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Research Article

Kelsen and Morgenthau in America: Betwixt Legal Philosophy and International Politics

Oliver Jütersonke

Centre on Conflict, Development and Peacebuilding (CCDP), Graduate Institute of International and Development Studies
oliver.jutersonke@graduateinstitute.ch

Abstract
Hans Kelsen and his former mentee at the Graduate Institute of International Studies in Geneva, Hans J. Morgenthau, emigrated to the United States in 1937 and 1940, respectively. Both were unable to secure stable academic positions in the law departments of American universities, and they would go on to become professors of political science at Berkeley (Kelsen) and contemporary history at Chicago (Morgenthau). This article traces the ways in which the two legal scholars sought to make sense of their new intellectual environment: by stepping out of American law debates, and by placing the emphasis on the international.

Keywords
Kelsen, Morgenthau, public international law, emigration, legal realism, international politics

Kelsen und Morgenthau in Amerika: Zwischen Rechtsphilosophie und Internationale Politik

Zusammenfassung
Hans Kelsen und sein ehemaliger Mentee am Genfer Hochschulinstitut für internationale Studien, Hans J. Morgenthau, emigrierten 1937 bzw. 1940 in die Vereinigten Staaten. Beide konnten keine festen akademischen Positionen an den juristischen Fakultäten amerikanischer Universitäten erlangen, wurden allerdings später Professoren für Politikwissenschaft in Berkeley (Kelsen) bzw. für Zeitgeschichte in Chicago (Morgenthau). In diesem Artikel wird nachgezeichnet, wie die beiden Rechtswissenschaftler versuchten, sich in ihrem neuen intellektuellen Umfeld zurechtzufinden: nämlich indem sie aus den amerikanischen Rechtsdebatten heraustraten und ihren Schwerpunkt auf Internationale (Rechts-)Beziehungen legten.

Schlüsselwörter
Kelsen, Morgenthau, Völkerrecht, Emigration, Rechtsrealismus, Internationale Politik

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1. Introduction

It has been a substantively inspiring few years for those interested in the thought of Hans Kelsen. The mind-boggling project of publishing his complete works is in full swing under the editorship of Matthias Jestaedt and the Hans-Kelsen-Institut (HKI) in Vienna, and with the eighth of an envisaged 32 volumes issued in September 2020 (Kelsen 2020), one can only hope to live long enough to see the volumes in their entirety on one's shelf by the projected completion date of 2042. We now also have all 1027 pages of Thomas Olechowski's (2020) thumping new intellectual biography of Hans Kelsen to keep us busy, as well as Robert Schuett's (2021) spirited *plaidoyer* of Kelsen the "political realist," tirelessly defending his man from the claim (voiced by "Schmittians" of one sort or another) that the pure theory of law sentences him to eternal damnation as a "naïve idealist."

The merits of revisiting the lives and "redescribing" the academic production of intriguing thinkers who have been pigeon-holed in one or the other disciplinary paradigm should not be dismissed – as evident, for instance, from engagement with another German-speaking Jewish émigré legal-scholar-turned-political-realist, Hans J. Morgenthau (e.g. Scheuerman 2009; Jütersonke 2010; Rösch 2015; Reichwein 2021). Morgenthau, who had written his *Habilitation* under Kelsen's guidance in Geneva in the early 1930s, remained very much a Kelsenite formalist in terms of the ways he perceived of (international) law, even once he had turned his back on this discipline to become the astute realist commentator of international politics. Arguably, the urge to go beyond standard straw-man arguments about Morgenthau's realist take on the "lust for power" is greater (and also intellectually more rewarding) than seeking to assign Morgenthau to the 101 International Relations (IR) theory syllabus precisely because his thought can be conveniently condensed into a set of easily comprehensible assertions (for a discussion see Jütersonke 2013). And so it is with Kelsen: it is not particularly stimulating to boil down his vast academic output of 387 publications (give or take a few) spanning seven decades to the pure theory of law, nor to a particular neo-Kantian take on the study of legal norms. The topics he and his disciples of the Vienna School covered are far too diverse, and the adjustments and refinement of Kelsen's thinking over time too intricate to be summed up in a set of bullet points for the classroom. And yet, it is precisely because the likes of Morgenthau and Kelsen can be taught in such a textbook manner that they continue to be remembered by successive generations of university graduates: Kelsen's *Reine Rechtslehre* (1934) is a crucial cornerstone to any overview of theoretical positions in public (constitutional and international) law, just as Morgenthau's principles of political realism expressed in *Politics Among Nations* (1948) form the basis for any schools-of-thought discussion in IR theory.

