
Hans Kelsen on International Law

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Abstract

Kelsen's monistic theory of law, according to which international and municipal law have the same subject-matter, paved the way for the dominant contemporary doctrine: international law can encompass every aspect of human life which warrants international legal protection of human rights. Kelsen's doctrine of the identification of law and state held the legal order of the modern state to be the pattern of every legal system. Since, moreover, he considered physical coercion to be the very requisite of a legal normative order, Kelsen was bound to look for such a coercive element in the international order and found it in war. The experience of World War Two led Kelsen to develop the doctrine of the 'just war' (bellum iustum) as the appropriate sanction for violations of international norms, a theory which is hard to reconcile with his condemnation of every form of natural law. Kelsen's narrow definition of law prevented him from assessing the true nature of normative systems which do not fall within the state-based definition. Such systems may rely on non-physical forms of coercion, forms which are also available, as this article argues, to the international order.

Introduction

A reflection on Kelsen and international law is an immensely stimulating exercise since it places us before a formidable, indeed triple, challenge: firstly, because Kelsen's thought shifted during his long and productive career from constitutional to international law; secondly, because no legal theory may be considered satisfactory without encompassing the awkward position of international law within the legal field; and thirdly, because among the many remarkable features of Kelsen's outstanding scholarship is the strength of his logical mind, although some elements of his thought were not always congenial with the specific status of an international legal order.

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The first two of these challenges were deeply felt by this author. An examination of Kelsen's approach to international law involves two equally far-ranging areas of study, Kelsenian thought as a whole and the very nature of legal theory, especially as all legal systems have to be brought together into a 'grand unified theory', to use the language of contemporary physics,¹ a notion which Kelsen himself would have considered akin to his own thinking.²

1 'Das Problem der Souveränität'

The first part of this article will examine Kelsen's first deliberate attempt to deal with international law in his *Das Problem der Souveränität und die Theorie des Völkerrechts*,³ written during World War One and published in 1920. The sub-title of this book is particularly significant: *Beitrag zu einer reinen Rechtslehre*.⁴ The first of the three courses that Kelsen delivered at the Hague Academy of International Law⁵ is based on this volume, but as the ensuing publication does not contain any references it is necessary to return to the original publication.

In *Das Problem der Souveränität* Kelsen drew on the rich controversies that the juridical nature of international law gave rise to in German scholarship during the nineteenth century. With an approach that was unique at that time in Europe, Kelsen was keenly critical of the discrepancies he saw in the most prominent scholars of his time. His attacks were not only levelled at the dualism of Triepel, who remains the best-known German scholar of that period, but also at various other authors. More specifically, Kelsen was particularly harsh in his reactions to those who, after Hegel,⁶ favoured a brand of monism which he considered disruptive of the very nature of international law,⁷ namely, state-linked monism. According to this particular school of thought, international law was merely a branch of state law (*äusseres Staatsrecht*)⁸ and the compulsory character of international law was derived from the convergent will of all states. Indeed, some scholars of that period conceived international law as a 'common law' of nations (*Völkerrecht als 'gemeinsames Recht'*).⁹

Kelsen's approach incorporated three issues of constitutional law, each of which was the subject of intense debate in Germany and Austro-Hungary and after 1918 in

¹ R. Feynman, *QED: The Strange Theory of Light and Matter* (1990); S. W. Hawking, *A Brief History of Time. From the Big Bang to Black Holes* (1988), at 74, 176.

² See, e.g., the hinting at Max Planck's physics in H. Kelsen, *The Pure Theory of Law* (transl. from the 2nd rev. ed. of *Reine Rechtslehre* (1960) by M. Knight, 1970) [hereinafter *Pure Theory*], at para. 44. Moreover, *idem*, *Society and Nature, A Sociological Inquiry* (1943), at 249–266.

³ H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920) [hereinafter *Souveränität*].

⁴ 'Contribution to a Pure Theory of Law'. The first edition of *Reine Rechtslehre* was published in 1934.

⁵ 'Les rapports de système entre le droit interne et le droit international public', *RdC* 13 (1926, IV) 231. *Souveränität*, at 154. In his criticism of Hegel he included Spinoza (at 100).

⁶ *Ibid.*, its para. 45 is entitled *Die Leugnung des Völkerrechts*.

⁷ *Ibid.*, at para. 37.

⁸ *Ibid.*, at para. 42.

the Austrian Republic.¹⁰ The first is the nature of a federal state, a question which had aroused considerable discussion from the time the German Reich was founded in 1871; the second is the duty of any state to allow its citizens certain fundamental rights and freedoms; and the third is the means by which respect for the constitutional scheme is effectively ensured.

The first issue links directly with the sovereignty question: Do sister-states (*Länder*) hold any kind of sovereignty or is the federal state the sole bearer of sovereignty? The most interesting feature of Kelsen's answer to this question is his notion of the indivisibility of sovereignty.¹¹ Even the jurisdiction exercised by each component part of a federal unit, guaranteed against any encroachment by the federal state, is nonetheless grounded on the latter's own sovereignty.¹² It is precisely where the federal state exercises its own jurisdiction that it is not autonomous; that jurisdiction is grounded on a 'basic norm' which belongs with the federal constitution.

Two remarks need to be made here. Kelsen's terminology at this point is still tentative: in his 1920 book he invariably refers to what subsequently became the *Grundnorm* (basic norm) as an *Ursprungsnorm* (originary norm).¹³ This latter term conveys a time element which Kelsen later removed.

The second observation is of greater importance: the historical development of a federation or a confederation of states carries no relevance for defining the relationships between the federated states and the federating body. There is no argument to be found in a mere set of facts: it cannot be concluded that states that were sovereign before entering into a federal pact retain some parcel of their originary sovereignty.¹⁴ It follows that there is no distinction either between a *Staatenbund* and a *Bundestaat*, nor is it of any relevance whether the former is grounded on a treaty (*Vertrag*) and the latter on a constitution (*Verfassung*).¹⁵

The hypothetical *Grundnorm* of the entire system must be found in the federal (or international) compact which will be the organizing structure of the Commonwealth

¹⁰ It may be recalled that Kelsen actively contributed to the drafting of the first Austrian republican Constitution. He published many works on that topic. See, e.g., *Der Staat als Übermensch* (1926); *Der soziologische und der juristische Staatsbegriff*, Tübingen (1928); *Vom Wesen und Wert der Demokratie* (1929); 'Wesen und Entwicklung der Staatsgerichtsbarkeit', in *Justiz und Verwaltung* (1929); *Der Staat als Integration* (1930); *Wer soll der Hüter der Verfassung sein?* (1931); *Staatsform und Weltanschauung* (1933).

¹¹ *Souveränität*, at 64 and *et seq.*

¹² *Ibid.*, at 64.

¹³ The term *Ursprungsnorm* is generally used in *Souveränität*. See, e.g., 'begründende Ursprungsnorm' (at 93). The *Ursprungsnorm* has the function of a *grundlegenden Hypothese*. But it is not a legal rule (*Rechtsnorm*), see *Souveränität*, at para. 8. The term *Grundnorm* which will prevail in later works appears sporadically (*ibid.*, at 105). As a token of a not yet definitely fixed terminology see 'Ursprungsrechtssatz' (at 27), a term which contradicts the non-legal nature of that norm. See also 'oberste Grundsatz' (at 214), 'grundlegende Norm' (at 222).

