

## KELSEN'S PEACE THROUGH LAW AND ITS RECEPTION BY HIS CONTEMPORARIES

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### I. *Introduction*

Austrian law professor and legal philosopher Hans Kelsen has often been called the “jurist of the century”, for example by German law professor and legal philosopher Horst Dreier (who, however, qualified this statement with a “maybe”).<sup>1</sup> There is no doubt, however, that Kelsen is one of the most important legal positivists of the twentieth century, whose ideas had strong influences on legal science, particularly in South America, Spain, Eastern Europe, Italy and Japan. It is surprising then that in spite of this Kelsen is relatively little known outside the field of legal philosophy. Those who know his name usually associate him with the Austrian constitution of 1920, to which he made significant contributions, and the Pure Theory of Law<sup>2</sup>, which was his most important creation.

The preeminent position the Pure Theory of Law holds among his work often overshadows another important aspect of Kelsen’s scientific work, namely that relating to international law and international peace, as well as issues of collective security. Although Kelsen worked on these topics from as early as the end of the First World War in parallel with, and often in the context of, developing the Pure Theory of Law, he developed the main body of his work on collective security and international peace during the 1930s and 1940s. At that time Kelsen had already left Austria and Germany, first for Geneva and then, in 1940, permanently for the United States. Many of his writings, especially after 1940, were therefore published first in the United States in English. This includes his major work on international peace, “Peace through Law”, published in 1944.

In spite of this, Kelsen’s work, both on the Pure Theory of Law as well as on international law, has until recently received little attention from American scholars. The reasons cited for this usually include the incompatibility of Kelsen’s Pure Theory of Law with American legal realism and the limited extent to which it was discussed in American legal journals.<sup>3</sup> However, while this may be true of Kelsen’s publications on legal positivism and international law, it cannot be assumed automatically for “Peace through Law”. “Peace through Law” was not so much a treatise on the Pure Theory of Law as, in its design, an engineering project in the field

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<sup>1</sup> H. Dreier, Hans Kelsen (1881-1973): “Jurist des Jahrhunderts?” in: Helmut Heinrichs et al. (ed.), *Deutsche Juristen jüdischer Herkunft*, München 1993, p. 705, note 147.

<sup>2</sup> H. Kelsen, *Reine Rechtslehre*, 1st ed. Leipzig/Vienna 1934.

<sup>3</sup> M. S. Green, Hans Kelsen and the Logic of Legal Systems, 53 *Alabama Law Rev.* No. 2 (Winter 2003), p. 365; see also J. Telman, *The Reception of Hans Kelsen’s Legal Theory in the United States: A Sociological Model*, L’Observateur des Nations Unies, Vol. 24, 2008.

of international relations and the contribution of a renowned legal scholar to an important debate at that time: how the international community should be organised after the end of the Second World War. It seems, therefore, unlikely that “Peace through Law” did not receive attention in the academic world at the time of its publication.

This paper will look at “Peace through Law” in its historical setting and the reception it received from its contemporaries in the United States. It will also examine the reasons given for the approval or rejection of Kelsen’s theories in “Peace through Law”, and consider whether those arguments remain valid today.<sup>4</sup>

### 1. Biographical Note on Kelsen<sup>5</sup>

Hans Kelsen was born in Prague in 1881, but from 1884 onwards he grew up in Vienna, Austria. Although more interested in philosophy, mathematics and science, Kelsen studied law at the University of Vienna, where he graduated as doctor juris in 1906. Although he was completely indifferent to religion, Kelsen converted from Judaism to Catholicism in 1905 and then to Protestantism in 1912, in order to avoid difficulties in his academic career. During World War I he served in different functions in the military administration in Vienna until he became the personal consultant of the last minister of war of the Austro-Hungarian Empire, General Stöger-Steiner. In 1918, after the war and the end of the Habsburg monarchy, Kelsen, who in 1911 had published his professorial thesis, received an invitation to teach at the Vienna law faculty. In 1919 he became a full professor. At the same time Kelsen was significantly involved with the creation of the Austrian constitution of 1920, which led to his lifetime appointment as a judge of the Austrian Constitutional Court in 1921. He would, however, lose this position only eight years later when all constitutional judges were dismissed in a legal “coup” by the conservative Austrian political leadership, who deemed the constitutional court too liberal. Disappointed, and faced with an academic environment increasingly strained by personal conflicts and anti-semitic tendencies, Kelsen accepted an offer of a position at the University of Cologne in 1930. His stay there was brought to a sudden end when the National Socialists came to power in 1933. Kelsen, of Jewish origin and close to the Social Democrats, left Germany for Geneva to teach at the Postgraduate Institute of International Studies. In 1934 he published the first edition of the Pure Theory of Law, which would secure his international acclaim permanently.

While the Pure Theory of law most certainly constitutes Kelsen’s greatest work, the Geneva years also saw him develop an important part of his theories on international peace. Kelsen stayed in Geneva until 1940 (a teaching position in Prague once again had to be abandoned shortly after it began due to disturbances and threats by right wing students), when he decided to leave war-ridden Europe for the United States. There he gave his famous Holmes Lectures on international law as a lecturer at Harvard University and finally, in 1942, was appointed visiting associate professor at the political science department of the University of

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<sup>4</sup> “Peace through Law” includes two parts. Part one is dealing with Kelsen’s proposed plan for a Permanent League for the Maintenance of the Peace and the relation of international law to world peace, part two with individual responsibility for violations of international law. This paper will only focus on the first part.