Drawing on Schuett's (2021) rallying cry to "save" Kelsen the political realist from those Schmitt-inspired "decisionists" seeking to brand him as a head-in-the-clouds utopian theorist, this article intends to reflect, from our 21st-century vantage point, upon the ways in which Hans Kelsen's intellectual reception in America in the 1940s and 50s compared with that of Hans J. Morgenthau. The two Hans's were of a different generation – with the younger Morgenthau being at the outset of his academic career upon arrival in the United States, while Kelsen was already in his late fifties – but it is an interesting exercise nonetheless to juxtapose their professional trajectories from law to politics, from the humanistic spirit of international Geneva to the hard-nosed (legal and political) realism of mid-century America. Despite having very similar views on a number of core themes related to relations among states, and despite eventually gaining professorships in non-law departments (contemporary history at Chicago for Morgenthau and political science at Berkeley for Kelsen), only Morgenthau made a successful career as a public intellectual stepping *out of* law debates and *into* the study of (international) politics (for a more general discussion of the disciplinary ramifications of this "scientific migration" see Söllner 1990). While Morgenthau's reputation flourished, Kelsen's star waned, leaving it the task of his predominantly European disciples to hold up the torch and nurture the important intellectual corpus of their mentor to this day.

Conceptually and methodology, this article is not an exercise in textual exegesis, but rather a thought experiment on the legacy of the two thinkers in terms of the way they are presently remembered and taught (or not) in departments of (international) law and politics. In that sense, the paper is situated more in the sociology of knowledge production than it is in the history of ideas *per se* – with a particular focus on the institutional parameters that helped shape their academic trajectories upon emigration. Moreover, and not least as a function of the paper's brevity, it will be assumed the reader shares a basic knowledge of Kelsen and Morgenthau's main works and standard "legacy" – no detailed understanding of their theoretical contributions to the fields of law and politics are necessary to (hopefully) capture the gist of the arguments offered in the following sections.

2. A steamship to the United States

The American intellectual and political climate the likes of Morgenthau and Kelsen were confronted with upon arrival in America (in 1937 and 1940, respectively) was anything but opportune. Institutionally, there were far

more émigré legal scholars arriving than there were university positions to fill – with resistance in many law faculties to hiring Jews, and indeed outright anti-Semitism in many academic circles (see Rösch 2020, 148-149), adding to a dearth in new appointments in the face of severe budget cuts (Graham 2002, 783). American legal giant Roscoe Pound (1934, 532) may have declared Kelsen to be "unquestionably the leading jurist of the time," before being instrumental to Kelsen receiving an honorary doctorate from Harvard University during a visit to the United States in 1936, but what allowed Kelsen to maintain some form of academic existence in the years 1940 to 1945 were repeated injections of funds from the Rockefeller Foundation (see Olechowski 2020, 677-679): these enabled Kelsen to give courses at Harvard, Wellesley College and then Berkeley while pursuing his ambition of making his Vienna School publications accessible to an American audience. Morgenthau fared little better, spending his early years in America working first at Brooklyn College in New York and then from a humid water-closet-cum-office at Kansas University, trying to teach countless hours per week to students struggling to make sense of their lecturer's thick accent just as much as the obtuse theory he was seeking to convey. German-speaking Jewish émigré jurists were not having a good time of it.

Substantively, the American law scene of the period was all but fertile territory for our two Hans's: the era of legal realism had been at its peak in the late 1930s, and there was little sympathy for heavy, Continental-style theorising. The philosophical pragmatism of William James and Charles Sanders Peirce had been embraced by the likes of Oliver Wendell Holmes, perhaps the most influential legal figure of his generation, who spearheaded a revolt against bookish "classical" legal thought that was declared oblivious to the realities of concrete legal cases (see Horowitz 1992; Duxbury 1995; Menand 2001; White 2006). Enter legal "progressivism" in the form of Holmes' "prediction theory": who cares about "axioms and deductions" derived from legal principles: "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (Holmes 1897, 459-461). Through his famous dissenting statement on the *Lochner v. New York* (1905) case, US Supreme Court Justice Holmes paved the way for what Roscoe Pound (1911a; 1911b) would go on to call "sociological jurisprudence": putting the empirical study of the "human factor" above "logic" in an effort to incorporate insights from economics, sociology, political science and social psychology to generate a genuine "law in action" rather than a stale "law in books" (Pound 1910).

