
Antinomies of the United Nations: Hans Kelsen and Alf Ross on the Charter

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Abstract

In Towards a Realistic Jurisprudence, Alf Ross locates his theoretical position as a via media between the 'pure theory of law' of his teacher, Hans Kelsen, and the American legal realism he identified with Jerome Frank. When Ross and Kelsen came, however, to publish their respective studies of the UN Charter in 1950 — Ross' Constitution of the United Nations and Kelsen's massive The Law of the United Nations — their perspectives converge. This article places their analysis of the UN Charter in the context of their theoretical writings, but despite Kelsen's pure theory of law and Ross' Scandinavian realism, the two share a sense of law's dependence upon sanction and an understanding of the political underpinning of law's creation. And both held a strong commitment to international law doctrine, so that when they came to criticize the Charter, whether for its logical inconsistencies or the increased role of the political, they depict the Charter as ultimately representing a legal system that takes up the space of traditional international law. In their two works, Kelsen and Ross both register a tragic concern about that disappearing act of traditional international law doctrine.

1 Introduction: Science as a Vocation and Vocation as a Science

As Chichele Professor of International Law and Diplomacy at Oxford and author of the breezy *Law of Nations*, J. L. Brierly provided the foreword to the English translation of Alf Ross' *A Textbook of International Law* in which he exoticizes Ross along the traditional Anglo-Continental divide — Ross 'brings to the writing of this book a combination of qualifications which are not often found whether in our English

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writers, a familiarity with philosophical concepts as well as a training in law.¹ Brierly then re-domesticates Ross: ‘An English reader will find, despite the novelty to him of the approach, that Professor Ross’ conclusions more often than not are the same as those which he reaches himself by his different route.’² Similarly, Trygve Lie, the UN’s first Secretary General, provided the foreword for Ross’ 1950 *Constitution of the United Nations*. Seemingly oblivious to the energetic critique in Ross’ book, Lie follows his encomium on Ross’ ‘keen analysis of the structure and functions of the Organization’ with a paragraph advertising the successes of the Charter.³ Each in his own way, Brierly and Lie softened the critical bite of Ross’ writing.

At present, Alf Ross and my other subject, Hans Kelsen, are typically located in the far theoretical reaches of legal thought and their continued life in closely defined segments of the theoretical realm does not always ensure continued vitality. There is something (particularly in the Anglo-American legal tradition) that quickly removes dead legal theorists to a dusty attic. Frederick Schauer and Virginia White’s discussion of legal positivism identifies ‘Scandinavian Realism’ in which Ross was a major participant as one of the ‘legal theories surviving only in the museums of jurisprudential archeology’,⁴ and David Kennedy similarly describes the standard view of Kelsen as ‘a leftover European philosopher’.⁵ If Kelsen and Ross are embedded in a hypertheoretical space, one of ‘pure theory of law’ for Kelsen and ‘Scandinavian realism’ for Ross, it is interesting to see these two supposed hypertheorists turn to such a mundane, politically negotiated document as the UN Charter.

Both Kelsen and Ross are described in various places as ‘positivists’ and ‘realists’. These monikers tend not to be very helpful. I am often drawn to Arthur O. Lovejoy’s thirty ‘Romanticisms’ or his essay on the thirteen ‘pragmatisms’ in which he asked whether ‘[i]t is perhaps not too much to attach some single and stable meaning to the term.’⁶ John Bix writing on H. L. A. Hart adopted Austin’s definition of ‘positivism’ as a useful definition for positivism more broadly:

The existence of the law is one thing; its merit or demerit is another. Whether it be or not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.⁷

¹ A. Ross, *A Textbook of International Law* (1947), at 9.

² *Ibid.*

³ Lie writes: ‘With the completion of the fourth year of United Nations activity it may be said that the Charter has furnished an adequate framework for the functioning of the Organization. The Charter is proving itself a living instrument under which increasingly complex and varied activities in the international sphere are being inaugurated and carried forward.’ A. Ross, *Constitution of the United Nations: Analysis of Structure and Function* (1950), at 5.

⁴ Schauer and Wise, ‘Symposium: Legal Positivism as Legal Information’, 82 *Cornell Law Review* (1997), at 1080, 1081.

⁵ Kennedy, ‘Symposium: The International Style in Postwar Law and Policy’, 7 *Utah L. Rev.* (1994), at 21. Significantly, neither Kelsen nor Ross appear in the index of Rawls’ *A Theory of Justice* despite the half a column of citations devoted to Kant, and neither appears in the index of Ronald Dworkin’s *Law’s Empire*.

⁶ A. O. Lovejoy, ‘The Thirteen Pragmatisms’, in A. O. Lovejoy, *The Thirteen Pragmatisms and Other Essays* (1963), at 1, reprinted from 5 *Journal of Philosophy* (1908), at 5–12.

⁷ Bix, ‘H. L. A. Hart and the Hermeneutic Turn in Legal Theory’, 52 *SMU Law Review* (1999), at 169.

Nevertheless, Bix observes that ‘John Austin’s austere command theory bears little resemblance to Hans Kelsen’s neo-Kantian theory, and both are quite different from H. L. A. Hart’s work.’⁸ In essence, there is speciation within the genus. But, to go to the very definition borrowed from Austin, there are also differences in what constitutes ‘law’ (e.g., whether it includes custom à la Maine and Kelsen), which ultimately destabilize any effort to use Austin’s definition. Nevertheless, I believe that Kelsen and Ross — despite their supposed pure theory/Scandinavian realism divide — share enough of a sanction, rather than a command, of theory of law, and both have a strong enough sense of historical and political contingency, that Ross’ attacks on Kelsen may be touched by oedipal exaggeration and suggest an ‘anxiety of influence’.

Kelsen is famous for the creation of a ‘pure theory of law’ separating the ‘is’ from the ‘ought’ (‘Sein’ from ‘Sollen’) drawing on the neo-Kantian separation as well as neo-Kantian propounding of a cognitive structure to the various human sciences. His distinction of science from both politics and morality is a close relative of Weber’s famous ‘Science as a Vocation’.⁹ In the Sein/Sollen distinction, Kelsen, however, wanted to establish that a science of law focused on ‘Sollen’ as its subject, and he would follow the various norms of the legal system up to a ‘basic norm’. There have been attempts to situate Kelsen’s attraction to the *Grundnorm* in the complexity of the Austrian dual monarchy, the intellectual atmosphere of turn-of-the-century Vienna, and the like,¹⁰ yet Kelsen’s work transformed over decades of active scholarship, even if he retained some of his earliest touchstones. Nevertheless, articles on Kelsen’s international law published in a symposium in the *European Journal of International Law* as well as Martti Koskenniemi’s *The Gentle Civilizer of Nations* focus primarily on *Das Problem der Souveränität* published in 1920¹¹ as if Kelsen had little more of interest to say on international law; the Kelsen who could write *Collective Security under International Law* for the US Naval War College in the 1950s is nowhere in sight. I would like, then, to analyse Kelsen’s *The Law of the United Nations*¹² in the context of his work as it developed in the 1930s and 1940s and how the interweaving references to law, constitution, politics, and morality shift in his confrontation with the ambitious attempt at international organization after the Second World War.

Similarly, his student Alf Ross, who taught at the University of Copenhagen, is known mostly for his Scandinavian realism and ties to the Swedish philosopher Axel Hägerström. There is little of the Ross who wrote *Why Democracy?* in 1952 as an argument that social democracy provides an answer to the Soviets in the Cold War. In the final paragraph of *Why Democracy?* Ross writes:

⁸ *Ibid.*

⁹ See also Weber’s series of earlier essays written between 1903 and 1917 that were collated in M. Weber, *The Methodology of the Social Sciences* (ed. and trans. Edward A. Shils and Henry A. Finch, 1949).

¹⁰ See, e.g. Jabloner, ‘Kelsen and His Circle: The Viennese Years’ 9/2 *EJIL* (1998), citing R. A. Métall, *Hans Kelsen: Leben und Werk* (1969), at 42.

¹¹ See 9 *EJIL* (1998) H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920). M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (2002), at 238–249.

¹² H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950).

The fight for democracy thus goes on at once in the moral, the legal, and the economic spheres. These three are intimately interconnected. The struggle occurs every day on all fronts. It is the greatest drama of our time. We are all equally responsible for its outcome. It is not only our freedom that is at stake, but also the dream of a happier and more righteous society.¹³

Thus, when we read Ross' own 1950 UN Charter book, we not only need to read it in terms of his attempt to resolve the antinomies of legal theory, including direct criticism of Kelsen's 'pure theory of law', but we also have to remember that *Constitution of the United Nations* appeared only two years before *Why Democracy?*¹⁴

From Axel Hägerström's analysis of Roman law, Ross acquired an interest in the mythological underpinnings of law, which found particular prominence in *Towards a Realistic Jurisprudence* of 1946.¹⁵ Mythical, religious, and psychological sources are central to Ross' legal analysis — an analysis of vocation becomes his profession. And he will return in the mid-1960s book on the politics of the UN to the psychological and mystical factors that create a 'sense of community' of nations and assert that national state loyalties cannot merely 'be altered through the mere desire to sever this bond by "establishing" a world state'.¹⁶ Against talk of "transferring" sovereignty to a world authority', he warns that that could 'only happen when conditions are ripe, in other words, when the peoples concerned are psychologically prepared for it by their historical development'.¹⁷ But the psychological and anthropological commitments of *Towards a Realistic Jurisprudence* are only vaguely connected to his later return to psychology. Where Ross in the second UN book tried to establish the growth of community out of the 'circular interplay between validity and effectiveness, right and might' of *Towards a Realistic Jurisprudence*,¹⁸ this communal growth was not as explicit in *Towards a Realistic Jurisprudence* as he later tried to suggest.

Despite Kelsen's identity as the pure theorist of law and Ross as the Scandinavian realist and Ross' sharp critique of Kelsen, they share a sense of law's dependence upon sanction and an understanding of the political underpinning of law's creation. The also shared a strong personal commitment to international law doctrine. When they take up the task of criticizing the UN Charter, whether for its logical inconsistencies or the displacement of law by politics, their books seem to suggest that the UN Charter is a *legal* system that somehow took over the space of traditional international law. When Kelsen refers to 'general international law', that general international law seems marginalized. And international law in Ross' book, despite numerous references to his *Textbook in International Law* published a year earlier, seems pushed to the edges, if somewhat more openly than for Kelsen. Their two books register a concern in 1950 about the disappearing act of traditional international law.

¹³ A. Ross, *Why Democracy?* (1952), at 249.

¹⁴ Ross writes in his preface that *Why Democracy?* 'came about due to the impressions I had of the German occupation of Denmark'. *Ibid.*, at v.

¹⁵ A. Ross, *Towards a Realistic Jurisprudence: A Criticism of the Dualism in Law* (1946).

¹⁶ A. Ross, *The United Nations: Peace and Progress* (1966), at 270.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, at 273.