¹⁴ *Souveränität*, at 59.

¹⁵ *Souveränität*, at para. 58, 280–287. The difference between both sources holds 'no reliable logic-systematic signification' (*keine zulässige logisch-systematische Bedeutung*, at 286). Of course, there is a difference between a federal state and a confederacy of states according to international law: each state which is a member of a confederacy enjoys the status of a subject of international law, which is not the case for the composing parts (states or *Länder*) of a federal state. But that solution of positive international law — which remains open to future modification — is not relevant for the theory of law.

it has set up. This observation is of the utmost importance for the status of international law: no argument whatsoever must be sought in the historical process which brought pre-existing states into the framework of an international community. The Hobbesian concept of an initial state of nature, which is also accepted by Spinoza, is entirely unknown to Kelsen.

There is, however, some inconsistency as to the nature of the *Ursprungsnorm*. Although it is a non-judicial norm, a premise (*Hypothese*), Kelsen sometimes gives a rule of positive law as examples of such a norm: for instance, the obligation to comply with the monarch's will in a despotic state — *Verhalte dich so, wie der Monarch befiehlt*.¹⁶ In the field of international law the rule *pacta sunt servanda* is put forward as *Ursprungsnorm*.¹⁷ In his later works, however, Kelsen excluded the possibility that the *pacta sunt servanda* rule alone be the basic norm of international law. It is only the most important norm of international customary law.¹⁸ Kelsen states: 'The basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: The states ought to behave as they have customarily behaved.'¹⁹

The second constitutional law issue which, as mentioned, is also relevant for a theory of international law is the position of domestic law as to the fundamental rights and freedoms of a state's citizens. Imbued as it was with the prepotency of the state, the German doctrine did not easily accept that such liberties were afforded outside of any state control. Georg Jellinek remains renowned for his theory of autolimitation (*Selbstbeschränkung*)²⁰ of the state. The state, he argued, is not bound by any precepts of natural law such as were affirmed in the Preamble of the United States' Declaration of Independence and in the Preamble of the French *Déclaration des droits de l'homme et du citoyen*. On the contrary, a state as a legal order (*Rechtsstaat*) grants its citizens such fundamental rights which it deems convenient to its own ends. The 'Ob' of state power limitation is beyond the scope of the state, but the 'Wie' is not.²¹ Jellinek applied the same reasoning to the self-imposed obligation (*Selbstverpflichtung*) of the state in the international sphere.

Both of these solutions are emphatically rebutted by Kelsen. Indeed, they stand in

¹⁶ *Souveränität*, at 102.

¹⁷ *Ibid.*, at 217, 262, 284.

¹⁸ H. Kelsen, 'Théorie générale du droit international public. Problèmes choisis', *RdC* 42 (1932, IV), at 13; *idem*, 'Théorie du droit international public', 84 *RdC* (1953, III), at 123; *idem*, *Pure Theory*, at para. 42, c.

¹⁹ H. Kelsen, *Principles of International Law* (1952), at 417–418. See also 'Théorie générale', *supra* note 18, at 279. In a footnote in *The Pure Theory of Law*, Kelsen repudiated the 'theory held by many authors (and at one time by myself) that the norm of *pacta sunt servanda* is the basis of international law . . .', *supra* note 2, at 216, note 80).

See also *ibid.*, at 324, on the hierarchical nature of the international legal order. There are three levels in international law. The binding force of treaties is based on a positive norm, *pacta sunt servanda*, which is a part of international customary law. 'Since this second level, that is, the international law created by international treaties, rests upon a norm of general international law (the highest level), the presupposed basic norm of international law must be a norm which establishes custom constituted by the mutual behavior of states as law-making fact.' On the static and dynamic principle, see *ibid.*, at 195–198.

²⁰ G. Jellinek, *Allgemeine Staatsrechtslehre* (1905), at 357–368 (*die Bindung des Staates an sein Recht*).

²¹ *Ibid.*, at 477 (*Nur das Wie, nicht das Ob der Rechtsordnung liegt in seiner Macht, in seiner faktischen wie in seiner rechtlichen*).

stark contrast with Kelsen's identification of state and law.²² Yet, in the field of constitutional law Kelsen is not so distant from Jellinek's position. In his view, a citizen is afforded the fundamental rights which a state's legal order provides for: 'From the viewpoint of an objective state order there does not exist any individual freedom. ... Freedom is a non-juridical phenomenon.'²³ On this point, Kelsen is in accordance with John Austin's philosophy of law.²⁴

Kelsen dealt with the third issue of constitutional law during his time as professor at the University of Cologne. It bears on the threats against the legal order of the Weimar Republic. He questioned where the 'guardian' (*der Hüter*) of the Constitution was to be found. On this point a controversy flared between Kelsen and Carl Schmitt. While Kelsen was in favour of a judiciary control for respect of the Constitution,²⁵ Schmitt gave scholarly support to the position of the *Deutsche Nationale Volkspartei*, thereby affording the *Reichspräsident* the task of safeguarding the constitutional framework.²⁶ With the help of this same party, Hitler was saddled into power by President von Hindenburg and was granted dictatorial powers by a terrorized *Reichstag*.²⁷ While Kelsen was deprived of his chair and forced to emigrate, Carl Schmitt pompously upheld the new regime.²⁸

2 Kelsen's Nomological Approach

Kelsen's monistic and logical approach is so well known as not to require lengthy explanation. Its basic elements are i) the identification of law and state; ii) the idea that a legal order is a compound of norms, the validity of which relies on a hypothetical basic norm, the *Grundnorm*; iii) the exclusion of any factual element in the construction of a legal order; and iv) the repudiation of any reference to other non-logical premises, such as morals or natural law.

²² *Souveränität*, at 9–15. It follows that every state, being a legal order (*Rechtsordnung*), is also a *Rechtsstaat*, even an absolute monarchy (at 26). The non-democratic character of a state has no bearing on its status as a *Rechtsstaat* (at 29). See also 45–46. Slavery is not beyond the scope of a legal order (at 45). Kelsen's critique of the *Selbstverpflichtung* already appeared in his first main work, *Hauptproblemen der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze* (1911), at 395–412, more precisely, at 398–401.

²³ *Souveränität*, at 247.

²⁴ J. Austin, *The Province of Jurisprudence Determined* (1st ed., 1832), also in R. Campbell (ed.), *Lectures of Jurisprudence on the Philosophy of Positive Law*, vol. 1 (5th rev. ed., 1885), at 267.

²⁵ H. Kelsen, *Wer soll der Hüter der Verfassung sein?* (1931).

²⁶ C. Schmitt, 'Der Hüter der Verfassung', 16 *Archiv des öffentlichen Rechts* (1929) 141; *idem*, *Der Hüter der Verfassung* (1931).

