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# Hans Kelsen and the Advancement of International Law

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## Abstract

*Kelsen holds a unique place in the theory of international law as the only great legal theorist to have placed international law and its relations with domestic law at the centre of his considerations. Kelsen consistently defended the idea that international law was law in its own right. This he did in a paradoxical way, viewing war and reprisals as sanctions that gave international law a positive character. But that was just a first step in his argument. It led on to the prohibition of the use of armed force in international conflicts and the necessary creation of international justice to settle international disputes as the only means of taking international law out of a state of anarchy. But the particularly fascinating point of Kelsen's thinking is not only the cogency and rigour of his reasoning but also the fact that his work, which was reputed to be theoretical, even dogmatic, and remote from the concerns of the real world, provides us with the sharpest conceptual tools with which to think through the contemporary developments of international law. Two examples are given in this paper: i) the theory of centralization of legal orders, which provides some understanding of the advances made by the European Community and situates those advances in the general theory of international law; ii) Kelsen's analysis of the role of the individual in international law, which allows us to understand the innovations implied by the theory of state contracts.*

For anyone wishing to go beyond an empirical approach to law, to examine its concepts in depth and to develop an overview which may provide a guide through the mass of facts, reading Kelsen will always prove a worthwhile occupation. This is so even for those who subscribe only in part or indeed not at all to his views. And what is true of his theory of law as a whole is possibly even more true of his theory of international law. This subject is genuinely central to Kelsen's theory of law, which sets him apart from other legal theorists who usually disregard international law or at

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best (as with Hart) accord it very limited treatment.<sup>1</sup> Kelsen, however, devoted a great deal of space to reflections on international law and to ways of incorporating this specific topic into the general theory of law. Of the 387 titles listed by the Hans Kelsen Institute of Vienna, 106 deal with international law, ahead of legal theory (96 titles) and constitutional law (92 titles).<sup>2</sup>

The purpose of this paper is not to make a tally of everything international law owes to Kelsen's writings. I shall endeavour instead to show why Kelsen's tenets are valuable for viewing international law both as *positive law* and as *evolving law*. Kelsen's theoretical analyses allow us not only to consider international law as law proper but they also provide insight into how such law can evolve and be improved. I shall show in particular how these analyses account for certain recent legal developments which have created considerable surprise as they have not been consistent with the traditional conception of international law as law between states.<sup>3</sup>

## 1 The Nature of International Law

### A Law in Its Own Right

Already in his earliest writings Kelsen claimed that international law was law in its own right. What was original and paradoxical about this stance was that he viewed international law as law in the strict sense of the term for the *very reasons* that prompted many positive theorists to question the legal status of international law.<sup>4</sup>

It is well known that Kelsen defines a legal obligation by the sanction it entails. Law is therefore a 'coercive legal order'. He further defines a sanction in a very narrow sense as the exercise of threat of physical coercion. In the nineteenth century Austin had also defined law as 'a wish conceived by one and expressed or intimated to another with an evil to be inflicted and incurred in case the wish be disregarded'.<sup>5</sup> Austin deduced that because international law had no sovereign capable of sanctioning the violation of its rules, it could not be true law but only 'positive morality'.<sup>6</sup>

It is this conclusion that Kelsen forcefully dismisses, whether it be reached by strict

<sup>1</sup> Thus, see for example, R. Carré de Malberg, *Contribution à la théorie générale de l'État* (1920, reprint, 1962). This author, probably the leading French theorist of public law, presents no development of international law, despite a passing mention in discussion about sovereignty. See also H. L. A. Hart, *The Concept of Law* (1961), at 208–231. In contrast Dworkin seems unaware of the existence of international law, or at least has no interest in it. Similarly, J. Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System* (2nd ed., 1980) fails to develop the question. Other examples could be cited.

<sup>2</sup> See H. Kelsen, *General Theory of Norms* (transl. M. Hartney, 1991), at 440. These bibliographic indications are not given in the French translation of the work: *Théorie générale des normes* (transl. O. Beaud, 1996).

<sup>3</sup> See also de Visscher, 'Observations sur la contribution de Hans Kelsen au droit international positif', 4 *Revue Internationale de philosophie* (1981) 530.

<sup>4</sup> Bull, 'Hans Kelsen and International Law', in R. Tur and W. Twining (eds), *Essays on Kelsen* (1986) 321, at 323.

<sup>5</sup> J. Austin, *The Province of Jurisprudence Determined* (1995), at 24.

<sup>6</sup> *Ibid.*, at 112.

positivists (like Austin) or by realists who hold that there can be no international law until such time as the power to coerce states is concentrated in the hands of a single authority (Raymond Aron).<sup>7</sup> Against these arguments Kelsen asserts that law is defined by sanction, that sanction consists in physical coercion and that international law does indeed have this type of sanction available to it. This is probably Kelsen's most famous tenet, but also the one that has given rise to the most serious misunderstanding of his theory.

### **B Reprisals and War: Sanctions of Decentralized International Law**

For Kelsen the sanctions available under international law are reprisals and war. 'These sanctions like the sanctions of national law, consist in the forcible deprivation of life, liberty, and other goods, notably economic values. In a war human beings are killed, maimed, imprisoned and national or private property is destroyed; by way of reprisals national or private property is confiscated and other legal rights are infringed.'<sup>8</sup> These are sanctions of a 'primitive' i.e. 'decentralized' legal order: a legal order in which the functions of the creation of law and administration of justice have not yet been concentrated in the hands of central organs. This means that law is both created and applied by the subjects of law themselves who resort to reprisals and war to exact their own justice.

This conception of international law and sanctions came in for harsh criticism from almost all sides from the time it was first presented. I myself have been very critical of Kelsen's argument about sanctions in international law.<sup>9</sup> Nevertheless, it now seems more worthwhile to concentrate on the rationale of the argument and the service it renders all those who want to 'take international law seriously'.

Commentators focus primarily on the gloomy view that Kelsen seems to take of primitive, i.e. decentralized or anarchical, international law. But it can be argued that it is precisely this same view that allows Kelsen to imagine relations between states as being subjected to law proper and above all to law amenable to progress. That there is no sovereign above the states to enforce sanctions on them does not in Kelsen's view preclude the conception of inter-state relations being governed by law since, and here lies the difference with Austin, law involves submission to rules and not to the person of the sovereign (*non sub homine sed sub lege*).<sup>10</sup> This means that even a decentralized legal order can be conceived of as a true legal order. The difference between this sort of primitive order and an advanced order such as that of the state is one of degree and not of kind.

