Lehrbuch* (note 177), pp. 92-93.

nation“, metaphorically “incorporating” individual citizens into the state as a seemingly living body. Not only jurists, who, like Hugo Preuß (1860 – 1925)¹⁸⁸ and Rudolf Smend (1882 – 1975),¹⁸⁹ supported the Republican state constitution in the German Empire and the League of Nations, subscribed to this theory, but also ardent foes of the constitution and of the League, such as Carl Schmitt (1888 – 1985), who were fundamentally opposed against any theory that could be displayed as restricting the decision-making capability of governments of sovereign states. During the mid-1920s, Schmitt had cooperated with Smend on issues of constitutional policy in the Association of German Public Lawyers, but had distanced himself from Smend around 1930 and sharply attacked Preuß together with Kelsen. Schmitt censured Smend and Preuß as democrats, Kelsen as a Marxist,¹⁹⁰ while Kelsen referred to Smend, who was well versed in canon law, as a “state theologian”.¹⁹¹ In its own right, the expectation that the state should serve as an instrument promoting the “unity” of the population, followed from Jellinek’s concept of the state, who had used the triad of the “unities” of the territory, the population and the governments as definitional elements of the state.¹⁹² According to corporatist theory, the state had to have priority over all international organisations. Therefore, the concept of the state enshrined in this theory was incompatible with the idea that international law should be accepted as the “legal ordering system” above the state. Kelsen at least noted the contradiction and emphasised the distinction between what he termed a “juristic” concept of the state, seemingly compatible with his theory of international law as the ultimate legal “source”, and Jellinek’s triad of unities, which he classed as a “sociological” concept.¹⁹³

However, it was not Kelsen’s but Jellinek’s concept of the state that found its way into international law, with the Montevideo Convention on the Rights and Duties of States of 26 December 1933 serving as the venue. When the convention went into force on 26 December 1934, it bound only states in America, but it set the standards for state definitions in international law at large.¹⁹⁴ When henceforth discrepancies came up between norms of state and of international law, either one or several of the state “unities” had to be called into question or the unity of the “international legal community” operating under international law. The Montevideo Convention referred to this dilemma by adding one further “unity” to Jellinek’s triad. This fourth “unity” as a definitional requirement for the existence of a state in terms of international law was the capability of taking up relations with other states.¹⁹⁵ In stipulating this demand, the convention referred to yet another of Jellinek’s demands. The fourth “unity” was, of course, also taken from Jellinek’s theory, in this case, his argument that states formed a community of communicating members, subjecting themselves to the rule of law simply by virtue of having joined the community.¹⁹⁶ That meant that, for Jellinek as well as for the Montevideo Convention, states classed as “Protectorates”, being denied the capability of maintaining relations with other states, were denied statehood. The Convention thus legalised, explicitly only for America, colonial rule.

But it was not just continuing colonial rule that jeopardised the build-up of an “international legal community” under the rule of law; equally threatening were the lasting

¹⁸⁸ Hugo Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften* (Berlin, 1889) [reprint (Aalen, 1964)].

¹⁸⁹ Rudolf [Carl Friedrich Rudolf] Smend, *Verfassung und Verfassungsrecht* (Munich and Leipzig, 1928) [newly edited in: Smend, *Staatsrechtliche Abhandlungen und andere Aufsätze*, edited by Wilhelm Hennis, second edn (Berlin, 1968), pp. 119-276; first edn (Berlin, 1954)].

¹⁹⁰ Carl Schmitt, *Hugo Preuss. Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Recht und Staat in Geschichte und Gegenwart, 72) (Tübingen, 1930) [on these comments see: Christian Tilitzki, ‘Carl Schmitt an der Handelshochschule Berlin 1928 – 1933’, in: Piet Tommissen, ed., *Schmittiana*, vol. 4 (Berlin, 1994), pp. 166-175].

¹⁹¹ Kelsen, *Staatsbegriff* (note 141), p. 35.

¹⁹² Georg Jellinek, *Allgemeine Staatslehre* (Berlin, 1900), pp. 394-434 [second edn (Berlin, 1905); third edn (Berlin, 1913); reprint of the third edn (Bad Homburg, 1960)]. Similarly already: Albert Eberhard Friedrich Schöffle, *Bau und Leben des sozialen Körpers*, vol. 4, part 2 (Tübingen, 1881), pp. 220-222.

¹⁹³ Kelsen, *Staatsbegriff* (note 141).

¹⁹⁴ Montevideo Convention on the Rights and Duties of States [approved during the Seventh International Conference of American States, 26 December 1933 [http://www.avalon.law.yale.edu/20th_century/inf]., Art 1, a-c].

¹⁹⁵ *Ibid.*, Art 1 d.

¹⁹⁶ Georg Jellinek, *Die rechtliche Natur der Staatsverträge. Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (Vienna, 1880), p. 48.

dissatisfaction in Europe with the outcome of the Paris Peace Conference and in America the mounting disaffection with the arbitrariness of international borders as they had emerged there since the beginning of the nineteenth century. The Montevideo Convention sought to address these problems with the mantra that all states were equal, had the same competence to execute their rights and that no state had the legitimacy to interfere into the domestic affairs of another state.¹⁹⁷

Yet already the “dollar diplomacy”, seeming to provide unilateral support for US businesspersons operating in Latin America and the Caribbean, stood against these protective rights. Democratic forms of government, installed to promote the “unity” of the state population, so to speak, from below, thus appeared to promote instability. Political scientist Quincy Wright (1890 – 1970), teaching at the University of Chicago and conducting a large research project on the concept and the conduct of war there from 1926 to 1942, upon completion of the project detected a majority among academics holding the view that wars did not result from an inclination inscribed into human nature. By contrast, the majority of academics believed, Wright found, that wars presented a problem that humankind as a whole had the task to solve. According to Wright, the solution of this problem was growing more urgent due to four factors: the shrinking of the world in consequence of the technologising of communication; the increase of the speed of change throughout history; the “progress” in the killing capacity of weaponries; and the increase of “democracy”.¹⁹⁸ Democracy, Wright opined, demanded politics to respond to public opinion. Consequently, the conduct of war and foreign policy were, in his view, no longer matters of state secret policy, but objects of public debate. Wright believed that democracy had strengthened public determination to extinguish war, but diagnosed that it had not provided for an understanding in the general public of the means required for the accomplishment of that goal.¹⁹⁹ In arriving at this conclusion, Wright did not want to suggest that democratically governed states were war-prone. But he did assert the position that democratic state governments were not only bound by treaty obligations in accordance with state and international law, but were also required to take into account the potentially aggressive “national passions”,²⁰⁰ of the populations under their sway.

Yet the League of Nations could not only in the perception of promoters of democratic forms of government appear as an instrument of apparently illegitimate intervention into domestic affairs of states. In addition, the League became the target of increasingly vocal criticism from other political camps since the later 1920s as well. Deniers of international law continued to argue along the paths their predecessors had trodden during the nineteenth and early twentieth centuries, arguing that international law lacked cogent enforcement mechanisms and was not embedded in a “legal community”. The deniers restated the nineteenth-century conventionalism that there existed the “impossibility of legal institutions among sovereigns” (Unmöglichkeit zwischenstaatlicher Rechtsgebilde), contested the legal nature of norms pertaining to international law²⁰¹ and placed the validity of treaties among states under the proviso that “the interplay among political forces was prior to all law” (Spiels politischer Kräfte, das jedem Recht vorangehe).²⁰² In deniers’ perspective, any treaty could be challenged, unless there was positive enforceable law, and in default of this law in the international arena, there was no guarantee of the security of states.²⁰³ According to this theory, the League of Nations did not have the entitlement to intervene into the political decisions of

¹⁹⁷ Montevideo Convention (note 194), Art. 4, 8.

¹⁹⁸ Quincy Wright, *A Study of War* (Chicago, 1942) [new edn (Chicago and London, 1965), p. 3].

¹⁹⁹ *Ibid.*, pp. 4-5.

²⁰⁰ Wright took up an early nineteenth-century phrase: Henry Peter Lord Brougham and Vaux, ‘Balance of Power’, in: Brougham, *The Works*, vol. 8 (London and Glasgow, 1857), pp. 1-50, at pp. 2-3 [first published as a review of: Charles François de Broglie, *Politique de tous les Cabinets de l’Europe*, 3 vols (Paris, 1802), in: *Edinburgh Review* 1 (1803), pp. 345-381].

²⁰¹ Walter Burckhardt, *Die Organisation der Rechtsgemeinschaft* (Basle, 1927), pp. 350-354 [reprint (Zurich, 1971)]. Fritz Sander, ‘Das Wesen der “Völkerrecht” genannten gesellschaftlichen Gebilde’, in: *Zeitschrift für die gesamte Staatswissenschaft* 81 (1926), pp. 80-127, at pp. 81, 120-127.

²⁰² Edward Hallett Carr, *The Twenty Years’ Crisis. 1919 – 1939*, second edn (London, 1946), p. 192 [reprint (Basingstoke, 1993); first published (London, 1939)].

