
Kelsen Lives

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Abstract

Does it make sense any longer to study international law as a system of law? In both theory and practice, the impression of fragmentation and feebleness seems to be currently eclipsing the traditional faith in the unity and efficacy of cosmopolitan benevolence. Repeatedly, state interest has trumped the discipline of norms; international regimes do not form one coherent system, and behind their multiplicity seems to lurk disarray and new modes of hegemony. This article proposes to meet these challenges by reintroducing to the discipline a set of ideas about the foundations and the modest aspirations in the analysis of international law that are associated with the work of Hans Kelsen. To the argument that the system of public international law, as envisaged by Kelsen, is now untenable, the paper replies that phenomena such as hegemony and persistent decentralization are quite compatible with a system of public international law. To the argument that ideas associated with classical Kelsenian legal positivism have been eclipsed by more sophisticated sociological theorizing, it will be replied that Kelsen's insistence on the non-idealization of law remains a convincing answer. It will be shown that, contrary to their haughty pretensions, current sociological approaches are prey to idealizing assumptions as regards the agents and the substantive coherence of the international legal system. One example is social systems theory, which seeks to expose the unity of the international system as a myth, and to convince us that enduring fragmentation is all there is. Another example is that of theories premised on rational choice atomism, which would have us believe that international law is merely the combined factual consequence of self-interested state conduct. In both cases, the relevant sociology implicates a series of idealizations which betray its ideological thrust. Insofar as this kind of sociology provides the misguided basis for the claim that public international law is in crisis, legal positivism – methodo Vindobonense – is the antidote.

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1 Sobriety

The title for this article was chosen, at least in part, in approbation of the behaviour of oddballs who respond to the loss of their idol with the denial of death. The idol that I have in mind is not, however, Hans Kelsen or his theory *in particular*.¹ Neither he nor his work mean to me what Elvis would if I had ever been turned into a fan of his music.² What I mourn, rather, is the decreasing respect that is earned, currently, by a style of legal analysis that promises to emancipate legal thought from the grip of *unnecessary idealizations*.³

There can be no doubt that Kelsen made one of the most notable stabs at that. He made only the most sparing use of idealizations in explaining what it takes to know what the law is. Indeed, Kelsen strives to limit idealizations to the level at which further parsimony would abandon the theory's subject altogether. He was not wrong, hence, in likening his project, at a certain point, to transcendental philosophy⁴ for it can be characterized as an inquiry into the idealizations that are *necessary* for there to be *meaningful* legal claims.⁵

This may sound philosophical, but the matter is straightforward. It is straightforward precisely because it is philosophical. Through the lens of *idealizations* realities come to be presented as though they were consonant with norms or, alternatively,

¹ The public international law scholarship of Kelsen and his disciples, such as Josef Kunz, has not been forgotten. See J. von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001). For a review of this book see Jakab, 'Kelsens Völkerrechtslehre zwischen Erkenntnistheorie und Politik', 64 *Heidelberg J Int'l L* (2004) 1045. This is not the place to recognize the contribution that was made by Josef Kunz to the development of a positivist theory of public international law; nevertheless, I would like to mention that he made a foray into the discipline long before he had to move to the United States. See J. Kunz, *Völkerrechtswissenschaft und Reine Rechtslehre* (1923).

² I have recently demonstrated once more that I am not a legal positivist. However, I did so in the mother tongue of this persuasion. See Forgó and Somek, 'Nachpositivistisches Rechtsdenken', in S. Buckel *et al.* (eds.), *Neue Theorien des Rechts* (2006), at 263–290.

³ I hasten to add that there are a few offering resistance. See, e.g., Schlag, 'Hiding the Ball', 71 *NYU L Rev* (1996) 1681.

⁴ See, e.g., his characterization of the basic norm (*Grundnorm*) *qua* transcendental-logical hypothesis (*transzendentallogische Annahme*) in H. Kelsen, *Reine Rechtslehre* (2nd ed., 1960), at 204. On Kelsen's neo-Kantian period, during which he followed the transcendental path most explicitly, see Paulson, 'Introduction', in H. Kelsen, *Introduction to the Problems of Legal Theory* (trans. B.L. and S.L. Paulson, 1992), at xxix–xlii. It was recently pointed out by Paulson that Kelsen's rejection of the traditional notion of sovereignty needs to be understood in light of his rejection of naturalism: see Paulson, 'Souveränität und der rechtliche Monismus. Eine kritische Skizze einiger Aspekte der frühen Lehre Hans Kelsens', in S. Hammer *et al.* (eds.), *Demokratie und sozialer Rechtsstaat in Europa* (2004), at 26. On the current state of the transcendental project in general see M. Sacks, *Objectivity and Insight* (2000); J. Habermas, *Wahrheit und Rechtfertigung. Philosophische Aufsätze* (1999).

⁵ It is a different matter, however, how successful Kelsen was in the pursuit of this project. For a critical assessment see Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', 12 *Oxford Journal of Legal Studies* (1992) 311, and 'Der Normativismus Hans Kelsen', 61 *Juristen Zeitung* (2006) 529. I should add in passing that I maintain an understanding of 'transcendental' that attends to the conditions of meaning. It is broader than the '*sinnkritische*' version of transcendental argumentation that has been discussed in German philosophical circles. See G. Schönrich, *Kategorien und transzendente Argumentation. Kant und die Idee einer transzendentalen Semiotik* (1981), at 189.

realizations of ideals.⁶ The idealization most prevalent among legal scholars has it that law, in and of itself or *in toto*, is a good thing. Many, if not most, take the existence of the legal system to be the manifestation of valuable ideas (the rule of law, efficiency, etc.). This is exactly the type of idealization that Kelsen wanted to avoid. He did not believe in a proposition to formulate a universal truth that states that the law is a good thing. Science – legal science no less than any other science – should stay away from raising indefensible claims. It should not, in particular, lend its voice to political views or moral sentiments, for this would overdetermine law, as a social phenomenon, with avoidable attributions of meaning.⁷ According to Kelsen, all idealizations that are also unnecessary are indefensible. Unnecessary and indefensible idealizations are co-extensive. They are unnecessary if they can be dispensed with altogether in knowing what the law is. One does not, for example, have to attribute value to the legal system or to believe in popular sovereignty in order to determine what the law says, if it says anything at all. In fact, Kelsen believed that it is due to the interference of dispensable idealizations that the law is rendered obscure.

The significance of Kelsen's critical stance can scarcely be overstated. It explains in which respect Kelsen's version of legal positivism is different from what has come to be known by this name in the Anglo-American world.⁸ According to such positivism, the law and its sources are constituted by conventions.⁹ Nowhere is it put into question that such conventions might themselves create a wrong picture of what they are about.¹⁰ There is never any question, that is, whether the conventions correctly appeal to what, according to the conventions themselves, implicitly accounts for their authoritativeness (for example, the bounded nature of a binding 'precedent'). In practice, the law often creates a wrong picture of itself.

⁶ It should go without saying that my use of 'idealization' is both close to and broader than the use that has been made of this term in psychoanalysis. According to Laplanche and Pontialis, 'idealisation' is a psychological occurrence as a result of which something attains the quality of perfection. See J. Laplanche and J.-B. Pontialis, *Das Vokabular der Psychoanalyse* (1972), at 218. See, originally, Freud, 'Massenpsychologie und Ich-Analyse' (1921), in A. Mitscherlich *et al.* (eds.), *Studienausgabe* (1982), ix, at 61, 105. In the text above, by 'expression' I mean compliance as well as constitution.

⁷ The social experience with which the transcendental project begins is the fact that in a society persons raise legal claims with the purport that such claims are objectively valid. See Kelsen, *Introduction*, *supra* note 4, at 9–10. Any legal theory that takes the meaning of such claims *seriously* needs to explore the conditions for their validity. Such claims are not taken seriously by theories that merely study the conventions ('modalities') for their use. They bracket the claim to validity that is made by such claims. See P. Bobbitt, *Constitutional Interpretation* (1991), at 12–13; D. Patterson, *Law and Truth* (1996), at 70.

⁸ For a very brief sketch see R. Dworkin, *Law's Empire* (1986), at 116–117. A useful introduction is offered by Coleman and Leiter, 'Legal Positivism', in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (1996), at 241–259.

⁹ See, notably, J. Coleman, *The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory* (2001), at 68–69.

¹⁰ Paradoxically, the critical spirit of positivism is more adequately reflected in the work of Oliver Wendell Holmes than in the writings of present-day legal positivists. Holmes went at quite some length to expose the corrupting influence of morality on the conventions governing the law of torts. See his 'The Path of the Law', reprinted at 110 *Harvard L Rev* (1997) 991 (first published in 1897).

Kelsen's positivism pays attention to the self-referential constitution of what is purported to be known as 'law' in society. Some social acts, in contrast to natural occurrences, come with a self-interpretation attached.¹¹ When someone says 'I herewith declare x's property confiscated' a self-referential statement is made as to the social consequence of this verbal act. Whether or not the consequence *actually* follows depends on the *validity* of the act. The validity hinges, in turn, on whether the act is indeed what it claims to be, that is, a legal declaration of confiscation. To determine whether that is the case cannot be left to conventions, for such conventions, on a semantic level, often obscure what their *use* is all about. Choosing a random example, an international tribunal may claim that the source of the human rights law of a particular regime is the constitutional tradition common to all participating states, whereas in fact human rights are effectively laid down by that tribunal on a case by case basis. Conventions camouflage as much as they reveal the power structures underpinning the operations of the legal order.

2 Elimination Comes Naturally

Kelsen's attention to the potential incongruence between the 'subjective' self-interpretation of the act and its objective validity renders his project dialectical.¹² I should grant, though, that an association with dialectics has never been established before; Kelsen himself would have definitely abhorred the idea. Nevertheless, I think it is possible to work with Kelsen's theory by assuming that any legal theory has to take seriously an ideal aspiration that is built into the social practice of knowing the law, that is, the aspiration to rest upon an adequate account of what it takes to know the law.¹³ Kelsen submits the conventional accounts that he encounters in the legal theory of his time to several critical tests. Kelsen's respective critical stance – which *can* be understood as the actualization of the self-critique that is built into the social practice of knowing the law – provides the key to his programme. It is in the process of weeding out unnecessary (*viz.*, corrupting) idealizations that the law works itself pure.¹⁴ Arguably, this process is a trivial consequence of raising *legal* – as opposed to other – claims.¹⁵

¹¹ See Kelsen, *Introduction*, *supra* note 4, at 9–10; more generally, see J.L. Austin, *How to Do Things with Words* (2nd ed., 1975), at 103–104.

