

Politeja

No. 3(72), 2021, pp. 175-191

<https://doi.org/10.12797/Politeja.18.2021.72.09>

License: CC BY-NC-ND 4.0

Tomasz WIDŁAK 

University of Gdańsk

tomasz.widlak@ug.edu.pl

## KELSEN'S IDEA OF A WORLD STATE (*WELTSTAAT*)

**ABSTRACT** This article offers an analysis of the meaning of the term 'world state' (*Weltstaat*) as used by Hans Kelsen in his work on international legal theory. The author argues that Kelsen understands the term solely as a legal concept. Reconstruction of Kelsen's understanding of the notion of world state begins with a summary of Kelsen's reductionist doctrine of the state and its identity with law. Secondly, the analysis moves to Kelsen's radical deconstruction of sovereignty. Thirdly, Kelsen's doctrine of evolution of legal orders along the axis of centralization is considered. These considerations lead to the assertion that Kelsen's *Weltstaat* shows in fact more affinity with the concept of the international community rather than a fully-fledged state. The article concludes that Kelsen's world state is only a theoretical possibility, a stage in the evolution of legal orders and a common point of imputation rather than a manifestation of any cosmopolitan agenda.

**Key words:** Kelsen, international law, world state, *Weltstaat*, pure science of law, pure theory of law

The problem I am going to explore in this essay is whether and to what extent Hans Kelsen (1881-1973) actually proposed and promoted the idea of creating a world state (*Weltstaat*). Essentially, this implies a question about the meaning that Kelsen ascribed to this somewhat ominous sounding term. It is unnecessary to explore in detail the usual notorious critique and distrust towards any legal or political theory, whenever it uses the notion of a world state. Perhaps this is fair as far as the term actually connotes a tyrannical and oppressive superstructure that makes national states virtually impotent in exercising their 'sovereign rights.' However, very often the looming ghost of an *imperium mundi* is just what it is – an apparition resulting from ignorance of the particular author's theoretical project rather than a real thing or a claim actually made. Certainly, this is true in regard to Kelsen's work.

The use of the term "world state" is not incidental in the Austrian professor's writings. He refers to it consistently across his works devoted to international law, starting from *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920)<sup>1</sup> to *Peace Through Law* (1944)<sup>2</sup> and *Principles of International Law* (1952)<sup>3</sup> as well as in the most important general restatements of his pure science of law, like the *General Theory of Law and State* (1945)<sup>4</sup> or the second edition of the *Pure Theory of Law* (1960).<sup>5</sup> Kelsen's commentators with less cosmopolitan views exploited this language to deem his international legal theory as unrealistic,<sup>6</sup> idealistic,<sup>7</sup> and even *imperialistic*.<sup>8</sup> The latter criticism, merging the idea of a world state with an alleged sinister project of a revival of the age of European empires in the new form of one world super-state may adversely affect the imagination of those who are only superficially acquainted with Kelsen's work. However, the Austrian scholar was always careful not to associate this term with any

<sup>1</sup> \*This article is part of a research project financed by the National Science Centre, Poland (DEC-2016/23/D/HS5/02613). It includes some modified and summarized arguments from my book T. Widlak, *Teoria i filozofia prawa międzynarodowego Hansa Kelsena*, Gdańsk 2018. H. Kelsen, "Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre", Tübingen 1920, in M. Jestaedt (ed.), *Hans Kelsen Werke. Bd. 4, Veröffentlichte Schriften 1918–1920*, Tübingen 2013.

<sup>2</sup> Idem, *Peace Through Law*, Chapel Hill 1944.

<sup>3</sup> Idem, *Principles of International Law*, New York 1952.

<sup>4</sup> Idem, *General Theory of Law and State*, transl. by A. Wedberg, Clark 2011.

<sup>5</sup> Idem, *Pure Theory of Law*, transl. by M. Knight, Clark 2005.

<sup>6</sup> Kelsen's philosophy of international law had been criticized from the realist point of view by Hans Morgenthau, and Raymond Aron; see: A. Carty, "The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law", *European Journal of International Law*, vol. 9 (1998), pp. 344-354.

<sup>7</sup> See: H. Bull, "Hans Kelsen and International Law", in: R. Tur, W. Twining (eds), *Essays on Kelsen*, Oxford 1986, pp. 321-336.

<sup>8</sup> Michael Hardt and Antonio Negri (M. Hardt, A. Negri, *Empire*, London 2001, pp. 5-16) see Kelsen as the main figure of the „imperial global order”, cf. J. von Bernstorff, "Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: A Theory of Global Judicial Imperialism?", *The Law and Practice of International Courts and Tribunals*, vol. 14 (2015), p. 44.

specific political project, but rather used it in a specific context, indicating the organizational form of international relations (*Weltstaat als Weltorganisation*<sup>9</sup>) or the final stage of the process of centralization of the international legal order,<sup>10</sup> which he discusses in the *General Theory of Law and State* under the sub-section entitled *International Legal Community*. In the second edition of the *Pure Theory of Law*, both these meanings merge into one – the centralizing international law is set to ultimately create *the organizational unity of a universal legal community of world law, that is, the emergence of a world state*.<sup>11</sup> It is important to underline that the term used by Kelsen to define the world state in the German language version of the text reads *Weltrechtsgemeinschaft*<sup>12</sup> or world law community.