While this reasoning may leave us sceptical at this point, it goes further. Kelsen argues that any use of force in the international community must be characterized either as a sanction or a delict, i.e. a violation of international law. It is important to

<sup>7</sup> R. Aron, *Guerre et paix entre les nations* (3ème éd., 1962), at 704–712.

<sup>8</sup> Kelsen, 'The Essence of International Law', in K. W. Deutsch and S. Hoffmann (eds), *The Relevance of International Law: Essays in Honor of Leo Gross* (1968), at 87.

<sup>9</sup> C. Leben, *Les sanctions privatives de droits ou de qualité dans les organisations internationales spécialisées* (1979), at 41–45.

<sup>10</sup> H. Kelsen, *Principles of International Law* (1952) [hereinafter *Principles*], at 104.

understand the theoretical consequences of this conception. It leads, as Hedley Bull has shown, to ranking Kelsen's thinking in the 'Grotian' tradition of international law, i.e. a tradition that asserts that international law is true law and that denies states the right to wage war indiscriminately.<sup>11</sup> And this is the essential point that is often overlooked by critics of Kelsen's presentation of sanctions of international law: the assertion that those sanctions are reprisals and that war *is made only as a lead-up* to the assertion that international law in the twentieth century has emerged from the state of anarchy and no longer authorizes indiscriminate resort to such sanctions.

### *C Centralization of International Law: Collective Security and Compulsory Jurisdiction*

At this juncture it is necessary to sketch out a side of Kelsen that is little known to legal scholars, that of political militant for democracy within states and for peace in the international community.<sup>12</sup> It should be recalled in this respect that particularly in the 1930s and 1940s Kelsen actively supported the setting up of a collective security system in the international community. He wrote extensively on the issue.<sup>13</sup> In his early works he takes a position 'politically' for the *bellum justum* theory, which restricts the discretionary power of states to resort to war and only justifies this course of action when it is in response to an earlier breach of international law, and therefore a sanction. It is a political statement since Kelsen acknowledges that in the 1920s examination of positive law does not lead to the 'scientific' conclusion that war can only be either a legal sanction or a violation of law.

In his final works, however, he takes the view that this 'political' position henceforth reflects positive law. Considering the effects in general international law of the Covenant of the League of Nations, the Briand-Kellog Pact and the United Nations Charter: 'It is hardly possible to say any longer today that according to valid international law any state, unless it has obligated itself otherwise, may wage war against any other state for any reason without violating international law; it is hardly possible, in other words, to deny the general validity of the *bellum justum* principle.'<sup>14</sup>

Some observers criticize Kelsen's doctrine of *bellum justum* as 'the product of wishful thinking'.<sup>15</sup> It could be countered that it accurately anticipated the process of change

<sup>11</sup> Bull, *supra* note 4, at 329.

<sup>12</sup> Carlos Miguel Herrera's valuable study of the 'political' side of Kelsen is now available in French, *Théorie juridique et politique chez Hans Kelsen* (1997). It is regrettable though that the author does not address the question of international law in Kelsen's work. See also the special issue of the journal, 17 *Cahiers de philosophie politique et juridique* (1990): 'La pensée politique de Kelsen'. On the pacifist presuppositions of Kelsen's theory of sovereignty see Herrera, at 115–118, and Carrino, 'Le positivisme critique de Hans Kelsen: une fondation logico-formelle des normes', 20 *Cahiers de philosophie politique et juridique* (1991), at 77–78, 88. The pacifist and anti-imperialist creed is particularly obvious in his conclusion to the 1926 Hague Lectures 'Les rapports de système entre le droit interne et le droit international public', 14 *RdC* (1926, IV) 231, at 320–331.

<sup>13</sup> See Kelsen's 1940s writings, such as *Peace through Law* (1944) [hereinafter *Peace through Law*]: 'The Strategy of Peace', *American Journal of Sociology* (1944) 381.

<sup>14</sup> Kelsen, *supra* note 8, at 87. For a full discussion of the role of war in international law see *Principles*, at 25–44. See also the developments on the *bellum justum* theme by F. Rigaux in this issue, at 335 *et seq.*

<sup>15</sup> Bull, *supra* note 4, at 329.

in the international community during its darkest hours. The important point to emphasize in any case is that the conception of the inter-state order as a primitive legal order with war and reprisals as its sanctions exists for Kelsen alongside a dynamic conception of international law as evolving law, *advancing law*, and of a society that may have been completely anarchical in the past but is no longer.

With regard to international law, therefore, Kelsen actually ascribes central importance to the institution of a *compulsory jurisdiction* responsible for settling disputes that threaten international peace. This is another little understood aspect of his theory, although it is set out in Kelsen's many works on the idea of 'peace through law'. In the most important of these, published in 1944, he proposes a draft Pact to supersede the League of Nations, in which he devotes 33 articles to the future Court of Justice, as opposed to one article for the Council and one for the Plenary Assembly!<sup>16</sup> There is no need to underscore the Utopian and unrealistic character of such a construction. However, it should be recalled that for Kelsen '[t]he foundation of all legal organisation as of any legal community is the judicial process'.<sup>17</sup>

In this he falls in with legal theorists who like Bobbio and (probably) Hart consider that the turning point in the transition from a simple (or primitive) form of law to a more complex form occurs with the centralization of the function of application of law in the courts.<sup>18</sup> This led Kelsen to write in 1932 that it is '... much more important to get states to renounce deciding by themselves whether there has been a violation of law than to abolish the right to exact justice themselves'.<sup>19</sup> This assertion was confirmed during the International Law Commission proceedings where, on the question of countermeasures without the use of armed force, the Special Rapporteur for the draft articles on the international responsibility of states, Professor G. Arangio-Ruiz was unable to obtain support for the point that the process of countermeasures as a response to an unlawful act should be strictly governed by resort to judicial proceedings.<sup>20</sup>

But whatever the still Utopian character of the introduction of a compulsory jurisdiction within the universal inter-state community, two remarks need to be made which confirm the idea that the introduction of such a jurisdiction is the turning point

<sup>16</sup> *Peace through Law*. For a study of this work see C. Tournay, *Kelsen et la sécurité collective* (1995).

<sup>17</sup> *Peace through Law*, at 73. See also the valuable paper by Pfersmann, 'De la justice constitutionnelle à la justice internationale: Hans Kelsen et la seconde guerre mondiale', 16 *Revue française de droit constitutionnel* (1993) 760, at 776-779.