²⁰³ Walter Burckhardt, *Über die Unvollkommenheit des Völkerrechts* (Berne, 1923). Burckhardt, *Organisation* (note 201), p. 368.

the governments of sovereign states and did thus, as an international organisation, have neither the capability nor the competence to provide collective security for states.²⁰⁴

Likewise, the “Pan Europe” movement, emerging in the early 1920s, stood against the League of Nations, even though it did not employ a rhetoric attacking it frontally.²⁰⁵ The movement advocated the goal of “establishing the United States of Europe as a confederation of European states and a customs union” within continental borders.²⁰⁶ In pursuit of this goal, it worked against the international community of states as represented by the League. “Pan Europe” considered as a given fact the “dismemberment of the world into global powers” (Gliederung der Welt in Weltmächte), namely the “British Empire”, the USA, the Soviet Union and Japan. It warned that “a divided Europe” was “powerless vis-à-vis the growing non-European global powers” (den wachsenden außereuropäischen Weltmächten gegenüber ohnmächtig) and that the lack of power might “lead to economic and political dependence or to the partition of Europe into spheres of foreign interests” (zur wirtschaftlichen und politischen Abhängigkeit zu führen oder zur Teilung Europas in fremde Interessensphären).²⁰⁷ Meeting these threats, “Pan Europe” ought to comprise, in spatial terms, all “continental states” with their colonial dependencies “wishing and having the capability to accede to this confederation”, with the Soviet Union, Turkey and the UK remaining excluded.²⁰⁸ The movement thus structured its program for the unity of Europe in accordance with conceptions of power politics, but was not based on visions of geographical unity or cultural identity. On the one side, “Pan Europe” was to be smaller than Europe as a continent, on the other side it was to reach out to the Dutch, French, Portuguese and Spanish colonial dependencies in Africa, America, Asia and the South Pacific.²⁰⁹ According to this ideology, the world was to become carved up into the isolated continental blocks of “Pan Europe”, America, the UK with its “Empire”, the Soviet Union and some “Mongolian peoples’ block“ (mongolischen Völkerblock) including Japan.²¹⁰

The movement’s founder and long-term ideologue was the Belgian-Hungarian-Czech aristocrat Richard Nicolaus Graf Coudenhove-Kalergi (1894 – 1972), son of the Austria-Hungarian diplomat Heinrich Graf Coudenhove-Kalergi (1859 – 1906) and the daughter of a Japanese merchant Mitsuko Aoyama (1874 – 1941). Despite the strict opposition by his father to all kinds of racism²¹¹, Richard Coudenhove-Kalergi cooperated with fascists and unscrupulously used not only contemptuous racist diction but also Nazi ideology. He identified European culture as the “culture of the white race” (die Kultur der weißen Rasse), confessed his preference for the “grafting” of races “through breeding” (Veredlung durch Züchtung), tried, unsuccessfully, to lure Benito Mussolini (1883 – 1945) into the movement immediately after the coup d’état of 1923 and pushed “Pan Europe” into opposition against the international peace movement, because peace activists had, Coudenhove held, surrendered “to the idea of the League of Nations completely” (restlos der Völkerbunds-idee). In doing so, they had opted against power political goals and appeared not to be approachable for “any new idea that might distract public interest from the League of Nations” (jede neue Idee, die das öffentliche Interesse vom Völkerbunde ablenken könne).²¹² Coudenhove-Kalergi traced the “idea of Europe” back to the Crusades which he took to have been “the strongest manifestation of European solidarity” (die stärkste Manifestation europäischer Solidarität).²¹³ “Pan Europe” thus

²⁰⁴ Carr, *Crisis* (note 202), pp. 28-30, 34-35.

²⁰⁵ Richard Nicolaus Coudenhove-Kalergi, ‘Das Pan-Europäische Manifest’, in: *Pan-Europa*, vol. 1, nr 1 (April 1924), pp. 3-19 [edited by Anita Ziegerhofer-Prettenthaler, *Botschafter Europas. Richard Nicolaus Coudenhove-Kalergi und die Paneuropa-Bewegung in den zwanziger und dreissiger Jahren* (Vienna, Cologne and Weimar, 2004), pp. 516-524].

²⁰⁶ Richard Nicolaus Coudenhove-Kalergi, *Kampf um Paneuropa*, vol. 3 (Vienna and Leipzig, 1928), p. 3.

²⁰⁷ *Ibid.*, p. 4. Coudenhove-Kalergi, *Kampf um Europa* (Zurich, 1949), p. 81.

²⁰⁸ Coudenhove-Kalergi, *Kampf um Paneuropa* (note 206), p. 7.

²⁰⁹ Richard Nicolaus Coudenhove-Kalergi, *Pan-Europa* (Vienna and Leipzig, 1931), pp. 36-38.

²¹⁰ *Ibid.*, p. 38. Coudenhove-Kalergi, *Kampf um Europa* (note 207), p. 81.

²¹¹ Heinrich Coudenhove-Kalergi, *Das Wesen des Antisemitismus*, edited by Richard Nicolaus Coudenhove-Kalergi, second edn (Leipzig, 1923) [first published (Leipzig, 1923); further edns (Vienna, 1929); (Leipzig, 1932)].

²¹² Coudenhove-Kalergi, *Pan-Europa* (note 209), p. 34. Richard Nicolaus Coudenhove-Kalergi, *Los vom Materialismus* (Vienna and Leipzig, 1931), p. 202. Coudenhove-Kalergi, *Kampf um Europa* (note 207), pp. 89, 91-92.

²¹³ Coudenhove-Kalergi, *Kampf um Europa* (note 207), p. 90.

conveyed the impression of militancy specifically targeted at Muslims. Coudenhove-Kalergi structured “Pan Europe” as an extension of the “movements for national unification” across the international borders of states and predicted the disappearance of “national hatred” (Nationalhass) in “Pan Europe” through the struggle against the rest of the world.²¹⁴ He paid little respect to the existing state constitutions, which he took to be emanations from immobile minds. Instead, he focused his rhetoric on “the young generation” to which he attested “dissatisfaction with parties, theories, programs and beautiful speeches” (habe genug von Parteien, Theorien, Programmen und schönen Reden) and willingness to follow “leaders” rather than “deputies”.²¹⁵ Already in 1931, Coudenhove-Kalergi justified the Japanese expansion into China with some “Japanese Monroe Doctrine”, which, he argued, served the purpose of forming a block under the control of the Japanese government and ought to be recognised by the League of Nations as the US Monroe Doctrine and the “right of self-determination of the British Empire” (das Selbstbestimmungsrecht des British Empire). The “Japanese Monroe Doctrine” appeared to be limited in reach “strictly to East Asia”, was directed against the Soviet Union, secured “peace and the future of East Asia” and would pave the way for a future “European Monroe Doctrine”.²¹⁶

Moreover, Coudenhove-Kalergi sharply attacked the Soviet Union, claiming that “Bolshevism” had shaken off “European civilisation” and was trying “to establish the foundations for the new culture with Asian practices” (mit asiatischen Praktiken die Grundlage zu einer neuen Kulturform zu schaffen).²¹⁷ Although Coudenhove, born in Tōkyō, was more familiar with parts of Asia than most of his contemporaries, he belonged to earliest ideologues who displayed readiness to apply to the Soviet Union images of some “Asian” or “Oriental despotism”, long before this slogan gained popularity among intellectuals in the 1950s.²¹⁸ But the “Pan Europe” movement not only radicalised ideological opposition, then current in Central and Eastern Europe against the Soviet brand of socialism, but also generated a platform for opposition against the League of Nations and the international community of states represented by it. In the perception of followers of these movements, the League of Nations appeared as a manifestation of a bygone epoch. Even though Coudenhove-Kalergi was not a Nazi, he did operate with anti-internationalist rhetoric already before 1933 and randomly employed bits of Nazi ideology. During the 1920s, 1930s and 1940s, “Pan Europe” thus advocated the revisionist strategy of partitioning the world into isolated blocks, while attacking universal international law as the ordering frame for relations among states.

Block Formation in East Asia and Europe

Following the departure from the League of Nations, the government in the name of the Shōwa-Tennō supported efforts to establish a regional block in East Asia. However, intellectuals, as late as in 1938, adhered to the view that this block was compatible with League policy. They supported this view with the argument that the block was not global and, by consequence, did not compete with the League. They located the “nations” in the Japanese block as well as in its dependencies in East Asia and the South Pacific in an integrated area, which some fate seemed to have put together (chiikiteki renmei), and the Japanese government appeared to have been given the task to convert this fate-determined area into a political space. No new League of Nations was to emerge from this block, and Japan could easily re-enter the existing League, once it had received international recognition of its block.²¹⁹ Only after 1941 did radical jurists expand this conception into the revisionist project of the generation of an “East Asian international law” (tō-a kokusaihō),

²¹⁴ Coudenhove-Kalergi, *Kampf um Paneuropa* (note 206), pp. 11-13.

²¹⁵ Coudenhove-Kalergi, *Los* (note 212), p. 170.

²¹⁶ Richard Nicolaus Coudenhove-Kalergi, ‘Japans Monroe-Doktrin’, in: *Paneuropa* 7 (1931), pp. 256-263, at pp. 256-257, 261]

²¹⁷ Coudenhove-Kalergi, *Pan-Europa* (note 209), p. 36.

²¹⁸ Karl August Wittfogel, *Oriental Despotism* (New York, 1957).