In what follows I will argue that Kelsen understands the term “world state” solely as a legal concept. It is set out to be an organizational form, a point of imputation<sup>13</sup> of international legal norms created as a result of the process of centralization of international law reaching its near maximum. The author of the *Pure Theory of Law* arrives at this concept in several steps and I aim at reconstructing his argument. In what follows, I assume that the reader is generally familiarized with the main tenets of Kelsen's theory of law, such as the separation of *Is* and *Ought*, the idea of *Grundnorm* and the hierarchical normative structure of law or the argument for monism of national and international law. First, I will offer a brief summary of Kelsen's reductionist doctrine of the state and its identity with law. Second, the analysis will focus on his project of radical deconstruction of sovereignty, which, together with the monistic argument, allows for continuous application of his doctrine of state as a legal order at the international (global) level. Third, it is necessary to invoke Kelsen's doctrine of evolution of legal orders along the axis of centralization, which is the key dynamic principle linking ontologically the state with international and supranational forms of legal orders. Last but not least, I will claim that Kelsen's *Weltstaat* shows in fact more affinity with the concept of the international community than a state in the standard terminology of legal and political science. To support that assertion, I briefly point to Kelsen's inspiration with the ideas of an earlier influential thinker Christian von Wolff (1679-1754).

<sup>9</sup> “Als unendliche Aufgabe aber muß solcher Weltstaat als Weltorganisation allem politischen Streben gesetzt sein” – H. Kelsen, “Das Problem der Souveränität...”, p. 320 (572).

<sup>10</sup> „It is not *a priori* excluded that the evolution of international law will lead to the establishment of a world State. This means, that the actually valid international legal order would be transformed by way of centralisation into a national legal order whose territorial sphere of validity would coincide with that of actually valid international law” – H. Kelsen, *General Theory of Law...*, p. 326.

<sup>11</sup> H. Kelsen, *Pure Theory...*, p. 328.

<sup>12</sup> Idem, *Reine Rechtslehre*, Wien 1960 (1992), p. 328.

<sup>13</sup> For the concept of imputation in Kelsen, see: M. Zalewska, “Causality and Imputation (Kelsen)”, in M. Sellers, S. Kirste (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*, Dordrecht 2017.

## IDENTITY OF STATE AND LAW

When Kelsen started his academic career in the early 20<sup>th</sup> century, the standard view of the state in German legal theory was dualist. The most influential concept was (and continues to be) that of Georg Jellinek, who defined the state simultaneously in legal and sociological terms. According to this view, on the one hand, the state is a matter of fact. It is the Leviathan that manifests itself through the raw power over its people and territory. On the other hand, the state creates the law and limits itself through this normative system, at least as far as the ideal of the *Rechtstaat* (the rule of law) is concerned. Kelsen could not accept this claim, not only because of the methodological foundation of the pure science of law, which is the separation between *Is* and *Ought*. Jellinek's concept, according to Kelsen, constructs the state as a *meta-legal being*, a kind of *powerful macro-anthropos or social organism*.<sup>14</sup> This dualism has an ideological function as it allows the state, which grows out of the desire to wield power and therefore to employ violence in the form of state coercion, to justify itself through the ideal of law and thereby to become a *just* order. Kelsen emphasizes an internal antinomy in the dualist view: while it contrasts the realistic dimension of the state with the normative power of law, at the same time this doctrine recognizes the state as a legal person. If this is the case, and the state as a legal person is the object of inquiry of the science of law, then it cannot be at the same time viewed as the Leviathan positioned outside the law.

According to Kelsen, the state and the legal system are one and the same thing. This is because state cannot be conceived as a real person. State actions depend on the actions of individual people and these acts can be attributed to the state only if there is a competence to perform those actions contained in the legal norm. Therefore, there can be no state before the law. The individuals within the state constitute a community only as far as there are social relations between them. The community of law is all about legal regulation of these social relations.<sup>15</sup> Therefore, the social order being the legal order cannot be separate from the community of individuals. On the contrary, the legal order is the community, there is equality in meaning between the two notions. Since the state is a community, and the community is not something secondarily constituted by a social order governed by law, but is the order itself, then one must consistently recognize that the state is a legal order. From the two assertions that, first, the state is a kind of social order, and second, that – as it is commonly recognized – the state needs to enact and apply the law, Kelsen concludes that the state is essentially its legal order.<sup>16</sup> Thereby he arrives at the claim of the identity of the state and law. However, it is worth emphasizing, especially in the context of the theory of international

<sup>14</sup> H. Kelsen, *Pure Theory...*, p. 285.

<sup>15</sup> See: H. Kelsen, *General Theory of Law...*, p. 182.

<sup>16</sup> Idem, "Law, State and Justice in the Pure Theory of Law", *Yale Law Journal*, vol. 57 (1947-1948), p. 381.

law, that this relationship does not necessarily work the other way around, for not every legal order is a state, but only one that is *relatively centralized*, which means that it must rely on the existence of organs (institutions) operating according to the principle of division of labor.<sup>17</sup>

## DECONSTRUCTION OF SOVEREIGNTY

The argument about the state being exclusively a legal order has serious consequences for the notion of sovereignty. Here, Kelsen also stands firm against the prevalent view of the legal doctrine in Germany in the 1920s and 1930s and holds fast to his methodology amid critique by figures such as Herman Heller or Erich Kaufmann.<sup>18</sup> However, Kelsen's main opponent as far as the view of sovereignty and the broader theory of state are concerned was Carl Schmitt.<sup>19</sup> Schmitt's concept of sovereignty is a derivative of his idea that legal orders ultimately rest on decisions and not on norms.<sup>20</sup> His decisionism corresponds with the view that the essence of the political life lies in the antithetical distinction between friend and enemy.<sup>21</sup> To act politically according to Schmitt means to define the enemies.<sup>22</sup> The act of 'defining' of course entails also deciding on particular actions to undertake against the identified enemy, including physical violence, which essentially means going to war.<sup>23</sup> Such an act may take place both in the internal and external (or international) context. However, this is not to suggest that Schmitt implies any act of defying the law – on the contrary, acting on sovereignty is about deciding on the exception, which is by definition a deviation from the normal *lege artis* state of affairs. The essence of sovereignty is therefore the power of deciding on the extraordinary situation,<sup>24</sup> and the sovereign is the one who decides – without being challenged – on the undertaking of actions in exceptional circumstances.<sup>25</sup> In Schmitt's view, this transcending sovereign power and the sovereignty itself are pre-judicial concepts. Like Hobbes and Bodin, he is committed to the view of

<sup>17</sup> See: H. Kelsen, *Pure Theory...*, pp. 286-287.