²⁷ *Verordnung zum Schutz von Volk und Staat* of 28 February 1933 (RGBl I, 83) followed on 24 March (after the arson attack on the *Reichstag*) of the *Gesetz zur Behebung von Volk und Reich* (RGBl I, 141) granting the government (*Reichsregierung*) the power to pass statutes (*Gesetze*) which went much further than the *Reichspräsident's* authority under Article 48 of the Weimar Constitution (1919).

²⁸ Despite their constitutional law differences, Schmitt was appointed to the Cologne Faculty with Kelsen's approval. On 13 April 1933 the latter was dismissed from his chair and Schmitt abstained from undersigning the letter of protest addressed to the Minister in Berlin. On these events see B. Rüthers, *Carl Schmitt im Dritten Reich* (1990), at 62–71.

A The Identification of Law and State

The main objection raised by Kelsen against Triepel's dualism is that it contemplates the state within two irreconcilable perspectives. On the one hand, the state is totally identified with its legal order — for a lawyer a state is nothing other than a legal order (*Rechtsordnung*). Yet, at the same time, the state acting in the international legal order is deemed to be a legal subject (*Rechtssubjekt*), whose personification is rejected by Kelsen as being anthropomorphic.

The concept of the state as a legal order, which relies on the familiar doctrine of the *Rechtsstaat*,²⁹ is highly illuminating in the field of constitutional law. It removes any distinction between private and public law since all legal actions or interests are to be referred to a legal norm whose validity is itself grounded in the *Grundnorm*.³⁰ It erases the distinction between state organs and private persons. It makes short shrift of the personification of the state as an agent possessing any other powers than those afforded by the rule of law.³¹ The state fabric as a pyramidal construction of interrelated norms³² is a guarantee for respect of the rule of law and can as such be an enlightened pattern of democracy.

It has sometimes been assumed that Kelsen's nomological approach does not provide any argument against the legal character of the Third Reich. Although it can be argued that the effectiveness of the Nazi system hardly had a stronger claim to legality than that of a robbers' band (see below), the legal nature of that system was afforded adequate justification through Schmitt's *Dezisionismus*. Yet such a system was incompatible with Kelsen's pyramidal order. Indeed, positing an individual decision above any rule, the *Führerprinzip* subverted the Kelsenian hierarchy between the rule and particular acts or decisions which had to conform to a superior rule right up to the ultimate subordination to the *Grundnorm*. The Nazi power structure was not a legal order according to Kelsenian standards, not for its want of effectiveness, which could hardly be denied, but because the invasion of the legal field by individual decisions fundamentally contradicted Kelsen's hierarchical scheme. It could be conceded that the *Führerprinzip* was the basic norm of the Nazi system, but at the same time a veil of legality was intended to cover up the anarchical character of the power to defeat any norm through an individual decision. Nor could the unity of the legal order, which was another tenet of Kelsenian doctrine, be reconciled with a dual system which provoked a struggle between the prerogative state and the normative state.³³

The identification of law and state also explains why Kelsen could not accept the

²⁹ The expression *Rechtsstaat* appeared in 1832, coined by Robert von Mohl. See H. Heller, *Die Souveränität* (1927), *idem*, *Gesammelte Schriften*, vol. 2 (1971) 31, at 38.

³⁰ *Souveränität*, at 68, 116, 278; *Pure Theory*, at 193–221.

³¹ *Souveränität*, at 17, 21, 177; *Pure Theory*, at 145–158.

³² *Souveränität*, at 119; H. Kelsen, 'Les rapports de système entre le droit interne et le droit international public', 14 *RdC* (1926, IV), at 258; *Pure Theory*, at 221–278, 323–324. The same hierarchical nature also characterizes international law. See *supra* note 19.

³³ See in that sense E. Fraenkel, *The Dual State, A Contribution to the Theory of Dictatorship* (1941). Fraenkel's position is itself debatable: on the one hand, the prerogative state could at any moment defeat the normative state, but on the other hand the Nazi system was chaotic and this constituted another reason why it did not comply with Kelsen's standards.

continuity of the German state after the defeat of World War Two.³⁴ The Third Reich could not be disjoined from its 'legal' order and, conversely, the building of a new democratic system implied the setting up of a new state. As is well known, this was not the official position taken up by the Federal Republic, whose intention was to assume its succession to the so-called Third Reich. Indeed, the first decisions of the *Bundesverfassungsgericht* adhered to the government's doctrine, thus expressly meeting with strong objections from Kelsen.³⁵ Not only did the Federal Republic accept the burden of providing for some kind of reparation for the victims of the dictatorship, but it in fact chose not to repudiate the nation's legal legacy: the federal courts accepted that the Weimar Constitution had been superseded³⁶ and they applied most of the normative acts passed by the *Reichsregierung* under the *Ermächtigungsgesetz* of 1933.³⁷ On this the government relied on Gustav Radbruch's position, according to which laws passed under the previous regime could still be applied except in the case that they contravened the inviolability of human dignity.³⁸ One of the basic rules of the new *Grundgesetz* (1949) — *Die menschliche Würde ist unantastbar* — which no constitutional revision could remove (Article 79 III GG), was projected into the past as into the future, offering a retrospective standard for evaluating the law of the Third Reich.

B The Legal Order as a Set of Norms

Kelsen's logical approach takes exclusive account of the norms (*Rechtssätze*). Since the state is equivalent to a legal order, there is no room for institutions as such, nor for human beings (*Menschen*). According to the nomological nature of a state legal order, a person is defined through the rights, interests and competencies afforded by a legal rule. It is incidental whether such a person is a state organ or a private citizen.³⁹ A juridical person, a notion which includes physical persons and legal entities, is neither an existing human being — which would insert a factual element into the operation of legal rules — nor a subject endowed with innate rights — which would corrupt the purity of a legal order with metaphysical improprieties. Kelsen's legal positivism,⁴⁰ which he consciously adheres to, follows a narrow track between the vulgarity of factual elements and the daydreams of philosophy.

³⁴ Kelsen, 'The Legal Status of Germany according to the Declaration of Berlin', 39 *AJIL* (1945) 518.

³⁵ In its first decisions the German Federal Constitutional Court admitted the continuity of the legal state as a mere hypothesis: *BverfG*, 17 December 1953, at 3, 58, 88–89, where Kelsen's contrary opinion is commented. Later on the same Tribunal would become more vocal in supporting the official governmental position: *BverfGE*, 31 July 1973, at 31, 1, 16.

³⁶ *BverfG*, 24 April 1953, at 2, 237, 248–250; 17 December 1953, *BverfGE*, at 3, 58, 77.

³⁷ *BverfG*, 19 February 1957, at 6, 132, 170, 198–199.

³⁸ Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', 5 *Süddeutsche Juristen-Zeitung* (1946), in *Rechtsphilosophie* (1970) 347.

³⁹ *Souveränität*, at 45, 109; *Pure Theory*, at 168–192.

⁴⁰ *Souveränität*, at VI, 87, 88–90; 'Les rapports de système', *supra* note 32, at 314; *Pure Theory*, at 214–217. It is noteworthy that Kelsen strongly affirms that international law is 'a juridical order' against the misconception of some pacifist approaches which attribute to it 'a moral and not a legal character', see *The Legal Process and International Order* (1935), at 11.

