Hans Kelsen and Nuremberg: The Challenge for the Kelsenian Theory of Public International Law

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Abstract

Since his 1920s writings, Kelsen called for a permanent court of compulsory jurisdiction capable of resolving international conflicts. It should also be capable of establishing the individual responsibility of the violators of international law and punishing them in criminal terms when violence had already occurred. Kelsen worked from April 1945 for the U. S. government's War Crimes Office, preparing up to eight legal reports. And yet it is difficult to gauge exactly what Nuremberg, with its pros and cons, owes to Kelsen's theses and what those trials really meant for the great jurist. It is worth asking whether Nuremberg was a triumph, or rather a failure of the theses championed by Kelsen; whether we are facing a conquest of legal reason or a new expression of its limitations. Do the Nuremberg trials represent the culmination or the failure of Kelsenian theory of international law? In order to answer these questions, this article takes five selected texts of Kelsen to assess the evolution of his internationalist theses from 1934, when the great war had not yet broken out, until 1947, after the Nuremberg trials. On reading them, one may observe how reality convulses the pure theory of law, subjected to what may be its greatest moment of tension.

Keywords: international court – international justice – international law – legal technique – London Agreement – Nuremberg trials – peace – Pure Theory of Law – retroactive punishment

I. Five selected texts of the internationalist Kelsen

Within Hans Kelsen's impressive bibliographic output, especially in the texts related to international law, one can discern a constant concern, a more or less explicit fear that forms the backbone of many of his ideas and upon which some of his best-known theoretical stances are built. We are referring to the fear of war, understood and felt by the Austrian jurist to be the greatest of evils, the enemy to be defeated using all of the instruments that the science of law provides for us. The evil of war was to haunt Kelsen throughout the events that marked his biography; it would be expressed in his choices in life, his flight into exile and also in the choice of problems to which he was to dedicate his long career. As a jurist who witnessed one of the bloodiest periods

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in human history, Kelsen would have to reckon with the limits of law in the most extreme scenarios. He was faced with what some philosophers called the *absolute evil*. How to think of law after the end of World War II? Where did such a legacy of violence and devastation leave the pure theory of law? Were the great wars not clear proof of the futility of positive law, of the empty rhetoric of laws? Had it not become clear that there is no law wherever decisions are imposed? Is that not the clear lesson to be drawn from history?

As is well known, the interpretation that Kelsen was to make of what had happened did not enter the realms of surrender or legal scepticism. His work is packed with proposals looking to the future. Kelsen did not give in to what seemed clear to others: the impotence of law in the face of the *hydra* of power, which by definition does not accept any rules. On the contrary: before and after May 1945, the father of the pure theory of law put forward law as the privileged instrument not only to avoid war, but also to handle its consequences. Law was the means for building peace. Or, in other words, if war "is mass murder, the greatest disgrace of our culture",[2] the progress of legal order is the only path to peace. Only within the framework of a modernised, perfected international legal order, via the establishment of a supra-state jurisdiction, would it be possible to resolve conflicts between countries and pacify societies. As of the 1920s, in his writings Kelsen called for a permanent international court of compulsory jurisdiction capable of resolving conflicts before the parties resorted to violence. It should also be capable of establishing the individual responsibility of the violators of international law and punishing them in criminal terms when violence had already occurred. There is therefore, without a doubt, a common thread between the Kelsenian theses expressed (among other works) in *Peace Through Law* and the Nuremberg trials. We know that Kelsen worked from April 1945 for the U. S. government's War Crimes Office, preparing up to eight legal reports.[3] And yet it is difficult to gauge exactly what Nuremberg, with its pros and cons, owes to Kelsen's theses and what those trials really meant for the great jurist.

On the one hand, the Nuremberg trials put an end to the Second World War. And they did so precisely by translating what was presented as an exclusively political problem into legal terms. Under the assumption that *countries do not commit crimes, but people commit crimes*, through the Nuremberg trials it would be possible to determine the individual responsibility of those who had been some of the great criminals during the war. On the other hand, however, that achievement was achieved at the cost of accepting a trial that was manifestly restricted in its universality, to the extent that the only ones judged were those responsible for the crimes committed by one of the parties in the conflict: the defeated. It was the victors themselves, the allied countries, who dispensed justice upon the vanquished, the Axis countries. The principle of criminal prosecution thus became selective, depending on the national, military or ideological affiliation of the perpetrator of the crime. In this sense, it is worth asking whether Nuremberg was a triumph, or rather a failure of the theses

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[2] *Kelsen*, Peace Through Law, 1944, vii.

[3] *Olechowski*, Hans Kelsen, The Second World War and the U. S. Government, in: Telman (ed.), Hans Kelsen in America – Selective Affinities and the Mysteries of Academic Influence, 2016, 101 (106); *Olechowski*, Hans Kelsen. Biographie eines Rechtswissenschaftlers, 2020, 728; *García-Salmones*, Not Just Pure Theory, Hans Kelsen (1881-1973) and International Criminal Law, in: Mégret/Tallgren (eds.), The Dawn of a Discipline. International Criminal Justice and Its Early Exponents, 2020, 174 (189).

championed by Kelsen; whether we are facing a conquest of legal reasoning or a new expression of its limitations. Do the trials held between 1945 and 1946 represent the culmination or the failure of Kelsenian theory of international law? The perspective given to us by time, as well as the new events that have shaken the world panorama, may help us draw up an answer to this intricate question.

In order to answer this and other questions, in this paper we have gathered together five texts by Hans Kelsen on the problem of peace and international law. They are five texts that serve to study the evolution of his internationalist theses from 1934, when the great war had not yet broken out, until 1947, after the Nuremberg trials. On reading them, one may observe how reality convulses the pure theory of law, subjected to what may be its greatest moment of tension.

II. Peace, a technical matter

The first of the texts we wish to analyze here, *La technique du droit international et l´organisation de la paix* (1934), arose from the inaugural lecture that Kelsen gave when he joined the prestigious *Institut des Hautes Études Internationales* in Geneva in 1933. It reflects the intense concern for the problem of war, as well as a clearly outlined essential idea from Kelsen's thinking: that peace is a matter of legal technique. So much is this the case that any pacifist, any lover of peace, should embrace the idea not of the disarmament of all countries – a noble but utopian aspiration according to Kelsen – but the idea of a slow yet constant improvement of international law. In 1934, there could still be room for some hope. A second great European war was not an obvious scenario, though it was not ruled out, either. The Third Reich had not yet begun its expansion – driven by the famous doctrine of *Lebensraum*. Fascist Italy had not yet invaded Abyssinia. Nevertheless, hundreds of Jewish intellectuals from all over Europe, deprived of their citizenship, were beginning to settle in Switzerland, faced with the enormous movement that had already begun to take shape. In October 1933, Germany had left the League of Nations. A few months earlier, Japan had also done so. Both the Covenant of the League of Nations and the Kellogg-Briand Pact were at that time two of the fundamental international instruments for preserving peace. The peace of a continent and the lives of millions of people depended on its effectiveness; on whether the member states were capable of enforcing its provisions. But the two international pacts seemed to be based on very different premises and, of course, pointed towards very different solutions that were even contradictory to each other. That is how Kelsen considered it to be, writing about them extensively with the constant intention of helping to pacify international relations by improving legal technique.

The League of Nations, the offspring of the First World War, was initially seen by Kelsen as an example of the constant process towards a centralisation of the functions of international law. During his time in Geneva between 1933 and 1940, when the League was going through its most difficult years, he was able to come very close to those who were working on it and assess how it worked in detail. At the proposal of the director of the *Institute of Hautes Études Internationales*, William E. Rappard, Kelsen made several brief reports on the possible ways for technical

improvement of the Covenant of the League of Nations.[4] Building on the work done in those reports, Kelsen published the monograph *Legal Technique in International Law* (1939). The text firstly includes a section dedicated to a reflection on the *principles of legal technique* and then offers a broad catalogue of possible interpretations of each of the twenty-six articles that made up the Covenant, often proposing an alternative wording. Such was the same analytical exercise that he would carry out years later, at an astonishing length of almost a thousand pages, with the Charter of the United Nations.[5]

Both the book dedicated to the League of Nations and the one dedicated to the United Nations are above all two notable exercises in legal interpretation within the context of the characteristic theory of interpretation held by Kelsen. It should be kept in mind that within the arrangement of producing and applying legal norms, the norms of a higher hierarchy determine the content of the lower norms. That determination, however, is not complete but relative. Unlike what happened following some stances of the most naive kind of positivism (or perhaps more cynically, those that considered the judge to be a legal automaton who applied the law to a specific case without any work on interpretation), Kelsen considers that there is always a more-or-less wide margin of free appreciation for the competent body which, while applying the higher norm, produces the lower norm.[6] To be clear: there is always room for an act of will, and that will is expressed via the different ways of interpreting a norm. Kelsen, within his positivism and from a legal point of view, denies that it is possible to affirm the best way to interpret a norm. Consequently, he rejects that the application of one or another method of interpretation can be determined based on strictly legal criteria.[7] Hence, it makes sense that in court rulings, together with the majority vote, there is room for the so-called individual votes or dissenting opinions, which include other possible interpretations of the norms to be applied. So the choice of correct criterion to interpret a norm does not correspond to the science of law; rather, it is an inevitably political matter.[8] For this reason, the jurist's role in ambiguous cases (in other words, in cases in which the norm allows for different interpretations) is not to say what the correct solution is, but to explain all the possible meanings of a norm,[9] including interpretations not foreseen by the legislator but which are possible within the literal tenor of the norm, and also including those that may be politically undesirable to the very same jurist who is demonstrating that they are possible.

The ambiguity – typical of international norms, but by no means exclusive to them – with which the Covenant of the League of Nations was drafted fostered criticism from those who wished to see it as a mere political document. Therefore, for Kelsen it was a priority to defend the Covenant's legal nature. Considering the Covenant to be a merely political instrument was tantamount to denying that the differences

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[4] *Bersier Ladavac*, Diritto e pace in Hans Kelsen, Sociologia del Diritto 39/1 (2012), 88. The reports have been partially published under the title "Comment devant la guerre penser l´après-guerre?" in the compilation of writings on international law published by *Leben*, Kelsen. Ecrits français de droit international, 2001.