<sup>18</sup> See Bobbio, 'Kelsen et les sources du droit', 4 *Revue internationale de philosophie* (1981) 474, at 482: '... Courts are not only a source of law ... they are the necessary condition for the existence of a legal order'. See also by the same author, this time on a study of Hart, 'Nouvelles réflexions sur les normes primaires et secondaires', in C. Perelman (ed.), *La règle de droit* (1971) 104, at 121. It will be recalled that for commentators like H. Kantorowicz, the main characteristic of a rule of law is to be *subject to justice*, i.e. to the subject of a judgment by a third party, at least potentially. See *The Definition of Law* (1958), at 79.

<sup>19</sup> Kelsen, 'La technique du droit et l'organisation de la paix: la théorie du droit devant le problème du désarmement', *Journal des Nations*, 3 février 1932, at 61.

<sup>20</sup> For an overview of the controversies raised by the reports of Prof. Arangio-Ruiz see the special issue of this journal, 5 *EJIL* (1994), at 20-119; Pellet, 'Remarques sur une révolution inachevée. Le projet d'articles de la CDI sur la responsabilité des États', *Annuaire français de droit international*, (1996) 7, esp. at 18-32; Leben, 'Contre-mesures', in *Nouveau Répertoire Dalloz de droit international* (forthcoming).

in the transition from a decentralized legal order to a more centralized, and therefore more effective, legal order. Furthermore, everyone is aware that the very special characteristics of the Community legal order are primarily the result of the role of the European Court of Justice. However, it has been convincingly argued that the setting up of the Court and the different procedures for bringing cases before it (especially that of Article 177 EC Treaty) presupposed a unified vision of the founder states of the Communities. In other words, it was not the setting up of the European Court of Justice that produced this remarkable legal order but the prior political will among the states that allowed this order to be constructed.

This is hardly disputable. However, it will be observed that within the universal inter-state community phenomena occur which give rise to compulsory quasi-tribunals that completely transform the topography of international law. Such is the effect produced by the creation within the World Trade Organization of an effective mechanism for the settlement of disputes which, within the space of two years, has led to no fewer than 100 cases being brought before the Dispute Settlement Body. In striking contrast, the previous ineffective GATT procedure dealt with a mere 195 procedures in 46 years of existence.<sup>21</sup>

These points confirm that 'the foundation of all legal organisations . . . is the judicial process' and that international law is at one and the same time the law of a decentralized society and of a society in the process of centralization.

## 2 Changes in International Law: Towards what Sort of *Civitas Maxima*?

Given the importance of the theory of the state in Kelsen's work and the fact that he characterizes general international law as primitive law, it is often thought that Kelsen only envisaged the development of international law along the lines of the state model. This is an error of appreciation. Kelsen considers that there is only a difference of degree and not a difference of kind between the state legal order and the international legal order: both are merely specific cases of a general phenomenon which is the centralization and decentralization of legal orders. It is by analysing this phenomenon that the specificity of the state can be understood and the ways forward for international law can be conceived. These lead to a *civitas maxima* which is definitely not conceived of along the lines of the nation-state.

### A Centralization/Decentralization of Legal Orders

As Kelsen pointed out, any legal order which is based on a territory invariably consists

<sup>21</sup> See Ruiz Fabri, 'Le règlement des différends dans le cadre de l'organisation mondiale du commerce', 3 *Journal du droit international* (1997) 709. See also *Focus* (WTO), no. 21, August 1997, which announces that the 100th dispute was reported on 19 August 1997. All proceedings brought under Article XXIII of the GATT (1947) are listed in *Guide to GATT Law and Practice* (6th ed., 1994), at 719–734.

of a combination of norms, some of which are valid for the entire territory (known as the 'central' norms), while others are valid for part of the territory only (and known as 'local' or 'partial' norms). A wholly centralized legal order with no local norms is virtually impossible to set up. Conversely, a fully decentralized legal order with no central norm is simply inconceivable since a legal order must have at least one central norm to ensure the unity of the territory which acts as the basis of that order.<sup>22</sup>

Thus the two 'bounds' (in the mathematical sense) of the range of variation of the function are excluded from the range of possibilities. However, within these bounds, the function can take on any value, i.e. the degree of centralization or decentralization of a legal order can vary over a continuum. This contrast within any legal order between a central order and a number of local (or partial) orders based on the criterion of the spatial validity of the norms is the 'static' conception of the notion of centralization/decentralization. As ever Kelsen adds a 'dynamic' conception based on the way norms are created and executed.<sup>23</sup>

This presentation of the structure of the legal orders allows Kelsen to bridge the gap which in classical theory, and in particular dualist theory, separates the nature of the state and the nature of the international legal order: *both orders* are partly centralized and partly decentralized. While the international legal order is more decentralized (and that is all that is meant when it is said to be 'primitive') the internal legal order is never fully centralized: the difference between the two is one of degree and not of kind. The state is the model for the future development of the international legal order in that it is a more centralized legal order and in that the development of international law will also bring about increased centralization of that legal order. But that does not necessarily entail, as is usually understood and as some of Kelsen's writings may have given us to believe,<sup>24</sup> that we are moving towards the constitution of a 'world state'. It means only that the international legal order tends to become centralized. It is not inevitable, however, that it should become centralized to the same extent as the nation-states.

### ***B The International Organization as a Comparatively Centralized Legal Order and Its Relations with the State***

The international organization, like the state, is therefore a combination of a central legal order, the institutional order created by the treaty, and of partial legal orders, those of states parties to the treaty. Each treaty thus creates a special international legal order relative to the general international legal order. But this is also a central legal order, with the legal orders of all the states and those of international organizations making up only partial legal orders. Naturally there are differences

<sup>22</sup> H. Kelsen, *General Theory of Law and State* (1961), at 306. On the sphere of validity of norms see *ibid.* at 42–44; *Principles*, at 93–96.

<sup>23</sup> Kelsen, *General Theory*, *supra* note 22, at 308. This whole question of centralization and decentralization of orders is covered at 303–327.

<sup>24</sup> See *infra* note 27.

between all of these ‘comparatively centralized’ legal orders. Two of these differences are examined here.

The first concerns the attribute of sovereignty which is attached to the state and the state alone. But Kelsen defines sovereignty differently from his predecessors: sovereignty attaches to the legal order with a territorial basis whose validity is founded in general international law. This can be expressed otherwise as ‘the state [is] a community subjected only to international law’. This definition breaks completely with the myth of sovereignty as absolute and unconditional power and once again allows for the existence of international law as true law whose obligatory character matters for its subjects.