In terms of legal education, this change in mindset had been furthered by a parallel and quite complementary 19th-century trend set in motion by the Dean of the Harvard Law Faculty, Christopher Columbus Langdell (Schlegel 1985; Telman 2009). Despite still very conservative in his outlook of law as a science consisting of "certain principles or doctrines" (see Grey 1978), Langdell was out to professionalise what was being taught in American law schools, and in stark contrast to developments in Europe, early 20th-century legal education in the United States was increasingly based on the case law method: emulating the natural sciences and making law an empirical undertaking, law students were expected to immerse themselves in the details of particular cases, rather than studying the principles of law expounded in legal treatises and textbooks. Whereas European legal training involved seeing a body of law as constituting a unified, logical whole, and thus the articulation of abstract concepts that allowed to make sense of this system of code rules, the American version, which sought to offer students practical experience with which to accede to the bar association, privileged the study of concrete cases (see also Riesenfeld 1937, 53-54). As a result, there was little space (or perceived need) for courses and books on jurisprudence and the philosophy of law – and thus limited appreciation of what the likes of Kelsen and Morgenthau were offering (see also Olechowski 2020, 712; Jütersonke 2010).

The American-style brand of legal positivism just outlined had culminated in the position of the "legal realists" of the 1930s: the Great Depression had only strengthened convictions that the law was out of sync with complex social processes, and that the artificiality of the law-politics distinction had to be transcended once and for all (see Purcell, Jr. 1969; White 1972). At the core of the legal realist agenda, articulated by the likes of Karl Llewellyn, Jerome Frank and Walter Wheeler Cook (for an overview and key texts see Fischer III/Horowitz/Reed, 1993; Duxbury 1991), was thus the law's perceived indeterminacy, and the only way you could study the common law was empirically, on a case-by-case basis. Law was not seen as a static structure the application of which students could acquire by learning the methods of inductive reasoning; and *stare decisis*, the theory of precedent, was "simply a gimmick by which clever judges fool other people and stupid judges occasionally fool themselves," as Grant Gilmore (1961, 1038) subsequently caricatured it. And while the legal realist movement experienced a somewhat swift demise during the 1940s – not least because a certain Adolf Hitler began voicing opinions about "the law" that sounded terribly close to the legal realist position (see Jütersonke 2010, 118-123) – the case-law method, and the concomitant aversion to German-style grand theory and Kantian philosophising, did remain the dominant way in which the law was and continues to be taught in the United States.

Enter Hans Kelsen, armed with his "pure theory of law," which he himself once proudly described, in a 1933 letter

to Renato Trèves, as "*die deutscheste aller Rechtsphilosophien, die in Deutschland seit Kant entwickelt wurden*"[1] (cited in Cadore 2018, 260). Not the most convenient calling card in a country that was increasingly involved in a world war against the dark forces of the Third Reich. The new generation of US legal scholars were far from being keen takers – Karl Llewellyn, for instance, wrote off Kelsen's work as being "utterly sterile" (Llewellyn 1962, 356, fn. 7) – while the older generation, which had still been taught differently and would have thus been more attuned to Kelsen's theoretical premises, were mainly engrossed in Ivy-League university politics. Overall, and as described in much detail by Olechowski (2020), there was plenty of institutional resistance to any ideas of offering the Austrian legal theoretician a permanent position at Harvard.