<sup>18</sup> See: J. von Bernstorff, *The Public International Law Theory of Hans Kelsen. Believing in Universal Law*, transl. by T. Dunlap, New York 2010, pp. 66-67, 73-77.

<sup>19</sup> Schmitt opposed Kelsen not only in terms of the understanding of sovereignty, but also more generally in relation to the shape of the world order and the role and character of international law. For a comprehensive analysis of Schmitt's international thought see A. Górniewicz, *Wojna i nomos. Carl Schmitt o problemie porządku światowego*, Kraków 2019.

<sup>20</sup> C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, transl. by G. Schwab, Chicago-London 2005, p. 10.

<sup>21</sup> Idem, *The Concept of the Political*, transl. by G. Schwab, Chicago-London 2007, p. 26.

<sup>22</sup> Ibid., p. 45.

<sup>23</sup> Ibid., p. 32-37.

<sup>24</sup> Idem, *Political Theology...*, p. 5.

<sup>25</sup> Ibid., p. 7.

extra-legal character of sovereignty (the extrinsic view).<sup>26</sup> Until the 20<sup>th</sup> century, all major classical doctrines of sovereignty, both naturalist and positivist, represented one or another variation of the extrinsic view of the sovereign power of the state in relation to international law. According to this line of thinking, sovereignty is primarily a concept that exists independently of legal regulation. The extrinsic view is the basis for the voluntarist approach to international law, which envisages this legal order as a direct product of the will of its legal subjects, that is the states.

In contrast to the dominating voluntarist concept, Kelsen ignores sovereignty's alleged non-normative, political face, which amounts to the actual *summa potestas* – the *de facto* power of the state (*Gewalt*). Again, as a consequence of the methodological assumptions of the pure science of law, sovereignty for Kelsen can only be a logical or formal concept.<sup>27</sup> Kelsen believes that in the realm of facts there is no possibility of any permanent and undisputed absolute source of power as a fulcrum for sovereignty and, consequently, for the validity of the law. The highest sovereign power, understood as the primary authority, personified at a given time, e.g. by a parliament, can only exist in a specific normative context. From the perspective of legal theory, considerations of the actual socio-political determinants are of little if any importance for the legal concept of sovereignty.<sup>28</sup> Therefore, it is abundantly clear that for Kelsen sovereignty makes no sense as an extra-legal concept.

In a similar vein, Kelsen uses his claim on separation between law and morality to deal with the assumptions seeking roots of sovereignty in material components such as religious, moral or ideological doctrines. There may be some normative sources, e.g. ethical (Kelsen gives the example of Christian morality), which are perceived by some states as normative sources of sovereign power or deontological restrictions on their will and ability to act.<sup>29</sup> However, they only constrain the state in the sphere of will and are not of a legal nature. When defining sovereignty as a legal concept, such conditions, derived from extra-judicial normative systems, must be ignored. By way of radically eliminating traditional material components of sovereignty, Kelsen aims to deny the dual political and legal nature of sovereignty because it creates a possibility for politically or ideologically motivated abuses of power.

Instead, Kelsen proposes a new and radical view of sovereignty. Alike Schmitt, he is a reductionist and believes that the contents of sovereignty cannot be determined by substantive international law – they are not a particular set of their international legal competencies or rights. By listing all such necessary fundamental competencies in the aim of describing a sovereign state, the observer may be only characterizing the legal system itself. For Kelsen, state sovereignty is closely related to the etymology of

<sup>26</sup> Schmitt (*Political Theology...*, p. 7) writes about the sovereign: "Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety."

<sup>27</sup> H. Kelsen, "Das Problem der Souveränität...", pp. 40-43 (309-313).

<sup>28</sup> J. von Bernstorff, *The Public International Law...*, p. 64.

<sup>29</sup> H. Kelsen, "Sovereignty and International Law", *Georgetown Law Journal*, vol. 48, no. 4 (1960), p. 627.

the Latin word *superanus* and comes down to a specific feature or property of the state, which manifests itself in being “the highest” order or authority.<sup>30</sup> So far this is in line with the majority view: a sovereign state is not and cannot be subordinated to any legal order other than its own. However, due to the abovementioned assertion of the identity of the state and the law, sovereignty for Kelsen becomes solely a property of the legal order,<sup>31</sup> and not of the state understood as a hypostasized Leviathan, a dual socio-legal concept. Therefore, sovereignty is the property of being the highest or primary legal order, which does not derive its legality or validity from any other legal order. Therefore, no other legal order can be seen as standing above the legal order constituting a sovereign state.