²¹⁹ Masamichi Rōyama, ‘Sekai no sai-ninshiki to chihōteki kokusai renmei’, in: Rōyama, *Sekai no hankyoku to Nihon no sekai seisaku* (Tokyo, 1938), pp. 91-105, at p. 102 [first published in: *Kokusai chishiki* 13 (1933)]. Rōyama, *Foreign Policy of Japan. 1914 – 1939* (Tokyo, 1941), p. 27 [reprint (Westport, CT, 1975)].

which was to consist of regional, not of universal legal norms.²²⁰ These theorists proposed the rejection of internationalism and opposed the League, by explicitly referring to Carl Schmitt's 1939 design of an "international legal order for a larger space, including the prohibition of intervention by external powers". Meanwhile, Manchukuo and the South Pacific islands under Japanese control became targets of settler emigration from Japan.²²¹ The Shōwa government launched programs in support of the emigration of farmers.²²² Moreover, it released an official statement of the principles of a national policy in August 1935, which categorised expansion to the South as essential for the continuing existence of the Japanese state.²²³ Yet some revisionist army officers were dissatisfied with the Shōwa government initiatives regarding Manchukuo and developed their own strategy of the conquest of China as a whole. Against considerable resistance from the side of internationalists in the navy and through resort not only to illegal but also illegitimate measures of conspiracy, these revisionist army officers staged an "incident" at the Marco Polo Bridge outside Beijing in 1937 and launched combat actions under the goal of conquering China.²²⁴ When this strategy turned out illusionary and the army could not deliver its pledge of a swift conquest of China, the military leadership responded by expanding the war theatre to the South Pacific and the Indian Ocean in search for control over mineral resources and in an attempt to cut enemy supply routes. The Pacific War resulting from this response entailed the military occupation of large areas in the South Pacific and Southeast Asia between 1942 and 1945 with Singapore as the administrative centre. Despite the explicitly military character of that occupation, the Shōwa government continued to avoid imperial terminology and, already in 1938, began to proclaim a "New Order in East Asia" under its sway and referred to the territories under its control as the "Greater East Asian Co-Prosperity Sphere" (Dai Tō-A Kyōeiken) from 1940.²²⁵ The sphere became institutionally manifest in the "Greater East Asian Ministry" (Dai Tō-A Shō), which was established in 1943 against strong opposition from the Ministry of Foreign Affairs. The new ministry absorbed the Colonial Ministry that had been formed in 1929. The propaganda authorised by the Japanese army sought to buy support for the occupation²²⁶ by claiming that it was a means to end European colonial control.²²⁷ In Burma (Myanmar) Aung San (1915 – 1947), the leader of the anti-colonial liberation movement, indeed, used these ideologies in his own propaganda and cooperated with the Shōwa government.²²⁸ Likewise, the supreme commander of the Indian National Army, Subhas Chandra Bose (1897 – 1945), who collaborated with the Nazi government, readily took advantage of the decision of the

²²⁰ Text was published under the name of Saburō Yamada, 'Dai Tō-A kokusaihō sōsho [= preface to]', Kaoru Yasui, *Ōshū kōiki kokusai hō no kiso rinen* (Dai Tō-A kokusai hō sōsho, 1) (Tokyo, 1942), pp. 1-3, presumably written by Yasui.

²²¹ Japan: Takumushō, Takumukyoku, ed., *Manshū nōgyō imin no genkyō* (Tokyo, 1937; 1938).

²²² Japan: Takumushō, Takumukyoku, ed., *Manshū nōgyō imin ni tsuite* (Tokyo, 1938), pp. 241-262]. Louise Young, *Japan's Total Empire. Manchuria and the Culture of Wartime Imperialism* (Berkeley, 1998).

²²³ Ken'ichi Gotō, 'Taiwan to Nan'yō kanshin mondai tonon kanren de', in: Shinobu Ōe, ed., *Kindai Nihon to shokuminchi*, vol. 2 (Tokyo, 1992), pp. 147-175.

²²⁴ Reinhard Zöllner, 'Ein ostasiatischer Holocaust? Japans Aggression in China (1931 – 1945)', in: Thoralf Klein, ed., *Kolonialkriege. Militärische Gewalt im Zeichen des Imperialismus* (Hamburg, 2006), pp. 291-328.

²²⁵ Fumimaro Konoe, 'Tō-a shin-chitsujo [22 December 1938]', in: *Japan Times* (23 December 1938) [reprinted in: Joyce Chapman Lebra, ed., *Japan's Greater East Asia Co-Prosperity Sphere in World War II. Selected Readings and Documents* (Kuala Lumpur, 1975), pp. 68-70]. Hachirō Arita, '[Radio Address, June 1940]', in: *Nihon gaikō nenpyō narabi ni shuyō bunsho*, vol. 2 (Tokyo, 1966), pp. 433-434. Arita: 'The Greater East Asian Sphere of Common Prosperity', in: *Contemporary Japan*, vol. 10, nr 1 (1941), pp. 9-15 [partly printed in: Lebra (as above), pp. 73-77]. Yōsuke Matsuoka, '[Declaration on the Greater East Asian Co-Prosperity Sphere, 1 August 1940]', in: *Asahi Shinbun* (2 August 1940); printed in: Lebra (as above), pp. 71-72. Expansionist propagandists used the ideology of Turanism to advocate that the Japanese government should seek to establish itself over large parts of Asia: Imaoka, *Han* (note 35).

²²⁶ Tōru Hasegawa, *Nanshin ron to wa nanzo ya* (Tokyo, 1936). Tetsusaburō Uehara, *Shokuminchi toshite mitaru Nan'yō guntō no kenkyū* (Tokyo, 1940) [reprint (Tokyo, 2004)].

²²⁷ Rōyama, *Policy* (note 219), p. 91.

²²⁸ Aung San, 'Blue Print for Burma [1941]', edited by Joseph Silverstein, *The Political Legacy of Aung San* (Southeast Asia Series, 11) (Ithaca, 1993), pp. 19-20 [first published (Data Paper. Southeast Asia Program, 86) (Ithaca, 1972)].

Japanese navy administration in Singapore to allow all inhabitants of South Asian origin the emigration from the island under the condition that they declared their support for Bose.²²⁹

During the 1920s, the Taishō government had administered the “mandatory” territories in accordance with the principles that had been formulated for control of Taiwan and Korea. In doing so, it had followed the European practice of colonial administration. Between 1937 and 1945, the Shōwa government sought to apply the same principles to the administration of the newly occupied territories, even though control over them was dictated by the strategic goals pursued by the army. The army placed occupied territories in China under military rule. In Manchukuo, however, it sought to “civilianise” rule and tried to do so in accordance with international, not Japanese state law. With regard to parts of Southeast Asia, specifically Indonesia and Burma, it combined its military occupation regime for the purpose of exploiting mineral resources with support for anti-colonial movements whose declared goal it was to accomplish independence at the earliest possible point of time.

In Europe as well, opposition against the League of Nations met with nationalist propaganda, which was filled up with arguments against the admission of external influences into domestic political decisions and rejected these influences as emanations of imperialism. The opposition against the League from the side of the advocates of nationalist ideologies was, however, not immediately recognisable. As late as in 1937, even Verdroß credited the Nazis with being “a movement of national renewal” (eine nationale Erneuerungsbewegung), “anti-imperialistic and federalist” (antiimperialistisch und föderalistisch) because, he believed, it did no more than oppose “the re-smelting of alien nationalities” (die Einschmelzung fremder Volkstümer).²³⁰ Verdroß thus still ignored the then already explicit Nazi enmity against the “Versailles system” with the League as its most visible representative.²³¹ Already in 1935, Hitler’s government had openly trespassed the restrictions on armament imposed by the Treaty of Versailles, had, in 1936, formed the Anti-Comintern Pact with Italy and Japan, which was not only explicitly directed against the Soviet Union, but also featured the declaration of the refusal to accept mandates from the “international legal community” of states. The Italian government under Mussolini broke international law with its military occupation of Ethiopia in 1936 and its military intervention in Albania in 1939. In the block established through the Anti-Comintern Pact, the German and the Japanese governments cooperated more closely with each other than with their Italian partner,²³² even though several factors strained the German-Japanese relationship, most importantly the German demand for the return of the South Pacific islands to German control.²³³

Resistance against the League of Nations emerged among German international legal theorists in the middle of the 1920s, that is, at the time, when the German Empire was admitted to the League. In 1926, Carl Schmitt published his critique of the Covenant, League policies and the positions held by League supporters.²³⁴ Schmitt posed as a critic of what has subsequently become termed globalisation, which he identified with what he called the “new international law” formulated and enforced under League auspices. This formula was a shortcut for Schmitt’s perception not only of certain theories of international law, but also of the principles informing League policies. The theories and political principles that Schmitt attacked focused on the project of the formulation and codification of international legal norms both through League of Nations legislation and the conclusion of multilateral treaties. This purportedly “new international law” was, in Schmitt’s

²²⁹ Marshall J. Getz, *Subhas Chandra Bose* (Jefferson, NC, 2002). Milan Hauner, *India in Axis Strategy. Germany, Japan and Indian Nationalists in the Second World War* (Veröffentlichungen des Deutschen Historischen Instituts London, 7) (Stuttgart, 1981).

²³⁰ Alfred Verdross, *Völkerrecht* (Enzyklopädie der Rechts- und Staatswissenschaften. Abteilung Rechtswissenschaft, 30) (Vienna, 1937), p. 29.

²³¹ Carl Schmitt, *Die Kernfrage des Völkerbundes* (Völkerrechtsfragen, 18) (Berlin, 1926). Schmitt, *Nationalsozialismus und Völkerrecht* (Berlin, 1934).

²³² Johanna M. Menzel, ‘Der geheime deutsch-japanische Notenaustausch zum Dreimächtepakt’, in: *Vierteljahreshefte für Zeitgeschichte* 5 (1957), pp. 182-193.

²³³ Gerhard L. Weinberg, ‘Deutsch-japanische Verhandlungen über das Südseemandat. 1937 – 1938’, in: *Vierteljahreshefte für Zeitgeschichte* 4 (1956), pp. 390-398.

