
The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law

Anthony Carty*

Abstract

The article explores the contribution of the purity of Kelsen's theory of international law to the exclusion of ethics and political analysis from the workfield of the international lawyer. It is argued that Kelsen's own approach is an epistemologically grounded argument against involvement in the emotional dimension of political relations, which he dismisses as irrational. This is what justifies professional evasiveness in the face of the continuing self-assertiveness of the nation-state. Kelsen is now such a formidable obstacle to the development of the discipline because the profession lacks his general intellectual culture and so is unable to question the foundations of his system.

1 Introduction

In this short space it is proposed to suggest a hypothesis concerning what is believed to be the decisive influence of Kelsen on the subsequent development of the discipline of international law. His genius has been in the realm of the formal. He has been able to give style and shape to the desire of the profession to depoliticize the discipline and to absolve itself from moral and political responsibility with respect to serious analysis of the actual conduct of states.

This genius is captured by the one-time Oxford master of the theory of international relations, Hedley Bull. Writing in 1986,¹ he remarks of Kelsen that the key to his thought on international law is to be found in passages of his *Law and Peace in*

* Eversheds Professor of International Law, LL.M (London) PhD (Cambridge), The School of European and International Studies (Director of Research), University of Derby, Kedleston Rd. Derby DE22 1GB, United Kingdom.

¹ Bull, 'Hans Kelsen and International Law' in R. Tur and W. Twining, *Essays on Kelsen* (1986) 321.

*International Relations.*² To be fair to Kelsen it is thought necessary to quote in full the argument onto which Bull latches. Kelsen asks what is the basis of the efficacy of a social order, the motives for the obedience accorded to it, the secret of power. This, he says, is sociologically a very significant problem. Whether it can be solved scientifically is doubtful. 'But it lies outside the field of the question of the nature of law.' The coercive order which is called law must have a minimum of efficacy for its norms to be regarded as valid. The assertion 'that back of the legal order is a power means only that the legal order is by and large efficacious', which is true of every social order. If one objects that the essential characteristic of law is that the power back of it is the state, this answer is misleading. The state is nothing but an order, an organized power, which means an effective order. Bull quotes the following passage of Kelsen: 'As a power, the state is the effectiveness of the legal order, and as an order . . . it is this legal order itself.' Kelsen goes on to say 'The state as a power back of law, as sustainer, creator and source of the law — all these expressions are only verbal doublings of the law as the object of cognition, those typical doublings towards which our thinking and our language incline, such as the Animistic presentations according to which "souls" inhabit things.'³

Bull comments directly 'The state as entity exerting power, in disregard of the legal order, engaged both domestically and internationally in contests for power that take no account of law, is thus defined out of existence.'⁴ Bull remarks that Kelsen does set up international law in opposition to power politics. He presents war as a contest between the law-breakers and the law-enforcers, but takes no account of the possibility that the latter will not have might on their side. Says Bull, Kelsen's 'conception of international law as "the force monopoly of the community" makes no concessions to the fact that force is the monopoly of states and that the international community is without force . . . Kelsen's only references to power are made in the course of his discussion of the efficacy of law.' At this point Bull introduces the passages from Kelsen cited above. He concludes *vis-à-vis* Kelsen that the pure theory of law recognizes that law has its own logic, but that legal logic will not help to understand the place of law in international society. This would require a study of international political realities.⁵ This is what Kelsen absolves international lawyers as lawyers from doing. This is his genius. The profession is now very largely unable to question the foundations of Kelsen's fierce argumentation, because it lacks his general intellectual culture and so is unable to challenge the foundations of his system. Without a return to the wider culture with which Kelsen was perfectly familiar the profession must continue to be lost in its self-contemplation.

What this short note will attempt to do in the space available will be to explain how Kelsen himself developed his strange idea about the place of the state as a matter of what he calls legal logic. Then reference will be made to the rather obvious persistent criticism which has been made of his ideas. In conclusion, it will be suggested, through

² *The Oliver Wendell Holmes Lectures 1940-41* (1948).

³ *Ibid.*, at 69-70.

⁴ Bull, *supra* note 1, at 336.

⁵ *Ibid.*, 336

an illustration from prominent international legal doctrine, just how and why his style and form continue to have immense appeal.