[5] *Kelsen*, The Law of the United Nations. A Critical Analysis of its Fundamental Problems, 1950.

[6] *Kelsen*, Reine Rechtslehre, 1934, 92.

[7] Ibid., 95 f.

[8] *Kelsen*, Legal Technique in International Law, 1939, 12.

[9] *Kelsen*, Teoría pura del derecho, translation of the 2nd ed. 1960 by Roberto J. Vernengo, 2009, 356.

arising from applying it could be legally resolved;[10] that is, by submitting them to the authority of a tribunal – in this case, the Permanent Court of International Justice. Kelsen argues that in no way does the vagueness and ambiguity plaguing the Covenant diminish its worthiness as a legal norm. It is a norm produced in compliance with the procedures of any international treaty and which sets out among its members a series of rights and obligations, for which failure to comply implies sanctions. Nor is the Covenant's legal value diminished by the fact that it is explicitly intended to achieve political goals, such as fostering cooperation between nations or maintaining international peace and security:

> "from the moment that the norms [of international law] have the nature of rules of law, they are no less legal than the articles of a civil code, no matter how much they are intended to achieve political results".[11]

The ambiguity affecting a legal norm may be intentional or not. If it is intentional, Kelsen argues, the *technique of ambiguity* can be useful insofar as it enables a norm to be adapted to different scenarios of factual situations.[12] However, if it is not intentional, then it is usually the result of a defective legislative technique that will lead to problems in applying the norm. In the case of the ambiguity affecting the Covenant of the League of Nations, one could say that it is a combination of both. It is partly an intentional ambiguity, since it is typical of a treaty with the characteristics of the Covenant, with its universalist intent, leaving a wide margin of indeterminacy in its provisions so that the greatest possible number of states would adhere to it. On the other hand, it is also to a large extent an ambiguity resulting from poor legislative technique. Kelsen partly blamed this defect on President Woodrow Wilson himself, who, in order to translate his famous Fourteen Points into positive law, surrounded himself with a very insufficient number of jurists. The result was a treatise that was "more than imperfect from a technical point of view", whose provisions were extremely vague and imprecise.[13] Faced with this technical imperfection, Kelsen put forward the need to take on either a *legal-political* reform or a *legal-technical* revision of the Covenant. In reality, he argued, there is not so much difference between one option or the other, since a technical revision is also likely to cause a change in the application of the law.[14] The task of revision that Kelsen undertook in his 1939 book, when the organization was already hit and sunk is another example of his *faith in the law*;[15] but not of his naivety or his disregard for the real political circumstances. He was well aware that his proposal for revision would barely have any effect on the minds of the political leaders. But his explicit reason for not giving up on his efforts was that, at least, criticism might serve to help legal technique in the future.[16]

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[10] E. g. *Morgenthau*, Scientific Man vs. Power Politics, 1946, 119.

[11] *Kelsen*, Legal Technique in International Law, 1939, 9.

[12] Ibid., 11.

[13] Ibid., 16.

[14] Ibid., 18.

[15] We have taken the expression from *Calamandrei*, Fe en el derecho, ed. by Silvia Calamandrei, 2009, who originally used it as the title for a conference presentation given in Florence in 1940, on the verge of Mussolini taking Italy into World War II.

[16] *Kelsen*, Legal Technique in International Law, 1939, 24.

Going into some specific aspects of criticism of the Covenant, it should be noted that what Kelsen attacked most harshly was the abusive use of the word *justice*. If the Covenant had spoken less about justice and more about *legal technique*, the League of Nations would probably have obtained a different outcome from its failed task of maintaining peace and security. Based on this, he considers that the Covenant's great structural defect was the fact that the Permanent Court of International Justice was left out of it.[17] In his opinion, the Court should not only have been part of the Covenant, but should have been set up as the central body of the entire system for the League of Nations. Instead, the Council was established as its main body, followed in importance by the General Assembly, thus providing the illusion of resemblance to the executive and legislative branches that one could find at the level of a state.

However, the reasons for defending the central nature of the Court are not only related to the requirement of instituting a third party to determine if an illegal act has occurred and what sanction should be applied in such cases (that is, related to a technical-legal question). Kelsen also provides strategic and political arguments. Given that sovereignty continued to be an inalienable attribute of the states, it was not possible to establish the majority principle within the Council. This circumstance made it tremendously inoperative in adopting the most relevant resolutions; that is, those to do with peacekeeping. There was no possibility of binding any member state against its will. In such circumstances, Kelsen considers that the only body whose decisions the states would abide by without having contributed to their formation is a court. In fact,

> "the majority principle, which was systematically excluded from the procedure of the Council and of the Assembly, was indeed introduced without any difficulty into [the statute of] the court".[18]

Indeed, this idea is confirmed when one takes into account that, among the main tasks entrusted to the League, the only ones that were relatively successful were those related to resolving lawsuits by submitting issues to arbitration or to jurisdiction. The matter of protecting member states in the face of aggressions by non-member states was very different, however. Kelsen draws attention to the powerful contradiction between the obligation imposed by Article 8, relative to restricting weapons, and the obligation of Article 11 to provide aid to the member of the community who is attacked by a third party.[19] The disarmament rationale set out in the former article seems barely compatible with the collective security mechanism established by the latter. Disarmament of states would only be feasible if it were accompanied by the

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[17] The Covenant only stipulated, in its Article 14, that: "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The Statute of the Permanent Court of International Justice, therefore, was not within the Covenant itself (unlike the Statute of the International Court of Justice, which is found in the UN Charter itself), so that its jurisdiction was not binding, but the member states were free to decide whether to sign the protocol approved by the General Assembly on 13th December 1920, which entered into force the following year, once it had been signed and ratified by half of the member states.

[18] *Kelsen*, Derecho y paz en las relaciones internacionales, 1996, 186.

[19] *Kelsen*, Legal Technique in International Law, 1939, 63.

consequent rearmament of the international community. In addition to this (which also seemed very unlikely to be achieved at the time), disarmament was in any case a risk for all members of the organisation: "to be unarmed is to be without rights", Kelsen would affirm over and over again, based on the conviction that a commitment to disarmament would favour those who breach international law.[20]

The Covenant of the League of Nations' deficiencies seem to justify the Pact of Paris, better known as the Kellogg-Briand Pact, signed in August 1928 by fifteen countries that solemnly agreed to renounce war as a means of settling international disputes. In an interesting book, Oona Hathaway and Scott Shapiro argue that the Kellogg-Briand Pact was a true milestone in the evolution of international law, marking the shift from the old to the new world order.[21] In the old order arising from the Peace of Westphalia in 1648, built upon the theoretical foundations of Hugo Grotius, war was the inevitable consequence of conflicts between countries and a valid means of resolving such conflicts. Power was the measure of rights. Diplomatic negotiations between states were often preceded by demonstrations of military capability. Furthermore, the lands acquired through conquest were recognised by third countries, which were guided by the principle of neutrality. For Hathaway and Shapiro, the Kellogg-Briand Pact, with its three simple articles, spelled the end of that Westphalian system. Of course, after the Pact there were still wars. Eleven years after it was signed, in fact, the bloodiest war in history was declared, with at least 50 million killed. However, the Pact does not deserve to be judged by its ability to prevent war – a capacity that no legal norm can possess by themself, but rather by the legal consequences it lays down in the event of non-compliance. It is in this aspect that the Kellogg-Briand Pact passes a remarkable historical milestone, since it sets out the point of reference to be taken after the Second World War to restore the territories that had been annexed by force by the Axis powers. Quantitative studies conducted by Hathaway and Shapiro show that before the Pact was signed, in the old world order, on average there was a territorial conquest in the world every ten months. After the Pact, this statistic dropped noticeably to an average of one territorial conquest every four years. Also, before the Pact, every year an average of 295,486 km² were acquired through violence, whereas the figure contemporary has fallen to 14,950 km².[22] To sum up, although international law may be breached (and in fact it is breached every day), this data may indicate that the Covenant entering into force was not wholly ineffective, but actually had concrete, measurable effects on the behaviour of states in the international sphere.

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[20] Another example of Kelsen taking into account political reality is the considerations he makes noting that within an organisation with universal intentions and which therefore encompasses countries that are very different from each other, there is difficulty in getting such countries involved in defensive action against the aggression of a third state with which they may have as many commercial or cultural ties as with the member state attacked (*Kelsen*, Peace Through Law, 1944, 51). In this vein, Kelsen considers that the role of the organisation in terms of maintaining international security should have focused on sanctioning member states that breached the norms of the Covenant, while the sanctions on third party aggressor states should have been entrusted to political alliances (ibid., 55), not because that was the most desirable way from a universalist point of view, but because it was the most politically feasible.

[21] *Hathaway/Shapiro*, The Internationalists and Their Plan to Outlaw War, 2017.

[22] Ibid., 314. This statistic will surely need to be revised after the Russian invasion of Ukraine in February 2022 and the subsequent ongoing war.