It follows from this that there is in the theory of groups of states a fundamental distinction between the *Staatenbund* (Confederation) and the *Bundestaat* (Federation). This distinction does not lie in the constitutive charter (constitution or treaty)<sup>25</sup> but in the fact that a confederation is a grouping of states which is not itself a state in the eyes of international law, whereas a federation is a grouping of ‘states’ which is itself a state. In other words, from the instant a federation is formed, the states it groups vanish as states subject to international law and become partial legal orders which are founded in the constitution of the federation and not in general international law. The federal state alone has a basis in the international legal order, or, put differently, is in immediate contact with that order.<sup>26</sup>

A second difference arises from the very contrasted proportion of central norms and local norms in the state and in the international orders, be it the global international legal order or the legal order of international organizations. In the state, central norms make up the most part of the total legal order whereas in international orders it is local norms that are in the majority. Accordingly, the degree of centralization of an order can be evaluated from the ratio of the number of central norms to the number of local norms.

That said, for Kelsen, the dynamics of centralization/decentralization begins within the state with the contractual order created by two persons by virtue of the law of the state. It continues in the organization of the state, and then extends beyond the states in the constitution of higher centralized legal orders, international organizations and,

<sup>25</sup> See also the fairly involved case of the Treaty of Unification between the Federal Republic of Germany and the German Democratic Republic concerning the establishment of German unity (Berlin, 31 August 1990 — Federal Republic of Germany — German Democratic Republic — Treaty on the Establishment of German Unity, 31 August 1990, *ILM* (1991) 457). Under this ‘Treaty of Unification’: ‘Upon the accession of the German Democratic Republic to the Federal Republic of Germany in accordance with article 23 of the Basic Law taking effect on 3 October 1990 the Länder of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia shall become Länder of the Federal Republic of Germany’ (Article 1 of the Treaty of Unification). On the process of unification see Fromont, ‘Les techniques juridiques utilisées pour l’unification de l’Allemagne’, 8 *Revue française de droit constitutionnel* (1991) 579. The author notes that ‘this treaty is incontestably an international treaty ... [which] has international effects since its coming into force has entailed the disappearance of one of the parties, the GDR, as an international subject. But in domestic law [it] is original in two ways: it is in part a constitutional text and in part a legislative and regulatory text’ (at 583).

<sup>26</sup> *Principles*, at 168–174.

beyond that, of the community of all states, the *civitas maxima*, the law of which is general international law.<sup>27</sup> This principle of centralization of orders that Scelle preferred to call 'federalism'<sup>28</sup> is, according to Kelsen, 'the fundamental principle of organization of the different legal communities . . . the law which allows them all to be arranged in a strictly continuous series . . .'.<sup>29</sup>

This point, though, calls for a clarification that seems to derive from Kelsen's theory of the state: there is necessarily a separation between the phenomenon of centralization/decentralization within the state and that found outside the state. Between a state and an international organization, albeit a very 'centralized' one like the European Union, there is a difference of kind and not merely of degree, as argued above.<sup>30</sup>

This difference lies in the recognition or non-recognition of the statehood of an entity by international law. But how do we get from a group of states that is not a state to a group of states that is itself a state while its component parts lose this standing in international law? And conversely, how do we get from a federal state, e.g. the USSR, to a group of sovereign states in international law, such as the Commonwealth of Independent States (CIS), say?

The events of recent years have corroborated a very old answer of international law doctrine: it is the transfer of competence in terms of defence and foreign affairs that is the main (although possibly not the only) point in the shift.<sup>31</sup> The state legal order is a coercive order, and it is necessary therefore for the (federal) state formed from a group

<sup>27</sup> It is in his 1920 book on sovereignty that Kelsen develops at length his idea of international law as the law of a *civitas maxima*, expressly invoking Christian Wolf (in the Italian translation consulted: *Il problema della sovranità* (transl. A. Carrino, 1989), at 355–402). However, it seems that Kelsen no longer used the expression *civitas maxima* after his Hague Lecture, see 'Les rapports de système', *supra* note 12, at 318–320, 331. He wrote in particular: 'Since the idea of the sovereignty of the national state has until now, rightly or wrongly, proved an obstacle to any attempt to organize the international order to create specialized organs, to develop, apply and execute international law, in a word to transform the international community, which is still hardly evolved to date, into a *civitas maxima*, in the full meaning of the word'. And Kelsen ended his lectures by writing 'And it is this organization of the world into a universal state that should be the ultimate, though still distant goal, of all political endeavour', *ibid.*, at 331. I suggest that Kelsen abandoned the expression *civitas maxima* in his later writings because of the idealistic and ambiguous character of this text. In particular, the mention of a 'Universal State' caused confusion. (See esp. at 139 where Kelsen asserts that even at its primitive stage international law is a state and a *civitas maxima* because these expressions can be used to designate any supreme legal order. But he suggests that the international legal order could also evolve towards a form of state in the strict sense of the term.) But if we take it that by 'universal state' Kelsen meant simply a more developed and peace-loving international legal order, which does not imply the disappearance of nation-states, it can be said that he never gave up this political ambition. See also *infra* note 41.

<sup>28</sup> G. Scelle, *Précis de droit des gens* (1932–1934, republished 1984), at 187–287.

<sup>29</sup> Kelsen, 'Aperçu d'une théorie générale de l'État', *Revue du droit public* (1926) 619. See also 'Les rapports de système', *supra* note 12, at 319–320.

<sup>30</sup> See text at note 24.

<sup>31</sup> *Principles*, at 168–174; see also the 2nd edition of *Principles* (revised and edited by R.W. Tucker (1966), at 263, note 89); Leben, 'A propos de la nature juridique des Communautés européennes', 14 *Droits* (1991) 61, at 69–71.

of states to be able to concentrate the military might given up to it by the member states.<sup>32</sup>

By contrast, the break-up of the Soviet Union and of Yugoslavia has shown that the emergence of new states follows closely on the break-up of the military monopoly of the former state. It further shows that the implementation of a foreign policy goes along with this break-up and manifests the birth of new subjects of international law.

### C *The European Union as a Possible Horizon of International Law*

Elsewhere I have inquired into the nature of the European Communities and concluded that whatever the very great originality of the Community legal order, it remained less than a state and still came under the theory of international organization.<sup>33</sup> This point of view, which has been criticized as being overly marked by internationalist bias, has since then been confirmed at all tiers of the Community legal order. For the Court of Justice of the European Communities the clarification came in a case concerning Germany 'that the rules concerning the relations between the Community and its Member States are not the same as those uniting the Bund and the Länder'.<sup>34</sup>

For the courts of the Member States, and more particularly the constitutional courts which are primarily concerned with this question, the French Constitutional Council reiterated in its Maastricht ruling (9 April 1992) that nothing in the Constitution precluded France from concluding 'subject to reciprocity, international commitments with a view to participating in the creation or development of a permanent *international organisation* endowed with legal personality and invested with decision-making power by the effect of transfer of competence consented by the Member States (9 April 1992)'.<sup>35</sup> And similarly the German Constitutional Court specified in its ruling of 12 October 1993, concerning the constitutionality of the Maastricht Treaty, that 'the European Union treaty creates ... an association of States ... and not a State formed by a European people' and that in any event 'the foundation of a "United States of Europe" comparable to the formation of the United States of America is not contemplated at the present time'.<sup>36</sup>

As for the states themselves, they reasserted at the European Council of Edinburgh on 12 December 1992 that the Union is constituted of 'independent sovereign States that have freely elected to exercise some of their competences jointly pursuant to the treaties in force'.<sup>37</sup> But above all, the European Union, as established in the Maastricht

<sup>32</sup> M. Virally, *L'organisation mondiale* (1972), at 23.