¹² On the point of the dialectical project see R.B. Pippin, *Modernism as a Philosophical Problem. On the Dissatisfactions of European High Culture* (2nd ed., 1999), at 75–76.

¹³ In this sense, Kelsen is closer to Hegel than to positivists. On the Hegelian project see, generally, T. Pinkard, *Hegel's Phenomenology. The Sociality of Reason* (1994). Dworkin, in turn, is close to both Kelsen and Hegel, but he does not seem to know, for he does not seem to have read either.

¹⁴ I do not see any point, hence, in coming up with some psychoanalytical account of Kelsen's apparent obsession with 'purity'. The latter is the consequence of determining what a legal claim is (in fact, its self-determination). But see Carty, 'Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt', 16 *Cardozo L Rev* (1995) 1235.

¹⁵ The process can be linked, then, historically to the differentiation of the legal system. See N. Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (1981), at 122.

A simple example may help to illustrate this point. The claim that sex offenders, after they have served their term, ought to be expelled from the country is indeterminate as to what is actually being claimed. Is it an expression of moral indignation that appeals to drastic measure in order to underscore how contemptible sex offences are? Does it propose future legal policy? Is it a suggestion of a measure that is considered most apt for the protection of one's children? Or is it, finally, a claim about what the law requires? Any attempt at clarifying the meaning of such a statement will have to determine in which respect assumptions about instrumental accuracy of measures, the blameworthiness of conduct or feelings of moral indignation may legitimately enter a determination of what the law is. If one is convinced, as Kelsen undoubtedly was, that *much* needs to be eliminated from the determination of legal claims, an account will for that reason have to be, in a sense, minimalist.¹⁶ For Kelsen, this is the consequence of the drive to insulate legal analysis from the influence of misleading considerations. It reflects his suspicion that legal claims are overdetermined and confused through the interference of false idealizations. Owing to their presence, the law is rendered obscure. Purifying legal science, hence, is an eminently practical matter. It means combating, on the legal field, those who want to impress their ideological agenda upon the law.

3 Sociology Is Ideology

Kelsen was strictly opposed to both natural law theory and sociological modes of legal reasoning because of his deep-seated distrust of substantive moral theory.¹⁷ It may appear puzzling, at first glance, why and how moral scepticism should affect the possibility of a sociological theory. Isn't such a theory supposedly about facts and hence exclusively concerned with the accuracy of its statements as regards such facts? Why should moral beliefs have any bearing on that?

It is precisely because a sociological theory, in particular the sociological theory of the state, implicitly claims to be based on facts alone that Kelsen takes on the challenge to prove, dialectically indeed, that such a claim is unfounded.¹⁸ He goes at

¹⁶ As was pointed out to me by Michael Green, a description of Kelsen's project in 'reductionist' terms might strike one as odd. Is not Kelsen a legal philosopher who abstained from explaining the law in terms of something else, thereby avoiding any reduction of the law to another entity? Even though Green's point is well taken, I contend that in one important respect Kelsen's theory is indeed reductionist. Kelsen reduced all person-neutral moral appeals to expressions of person-relative wants and attempted to reconstruct their relevance from the perspective of power-conferring norms. See Somek, 'Ermächtigung und Verpflichtung. Ein Versuch über Normativität bei Hans Kelsen', in S.L. Paulson and M. Stolleis (eds.), *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (2005), at 58–79.

¹⁷ By 'substantive moral theory' I mean a theory that wishes to provide guidance for moral problem-solving. Kelsen's distrust in a sociological theory did not change after he made the encounter with American legal realism; however, the ground for his distrust changed. Kelsen thought that what 'goes under the name of sociological jurisprudence is hardly more than methodological postulates': H. Kelsen, *General Theory of Law and State* (trans. Anders Wedberg, 2nd ed., 1961), at 174.

¹⁸ See H. Kelsen, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht* (2nd ed., 1928), at 8–11.

great lengths to demonstrate that sociological legal theory – at any rate, the theory of his time – mistakes for reality its very own idealizations. His major target is the sociological concept of the state.¹⁹ According to his analysis, what is purported to be a social fact by sociological state-theory is merely a hypostatization of normative claims. For example, the state is thought to *be* an entity that is more powerful and more eminent than individuals; but this belief, Kelsen replies, is merely the mirage of the moral belief in the greater authority of the powers that be. The state is also thought to *be* something prior to the legal system; but this idea, again, is merely the displaced articulation of the desire to be protected by, and to be able to identify with, a collective that could – at any given moment – defy legal constraints. Indeed, Kelsen’s critique of the concept of the state is the attempt to reveal that sociological theory is not sociological at all.

This is not to say that Kelsen believes that a theory of law can dispense with all idealizations. Kelsen needs to resort to idealizations, too, in order to describe the legal system, for example, the belief that conduct can actually conform with, or be constituted by, legal norms. This, however, is about the only idealization that is admitted to the game.

Kelsen’s minimalism has an epistemological point. Much *less* can be known about law than is usually assumed by legal ‘idealists’. Kelsen’s epistemological point has an ontological message.²⁰ The law is much more meagre and less morally elevating than it may appear in the eyes of an adoring observer. The law is, essentially, the social technique for the imposition of sanctions at will.²¹ A legal system is a medium for the organization of power. Law is about the limits that are drawn to one will by another. This ontological message has a political consequence. More can be done with legal systems than most of us are likely morally to approve of. Consequently, we should lower our normative expectation as to what it takes for a legal system to exist. We study law not to find out what we must admire but to realize what we may have good reason to fear.

4 The Current

In what follows, I would like to reclaim Kelsenian sobriety for the study of public international law. I would like to highlight, in particular, that Kelsen’s minimalism allows us to perceive a well-functioning legal system where others would already observe a lack of organization or even nothing at all. In the final sections of this essay, I would like to take issue with two currently fashionable ways of thinking about public international law that intend to expose international legality as a myth. What I have in mind, in particular, are approaches that promise, each in their own way, to infuse the

¹⁹ On the following see Somek, ‘Stateless Law: Kelsen’s Conception and its Limits’, 26 *Oxford Journal of Legal Studies* (2006) 753.

²⁰ On the relationship between epistemology and ontology in legal thought see Schlag, *supra* note 3.

²¹ See Kelsen’s reconstructed concept of the legal norm in Kelsen, *Introduction*, *supra* note 4, at 26–27.

study of international law with greater sociological 'realism'.²² Such increased 'realism' is based on different and, indeed, opposing, sociological persuasions – one assuming that international society is composed of rationally behaving individual actors,²³ be they local constituencies or states, and another believing that the world society is articulated in different social systems which are essentially the product of self-referential communications.²⁴

The first variant of taking social realities into account has dominated international relations theory in the United States for most of the second half of the 20th century.²⁵ Increasingly, it is also spilling over into the domain of public international law.²⁶ From the angle of idealizations entertained as regards the conduct of the relevant agents, it makes sense to bundle the dominant strands of international relations and public international law theory in the United States²⁷ under the name of 'rationalism', if by 'rationalism' is understood the belief that the shape of international society can be explained by looking at a composite unit that uses scarce resources and engages in cooperation in order to attain its own ends.²⁸ According to Elster, rational action requires that an agent choose the action that best satisfies the agent's desires provided that the desires themselves are internally consistent and 'optimally related' to the

²² I know that I am entering a linguistic minefield when talking loosely, in the text above, about 'realism'. I am aware that the term stands for a very distinct approach in international relations theory which – despite resting on a conception of rational action that is shared by other approaches as well – has its distinct perspective on the role and influence of state power in international relations. For a useful characterization see Hathaway, 'Do Human Rights Treaties Make a Difference?', 111 *Yale LJ* (2002) 1935, at 1944–1945. For an illuminating discussion see also Keohane, 'Rational Choice Theory and International Law: Insights and Limitations', 31 *J Legal Studies* (2002) 307. Hans Morgenthau, the intellectual founding father of what came to be called 'realism' in international relations theory, had been a critic of Kelsen's theory since the days when he had published his first works in German. See H. Morgenthau, *Der Kampf der deutschen Staatslehre um die Wirklichkeit des Staates* (Inaugural Lecture at the University of Geneva, 1932, manuscript HJM-B110, Library of Congress). On the significance of this work for the development of Morgenthau's thought see C. Frei, *Hans J. Morgenthau. An Intellectual Biography* (2001), at 117; M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (2002), at 455–459. On his relation to the thought of Carl Schmitt see *ibid.*, at 459–465 and W.E. Scheuerman, *Carl Schmitt. The End of Law* (1999), at 245–251. For Morgenthau's later engagement of Kelsen see Morgenthau, 'Positivism, Functionalism, and International Law', 34 *Am J Public Int'l L* (1940) 260; G.A. Lipsky (ed.), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (1953). For a useful discussion of the inconsistencies of 'realism' see C.R. Beitz, *Political Theory and International Relations* (2nd ed., 1999), at 23–27.

²³ For a brief overview see Krasner, 'International Law and International Relations: Together, Apart, Together', 1 *Chicago J Int'l L* (2000) 93.

²⁴ On this basic tenet of social systems theory see N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997), at 14.

²⁵ For an overview see R. Beck *et al.* (eds.), *International Law Rules. Approaches from International Law and International Relations* (1996).

²⁶ This spillover is associated, mostly, with the work of Anne-Marie Slaughter. See, in particular, Slaughter, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205.

²⁷ The explanation for the currency of this type of theorizing may lie in the Protestant heritage of this nation. See M. Weber, *Gesammelte Aufsätze zur Religionssoziologie* (1920), i, at 32–37.