### THE MONISTIC ARGUMENT AND SOVEREIGNTY AS *VÖLKERRECHTSUNMITTELBARKEIT*

Kelsen's concept of sovereignty is in conformity with the political notion of “independence” of a sovereign state from other states (their legal orders). Nevertheless, it gives rise to the so-called problem of the ‘sovereignty of international law.’ If international law exists and is indeed law properly called so, then sovereignty could logically contradict international law's validity. For a sovereign state cannot, by definition, be subject to international law as a legal order other than the state's own law.<sup>32</sup> Kelsen responds to that problem with his monistic doctrine, which holds that both international and international legal orders constitute the same legal system. His reasoning proceeds as follows. Starting with the law-state identity notion, Kelsen concludes that the problem of state sovereignty is in fact the problem of the relationship between the state legal order and the international legal order.<sup>33</sup> In accordance with the standard understanding of sovereignty, state law cannot be subject to international law. Since this means international law cannot constitute a legal order superior to the state legal order, the only possibility left is that the international legal order must be recognized as part of state legal order. Even if this is the case, the actions of the state, understood here as actions undertaken by its officials and imputed (attributed) to that state, cannot be free from limitations imposed by its own law, and therefore also by international law (which is constituted as part of state law).<sup>34</sup> As a consequence, it turns out that the state acting through competent officials, whose actions are recognized by that state and attributable to it, is still restricted by international law. This reasoning illustrates the use of the monistic argument. If all and every law necessarily constitutes one legal order, then

<sup>30</sup> Idem, “Souveränität”, in *Wörterbuch des Völkerrechts. Bd. 3*, Berlin 1962, p. 278; Idem, “Sovereignty and International Law...”, p. 627.

<sup>31</sup> Idem, “Das Problem der Souveränität...”, p. 12-14; cf. idem, *Principles of International Law...*, p. 113.

<sup>32</sup> Ibid., p. 109.

<sup>33</sup> Idem, “Sovereignty and International Law...”, p. 627.

<sup>34</sup> Idem, *Principles of International Law...*, p. 109.

state law is identical with international law in the sense that the former is part of the latter. Thereby, the state law order is incorporated into international legal order, where it finds its source of validity.

Kelsen tries to prove that the essence of state sovereignty as a specific, territorially limited legal order is confined to state law's direct normative connection with general international law. In this understanding the problem of state sovereignty versus international law disappears. However, sovereignty remains in place as an important feature, signifying the normative independence of the particular state (its legal order) from other state legal orders. In this setting, the fundamental norm (*Grundnorm*) of a given state legal order can only be mediated by general international law, and not by another order of state law. Alfred Verdross<sup>35</sup> described this situation with the German word *Völkerrechtsunmittelbarkeit*,<sup>36</sup> which denotes the property of remaining in direct normative connection with international law. The connection signifies here a dynamic relation of competence to create law at the subsequent levels of the system.<sup>37</sup> State actions depend on the action of individual people and these acts can be attributed to the state only if there is a competence contained in the legal norm. There is no place for any Schmittean 'exception' because according to Kelsen the legal system of norms is complete and there cannot be state before the law. Sovereignty is simply a normative independence of a legal system. Any state voluntarism is radically eliminated from the concept, which is left only with its logical essence of supra-ordination. There is no possibility that state could be sovereign towards the positive law including international law because in Kelsen's theory, the state (or its personification) dissolves into law.

## THEORY OF LEGAL ORDERS

As explained above, states are legal orders. However, they are not just an average type, but instead relatively centralized legal orders, which is the effect of the process of their evolution from more rudimentary forms. Kelsen claims that international law is not quite comparable to state legal orders in this sense, since it is still a decentralized order in the early stages of its development. He is convinced that international law will evolve towards more advanced forms, where the measure of this development is the degree of centralization. In other words, international law is likely to follow the path taken already by state legal orders. By way of analogy, the result of this process will be something similar in form to the national state – a relatively centralized order at the international (or supranational) level or a world state (*Weltstaat*).

Kelsen introduces two aspects of the centralization of legal orders: the static and the dynamic one. In the case of the static centralization, the key determinant is the territorial reach of the legal norms of the particular legal order. Centralized orders are those

<sup>35</sup> A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna 1926, p. 118.

<sup>36</sup> Kelsen adopts and uses this term in his writings. See: H. Kelsen, "Souveränität...", p. 281.

<sup>37</sup> H. Kelsen, "Sovereignty and International Law...", p. 529.



in which the law consists solely or primarily of legal norms valid for the entire territory under their jurisdiction. These norms, which are valid within the full territorial scope of the jurisdiction of a given order are called central norms. They are distinct from local legal norms which are those that are valid only in part of the particular legal order's territory.<sup>38</sup> All norms within a given order, both central and local, together form a comprehensive (or "total"<sup>39</sup>) legal order corresponding with the widest legal community. Separately, both the central and local norms give rise to the partial legal communities placed within the widest legal community.<sup>40</sup> The fact whether a given total legal order is called centralized or decentralized in the static aspect is determined by the predominance of norms of one or the other type, both in terms of their number and importance (subject of regulation).<sup>41</sup>

The dynamic aspect of the problem of centralization and decentralization of legal orders pertains to the institutions and methods of creating and applying legal norms.<sup>42</sup> A legal order is strongly or even ideally centralized in the dynamic sense if its norms are created and applied (which includes, according to Kelsen, also the enforcement of sanctions) by one and the same legal organ, preferably held by one individual.<sup>43</sup> The degree of centralization is declining and decentralization is increasing in two cases: when multiple authorities are included in the processes of creation or application of law, as well as when the principle of collegiality dominates over one-person bodies. In other words, the more people and more institutions manage the process of creating and administering the law, the more decentralized the legal order is. The territorial scope of the rules produced by legal organs is irrelevant to the dynamic aspect of centralization.<sup>44</sup>

The evolution of the legal orders relies on their propensity to self-organize and move from fundamental primary decentralization (which is called a "primitive" order in Kelsen's terminology) to a more advanced, relative centralization in the static and dynamic aspects. This is Kelsen's postulate that pertains at least to state legal orders. In contradistinction to states, primitive legal orders are characterized by the lack or low level of organization of the organs called to creating, applying and enforcing the law, significant content particularism of the body of law within a given legal order, as well as predominance of common law. This stage can be defined as a pre-state because

<sup>38</sup> Idem, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940-41*, Cambridge 1942, Buffalo 1997, p. 107.

<sup>39</sup> See: H. Kelsen, *Pure Theory...*, pp. 313-317.

