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ORIGINAL ARTICLE

How Kantian is Kelsen's Early Theory of International Law?

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Abstract

In this article, the author examines the influence of Immanuel Kant's philosophical ideas on Hans Kelsen's early theory of international law. He situates Kelsen's work within the post-World War I context, where Kant's vision of perpetual peace significantly impacted the creation of international organizations. The article delves into Kelsen's seminal work "Das Problem der Souveränität und die Theorie des Völkerrechts," exploring how Kelsen's pure theory of law parallels and diverges from Kant's concepts. While Kelsen's ideas were shaped by Kantian philosophy, particularly in promoting a lawful international order, Kelsen transcended Kant by developing a more rigorous, epistemologically grounded legal theory. The author argues that Kelsen's adaptation of Kantian principles reflects both a continuation and transformation of Kant's vision, tailored to the political and cultural challenges of early 20th-century Europe.

Keywords: Kelsen; Kant; mass democracy; sovereignty; international law; perpetual peace; civitas maxima

It was the Autumn of 1918, Wilhelm Solf, Weimar's foreign minister, was writing to Woodrow Wilson about the League of Nations. To support his arguments, he "invoked Kant's *Perpetual Peace* to convey … that the new German League enthusiasm built on a long tradition."[1]

This is not merely an anecdote from the annals of diplomatic history. Rather, Solf's invocation of Kant reflects an attitude deeply rooted in the European climate following the Great War. At a time of "cultural despair … [when] a

[1] Patrick O. Cohrs, *The New Atlantic Order: The Transformation of International Politics, 1860–1933* (Cambridge: Cambridge University Press, 2022), 260.

profound 'crisis of culture' was at hand,"[2] when one looked with horror at the "cataclysm that separated what afterward looked like an age of innocence from the wasteland,"[3] when there was a widespread conviction that "the rosy blush of … the Enlightenment [is] irretrievably fading,"[4] Solf instead turned toward that very blush for inspiration. Thus, as Stefan Zweig called this period two decades later, while "our generation felt that a revolution or at least a change in values was in preparation,"[5] Solf drew a different conclusion: what was needed was not revolution, but a return to the ideals articulated over a century earlier. It was in the post-war context that the promise of "the imminent possibility of a secular golden age"[6] contained in those ideas could be realized.

Solf was not the sole figure within the European discourse of the period—understood here to encompass politicians, intellectuals, and activists—who sought to distance himself from the prevailing pessimism by invoking the ideas of Kant. On the contrary, *Perpetual Peace* "experienced a great renaissance [already] during World War I."[7] At the time of the European hecatomb, Kant's work, as the one that "probably came closest to crafting a comprehensive philosophy of peace,"[8] inspired peace movements and intellectuals, who reflected in advance on the shape of the post-war world, advocated for the creation of either an international organization, an equivalent to an American-style federation, or a pan-European state on the continent.[9] A different but complementary vision emerged, advocating for the establishment of an international organization with global reach. This envisioned supranational authority would "comprise an international high court, an international parliament with proportional representatives from all European states and the U.S., which every other independent sovereign State in the world should be pressed to join."[10] These efforts, whether formalized political postulates or discursive ideas, assigned a crucial role to international law. As David Cortright writes, "just as the development of law helped to create order and reduce violence within domestic societies, it was hoped that the emergence of

[2] Fritz Stern, *The Politics of Cultural Despair: A Study in the Rise of the Germanic Ideology* (Berkeley: University of California Press, 1974), xi.

[3] Jeffrey C. Alexander, *The Dark Side of Modernity* (Cambridge: Polity Press, 2013), 17.

[4] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (New York: Scribner and Sons, 1958), 182.

[5] Stefan Zweig, *The World of Yesterday*, trans. Anthea Bell (Lincoln: University of Nebraska Press, 2009), 65–80.

[6] Jeffrey C. Alexander, "Between Progress and Apocalypse: Social Theory and the Dream of Reason in the Twentieth Century," in *Rethinking Progress: Movements, Forces, and Ideas at the End of the Twentieth Century*, ed. Jeffrey C. Alexander and Piotr Sztompka (Boston: Hyman, 1990), 15.

[7] Hans Brunkhorst, "Critique of Dualism: Hans Kelsen and the Twentieth Century Revolution in International Law," *Constellations* 18 (2011): 504.

[8] David Cortright, *Peace: A History of Movements and Ideas* (Cambridge: Cambridge University Press, 2008), 2.

[9] See: Dina Gusejnova, "Noble Continent? German-Speaking Nobles as Theorists of European Identity in the Interwar Period," in *Europe in Crisis: Intellectuals and the European Idea, 1917–1957*, ed. Mark Hewitson and Matthew D'Auria (New York: Berghahn Books, 2012), 111–135.

[10] Cohrs, *The New Atlantic Order*, 231.

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international law would tame the anarchy of political relations among nations."[11]

The hopes that actors of European discourse placed in international law at that time seem obvious on the one hand, but may be surprising on the other. As Martti Koskenniemi aptly notes, "international law has always been the most open to moral or philosophical reflection,"[12] making it particularly susceptible to the influence of ideas such as those articulated in Kant's work. From its inception, international law and its scholarly traditions have been profoundly shaped by philosophical currents, representing the only conceivable domain for normative reflection on peace to be effectively implemented in practice.[13] This statement does not exclude the other: that, despite its theoretical potential, international law exerted relatively little influence on the actual legal and political spheres of the time and, furthermore, inspired limited confidence in the capacity of international lawyers to bring about meaningful change. The first European Society for International Law was not founded until 1873; at the beginning of the twentieth century, most German universities did not have chairs in international law, and the first German-language journal on the subject did not appear until 1906.[14] Despite the optimism embedded in such philosophical sources of international law as Kant's thought, the nascent discipline was overshadowed by skepticism: most of the jurists who attended the Hague Peace Conference in 1899 believed that nations were too different to have non-hostile relations. "The formative first decades of the long twentieth century - and particularly the phase between the 1880s and 1914 - were overall a period of regression."[15] There were exceptions, such as the thought of Georg Jellinek, who argued in the 1880s that international law had a practical validity and was similar in its construction to other areas of public law.[16] One must also mention Robert Piloty, who argued that the transition from an absolutist to a republican system had led states to consider themselves bound by law not only within their own borders, as well as Josef Kohler—who attacked the belief in the inevitability of war—and Walther Schücking, who, following the Hague Conference, argued that its mere occurrence had established a *Weltstaatenbund.*[17]

It was Jellinek who, in 1892, stated that the contemporary controversies in legal scholarship concerning international law were due to the fact that there

[11] Cortright, *Peace*, 45.

[12] Martti Koskenniemi, "International Law in the World of Ideas," in *The Cambridge Companion to International Law*, ed. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 47.

[13] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2004), 113.

[14] Koskenniemi, *The Gentle Civilizer of Nations*, 209–214.

[15] Cohrs, *The New Atlantic Order*, 43, 71.

[16] See: Paul Honigsheim, "Georg Jellinek und die Internationale Staatengemeinschaft," *Die Friedens-Warte* 51 (1953): 65–72.

[17] See: Roger Chickering, *Imperial Germany and a World Without War: The Peace Movement and German Society, 1892–1914* (Princeton: Princeton University Press, 2016), 302, 431.

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was no Kant in juridical sciences.[18] Although he was addressing the need for a critique of legal judgment as foundational and transformative as the Copernican revolution, rather than the introduction of the concept of perpetual peace into legal science with the same force that Kant brought it to political philosophy, in the case of the protagonist of this essay, Hans Kelsen, these two themes are deeply interconnected. The intertwining is reinforced by the fact that Kelsen's seminal work for his vision of international law and peace after the Great War, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre*, although written during the war, was published in the early 1920s, therefore, at a time when "the jurist was king. University professors wielded extraordinary influence and experts … put their theories into practice"[19] or supported already existing institutions such as the League of Nations with their theories. Kelsen exemplifies this "kingship" of a lawyer and scholar particularly well. As Scott Shapiro and Oona Hathaway observe, his academic activity was driven by the belief "that giving lectures on international law at a university would counteract the irrational forces of militant nationalism."[20] Viewing the world in which he lived as being at a pivotal moment of civilizational progress, Kelsen sought to contribute to the latter through his theoretical work: the project of *civitas maxima* of the international law.[21]

Although this Latin term originates not from Kant but Christian Wolff, three key factors necessitate examining Kelsen's theory of international law from the early 1920s within the framework of Kant's *Perpetual Peace*—as well as employing for this purpose several methodologies, which I outline hereafter. The first is the influential nature of Kant's concept, which Wolff did not enjoy. As Andreas Blank writes, while "Kant's political thought has turned out to be a major source of inspiration for late twentieth- and early twenty-first-century forms of cosmopolitanism, nothing comparable can be said of Wolff's concept."[22] Second: the Kantian dimension of a pure theory of law in general, as based on the separation of being and ought. If "in *Kritik der reinen Vernunft* Immanuel Kant uses the concept of *Kategorien* as conditions of the possibility of all cognition … It is easy to see how Kelsen adapted this for the *Grundnorm* and how it is merely the expression of the Ought."[23] Stanley Paulson labels the classical phase of Kelsen's thought as neo-Kantian, while Martti Koskenniemi states that "Kelsen's epistemological-scientific outlook and his transcendental

[18] See: Natasha Wheatley, *The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty* (Princeton: Princeton University Press, 2023), 154.

[19] Mark Mazower, *Dark Continent: Europe's Twentieth Century* (New York: Alfred A. Knopf, 1999), 7.

[20] Scott J. Shapiro and Oona A. Hathaway, *The Internationalists: And Their Plan to Outlaw War* (New York: Allen Lane, 2017), 245.

[21] Hans Kelsen, *Das Problem der Souveränität* (Tübingen: Verlag von J. C. B. Mohr, 1928), 319.

[22] Andreas Blank, "The Presumption of Goodness and the Controversy over Christian Wolff's Cosmopolitanism," in *Debates, Controversies, and Prizes: Philosophy in the German Enlightenment*, ed. Thierry Prunnea-Bretonnet and Christian Leduc (London: Bloomsbury Academic, 2024), 11.

[23] Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (London: Routledge, 2011), 251.

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deduction of the basic norm were firmly embedded in his philosophical neo-Kantianism."[24]

To analyze the connections between Kelsen's and Kant's thought and address the question of what the prefix "neo" signifies within the context of Kelsen's theory of international law, in this essay, I adopt an approach that can be characterized as both contextual and socio-legal. This approach emphasizes the migration of ideas and engages with a form of intellectual legal history that, as Valentina Vadi writes, "focus[es] on the genealogy or evolution of concepts and investigating the past, the present, and the future of given ideas."[25] Within this framework, the history of international law is understood as "the history of doctrines (or of the science of international law."[26] Given that Kelsen and Kant—this is my initial assumption—belong to the same doctrinal tradition, I further draw on the methodological framework advanced by Quentin Skinner, situating their works as epitomes of this doctrine within their specific political and historical contexts. This entails treating their works not only as products of their respective circumstances but also as deliberate interventions within them. Following Skinner's assertion that "the classic texts, especially in social, ethical, and political thought, help to reveal—if we let them—not the essential sameness, but rather the essential variety of viable moral assumptions and political commitment,"[27] my essay seeks to explore how such assumptions and commitments evolved in Kelsen's reinterpretation of Kant. Specifically, it examines how Kelsen's engagement with Kant was shaped and transformed by the shifting political and legal contexts of his time.