Kelsen's theory is firmly convincing when he affirms the circularity of a legal system, which obeys a double test: first, no legal order requires an external legitimacy, postulating instead the hypothetical *Grundnorm* upon which its validity is grounded; second, for all persons subjected to a legal order, there should be no possibility of a conflict of duties arising from a so-called conflict of laws — a legal order is exclusive of any other. This is one aspect of Kelsen's monism. Before encompassing any global combination of legal orders — such as is emphasized by the relations between international and municipal law — Kelsen stresses the unity of any legal order, a notion which was attuned to the German doctrine prevalent in his time.⁴¹ It would be beyond the scope of this paper to deal at length with that internal branch of monism. Suffice it to say that conflict of laws forms not only a branch of private international law, but it pervades the very core of municipal law. An instance among others is constitutional law: fundamental rights and liberties are in conflict among themselves and the first duty of constitutional courts — as is the case of the European Court of Human Rights — is to reconcile them. Clearly, and this would appear to coincide with Kelsen's scheme, the judicial decision in such cases resolves the controversy and, in this sense, restores the unifying approach. But the same can be said of conflicts of laws in private international law: the final stance will assuage the conflict, the decision of a judge will close the debate.

If, however, in relinquishing the statist approach one were to contemplate the plurality of legal orders or the internal pluralism of any legal order from the point of view of a human being who is a person in the Kelsenian sense, i.e., a man or a woman or a legal entity whose rights and interests are the subject-matter of rules of law emanating from more than one legal order, other problems arise. These will be discussed in the concluding section of this paper.

One of Kelsen's basic contentions is that there exists no difference in the nature of the subject-matter of state law and international law.⁴² This affirmation reinforced the rarefied atmosphere of traditional international law. It led to a dismantling of the separation of both branches of law according to their respective fields: state jurisdiction concerns relationships between the state and its subjects (public law) and dealings between citizens themselves (private law), while international law only contemplates relations among states. Kelsen's theory brought into focus an idea largely accepted nowadays and which the contemporary evolution of international law has overwhelmingly confirmed: international law is not confined to relations among states, it can encompass all human activities. The clearest example of such an evolution is the international protection of human rights: while the relations between a state and its own nationals were viewed in the past as a purely domestic question, protected by the concept of state sovereignty within its frontiers, such relations have acceded to the international legal sphere. At the same time any separation between public and private law has become devoid of any relevance.

⁴¹ *Souveränität*, at IV, 111–112, 188; *Pure Theory*, at para. 34c. See the earlier work by R. Stammler, *Theorie der Rechtswissenschaft* (1911), at 24–25.

⁴² *Souveränität*, at 124–130; 'Théorie générale', *supra* note 18, at 178; *Principles*, *supra* note 19, at 402.

The linkage between fundamental rights inside and adhesion to international law outside is twofold. On the one hand, both are confronted with the concept of sovereignty: a *Rechtsstaat* cannot deny all guarantees to its citizens and it also has duties in relation to other states in the international sphere. On the other hand, the development of an international protection of human rights and fundamental freedoms strongly emphasizes the unity of the rule of law. One of Kelsen's contributions to legal theory was to cure German scholarship, which was predominant at the end of the nineteenth century, of its own malaise and to disentangle the skein that the Hegelian concept of state had woven. As early as his lecture delivered to the Hague Academy in 1932, Kelsen affirmed that issues of constitutional law, such as the duties of a state in relation to its citizens, can be apprehended by international law.⁴³

International economic law and EEC law provide further illustrations of the outdated character of a clear-cut delimitation of the field of international law. Here the identification of a state with its legal order takes part in the rationalization of such a trend: If international law tends to coordinate the legal orders of states, no issue upon which a state has jurisdiction is beyond the scope of international law.

C The Purely Logical Approach

Already in his *Das Problem der Souveränität* Kelsen drew a distinction between *Sollen* and *Sein*, a distinction that would be given greater emphasis in his *Reine Rechtslehre*. His epistemological position is well in advance of legal scholars of his time. Their argumentation intermingled 'legal' reasoning with factual elements, with a brand of sociology or of psychology and, in the field of the relationships between domestic and international law, of politics. The personification of the state, for instance, endows the state and other legal entities with the effects of a human being, while Kelsen's position consists in dehumanizing the person as an actor in the legal field and in reducing corporate bodies to the 'persons' acting within them. To be 'pure'⁴⁴ a theory of law has

⁴³ Kelsen, 'Théorie générale', *supra* note 18, at 301–302.

In a pamphlet published three years earlier, Kelsen distinguished between autocracy and democracy: 'Der metaphysisch-absolutistischen Weltanschauung ist eine autokratische, der kritisch-relativistischen die demokratische Haltung zugeordnet', *Vom Wesen und Wert der Demokratie* (1929), at 101. Democracy goes better along with a modern scientific and relativist approach of reality. Further on, Kelsen states that the majority rule in a democracy can be distinguished from any other kind of authority (*Herrschaft*) since fundamental rights and liberties of the minority are duly protected under the principle of proportionality (at 101–102).

⁴⁴ The notion of a *reine Rechtslehre* sporadically appears in *Souveränität: Reinheit der Rechtserkenntnis* (at 189); *die reine Theorie des Rechts* (at 243); *vom Standpunkt einer reinen Rechtstheorie* (at 243), see also at 275; *Eine reine juristische Theorie der ...* (at 277). Significantly, the expression *reine Rechtslehre* appears only in the subtitle of the book, as though the author conceived and inserted it after completing his work. Already in 1920, Kelsen contemplated international law as the 'science' of that branch of law (*die Völkerrechtswissenschaft*, at 235). The three lectures delivered at the Hague Academy are presented as 'théories' ('Les rapports de système', *supra* note 32, at 232), with a reference to the 'théorie pure du droit' ('Théorie générale', *supra* note 18, at 122; 'Théorie du droit international public', *supra* note 18, at 7), which includes the theory of international law.

to be stripped of the fancy dresses in which legal situations are attired. Kelsen's fashion was to let the body of state law appear in its nakedness.

State law remains the point of approach or of departure in Kelsen's legal thinking. This is true in two senses. State law provides the pattern for the future evolution of international law.⁴⁵ In order to be afforded a juridical nature, international law has to comply with the same criteria as those which determine the legal character of a state.⁴⁶

Kelsen's scholarship as a constitutional lawyer obviously influenced his thought in this regard. State law offered the best example of a logical unit encompassing all aspects of human life and apt to transform every situation into a legal relationship (*Rechtsverhältnis*). Kelsen rightly observes that facts of life have no bearing as long as they are not seized through a legal system, but can such a system only be that of the state? He is also right when he contemplates the same — and more justified — universality of international law. However, his consideration for other normative systems is excessively narrow. Most significantly, when comparing state law to such systems he most often calls up morals.⁴⁷ Contemplating the space for liberty which any state law, even the law of the German Empire or the Dual Monarchy, allows its citizens,⁴⁸ he does not envision that such liberty could afford an opportunity to create autonomous legal orders.

