

Hans Kelsen: International Peace through International Law

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The idea of law, in spite of everything, seems still to be stronger than any ideology of power.
H. Kelsen

Abstract

*This article focuses on Hans Kelsen's theory of international law and pacifism. Following an analytical reconstruction of Kelsen's theses, the author makes a number of critical observations. In particular, the article examines Kelsen's ideas on the primacy of international law, the necessary demise of the concept of sovereignty and the assumption of the doctrine of justum bellum as the basis for the juridical character of international law. Special attention is given to Kelsen's idea of a 'Permanent League for the Maintenance of Peace', inspired by a kind of 'judicial cosmopolitanism', and developed in his *Peace through Law*. It is the author's opinion that Kelsen's internationalism and pacifism brought about an important turning-point in the theory of international law and anticipated by 50 years many of the issues that the international community are today discussing: in particular, individuals as subjects of international law (and not only states) and the use of international criminal tribunals for the punishment of those responsible for war crimes and crimes against humanity. Finally, the author argues that there is some doubt whether Kelsen's theoretical and political goals, inspired by the Kantian idea of the moral unity of humanity and by a normativist conception of law, may be fulfilled or even desirable.*

1 Neo-Kantian Epistemological Assumptions

In his essay *Das Problem der Souveränität und die Theorie des Völkerrechts*, written during the First World War and published in 1920, Kelsen tackled for the first time the theme of the nature and functions of the international legal system.¹ With undoubted originality and impressive theoretical development, he puts forward a 'monist' view in opposition to the theories of the primacy of state law and of the pluralism on a parity basis of sources of law. For Kelsen there exists only one legal system, which includes in its single normative hierarchy both domestic and international law.

The starting point is radical, in that the premises Kelsen takes have their roots in general epistemology. Kelsen adopts the theory of knowledge and the philosophy of science developed by the Marburg school, deducing from them, following the teaching of Rudolf Stammler, the central assumptions of his theory of law. Hermann Cohen's neo-Kantian Platonism instilled in him an almost obsessive methodological concern: to eliminate from the science of law all subjective elements and make it a unitary, objective and therefore 'pure' knowledge. The pureness of knowledge – as Cohen had maintained and Kelsen repeated – is nothing other than its 'unity' according to the model of the deductive sciences. Logico-mathematical knowledge, by contrast with the empirical disciplines that study natural phenomena, is autonomous in object and method. It is, moreover, transcendental knowledge in the Kantian sense, i.e., 'original' and valid in itself, independently of any reference whatever to content, reality or *praxis*.²

The unity and objectivity of the logico-mathematical method requires the internal unification of each cognitive sphere, including that of the 'ought'. For Cohen and for Kelsen, the universe of the 'ought' – including the realms of law and the state – is inconceivable without reference to the logical idea of 'unity': here too 'the unity

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¹ See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (1920) [hereinafter *Das Problem der Souveränität*]; *Idem*, 'Les rapports du système entre le droit interne et le droit international public', 13 *RdC* (1926) 4; *Idem*, 'Die Einheit von Völkerrecht und staatlichem Recht', 19 *Zeitschrift für ausländisches öffentliches Recht* (1958); *Idem*, 'Souveränität', in H. Kelsen, A. Merkl, A. Verdross, *Die Wiener rechtstheoretische Schule* Bd. 2, (1968); *Idem*, 'The Essence of International Law', in K. W. Deutsch, S. Hoffmann (eds.), *The Relevance of International Law. Essays in Honour of Leo Gross* (1968).

² See the illuminating pages of the *Vorrede* in *Das Problem der Souveränität*, at v-ix.

of the viewpoint of knowledge imperatively requires a monist conception'.³ In this case the unity is represented by mankind as a whole, and it is only here that, according to Kant's teaching, the individual finds meaning and fulfilment.

The unitary nature of the legal universe (and the primacy within it of the international law) is for Kelsen an 'epistemological hypothesis' which corresponds to a very general option supporting the objectivity of knowledge: it presupposes a 'universal objective reason' and an 'objectivist world view'. In this epistemology of the unity and objectivity of the science of law, the dimension of state subjectivity, and even the individual and his or her fundamental rights – in a paradoxical equation of the individualism of states with the individualism of individuals – are subordinated to the objectivity of the universal legal system. For Kelsen

the subjects who know and will are really only ephemeral and temporary phenomenal forms, the spirits of which are co-ordinated and related only insofar as they are integral parts of the universal world spirit, the knowing reason of which is merely an emanation of the supreme universal reason.... For objectivism the individual is a mere appearance. And the legal theory that takes the objectivity of law to its ultimate consequences and therefore affirms the primacy of international law, must not only remove the idea that individual state subjects are definitive and supreme entities, but ultimately must, to be consistent, reduce the 'physical' person too - the 'natural' legal subject - to its substrate, that is, to an element of the objective legal system.⁴

On the contrary, maintains Kelsen, the subjectivism and cognitive relativism that inspire the thesis of the primacy of state sovereignty lead not only to a logic of 'pure power' in international relations, but, still more, to the denial of law and of the possibility of legal science.⁵

Kelsen admits that the acceptance or rejection of these epistemological hypotheses are, in principle, the object of an evaluative choice involving alternative world views.⁶ Yet he nonetheless maintains that the primacy of international law is imposed by logical and conceptual ('normological') requirements internal to the scientific, that is unitary and objective, interpretation of law: it is a hypothesis that 'must be accepted if one intends to interpret social relations as legal relations.'⁷ Indeed, maintains Kelsen, 'the binding nature of law and its entire existence lie in the objectivity of its validity.'⁸

³ *Das Problem der Souveränität*, at 123. And elsewhere: 'The postulate of the unity of knowledge holds without limit, at normative level too, finding its expression here in the unity and exclusivity of the system of norms taken as valid, or, which amounts to the same thing, in the necessary unity of the viewpoint of consideration, evaluation and interpretation' (*ibid*, at 104-105). On Kelsen's neo-Kantian epistemology, cf. H. Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (1986), at 56-90; see also H. Kelsen and F. Sander, *Die Rolle des Neukantianismus in der Reinen Rechtslehre: eine Debatte zwischen Sander und Kelsen* (1988); also useful is Carrino, 'Presentazione', in H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale* (Italian transl., 1989), esp. at xiii-xx.