2 Hans Kelsen's Separate Discourses and the Law of the United Nations

A *Trace Faults in the Grundnorm*

David Kennedy, in his provocative portrayal of Kelsen as the missed chance of a modern pragmatic path for international law in the US,¹⁹ depicts Kelsen's 1941 Holmes Lectures at Harvard Law School²⁰ as 'refreshingly contemporary'.²¹ In contrast to his rediscovered Kelsen, Kennedy describes an American reception in which 'Kelsen has come to be treated as a leftover European philosopher who could never quite get with the program in the United States after the war, and is remembered as much for his tin ear toward specific international legal issues as for his old worldly philosophical arguments.'²² Significantly, Kennedy, 'for early criticisms in this mode', points in his footnote to three reviews of *The Law of the United Nations*.²³ Oscar Schachter disparages 'Kelsen's rigid analysis',²⁴ Louis Sohn complains that Kelsen 'is seldom concerned with finding an interpretation which will remove the difficulties and facilitate the working of the United Nations',²⁵ and A. H. Feller asserts that the 'real importance of this effort seems dubious'.²⁶

Nevertheless, for the three reviewers, Kelsen's book is not of the dry-as-dust irrelevancy that Kennedy suggests but a real challenge. Schachter describes the reviewer's 'special obligation to review it critically' for the very reason that 'the book may exert a significant influence on developments in the United Nations',²⁷ and he tells us of the irony that 'this non-political study thrust almost immediately after publication into the political arena of the United Nations'.²⁸ Sohn also relates that the book 'has already been used in official meetings of the United Nations and both those who wish to thwart the aims of the Organization and those who try to strengthen it must take this work into account in the preparation of their legal arguments'.²⁹ For him, Kelsen's book could be injurious to the United Nations: 'There is no doubt that his scalpel is sharp and that the hand that guides it is sure and strong. But unlike his *post*

¹⁹ Kennedy asserts that had Kelsen's 'strategy succeeded, or had his supporters been right, Kelsen might have become America's first post-war international pragmatist, bringing realism and interdisciplinarity and rigorous theoretical sophistication to the international law field.' Kennedy, 'Symposium', *supra* note 5, at 33.

²⁰ H. Kelsen, *Law and Peace in International Relations: The Oliver Holmes Lectures, 1940–41* (1942).

²¹ Kennedy, *Symposium*, *supra* note 5, at 22.

²² *Ibid.*, at 21.

²³ *Ibid.*, at 26. A. H. Feller, 'Book Review', 51 *Columbia Law Review* (1951), at 537; Schachter, 'Book Review', 60 *Yale Law Journal* (1951), at 189; Sohn, 'Book Review', 64 *Harvard Law Review* (1951), at 517.

²⁴ Schachter, *supra* note 23, at 192.

²⁵ Sohn, *supra* note 23, at 518.

²⁶ Feller, *supra* note 23, at 538.

²⁷ Schachter, *supra* note 23, at 190.

²⁸ *Ibid.*, at 189.

²⁹ Sohn, *supra* note 23, at 518–19.

mortem of the League, this time he is damaging living tissue.³⁰ Feller, from his post as General Counsel and Director of the UN Legal Department, worries whether Kelsen's contributions 'are worth the damage done to the fundamental conception of the Charter as a living instrument to guide the conduct of international life.'³¹ Sohn's reference to a 'stimulating point of departure' may have the ring of an obligatory tribute to a theorist of Kelsen's stature, but all the worries about the 'damage' Kelsen could cause suggest that the large book with its 'forbidding price'³² exerted real power in the early discussion of the law of the UN.

Kelsen gained his reputation from his advocacy of a 'Pure Theory of Law' beginning with his *Habilitationsschrift* in 1911.³³ William Ebenstein sets Kelsen's work in a detailed discussion of turn-of-the-century neo-Kantianism.³⁴ Indeed, Ebenstein argues that 'the Pure Theory of Law consciously follows in the steps of Ernst Cassirer, whose now classic work, *Substance and Function* (1910) initiated the trend in philosophy which sought a critical solution to the fundamental problem of substance and function', and while Cassirer turned substance into function, Kelsen adapted 'to his own field this transformation of the ontological concept of substance into a relationship concept'.³⁵ Neo-Kantianism sought the scientific logic of the human sciences. In this vein, Kelsen worked to establish the peculiar logic of law separate from politics and morality.

As Max Weber in his famous *Wissenschaft als Beruf* distinguished his science from politics, Kelsen separated legal science from politics. Stanley Paulson explains that Kelsen identified legal science as a science of norms separate from the factual world.³⁶ Kelsen was also vehement in distinguishing law and morality. In this, he drew from the nineteenth-century positivist tradition, particularly late German legal theorists like Gerber, Laband, and Jellinek. Stanley Paulson describes this as the 'separability thesis' and asserts that 'Kelsen sees himself as a champion of legal positivism, defends the separability thesis with a vengeance, and readily acknowledges his debt to the juridico-positivist tradition.'³⁷ Legal science was then simultaneously divorced from

³⁰ *Ibid.*, at 518.

³¹ Feller, *supra* note 23, at 539–539.

³² Sohn, *supra* note 23, at 519.

³³ H. Kelsen, *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze* (1911). On Kelsen's *Habilitation*, see P. C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (1997), at 4, 41; see also W. Ebenstein, *The Pure Theory of Law* (1969; originally 1945), at 6, and M. Stolleis, *Public Law in Germany, 1800–1914* (2001), at 443.

³⁴ Stanley Paulson ties him to the Marburg neo-Kantians but perhaps more closely to the Heidelberg neo-Kantians, such as Wilhelm Windelband in his discussion of cognition as 'normative' or 'causal'. Paulson, 'Introduction', in H. Kelsen, *Introduction to the Problems of Legal Theory* (trans. Bonnie Litschewski Paulson and Stanley L. Paulson, 1992; originally 1934), at xli.

³⁵ W. Ebenstein, *The Pure Theory of Law* (1969; originally 1945), at 30.

³⁶ Paulson, in fact, provides a four-fold grid dividing law from fact horizontally and law from morality vertically. Paulson, 'Introduction', *supra* note 34, at xxvi.

³⁷ *Ibid.*, at vii; and quoting Kelsen, *Allgemeine Staatslehre*, preface at vii ('I see, more clearly than before, how very much my own work rests on that of my predecessors . . . Karl Friedrich von Gerber, Paul Laband, and Goerg Jellinek.'). *Ibid.*, at vii.

the moral certainties of natural law and the mundane facts of the political world. Ultimately, Kelsen wanted a ‘restriction of legal science to its object of cognition’.³⁸

In defining sovereignty, Kelsen moved away from pure recognition of power. As he stated in the *General Theory of Law and State*, his 1945 English-language summary of earlier work, ‘[o]nly a normative order can be “sovereign”, that is to say, a supreme authority, the ultimate reason for the validity of norms which one individual is authorized to issue as “commands” and other individuals are obliged to obey. Physical power, a mere natural phenomenon, can never be “sovereign” in the proper sense of the word.’³⁹ Similarly, he asserted in *Introduction to Problems of Legal Theory*: ‘All of the external displays in which one traditionally perceives the power of the state — the prisons and fortresses, the gallows and machine guns — all of these are in and of themselves lifeless objects. They become tools of state power only in so far as human beings make use of them in accordance with a certain system.’⁴⁰ This feeds into his critique of a dualism between state and law, to the ‘familiar mistake of doubling the object of cognition’,⁴¹ and Kelsen is clear that ‘[t]he state, then, is a legal system’.⁴²

Kelsen’s unitary legal system involves his famous hierarchy of norms, so he is impatient with any suggestion that an ‘unconstitutional statute’ could give lie to that unity. He explains that ‘[t]he expression “unconstitutional statute”, applied to a statute which is considered to be valid, is a contradiction in terms.’⁴³ What is not understood is that ‘[a]s long as a statute has not been annulled, it is “constitutional” and not “unconstitutional”, in the sense that it contradicts the constitution.’⁴⁴ The ‘so-called “unconstitutional” law is not void *ab initio*, it is only voidable.’⁴⁵ The recurring motif of the ‘unconstitutional statute’ is tied to Kelsen’s core argument that ‘[a] plurality of norms forms a unity, a system, an order, if the validity of the norms can be traced back to a single norm as the ultimate basis of validity.’⁴⁶ This is Kelsen’s famous *Grundnorm* and the centrepiece of the legal system. Indeed, norms — despite the proximity of law to moral values — ‘are not valid by virtue of their content’.⁴⁷ Rather, a ‘norm is valid *qua* legal norm only because it was arrived at in a certain way — created according to a certain rule, issued or set according to a specific method.’⁴⁸ In short, the ‘basic norm of a positive legal system . . . is simply the basic rule according to which norms of the legal system are created; it is simply the setting into place of the basic material fact of law creation.’⁴⁹

Martti Koskenniemi has argued that ‘[d]espite the critical bite of Kelsen’s

³⁸ Kelsen, *Introduction*, *supra* note 34, at 35.

³⁹ H. Kelsen, *General Theory of Law and State* (trans. Anders Wedberg 1945), at 383.

⁴⁰ Kelsen, *Introduction*, *supra* note 34, 104.

⁴¹ *Ibid.*, at 105.

⁴² *Ibid.*, at 99.

⁴³ Kelsen, *supra* note 39, at 155.

⁴⁴ *Ibid.*, at 157.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, at 55.

⁴⁷ *Ibid.*, at 56.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

arguments, they still emanate from nineteenth-century German legal thought: academic, system oriented, and neurotically concerned over its status as *Wissenschaft*.⁵⁰ Kelsen's formalism and relativism often positions him as part of the problem, contributing to the defenselessness of the Weimar Republic, so that Peter Caldwell, in his book on Weimar legal thought, could write that 'Kelsen's theory provided no means for depriving Papen's or Hitler's robber band of its claim to promulgate valid law.'⁵¹ Nevertheless, Kelsen saw his own project as critical and insisted that the 'ideological character of traditional legal theory, the theory assailed by the Pure Theory of Law, is apparent in the familiar definition of the concept of law. Traditional theory even today is under the influence of conservative natural law theory, with, as mentioned above, its transcendent concept of law.'⁵² His formalism was political in its critique of traditional modalities.

Despite Kelsen's distancing of law from politics, we are reminded that he was asked by the Social Democratic chancellor of the Austrian government to draft Austria's constitution in 1918, and, as Caldwell points out, 'he published articles and pamphlets that defended a tolerant, party-based parliamentary system open to proposals of Social Democracy.'⁵³ One of the pamphlets Caldwell cites is the book-length *Vom Wesen und Wert der Demokratie*, in which Kelsen writes of parliamentary reform that would strengthen democracy — 'das demokratische Element wider zu stärken'.⁵⁴ There may be no sharp divide between *Vom Wesen und Wert der Demokratie* and Kelsen's theoretical works, which appear in its footnotes.⁵⁵ In the book's final footnote, he turns to Kant and explains that despite the critical nature of Kant's idealism, it is in the final analysis positivistic — 'Gerade der Kantsche Idealismus ist schon kraft seines durchaus kritischen Charakters positivistisch.'⁵⁶ Clearly, if Kelsen's democracy book turns to Kant's 'kritische system der reinen Vernunft', Kelsen's politics bridge to his pure theory.

Another important act of bridging is Kelsen's treatment of international law, particularly in his writings of the 1930s and 1940s. Kelsen ends the *Introduction to the Problems of the Theory of Law* in 1934 with a section on 'The State and International Law'. As he does elsewhere, he sets out a claim for international law as law because of its coercive character.⁵⁷ And rather than pose treaty and custom as separate 'sources' of international law along traditional lines, he locates them at two different levels of

⁵⁰ Koskenniemi, *supra* note 11, at 349.