A further narrowness of Kelsen's approach relates to the traditional features of state law: what distinguishes law from other normative systems, such as morals, is the coercive force of law. Law is a 'coercive order' (*Zwangsordnung*).⁴⁹ Although coercion is distinguished from the mere fact of its effectiveness, being juridically construed as the content of the relevant rules,⁵⁰ the sole pattern of coercion contemplated by Kelsen is the exercise or the threat of physical force within the territorial limits of a state.⁵¹ It follows that international law is a branch of law and not a mere province of morals if and only if it disposes of its own means of coercion. 'International law is law in the same sense as national law, provided that it is, in principle, possible to interpret the

⁴⁵ Kelsen, *The Legal Process*, *supra* note 40, at 17: 'We are in the happy position, as it were, of having a pattern in the evaluation of the legal system of the individual State.'

⁴⁶ Kelsen, *Principles*, *supra* note 19, at 18: 'The question whether or not international law is law in the sense determined above is identical with the question whether or not the phenomenon commonly called international law can be described by rules of law of the same kind as the rules by which national law may be described.' See also *Théorie du droit international public*, *supra* note 18, at 28.

⁴⁷ *Souveränität*, at 46, 92, 93–95, 104–109, 119, 124; *Pure Theory*, at 59–69. He affirms in *Souveränität* (at 175) that the difference between municipal and international law is the same as that between law and morals. On law and morality, see also his *Essays in Legal and Moral Philosophy* (1973), at 83–113. See also Kelsen, *Hauptprobleme*, *supra* note 22, at 33–57 and 311–346.

⁴⁸ Kelsen, *Pure Theory*, at 33–44. See in particular the concept of 'minimum of liberty' (at 42–44).

⁴⁹ *Souveränität*, at 70; 'Les rapports de système', *supra* note 32, at 242; 'Théorie générale', *supra* note 18, at 134 (*ordre de contrainte*); *The Legal Process*, *supra* note 40, at 12: 'All law is in essence a system of compulsion'; *Pure Theory*, at 12 (*usage ou menace de la force*). In the same context it is clear that coercion is a physical form of force (*force physique*) or the threat of physical force. See also *Pure Theory*, at 33.

⁵⁰ *Souveränität*, at 70, note 1; *Pure Theory*, at 37–39.

⁵¹ 'Théorie du droit international public', *supra* note 18, at 22–23.

See also H. Kelsen, *Peace through Law* (1944), at 3: 'It is the essential characteristic of law as a coercive order to establish a community monopoly of force.'

employment of force directed by one state against another either as sanction or as delict.⁵²

The mere circumstance that the international community is not as organized as a state order, that it is a 'primitive' system of law,⁵³ does not prevent it from stating rules on the use of force. As in a primitive society, force is administered by single members of the community, in the form of self-help⁵⁴ according to rules laid down by the community itself. Right from the very beginnings of international law, war was the core from which that branch of law was conceived.

The most typical delict under international law is the launching of an unjust war, whereas a war fought with the intention of redressing an international wrong is considered just. War and reprisals or retaliations are the sanctions which allow international law to qualify as a legal order.⁵⁵ 'Anyone who rejects the theory of the just war denies, indeed, the legal nature of international law ...'.⁵⁶

Kelsen underlined the just war (*bellum iustum*) doctrine in his Oliver Wendell Holmes Lectures of 1940–41. Since this theory was generally rejected by most of the positivist legal scholars of his time, he dealt in considerable depth with the arguments supporting his own position in that context. He considered five topics.⁵⁷

The first one — strangely enough — comes from outside the scope of his own positivist approach: even during the nineteenth century and until the outbreak of the First World War, public opinion — national as well as international — did not accept that a government was at liberty to resort to war without having a just cause. Moreover, governments themselves implicitly supported the *bellum iustum* theory since they emphasized the reasons for which they felt the necessity to resort to war.

Kelsen's thought on this point is strikingly in accordance with the analysis of another renowned legal scholar of his time, Hermann Kantorowicz. Interestingly, the legal opinion delivered by Kantorowicz to the German Foreign Office of the Weimar Republic on the matter of responsibilities for the launching of the First World War (*Die Kriegsschuldfrage*) was not disclosed until its posthumous publication in 1967.⁵⁸ Thus, these two scholars clearly reached their individual conclusions independently. As one of the leading scholars of the *Freirechtslehre*, Kantorowicz made use of that doctrine to justify the liability of the Central Powers for the outbreak of the First World War:

⁵² *Principles*, *supra* note 19, at 18.

⁵³ *Souveränität*, at 267; 'Théorie générale', *supra* note 18, at 131; *The Legal Process*, *supra* note 40, at 14; H. Kelsen, *Law and Peace in International Relations, The Oliver Wendell Holmes Lectures* (1942), at 51–55; *Principles*, *supra* note 19, at 36; 'Théorie du droit international public', *supra* note 18, at 71–72; *Pure Theory*, at 323. On that characterization of international law as akin to primitive law, see later in this essay.

⁵⁴ *Souveränität*, at 258 (*Selbsthilfe*); *The Legal Process*, *supra* note 40, at 15. On self-help, see later in this essay.

⁵⁵ *Souveränität*, at 241 et seq., 264–265; 'Les rapports de système', *supra* note 32, at 317–318; 'Théorie générale', *supra* note 18, at 128–129, 134; *Principles*, *supra* note 19, at 18, 59, 401; 'Théorie du droit international public', *supra* note 18, at 32–44; *Pure Theory*, at 324–328.

⁵⁶ *The Legal Process*, *supra* note 40, at 13.

⁵⁷ *Law and Peace*, *supra* note 53, at 36–55.

⁵⁸ H. Kantorowicz, *Gutachten zur Kriegsschuldfrage 1914. Aus dem Nachlass herausgegeben und eingeleitet von Immanuel Geiss* (1967).

although in 1914 it was deemed that a war of aggression was not contrary to international law, public opinion thought differently and the German Emperor was eager to stress Germany's defensive position (*Einkreisungstheorie*) in order to have the war credits voted by the *Reichstag*.⁵⁹ Before and during most of the European wars of the nineteenth century, each state in conflict invariably took the stand that its action was defensive.

As a second argument Kelsen invoked positive law, namely Article 231 of the Versailles Treaty, Article 15, paragraph 7 of the Covenant of the League of Nations and the Briand-Kellogg Pact. Even if those instruments are somewhat specific, they provided clear indications of the trend of general international law.⁶⁰

Kelsen's three last arguments relied on the law of primitive communities, the *bellum iustum* doctrine from Antiquity to Grotius and the concept of international law as a primitive legal order. The first and third of these considerations will be taken up later in this article.

Kelsen was of the opinion that the *bellum iustum* doctrine came into being after 1918.⁶¹ The exercise or threat of physical coercion are not the sole forms of constraint. Other means of coercion derive from the most ancient practices found in traditional societies, for instance the exclusion of rebellious members from the community. In evoking such 'primitive' communities Kelsen is referring to the *vendetta*,⁶² a coercive measure which obeys the pattern of physical violence. *Vendetta* in a traditional community and war in the international legal order are closely related instances of poorly regulated violence. They represent a private justice (*justice privée*).⁶³ This use of coercion implies the application of a legal norm in a system of decentralized or non-organized constraint.