⁴ *Das Problem der Souveränität*, at 316-317. Again, with rigorous legal positivism: 'the only rights that exist are those deriving from the legal system or conferred by the state. The "personalities inserted in the state" have their rights (and their obligations) not ... "as bearers of rights, as persons". They are persons only to the extent that the state or the legal order sanction their rights and obligations, or recognize them as persons. Just as the state confers personhood on them, so it can take this quality away from them too. The introduction of slavery as a legal institution is entirely within the possibilities of a legal system or state' (*ibid*, at 45).

⁵ See *Das Problem der Souveränität*, at 317. 'Just as the egocentric position of a subjectivist theory of knowledge is bound up with an ethical egoism, so the legal cognitive hypothesis of the primacy of the particular state legal system is coupled with the state egoism of an imperialist policy' (*ibid*).

⁶ *Ibid*, at 314-315, 317; more than thirty years later, in his *Principles of International Law* (3rd. ed., 1967) [hereinafter *Principles*], at 569-588, Kelsen retained a position of strict adherence to the Marburg school's neo-Kantian epistemology.

⁷ *Principles*, at 587. Kelsen's position on this crucial point nonetheless fluctuates. In *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934) [hereinafter *Reine Rechtslehre*], the primacy of international law and the dissolution of the 'dogma of sovereignty' are presented as a technical outcome of the pure theory of law (English trans. *Introduction to the Problems of Legal Theory* (1992), at 124-125). In the second edition of *Reine Rechtslehre* (1960), at 343-345, Kelsen maintains that only the monist conception is laid down by theoretical requirement, whereas the choice between the primacy of international law and the primacy of domestic law can be based only on preferences of an ideological or political nature (English trans. *Pure Theory of Law* (1967), at 344-347. On this point see in

2 *Civitas Maxima*: The Primacy of International Law and the Critique of Sovereignty

The unity of law and the associated primacy of international law mean for Kelsen that the international legal system encompasses all other normative systems, in particular state legal systems, and is super-ordinate to them. Understood as an original, exclusive and universal legal order, international law is accordingly incompatible with the idea of the sovereignty of national, territorial states and their legal systems: this idea must be ‘radically eliminated’.⁹

To corroborate this twofold thesis, Kelsen undertakes first and foremost, by recourse to the formal arguments of his ‘pure theory of law’, to show the inconsistencies of the pluralist or statist theories upheld by almost the entirety of jurists in the German culture, from Felix Somló to Georg Jellinek, to Paul Laband, Hugo Preuss, Heinrich Triepel, and to the Hegelian Adolf Lasson. He rejects the idea that the source of international law is the conventional self-obligation of states or that the binding nature of international norms derives from the implicit or explicit recognition given them by the governments or parliaments of individual countries.

For Kelsen the domestic law of states is merely a ‘partial system’ in relation to the universality of the international legal system; indeed, it is the latter’s full legality and validity that confers validity on the national law. For this reason, domestic norms can never be in contradiction with international ones, on pain of nullity.¹⁰ As regards the foundation of the binding nature of international law, it cannot be sought in anything outside the system itself: its validity must be postulated in logical or transcendental terms as the legal image of the world, and at the same time as a reflex of the moral unity of the human species.

The summit of the formalist self-reference of the pure theory of law thus comes, paradoxically, to coincide with the ancient theological idea of *civitas maxima*, put forward again in the modern era by the Enlightenment metaphysics of Christian Wolff, to whom Kelsen refers. In taking this idea as the ultimate foundation for his legal cosmopolitanism, Kelsen notes that it was already present, even before modern international law came into being, in the notion of *imperium romanum*. It existed right through the entire Middle Ages and reached a crisis only at the dawn of modernity.¹¹ Now the pure theory of law is able to ransom this idea and demonstrate its scientific validity. It does so by seeing international law as a ‘world or universal legal system’. And the primacy of this world system can be linked with the idea of a ‘universal legal community of human beings’ overreaching the individual state communities, whose validity is rooted in the sphere of morality:

just as for an objectivist conception of life the ethical conception of man is humanity, so for the objectivist theory of law the concept of law is identified with that of international law and for that very reason is at the same time a moral concept.¹²

Once the system of the world state has absorbed all the other normative systems, the law will become ‘the organization of mankind, and accordingly all of a piece with the supreme ethical idea’.¹³ Dropping all methodological caution, Kelsen ends by committing himself to a downright historical prophesy:

it is only temporarily, by no means forever, that contemporary humanity is divided into states, formed in any case in more or less arbitrary fashion. Its legal unity, that is the *civitas maxima* as organization of the world: this is the political core of the primacy of international law, which is at the same time the fundamental idea of that pacifism which, in the sphere of international politics, constitutes the inverted image of imperialism.¹⁴

general H. Hart, ‘Kelsen’s Doctrine of the Unity of Law’, in H. Hart, *Essays in Jurisprudence and Philosophy* (1983).

8 *Das Problem der Souveränität*, at 317.

9 *Ibid*, at 9-101; and Carrino, *supra* note 3, at xx.

10 ‘One should never tire of emphasizing that the logical unity of the system is the fundamental axiom of any normative knowledge. In the sphere of normative consideration, a real objective conflict of norms is unthinkable’ (*Das Problem der Souveränität*, at 111, 120-124). The domestic norms must conform with the international ones, and in the event of conflict it will be the latter that must prevail. At least in principle, they can accordingly be assumed as *jus cogens* and applied by national courts with no need for conversion into domestic law (*ibid*, at 206-212).

11 See *Das Problem der Souveränität*, at 271-274; Carrino, *supra* note 3.

12 *Das Problem der Souveränität*, at 319.

13 *Ibid*, at 205. On the link between ethics and law in Kelsen’s foundation of the primacy of international law cf. Silvestri, ‘La parabola della sovranità’, 1 *Rivista di diritto costituzionale* (1996) 1, at 34-39.

14 *Das Problem der Souveränität*, at 319.