²⁸ See Hathaway and Lavinbuk, 'Rationalism and Revisionism' (A review of Goldstein and Posner, *The Limits of International Law*), 119 *Harvard L Rev* (2006) 1404, at 1410, 1421.

pertinent evidence.²⁹ From a philosophical perspective, however, it is more accurate to speak of *atomism*, for in all of its forms rationalism rests on the conviction that the existence of a social fabric between and among states is to be explained by looking at the interests and actions of original units.³⁰ Such units are taken as a given.³¹ It is this basic atomist belief in the existence of agents prior to international society that sets atomism apart from ‘constructivism’, according to which the interests and the identity of international agents is actually shaped by pre-existing international institutions and established modes of interaction.³²

By contrast, social system’s theory – not too dissimilar from constructivism – sees organizations, such as states and businesses, merely as instantiations of larger networks that can be identified by their mode of communication and function.³³ Individual units, if there are assumed to be any, are always seen as being constituted in the context of networks of communication. The claim of this type of theory is, in a legal context, that traditional beliefs in the regulatory import of norms and the governing effect of a legal hierarchy have no reality.³⁴ All normativity is bound to collapse in

²⁹ See J. Elster, *Solomonic Judgements. Studies in the Limitations of Rationality* (1989), at 3–4, and *Nuts and Bolts for the Social Sciences* (1989), at 30–32.

³⁰ See Taylor, ‘Atomism’, in C. Taylor, *Philosophy and the Human Sciences* (Philosophical Papers, vol. 2, 1985), at 187–210; the term is borrowed from Hegel. See Hegel, ‘Grundlinien der Philosophie des Rechts’, in E. Moldenhauer and K. Michel (eds.), *Werke in zwanzig Bänden* (1969–1971), vii, § 155, Zusatz, 305.

³¹ As is well known, international law atomism comes in different forms. The classical form is called ‘realism’. It sees the world of international relations composed of states seeking their own advantage. The most essential ingredient of ‘realism’ is the belief that international relations are a zero sum game, with each country seeking its gain at the expense of others. For a discussion of realism see Legro and Moravcsik, ‘Is Anybody Still a Realist?’, *24 International Security* (1999) 5, at 6–9, 16–18. Institutionalism, by contrast, even though sharing the same ontological commitment, believes that the major problem that is to be solved through international co-operation consists in creating common gains. Hence, international co-operation is conceived of as a positive sum game: see *ibid.*, at 10; Hathaway and Lavinbuk, *supra* note 28, at 1430–1431. The most prominent work reflecting this perspective is R. Keohane’s *After Hegemony, Co-operation and Discord in the World Political Economy* (1984). Liberalism fits into the picture of atomism, too, however, with the atoms changing from states to local constituencies that exert influence on their governments. See Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’, *51 Int’l Org* (1997) 513.

³² On ‘constructivism’ see Bederman, ‘Constructivism, Positivism, and Empiricism in International Law’, *89 Georgetown LJ* (2000–2001) 469, at 477; P.A. Karber, ‘“Constructivism” as a Method of International Law’, *94 Proceedings of the Am Soc Int’l L* (2000) 189; Brunée and Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’, *39 Columbia J Transnat’l L* (2000) 19; Hathaway and Lavinbuk, *supra* note 28, at 1411, 1439–1440 (with further references). I am taking the liberty to bemoan, briefly, the fact that modern international law and international relations theory uses terminology that does not reflect the philosophical schools of thought with which certain ideas could be associated. For example, the point of ‘constructivism’ would be better captured by calling it pragmatism or even symbolic interactionism. See, for that matter, G.H. Mead, *Mind, Self & Society from the Standpoint of a Social Behaviourist* (1934); H. Blumer, *Symbolic Interactionism. Perspective and Method* (1969).

³³ For a more general theoretical statement see D. Baecker, *Organisation als System* (1999).

³⁴ See, e.g., Teubner, ‘“And God Laughed ...”: Indeterminacy, Self-Reference and Paradox in Law’, in C. Joerges and D.M. Trubek (eds.), *Critical Legal Thought: An American–German Debate* (1989), at 399–434.

practice.³⁵ As regards public international law, it is the very belief in the existence of a (unified) system of public international law that is put into question.³⁶

The two modes of 'realistic' infusion could not be further apart. Whereas in the first case, collective agents are depicted as though they were just large-scale individuals pursuing their ends, in the case of the latter, agency and action matter only inasmuch as they serve as the markers of self-referential system reproduction;³⁷ action, therefore, is experienced as a moment in the continuous life of a system.³⁸ Both approaches, nonetheless, claim to offer sobering insights with regard to the normative purport of public international law. While some atomists contend that an examination of the reasons for compliance reveals that public international law is *normatively empty*, some social system theorists claim that, as a legal system, it has already *disappeared*.

I would like to argue, in a Kelsenian vein, that both claims rest on unwarranted idealizations. What they do, in effect, while seemingly 'unmasking' public international law, is to reveal their own unexamined normative presuppositions.

5 Kelsen's Legacy

The reason why recent scepticism as regards public international law is relevant to Kelsen's theory is straightforward. Much of modern public international law appears to coincide with his ideas and aspirations.³⁹ In retrospect, it seems as though Kelsen, indeed, had been particularly prescient about the future direction of the international

³⁵ See, in particular, Teubner, 'The King's Many Bodies. The Self-Deconstruction of the Law's Hierarchy', 31 *Law and Society Review* (1997) 763.

³⁶ See, e.g., Zumbansen, 'Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law', 15 *EJIL* (2004) 197, and 'Die vergangene Zukunft des Völkerrechts', 32 *Kritische Justiz* (2001) 46. For a sympathetic discussion of these ideas see Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *MLR* (2007) 1, at 22–23.

³⁷ On this difference see Luhmann, 'Handlungstheorie und Systemtheorie', in N. Luhmann, *Soziologische Aufklärung* (1981), iii, at 50–65.

³⁸ The emphasis on reproduction explains why social systems theory conceives of the social world basically in biological terms. See J. Habermas, *Der philosophische Diskurs der Moderne. Zwölf Vorlesungen* (1985), at 430. For a genealogy of the prevalence of a way of thinking that sees the reproduction of life at the centre of the human condition see H. Arendt, *The Human Condition* (1958), at 306–313.

³⁹ There is something puzzling about Kelsen's career in international law. His emigration marked, in a sense, his death as a publicly recognized scholar. Even though it was known, by no less a figure than Roscoe Pound, that at the time of his arrival in the US Kelsen was the most eminent legal scholar of his time, the reception of his legal theory in the US turned out to be simply disastrous (see Paulson, *supra* note 4, at 17; see also Paulson, 'Die Rezeption Kelsens in Amerika', in: W. Krawietz and O. Weinberger (eds.), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (1988), at 179–202; Pound, 'Law and the Science of Law in Recent Theories', 43 *Yale LJ* (1933–1934) 525, at 532). One of the greatest *constitutional* scholars of his time did not come to be perceived as such in his new intellectual environment. This explains why I am inclined to look at Kelsen's career in the field of public international law as his second, however late, career. The perspective is myopic, I must acknowledge, for much of the groundwork for his later work in public international law had already been done at a fairly early stage of his career. For an account that situates Kelsen's theory in the context of early twentieth century Viennese culture see Jabloner, 'Kelsen and His Circle: The Viennese Years', 9 *EJIL* (1998) 368.

community.⁴⁰ Kelsen seems to have anticipated, or maybe even precipitated, many modern developments.⁴¹ It was clear to him that the international system could be strengthened only by increasing the degree of centralization. Kelsen was aware that adjudicative bodies would be indispensable thereto.⁴² It was also clear to him that under the then (and today still) prevailing political circumstances the organization of collective security had to be asymmetrical. Even though emphasizing the sovereign equality of states,⁴³ he realized that collective security was for the grand powers to guarantee.⁴⁴ Kelsen also pioneered recognition of the role of the individual in public international law, and he did so *on the basis* (but not as a normative consequence) of his theory. According to Kelsen, most public international law is addressed to states; but this does not mean that public international law does not regulate human conduct. It does so only indirectly by delegating to states the task of obligating individuals to abide by its precepts.⁴⁵ But such delegation is not a necessary feature of the system. Kelsen had no qualms about conceiving of individuals as the direct addressees of international laws, either as the addressees of obligations or the bearers of rights. Kelsen also recognized that international law is in a primitive state.⁴⁶ In order to overcome this primitiveness he recommended strengthening both centralization and individual responsibility.⁴⁷ Kelsen, in a sense, is an early champion of two developments that are often deemed to epitomize the improvement of the international system, namely, the

⁴⁰ See A. Cassese, *International Law* (2nd ed., 2005), at 216: '[t]he Kelsenian monistic theory, an admirable theoretical construction, was in advance of its time; in many respects it was utopian and did not reflect the reality of international relations. However, for all its inconsistencies and practical pitfalls, it had a significant ideological impact. It brought new emphasis to the role of international law as a controlling factor of state conduct. It was instrumental in consolidating the notion that state officials should abide by international legal standards and ought therefore put international imperatives before national demands.' In some respects, this assessment is flawed, in particular in attributing to monism a specific normative aspiration. But it says something about the esteem in which Kelsen is still held by leading exponents of the discipline.

⁴¹ For an assessment along these lines see Leben, 'Hans Kelsen and the Advancement of International Law', 9 *EJIL* (1998) 287.

⁴² See, e.g., H. Kelsen, *The Legal Process and International Order* (1935).

⁴³ See Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organisation', 53 *Yale LJ* (1944) 207.

⁴⁴ See H. Kelsen, 'Collective Security under International Law', 49 *Naval War College International Law Studies* (1954) 1, at 34–52.

⁴⁵ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 327; see also Kelsen, *supra* note 61, at 526: '[t]hat international law imposes obligations and confers rights on the state to behave in a certain way means that international law leaves it to the state legal system to specify the human beings who are to behave in such a way as to fulfil these obligations and to exercise these rights; in other words, international law delegates powers to the state legal system to make this determination'.

⁴⁶ See sections XII–XIII below.