Kelsen, of course, did not have such a favourable opinion of the Kellogg-Briand Pact. Not only did he criticise it in his 1934 text, when it had not yet deployed its effects in Nuremberg in determining the so-called crimes against peace, but he continued to criticise it beyond the 1930s in most of his works on international law.[23] From his point of view, the Pact was based on a precarious knowledge of international law in particular, but also of law in general. "Law is an order of coercion", Kelsen firmly maintained. What characterises any legal order is its ability to impose sanctions, if necessary, by force. It is that particular feature of law, its specificity, that differentiates it from other normative orders such as morality or religion. Like any law, international law must also be a coercive order that prescribes sanctions. It could not be otherwise when we speak of a legal order, and it has been so, constitutively, since long before the Pact was signed. Kelsen certainly knew that such a statement would be very unlikely to arouse consensus among legal practitioners and theoreticians. The legal nature of international law has been questioned by jurists themselves for centuries. The best-known case is perhaps that of John Austin[24] or, in more recent times, that of Herbert L. A. Hart,[25] although there are a range of stances to be found which, with differing nuances, deny the legal value of international law.[26] Many "deniers" would raise doubts about the real existence of institutionalised international coercion. They would deny what for Kelsen remained evident: that war and reprisals are legal sanctions. The opposing perspective served, for example, to qualify international law as a kind of non-law or as an *anarchic law.* And yet for Kelsen the term *anarchic law* would constitute a monumental oxymoron: law can never be anarchic, because anarchy is precisely the absence of law. His support for international law as a legal order is necessarily based on the indubitable verification of the existence of sanctioning instruments in the sphere of the international community. Such instruments are war and reprisals.[27]

Hence, Kelsen affirms that international law is a coercive order to the extent that under its rules military action can only be understood either as a crime or as a sanction, as established by international custom. The affirmation that war according to law is what lends a legal character to the international order can be seen as a *contradictio in terminis* if we consider that military action in practice implies the denial of the validity of so many legal norms.[28] Kelsen was aware of this but argued

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[23] *Kelsen*, Principles of International Law [1952], reprint 2003, 29; *Kelsen*, Collective Security Under International Law [1957], reprint 2001, 55.

[24] *Austin*, Lectures on Jurisprudence. Or, the Philosophy of Positive Law, 5th ed. 1911, 575.

[25] *Hart*, The Concept of Law, 2nd ed. 1994, 213.

[26] *García Pascual*, Norma mundi. La lucha por el derecho internacional, 2015, 89.

[27] The influence on Kelsen of Karl von Kaltenborn and, through him, of Christian Wolff were fundamental as regards this point, see *von Bernstorff*, The Public International Law Theory of Hans Kelsen. Believing in Universal Law, 2010, 84.

[28] One of the clearest formulations for war as a denial of law was made by Luigi Ferrajoli: "War can be justified for extra-legal reasons of an economic, political and even moral nature; it can also be considered lawful or not illegal, when there are no norms of positive law that prohibit it. But it cannot be classified as legal, because the contradiction between war and law does not allow that. Law, in effect, is by its nature an instrument of peace, that is to say, a technique for the peaceful settlement of disputes and for the regulation and limitation of the use of force. (...) Peace is its intimate essence and war is its negation." *Ferrajoli*, Razones jurídicas del pacifismo, 2004, 28; also *Ferrajoli*, Principia iuris. Teoría del derecho y de la democracia, 2011, 481.

that the aporia is only apparent. Any legal system, not only the international one, must be able to use force precisely so that individuals do not make individual and arbitrary use of it. That does not necessarily imply that the legitimate use of force must be exercised by a specialised body. It does mean that it is the legal system itself that determines under what circumstances and by whom the coercion may be exercised. Any coercion exercised outside the circumstances determined by the legal system will become illegal. In this way, within the legal system, coercion can only be considered as either a sanction or as crime. The law thus becomes a peace-making instrument precisely because, with coercion being exercised in a centralised or at least legally determined manner, acts of coercion that may be exercised by individuals are consequently forbidden.[29] In other words, the international order does not prohibit all wars, only those of aggression; that is to say, war on the part of the state that is the first to commit a hostile act of force, and not war waged by the state defending itself against its aggressor. More explicitly, "War and counterwar are in the same reciprocal relation as murder and capital punishment".[30]

Military action, then, from the point of view of international law, is either a crime or a sanction. There can be no intermediate options. Either it is a reaction to a breach of international law, or it is in itself a direct breach of international law. One clear example that war should be – and is – considered by the international community to be a legal sanction is the fact that those who have carried out any type of military action have always made an effort to justify it based on the law. Throughout history, affirms Kelsen, states have constantly sought legal arguments with which to justify their wars.[31] It could be said that there is a shared belief that the only war that can be considered as a sanction, and which can therefore be considered a *just war* (or better still, a legal war) is one in keeping with *jus*, in accordance with the legal requirements. Anything else would be a violation of it, i. e. illegalities, crimes. In this sense, Kelsen was to consider that agreements between states such as the Kellogg-Briand Pact, intended to prohibit war, may be positive in the political field; however, in the legal field they are absolutely useless, since war was already generally prohibited by customary international law.[32] As a sanction, there is no doubt that it is a crude instrument: due to its objective nature, most of the time it makes the innocent civilian population pay for the excesses carried out by their rulers. But Kelsen insists that eliminating it is not only a matter of political will, but of legal technique. If the intention is to eliminate war from the international scene, then it is necessary to act like a surgeon "who must know exactly the function of the organ he proposes to remove from the human body in

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[29] *Kelsen*, Teoria Generale del Diritto e dello Stato, 2009, 13.

[30] *Kelsen*, Principles of International Law 2003, 28.

[31] *Kelsen*, La technique du droit international et l´organisation de la paix, Revue du Droit International et de Législation Comparée 61 (1934), 255. A comprehensive collection of more than 400 war manifestos can be found on the Yale University website, stretching from the 15th century to World War II. Hathaway and Shapiro have summarised an analysis of the manifestos, presenting some interesting conclusions: 69 % of the manifestos mention self-defence as a reason; 47 % mention fulfilling obligations arising from a treaty, 42 % allege the reparation of injuries suffered, etc., *Hathaway/Shapiro*, The Internationalists and Their Plan to Outlaw War, 2017, 43.

[32] *Kelsen*, Théorie Générale du Droit International Public. Problèmes choisis, Recueil de Cours 1932, 120 (135).

order to maintain and stimulate life in that body".[33] Eliminating war, therefore, would only be viable in the event that another mechanism capable of exercising coercion in the international arena was established. The Viennese jurist concentrated all of his efforts on that. But as long as such a mechanism is not instituted, war can only be accepted as a sanctioning instrument. This is symbolic, perhaps, of the precarious and primitive situation in which international law finds itself and, at the same time, of the paradoxical foundations of its legal nature.

III. The groundwork for international justice

From Kelsen's American exile, two internationalists works may be highlighted: *Essential Conditions of International Justice* (1941) and *The Strategy of Peace* (1944). They are part of the process of intellectual evolution that would conclude in his famous book *Peace Through Law*. The two texts coincide in pointing out the importance of an international court in establishing a stable world peace. As long as states do not agree to submit their differences to the authority of a permanent court endowed with a binding jurisdiction, war cannot be effectively eliminated from international law. Various points must be addressed in order to place this idea's foundations and consequences in their proper context.

The Second World War was raging when Kelsen wrote these two texts. The League of Nations and the Kellogg-Briand Pact had ultimately failed in their task of keeping the peace. Faced with this, instead of adopting a defeatist attitude, Kelsen warned of the dangers of discouragement and redoubled his efforts on his theoretical work. Whereas the 1941 text takes the tone of a critical analysis, in the 1944 text he was thinking above all about the new society that might arise from the ashes of war. He was offering, in the clearest and most concise way possible, his recipe for preparing the international justice of the future. It was a future which, still today, is our present. If we consider that Kelsen – unlike many other scholars[34] – remained faithful to the postulates of his pure theory of law, then it may be noteworthy to look inside the article that bears the title *Essential Conditions of International Justice*. One of his most incisive criticisms of the Covenant of the League of Nations had focused on the abusive use of the "proud" term *justice*, related to a lack of care taken in its legal technique. Nevertheless, the stance Kelsen adopts in the 1941 text as regards the idea of justice turns out to be nothing more than a reaffirmation of his well-known ethical scepticism. As he would do at greater length a few years later,[35] he begins his text by questioning the concept of justice and verifying how the efforts by the greatest philosophers in history to give content to that concept have been fruitless. Whether one thinks one way or another, justice ends up being reduced to a subjective matter, to value judgements contaminated by individual emotional factors. This implies rejecting the idea that judgement about what is fair or unfair can be made according to objective and rational criteria. This is why a *pure theory of law* like the one that Kelsen intended to construct found itself in need of establishing a sharp distinction between *valid*

[33] *Kelsen*, Revue du Droit International et de Législation Comparée 61 (1934), 253.

[34] *Söllner*, From Public Law to Political Science? The Emigration of German Scholars after 1933 and Their Influence on the Transformations of a discipline, in: Söllner/Ash (eds.), Forced Migration and Scientific Change. Émigré German-Speaking Scientists and Scholars After 1933, 1996.

[35] *Kelsen*, ¿Qué es la justicia?, 2008.

norms and *fair* norms. The normative validity can be determined in an objective and rational way by taking other norms from the legal system itself as references. The fairness of norms, on the other hand, can only be determined according to criteria detached from law.[36] As a result, determining whether a norm is fair or unfair is a task that is not the responsibility of the jurist – or at least not when the *jurist is acting as a lawyer*.

This postulate applies exactly the same when we talk about the international scenario. Kelsen distinguishes two main ways of conceiving international justice, both of which have to do with the problem of territorial regulation. One model would be that of the self-determination of peoples, which is a democratic model based on the protection of minorities and which recognises the equal value of all races, religions and nations. The other model would be the *Lebensraum* ("living space") advocated by National Socialism, which is based on the superiority of some races and nations over others and, consequently, gives superiors the right to invade and plunder inferiors.[37] In the same way that the conflict between socialism and capitalism cannot be resolved rationally, neither can the conflict between the self-determination of peoples and imperialism. Science – and let us remember that law was a science for Kelsen – cannot resolve conflicts of values.