<sup>5</sup> This part of the paper follows Horst Dreier’s description of Kelsen’s life in: Hans Kelsen (1881-1973): “Jurist des Jahrhunderts?” supra note 1, p. 705.

California, where he became full professor in 1945. In 1952 Kelsen retired but kept on publishing until some years before his death in 1973.

## 2. Kelsen's Understanding of International Law

"Peace through Law" builds on Kelsen's ideas about international law. It is therefore necessary to examine briefly some of the core elements of Kelsen's theory of international law.

At the beginning of the twentieth century, the time when Kelsen developed his Pure Theory of Law, two historical questions concerning international law were still strongly debated. The first was whether international law, being based on the Westphalian principle of individual states playing an equal part in an international order with no real central power, could actually be seen as a normative and binding order.<sup>6</sup> The second question concerned the relationship between national law and international law.<sup>7</sup>

Kelsen dealt with these questions extensively within the framework of his work on a general theory of law as well as his work on matters concerning world peace and international relations. By 1920 Kelsen had already published his major work on "The Problem of Sovereignty and the Theory of International Law", introducing a new understanding of the sovereignty of states founded on the concepts set down in the Pure Theory of Law and considering these topics in depth.<sup>8</sup> For Kelsen, international law is genuine law, since the basic requisite of a legal order in Kelsen's system is that norms can be enforced by physical coercion, which Kelsen sees realized in international law. In international law the coercive sanction that must follow the breach of a norm in order to build a normative system is war. War in international law is thus both transgression and sanction. If the transgression constitutes a delict in international law, each state may punish the transgressor by punitive war, and the acting state is then acting as an organ of coercive international law. The standard by which war as a delict can be distinguished from war as a sanction in this primitive international legal order is the *bellum justum* doctrine. However, since Kelsen measures the degree of evolution of a legal order by its level of centralisation, the international legal order, which lacks central organs, can only be defined as a primitive legal order in which the principle of self help prevails and every individual actor takes the law into its own hands.<sup>9</sup>

Concerning the relationship between national and international law, Kelsen takes a monist position; thus, for him, international law and national law form one system and derive their validity from one common source. In his earlier publications on this matter Kelsen followed a radical monism and saw the final source of the validity of all law in a basic rule (*Grundnorm*) of international law. Thus all norms of international law have a higher status than national law and render national law which is not in conformity with international law null and void. Kelsen also viewed international law as being applicable directly in the national sphere.<sup>10</sup> In his later publications on the matter Kelsen moderates his position. The doctrine that national law which is inconsistent with international obligations is automatically null and void is revised so that

<sup>6</sup> see W. Rudolf, *Völkerrecht und deutsches Recht*, Tübingen 1967, pp. 14 et seq.

<sup>7</sup> *Ibid.*, pp. 128 et seq.

<sup>8</sup> H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* 1st ed. 1920, 2nd ed., Tübingen 1928.

<sup>9</sup> H. Kelsen, *Technik des Völkerrechts und die Organisation des Friedens*, 14, *Zeitschrift für öffentliches Recht* (1935), p. 240, p. 244; *Idem*, *supra* note 8, pp. 260 et seq.

<sup>10</sup> *Idem*, *supra* note 8, p. 113.

such national law is still valid, but can be abolished by legal act.<sup>11</sup> In this context (i.e. Kelsen's espousal of the primacy of international law) it has been said that Kelsen argued away sovereignty, since state legal systems are not the highest normative system.<sup>12</sup> In Kelsen's view, however, the state's sovereignty under international law is its legal independence from other states. Thus subjection under international law is not contrary to the concept of sovereignty.<sup>13</sup> The definition of sovereignty as supreme power Kelsen rejects as being metaphysical and unscientific, since it refers to actual facts and not to the legal setting, thus violating the division of "ought" and "is", which is a core element of the Pure Theory of Law.<sup>14</sup> Sovereignty in international law is thus only the legal authority or competence of a state, limited and limitable only by international law.<sup>15</sup>

## II. *Kelsen and International Peace*

Kelsen, guided in his work on international law by the Pure Theory of Law, developed an understanding of the nature of law that contained both national and international law within the same system. The same theoretical foundations also prompted him to take a strong interest in international peace. Here, however, Kelsen exhibited a more political side to his character, fervently supporting the idea of a collective security system.<sup>16</sup> Kelsen was very active on these issues during the 1930s and 1940s.<sup>17</sup> In 1944, shortly before the end of the Second World War and the foundation of the United Nations, Kelsen published his major work "Peace through Law" on the maintenance of world peace.<sup>18</sup> In that work, Kelsen readdressed, refined and fully developed his theory on the relationship between international law and peace, founding it on, and incorporating within it, his views on the nature of international law and the sovereignty of states.

Much of what was laid out in "Peace through Law" Kelsen had previously published and was therefore already known to the academic world. What was new about "Peace through Law" were the depth and magnitude of the scheme, which not only gave a comprehensive insight on Kelsen's ideas on peace and collective security within the system of international law, but also

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<sup>11</sup> Idem, *Reine Rechtslehre*, 2nd ed., Vienna 1960, pp. 328 et seq.

<sup>12</sup> R. B. M. Cotterrell, *The Politics of Jurisprudence. A Critical Introduction to Legal Philosophy*, London 1989, p. 115.

