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# *Hans Kelsen, the Theory of Law and the International Legal System: A Talk*

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## 1 Meeting Kelsen

D.Z. *I believe you met Kelsen only once, in Paris in 1957. Do you remember anything particular about that meeting?*

N.B. That's true, the only time I actually met Kelsen was in Paris in 1957. The occasion was an international seminar organized by the *Institut International de Philosophie Politique*, with René David in the chair and Raymond Polin, the real promoter of the initiative, as secretary. I immediately signed up. I may not have taken part in the first of the meetings, but I did attend all of the later ones, which were held at the *Fondation Thiers* in Paris. They were fairly restricted seminars, with around twenty people taking part. The proceedings of the meetings were subsequently published in the *Annales de philosophie politique*, published by PUF Paris. The theme for 1957 was *le droit naturel*.

D.Z. *Did you have any other contacts, for instance by letter, with Kelsen?*

N.B. No. I recall only that at the Paris meeting Kelsen showed he appreciated the arguments in my report on natural law. And I recall that in his *Allgemeine Theorie der Normen*, in the 1979 Vienna edition, he comments, in part critically, on a text I had written before the Paris meeting, namely 'Considérations introductives sur le raisonnement des juristes', published in the *Revue internationale de Philosophie* in 1954. Someone who knew Kelsen better than I, and earlier, was my friend Renato Treves, another disciple of Gioele Solari.

D.Z. *Yet it is you who is regarded as the real importer of Kelsenism into Italy.*

N.B. In fact it was Renato Treves, who as long ago as 1934 had published a volume, *Il diritto come relazione*, largely devoted to Kelsen. By contrast my Kelsenism, which has led me to be regarded as the one responsible for Italy's 'Kelsenitis', started a few years later. When I was a student, Kelsen, who had already published two important works, the *Hauptprobleme der Staatsrechtslehre* in 1911 and *Das Probleme der Souveränität* in 1920, was barely known in Italy. In 1954 I published *L'indirizzo*

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*fenomenologico nella filosofia sociale e giuridica*. In that book, obviously not dedicated to Kelsen, I nonetheless referred to his theses several times. And I dealt with both the critique by Kelsen of Rudolf Smend's theory of the state and with the anti-Kelsen polemic by his ex-pupil Fritz Sander (who died a few years later). In 1954, in the essay 'Aspetti odierni della filosofia giuridica in Germania', moreover, I analysed the work of two of Kelsen's followers, Felix Kaufmann and Fritz Schreier, who had endeavoured to reconcile the criticism of the Marburg school with phenomenology.

D.Z. *While you had already read and discussed some of Kelsen's works back in the early 1930s, your decisive encounter with his work does not seem to date back much before the early 1950s. You yourself in a recent article talk of a 'conversion' after a more critical phase in relation to Kelsen.*

N.B. My first article directly devoted to Kelsen, 'La teoria pura del diritto e i suoi critici', appeared in the *Rivista trimestrale di diritto e procedura civile* twenty years after I started out as a legal philosopher, namely in 1954. But my 'conversion' to Kelsenism, to use that term again, had come years earlier. In my lectures at Padoa in 1940–41 there was a section on the step-wise construction of the legal system: the reference was to Kelsen's famous *Stufenbau*, which fascinated me even then. I may add that in the legal philosophy courses I gave at the University of Camerino in the second half of the 1930s, the lesson plans were structured in three parts: the sources of law, the legal norm and the legal system. This pattern directly reflected my reading of Kelsen. In fact my 'conversion' to Kelsen coincided with the violent break with the past that came in our country's history between the second half of the 1930s and the early 1940s. That historical break corresponded to a discontinuity in my intellectual life too, both private and public.

D.Z. *Your support for Kelsenism, then, may be seen within an overall framework of revolt against speculative philosophy, especially against idealism?*