<sup>33</sup> Leben, *supra* note 31, at 69–71. For thoughts on the signification of the 'supranational' character of the Community see Weiler 'The Community System: The Dual Character of Supranationalism', *The Year Book of European Law* (1981) 267.

<sup>34</sup> Case C-359/92 *Germany v. Council* [1994] ECR I-3712, at 38.

<sup>35</sup> See the text of the decision in 3 *Revue française de droit administratif* (1992), at 403–408, point 13 (emphasis added); Favoreu and Gaïa, 'Les décisions du Conseil constitutionnel relative au traité sur l'Union européenne', 11 *Revue française de droit constitutionnel* (1992) 389.

<sup>36</sup> The text of the French decision is in *Revue universelle des droits de l'homme* (1993) 286, at 290 (columns 1 and 2). The German text is in *EuGRZ* (1993) 429.

<sup>37</sup> *Documents d'actualité internationale* (1993), at 48.

Treaty marks, as everyone knows, a step backward in Community integration because the Union has no legal personality proper and because the two 'pillars' of common foreign and security policy and of cooperation in the fields of justice and home affairs operate according to classical mechanisms of cooperation in international law and are not subject to the control of the European Court.<sup>38</sup>

Coming on to the way the Community works, it can be said that the distinctive features of its operation almost all exist but in a far less developed and efficient state in the international legal order. This is the case of the direct applicability of conventional norms, the principle of which was recognized in the Advisory Opinion of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Dantzig Case* (1928). And what was at the time an exceptional occurrence, namely that '... the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts' has now become something quite common.<sup>39</sup>

And the same is true of the primacy of international law: it is just as much an 'existential condition' (in the well-known expression of Pescatore) of the existence of this order as of the Community order. In an international court, as in a Community court, a state cannot invoke domestic reasons to justify the non-performance of its obligations. Moreover, different national constitutions themselves provide for the primacy of international norms. This is the case of Article 55 of the French Constitution on the superiority, under certain circumstances, of treaties over legislation, even when enacted subsequently.<sup>40</sup>

However, the existing potential in international law is only rarely realized as the effectiveness of the principles of direct applicability and primacy of such law are entirely at the mercy of state courts which usually give restrictive interpretations. The existence of the Court of Justice of the European Communities and the preliminary ruling procedure mean that national judges, on the contrary, exercise dual functions (*dédoulement fonctionnel*), making them at one and the same time judges of the national legal order and of the Community legal order. As such and because they are bound in law by the answer to the question they themselves put to the European Court, they will be led to set aside the national law, including statutes (the question is more problematic for constitutional laws) to apply Community law according to the centralized interpretation given by the Luxembourg Court.

<sup>38</sup> On all these points see J. Verhoeven, *Droit de la Communauté européenne* (1996), at 130–134; D. Simon, *Le système juridique communautaire* (1997), at 60–68; Pliakos, 'La nature juridique de l'Union européenne', *Revue trimestrielle de droit européen* (1993) 187.

<sup>39</sup> PCIJ Series B, No. 15, at 17–18. See also Verhoeven, 'La notion d'applicabilité directe du droit international', *Revue belge de droit international* (1980) 243.

<sup>40</sup> This principle has struggled for acceptance in French courts. The French *Cour de cassation* first confirmed it in its decision *Société des cafés Jacques Vabre*, 24 May 1975; but the *Conseil d'Etat* only supported this position, i.e. the precedence of the treaty over subsequent legislation, with the *Nicolo* decision of 20 October 1989, see M. Long, P. Weil, G. Braibant, P. Delvolvé and B. Genevois, *Les grands arrêts de la jurisprudence administrative* (11<sup>ème</sup> éd., 1996), at 743–752.

The bottom line is that the Community legal order is a comparatively centralized legal order, less than a state order but more than that of any other international organization. And when thinking about the future of international law, it is easy to imagine that it may advance through the multiplication of specialized legal orders based upon constituent treaties of international organizations which may in the long term tend to provide the international order with the institutional and normative advances that are part of the Community legal order today. This is a trend that is already observable in the context of human rights conventions, and primarily the European Convention, but also, as has already been noted above, in the context of a legal order established by the Marrakech Agreement creating the World Trade Organization.

In this way Kelsen's *civitas maxima* begins to take recognizable shape. It is not a world state, as then there would be no international law but merely the domestic law of that state. However, it is possible to imagine that the *civitas maxima* might borrow a number of features from the Community legal order: an order in which states remain sovereign,<sup>41</sup> but in which greater normative powers would be granted to institutional organs and the observance of institutional norms would be ensured by tribunals or quasi-tribunals. To summarize, it could be said that Community law is 'successful international law' and that it is thus a 'possible horizon' of international law, indicating the route that international law must follow if it is to move forward, or more accurately, if states are willing to accept that it move forward.

<sup>41</sup> Do states really retain their sovereignty in the Community legal order? This question has been the subject of heated debate in France and the other countries of Europe. In an important work of doctrine, Beaud, 'La souveraineté de l'État, le pouvoir constituant et le traité de Maastricht', 6 *Revue française de droit administratif* (1993) 1045, the author argues that a state cannot give up its monetary sovereignty without ceasing to become a state worthy of the name (at 1053), that after the Maastricht Treaty states only retain pseudo-sovereignty (at 1058), that the European Union can no longer be characterized as an international organization and that 'the process at work in European construction leads to a loss of sovereignty...' (at 1066). Underpinning the entire paper is a rejection of the 'formalist' conception of sovereignty and the assertion that 'sovereignty of state means fullness of power...' and that it 'consists in taking on any important political matter...'. It is just this material conception of sovereignty that Kelsen denounced as early as his 1920 work *Das problem der Souveränität und die Theorie des Völkerrechts*. Such a conception runs counter to the tide of development of international law. As Professor Vedel remarked in 1954 during the controversy about ratification of the European Community defence treaty, such a conception means that virtually no treaty can be concluded without revising the Constitution which it necessarily affects (see Vedel, 'Schengen et Maastricht', 2 *Revue française de droit administratif* (1992) 173). Beyond the material conception of sovereignty as 'fullness of power' i.e. *summa potestas*, which is not readily compatible with the existence of international law, and beyond the confusion between the ideas of economic independence (if there is any such thing) and legal sovereignty, the holders of this view have a political ambition, which is just as legitimate as the opposite conception, namely, to halt the development of the European Union in its path towards becoming a true federal state. It will be observed that since 1985, the French Constitutional Council has considered that an international commitment would be contrary to the Constitution if it affected the 'essential conditions of exercising national sovereignty' (Decision of 22 May 1985; see also Genevois, 'Le traité sur l'Union européenne et la Constitution', 3 *Revue française de droit administratif* (1992) 373).