Beside these two methodologies, my essays also employ the biographical one. This choice is justified by the observation, that while Kelsen did not explicitly opt for *civitas maxima* in the pure theory of law and conceptualized the latter without articulating his specific political position—arguing for its deliberate exclusion from its framework; as Lars Vinx writes, within the pure theory of law the "normative basis … is not made explicit (and not explicitly defended by) Kelsen"[28]—his scholarly and public activities later in life (influenced, of course, by his life of the emigrant,) alongside the cosmopolitan ethos of the *milieu* in which he operated prior to and during the First World War, suggests that his theoretical contributions were informed by a particular political perspective. The latter was shaped not only by personal experiences but also by distinct character traits and a specific stance toward the prevailing *status quo*, which the biographical method would help to decipher.[29] The

[24] Koskenniemi, *The Gentle Civilizer of Nations*, 241; S. Paulson, "Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory," *Oxford Journal of Legal Studies* 19 (1999): 351–364.

[25] Valentina Vadi, "International Law and Its Histories: Methodological Risks and Opportunities," *Harvard International Law Journal* 58 (2017): 312.

[26] Ignacio de la Rasilla, *International Law and History: Modern Interfaces* (Cambridge: Cambridge University Press, 2021), 30.

[27] Quentin Skinner, "Meaning and Understanding in the History of Ideas," *History and Theory* 8 (1969): 52.

[28] Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007), 177.

[29] See: Megan Donaldson, "Legal Innovation through a Biographical Lens: Antonio Cassese and the European Tradition," *European Journal of International Law* 35 (2024): 260–261.

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biographical method has traditionally faced skepticism within legal scholarship, often dismissed on the grounds that "the narrative which is required of a good biography appears to legal scholars as merely descriptive and the interpretative analysis which underlies the narrative is overlooked … [However,] judicial biography, set within particular themes other than the purely legal, has the potential to make major contributions to the socio-legal history."[30] The elevation of Kelsen to the pantheon of great jurists of the previous century, coupled with his conviction in the creative dimension of academic activity, aligns with the theoretical foundation underscoring legal biography: the so-called great man theory.[31]

Employing these methods and focusing on the critical distinctions between Kelsen and Kant—particularly the fact that Kant, unlike Kelsen, in his reflections on international relations, is, in the words of Jürgen Habermas, "thinking … of spatially limited wars between individual states or alliances, not of world wars. … He is thinking of technically limited wars that still permit the distinction between fighting troops and the civilian population"[32]—this essay argues that Kelsen's seminal 1920 work cannot be understood as merely a reinterpretation of Kant's concept, as it had been shaped by differing historical contexts for Kant's contemporaries. After all, the pure theory of law itself, Kelsen noted in *Reine Rechtslehre*, "in an important sense went beyond Kant, who in his jurisprudence denied the transcendental method."[33] What was this going beyond in his concept of international law? Can Kelsen's polemic with Kant's epistemology and metaphysics be found in his different formulations of the political vision of perpetual peace and *civitas maxima*? Later I will argue that yes, and that the political situation in which Kelsen formulated his theory—the dying and birth of states in Europe after 1918 and the transition from bourgeois democracy to both mass democracy and parliamentary democracy—influenced the latter, conceived, in the words of Natasha Wheatley, as "Kelsen's way of taming the chaos"[34] in his contemporary Europe, making it a thinking with Kantian roots, though not fully Kantian thinking.

This essay consists of six sections. In the next, I describe Kant's theory of perpetual peace. In the third, I deal with the manifestation of Kelsen's pure theory of law in his concept of international law in *Das Problem der Souveränität*. In the fourth, I present both Kelsen's and Kant's different approaches to the problem of dualism and monism, and in the fifth, Kelsen's critique of sovereignty and praise of political parties as a response to the phenomenon of mass democracy. In the last, I conclude my reflections from the previous sections.

[30] Victoria Barnes et al., "On Legal Biography," *The Journal of Legal History* 41 (2020): 1–3.

[31] Philipp Bajon et al., "Global Legal Biography," *Comparative Legal History* 9 (2021): 137.

[32] Jürgen Habermas, "Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight," in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, ed. James Bohman (Cambridge: MIT Press, 1997), 115.

[33] Hans Kelsen, "Reine Rechtslehre. 'Labandismus' und Neukantianismus. Ein Brief in Renato Treves," in *Formalismo giuridico e realtà sociale*, ed. Hans Kelsen and Renato Treves (Napoli: Edizioni Scientifiche Italiane, 1992), 56.

[34] Wheatley, *The Life and Death of States*, 142.

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Kant's *Toward Perpetual Peace* as an Intervention

To situate Kelsen's theory within his contemporary political context, it is essential to undertake a similar historical grounding of Kant's ideas. This necessitates referencing two key events: one more distant—the autumn and winter of 1795, when Perpetual Peace was written—and another that served as its more immediate inspiration. The first is the French Revolution, which Kant interpreted "as a 'historical sign' of the inherent moral trend of the human race towards improvement."[35] The second is the signing of the peace treaties between France, Prussia, Spain, and Hesse-Kassel in Basel in summer of 1795. Addressing matters such as the regulation of the banks of the Rhine and Haiti, the treaties were not intended to be permanent: the parties agreed not to engage in hostilities for a period of three months.[36] They thus constituted "sort of strategic treaty that Kant condemns as illegitimate: it is only the suspension of hostilities, not a *peace*."[37] In this sense, the title of Kant's work, serving as a commentary on his contemporary political circumstances, carries an ironic undertone, further accentuated by the fact that Kant was not the first to use it. The credit for coining the title goes to Abbé de Saint-Pierre and his 1712 *Project of Perpetual Peace*. Nor was Kant the first to mock this title; G.W.F. Leibniz remarked that invoking *Pax Perpetua* reminded him of the inscription over cemetery gates: "for the dead do not fight any longer: but the living are of another humor; and the most powerful do not respect tribunals at all."[38] According to Patrick Riley, Kant's irony served as a cue for readers, guiding them to interpret his essay as addressing the conditions for the possibility, within Kant's contemporary international order, of the "right kind of eternal peace - not the peace of exhaustion and desperation under universal despotism, but a peace constantly renewed by citizens of a universe of republics."[39]

The mere engagement with such a subject may have surprised Kant's contemporary readers. His earlier reflections on the international sphere could have led them to categorize him as a thinker aligned with the Hobbesian tradition, which likened international relations to a state of nature. In *The Metaphysics of Morals*, Kant writes: "however well disposed and law-abiding man might be, it still lies *a priori* in the rational Idea of such a condition (one that is not rightful) that before a public lawful condition is established, individual men, peoples, and states can never be secure against violence from one another, since each has its own right to do what seems right and good."[40] For Kant, the rights that emerge in such a condition are as provisional and temporary as the

[35] Jürgen Moltmann, *The Coming of God: Christian Eschatology* (London: SCM Press, 1996), 188.

[36] See: Peter Sahlins, "Natural Frontiers Revisited: France's Boundaries since the Seventeenth Century," *The American Historical Review* 95 (1990): 1430.

[37] James Bohman and Matthias Lutz-Bachmann, "Introduction," in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, ed. James Bohman and Matthias Lutz-Bachmann (Cambridge: MIT Press, 1997), 1.

[38] GWF Leibniz, "Letter II to Grimarest," in *Political Writings*, ed. Patrick Riley (Cambridge: Cambridge University Press, 1988), 183.

[39] Patrick Riley, *Kant's Political Philosophy* (New York: Rowman & Littlefield, 1983), 122–123.

[40] Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 124.

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Basel treaties. Yet, this apparent disadvantage contains an element of optimism: the very emergence of such rights, despite their provisionality, signals what Kant interprets—similarly to Hobbes—as humanity's moral duty to transcend the state of nature and establish a lawful condition of existence. This creation entails the overcoming of the antagonisms that distinguish individuals from their fellow beings and states from one another, all in pursuit of achieving reason.[41] Kant thus appropriates Hobbes's argument for peace as a rational ideal but reorients its emphasis. While "Hobbes emphasizes peace, Kant progress."[42] For Hobbes, peace is desirable because it resolves the state of nature within the international sphere; for Kant, it signifies man's growth in his nature, "full development or actualization of a thing according to its *telos*,"[43] the full realization of human potential.

The 1795 text is, however, not necessarily a description of such a peace. As the first word in the title, *Zum*, suggests, Kant does not provide a fully developed utopian or entelechian vision of the international order. As Jürgen Habermas points out, Kant's focus is not on norms that are to occur in perpetual peace, but ones that must occur in the domestic order of already existing states in order for world peace to occur at all.[44] I do not use the word "norms" by accident: Kant's text is juristic nature, what is emphasized by the distinctive structure of the text, written in sections that echo the formal style of treaties such as those signed by France and other states in Basel. This deliberate choice of form "indicates that Kant intended to offer a programmatic formula for peace, rather than a philosophical analysis of the nature of international law and relations. Indeed, he wanted politicians to follow his advice - he specifically enjoins governments to take advice from philosophers,"[45] but this advice is, in the context of *Perpetual Peace*, legal advice on laws, which, especially the laws of hospitality "were never intended to be the final representation of what would constitute a thoroughgoing condition of cosmopolitan justice. In fact, what seems more plausible is to suggest that the laws of hospitality only represent the minimal conditions that are necessary for peaceful interaction to occur, which may eventually, with consistent application, evolve into a more thoroughgoing condition of cosmopolitan law."[46] While Kant believes in the natural development of human beings towards living in a state of harmony with others, he writes of a certain point in this development at which human entelechy has not yet occurred. Thus, he focuses only on how "human being's unlovely qualities - his love of glory, power, and possessions create the

[41] Kant, *The Metaphysics of Morals*, 152–153.

[42] Timo Airaksinen and Arto Siitonen, "Kant on Hobbes, Peace, and Obedience," *History of European Ideas* 30 (2004): 328.

[43] GE Kelly, *Idealism, Politics and History: Sources of Hegelian Thought* (Cambridge: Cambridge University Press, 1969), 122.

[44] Habermas, *Kant's Idea of Perpetual Peace*, 116.

[45] Fernando R. Tesón, "The Kantian Theory of International Law," *Columbia Law Review* 53 (1992): 37.

[46] GE Brown, *Grounding Cosmopolitanism: From Kant to the Idea of a Cosmopolitan Constitution* (Edinburgh: Edinburgh University Press, 2013), 65.

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conditions for the emergence and development of the human being's better qualities and his use of reason."[47] He does not describe the world of the future, but rather shows how competition between states can lead to "the establishment of a completely just civic society in which alone the faculties of men could be fully developed."[48]

The type of political states within which, according to Kant, such a civic society can be established is republican in nature. Kant underscores their fundamental essence, distinguishing them from democracies, where power resides collectively with all individuals; all citizens simultaneously hold both executive and legislative powers, creating a potential for instability and arbitrariness.[49] Republican governments make it possible to avoid this danger, because republicanism is "the political principle whereby the executive power (the government) is separated from the legislative power,"[50] thereby precluding the possibility of arbitrary governance. As Onora O'Neill observes, only within a republican framework can meaningful communication between subjects occur in a manner that ensures respect for authority is not maintained through fear and fosters tolerant relations among citizens, who address conflicts through the mechanisms of commerce and dialogue.[51] For Kant, the republican state is a stage in the development of forms of political organization attaining of which proves that a nation "has solved the problem of combining moral autonomy, individualism and social order. … republic preserved juridical freedom - the legal equality of citizens as subjects, on the basis of a representative government with a separation of powers. … tyranny is avoided because the individual is subject to laws he does not also administer."[52] The term "development" is particularly salient, as Kant references of "mechanism that leads states (willingly or unwillingly) towards republican institutions."[53] While all states are destined to adopt this model, some have already achieved this institutional progression.