⁵¹ Caldwell, *supra* note 33, at 117.

⁵² Kelsen, *Introduction*, *supra* note 34, at 23. It is important also to note the politics of Kelsen's critiques of the Historical School.

⁵³ Caldwell, *supra* note 33, at 86–87.

⁵⁴ H. Kelsen, *Vom Wesen und Wert der Demokratie* (2d ed. 1929; originally 1920), at 38.

⁵⁵ See, e.g. *Ibid.*, at 112, n 24 ('Vgl. meine Hauptprobleme der Staatsrechtslehre, 2. Aufl. 1925, S. 97 ff. und Allgemeine Staatslehre, S. 65 ff.').

⁵⁶ *Ibid.*, at 118–119, n 44.

⁵⁷ 'International law exhibits the same character as the law of individual states. Like the latter, it is a coercive system.' Kelsen, *Introduction*, *supra* note 34, at 108.

normative hierarchy.⁵⁸ Kelsen devotes the bulk of the section to the relation between international and state law, which he begins by attacking any attempt to see them as separate systems. For him, ‘this dualistic construction — better characterized as “pluralistic”, considering the multiplicity of state systems — is not tenable even on purely logical grounds if the norms of international law as well as those of the state legal system are to be viewed as simultaneously valid norms, and indeed, if the norms of both alike are to be viewed as legal norms.’⁵⁹ After disposing of ‘norm contrariety’ along the lines of the ‘unconstitutional statute’, he asserts the primacy of international law and attacks the ‘dogma of sovereignty’.⁶⁰ For him, the ‘theoretical dissolution of the dogma of sovereignty, the principal instrument of imperialistic ideology directed against international law, is one of the most substantial achievements of the Pure Theory of Law.’⁶¹ Here he defends against any suggestion of theoretical impurity and asserts that ‘the possibility of political import cannot besmirch the purity of the Pure Theory.’⁶² But from Geneva, the capital of internationalism, he ends by confirming that the ‘Pure Theory of Law, because it secures the cognitive unity of all law by relativizing the concept of the state, creates a presupposition not without significance for the organizational unity of a centralized system of world law.’⁶³

Kelsen’s *General Theory of State and Law* goes over much the same ground, rehearsing the claim for international law as law⁶⁴ and devoting more space to his assault on the ‘pluralistic theory’. But rather than a simple attack on the myth of state sovereignty, he posits two alternative ‘hypotheses’ of monistic theories in which either the national or international takes precedence, and he ends on the political choice driven either by nationalism/imperialism or by internationalism/pacifism with an unstated assumption in 1945 that the choice was simple.

Kelsen’s *Peace Through Law* of 1944 seems to have little left of the pure theory. For David Kennedy, the book ‘situated itself explicitly in Woodrow Wilson’s progressive

⁵⁸ ‘Since the basis of particular international treaty law is a norm belonging to the group of norms of general international customary law, the relation between the two is a relation between lower and higher hierarchical levels.’ *Ibid.*, at 107.

⁵⁹ *Ibid.*, at 111.

⁶⁰ ‘The Pure Theory of Law relativizes the state. And by recognizing the state as an intermediate level of the law, the Pure Theory discerns that a continuous sequence of legal structures, gradually merging into one another, leads from the universal legal community of international law, encompassing all states, to the legal communities incorporated into the state.’ *Ibid.*, at 124.

⁶¹ *Ibid.*

⁶² *Ibid.* He goes so far as to counter that ‘[e]ven the exact natural sciences, which alone make technical progress possible, do so without intending it . . .’ *Ibid.*

⁶³ *Ibid.*, at 124–25. Kelsen lived in Geneva from 1933 to 1940. See the biographical outline, Appendix to Kelsen, *Introduction*, *supra* note 34, at 139–143.

⁶⁴ ‘International law is law in this sense if the coercive act of a State, the forcible interference of a State in the sphere of interests of another, is permitted only as a reaction against a delict, and the employment of force to any other end is forbidden, if the coercive act undertaken as a reaction against a delict can be interpreted as a reaction of the international legal community.’ Kelsen, *General Theory*, *supra* note 39, at 328.

tradition, and was something of a blue print for the United Nations'.⁶⁵ It is largely a proposal for international order with compulsory international adjudication at its center.⁶⁶ The harder task may be to find the advocate of pure theory. He is there at the book's opening definition of international law as a coercive order rather like a primitive legal community with its reliance on 'self-help'⁶⁷ and in the denial of a boundary between national and international law. The clear definition of law is familiar as well as the impatience with 'gap' theories of law-making. Still, the *Grundnorm* seems to have fallen by the wayside and, as it turns out, 'it is difficult to prevent an international court endowed with compulsory jurisdiction from applying other norms than those of positive international law.'⁶⁸

Despite his notions of law and morality as separate realms, Kelsen stated in his *Introduction to the Problems of the Theory of Law* that 'law is a coercive apparatus having in and of itself no political or ethical value, a coercive apparatus whose value depends, rather, on ends that transcend the law *qua* means.'⁶⁹ Law as 'means' is at the core of his book on the League Covenant, *Legal Technique in International Law*.⁷⁰ There he states that the 'system of norms which constitutes the statute of the League of Nations must aid in the realization of the objective indicated in the Preamble, that is to say, in promoting international co-operation and in achieving international peace and security.'⁷¹

Even with a view of the Covenant as means to an end, Kelsen criticized any attempt to interpret it politically: 'One might qualify as merely political those instruments which are the source of no obligation, i.e., which do not institute rights and duties of a legal nature.'⁷² Yet with his stated 'juridico-technical' approach, Kelsen asserts that there is 'no such thing as a specifically juridical interpretation'⁷³ and widens the act of interpretation: 'All which has an intelligible content, each fact which "signifies" something is susceptible of interpretation. This applies to a literary or an artistic work as well as to a law, an international treaty or moral canon. One interprets the Bible as well as Shakespeare, primitive paintings as well as Goya.'⁷⁴ For Kelsen, '[i]f the meaning of an object is expressed in words, whatever may be the species to which the object belongs, one has the choice of two methods of interpretation. In law these are

⁶⁵ Kennedy, *supra* note 5, at 33, citing H. Kelsen, *Peace Through Law* (1944) vii–ix.

⁶⁶ 'Consequently, the next step on which our efforts must be concentrated is to bring about an international treaty concluded by as many States as possible, victors as well as vanquished, establishing an international court endowed with compulsory jurisdiction.' Kelsen, *supra* note 65, at 13.

⁶⁷ *Ibid.*, at 3–4, 22.

⁶⁸ *Ibid.*, at 45.

⁶⁹ Kelsen, *Introduction*, *supra* note 34, at 31.

⁷⁰ Kelsen, *Legal Technique in International Law: A Textual Critique of the League Covenant*, 10/6 *Geneva Studies* (Dec. 1939).

⁷¹ *Ibid.*, at 9. Kelsen goes on to state: 'Certainly the statute of the League of Nations is a political instrument. But this political character has no effect on its 'legal' quality, which results from the manner in which it was established and from its contents, whereas its political character is determined by the end which the statute serves as a legal instrument.' *Ibid.*, at 10.

⁷² *Ibid.*, at 8.

⁷³ *Ibid.*, at 12.

⁷⁴ *Ibid.*

called the historical and the logico-grammatical methods.⁷⁵ The neo-Kantian makes no attempt to differentiate a separate method of legal interpretation from that of the Romance philologist.⁷⁶ Moreover, he asserts that ‘the duality of methods of interpretation makes a duality of meanings possible.’⁷⁷ A ‘scientific interpretation’ results in identifying *possible* meanings. Still, by the end of his introduction, Kelsen focuses on the ‘technical defects’ of the Covenant that could ‘cause misunderstandings and consequently difficulties which it would be preferable to avoid’,⁷⁸ and he concludes that it ‘is time to free it from these defects and to give the most important of all international documents a text which is correct from the juridico-technical point of view.’⁷⁹ He thus launches into an article-by-article critique, focusing on vagaries and inconsistencies, often proposing amended language. Again, he shows impatience with formulations that do not create legal rights or duties but merely express political values.⁸⁰ Thus, despite the introduction’s suggestion of interpretative pluralism and the identity of all textual interpretation, Kelsen remains stubborn on restricting legal texts to the creation of legal rights and duties and emphasizes clearness of expression because, in the end, he worries that the drafters did not adequately marshal legal technique.

B Kelsen’s The Law of the United Nations

Approximately a decade after Kelsen’s study of the League Covenant appeared in *Geneva Studies*, Kelsen’s UN Charter book appeared. In addition to the ‘forbidding price’ noted by Louis Sohn, it was remarkable for the sheer bulk of its 900 crammed, small-type pages. This was an intimidatingly large book on an intimidatingly large topic. Other books preceded his, including the first edition of Leland Goodrich and Edvard Hambro’s *Charter of the United Nations* in 1946, Lazare Kopelmanas’s *L’Organisation des Nations Unies* in 1947, and Herbert Vere Evatt’s *The United Nations* in 1948. But Kelsen’s represented the direct interaction of one mind with the Charter, the Statute of the International Court of Justice, and a range of official documents from official publications as well as transcripts of the founding conferences. The first reference to a secondary source I found in Kelsen’s book is a reference on page 111 to

⁷⁵ *Ibid.*

⁷⁶ This is, of course, odd in the context of the proliferation of methodologies in the humanities. In art history, one thinks, for example, of the emergence of various formalist and contextualist methodologies, such as the growth of iconology out of Bibliothek Warburg in Hamburg. Similarly, in Romance philology, referenced in my text, there was a splintering of approaches that would lead, among many others, to the wartime studies of Leo Spitzer’s ‘stylistics’, Erich Auerbach’s analysis of ‘levels of style’, and Ernst Robert Curtius’ analysis of rhetorical ‘topoi’. On Curtius’s topoi, see my discussion in Landauer, ‘Ernst Robert Curtius and the Topos of the Literary Critic’, in R. H. Bloch and S. G. Nichols, *Medievalism and the Modernist Temper* (1996), at 334–354.

⁷⁷ Kelsen, *supra* note 70, at 12.

⁷⁸ *Ibid.*, at 23.

⁷⁹ *Ibid.*, at 24.

⁸⁰ For example, he does when addresses Article 22 on the Mandate system: ‘As it is drafted this article resembles a dissertation on the Mandate system rather than a legal regulation thereof. It contains a host of details having no legal meaning: motives of the legislator, ideological justifications, political judgments, etc.’ *Ibid.*, at 157.

his own study of the League Covenant. In addition to a footnote referencing another of his studies, *Peace Through Law*, on page 469, the only other secondary source I located in the notes was Lasa Oppenheim's *International Law* in support of his discussion of the international law concept of *clausula rebus sic stantibus* — unless one includes his resort on page 359 to *Webster's New International Dictionary of the English Language* to confirm the similarity of meaning of the words 'adjustment' and 'settlement'. Kelsen was our sole guide, even adopting an odd third person singular 'he' in his preface.