None of this deterred Kelsen, however, from seeking to translate some of his oeuvre into English, while also rewriting large chunks of it to make it more accessible to an American audience – a task that, as all émigré scholars realised, went far beyond a mechanical shift from one language to another (for a discussion see Rösch 2020, 151-154). Of note in this respect is the publication of a *General Theory of Law and State* (Kelsen 1945), published, thanks to Pound, as the first volume of Harvard's new "20th Century Legal Philosophy Series." Originally intended to showcase existing works of important legal thinkers, Kelsen persuaded the editors to allow him to write a new text, incorporating elements of his *Allgemeine Staatslehre* (1925) and the *Reine Rechtslehre* (1934) to generate a new volume that was intended to be more in tune with Anglo-Saxon thought styles (Olechowski 2020, 698-699). Notably, Kelsen emphasised the – in his view – similarities and compatibilities between his work and the analytical jurisprudence of John Austin. The attempt fell on predominantly deaf, ill-willed or obtuse ears, however, with the mediocre English translation (by a non-native speaker) not helping matters. Paul Sayre (1946, 1189), in the *Harvard Law Review*, concluded that Kelsen's "negative, rigid formalism is the limiting, injurious character of the pure theory of law," while Harry W. Jones (1946, 686), writing in the *Colombia Law Review*, deemed it "unlikely […] that any American thinker about the law will accept it [the pure theory of law, OJ] as a definitive statement of the province and the problems of legal philosophy. For the purity of Kelsen's legal science is attained by characterizing as juristically irrelevant precisely those subjects of inquiry to which the most vigorous of American juristic thinking has been directed." And despite a burgeoning European literature that continues to find much of merit in Kelsen's theoretical corpus (e.g. Vinx 2016; Gragl 2018), the fate of Kelsen's philosophy of law in America was sealed: when the English translation of the second edition of Kelsen's *The Pure Theory of Law* appeared in 1967, it was all but ignored in US academic circles and barely even reviewed (Paulson 1988, 181).

Morgenthau, by contrast, was a far less known quantity in US academic circles, despite having several dozen publications to his name by the time the steamship arrived in New York. Much of his pre-emigration time in Geneva and Madrid had been spent developing a number of francophone articles and pamphlets that sought to articulate a "radical legal realism" – a notion taken straight out of Kelsen's pure theory (Kelsen 1934, 17) – that would rise out of the ashes of the disqualified "dominant doctrine" of traditional legal positivism, a doctrine that had been thoroughly debunked, Morgenthau claimed, by Hans Kelsen, James L. Brierly and Roscoe Pound (Morgenthau 1936, 2). Legal positivism, Morgenthau now asserted, delimited its subject matter by separating the legal sphere from morality and mores, and also from other sciences such as sociology and psychology. Moreover, it confined its attention to those legal rules that were enacted by the state, thereby excluding all norms the existence of which could not be traced to the statue books or court decisions. These legal rules were accepted without passing judgement on either their ethical value or their practical appropriateness, and were taken to form a logically coherent system. These four characteristics: legalism, state monism, agnosticism, and dogmatic conceptualism, together formed the positivist "fiction" that had come under attack from various forms of sociological and realist jurisprudence, Kelsen's pure theory, and a resurgent natural law movement (Morgenthau 1940, 261-262).

What legal theory thus needed, according to Morgenthau, was to be "closer to reality," but since realism had, not least in the American setting, become "a collective designation for several tendencies in modern jurisprudence […] [that] search for the psychological, social, political and economic forces which determine the actual content and working of legal rules and which, in turn, are determined by them," it would be preferable to find an alternative nomenclature to delineate the "functional relationships" between these forces and legal rules: "[h]ence, 'realist' jurisprudence is, in truth, 'functional' jurisprudence" (Morgenthau 1940, 273-274). A rather unoriginal and somewhat disingenuous proposition: for most legal realists were themselves using the two terms interchangeably (see Kalman 1986), with some pointing out that "functionalism" was indeed not any more precise nor, as a label, any less misused than "realism" (Cohen 1935, 821-822). Morgenthau's cursory gesturing towards the anthropology of Malinowski (1939; see Morgenthau 1940, 274, fn. 43) to buttress his functionalist approach was also rather problematic if not

1 "The most German of all philosophies of law that have been developed in Germany since Kant" (translation OJ).

substantiated properly, as Kelsen himself would find out soon enough (see the next section). In any event, it would make little difference, as Morgenthau would not go on to pursue this research agenda, nor the terminology – and Martti Koskenniemi (2002, 459) aptly refers to the 1940 article as Morgenthau's "legal swansong": it was the last time Morgenthau would try to engage substantively with contemporary debates in legal theory, and also one of the last time he explicitly cites Kelsen. By the early to mid-1940s it had become clear to both Hans's that they were in need of finding new pastures for their academic exploits, and both, in truly "streetfighter" fashion (Schuett 2021), did two things to make this happen. The first: they tried to rebrand themselves as polyvalent social theorists, rather than ivory-tower legal philosophers. The second: they sought to dodge the "scientism" of American law and politics debates by placing the emphasis on "the international."