Such a conclusion may be disappointing, but with it Kelsen confronts us with the gorgon of power that inevitably hides behind the law. The quandary is not resolved if jurists are unaware that they are also citizens, if they do not take off their lawyer's gown for a moment to take sides, if they do not get politically and ethically involved. However, the gown must necessarily be removed. Jurists must always take sides without mixing up the different areas of knowledge, which must remain separate. In order to preserve its status as a science, law must preserve its autonomy with respect to politics or morality – areas where objectivity is not possible. That does not mean that the jurist as a person must therefore be amoral or apolitical, but it does mean that when they are working with norms they must do so without confusing their moral and political preferences with the demands of the legal sphere. Kelsen is clear in this regard, and that is how it is understood on reading his work. For him, pacifism is preferable to imperialism. The equality of all peoples is preferable to the superiority of some peoples over others. As republics are preferable to monarchies, or democracies are far more preferable to autocracies. In order to defend such values, he would give a subtle twist to his argument and stand by a strictly practical ideal: in reality, an equivalence can be made between justice and peace, since justice can be understood as a situation of social order in which there is no violence by some people against others. To that extent, a demand for justice is a demand for peace. Justice is stripped of all metaphysical attributes so as to become "peace guaranteed by law".[38] Hence, the term *international justice* should be understood as synonymous with international peace. Once again, what international peace needs most is constant improvement of international law.

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[36] This is what he states in the first edition of his *Pure Theory of Law*, stating that his doctrine "is intended (…) to describe law as it is, without legitimising it as fair or disqualifying it as unfair; it asks about real and possible law, not about correct law" (*Kelsen*, Reine Rechtslehre, 1934, 17).

[37] *Kelsen*, Essential Conditions of International Justice, American Society of International Law Proceedings 35/3 (1941), 70 (71).

[38] Ibid., 72.

In pursuit of a technically evolved international law removed from primitivism, Kelsen defended the need to create a permanent court with a binding jurisdiction, as we have mentioned above. But before stating the characteristics of such a court, we must remember that the matter of international jurisdiction had been the subject of agitated theoretical controversies since the times of Weimar. Hersch Lauterpacht described these disputes in great detail in his book *The Function of Law in the International Community*. In the book, he makes an allegation against theories that distinguished between international conflicts of a legal nature and those of a political nature, considering that the former were likely to be submitted to the authority of a court, while the latter were not. Hans Morgenthau's doctoral thesis, read in 1928 and published in its French version in 1933, is one of the most significant examples of such stances. Lauterpacht would agree with Morgenthau – and also to a certain extent with Schmitt – that there is no criterion that makes it possible to unequivocally differentiate between purely legal conflicts and political ones. However, he comes to a completely opposite conclusion. The impossibility of distinguishing what is political from what is legal leads Morgenthau to consider that ultimately everything is political and that, consequently, the role of international courts should be minimised. Lauterpacht, on the other hand, was to consider that any subject matter, regardless of its seriousness or whether it affects the national interest or honour, can be resolved by applying the law.[39] This would not only constitute a theoretical postulate, but was to be confirmed by experience in numerous practical cases in which the courts were capable of successfully resolving cases of an undoubtedly political nature.[40] By thus combatting the arguments of those who, excusing themselves via the myth of sovereignty, sought to free states from being subject to the normative force of law, Lauterpacht upheld the role of judges and binding courts as indispensable elements of international law.

This same stance was championed by Kelsen, albeit with significant nuances, since Lauterpacht would reject his teacher's positivism to adopt a natural law perspective, like Verdross.[41] The exalted defence of a court's central importance as an essential institution to pacify international relations must be placed in the context of the postulates that make up the pure theory of law. Defending the need for an international court with a binding jurisdiction is nothing less than defending the primacy of law over politics. The postulates adopted by Kelsen in the domestic sphere can be fully extrapolated to the international sphere. In the same way that in the Weimar Republic it was the jurisdiction[42] – and not the head of state, as Schmitt maintained[43] – that had to remain vigilant over the legal order as a whole, in the international arena it must also be a jurisdictional body – and not the mere balance of forces between the different states – that should remain vigilant over international legality. The centralisation of the function of determining whether an illicit act has occurred and of determining the sanction that such an offence incurred was for Kelsen the greatest technical advance to which international law at the time was in a position to aspire. As has already been noted, war cannot be recognised as a valid sanction in keeping with

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[39] *Lauterpacht*, The Function of Law in the International Community, 2011, 166.

[40] *Lauterpacht*, The Development of International Law by the International Court, 2010.

[41] *Verdross*, Règles générales du droit de la paix, Recueil des Cours 1929, 271–517.

[42] *Kelsen*, ¿Quién debe ser el defensor de la Constitución?, in: Schmitt/Kelsen, La polémica Schmitt/Kelsen sobre la justicia constitucional, transl. Sánchez and Brie, 2009.

[43] *Schmitt*, El defensor de la Constitución, in: Schmitt/Kelsen, La polémica Schmitt/Kelsen sobre la justicia constitucional, 2009; *Schmitt*, Teología política 2009.

international law without immediately noticing the technical precariousness afflicting a system with such a crude sanctioning instrument and the need to articulate ways of overcoming such examples of legal primitivism. Kelsen fully recognised this situation and in successive works he developed a complete critique of war as a sanction that would enable him to advocate for a technical purification of this punitive mechanism. We can sum up this criticism based on four characteristics that accompany war as a legal sanction: it follows the dynamics of *self-authorisation*, is based on the principles of *collective responsibility*, of *objective (strict) responsibility,* and does not take into account the principle of *proportionality*.

1. Self-authorisation

Self-authorisation may be considered the most significant characteristic of war as a sanction, at the same time that it implies "the most serious technical defect" of international law.[44] The international sphere would be characterised by strong institutional decentralisation, that is to say, by the absence of central bodies producing and applying the law in accordance with the principle of division of labour. Two phases could be distinguished in the application of general norms: 1) the determination that events have occurred that give rise to the sanction stipulated by law, and 2) the implementation of the sanction, by force if that is the case. In the absence of centralised bodies in international law, the two phases are entrusted to states themselves as subjects whose rights have been violated. Customary international law delegates to the state first the power to establish that its own interests have been affected by another subject (generally another state) that has acted in contravention of international regulations. Secondly, it also delegates to the states the power to materially implement the corresponding sanction – war or reprisals – in the event that the state considered to be the offender does not repair the damage caused. From such a perspective, it seems clear that self-authorisation is not anarchy. For Kelsen, it is not that there is no law in the international arena, but that it exists with a significant degree of decentralisation. From a logical legal point of view, it is customary international law that *delegates* in the state the capacity to satisfy its own right. The state acts in this case not as a sovereign entity – which some, like Schmitt,[45] consider to be endowed with a *jus belli* – but as a true body of the international community.[46] Kelsen would maintain that it is possible to centralise the first of the phases of the regulatory application, that is, the determination that an unlawful act has been committed, transferring such power to a specialised body. However, the international community would be poorly prepared to decentralise the second phase of regulatory application, that is, the material undertaking of war or reprisals, given the material difficulty of setting up some kind of executive body or world police force.

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[44] *Kelsen*, Théorie Générale du Droit International Public. Problèmes choisis, Recueil de Cours 1932, 130.

[45] *Schmitt*, Der Begriff des Politischen, 1932, 33.

[46] *Kelsen*, Les rapports de système entre le droit interne et le droit international public, Recueil des Cours 1926, 227 (318).

2. Collective responsibility

In order to understand the critique of war as a *collective sanction*, one must take into account that in Kelsenian theory those subject to the norms of international law are not the states themselves, but the individuals whose conduct can be attributed to the state.[47] People, not states, commit crimes. However, traditionally, when those people (authorities, political leaders, etc.) fail to comply with the mandates of international law, it is not them, but the population of the state they represent who bear the consequences of their non-compliance. Indeed, war as a coercive instrument is not likely to affect only a handful of specific individuals, but it always affects a more-or-less large group of people. In Kelsen's words, "retaliation or war does not reach the state agents that have violated international law, but the mass of persons who make up the people".[48]

3. Objective (strict) responsibility

For this reason, unlike in modern legal systems where the principle of subjective or fault-based responsibility prevails, in international law the principle of objective or *strict responsibility* predominates. This is a direct consequence of collective responsibility: if the sanction is applied against a party that was not the individual bound by the norm, then it cannot be applied only against the party that has acted with wilful intent or negligently. What matters in international law is the result: the fact that objectively there has been damage in a state's sphere of interests. It does not matter if this damage was caused by fault or negligence, since there is no way that these can be determined if it is considered that the party receiving the sanction in a general way is the state or the people as a whole.

4. Unproportionality

Finally, although war continues to be the coercive instrument *par excellence* in the field of international law, it is not possible to maintain the desired proportionality between the seriousness of the offence and the intensity of the sanction. Attempts to limit warfare via the traditional *jus in bello* or contemporary international humanitarian law, have only managed in a few cases to reduce the destructive potential of war; but they are clearly insufficient to achieve the proportionality that a functional conception of law would require. Nor does the difference in degree between war and reprisals imply observance of the principle of proportionality. Kelsen writes:

> "It is true that reprisals and war involve two different degrees of sanction (...); but international law does not decide in favour of one or other of the sanctions, whose difference depends on the seriousness of the international crime, against which the sanction is the reaction. According to general international law, the injured state is free to choose the sanction with which it wishes to react against the person who injured it, without taking into account the seriousness of the crime, that is, the type of injury."[49]

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[47] *Kelsen*, Teoría General del Estado, 2008, 87.

[48] *Kelsen*, Théorie Générale du Droit International Public. Problèmes choisis, Recueil de Cours 1932, 131.

[49] *Kelsen*, Derecho y paz en las relaciones internacionales, 1996, 133.

With this rationale, the creation of a strong international court is Kelsen's great commitment on the path towards the modernisation of international law. In *Essential Conditions of International Justice* as well as in *Strategy of Peace*, we can find the first traces of that court as conceived by Kelsen, which would be described in great detail in *Peace Through Law*. In these two texts, which we can call preparatory ones, there is a striking insistence on presenting the process of technical evolution of international law practically as a *natural process;* something that would necessarily happen in the international arena because it has already happened in the domestic arena. It is an image, then, of legal progress that evokes Kant's philosophy, with successive departures from the state of nature and an understanding of peace as the end of history or as the hidden ideal of nature. For Kant, as for Kelsen, the progress of human history seems to depend on the development of legal society. A lasting peace, the former would say, "is not an empty idea but a task that is gradually resolving itself and is always coming nearer to its goal".[50]

In pursuit of this development, the binding jurisdiction of the court that Kelsen imagines – even not excluding possible conciliation procedures – is essential. Establishing a binding jurisdiction is "the strongest possible guarantee for maintaining peace".[51] The path towards pacification in the international arena can only begin by taking away from the states the power to decide whether or not an offence has been committed and bestowing this power on an impartial authority such as a court. Only in this way will the states no longer settle their controversies by themselves through war or retaliation. Establishing an international court with a binding jurisdiction is the first step towards replacing the rationale of the mightiest with the rationale of law. In order to take this first step, it is also essential to end the eternal distinction between legal conflicts and political conflicts, which has the effect of making each of the states believe it has the power to take any conflict out of the jurisdiction of the court.