To be truly republican, for Kant "the state must govern through established law (that which is *rechtens*), in support of that which is rightful (*rechtlich*). The basis for legally established justice is the procedure of the Universal Public Reason, which requires laws to be such that they secure equal liberty."[54] Its provision among citizens can manifest itself in a seemingly paradoxical way, for

[47] Seán Molloy, *Kant's International Relations: The Political Theology of Perpetual Peace* (Ann Arbor: University of Michigan Press, 2017), 7.

[48] FH Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge: Cambridge University Press, 1963), 74–75.

[49] BS Byrd and Joachim Hruschka, *Kant's Doctrine of Right. A Commentary* (Cambridge: Cambridge University Press 2010), 178.

[50] Immanuel Kant, "Toward Perpetual Peace," in *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, trans. David L. Colclasure (New Haven: Yale University Press, 2006), 76.

[51] Onora O'Neill, "The Public Use of Reason," *Political Theory* 14 (1986): 545–546.

[52] Michael W. Doyle, "Kant, Liberal Legacies, and Foreign Affairs, Part 1," *Philosophy and Public Affairs* 12 (1983): 225–226.

[53] Luigi Caranti, *Kant's Political Legacy: Human Rights, Peace, Progress* (Cardiff: University of Wales Press, 2017), 118.

[54] Reidar Maliks, "Kant, the State, and Revolution," *Kantian Review* 18 (2013): 36.

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"in Kant the establishment of the 'republican' form of government will come to mean not only the exclusion of the principle of resistance, but also the illegitimacy of every form of public opposition to the sovereign power."[55] The republican form of governance, therefore, assumes an educative role, fostering the moral and civic development of citizens to the extent that they no longer engage in opposition to the state. At the same time, it guarantees individual liberty, a principle that extends beyond the boundaries of the nation-state. This transnational dimension acts as a deterrent to "aggressive behavior abroad,"[56] as Kant posits that a sovereign that fails to regard its subjects as autonomous agents within its jurisdiction will replicate such disregard in its interactions with other states.

That said, we must inquire how perpetual peace might be achieved, as Kant's vision diverges from that of international society as conceived earlier by Grotius or de Vattel.[57] Given the historical context of his time, he does not entertain the feasibility of such an arrangement. He does, however, assert that "according to reason there can be no other way for them to emerge from the lawless condition, which contains only war, than for them to relinquish, just as do individual human beings, their wild (lawless) freedom, to accustom themselves to public binding laws, and to thereby form a state of peoples (*civitas gentium*), which, continually expanding, would ultimately comprise all of the peoples of the world."[58] This expansion, however, is a distant goal rather than an immediate project. For Kant's era, the practical proposal is a federation of states—one that is not an organization of political unity, as it neither seeks nor has the capacity to undermine the sovereignty of its member states: "the League would not exercise coercive powers within any national order and every state would be free to leave it."[59] The federation, being composed of republican states, obviates the need for an external sovereign authority. Instead, disputes among member states would be governed by "the international rule of law, and … the mutual advantages derived from peaceful intercourse."[60] The likelihood of inter-state conflict within such a federation is minimal, given the unifying force underpinning it: "the spirit of commerce cannot coexist with war and … sooner or later takes hold of every nation' that will bring together nations."[61]

Luigi Caranti, analyzing Kant's view of the mechanism of the development of states, notes that according to the philosopher "republican citizens internalize the rightness of their institutions and, possibly, citizens of neighbouring countries living under despotic regimes will admire republican achievements, thus exercising pressure on their own rulers to concede a republican

[55] Luigi Bocelli, "Machiavelli, the Republican Tradition, and the Rule of Law," in *The Rule of Law: History, Theory, and Criticism*, ed. Pietro Costa et al. (Utrecht: Springer, 2007), 391.

[56] Tesón, *The Kantian Theory of International Law*, 32.

[57] See: Ian Hunter, "Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry," *History of European Ideas* 39 (2013): 478.

[58] Kant, *Toward Perpetual Peace*, 81.

[59] Alec Sweet and Clare Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (Oxford: Oxford University Press, 2018), 17.

[60] Markus Burgstaller, *Theories of Compliance with International Law* (Leiden: Nijhoff, 2005), 51.

[61] Kant, *Toward Perpetual Peace*, 92.

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constitution."[62] In other words, Kant believes that the day will inevitably come when all the states of the world he would admit to a peace-ensuring federation enjoy such a constitution, not just some of them. Contrary to Jürgen Habermas's objection that Kant, in designing a permanent congress of states, does not explain how this union is to be permanent, for the philosopher permanence is designed to come to an end at some point, and the failure to explain the conditions of its duration is a tacit admission that this is its main task.[63] Was the era of Hans Kelsen, immediately after the First World War, that point in history?

Kelsen's Theory of International Law in the Early 1920s

In order to understand Kelsen's theory of international law in the early 1920s, two issues need to be addressed: socio-biographical, which points to the interventionist character of *Das Problem der Souveränität*, and a dogmatic, which allows the text to be seen not so much as an element of a broader philosophical-legal project as its crowning element—atypical, since the works in which Kelsen was to lay its foundations were written later in 1920s and 1930s.

"Philosophical writing is also autobiographical. Philosophers have pretensions of discovering abstract and timeless truths about the human condition, but they cannot help but draw on their own personal and parochial experiences"[64]—Scott Shapiro and Oona Hathaway state. In the case of Kelsen, born in 1881 and hailed in 1934 by Roscoe Pound as "unquestionably the leading jurist of the time. His disciples are devoted and full of enthusiasm in every land,"[65] those experiences and lands were the Habsburg ones as a multinational empire, where he was born a Jew, educated in a Protestant school, and baptized into the Catholic faith in the early 20th century, only to convert to Protestantism a few years later. "Kelsen was described as an extremely assimilated Jew an admirer of the old Austrian Empire, and in particular the empire's multinational ideals."[66] These ideals were particularly evident within the intellectual elites of the Habsburg Empire, where antisemitism was largely absent, and the Jewish heritage of its members, such as Kelsen himself, was regarded as "irrelevancy."[67] Jews who ascended to these elite circles, motivated by *Bildung*, often changed their religious affiliations to navigate societal spaces beyond the elite institutions, which were still tainted by antisemitic sentiments. The Habsburg Empire, however, actively sought to counter such prejudices through legislative reforms, including the Universal Suffrage Bill of 1907, which established legal equality for all ethnicities within

[62] Caranti, *Kant's Political Legacy*, 122.

[63] Habermas, *Kant's Idea of Perpetual Peace*, 117.

[64] Shapiro, Hathaway, *The Internationalists*, 219–220.

[65] Rosoce Pound, "Law and the Science of Law in Recent Theories," *Yale Law Journal* 43 (1934): 532.

[66] Eyal Lieblich, "Assimilation through Law: Hans Kelsen and the Jewish Experience," in *The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century,* ed. James Loeffler and Moria Paz (Cambridge: Cambridge University Press, 2018), 69.

[67] Steven Beller, *Vienna and the Jews, 1867–1938: A Cultural History* (Cambridge: Cambridge University Press, 1991), 76.

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the Austrian part of the Empire.[68] The intellectual and cultural *milieu* that defined Kelsen's formative years was, in the words of Stefan Zweig, "the Golden Age of Security … [where everything in the] thousand-year-old Austrian Monarchy seemed based on permanency."[69] Kelsen, as a young citizen of the Empire, was an advocate for this stability, while simultaneously engaging with progressive political ideologies. Although not affiliated with any political party, he expressed support for the Social Democrats.[70] His dual commitment to the ideals of permanence and the necessity of progressive reform would later find expression in his legal and international law theories. As Anthony Carty writes, "in response to the developments of 1918 and the overthrow of the monarchical state, Kelsen proposed radical change, but not so as to affect the potentially popular ethos of the political and legal order."[71] Helmut Plessner contends that Kelsen's legal theory was not only influenced by his immediate socio-political environment but also by the intellectual tradition that gave rise to it. Specifically, Plessner highlights the Kantian emphasis on skepticism, which shaped the German-speaking intellectual bourgeoisie as a class that was politically neutral, hesitant to engage in conflict, and, as a result, politically immature—reluctant to grapple with the complexities of political life.[72] Similar is the perspective of Christian von Krockow, who describes Kelsen's legal theory as fundamentally escapist, characterized by its helplessness in the face of the facts.[73]

Kelsen did not initially set out to pursue a career in law. As a young man deeply influenced by the works of Schopenhauer and Kant, he intended to study philosophy and found the curriculum at the Viennese Faculty of Law uninspiring, as it focused predominantly on dogmatic legal principles. An intellectual respite from this monotony was his friendship with Otto Weininger, a relationship tragically cut short by Weininger's suicide. Nevertheless, "during the course of his studies - and with the development of the methodological aspects of his work - his interest in the subject seems to have grown more intense."[74] In 1911, after writing his habilitation—*Staatsrechtslehre*—he became a professor. At the University of Vienna, he became friends with his younger colleagues (Alfred Verdross and Adolf Julius Merkl), with whom he founded *jungösterreichische Schule*: a circle of thinkers interested in combining philosophical and legal issues. Kelsen was also a participant in Viennese

[68] Katie Witt, "The Politics of Managing Pluralism: Austria-Hungary 1867–1918," *Constellations* 1 (2009): 86.

[69] Zweig, *The World of Yesterday*, 1.

[70] Shapiro, Hathaway, *The Internationalists*, 231.

[71] Anthony Carty, "Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt," *European Journal of International Law* 6 (1995): 1241.

[72] Helmuth Plessner, *Die verspätete Nation: Über die Politische Verführbarkeit Bürgerlichen Geistes* (Stuttgart: W. Kohlhammer, 1959), 132–133.

[73] Christian Graf von Krockow, *Die Entscheidung: Eine Untersuchung über Ernst Jünger, Carl Schmitt, Martin Heidegger* (Stuttgart: Ferdinand Enke, 1958), 26.

[74] Clemens Jabloner, "Kelsen and His Circle: The Viennese Years," *European Journal of International Law* 9 (1998): 370–371.

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intellectual life, frequenting salons, including the one of Sigmund Freud. During the war, he served as an adviser on international law in the Ministry of Defence. He was also involved in peacemaking: the arguments put forward by Karl Renner at the Paris Peace Conference in favor of Austria's legal existence were invented by Kelsen, to whom also the state turned in 1918 with a proposal for drafting of a constitution.[75] *Das Problem der Souveränität*—on which he had worked during the war, taking advantage of his ministerial experience—was published two years later and marked the beginning of a productive period of his work.

Let us now turn to the dogmatic issues encapsulated in the subtitle of this work: *Beitrag zu einer reinen Rechtslehre*, which Kelsen would develop extensively throughout the 1920s and into the following decade. Four key elements of Kelsen's legal theory, as articulated in the 1920s and 1930s, are particularly significant for understanding his 1920 approach to international law: first, the later identification of law and the state; second, the concept of the hierarchy of norms, underpinned by the *Grundnorm* as its foundational hypothesis; third, the rejection of facticity as a component in legal theory; and finally, the purification of his doctrine from elements extraneous to the strictly juridical.[76]

In Kelsen's mature formulation of the pure theory of law, there can be no legal order outside the state; a non-state order is not legal, and a state that is not a legal order is not a state.[77] "There is no pre-existing substratum of the state that supposedly gives rise to a legal order. The legal order is the state itself, or in other words, the state is the personification of the legal order"[78]. Kelsen rejects the division between *ius publicum* and *privatum*, claiming "that all law is State-made law. … This explains why Kelsen's analyses are not limited to the 'law of the state' or 'public law' … They are also applicable to private and criminal law. It examines law in its integrity and complexity."[79] And since "state is equivalent to a legal order, there is no room for institutions as such, nor for human beings."[80] If we want to look at law through a pure prism, we have to strip it of its factuality. Rejecting *Sein* in favor of *Sollen* and recognizing that "the legal act objectifies what commences as an institutional author's enactment of a subjective value through a will. For the signification of the will abstracts the will from its social circumstances,"[81] Kelsen rejects the possibility of seeking the legitimacy of the law outside of it. The basis of the validity of the legal system turns out to be the fundamental norm, not its legitimacy, but the condition of

[75] Wheatley, *The Life and Death of States*, 195–232.