3. Tergiversation #1: The move "beyond" the law

As another émigré scholar, Franz L. Neumann (1978 [1952], 416; also cited in Frei 2001, 184), aptly summarised, "[t]he German emigrant, having grown up in a veneration of theory and history and contemptuous of empiricism and pragmatism, suddenly found himself in an intellectual setting that was diametrically opposed to the previous one: optimistic, pragmatic, ahistorical." The younger Morgenthau, in particular, became increasingly aware of the disconnect between his Continental-European intellectual heritage and his new university environment. Both Hans's, each in their own way, tried to make sense of not only the US law scene, but more generally the American approach to social science. Kelsen did so by revisiting some of his previous work on causation and retribution, while Morgenthau would go onto write an entirely new text in the form of *Scientific Man versus Power Politics* (1946).

Already in the lead-up to emigration, and then also in the first, difficult years upon arrival, both Kelsen and Morgenthau were keen to emphasise the breadth of their learning, thus potentially raising the likelihood of finding academic employment. Both were extremely well read, and both had recently come from stints at the Institut universitaire de hautes études internationales (IUHEI) in Geneva, where a small but very select group of economists, historians, legal scholars, and eventually also political scientists were plying their trade. Exemplary is Kelsen's dossier for the Emergency Committee in Aid of Displaced Scholars, in which he described his experience as being in (and note the order) "Sociology; Political Science; Law (International Law)" (cited in Cadore 2018, 252, fn. 16). Morgenthau too found himself teaching all sorts of courses at Brooklyn College beyond his ostensible expertise, including European politics and US public policy. Perhaps they were both "reluctant jurists" to begin with (Schuett 2021, 44), having had law and legal studies imposed on them early in their academic careers, but the extent to which they had to leave their juridical comfort zones in order to obtain university positions is nonetheless remarkable. And much of that had to do with the way in which their theoretical foundations were perceived by the new environment. When Thomas R. Powell from the Harvard Law School wrote a letter of recommendation for Kelsen to the Dean of the University of Berkeley, in 1942, he bluntly asserted that "Kelsen is not at all a lawyer […] but he is a philosopher and sociologist […] [h]e would be a most acceptable classroom teacher in a Department of Government" (cited in Cadore 2018, 256). Once installed in California, where Kelsen would indeed eventually become professor of political science at the age of 64, he found himself teaching predominantly undergraduate courses – a situation that must have been rather tough for someone who had for so many years been used to supervising doctoral dissertations and habilitations, all the while cultivating a growing group of followers holding up the banner of the Vienna School. Amongst the young students on California's beaches, however, there weren't many of those (Cadore 2018, 256-257).

Undeterred, Kelsen spent a considerable amount of time (and financial goodwill from the Rockefeller Foundation) to translate and publish a shortened version of *Vergeltung und Kausalität* (1941) (see Olechowski 2020, 692-693). Drawing on insights from anthropology (notably the likes of Malinowski, Lévy-Bruhl etc.) and an exegesis of the Classics, Kelsen's *Society and Nature: A Sociological Inquiry* (1943) sought to make the link between causation and modernity – or rather, to claim that "primitive man" did not possess a conception of causality, with relations among individuals instead being entirely grounded in the notion of retribution. Primitive man did not seek explanation, but only justification, and thus had no conception of "nature," but only of "society." Reviewers were unimpressed. Herbert W. Schneider, professor of philosophy at Colombia University but writing in the *Columbia Law Review* (maybe Kelsen was a legal scholar after all?), asserted that the book's author was "following too uncritically an antiquated anthropology" (Schneider 1944, 589), while Edwin N. Garlan, a legal scholar but writing in the *Journal of Philosophy*, despairingly concludes that: "[t]he spirit of Procrustes walks through many of these pages. One thinks of it more as a contribution to a mythology of positivism and neo-Kantianism rather than as a contribution to either scientific sociology or the history of ideas" (Garlan 1944, 528). And then no other than Talcott Parsons (1944, 140) himself felt obliged to assert, again intriguingly in the *Harvard Law Journal*, that it

would have been better for Kelsen not to venture too far of the paths of legal theory: the work was written "in complete ignorance of the state of the field" (of sociology and social anthropology) and "definitely incompetent. If it were submitted to be as a doctoral dissertation I should have no alternative but to reject it."