N.B. I would say so. While the failure of Fascism was becoming evident, we realized that speculative philosophy had offered us very little help in understanding what had happened in Europe and in the world during the World War. We had to start from scratch, embarking on studies of economics, law, sociology, history. Dropping speculative philosophy in favour of 'positive philosophy' — in accordance with Carlo Cattaneo's lesson — I understood that the philosophy of law could not but become part of the 'general theory of law'. Accordingly, once I had conceived of the 'general theory of law' as a formal theory I found myself very close to Kelsen and his *Reine Rechtslehre*. And I was impelled to defend Kelsen against his detractors, then numerous in Italy, among both sociologists, Marxists and followers of the natural law doctrine. I also broke with the idealistic features of Italian philosophy of law, which then concentrated, in the wake of Croce and Gentile, on topics like the 'place' that should be assigned to law in the moral sciences. My essays on 'La teoria pura del diritto e i suoi critici', which I cited earlier, and 'Formalismo giuridico e formalismo etico', which appeared in the *Rivista di filosofia* in July 1954, put a public stamp, so to speak, on my Kelsenism, even though in fact it dated from several years earlier. I might say that Kelsen was at home, as it were, among us and had been since the 1930s. As long ago as 1932, as you can see, I had his *Hauptprobleme der Staatslehre* sent to me [Bobbio

showed the volume in the original edition, heavily annotated by him, bearing the hand-written date: February 1932].

## 2 Kelsen's Theoretical Model

D.Z. *It is in this sense that you have stated that Kelsen has always been your primary author in the area of theory of law. Moreover, you have acknowledged that the two philosophy of law courses you gave in Turin in 1957–8 and 1959–60 ('Theory of the Legal Norm' and 'Theory of the Legal System') were very directly inspired by Kelsen. These courses have become for you and many other lecturers, both Italian and not, a sort of theoretical model.*

N.B. Yes, that's true. My contribution to Kelsen's fortunes in Italy is due essentially to my university teaching. Kelsen became my primary author for one very simple reason: I felt that theoretical reflection on law within a law faculty context ought to coincide with the 'general theory of law' or, as I said at the time, with the legal philosophy 'of lawyers', not 'of philosophers'. And Kelsen's monumental work offered me just the model I needed: a rigorous 'general theory of law', systematic and of exemplary clarity, a rather rare gift even among German lawyers. It was also a very original theoretical proposal, which had nothing in common with the speculative lucubrations of Italian idealism, then very much present in the philosophy of law (incidentally, it cannot be said that this tradition of vagueness and speculative obscurity has been entirely done away with even today within our legal theory disciplines). Kelsen was the only author to offer a clear theoretical alternative. Then a few years later the figure of Herbert Hart appeared and I developed a much closer personal and intellectual relationship with him than with Kelsen. Hart was British, but his theoretical research was closely associated with German legal culture, and was essentially a development of Kelsen's reflections. This explains why my lessons in the philosophy of law, particularly my courses in the 'general theory of law', could not help being strongly influenced by Kelsen, especially by one of his most important works, *Reine Rechtslehre*, which I used in its first edition from 1934. Nor should it be forgotten that I began to give courses in philosophy of law at the University of Camerino in the winter of 1935, and thus almost at the same time as the publication of that fundamental work by Kelsen. Kelsen was, and could not help being, *naturaliter* the inspiration for my activity as a young lecturer in the philosophy of law (I was not yet thirty years old). Even the structure of my two Turin courses mentioned earlier reproduces a fundamental distinction put forward by Kelsen: between the theory of (individual) norms and the theory of the legal system as a structured set of norms. I need not add that the thesis I then upheld — that what identifies law is not the nature of its norms but the structure of its system — was implicit in the distinction drawn by Kelsen between the 'static' system, characteristic of ethics, and the 'dynamic' system of law. This distinction, as we know, was to become central in Hart's thought. He talked of primary norms and secondary norms, including among the latter the norms on the production of law. I say this even though it is true that the central, unifying

thesis of these two courses of mine, that the definition of law is to be sought not in the distinctive features of the legal norm but in those of the legal system, also has much to do with the Italian doctrine of the legal institution.

D.Z. *I recall, though, that you have spoken of 'excessive Kelsenism' in connection with your university courses. So your Kelsenism has never been without reservations. Right from your 1954 article, though written to defend Kelsen from his Italian detractors, your writing did not lack critical aspects. In that article you mentioned the irrationality of values as the punctum dolens of Kelsen's theory, referring to the relation between pure theory of law and sociology of law as another possible difficulty with Kelsen's normativism. And in a subsequent article you indicated, as a general limitation of Kelsen's work, his minimal attention to the problem of the function of law which he sacrificed in favour of purely structural analysis.*

N.B. That's true. But what had appealed to me in Kelsen's theory was his conception of the legal system in the 'hierarchical' form (normatively hierarchical, obviously, not politically) of the *Stufenbau*. His step-wise construction introduced an essential order into the relations between legal norms, from the contractual norms of the private sphere to jurisdiction, to legislation, and right up to the constitution. To be sure, there remains the delicate problem of the *Grundnorm*, the 'fundamental norm', which is a solution that continues to arouse doubts and to feed theoretical discussions. I would say, though, that the *Grundnorm* in Kelsen is a sort of 'logical' closure of his system.