It is accordingly clear that the option in favour of the primacy of international law and against the idea of the sovereignty of nation-states in Kelsen is, despite the claimed neo-Kantian purity of his science of law, an ideological and political choice loaded with methodological decisions, value assumptions and moral implications. On the one hand Kelsen associates the primacy of international law with a pacifist, anti-imperialist ideology intended to oppose the logic of power of modern individualist, statist and relativist conceptions. Yet it does so by referring to notions like that of *imperium romanum* or *civitas maxima* which, it would seem, are hard to associate with anti-imperialist and pacifist ideas. What is more, they appear to be historically bypassed with the collapse of the *respublica christiana*, the end of the medieval empire and the affirmation, starting with the peace of Westphalia, of the modern pluralist system of sovereign states. Over and above that, Kelsen puts forward the concluding proposal of a 'revolution of cultural knowledge' in a cosmopolitan sense. This is in every sense a political programme, advocating an evolution of the international legal community from its 'primitive' condition imposed by the dogma of state sovereignty to a universal organization of mankind: within this framework morality, politics and economics should converge and be integrated under the aegis of law.¹⁵ This programme is, in the twentieth century, offering up anew an Enlightenment, natural-law doctrine which can be traced back to eighteenth-century Europe.

3 Four Legal Corollaries

The 'monist' hypothesis of the unity of law and the primacy of the international legal system is inseparable from a series of collateral assumptions that Kelsen's construction has recourse to. It is in any case typical of Kelsen's style of thought to develop systematically all possible implications of the theory's central hypotheses. At least four corollaries merit illustration and discussion here.

1. It is, first, clear that Kelsen cannot maintain the primacy of international law without committing himself to maintaining its juridical nature too. He must accordingly take a stance against the argument, going back to John Austin, which attributes to the international normative system the nature of a sort of 'positive morality', rather than that of a legal system in a strict sense. As we know, doubts as to the legal nature of the international normative system have mostly been raised by pointing to the lack at the international level of sanctioning institutions or instruments, or to the decentralized, fragmentary and ineffectual nature of those which do exist.¹⁶

Kelsen brings a complex argument to bear against this. On the one hand he holds that any legal system, in order to be such, must be a coercive system, and by coercion he means the exercise or threat of physical force. From a historical, evolutionary viewpoint a legal system is the more perfect the more the exercise of force is withdrawn from individual initiative and centralized in specialized organs like governments and courts. In this sense, the modern nation-state, albeit a partial normative system, is a perfect legal system because within it the pacification of inter-subjective relations is guaranteed at the highest possible level through a tight centralization of the use of force.¹⁷ On the other hand, Kelsen distinguishes the normative aspect of coercion from its effectiveness, regarding the latter as a mere fact, and as such normatively irrelevant. It follows that for Kelsen the international normative system is legal on the mere condition of having available its own 'normative' means of coercion (albeit ineffective or inefficient). In other words, the international normative system is legal if it issues norms on the use of force and if on the basis thereof it is possible to interpret the exercise of force by one state against another state either as a sanction or as a wrongful act.¹⁸

¹⁵ Cf. *Das Problem der Souveränität*, at 317-320. For a critique of the excessive normative ambitions of Kelsen's conception see Bull, 'Hans Kelsen and International Law', in R. Tur and W. Twining (eds.), *Essays on Kelsen* (1986); see also Lauterpacht, 'Kelsen's Pure Science of Law', in *Modern Theories of Law* (1933); G. Sperduti, 'Le principe de souveraineté et le problème des rapports entre le droit international et le droit interne', 153 *RdC* (1983).

¹⁶ See J. Austin, *The Province of Jurisprudence Determined* (1832, reprint H. L. A. Hart (ed.), 1954), *Lecture VI*; H. L. A. Hart, *The Concept of Law* (1981), *passim*. On the doubts regarding the legal nature of international law, see also N. Bobbio, *Teoria generale del diritto* (1993), at 138-140; H. Bull, *The Anarchical Society* (1977), at 130 *et seq.*

¹⁷ The idea of law as a coercive social system tending towards increasingly centralized forms through historical evolution is one that Kelsen increasingly returns to in his writings: cf. esp. H. Kelsen, *Law and Peace in International Relations, The Oliver Wendell Holmes Lectures 1940-41* (1952) [hereinafter *Law and Peace*], at 48-51, 56-81.

¹⁸ See *Das Problem der Souveränität*, at 69-70, 257-67; Kelsen, *Les rapports du système*, *supra* note 1, at 134; *Idem*, *The Legal Process and International Legal Order* (1935), at 12; *Idem*, 'Théorie du droit international public', 84 *RdC* (1953) 3, at 12, 22-23; *Principles*, at 18.

The undeniable fact that the international community has no level of organization of sanctions and coercion comparable to that of individual states – that is, it lacks specialized organs for implementing the law – does not prevent its normative system from being a legal one. Given that the international community at any rate produces a series of rules regarding the exercise of force, what can be noted critically is only that the international legal system is imperfect or ‘primitive’ due to the decentralized nature of its sanctioning structure. Like all primitive societies, the international community leaves to its own members the task of exercising force in the form of self-defence or of forced compensation for harm.¹⁹ But it does not do so indiscriminately: it does so by laying down certain rules that define recourse to violence among states as rightful or wrongful. These are the rules codified in the doctrinal tradition of the *iustum bellum* which, maintains Kelsen, are wrongly neglected by the theorists of modern international law. They are neglected wrongly because ‘whoever rejects the theory of the *iustum bellum* denies the legal nature of international law’.²⁰

2. The theory of the just war, rejected as a pre-modern theoretical vestige by the vast majority of legal positivists, is forcefully re-proposed by Kelsen, albeit in a simplified, stylized version. War, Kelsen maintains, using arguments that undoubtedly fall outside not just a ‘pure’ theory of law but even outside any legal positivist approach whatever, is a phenomenon which has traditionally been the object of ethical consideration, and which international ethics is, after the nineteenth-century parenthesis, picking up again with attentive consideration. This tendency ought not to be underrated, he warns, since international ethics is the ground that nourishes the growth of international law: everything international ethics considers just is very likely to become international law.²¹ It is not by chance, argues Kelsen, that a series of international covenants and treaties – from the Versailles Peace Treaty to the League of Nations Covenant to the Kellogg-Briand Pact – tend to regard war as a possible object of (positive or negative) legal treatment.