In his Oliver Wendell Holmes lectures, Kelsen makes use of 'a sociological inquiry' which he developed more thoroughly in another work of the same period, *Society and Nature*.⁶⁴ In his view: 'The dualism of nature and society, a characteristic element of modern thinking, is completely unknown to the primitive mentality.'⁶⁵ The first part

⁵⁹ *Ibid.*, at 189–190.

⁶⁰ *Law and Peace*, *supra* note 53, at 38–40. See also *Peace through Law*, *supra* note 51, at 88–91. Kantorowicz, *supra* note 58, at 189, also indicates that the Covenant of 1919 has transferred to the field of positive law what was in 1914 a developing law (*ein 'werdendes' Recht*).

⁶¹ *Law and Peace*, *supra* note 53, at 44–45: 'This idea, which remained predominant until the end of the eighteenth century, disappeared almost entirely from the theories of positive international law during the nineteenth century, although it still formed the basis of public opinion and of the political ideologies of the different governments. Only after the close of the first World War was this doctrine of *bellum iustum* again taken up by certain authors'. On the *bellum iustum* doctrine see also Kantorowicz, *supra* note 58, at 189–190, 205–207.

⁶² 'Les rapports de système', *supra* note 32, at 318; 'Théorie générale', *supra* note 32, at 126; *The Legal Process*, *supra* note 40, at 15; *Law and Peace*, *supra* note 53, at 40–43; 'Théorie du droit international public', *supra* note 18, at 18, 20; *Pure Theory*, at 29; *blood revenge*.

⁶³ 'Théorie du droit international public', *supra* note 18, at 24, 26.

⁶⁴ What is only sketched in *Law and Peace*, at 40–43, is developed at great length in a subsequent volume, *Society and Nature*, *supra* note 2.

⁶⁵ *Law and Peace*, *supra* note 53, at 40; *Society and Nature*, *supra* note 2, at VII, 266. See his earlier *Die philosophische Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1928), at 41–63.

of *Society and Nature* relies heavily on anthropological and ethnological studies, which Kelsen quotes at length.⁶⁶ Kelsen's own interpretation of the primitive holistic approach is that it ignores any distinction between society and nature, as well as between law, religion and morality, due to the prevalence of the principle of retribution.⁶⁷ The importance attributed to retribution is better emphasized in the German title of the same work: *Vergeltung und Kausalität*.⁶⁸

One can readily agree with Kelsen's distinction between the centralized character of the state (i.e., of state law) and the decentralized nature of international law.⁶⁹ What is more open to doubt is his concept of international law as a 'primitive' legal system,⁷⁰ even more so as he stresses the analogy between that branch of contemporary law and the rules laid down in traditional 'primitive' societies such as those researched by anthropologists of his time.⁷¹ International law is not 'primitive' in the sense that it conveys the same model of rationality as the rules of conduct which operated in primitive communities. It is rather the law of a 'civilized' community which can rely on the distinction between society and nature evolved by the society at large⁷² and which has set up a very sophisticated approach to the rule of law. Clearly, it lacks the coercive element which characterizes state law. What is debatable, however, is Kelsen's insistence on grounding the legal character of international law on recourse to physical force, on the pattern of violent retribution (*Vergeltung, talio, vendetta*), borrowed from primitive communities of a remote past.

The development of Kelsen's thought on the 'growth' of international law is not in accordance with his Pure Theory of Law. On the one hand, he concluded his discussion on the *bellum iustum* doctrine in the Oliver Wendell Holmes Lectures with the following sentiment:

Even if such justification is of a moral rather than strictly legal significance it is of great importance; for, in the last analysis, international morality is the soil which fosters the growth of international law: it is international morality which determines the general direction of the development of international law. Whatever is considered 'just' in the sense of international morality has at least a tendency of becoming international law.⁷³

On the other hand, he adhered to a concept of international law which is not in accordance with his nomological approach: 'As the embryo in a woman's womb is from the beginning a human being, so the decentralized order of primitive self-help is already law — law in *statu nascendi*.'⁷⁴

Traditional communities — and more recent ones — regularly apply other forms of

⁶⁶ *Society and Nature*, *supra* note 2, at 1–185.

⁶⁷ *Ibid.* at Ch. 3.

⁶⁸ 'Retribution and Causality'.

⁶⁹ *Law and Peace*, *supra* note 53, at 28, 121–122.

⁷⁰ See *supra* note 53 and accompanying text.

⁷¹ *Law and Peace*, *supra* note 53, at 45–48.

⁷² *Society and Nature*, *supra* note 2 deals at length with the law of retribution and the emergence of the principle of causality in Greek religion and philosophy (at 182–248) and with the law of causality in modern science (at 249–266).

⁷³ *Law and Peace*, *supra* note 53, at 36–37.

⁷⁴ *Ibid.* at 51.

coercion. Ecclesiastical law offers many sophisticated instances, including matrimonial rules, interdiction of priests *a divinis*, excommunication. The law of the Roman Catholic Church is all the more significant since it has a transnational — perceived as universal — domain. In contrast to Kelsen's opinion,⁷⁵ the liberties granted to the Church in many states cannot be interpreted as common recognition by those states of the juridical nature of ecclesiastical law. Kelsen's criticism of international law as '*gemeinsames Recht*' is also relevant here. The autonomy of ecclesiastical law does not need the support of any state law, nor does it require the convergence of many of them.

The same observation can be made in relation to other transnational systems of law, such as the rules adopted by sporting organizations. In the case of failure by members to comply with rules voluntarily accepted, the sole form of sanction that such entities can apply, besides fines which can be collected without interference by state courts, is that of exclusion. The effectiveness of such coercion derives from the authority that the organization — be it a Church or a sports club — wields in its particular sphere.

Similarly, the means of coercion of international law are not limited to the use of physical force. A Member State of the United Nations can be excluded from the Organization. The rulings of the European Court of Human Rights have no mandatory effect in the legal order of a condemned state, but states must abide by them in order to retain their membership in the organization. Should a state default on one of its basic obligations as set down by the European Convention on Human Rights, it could be sanctioned with exclusion, but the other Member States would not surely wage a war to redress the wrong.

Here two objections must be levelled at Kelsen's overly narrow definition of law. Firstly, when dealing with normative systems which do not qualify for legal status, Kelsen contemplates morals which are clearly devoid of any coercive element and religious orders whose coercion is 'transcendental', meaning that 'sanctioning' is a matter for the hereafter.⁷⁶ But a religious order can also be a legal one, and can thus institute provisions for its followers in this life while preparing for their salvation in the hereafter.⁷⁷ The old saying *Hors de l'Eglise point de salut* is the expression of a legal rule:

⁷⁵ See H. Kelsen, *Allgemeine Staatslehre* (1925), at 133–136, where the condition of ecclesiastical law is presented in a different manner from that which appears in *Pure Theory*. He contemplates two possibilities for ecclesiastical law: under the separation of state and church, each church is a private organization submitted to state law; when a church is privileged within the state it becomes a part of that state's public law (*öffentlich-rechtlichen Korporation*). Even a universal Church has no other legal standing than that which is afforded by each particular state.