[76] Rigaux, *Hans Kelsen on International Law*, 329. See also: W. Engelking, "The juridical aspects of Kafka's The Castle: Sein, Sollen and land from a normativist and Talmudic perspective," *Law and Humanities* (2025): 10–13.

[77] Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1967), 287–290.

[78] Charles Leben, *The Advancement of International Law* (Oxford: Hart, 2010), 117.

[79] Gustavo Robles, "Hans Kelsen," in *Handbook of the History of the Philosophy of Law and Social Philosophy: From Ross to Dworkin and Beyond*, ed. Giovanni Zanetti et al. (Utrecht: Springer, 2023), 169.

[80] François Rigaux, "Hans Kelsen on International Law," *European Journal of International Law* 9 (1998): 331.

[81] William E. Conklin, "Hans Kelsen on Norm and Language," *Ratio Juris* 19 (2016): 104.

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possibility that allows it to develop. Thus conceived, the legal order is a *Stufenbau*: a pyramid in which each norm derives its validity from a higher-order norm, culminating in the *Grundnorm*, which underpins the entire legal system. It is not a static order, as "the doctrine of the hierarchy of the legal order comprehends the law in motion: i.e. in its perpetually renewed process of self-regeneration. It is a dynamic theory of law, as opposed to a static theory which attempts to comprehend the law without consideration of its creation, only as a created order."[82]

Although only some of these concepts are present in *Das Problem der Souveränität*, the fundamental problems of his approach to international law either derive from them or are based on them. These problems are: the rejection of the division of law into domestic and non-domestic, and the consequent rejection of the concept of state sovereignty, from which arises the problem of finding a *Grundnorm* of international law. This rejection is a consequence of the negation of the division between public and private law: if these two branches, usually distinguished, derive their legality from the same basic norms, it makes no sense, and the same is true of the distinction between state and international law. Given this understanding, no distinction can be drawn between them, as "Kelsen argues that all norms of a given municipal legal order are derivable from the basic norm of that order in the sense that they have been created in accordance with it, and that the basic norms of the various municipal legal orders are derived from a norm of public international law."[83] Just as the state is conceptualized exclusively as a legal system, so too the globe is envisioned as a unified legal system.[84] Although it may appear as novelty, this approach is, according to Kelsen, not unprecedented in world history: the jurist "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. 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."[85] The argument of non-modernity and the enduring rootedness of what he calls *civitas maxima* in the European legal system leads Kelsen to conclude that the division not of the continent but of the entire globe into states was only temporary; it represents merely a stage in human development, not its point of arrival. "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

[82] Kelsen, *Pure Theory of Law*, 279.

[83] John R. Stevenson, "The Relationship of Private International Law to Public International Law," *Columbia Law Review* 52 (1952): 575.

[84] See: David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, 2022), 242–249.

[85] Danilo Zolo, "Hans Kelsen: International Peace through International Law," *European Journal of International Law* 9 (1998): 309.

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pacifism which in the sphere of international politics, constitutes the inverted image of imperialism."[86]

The quoted passage reveals two layers within Kelsen's text. On the philosophical-dogmatic level, his argument for the unity of international and domestic law finds practical justification in the conviction that only such a hypothesis can explain the continuity of international obligations. This perspective addresses the question of why international law remains binding on newly created states. In this view, the new legal system neither originates the law nor exemplifies *autopoiesis* but instead exists as part of the broader legal system. On the level of political intervention, this argument functions as a claim for the supremacy of international law over national law. However, it also transcends this immediate political content, as "a number of political positions followed from the fundamental (though in Kelsen's own view, fundamentally arbitrary) choice in favor of the primacy of the international legal system. It qualified States as organs of international law and determined their jurisdiction from an international perspective."[87] Kelsen's work, shaped by the methodological commitments of pure theory of law, does not explicitly engage with the political circumstances in which it was conceived. Rather, it avoids direct acknowledgment of these circumstances while remaining closely intertwined with them. Kelsen composed *Das Problem…* "during the First World War in a historical phase when the pacifist-liberal current in Europe and the US regarded the inadequate institutionalization of the international legal system, including compulsory jurisdiction, as the chief reason for the outbreak of the war."[88] The jurist looks back on his contemporary historical moment, occurring at the time of the writing of *Das Problem…* (in which the October Revolution, the Treaty of Versailles, and the formation of the League of Nations took place), as "the double revolutionary turn of World War I that originated in the periphery of old Europe, in Russia and America, [which] had destructed the old international law completely, and led to the invention of a new set of international institutions and a new 'constitution' of international law."[89] The conceptual identification of domestic law with international law, while framed as a claim for the primacy of the latter on the political-interventionist layer, also represents Kelsen's attempt to influence political thought and prepare his readers for a new conceptualization of law. The argument begins within the interventionist layer but transitions toward the philosophical-dogmatic.

A key aspect of this intellectual preparation is Kelsen's proposition to eliminate from jurisprudence the concept of sovereignty—a concept he would later define as "the supreme power or supreme order of human behavior"[90] attributed to the state. "In his view … the problem of sovereignty can be

[86] Kelsen, *Das Problem der Souveränität*, 319.

[87] Koskenniemi, *The Gentle Civilizer of Nations*, 246.

[88] Jochen von Bernstorff and Thomas Dunlap, *The Public International Law Theory of Hans Kelsen* (Cambridge: Cambridge University Press, 2010), 272.

[89] Brunkhorst, *Critique of Dualism*, 503.

[90] Hans Kelsen, "Sovereignty and the International Law," *The Georgetown Law Journal* 47 (1960): 627.

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answered in two principle ways: either the national legal order is the highest order, or the international legal order is *superanus*. … The sovereignty of the state arises purely and simply when one presupposes a national legal order as a supreme order."[91] Meanwhile, according to Kelsen, seeing law as a hierarchical *Stufenbau* precludes such a perception of legal order. For if "sovereignty means autonomy of a legal order *vis-à-vis* the outside and its internal supremacy, and political self-determination meaning non-imposition of political form or rule by outsiders or foreigner powers,"[92] Kelsen wants to think of it in a different way, in so far within the framework of its pure theory, it cannot presuppose these powers. As Natasha Wheatley writes, Kelsen's "argument was not that international law came first in a historical sense but that it came first in a logical one."[93] Since the value of sovereignty can only be shared by separate legal systems arising from the *Grundnorm*, and since the state is not such a system, to include it among the holders of sovereignty would be to make a breach in the wall that defends the entry of the factual into law. For this reason, according to Kelsen, "the concept of [state] sovereignty ought to be radically eliminated from the vocabulary of international law. … [If] sovereignty is usually described as a highest power or authority that is not dependent on or derived from any other power or authority."[94] The theory of sovereignty is thus transformed into the theory of the identity of the legal system. "For Kelsen, the normative-logical essence of all great theories of sovereignty since Bartolus was the view of the bearer of sovereignty as an entity occupying the highest place in a given order … According to Kelsen, then, the state as a legal order could be regarded as sovereign only if that order was to be seen in fact as a normative system that was not further derivable."[95] According to Kelsen, as a philosopher of law who simultaneously anticipates the advent of *civitas maxima*, the state does not possess sovereignty because its legal order is not a distinct legal system subordinate to a larger one, but rather constitutes a global legal order (not merely a part of it) within a defined territory.[96] In this framework, the concept of sovereignty is dissociated from the state or any other *de facto* subject of will.[97]

Two problems arise here. First, how to establish the *Grundnorm* of the system of international law as simply law, and second, how to determine who decides and executes its coercion. As for the basic norm, in 1920 text, Kelsen calls it the original norm, apparently moving away from seeing it as empty: he states that it is constituted by the principle of *pacta sunt servanda* (in later works on

[91] Christian Volk, "The Problem of Sovereignty in Globalized Times," *Law, Culture and the Humanities* 18 (2022): 721.

[92] Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2014), 186.

[93] Wheatley, *The Life and Death of States*, 23.

[94] Vinx, *Hans Kelsen's Pure Theory of Law*, 178–179.

[95] Bernstorff, Dunlap, *The Public International Law Theory of Hans Kelsen*, 64–65.

[96] Kelsen, *Das Problem der Souveränität*,10.

[97] Stanley L. Paulson, "Methodological Dualism in Kelsen's Das Problem der Souveränität," in *Kelsen e il Problema Della Sovranità*, ed. Agostino Carrino (Napoli: Edizione Scientifiche Italiane, 1990), 89–94.

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international law he will admit that it does not fit into any written form, being simply the adherence of states to custom.)[98] "This traditional rule, although relatively simple and straightforward, does seem a promising basis for an account of the international legal system that is not meant to beg the question as to 'natural'."[99] However, Kelsen chooses it because of the reasons valid in the optics of pure theory of law. Firstly, in the 1920 work as a political intervention, he seeks the minimum to answer why the parties which his contemporaries perceive as belonging to international law—the states—are abide by it. Secondly, because "the basis of the binding nature of norms can only be a norm,"[100] *Grundnorm* of that law must, in his view, ensure that it is dynamic, so that it is not a political axiom but a technical premise that allows it to act and change. *Pacta sunt servanda* as *Grundnorm* is meaningless because its observance involves the conviction that international law is valid. It is the "recognition of the existence of a legal order and of subjects with legal capacity which act in it. … The *pacta sunt servanda* is not a right formed by custom but a prerequisite for the existence of legal norms."[101] Moreover, this maxim can be derived from international law itself: its existence is not influenced by any state.[102] It is therefore not the effect of a treaty as a contract, but the possibility of its existence.[103] As Hersch Lauterpacht writes, "*pacta sunt servanda* [is] conceived as a necessary *a priori* assumption of the international legal systems which, although capable of explanation by reference to political or moral considerations, cannot itself be proved juridically, just as the legal force of the highest constitutional rule within the State cannot be proved as a juridical proposition."[104] From the assumption of the validity of the law perceived as international follows the validity of the law perceived as domestic; by the simple constitution of law, the validity hitherto recognized as domestic derives from the norm from which the legality of others follows.

Let us turn to the question of coercion, which, according to Kelsen, "occurs through 'sanctions'. … Kelsen's reply is that international law does have sanctions (reprisals and war), although these are decentralized."[105] Without coercion it is impossible for law to be law; its pure theory of it does not recognize *lex imperfecta*. This implies the problem of the institution which, in the context of international law, is supposed to be responsible for coercion: if an organ entrusted with the application of force and coercion is the distinguishing feature of law, and in Kelsen's conception of international law such an organ

[98] Hans Kelsen, *General Theory of Law and State* (New York: Lawbook Exchange, 2007), 369.

[99] Ryan Mitchell, "International Law as a Coercive Order: Hans Kelsen and the Transformations of Sanction," *Indiana International & Comparative Law Review* 29 (2019): 254.

[100] Kelsen, *Das Problem der Souveränität*, 105.

[101] Felipe Moreira, "Beyond the Grundnorm: Static and Dynamic Legitimacies of International Norms," *Revista Juris* 32 (2022): 78.

[102] Bernstorff, Dunlap, *The Public International Law Theory of Hans Kelsen*, 69.

[103] Kelsen, *Das Problem der Souveränität*, 217, 262, 284.

[104] Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011), 426.

[105] Luca Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012), 349.