When positively defined, war takes the shape of a coercive instrument introduced by the international law against those breaching its norms. In this case, war plays the part of a legal sanction whose application is left up to the discretion of the individual members of the international community. But it is a sanction – and hence not merely legitimate but also mandatory legal conduct – on condition that i) it is ‘just’, that is, an act of defence or response (reprisal, retaliation, reparation etc.) to an internationally wrongful act; ii) it is engaged in by the state victim of the wrongful act or by other states seeking to assist it militarily. Apart from this case of *iusta causa belli*, war is an illegitimate use of force and hence itself definable as an internationally wrongful act.²²

Kelsen acknowledges that the lack of a judicial body to ascertain the initial breach of international law and authorize war as a sanctioning act is a grave shortcoming in the international legal system: it is indeed the pointer to its ‘primitive’ nature. But this does not prevent the construction of a theory of the ‘just war’ that legitimates war when it is a legal sanction, that is, a coercive act carried out by a state on the basis of international law, thereby exercising the functions of an organ of the international legal community.²³

3. The third corollary of the unity of the legal system and the associated primacy of international law is the formal equality of states (at least until the time that they are absorbed by the global order of the *civitas maxima*). Seeking to do without the monist hypothesis, according to Kelsen, makes logically inconceivable what for him is the very essence of the international order, namely the idea of a community of states endowed with equal rights despite their diversity in territorial extent, population and power. This is, Kelsen holds, ‘an ethical idea *par excellence*’, one of the few truly undisputed ideas in modern culture. But it is

possible exclusively through the aid of a legal hypothesis: that above the legal entities considered as states there is a legal system that delimits the spheres of validity of the individual states, preventing interference by one in the sphere of the other, or associating such interference with certain conditions that are equal for all. That is, it is essential for there to be a legal system regulating, through norms equal for all, the reciprocal conduct between these entities and

¹⁹ See *Das Problem der Souveränität*, at 258-259, 266-267; H. Kelsen, ‘Théorie générale du droit international public. Problèmes choisis’, 42 *RdC* (1932) 4, at 131; *Idem*, *The Legal Process*, *supra* note 18, at 14-15; *Principles*, at 36; *Idem*, ‘Théorie du droit’, *supra* note 18, at 71-72; *Law and Peace*, at 51-55.

²⁰ See Kelsen, *The Legal Process*, *supra* note 18, at 13. On the theme of the theory of the ‘just war’ in Kelsen, cf. Rigaux, ‘Hans Kelsen e il diritto internazionale’, 4 *Ragion pratica* (1996) 6, at 91-8; Leben, ‘Un commento a Rigaux’, *ibid*, at 107-109.

²¹ See *Law and Peace*, at 36-37.

²² Cf. *Das Problem der Souveränität*, at 265-266.

²³ Cf. *ibid*, at 264-267. A broad, systematic treatment of the theme of the *iustum bellum* can be found in *Law and Peace*, at 36-55. For a severe critique of Kelsen’s theory of the *iustum bellum* see Bull, *supra* note 15, at 329. Some classic pages on the topic are Carl Schmitt’s in *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1974).

excluding at the root, as regards the legal relations between the individual states, any *legal overvalue* of one *vis à vis* the other.... It is only on the basis of the primacy of the international law that the particular states appear on the same legal plane and can count legally as entities of equal rank, being subject equally to the higher international legal system.²⁴

He adds, stressing the incompatibility between the formal equality of states and their sovereignty, and explicitly accepting the natural-law nature of the *civitas maxima* idea:

a multiplicity of entities or legal communities must be bearers of equal rights, that is, be on an equal footing in a legal community ... in which the freedom of the subjects (the states) is limited by their fundamental legal equality. This idea finds its expression in the hypothesis put forward by Christian Wolff of the *civitas maxima*, which as a legal system is superior equally to the particular states.... The 'natural law' nature of this sort of foundation of international law cannot and should not be denied.²⁵

4. The fourth corollary concerns the question of international legal subjectivity. Deriving from the denial of state sovereignty and from the recognition of the moral and legal unity of mankind, argues Kelsen, is the logical necessity of rejecting Grotius' traditional conception of international law as a normative system whose subjects are exclusively states. According to this vision, international law concerns only the relations between nation-states, and perhaps also relations between states and the international organisms they may have set up by agreement: it does not by contrast concern either the relations between states and their citizens nor, *a fortiori*, relations between the citizens of a state and international bodies. On this theory, the conduct taken as relevant by international law must be attributed not to individual people, despite the fact that it is always individuals that are their authors, but to the state legal system to which these individuals belong as subjects or as citizens. The individuals are, then, devoid of legal subjectivity within international law, and in general terms are not directly bound by its norms nor exposed to its sanctions.

For Kelsen, on the contrary, alongside the states, individual persons too cannot but be subjects of international law, so that the norms of international law have also to regulate the activities of individuals, thereby entailing direct consequences in their regard. Kelsen is concerned above all to establish that all human subjects are bound to obey the international norms (even if in passing he maintains that international law is competent also to deal with a state's duties towards its citizens²⁶). For Kelsen it is in fact inconceivable, on pain of denying the legal nature of the state's normative system, for the state to be able to bind itself at the international level without thereby also binding its organs. On the other hand, it is impossible in legal terms to separate a state organ from the subjects (or citizens) whose conduct is 'attributed to the state' by norms of its law.²⁷

4 A Criticism

The four corollaries that Kelsen derives from the primacy of international law have been variously criticized both in formal terms and for their assumption of values which they refer to implicitly and explicitly. It has been maintained that Kelsen arbitrarily deduces from the state legal model the idea that there is no law in the absence of the exercise, by way of sanction, of physical force.²⁸ There is no doubt that Kelsen abuses the 'domestic analogy' when he judges as 'primitive' the stage at which the international law finds itself. For he assumes that in order to become 'mature', that is, fully legal, international law must develop to the point of meeting the same criteria as those which determine the legal nature of a state normative system. But while the monopoly exercise of physical coercion (or the threat of it in the last instance) is undoubtedly a salient feature of the state legal system, it cannot be denied that there are effective normative systems, for instance that of the Roman Church, that apply sanctions without recourse to physical coercion or even the threat of it. In international terms, too, there are normative

²⁴ Cf. *Das Problem der Souveränität*, at 204-205 (emphasis added). See also *Principles*, at 586.

²⁵ Cf. *ibid*, at 251-253.

²⁶ Cf. Kelsen, 'Théorie générale', *supra* note 19, at 301-303.

²⁷ *Das Problem der Souveränität*, at 159-167. Kelsen was to return at length to this theme in *Law and Peace*, at 90-102.