2 Kelsen, Law and the State

The Pure Theory of Law is about relieving lawyers of a responsibility for political analysis. Kelsen says that political demands masquerade as appeals to objective authority, with respect to so-called absolute values of nation, class or religion. However, they can only be emotionally held subjective opinions.⁶ Pure Theory is therefore legal science, not legal policy; focusing on the law alone, it removes all foreign elements (7). Normativity is crucial in Kelsen's system for the exclusion of facticity. The specifically legal sense of an event rests in the fact that a norm refers to it. And the norm as a specific meaning is something other than the mental act of intending or imagining the norm. There is no concern with legal norms as data of consciousness (10–14). Pure Theory remains remote from longings for justice, since it is impossible to answer the question of what justice is. All attempts end in empty formula such as: 'do good and avoid evil'. For Kelsen, even the Kantian categorical imperative is without content. Justice is a matter of will and action and cannot be forced into a scientific act of cognition without denaturing a matter by forcing into a logical scheme an object which is alien to logic. Rational cognition can only see that conflicts of interest and justice as an absolute value is irrational: that is, the absolute claims of justice lie beyond all experience. In actual experience claims of justice express themselves in ideology. All ideology has its roots in will, not in cognition, stemming from interests. Cognition rends the veil that will, through ideology, draws over things (15–19).

External to the confusion of conflicting human interests Kelsen imposes the concept of legal imputation. This involves understanding the legal norm as a hypothetical judgment that expresses the specific linking of a conditioning material fact with a conditioned consequence (23). This category of the law has a purely formal character in that it remains applicable whatever the content of the material facts so linked, and whatever the type of acts to be understood as law (25). The final stage in this reasoning is to assert that what makes certain human behaviour illegal is neither some sort of immanent quality nor some sort of connection to a metalegal norm or moral value, but solely that this behaviour is set in the reconstructed legal norm as the condition of a specific consequence, that the positive legal system responds to this behaviour with a coercive act (26). This empirical approach avoids identifying law in terms of an intuitive correspondence with an idea of right, which Kelsen takes to be a return to the exploded metaphysics of natural law or of a divine order (28).

The great appeal of Kelsen's approach, apart from its razor-sharp nihilism, is that it can be presented as a technique, and thereby offer the allure of professionalism. The formality of the approach allows its adaptation to any social purpose whatever, as the

⁶ H. Kelsen, *Introduction to the Problems of Legal Theory* (1934, transl. B.L. Paulson and S. Paulson, 1992), at 2. Further page references will be in the text.

law is characterized not as an end but as a specific means. The law is a coercive apparatus having in and of itself no political or ethical value, whose value depends on ends that transcend the law as a means. The law is indifferent to the connection between the social technique of a coercive system and a societal state of affairs to be maintained by way of that technique (31).

Kelsen's attack upon the state has to be seen as an integral and even subordinate part of his attack upon what he calls the ideology of subjective right. Kelsen objects to any idea that a subject can confer to itself rights before an objective legal order does so, rights being, in any case, understood as exclusive property rights. The person is, as a word, anthropomorphic, while for the law it can only mean an expression for the unity of a bundle of legal obligations and rights. The law does not deal directly with biogenico-psychological concepts but only with particular human acts as obligations or rights. The physical person is the common point of imputation, the subject who does or forebears, with or without which a sanction will be applied against it (40–49). The law merely establishes legal connections between material facts of human behaviour (52).

Kelsen is interested in the concept of legal system as such. If a plurality of norms can be traced back to a single norm as the ultimate basis of validity, there is unity (55). The uniqueness of law is that it creates itself, so that it is a legal norm that governs the process whereby another legal norm is created (63). In this sense there is a hierarchy of norms and the unity consists in the chain (64). The Pure Theory relativizes the distinction between public and private law, where in practice all that can be said of the two is that the activity of the legislature is subject to fewer restraints than that of the courts or of contracting individuals, who are at the bottom of the hierarchy of norm-delegation (94–95). The supposed distinction between public and private law still supposes the state as prior to the law which it gives itself (as the private subject was also supposed to be prior to the objective law). In fact, the state is a word to cover a coercive legal system which establishes certain organs for creating and applying the norms of the legal system (99). The state is merely a system of legally particular functions (101). The so-called elements of the state, state power, state territory and citizenry, are simply the validity of the state system as such, along with the territorial and personal spheres of validity of the system (104). However, the international legal system is insufficiently centralized to be considered a state (100). In this vital statement Kelsen recognizes the hypothetical character of international law. He wishes to define what it *would mean* to say that international law is law.