⁴⁷ See, in particular, H. Kelsen, *Peace Through Law* (1942).

rise of adjudicating bodies⁴⁸ on the one hand and individual responsibility for violations of international norms on the other.⁴⁹ In his eyes, international tribunals and individual responsibility were key to increasing compliance with international obligations prior to the creation of a world state.⁵⁰ Most interestingly, Kelsen was also keenly aware that with growing international cooperation and interpenetration public international law was going to look more like a sibling of administrative law.⁵¹ As a consequence, more and more norms would be addressed to the individual.

In the face of current developments, there might be reason for concern that the modern system, which can be tied to Kelsen's idea, is in the process of disintegration. I mention merely the most salient cases. The United States withdrew from the optional clause that confers default jurisdiction to the International Court of Justice.⁵²

⁴⁸ See H. Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940–41* (1942), at 146–151 (for an evolutionary perspective on the development of centralized adjudicative bodies); Kelsen, 'International Peace – By Court or Government?', 46 *Am J Sociology* (1941) 571; Kelsen, 'Essential Conditions of International Justice', 34 *Proceedings of the Am Soc Int'l L* (1941) 70, at 76–77; Kelsen, 'Compulsory Adjudication of International Disputes', 37 *AJIL* (1943) 397. See Carthy, 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law', 9 *EJIL* (1998) 344, at 353–354 (on Lauterpacht's indebtedness to Kelsen).

⁴⁹ For a discussion of the state of development of public international law at that time see Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law', [1948] *Jewish Yearbook Int'l L* 226 (with a critical discussion of the theory employed by the Nuremberg Tribunal).

⁵⁰ His belief that adjudicative centralization could precede large-scale political integration of the international community again set him apart from Hans Morgenthau who thought that sovereignty would render such incrementalism ineffective. According to Morgenthau, sovereignty is compatible only with a weak and decentralized international order. See Morgenthau, 'The Problem of Sovereignty Reconsidered', 48 *Columbia L Rev* (1948) 341, at 343.

⁵¹ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 328. For a reconstruction of the 'geology' of modern international law that seems to confirm Kelsen's intuition see Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *Heidelberg J Int'l L (ZaöRV)* (2004) 547.

⁵² See Letter from Condoleezza Rice, US Secretary of State, to Kofi Annan, UN Secretary-General (7 Mar. 2006), available at: www.discourse.net/archives/2005/03/us_announces_withdrawal_from_consular_convention.html (acknowledging that the US proclaimed its withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna, on 24 Apr. 1963). The recent decision to withdraw from the Optional Protocol stems from the perceived adverse effects on the autonomy of the American criminal justice system in light of a previous ICJ decision that required new state court hearings for 51 Mexican nationals on death row who claimed that their cases had suffered due to a lack of contact with consular officials as mandated under the protocol: see Liptak, 'U.S. Says It Has Withdrawn From World Judicial Body', *New York Times*, 10 Mar. 2005, at A16 (describing how the US desires to insulate its courts from future ICJ rulings that may interfere in ways that were unanticipated 'when [it] joined the optional protocol'). Although the US proposed and ratified the Optional Protocol in 1963 – giving the ICJ jurisdiction when a signatory's nationals claim illegal denial of 'the right to see a home-country diplomat when jailed abroad' – the US has faced recent challenges from other signatory countries whose citizens suffered capital punishment without access to diplomats in contravention of the Optional Protocol: Lane, 'U.S. Quits Pact Used in Capital Cases', *Washington Post*, 10 Mar. 2005, at A01. Before the withdrawal took effect, however, the United States decided to honour the latest ICJ ruling regarding the 51 Mexican nationals in accordance with international law and the Optional Protocol. See Memorandum from President George W. Bush to Attorney General Alberto Gonzales (Feb. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html> (citing 2004 ICJ 128 (Mar. 31)) (requiring that 'State courts give effect the decision in accordance with general principles of comity').

Through the past withdrawal from the International Criminal Court⁵³ and the conclusion of non-extradition agreements with third states⁵⁴ the United States has effectively ambushed a major step towards universalizing individual responsibility for particularly heinous acts.⁵⁵ The allocation of veto rights in the Security Council no longer commands respect, for it is taken to reflect a now indefensible distribution of power.⁵⁶ The prohibition on the unilateral use of force has come under serious

⁵³ On 6 May 2002, the Bush administration formally rejected the US signature of the Rome Statute of the ICC, which President Clinton authorized on 31 Dec. 2000: Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, UN Secretary-General (6 May 2002), available at: www.state.gov/r/pa/prs/ps/2002/9968.htm. The rationale behind the bold move to 'unsign' the treaty stemmed from unsubstantiated fears that Americans might be subject to unfair or politically motivated prosecution: Roth, 'Is America's Withdrawal From the New International Criminal Court Justified?', *Human Rights Watch*, 17 July 2002, available at: www.hrw.org/editorials/2002/icc0731.htm. The negative effects of this manoeuvre on American foreign policy, however, seem clear: (1) public repudiation of the ICC will hardly foment international cooperation in the US-led war on terrorism; (2) with an uncompromising and unilateralist approach, the US 'risks finding itself on the wrong side of history;' and (3) perpetuating the idea that America considers itself to be 'above international law' promotes increased isolation at a juncture in history when the US can ill-afford to act alone as a global policeman. *Id.* For more background as to why US fears of the ICC are unwarranted, see generally Justice Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, *INTERNATIONAL CRIMINAL COURT MONITOR* (Jun. 2002), http://www.thirdworldtraveler.com/International_War_Crimes/USWithdrawal_ICC_Goldstone.html. The ICC is not a rogue court that indiscriminately wields power; instead, it was intended as court of 'last resort' whereby complementarity offers domestic judicial systems to investigate and prosecute if they so choose. *Id.* From the Nuremberg trials to ad hoc tribunals, the United States consistently exhibited its leadership in serving international justice; that is, until now when it chooses to alienate itself from 'key allies, especially in Europe'. *Id.* For additional insight into America's refusal to cooperate with the ICC, see generally America Service Members Protection Act 2002, H.R. 4775, 107th Cong. (2002) (enacted).

⁵⁴ The US desires the completion of as many bilateral Art. 98 Agreements as possible because they are thought to afford American 'citizens ... essential protection from the jurisdiction of the International Criminal Court, particularly against politically motivated investigations and prosecutions': Press Release, 'White House Spokesman Richard Boucher: Article 98 Agreements' (23 Sept. 2003), available at: www.state.gov/r/pa/prs/ps/2003/24331/htm. By 2 May 2005 the US had concluded 100 such agreements: Press Release, 'White House Spokesman Richard Boucher, U.S. Signs 100th Article 98 Agreement' (23 Sept. 2003), available at: www.state.gov/r/pa/prs/ps/2005/45573/htm. These 'bilateral immunity agreements' that require American nationals not to be extradited to the World Court without the express consent of the US have been criticized by the international community on several grounds: see Letter from Kenneth Roth, Executive Director of Human Rights Watch, to Colin Powell, US Secretary of State (9 Dec. 2003), available at: www.hrw.org/press/2003/us120903-ltr.htm (describing the most egregious elements of these agreements as the US legal misinterpretation of Art. 98 of the Rome Statute; and coercive tactics employed (e.g., threats to curb military/humanitarian/economic assistance) to obtain the desired signatures).

⁵⁵ US offensive measures to protect its citizens and leaders from prosecution for the worst possible offences have damaged America's credibility on the international stage and promoted the impression of the US as 'above the law'. See the letter from Roth to Powell, *supra* note 54.

⁵⁶ Other Security Council Members and the world community at large expressed vehement opposition to US unilateralism and the use of its veto power as a tool to manipulate important international treaties like the Rome Statute. See 'The ICC in the Security Council', *Global Policy Forum*, available at: www.globalpolicy.org/intljustice/icc/crisisindex.htm (describing how the US threatened to veto UN peace-keeping missions if it could not obtain adequate assurances of immunity from prosecution in the ICC).

attack by adherents to the doctrine of 'pre-emptive self-defence'.⁵⁷ Finally, states themselves seem to be in the process of disaggregation.⁵⁸

6 Monism Debunked

Kelsen's project appears to be even more deeply embarrassed and discredited at a theoretical level. Kelsen was a monist. He was convinced, that is, of the unity of public international law and the domestic⁵⁹ legal order.⁶⁰ Both are taken to be components of one and the same legal system.⁶¹ More precisely, he was not convinced that public international law and domestic law are two separate legal spheres that can only be connected on the basis of the recognition, by states, of international obligations.

Why should one be a monist? Dualism, it seems, is the most straightforward manner of conceptualizing public international law. Indeed, dualism seems to be very much alive, while monism is dead. Dualism is alive inasmuch as constitutional orders regularly presuppose an independently existing international legal order. If that were otherwise it would be difficult to understand why constitutions contain provisions stating something about the relevance of international law.⁶² In particular, the notorious conflicts that have arisen in the European Union as regards the supremacy of either European Union law or the law of the Member States seem to have taught that there *is no* unifying perspective.⁶³ In fact, the conclusion has been drawn that, using Kelsenian parlance, there is no single *Grundnorm* encompassing

⁵⁷ For a discussion see C. Gray, *International Law and the Use of Force* (2nd ed., 2004), at 159–194.

⁵⁸ See, of course, A.-M. Slaughter, *A New World Order* (2004).

⁵⁹ H.L.A. Hart's discussion of public international law in his *The Concept of Law* (1961) is clearly indebted to Kelsen's writings on the subject, in particular where he criticizes the allegedly self-binding nature of international law with regard to the state (at 220–221).

⁶⁰ This conviction extends as far back as to his first major work on public international law, which first appeared in 1920: see H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (2nd ed., 1928). He was, however, cautious as regards the version of monism that was to be preferred. Indeed, he argued that there was no basis for preferring one over the other. But he clearly seemed to favour, if only as a matter of constructivist elegance, international monism, that is, the theory according to which international law is accorded primacy over state law.

⁶¹ See Kelsen, 'Sovereignty', reprinted in S.L. Paulson and B.L. Poulson (eds.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (1998), at 525, 527.

⁶² From a monist perspective, however, such provisions do not mean to express recognition of international law, but rather its transformation into the domestic order. See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 336.