Morgenthau, for his part, spent the early 1940s writing a series of articles on the broad theme of "science and politics" that culminated in the monograph *Scientific Man versus Power Politics* (1946), a text that was dismissed as unsound by most reviewers but that established its author's reputation as a public intellectual. It must have been trying times at Chicago: on the one had you had a group of scholars around Charles Merriam consolidating their take on behaviouralist political science that would shape the field for decades to come; on the other you had genuine political theory being pursued by Leo Strauss and his disciples (who included the likes of Allan Bloom). There was little space for a Kelsenite legal scholar such as Morgenthau to carve out an intellectual niche for himself in this setting (see Jütersonke 2010, 131-135) – and so the "intellectual streetfighter", as he called himself in a letter to Hannah Arendt in 1969 (cited in Schuett 2021, 7), was to go on the offensive. America was facing a "crisis of philosophy," he boldly claimed, because of a fallacious view of how individuals interact in society and how the world as such functions. Morgenthau's remedy against the misplaced optimism of a decadent liberalism that was manifesting itself in a naïve legalism and a self-righteous moralism was threefold: a focus on the tragic as the defining condition of human existence, an emphasis on the limits of the scientific method as a means of shaping and controlling society, and a call to acknowledge the permanence of political forces and the primacy of the "lust for power" in shaping inter-personal and thus societal relations (for a useful discussion see Frei 2001, 183-206).

Reviews of the book were generally scathing and came from a variety of disciplinary angles. Someone no less prestigious than Ernest Nagel (1947, 907), one of the most eminent philosophers of science of his generation, thought it necessary to take Morgenthau to task for his lack of knowledge of the scientific method – curiously, in the *Yale Law Journal*: "[a] coherent view as to the nature of the scientific method he ostensibly criticises is not one of Mr. Morgenthau's prominent possessions." Others, such as the sociologist Read Bain, writing in *Social Forces*, focused their attention more on the problematic juxtaposition of the "pre-rationalistic" and the "scientific" that had already disturbed Kelsen's reviewers:

> "This book typifies much writing in various fields during these dubious years when 'the old order changeth yielding place to the new.' Those unable to bridge the gap between the dying Age of Animism and the dawning Age of Science often indulge themselves in paranoiac self-pity and cosmic fear. They also inflict it upon others in the 'literature of despair,' in the atrabilious verbalisms of the tired radicals, and in loud trumpetings of doom. Some take the brave Stoic pose of our author (page 203), 'To know with despair that the political act is inevitably evil, and to act nevertheless, is moral courage.' In my opinion, it is immoral nonsense. Such people should not set themselves up as teachers of the young." (Bain 1947, 473)

Other reviewers called Morgenthau out for the way the book was written, including Robert K. Gooch (1947, 336), in the *American Political Science Review*, who concluded that "[s]o far as form and tone are concerned, it seems a pity that Professor Morgenthau is apparently not much concerned with the truism that potential influence is often weakened or destroyed by manner and attitude. Unfortunately, he is often dogmatic, at times supercilious, and not infrequently sneering and flippant."

The list of reviews of this nature is remarkably long. And yet, with hindsight the words of Gooch ring hollow: for perhaps it was precisely because *Scientific Man versus Power Politics* split opinions and created a stir, because it was, for better or worse, sensationalistic, that people in academia and beyond began to take notice of its author. Soon Morgenthau was part of the Washington DC intelligentsia, rubbing shoulders with the likes of George Kennan and Henry Kissinger, and speaking "truth to power" in a manner that resonated surprisingly well with the US foreign policy establishment of the early Cold War (for a recent discussion see Molloy 2020). Generally, I tend to side with the reviewers of the period: *Scientific Man versus Power Politics* is a terrible book, for all sorts of substantive and stylistic reasons. But unlike Kelsen's *Nature and Society*, which ruffled the feathers of some but was generally shrugged off as the ramblings of an ageing Austrian legal theorists, Morgenthau's book, which again has a Kelsenite stamp all over it (although Kelsen himself does not receive a single mention), formed the basis for a career as public intellectual.