D.Z. *But was it not you yourself who showed that in practice no system of thought can be closed, not even logically?*

N.B. Certainly, you're right. Kelsen's closure of the legal order is a sort of reference back from final causes to the first cause, from empirical determinations to the *causa sui*. Thus in an essentially non-metaphysical thinker like Kelsen the 'closure' of a system through the *Grundnorm* is only, so to speak, a closure of convenience. It is a little like the idea of the absolute sovereignty of the nation-state. The idea of sovereignty as 'power of powers' is a closure of convenience, no different from the *Grundnorm* conceived of as a 'norm of norms'. Nothing verifiable corresponds, nor can correspond, to these notions.

D.Z. *Yet you maintained in your 1981 article, 'Kelsen e il problema del potere', that the Grundnorm makes indirect reference to an ideology which is not the ideology of the bourgeois state, as polemically maintained by the Marxists, but the ideology of the state based on the rule of law.*

N.B. Yes, I did put forward that interpretation. In Kelsen, and let us not forget that he is a democratic and pacifist thinker, reference to the 'fundamental norm' is probably a way of removing the legal system from the arbitrariness of political power, of asserting the primacy of law and of rights and freedoms over *raisons d'état*. Without neglecting the fact that at the international level law is for Kelsen associated with a fundamental value, namely peace. And it is certainly because of this, in the name of an explicitly pacifist and anti-imperialist ideology, that he asserts the primacy of international law over the legal systems of individual nation-states. For Kelsen, as, incidentally, for Thomas Hobbes, law is the instrument for introducing peaceful

relations among men and among states. For Hobbes the fundamental natural law, the 'fundamental norm' you might say, is *pax querenda est*. This convergence between Hobbes and Kelsen has always impressed me. It is no coincidence, probably, that after having studied Kelsen I spent a lot of time studying Hobbes' political thought. For both, peace is the fundamental good that only the law can guarantee. *Peace through Law* is in fact the title of a famous book by Kelsen.

D.Z. *If I may interrupt you once more, I wanted to object that for Hobbes, if there is anything 'fundamental' at the root of law it is not an abstract or formal norm that 'closes' the legal system. It is more of a de facto condition, anthropological and sociological, very much outside legal forms; indeed, it prevents, so to speak, the legal system from being closed in on itself. It is the radical insecurity of the human condition which produces aggression, violence, fear, the need for security and the search for political protection. If that is so, Hobbes' realism is very far away from Kelsen's normative metaphysics. Perhaps Hobbes can in this respect be more plausibly similar to a merciless critic of the rule of law and of Kelsen's normativism, such as Carl Schmitt. If we accept, as you do, that for Kelsen the Grundnorm is a 'solution of convenience', then the way is open to a non-formalistic foundation of the legal form. What then emerges in the background is Schmitt's idea of the 'state of exception' or, if you prefer, the idea that the force of law, as Marx wrote, is inseparable from the law of force.*

N.B. Perhaps I have never taken a sufficiently clear position on this point, which I acknowledge is both highly delicate and, I fear, irrepressibly ambiguous: the relation between law and power. In one way it is law that allocates power — *lex facit regem* — but in another way it is always power that institutes the legal system and guarantees its effectiveness: *rex facit legem*. And it cannot be denied that this ambiguity may also be perceived in Kelsen as a theorist of law and the state or, in any case, he does not resolve it. For Kelsen too, the uncertain relationship he sets up between the validity and effectiveness of norms means that at the vertex of the normative system *lex et potestas convertuntur*.