²³⁴ Schmitt, *Kernfrage* (note 231).

rendering, destroying the “old” *ius Europeum publicum*, which he regarded as having been in force up to the end of the nineteenth century. He posited that the *ius Europeum publicum* had been destroyed through the admission, first of Japan and subsequently of further states outside America and Europe, into the “family of nations”. Its expansion to the boundaries of the globe had, Schmitt insisted, bereaved the “old” *ius Europeum publicum* of its “natural unity and centre” (natürlichen Einheit und Mitte).²³⁵

Without referring to them explicitly, Schmitt used the theories advocated by deniers of international law, whose positions he took as the platform for his criticism of the League. According to Schmitt, the League was not to be put into a position, from out of which it could interfere into the sovereignty of its member states and could subject them to its jurisdiction. Schmitt supported this verdict with the argument that the League had hitherto not been legitimised to fully abrogate the “old” *ius Europeum publicum* around the respect for the sovereignty of states as its core feature. As a result, he diagnosed the existence of what he considered as an unbearable situation, in which the “old” and the “new” international law were rivalling each other. Hence, the League of Nations was unable to implement its own norms and a lawless sphere was emerging with the growing danger of military conflicts. These conflicts, Schmitt expected, would arise, because the “great powers” would not act in accordance with League norms, but would oblige “weak” states to do so. Schmitt identified this situation as unjust. Under the roof of the League, he postulated, “weak” states were exposed to “great power” arbitrariness and were even lacking legal instruments to resist “great power” pressure. In Schmitt’s perception, League of Nations policies were not only founded in wishful thinking but prepared the ground for another world war.²³⁶

Moreover, Schmitt determined that the League of Nations was not a “league” (Bund). He postulated that a “real league” (wirklicher Bund) ought to feature a minimum of homogeneity.²³⁷ Yet, Schmitt would not detect such homogeneity in the League, as it was set to evolve into a global international organisation, hampered in its activities by “the diversity of cultural areas, races and religions”.²³⁸ Hence, he concluded that the League was not capable of maintaining its own armed forces and could thus neither be nor become an organisation guaranteeing the security of its members. The League, as Schmitt characterised it, was therefore not legitimised to restrain the decision-making capability of governments of sovereign states and, by consequence, advocates of the “new” international law were placing vain hopes in the League. The League was not entitled to set general legal norms, because humankind did not form a “legal community”. As the league was not a “real league”, relations among its members were ordinary relations among sovereign states, with the implication that wars among League members were regular inter-state wars.²³⁹ These observations largely agreed with those that Ernst Immanuel Bekker (1827 – 1916), one of the doyens of German jurisprudence, had argued during World War I.²⁴⁰ Schmitt did not refer to Bekker, but claimed originality for his dicta, adding in 1939 that next to the League, there were also “large spaces” and “empires”.²⁴¹ On the basis of contemporary economic theory²⁴² Schmitt defined an

²³⁵ Carl Schmitt, ‘Die Auflösung der europäischen Ordnung im “International Law”’, in: *Deutsche Rechtswissenschaft*, vol. 5, nr 4 (1940), pp. 267-273 [reprinted in: Schmitt, *Staat – Großraum – Nomos. Arbeiten aus den Jahren 1916 – 1969*, edited by Günter Maschke (Berlin, 1995), pp. 372-383]. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europeum* [essential parts written before the end of World War II] (Cologne, 1950), p. 204 [reprints (Berlin, 1974; 1988; 1997)].

²³⁶ Schmitt, *Kernfrage* (note 231), p. 11.

²³⁷ *Ibid.*, p. 21.

²³⁸ *Ibid.*, pp. 19-20.

²³⁹ *Ibid.*, pp. 16-17.

²⁴⁰ Ernst Immanuel Bekker, *Das Völkerrecht der Zukunft* (Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philos.-Hist. Kl. 1915, nr 3) (Heidelberg, 1915).

²⁴¹ Carl Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht* (Schriften des Instituts für Politik und Internationales Recht an der Universität Kiel, N.F. 7) (Berlin, 1939) [reprinted in: Schmitt, *Staat – Großraum – Nomos. Arbeiten aus den Jahren 1916 – 1969*, edited by Günter Maschke (Berlin, 1995), pp. 269-371, at p. 316].; similarly: Gustav Adolf Walz, *Völkerrechtsordnung und Nationalsozialismus. Untersuchungen zur Erneuerung des Völkerrechts* (Munich, 1942), pp. 130-144.

²⁴² Ladislav Nyiri, *Die europäische Großraumwirtschaft*. Ph. D. Diss. (University of Berlin, 1936). Arno Sölter, *Das*

area under the control of the government of one state as a “larger space”, which he divided into several sovereign and independent states under a common ideology and an integrated system of economic relations. By contrast, “empire” was to Schmitt a “larger space” under the direct control of one and the same government. According to Schmitt, the “new” international law had to be structured so as to guarantee legal titles to “larger spaces” and “empires” and prohibit interventions into them by external powers.²⁴³ Schmitt’s program for the making of future international law was particularistic and aimed at the generation of legal titles allowing the formation of blocks.²⁴⁴

The Nazi “revolution” forced Schmitt’s most serious rivals among German legal theorists into emigration or silenced them. Smend remained in Germany but lost his post at the University of Berlin and remained quiet. Kelsen emigrated, first to Geneva, then to his native Prague and eventually to Berkeley, California. Wehberg had settled in Geneva. Schücking was forced into retirement but retained his position at the International Court of Justice and died in 1935.²⁴⁵ Whoever taught international law in Nazi Germany withdrew into ivory tower research or collaborated with the Nazis, within or outside the party. Schmitt’s Berlin colleague Friedrich Berber (1898 – 1984), a mid-ranking SS man, pleaded for the recognition of Francisco de Vitoria as initiator of the European law among states, took positions that were not compatible with Schmitt’s, but did not attack Schmitt’s work.²⁴⁶ Carl Bilfinger (1879 – 1958) at Halle had joined Schmitt as a legal representative in support of the central government when it faced court cases during the late Weimar Republic, but denounced the League and the War Renunciation Pact as instruments of British imperialism once the Nazi government was in office.²⁴⁷ Helmut Jahrreiß (1894 – 1942) at Cologne critically discussed Schmitt’s international legal theory without censuring Schmitt for his critique of the League,²⁴⁸ Ulrich Scheuner (1903 – 1981) successively at Jena, Göttingen and Strasbourg restated the nineteenth-century postulate that there was a legal entitlement for colonial rule and polemicalised against alleged British design for world domination.²⁴⁹ Ernst Wolgast (1888 – 1959) at Würzburg propagated the need for some “new law of the sea”, which he posited as setting binding norms of the use of military force on the high seas. Wolgast expected that only the government of the German Empire was in a position to develop and enforce this “new law of the sea”.²⁵⁰ Viktor Böhmert (1902 - ?) at Kiel elaborated upon Schmitt’s program for the creation of “larger spaces”.²⁵¹ Herbert Kraus (1884 – 1965) at Göttingen was a special case. In 1937, he was expelled from government service due to his membership in the German Peace Association and the German Committee for Palestine. The Göttingen University administration did not act in Kraus’s support.²⁵²

Großraumkartell. Ein Instrument der industriellen Marktordnung im neuen Europa (Dresden, 1941).

²⁴³ Schmitt, *Grossraumordnung* (note 241), p. 316.

²⁴⁴ Similarly: Gustav Adolf Walz, ‘Das Verhältnis von Völkerrecht und staatlichem Recht nach nationalsozialistischer Auffassung’, in: *Zeitschrift für Völkerrecht* 48 (1934), pp. 145-154, at pp. 147-149.

²⁴⁵ Hans Wehberg, ‘Das Leben Walther Schückings’, in: *Die Friedenswarte* 35 (1935), pp. 162-175.

²⁴⁶ Friedrich Berber, ‘Die Entdeckung der “Neuen Welt” und die Entstehung des modernen Völkerrechts’, in: *Auswärtige Politik* 9 (1842), pp. 882-888. Berber, ‘Der Mythos der Monroedoktrin’, in: *Auswärtige Politik* 9 (1942), pp. 287-300.

²⁴⁷ Carl Bilfinger, ‘Das Reichsstatthaltergesetz’, in: *Archiv für öffentliches Recht* 63 (1934), pp. 131-165. Bilfinger, *Völkerbundsrecht gegen Völkerrecht* (Schriften der Akademie für Deutsches Recht. Gruppe Völkerrecht, 6) (Munich, 1938). Bilfinger, *Das wahre Gesicht des Kellogg-Paktes. Angelsächsischer Imperialismus im Gewande des Rechts* (Essen, 1942).

²⁴⁸ Helmut Jahrreiß, ‘Wandel der Weltordnung. Zugleich eine Auseinandersetzung mit der Völkerrechtslehre von Carl Schmitt’, in: *Zeitschrift für öffentliches Recht* 21 (1941), pp. 513-536.

²⁴⁹ Ulrich P. Scheuner, ‘Zur Geschichte der Kolonialfrage im Völkerrecht’, in: *Zeitschrift für Völkerrecht* 22 (1938), pp. 442-473 [reprinted in: Scheuner, *Schriften zum Völkerrecht*, edited by Christian Tomuschat (Berlin, 1984), pp. 317-348]. Scheuner, ‘Politische Wissenschaft in der Auseinandersetzung um Volk und Raum’, in: *Deutsches Recht* 10, nr 21 (1939), pp. 850-852. Scheuner, *Das europäische Gleichgewicht und die britische Seeherrschaft* (Hamburg, 1943).

²⁵⁰ Ernst Wolgast, *Völkerrecht* (Berlin, 1934). Wolgast, ‘Großraum und Reich’, in: *Zeitschrift für öffentliches Recht* 21 (1941), pp. 20-31. Wolgast, *Seemacht und Seegeltung. Entwickelt an Athen und England* (Berlin, 1944).

²⁵¹ Viktor Böhmert, ‘Besprechung von “Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte” von Carl Schmitt’, in: *Zeitschrift für Völkerrecht* 24 (1940), pp. 134-140.