### 3 Changes in International Law (Continued): Internationalized State Contracts and the Status of Private Persons in the International Legal Order

The question of the status of individuals in international law is mostly addressed by examining international humanitarian and human rights law.<sup>42</sup> The question is whether individuals have the capacity of (limited) subjects of international law. The most prudent response is to observe that private persons are increasingly the addressees of rights defined by international instruments, which makes them passive subjects of international law. Their capacity as active subjects is still exceptional. As P.-M. Dupuy remarks:

In order to be considered an active subject of a legal order an entity must of course first be invested by that order with clearly defined rights and obligations. But that is not enough. There must also be the possibility of acting directly through appropriate procedures to ensure effective observance of the exercise of the rights one enjoys. The capacity to act is the decisive criterion of legal personality.<sup>43</sup>

This same problem of the importance of the individual in international law will be addressed here but by examining the law of investment and what are termed state contracts. It will be shown that Kelsen's theory of international law accounts for phenomena that many hesitate to categorize as public international law.

Of the areas where the question of changes in international law has been raised in the second half of the twentieth century, that of contracts between states and private persons is probably one of the most controversial.<sup>44</sup> More specifically, this concerns not all the contracts between states and individuals but only those characterized as state contracts and which for some commentators may be governed by public international law. Other scholars consider this to be impossible because of the nature of international law. They argue that it is strictly inter-state law, the legal order of which cannot accommodate individuals.<sup>45</sup> However, if we examine the points of fact, i.e. contract practice and also the provisions contained in some international

<sup>42</sup> See the article by Rigaux in this issue, 'Hans Kelsen on International Law', at 325 (at text accompanying note 41).

<sup>43</sup> P.-M. Dupuy, *Droit international public* (3<sup>ème</sup> éd., 1995); and see also the valuable analysis by Combacau of the international personality of subjects of domestic law in J. Combacau and S. Sur, *Droit international public* (3<sup>ème</sup> éd., 1997), at 307-318.

<sup>44</sup> I cover this issue in detail in 'Retour sur la notion de contrat d'État et sur le droit applicable à celui-ci', in *Mélanges H. Thierry* (forthcoming).

<sup>45</sup> To mention only a few names from a large selection of references: in favour of possible internationalization of these contracts see Well, 'Problèmes relatifs aux contrats passés entre un État et un particulier', *RdC* (1969, III) 94 and *idem*, 'Droit international et contrats d'État', in *Mélanges offerts à Paul Reuter* (1981) 549, and likewise, Lillich, 'The Law Governing Disputes under Economic Development Agreements: Reexamining in the Concept of Internationalization' in R. B. Lillich and Brower (eds.), *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?* (1994) 61. Among the opponents of internationalization see Rigaux, 'Des dieux et des héros. Réflexions sur une sentence arbitrale' (on the TOPCO award), *Revue critique de droit international privée* (1978) 435 and similarly Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach', *BYbIL* (1988) 49, esp. at 51-52. For an all-round study see E. Paasivirta, *Participation of States in International Contracts and Arbitral Disputes* (1990).

conventions, individuals do indeed appear in the international legal order, and not in connection with the question of human rights (a well-surveyed area) but in that of international investments. This situation, which is unthinkable for some commentators, is hardly surprising however if we adopt Kelsen's view of international law.

### A *The Notion of State Contract*

From the arbitration awards concerning petroleum concessions in the 1950s and 1960s (Abu Dhabi, Ruler of Qatar, Aramco, Sapphire awards) and then in the 1970s and 1980s (TOPCO, Liamco, BP, Aminoil) and finally from the awards made in the context of the ICSID arbitration centre, it would appear that practice produces contracts which are not contracts in national law nor international contracts as are concluded by private persons together. These contracts usually concern investment operations, but F. A. Mann, who coined the expression 'state contracts' in 1944, used the terms for certain types of loan agreement in which the parties chose international law as the governing law.<sup>46</sup>

In any event, almost all observers agree that not all the contracts between a state and a private person are state contracts in the strict sense of the term. Yet they are hard pressed to provide a purely legal criterion to distinguish them from ordinary contracts concluded by states. For example, state contracts have been defined as 'economic development agreements'. But authors have struggled to come up with an objective criterion to indicate from what point of view and under what circumstances an investment agreement (or loan agreement) could be so characterized.

Pierre Mayer seems to be the only commentator to have come up with a strictly legal definition of state contract, allowing a distinction to be drawn between contracts between states and private persons on the one hand and *state contracts* in the strict sense of the word on the other hand. The former are concluded *in the legal order of the state* and with the state as it appears in its legal order, i.e. government administration, whereas the latter are concluded by the state as a subject of public international law *in a legal order that is external to it*. The recognition of state contracts *stricto sensu* involves purely legal criteria: existence of an arbitration clause, neutralization of the normative power of the state by inclusion of stabilization clauses to state law, if this is applicable, possible integration of the contract in an international treaty and, under certain circumstances, internationalization of the governing law.<sup>47</sup>

This genuine discovery of a new category of contracts between the state *as a subject of international law* with a private person (in practice a corporation) did not, however, lead Mayer to consider that the legal order in which this state contract was passed could be the legal order of public international law. Instead, he presents a renewed and, in my view, unconvincing version of the *contrat sans loi* theory, i.e. a contract detached from every municipal or international law. His refusal to accept that state contracts in the strict sense can constitute a new category of legal instruments within

<sup>46</sup> 'The Law Governing State Contracts', *BYbIL* (1944) 11 *et seq.*, text reprinted in *idem*, *Studies in International Law* (1973), at 179–210.