²⁸ Cf. Rigaux, *supra* note 20, at 94-98; Leben, *supra* note 20, at 106-109. See also Virally, 'Sur la prétendue primitivité du droit international', in M. Virally, *Le droit international en devenir* (1990); more generally, Herz, 'The Pure Theory of Law Revisited: Hans Kelsen's Doctrine of International Law in the Nuclear Age', in S. Engel and R. A. Métall (eds.), *Law, State and International Legal Order. Essays in Honor of Hans Kelsen* (1964); Isak, 'Bemerkungen zu einigen völkerrechtlichen Lehren Hans Kelsens', in O. Weinberger and W. Krawietz (eds.), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (1988).

systems, such as professional sports organizations, that apply only pecuniary sanctions or expulsion from the organization or exclusion from its benefits.²⁹ In other words, one might say that Kelsen's legal and political monism tends, at the very point where it opposes state sovereignty, to conceive of the international legal system as precisely a state form.

There has been equally heated criticism of Kelsen's attempt to incorporate in his 'pure' theory of law the ethico-theological notion of the 'just war' as a foundation of the legal nature of international law. It is undoubtedly paradoxical for an author who lays claim to pacifist and anti-imperialist ideals – and makes peace the ultimate end of law – to assume (just) war as the condition for the legal nature of the international system (and hence, given his monist assumption, of law *tout court*). Kelsen seems to be aware of this paradox, however partially and tardily, in *Principles of International Law*.³⁰ In this work, by continuing to uphold the theory of the 'just war', Kelsen recognizes that the practical applicability of the theory is problematic in the absence of a neutral higher authority invested with the power to determine whether acts of war are just or unjust. And he recognizes as equally serious the objection resting on the argument that only a state which is stronger than its adversary state is in a position to use war as a legitimate instrument of coercion.

As to the corollary that infers the legal equality of states from the primacy of international law, it may be noted that Kelsen, in his treatise devoted to the normative structure of the United Nations, *The Law of the United Nations*, devotes no more than a bland comment to the formally unequal hierarchical nature of the institution.³¹ In this text, published in 1950, Kelsen passes over almost in silence the 'legal overvalue' that the United Nations Charter had a few years earlier accorded the five victor powers of the Second World War. Moreover, in his own project for a 'Permanent League for the Maintenance of Peace', published in 1944 as an appendix to *Peace through Law* – and thus before the foundation of the United Nations – Kelsen had foreseen the institution of 'permanent members' or the Council of the League, on the pattern of the League of Nations Covenant. He proposed that this privilege should be granted to the United States, Britain, the Soviet Union and China. It may thus be noted that in Kelsen the formal equality of states – which he regards as not only a legal principle but an undisputed ethical ideal in modern culture – is an abstract assumption that may remain without effect for the development of positive international norms.³²

But the point particularly worth stressing, especially since it has to date been neglected by critics, is the glaring contrast between Kelsen's demand for individuals to also be considered as subjects of international law and the idea that war can be a 'just' sanction of international law against states (and their citizens) who have wrongfully used force. Understood as a legal sanction, war is basically the execution of collective capital punishment on the basis of a presumption of criminal liability of all individuals acting within the military organizations of the state to be punished, from the highest military officials to the lowliest soldier. Moreover, it should not be neglected that in modern conditions the sanction of war indiscriminately strikes not only those responsible for conduct judged as criminal but also the vast numbers of subjects entirely external to the decisions and operations of war, and possibly even victims of the totalitarian power of the domestic political *élite* that unleashed it. From the viewpoint of its destructive consequences – devoid of rule, measure or proportion – modern war is not easy to distinguish from international terrorism. (It is perhaps appropriate to recall that Kelsen was writing *Peace through Law* in the very years that the Allies' 'just' war was ending with the 'terrorist bombings'³³ of such German cities as Dresden, Hamburg and Berlin, then the dropping of the atom bombs on Japan). With formal arguments similar to those used by Kelsen one might, then, put forward a theory of 'just terrorism' as an international legal sanction, thereby maintaining that a terrorist act could be a valid legal act.

But apart from this formal argument it is doubtful that Kelsen remains faithful to a liberal democratic inspiration in conceiving war as a penal sanction, albeit technically primitive, even though it hits at the life, freedom or property of individual human beings simply because they belong to a particular state. In this way, it simply ignores the principle of personal liability. An individual, writes Kelsen, can be legally punished 'on the basis of absolute liability, even without acting voluntarily or maliciously, or even blamefully or negligently'.³⁴ To

²⁹ Cf. Rigaux, *supra* note 20, at 94-97; Leben, *supra* note 20, at 118-120.

³⁰ Cf. *Principles*, at 29-33.

³¹ Cf. H. Kelsen, *The Law of the United Nations* (1950). Kelsen confines himself to noting incidentally that the Security Council's decision-making procedures are not in line with the democratic ideals, proclaimed during the War by the victor powers, which had inspired the United Nations Charter as a whole (at 276-277).

³² Cf. H. Kelsen, *Peace through Law* (1973) [hereinafter *Peace through Law*] at 58, 135.

³³ As Michael Walzer calls them in his *Just and Unjust Wars* (1992), at 263-268.

³⁴ Cf. *Peace through Law*, at 72-73 ('That an individual is to be punished although he has not acted wilfully and maliciously or with culpable negligence, so-called "absolute liability", is not completely excluded, even in modern criminal law'). On the theme of 'absolute liability' in domestic and international law see also *Law and Peace*, at 96-106. On the same theme see the recent essay by Parisoli, 'Soggetto

this one might add that in the same work Kelsen argues that the democratic principle of ‘one man, one vote’ is impracticable in international terms, since if applied to the election of a world parliament it would mean that demographic powers like India and China would have three times more representation than the United States and Britain together.³⁵ Kelsen’s legal internationalism thus ignores two basic principles of the liberal democratic tradition: the personal nature of criminal liability and individual responsibility for constituent power.