⁶³ See N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (1999), at 131–133, and, more recently, Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty', 11 *European LJ* (2005) 262.

both legal orders.⁶⁴ This is a classical reinstatement of the dualist position.⁶⁵ In the words of Kelsen:⁶⁶

The dualistic construction would not be warranted unless there were, between norms of international law and the norms of state law, conflicts that could only be described in contradictory statements by a legal science having legal systems of equal validity as its subject matter. For then a unity of the two systems – which is simply an epistemic unity – would be out of the question.

Interestingly, in the discussion of monism versus dualism it is often assumed that the alternative is an *empirical* one and that, hence, the choice of one over the other needs to be made with regard to the ‘realities’ of the international legal system.⁶⁷ In a situation with enduring decentralization, dualism needs to be adopted; monism *may* commend itself as soon as the international system approximates more closely the ideal of a (federal) *civitas maxima*.⁶⁸ Where domestic law has finally become a component of a more comprehensive system monism is the doctrine to adopt.⁶⁹ Put bluntly, monism might be something for Europeans, at any rate, if the Member States of the European Union were ever to adopt the ‘Constitution for Europe’. Ironically, one could also argue that a monism that accords primacy to domestic law fits international law under conditions of hegemony.⁷⁰ In other words, American scholars should adhere to monism, too,⁷¹ because their country behaves ‘monistically’; for America there is only American law.

Widespread misperceptions aside,⁷² however, the persuasiveness of Kelsen’s monist construction does not turn on the substance of international relations or on what happens to be international law. Whether or not one subscribes to monism depends on whether or not one takes the normativity of law – its validity – seriously. Monism’s basic contention is that conflicts between norms that originate from different

⁶⁴ See Heintzen, ‘Die “Herrschaft” über die Europäischen Gemeinschaftsverträge – Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?’, 119 *Archiv des öffentlichen Rechts* (1994) 564. For a critique of such positions see Schilling, ‘The Jurisprudence of Constitutional Conflict: Some Supplementations to Mattias Kumm’, 12 *European LJ* (2006) 173.

⁶⁵ See Kelsen, *supra* note 61, at 526.

⁶⁶ *Ibid.*, at 527.

⁶⁷ Kelsen did not think that this was an empirical question even though he states that the existence of an international norm that determines the sphere of validity of the state legal system ‘also’ speaks in favour of a monist construction: see *ibid.*, at 527.

⁶⁸ The idea of the *civitas maxima* first appears in the writings of the pre-Kantian philosopher Christian Wolff. Kelsen was full of praise for Wolff in his book on sovereignty. He gave him credit for first having discovered the primacy of international law from the perspective of a pure legal theory. See Kelsen, *supra* note 60, at 249.

⁶⁹ See Cassese, *supra* note 40, at 217.

⁷⁰ For a stimulating discussion see Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, 16 *EJIL* (2005) 369; a more extensive exploration of the issue is offered by A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

⁷¹ I shall return to the remarkable return of right-wing Hegelianism in current American jurisprudence *infra* in note 221.

⁷² See, e.g., M.N. Shaw, *International Law* (5th ed., 2003), at 50, 122–123.

systems cannot be resolved on dualist grounds.⁷³ It can be the case, according to dualist premises, that while public international law demands *x*, the domestic legal order commands *non-x*.⁷⁴ Joint obedience is impossible.⁷⁵ Two different systems with different basic norms give rise to an external conflict of norms. Or, using a Hartian description, two different judicial tribunals that attribute primacy to the norms of their requisite systems accept two different rules of recognition – with no meta-rule in sight that could be used by either tribunal in order to resolve the conflict (and that would be susceptible to description from the external point of view).

As per the argument below, the question of whether monism or dualism are ‘right’ does *not* turn on whether the respective international and national legal orders lend themselves more to one or the other description. The question is more fundamental. It affects whether it is *law* that one claims to be describing. It is at this more fundamental level that empirical questions legitimately claim their relevance, too.

7 Monism Defended

Kelsen’s bid for monism shows that he is not a conventionalist.⁷⁶ Accordingly, any view that is adhered to by legal officials about the authority of certain legal sources is not decisive in explaining their validity.⁷⁷ Even if the legal standards regulating the relation between domestic and international law are construed, within a legal system, in a dualistic manner, such a construction can still be exposed for its inadequacy with regard to what *really* accounts for international legal obligations. Not infrequently, the space of reasons constituting the legal system may be marred by the discrepancy between what the participants think they believe and what they would recognize as believing if only they had a clearer conception of it.⁷⁸

In his discussion of the monism-dualism alternative, Kelsen usefully compares the potential conflict between international law and domestic law with a potential

⁷³ Sophisticated dualists, such as Kumm, emphasize that conflict-resolution between legal orders cannot rest on the application of hard and fast rules; rather, it requires mutual ‘deliberative engagement’ in the relations of adjudicative bodies located at different levels of a multi-level system: see Kumm, *supra* note 63, at 273, 286–288. Evidently, recommendations such as these do not invoke any legal authority. For a related observation see Schilling, *supra* note 64, at 182. If they were meant to evince a legal norm they would have to grant that the authority of another legal norm is based on one legal order encompassing both potentially conflicting orders. For a reconstruction of Kelsen’s transcendental argument against dualism see Paulson, *supra* note 4, at 33–34.

⁷⁴ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 329.

⁷⁵ I take this to be an intuitively acceptable formulation of a conflict of norms. See Hart, ‘Kelsen’s Doctrine of the Unity of Law’, in Paulson and Paulson, *supra* note 61, at 553, 566–567.

⁷⁶ See above at Section 1.

⁷⁷ Accordingly, Kelsen’s positivism admits the possibility of collective self-deception by legal officials and, thus, entertains a less complacent image of agency than Anglo-American legal positivism. On the relevance of ‘convergent’ behaviour see Coleman and Leiter, *supra* note 8, at 247–248. For a useful reconstruction of the ‘complacent’ view of agency that seems to dominate much of current social and political science see J. Lear, *Freud* (2005), at 2–3.

⁷⁸ On this point see, generally, Pinkard, *supra* note 13, at 175, 221.

conflict between law and morality.⁷⁹ Conceivably, there are conflicts between what the law requires and what one imagines to be morally commendable. Any positivist legal theory is expected to establish the conditions under which we are able to clarify what the law is regardless of whether it is also defensible from a moral point of view. The notion of legal validity needs to be *instructive* even if it cannot tell us what we ought to *do*, all things considered.

If, alternatively, one neither believed in the resolvability of conflicts between legal norms nor in the possibility of attributing conflicting norms to systems of a different *kind*, one would not take the notion of *legal* validity seriously. In other words, from a Kelsenian perspective dualist or pluralist theories of law are possible only on the basis of surreptitiously altering the meaning of the predicate ‘legally valid’ from one system to the other.⁸⁰

I should like to explain, briefly, what this means.⁸¹

The statements that *x* is legally valid according to system A and that non-*x* is legally valid according to system B can both be true only if in one of the statements ‘legally valid’ is used in quotation marks.⁸² That is, it is impossible to disquote both predicates (‘is legally valid’) for the simultaneous disquotation would divest ‘legal validity’ of its predicative value. One could say, of course, that Judge Grimm thinks ‘*x* is legally valid’ while Judge Iglesias thinks ‘non-*x* is legally valid’. But a statement of this kind would not state the validity of either *x* or non-*x*. It would merely attribute beliefs and propositional attitudes.⁸³ The validity of a norm, however, does not turn on whether a judge believes it to be valid. On the contrary, once the validity of a norm has been established it has to be recognized by a judge.

A statement about validity would be made, however, if one were to say that, while *x* is legally valid, Judge Iglesias believes in the validity of non-*x*. This would be a polite way of saying that Judge Iglesias is mistaken. However, one cannot say that *x* is legally valid and that non-*x* is legally valid without either quoting one or the other proposition or by altering the meaning of legal validity when moving from one to the next. If both were valid, the concept of validity would be devoid of its pragmatic content.

⁷⁹ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 329. Much sophistry can be invested, at this point, in discussing whether Kelsen was right in speaking of a logical contradiction in this context. See Hart, *supra* note 75, at 571. What is most often not discussed, in such a context, is how the line ought to be drawn between ‘logical’ and other forms of ‘impossibility’. For an introduction to the problem see Quine, ‘Carnap and Logical Truth’, in W.V. Quine, *The Ways of Paradox and Other Essays* (2nd. edn., 1976), at 107–132.

⁸⁰ That is exactly, by the way, what Derrida has in mind when speaking of the *différance*, understood as an iteration that alters. See Derrida, ‘Différance’, in J. Derrida, *Margins of Philosophy* (trans. Alan Bass, 1982), at 1–28; J. Derida, *Limited Inc* (trans. S. Weber, 1988), at 130. Whoever defends pluralism is not in conflict with Kelsen when granting, at the same time, that the meaning of ‘legal validity’ is thereby rendered indeterminate.

⁸¹ For a discussion of Hart’s criticism of Kelsen’s arguments see section VIII.

⁸² See D. Davidson, *Inquiries into Truth and Interpretation* (1986), at 65, 79–86. I would like to abstain, however, from delving into the intricacies of quotation theory here.

⁸³ Kelsen views ‘juridical cognition’ as entirely analogous to propositional knowledge. I would like to thank Stanley L. Paulson for a helpful clarification of this point.

It would no longer have any import, that is, it would not inform about what ought to be – or can be – legally done. If the predicate of validity is used in both cases it necessarily alters its meaning.⁸⁴

Kelsen draws on the difference in meaning in order to explain how the conflict between legal norms and moral norms can be resolved. Legal validity and moral validity differ with regard to their meaning. Owing to this difference they can be used in different systems. An external resolution of normative conflicts is possible on the basis of differentiating between types of ‘validity’. The validity of law is one and indivisible. It needs to be one and indivisible, for otherwise a legal statement would lack instructive import. If it were not for this unity the question of what, in light of conflicting considerations, *the law* requires would be unanswerable. This is not to say that a legal statement determines what one ought to *do*. There may be sound moral reasons for breaking the law (or good legal reasons for eschewing morality).