### 3 Formalism versus Anti-formalism

D.Z. *At this point I must inevitably ask you for some clarification regarding your 'formalism'. You yourself have often stated that you consider yourself a formalist in the legal sphere but an anti-formalist in ethics. You have frequently written and said that your legal positivism has always been a 'critical legal positivism'. What exactly does that mean to you?*

N.B. When I speak of legal positivism I distinguish among three possible interpretations. First, there is legal positivism as method, that is, a way of studying the law as a complex of facts, phenomena or social data and not as a system of values; a method which therefore sets at the centre of inquiry the 'formal' problem of the validity of law, not the axiological one of the justice of the contents of norms. Secondly, there is legal positivism understood as a theory: a theory of legal positivism, developed during the era of the great codifications, ran right through the nineteenth century. For this conception, from the *école de l'exégèse* to the German *Rechtswissenschaft*, law coincides perfectly with the positive order emanating from the

legislative activity of the state. This is an imperativist, coercivist, legalist conception, which upholds the need for a literal, mechanical interpretation of written norms by the interpreters, especially judges. Finally there is a third interpretation, the one I have called the ideology of legal positivism: the idea that the law of the state deserves absolute obedience as such, a theory which may be summed up in the aphorism *Gesetz ist Gesetz*, the law is the law. I have always rejected legal positivism in its specifically theoretical and ideological aspects, although I have accepted it from the methodological viewpoint. I have accepted it in the sense that legal scientists are those who are concerned with analysis of the law in force within a definite, particular political community. Accordingly, they do not set themselves ethical or ethico-legal objectives of a universal nature, which obviously does not rule out that they can or ought to deal also with *iure condendo* . . .

D.Z. *Let me interrupt you one last time to stress that in your methodological legal positivism there is, I feel, a rather ambiguous relationship with the theory of human rights. Though denying the possibility of a philosophical and hence universal foundation for subjective rights, you would appear to find it very difficult to give up the idea of some sort of universality of these rights.*

N.B. I don't know, I don't know . . . You suspect that there is in me, unconsciously, some sort of 'Kantianism', an attachment to the idea that some values, like respect for human life, must be asserted in every case. But I would like to remind you that I have always regarded the idea of the universality of moral laws as highly problematic. Indeed, I have strongly supported the notion that there is no norm or moral rule or value — not even the principle of *pacta sunt servanda* — which, however fundamental, ought not historically be made subject to exceptions, starting with the two chief distinguishing factors: the state of emergency and self-defence.

D.Z. *Allow me one final observation on the theme of your formalism or Kelsenian normativism. In a situation of 'elephantiasis' and turbulence of state legislation which makes the legal system, pace Kelsen, increasingly less unitary, coherent and complete, do you not think that the power of interpreters, in the first place judges, is a growing discretionary power that is tending increasingly to become a directly political power?*

N.B. Personally I feel that what is in crisis is not so much the normativist model as legal positivism. What is in crisis is the positivist ideology of the primacy of the law of the state, the supremacy of legislation in relation to jurisdictional law or contractual law. This is so because of the poor technical quality of legislative output, because of disproportionate quantities of legislation and also because of the growing complexity of social phenomena requiring regulation. And I feel that the thesis of the centrality of the judge, which has been affirmed in American legal thought for obvious historical and institutional reasons, ought to be taken into account, or at least re-discussed, in a continental context. Perhaps also more attention ought to be given to the ideas of Bruno Leoni, whom I have perhaps too readily criticized in the past. Leoni, closely associated as he was with the English-speaking world and especially the conservative liberalism of Milton Friedman and Friedrich Hayek, had opposed the English-speaking tradition of the rule of law to the continental *stato di diritto* (or *Rechtsstaat*, *état de droit*, etc).

D.Z. *Both Leoni and Hayek were very bitter critics of Kelsen's legal 'voluntarism'. According to them, modern freedoms have their roots in the ius gentium: it was the law of markets, the customs of ports and fairs, that laid the bases for the affirmation in the West of free, open societies. This merit ought not, by contrast, to be assigned to the bourgeois revolutions. They maintain that the ideal of individual freedom — the 'British freedoms' — flourished among the peoples who were most involved in large-scale activities of exploration and trade...*

N.B. I am basically in agreement with you. On this very topic I wrote a long letter a few days ago in reply to a liberal economist. Following Leoni, this economist made a juxtaposition of law as a spontaneous, conventional phenomenon, founded essentially on contract, with legislation as the expression of the centralist power of the state, with its despotic tendencies. I have no difficulty in acknowledging that Kelsen's whole approach, in the light of which I trained as a legal theorist more than half a century ago, is in grave difficulties today, if not in downright discredit. I recognize that things have changed a great deal. In addition, it should be borne in mind that Kelsen was a publicist, that he came from public law: accordingly, he saw the law much more from the viewpoint of power than from that of the freedoms of the individual, of private life, of individual privacy. But even here one ought not to exaggerate by one-sidedly overthrowing the relationship between public law and private law, a distinction already present in Roman legal thought. The Romans clearly distinguished between legal relationships oriented towards individual utility and those that concerned collective interests. Otherwise, we risk celebrating the victory of private particularism over the dimension of the public sphere, of surrendering without defence to the logic of the market. And I fear that were that to happen, and perhaps it is already happening, what would triumph would not be the freedom of all, but the war of all against all.