5 Peace through Law

In *Peace through Law* Kelsen, as is well known, sets forth a complete legal-institutional strategy to pursue a stable and universal peace among nations. Kelsen borrows from Kant both the ideal of perpetual peace and the federalist model, as well as the idea of a *Weltbürgerrecht*, a ‘world citizenship’ which includes as its subjects all the members of the human species.³⁶ According to Kelsen, the royal road to achieving the aim of peace is the union of all states (or the greatest possible number of them) in a world federal state.³⁷ But to be a realist, this objective must be viewed as the outcome of a long historical process. It is only through numerous intermediate stages and on the basis of a conscious ideological, political and educational commitment that it is possible to achieve an attenuation of national feelings and a levelling out of cultural differences between the various countries. Although it is Utopian to think of the goal of the world state as immediately possible it is nonetheless plausible, Kelsen declares, to create, once the war is over, a ‘Permanent League for the Maintenance of Peace’ whose members will be, first and foremost, the victor powers, including the Soviet Union.³⁸

Kelsen elaborates the project for the ‘League’ by incorporating some substantial innovations in the old League of Nations model. These give a central role to judicial functions by comparison with those of government or legislation. The failure of the League of Nations, Kelsen maintains, is due to the very fact that the centre of its operations was not the Court of Justice but the Council, that is, a sort of international government. This was a ‘fatal error of design’ since the most serious lacuna in international law is the very absence of a judicial authority. Failing this higher authority, every state has *de facto* competence to decide who is in breach of international law and to make recourse to war or reprisals against those presumed in breach of international law.³⁹

According to Kelsen, there was no reason to fear that the Great Powers, once the Covenant was signed, would not respect the Court’s decisions or assist it in enforcing its sentences by means of military force. Nor did it make much sense to maintain that this would amount to ratifying at legal level their political and military hegemony. In fact, the Great Powers would make themselves the guarantors of international law: they would be ‘the power behind the law’. By accepting the rules of the Covenant and ensuring their observation the Great Powers would commit themselves to exercising their inevitable superiority within the conventions of international law rather than in arbitrary fashion.⁴⁰

Kelsen does not conceal that the gravest difficulty is the need to establish an international police force which would be different to and independent of the armed forces of the Member States. Nor does he hide the fact that organizing a police force dependent on the Court would basically require the constitution of a centralized executive power endowed with armed force of considerable power. And this would only be possible by obliging all Member States to disarm or drastically limit their own armaments, consequently restricting, if not totally suppressing, their sovereignty.

It is realist, then, Kelsen believes, to postpone the setting up of an international police force to a second stage, while immediately starting with the establishment of the Court. For it is only once the Court has won the

responsabile, sanzione collettiva e principi morali: suggestioni kelseniane in tema di politica internazionale’, 11 *Filosofia politica* (1997) 3, at 471-489.

³⁵ Cf. *Peace through Law*, at 10.

³⁶ As we know, however, by contrast with Kelsen, Kant in *Zum ewigen Frieden* rules out the possibility of speaking, in the absence of an international political order, of a ‘just war’: for Kant, a state embarking on war is acting as judge in its own case. On the debate between ‘cosmopolitan’ (H. Bull, M. Wight, T. Schlereth) and ‘statist’ (F. H. Hinsley, W. B. Gallie, I. Clark, P. Riley, H. L. Williams) interpreters of Kantian pacifism, see Hurrell, ‘Kant and the Kantian Paradigm in International Relations’, 16 *Review of International Studies* (1990) 3, at 183-205.

³⁷ Cf. *Peace through Law*, at 3-9, 11-13; *Law and Peace*, at 142-144.

³⁸ Cf. *ibid*, at 14-15. In the early 1940s Kelsen devoted a long series of essays and articles to this proposal, which he cites in a long footnote together with testimony of assent from numerous political and religious associations in the United States (*ibid*).

³⁹ Cf. *Peace through Law*, at 13-15; *Peace and Law*, at 145-168.

⁴⁰ Cf. *Peace through Law*, at 66-67.

universal trust of governments, thanks to the impartiality of its verdicts, that it will be possible to establish an effective international police force.⁴¹

There is a second point which, as we know, was close to Kelsen's heart: he held that one of the most effective ways of guaranteeing international peace was through the approval of rules establishing individual responsibility, whether it be members of government or agents of the state, for breaches of international law in war.⁴² The Court, then, should not just authorize the application of collective sanctions against citizens of a state on the basis of their 'absolute liability', but should also bring to trial and punish individual citizens personally responsible for war crimes. And the states would be obliged to hand over to the Court their incriminated citizens. They might be made subject to sanctions, including in certain circumstances the death penalty, even in breach of the principle of non-retroactivity of penal law, on the sole condition that at the time the act was committed it was regarded as morally unjust, even if not forbidden by any legal norm.⁴³

Having laid down these premises, Kelsen could not restrain from criticizing in *Peace through Law* the proposal put forward by the Allied Powers to set up an international tribunal to comprise judges solely from the victor powers, excluding even representatives of the neutral states. This tribunal would be competent to judge only the Nazi criminals, that is, the defeated. Kelsen was to return to this theme still more sternly in a 1947 article criticizing the procedures and decisions adopted at the Nuremberg trials.⁴⁴ Punishing war criminals, Kelsen declares, should be an act of justice and not the continuation of hostilities through formally legal instruments aimed in fact at satisfying a thirst for revenge. And it was incompatible with the idea of justice for only the defeated states to be obliged to subject their citizens to the jurisdiction of an international court for the punishment of war crimes. Only if the victors subjected themselves to the same law they intended to impose on the defeated states, warned Kelsen, would the legal nature - that is, the generality - of the punitive norms and the very idea of international justice be saved.⁴⁵

6 Judicial Cosmopolitanism?

To sum up, we may say that Kelsen's legal pacifism entails two essential theses, a cosmopolitan one and a judicial one. On the one hand, Kelsen believes that a stable, universal peace can be guaranteed only by an international law that is no longer 'primitive'. In his theoretical lexicon, as we have seen, this means that in order to prevent the use of force among states it is necessary to centralize the international legal system, particularly its sanctioning organs, with a view to setting up a federal world state. In this respect, Kelsen's legal pacifism fits, without any particularly original features, into the tradition of classical and Christian cosmopolitanism as repropounded in Enlightenment terms by Wolff and Kant.⁴⁶

In another respect, this time certainly original, Kelsen traced the failure of modern institutional pacifism back to the primacy given to the executive functions over judicial ones. For Kelsen, peace could be guaranteed only by an international court of justice operating in relation to disputes between states as a higher, impartial third party, with an international police force under its command.⁴⁷

If this is a correct summary of Kelsen's pacifism, it may make sense to ask whether it presents truly innovative aspects, and especially whether, as Kelsen claims, it is a more realist proposal than the tradition of European and Western institutional pacifism. This question should, of course, be raised in the light of

⁴¹ Cf. *ibid*, at 19-23.