²⁵² Herbert Kraus, [Supplication to the Imperial and Prussian Minister for Science, Schooling and General Education

During the Nazi period, some German jurists, rather explicitly, when compared to Schmitt, hooked on theories, to which they attached the label of natural law. However, they did so without carefully scrutinising natural law theories. Apparently misled by the suggestive force of the German word *Völkerrecht* (literally: law of the peoples) for international law, Nazi theorists contended that *Völkerrecht* ought not to serve the demands of the equality of state but should instead be identical with some “law of the peoples”. “Peoples”, these theorists claimed, were unequal in their “natural position”. Therefore, they demanded, the current theory of the legal equality of states should be rejected and replaced by a theory recognising not the state, but “the people as the original community” and the sole subject of international law.²⁵³ International law, in their view, had to be equivalent of some “law of peoples’ groups”. (*Volksgruppenrecht*)²⁵⁴ Acknowledging the “peoples” in their purported “natural” inequality was given out by these theorists as the command of natural law.²⁵⁵ Herbert Kraus concurred and was ready for a move of reconciliation, even after the Nazi government and Göttingen University had removed him from office. In 1939, he praised the Nazis as bringers of peace, demanded that international law should give support to the “interests of the several communities of peoples organised as states” (*den Interessen der verschiedenen als Staaten zusammengefassten Volksgemeinschaften*), gave assurance that the “suppression of peoples” (*Vergewaltigung anderer Völker*) did not belong “to the Nazi program of inter-state relations” and raised such empty propaganda to the level of an allegedly inalterable guideline of natural law. Kraus thus insisted that “the National Socialist is a supporter of natural law, even in the international arena” (*der Nationalsozialist ist Naturrechtler, auch im zwischenstaatlichen Bereich*).²⁵⁶ His perversion of the concept of natural law into a mechanism legalising inequality came in succession to the earlier confession by the Breslau publicist Gustav Adolf Walz (1897 – 1948), who, in 1934, launched a campaign against what he called “*pacta-sunt-servandaism*” as a derogatory term for the obligation to honour valid treaties by international law. Instead of accepting *pacta sunt servanda* as a “basic norm” of international law, Walz would derive the practice of keeping treaties between states from some unspecified extralegal “faithfulness” (*Treue*) as a “principle of human behaviour” (*Grundsatz menschlichen Verhaltens*), that is from the realm of politics, not the law.²⁵⁷ Walz thus explicitly made the binding force of treaties by international law subject to political considerations, which, he requested, could not stand against some nebulous “welfare” of the “peoples”: “Treaties exist not for their own benefit but for that of the peoples and are determined to serve the peoples’ welfare” (*Verträge sind nicht um ihrer selbst willen, sondern um der Völker willen da, deren Wohlfahrt sie im Namen der Gerechtigkeit zu dienen bestimmt sind*).²⁵⁸

Further jurists were leading members of Nazi organisations, among them the SS man Reinhard Höhn (1904 – 2000)²⁵⁹ in Berlin. These jurists were determined to turn international law into an instrument for the legitimisation of rule over “larger spaces”. From 1941, they provided propagandistic designs flanking the German invasion of the Soviet Union. Walz, who had come up

Relating to His Retirement, 30 Junie 1937]. Ms. Georg-August-Universität Göttingen: Universitätsarchiv, Personalakte Kraus.

²⁵³ Norbert Gürke, ‘Der Begriff des totalen Krieges’, in: *Völkerbund und Völkerrecht* 3 (1936/37), pp. 207-212, at pp. 24-26. Gustav Adolf Walz, ‘Nationalsozialismus und Völkerrecht’, in: *Völkerbund und Völkerrecht* 1 (1934/35), pp. 473-479, at p. 473.

²⁵⁴ Norbert Gürke, *Grundzüge des Völkerrechts* (Berlin, 1936), pp. 48-51 [second edn (Berlin, 1942); third edn (Berlin, 1944)].

²⁵⁵ Dietze, *Naturrecht* (note 182). Helmut Nicolai, *Die rassengeschichtliche Rechtslehre*, second edn (Nationalsozialistische Bibliothek, 39) (Munich, 1933) [first published (Munich, 1933)].

²⁵⁶ Herbert Kraus, ‘Das zwischenstaatliche Weltbild des Nationalsozialismus’, in: *Juristische Wochenschrift* 62 (1939), pp. 2418-2423, at pp. 2423, 2421, 2420.

²⁵⁷ Gustav Adolf Walz, ‘Der Treuegedanke im Völkerrecht’, in: *Deutsches Recht* 4 (1934), pp. 521-525, at pp. 524, 525.

²⁵⁸ *Ibid.*, p. 525.

²⁵⁹ Roger Diener, ‘Das Reich im Weltanschauungskampf und Theorienstreit’, in: *Reich – Volksordnung – Lebensraum* 6 (1943), pp. 216-352. Reinhard Höhn, ‘Großraumordnung und völkisches Rechtsdenken’, in: *Reich – Volksordnung – Lebensraum* 1 (1941), pp. 256-288. Höhn, *Reich, Großraum, Großmacht* (Forschungen zum Staats- und Verwaltungsrecht, Reihe A, Bd 13) (Darmstadt, 1942).

with a serious critique of the positions of the deniers of international law in 1930,²⁶⁰ as a member of the Nazi party pleaded in favour of the novellation of international law into a means of sanctioning, not Schmitt's "larger space" of states, but some "order of larger spaces of peoples" (*völkische Großraumordnung*).²⁶¹ Otto Koellreutter (1883 – 1972), successively at Jena and Munich, launched rude attacks not only against the League of Nations, but also against Schmitt whom he censured for inappropriate support of state institutions and lack of interest in *völkisch* ideas.²⁶² Even though these theorists took positions against Schmitt, they were no serious challengers. Younger jurists displayed sympathies with the Nazi ideology and strategies, among them Ernst Rudolf Huber (1903 – 1990), Schmitt's student,²⁶³ Ernst Forsthoff (1902 – 1974), also Schmitt's student,²⁶⁴ Herbert Krüger (1905 – 1989)²⁶⁵ and Wilhelm Carl Georg Grewe.²⁶⁶ On occasions, Schmitt cooperated with Bilfinger, Scheuner, Walz, Wolgast, Berber and Jahrreiss in the Academy for German Law in Berlin,²⁶⁷ which housed a working group on international law. This working group evolved into a forum for the discussion of Schmitt's international legal doctrines. Without serious rivals Schmitt could occupy the position of a judge on the justice of government action according to what he proclaimed as international law.²⁶⁸

In 1939 Schmitt granted some "right of empire building" to states to whom he ascribed self-defense capability. But he denied this right to states not capable of defending themselves in his perception.²⁶⁹ According to this logic, "empires" tolerated only interventions by the ruling government, while interventions by external powers were illegal. In attempting to categorise "empire building" as an international legal title, Schmitt moved away from his previous position that the "international legal community" was a club of legally equal sovereign states. He now advocated the counter-position that certain states existed whose governments not only had the military and political power but even the right to intervene in other sovereign states, thereby creating "larger spaces" and empires under their exclusive control. Schmitt's new position thus included the Nazi postulate that states and "peoples" were unequal, forming a hierarchy of, so to speak, states with ordinary sovereign under the control of a block leader, with self-defense capability serving as the criterion of distinction. Schmitt explicitly gave two examples of such "larger spaces" and empires, the Monroe Doctrine and the British Empire. The British Empire, he supposed, covered that part of the world over which the British government claimed the exclusive right of intervention. He adduced the row over the Geneva protocol of 1924 as evidence. In a note on the Protocol of 1925, the British

²⁶⁰ Gustav Adolf Walz, *Das Wesen des Völkerrechts und Kritik der Völkerrechtsleugner* (Fritz Stier-Somlò, ed., Handbuch des Völkerrechts, vol. 1) (Stuttgart, 1930).

²⁶¹ Walz, *Völkerrechtsordnung* (note 241), pp. 130-144.

²⁶² Otto Koellreutter, *Volk und Staat in der Verfassungskrise. Zugleich eine Auseinandersetzung mit der Verfassungslehre Carl Schmitts* (Berlin, 1933). Koellreutter, 'Leviathan und totaler Staat', in: *Reichsverwaltungsblatt*, vol. 59, nr 38 (1938), pp. 803-807.

²⁶³ Ernst Rudolf Huber, 'Positionen und Begriffe. Eine Auseinandersetzung mit Carl Schmitt', in: *Zeitschrift für die gesamte Staatswissenschaft* 101 (1041), pp. 1-44.; 85 Huber, 'Reich, Volk und Staat in der Reichsrechtswissenschaft des 17. und 18. Jahrhunderts', in: *Zeitschrift für die gesamte Staatswissenschaft* 102 (10942), pp. 593-627.

²⁶⁴ Ernst Forsthoff, *Der totale Staat* (Hamburg, 1933). Forsthoff, *Die Verwaltung als Leistungsträger* (Stuttgart and Berlin, 1938).

²⁶⁵ Herbert Krüger, 'Der Raum als Gestalter der Innen- und Außenpolitik', in: *Reich – Volksordnung – Lebensraum* 1 (1941), pp. 77-176.

²⁶⁶ Wilhelm Georg Carl Grewe, 'Der Reichsbegriff im Völkerrecht', in: *Monatshefte für auswärtige Politik* 6 (1939), pp. 798-802 [not included in the volume of his collected essays: Grewe, *Machtpositionen und Rechtsschranken* (Baden-Baden, 1991)].

²⁶⁷ Akademie für Deutsches Recht, 'Niederschrift über die 2. Sitzung der Völkerrechtlichen Gruppe der Klasse II der Abteilung für Rechtsforschung (Akademie für Deutsches Recht) am Freitag, dem 6. Mai 1938', edited by Piet Tommissen, in: *Schmittiana*, vol. 4 (Berlin, 1994), pp. 221-226.

²⁶⁸ Schmitt, *Nationalsozialismus* (note 231), p. 13.

²⁶⁹ Schmitt, *Grossraumordnung* (note 241). Schmitt, 'Der Reichsbegriff im Völkerrecht', in: *Deutsches Recht* 11 (1939), pp. 341-344 [reprinted in: Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923 – 1939* (Hamburg, 1940), pp. 344-354; third edn (Berlin, 1994)]. Schmitt, 'Reich und Raum. Elemente eines neuen Völkerrechts,' in: *Zeitschrift der Akademie für Deutsches Recht* 7 (1940), pp. 201-203.

government had maintained that the Protocol could not obstruct its use of special rights over its colonial dependencies. Instead, the British government had declared its determination to retain its right to conduct war at its own discretion and without threat of sanctions anywhere in its colonial dependencies. Schmitt used the note to confirm his view that colonial wars were not wars in accordance with international law, for otherwise the note would have been incompatible with the Geneva Protocol. For this interpretation, Schmitt concluded that the British Empire was both a “larger space” and an empire according to his conception of the “new” international law. As no entitlement by international law could be granted to the British government without being granted under the same conditions to other governments as well, Schmitt requested that the German government, in his view capable of defending the German Empire, should be authorised to establish its own “larger space” combining territories in Europe with colonial dependencies. Colonies, Schmitt opined, “self-evidently” “belonged” to the “European power” that “possesses them” (die sie besitzt).²⁷⁰ Thereby, Schmitt buried the conception of a universal international law above the blocks.