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cannot be the state, how can such an institution be found?[106] If in the works of the Second World War Kelsen opts for the establishment of an international court,[107] in the 1920 text, he does not argue that a body beyond the state is necessary as an adjudicator and administrator of punishment.[108] Contrary to the character of political intervention that characterizes the 1920 text, he interprets the state in the concept of coercion not so much as an intermediary element in international jurisprudence (which would imply a partial recognition of its sovereignty), but as a non-centralized body exercising authority over arbitrarily separated, territorial parts of the international community, which constitutes a universal legal community "of human beings' overreaching the individual state communities, whose validity is rooted in the sphere of morality."[109] The experience on which Kelsen draws is that of the end of the Great War, which brought about a significant shift in perception: not the German Empire as a whole, but Wilhelm II was regarded as a subject of international law—not in his capacity as the sovereign of the Empire, but as an individual. This marked "the first step to create a legal subjectivity of individual human beings under international law."[110] Kelsen thus removes from his thinking the notion of the state as a subject of international law—the sovereign of that state can only exist as a subject—and introduces "strict demarcation of the juridical from the moral is the counterpart, in the later *Das Problem der Souveränität*, of the removal of the Wolffian fiction of the figure of the supreme legislator and its replacement with the transparently fictional notion of the state as the purely heuristic designation for a partial, subordinate element of a world legal order."[111] In this order, there are only individuals as its subjects, while their judgment is carried out by decentralized courts that thus enforce the law as law. Thus, two elements of his text are intertwined: if "the *civitas maxima* as organization of the world … is the political core of the juridical hypothesis of the primacy of international law,"[112] then in seeing the courts as agents of the law, which must be international, he means the establishment of an international community composed of individuals. By omitting the state, Kelsen's thinking on international law becomes as individualistic as it is universalistic.

Dualism and Monism in Kelsen and Kant

Published in 1920, *Das Problem der Souveränität* was significant for the perception of Kelsen in contemporary discourse on international law and its science. While

[106] See: Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford: Oxford University Press, 2018), 249.

[107] Danilo Zolo and Norberto Bobbio, "Hans Kelsen, the Theory of Law and the International Legal System," *European Journal of International Law* 9 (1998): 358.

[108] Kelsen, *Das Problem der Souveränität*, 70.

[109] Zolo, *Hans Kelsen: International Peace through International Law*, 310.

[110] Kelsen, *Das Problem der Souveränität*, 166.

[111] Peter Langford and Ian Bryan, "From Wolff to Kelsen: The Transformation of the Notion of Civitas Maxima," in *Hans Kelsen and the Natural Law Tradition*, ed. Peter Langford *et al.* (Leiden: Brill, 2019), 161.

[112] Kelsen, *Das Problem der Souveränität*, 319.

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"during the First World War, Kelsen had … refrained from publishing pacifist works or works promoting international understanding. But the publication of his monograph … made him into a pacesetter in international law theory within the renewal movement during the interwar period."[113] Believing that the events of 1914–1918 marked a complete reformulation of political conditions in the world, Kelsen, in his fresh internationalism, did not belong to the group of thinkers in this movement who thought, like Leonard Woolf, that while among historical projects of peace "none is more curious and original than Kant's *Zum ewigen Frieden* … [however, the effects of World War I were] ruinous condition [of] … the temple of Perpetual Peace."[114] Nevertheless, the change of political circumstances which, on the one hand, made possible the existence of an organization expressing the idea manifested in Kant's text, required, according to Kelsen, a reformulation of the methodological paradigms of his thought in order to make Kelsenian assumptions about international law possible.

I identify two fundamental political problems of Kelsen's contemporary West for which this reformulation was particularly important. The first, which I will address in this section, is the problem of the institution of the state as a mediator between the legal system and the individual, the Kelsenian solution of which I described earlier. What is important, however, is the larger assumption behind this solution. I identify it as Kelsen's abandonment of Kantian dualism in favor of monism, which in turn I see as a consequence, first, of Kelsen's knowledge of what happened to the Kantian project of perpetual peace for a century after its promulgation, and, second, of his specific experience of living in Austria-Hungary at the beginning of the twentieth century: both as a state and a specific *milieu* of intellectuals.

Let us commence with an examination of the trajectory of Kant's text as a political intervention articulated in the form of a legal proposition. The optimism it conveys regarding the voluntary adoption of the republican form of government by successive European states ultimately proved to be misplaced. Although a variant of this governmental structure did indeed emerge in many such states as a consequence of Napoleon's conquests, it was, first and foremost, not voluntary. Moreover, while "Napoleon's Empire tried to impose upon Europe its vision of peace, based on the assumptions of popular sovereignty, civic rights and the rule of law,"[115] this imposition did not involve the creation of a league of nations working for establishing peace, but the use of force to enforce new territorial conquests. It was a degeneration of ideas of a philosopher, who "insisted that conquest had to be excised completely from the canon of a truly republican politics, lest it infect and compromise the integrity of a legalized international order."[116] After 1815, Kant's ideas resurfaced with

[113] Bernstorff, Dunlap, *The Public International Law Theory of Hans Kelsen*, 6.

[114] Leonard Woolf, "Perpetual Peace," *New Statesman*, July 31, 1915: 398–399.

[115] Thomas Hippler and Milo Vec, "Peace as a Polemic Concept: Writing the History of Peace in Nineteenth-Century Europe," in *Paradoxes of Peace in Nineteenth-Century Europe*, ed. Thomas Hippler and Milo Vec (Oxford: Oxford University Press, 2015), 10.

[116] Isaiah Nakhimovsky, *The Closed Commercial State: Perpetual Peace and Commercial Society from Rousseau to Fichte* (Princeton: Princeton University Press, 2011), 101.

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notable influence during the Congress of Vienna, albeit in a manner that subverted their original intent "in favor of absolutism and dress[ing] them in the garb of mysticism."[117] The Congress's principal political architect, Klemens von Metternich, expressed considerable enthusiasm for Kantian philosophy, and *Idea for a Universal History with a Cosmopolitan Purpose*, "can be seen as providing the foundation for his approach to world politics."[118] However, while Metternich shared Kant's aspiration for peace, his vision for achieving freedom and peace in Europe diverged significantly. Instead of advocating for a federation of states progressing toward a global political organism, Metternich championed the principle of a balance of great powers. Other key political figures of that epoch similarly deviated from Kant's cosmopolitan vision. "Alexander I explicitly rejected Rousseau and Kant's proposals to found the European Society on a social contract, which would have gone all the way to establish the *res publica*."[119] Thus, while Kant's writing was shaped by the revolutionary optimism of his era, anticipating the realization of his ideals across Europe, the course of the nineteenth century unfolded in opposition to such expectations. Even Kant's propositions regarding the role of trade in fostering peace were reinterpreted within a radically different framework. Johann Gottlieb Fichte's 1800 concept of the closed commercial state exemplifies this transformation, being a result of the German philosopher's belief that "only states that had gone to these lengths to insulate themselves from the effects of interstate rivalry could safely allow themselves to engage in international commerce on a permanent basis."[120]

The second important reason for Kelsen's monism is the legal situation of his native Austria-Hungary before the Great War—a country of which the French jurist Robert Redslob wrote that "if we step into the double monarchy Austria-Hungary, our gaze will be enthralled by other formations that appear as curiosities of state theory."[121] In an attempt to define these curiosities, Georg Jellinek noted that the Habsburg Empire was a time capsule of European history in which different phases of state formation remained alive in the present. For most of the nineteenth century, the Habsburg Empire was "a remarkably explicit workshop for the attempted production of abstract, singular sovereignty out of multinational dynastic empire."[122] This production stemmed from the specific situation of Austria-Hungary's different legal and *de facto* existence: a dual situation that resulted from after *Ausgleich* or *Kiegyezés* (the Austro-Hungarian Compromise of 1867), because of which legally Austria (Cisleithania) and Hungary (Transleithania) were separate political organisms with separate constitutional laws: *Dezember Verfassung* (the December

[117] Koskenniemi, *The Gentle Civilizer of Nations*, 15.

[118] James R. Sofka, "Metternich's Theory of European Order: A Political Agenda for 'Perpetual Peace'," *The Review of Politics* 60 (1998): 122.

[119] Stella Ghervas, "Balance of Power vs. Perpetual Peace: Paradigms of European Order from Utrecht to Vienna, 1713–1815," *The International History Review* 39 (2017): 15.

[120] Nakhimovsky, *The Closed Commercial State*, 111.

[121] Robert Redslob, *Abhängige Länder: Eine Analyse des Begriffs von der ursprünglichen Herrschergewalt* (Leipzig: Veit, 1914), 143.

[122] Wheatley, *The Life and Death of States*, 3.

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Constitution) and an uncodified old constitution (as well as *1867. évi XII. törvénycikk*, Law XII of 1867.)[123] In legal terms, they remained separate states with their own laws; in Hungary, whose elites saw this form of state as a renewal of Hungarian independence from 1526, Austrians were legally treated as foreigners. (In addition, the Czechs claimed that their state was sovereign in legal terms—acknowledging that it was not sovereign in fact—by recognizing that their "independence and autonomy is not abrogated, but rather persists wholly and completely in law.")[124] Duality meant the transfer to legal modernity of the legal construct from its origins: the *Herrscherpersönlichkeit*—whereby several legally separate titles to sovereignty were intertwined in the person of the ruler, who possessed the significant semi-absolutist rights wielded by the imperator across both halves of the realm. After 1867, the formal, legal arrangement of Austria-Hungary was very much different than its *de facto* arrangement, influencing "differing interpretations of the empire's state structure."[125] It was, in the words of Sándor Nagy, "one empire, two states, many laws."[126] The citizens of such a legal and political project did not consider themselves Austria-Hungarians—as one of them, Bronisław Malinowski, noted, there was no such thing as an Austria-Hungarian identity[127]—but rather inhabitants of certain lands. A separate issue pertains to the Viennese elite, defining itself through a "cultural identity disconnected from territorial sovereignty."[128] This elite embraced internationalist beliefs best encapsulated in the ironic concept from the novel written by one of their members: the *Weltösterreich* from Robert Musil's *The Man Without Qualities*—Austria as a home for the human spirit, wherever that spirit resides territorially.[129]

Let us now examine how Kant's approach to the concept of a republican polity—understood as a legal proposition that was negatively verified in a factual sense by the historical developments of the nineteenth century—integrates into the broader framework of his philosophy of law. Specifically, this analysis will address Kantian dualism, which, as I argue in this paper, Kelsen reinterprets and ultimately translates into monism. It is based on the "distinguish[ing] in a legal action the question of right (*quid juris*) from the question of fact (*quid facti.*)"[130] Kant distinguishes *Sein* (being, reality, and

[123] See: RW Seton-Watson, "The Austro-Hungarian Ausgleich of 1867," *The Slavonic and East European Review* 19 (1940): 123–140.

[124] Wheatley, *The Life and Death of States*, 121.

[125] Bálint Hilbert, "New Aspects in Historical-Geographical Research of the Austro-Hungarian Monarchy: The Legal Nature of the Customs Union and Migration Links between Austria and Hungary (1870–1910)," *Mitteilungen der Österreichischen Geographischen Gesellschaft* 165 (2022): 67.

[126] Szabolcs Nagy, "One Empire, Two States, Many Laws: Matrimonial Law and Divorce in the Austro–Hungarian Monarchy," *Hungarian Historical Review* 3 (2014): 230.

[127] Raymond Firth, "Malinowski as Scientist and as Man," in *Man and Culture: An Evaluation of the Work of Bronislaw Malinowski*, ed. Raymond Firth (London: Routledge & Kegan Paul, 1957), 13.

[128] Glenda Sluga, "Habsburg Histories of Internationalism," in *Remaking Central Europe: The League of Nations and the Former Habsburg Lands*, ed. Peter Becker and Natasha Wheatley (Oxford: Oxford University Press, 2020), 25.