<sup>13</sup> H. Kelsen, *The Principle of Sovereign Equality of States as a basis for International Organization*, in: *The Yale Law Journal*, Vol. 53, No. 2 (Mar., 1944), p. 207, p. 208.

<sup>14</sup> see idem, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik. Studienausgabe der 1st ed.* 1934, M. Jestaed (Ed.), Tübingen 2008, pp. 32 et seq.

<sup>15</sup> Idem, *supra* note 13, p. 208.

<sup>16</sup> Charles Leben even called Kelsen "a political militant for democracy within states and for peace in the international community", Ch. Leben, *Hans Kelsen and the Advancement of International Law*, *EJIL* 9 (1998), p. 287, p. 290.

<sup>17</sup> H. Kelsen, *Zur rechtlichen Revision des Völkerbundstatutes*, 17 *Zeitschrift für öffentliches Recht* (1937), p. 401, p. 590; Idem, *supra* note 9, p. 240; Idem, *The Essential Conditions of International Justice*, *Proceedings of the American Society of Int. Law* (1941), p. 70; Idem, *supra* note 13, p. 207; Idem, *Law and Peace in International Relations*, *The Oliver Wendell Holmes Lectures, 1940-41*, Cambridge 1942; Idem, *Compulsory Adjudication of International Disputes*, 37 *AJIL* (1943), p. 397.

<sup>18</sup> Idem, *Peace Through Law*, Chapel Hill 1944.

offered a concise plan for a collective security system, including a charter. The key elements of this collective security system, which Kelsen in reference to the League of Nations called the Permanent League of the Maintenance of the Peace, were that it would be a federation of states organised as a legal community with an international court as its central organ. This court would have compulsory jurisdiction over all conflicts, be they legal or political.

In "Peace through Law" Kelsen defines peace as the absence of force, which in an organised society must mean that force is controlled by law, since an absolute absence of force would be nothing other than anarchism.<sup>19</sup> In Kelsen's monist view of the nature of national and international law, both have the same characteristics<sup>20</sup> and Kelsen takes a leap from here to the conclusion that lasting international peace can be achieved similarly to national peace by establishing a community monopoly of force. Thus Kelsen comes to the conclusion that the most effective way to secure international peace would be "to unite all individual states (...) into a World State, to concentrate all their means of power, their armed forces, and put them at the disposal of a world government under laws created by a world parliament."<sup>21</sup> This idea Kelsen views however as being incompatible with the principle of sovereign equality (the idea that all states are equal with regard to their sovereignty) contained in the Moscow Declaration of 1943 and he therefore concludes that a federation of states governed by international law is the only possible solution for attaining lasting international peace.<sup>22</sup> At the centre of this federation Kelsen places the court. He justifies this decision by reference to the example of the League of Nations. Kelsen attributes the failure of the League of Nations to the fact that its central organ was the Council of the League of Nations, a kind of international government whose decisions had to be taken unanimously, binding no member against its will and lacking a centralised power to execute decisions.<sup>23</sup> Kelsen argues that in the process of forming a centralised state from a de-centralised pre-state, law-applying bodies (courts) are relatively easily centralised early on in the process, whereas legislative and centralised executive power must form the last step. In early legal societies courts apply (customary) law, but by doing so also create this law, thus acting in a certain way as legislative bodies as well.<sup>24</sup> Since the international legal order is still at a primitive stage it is only logical for Kelsen that the court should be at the centre of the Permanent League, which would also solve the problem of decision-making within the organisation. Court decisions can be achieved by the majority principle, which is in fact the only case in international relations where this is not considered incompatible with the sovereignty and equality of states.<sup>25</sup> The court is to have compulsory jurisdiction over all conflicts. Kelsen views it as paramount that no distinction is made between legal and political disputes. In fact, Kelsen rejects the distinction between justiciable legal and non-justiciable political disputes altogether, since it is entirely subjective in character, the difference only consisting in the way the parties to the conflict justify their respective attitude.<sup>26</sup> Kelsen, in accordance with the Pure Theory of Law, omits any question of whether a disputed policy,

<sup>19</sup> *Idem*, supra note 18, pp. 3, 7.

<sup>20</sup> *Idem*, *The Strategy of Peace*, *American Journal of Sociology* (1944) No. 49, p. 385; *Idem*, supra note 18, p. 22.

<sup>21</sup> *Idem*, supra note 18, p. 5.

<sup>22</sup> *Ibid*, pp. 9 et seq., pp. 34 et seq.

<sup>23</sup> *Idem*, supra note 20, pp. 381, 386; *Idem*, supra note 18, p. 49.

<sup>24</sup> *Idem*, supra note 18, p. 21.

<sup>25</sup> *Ibid*, p. 21.