It is the relation of the state to international law, in Kelsen's theory, that has attracted the particular subsequent criticism which will be highlighted later in this short essay. Law has to have a hierarchical structure for Kelsen because he opts for structures of coercion rather than intrinsic content as the distinguishing mark of law. This creates serious problems for international lawyers who have been content to insist that some of the rules of international society are regarded as law. They may not be enforceable against states but this does not matter as they are usually observed anyway. Such is not enough for Kelsen's idea of law. Since law's structure has to be hierarchical, Kelsen has to speak conditionally about international law. If one

recognizes that it is positive international law that accomplishes the coordination of legal systems and the reciprocal separation of their spheres of validity, then one must conceive of international law as a legal system above state legal systems, assuring the unity of law (71). Yet international law has to legitimize power that is actually establishing itself and it then authorizes the coercive system set up by this power, in so far as it becomes effective. The coercive system directly under international law is to be regarded, in terms of international law, as a legitimate, binding legal system (61).

Here is a weakness in Kelsen's thought to which his critics (see later in this essay) will draw attention. Kelsen simply displaces the meta-judicial power of the state from constitutional to international law. Since all law rests on a series of norms of imputation which are backed by sanctions, international law must also have such a structure. Yet Kelsen recognizes quite openly that the international legal system allows states to be judges in their own cause on matters of sanction (i.e. as in 1934) (108–109). While there is no world state the only direction possible, in Kelsen's opinion, and for which there is mounting pressure, is increasing centralization. Legal technique is then concerned to diagnose measures of progress. For Kelsen the epistemological requirement that all law be considered one system pushes in the same direction (111). As a matter of logic two systems can only be unified if one is subordinate to the other because the basis of its validity is found in the other. Coordinate systems suppose a third higher order system that governs the creation of the others, determining an element of the content of a lower level norm by a higher one. 'Here one speaks of delegation; and the unity comprising the linked higher- and lower-order systems has the character of a chain of delegation' (113).

Again an anti-subjectivism determines Kelsen's rejection of the possibility, which exists logically, that one could treat all legal systems and their relations with one another as subject to one particular legal system. This would suppose the whole world as centred in a single individual, merely willed or imagined by the 'I' (116). Kelsen returns, instead, to the principle of effectiveness. When a state has established itself, international law treats it as legitimate if it is capable of securing the effectiveness of its norms. A crucial statement is the following. 'When this principle of effectiveness, this basic principle of positive international law, is applied to state legal systems, it amounts to their authorization by international law' (120). International law invests the entity with the authority to make law and also determines the spatial and temporal validity of the legal system (120). Kelsen goes on to claim that international law guarantees this framework for individual legal systems by attaching sanctions of reprisals and war if it is violated (121). The state may then be characterized as an organ of the international legal community. Here the hypothetical appears to become actual (categorical) and a contradiction emerges. In what real, i.e. effective, sense can it be said that states are such organs? For instance, in Kelsen's view, it is not really individual states which create law by making treaties. It is the international legal community which provides a norm, *pacta sunt servanda*, which treats the state treaty as a law creating material fact (122–123). The supreme attractiveness of Kelsen's system is, ironically, at an emotional level for international lawyers. His Pure Theory of Law appears to eliminate so-called state sovereignty as a nearly insurmountable

barrier confronting every technical improvement in international law, which means every effort towards further centralization of the international legal system (124). This effort is the task the profession wishes to accord to itself, a task happily understood in Kelsen's terms as a matter of legal technique, since the moral and political reality of the state is excluded from legal consideration as unscientific.

3 The Critique of Kelsen-style International Law Made by Hans Morganthau and Raymond Aron

A.

In the inter-war period Morganthau had been a student of international law publishing various works which occupied themselves closely with international law. In particular, he published in 1934 a work which considers Kelsen's theory of the state in international law. In *La Réalité des Normes en Particulier des Normes du Droit International — Fondements d'une Théorie des Normes* Morganthau makes a criticism of Kelsen's notion of an international legal constitution. He is concerned to unpack Kelsen's idea of the efficacy of the norm.