Draping arguments of the “Pan Europe” movement into a juristic robe, Schmitt further adduced the Monroe Doctrine as a legal entitlement for block formation, with the justification that the Doctrine was mentioned in the League of Nations Covenant. Schmitt asserted that the Covenant converted the American continent into a “larger space” under the control of the US government, which was claiming not merely the right of intervention for itself, but was denying it to all other governments at the same time. Although the doctrine had been declared unilaterally, Schmitt repeated his conclusion that no one could grant an international legal title to the US government and deny the same title to other governments under the same conditions.²⁷¹ His interpretation met with sheer joy in the Nazi establishment. Adolf Hitler (1889 – 1945) grabbed it and dispatched a note to President Franklin Delano Roosevelt (1882 – 1945) in 1939, announcing a “German Monroe Doctrine” for Europe. Schmitt was informed over the telephone that Hitler had demanded the sole authorship for the idea and the formulation of the “German Monroe Doctrine”, backed in and remained silent.²⁷² Already before the beginning of World War II, Schmitt and his affiliates as international legal theorists divided the world into isolated blocks. But in contradistinction against “pan European” rhetoric, Nazi international legal theorists admitted only three blocks, one under German control in Europe, one under Japanese control in East Asia and America. The idea of the blocks was the product of the work of revisionist theorists concocting some particularistic international law and casting into terms the counter model to the League of Nations.

In Japan, by contrast, the conceptualisation of particularistic international law in confinement to blocks remained controversial. Even during the “Greater East Asian” and the ensuing “Pacific War” (1937 – 1945), the Japanese government consociated its expansionist war aims of accomplishing the unity of East Asia with allegations of the need for economic cooperation²⁷³ and, even after having proclaimed its “Greater East Asian Co-Prosperity Sphere” (Dai Tō-A Kyōeiken),²⁷⁴ refrained from using Schmitt’s concept of the “larger space”. Instead of turning to Schmitt, it accused the British and the US governments of having turned away from supporting free trade in the globe at large by introducing trade restrictions and claimed the right for itself to proceed in the same way.²⁷⁵ The majority of international legal scholars took a critical stance towards government foreign policy and military operations²⁷⁶ and made use of Nazi

²⁷⁰ Schmitt, *Nationalsozialismus* (note 231), pp. 20-21. Schmitt, ‘Raum und Großraum im Völkerrecht’, in: *Zeitschrift für Völkerrecht* 24 (1940), pp. 145-179, at p. 158 [reprinted in: Schmitt, *Staat – Großraum – Nomos. Arbeiten aus den Jahren 1916 – 1969*, edited by Günter Maschke (Berlin, 1995), pp. 234-268].

²⁷¹ Schmitt, *Kernfrage* (note 231), p. 20, 72.

²⁷² Felix Blindow, *Carl Schmitts Reichsordnung. Strategie für einen europäischen Großraum* (Berlin, 1999), pp. 78-89. Max Domarus, ed., *Hitler. Reden und Proklamationen. 1932 – 1945*, vol. 2 (Leonberg, 1988), p. 1173.

²⁷³ Fumimaro Konoe, ‘Tō-A shin-chitsujo [22 December 1938]’, in: *Japan Times* (23 December 1938) [printed in: Joyce Chapman Lebra, ed., *Japan’s Greater East Asia Co-Prosperity Sphere in World War II. Selected Readings and Documents* (Kuala Lumpur, 1975), pp. 68-70].

²⁷⁴ Arita, ‘Sphere’ (note 225). Matsuoka, Yōsuke: ‘Declaration’ (note 225).

²⁷⁵ Arita, ‘Sphere’ (note 224), edn by Lebra, pp. 74-75.

²⁷⁶ Urs Matthias Zachmann, *Völkerrechtsdenken und Außenpolitik in Japan. 1919 – 1960* (Studien zur Geschichte des Völkerrechts, 29) (Baden-Baden, 2013), pp. 191-196.

international legal theories only reluctantly and with modifications.²⁷⁷ Theorists did accept Schmitt's so-called "discriminating concept of war",²⁷⁸ but took over neither the racist connotations of the concept of the "larger space" nor the principle of the limited sovereignty of states included into a "larger space" under a self-appointed leader. Instead, the majority of theorists supported the internationalist stance that Foreign Minister Mamoru Shigemitsu (1887 – 1957) adopted during the later phase of the "Pacific War".²⁷⁹ Explicitly, they confirmed the validity of universal international law above "larger spaces".²⁸⁰ However, a minority within the "Committee for East Asian International Law" (Tō-A Kokusaihō I'inkai) of the Association for International Law (Kokusaihō Gakkai) opted for the conception of some regional international law (tokushi kokusaihō) since 1941, which they gave out as a set of "social" norms. Jurist Kaoru Yasui (1907 – 1981) was the voice of this group, which devoted itself to the construction of a regional international law valid only for the "Greater East Asian Co-Prosperity Sphere". But this conception remained pure theory and was never converted into legal norms.

Like the conceptualisation of the international law for "larger spaces" in Nazi Germany, the formation of the conception of an "East Asian international law" followed from the initiative of a few academics in universities. However, the Japanese government did not take over their arguments entirely, even when it received written proposals. These proposals came in succession to the promulgation of the "Greater East Asian Co-Prosperity Sphere", as is testified by the application for funding submitted to the Ministry of Education by the Association for International Law on 1 December 1941. In the reasoning for its application, the Association argued that research was necessary for the creation of a new particularistic international law (tokushu kokusaihō) specifically for the "Co-Prosperity Sphere".²⁸¹ It reminded the government of the efforts it had made since its establishment in 1897 to accomplish the revision of the non-reciprocal treaties, thereby alluding to the foundation in natural law of the right to resist positive legal norms. It then asked the government to provide financial support for its work and pledged to devote itself to the advancement of research in international law.²⁸² To that end, it would seek cooperation with legal scholars in other member states of the "Co-Prosperity Sphere" to "establish an East Asian international law" (tō-a kokusaihō no kiritsu) jointly with them.²⁸³ The Ministry approved of the application on 23 December 1941. Immediately, the Association established the "Committee for East Asian International Law" and placed it under Yasui's chairpersonship. Already in the following year 1942, the Committee produced two sizeable volumes on the "International Law of Larger Spaces" (kō-iki kokusaihō) within the newly launched series "East Asian Law" (tō-a kokusaihō sōsho), one on Schmitt's European "larger space", and the other on the Monroe Doctrine.²⁸⁴ Both monographs remained the only substantial academic contributions seeking to conceptualise the particularistic international law within the any field of legal study. The "larger spaces" on which these monographs focused, lay outside the control of the Japanese government. These lawyers appear to have responded to a widespread public sentiment that equated international law as such with the operations of the League of Nations, chasticed, like Schmitt, the League as an agent of foreign domination and took the radical revisionist view that, within the "Co-Prosperity Sphere", there was no need for any international law at all.²⁸⁵ Particularist lawyers responded to this view with the argument that a specific 'East Asian international law' ought to be conceptualised in contradistinction against the

²⁷⁷ Ibid., pp. 232-248.

²⁷⁸ Shigejirō Tabata, 'Tō-A kyōeiken kokusaihō e no michi', in: *Gaikō hyōron*, vol. 23, nr 1 (1943), pp. 10-23, at pp. 12-13.

²⁷⁹ Zachmann, *Völkerrechtsdenken* (note 276), pp. 236, 241, 243-244, 273.

²⁸⁰ Shigejirō Tabata, 'Kokusai chijitso no tagen-teki kōsei', in: *Hōgaku ronsō*, vol. 47 (1942), pp. 383-402, vol. 48 (1943), pp. 349-374, 908-934, at pp. 388-389.

²⁸¹ Zachmann, *Völkerrechtsdenken* (note 276), p. 228.

²⁸² Ibid., p. 228.

²⁸³ Ibid., p. 229.

²⁸⁴ Kaoru Yasui, *Ōshū kōiki kokusaihō no kiso rinen* (Dai Tō-A kokusaihō sōsho, 1) (Tokyo, 1942). Masatoshi Matsushita, *Beishū kōiki kokusaihō no kiso rinen* (Tō-A kokusaihō sōsho, 2) (Tokyo, 1942).

²⁸⁵ Sanehide Komaki, Yoshio Satō et al., 'Funan no gaku. Shutsujin no gakuto ni okeru', in: *Chūō Kōron*, nr 675 (December 1943), pp. 94-111, at p. 99.

legal basis informing the League of Nations. Yasui's work on the European "larger space" was prefixed by a sketch of the "East Asian international law" under the name of Saburō Yamada, a founding member of the Association and then its president. But it is unclear whether Yamada actually wrote the text or whether Yasui published a text of his own under Yamada's name.²⁸⁶

Yasui explicated Schmitt's concept of a particularistic international law for a "larger space" and posited this concept against universal international law. Whereas Schmitt's concept had not met with criticism from established legal scholars, but only from SS men, in Japan jurist Shigejirō Tabata (1911 – 2001) at Kyōto University tore Yasui's arguments to pieces in thorough juristic analyses.²⁸⁷ Tabata's scathing attacks on Yasui and, by implication, on Schmitt reduced the resonance of the concept of the "East Asian international law".