⁴² Cf. *ibid*, at 71 *et seq.*

⁴³ Cf. *ibid*, at 87-88. Here too Kelsen displays a normative contamination between morality and law from which he should have been barred by the assumption of the 'purity' of his theory of law. In general, in relation to the international criminal court's competence to judge individual liability for war crimes Bull, *supra* note 16, at 89, has noted that their symbolic function has been obfuscated by the selective nature of their pronouncements. It has been the 'victors' that have promoted these tribunals and without exception acted as judges there, while those who appeared in the dock were normally a few scapegoats representing the defeated.

⁴⁴ Cf. Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', 1 *The International Law Quarterly* (1947) 2. Kelsen was to return to the theme again in *Principles*, at 215-220.

⁴⁵ Cf. *Peace through Law*, at 110-115. Kelsen held that the Soviet Union, by invading Poland and declaring war on Japan, had committed war crimes punishable by an international tribunal.

⁴⁶ On this point I would take the liberty of referring to my *Cosmopolis. Prospects for World Government* (1997), at 1-18.

⁴⁷ The theme of the 'third party' as a guarantee of international peace was developed by Norberto Bobbio in the collection of articles *Il terzo assente* (1989). More generally, see also P. P. Portinaro, *Il terzo* (1986).

developments witnessed by the international institutions in the second half of our century, starting with the foundation of the United Nations in 1945.

It should first and foremost be noted that the cosmopolitan thesis in Kelsen is founded on his adoption of the 'domestic analogy' in both the legal and the politico-institutional areas, albeit with greater caution in the second area. However, in methodological terms it is highly doubtful that analogical reference to the evolution of the modern European state can supply reliable patterns for constructing a theory of international relations, and especially a theory of peacemaking. For it is controversial that contemporary world society can be regarded as analogous in some way to the nascent 'civil society' that acted as a support for the process of legal and political centralization which led in Europe to the state based on the rule of law. More generally, as we have noted, it is doubtful that the development of international law can be measured by the yardstick of the evolution of state law.

Accordingly, even recognizing that legal and political centralization has given significant results from the perspective of 'pacifying' social relations within the European nation-states, there is no guarantee that concentrating sanctioning power in the hands of a supreme supranational authority is the royal road to building a safer, ordered, peaceful world. The theory of 'international regimes' developed by Stephen Krasner and Robert Keohane, for instance, seems to contradict this assumption by showing how there are broad areas of 'co-operative anarchy' within which international legal obligations are effective, and efficiently sanctioned, even in the absence of centralized jurisdiction and an international police force.⁴⁸ In the international sphere the absence of binding jurisdiction would not seem to be tantamount to a situation of legal primitivism in which armed self-defence represents the sole possible form of sanction against wrongful acts (even if, of course, violence is very much present, as it is in any case even within individual states, starting with the United States).

It should also be noted that the levelling out of cultural differences and the quashing of feelings of national belonging that Kelsen hopes for as premises to the legal unification of the world may be seen with considerable distrust by those who think that the variety of cultures and the plurality of ethnic and national identity are anthropological resources not to be abandoned. This mistrust may become hostility in those who fear that the cosmopolitan project expresses unquenched hegemonic tendencies by the Western world. Contemporary authors maintain that cosmopolitan doctrines are merely the ideological counterpoint to the processes under way of globalization, which affirm the technical, economic and military supremacy of the industrial powers.⁴⁹ Nor can it, on the other hand, be ignored that Kelsen's proposal for a World State presents all the cultural connotations of European ethnocentrism. It is not just, as we have seen, inspired by a tradition of thought that is foreign to a pluralist vision of relations among nations, but also lacks any interest whatever in cultures or legal and political traditions differing from Western ones.

One might even surmise that Kelsen's cosmopolitanism, taken together with the proposal of the medieval doctrine of the *iustum bellum* and the idea of a court of justice with the power to resolve military disputes between states, evokes the image of the *respublica christiana*, with at its centre the undisputed spiritual and legal *auctoritas* of the Roman Papacy. But apart from this anachronistic aspect, Kelsen's judicial pacifism seems to date to have been challenged in its very aspiration to present itself as an innovative and at the same time realist proposal. The bitterness with which Kelsen first denounced the partiality of the Nuremberg Tribunal⁵⁰ and then criticized the excessive political and military power granted by the United Nations Charter to the Security Council⁵¹ is a pointer to the impracticability of Kelsen's judicial pacifism, to its illusory nature. Kelsen's disappointment is the proof that his distinction between 'judicial' pacifism and 'governmental' pacifism is of little significance.

If Kelsen tacitly assumed, as some indications tend to suggest, that the court of justice ought to have been assisted forever – not just in an initial stage – by the military forces of the Great Powers, then his proposal would lie, without any claim to originality, within the tradition of institutional pacifism that runs from the Holy Alliance to the League of Nations to the United Nations. And it would be shown to be founded on a reductive conception of international peace as a pure and simple political and military guarantee of collective security, that is, of the

⁴⁸ See Keohane, 'The Demand for International Regimes', in S. D. Krasner (ed.), *International Regimes* (1983); Krasner, 'Regimes and the Limits of Realism: Regimes as Autonomous Variables', in *ibid.*

⁴⁹ See S. Latouche, *L'occidentalisation du monde. Essai sur la signification, la portée et les limites de l'uniformisation planétaire* (1989); M. Featherstone (ed.), *Global Culture, Nationalism, Globalization and Modernity* (1991); B. S. Turner, *Theories of Modernity and Postmodernity* (1990).

⁵⁰ Kelsen's demand for the victor states of the Second World War to subject their own soldiers to the verdict of the same courts as those set up to judge the enemy seems to ignore the radically partisan, destructive logic of war.

⁵¹ In *Principles* Kelsen emphatically stresses the fact that the United Nations Charter finally introduces 'a system of international security marked by a high degree of centralization' (at 40), but nonetheless complains that the excessive discretionality of the power conferred on the Security Council prevents it from acting as a 'legal' body, that is, as a source of centralized, equal and universal jurisdiction able to give rise to an effective system of sanctions alternative to war, especially 'defensive war' (at 47-51).

hegemonic *status quo*. For it is clear that an international court obliged to have recourse to the armed forces of the Great Powers in order to enforce its verdicts could not be impartial, in particular when it had to deal with conflicts involving a Great Power. The court could not be more impartial than the present United Nations Security Council, subordinate to the veto power of a few Great Powers, or than NATO. Nor could its jurisdiction invoke any foundation of a liberal or representative democratic type. Kelsen's expectation, to which he alludes, that the Great Powers might play the part of rigorous guarantors of international law by respecting its norms and applying the verdicts of an international court, even when in conflict with their vital interests, is surely too optimistic.