<sup>40</sup> Idem, *General Theory of Law...*, p. 304.

<sup>41</sup> Ibid., p. 306.

<sup>42</sup> Ibid., p. 308. The pure science of law does not see any clear boundary between the two processes – the 'application' of the law, understood as the issuance of decisions or rulings containing individual norms, is a part of the uniform process of creating norms of ever lower levels in the hierarchical structure of the legal order (*Stufenbau*). Therefore, even a unitary state is decentralized because individual norms, which are 'established' by an administrative act also count as legal norms of this legal order. See: H. Kelsen, *Pure Theory...*, pp. 313-314.

<sup>43</sup> See: H. Kelsen, *Law and Peace...*, p. 110.

<sup>44</sup> See: H. Kelsen, *General Theory of Law...*, p. 309.

according to the Austrian scholar, to be recognized as a state, a particular legal order needs to shape its organs of creation and application of law so that they operate in accordance with the “principle of division of labor.”<sup>45</sup> In other words, the state *in statu nascendi* needs separation and specialization of the legal functions. This process allows for the occurrence of a certain degree of relative centralization of the legal order.<sup>46</sup>

## INTERNATIONAL LAW AS A PRIMITIVE ORDER

In keeping with some other thinkers, Kelsen describes international law as a “primitive” legal order.<sup>47</sup> However, he uses this designation solely in the context of his carefully tailored theory of legal orders and does not need to concern himself, as others do, with controversies arising from the common meaning of the term. For instance, H.L.A. Hart needs to make reservations to explain that international law is developed in terms of “concepts, methods and techniques” and that its resemblance to the rudimentary legal order exists only in form but not in content.<sup>48</sup> Such theoretically unclear explanations and problematic divisions are foreign to Kelsen, because his theory is fully inclusive of international law *qua* legal order. Therefore, what determines international law’s primitivism as a pre-state form of legal order is only its degree of centralization, which has dire consequences for the way the law is both created and applied (enforced).

For Kelsen, international law is the legal order valid between the states. The central body of general international law in terms of substantive importance is customary international law. First of all, when the static aspect of centralization is taken into account, it is justified to claim that this part of international law is centralized, since customary norms are often central norms, commonly binding within the whole international community. However, there are definitely fewer customary norms than contractual norms of the international treaty law. The latter are particular in terms of their territorial scope of validity and therefore can be described as local norms. If international law is to be considered as the sum of customary and treaty law, then it should be considered as fairly decentralized in the static aspect due to the proportion of particular to local norms.<sup>49</sup> Furthermore, the dynamic aspect of centralization of the norms of international law leaves even less doubts as to the decentralized character of the international legal order. The way international law is created is characteristic of the primitive legal orders since no specialized lawmaking bodies are involved. Instead, the law is created directly by the members of a particular community, which is evident in treaty making by the states. Also, when it comes to law application and enforcement,

<sup>45</sup> Ibid., p. 410.

<sup>46</sup> Ibid.

<sup>47</sup> Idem, *Law and Peace...*, p. 49; Idem, *The Legal Process and International Order*, London 1934, pkt. VI, p. 11.

<sup>48</sup> H.L.A. Hart, *The Concept of Law*, Oxford 1994, pp. 213-237.

<sup>49</sup> H. Kelsen, *Law and Peace...*, pp. 111-112.

the international community remains dependent on self-help institutions. This is evident in a way sanctions of international law, such as reprisals and war, are administered: directly by the members of the international community in the course of self-help.<sup>50</sup> Of course, there is a growing number of international courts and tribunals under international law, however their jurisdiction is either not obligatory or particular and limited to partial legal orders, such as international organizations.

Out of the two above mentioned modes of dynamic centralization – through law-making and law-applying institutions – the latter is seen by Kelsen as the most promising way for the process of evolution of international law towards a more centralized form. He sees the courts as having potentially the most important role to play in that transformation because apart from concentrating the power to apply the law but, they are also in position to create it. The hierarchical structure of the legal system (*Stufenbau*) based on the principle of a dynamic delegation of competences, which dominates the static element, blurs the boundary between the creation and application of law. Kelsen puts it outright: “Application of law is at the same time creation of law.”<sup>51</sup> Kelsen refers here to the historical argument, according to which the centralization of the law application process generally preceded the centralization of its creation.<sup>52</sup> As he explains, it happened precisely because the courts have the power to create the law, i.e. to develop and change it by adjusting the general norm to a specific situation.<sup>53</sup> The less developed legal order generally copes well with the function of creating law at the level of general norms through the development of customary law. However, the key factor for the existence of an independent legal order is the development of a process in the course of which the content of individual norms can be objectively determined, since this constitutes a premise for the imposition of a sanction.<sup>54</sup> Therefore, it is precisely the centralization of the judicative that should also logically precede the need to establish a uniform organized administrative and police apparatus or the function of the executive power, as well as the general legislative function. Kelsen sums up these observations succinctly, stating that *there can be no legislator without a judge even though there can very well be a judge without a legislator.*<sup>55</sup>

<sup>50</sup> I analyze Kelsen's approach to war in international law, peculiarly named by him as the *bellum iustum* doctrine elsewhere; see: T. Widlak, “From Vladimiri's Just War to Kelsen's Lawful War: The Universality of the ‘Bellum Justum’ Doctrine”, *Studia Philosophiae Christianae*, vol. 53, no. 3 (2017), pp. 77-96.

<sup>51</sup> H. Kelsen, *Pure Theory...*, p. 234. It is worth mentioning though, that for Kelsen the final act of compulsion, established by a legal norm and enforced by a policing authority, is in itself an act of will devoid of any element of law-making.