For Kelsen, as well as for Lauterpacht, any legal order has an objective substratum that would be lost if the determination of the legal or political nature of a conflict did not depend exclusively on the third party between the parties in conflict.[52] The legal system, which has the characteristics of being full and coherent, will always be in a position to offer a response to the claims of the parties in dispute. The argument, typical in realism, which puts forward the impossibility of legally resolving a certain dispute (alleging the inexistence of a norm applicable to the case or else alleging the political and non-legal nature of the conflict), in reality would be hiding the excuse of a party that simply does not agree with the law in force or believes that it would be harmed if it were applied. But it is far from a simple task to get states, clothed in their fine sovereignty, to allow an external body such as an international court to impose its criteria on them. Kelsen was not naïve.[53] Even when defending the strict independence of legal matters from the political sphere, he does not fail to address the political circumstances upon which the norms of law are based. In this sense, he considered that in order to achieve the establishment of the court, the greatest possible number of states must sign an international treaty that would give rise to the organisation that

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[50] *Kant*, La paz perpetua, in: Kant, Ensayos sobre la paz, el progreso y el ideal cosmopolita, 2009, 141 (187).

[51] *Kelsen*, Peace Through Law, 1944, 56.

[52] Ibid., 28.

[53] He has even been tagged has a "political realist", *Schuett*, Hans Kelsen's Political Realism, 2021.

was to establish that court.[54] If it happened after a war – as Kelsen clearly thought was the case at the time – both winners and losers should be encouraged to sign it. The greater the tendency towards universality, and the bigger the alliance, the more one could impose political pressure and isolation on those remaining outside it, that is, those who did not want to give up the use of violence to resolve their conflicts.[55] Following this idea, in order to be part of the new international organisation that he was thinking of, it would suffice to have a unilateral declaration by the state that wanted to join, with no need for express acceptance by the states that were already members. But their adhesion had to be formulated without reservations: being part of the alliance had to necessarily imply acceptance of the court's jurisdiction over any dispute that might arise among them, regardless of the possible seriousness of the case or importance of the interests in play.

In order to carry out the sentences handed down by the court, ideally an international police force would be created. But such a police force would only be possible on the condition that there was a corresponding obligation for states to disarm or drastically reduce their weapons,[56] thus establishing a worldwide monopoly on the legitimate use of force. Since international society was not yet ready to take that step, Kelsen advised maintaining the principle of self-help that had traditionally governed primitive legal systems, and authorising the affected states to implement the court's decisions, whether alone or in coalition. Even so, he proposed an element that marked out the path towards the rationalisation and control of such implementation, and consequently again a way to overcome legal primitivism. That element was supervision by an administrative body over the implementation of the sentence by individual states. The main task of this administrative body, called the *Council*, should be to implement the court's decisions. The possibility of exercising a binding jurisdiction over the covenant's member states was undoubtedly a great advance in the technique of international law. However, the qualitative leap allowing legal primitivism to be left behind can only be achieved by introducing the international criminal liability of individuals. Kelsen insists that each breach of international law is carried out by specific individuals, with names and surnames. However, the immunity that these individuals – the state agents – have traditionally enjoyed has prevented them from being judged by other states, leaving their responsibility to dissolve within the pain of collective sanctions inflicted on the populations of the states on whose behalf they acted. By setting up an international court with the capacity to judge individuals, Kelsen proposes reversing this rationale: it is the subject's individual liability that excludes the people's collective liability, and not the other way around, as had been the case until then throughout the long history of international law.

As a result, it should no longer be states, but mainly people, human beings of flesh and blood – whose responsibility can indeed be determined individually and subjectively – who should be prosecuted by the international court. The establishment of individual responsibility is the great step forward towards the complete elimination of war. In Kelsen's words: "individual responsibility (…) is probably the most radical step that is possible within a legal order which shall maintain the character of interna-

[54] *Kelsen*, The Strategy for Peace, American Journal of Sociology XLIX (1944), 381 (388).

[55] *Kelsen*, Peace Through Law, 1944, 66.

[56] *Kelsen*, American Journal of Sociology XLIX (1944), 389.

tional law".[57] With these ideas, the groundwork has been laid for us to definitively approach the Nuremberg trials.

IV. In view of the London Agreement

The fourth Kelsenian work in which we wish to focus here is *The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*, published in the autumn of 1945. France, the United States, the United Kingdom and the Soviet Union signed the London Agreement on 8th August 1945, establishing the Statute of the International Military Tribunal. Based in Nuremberg, the court would be responsible for judging crimes committed by Axis war criminals. The London Agreement therefore certifies the victorious powers' intention to put the defeated on trial. Although it was a trial afflicted by multiple defects seen from the view of standard contemporary legal guarantees, the decision itself is enormously valuable for history and was not without controversy. On the contrary, it was difficult to reach a consensus, requiring intense diplomatic negotiations. Churchill himself was clearly against holding any kind of trial. The British Prime Minister was of the opinion that surprises and even acquittals occur in trials! He would have preferred to determine the culprits through inquisitorial committees[58] to summarily execute them afterwards.[59] Public opinion in the allied countries, which had had to bear the brunt with so many victims, did not appear keen on the idea of prosecuting war criminals in a trial, either. A poll carried out in the

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[57] *Kelsen*, Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals, California Law Review 31 (1943), 530 (565 f.).

[58] The Moscow Declaration of 1943 had determined that individual responsibilities should be established, though it did not necessarily follow that it should be done through a judicial procedure or trial. The option of a *political* trial, and not a judicial one, was a recommendation from Franz Neumann himself, who also served as an advisor to the U. S. government: "These cases can be brought before an international tribunal or one made up of the allies. But political experience seems to advise opting instead for a political agency. Such a trial would avoid the difficult and intricate question of the law applicable to the treatment of criminals (…) an international political body or one composed of allies could apply the recognised principles and standards of criminal law without being obliged to follow any particular system." *Neumann*, Problems Concerning the Treatment of War Criminals, in: Laudani (ed.), Secret Reports on Nazi Germany. The Frankfurt School Contribution to the War Effort, 2013, 456 (462). It is worth noting the intense advisory work carried out between 1943 and 1949 by Neumann, together with other members of the Frankfurt School, such as Herbert Marcuse and Otto Kirchheimer, for the Office of Strategic Services; and which Raffaele Laudani compiled into a volume. The fact that the U. S. government was of the same opinion as these intellectuals, taking into account their ideological profile (which we could call *heterodox*) shows the difficulty of the task of managing the end to the conflict and the post-war scenario. But it also bears testimony to the commitment of those emigrated intellectuals who, like Kelsen, put their knowledge at the service of the intelligentsia of the country that had welcomed them. In contrast, other members of the Frankfurt School, such as Adorno and Horkheimer, devoted themselves to writing *Dialectic of the Enlightenment* from sunny California while the war was still raging, *Salter*, The Visibility of Holocaust: Franz Neumann and the Nuremberg Trials, in: Fine/Turner (eds.), Social Theory after the Holocaust, 2000, 212.

[59] *Hathaway/Shapiro*, The Internationalists and Their Plan to Outlaw War, 2017, 255; *Nino*, Juicio al mal absoluto ¿Hasta dónde debe llegar la justicia retroactiva en casos de violaciones masivas de derechos humanos?, 2015, 54.

United States a few days after the capture of Hermann Göring shows that only 4 % of the people surveyed agreed with the idea of putting him on trial. On the contrary, 56 % opted for "hanging, shooting, execution, beheading or capital punishment" and 15 % expressed the desire to be "killed slowly, tortured to death, forced labour and left to die of starvation or dismembered".[60]

The idea of the trial finally took hold, and Robert Jackson's opening words as U. S. Attorney on 21st November 1945, perhaps give the measure of the need for it:

> "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason."[61]

Jackson's words indicate what is probably most valuable about Nuremberg: respect for the rationale of the rule of law. It was to be a legal instrument such as the London Agreement, and not military superiority, that would determine how war criminals were dealt with. It would be a court, not the blind desire for revenge, which passed down the punishment to be imposed. It was about making the reasoning of law prevail against the irrationality of a power not subject to limits. But it was also about affirming the common humanity of the victims and perpetrators. That is precisely the presupposition of the law, and of submission to the law. In the words of Hannah Arendt, the law presupposes that "we have a common humanity with those whom we accuse and judge and condemn".[62] We owe it to the victims to show them that we take the crimes they have suffered seriously by calling the perpetrators to account. And we also owe it to the perpetrators, because by holding them accountable for the crimes they have committed, we treat them as responsible agents, as agents whom we can and must call to account for their actions.[63] In this sense, it can be said that judging humanises the judge and the judged. And not only that: the more serious the crime prosecuted, and the greater asymmetry we find between the criminal conduct and the treatment that the accused should be given in the trial, then the greater the meaning that the procedural guarantees acquire, and the greater the legitimacy of the process.[64] Hence, the response in accordance with the rationale of the rule of law, which demanded that the Axis criminals be put on trial, was seen not only as an end in itself, but also as a means by which a message was sent to the world. If this message had to be synthetically reconstructed, it could be said that it consisted of affirming that the rebuilding of the new world order should have the rule of law as its pillar. To send that message and prepare for the Nuremberg trials, the U. S. Prosecutor Jackson, through the War Crimes Office, availed himself of the advice of various European jurists who had been closely acquainted with the horrors of war. Among them, of course, was Hans Kelsen. The Viennese man's role was especially relevant in introducing international criminal responsibility into the London Agreement. In

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[60] *Hathaway/Shapiro*, The Internationalists and Their Plan to Outlaw War, 2017, 256.