⁷⁶ *Principles*, *supra* note 19, at 5; 'Théorie du droit international public', *supra* note 18, at 13–14; *Pure Theory*, at 28–30. But compare the basically different view expressed by Kelsen in *Allgemeine Staatslehre*, *supra* note 75, at 134: 'Allein, wie jede Ordnung, als ein System von Normen, kann auch die kirchliche Ordnung nur menschliches Verhalten zum Gegenstand haben, und kann — als erkennbare Ordnung — nur das irdische, diesseitige Verhalten der Menschen als den allein erkennbaren Gegenstand regulieren.' In applying his identification of law and state, Kelsen is drawn to characterize the Church as a state: *Ist die Kirche Rechtsordnung, dann ist sie Staat*, what is called *Religionsstaat* (at 133).

⁷⁷ 'Théorie générale', *supra* note 18, at 203 dismisses the acts performed by organs of the Catholic Church because they cannot interfere with state power since they concern the Catholic faith (*croyance catholique*).

those who wish to attain the kind of salvation offered by a Church must abide on earth by those means of salvation, just as a sportsman who wishes to enter a competition must comply with the conditions *imposed* upon him by the organizer. The power of such entities is drawn from the monopoly they wield. Even if we assume that a legal order is a coercive one, this does not warrant the limitation of the means of coercion to physical force.

Second, Kelsen also contemplates normative systems which resort to physical force for their implementation. Borrowing the example of a gang of robbers from St Augustine, he concurs with the Bishop's conclusion but not his reasoning. There is no difference between the Roman Empire whose rule was based on brute force and the small empire of a gang of robbers. Neither of these constitute legal orders since they do not embody Augustine's idea of justice. Needless to say, Kelsen rebuts this argument, but his motivation in denying the legal nature of 'the coercive order that constitutes the community of the robber gang and comprises the internal and external order' is no less flawed than Augustine's.

The reason why such a system is not granted the legitimacy of law is that those who speak in the name of legal science do not provide it with a basic norm. Why is that? Because such an order does not enjoy the permanent effectiveness without which the basic norm is not assumed.⁷⁸ But since the assumption of the hypothetical basic norm relies on a mere evaluation of fact, the pure theory of law is self-defeated.

Although the basic norm is a 'transcendental-logical presupposition',⁷⁹ it is not devoid of factual connotations. The monopoly of force, upon which the definition of law is based, is such a factual element. The state claims to be granted such a monopoly on its own territory. From the point of view of state law, it remains true that it cannot recognize any juridical character in the use of coercion, either physical (a gang of robbers, the Mafia and other forms of organized crime) or non-physical (Church law, sporting organizations), on that state's territory. However, by adhering to the state's own definition of the rule of law, the Pure Theory of Law dismisses its own purely scientific approach since it supports the definition laid down by one particular legal system.

D The Exclusion of Natural Law

The law of nature or natural law can receive different meanings, one deriving from a set of observations which can be made regarding the occurrence of physical facts, such as human reproduction, effects of health care on the human body, voluntary termination of pregnancy, and so on; the other is embodied in the concept of natural justice, the determination of human goals, pursuit of happiness, the striving of humanity towards a more equitable repartition of natural resources and goods, and,

⁷⁸ *Pure Theory*, at 47–49. On a highway robber's command, see *Essays*, *supra* note 47, at 244–245.

⁷⁹ *Pure Theory*, *supra* note 2, at 201.

more generally, peace and freedom for the whole of humankind.⁸⁰ Such aims, especially the last ones, are of particular significance for international law.

Kelsen's position in relation to these two meanings of natural law is well known. Neither of them enters into a 'pure' theory of law: the first is discarded as mere facts and the second is excluded because legal thinking must centre on positive rules which rely on the hypothetical *Grundnorm*, a purely formal premise without any reliance on philosophical or moral considerations, without any engagement with political or social values.

It can be assumed that Kelsen's thought became more rigid on those questions in *Reine Rechtslehre*. His 1920 volume as well as some of his writings on international peace were more receptive to social goals than was the case for subsequent syntheses. While the development of the argument and the conclusions of *Das Problem der Souveränität* stressed the necessity — for logical reasons — of a world order and the predominance of international law in a monistic approach, the author of *Reine Rechtslehre* refused to take any stand on the respective merits of that brand of monism and of state monism. In 1920 Kelsen adhered to Christian Wolff's *civitas maxima*⁸¹ as a prefiguration of a unique universal system of law. Such a scheme is not only justified by its political superiority and its greater effectiveness in aiming at the establishment of a peaceful world order, it is also grounded on the nomological nature of law: state monism is the expression of state-subjectivity, the expression of the state-*Ich* throughout the world, while the *civitas maxima* gives voice to the objective nature of a global unit. When one has deliberately chosen the path of monism, there is a logical argument in favour of a form of monism which encompasses the whole fabric of mankind. Kelsen's scepticism is not entirely in accordance with his logical premises.

Coming back to the juridical nature of international law as a coercive order based on the *bellum iustum* doctrine, one cannot dismiss the thought that the doctrine is

⁸⁰ Kelsen, 'The Function of the Pure Theory of Law', in *Law. A Century of Progress 1835 to 1935* (1937), at 236–237 distinguishes between two schools of natural law, one which is conservative-minded and supports existing legal orders, the other which challenges positive law and relies on natural justice. The first school relies on facts which cannot take part in elaborating a legal order (see *Principles*, *supra* note 19, at 98), the second one, on natural law. See also H. Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science* (1971), at 137–197; *Essays*, *supra* note 47, at 27–60. Such a bipartition is certainly too schematic. One could distinguish four orientations of natural law. The first, the Roman *lex naturae*, relies on a rationalization of factual observations. But Roman lawyers referred to those institutions such as marriage or contracts common to different peoples as *ius gentium*. It is also grounded on factual observations but of a different kind: the existence of cultural institutions common to many peoples. According to scholastic thought, namely Aquinas, *ius gentium* was deemed natural law by derivation. The same school borrowed a third orientation from the Greek philosophers, Aristotle and the Stoa: the embodiment of a philosophical concept of justice. Such a brand of natural law is a branch of moral philosophy. While that doctrine supported the state and the existing legal order, natural law was conceived at the time of the Enlightenment in a forward-looking way: it took substance in the Declarations of Rights of the late eighteenth century. In his *Die philosophische Grundlagen*, *supra* note 65, at paras 20–21, Kelsen disputes the distinction between a conservative trend of natural law and a revolutionary one: in his view, natural law is always conservative (*Das Naturrecht als Rechtfertigung des positiven Rechts*, at 37). The allegation of its revolutionary character is an invention of the historical school of law (at 40).