[129] Robert Musil, *Der Mann ohne Eigenschaften* (Berlin: Rowohlt Verlag, 1990), 91, 103, 106, 121–123.

[130] Immanuel Kant, *Critique of Pure Reason*, trans. Norman Smith (London: Macmillan, 1953), A84/B117.

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actuality) from *Sollen* (oughtness, what should be): "the former relates to the principle of causation arising from natural necessity or, simply, nature as it is, while the latter is indicative of what ought to be done and hence of normative ethical freedom or man's autonomy in making choices in the field of voluntary ethical conduct."[131] Thus, when Kant writes about the republican system and perpetual peace, he does not write from the perspective of theoretical reason, which knows what is, but from the perspective of practical reason, which determines what ought to be, insofar as he draws on the achievements of theoretical reason, aware of his contemporaries in France. His political intervention, cloaked as a legal text of the international law of his time, is therefore primarily based on premises which, according to Kant's methodology, are ethical premises. By the same token, however, Kant, within the framework of his own methodology, prevents his proposal from actually being legal. According to Kant, what is legal does not serve the moral perfection of the individual, whereas the project of perpetual peace depends on moral perfection, since it results both from the liberation of man from egoism through the progress of reason and from the perfection of man, leading to a situation in which everyone decides for everyone and everyone decides for himself. The federation of states as a stage on the way to perpetual peace as a project therefore belongs to the realm of *Moralität*, not *Legalität*, being "a moral justification for states to be governed by an omnilateral will."[132] In Kelsen's time, when was known what happened to Kant's demands for a republican system, they lose all the more their connection with legality. As a moral project, therefore, it is difficult to accommodate Kant's work in a pure theory of law, insofar as it stems from an attempt to create a theory of law as law, separate from and independent of both moral philosophy and empirical knowledge. From the perspective of the latter, it is not legal.

The reworking of Kant's thought that Kelsen undertakes in *Das Problem…* stems from his observation of the legal-moral charade that the 1795 text proved to be after the experiences of the nineteenth century. Kelsen places it within the framework of Kantian ethics as "utterly worthless"[133] for legal thought. The transcendence and universalism underlying these ethics are, according to him, for this reason, superfluous in a pure theory of law, because they introduce a basis—not a premise—for its validity. They prevent law from being truly juridical, which is all the more important in the context of its international dimension, since before Kelsen's preoccupation with it many jurists saw in it precisely "a sort of 'positive morality', rather than that of a legal system in a strict sense. … Kelsen cannot maintain the primacy of international law without committing himself to maintaining its juridical nature too."[134] At the same

[131] DH Van Zyl, "Cicero and Kant," *Tydskrif vir Regswetenskap* 16 (1991): 51.

[132] Patrick Capps and Julian Rivers, "Kant's Concept of International Law," *Legal Theory* 16 (2010): 243.

[133] Hans Kelsen, "The Pure Theory of Law, Labandism and Neo-Kantianism: A Letter to Renato Treves," in *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, ed. Stanley L. Paulson (Oxford: Oxford University Press, 1999), 173.

[134] Zolo, *Hans Kelsen: International Peace through International Law*, 311.

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time, Kelsen, who politically makes an accession to the ideas expressed by Kant, wishes to accommodate his project of international law in the space of pure law; because of this attempt "Kantian cosmopolitanism plays the role of previously gained but subsequently forgotten knowledge, which Kelsen recovered once more, albeit fragmentarily, due to his natural sciences formation; but crucially, without Kant's 'ideal of morality' and purposiveness."[135] Kelsen, by virtue of his internationalist outlook and integration to the cosmopolitan circles of the Viennese intelligentsia, seeks to conceptualize the norms of international law not as moral rules cloaked by Kant in the guise of legal provisions, but as expressions of will. However, this will, in Kelsen's framework, is not the will of the state as a constituent element of international law. His theory represents a departure from both post-Kantian naturalism and positivism as fact-centered frameworks, aiming instead to introduce a novel paradigm in jurisprudence. This new approach reframes the *quasi*-Kantian project of eternal peace, detaching it from moral underpinnings to render it pragmatically effective.[136] At a methodological level, Kelsen's departure is marked by his rejection of Kantian dualism in favor of monism. While following Kant's separation of law and morality, Kelsen concludes that morality has no bearing on the nature of law. For Kelsen, law does not require morality as a guiding principle; it operates independently of the Kantian moral imperatives. "The philosophical premise of legal universalism in Kant's idea of the unity of morality was taken up by Kelsen and reformulated in his innovative and radical theses."[137] According to Kelsen, the point of arrival of international law is a situation in which "law becomes organisation of humanity and therefore one with the supreme ethical idea."[138] As such an idea, it is all-encompassing and rests on one single *Grundnorm*.

Kelsen's rejection of the foundational framework of Kantian dualism extends to the dismissal of other dualistic structures traditionally underpinning legal thought, most notably the division between national and international law. According to Kelsen, "international law and the various state legal systems taken together constitute a unified normative system, and the primacy of international law over state law within the monistic framework."[139] If, in arguing for the rejection of the division between state and legal system, Kelsen argued that a state cannot be a state without being legal, and a legal system cannot exist outside the state, in rejecting the division between domestic and international law, he concludes: it is the world what cannot be non-legal, so the Kantian different standpoints from which we can view norms and human motivations for acting under them are superfluous in legal thought. If "under dualism … a state will not be bound by international law, unless it has

[135] Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013), 289.

[136] Stanley L. Paulson, "The Great Puzzle: Kelsen's Basic Norm," in *Kelsen Revisited: New Essays on the Pure Theory of Law*, ed. Luís Duarte d'Almeida et al. (Oxford: Hart, 2013), 50.

[137] Stefan Schieder, "Pragmatism as a Path Towards a Discursive and Open Theory of International Law," *European Journal of International Law* 19 (2000): 668.

[138] Kelsen, *Das Problem der Souveränität*, 205.

[139] Torbjörn Spaak, "Kelsen on Monism and Dualism," in *Basic Concepts of Public International Law: Monism & Dualism*, ed. Marko Novakovic (Belgrade: Alter DOO, 2013), 2.

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recognized it,"[140] in a monist view of international law recognition is not necessary because no state is necessary. Nor is it possible, therefore, the situation in which Kant's ideas found itself, encountering the obstacle of "greatest hindrance to the development of such an international legal order … the dogma of sovereignty, because it mistakenly claims that the independence of states is necessarily incompatible with the existence of international legal norms."[141] In this way, Kelsen's concept, not rooted in a moral idea, makes it possible to implement it, making "objections to the realization of the *civitas maxima* and the unwillingness to accept the subjection of one's own state to international law … merely politically motivated."[142]

Another aspect of Kelsen's monism is a consequence of the legal and political problems of Austria-Hungary at the time of his writing, as described earlier. The best introduction to it is an anecdote that Kelsen recalled about his work in the Ministry of War. During a conversation in 1918, when his superior heard that he was, according to Kelsen, the last Minister of War in the Monarchy, he could not believe it. "'You are crazy, he responded, how can you say something so awful!' To the very last moment, the old officer, even though he had no illusions about the magnitude of the military defeat, could not believe it possible that an empire of four hundred years could simply vanish from the stage of history."[143] The significance of this anecdote, representing a belief about which the aforementioned Stefan Zweig writes that "everything in our almost thousand year-old Austrian monarchy seemed based on permanency, and the State itself was the chief guarantor of this stability,"[144] is expressed in the question: if, according to Karl Renner, "the Danube Monarchy ceased to exist on 12. November, 1918,"[145] how is it possible to think in terms of international law about the existence of states that did not so much replace it as were created as completely new political entities? What was the legal basis for their existence? Were they a political intervention in a system of international law in which they appeared *ex nihilo*, from a legal black hole? In what legal framework did these new states actually come into being?

Within the Kantian model of double vision of phenomena, this event would be described as political, which only becomes juridical through the recognition of other states as acting in their autonomy, in accordance with the dictates of reason: the recognition of the right of peoples as moral persons to self-determination, in this case: the national and political self-determination. On the basis of monism, however, the problems outlined earlier find a different solution. In arguing for the abolition of the distinction between national and international law and the introduction of the fundamental norm as the content-free premise for the validity of law, Kelsen says: law has no beginning. The

[140] Spaak, *Kelsen on Monism and Dualism*, 3.

[141] Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford: Oxford University Press 2018), 326.

[142] Gragl, *Legal Monism*, 327.

[143] Hans Kelsen, "Autobiographie," in *Hans Kelsen Werke*, vol. 1, ed. Matthias Jestaedt (Tübingen: Mohr, 2007), 49–50.

[144] Zweig, *The World of Yesterday*, 4.

[145] Wheatley, *The Life and Death of States*, 195.

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question of what principle gives rise to a state organism makes no sense, and attempting to answer it is like pulling oneself out of a swamp by one's own beard: "the numerous, continually repeated attempts to understand the emergence of states juridically, to legally ground the state, i.e., the legal order, must of course fail."[146] By delineating a clear distinction between law and fact, and positing that the state is initially established as a factual entity and then drawn into the realm of that which arises from reason, we introduce to our thinking, according to Kelsen, the moment of the state as being outside the realm of law, making it impossible to know legally both the moment of the creation of the state and the relation of the new creation to the obligations of the one that existed before it on the given land. Meanwhile, since it is not the state that is the holder of sovereignty, but the legal system as it encompasses the entire globe, "there is no legal cognition in legally empty space."[147] To think otherwise, Kelsen argues, is to plunge into the abyss beneath the bridge connecting two constitutions: the one of the state that has ceased to exist and the one of the state that emerged from the legal void. In this sense, international law is not the bridge constructed to prevent the collapse into chaos during the death of one state and the birth of another. "The rise and fall of the state show themselves to be legal phenomena."[148] A new state, even before its formation, is already legal because it exists within the only possible legal framework, which is a framework of international law.

Through his monist conception of international law, Kelsen transcends the aporias inherent in the Kantian framework. By formulating his theory in the aftermath of the 19th century, Kelsen avoids the pitfall of reducing Kant's moral postulates to a *quasi*-legal framework disguised as a treaty of international law. Instead, he directly engages with the nature and function of international law itself. However, the historical disillusionment is not the sole event prompting the Austrian jurist to reformulate his theoretical approach.

Kelsen and Mass Democracy

The transformations between 1795 and the early twentieth century extended far beyond the conditions of warfare identified by Habermas in the passage cited in the introduction to this essay. The parameters of normalcy and the processes of everyday political decision-making also underwent significant changes. This shift was partly due to the fact that "the century since the end of the Napoleonic Wars had been the most peaceful one Europe had known since the Roman Empire."[149] Patrick Cohrs comments on this maladjustment of Kant's ideas to Kelsen's era by noting that they were "conceived in a republican

[146] Kelsen, *Das Problem der Souveränität*, 235.

[147] Kelsen, *Das Problem der Souveränität*, 236.

[148] Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1997), 121.

[149] Margaret MacMillan, *The War That Ended Peace: How Europe Abandoned Peace for the First World War* (London: Random House, 2013), xxvii.