In the short 'Preface on Interpretation', Kelsen announced in a sentence, quoted by Schachter and Sohn: 'This book is a juristic — not a political — approach to the problems of the United Nations.'⁸¹ And he positioned law, as in the Covenant study, as a means to a political end: 'Separation of law from politics in the presentation of national or international problems is possible in so far as law is not an end in itself but a means or, what amounts to the same, a specific social technique for the achievement of ends determined by politics.'⁸² Kelsen refers to 'technique', 'technical', and 'technician' all in the second paragraph of his preface. For him, it is 'not superfluous to remind the lawyer that as a "jurist" he is but a technician whose most important task is to assist the law-maker in the adequate formulation of legal norms.'⁸³ Kelsen uses the term 'technique' both to refer to the creation of law by the legislator — 'The ambiguity of the legal term moreover is sometimes not the involuntary effect of its unsatisfactory wording but a technique intentionally employed by the legislator' — and to the act of interpretation by the lawyer as technical advisor.

Departing from his flattening of the interpretative act in *The Technique of International Law*, Kelsen is interested not only in scholarly interpretation but also identifies what he calls 'authentic interpretation'. By that he means interpretation that itself has legal effect; it is 'a law-creating act'.⁸⁴ He asserts not only that '[i]nterpretation as a legal function is possible only as authentic interpretation' but also that '[a]ny other interpretation of a legal norm is an intellectual activity which may have great influence on the law-creating and law-applying function, but has no legal importance in itself.'⁸⁵ The book in front of us is not an exercise in 'authentic interpretation', but potentially it could exercise 'great influence' on the truly law-creating and law-applying function. Indeed, one should fuse Kelsen's two statements, that 'the function of authentic interpretation is not to determine the true meaning of the legal norm thus interpreted but to render binding one of the several meanings of the legal norm'⁸⁶ and his claim 'to present all the interpretations which according to his opinion might be possible'.⁸⁷ We are in a position, then, to read

⁸¹ Kelsen, *supra* note 12, at xiii.

⁸² *Ibid.*, at xiii.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, at xv.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, at xvi.

Kelsen's study as a catalog of meanings from which the authentic interpreter of the Charter may choose.

Kelsen's book is no neutral catalog of possible meanings. Like his study of the Covenant, he shows little patience for the inconsistencies and shortcomings of the UN's organizational documents. His book is a running complaint about the poor formulations chosen by the drafters. Even before criticizing the Charter's preamble, he launches into a complaint about the very term 'United Nations': "The term "United Nations", taken literally, refers to states associated in some way or another, not to an organisation of states. In this literal meaning the term is used in the above mentioned Declaration [the "Declaration of the United Nations" of 1942]. But in the Charter it is used to designate the international community constituted by the Charter. This ambiguity of the term is not very fortunate."⁸⁸

When Kelsen turns to treat 'The Two Sentences of the Preamble', he attacks the opening formulation inspired by the US Constitution, 'We the peoples of the United Nations', because the 'Charter is an international treaty concluded by states represented by their governments. These governments, not the "peoples", were represented at the San Francisco Conference.'⁸⁹ After attacking this 'political fiction' he moves to a similar complaint about the reference in final sentence of the Preamble to 'Our respective governments', and expresses his cavil that some of the original members had not signed the Declaration of the United Nations.⁹⁰ Kelsen is even impatient with the various references to agreement among the states as 'technically superfluous' because that is a given in their ability to draft the Charter.⁹¹

Still on the Preamble, Kelsen addresses its binding force and follows his League book in distinguishing political aspiration from legal effect. Despite the fact that the Preamble 'is part of the Charter', he makes a point consistent with his long-held views of legal import that '[t]he binding force of a statement does actually depend not only on its being part of a statute or a treaty but also on its contents.'⁹² And he is similarly consistent on his view that a 'legal obligation to behave in a certain way is established if a sanction is attached to the contrary behaviour.'⁹³ Unfortunately, Kelsen relates, '[t]he Preamble sets forth certain political ideals without guaranteeing their realisation by the sanctions stipulated by the Charter. Thus it has rather an ideological than a legal importance.'⁹⁴ Furthermore, he tells us that in all the discussion of 'ends' and 'aims' the 'strangest thing is that the main "Purpose" of the Organisation: "to

⁸⁸ *Ibid.*, at 4.

⁸⁹ *Ibid.*, at 7. Here Kelsen even criticizes the formulation of the US Constitution, stating that the "'people of the United States" could not be the author of the Constitution since the people of the United States, as a legal entity, was first constituted by the Constitution.' *Ibid.*

⁹⁰ *Ibid.*, at 8.

⁹¹ *Ibid.*

⁹² *Ibid.*, at 9.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

maintain international peace and security” (Article 1, Paragraph 1) is presented in the Preamble not as an “end”, but — on the second place only — as a means to achieve the ends of the Organisation in the phrase: “to unite our strength to maintain international peace and security”.⁹⁵

Just in the pages devoted to the UN name and the Charter’s Preamble, we have Kelsen criticizing the accuracy of the name; the sloppy reference to the ‘peoples of the United Nations’; ‘superfluous’ language that has no legal import; and a lack of care as to what are ends and means. The understandable idealistic hyperbole of the convocation in San Francisco with Europe in ruins, the horrors of the Holocaust increasingly on the public mind, and the war still raging in Asia, meets up with the cranky Central European professor who seems not to shed light on his own emigration. Kelsen punctures any pure expression of idealism — either it is not legally binding or it is misplaced or misleading — as he notes in a footnote regarding the popular sovereignty suggestion of ‘We the peoples’: ‘The democratic character of the Organisation is, in view of the privileged position of the five permanent members of the Security Council, very doubtful.’⁹⁶ From the very beginning, he gives notice that we are in for a 900-page demolition of the organizational documents of the United Nations.

Throughout Kelsen provides textual examples that do not create legal meaning. He repeatedly identifies ‘superfluous’ language,⁹⁷ references text that has ‘no legal importance’,⁹⁸ and flatly condemns an ‘empty tautology’.⁹⁹ At one point he even states that it is ‘difficult to understand why the second sentence of paragraph 2 has been considered to be necessary at all.’¹⁰⁰ Indeed, the resort to Webster’s dictionary appears in one of his frequent efforts to ask why the doubling of two synonyms is needed. In the end, much of language produced in Dumbarton Oaks and San Francisco is meaningless verbiage.

His most common complaint is not meaninglessness but inconsistency, even if he sometimes blends the two as he does with the language on human rights in the Charter: ‘These inconsistencies, however, are without any legal importance since the Charter does not impose upon the Members a strict obligation to grant to their subjects the rights and freedoms mentioned in the Preamble or in the text of the Charter.’¹⁰¹ Mostly, Kelsen identifies the inconsistencies and lack of clarity of the organizational

⁹⁵ *Ibid.*, at 11.

⁹⁶ *Ibid.*, at 6, n. 4.

⁹⁷ E.g., *ibid.*, at 95, 411.

⁹⁸ *Ibid.*, at 127. Interestingly, this reference includes a rare return to the notion of ‘authentic interpretation’. Kelsen suggests what is required ‘[i]n order to get legal effect, that is to say, in order to have the character of an authentic interpretation of the Charter . . .’ *Ibid.*

⁹⁹ *Ibid.*, at 99.

¹⁰⁰ *Ibid.*, at 291.

¹⁰¹ *Ibid.*, at 29.

documents. He will speak of ‘open contradiction’,¹⁰² text that is ‘ambiguous’¹⁰³ or ‘not clear’,¹⁰⁴ that ‘contradictory answers are possible’,¹⁰⁵ that certain text has ‘no fixed meaning’,¹⁰⁶ and make multiple references to lack of ‘consistency’.¹⁰⁷ Kelsen’s book is also filled with sentences that begin with ‘But’ in a continuous indication of reversals in logic. And his impatience often turns to sarcasm. A good deal of the effort in San Francisco is, finally, ‘strange’ — ‘It is rather strange that’¹⁰⁸ and it ‘seems to be very strange’.¹⁰⁹ He brutally condemns ‘an unjustifiable defect of the Charter’.¹¹⁰ In short, he believes that the drafters were deficient in their legal technique so that wording is ‘technically defective’¹¹¹ or he might refer to a ‘typical example of an insufficient legal technique’.¹¹²

Kelsen’s text, with its untiring condemnation of poor drafting, does not seem to recognize the multi-country political struggle, the huge and cumbersome machinery of the various committees in San Francisco, the beginning moves in the Cold War, and debates over decolonization. Kelsen acknowledges that his focus on legal meaning ‘does not imply that the author underestimates the value of the political activities of the United Nations; on the contrary, he is aware that the international community established at the San Francisco Conference is by its very nature a political phenomenon and that a merely juristic interpretation cannot do justice to it.’¹¹³ He similarly maintained in the League book that ‘[c]ertainly the statue of the League of Nations is a political instrument. But this political character has no effect on its “legal” quality, which results from the manner in which it was established and from its contents, whereas its political character is determined by the end which the statute serves as a legal instrument.’¹¹⁴

More than the political charge of the creation of the UN or the League, Kelsen shows himself in *The Law of the United Nations* to be intimately familiar with the debates that brewed around various drafting decisions and plagued the organization’s first years. His footnotes read dramatically differently from the main text, for there one finds the debate and the struggle and numerous references to views espoused by representatives of various countries. Politics and debate are relegated to large footnotes as if there were two simultaneous discourses running through the book, one at the top of the

¹⁰² *Ibid.*, at 405.

¹⁰³ *Ibid.*, at 95.

¹⁰⁴ *Ibid.*, at 91.

¹⁰⁵ *Ibid.*, at 88.

¹⁰⁶ *Ibid.*, at 286.

¹⁰⁷ E.g., *ibid.*, at 139, 414, 415.

¹⁰⁸ *Ibid.*, at 459.

¹⁰⁹ *Ibid.*, at 379.

¹¹⁰ *Ibid.*, at 429.

¹¹¹ *Ibid.*, at 198.

¹¹² *Ibid.*, at 71.

¹¹³ *Ibid.*, at xvii.

¹¹⁴ Kelsen, *supra* note 70, at 10.

page and one at the bottom. Anthony Grafton has observed in his book on footnotes in historical writing that '[o]nce the historian writes with footnotes, historical narrative tells a distinctly modern, double story.'¹¹⁵ When Grafton tells us that the 'footnotes form a secondary story, which moves with but differs sharply from the primary one', he is thinking about notes that have a more intimate relationship the historians' ability to write the main text.¹¹⁶ With Kelsen, the double story is of a different nature: his main text is a thorough demolition of the UN organizational documents and his secondary text provides detail either as to the debate that resulted in the impoverished language or examples of how the language played out in the aftermath. The secondary text is far from that described by Grafton of his modern historians, providing the background and contingency of *their* thoughts. Rather, Kelsen is basically alone with his text, and the bulk of his footnotes have little relation to the formulation of his critical analysis.

Deep into his book, Kelsen launches into a chapter on sanctions, which he opens not with an article-by-article critique but in classic Kelsenian terms: 'Law is, by its very nature, a coercive order' and a 'coercive order is a system of rules prescribing certain patterns of behaviour by providing coercive measures, as sanctions, to be taken in case of contrary behaviour, or, what amounts to the same, in case of violation of the law'.¹¹⁷ Kelsen summons his notion of a 'delict' as 'correctly designat[ing] any kind of behaviour which is made the condition of a sanction because it is considered to be undesirable'.¹¹⁸ Again, he shows confidence that international law 'is law in the true sense of the term, for its rules regulating the mutual behaviour of states provide sanctions to be directed against the state which has committed an international delict, or, what amounts to the same, has disregarded its obligations towards another state and thus violated the right of the other state'.¹¹⁹ He reuses the notion from *Peace Through Law* of 'general international law' as 'characterized by the principle of self-help'¹²⁰ and tells us again that 'it is primitive law'.¹²¹

The question Kelsen is aiming at is whether the Charter is truly law in the sense of establishing sanctions. As it turns out, the Charter 'does not use the term "sanction" and contains only two provisions that clearly stipulate sanctions', which are Article 6's expulsion from the organization for persistent violation of the Charter principles and Article 19's suspension of the right to vote in the General Assembly based on non-payment of dues. Neither really cuts to the bone, so the real question Kelsen poses is whether the enforcement measures of Article 39 established by the Charter represent the organization's true sanctions. Everything, it seems, hinges on the

¹¹⁵ A. Grafton, *The Footnote: A Curious History* 23 (1997).