<sup>47</sup> Mayer, 'La neutralisation du pouvoir normatif de l'État', *Journal du droit international* (1986) 5, at 29–39.

international law is based on a fairly widespread conception that international law cannot accept individuals as active subjects and, incidentally (for other commentators), that international law cannot deal with certain types of legal relations apprehended by domestic law alone. These postulates were rejected by Kelsen in his earliest writings on international law.

### B *The Possibility for Individuals to be Limited Subjects of International Law*

The main argument of those who object to including state contracts in the legal order of public international law is a theoretical one. For Mayer international law 'has as its sole object relations between constituents of that society: states and the legal entities they form' (international organizations).<sup>48</sup> Similarly, back in 1959 A. P. Sereni wrote, 'Each legal system serves the purpose of regulating the status and relations of social entities for which and among which it exists. An attempt at applying international law to private relations would be tantamount to seeking to apply the matrimonial laws of France or England to relations between cats and dogs'.<sup>49</sup>

One could retort, of course, that state contracts are not 'private relations', but Sereni's cutting criticism was indeed aimed at discussions about the law governing petroleum concessions. We are confronted here with two irreconcilable conceptions of what international law should be and could be. On the one hand are commentators who consciously or unconsciously profess a dualist vision of relations between domestic law and international law. Thus in his 1923 lectures at The Hague, Triepel maintained that 'international public law governs relations between states and only between perfectly equal states. . . . The private person, from the point of view of a community of law uniting states as such, cannot be endowed with his own rights and duties, deriving from a legal system of *that* community'.<sup>50</sup>

When lecturing three years later on this same subject, Kelsen asserted on the contrary that the fact that international law applied immediately to states and only mediately to individuals '... is not inherent to international law [and] is not a necessary character of its norms. . . .'<sup>51</sup> The demonstration was made still more fully in the 1932 lectures with the same conclusion: 'International law has, as a general rule, states as its subjects, that is to say individuals in a mediate way [i.e. individuals whose action or inaction will be counted as actions or inactions of the state as the state can only act through individuals] — and exceptionally too individuals in an immediate way. *It is not contrary to the nature of international law that what is today an exception should one day become the rule*'.<sup>52</sup>

<sup>48</sup> *Ibid.*, at 21.

<sup>49</sup> Sereni, 'International Economic Institutions and the Municipal Law of States', *RdC* (1959, I) 133, at 210.

<sup>50</sup> Triepel, 'Les rapports entre le droit interne et le droit international', *RdC* (1923, I) 77, esp. at 80 (emphasis in original).

<sup>51</sup> 'Les rapports de système', *supra* note 12, at 283–286, citation at 284.

<sup>52</sup> 'Théorie générale du droit international public. Problèmes choisis', *RdC* (1932, IV) 121, esp. at 141–172, citation at 170 (emphasis added).

In the face of these two theories that are so opposed in their very basics, the legal scholar must observe facts to decide which conceptualization provides the more accurate account of reality. It is clear for me that it is Kelsen's, for reasons I shall try to outline here.<sup>53</sup>

The starting point is what may be called the revolution of mixed or transnational arbitration proceedings, i.e. between a state and a private company. This means of settling disputes made the mechanism of diplomatic protection, which was long the only means of internationalizing a conflict between a foreign company and a host state, obsolete. Through transnational arbitration, any company which invests by contracting with a state knows that it has a legal instrument with which to bring the state before an arbitration panel that is independent of that state in order to have a dispute opposing it to that state settled directly. This is not the time or place to go into the debate about the international character of *ad hoc* arbitration tribunals asserted in different awards (Aramco, Topco, Liamco and with some hesitation Aminoil) but rejected by some scholars.<sup>54</sup>

Doctrine does recognize, however, the international character of arbitration tribunals set up by an inter-state agreement, as with the Iran–US Claims Tribunal on Iran–American disputes and, more especially, ICSID tribunals set up on the basis of the 1965 Washington Convention. This Convention was ratified in August 1997 by 129 countries (out of 142 signatory states) and consecrates the capacity for direct action of investors against host states. This capacity for action is further increased by the considerable development of treaties promoting and protecting investments concluded between capital-exporting states and host states. Such bilateral investment treaties (there are said to be more than 1,300 at present) commonly include clauses allowing for cases of alleged breach of obligations subscribed by the host state in the treaty to be brought before an ICSID tribunal, even if there is no contractual tie between the state and the investor.

This possibility was confirmed in the case of *AAPL v. Sri Lanka* (award of 27 June 1990) where, for the first time in the ICSID, arbitration proceedings were brought not on the basis of an arbitration clause or a compromise but on the basis of an undertaking made in the treaty protecting investments between the states issuing and accepting the investment.<sup>55</sup> Such actions can only become more common in the future, if it is considered that in 1996 there were 350 bilateral treaties proposing this type of possibility to investors.<sup>56</sup> To this it must be added that certain multilateral treaties contain similar provisions. Thus the NAFTA Treaty in Chapter 11, Section B:

<sup>53</sup> For more important developments see Leben, *supra* note 44.

<sup>54</sup> P. Mayer holds that the international character of the arbitration tribunal depends on the law governing the arbitration clause, see Mayer, *supra* note 47, at 32. For F. Rigaux on the contrary, only an arbitration court created by treaty can be characterized as international. See 'Contrats d'État et arbitrage transnational', *Rivista di diritto internazionale* (1984) 489, at 502.

<sup>55</sup> See *F.I.L.J.* (1991), at 526–597 and Chronicle Gaillard, *Journal du droit international* (1992) 216. See also Brewer, 'International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment', *L. & Pol'y Int'l Bus.* 633.

<sup>56</sup> Chronicle E. Gaillard, *Journal du droit international* (1996) 274.

'Settlement of Disputes between a Party and an Investor of Another Party'<sup>57</sup> sets up a procedure giving investors the possibility of asking for an arbitration tribunal to be formed under the aegis of the Washington Convention or that of a supplementary mechanism proposed by the ICSID when there is a dispute between states that are not parties to the Convention. For the first time in 1997 two cases were submitted to the ICSID under this section of the NAFTA treaty. Similar provisions are found in the Energy Charter,<sup>58</sup> opened for signature in December 1994, and in the Multilateral agreement on investment, which is currently being negotiated in the OECD, the text of which should have been adopted in spring 1998.<sup>59</sup>

Examination shows then that the mechanisms by which investors, private persons, can bring states before international arbitration tribunals are becoming commonplace. If we now turn to the law applicable to state contracts, a quick survey of a collection of petroleum contracts<sup>60</sup> shows that clauses referring to international law are not hard to find in recent agreements (1987–1995). Wording is frequently found that refers to the law of the country and 'to such rules of international law as may be applicable including rules and principles as have been applied by international tribunals' (Ghana 1988, Pakistan 1990, Nepal 1986, Bulgaria and Poland 1991).