#### 4 The International Legal System and Peace

D.Z. *I should now like to bring in the theme of your relationships with Kelsen's work in connection with the theory of the international legal order and the problem of peace. You tackled this theme for the first time by devoting an entire legal philosophy course to it at Turin University in the academic year 1964–5. Then in 1966 you published, in Nuovi Argomenti, what is generally regarded as your most important essay on international relations: 'Il problema della guerra e le vie della pace'. Yet I note with some surprise that in these articles your references to Kelsen are very few and far between. I'd like, then, to ask you whether works by Kelsen, such as Das Problem der Souveränität und die Theorie des Völkerrechts (1920) or Peace through Law (1944) or the collection of articles Law and Peace in International Relations (1948), aroused in you as profound an interest as did other works we have talked about so far. And that is not to mention two treatises on international law, the 1950 Law of the United Nations or his 1952 Principles of International Law.*

N.B. If I had to pin down the two 'theoretical finds', if you'll pardon the expression, that always inspired me with profound admiration for Kelsen, then I would say his

hierarchical structure of the legal order, that we have already discussed, and the primacy of international law. I say that the idea of the primacy of international law is a 'find' in the sense that this too was a very original proposal. The theoretical area of international law was then dominated by the dualist theory, namely the idea that there are two normative realms radically different from each other, represented by the state legal systems on the one side and international law on the other, the full legal nature of which tended to be called into doubt. There was also a monistic doctrine, albeit a minority one, which denied the existence of an international legal order outright, recognizing no other law than that of sovereign states. Kelsen literally inverted the traditional approach, proposing a monism that made international law the only authentic 'objective' legal order, with state legal systems forming merely a part thereof, and a subordinate part to boot, destined in the long run to dissolve along with the sovereignty of states. This proposal is in my view an extraordinary one, since it is the only one that can make international law do its essential job, namely, to organize peace. I am, as you know, convinced that as long as there is primacy not of international law but of the legal systems of the individual states, peace can never be stably assured.

D.Z. *Are you asserting, then, that Kelsen exercised direct influence over your 'institutional pacifism' too?*

N.B. There is no doubt about that. And I confess I am surprised that, as you maintain, I have never explicitly written as much, or that it does not clearly transpire from my writings on the theme of war and peace. Kelsen is the jurist who not only maintains that the chief end of law is peace and not justice, but goes so far as maintaining that the law — especially international law — is the only way to guarantee a stable, universal peace. Who but Kelsen could be the emblematic founder of 'legal' or 'institutional' pacifism, as I have termed my position? And when, after criticizing other forms of pacifism, I end by proposing the idea of a pacifism that would pivot around truly supranational legal institutions — and not only international ones — I have always had in mind Kelsen's idea of the primacy of international law. I have had in mind, too, his opposition to the system of sovereign states in the name of peace and an anti-imperialist ideal. (And, I might say in parentheses, I was rather disconcerted when, in the second edition of *Reine Rechtslehre*, in 1960, Kelsen made a by no means minor correction on this point: he substituted the term 'collective security' for 'peace', obviously in the name of a more rigid instrumental, anti-finalist conception of law.)

D.Z. *It seems clear to me, then, that it was primarily, if not exclusively, Kelsen's Das Problem der Souveränität that inspired your 'institutional pacifism', since it is there that Kelsen, as well as theorizing the primacy of international law, unleashes a very strong attack against the sovereignty of states and against the very idea of the nation-state. This he does in the name of the (originally theological) conception of the unity of the human race as civitas maxima. It is also in the name of this classical cosmopolitan ideal — of this 'supreme ethical idea' as he writes — that Kelsen goes so far as to predict the extinction of states and the birth of a 'world or universal state' and of a planetary legal order capable of guaranteeing peace*



*through the use of legitimated international force. Was this, then, the model that inspired what I have called your 'cosmopolitan pacifism'?*