[61] *Jackson*, Opening Statement for the United Stated of America, International Military Tribunal, 1945, 1; online: https://digitalcommons.law.uga.edu.

[62] *Arendt*, Eichmann in Jerusalem. A Report on the Banality of Evil, 2006, 251 f.

[63] *Duff*, Authority and responsibility in international criminal law, in: Besson/Tasioulas (eds.), Philosophy of International Law, 2010, 589 (593).

[64] *Ferrajoli*, Razones jurídicas del pacifismo, 2004, 53.

July 1945, Kelsen travelled to Washington to technically review the work of Jackson's team. Among other things, he took issue with the statement "The Tribunal is bound to consider (…) that the following acts constitute criminal breaches of international law". The experienced professor considered that such wording was imprecise and was likely to cause significant complications on applying sanctions, since it did not take into account the reality of the sanctions established by international law, which – with exceptions[65] – were collective rather than individual sanctions. That is why Kelsen explicitly suggested introducing a provision relating to individual responsibility. He even suggested the wording of said provision: "[any person who breaches] international law that prohibits the use of force (…) may be individually responsible for these acts (…) and may be prosecuted and punished by the court".[66] Prosecutor Jackson understood the warning perfectly, and in one of his reports he writes:

> "Hans Kelsen is worried over the absence of any norms of international law on the subject of individual responsibility. He thinks a definite declaration is essential (…) I think it would be worthwhile to include it to prevent discussion as to whether or not the law provides for such responsibility."[67]

Jackson insisted that the London Agreement should clearly provide for the individual responsibility of the accused, and as a result Art. 6 stipulated that

> "The Tribunal (…) shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes".[68]

In this article, which was essential in the course of the trials, we can find a more direct and visible trace of Kelsen's influence in Nuremberg.[69] However, introducing individual criminal responsibility via this new norm of international law threw up a subsequent problem that is a not minor one: was it legitimate to apply sanctioning norms retroactively? Would this not incur a breach of the general principle of non-retroactivity of the criminal rules? These are precisely the issues that Kelsen addresses in his work *The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*, arising from one of eight reports he wrote for the War Crimes Bureau.

With the text of the London Agreement in hand, Kelsen drew attention to some of the problems that are still typical of what we call transitional justice or post-conflict justice today. He begins by raising the question of the legality and legitimacy of retroactive criminal norms. Often the most serious crimes, the massive violations of

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[65] Extensively *Kelsen*, California Law Review 31 (1943), 534 ff.

[66] *Kelsen*, Report, 1945, 4 f., in: Robert Houghwout Jackson Papers, Library of Congress, Manuscript Division, Washington D. C.

[67] *Jackson*, Memorandum, 5 July 1945, box 104 -10, Robert Jackson Papers, Library of the Congress, Washington D. C.

[68] The crimes established in the Statute were: a) crimes against peace; b) war crimes and c) crimes against humanity.

[69] *García-Salmones*, The Project of Positivism in International Law, 2013, 365. Kelsen's advice was, however, less influential in other regards such as the stance taken by the U. S. Prosecutor's Office regarding crimes of aggression. It should be noted that Kelsen's personal involvement in preparing the trials probably helped him obtain U. S. citizenship more quickly (on 28th July, 1945), as well as being offered a permanent place at the University of California, *Olechowski*, in Telman (ed.), Hans Kelsen in America, 2016, 110).

human rights, whether in times of war or not, are committed in dictatorial regimes under the protection of state regulations. A change of regime entails the annulment of those norms and the creation of new ones. The problem of retroactivity arises, then, whenever somebody is tried for actions that were not classified as crimes at the time they were committed. The non-retroactive nature of criminal law is a legal principle enshrined in all modern legal systems as a clear principle of justice. Nevertheless, it does not seem correct that those who have previously modified the law to commit serious human rights violations intend to be judged by their own law. Could the leaders of National Socialism be protected by that same principle? Could they avoid prosecution by resorting to a principle they had eliminated from German law themselves during their years of rule? Even so, on the other hand, the principles of law maintain their value in contexts where they do not enjoy the favour of the majority. What sense would a principle have that we can make exceptions for when it benefits someone who does not enjoy our sympathies?

Kelsen provides us with a meticulous analysis of the problem. On the one hand, relying on Blackstone, he shows us the "original meaning" of *ex post facto* laws and their ancient prohibition, which dates back to Roman law. On the other hand, he specifies their validity within the scope of a modern positivist view of law. The foundation of the principle of non-retroactivity of norms regarding sanctions is found in the idea that the law must be known in order to be obeyed or violated. We question the retroactivity of unfavourable criminal norms because the individual did not have the opportunity to avoid the sanction. However, this principle – whose rationale is so evident – conflicts with another principle arising from the very practical demands of applying the law: the principle that ignorance of the law is no excuse.[70] Kelsen shows us that a more precise formulation of the principle of non-retroactivity of criminal law and its role in legal systems arises from the tension between the two principles. The requirement of awareness of the law does not demand knowledge of the content of it so much as the possibility of being aware of it. In other words, the principle of non-retroactivity does not demand that the defendants (for example, in the Nuremberg trials) should have known that their conduct would lead to a sanction in the future, but that they could have foreseen that possibility. There is a substantial difference, Kelsen tells us, between a retroactive norm that converts an *innocent* or *irrelevant* act when it was committed into a crime and a retroactive norm that attributes a sanction to an act that was previously considered illegal – or, if we use Blackstone's terminology as Kelsen does, not innocent or legally or morally irrelevant.

At the Nuremberg trials, the tribunal would be competent to judge crimes against peace, war crimes and crimes against humanity. These three types refer to conduct that was already considered illegal prior to the London Agreement itself. Acts such as the violation of treaties, ill-treatment of the civilian population, or persecution on racial grounds are certainly "open violations of the principles of morality generally recognized by civilized peoples and hence were, at least, morally not innocent or indifferent when they are committed".[71] The new concept lies not so much there but in the establishment of individual responsibility for these actions, especially as regards the offence of crimes against peace and crimes against humanity. Indeed, although

[70] *Kelsen*, The Rule Against Ex-Post Facto Laws and the Prosecution of Axis War Criminals, The Judge Advocate Journal, 2 (1945), 8 (9).

[71] Ibid., 10 f.

it was less complicated to apply war crimes in Nuremberg since the norms of international humanitarian law pre-existed the punishable acts, the application of the types of crimes against peace and crimes against humanity was more controversial among the jurists of the time. The category of crimes against humanity was, in fact, entirely new, and its introduction in the London agreement owes much to one of Kelsen's students in Vienna, Hersch Lauterpacht. As Philippe Sands has narrated magnificently in *East-West Street*, it was in a meeting held in July 1945 when Lauterpacht convinced Jackson to introduce the new criminal definition[72] in order to sanction what until then had imprecisely been called *atrocities*. By coining the concept of crimes against humanity, Lauterpacht intended to provide a legal response to such acts which, due to their particular cruelty and severity, should not go unpunished. For this to be the case, the criminal definition had to cover not only the acts committed during war, but also those that had taken place before it; and not only acts directed against the population of another state, but also those directed against its own population.[73]

It is striking that for crimes against humanity, Kelsen would never provide an articulated reflection, as if the legal technical problems worthy of analysis were not to be found particularly within them or in the international prosecution of them. It should suffice to recall here, however, the surprising assertion he made in 1944 about the existence of "crimes by nature" – not in *lege lata* but in *lege ferenda* – so as to discriminate between offences deserving international criminal sanctions from those that do not deserve sanctions or only a civil sanction. For Kelsen, in the international arena, a crime by nature is a crime "for which the individual perpetrator is punishable if the act is harmful not only to the State directly injured by it but also to the whole international community".[74] As we have reiterated on other occasions, here we find ourselves notably far from the thesis defended by Kelsen in his iusphilosophical work that a crime is simply a conduct to which the legal system attributes the sanction – a fundamental thesis in the economy of its theoretical construction according to which the primary norms that ascribe or impose sanctions are the only legal norms in

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[72] As Sands describes in that same book, a different fate befell Raphael Lemkin's proposal to introduce another new criminal definition into the Agreement: the crime of genocide, a crime with its own identity to be found in the intention of eliminating not a set of individuals considered individually (as was the case of crimes against humanity proposed by Lauterpacht), but rather of eliminating a group of people due to their being members of a certain group. The strenuous effort made by Lemkin to champion the application of this new crime led the French prosecution in Nuremberg to include genocide among the charges made at the hearing (*Sands*, East West Street: On the Origins of Genocide and Crimes Against Humanity, 2016). The reluctance of the U. S. and British prosecutors to refer to genocide did not prevent this new concept from being discussed on several occasions throughout the trial. As a result, the Convention for the Prevention and Punishment of the Crime of Genocide would be one of the first major human rights conventions to be approved within the United Nations, on 9th December, 1948; one day before the approval of the Universal Declaration of Human Rights.

[73] Thus, the final wording of the criminal definition in the London Agreement was as follows, in Article 6.c: "Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.".

[74] *Kelsen*, Peace Through Law, 1944, 117.

the strict sense.[75] The idea of crimes by nature, on the other hand, could have been developed in the analysis and justification of crimes against humanity. But here we enter the sphere of pure speculation, since we can find nothing in this vein in Kelsen's work.