In addition, the Washington Convention of 18 March 1965 creating the ICSID has brought about a revolution in disputes over state contracts by providing in article 42 §1 the possibility, under certain circumstances, for public international law to apply. According to this article, 'The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.' But, 'in the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rule on the conflict of laws) and such rules of international law as may be applicable'.

This is not the place for exegesis of this article, nor for describing ICSID case law as it applies to international law. However, it can be seen that there is a movement towards international law by several ICSID tribunals, such as the one presided by Rosalyn Higgins in the case of *Amco Asia v. Indonesia*, award of 31 May 1990. After analysing the meaning of Article 42 §1, it stated: 'Thus international law is fully applicable and to classify its role as "only" "supplemental and corrective" seems a distinction without a difference. In any event, the Tribunal believes that its task is to test every claim of law in this case first against Indonesian law, and then against international law.'<sup>61</sup>

If we turn now to the differences opposing an investor and the host state on the basis of a protection treaty alone, it can be seen that in the case of *AAPL v. Sri Lanka*, the arbitrators decided, in view of the arguments between the parties, to consider that the

<sup>57</sup> *ILM* (1993) 639.

<sup>58</sup> See Wälde, 'International Investment under the 1994 Energy Charter', *J.W.T.* (1995) 5, at 47–50.

<sup>59</sup> O.C.D.E., *Accord multilatéral sur l'investissement. Texte consolidé*, DAF/MAI/NM(97)1, 15 sept. 1997, 'Procédure entre un investisseur et un État', at 61–68; OECD, *Towards Multilateral Investment Rules* (1996).

<sup>60</sup> The collection of *Basic Oil Laws & Concession Contracts*, published by Barrows Company of New York.

<sup>61</sup> *Amco v. Indonesia, Resubmitted Case*: Award, 31 May 1990, *ICSID Reports*, vol. 1, 569, at 580 no. 40. See also the highly controversial use made by the ICSID Tribunal in *SPP(ME) v. Arab Republic of Egypt Case*, award of 20 May 1992, *ICSID Reports*, vol. 3, 189, Dissenting opinion, at 249–355.

provisions of the bilateral conventions were the main source of law in the case in point, given that the convention referred also to other sources of law such as general international law and other conventions.<sup>62</sup> For the NAFTA Treaty and provisions of the settlement of disputes between a party and an investor of another party, Article 1131 §1 provides that: 'A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.'<sup>63</sup>

In the Energy Charter, Article 26(6) on governing law is worded in exactly the same way. As for the OECD Multilateral Agreement on Investment draft, it states that: 'Issues in dispute [between an investor and a state] shall be decided in accordance with this Agreement, interpreted and applied in accordance with the applicable rules of international law.'<sup>64</sup>

After looking at these facts we can return to the difference between Triepel and Kelsen regarding the nature of international law and its capacity or incapacity to bestow rights and duties on individuals. Kelsen had already observed, in relation to the question of whether individuals can be direct subjects of international rights, that 'individuals can have international rights only if there is an international court before which they can appear as plaintiffs'.<sup>65</sup> Such a situation came about after World War One when the peace treaties provided that the subjects of the allied powers could claim reparations in mixed arbitration tribunals.<sup>66</sup>

But this situation, which was the exception after 1918, has now become commonplace and Kelsen emphasizes in the *Pure Theory of Law* that 'the tendency of [contemporary] international law to lay down direct rules of obligation and authorisation of individuals must necessarily be reinforced to the same degree as it increasingly extends to subjects of areas that were previously governed by state law alone'.<sup>67</sup>

In writing these lines Kelsen was probably not thinking of investment law, but there is no escaping the fact that they apply perfectly to the development of this law. It is also

<sup>62</sup> *Journal du droit international* (1992), at 217.

<sup>63</sup> *ILM* (1993), at 645.

<sup>64</sup> O.C.D.E., *supra* note 59, 61–68, point 14 at 66, (English text, at 64).

<sup>65</sup> *General Theory*, *supra* note 22, at 347 and in more detail *Principles*, at 124–148.

<sup>66</sup> *Ibid.*, see the examples at 347–348. On this point Lauterpacht shared Kelsen's opinions and they may both be considered as representatives of the Grotian tradition of international law. Thus in his paper 'The Subjects of the Law of Nations', *Law Quarterly Review* (1947) 438 and (1948) 97, Lauterpacht sets out to show that 'The doctrine that States are the only subjects of international law is not an accurate statement of the actual legal position' (1947, at 439). He first shows that the individual can have procedural capacity in international law. There is no principle in international law, he comments, which 'prevents States, if they so wish, from securing to individuals ... access to international courts and tribunals' (1947, at 451). He demonstrates this, just as Kelsen did, by the example of the courts provided for under Articles 297 and 304(b)(2) of the Treaty of Versailles and of the corresponding provisions of the other peace treaties (at 452). He goes on to show that 'There is no rule of international law which precludes individuals ... from acquiring directly rights under customary or conventional international law ...' (1948, at 112) and that 'Similar considerations apply to the question of subjects of duties imposed by international law', in particular in the field of international criminal liability (1948, at 112–113).

<sup>67</sup> *Théorie pure du droit* (transl. C. Eisenmann, 1962), at 429 (emphasis added).

worth recalling Kelsen's position expressed above<sup>68</sup> that it is possible to consider a subject of international law *any person capable of entering into dispute directly with another subject of international law as such and, possibly, of bringing that subject before an international court* (provided consent is given in one form or another). From these premises it can be understood how the change which has come about with state contracts means that the individual can be considered as the (limited) subject of international law. But if we look closely, it is in fact in the entire field of international investment law that individuals benefit increasingly, through bilateral or multilateral treaties, from the privilege of bringing actions against states directly, and thus obtain the same status of subjects of international law.

Under these circumstances, there is no reason other than dogma for continuing to refuse to face up to the reality of modern international law, namely that by means totally different from those used in the field of human rights,<sup>69</sup> private persons have acquired in the legal institution of state contracts, and more generally in the field of investment law, (limited) international legal personality by dint of their capacity to act directly against the state for the defence of their rights and to do so in international courts.

It can be seen once more that Kelsen's theoretical positions both anticipated the change in international law during the course of half a century and provided the theoretical framework within which to account for the current state of law as well as to offer a cautious glimpse of its future advances.

<sup>68</sup> See text at note 51.

<sup>69</sup> The comparison between the two fields of investment law and human rights is also made by Burdeau, 'Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les États', *Revue de l'arbitrage* (1995) 3, at 16 and by Lillich, *supra* note 45, at 67–68.