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tradition rather than for a 'democratic age',"[150] in which the very notion of democracy, due to the emergence of democratic systems in nineteenth-century Europe, carried a slightly different meaning than it had in Kant's time. More significant than the mere existence of these systems, however, was the transformation of the masses into the most important political collectivity: "the mass [which] was the dark sun, unapproachable for all the heat it emitted, around which scholarly studies, esthetic experiments, political activities, and social programs moved in the vibrant and violent cultures of interwar Germany and Austria."[151] Although Kant wrote about the masses—an example being his discussion in *What is Enlightenment?*, where he describes the 'guardians of the masses' spreading independent thinking among them, including in the form of prejudices, which "will serve as well as old ones to harness the great unthinking masses"[152]—he could neither anticipate nor conceive of a situation in which these masses would reject the prejudices imposed by philosophers, resist being instrumentalized as a controlled social force, and instead become a self-sustaining and independent social power. For Kant, the notion of what "no one could avoid encountering them on streets and squares … These masses were more than a weighty social factor; they were as tangible as any individual. … they haunted the imagination,"[153] as Siegfried Kracauer writes about the masses, was beyond the realm of possibility. To fully comprehend Kelsen's reformulation of Kant's project in the early 1920s, it is necessary to first engage with Kant's broader critique of democracy. Although Kant's interpretation was shaped by the historical limitations of his era, it offers a foundation for arguments that would later become pivotal to Kelsen's theoretical framework.

I indicated earlier that Kant rejects democracy on the grounds of the impossibility of a tripartite government. The consequence of this impossibility is Kant's conviction, that "democracy, and only democracy, necessarily leads to despotism. … he saw in democracy something that can alter the very moral standing of a state—what Kant calls the *forma regiminis*."[154] In his critique of democracy, Kant does not reject democracy in general or what, by the early twentieth century, might have been recognized as its predominant form. Rather, his critique targets a specific type of democracy, which he regarded as the comprehensive embodiment of this political system: direct democracy. As articulated in the writings of his contemporaneous thinkers such as Jean-Jacques Rousseau, this form of democracy operates without representative institutions or, as Rousseau asserted, is inherently incompatible with them.[155]

[150] Cohrs, *The New Atlantic Order*, 207.

[151] Stefan Jonsson, *Crowds and Democracy: The Idea and Image of the Masses from Revolution to Fascism* (New York: Columbia University Press, 2013), 17.

[152] Immanuel Kant, "An Answer to the Question: What is Enlightenment?," in *Practical Philosophy*, trans. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 16.

[153] Siegfried Kracauer, "Cult of Distraction," in *The Mass Ornament: Weimar Essays*, trans. Thomas Y. Levin (Cambridge: Harvard University Press, 1995), 325.

[154] Luigi Caranti, "Why Does Kant Think that Democracy is Necessarily Despotic?," *Kantian Review* 28 (2023): 168–169.

[155] See: Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: The University of Chicago Press, 2006), 74.

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"Only in direct democracy, so the argument goes, the mechanism feared by Kant of a faction (probably majoritarian) imposing its will against the other would be triggered."[156] Direct democracy, according to Kant, involves a tendency for citizens to see their vote as a tool for advancing their private interests. In direct democracy, the citizen is even expected to treat the political space as one that serves the realization of what serves him, which in turn relieves the citizen of the need to ground his political decisions in reason: because citizens only represent selfish interests, they do not shape the overall shape of the political community. "Kant equated democracy with mob rule, in which 'everybody wishes to be ruler' and minority views (however Rightful) could be quashed."[157] In other words, according to Kant, democracy is a situation in which the principle of autonomy cannot be fully realized because democratic citizens are incapable of realizing that they live together with their fellow citizens in the kingdom of ends. Democracy appears as an impediment to the supremacy of civil society as a mode of organizing a community that emerges from "growing self-awareness … Such self-consciousness can be achieved only when people are free to govern themselves both individually and collectively."[158] Since it obstructs this growth, direct democracy becomes a system in which the dominant trait of human nature is egoism, which, "when taken as the principle of all our maxims, is the very source of evil."[159]

For Kant, the facilitation of egoism is intrinsically connected to the obstruction of a critical principle: the rule of law, which he identifies as the guarantor of individual freedom. In his view, direct democracy precludes the possibility of acting in the true interest of the community, as such a system inherently leads to the degeneration of majority rule. While Kant acknowledges its necessity and "proposes a majority principle as necessary in face of disagreement … [he also says that] equal freedom … is not secured by voting and majority rule alone but requires a constitution that establishes an impersonal public authority."[160] Consequently, direct democracy, according to Kant, is fundamentally flawed, as its laws are dictated by the will of the majority rather than by an impartial constitutional framework. In the historical and intellectual context in which Kant writes, he expresses skepticism regarding the capacity of his contemporaries to construct a legal and political order in which the unreasoned will of the masses does not eclipse the rational judgment of the individual. While Kant implicitly acknowledges the historical inevitability and necessity of universal history, he contends that the moral development of his contemporaries must first occur through the establishment of a republican system. This perspective aligns with Cartesian thought, where reason constitutes the essence of individuality, standing in opposition to the passions.

[156] Luigi Caranti, "The Word 'Democracy' in Kant's Political Writings," in *A Linguagem em Kant, a linguagem de Kant,* ed. Maíra Hulshof et al. (São Paulo: Cultura Acadêmica, 2018), 200.

[157] Sweet, Ryan, *A Cosmopolitan Legal Order*, 15.

[158] Karl T. Gaubatz, "Kant, Democracy and History," *Journal of Democracy* 7 (1999): 139.

[159] Immanuel Kant, *Religion Within the Limits of Reason Alone,* trans. Theodore M. Greene and Hoyt H. Hudson (New York: Harper & Row, 1992), 31–32.

[160] Christian Rostbøll, "Kant, Freedom as Independence, and Democracy," *The Journal of Politics* 78 (2016): 798.

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If Kant is "describing those who succumb to such passions as mad, sick, and deformed …[he also] admits that we can be overcome by particularly strong desires, such as passions for money or power, which we know will prevent us from satisfying our other desires and leave us unhappy."[161] The establishment of a republican system, therefore, is a moral imperative to restrain such overpowering passions and reorient individuals toward rationality.

Does Kant's critique of democracy render him an elitist? Not necessarily. As Luigi Caranti observes, Kant's "reservations against democracy are everything but outdated, dully conservative, elitist concerns."[162] On the contrary, his proposal for a representative system can be understood as an effort to protect the majority of citizens from the undue influence of the wealthiest members of society, ensuring that the latter "do not increase their say on political decisions by exploiting their influence on dependents in forms that range from relying on adaptive preferences to explicit blackmailing."[163] Therefore, for Kant, the rule of law serves as the mechanism to secure genuine equality among citizens, aligning their material conditions with their formal status as described by the legal principles.

Let us now turn to Kelsen and his era. The previously stated invocation of the Cartesian distinction between consciousness and passions is deliberate, as this conceptual dichotomy was frequently reiterated by early twentieth-century intellectuals when confronted with the phenomenon of the masses, mass politics, and mass democracy. "Assuming that the individual was characterized by consciousness, and that the crowd was the opposite of the individual, they concluded that the crowd must be characterized by what was opposite to consciousness, that is, by unconscious passions."[164] Hannah Arendt observed that the masses are inherently alien to the sphere in which political matters are resolved through rational deliberation.[165] Guided by instinct rather than reason, the masses, in her view, undermine the values necessary for the successful functioning of a political system. The intellectual response to the emergence of the masses was marked by critical scrutiny and apprehension. While acknowledging that the masses represented "the enormous fact of an era,"[166] intellectuals regarded them with unease and resentment, viewing their influence as disruptive.

Did Hans Kelsen diverge from his intellectual contemporaries, who contended that "the crisis of the post-1918 period owed … to the explosion of mass politics"[167] in this respect? Like Kant, Kelsen—an undisputed member

[161] Alison Hills, *The Beloved Self: Morality and the Challenge from Egoism* (Oxford: Oxford University Press, 2012), 40–44.

[162] Caranti, *The Word 'Democracy' in Kant's Political Writings*, 211.

[163] Luigi Caranti, "Kant via Rousseau Against Democracy," in *Kant and the Problem of Politics*, ed. Luigi Caranti and Alessandro Pinzani (London: Routledge, 2022), 52.

[164] Jonsson, *Crowds and Democracy*, 23.

[165] See: Craig Calhoun, "Facets of the Public Sphere: Dewey, Arendt, Habermas," in *Institutional Change in the Public Sphere: Views on the Nordic Model*, ed. Fredrik Engelstad (Berlin: De Gruyter, 2022), 29.

[166] Jonsson, *Crowds and Democracy*, 30.

[167] Richard Overy, *The Inter-War Crisis* (London: Routledge, 2017), 75.

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of the Austro-Hungarian and later Austrian elites—rejected elitism, which he regarded, in the context of early 1930s leadership, as a defining feature of fascism.[168] Nonetheless, "his political writings mirror the particular political atmosphere of the 1920s: theoretical reflections on the nature of democracy in the era of mass politics as well as on the complexity of political processes developed alongside considerations tinged by the specific institutional insecurity that characterized the young Austrian and German republics born after the First World War."[169] In 1920, the same year as *Das Problem der Souveränität*, Kelsen published *The Essence and Value of Democracy*. In this work, he reveals himself as a proponent of nineteenth-century parliamentarism, which he understands as a social technique in order to politically integrate plurality in the form of laws binding the community via mechanism which "stipulates that the will of the state in all of its manifold manifestations be determined directly by one and the same assembly of all citizens entitled to vote."[170] According to Kelsen, this kind of parliamentarism, in which the split between rulers and ruled is fluid and dynamic because of the fact that all citizens are equipped with fundamental rights and the ruled of today might become the rulers of tomorrow, prevents the democratic cacophony inherent in the fact that each political actor speaks only in his own name, restraining "the people's 'natural' aspirations that might endanger the democratic system."[171] By implicitly critiquing mass democracy and extolling nineteenth-century parliamentarism, Kelsen critiques the former in a manner akin to Kant's critique of direct democracy. He identifies in mass democracy the dual threats of autocracy and the tyranny of the majority, perceiving it as a space dominated by clashing interests that fail to coalesce into meaningful compromise. He attributes the emergence of mass democracy to historical circumstances "as the inevitable outcome of a complex social and political process by means of which people remained free and equal by respecting laws which they could not directly create."[172]

This emphasis on the historical roots of mass democracy is particularly significant, as Kelsen does not, in his second major work of 1920, propose the restoration of nineteenth-century parliamentarism. He is not an antiquarian seeking to revive what has become obsolete. Instead, he asserts that "democracy should be representative rather than direct … representation should be based on assemblies."[173] In this context, Kelsen, as a political thinker

[168] Hans Kelsen, "Party Dictatorship," *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 16 (1936): 31.

[169] Giulia O. Angelis, "Ideals and Institutions: Hans Kelsen's Political Theory," *History of Political Thought* 30 (2009): 526.

[170] Hans Kelsen, *The Essence and Value of Democracy*, trans. Brian Graf (New York: Rowman & Littlefield, 2013), 49.

[171] Angelis, *Ideals and institutions*, 527.

[172] Simona Lagi, "Kelsen's Realistic Theory of Modern Democracy," *Österreichische Zeitschrift für Politikwissenschaft* 51 (2022): 25.

[173] Eerik Lagerspetz, "Kelsen on Democracy and Majority Decision," *Archiv für Rechts- und Sozialphilosophie* 103 (2017): 156.

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engaging directly with the challenges of his time, identifies the institution central to ensuring democratic representation: political parties. For Kelsen, political parties serve as the facilitators of "compromise, which Kelsen treated as the corollary of majority principle."[174]

As Bernard Manin observes, the vision of parliamentarism grounded in political parties represents a marked departure from the model prevalent in the previous century. Whereas nineteenth-century liberal parliamentarism prioritized a narrow elite, parliamentary democracy in the early twentieth century is structured around the people as a collective, without succumbing to populist subjugation.[175] Political parties, in this framework, serve to organize the populace and function as "one of real democracy's most important elements … modern democracy virtually rests on political parties, whose importance grows the more the democratic principle is realized in practice."[176] According to Kelsen, the primary role of political parties is to shift the conception of freedom from an individualistic understanding of absolute freedom from constraints to a political notion of freedom as self-determination. For Kelsen, genuine freedom is inherently political. In this respect, political parties of Kelsen's time differ significantly from their counterparts in earlier centuries, which were often dismissed as factions acting solely to advance their own interests, attempting to impose those interests on the state as its expressed will. By contrast, in the early twentieth century, "the will of society is not to be the expression of the interests of one group alone … that will must be the result of a compromise between opposing interests. The division of the People into political parties, in truth, establishes the organizational preconditions for the achievement of such compromises."[177] This ongoing and dynamic process of compromise fosters harmony in political life, as such harmony "can only result from a renewable compromise between the different actors in the plurality - political parties."[178] Recognizing their indispensable role, Kelsen calls for the constitutionalization of political parties, what would make possible dismantling the remnants of a previous, aristocratic model of the political sphere.