4. Tergiversation #2: The emphasis on "the international"

Beyond seeking to grapple with the American way of thinking about law, science and politics, both Kelsen and Morgenthau would end up seeking refuge in the far less intellectually polarised field of international affairs – and this, more than anything else, would be the decisive move to cement their careers in the United States. While schools-of-thought debates were raging in the disciplines of political science and law, the fledgling "field" of international relations, still seeking

to find its own identity vis-à-vis the established social science disciplines, was one more tolerant of a variety of thought styles and intellectual heritages – with some recent work going as far as suggesting that the emerging "realist gambit" was essentially a way of "insulating" the field from the behaviouralist approaches dominant at the time (see Guilhot 2008). For Kelsen, embracing "the international" involved shifting away from jurisprudence and constitutional law (he was, after all, instrumental in drafting the Austrian constitution) and into (public) international law. For Morgenthau, who was already publishing on international law since his doctoral dissertation on the justiciability of disputes in the international realm, it meant moving away from international law and towards international politics more generally – a shift facilitated by the mushrooming of IR and area studies departments in many American universities following the end of World War II. Both Kelsen and Morgenthau would eventually find their feet teaching international organisation, diplomatic history, and introductory courses to international law and politics.

Save for an early foray into the concept of sovereignty (Kelsen 1924), Kelsen's first substantive engagement with international law was his 120-page essay, *Unrecht und Unrechtsfolge im Völkerrecht* (1932). A steady stream of smaller publications followed, many of which unsurprisingly took shape during his time in Geneva, although this was also the period in which he was working on the first book-length version of the *Reine Rechtslehre* (see Olechowski 2020, 587-593; Losano 2015). Upon his arrival at Harvard, when Roscoe Pound enabled Kelsen to give the first of a biennial Oliver Wendell Holmes lecture series (as prestigious as they were financially lucrative), it was thus – to the surprise of many – also international law that became the focus, rather than the legal philosophy his Cambridge hosts were expecting. The result, building on his 1932 German text, was published as *Law and Peace in International Relations* (1942) by Harvard University Press. In subsequent years Kelsen would increasingly turn his attention to the fledgling United Nations, offering a 900-page commentary on *the Law of the United Nations* (1950) as well as numerous shorter publications. According to Leben (1998, 288), who had the courage to count, 106 of Kelsen's 387 publications would eventually pertain to international law – a striking number for someone whose legacy is so clearly in legal philosophy, not in public international law circles.

The parallels between Morgenthau's and Kelsen's forays into the "international" during the 1940s are striking, and especially because they do not cite each other. And yet (and at risk of cutting too many corners), *Law and Peace* and Morgenthau's "classic" textbook, *Politics Among Nations* (first edition 1948) could essentially have come from the same pen: in both we find the mantra of international law being a "primitive" type of law because of its decentralised nature; we also find different types of "sanctions" (legal, moral, societal) on which the system is based, and the ultimate legal-monist assertion that the international would, theoretically at least, have primacy over the domestic sphere – with the aspiration of an eventual culmination in a world state being the logical (if as yet unrealistic) conclusion (for a discussion see Scheuerman 2011; also Jütersonke 2012). The emphasis on sanctions is particularly one that makes Morgenthau and Kelsen partners in crime, in that it places them both somewhere between a purely positivist standpoint à la John Austin, according to which in the absence of a centralised authority there cannot be a credible (because enforceable) system of sanctions, and the lumberjack version of power politics à la Raymond Aron that claims international law does not exist at all until such a time as a single authority has been established – this is also the reason why the likes of Hedley Bull place Kelsen more in the "Grotian" tradition in that international law *is* law, and that war cannot be waged indiscriminately (see also Leben 1998 for a discussion).