¹¹⁶ 'In documenting the thought and research that underpin the narrative above them, footnotes prove that it is a historically contingent product.' *Ibid.*

¹¹⁷ Kelsen, *supra* note 12, at 706.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, at 707.

¹²¹ *Ibid.*

Security Council's discretion. Here he worries that '[t]o interpret enforcement measures taken in accordance with Article 39 not as sanctions, but as measures to be used by the Security Council at its discretion, would be in conformity with the general tendency which prevailed in drafting the Charter; the predominance of the political over the legal approach.'¹²² We no longer have law as a means to the political ends of the drafters but the threat of legal technique being invaded by changing political pressures. Indeed, Kelsen clearly cannot abide a political interpretation of Article 39 enforcement:

However, the interpretation according to which the enforcement actions are merely political measures is not the only possible one. It may be argued that, in accordance with general international law, a forcible interference in the sphere of interest of a state, that is reprisals or war, is permitted only as a reaction against a violation of law, that is to say as sanction. Since the enforcement actions determined by Articles 39, 41 and 42 of the Charter constitute forcible interference in the sphere of a state, they must be interpreted as sanctions if the Charter is supposed to be in conformity with general international law.¹²³

Kelsen states stridently that '[n]o other interpretation is possible with respect to the enforcement of measures not involving the use of armed force as determined in Article 41.'¹²⁴ But his confidence seems to fade when he acknowledges that '[s]ince it is difficult to foresee whether the Security Council will consider in a concrete case non-compliance with a recommendation of an organ of the United Nations or any other conduct of a state as a threat to, or breach of, the peace and hence as a condition of enforcement measures, a highly unsatisfactory state of uncertainty exists with respect to the obligations of a Member.'¹²⁵ In a mode of surrender, Kelsen recognizes that the 'difference between the interpretation of Article 39 according to which this Article provides for true sanctions and the interpretation according to which the enforcement actions taken under this Article are political measures, is rather of theoretical than of practical importance.'¹²⁶ That last statement is an odd juncture. After hundreds of pages of hyper-textual criticism, suddenly there is a flash of energy around whether the Charter is ultimately a document of legal rights and obligations embedded in general international law, and this results in the end in an open expression of resignation.

Both Feller and Schachter were convinced that Kelsen's book was an exercise in the 'pure theory of law'. Schachter asserts that '[i]n accordance with his "pure theory of law", Professor Hans Kelsen presented in this 900 page treatise a "juristic — not a political — approach to the problems of the United Nations".'¹²⁷ And Feller writes that 'we see Professor Kelsen courageously throwing the "pure science of law", on which he has lavished a lifetime of study, into the confusing international area, offering it as

¹²² *Ibid.*, at 735.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, at 737.

¹²⁶ *Ibid.*

¹²⁷ Schachter, *supra* note 23, at 189.

the method for analyzing the constitutional instrument which governs the organizational structure of a world community.¹²⁸ Whether or not the piecemeal textual demolition of the UN organizational documents, focusing on lapses in logic and construction, fully represent a neo-Kantian-inspired special legal science, there seems little of the almost self-executing *Grundnorm*. Kelsen is interested in legal technique embodying the political goals of the drafters and his textual criticism is a critique of their inadequacy particularly in terms of establishing clear legal rights and duties. But there is little sense of the almost self-generating norms of Kelsen's pure theory in the Charter book — that is one of the important absences of *The Law of the United Nations*.

3 Ross' Discourse of Separation and the Constitution of the United Nations

A Riffs in Copenhagen

In his 1968 book *Directives and Norms* — a book dotted with technical logical equations — Alf Ross turns to Kelsen in a critique of the basic norm. In those three pages he shows unrestrained glee in quoting Kelsen's admission published in 1963:

In earlier works I have spoken about norms which are not the meaning-content of some act of volition. In my doctrine the basic norm was always conceived as a norm which was not the meaning-content of some act of volition but presupposed in our thinking. Now, gentlemen, I must confess that I cannot any more abide by this doctrine, that I have to abandon it. You may take my word for it, it was no easy thing to give up a doctrine that I had defended through decades. I have abandoned it seeing that a norm (*Sollen*) must be the correlate of a will (*Wollen*). My basic norm is a *fictive* norm based in a fictive act of volition . . . In the basic norm a fictive act of volition is conceived that actually does not exist.¹²⁹

Ross continues: "The revision, however, cannot stop here . . . Once it has been realized that the idea of a basic norm cannot be maintained as a necessary cognitive prerequisite, a postulate of "legal thinking", and that it neither corresponds with any reality, one is bound to go the whole way: the doctrine of a basic norm must be abandoned."¹³⁰ In a few short pages the student has demolished the teacher. In *Directives and Norms*, Ross makes Kelsen look pathetic in retreat, but in *Towards a Realistic Jurisprudence* he takes Kelsen very seriously, using his theory as a significant foil to establish his own.

In the short preface to *Towards a Realistic Jurisprudence*, Ross describes his book as a 'settlement' of the dualism that 'law belongs at the same time to the world of empirical facts and the supersensual world of eternal ideas, the realm of validity'.¹³¹ He identifies three basic 'possibilities' in addressing the jurisprudential dualism: 'Either the dualism of the natural conception can be retained without tracing its immanent antinomies,

¹²⁸ Feller, *supra* note 23, at 537.

¹²⁹ 1963 *Österreichische Zeitschrift für öffentliches Recht* 119–120 cited in A. Ross, *Directives and Norms* (1968), at 158.

¹³⁰ *Ibid.*

¹³¹ Ross, *supra* note 15, at 9.

or one of its two elements, reality or validity, can be chosen.¹³² The first of the alternatives 'is taken by traditional jurisprudence'.¹³³ The other 'two extreme courses' are realism and the pure science of law: 'On the one side are the purely sociological or "realistic" theories, on the other Kelsen's pure, normative science of law.'¹³⁴ From the start, the former teacher performs more than the role of foil for Ross; he represents one of the three main responses to the dualism of legal theory.

Ross' depiction of 'realist' approach involves a number of realistic theories but focuses primarily on American legal realism and Jerome Frank's 1930 *Law and the Modern Mind* rather than their European counterparts.¹³⁵ Indeed, Ross refers to the 'radical theory' which is 'represented within the American "realistic school", the most extreme representative of which is Jerome Frank'.¹³⁶ Ross frequently places either 'the American realistic theory' or more simply 'Frank' in parentheses at the end of various propositions if perhaps less frequently than he similarly uses Kelsen's name.

Ross adopts a tactic of demonstrating how each of the theories is self-contradictory. For example, he makes short work of Austin whose 'determination of the positivity of the law resolves itself into a circle'.¹³⁷ If '[i]n the absolute monarchy the sovereign power is vested in a person, in constitutional states in a parliament', it turns out that 'we may object' that 'the habit of submission to certain authorities is itself an expression of legal ideas'.¹³⁸ 'The sovereign', Ross contends, 'who should be the source of all law — is himself sovereign by virtue of the law.'¹³⁹ Here Ross adopts the standard technique of undermining a philosophical proposition by following its logical course until it is required to go beyond itself to find its footing.

With legal realism, however, Ross is mostly interested in how the extremes of legal realism leave almost no law in law. He believes that a true realistic criticism must do more than 'spirit away' validity.¹⁴⁰ Ross is convinced that '[w]ithout an understanding of the legal experiences of validity, which — erroneously — are interpreted as notions of a specific legal validity, that is to say, notions of the law as a valid rule or norm, it is not possible to arrive at a true realism in the theory of law.'¹⁴¹ He takes as his task being able to create a realistic theory that fuses validity and realism:

The law is not, like morality, pure ideality. But neither is it, like the tyranny of crude power, a purely empirical social reality. The law is both, valid and factual, ideal and real, physical and

¹³² *Ibid.*, at 11.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ J. Frank, *Law and the Modern Mind* (1930).

¹³⁶ Ross, *supra* note 15, at 59.

¹³⁷ *Ibid.*, at 58.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, at 13.

¹⁴¹ *Ibid.*

metaphysical, but not as two things co-ordinated, but as a manifestation of but as a manifestation of validity in reality, which is only thereby qualified as law.¹⁴²

Ross pays a lot of attention to Kelsen because Kelsen is no natural law theorist — that would be too simple. Ross maintains that Kelsen is a ‘pronounced positivist’ and at the ‘same time as the law is placed wholly in the “Sollen” category, the latter is deprived of all *a priori* content and merely becomes a categorical form or mode of thinking quite empty in itself.’¹⁴³ He is placed at an extreme from the realists: ‘Thus we arrive at the result that the law is a “Sollen”, absolutely a “Sollen” only, no “Sein”, no social reality.’¹⁴⁴ Still, “on the other hand, the norms here under consideration have nothing to do with an absolute, rational validity. The legal norms are neither derived from nor “subject to” any absolute idea of law or any other rational validity.’¹⁴⁵

Kelsen has accomplished a neat trick — he ‘is able to combine the traditional notion of the law as a binding, (valid) order with an unlimited recognition of the empirical positivity of law.’¹⁴⁶ But Ross is suspicious: ‘it is impossible for Kelsen to establish any difference in principle between the moral and the legal “Sollen”.’¹⁴⁷ Kelsen’s contention is that ‘the difference is supposed to lie merely in the fact that, while morality appears as a natural order, or an order valid in itself, the legal norms, on the other hand, appear as positively posited in a system of compulsion.’¹⁴⁸ Kelsen might differentiate legal and moral norms by maintaining that the fundamental legal norm, ‘in contrast with the moral norm, does not contain any direct principle of action, but establishes a method of production; it formally delegates the law-creating authority to a power (source of law) whose pronouncements are to stand as legally binding.’¹⁴⁹ But this ultimately means that the two norms differ in the ‘content of the “Sollen” in which the norms are expressed’.¹⁵⁰ Here Kelsen gets into trouble: ‘Just as two kinds of morality are not produced by distinguishing between the moral norms whose content concerns family life and those whose content concerns the positions of the individual in the State, two kinds of norms (moral and legal) will not be obtained, either, by making a contentual distinction such as that indicated by Kelsen.’¹⁵¹ The moral/legal distinction collapses.

Ross wants to establish law in its real ‘psycho-social connection’.¹⁵² For him, ‘the idea that jurisprudence as well as mathematics should consist in an objective consideration of the meaning of the so-called legal propositions apart from the psycho-physical acts that “uphold” these meanings, is impossible.’¹⁵³ By comparison:

¹⁴² *Ibid.*, at 20.

¹⁴³ *Ibid.*, at 39.

¹⁴⁴ *Ibid.*, at 40.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, at 41.