Kelsen's reflections on political parties may surprise readers of his second text from 1920. At first glance, one might be tempted to draw a sharp distinction between Kelsen as a legal scholar and Kelsen as a political theorist: on the one hand, in his legal writings, Kelsen "urged us to emancipate ourselves from fictional entities such as the state; or indeed, from the fiction of representation in a democratic state,"[179] while on the other, in his political writings, he emerges as a defender of institutions, including political parties,

[174] Timothy Stanton, "Popular Sovereignty in an Age of Mass Democracy: Politics, Parliament and Parties in Weber, Kelsen, Schmitt and Beyond," in *Popular Sovereignty in Historical Perspective*, ed. Quentin Skinner *et al.* (Cambridge: Cambridge University Press, 2016), 325.

[175] Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997), 207.

[176] Kelsen, *The Essence and Value of Democracy*, 38.

[177] Kelsen, *The Essence and Value of Democracy*, 40.

[178] Sandrine Baume, "Rehabilitating Political Parties: An Examination of the Writings of Hans Kelsen," *Intellectual History Review* 28 (2018): 430.

[179] Rovira, *The Project of Positivism in International Law*, 206.

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as mechanisms for moderating human instincts. Such a reading of Kelsen's thought, however, is not entirely accurate, and his remarks in *The Essence…* should not be interpreted in isolation from *Das Problem…*, mainly: from a critique of the use of the concept of sovereignty. This aporia will cease to seem aporic once we understand Kelsen's critique of the concept of representation.

Kelsen, unlike theorists of the masses such as Gustav Le Bon, does not claim that social interactions among individuals give rise to a mass social structure independent of those individuals. Instead, he maintains that only the individual subject possesses a soul.[180] Who, then, are people, not only as part of the masses that emerged at the beginning of the twentieth century but more generally as members of a political collectivity? They constitute "a system of individual human acts regulated by the state legal order."[181] In this sense, as David Ragazzoni emphasizes, they do not form a sovereign entity governing itself through representation; they are merely the object of governance.[182] For this reason, it cannot be said that they express, or are even capable of expressing, any collective will. Fictions such as the common will "do not limit themselves to contain specific juridical facts, but rather they affirm psychological facts, that do not exist, and for that reason are fictions, that neither have a place in the empire of psychology, nor in that of jurisprudence … How should there be a unified will of the people which is divided into hundreds of directions and separated by the deepest oppositions; that must remain a mystery."[183] In other words, in the pure theory of law, the common will is not a concept to be considered. In the practical aspect of politics, according to Kelsen, "representation, and, more specifically, the parliamentary form of representation can be justified by practical considerations. Essentially, parliamentarianism is mandated by the division of labor."[184] This division entails the effort to reach a compromise, rather than the pursuit of any *telos* for which a political collectivity might exist. Within the framework of the pure theory of law, such a collectivity cannot be conceived, and therefore, neither can its purpose. As Adam Przeworski notes, Kelsen departs from the belief that representative political systems are grounded in an ideology or even a harmony of values.[185] Instead, their foundation lies in compromise, which, like the principle of *pacta sunt servanda* in international law, has no intrinsic content and serves merely as a precondition for the functioning of political life. Political parties, in this context, extend the function of compromise by providing the practical means to organize it: they bring "like-minded individuals together to secure them actual influence … [constituting] collective bodies, which unite the common

[180] See: Hans Kelsen, *Der Begriff des Staates und die Sozialpsychologie* (Berlin: Inktank, 2020), 125.

[181] Kelsen, *The Essence and Value of Democracy*, 52.

[182] Davide Ragazzoni, "Political Compromise in Party Democracy: An Overlooked Puzzle in Kelsen's Democratic Theory," in *Compromise and Disagreement in Contemporary Political Theory*, ed. Christian Rostbøll (London: Routledge, 2021), 137.

[183] Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen: Mohr, 1911), 171.

[184] Lagerspetz, *Kelsen on Democracy and Majority Decision*, 176.

[185] Adam Przeworski, "Consensus, Conflict, and Compromise in Western Thought on Representative Government," *Procedia – Social and Behavioral Sciences* 2 (2010): 7048–7049.

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interests of their individual members … [they act like] subterranean springs feeding a river … surfac[ing] and channel[ing] into a common riverbed in the popular assembly or parliament."[186] As intermediary bodies between the state and individual legal actors, they are "legally obliged to execute the will of the represented,"[187] who are always individual actors and never collectivities. The latter, as Kelsen's view distinguishes him from the one expressed by Carl Schmitt, possess no will of their own.[188]

Kelsen's normativism and pure theory of law is a theoretical construct developed in and for the conditions of the early twentieth century, representing an intensification of the German-language legal tradition that underpinned the liberal parliamentarism of the previous century—namely, positivism, with its focus on, as Michael Stolleis describes it, what actually exists; and what exists is the legal order and individual beings.[189] Kelsen's approach to addressing the challenges of mass democracy, therefore, embodies "extreme individualism. Evidently, in an era when the worst totalitarianisms of history were ripening, that standpoint was not devoid of intrinsic value."[190] By seeing individual subjects in the normative space as subjects not of national law, but simply of international law, Kelsen rejects the danger of mass democracy in depriving the masses of their influence in shaping community affairs through the tyranny of the majority. Rather, democracy is a system that "was still up to its promise of atomization in the sense of satisfying singularly each individual's yearning for freedom."[191] Such a withdrawal of influence prevents the masses from acting politically by influencing a legal system that would depend on them in a moment of clash of interests. If we see the normative space as spanning between the legal system and individuals, it is these subjects who become dependent on the system, not the other way. If, for Kelsen, individuals "have been advanced to essential subjects of international law … As a result they remain indirectly objects of rights and obligations (mediated by states), but also become direct holders of rights and direct recipients of obligations."[192] The word "state" in the quoted passage can be replaced with words: political parties, as well as: international order.

A crucial element in this perspective on law, the individual actor, the state, and political parties is the nature of law as a coercive order, which, in this sense, can wield authority over rebellious masses. As I have shown in section two, the Kantian project of a peaceful federation excludes this character in terms of the

[186] Kelsen, *The Essence and Value of Democracy*, 38.

[187] Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Union: Lawbook Exchange, 1999), 292.

[188] See: J. Pitseys, "Publicity and Transparency: The Status of Representation and Political Visibility in Kelsen and Schmitt," *Revue Française de Science Politique* 66 (2016): 105–123; W. Engelking, "The State of Emergency and the State Without a Name in Carl Schmitt's Thought: A Proposal for Radical Separation," *Law, Culture and the Humanities* 19 (2023): 402–413.

[189] Michael Stolleis, *Public Law in Germany, 1800–1914* (New York: Berghahn Books, 2001), 352.

[190] Rovira, *The Project of Positivism in International Law*, 130.

[191] Rovira, *The Project of Positivism in International Law*, 131.

[192] Sergio Dellavalle, *Paradigms of Social Order: From Holism to Pluralism and Beyond* (Berlin: Springer, 2021), 251.

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influence of any normative order in the internal affairs of the state. This, however, does not change the fact that "Kant understands the state's function as essentially coercive."[193] As such, states are coercive orders in the sense that coercion can be applied to their citizens, which, in the case of the project of perpetual peace, gains significance when it comes to the moral education of their citizens. According to Kant, this education does not necessarily have to be nonviolent: "Kant makes it clear that this process occurs without a reorientation of human beings' wills; it will happen even against their will."[194] Similarly, Kelsen gives coercion a special importance in a pure theory of law; it is essential as "what distinguishes a legal order from an 'ought-order' such as morality and religion … Coercion is a constitutive element of the legal order as a whole but not a validity criterion of each of the norms composing that legal order"[195]. In it, the state appears not as an institution that is a constitutive component of the international order influenced by mass democracy, but as an agenda of the legal order, devoid of legal but endowed with practical significance, which imposes norms on individuals as subjects of the international order. Individuals, after all, have no influence on this order, and therefore their emotions and passions do not pose a threat to it. In contrast to Kant, however, Kelsen believes that if a state, as a purely mediating institution, deprived of the sovereignty that is part of the international legal order, nevertheless acts against it, it can be coerced by this order—in the form of the activities of other states, also purely mediating at the time: an example of this, for Kelsen, is the institution of just war.[196] It does not need to be enshrined in a positive system of international law, because "a legal norm itself need not employ the idea of coercion. But no norm is a legal norm unless it is both valid that is, authorized by some superior norm - and a condition of a coercive sanction."[197] Kelsen's approach to the problem of coercion is thus not so much different from Kant's as enriches it—necessarily so, for in *Das Problem*… Kelsen "attempted to construct a legal theory that reflected the world of the twentieth century."[198]

Conclusions

This article explored the relationship between Hans Kelsen's international legal thought and Immanuel Kant's philosophy. It argued that while Kelsen's vision draws on Kantian principles, it ultimately transcends them. Rather than merely adapting Kant's work to suit his time, Kelsen embarked on an independent

[193] Benjamin L. McKean, "Kant, Coercion, and the Legitimation of Inequality," *Critical Review of International Social and Political Philosophy* 25 (2022): 3.

[194] Molloy, *Kant's International Relations*, 74.

[195] Jean d'Aspremont, "The Collective Security System and the Enforcement of International Law," in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford: Oxford University Press, 2015), 133.

[196] Kelsen, *Das Problem der Souveränität*, 258.

[197] William A. Edmundson, "Coercion," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (London: Routledge, 2012), 452.

[198] Rovira, *The Project of Positivism in International Law*, 128.

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project that, while grounded in similar premises, diverged significantly. This project involved, first, a critical engagement with the evolution of Kant's ideas, and second, an attempt to address a modernity distinct from that encountered by Kant. These divergences led Kelsen to conceptualize an actual *civitas maxima*, a global order inhabited by individual legal subjects lacking collective interests and represented through political parties. For Kelsen, this vision of a global legal framework was feasible because only global law, in his view, possesses a unique *Grundnorm*. Within the framework of his pure theory of law, the *Grundnorm* of national law, if it is to be subsumed under global law, would be inconceivable if it contradicted the *Grundnorm* of international law. Under markedly different historical conditions, Kelsen thus went far beyond Kant, achieving what could be described as a "Copernican revolution" in the study of law—particularly international law—that Georg Jellinek had once called for. Reflecting on Kelsen's legacy as a late inheritor examining transformations in legal thought, it can be argued that his ideas, while mirroring the global political ethos underpinning the establishment and early success of institutions like the League of Nations, soon revealed their limitations. A decade after the publication of *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre*, Kelsen's framework struggled to align with the prevailing political climate, characterized by the rise of nation-states and their increasingly imperialist orientations.[199] The extent to which Kelsen's later reflections on international law—shaped by his experiences with European totalitarian regimes during and after the Second World War—reconnected with Kantian framework remains a question for further inquiry.

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[199] See: Armin Mohler, *Carl Schmitt: Briefwechsel Mit Einem Seiner Schüler* (Berlin: de Gruyter, 1995), 419.

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