Morganthau accepts that one cannot simply observe and then denounce a divergence between norm and practice in order to defeat Kelsen's system. Nonetheless, it is still necessary to have a method to examine critically whether a normative system is effective. The system exists for Kelsen in the 'realm' of the *ought*. However, the concept of *ought* as such is only an idea, existing in the realm of thought.⁷ Morganthau does not accept this neo-Kantian epistemology of Kelsen. The *ought* can only have a psychological existence, because the ideal representation which the subjects of the norm make with respect to the content of the norm is a cause of the realization by these same subjects of the state of fact prescribed by the norm (30). The notion of validity must contain the element that, once promulgated, it will probably be implemented (48–49).

This insistence upon a *real* dimension to law informs Morganthau's critique of Kelsen's theory of the hierarchy and dependency of norms. The notion that norms enjoy validity through a process of delegation must have an empirical dimension (171). For Morganthau a juridical norm which delegates to another cedes to that other a part of its own vital strength, while for Kelsen delegation concerns merely an epistemological criterion (174–175). Yet this controversy touches acutely upon the question whether it means anything to say that international law delegates to states the validity of their legal orders. The legal order of the state takes from within the power of the state itself the reality of its normative order. It is empirically observable

⁷ *La Réalité des Normes* (1934), at 13. Further page references to this work will be in the text. See further G. Arangio-Ruiz, 'The Concept of International Law and the Theory of International Organisation', appendix to *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (1979).

that the state exercises the highest concentration of power that exists over a specific territory (176–177).

For Morgenthau normativism must include a criterion whereby one can identify whether one legal order can determine the will of another (183). How can international law penetrate state territory which is, by definition, already subject to the highest, strongest power (214)? Kelsen's theory of law should require that sanctions are above their objects. It may well be possible to say that the nature of a sanction, such as blockade or intervention, is determined by a rule of international law, but the normative determination of the means of realization remains entirely with particular states. Morgenthau states what this should mean:

Dans le cas où l'État réalise sur le territoire de l'État B des sanctions internationales directes — étant donné le critère de l'État — qui possède le plus haut degré d'efficacité empiriquement constatable sur un territoire — le droit international livre en ce cas, en dérogation aux principes généraux de l'ordre international qu'il institue, le territoire des habitants de l'État B, en tout ou en partie, à l'action des ressortissants de l'État A (225).⁸

If it might be thought that Morgenthau has become outdated he remarks as well that he would not be impressed by the news that states had acted effectively in concert under the umbrella of the Council of the League of Nations. Whatever the good will of such states their actions have still a purely state character (221). Indeed, the same criticisms of Kelsen are made by Arangio-Ruiz in the context of his reflections on the United Nations in 1979.⁹ The continued effective factual existence of the state has consequences which are crucial for the expectations which might be entertained by international lawyers about the development of international organization. Interstate compacts (treaties) are inherently unable to create an international organization. For instance, the Statute of the International Court of Justice is just one more treaty, i.e. an inter-state compact not designed to alter the system's structure by ensuring effective delegation to other organs.¹⁰ In fact 'functionalism' is rejected by Arangio-Ruiz as a misleading approach to international organizations generally as these are not the agents of an international community.¹¹

B.

Raymond Aron has also a special interest for international law because he engages closely not only with Kelsen but also with Hersch Lauterpacht who insists, as well, upon the supremacy of international law over the sovereignty of the state in his work *The Function of Law in the International Community* (1933) (see next section). When

⁸ 'Where state A executes sanctions on the territory of state B — given the criteria of statehood, i.e. possession of the most effective power over a specific territory — international law is handing over the territory of the population of state B, in whole or in part, to the action of the inhabitants of state A, in derogation of the general principles of international order which it has instituted.'

⁹ *Supra* note 7.

¹⁰ These arguments have already been enumerated in the author's *The Decay of International Law* (1986), at 16–18.

¹¹ One might explore this issue further by asking how many times the International Court of Justice simply refers the parties back to their own negotiating table after lengthy litigation before it.

Lauterpacht says that peace is a legal postulate, the principle of the unity of a legal system. Aron agrees with the idea that force cannot be employed except in the service of law. He compares this postulate with the Pure Theory of Law which also defines the legal order through the regulation of violence. Aron makes the same objection as Morgenthau, adding more graphically that diplomats and soldiers are not conscious of themselves as legal executioners of international court judgments.¹² The idea of effective legal sanction supposes that the individual state is not in a position to oppose an international police force. The United Nations action in Korea much more resembles a classical war. Under whatever authority the pro-UN states are acting, the outcome of the conflict depends on the risks of war and is most likely to be a compromise which reflects a balance of forces (710–711).