It can be seen, then, that, according to Kelsen, the unity of the legal system, which finds its expression in the doctrine of monism, is a consequence of the unity and indivisibility of legal validity. There is only one legal validity. Hence, there can be only one legal system. Of course, among different types of validity there can be validity relative to morality and validity relative to law; however, there can be no system-relative legal validities.

The purveyors of legal pluralism, fragmentation and ‘polycontextuality’⁸⁵ offer valuable insights; but they should make explicit, too, that in speaking about a plurality of legal systems they produce an equivocation in the concept of legal validity. Legal validity may well be in demise.⁸⁶ This should give the advocates of pluralism reason to acknowledge that what they are talking about is no longer law.⁸⁷ Such a conclusion would be supported by the remarkable coincidence that in cases of an *externally* perceived plurality of legal systems the alleged legal structures *internally* cease to have normative force. Instances of pluralism yield evidence that strategies of regime-management involve the hybrid mixing of rules of thumb, technical expertise and processes of mutual accommodation.⁸⁸ Their operation may not be susceptible to reconstruction in legal terms. The true question posed by observations of legal pluralism, therefore, is not whether existing legal structures require either a dualist or monist construction but rather whether the phenomena under consideration lend themselves to interpretation in terms of adjudicating or norm-creating bodies.⁸⁹

⁸⁴ Again, a matter that can be perceived with a certain Derridian subtlety. See *supra* note 80.

⁸⁵ The term means that in a complex society there is no privileged position for understanding and influencing social life, but merely a multitude of bounded and incommensurable points of view. See, e.g., P. Fuchs, *Die Erreichbarkeit der Gesellschaft. Zur Konstruktion und Imagination gesellschaftlicher Einheit* (1992), at 43–52.

⁸⁶ For an observation from a completely different angle see A. Somek, *Rechtliches Wissen* (2006), at 100–103.

⁸⁷ For perceptive observations see Koskenniemi, *supra* note 36, at 10.

⁸⁸ See *ibid.*, at 14, 29.

⁸⁹ For a positive answer to the latter question see Simma and Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, 17 *EJIL* (2006) 483; see also International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, A/CN.4/L-682, 13 Apr. 2006 (finalized by Martti Koskenniemi).

Since dualism can be sustained as a doctrine only at the cost of according legal validity to one system and a different type of validity to another, dualism undermines itself. A dualism that in cases of collision accords primacy to domestic law treats public international law not as law but as something that may resemble more closely ‘morality’.⁹⁰ Of course, one may prefer to decide on the spot and with regard to the exigency of the situation which order ought to take precedence; but this would amount to exactly the denial of normativity that Kelsen⁹¹ is concerned about.

8 A Brief Rebuttal of Hart

As is well known, one of the most powerful criticisms of Kelsen’s doctrine was put forward by H.L.A. Hart.⁹² We are already in a position, at this point, to understand why Hart may have been mistaken.

According to Hart, Kelsen’s doctrine of the unity of law comes in a weaker and in a stronger form. Whereas the weaker version claims that as a matter of international law domestic law is a component of international law, the stronger version has it that the relation of inclusion of either one into the other is necessary.⁹³ Alas, Hart’s distinction between these two different versions of monism cannot be sustained. Nowhere does Kelsen expound monism in a ‘weaker form’, that is, by pointing *exclusively* to the existence of the effectiveness principle, which, as a matter of positive public international law, anchors recognition of states in the existence of efficacious territorial systems of coercive rule.⁹⁴

But even if Kelsen had undertaken to do just that,⁹⁵ Hart would have to criticize Kelsen *on his own terms*. This is what Hart fails to do. Hart thinks that Kelsen’s monism cannot withstand scrutiny because it conflates relationships of validation proper⁹⁶ with what Hart calls ‘validating purport’.⁹⁷ Hart has in mind here, obviously, two

⁹⁰ For an excellent discussion of why it would be, even under such circumstances, erroneous to conceive of international law as morality see Hart, *supra* note 59, at 223–224.

⁹¹ I add in passing that today Koskenniemi appears to be concerned about it. See Koskenniemi, *supra* note 36, at 13–14.

⁹² See *supra* note 79.

⁹³ See Hart, *supra* note 75, at 554, 564. The effectiveness principle is not a necessary component of a monistic theory, for it is conceivable to construct the unity of the system from a different angle, e.g., from the perspective of overlapping fundamental rights standards. Public international law and national law could then be seen as lending expression to one overarching system of value.

⁹⁴ Hart, *supra* note 75, at 560–561 regards it as Kelsen’s ‘central mistake’ to have based monism on the principle of effectiveness.

⁹⁵ Kelsen was not clear, I must acknowledge, which role the effectiveness principle had to play in his theory. It makes a very prominent appearance in a more general discussion of validity, though. See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 214–215.

⁹⁶ I take it that Hart explained what I call here ‘validation proper’ as early as at the outset of his article where he identified the ‘kind of error which ... infects Kelsen’s interpretation’: see Hart, *supra* note 75, at 556.

⁹⁷ See *ibid.*, at 560–561.

different intentional states.⁹⁸ *Validation proper* obtains if a norm becomes adopted with the intent of creating it on the basis of another one; it also occurs when judges identify a standard as valid law on the basis of an accepted rule of recognition.⁹⁹ When a national parliament adopts a law pursuant to constitutional procedures the relation of validation proper obtains. If, however, the same law is declared to be the relevant legal standard for certain transactions by the conflict of law statutes of another state, this is an instance of mere *validating purport*.¹⁰⁰ Validating purport means that rules that fit a certain description are to be deemed valid regardless of whether they were generated in order to become members of the legal system containing the description. Hart exemplifies what he has in mind by entertaining the hypothetical possibility of a law of state A which declares that all laws adopted by the legislature of state B are to be considered valid laws of A or, more disturbingly, of B. The point of Hart's observation is that the laws of B are legally valid in B regardless of the validating purport by A because their validity is derivative of the accepted rule of recognition in state B. *Mutatis mutandis*, Hart concludes that the validity of domestic laws is derivative, indeed, of the relevant national rules of recognition and that the effectiveness principle is merely an expression of the validating purport built into public international law.¹⁰¹

Hart's criticism cannot be sustained.

First, the identification of the weaker version of monism – a monism embracing validating purport from the perspective of positive public international law – presupposes a premise that is tacitly rejected by Kelsen. Weak monism is possible only if validating purport clearly needs to be distinguished from validation proper, that is, if the distinction is a necessary component of a workable theory of legal validity. Hart wishes to ascribe relevance to this distinction in order to explain what he presupposes to exist, that is, system-relative validity. But Kelsen clearly thinks that relative validity can be dispensed with. It follows that Hart's critique is weak, at best, for it rests on a premise that is not shared by Kelsen, namely, the existence of different rules of recognition for different legal systems.¹⁰² One may wonder, already at that point, whether Hart's criticism can be relevant to Kelsen's project for it betrays, if anything, Hart's quite explicit commitment to methodological nationalism.¹⁰³

In defence of Hart, it could be replied that positivist theories should take heed of social facts and, hence, attend to the conventions that are established in different domestic legal systems. With dualism (or rather: pluralism) being the ruling

⁹⁸ My reconstruction of the first state is an extrapolation from the example that Hart introduces to alert readers to Kelsen's 'error': see *ibid.*, at 556.

⁹⁹ See *ibid.*, at 562.

¹⁰⁰ See *ibid.*, at 561–562.

¹⁰¹ See *ibid.*, at 563: 'Kelsen's arguments fail because the fact that the relationship of validating purport exists between the principle of effectiveness, treated as a rule of international law, (or any other rules of international law purporting to determine the validity of municipal law) and the rules of municipal law does not show that the latter derive their validity from the former, and does not show that "pluralists" are wrong in denying that international law and municipal law form a single system'.

¹⁰² See *ibid.*, at 575–576.

¹⁰³ See *ibid.*, at 576.

convention, national legal systems operate *in fact* with recourse to their own rule of recognition. Hart's distinction between validation proper and validating purport captures this important reality. Moreover, a variation of Hart's hypothetical example may further help to drive home its point.¹⁰⁴ Imagine that legal system A declares all laws of country B to be valid, however, for country B only and not for legal system A. Why should country B depend on such a declaration by A in order to have its own laws validated? This is precisely what monism with primacy of public international law asks everyone to accept.

It bears emphasis, once more, that Kelsen was a legal positivist *without* also being a conventionalist.¹⁰⁵ He distrusted conventions because of the *distorting* influence they may exercise on the perception of the conditions that are really necessary in order to explain the existence of a legal system. Kelsen wanted to uncover these conditions in spite of whatever views may be conventionally entertained by legal officials. For example, a judge adjudicating a fundamental rights question may consider herself to be bound by some conventional standard of morality; contrary to what she believes to be binding upon her, however, Kelsen would explain that what makes her act authoritative is not some moral principle but the bounded exercise of discretion because moral standards simply *cannot* underpin the authority of a judicial decision. Conventions are often the source of false beliefs or, indeed, false consciousness. Similarly, the national legal system *needs* not to be seen as grounded in some customarily accepted practice of recognition as long as there is a straightforward monistic mode of accounting for its validity. Kelsen was interested in uncovering the true conditions of validity and not in interlocking conventions with varying pedigrees.

Second, Hart's distinction between validation proper and validating purport is immaterial to a theory which explores not substance, but the form in which substance is to be accounted for by legal science. Hart's distinction is a substantive one. Some processes of norm-creation or the constitution of legally relevant facts may require *some* intentional use of a rule or a standard. No law can be validly adopted by the legislature unless the relevant rules of procedure are painstakingly adhered to. It is possible, nonetheless, to establish contractual relations, as is the case for so-called 'exercises of will',¹⁰⁶ through mere conduct that is not intended to create a norm. Whether or not a relation of validation is based on what Hart imagines to be validation proper or mere validating purport turns on the substance of the legal norm in question. In a sense, the commission of a tort can be seen as an act that creates liability. The normative consequence attached to a wrongful act may not appear to be desirable to the tortfeasor, but this does not change the fact that the tortfeasor's act is a condition for

¹⁰⁴ See *ibid.*, at 562.