⁸¹ *Souveränität*, at Ch. 9.

more an article of faith than an observed reality. When Kelsen contemplates the positive aspects of the just war, he inevitably blurs the distinction between international law and international morality: the conviction that war is a delict is not supported by general international law. Even after the adoption of the United Nations Charter, two issues remained open to dispute. One is whether the Charter mechanisms are apt to exclude any resort to self-help between Member States. Kelsen was not entirely convinced of the efficiency of such devices⁸² and after 50 years of the Charter's functioning, his apprehensions have been confirmed. The other question, which has now become superseded, was whether Article 2(4) of the Charter could be deemed a general principle of international law in relation to non-member states.⁸³ In any event, the *bellum iustum* doctrine, which is the cornerstone of Kelsen's characterization of international law as a legal order, is not devoid of references to international morality in his system and does not fit properly his nomological approach.

3 Concluding Reflections on Legal Monism

Are the reasons for choosing between state-monism (the primacy of state law) and international law-monism (the primacy of international law) really only of an ethical nature?⁸⁴ Assuming the unity of a legal system, there are nomological arguments in favour of the primacy of international law. One of its principal functions is to determine the scope of validity of national laws,⁸⁵ which clearly assumes its supremacy. More than any other legal scholar of his time Kelsen advanced the ideological and metajuridical nature of the concept of sovereignty.⁸⁶ The so-called sovereignty of a state, i.e. of a legal order, is based on the fact that its basic norm does not derive from another legal order. If the state is bound to respect international law it cannot be deemed sovereign;⁸⁷ it is only a partial order (*Teilordnung*), no more and no less than a federated state.⁸⁸ While not denying the legal character of international law — although justifying it on the overly narrow basis of the coercive nature of war and reprisals — Kelsen only questions whether it derives from state law or the other

⁸² H. Kelsen, *The Law of the United Nations* (1950), at 269–270, 706–708, 791–805. On self-help, see also the new developments incorporated by Robert W. Tucker in the second edition of *Principles*, *supra* note 19, at 64–87.

⁸³ *Ibid.* at 708–709.

⁸⁴ 'Les rapports de système', *supra* note 32, at 313–314; *Principles*, *supra* note 19, at 444–447; 'Théorie du droit international public', *supra* note 18, at 193; *Pure Theory*, at 344–347.

⁸⁵ 'Les rapports de système', *supra* note 32, at 249–262; 'Théorie générale', *supra* note 18, at 182–311; *Principles*, *supra* note 19, at 205–209.

⁸⁶ *Souveränität*, at 240; 'Théorie du droit international public', *supra* note 18, at 5, 85.

⁸⁷ 'Théorie du droit international public', *supra* note 18, at 79–85, 81.

⁸⁸ According to Kelsen's hypothesis of the primacy of international law, the basic norm of national law is not 'a norm only presupposed in juristic thinking but a positive norm of international law; and then the question arises as to the reason for the validity of the international law order to which the norm belongs on which the validity of the individual national law is founded — the norm in which this legal order finds its direct, although not its ultimate, reason for the validity. This reason of validity, then, can only be the

way around. But once it has been assumed that an international legal order exists, how can it be conceived, according to a monistic approach, other than as having primacy?

One argument which Kelsen relied on in his contemplation of the logical possibility of state-monism was that no subject-matter can be put out of bounds of any legal system. The already noted positive aspect of that doctrine is that any human situation can be internationalized, i.e., apprehended by international law. But there is another consequence of the all-encompassing scope of any monistic legal order — a perverse consequence — namely, the ability of state law to rule on an interstate relationship.⁸⁹ If, on the contrary, some subject-matters fall outside the scope of state law, international law can no longer be conceived as a branch of state law. In his last works Kelsen affirmed that 'there are, it is true, certain matters specific to international law, matters which can be regulated only by norms created by the collaboration of two or several states. These matters are — as pointed out — the determination of the sphere of validity of the national legal orders and the procedures of creating international law itself.'⁹⁰ Accordingly, there is no longer room for the unity of the legal order under the primacy of national law.

A final topic requiring attention is the inadequacy of Kelsen's monistic approach. Another scientific hypothesis, legal pluralism, can more appropriately tackle the intricacies of the multiplicity of legal orders. Legal pluralism has two meanings: one is that there exist various patterns of legal orders. The fragility of the Kelsenian approach lies in the fact that he defined a legal order on the basis of the traditional features of state law.⁹¹ Even assuming that coercion forms part of the constitutive elements of a legal order, one cannot deny the existence of other forms of constraint than physical coercion. The emergence of 'soft law'⁹² is a further indication of other kinds of legal rules than those which rely on physical coercion.

Secondly, legal pluralism means that there exist multiple legal orders, some endowed with common characters (the legal orders of different states or the various

basic norm of international law, which, therefore, is the indirect reason for the validity of the national legal order. As a genuine basic norm, it is a presupposed — not a positive norm. It represents the presupposition under which general international law is regarded as the set of objectively valid norms that regulate the mutual behaviors of states', see *Pure Theory*, at 215.

However, under a pluralistic approach, one is not bound to find the basic norm of any national legal order in a 'positive' norm of international law, which is a far-fetched theory since such a positive norm did not exist at the time that national states were set up as positive legal orders. Kelsen's rejection of any bearing of the historical mutual developments of the national states and an international legal order can be assumed when dealing with the determination of the autonomous basic norm of each state's legal order. It does not fit a system where the so-called basic norm of state law is itself a positive norm of international law, which, by its very nature, cannot be 'presupposed'.

⁸⁹ *Souveränität*, at 128–130.

⁹⁰ *Principles*, *supra* note 19, at 406; 'Théorie du droit international public', *supra* note 18, at 117.

⁹¹ One striking application of such an approach is the defining of Church law as a 'Religionsstaat', *supra*, note 76.

⁹² See F. Rigaux, 'Les situations juridiques individuelles dans un système de relativité générale', 213 *RdC* (1989, I), at paras. 256, 264; I. Seidl-Hohenveldern, 'International Economic Soft Law', 163 *RdC* (1979, III), at 165–246.

systems of sporting organizations), others varying in their nature. International law is unique, not only because its very scope is to be ecumenical but also because no other legal order is cast in the same mould. But within the international community there are regional or particular legal orders as is shown by their institutions. The most fragile aspect of Kelsenism is that it relies on a definition of law which is appropriate to state law and even to the *Rechtsstaat* of a nineteenth-century scientist, while each legal order may define its own juridical nature. Legal science has no jurisdiction over the definition of law.

A final inadequacy of the monistic approach concerns the issue of the conflict of laws. Even the assumption that there cannot be any conflict of laws within a given legal order has been seriously questioned.⁹³ Moreover, different legal systems may subject the same 'person' to contradictory commands. Such is the case, for instance, for an Italian wishing to marry a Moroccan woman. The validity of the matrimony will be decided differently in Italian civil law, ecclesiastical law if the man is a practising Christian, and in Moroccan law which incorporated the Islamic law prohibiting the marriage of a Moslem woman with a non-Mohammedan. It is correct, according to the Kelsenian theory, that the person of the young girl is not the same in each of the three legal systems. Each of them creates its own juridical relation (*Rechtsgeschäft*). There is thus no logical contradiction among the three systems operating separately, nor is there any conflict of laws. Nevertheless, it remains the case that the same individual receives three different commands, a situation which can only be dealt with in a pluralistic approach.

⁹³ See *supra* Section 2B.