¹⁴⁷ *Ibid.*, at 46.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, at 47.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, at 48.

¹⁵² *Ibid.*, at 101.

¹⁵³ *Ibid.*, at 102.

Kelsen has most plainly expressed the idea of the immanent logical nature of law in the doctrine of the origin of law from the fundamental norm, and its systematic development in a graduated structure. This is a fallacious idealisation, as is revealed by the fact that it is impossible, if legal reality be taken into consideration, to carry through the construction of the systematic unity of law in a fundamental norm, without resorting to empty tautologies.¹⁵⁴

Kelsen, like other legal theorists, creates 'rationalisations' but does not see them as such. The way to 'conquer' the dualism of law 'and its unfortunate consequences is not to deny the fundamental significance of these experiences but to interpret the ideas of a superempirical "validity" as rationalisations of certain emotional experiences and thus include them in a world of facts.'¹⁵⁵

Axel Hägerström's study of the Roman law of obligation figures prominently in *Towards a Realistic Jurisprudence*.¹⁵⁶ For Ross, the 'first condition for grasping the actual significance of the early Roman notions of law is to divest oneself of the dogmatic presupposition that law consists of commands issued by an authoritative power in the state, and creates a duty for those subject to the state in a certain way.'¹⁵⁷ Turning to the Roman views of obligation, 'it is necessary to disregard all idea of duty in the modern sense.'¹⁵⁸ Rather, Hägerström's Roman law of obligation is one of 'magico-ritual acts' and the findings of 'Hägerström's investigations is in excellent agreement with modern sociology and the history of religion, which have shown with a greater and greater abundance of convincing material that the primitive mind, far from being a *tabula rasa* patiently waiting for the experience and insight of a more advanced culture, possesses a highly complicated theory of nature, often very ingeniously developed and of a magico-mystical or religious character.'¹⁵⁹ For Ross, 'the ideas cherished by men do not delay their appearance until certain reasonable causes are present to support their truth; but they have first grown up freely and luxuriantly as rationalisations (fancies) out of the out of the soil of human emotions.'¹⁶⁰

In delving into the magical/primitive sources of law, Ross devotes a single footnote citation to James Frazer's *Golden Bough*¹⁶¹ and seems to have little use for the vast range of anthropologists. He is able to write '[h]owever strange this may seem, it appears nevertheless to be true without magic no law of contracts' without any reference to Henry Sumner Maine on the ceremonial sources of contract law — especially in light of the claim in Ross' preface to 're-establish the connection between Scandinavian and Anglo-American legal philosophy'.¹⁶² It is also strange that this

¹⁵⁴ *Ibid.*, at 102.

¹⁵⁵ *Ibid.*, at 10.

¹⁵⁶ A. Hägerström, *Der römische Obligationbegriff im Lichte der allgemeinen römischen Rechtsanschauung* (1927).

¹⁵⁷ Ross, *supra* note 15, at 217.

¹⁵⁸ *Ibid.*, at 222.

¹⁵⁹ *Ibid.*, at 217, 222.

¹⁶⁰ *Ibid.*, at 222.

¹⁶¹ *Ibid.*, at 225 n. 15.

¹⁶² *Ibid.*, at 9.

theorist of the emotional sources of law can repeatedly cite Frank's *Law and the Modern Mind* as the 'extreme' view of the contingency of judicial decision-making without drawing attention to the significance of Freud for Frank or Frank's discussion of 'Word-Magic'.¹⁶³

Like Frank, Ross is engaged in an act of demystification. His approach to legal theory 'unveils the purely illusory justification for such practical solutions as are merely dogmatically constructive consequences of the mystical implications of the traditional doctrine'.¹⁶⁴ Perhaps more significantly than the work of demystification, Ross seeks to open the way for 'a set of principles which actually — as a rough skeleton — form the basis of the rules of conflict in modern legal constitutions' and 'thus renders possible a better systematic arrangement of these than the traditional one which is based on the false notion that dynamic protection like static protection is something directly associated with a right as such'.¹⁶⁵ Ross's final paragraph is entitled 'Criticism and Reconstruction', and the 'reconstruction', if mostly buried, forms a significant part of his objective.

The bridge between Ross' *Toward a Realistic Jurisprudence* of 1946 and *A Textbook of International Law* the following year is his claim to be engaged in the international law textbook in a 'realistic' enterprise analysing 'socio-psychological' factors in international society. 'To a realistic consideration', he writes, 'the law is a socio-psychological relationship of motives which release actions, and of actions which again create motives'.¹⁶⁶ Ross insists that the 'question of the existence of a law is in the last instance always a question of certain *socio-psychological* realities'.¹⁶⁷ And in his discussion of morality and law, he writes: 'Behind this metaphysical interpretation lie certain psychological realities, a difference in the way in which the moral and legal feelings of validity arise and are experienced'.¹⁶⁸ Yet despite the talk of 'socio-psychological' factors, there is precious little socio-psychology in Ross's international law just as all of Brierly's talk of 'facts' in his *Law of Nations* was ultimately empty.¹⁶⁹ And rather than picking up on the promises of the more ambitious passage of *Towards a Realistic Jurisprudence*, Ross' international law textbook basically flattens out his theory. Admittedly, the exact temporal relationship between the books is not clear from their texts. The international law textbook, which contains only one major reference to the International Court of Justice established with the UN and multiple references to the League, reads as if most of the draft had been sitting in a drawer waiting for the war's end.

When Ross writes his 'textbook' he creates an odd distancing from its textbook status. The title may be straightforward, but the book separates itself from type at its

¹⁶³ E.g., Frank, *supra* note 135, at 65.

¹⁶⁴ Ross, *supra* note 15.

¹⁶⁵ *Ibid.*, at 289–290.

¹⁶⁶ Ross, *supra* note 1, at 47.

¹⁶⁷ *Ibid.*, at 62.

¹⁶⁸ *Ibid.*, at 52.

¹⁶⁹ On Brierly's empty rhetoric about 'facts', see Landauer, 'J. L. Brierly and The Modernization of International Law', 25 *Vanderbilt Journal of Transnational Law* (1993), at 881, 899.

start. Rather than the traditional opening definition of international law, Ross deflects. Where Brierly, who provides the short preface to Ross' book, opens his famous textbook with 'The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another',¹⁷⁰ Ross takes no ownership of the definition with which he opens: 'According to the current view *International Law* is the body of legal rules binding upon states in their relations with one another.'¹⁷¹ Ross does this, in part, because he will slightly revise the definition a few pages later.¹⁷² But his opening is not merely a prelude to the later refinement, for repeatedly his rhetoric establishes distance between him and his subject. He will state, for example, that '[i]t is usual to lay down the maxim of the freedom of the open sea as an independent international principle.'¹⁷³ He will write that '[f]rom the old days it has been customary to lay down five fundamental rights. . .'¹⁷⁴ And he begins his discussion of territory by stating that '[i]n the current textbooks great obscurity prevails as to the systematic placing and development of the rules concerning the territory and population of states.'¹⁷⁵

In part, Ross is announcing a critical stance — his textbook is an anti-textbook. Thus, on the first page of his chapter on the sources of law, he writes: 'As a rule it is not explained what is meant by the term "source of law".'¹⁷⁶ He explains that the 'traditional doctrine of the sources of law is based on the view that all law derives its specific validity form coming into existence in certain forms.'¹⁷⁷ From there he increases his critical bite: 'Altogether, the notion that the "validity" of the law can be "deduced" from certain sources is metaphysical.'¹⁷⁸ This is the familiar Ross of *Towards a Realistic Jurisprudence*, although by the end of his paragraph he turns to a realism perhaps closer to the American type than his own: 'A source of law, then, means *the general factors (motive components) which guide the judge when fixing and making concrete the legal content in judicial decisions.*'¹⁷⁹

Ross signifies his distance from the textbook genre also with the appearance of a long opening chapter on 'The Concept and Presuppositions of International Law' before the traditional starting point, 'The Sources of International Law'. Indeed, he makes much of his revision of the standard organization. After a reference to the 'great obscurity as to the systematic placing and development of the rules concerning territory and the population of states', he writes that '[u]sually these are dealt with in the chapter on the subjects of International Law, the territory and population being

¹⁷⁰ J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (1928), at 1.

¹⁷¹ Ross, *supra* note 1, at 11.

¹⁷² 'I now propound the hypothesis that the current definition of the term "International Law" (as the law valid for states in their relations with each other) may be rendered more complete by replacing the term "state" implied in it by "a self-governing legal community".' *Ibid.*, at 16.

¹⁷³ *Ibid.*, at 179.

¹⁷⁴ *Ibid.*, at 191.

¹⁷⁵ *Ibid.*, at 136. In this context it is significant to note that these statements tend to open his chapters.

¹⁷⁶ *Ibid.*, at 79.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, at 80.

¹⁷⁹ *Ibid.*

regarded as natural elements of the states.¹⁸⁰ Ross states that the chapters devoted to international legal doctrine will adopt a descending order of discussion beginning with the ‘*preliminary rules concerning the capacity for legal rights and duties*, the Law of Persons’ before moving to the ‘*central rules of intercourse*’.¹⁸¹ Then ‘[a]t the very center of every legal system we find the *central rules of intercourse* which make the conduct that it is desired to realise in the intercourse of the members a duty.’¹⁸² Ross, in fact, provides a full-page chart of his scheme for the ensuing chapters — even if his book’s table of contents may ultimately look not all that unfamiliar.

Significantly, Ross clearly distinguishes international from national or ‘internal’ law. As opposed to the ‘monism that has gained considerable ground supported particularly by the so-called “Vienna School” (Kelsen, Verdross, *et al.*)’,¹⁸³ Ross identifies himself as a dualist and asserts that ‘International and National Law are independent systems’.¹⁸⁴ He explicitly separates himself from Kelsen, but it is Kelsen who defines the terms and even Ross’ odd descending chart reads like a loose translation of Kelsen’s normal hierarchies.

Very far from any ‘pure theory of law’, Ross asserts at the end of his chapter on the ‘Fundamental Rights’ of States that ‘International Law cannot, any more than other law, shut its eyes to important political facts’.¹⁸⁵ Ross’ preface addresses the weightiness of the moment: ‘It will perhaps be thought that this is not an auspicious time for publishing a textbook of International Law, now that the statesmen of the victorious Allied Nations are building up a new international system which is to create a possibility of liberty and peace in a world that was threatened with destruction by tyranny and barbarity.’¹⁸⁶ Oddly, that is the last glimpse we see of the horrors of the Third Reich. Indeed, it is almost unimaginable that in his discussion of national minorities he could maintain that ‘[w]hile in earlier times religious differences were the decisive factor in the formation of minorities, in our day it is national feeling which occupies this place. In Europe, at any rate, purely linguistic or religious minorities rarely occur.’¹⁸⁷ If Brierly offers a factual approach without any facts, Ross, it seems, offers a political realism without any political reality.

B Ross’ Constitution of the United Nations

When Alf Ross returned to write a second book on the UN in the 1960s, he placed his earlier book among the works that ‘consider the United Nations from a juridical point of view’.¹⁸⁸ The second book would contain ‘historical juridical, and ideological

¹⁸⁰ *Ibid.*, at 136.

¹⁸¹ *Ibid.*, at 75–77.

¹⁸² *Ibid.*, at 75.

¹⁸³ *Ibid.*, at 60.