<sup>26</sup> *Ibid*, pp. 28 et seq.

although perhaps perfectly legal, may be politically unwise and morally wrong,<sup>27</sup> and maintains that a positive legal order can be applied to any conflict whatsoever, for to put it bluntly: “What is legally not forbidden, is legally permitted”.<sup>28</sup> Therefore all disputes are legal ones. The declaration that a conflict is political implies only that the declaring party considers the positive law to be unjust or unsatisfactory.<sup>29</sup> While by settling all disputes between the members through judicial decisions and leaving in general no room for conciliation the jurisdictional competences of the Permanent League would be more or less universal, there would, on the other hand, be no obligation of mutual protection against aggression from outside, and consequently also no obligation for disarmament upon the member states. The League is therefore to be set up as a legal community and not as a political one.<sup>30</sup>

In conclusion, it is apparent that Kelsen sees the appropriate means of achieving order and peace internationally as lying not in political methods but in legal relations. And while Kelsen undoubtedly flavoured his analysis with value judgements theoretically unavailable under the Pure Theory of Law, both Kelsen’s technique, as well as his major premises (e.g. concerning the distinction of political and legal disputes), still mirror typical Pure Theory of Law thinking.<sup>31</sup>

### III. *The “Setting” for Peace through Law*

The idea to bring lasting peace to the world by means of law was not new when Kelsen published “Peace through Law”. Already Kant had claimed in “Zum ewigen Frieden” that international peace could be achieved by the formation of a confederation of free states based on international treaty and international law (as a legal system) and adhering to the basic rule of *pacta sunt servanda*. Kant draws an analogy from how a peaceful legal society is formed to how peace among states can be achieved. In Kant’s view, states as relative sovereign entities have to regulate their relations to each other by binding laws, just as the citizens of a state must; otherwise, they live in a state of nature where anarchy prevails and, to speak in Hobbesian terms, a condition of war of everyone against everyone results.<sup>32</sup> Certainly the foundation and details differ between Kant and Kelsen, but the similarities in method and thought are visible. Kelsen borrows from Kant both the idea of perpetual peace and the idea of a (federal) world state. His belief that in order to prevent the use of force among states it is necessary to centralise the international legal system, particularly its sanctioning organs, and his aim to set up a federal world state, fit well into the tradition of classical and Christian cosmopolitanism, as reworked in Enlightenment terms by Wolff and Kant.<sup>33</sup>

The Peace Conferences in The Hague in 1899 and 1907, which resulted from the pacifist

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<sup>27</sup> G. Niemeyer, Review, Harvard Law Review, Vol. 58, No. 2 (Dec. 1944), pp. 306 et seq.

<sup>28</sup> H. Kelsen, supra note 18, p. 27.

<sup>29</sup> Ibid, pp. 29 et seq.

<sup>30</sup> Ibid, p. 66.

<sup>31</sup> M. A. Gordon, Review, Columbia Law Rev., Vol. 45, No. 4 (Jul. 1945), pp. 667 et seq.; G. Niemeyer, supra note 27, p. 305.

<sup>32</sup> O. Höffe, Völkerbund oder Weltrepublik, in: o. Höffe (Hg), I. Kant - Zum ewigen Frieden, Berlin 2004, p. 109, p. 114.

<sup>33</sup> D. Zolo, Hans Kelsen: International Peace Through International Law, EJIL (1998) No. 9, p. 306, pp. 317 et seq.

movement of the nineteenth century building on Kant and the ideas of the Age of Enlightenment, had strived — with little success - to develop an international legal regime and to establish mandatory international arbitration for all international conflicts. This concept was, as we have seen above, picked up by Kelsen in the context of his proposal for a Permanent League.<sup>34</sup> Woodrow Wilson's Fourteen Points Plan and the Paris Peace Treaties, which included the covenant of the League of Nations, can also be seen as following this Kantian tradition.<sup>35</sup>

Although Kelsen published "Peace through Law" and the major part of his writings on international peace and security during the 1940s, it must be stressed that his interest and dedication to these issues did not solely stem from the experience of the Second World War. As mentioned earlier in this article, Kelsen had already, in his writings on international law in the 1920s, laid the foundation for his theories in "Peace through Law" and had published several papers on collective security during the mid 1930s.<sup>36</sup> This is not surprising. That Kelsen devoted a great deal of his work to international law and peace fit well with the legal scientific tendencies of the interwar years. The unprecedented scale and cruelty of the First World War had spurred the development of ideas to end armed conflict and the public mood could generally be described as "never again". Especially in Britain and France, but also in the United States, large pacifist movements had formed.<sup>37</sup> It was not only Kelsen, therefore, who saw the means to achieve peace in law, namely international law.<sup>38</sup> The creation of the League of Nations, the Permanent Court of International Justice, the treaties of Locarno and the Kellogg-Briand Pact, which, in Kantian tradition, outlawed all war, can be seen as the pinnacle of this movement that focused on measures of collective security to replace the Congress System and the secret diplomacy policies of the pre war era. "Arbitration, Security and Disarmament", all founded on international treaties, were the policies pursued in order to secure peace in the years between the two great wars.<sup>39</sup>

However, the League of Nations was ultimately a failure and Kelsen, from an early time onwards, sought to address and remedy its shortcomings, the Permanent League of "Peace through Law" being the end result of his efforts. While the League of Nations had, for a while at least, been a token of hope for lasting peace for many, the real-world value of the Kellogg-Briand Pact was already doubted by most of its contemporaries. The Kellogg-Briand Pact was generally interpreted as outlawing recourse to war for the solution of international controversies and only allowed self defence and military action in case of a military violation of the Covenant of the League of Nations.<sup>40</sup> Kelsen vehemently turned against this interpretation, by advocating, as mentioned above, that war has to be seen not just as a delict but also as a

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<sup>34</sup> J. v. Bernstorff, *Der Glaube an das universelle Recht, Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* Baden-Baden 2001, p. 171.

<sup>35</sup> E. Goldstein, *The First World War peace settlements, 1919-1925*, Harlow 2002, p. 34.

<sup>36</sup> see for example: H. Kelsen, *supra* note 9, p. 240.