Whatever the case, the seriousness of crimes against humanity was undeniable. Even so, the possibility of the perpetrators being brought to trial for such crimes was put up for discussion, in the same way as criminal prosecution of the perpetrators of crimes against peace. The questioning of different crimes would require different strategies. As regards crimes against humanity, Carl Schmitt – who, let us remember, was arrested and interrogated in Nuremberg for his complicity with the National Socialist regime[76] – would begin by not denying their atrocious nature. In 1945 he would tacitly assert that insofar as they were *mala in se*, crimes against humanity should be punished.[77] Determining how to do so would be quite another matter. Schmitt considered, not without some cynicism, that the disproportionate and "monstrous" nature of such events prevented them from being tried on the grounds of any law, be it national or international. In other words, only an extrajudicial form of punishment, "political justice", would be appropriate to prevent such atrocities from one day being equated with legal precedents. As Habermas points out, the publication of his diaries years later would make it clear that Schmitt actually wanted to see not only offensive warfare decriminalised, but also the breakdown of civilisation entailed by the annihilation of the Jews.[78] His stance – expressed more freely – leaves no room for doubt:

> "What is a 'crime against humanity'? Are there perhaps 'crimes against love'? (…) Genocide, a moving concept; I have experienced an example first-hand: the expulsion of the German-Prussian civil service in 1945 (…) Crimes against humanity is only the most general clause of all the general clauses for extermination of the enemy."[79]

On the other hand, the Plattenberg jurist publicly and clearly considered crimes against peace[80] to be nonsense from the very beginning. He believed that war was

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[75] *La Torre/García Pascual*, La utopía realista de Hans Kelsen, in: Kelsen, La paz por medio del derecho, 2003.

[76] Schmitt's first arrest and detainment occurred on 26th September 1945, as part of the de-nazification process. It lasted a little over a year, during which he first spent time in a military detention camp and later a civilian one (*Mehring*, Carl Schmitt. A Biography, 2014, 411). In March 1947 he was arrested for the second time and taken to the Palace of Justice in Nuremberg to testify in one of the secondary trials. After five weeks of interrogation, where he cleverly disassociated himself from his responsibilities with the previous regime (including belonging to the governing board of the *Akademie für Deutsches Recht*, controlled by his friend Hans Frank, the so-called *butcher of Poland)*, he was then released (ibid., 418–420).

[77] *Schmitt*, The International Crime of the War of Aggression and the Principle Nullum crimen, nulla poena sine lege, in: Schmitt, Writings on War, 2011, 125 (127 f.).

[78] *Habermas*, La idea kantiana de paz perpetua. Desde la distancia histórica de 200 años, in: Habermas, La inclusión del otro. Estudios de teoría política, 1999.

[79] *Schmitt*, Glossarium. Anotaciones desde 1947 hasta 1958, 2021, Entries 12.3.48, 21.8.49, 6.12.49, among others.

[80] Article 6.a of the London Agreement formulated these as follows: "Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international

not only a right of states but also the most perfect realisation of the phenomenon of politics. But where Schmitt's presence was felt most in the Nuremberg trials – following his eternal opposition to Kelsen – was precisely in the argument against retroactivity made by Hermann Jahrreiss.[81] In fact, the arguments put forward by Jahrreiss in the session held on 4th July, 1946, ended up perfectly following a work by his admired Carl Schmitt: *The International Crime of the War of Aggression and the Principle "Nullum crimen, nulla poena sine lege"*. This work was originated in the report that the industrialist Friedrich Flick entrusted to Schmitt in May 1945, fearing that businessmen collaborating with the regime could also be prosecuted. Of course, Schmitt shows himself in this text to be a champion of the principle of legality, and of the corresponding principle of non-retroactivity of criminal laws:

> "Bringing a normal citizen who does not belong to the dominant political class to that stage and, in addition, doing so retroactively as regards the past, would violate any sense of fairness. In light of the creation of an international crime that is not only new, but absolutely unusual, the principle *nullum crimen, nulla poena sine lege* becomes even more powerful. It is not only a valid principle of positive law, but also a maxim of natural law and morality."[82]

Such an immaculate stance is at the very least striking coming from the same jurist who had extensively justified the retroactive application of the law regarding the so-called *Lex van der Lubbe* in March 1933.[83] Through that law, the death sentence was imposed on the young Dutch anarchist Marinus van der Lubbe, accused of causing the famous Reichstag Fire on 27th February that same year, a pretext that was used by Hitler to suspend constitutional rights and declare a state of emergency. In the same way, Schmitt did not hesitate to justify the legality of the purge known as the Night of the Long Knives. The *Kronjurist*'s words can only be a privileged piece in the history of legal infamy:

> "The *Führer* protects the law from the worst kind of abuse when, in the moment of danger, he immediately creates law by virtue of his leadership as the supreme judicial authority (…). The true *Führer* is always a judge as well. From his domain as *Führer* flows his domain as judge."[84]

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treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.".

[81] Hermann Jahrreiss was a good exponent of the National Socialist international law doctrine. Ever since his habilitation thesis, presented in 1923, he questioned the binding nature of the obligations imposed by the Treaty of Versailles on Germany. Later, when he held the Kelsen chair in Cologne, and especially after 1939 with the outbreak of the war and influenced by Schmitt's *Großraum* doctrine, he dedicated himself to justifying the Third Reich's expansionist policy, *Weinke*, Law, History and Justice. Debating German State Crimes in the Long Twentieth Century 2019, 95.

[82] *Schmitt*, The International Crime of the War of Aggression and the Principle Nullum crimen, nulla poena sine lege, in: Schmitt, Writings on War, 2011, 196.

[83] *Schmitt*, Nationalsozialismus und Rechtsstaat, Juristische Wochenschrift 1934, 713–718. This essay comes from a talk that Schmitt gave in Cologne in the presence of Hans Frank. In it, he harshly criticises the formalism imposed by the rationale of the rule of law, which were an obstacle to the "National Socialism's spirit of justice", *Mehring*, Carl Schmitt. A Biography, 2014, 317.

[84] *Schmitt*, The Führer Protects the Law, in: Rabinbach/Gilman (eds.), The Third Reich Sourcebook, 2013, 63 (64).

The totalitarian concept of law proposed by Schmitt here implies the most radical denial of the principle of legality, the death of the very essence of law,[85] if we consider that the prohibition of arbitrariness, the principle of separation of powers and the principle of all being equally subject to the law are part of the basic content of what we understand by law.

In *The rule against non-retroactivity*, with the *Lex van der Lubbe* and of other examples of National Socialist retroactive legislation for sanctions in mind, Kelsen wondered if, given that the Nazis themselves abolished the rule against non-retroactivity, they had a right to be protected by it. He puts it succinctly, making it clear that it is an "additional argument",[86] not a main reason, to apply the sanctions established in the London Agreement retroactively. Even so, and although Kelsen's considerations were far from the inconsistencies of the opportunist Schmitt, the Viennese man's stance seems here to abandon the demands of methodological purity. Again, the alarms would sound for any positivist on hearing statements like this: "The non-application of the rule against *ex post facto* laws is a just sanction inflicted upon those who have violated this rule and hence have forfeited the privilege to be protected by it".[87] A few pages before this statement that ends his article, we find other surprising references to the principle of criminal non-retroactivity as a value of justice; and, as a value, a relative one, that is, not conceived without restrictions. In the event of clashing with another value or principle of justice, the most important principle must prevail. And in this case, what was important was to bring the war criminals to trial, avoiding impunity. Kelsen seems to be touching upon a new way of looking at law, no longer as the empty container of content that it is in his pure theory, but as a system that is perhaps endowed with some substantial, inalienable content. Is this the case, or is it a mirage? We shall have to look at his work from 1947 to see what direction his international thought was evolving towards, after the Nuremberg trial was over.

V. Nuremberg: milestone, but not precedent

The General Assembly of the United Nations, in its Resolution 95 (I) approved on 11th December 1946, recognised the validity and legal significance of both the London Agreement and the Nuremberg sentence, and entrusted the International Law Commission with drafting the so-called Nuremberg Principles arising from this historical event. The International Law Commission fulfilled its mission in 1950, using Nuremberg to draw up the guidelines on which the entire development of international criminal law has been based.[88] All of this does not seem to be enough for Kelsen, who in his 1947 text "Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?" is particularly critical of the way the trial was carried out. Nuremberg may be a milestone in the history of international law, the first time an international court has punished those responsible for an illegal war; nevertheless, according to the criteria of the Austrian jurist, in no way can the outcome of that

[85] *Scheuerman*, Carl Schmitt. The End of Law, 1999.

[86] *Kelsen*, The Judge Advocate Journal 2 (1945), 12.

[87] Ibid., 46.

[88] *Alfaro*, Question of International Criminal Jurisdiction, Yearbook of the International Law Commission, 1950, vol. II, §§ 37 ff.; see also *Sands*, After Pinochet: the role of national courts, in: Sands (ed.), From Nuremberg to The Hague. The Future of International Criminal Justice, 2003, 68 (83).

trial be taken as a legal precedent in the strict sense. Kelsen's reasons – focusing particularly on crimes against peace – are many and varied. But in all of them there is evident disappointment on seeing that much of his advice and his instructions were not heeded. Although his advice was vital in technically determining individual responsibility, most of the central features of the theory of international law that Kelsen had been carefully drawing up for years were left out of the London Agreement and the considerations expressed by the eight judges in the judgement.

The main reason that leads Kelsen to the resounding assertion that the main Nuremberg trial – contrary to what Jackson asserted – cannot be taken as a precedent for international law concerns the systemic nature of law. Although in that text from 1947 we find few direct allusions to the systematic nature of the legal system (and let us remember that international law is a part of the legal system), we know that it is a central element in Kelsen's theory. Legal norms considered as a whole do not form a disordered sum of elements but a system, a regulatory unit, that is, a legal order. Each norm is related to the other norms in the system through a precise chain of acts of will that imply the implementation of a superior norm, or else the production of a new norm and, in most cases, both actions at the same time. To affirm that a judgement such as the Nuremberg one should become a precedent is to affirm that the provisions in that judgment should become a mandatory norm for judicial bodies of the same or lower rank. A precedent can only be considered as such, according to Kelsen, if it is a law-creating source; that is, if it is mandatory for other legal practitioners. The Nuremberg judgment would clearly lack such binding power. The law-creating source is the London Agreement, and the Nuremberg tribunal limits itself to applying that. The judgement issued by the court would be a particular norm, enforceable only against those convicted; but it would lack the general effects that Jackson intended to attribute to it.