¹⁰⁵ Hart, without doubt, was a conventionalist. See Coleman, *supra* note 9, at 75–76; Green, 'Positivism and Conventionalism', 12 *Canadian J L and Jurisprudence* (1999) 35, at 37–41.

¹⁰⁶ The German term is '*Willensbetätigungen*': see K. Larenz, *Allgemeiner Teil des deutschen bürgerlichen Rechts. Ein Lehrbuch* (7th ed., 1989), at 317.

the generation of new (individual) law.¹⁰⁷ Such relations should not be dismissed as anomalies when constructing a legal system; indeed, their role may be important for sustaining a non-deconstructed notion of validity.

Even if Hart's distinction between weak and strong monism cannot be sustained because of its underlying commitment to methodological nationalism and conventionalism, both of which are revealed in his construction of a 'rule of recognition', it may still not be apparent why Hart's critique of strong monism cannot be sustained. Why should norms that are simultaneously valid not conflict, that is, give rise to two contrary or contradicting descriptive ought statements (for example, in the sense of 'It is the case that Op and ~Op')? Kelsen contends that the law is one and only one for otherwise it would only instruct those who happen to *believe* in the validity of a certain system. Hart, however, has nothing more to offer than the opposing contention that validity is (necessarily?) system-relative. The impression that matters cannot possibly be otherwise does not, in and of itself, amount to an argument against Kelsen's monotonous notion of legal validity according to which legal validity is always the same, and always of the same kind, regardless of where it may arise. It cannot be an argument against Kelsen, in particular, when taking into account that at the end of the day the 'harshness' of the legal code¹⁰⁸ requires the resolution of normative conflicts. Only one *or* the other norm is going to be lawfully applied.

9 Not a Harmonious World

Is Kelsen's position natural law? Isn't it a normative expectation to have all conflicts between the different layers of legal systems resolved? Why shouldn't a positivist legal scientist, in particular, be comfortable with acknowledging that in some instances a political choice needs to be made with regard to the legal norm that is to be accorded precedence?

A Kelsenian would reply that either a legal rule needs to be in place explaining why a resolution of the conflict, brought about on political grounds, is also legally binding; or, alternatively, an explanation has to be given as to why a certain conflict cannot be adjudicated on legal grounds. Non-adjudication, however, does not entail the lack of a legal solution. Interestingly, the hypothetical finding that there is 'no legal solution' always entails a legal solution, for example, a jurisdictional rule of recognition or a right to engage in certain conduct by one of the contending parties.¹⁰⁹

Kelsen has another argument against dualism that caters to the thirst for power of those who, in the tradition of Hegel and Morgenthau, conceive of public

¹⁰⁷ It is a different matter, though, whether it would make sense to describe the rules of tort law as power-conferring rules. See Raz, 'Voluntary Obligations and Normative Powers', in Paulson and Paulson, *supra* note 61, at 451, 453.

¹⁰⁸ See N. Luhmann, *Law as a Social System* (trans. K. Ziegert, 2004), at 190–191.

¹⁰⁹ The latter would be very much in line with Kelsen's contention that the law does not have gaps. See Kelsen, *supra* note 17, at 146–148.

international law as ‘external domestic public law’ (*äußeres Staatsrecht*).¹¹⁰ Accordingly, public international law is valid for a state if and only if it has been recognized by this state. If the norm constitutive of recognition is part of the domestic legal order then public international law derives its validity from the latter. It follows that the most steadfast defenders of state ‘sovereignty’ are not dualists but monists.¹¹¹

We have already seen that there are good reasons for being a monist. They do not affect the substance of public international law. In particular, monism neither presupposes nor entails any idealism about a *civitas maxima*.¹¹² From a legal point of view, public international law, like any other legal system, regulates the consequences of non-compliance. It is *not* a consequence of monism that an internationally unlawful domestic legal act is in and of itself null and void. Kelsen reminds us that in every legal system wrongful legal acts are allowed to exist until, upon appeal or complaint, they are eliminated from the system. Moreover, Kelsen also reminds us of a constitutional tradition that accommodates the validity of unconstitutional acts without judicial review. Such a system does not merely delegate to organizational subunits the *task* of ensuring compliance with substantive norms, it also delegates to them the *power* to create valid acts that conflict with such norms.¹¹³ In this respect, public international law is not different from any other system of law.

This view raises the question, to be sure, how much deviation is acceptable until the broken norms cease to have any normative force.¹¹⁴ It could be argued that even if all states disrespected their international obligations these obligations would be *effective enough* for the international legal system to exist as long as universal non-compliance is universally *perceived* as legally wrongful.¹¹⁵ The whole system would be, at best, a system of universal hypocrisy. It would not be worthy of praise from a

¹¹⁰ See Kelsen, *supra* note 60, at 154–159.

¹¹¹ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 336.

¹¹² This is sometimes overlooked by friendly commentators on Kelsen’s work. See Zolo, ‘Hans Kelsen: International Peace through International Law’, 9 *EJIL* (1998) 306, at 309.

¹¹³ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 326, 331–332.

¹¹⁴ See *ibid.*, at 330–332.

¹¹⁵ In the case of monism that accords primacy to domestic law, Kelsen has to take adventurous detours in order to construct state law that is contrary to public international law. It has been argued, most recently by Paulson, *supra* note 4, at 34–39, that Kelsen’s construction is doomed to failure and that, hence, the only alternative that remains to dualism is monism that accords primacy to international law. I am not convinced. Kelsen’s construction, to be sure, is strange (Kelsen, *Reine Rechtslehre*, *supra* note 4, at 340). The domestic legal order is divided into two different layers, one consisting of the general rules of public international law and the other of the state’s constitution. The state’s constitution, i.e. the second layer, is deemed valid on the basis of the effectiveness principle, which is a component of the first. While the norms of the first layer are taken to be valid on the basis of the *Grundnorm*, the norms of the second layer are valid on the basis of an ‘auto-recognition’ by the state – a recognition, however, that has to be extended as soon as the state perceives its own legal order to be effective. I do not want to deny that the construction is artificial, but I also do not see any logical flaw that would warrant the verdict ‘untenable’ (Paulson, *supra* note 4, at 39). The more interesting question is whether, in light of this construction, the distinction between two *different* versions of monism makes any sense. In which respect does monism with primacy of domestic law, thus understood, really differ from monism with the primacy of public international law? I wonder if the answer to this question would not turn on ascribing primordial effectiveness to the domestic legal order.

Kantian perspective. I say that one *might* consider describing such a system as a legal system and I shall return to the reasons that counsel against doing so in Section 14.

10 Systematically Induced Misreading

Just as the choice between dualism and monism does not turn on the substance of the international system, nor does the choice between different versions of monism. As is well known, monism can accord primacy either to domestic law or to international law. From a constructivist perspective, the choice is not very intriguing even though it needs to be said that Kelsen has to resort to quite a bit of conceptual wrenching in order to align monism so that it accords primacy to domestic law with the substance of modern international law.¹¹⁶ Intriguingly, Kelsen submits that each type of monism is internally linked to different views of world and society and, hence, intrinsically susceptible to fallacious extrapolations and ideologically informed misreading. More precisely, he perceives quite clearly that we would not even attribute *any* significance to these opposing versions of monism if it were not for our inclination to attribute *more* significance to them than they really have.¹¹⁷ Indeed, from a sober theoretical perspective it simply does not matter which version of monism one adopts; however, once these positions are given their respective philosophical and ideological spin, they become transmuted into means of articulating different views of objectivity and society.¹¹⁸

The choice of monism with primacy of international law reflects an inclination towards pacifism and the desire to create a world legal organization. Pacifists are also ‘objectivists’, that is, they are capable of seeing their own point of view as one among potentially conflicting others. They see themselves as being embedded in the general scheme of things. Objectivism has the effect of decentering the view of the individual – and of the state, respectively. However, adherents to pacifism are inclined to end up with a distorted perception of existing legal realities, such as the claim that certain

¹¹⁶ As mentioned above, he needs to introduce an internal differentiation of the legal order in order to account for discrepancies between the (broader) layer of law that comprises public international law and the (narrower) layer that is actually subordinate to it, even though it is part of the same domestic legal order. See Kelsen, *supra* note 61, at 532–533. I have noted already that there is something highly artificial about domestic monism as presented by Kelsen, for it denies that the true point of such monism would be to see the broader legal order determined by its narrower counterpart. See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 340–341.

¹¹⁷ This is a doctrine that Kelsen maintained until (or even beyond) the end of his career. See H. Kelsen and R.W. Tucker, *Principles of International Law* (2nd ed., 1966), at 586–587. In a very thoughtful discussion of Kelsen’s theory of international law, Theo Öhlinger observes that Kelsen’s theory is unappealing today precisely because it tried to expel the ideologically fascinating part of legal discourse from the realm of legal science: see Öhlinger, ‘Die Einheit des Rechts. Völkerrecht, Europarecht und staatliches Recht als einheitliches Rechtssystem?’, in S.L. Paulson and M. Stolleis (eds.), *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (2005), at 160–175.

¹¹⁸ This observation was made by Kelsen already in his *Problem der Souveränität*, *supra* note 60, at 314–319, and tirelessly repeated later in most of his writings on public international law. See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 343–345.

norms of public international law have direct effect because they wish these norms to have it.¹¹⁹

Monism that accords primacy to the domestic legal order reflects a subjectivist view of the world. It is closely associated with the collective egoism of nationalism and of imperialism. Kelsen quite perceptively observes that this is the world-view of those who have to identify with a powerful state in order to boost their own self-confidence.¹²⁰ Identification offers symbolic compensation for the powerless and the oppressed. Epistemologically, imperialism is an expression of solipsism, which is the view that there is no external reality outside the sensation that the subject creates of his or her reality. The external world can only be conceived of in terms of the internal world. Not surprisingly, the adherents to this view believe that the interpretation of public international law should be in the hands of those who are submitted to it.¹²¹

Far from idealizing international law into one harmonious system, Kelsen uncovers a remarkable dialectic. The development of the modern international legal system is driven by distorted conceptions of itself. Each conception avails over an impeccable but unappealing core.¹²² In my view, this observation makes Kelsen's theory of public international law not only fascinating, it also lends it enduring significance. It expresses a subtle awareness not only that, as a field of law, public international law invites, systematically, its own misreading, but also that its evolution is nurtured by it. Which of the two misreadings is going to prevail is a historical matter.¹²³

11 Constitutional Deficiency

The perception of public international law as a 'feeble' type of system echoes the position of classical legal positivists who concluded that since there are not, at an international level, central adjudicative or enforcing agencies, there can be no international law at all.¹²⁴ Indeed, viewed against the background of this typically positivist claim, Kelsen's own position must appear paradoxical.