<sup>37</sup> R. J. Overy, *The inter-war crisis 1919-1939*, 2nd ed. Harlow 2007, pp. 85 et seq.

<sup>38</sup> see for example B. Riehle, *Eine neue Ordnung der Welt. Föderative Friedentheorien im deutschsprachigen Raum zwischen 1892 und 1932*, Göttingen 2009, who gives a comprehensive overview on the existing theories in Germany and Austria between 1892 and 1932.

<sup>39</sup> E. Goldstein, *supra* note 35, pp. 34 et seq.

<sup>40</sup> Although the Kellogg-Briand Pact was ineffective in its aim to prevent future wars it served as an important legal basis for the trial of crimes against peace, namely at the Nuremberg and Tokyo trials. S. Hobe/O. Kimminich, *Einführung in das Völkerrecht*, 9th ed., Tübingen 2008, p. 49.

sanction against delicts, and is thus an instrument and a sanction of international law. He points out that there are many possibilities of violating international law without resorting to war; therefore eliminating war, the only effective sanction in international law, without replacing it with another kind of sanction is counterproductive to the protection of peace.<sup>41</sup> Although influenced by Kantian peace theories in other aspects of his work, here Kelsen rejects Kant's refusal of the *bellum justum* principle and argues instead for an interpretation of the Kellogg-Briand pact in accordance with the *bellum justum* principle as only forbidding war as an instrument of *national* policy but not *international* policy or *international* law.<sup>42</sup> Consequently, as noted previously, Kelsen included these views on the role of war as a means of sanction as an important aspect in his theories on peace through law.

"Peace through Law" was published shortly after the Dumbarton Oaks Conference, where the basic structure of the future United Nations had been laid out. Although "Peace through Law" by its content could therefore be read as a criticism of the Dumbarton Oaks papers, it was not written for that purpose. Kelsen had already, in 1940 and 1941, developed major features of his theory when he delivered the Oliver Wendell Holmes lectures on Law and Peace in International Relations at Harvard University.<sup>43</sup> That there were official plans to establish some kind of world organisation to replace the failed League of Nations had been known since the Atlantic Charter was published in 1941, and certainly since the Moscow Declaration of 1943. Consequently, the question of how the international order should be organised to prevent future wars had been a topic of wide academic discussion since the early 1940s, resulting in several conferences and a great number of publications all addressing this problem. "Peace through Law" must be seen in this context.<sup>44</sup>

#### IV. *Critique by Contemporaries*

Since the future international legal order and a potential world organisation were the topic of the hour at the time when "Peace through Law" was published, it was only natural that the contribution of a leading scholar of international law should be received with great interest by the academic world. "Peace through Law" was consequently reviewed and discussed in a large number of American academic journals, among them the Harvard Law Review<sup>45</sup>, the Columbia Law Review<sup>46</sup>, the Yale Law Journal<sup>47</sup> and the American Journal of International Law, which even featured two discussions of Kelsen's "Peace through Law" in short succession<sup>48</sup>. The

<sup>41</sup> H. Kelsen, Quincy Wright's A Study of War and the Bellum Justum Theory, *Ethics*, Vol. 53, No 3 (Apr. 1943), p. 208, p. 210.

<sup>42</sup> *Ibid.*, p. 211.

<sup>43</sup> Published in 1942 as: H. Kelsen, Law and Peace in International Relations, The Oliver Wendell Holmes Lectures, 1940-41, Cambridge 1942.

<sup>44</sup> E.g. the Carnegie Endowment for International Peace Conference on the International Law of the Future held in Atlantic City on Feb. 28th 1942 and its follow-up conferences the results of which were published in: *The International Law of the Future; Postulates, Principles, and Proposals*. American Journal of International Law and International Conciliation April 1944.

<sup>45</sup> G. Niemeyer, *supra* note 27, pp. 304 et seq.

<sup>46</sup> M. A. Gordon, *supra* note 31, pp. 667 et seq.

<sup>47</sup> G. Gilmore, The International Court of Justice, *The Yale Law Journal*, Vol. 55, No. 5 (Aug. 1946), pp. 1049 et seq.



scholarly opinions and reviews of Kelsen's "Peace through Law" vary greatly, however, in volume as well as in quality.

Among the numerous contemporary reviews of "Peace through Law" there are some that deal with Kelsen's publication only "in passing", devoting merely a few lines or a page to summarising its content without offering much discussion of the theories contained therein. The authors restrict themselves either to remarking that the book is a "piece of forward thinking"<sup>49</sup> or "commending Dr. Kelsen's views to all students of international affairs"<sup>50</sup>, while generally doubting its practicability. One review is even quite hostile, calling the book more or less a waste of paper and the proposed ideas irrelevant and dangerous.<sup>51</sup> Only one author is apparently in favour of the idea of a world court with compulsory adjudication on all disputes and a federal world state, but the same author nonetheless rejects the proposed plan for a Permanent League in favour of a world federation modelled after the United States.<sup>52</sup> None of these reviews make any serious effort to discuss Kelsen's ideas in an objective manner.