<sup>52</sup> See: H. Kelsen, “The Strategy of Peace”, *American Journal of Sociology*, vol. 49, no. 5 (1944), pp. 384-385; cf. *idem*, *Law and Peace...*, p. 148; cf. *idem*, *Peace Through Law...*, p. 21.

<sup>53</sup> See: H. Kelsen, *The Legal Process...*, p. 14.

<sup>54</sup> See. H. Kelsen, *General Theory of Law...*, pp. 135-136.

<sup>55</sup> H. Kelsen, “International Peace – By Court or Government?”, *American Journal of Sociology*, vol. 46, no. 4 (1941), p. 575.

## THE INEVITABILITY OF THE WORLD STATE?

It is not entirely clear whether it is the law between nations, consisting of general and particular (treaty) international law, that is Kelsen's primary candidate for becoming the 'world state' by way of its evolution towards centralization. Even as he writes at the end of World War II and at the dawn of the new constitutional momentum for the global legal arrangement, the Austrian professor is well aware of the perhaps insurmountable political difficulties standing in the way of the process of international law's centralization at that particular time. At one point he explicitly states that the project of a federal world state is unrealistic from the perspective of the emerging post-war international legal order.<sup>56</sup> The deep respect for the classical principles of international law as well as his esteem for democracy leads Kelsen to the conclusion that is somewhat surprising from the perspective of his main line of argument. He points out that *one must also admit that a community of states approaches the democratic ideal more closely by way of decentralization than by way of centralization.*<sup>57</sup> Does he contradict himself then? Given certain developments in international law, such as the attempts to sanction the prohibition of the use of force or the emergence of international organizations, one can support the idea that international law will follow the path of state legal orders and evolve towards increased centralization. In fact, the path seems to have been taken by international law as predicted by Kelsen, especially in view of the growing role of international courts and tribunals in the second half of the 20<sup>th</sup> century. However, this does not mean that the outcome of this process will be or should be the creation of a world state with the comparable degree of static and dynamic centralization as in the case of the state legal order.<sup>58</sup> While Kelsen does not *a priori* rule out the possibility of the system of international law heading this direction,<sup>59</sup> he limits his analogy to stating the mere existence of a general tendency to centralize primitive legal orders, without predicting the outcome. Perhaps, if international law is to retain its fundamental function and essence as the law *between* nations, it should not aim at the same or higher degree of centralization as represented by the state legal order.

Another candidate for becoming a world state could be seen in a form of legal order that not merely binds the states in their mutual relations but goes beyond that dimension to become a form of independent global legal order. In the second edition of the *Pure Theory of Law*, Kelsen points to at least one other primitive legal order that may embrace state legal orders and potentially evolve towards state-like centralization. The original text of the treatise in German<sup>60</sup> clearly mentions *supra*-national

<sup>56</sup> See: H. Kelsen, *Peace Through Law...*, p. 12.

<sup>57</sup> H. Kelsen, *Law and Peace...*, p. 141.

<sup>58</sup> Cf. C. Leben, "Hans Kelsen and the Advancement of International Law", *European Journal of International Law*, vol. 9 (1998), p. 293.

<sup>59</sup> H. Kelsen, *General Theory of Law...*, p. 326.

<sup>60</sup> In contrast, the English translation by M. Knight simply omits this subtle yet important distinction.

(*überstaatlichen*) beside *inter-national* (*zwischenstaatlichen*) legal order when Kelsen writes about the identity of state and law.<sup>61</sup> However, the author does not clarify the character of the supranational legal order. Assuming it is different from international law understood as law between nations, it is possible that it constitutes another form of non-state law, though it is not necessarily any form of 'post-state' legal order. Kelsen could have considered the supranational order to be the universal legal order or some form of international community understood as the total legal community. A supranational legal order defined in this way would be the sum of all norms of a 'non-state' character, and therefore, in addition to general customary and treaty international law, it would also cover international, supranational, and non-governmental organizations (which constitute legal orders themselves) and possibly other *sui generis* legal orders recognized in international law.<sup>62</sup> Such a system would therefore accommodate a number of international legal regimes which could themselves be relatively centralized and form partial legal communities (orders).<sup>63</sup>

## WORLD STATE OR INTERNATIONAL COMMUNITY?

Kelsen sees the legal system as a continuum that seamlessly links particular legal orders, including the states and other non-state regimes, with the order of international law that transcends them and contains the basis for their validity. The specific degree of organization and institutionalization of this community is of secondary importance to him. Having established the identity of state and its law and having reduced sovereignty to a property of that legal order in its relationship with international law, Kelsen paved the way to an inclusive and universal legal order of the largest international community.

In his concept of the organization of international order, he directly refers to the idea of *civitas maxima* proposed by Christian von Wolff (1679–1754).<sup>64</sup> In the work *Jus gentium methodo scientifica pertractatum* ("The law of nations explained by the scientific method"), Wolff argued that society in the moral sense existed both within individual states and at the cosmopolitan level, among all human beings (*societas magna*). Despite the division of humanity into individual nations, people are still naturally united into one community.<sup>65</sup> The aim of such an association is the common good than can be achieved through "mutual assistance" between individuals and nations, respectively. Therefore, the states are obliged to group together for the purpose

<sup>61</sup> H. Kelsen, *Reine Rechtslehre...*, p. 289.

<sup>62</sup> See: H. Kelsen, *Principles of International Law...*, pp. 158-174.

<sup>63</sup> Cf. J. von Bernstorff, *The Public International Law...*, pp. 123-145.

<sup>64</sup> Already in "Das Problem der Souveränität..." (pp. 241-274) Kelsen devotes entire chapter to this concept, titled "Das Völkerrecht als civitas maxima".