N.B. In a certain sense yes, I cannot deny that, though I would introduce a number of clarifications and nuances in relation to your reconstruction. At any rate, let me recall what I maintained in the 1966 essay you have cited, where I dealt most extensively with the theme of peace. I distinguish three forms of pacifism: what I called 'instrumental' pacifism, which is limited to proposals for intervention regarding means, such as controls on arms production and disarmament; then pacifism with an ethico-religious, educational or therapeutic approach, which aims to convert mankind to the virtue of peacefulness, or at least to provide moral and civic education; finally, I proposed the idea of institutional pacifism because I have gradually become convinced that the only sustainable pacifism, as it is achievable and effective in practice, is one which relies on a supranational development of the present international institutions. The (Hobbesian) argument underlying my position is very simple: just as men in the 'state of nature' first had to collectively renounce the individual use of force and then allocate it to a single power holding the monopoly of force, so too states, which today live in a 'state of nature' formed by mutual fear, must effect a similar transition. They have to make their power converge into a new, supreme organ exercising the same monopoly of force over single states that the state exercises over individuals. It is clear that, once again following Kelsen, I have very specifically adopted the model of the *domestic analogy* that you criticized in one of your recent books.

D.Z. *Yes, as you know, I maintain that one cannot take for granted the existence of a 'world society' that can be treated in any sensible way like northern European civil society of the seventeenth and eighteenth centuries. I do not believe that the so-called 'global civil society' can act as a basis for the political unification of the planet, repeating on a world scale the path that led to the formation of the modern European state. Moreover Kelsen himself, in Peace through Law, warns against any too nonchalant use of the domestic analogy in putting forward the possibility of a world federation of states currently in existence.*

N.B. One of the objections that might be made to your criticism of the domestic analogy is that the formation of the great federal states, such as the United States, repeated at the level of state relations that very process of concentration of power which characterized the emergence of Europe from feudal anarchy in the seventeenth and eighteenth centuries. These states were very much built on the *domestic analogy*, there's no doubt about that. You might maintain that the idea of a world federal state is a utopia, and that cultural, economic, religious and other differences are much greater here. This is not to deny that the federal state is today a concrete institutional reality, and that taking it as a model for the organization of supranational institutions is by no means absurd in theoretical terms, something plucked out of a hat . . . In any case, the tendency of contemporary states to concentrate part of their power in supranational organisms is already taking place. Just think of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. This is a line of development that Kelsen himself indicated and fervently hoped for when in 1944, in *Peace through Law*, he proposed the setting up of an international penal jurisdiction to

prosecute individuals for war crimes for which they were responsible. This is just what the Hague Tribunal is doing, even if only for the former Yugoslavia. What we are seeing, then, is a trend towards constructing the international legal system no longer as an association among states, but as something that includes as subjects of law all the citizens of all states. This too corresponds to a prediction by Kelsen, in addition to being recognized in the 1948 Universal Declaration of Human Rights, for which individuals are also subjects of the international legal system. A part of the power of states over their citizens is thus removed from them and handed over to supranational institutions that see to protecting fundamental rights even against the authorities of the individual states. How in practice to achieve the international protection of human rights — by means of which judicial institutions, for instance — is a very delicate question, but this is not to deny that we are slowly moving towards a position where individuals will no longer be mere citizens of an individual state, but also citizens or subjects of supranational entities or even of a federal state of worldwide dimensions. This corresponds, for me, to Kant's ideal of 'cosmopolitan law', the right of universal citizenship, on the basis of which all human beings as such are citizens of the world. To be sure, this also fits in with something that is part of the Catholic tradition. 'No one is an alien' is a splendid expression I recently heard spoken by the Pope. But this is, I believe, in fact the true ideal of law . . .

D.Z. *But there are those, I am thinking of Serge Latouche for instance, who maintain that after the global victory of the market economy we are becoming increasingly foreign to each other, to the point that today we might say that 'everybody is an alien'. On the other hand, there are those who maintain that the differences among cultures and among peoples, and hence in some way their political divisions too, are a wealth that is being threatened by the 'cosmopolitan' process of Westernization of the world led by the United States superpower.*

N.B. I understand, but the important thing is that there is a trend under way, and this I feel cannot be denied, which is taking us towards the fulfilment of Kant's ideal of cosmopolitan law. The ideal in my view is that the subjects of law in the world system should be individual persons, not states . . .