There are, however, also numerous other reviews which deal with Kelsen's proposal for a Permanent League and compulsory adjudication in detail, often offering praise for Kelsen as a legal scientist and the logical and theoretical approach of his argumentation and certain elements of his theory, but criticising many of the core elements of "Peace through Law". It should be noted here that among these last mentioned reviews, three - including the two most thorough and interesting ones<sup>53</sup> - were written by scholars of international law and politics who had come to the United States during the 1930s from Germany and Austria. Josef L. Kunz, whose review dated December 1944 and was the earliest and longest among those collected for this paper, had studied in Vienna and was a former student of Kelsen's.<sup>54</sup> Gerhart Niemeyer was a German-born conservative professor of political theory who had studied in Kiel and had later been a pupil of Hermann Heller,<sup>55</sup> and Hans Morgenthau had studied international law in Germany and had to leave Nazi Germany because he was Jewish. He had met Kelsen while working with him at the Graduate Institute of International Studies in Geneva in 1932.<sup>56</sup> It can be assumed that all three authors were well familiar with Kelsen's work before they came to the United States, which might have contributed to the quality of their evaluation of Kelsen's newest book. Among the American authors who discussed "Peace through Law" in detail were

<sup>48</sup> J. L. Kunz, *Compulsory International Adjudication and Maintenance of Peace*, *The American Journal of Int. Law*, Vol. 38, No. 4 (Oct. 1944), pp. 673 et seq.; P. B. Potter, *Review*, *The American Journal of Int. Law*, Vol. 39, No. 1 (Jan 1945), pp. 136 et seq.; other reviews were: R. Yoder, *Review*, *American Sociological Review*, Vol. 10, No. 6 (Dec. 1945), pp. 809 et seq.; F. L. Schuman, *Review*, *The American Political Science Review*, Vol. 39, No. 1 (Feb. 1945), pp. 169 et seq.; J. W. Ryan, *Review*, *Political Science Quarterly*, Vol. 60, No. 2 (Jun. 1945), pp. 296 et seq.; H. Morgenthau, *The Machiavellian Utopia, Ethics*, Vol. 55, No. 2 (Jan. 1945), pp. 145 et seq.; M. W. Graham, *Review*, *California Law Rev.*, Vol. 33, No. 2 (Jun. 1945), pp. 338 et seq.

<sup>49</sup> N. Bentwich, *Review*, *Int. Affairs*, Vol. 21, No 4 (Oct. 1945), p. 533 (which is however not an American Journal).

<sup>50</sup> F. R. Yoder, *supra* note 48, p. 810 who strangely calls Kelsen an "Austrian legal sociologist".

<sup>51</sup> F. L. Schuman, *supra* note 48, pp. 169 et seq.

<sup>52</sup> J. W. Ryan, *supra* note 48, pp. 296 et seq.

<sup>53</sup> these being: J. L. Kunz, *supra* note 48, pp. 673 et seq.; G. Niemeyer, *supra* note 27, pp. 304 et seq.; the third being: H. Morgenthau, *supra* note 48, pp. 145 et seq.

<sup>54</sup> A. Korb, *Kelsens Kritiker*, Tübingen 2010, at note 227.

<sup>55</sup> <http://www.phillysoc.org/gerhart.htm> (31.12.2010).

<sup>56</sup> see Ch. Frei, Hans. J. Morgenthau. *An Intellectual Biography*, Louisiana State Univ. 2001, here in particular pp. 48 et seq.

several professors of political science and law, notably Grant Gilmore, a law professor at Yale University, Malbone W. Graham from the University of California in Los Angeles, and Pitman B. Potter from the American University. The latter had spent some time at the Graduate Institute of International Studies in Geneva during the 1930s and had published an article during his stay there on "Progress in International Organisation."<sup>57</sup> Although not naming Kelsen, there are strong indicators that Potter, who calls Kelsen "his friend",<sup>58</sup> might have discussed the role of compulsory adjudication in international relations with him at a meeting in winter 1932-33.<sup>59</sup>

Several of the more thorough reviews were therefore written by scholars who were well acquainted with both Kelsen the man and his work, and either came from a civil law background or had at least spent considerable time working in a civil law environment. It seems therefore unlikely that Kelsen's way of argumentation and the theoretical structure of his work were too alien to be accepted by them. Several authors do, in fact, agree with Kelsen at least partially. In particular, the idea of compulsory jurisdiction is in theory seen as desirable and important for the advancement of the international community<sup>60</sup>, although the realistic scope of such jurisdiction is debated. Gilmore, for example, sees it as not only realistic but also highly valuable in the field of trade relations.<sup>61</sup> The outline of the court, especially the provisions concerning the impartiality of the judges, finds high praise, as does Kelsen's line of argumentation in general. Some even express hope that the Permanent League may influence the United Nations Charter.<sup>62</sup> Kunz and Potter, especially, agree with Kelsen that the centralisation of the international judiciary is highly important to the evolution of international law and agree that international law backed by force is the core instrument through which to maintain peace; however, they differ with Kelsen as to its being the exclusive instrument by which this may be done.<sup>63</sup> However, although many reviewers thus find Kelsen's theoretical outline convincing, even ingenious, and agree with him in many aspects, almost all reject at least some of the fundamental parts of his theory.

One, possibly even the major, point of criticism of Kelsen's reasoning in most reviews is the proposition that all disputes are legal ones and that international law covers all aspects of international relations.<sup>64</sup> It is argued that there clearly exist disputes that are objectively non-legal in character, since the relations or questions involved are not regulated by positive law because of the fragmentary character of the international institutions and that this cannot be overcome by Kelsen's simple argument that what is not forbidden by international law must therefore be allowed. It is stated that the mere fact that something is not forbidden can actually only mean that much, i.e. that it is not forbidden; it cannot automatically be concluded from the

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<sup>57</sup> P. B. Potter, *Progress in International Cooperation*, *Political Science Quarterly*, Vol. 50, No. 3 (Sept. 1935), pp. 377 et seq.