On the other hand, it is clear that an international court, in order to secure enforcement of its own verdicts without recourse to the military force of the Great Powers (or even against them), would have to have extremely great power at hand: it would itself have to be a (nuclear) superpower or the judicial organ of a (nuclear) superpower, endowed with overwhelming force by comparison with the other Great Powers. The consequences this would have in terms of impartiality of its verdicts are easy to conjecture. It need scarcely be added that the concentration of political and military power in it of the *ius ad bellum* that has been taken away from nation-states. Any sort of 'police action' carried out by a supranational authority holding the world monopoly of force is inevitably destined to take on the more classic outlines of war, as since proved by the 1991 Gulf War.⁵²

7 Conclusion

What theoretical value can be assigned overall to Kelsen's internationalist doctrine – from the monist conception of law to the primacy of international law, to judicial-cosmopolitan pacifism – over and above the individual features that have been pointed to in this essay?

Even the harshest critics have acknowledged Kelsen's great historical merit: to have brought about a decisive change in direction in the study of international law, moving away from the narrow perspective of statist legal positivism towards a presentation of the problem of the world order in radically new terms. There is no doubt that Kelsen, fifty years ago, anticipated many of the legal and institutional problems that have emerged at the international level in the second half of our century. Consider the processes of globalization that have dramatically raised the issue of the crisis of nation-states and of the Westphalian system founded on their sovereignty. Consider the growing assertion of the doctrine of human rights and the new practice of 'humanitarian intervention' to protect them, phenomena that have both contributed *de facto* to extending the subjectivity of international law to individuals. Consider, over and above all, the recent creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda – mandated to judge war crimes and crimes against humanity committed by individuals – which are very likely preludes to the creation before too long of a permanent international criminal court.

Moreover, one cannot fail to recognize the profound originality and theoretical greatness of Kelsen's internationalist constructions, supported by many, among whom Norberto Bobbio, Richard Falk and Antonio Cassese.⁵³ Finally, one cannot but recognize that, despite the proclaimed purity of his theory – indeed, incorporating in it, with systematic inconsistency, a quantity of value assumptions and historical and empirical references – Kelsen has proved himself a jurist attentive like few others to the international events of his time: from the 'nationalist madness' that invaded European culture with the failure of the League of Nations, to the primary imperative of the construction of a more ordered, peaceful pattern for the world after the scourge of the two world wars.

In my opinion this recognition should be flanked by the critical points I have set forth in this essay, which call into discussion not Kelsen's historical merits but the consistency of his general theory and the realism of his political proposals. These observations can be summarized, in conclusion, in the following four points:

1. On the plane of the epistemology of legal knowledge, Kelsen's monistic assumption stands or falls with the neo-Kantian philosophy from which it derives. Today a post-positivist and post-empiricist philosophy of science would fundamentally challenge the idea that the logico-mathematical model can be taken as the paradigm of legal knowledge. And a systemic approach would supply important premises for a relativist, pluralist and

⁵² Cf. Falk, 'Reflections on the Gulf War Experience: Force and War in the United Nations System', 3 *Juridisk Tidskrift* (1991) 1, at 192.

⁵³ See in this issue, Bobbio, 'Hans Kelsen, the Theory of Law and the International Legal System – A Talk with Danilo Zolo', *passim*; N. Bobbio, *Diritto e potere. Saggi su Kelsen* (1992). Richard Falk regards Kelsen as a 'great international lawyer of our era who has developed and sustained a coherent interpretation of the international order', R. Falk, *The Status of Law in International Society* (1970), at x. More soberly, Antonio Cassese maintains that Kelsen's doctrine of the primacy of international law 'has been instrumental in consolidating the notion that State agencies should abide by international legal standards and ought therefore to put international imperatives before national postulates', A. Cassese, *International Law in a Divided World* (1986), at 22.

polycentric conception – non-objectivist, non-monist and non-hierarchical – of legal phenomena, both domestic and international. It would also advise against treating international law with the same categories as state law.

2. The thesis of the primacy of international law (with its four corollaries, in particular acceptance of the doctrine of the *iustum bellum*) cannot aspire to any objective scientific validity, not even in the attenuated version that presents it as a hypothesis needed in order to construct legal knowledge. From the cognitive viewpoint, it is no more necessary than the opposite ‘subjectivist’ hypothesis that argues the primacy of state law, and does not subordinate the individual dimension to the objective validity of law. In Kelsen – an Austrian intellectual personally involved in the tragedy of the Second World War – legal internationalism is very likely a (noble) ethico-political option.

3. Kelsen’s pacifism is inspired by a twofold normative optimism. On the one hand, it starts from the rationalist presupposition that it is possible to abolish war, disarm states, attenuate political conflicts and overcome the immense economic and cultural disparities that cleave the planet, relying essentially on legal and institutional instruments; that is, giving rise to a supranational power which is supposed to be by definition impartial, rational and morally inspired. On the other hand, Kelsen’s pacifism is based on a great trust in penal instruments. For it assumes with certainty that the exemplary punishment of a few individuals responsible for war crimes by an international court may act as an effective deterrent in relation to possible future wars. Kelsen is firmly convinced that supranational judicial action can be capable of affecting the macro-structural dimensions of war much more than diplomatic, political or economic activity.

4. Kelsen’s legal cosmopolitanism hopes for the achievement of a peaceful world community on the basis of the postulate of the unity of the human species. A universal morality, a universal law and a universal state constitute for Kelsen a compact normative unity. It is in this attempt to transplant into the ‘chaos’ of the twentieth century and to propose for the whole of mankind the classical, Christian and Enlightenment idea of universal harmony that the fascination and the fragility of Kelsen’s internationalism lie.⁵⁴

⁵⁴ In this connection see W. Bauer, *Weltrelativismus und Wertbestimmtheit im Kampf um die Weimarer Demokratie* (1968), at 112-113; cf. also Carrino, *supra* note 3, at xlv-xlv.