<sup>65</sup> C. von Wolff, "Jus Gentium Methodo Scientifica Pertractatum", in C. Brown, T. Nardin, N. Rengger (eds.), *International Relations in Political Thought: Texts from the Ancient Greeks to the First World War*, New York 2002, § 7, p. 359.

of self-improvement.<sup>66</sup> This process is completed by the creation of a “world state” with individual nations as members. Wolff’s *civitas maxima* is not a state in the modern, homogeneous sense of the word, but rather an ‘association of associations’ in which the members are the states that retain their individuality.<sup>67</sup> Wolff implements here the idea of a fractal cascade of successive levels of association, and in this context his *civitas maxima* should also be seen as the highest degree of association, within which there is no direct relationship between this ‘world state’ and individuals.<sup>68</sup>

In his early period, Kelsen seems to share Wolff’s cosmopolitan idea of a moral universal community of humanity (*societas magna*).<sup>69</sup> Its juridical counterpart is the universal legal system based on international law as the keystone of state legal orders<sup>70</sup> since Wolff’s world state is, according to Kelsen, nothing but a legal order encompassing individual state orders, identical to the universal community (*umfassende universale Gemeinwesen*),<sup>71</sup> which is a community of law. The author of the *Pure Theory of Law* understands the idea of *civitas maxima* as much closer to the contemporary meaning of ‘international community’<sup>72</sup> than a ‘world state’ (although, as noted, he uses the term *Weltstaat* himself). Like Wolff, Kelsen does not suggest creating a world state in the literal sense. Neither does he seem to believe that the contemporary development of international law implies any specific political formula – the essence of this concept lies rather in the perception of the universal legal system as open to all possibilities.<sup>73</sup>

<sup>66</sup> Ibid., § 8-9, pp. 359-360.

<sup>67</sup> Ibid., § 10, p. 361.

<sup>68</sup> Cf. N.G. Onuf, “Civitas Maxima: Wolff, Vattel and the Fate of Republicanism”, *American Journal of International Law*, vol. 88, no. 2 (1994), pp. 295-296.

<sup>69</sup> Wolff’s concept has a direct influence on Kelsen and the development of the pure science of law in his early period, which can be clearly seen in the book “Das Problem der Souveränität...”. Reference to Wolff and the political-ethical aspects of his project gradually fades away with the publishing of the first edition of the *Reine Rechtslehre* (1934) and in subsequent publications – see: P. Langford, I. Bryan, “Hans Kelsen’s Concept of Normative Imputation”, *Ratio Juris*, vol. 26, no. 1 (2013), pp. 85-110.

<sup>70</sup> Cf. D. Zolo, “Hans Kelsen: International Peace through International Law”, *European Journal of International Law*, vol. 9 (1998), pp. 309-310.

<sup>71</sup> „Die juristische Hypothese, daß die Normen des Völkerrechts eine über den einzelstaatlichen Rechtsordnungen als Teilrechtsordnungen stehende, sie alle umfassende, universale Rechtsordnung seien, ist – bei Erkenntnis der Tatsache, daß die staatliche Ordnung ihrem Wesen nach nichts anderes als eine Rechtsordnung ist – identisch mit der Hypothese eines über den Einzelstaaten stehenden, diese umfassenden universalen Gemeinwissens, das, weil grundsätzlich von der gleichen Natur wie die Einzelstaaten, als Personifikation der Universal- oder Weltrechtsordnung, als Universal – oder Weltstaat, als *civitas maxima* bezeichnet werden kann” – H. Kelsen, “Das Problem der Souveränität...”, p. 249 (507).

<sup>72</sup> More on the meaning of the concept of “international community” as opposed to “international society” see: T. Wiślak, *From International Society to International Community. On the Constitutional Evolution of International Law*, Gdańsk 2015; cf. N.G. Onuf, “Civitas Maxima...”, p. 290, who points out that the Wolff’s term *civitas maxima* includes the elements of both a “society” and a “community” in the sociological understanding by F. Tönnies.

<sup>73</sup> „Von dem Standpunkt rein juristischer Betrachtung aus kann die Völkerrechtsordnung, sofern ihre Normen im Wege Rechtens sich ändern, nichts werden, was sie nicht schon ist. (...) die Völkerrechtsordnung ohne die geringste Gefährdung ihres Wesens auch eine »organisierte« Gemeinschaft, ein

## SUMMARY

Kelsen's idea of *Weltstaat* appears as a logically self-evident conclusion of his theoretical considerations of international law. The methodological consequence allows the author of the *Pure Theory of Law* to make a consistent step in his argument from the notion of radical identity and deconstruction of sovereignty towards the universal theory of legal orders. By the monistic argument, legal orders turn out as ontologically homogenous components of the universal legal system. States as well as the would-be world state and other non-state legal orders are elements of the same type, equally possible to come into being within the particular arrangement of the widest legal community. What is important to underline is that Kelsen never contaminates the legal concepts represented by terms *Weltstaat* or *civitas maxima* with any ideological burden. Kelsen tries to make them axiologically straightforward and neutral, even though they are clearly built on the ruins left by pure theory's sharp rebuttal of the plague of dualisms dominating legal theory so far (state vs. the law, national vs. international law, sovereignty vs. international law, national state vs. the world state). Of course, the proposals of the pure science of law constitute one of the possible versions of the new objective structure of international law and there are choices that Kelsen himself would consider 'political.' Above all, this concerns his indirect preference for monism in the version with the primacy of international law, which is quite evident in the construct of the "world state" as a universal community of law. Admittedly, however, this choice may be seen as determined less by any ideology than the objective vision of the international community based on the rule of law instead of the particular interests of its members. In his works concerning international law and the new arrangements for the global legal order, Kelsen does change hats and engages in normative political analyses, sometimes unexpectedly. However, at the end of the day Kelsen the political philosopher is only second to Kelsen the legal scientist. Even if anticipated and welcomed, *Weltstaat* is merely a possibility, a stage in the evolution of legal orders that could perform an important function of becoming a point of imputation for attributing it the various acts of the international community (mainly through the judicial process) and less so a manifestation of any cosmopolitan government agenda.