There are practical implications in regarding the state as a fact. It can close its frontiers against others, boycott whom it pleases, destabilize its neighbours, and so on. Most of all there is not agreement on the basic point of a constitutional order, the distribution of territory. The international law on this subject, the rules on the acquisition of territory, is quite banal, as the concern of the engaged political analyst is not with empty spaces. The problem to be faced is the attachment of populations to one state rather than another or the desire of a population to constitute an independent state. History offers few examples of peaceful disintegration of a national or imperial state (712–715).

What is provoking crises in international relations is the continuing dispute about the legitimacy of states. There is a collapse of the previously self-evident legitimacy of whatever was an established power, usually a military-based monarchy, in a world which is now increasingly dominated by nationalism and democracy. In the face of these real tensions, in Aron's view, the normativist approach to the state is nothing but a play on words. Kelsen and his disciples will not distinguish a juridical order and a state order, or they reduce the latter to a larger juridical order. That is, they think the concept of sovereignty is useless because, according to the Pure Theory, it means only the validity, within a certain space, of a certain system of norms. A realist approach appreciates that states are a law unto themselves and do not bow to external authority (724).

The centre of a responsible political theory of international society has to be concern with the composition of its basic political entities. For Aron these are a historical mixture of several elements. As a cultural historical nation an entity will have its own hierarchy of values and, however subjective these may be, in a democratic world they will be held onto and will lead to resistance against patterns of domination which are historical leftovers (296–299). The frontiers between allegiance based upon historic tradition and allegiance resting upon participative nationalism remain fluid and unstable. Yet even if they were resolved, in favour of the latter, states would still pursue a rivalry of their national cultures, each claiming superiority and a right to dominate (294–299).

Where does this leave international law? Aron remarks that the concepts of its

¹² R. Aron, *Paix et Guerre* (1962), at 704–705. Further pages references will be in the text.

multilateral treaty law, such as the right to self-determination of peoples, collective security, and so on, are very vague and in need of interpretation. These are formulae which require a mediation between positive law on the one side and ideologies and philosophies on the other (116), precisely the task which Kelsen wishes to deny the lawyer. One may speak of the principle *pacta sunt servanda*, but treaties represent a balance of forces, they are rarely signed freely and a stable *juridical* order is not possible unless all the parties judge it to be equitable (116).

The conclusion is easily drawn that the Pure Theory of Law is a ticket for professional irresponsibility of the international lawyer in the face of political difficulties. Kelsen clearly states that ideologies, and in particular economic and nationalist disagreements, are irrational, the cause of unpleasant emotions, etc. A scientific approach to law looks to the objectivity of a regime of sanction (coercion-based) norms. Kelsen himself admits that this leaves international law in a remarkably problematic situation. It cannot really be argued that he does not face the weaknesses of international law as an order. However, it seems that the appeal of his Pure Theory is precisely that he leaves the unpleasant work on emotions to others. To what extent might it appear that those who seem to follow him today adopt an approach which can be so harshly categorized?

4 The Reality of the Hypothetical: Or the Triumph of the International Lawyer's Will to Law

It is perhaps to play rather freely with historical chronology to treat Lauterpacht as a practical follower of Kelsen, since his already mentioned work came out in 1933. It is nonetheless the style of Lauterpacht which so clearly transforms the hypothetical Pure Theory of Law into a categorical Pure Theory. Typical of Lauterpacht's style is the following: 'The completeness of the rule of law . . . is an *a priori* assumption of every system of law, not a prescription of positive law. It is impossible, as a matter of *a priori* assumption, to conceive that it is the will of the law that its rule should break down as a result of the refusal to pronounce upon claims.'¹³ Lauterpacht says that the function of law is to maintain the peace, and the refusal of a *juridical* response is nothing but a permission to employ force. The least that one can ask of a judge is that he will forbid the use of force. Lauterpacht considers that it is a rule of customary international law that the international judge is entitled to go beyond the rules of customary and treaty law to general principles of law in order to resolve a dispute. This is implied in the enumeration of sources of international law in the statute of the Permanent Court of International Justice (66) (Article 38's reference to the general principles of law recognized by civilized nations). He interprets this article in the sense that each community can expect of the judges that they will prohibit violence (66–67). So, for Lauterpacht, judicial logic will resolve the crises of international society which preoccupy Morgenthau and Aron so much. Yet how does Lauterpacht overcome the

¹³ H. Lauterpacht, *The Function of Law in the International Community* (1933), at 64. Again, further references to this work will be given in the text.

classical doctrine of state sovereignty in legal positivism, which expressed the fact of state power?