In his criticism of Yasui's work, Tabata proceeded indirectly. Neither did he attack Schmitt from the front, whose statements about the "larger space" had gained official support from the Nazi government; nor did he argue explicitly against Yasui, whose position had found approval from the Association for International Law. In fact, Tabata did not even bother to discuss Schmitt's 1939 publication at all, but only referred to shorter papers, which Schmitt had added in defense of his position against SS men in 1940 and 1941.²⁸⁸ And from these texts, Tabata merely called attention to passages, in which Schmitt had softened his own views on the "larger space". Schmitt had done so through the concession to his critics that "larger spaces" were no definite spatial units, but could be expanded by the admission of additional states. More importantly, however, Tabata did not go to Schmitt at all for his definition of the "larger space". Instead, he used a theory popular during the 1930s in France and Spain, according to which "regional legal ordering systems" could be in force under the roof of universal international law.²⁸⁹

According to this theory, universal legal norms were applicable to members of the entire "international society" (*société internationale*) and, by virtue of their general applicability, were few in number and existed mainly as customary law.²⁹⁰ In the perception of the International Association of Jurists, carrying on nineteenth-century views,²⁹¹ these universal legal norms had resulted from "the economic conditions of modern life", which meant the increasing intensity of global communication, and were "manifest in recurrent legal acts and conventions resulting from the solidarity among states which had found its highest expression in the League of Nations".²⁹²

By contrast, particularistic regional legal norms appeared to have been constituted through special agreements among states made out for specific purposes,²⁹³ relating to continents, smaller regions, such as the Balkans or the Baltic area or enshrined in the doctrines of specific schools of

²⁸⁶ Yamada, 'Dai Tō-A' (note 220). The question is difficult to answer who actually wrote this preface. The textual evidence is incontestable in so far, as Yamada's name features in the monograph. But it is difficult to imagine that Yamada, in his capacity as President of the Association and as an established internationalist, would commit himself to the particularist concept of an international law for East Asia only. Moreover, after the end of World War II, Yasui lost his university teaching position, and a court found that he had written the preface. Hence, the possibility remains that Yasui published his text under Yamada's name in order to convey the impression that the entire Association supported the concept of the „East Asian international law“. Zachmann, *Völkerrechtsdenken* (note 276), p. 302.

²⁸⁷ Tabata, 'Kokusai chijitso' (note 280). Tabata, 'Tō-A' (note 278). Tabata, 'Nachisu kokusaihōgaku no tenkai to sono mondai-teki igi', in: *Gaikō jihō* 926 (1943), pp. 5-17.

²⁸⁸ Schmitt, 'Reichsbegriff' (note 269). Schmitt, 'Reich' (note 269).

²⁸⁹ José Ramon de Orúe y Arregui, 'Le regionalisme dans l'organisation internationale', in: *Recueil des cours* 53 (1935, part III), pp. 1-96, at p. 8. Octavian Stefanovici[-Ionitza], *Le régionalisme en droit international public* (Paris, 1935), pp. 12-24. Stefanovici-Ionitza, *Le droit international universel et continental* (Paris, 1938) [first published in: *Premier congrès d'études internationales* (Publications de l'Institut des Hautes Etudes Internationales de l'Université de Paris, 1) (Paris, 1938), pp. 293-321]. Karl Strupp, *Eléments du droit international public universel, européen et américaine*, second edn (Paris, 1930).

²⁹⁰ Reeves, 'Communauté' (note 119), pp. 9, 10. Stefanovici[-Ionitza], *Régionalisme* (note 289), p. 10. Strupp, *Éléments* (note 289), p. 6.

²⁹¹ Ferdinand Walter, *Naturrecht und Politik im Lichte der Gegenwart*, second edn, §§ 463, 465 (Bonn, 1871), pp. 346, 348 [first published (Bonn, 1863)].

²⁹² Orúe, 'Régionalisme' (note 289), p. 21.

²⁹³ *Ibid.*, p. 10.

legal thought.²⁹⁴ These regional legal norms had been acknowledged as valid and thus coexisted with universal international law. They represented a regrettable, but unavoidable fragmentation of the “great community” (*magna communitas* = *société internationale*).²⁹⁵ The International Association of Jurists deemed this „fragmentation” acceptable under the condition that its “accomplishment” (*atteinte*) did not jeopardise the universality of international law as such.²⁹⁶ In this perspective, particular regional legal norms applied to continents or smaller spaces, could be credited with validity solely as long as they were derived from universal international law. Instead, spatial units as such could not be bearers of legal contents.²⁹⁷ Hence, the Monroe Doctrine could not be a legal norm, even though it had found its way into the League Nations Covenant. In the Covenant, theorists of regionalism argued, the Monroe Doctrine merely served as a “political principle”, in line with the prohibitions of intervention into the domestic affairs of sovereign states and of colonisation as stipulated elsewhere in the Covenant.²⁹⁸ These arguments thus stood in direct opposition against Schmitt’s concept of the “larger space”. As Tabata referred to this theory of regionalism, he implicitly rejected as irrelevant Schmitt’s concept and committed himself to the position that particular regional legal norms could only be valid in conformity with universal international law. .

For Tabata, then, the “source” of the “East Asian international law” could only be universal international law with the League as the legislative institution. Therefore, any kind of „East Asian international law“ was only conceivable, as long as it remained compatible with universal international law. The general legal norms assembled in universal international law (*leges generales*) were, by consequence, the necessary “source” for the special dispositive norms (*leges speciales*) of an “East Asian international law”. In so far, Tabata, against Schmitt, defined a “larger space” as an entity of international law that maintained legal relations with other “larger spaces”. He did not call into question universal international law above the “larger spaces”, which could receive their legal status only through derivation from that law.²⁹⁹ In other words: Whereas for Schmitt, “larger spaces” were the highest form of state organisation, above which there was no law,³⁰⁰ Tabata placed the “larger spaces” under the control of universal international law. While Schmitt acted as the prophet of particularistic block formation, Tabata pleaded, against Yasui, for the subjection of block formation to international legal norms.

With these arguments, Tabata implicitly supported the “Wilsonianist” foreign policy favoured by Foreign Minister Mamoru Shigemitsu³⁰¹. The so-called “Wilsonianism” as the ideology of the recognition of the legal equality and the right of self-determination of states³⁰² met with strong objections among members of the Japanese army, navy and, since 1943, the “Greater East Asian Ministry”. But these objections were not only drawn on the expectation of military strategists that legal recognition of and political respect for the legal equality of the member states of the “Greater East Asian Co-Prosperity Sphere” could undermine the leadership exercised by the Japanese government and obstruct military operations. Instead, while the military leadership opted for strategies of block formation, Shigemitsu and his successor Shigenori Tōgō (1882 – 1950) were bent on applying “Wilsonianism” as a propaganda device against European colonial rule in Southeast and South Asia as well as against the prevailing British influence in China.³⁰³ Both ministers, then, continued to insist that Japanese hegemony within the “Co-Prosperity Sphere” was instrumental to the struggle against colonial rule. In doing so, they resorted to elements of Pan-Asianist ideology rather than claiming some quasi-imperialist right of the formation of a “larger

²⁹⁴ Ibid., p. 11. Strupp, *Éléments* (note 289), p. 6.

²⁹⁵ Orúe, ‘Régionalisme’ (note 289), p. 13]

²⁹⁶ Ibid., pp. 21, 88.

²⁹⁷ Ibid., p. 9; James Brown Scott, *Le progrès du droit des gens* (Paris, 1934), p. 146.

²⁹⁸ Orúe, ‘Régionalisme’ (note 289), p. 89. Stefanovici[-Ionitza], *Régionalisme* (note 289), pp. 142-143.

²⁹⁹ Tabata, ‘Kokusai chijitso’ (note 280), pp. 400-401.

³⁰⁰ Schmitt, ‘Raum’ (note 270), edn by Maschke, p. 261.

³⁰¹ Tetsuya Sakai, *Kindai Nihon no chitsujo-ron* (Tokyo, 2007), pp. 38-42.

³⁰² Jörg Fisch, *Das Selbstbestimmungsrecht der Völker. Die Domestizierung einer Illusion* (Munich, 2012), pp. 151-157.

³⁰³ Sumio Hatano, ‘Shigemitsu Mamoru to Ajia gaikō’, in: *Kokusaigaku Ronshū* 10 (1983), pp. 16-29.

space”.³⁰⁴ With the position of the military weakening as the end of the war came close, “Wilsonianism” turned stronger as the ideology of anti-colonialism. It also opened venues for the restitution of free trade in the postwar period and for playing off the internationalistically minded US government against the British government, which was then determined to retain its position as a colonial ruler.

As late as in March 1945, Foreign Minister Tōgō could call a conference of all ambassadors accredited from states in the “Co-Prosperity Sphere”. In his address to the conference, Tōgō raised the struggle for a “new world order” to the level of the sole war aim.³⁰⁵ The conference discussed the strategy of the continuation of the war on the basis of the “Joint Declaration for a Greater East Asia” (Dai tō-a kyōdō sengen) of 1943³⁰⁶. While this declaration had proclaimed the independence of one billion people from colonial rule in the “new order in East Asia”, the ambassadorial conference of 1945 expanded the war aim by demanding the facilitation of unrestricted access to natural resources and the capability of economic development as essential elements of the “new order”. The joint declaration, approved at the conference, thus was even closer to the Atlantic Charter of 14 August 1941 than the 1943 declaration. Already in June 1943, Shigemitsu had stated that good neighbourly cooperation on the basis of equality and reciprocity and complete independence were the “Wilsonian” goals of Japanese foreign policy. In October 1943, he repeated this statement, adding the commitments to end racial discrimination and to lift migration restrictions, to observe non-interference into domestic affairs of states, to boost “economic liberation” and to respect national identity.³⁰⁷ Hence, dissent between the military and the political leadership in wartime Japan consisted with regard to the choice of priority between universalistic and particularistic war aims. The closer defeat was, the more strongly the Ministry of Foreign Affairs insisted that overcoming block divisions should be the major goal, while the military leadership remained confined to its strategy of block formation. The position taken by the Ministry was carried on to the postwar period.³⁰⁸

In sum, the condition, upon which particularistic conceptions of international law relating to “larger spaces” or Monroe doctrines as blocks could be concocted in the academic world, was the determination, on the German side, of the Nazi government and, on the Japanese side, of some government supporters of expansionist ideologies to advance the promulgation of unjust law. This determination gave opportunity to unscrupulous scholars like Schmitt and Yasui to derive new law from their own fancy like subitist magicians releasing pigeons from their hats.