¹⁸⁴ *Ibid.*, at 63. Indeed, ‘[t]heir interconnection lies partly in the demands International Law makes on National Law, partly in references to one another.’ *Ibid.*

¹⁸⁵ *Ibid.*, at 194.

¹⁸⁶ *Ibid.*, at 10.

¹⁸⁷ *Ibid.*, at 230–31.

¹⁸⁸ A. Ross, *The United Nations: Peace and Progress* (1966), at v.

elements — not for their own sakes, however, and only to the extent that these can illustrate the object of this work: to understand the United Nations as a *political* phenomenon.¹⁸⁹ Ross' 1950 book does have some of the pedantic, close parsing of language that characterizes most of Kelsen's study. For example, he tells his reader that the 'expression "come into force" is not really quite exact, in so far as it covers two different legal functions.'¹⁹⁰ Regarding the language adopted in Article 2(1) he writes: 'Linguistically the expression "sovereign equality" is not a happy one. It is not "equality" which sustains the character of sovereignty, but the states. "Equality as sovereign states" is obviously what is meant.'¹⁹¹ With the intensity of his discussion of sovereignty and its relationship to the state as the subject of international law in his textbook in the background, one expects Ross to mount an attack on the sovereignty notion from his unhappiness with the expression 'sovereign equality'. But Ross does not seem to give the preoccupations of his textbook major play in *Constitution of the United Nations*. Indeed, the references to his textbook are mainly on technical points of law. For example, in his discussion of whether the UN should be deemed a federal state, he writes: 'Here I follow the view set forth in Chapter III of my Textbook on International Law.'¹⁹² Indeed, he creates more of textbook image for his textbook than it actually has.

Ross' reference to his textbook on the question of the UN as a federal state comes at peculiar moment in *Constitution of the United Nations*. He begins the book's conclusion, 'General Legal Characterization of the United Nations', by criticizing the common tendency to worry about what sort of entity the League represented:

It was a stock item of the programme in scholarly treatments of the League of Nations to round off the exposition with a discussion on the 'juridical nature' of the League. This usually included the query as to whether the organization was in its 'nature' a federal state, a federation, or an administrative union; whether it came under some other known type of legal relation between states, or perhaps had to be regarded as something quite different, an organization *sui generis*.¹⁹³

Ross is sceptical: 'The value of such discussions, however, has not been equal to the amount of energy expended upon them. This is because there has been an exaggerated idea of the scope and importance of the problem.'¹⁹⁴ But that skepticism does not stop him from devoting the last chapter to exactly such a discussion, concluding on the federal state issue that the 'question put above must therefore be answered decidedly in the negative'¹⁹⁵ before turning serially to whether the UN is a federation, an administrative union, an agency for pacific settlement of disputes, or an agency for enforcement of action for the maintenance of peace. The topology is rather mysterious in light of his lampoon of the League topology. But Ross ends his book with

¹⁸⁹ *Ibid.*, at vi.

¹⁹⁰ Ross, *supra* note 3, at 27.

¹⁹¹ *Ibid.*, at 118.

¹⁹² *Ibid.*, at 193.

¹⁹³ *Ibid.*, at 189.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*, at 194.

a run through the various classificatory alternatives and concludes not by summing up the book but by rounding out the exercise of classification.

This, it turns out, is a repetition of an earlier pattern. When he asks whether the Charter is ‘a treaty or a constitution’, Ross observes that the ‘question is hardly of any practical importance; but since it is connected with fundamental concepts and theories of international law, it calls for a few remarks.’¹⁹⁶ We are, of course, not surprised to find a few pages later that he concludes that in ‘a systematic sense’ the Charter should be understood as a constitution¹⁹⁷ — we already know that from the title of the book. It is, indeed, odd that Ross undermines the significance of his conclusion and the title of his book. It is as if he wanted to write one book but was under directions from a publisher to write another, just as his ‘textbook’ is both textbook and anti-textbook. There is, I think, a schizophrenia to Ross’ *Constitution of the United Nations*, and the seams are not only visible, but in places quite open.

When Ross wrote his second UN book he referred to the “magic-will” conception of the genesis of law’ and used belief to explain our tendency to obey law.¹⁹⁸ In returning to his earlier interest in ‘psychological factors’,¹⁹⁹ he talks of the ‘fundamental fallacy’ to think that a ‘legal order is something that can be created through a resolution if the people can first be persuaded that this is right and necessary.’²⁰⁰ And in derision he exclaims: ‘Here we are back to the abstract rationalism of the Enlightenment!’²⁰¹ We encounter the ‘same unhistorical and unsociological outlook [that] was professed by the great English reformer Jeremy Bentham.’²⁰² Ross turns specifically to *Towards a Realistic Jurisprudence* to discuss the development of community:

I have already described elsewhere in greater detail this notable circular interplay between validity and effectiveness, right and might (*Towards a Realistic Jurisprudence*, Copenhagen, 1946). If this analysis is correct in its main lines, it means that a state develops through a lengthy historical process that involves a continuous interaction, step by step, between common external institutions and a common internal ideology, mutually strengthening one another. The sense of community, which is a necessary condition for the more developed common institutions, is created through the practice of less-developed common institutions.²⁰³

Although *Towards a Realistic Jurisprudence* did not stress the development of community as much as Ross later suggests, the book described a development towards

¹⁹⁶ *Ibid.*, at 30.

¹⁹⁷ *Ibid.*, at 35.

¹⁹⁸ ‘Not only and not mainly because we are afraid of punishment, but because we recognize — I could almost say “believe in” — the validity of the constitution and accept its institutions as the instrument through which national unity and will of the people manifest themselves’, Ross, *supra* note 188, at 269.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*, at 268.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*, at 273.

modern constitution and bases its analysis on 'socio-psychological' factors that suggest the 'functionalism'²⁰⁴ he would later reference.

Constitution of the United Nations does not engage in a 'socio-psychological' analysis of the new international body. At most it engages in a much broader critique of ideology with no hint of Axel Hägerström's Roman world of obligations. Thus, for example, the 'equality principle' whereby states are described as having equal legal status is portrayed by Ross as 'an ideologically motivated declaratory principle in flagrant conflict with actual facts'.²⁰⁵ Basically, Ross is indignant about the legerdemain of the Great Powers — talk about equality is empty. Similarly, the protective aspect of the 'sovereignty principle' that could be marshaled as a defense against internal interference by the UN is 'merely declaratory'.²⁰⁶

This is part of Ross' strategy to unmask the new pieties of the UN, even if they are founded on old pieties of international law, as the ideological tricks of the Great Powers. If Ross describes the 'Geneva idealism' of the 1920s — very differently from the earnestness described by Alfred Zimmermann in his *The League of Nations and the Rule of Law* before its descent to 'Geneva sang-froid'²⁰⁷ — as having 'a flavour of insincerity',²⁰⁸ there is little question for Ross that the main propulsion of the drafting of the UN Charter was the cynical self-interest of the Great Powers. Ross is not entirely consistent in his critique of the privileged position of the Great Powers. To a certain extent he sees it as a recognition of political reality and 'based on a sound respect for facts'.²⁰⁹ There is an historical aspect to Ross' point here, because, as he will spell out in more detail in his second UN book but to which he only alludes here, the UN is not merely the renovation of the League. To a large extent its roots run further back in history to the Holly Alliance and the Concert of Europe.²¹⁰ Any debt to the Concert of Europe is a recognition of the role of Great Powers in the maintenance of peace. Ross goes so far as to suggest that the 'League was never based on that solidarity between the seven great powers then existent which alone could have guaranteed its success'.²¹¹ That is the answer — at least one of them — to the question 'Why was the League politically a fiasco?'²¹²

The composition of the Great Powers is, of course, always under revision but the Charter represents an attempt, like the Covenant, to fix the members permanently. Ross explains that '[h]istory has many examples of the desire to consolidate the *status quo* after a great war and give the peace conditions eternal validity' and the 'Charter of the United Nations is another example of this tendency'.²¹³ Understandable or not,

²⁰⁴ *Ibid.*, at 272.

²⁰⁵ Ross, *supra* note 3, at 135.

²⁰⁶ *Ibid.*, at 134.

²⁰⁷ A. Zimmermann, *The League of Nations and the Rule of Law* (2d ed. 1939), at 491.

²⁰⁸ Ross, *supra* note 3, at 16.

²⁰⁹ *Ibid.*, at 73.

²¹⁰ This is a topic he will address at length in the second UN book. Ross, *supra* note 188, at 5–8.

²¹¹ Ross, *supra* note 3, at 15.

²¹² *Ibid.*

²¹³ *Ibid.*, at 39.

Ross is openly hostile to the manipulation of the Charter in the interests of the Great Powers. He is never as intense as he is in his long explication of the so-called ‘Restrictive Principles’, the legal principles deployed to protect the sanctity of the individual states. He announces that “‘Munich’ has become the symbol of a policy which unscrupulously throws a small state to the wolves in the hope of thus buying ‘peace in our time’”.²¹⁴ But rather than affirming that the international community had learned its lesson, he asks: ‘Is it permissible for the United Nations to act on that principle or does law and justice set a limit to the price at which peace may be bought?’²¹⁵ The immediate answer is a ‘divided answer’ but as he moves through the legal principles meant to protect the sanctity of states, they are shallow, meaningless, or protect only the Great Powers.

In his discussion of the ‘sovereignty of states’, Ross references the doctrine that ‘there are certain matters which by their nature are purely national and therefore outside the competence of international law.’²¹⁶ He has long known better: ‘The idea of such a division of competences between International Law and Internal Law is of course — as has often been shown — quite illusory.’²¹⁷ Rather, ‘[e]very “internal” matter . . . may be conceived to be subject to international regulation.’²¹⁸ He explains that the ‘so-called “*domaine réservé*” is not absolute but *in a double sense relative*.’²¹⁹ It is relative, he explains, ‘in view of the general progressive development of international law’ and, ultimately, ‘the question as to whether or not a certain matter comes under the reserved domain cannot be settled by simple consideration of “the nature” of that matter.’²²⁰ Here Ross is specifically treating the Covenant analog to the Charter’s domestic reservation Article 2(7). But, as Ross would point out, the Charter takes the wording of Covenant and makes it worse by replacing the reference to ‘a matter which by international law is solely within the domestic jurisdiction’ with ‘matters which are essentially within the domestic jurisdiction’. His anger over the introduction of the word ‘essentially’ is palpable.²²¹ In addition, he attacks the omission of the reference to international law, which was present in both the Covenant and the Dumbarton Oaks draft. Its removal leaves pure politics: ‘The result of a political interpretation will easily be that the matter . . . will not be regarded as coming under the reserved domain, because in view of its political importance there ought to be a limitation on the liberty of action.’²²²

²¹⁴ Ross, *supra* note 3, at 116.

²¹⁵ *Ibid.*, at 116–17.

²¹⁶ *Ibid.*, at 120.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*, at 120–121.

²²¹ ‘The consequences of the change are so downright absurd that in my opinion it is necessary, in the name of reason, to *disregard* the essentiality requirement and instead of “essentially” read “solely” in Article 2(7) and then apply the interpretation to the concrete case, not the category.’ *Ibid.*, at 123.

²²² *Ibid.* Ross notes that the General Assembly and the Security Council have not brought this question of competence before the International Court of Justice because they want the political latitude unimpeded by the constraint of legal analysis. *Ibid.*, at 124.