For Lauterpacht classical positivism in international law is a negation of the rule of law in international relations because such positivism attempts to demonstrate that each state has consented to each rule, and that there are not rules which are not the product of the express will of states (67–68, 77). In international law the obligation of states to submit to judges may be imperfect, but once a submission is made, one accepts the principle which imposes on the judges the obligation to render a sentence in all circumstances (68–69). So the actual presence of an international judiciary will resolve the anarchy of international society.

How does Lauterpacht place the judiciary within the general system of international law? The thought of Lauterpacht depends upon Kelsen, although he does not explicitly acknowledge it. The crucial transition from the hypothetical to the categorical means the assured triumph of the will of the international lawyer, more particularly, of the international judge. Lauterpacht wishes to reject the idea of an international law of coordination which makes the law depend upon consent, in favour of an order which is complete. Such a vision is one of a law of subordination-command which ties states even against their will. The problem which is posed in this case is that international law does not possess a political superior. Thus how can one have a command without a commander? Here is the kernel of the search for objective validity. Yet the problem is that for Lauterpacht the idea which treats law as the psychological will of a real group is obsolete. From a juridical perspective, the state is identical to law and to talk of an opposition between state and law is only a play on words 'then there is no difficulty in accepting the view that the law may be a command merely by virtue of its external nature'. Lauterpacht goes so far as to say that there is an obligation to accept judicial settlement, since, contrary to an international legislator, the judge merely applies the existing law, the law already accepted by states. 'But from the principle that a state is objectively bound by an obligation once undertaken there follows, with inescapable logic, the juridical postulate of the obligatory rule of law through the instrumentality of courts'(420).

The influence of Kelsen — in this search for objective validity — is found also in the following assertion 'The rule *pacta sunt servanda* confronts states as an objective principle independent of their will' (149). What follows in the argument of Lauterpacht is very useful in understanding the evolution of the institutional approach to international law for which Kelsen can claim the original authorship. Yet Lauterpacht takes as given what Kelsen merely regarded as logically necessary if one were to speak scientifically of international law. Lauterpacht distinguishes himself from Kelsen, and also from Verdross, in saying that it is not important to know whether this claim for the principle *pacta sunt servanda* can be juridically verified or whether it is a rule of customary law. 'For in each case the rule [*pacta sunt servanda*] in its actual operation, confronts the state independently of its will'(419). *Pacta sunt servanda* may provoke confusions and have us still believe ourselves in the presence of a law of coordinated sovereignties. But, in fact, the *civitas maxima*, the 'Super-state of law' marks the transition from a law based on sovereign wills to a law of nations

founded upon the sovereign impersonality of law. For Lauterpacht, as for Kelsen, the organs of the international community are the states, but now the international tribunals are there to say what they want (421–422). Lauterpacht returns to the point which Aron has disputed: 'Peace is preeminently a legal postulate. Juridically it is a metaphor for the postulate of the unity of the legal system. Juridical logic inevitably leads to condemnation, as a matter of law, of anarchy and private force'(438).

5 Conclusion

In this short essay it is only possible to suggest hypotheses about the impact of Kelsen upon international law thinking. It remains important, in the absence of a magnum opus of historical research, to avoid categorical statements and conclusions concerning the exact influence of Kelsen upon subsequent international law doctrine. However, it appears that the outcome of Kelsen's thought is so well represented by Lauterpacht and in a way very far indeed from the lucidity of his arch-nihilist colleague. To take the step from asserting that lawyers can only work, in a nihilist age, with a totally instrumental view of law — as a formal system of rules effectively sanctioned — to claiming that international society furnishes such instrumentalist legal materials, through the activity of an international judiciary, is to fall prey to sheer intellectual confusion in the face of the continued presence of the brutal factual power of states. Lauterpacht represents a common belief in the profession that the international legislature, executive and judiciary are, so to speak, just around the corner. They would be the marks of what Kelsen means by saying that a state order is a mere form of words for a juridical order as such. As Hedley Bull has pointed out, this is a classical form of intellectual denial and escapism. With Lauterpacht's overstretched faith in the imminent, because so strongly willed, arrival of the international judiciary, the logic of international law simply bursts.