<sup>58</sup> *Idem*, supra note 48, p. 137.

<sup>59</sup> *Idem*, supra note 57, at note 43.

<sup>60</sup> J. L. Kunz, supra note 48, p. 678; M. W. Graham, supra note 48, pp. 339 et seq.; G. Gilmore, supra note 47, p. 1064; P. B. Potter, supra note 48, p. 137.

<sup>61</sup> G. Gilmore, supra note 47, p. 1066.

<sup>62</sup> M. W. Graham, supra note 48, p. 339.

<sup>63</sup> J. L. Kunz, supra note 48, p. 678; P. B. Potter, supra note 48, pp. 137 et seq.

<sup>64</sup> J. L. Kunz, supra note 48, pp. 673 et seq.; H. Morgenthau, supra note 48, pp. 145 et seq.; G. Niemeyer, supra note 27, pp. 304 et seq.; P. B. Potter, supra note 48, pp. 136 et seq.; to some part also M. W. Graham, supra note 48, pp. 338 et seq.

lack of a norm in a certain matter that something is allowed. This would presuppose that a legal order contains a rule for every eventuality, which it certainly never can. Kelsen's argument that what is legally not forbidden must be allowed, is not only seen as too simplistic, but also too formal, by neglecting any question of whether a nation's international policy is morally right or wrong.<sup>65</sup> Kunz, Niemeyer and Morgenthau in particular point out that although it might actually be possible to decide all disputes under present-day international law, this is no guarantee of peace. If the applied law is considered unjust by the states concerned, the dispute may be decided by the court, but it won't be settled, thus still constituting a threat to international peace.<sup>66</sup> This essentially goes against a key characteristic of the Pure Theory of Law, the omission of moral judgements from the decision on the validity of a norm.<sup>67</sup> This point of critique is closely connected to another main objection to Kelsen's theory that peace may be attained by the establishment of a Permanent League with an international court of justice with universal and mandatory competency at its core. While, as noted previously, there is much agreement that Kelsen's scheme, especially the outline and organisation of the international court, is commendable in theory, it is also more or less universally agreed that it is utopian, and thus a theoretical exercise that neglects the power mechanisms and interactions of the real world as well as the psychological and sociological aspects of international relations. At the core of this critique lies the argument that in fact, contrary to Kelsen's argumentation, the perception of the development of national and international legal communities as analogous, and the consequent reliance on similar strategies to obtain national and international peace, is wrong, and while in state law the Pure Theory of Law may be applicable it is not in international law. While compulsory centralised jurisdiction can override the interests of individuals to establish legal order, group interests, either among nations or within nations, cannot be managed in this way, because they lack a common value basis.<sup>68</sup> Kelsen's theory fails to deal with conflicts between religious denominations, classes and interests that may arise between different regions within the same nation, which pose a threat to international peace in much the same way as political and economical conflicts between nations do. It is argued that these conflicts, which are to a large extent motivated by moral and value decisions, cannot be solved by a law that does not offer an answer to the question of right or wrong by positive statement, based upon precedent, proven experience and collective conviction.<sup>69</sup> Thus this type of conflict can only be solved by settling these differences through the creation of mutual confidence and loyalty to a more general interest common to both sides of a conflict. Judges in an international court who come from different legal cultures and might not share a common conviction of righteousness with each other, nor with the parties involved in a conflict, will find it hard to come to decisions that are acceptable to all. At the core of this argument lies the notion that Kelsen's idea of a world court cannot be realized so long as common principles of

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<sup>65</sup> *Idem*, supra note 48, pp. 338 et seq.; P. B. Potter, supra note 48, pp. 136 et seq.; G. Niemeyer, supra note 27, pp. 304 et seq.

<sup>66</sup> J. L. Kunz, supra note 48, pp. 675 et seq.; H. Morgenthau, supra note 48, p. 146; G. Niemeyer, supra note 27, p. 306.

<sup>67</sup> H. Kelsen, supra note 14, pp. 12 et seq.

<sup>68</sup> G. Niemeyer, supra note 27, pp. 306 et seq.; J. L. Kunz, supra note 48, pp. 676 et seq.; G. Gilmore, supra note 47, pp. 1062 et seq.

<sup>69</sup> G. Gilbert, supra note 48, p. 1062; J. L. Kunz, supra note 48, pp. 676 et seq.; H. Morgenthau, supra note 48, pp. 146 et seq.; G. Niemeyer, supra note 27, pp. 305 et seq.

public international morality have not evolved.<sup>70</sup> Kunz, Niemeyer, Morgenthau and Gilmore all point out that even if Kelsen's analogy between the international community and nation states is correct, Kelsen overlooks an essential factor of peace maintenance within the state: that of extrajudicial or political settlement of conflicts, for example in the field of labour law. Without these social and political mechanisms civil unrest might still very well arise and, depending on the gravity of the dispute and the power of the groups involved, law that is perceived as unjust might be overthrown by revolution, thus creating new law.<sup>71</sup>

While "Peace through Law" was received in its time with great interest, its reception was, as we have seen, mixed. While the theoretical and argumentative achievement of "Peace through Law" was usually praised, most authors did not share Kelsen's views on crucial parts of his theory, thus giving the impression of a rather negative reception. Although the arguments advanced against Kelsen's Permanent League can certainly be seen as rooted in American legal realism, it would be too easy to claim that the failed acceptance of "Peace through Law" was due only to an incompatibility of legal schools. After all, in "Peace through Law" Kelsen wrote not so much a theoretical treatise as a political work, in the hope of taking a stand against certain trends current in international politics at the time. It is therefore only natural that Kelsen's proposal was assessed by his contemporaries on the basis of its real-life feasibility. While coming from mixed academic and national backgrounds, most reviewers were in unison in finding that Kelsen's analogy between conflict settlement in nation states and conflict settlement in the international sphere, as well as his assumption that all conflicts can be settled by international law, were unconvincing and partly missed the point, and it would seem undeniable that there was some truth in these criticisms.