D.Z. *But if we imagine building a world political system in which there are individuals on the one hand and the powers centred in a world state on the other, with no mediation any longer through intermediate political structures, do we not risk giving rise to a sort of cosmopolitan Jacobinism? If the sovereignty of the national Leviathans is suppressed because it is held responsible for the existence of international anarchy and war, it remains difficult for me to understand why the despotic or totalitarian sovereignty of the Leviathan should not reappear, enormously strengthened, in the guise of the universal state combining within itself the totality of international power, previously diffused and dispersed in thousands of rivulets. And this Leviathan would obviously be incarnated in a restricted 'directoire' of economic and military superpowers.*

N.B. I have already had occasion to say that while it is true that your 'anti-cosmopolitan' theses did not convince me at first reading — I remain an impenitent cosmopolitan — they did, all the same, cause me to reflect for a long while. This objection of yours was one of those that really made me think. Nonetheless, we

have to come to understand why today, on every continent, there is a widespread tendency towards the development of supranational legal and political entities, on a regional scale. By far the most important example is the process of European unification, which is not being arrested, but is indeed expanding in territorial terms. The United States of Europe, a prospect opposed today by no political force on the Continent, marks the success of the trend you criticize, namely the trend towards overcoming the dispersion of power by concentrating it in supranational organisms.

D.Z. *You are right, even if we ought not to underestimate the risks the unification process carries for the rights and interests of the weaker European subjects, both individual and collective. Ralf Dahrendorf, among many others, forcefully denounced this danger in connection with the Treaty of Maastricht. The European Union is today very far from the model of the constitutional state, or even of the state based on the rule of law. On the other hand, there does not seem to be emerging anything that could be called a 'European civil society' and could democratically legitimate the 'constitution' of a federal state. From a more general viewpoint, it is clear that European unification entails a strengthening, first and foremost of an economic and military nature, of one of the richest, most advanced areas of the planet, and an increasing remoteness from the Mediterranean countries. In theoretical terms too, it is very doubtful that the impetus towards the formation of regional economic and political aggregates will go in an inclusive direction, that is a cosmopolitan one, and not in exactly the opposite direction, towards exclusion, involving an increase in inequalities of rights, power and wealth among the states and among their citizens.*

N.B. Yet Italian citizens, like the French or German citizens, are gradually becoming citizens of Europe. And this ought to be a stage, as I like to say, in the process of overcoming the great walls that divide the world. But obviously I do not shut my eyes to the obstacles that exist, and which will become increasingly serious as the territorial area to be politically unified expands.

## 5 The Theory of 'Just War' and the Problem of the Legal and Moral Qualification of War

D.Z. *Let me move, by way of conclusion of our dialogue, to a topic you have been dealing with for a long time, which divided us during the Gulf War. This is the problem of the legal and moral treatment of war. You have repeatedly criticized the doctrine of the just war, especially in the essay 'Il problema della guerra e le vie della pace', proclaiming its obsolescence in the nuclear age. You have maintained that modern war, from both the ethical and the legal point of view, is legibus soluta. It is, you have written, outside 'any possible criterion of explanation and of legalization. It is uncontrolled and uncontrollable by law, like an earthquake or a storm. After being regarded either as a way to implement law (the theory of the just war) or as an object of legal regulation (in the evolution of the ius belli), war has gone back to being, as in Hobbes' portrayal of the state of nature, the antithesis of law.' Your intransigent ethical and legal rejection of war is very far removed from Kelsen, who, albeit with ambiguity and vacillations, adopted the doctrine of the iustum bellum. It seems to me, though, that in more recent years you have changed your opinion on this point. For instance,*

*you liked Michael Walzer's book, Just and Unjust Wars, and in an interview after the Gulf War, as I mentioned, you maintained that the tradition of the just war still has something important to say to us. Do you really think that this doctrine still contains any features of validity or interest?*