Summary

During the Nazi period, international legal theory was not a field in which academics could do their work in the German Empire without interference from politics. Instead, revisionist military and political strategies influenced theory-making, even though some scholars continued to operate within the established framework of Jellinek’s and Triepel’s theories.³⁰⁹ Most theorists, first and foremost Carl Schmitt, posed as intellectual makers of war propaganda. By doing so as desk workers, they

³⁰⁴ Peter Duus, ‘Shokuminchi naki teikokushugi’, in: *Shisō* 814 (1992), pp. 105-121.

³⁰⁵ Tokyo, Gaimushō gaikō shiryōkan, A7.0.09.53: Dai tō-a sensō kankei ikken; Dai tō-a taishi kaigi kankei, fol.18^f-23^f [new foliation, fol. 21^f-26^f].

³⁰⁶ The “joint declaration” is in: Tokyo, National Diet Library, Sensō mokuteki kenkyūkai, WT Series Reel 52, fol. 252^f-255^f, in Japanese, French and English versions. On the text see: Hiroshi Kawahara, *Shōwa seiji shisō kenkyū* (Tokyo, 1979), pp. 315-327. The declaration was first published by: Shigenori Tōgō, *Jidai no ichimen* (Tokyo, 1952), pp. 260-263 [English version: *The Cause of Japan* (New York, 1956, pp. 274-275)].

³⁰⁷ Gaimushō gaikō shiryōkan, A1.0.0.14: Shigemitsu Mamoru, ‘[Address to the National Diet, 17 June 1943]’, in: *Shigemitsu Addresses before the Diet* (Tokyo, 1943), pp. 1-4, at pp. 1, 3. Shigemitsu, ‘[Address to the National Diet, 27 October 1943]’, in: *ibid.*, pp. 6-11, at pp. 7, 10. Gaimushō gaikō shiryōkan, A1.0.0.14: Gaimudaijin sonota no enzetsu oyobi seimeishū; Shigemitsu gaimudaijin enzetsushū, pp. 59-66, at pp. 62-63.

³⁰⁸ Gaimushō gaikō shiryōkan, Microfilm reel A.0115: Shin Nihon kensetsu shoki gaikō seisaku yōkō an. October 1945.

³⁰⁹ For one: Dietze, *Naturrecht* (note 182), pp. 79-84.

have shared responsibility for war crimes and crimes against humanity committed by Germans during World War II, even though they may not have become guilty in terms of criminal law. When he was interrogated at Nuremberg about his involvement in war crimes, Schmitt insisted that he had composed his theory of the “larger spaces” according to criteria completely different from SS racist propaganda.³¹⁰ That may have been the case, even though Schmitt did use the jargon of racism in his attack on the League of Nations of 1926.³¹¹ Even if Schmitt may not have been a hardnosed blood-and-soil ideologue, he was manifestly an ideologue of the soil. In this respect, he was in agreement with SS propagandists on the demand that the block under the control of the Nazi government should be exempt from surveillance by the League of Nations. How maliciously Schmitt could twist arguments to his advantage, is on record from the interrogations he faced during the Nuremberg War Crimes Trial. When he had to defend himself against the accusation that he had planned a war of aggression, he denied the charge. In his defense, he pointed to an article Hans Wehberg had published in the pacifist journal *Die Friedenswarte*.³¹² In this article, Wehberg had reviewed Schmitt book on the “larger space”, but had then not accused Schmitt of planning a war of aggression.³¹³ Up to 1945, Schmitt had consistently censured Wehberg for holding pacifist convictions. At Nuremberg, Schmitt used Wehberg’s review as evidence that he had not planned a war of aggression.

In his 1938 scathing analysis of Nazi international legal theory, political scientist John Herman Herz (1908 – 2005), then publishing under the pseudonym Eduard Bristler, concluded his review of key theoretical texts persuasively with the confession that the theory imposed upon him “the feelings of fear and of sympathy. Fear in view of the fate that humankind will suffer if the principles of the theory might find application; sympathy with the researching human mind, which was raped to such a degree” (die Gefühle der Furcht und des Mitleids. Der Furcht vor dem Schicksal, das der Menschheit droht, wenn ihre Leitsätze Aussicht auf Verwicklichung fänden, des Mitleids mit dem forschenden Menschegeistes, der hier so geschändet werden konnte).³¹⁴

In retrospect after World War II, the decades between 1919 and 1939 appeared as the “interwar period”.³¹⁵ More than any other one, this label lends expression to the departure from the Augustinian paradigm of peace, war and peace and the acceptance of Clausewitz’s reversed paradigm of war, peace and war. Only very few contemporaries, among them James Brierly, refused to be impressed by the Clausewitzian paradigm during these two decades. To most of them, the period appeared as that of the *Twenty Years’ Crisis*,³¹⁶ into which the world seemed to have tumbled upon the end of World War I. During this period of perceived crisis, efforts to maintain peace seemed to be thwarted by the willingness to suffer.³¹⁷ Not only governments appeared to share this willingness to suffer but also intellectuals, who were determined to bring about a fundamental transformation of international law and the relations among states. Already in 1923, Sir Winston Churchill (1874 – 1965), then not in office, noted that under the pretext of the designs to preserve the balance of power, huge military capabilities were assembled, first parallel to and then gradually facing each other.³¹⁸ The League of Nations, which had been established to overcome the perceived constraints of balance-of-power politics, had turned out to be useless against the militant revisionism in the German Empire, Italy and Japan. International law, as the League handled it, could not provide security against militancy.

Recourse to natural law was not helpful either. During the 1920s, theorists were serious in

³¹⁰ Carl Schmitt, *Antworten in Nürnberg*, edited by Helmut Quaritsch (Berlin, 2000), p. 76.

³¹¹ Schmitt, *Kernfrage* (note 231), p. 19.

³¹² Schmitt, *Antworten* (note 310), p. 76.

³¹³ Hans Wehberg, ‘Universales oder europäisches Völkerrecht?’, in: *Die Friedenswarte*, vol. 41, nr 4 (1941), pp. 157-166.

³¹⁴ John Hermann Herz [Pseud. Eduard Bristler], *Die Völkerrechtslehre des Nationalsozialismus* (Zurich, 1938), p. 217.

³¹⁵ Wilhelm Georg Carl Grewe, *Epochen der Völkerrechtsgeschichte*, second edn (Baden-Baden, 1988), p. 677 first published (Leipzig, 1945); first book trade edn (Baden-Baden, 1984); English version (Berlin, 2000)].

³¹⁶ Carr, *Crisis* (note 202).

³¹⁷ Winston Churchill, *The World Crisis. 1911 – 1914* (London, 1923), pp. 188-189.

³¹⁸ *Ibid.*, p. 9.

committing themselves to natural law theory. But these theorists, most notably Kelsen and Verdross, could not prevent their foes from simply twisting natural law theory into a weapon of discriminating propaganda. Soviet theorist Korovin recognised this danger already at the end of the 1920s. He argued that the renaissance to natural law theory, of which he by no means approved, had been provoked by harmful experiences during World War I and resulting doubts in the enforceability of positive international law.³¹⁹ But Korovin overlooked the fact that the renaissance of natural law theory had already begun at the turn towards the twentieth century and thus could at best have been boosted, but not generated by wartime experiences. Specifically Kelsen himself had started his academic career with a doctoral dissertation about Dante Alighieri's *Theory of the State*. In this study, Kelsen derived Dante's concept of universal rule from some "right of empire" that was not subject to a "statute of limitation" (Verjährung).³²⁰ This apparent "right of empire", to Kelsen, was evidently not a derivative from natural law, but like divine law it was inalterable. In his later publications, Kelsen frequently referred with approval to older, mainly eighteenth-century traditions of natural law theory, whose adherents had removed natural law from the realm of human interference. Since Karl Theodor Pütter and Carl Kaltenborn von Stachau at the middle of the nineteenth century, research in the history of international law had restored eighteenth-century natural law theory to the consciousness of theorists.

During the 1920s, international legal theorists placed the League of Nations into the context of natural law theories and praised it as the fulfillment of a long-hedged dream. In comparison with the League, these theorists downgraded nineteenth- and early twentieth-century foreign policy to a silly game of cards. Proud of the establishment of the League, they ignored its structural defects. But these defects were numerous: The lack of capability of providing collective security limited the effect of efforts towards arms reduction and to enforce the renunciation of war as a means of state policy; the lack of effective means to enforce sanctions removed political clout from League decisions, specifically at times of conflict; the lack of toleration of Soviet ideology prevented the League from confronting ideologies of block formation; but most importantly, the League suffered from its active support of colonial rule, because, in doing so, it excluded the majority of the human population from participating in its activities. Not only the colonial governments in Europe, of the USA, South Africa and the so-called "Dominions" of Australia and New Zealand, but also governments in Canada and Latin America were unwilling to recognise the fact that populations of states under colonial rule could not avoid regarding the League as an institution of the colonial masters. But revisionist ideologues who ridiculed the League of Nations have to bear the full blame for their lack of morality, because strategies of block formation were incompatible with international legal norms and could not be derived from natural law.

³¹⁹ Korovin, *Völkerrecht* (note 47), p. 21.

³²⁰ Hans Kelsen, *Die Staatslehre des Dante Alighieri* (Wiener Staatswissenschaftliche Studien, vol. 6, nr 3) (Vienna and Leipzig, 1905), p. 134.