## BIBLIOGRAPHY

- Bernstorff J. von, "Hans Kelsen on Judicial Law-Making by International Courts and Tribunals: A Theory of Global Judicial Imperialism?", *The Law and Practice of International Courts and Tribunals*, vol. 14 (2015), <https://doi.org/10.1163/15718034-12341284>.
- Bernstorff J. von, *The Public International Law Theory of Hans Kelsen. Believing in Universal Law*, transl. by T. Dunlap, New York 2010.

---

»Staat« in jedem zulässigen Sinne dieses Wortes werden kann“ – H. Kelsen, "Das Problem der Souveränität...", p. 274 (530).

- Bull H., "Hans Kelsen and International Law", in: R. Tur, W. Twining (eds), *Essays on Kelsen*, Oxford 1986.
- Carty A., "The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law", *European Journal of International Law*, vol. 9 (1998), <https://doi.org/10.1093/ejil/9.2.344>.
- Górniewicz A., *Wojna i nomos. Carl Schmitt o problemie porządku światowego*, Kraków 2019.
- Hardt M., Negri A., *Empire*, London 2001, <https://doi.org/10.2307/j.ctvjnrw54>.
- Hart H.L.A., *The Concept of Law*, Oxford 1994.
- Kelsen H., "Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre", Tübingen 1920, in: M. Jestaedt (ed.), *Hans Kelsen Werke. Bd. 4, Veröffentlichte Schriften 1918–1920*, Tübingen 2013.
- Kelsen H., *General Theory of Law and State*, transl. by A. Wedberg, Clark 2011.
- Kelsen H., "International Peace – By Court or Government?", *American Journal of Sociology*, vol. 46, no. 4 (1941), <https://doi.org/10.1086/218699>.
- Kelsen H., "Law, State and Justice in the Pure Theory of Law", *Yale Law Journal*, vol. 57 (1947-1948)..
- Kelsen H., *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940-41*, Cambridge 1942, Buffalo 1997, <https://doi.org/10.2307/793234>.
- Kelsen H., *Peace Through Law*, Chapel Hill 1944.
- Kelsen H., *Principles of International Law*, New York 1952.
- Kelsen H., *Pure Theory of Law*, transl. by M. Knight, Clark 2005.
- Kelsen H., *Reine Rechtslehre*, Wien 1960 (1992).
- Kelsen H., "Souveränität", in *Wörterbuch des Völkerrechts. Bd. 3*, Berlin 1962.
- Kelsen H., "Sovereignty and International Law", *Georgetown Law Journal*, vol. 48, no. 4 (1960).
- Kelsen H., *The Legal Process and International Order*, London 1934, pkt. VI.
- Kelsen H., "The Strategy of Peace", *American Journal of Sociology*, vol. 49, no. 5 (1944), <https://doi.org/10.1086/219453>.
- Langford P., Bryan I., "Hans Kelsen's Concept of Normative Imputation", *Ratio Juris*, vol. 26, no. 1 (2013).
- Leben C., "Hans Kelsen and the Advancement of International Law", *European Journal of International Law*, vol. 9 (1998).
- Onuf N.G., "Civitas Maxima: Wolff, Vattel and the Fate of Republicanism", *American Journal of International Law*, vol. 88, no. 2 (1994), <https://doi.org/10.2307/2203730>.
- Schmitt C., *Political Theology. Four Chapters on the Concept of Sovereignty*, transl. by G. Schwab, Chicago–London 2005, <https://doi.org/10.7208/chicago/9780226738901.001.0001>.
- Schmitt C., *The Concept of the Political*, transl. by G. Schwab, Chicago–London 2007, <https://doi.org/10.7208/chicago/9780226738840.001.0001>.
- Verdross A., *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna 1926.
- Wiślak T., "From Vladimiri's Just War to Kelsen's Lawful War: The Universality of the 'Bellum Justum' Doctrine", *Studia Philosophiae Christianae*, vol. 53, no. 3 (2017), <https://doi.org/10.21697/2017.53.3.04>.
- Wiślak T., *From International Society to International Community. On the Constitutional Evolution of International Law*, Gdańsk 2015.



- Widłak T., *Teoria i filozofia prawa międzynarodowego Hansa Kelsena*, Gdańsk 2018.
- Wolff C. von, "Jus Gentium Methodo Scientifica Pertractatum", in C. Brown, T. Nardin, N. Rengger (eds.), *International Relations in Political Thought: Texts from the Ancient Greeks to the First World War*, New York 2002.
- Zalewska M., "Causality and Imputation (Kelsen)", Sellers M., Kirste S. (eds.), *Encyclopedia of the Philosophy of Law and Social Philosophy*, Dordrecht 2017, [https://doi.org/10.1007/978-94-007-6730-0\\_220-1](https://doi.org/10.1007/978-94-007-6730-0_220-1).
- Zolo D., "Hans Kelsen: International Peace through International Law", *European Journal of International Law*, vol. 9 (1998), <https://doi.org/10.1093/ejil/9.2.306>.

---

**Tomasz WIDŁAK** – PhD and D.Sc. in law, Master of Law from the University of Gdańsk and the University of Antwerp, associate professor at the Department of Theory and Philosophy of Law and State at the University of Gdańsk. Author of over 100 publications in theory and philosophy of law, international legal theory and international law, medical law and ethics. He was the Principal Investigator in the project "Neo-Kelsenian theory of international law" granted by the Polish National Science Centre. Currently, he leads research in another project financed by the National Science Centre titled "Judges and Virtues. A study in the aretaic theory of the judiciary."