In part, Ross discerns an effort to freeze the progress of international law in the area of the reserved domain of state activity: 'Hence the idea behind Article 2(7) is an interest in preserving international law at its present stage and opposing a further development of its through the efforts of the United Nations to regulate those things which are now abandoned, in anarchistic fashion, to the struggle for political power.'²²³ Once we glimpse the 'struggle for political power' we know who the winners are.²²⁴ In this carefully constructed scheme, '[t]he major powers alone can reap benefit from asserting the sovereignty principle and lawlessness at the expense of the competence of the United Nations to adjust disputes and a further development of international law.'²²⁵ At this point, Ross employs his ideology critique and explains not only that 'Article 2(7) is the quintessence of the tendency of sovereignty dogma to resist progress' but also that 'by the very act of investing the craving for power with the alluring draperies of this ideology' the Great Powers 'have succeeded in dazzling the small states — which have a natural desire to be recognized as "sovereign" too — and making them accept a standpoint at variance with their own interests and the claims of law.'²²⁶ By divesting the sovereignty principle from its international legal moorings, the principle only benefits the Great Powers. Similarly, the pronouncement of Article 2(1) that the 'Organization is based on the principle of the sovereign equality of all its Members' represents a parallel sleight of hand. It is 'merely declaratory' and 'politically motivated'.²²⁷ In Ross' long rampage about the manipulation of the sovereignty principle and the reserved domain, he sets law in opposition to politics and maintains that where law is replaced by politics, power assumes control. Against the maintenance of the status quo to the benefit of the powerful, international law is a progressive force.²²⁸

The reserved domain is only one of the places in where Ross clearly separates legal function and competence from politics.²²⁹ Evidently, the formula is unavoidable. He repeatedly intones that where there is no binding law, politics takes over. And yet there are also recurrences of his textbook's argument of the political force behind international law. Similarly, Ross separates morality and law in the sense that he can talk about an exception to the veto rule as having 'only morally binding force'.²³⁰ As a

²²³ *Ibid.*, at 129.

²²⁴ 'It is not difficult to determine which group of states is interested in this.' *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ 'Precisely because the Charter on certain points encroaches on what is traditionally associated with the sovereignty ideology the sponsors have felt impelled, as a reassurance, to insert a fundamental (but non-binding) confirmation of the sovereignty principle as one of the first maxims of the Charter.' *Ibid.*, at 134.

²²⁸ There is a contrapuntal move in his discussion of the role of the Security Council in *Constitution of the United Nations*: he suggests that if the Council could have been established as a 'universal arbitral tribunal' and it may have been possible for it to 'become that organ of peaceful adjustment which the world is so greatly in need owing to the static character of international law.' *Ibid.*, at 155–56.

²²⁹ Another example is where he states: 'Legally Article 2(1) is without any importance whatever. The purpose of the provision is purely political.' *Ibid.*, at 134.

²³⁰ *Ibid.*, at 83.

result, ‘a major power which would disregard moral considerations can push through its veto against any resolution passed in the Security Council, without exception.’²³¹ And yet in the definition of law at the beginning of his book, Ross writes of ‘that combination of force and moral obligation which is called law’.²³² Ross is ambivalent about some of the technical legal questions he poses — are they ‘hardly of any practical importance’ or are they worth his investigation? — but he is also unable to resolve tensions in his writing on law and politics and law and morality.

Ross’ book does not view the UN Charter as a major phenomenon of international law or even contributing to its development. Rather, the Charter and international law fundamentally stand in opposition to each other as unresolved antinomies. Admittedly, Ross may be able to point to the removal of the reference to international law in the transition from of the Covenant’s treatment of state sovereignty to the Charter’s, suggesting antagonism between the new international organization and the discipline of international law. This allows him to play games much like Kelsen in his Covenant and Charter studies, depicting the Charter as alternating between its lack of legal force and its surrender of legal determination to politics. But in Ross’ case, the realist, whose law is ‘socio-psychologically’ driven, finds himself in pure theory of law as he confronts the Charter drafted in 1945. In a sense, after expressing views similar to Kelsen’s about the Charter’s language allowing politics to invade the space of law, he also seems ultimately to share Kelsen’s methodological tension between pure theory and social reality if Ross’ book does not display a split discourse of text and footnotes.

4 Conclusion — the Disappearing Act of International Law

Something happens to the intellectual vitality of international legal thought after the Second World War. David Kennedy likes to talk of a ‘move to process’ that mirrors the US jurisprudential turn in the 1950s to the ‘Process School’.²³³ The tale of declension is central to the ‘fall’ of the subtitle to Martti Koskenniemi’s *The Gentle Civilizer of Nations: The Rise and Fall of International Law*. In his final chapter, Koskenniemi traces a move that follows Morgenthau out of international law and into international relations. He explains that it is ‘a well-known fact that “international relations” is a predominantly Anglo-American discipline whose origins lie in the academic activities of refugees — often with a legal background — from the German *Reich* in the United States during the early years of the Cold War.’²³⁴ Embedded in the creation of

²³¹ *Ibid.*

²³² *Ibid.*, at 16.

²³³ I would, and have, suggested that even the central text of the American Process School, Hart and Sacks’s mimeographed materials, *The Legal Process*, focused on a clearly articulated utilitarian, distributional substantive goal that sees a dispersion of decision-making power as a way of attaining that goal and even makes distributional comparisons with the Soviet Union. Landauer, ‘Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought’, 12 *Yale J. of L. & Humanities*, at 171, 212–217.

²³⁴ Koskenniemi, *supra* note 11, at 465.

international relations was a weary dismissal of international law: 'Political science departments at US universities received from the German refugees an image of international law as Weimar law writ large, formalistic, moralistic, and unable to influence the realities of international life.'²³⁵ For Koskenniemi, Morgenthau's own move is emblematic of a larger move to international relations in the US — and even a change of sensibility among international lawyers — and the change in the US was in turn emblematic of the eclipse of international law internationally. For Koskenniemi, the rise of international relations involved a repudiation of Kelsenian formalism. But one of the intriguing aspects of Kelsen's Charter book as well as the Scandinavian realist Alf Ross' study is international law's disappearance from the scene.

In one section of Kelsen's book, he turns to a discussion of 'the doctrine of *bellum justum*, just war' in the context of international law. Not only does he define international law 'in the true sense of the term'²³⁶ but he begins his paragraph on *bellum justum* with the assertion that '[i]t is a generally accepted principle of international law that a limited interference in the sphere of interests of one state by another is allowed only as a reaction against a delict, that is to say, as a sanction.'²³⁷ Kelsen then devotes a paragraph to explaining that '[g]eneral international law is characterised by a high degree of decentralisation' so that it is also 'characterised by the principle of self-help'.²³⁸ 'In this respect', he concludes, 'it is primitive law'.²³⁹ The move, then, to the League and United Nations represents a departure from the reliance upon sanction as self-help under general international law. What is interesting is the clear separation of principles of general international law from the rules of the international organization so that certain actions are 'neither forbidden nor prescribed by general international law, but authorised or prescribed by the constitution of the international organisation'.²⁴⁰ Kelsen himself does not address very explicitly the relationship between general international law and the law of the new organization. There is no such discussion in his preface, and the commentary that waits until page 707 may be his most explicit discussion of the relationship of the two orders. His close textual analysis does not, then, only push politics to the footnotes — it also seems to limit interplay of the law of the UN and the traditional doctrines of international law.

Alf Ross is perhaps more explicit about the disappearance of international law. As mentioned earlier, he complained that the discussion of domestic jurisdiction in the Charter eliminated the reference to international law from parallel clauses in the League Covenant and the Dumbarton Oaks draft. For him, this was a clear way to minimize the 'progressive' force of international law. Perhaps the struggle is over when one reads the cover of his book. As a result almost all of the air is sucked out of the space of international law doctrine. The various references to 'my Textbook on

²³⁵ *Ibid.*, at 471.

²³⁶ Kelsen, *supra* note 12, at 706.

²³⁷ *Ibid.*, at 707.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*, at 710.

International Law' imply the underlying relevance of international law doctrine — but, for the most part, the *Constitution of the United Nations* tells a different story. Despite the gesture towards the Concert of Europe, Ross worries about the marginalization of international law.

Ross and Kelsen's discussions of the International Court of Justice are important here because the Court's adjudication provides an obvious overlap of international organization and international law doctrine. Ross devotes less than six pages to the Court, focusing only on its jurisdiction and function, although that may be explained by his sole focus on its place in the Charter. Kelsen, who gives a good deal more space to the Court, devotes a very short section to 'The Law to be Applied by the Court', which he sums up: 'All these difficulties could have been avoided if the Statute had provided that the Court should apply existing international law unless the contesting parties agree that the case shall be decided *ex aequo et bono*, leaving it to the Court to determine which rules are international law and in what successive order they are to be applied.'²⁴¹ Article 38 of the Statute begins by explaining that the Court's function 'is to decide in accordance with international law such disputes as are submitted to it', and Kelsen observes that the reference to 'in accordance with international law' was not present in the Statute of the Permanent Court of Justice.²⁴² But Kelsen shows annoyance with the attempt to describe the components of international law as well as the final entrant on the list, 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law', which, for Kelsen, was not law at all.

It seems, then, from the perspective of Kelsen and Ross' Charter books of 1950, international law is characterized mostly by its absence. This does not mean that law has quite ceded to international relations, for both, I think, still see the Charter as a primarily a *legal* document even though too often it simply fails in its legal character. Central to both Kelsen and Ross' books is their view of the political character of certain provisions of the Charter in an explicit politics/legal polarity. Kelsen typically concerns himself with provisions that merely express political aims and are therefore without true legal effect or imprecisions that allow too much room to maneuver; the drafters have not succeeded in their task of carrying out the goals of the organization. And Ross points more energetically to places where the absence of law allows for more purely political decision-making, which represents an unstated power grab by the Great Powers in addition to the more obvious ones like their veto power in the Security Council. Yet despite the ceding of law to politics, neither Kelsen nor Ross want to give up entirely on the legal character of the UN Charter. Both refer to international law — 'general international law' by Kelsen and references to 'my Textbook of International Law' by Ross — as if the Charter were encased in the broader international legal regime. But, ultimately, Kelsen's *The Law of the United Nations* and Ross' *Constitution of the United Nations* attest to the disappearance of international law doctrine from the scene.

²⁴¹ *Ibid.*, at 534.

²⁴² *Ibid.*, at 531.

In an important sense, international law was an emblem for both Kelsen and Ross of their own politics of liberal internationalism — here we should remember Kelsen’s positing of a ‘internationalism/pacifism’ pole in the choice between national and international precedence in his monist hierarchy. And both of theorists, perhaps with disclaimers about ‘primitiveness’ by Kelsen and ‘imperfection’ by Ross, see the promise of international law. Ross states in his textbook that ‘International Law is not “conceptually” but only “accidentally” imperfect law’.²⁴³ In Kelsen and Ross’ 1950 books on the United Nations, there is a sense of another ‘accident’, another misdirection. Both Kelsen and Ross’ critical tools are useful in identifying problems with the UN organizational documents, but both have too much at stake in international law to describe the Charter as too explicitly moving outside the realm of international law doctrine. So they forge ahead and attempt to produce *Hamlet* without the Prince of Denmark and hope that they can pull it off.

²⁴³ Ross, *supra* note 1, at 19.