However, in spite of the fact that Kelsen's Permanent League did not find the acclaim he had hoped for, the idea of peace through law has never really been forgotten. During the late 1950s conferences and publications took up the concept<sup>72</sup> and, especially in recent years, Kelsen's ideas have received renewed attention.<sup>73</sup>

## V. *Conclusion — Kelsen Today*

While Kelsen himself never explicitly dealt with the question of European integration, the implementation of the European Convention on Human Rights and the establishment of the European Court of Human Rights, as well as the ongoing development of the European Union and the Court of Justice of the European Union have all been interpreted as evidence that Kelsen's ideas, which had seemed utopian in 1945, have now been actually realised on a

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<sup>70</sup> G. Niemeyer, *supra* note 27, p. 306; H. Morgenthau, *supra* note 48, p. 147.

<sup>71</sup> J. L. Kunz, *supra* note 48, p. 677; H. Morgenthau, *supra* note 48, p. 146; G. Niemeyer, *supra* note 27, p. 306; G. Gilmore, *supra* note 47, p. 1062.

<sup>72</sup> G. Clark/L. B. Sohn, *World Peace through World Law. Two Alternative Plans*, Cambridge Mass 1958, which was followed by two more editions in 1960 and 1966; Ch. S. Rhyne, *World Peace Through Law Conferences*, *The American Journal of Int. Law* Vol. 56, No. 4 (Oct. 1962), pp. 1001 et seq.

<sup>73</sup> J. v. Bernstorff, *supra* note 34 (here mainly Chapter 6); K. Zeleny, *Das Recht als Instrument der Friedenssicherung*, in: Walter/ K. Zeleny (eds.), *Reflexionen über Demokratie und Recht*, Wien 2009. pp. 67 et seq.; D. Zolo, *supra* note 33, pp. 306 et seq.; Ch. Leben, *supra* note 16, pp. 287 et seq.; C. Landauer, *Antinomies of the United Nations*. Hans Kelsen and Alf Ross on the Charter, *EJIL* (2003) Vol. 14, No. 4, pp. 767 et seq.

regional level.<sup>74</sup> This is seen as proof that the road Kelsen proposes might also lead to world peace eventually. The creation of the International Criminal Court, and tendencies in the United Nations Security Council after 9/11 to act as a world legislator (e.g. Resolution 1373, which established the Counter-Terrorism Committee, and Resolution 1540, which established binding obligations on member states to take and enforce effective measures against the proliferation of weapons of mass destruction) could be interpreted in this light.

It is true that in the case of the European Union national power politics are being checked in many fields (although not in all) by putting them under the control of a centralised international court — the Court of Justice of the European Union. However, common foreign and security policy as well as matters of cooperation in the field of justice and home affairs are to a large part not subject to the control of the Court of Justice although the Treaty of Lisbon has extended the Courts jurisdiction in these matters to some degree. Still, by now the European Union has as an entity reached a high level of legal consolidation and although it is not yet as centralised as a federation it has undoubtedly become more than a League of Nations. However, this does not prove that compulsory international jurisdiction can ensure peace, since in the case of the European countries, there is, in spite of many conflicts in the past, a common history and value basis. Moreover, the population of Europe is, in terms of its wealth, education and cultural background, in many aspects homogeneous compared to other parts of the world. And even within the European Union centralisation can differ in its scope, as is the case with the monetary union.

While the International Criminal Court might partly fit with Kelsen's vision of individual responsibility under international law, this does not necessarily mean that we are truly on the way to "Peace through Law". Kelsen's theory has peace among states in mind, but today it is not necessarily war between states that threatens international peace, but rather cultural clashes, religious fanaticism, international terrorism, civil wars and economic crisis. Moreover, the objections advanced by Kelsen's contemporaries against the feasibility of Kelsen's ideas in a world society made up of numerous countries of different kinds of governments, religious beliefs, moral values and ethnical identities remain valid in my view; such problems can be seen constantly in practice, and will not be overcome in the near future. In addition to this, it seems that the argument made by Kunz, Niemeyer, Gilbert and Morgenthau on the role of extrajudicial measures in civil societies still holds; peace cannot be kept only by law and force. Judicial decisions have to be accepted freely, since force alone cannot uphold the law forever if the law is not perceived as just by its addressees. Therefore, it may be preferable to see Kelsen's theories of legalisation not as an engineering project for attaining peace through the actual establishment of an international court with compulsory universal jurisdiction, but rather, as Zeleny suggested, as a plea to replace affect with rationality and objectivity, thus to further peaceful tolerance in the community of men.<sup>75</sup>

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<sup>74</sup> Ch. Leben, *supra* note 16, p. 924.

<sup>75</sup> K. Zeleny, *supra* note 73, p. 75.