Moreover, the Nuremberg tribunal was created as an *ad hoc* tribunal, and not as a permanent court. In this sense, the judgement could not have binding effects beyond the trial. The permanent nature of an international court capable of prosecuting specific individuals is a central feature of Kelsen's theory. That is why Kelsen, back in 1947, was calling for reform in the Charter of the United Nations to introduce the possibility of individuals being prosecuted by the International Court of Justice; and, he warned, the declaration made by the General Assembly on 11th December 1946 on the Nuremberg principles is in no way equivalent to that reform.[89] Ultimately, then, the principle of individual responsibility in Nuremberg was not being established in a general way in international law, but only within the strict context of applying the London Agreement. Furthermore, Kelsen also warned that the Statute of the International Court of Justice, like that of the old Permanent Court of the League of Nations, restricted the mandatory effects of its judgements to a specific case and only between the parties.[90] That is to say, the concept of precedent does not seem to apply

[89] *Kelsen*, International Law Quarterly 1 (1947), 170.

[90] Ibid., 163. The obligation to submit all disputes arising between the members of the organisation to the authority of the court, that is, for its jurisdiction to be binding, implies another of the elements contrary to the requirements formulated by Kelsen that would also make him tremendously critical of the San Francisco Charter and of the Statute of the International Court of Justice (2000:516).

in the dispute resolution system devised within the framework of the United Nations, either.[91]

If Nuremberg cannot be considered a precedent in the strict sense, Kelsen also demonstrates serious reluctance to consider it a precedent in the broad sense; that is, as an example to emulate in future. Kelsen's view was always that punishment of war criminals should be "an act of international justice rather than the satisfaction of a thirst for revenge". To that extent, "the victorious states, too, should be willing to transfer their jurisdiction over their own subjects (…) to the same independent and impartial international tribunal".[92] Clearly, that condition was not met at Nuremberg, where the justice of the victors was imposed on the vanquished.[93] This selective justice, as if it were not possible that the allied forces had also carried out actions contrary to law giving rise to individual responsibility, is undoubtedly the most difficult element to accept within the context of Kelsen's construction, insofar as it involves a violation of the principle of equality under the law. The disappointed Kelsen does not hold back on the harshness of his statements: "the London Agreement has the character of a privilegium odiosum imposed upon vanquished states by the victors";[94] such states "made themselves not only legislators but also judges in their own cause".[95] Indeed, the only signatory states of the Agreement, and the only ones that contributed their citizens to serve as judges and prosecutors, were the four allied powers: the United States, France, the United Kingdom and the Soviet Union. Not only were the representatives of the defeated states excluded, but any representative of the neutral states was also excluded. For Kelsen, this situation was a huge mistake, especially when, as the Austrian jurist pointed out, the victorious powers did not stop committing heinous crimes. He implicitly refers to the Soviet Union, undoubtedly responsible for crimes against peace, alluding to "a state" that shared the spoils of the war waged against Poland;[96] although he is careful to avoid mentioning "another state" that dropped two atomic bombs on a civilian population, causing an unpreced-

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[91] Mohamed Shahabuddeen has argued that although Article 59 of the Statute certainly forbids the resolutions issued by the Court from being binding to third parties, it can be spoken of as a precedent to the extent that its judgements contain constant references to resolutions previously adopted by the same court in previous cases (*Shahabuddeen*, Precedent in the World Court, 1996).

[92] *Kelsen*, California Law Review 31 (1943), 564.

[93] It should be clarified with Kelsen that an international court's imposition of individual responsibility on citizens of a state should in any case be accepted by the state via prior acceptance of the court's jurisdiction, *Kelsen*, Compulsory Adjudication of International Disputes, American Journal of International Law 37 (1943), 397. The case of the Nuremberg Tribunal was special from this point of view, since Germany was at that time under the special situation of a condominium by the four allied powers.

[94] *Kelsen*, International Law Quarterly 1 (1947), 170.

[95] Ibid., 171.

[96] At the trial, it was established that Germany was guilty of starting twelve wars of aggression (against Poland, France, Great Britain, Denmark, Norway, Belgium, Holland, Luxembourg, Yugoslavia, Greece, the Soviet Union and the United States), but obviously no mention was made about the Soviet Union's aggression against Poland in collaboration with Germany through the Molotov-Ribbentrop pact or the Russian aggression against Finland, Estonia, Latvia and Lithuania.

ented massacre – perhaps because it was the state where he had finally found his exile.[97]

In any case, the lack of impartiality or, at least, the lack of appearance of impartiality that characterised the composition of the Nuremberg tribunal, decisively affected its ability to become a role model. Some years later, Hannah Arendt herself would make some considerations very similar to those made by Kelsen in order to assess the court that tried Eichmann in Jerusalem. The German philosopher considered that the fact that the war crimes committed by dropping bombs on Hiroshima and Nagasaki were never even investigated from a legal point of view can only be understood by the fact that "International Military Tribunals [of Nuremberg, but also the one in Tokyo] were international in name".[98] The lack of a real international character or the vagueness in delimiting and understanding crimes against humanity expressed in the judgement cannot serve as a model. Indeed, Arendt considered that "part of the failure of the Jerusalem Court was due to its all too eager adherence to the Nuremberg precedent".[99] The remedy that Arendt suggests for these failures coincides again with Kelsen's postulates: the creation of a permanent international criminal court;[100] or, as she wrote in a letter to her teacher and friend Karl Jaspers: "the Eichmann case has shown that we need a court for criminal cases in The Hague".[101]

We have referred to the two most important objections that Kelsen formulated against the Nuremberg trials: their *ad hoc character* and their lack of impartiality. They are not the only ones, but they are the ones he presented most completely. What is important to underline, finally, from his 1947 text is that we once again find clear appeals to the idea of justice, made this time with greater force. As for the ability of Nuremberg to become a precedent, he goes so far as to say that:

> "A judicial decision will become a precedent only if the new rule embodied in it is generally considered to be just. The judgement of Nuremberg, even if it complied with all the formal requirements of a true precedent, will hardly be considered as worthy to be followed."[102]

Furthermore, regarding the retroactivity of the norms applied by the court, he reiterates some arguments already found in the 1945 text:

> "The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility (...) Justice required the punishment of these men, in spite the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for

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[97] For some years it has been known that this caution would not be enough for Kelsen to avoid investigation by the FBI in the days of McCarthyism. The first investigations into him made by the FBI date back to 1944, and remained intermittent until 1955, when his case was closed. They reached their peak when Kelsen came to be interrogated in 1953, *Losano*, Hans Kelsen criptocomunista e l´FBI: In margine al suo libro postumo Religione secolare, Sociologia del diritto 1 (2017), 140 (148).

[98] *Arendt*, Eichmann in Jerusalem, 2006, 256.

[99] Ibid., 274.

[100] Ibid., 270.

[101] *Arendt*, Letter to Karl Jaspers dated December 23rd, 1960, in: Köhler/Saner (eds.), Hannah Arendt and Karl Jaspers Correspondence, 1993, 418.

[102] *Kelsen*, International Law Quarterly 1 (1947), 164.

> the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws."[103]

It is certainly a complicated task to see how these passages fit into the hard core of Kelsen's pure theory, characteristic for appraisal and for the clear separation between law and morality. We believe that it cannot be affirmed that Nuremberg and what Nuremberg evokes – World War II, but also the Holocaust – mean much of a turning point in the postulates defended by Kelsen. As shown in the publication of the second edition of the *Pure Theory of Law* in 1960, Kelsen would only reaffirm his positivist postulates. It would also be unsatisfactory to be content with proclaiming the positivist theorist's incoherence by comparing these passages with others more representative of his extensive work, thus attempting to devalue their scientific worth. On the contrary, it seems to us that the Kelsenian passages quoted here indicate undeniable cracks in the building of pure legal theory. In completely exceptional historical circumstances, the radical separation between law and morality loses credibility.

On 29th November 1945, the eighth day of the trial, *Nazi Concentration Camps* was screened. It is a documentary of approximately one hour showing the harshest images of the Dantesque scene the allies encountered when they liberated the concentration camps. The Nazis themselves stirred in the dock at the images of what would turn out to be some of the most compelling evidence.[104] Although the magnitude of the crimes against humanity would take time to be understood, the Nuremberg trials were a fundamental instrument in clarifying the facts. Émigrés like Kelsen could not but feel shocked in the face of the reality they were beginning to realise. Nuremberg confronts us with the worst side of human beings, one that we had never seen, or that we had never wanted to see. It shows dehumanisation within the borders of the so-called "civilised Europe", a territory where art, science and reason had reached great sophistication and excellence. What is impressive, as well as the horror and the huge evil caused, is the context in which it occurred.

Adorno wondered if poetry could be written after Auschwitz, and what education would be like after Auschwitz. Likewise, it was urgently necessary to ask how to teach law and how to think about law after Auschwitz. Gustav Radbruch is probably the best-known case among the jurists driven to abandon positivism once and for all, under the conviction that *an extremely unjust law is no law*. That is the conclusion underlying the development of international human rights law and the European constitutions of the post-war period. Law can no longer be a container without content. It needs to equip itself with a minimum of substance, which can be no other than respect for the freedom and equality of all human beings. Kelsen seems to lose his bearings at this juncture. Sometimes he seems to intend to anticipate Dworkin and Alexy, pointing to the existence of inalienable principles of justice, and the need to weigh them up between each other in each specific case.[105] It is a move, however, that would not be verified or developed in subsequent works. He would return to the powerful theses of

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[103] Ibid., 165.

[104] *Taylor*, The Anatomy of the Nuremberg Trials. A Personal Memoir, 1992, § 8. It should be noted that at that time, screening an audiovisual as evidence examined in a trial was a completely new concept, so much so that the court had to make a generous interpretation of the procedural rules to allow it to be screened, *Douglas*, Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal, The Yale Law Journal 105 (1995), 449–481.

[105] *Kelsen*, International Law Quarterly 1 (1947), 164.

a positivism that he would never abandon, but he would indeed argue they must be actively backed by unavoidable work in the sphere of politics and morality.

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