The shift towards international affairs moreover opened institutional doors that the academic scene did not offer. Kelsen collaborated with the War Crimes Office – part of the Judge Advocate General (JAG) of the US armed forces – and was thus able to offer his legal expertise to the Nuremberg Trials, while Morgenthau would go on to become a consultant to the US State Department's Policy Planning Staff and a popular lecturer in military academies: becoming a "Cold Warrior" who was very much at the heart of the way in which the US foreign policy establishment conceived of the world and made sense of international relations (see also Greenberg 2015). For both, it was thus service to their new country, rather than academic renown *per se,* that would consolidate their place in American society. Kelsen's intellectual legacy was assured by a steady stream of mostly European legal scholars who continue, to this day, to build on the pioneering work of their mentor that, it can only be emphasised again, goes far beyond textbook versions of the "pure theory." And for Morgenthau, the defining moment was a switch of readership, away from legal or political theorists, and towards the American foreign policy establishment and the general public: by the end of the 1960s Morgenthau featured in lists of America's most influential voices, appearing regularly on radio, television, and in the printed media on issues ranging from nuclear weapons to the Vietnam War – and often with points of view that were not necessarily all that compatible with (and indeed increasingly opposed to) the hard-nosed realism he came to be identified with in the late 1940s and early 1950s (see Scheuerman 2009; also Reichwein 2015).

There, amongst the Kennans and the Kissingers, a vision of international affairs that was at heart quite similar to Kelsen's view was embraced rather differently: not as old-fashioned European legal theory, but as a strong, concrete and at times subtle articulation of power politics and the role of the United States in the world. As so often, it is not about what you write but how you pitch it, and who you have reading it.

5. Concluding thoughts

Rodrigo Cadore's (2018) thoughtful paper on Kelsen the exile scholar gestures to Robert Graves' famous book *Good-bye to all that* (1929), with Cadore musing over the extent to which Kelsen's move to America constituted a break with his Continental intellectual roots. When it comes down to it, however, the nod is more pertinent for Morgenthau than it is for Kelsen: Morgenthau certainly did put in plenty of effort to rid himself of his "German" intellectual heritage, with ceasing to cite the likes of Kelsen and Carl Schmitt being one of the key indicators – much effort has been put in over the years, by myself and others (Jütersonke 2010; Reichwein 2021) to clarify this complex set of "hidden dialogues.". Kelsen, on the other hand, was far less inclined to break with his own academic past – with both his age and his academic renown at the time of emigration certainly being two central reasons for it. The pure theory of law and the work of the Vienna School preceded him wherever he went, and despite investing much energy throughout the 1940s and 50s overseeing the translation and re-edition in English of his major works in legal theory, one is left with the feeling that at times he was quite oblivious to the lack of reception these books were having (both in research terms as well as in the classroom) in the country that had given him his fifth and final citizenship. Moreover, he seemed equally oblivious, at least judging from the sparse and rather unsubstantial correspondence found in the archives, to how the increasingly prominent former mentee, Morgenthau, was faring in his own career. Intellectually, a direct engagement between our two Hans's did not appear to have taken place in America.

Morgenthau, in contrast to Kelsen, was able to embrace his new surroundings in a far more constructive manner. Yet he had to do so by stepping out of the scientific disciplines of law and political science to which he at first sought to make a scholarly contribution. What he is ultimately remembered for – and that predominantly only in the field of IR – are the principles of political realism he outlined in the introduction of the second edition of his textbook, *Politics Among Nations*, at the request of his editor (see Cristol 2009). And while he complained repeatedly – echoing Montesquieu – that his claim to fame rested on distorted views of a position he himself had never held (see Morgenthau 1960, preface), his self-proclaimed role as an "intellectual streetfighter" meant that, when it came down to it, he was quite happy riding the wave – even if this meant accepting, to an extent at least, that he was being "misinterpreted," and ultimately part of the drastic "swing of the pendulum" from an over-estimation of international law in the inter-war era to the downright rejection of all things legal by the American foreign policy establishment, a condition nicely diagnosed by another student of Kelsen, Josef L. Kunz (1950). His formalistic, Kelsenite understanding of law as a system of binding rules the absence of which made international law so "primitive," had much to do with this dynamic, although Morgenthau's new American audience generally did not pick up on that backdrop (see also Meiertöns 2015). Harvard law professor Lon L. Fuller (1949: 496) was not wrong when he remarked that, in the United States, at least: "[t]here are a good many more Kelsenites than there are readers of Professor Kelsen's books."

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Author

Oliver Jütersonke is Head of Research at the Centre on Conflict, Development and Peacebuilding (CCDP) of the Graduate Institute of International and Development Studies, Geneva, and Lecturer in the Graduate Institute's Interdisciplinary Programme. He is the author of *Morgenthau, Law and Realism* (Cambridge 2010) and numerous publications related to peace-and-security concerns as well as international relations theory.