N.B. I wish to emphasize that my thoughts on the problem of war began in the 1960s — that is, the period of the Cold War and the balance of terror. When I defined war as an event, like a natural disaster, lying outside any legal or moral valuation, I was referring essentially to nuclear conflict. I maintain that conviction. Yet there is the risk of deducing from this position the principle that in the nuclear age any type of armed conflict is illegitimate and unjust. One might even draw the conclusion that a war of defence against aggression or a war of national liberation are unjust too. I do not share this conclusion, since I feel there must be a distinction between 'primary violence' and 'secondary violence', between whoever first uses military force and those who are defending themselves. Normally whoever first uses force is the aggressor, and those exercising force second are the weaker, compelled to defend themselves: the two positions cannot be legally or morally set on the same plane. This is the classic *topos* of aggression and resistance to aggression. I am very well aware that it is not at all easy in specific situations to determine clearly who is the aggressor and who is the victim, for instance in the case of a civil war. Yet we cannot neglect the fact that — as I maintained during the Gulf War too — if we do not establish criteria for legally and morally assessing the use of military force, we run the risk of always giving in to the bully. I usually say that if we were all conscientious objectors except one, this one could take over the world. Aggressors are very happy to find themselves facing adversaries who renounce the use of force. I am absolutely convinced of that. I say it with the greatest of respect for non-violence and for absolute pacifism. Indeed, there ought to be a truly absolute pacifism, practised by all . . . but we are aware that that is not the way things are, and perhaps never can be.

D.Z. *I would like to note, though, that these are practical arguments that do not necessarily lead to the conclusion that modern war can, in particular circumstances, be morally just (or unjust). If recourse to war is brought about by a state of necessity — the need to defend oneself against aggression — it does not thereby become a morally just act if it nonetheless entails, in a nuclear age, horrendous destruction and suffering, especially the sacrifice of a very great number of innocent persons or even victims of the despotic regime — victims of the 'bully' as you say — who first unleashed the violence, as happened in the Gulf War. Even a defensive war, in a nuclear age, involves enormous breaches of fundamental rights of thousands or hundreds of thousands of people. Thus a defensive war too remains, to use your expression, legibus soluta.*

N.B. Yet one must meditate on the fact that violent people do exist . . . This is why, for instance, at the domestic level we have assigned to the political system, to the state, a monopoly on the exercise of force: this has been done in order to control and reduce widespread violence, to protect citizens from the aggressions of the violent. So it is hard to see why this cannot be done at the international level too, giving rise here too to forms of monopoly of the use of force, and thus legitimating recourse to military force against those who first exercise violence. It should further be added that today, at

the international level, a new, very serious phenomenon is occurring: private violence is reappearing and spreading. It is almost a return to the situation of the Middle Ages. Criminal groups are engaging in clandestine trade in arms, drug trafficking and the exploitation of women and children are multiplying and growing stronger at planetary level. The Mafia, for instance, is a phenomenon that from the West has spread to Russia as well as to China. These are extremely powerful, highly armed criminal organizations that even have heavy weapons at their disposal. In the face of this phenomenon, the power of repression available to the individual states is entirely insufficient. Their very sovereignty might be overthrown by the overweening power of the criminal organizations, something we have more or less seen in Albania and perhaps, too, in the war in the former Yugoslavia. It would not be overly bold to imagine that there could be completely different wars in the near future from those we have seen so far in clashes between states. These wars were at any rate tempered to some extent, subject to rules of *ius in bello* regarding, for instance, the treatment of prisoners, the prohibition of certain types of weapon, etc. All this might become something utterly passé, ridiculous . . .

D.Z. *So you think that only a supranational power, supranational courts and police, would be able to control this new type of private international violence?*

N.B. I confine myself at this point to noting that today there are conflicts and wars of a new type. It's a frightening spectacle . . . And it is clear that the powers and the jurisdiction of individual states are insufficient.

D.Z. *So for these reasons too, I imagine that you look favourably on the International Criminal Tribunal for the former Yugoslavia in the Hague and the one for Rwanda. And I believe that you are particularly in favour of the prospect, which has been under discussion for more than fifty years now and is today apparently becoming concrete, of the establishment under United Nations auspices of a 'permanent' international criminal court. This court ought to judge all those responsible for crimes against humanity and other particularly serious war crimes, on the basis of an international criminal code.*

N.B. It is natural for me to be completely in favour, and along the purest Kelsenian lines. Kelsen was the first, in his 1944 work that I've repeatedly mentioned, to propose the setting up of this type of international court. I know that there are discussions in formal terms in connection with the Hague Tribunal. There are those who maintain that this is a special court, or that the United Nations Security Council was *ultra vires* in deciding to set it up. But I think that it was necessary to start somewhere, and that it was right to start this way. But over and above that, I am especially in favour of the fact that we are moving towards an international law whose subjects are no longer just the states, but also, and especially, individuals. This means, I repeat, the achievement of a project that Kelsen, in his farsightedness and courage, was the first to conceive.