Classical positivism tried to unmask the legal purport of the international order. According to Austin, public international law was simply positive morality.¹²⁵ Hart's take on this issue was far more nuanced, in particular as regards the inappropriate

¹¹⁹ See Case 26/62, *Algemene Transport en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹²⁰ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 345.

¹²¹ Moreover, this imperialism most often rests on the fallacy that conflates sovereignty in a legal sense, that is, supreme legal authority, with the almost uninhibited power of action. See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 341; Kelsen and Tucker, *supra* note 117, at 584–585.

¹²² *Supra* note 60, at 319–320.

¹²³ In his early work, Kelsen expressed a clear preference in favour of the creation of a world state: see Kelsen, *supra* note 60, at 320.

¹²⁴ See J. Austin, *Lectures on Jurisprudence* (ed. R. Campbell, 4th ed., 1879), i, at 175, and *The Province of Jurisprudence Determined* (2nd ed., reprint, New York: Burt Franklin, 1970) at 235.

¹²⁵ See *supra* note 124.

comparison with morality.¹²⁶ Nevertheless, he perceived the major deficiency of the international system to lie in the absence of a unified rule of recognition. He thought that no such unified rule existed with regard to the sources of public international law.¹²⁷ International law lacks the unity of primary and secondary rules that is the hallmark of domestic legal systems. Hart believed that, in the case of international law, primary rules, the rules of obligation, form a mere set and are not part of a system.¹²⁸ Systematic coherence would obtain only if their validity were derivative of a rule of recognition, which, in turn, would have to be accepted by the international community. The absence of systematic coherence is evidence of the 'primitive' nature of public international law.¹²⁹ Strangely enough, it did not occur to Hart that rules of recognition,¹³⁰ such as the rules governing *jus cogens* or customary law, could themselves be part of a set only – which is a strange idea after all for there cannot be a set without rules governing the membership to that set (as a consequence of which Hart's whole idea that some rules are only part of an accepted set and not derivative of an accepted rule may not withstand scrutiny after all).

But we need not assess the merits of Hart's position here. Suffice it to say that Hart considered public international law to be *constitutionally deficient*. It is constitutionally deficient precisely because it suffers from a defect that Hart attributed to any system that merely consists of a set of primary rules, namely, uncertainty.¹³¹

Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative.

The international legal system is *constitutionally deficient* in precisely the sense of the term which reflects what we have come to expect a constitutional system to accomplish. Under conditions of constitutional deficiency – in decisive matters, at any rate – obligations are not clear. It is not clear, for example, whether and to what extent the European Community law is an entirely self-contained regime.¹³² Generally, where obligations are unclear, the powerful have an easy time of kicking the powerless around. Conversely, a constitutionally adequate system combines rules governing impartial adjudication with a clarification of the forms and procedures that the creation of law ought to follow in order to be given proper effect. A constitution constrains the powerful, not merely by submitting their conduct to the discipline of rules but also by setting a limit to the resourceful renditions of what they would like to present as legal and constitutional.

¹²⁶ See Hart, *supra* note 59, at 224.

¹²⁷ See *ibid.*, at 228.

¹²⁸ Hart thought that any attempt to present the collective acceptance of a set of primary rules as evidence for the acceptance of a rule of recognition ('whatever is accepted by the international community is law') was futile. He thought, indeed, that a rule of recognition, thus formulated, would amount only to 'an empty restatement of the fact that a set of rules is in fact observed by the states': *ibid.*, at 231.

¹²⁹ This may be concluded from Hart's discussion of primary and secondary rules: see *ibid.*, at 90–93.

¹³⁰ The plural is used by Hart himself: see *ibid.*, at 92.

¹³¹ *Ibid.*, at 90.

¹³² For a useful discussion see Simma and Pulkowski, *supra* note 89, at 516–519.

Kelsen would not deny that public international law is constitutionally deficient. He would, however, not concede that the perceived deficiency does in any way affect the quality of international law to be *law*. Constitutional deficiency is merely a consequence of the decentralized, more ‘primitive’ mode of enforcement. Constitutionality, as implicitly used in Hart’s discussion, is an unnecessary idealization, which has an obscuring influence on the perception of how legal systems work in reality.

12 Sanctions

Kelsen confronted the traditional legal positivist’s challenge head on by conceding that for international relations to be susceptible to description in legal terms *one* idealization is indeed indispensable: it must be possible to attribute to certain acts of states the meaning of being a sanction for the breach of an international obligation.¹³³ No more, but no less, idealization is necessary to establish the condition under which certain rules of international relations can be described as law. It is, most importantly, completely unnecessary for international law to occupy some moral high ground vis-à-vis the interest of states.

Needless to say that this idealization lends expression to Kelsen’s concept of the legal norm.¹³⁴ The legal norm, as reconstructed by Kelsen, consists of two parts, namely, a description of the unlawful act and a consequence, that is, the *sanction* that ought¹³⁵ to be imposed as a consequence of that act. Since Kelsen, as a legal positivist, abstains from characterizing unlawful behaviour in moral terms (e.g., as behaviour that is socially disfavoured or considered harmful) *anything* can serve as a condition for the imposition of a sanction. Thus understood, Kelsen’s theory seems to push Holmes’ ‘bad-man-perspective’¹³⁶ to the extreme, even though it is unclear whether Kelsen would have agreed to converting ‘sanctions’ into mere costs of behaviour. In any event, the *onus explandandi* for what accounts for the normativity of a norm rests on the sanction and what it means to have authority to impose it. Using Hohfeldian parlance, without either disability or liability no normativity would obtain.¹³⁷ A sanction is any coercive act whose commission is authorized by the legal system. Presumably, a sanction is something that affects the will – a matter that has not been further

¹³³ See Kelsen, *supra* note 44, at 101: ‘[i]t is the essence of a legal order that it tries to bring about lawful and to prevent unlawful behaviour by coercive measures – that is, by the forcible deprivation of life, freedom, property and other values as a reaction against the violation of the order’.

¹³⁴ See Kelsen, *Introduction*, *supra* note 4, at 26–27.

¹³⁵ At least in his later work, Kelsen was strongly inclined to reduce the ‘ought’ of the imposition of the sanction to the legal power of the organ to order the coercive act, or even the right to inflict it. See, notably, H. Kelsen, *Principles of International Law* (1952), at 7: ‘[b]y the formula “ought to be applied” nothing else is expressed but the idea that if the delict is committed the application of the sanction is legal’.

¹³⁶ See Holmes, ‘The Path of the Law’, reprinted in 110 *Harvard L Rev* (1997) 991 (first published in 1897).

¹³⁷ See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923), at 36.

explored by Kelsen.¹³⁸ What he clarified, though, was that any sanction, in the final event, needs to involve the authorization to employ physical force.¹³⁹ A legal norm lays down the conditions under which it is permissible to use force against another person.¹⁴⁰ In other words, the law is a system of rights.¹⁴¹

Only if it is taken for granted that Kelsen does not have a moral conception of the sanction (*qua* 'necessary evil') is it possible to understand how he could come to the conclusion, already in the first edition of his *Pure Theory of Law*, that 'the law cannot be broken'.¹⁴² A norm cannot be violated, on the contrary, it is essential to the validity of norms that it is possible to commit (or omit) the act triggering the sanction.¹⁴³ In a tongue in cheek remark, Kelsen explains that the legal system is like theodicy. It strips 'evil of its original character as a sheer negation of the good' and accounts for 'evil only as a condition for realising the good'.¹⁴⁴ Breaches of the law provide occasion to produce more law.¹⁴⁵

No further explanation is needed to realize how Kelsen conceives of the most fundamental challenge to the international system from a legal point of view. The decisive question is whether 'international law provide[s] for coercive acts (enforcement actions) as the consequence of a certain conduct of states determined by international law'.¹⁴⁶ As long as the international system speaks of unlawful acts and sanctions, it is

¹³⁸ I add in passing that this blind spot of Kelsen's theory explains why the critique of legal positivism that attacks the conception of discretion does not affect his version of legal positivism at all. See R. Dworkin, *Taking Rights Seriously* (2nd ed., 1978), at 22–45. Kelsen would have replied to Dworkin, presumably, that the type of discretion that remains applicable even to the exercise of judgement by 'Hercules' is exactly the discretion that he has been talking about, that is, the exercise of *judgement* that lends a *political* dimension to adjudication. But Kelsen's theory is far from unassailable. The centrality of the notion of the sanction explains why he would have had to have a conception of free – as opposed to coerced – willing and acting in order to have been able to explain what the law is. Kelsen never developed such a conception, as a result of which his theory of norms remains strangely blunt. Kelsen can be superseded, not by invoking some non-relativist moral theory, but by exploring the reality of freedom (i.e., the opposite of its negation through sanctions). In other words, the adequate 'reply to legal positivism' would have to be given from the perspective of Hegel (and not, for that matter, per an exegesis of Radbruch; but see R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (trans. B. and S. Paulson, 2002)).

¹³⁹ See Kelsen, *supra* note 135, at 25. As he made clear a few pages before (at 21), a sanction is a coercive act and not an obligation. Hence, the duty to pay compensation for damage caused is not a sanction but another obligation the non-performance of which is backed by a sanction.

¹⁴⁰ Again, in conceiving of norms in such a way Kelsen's theory can be tied to the philosophy of German idealism. See, e.g., Schelling, 'Neue Deduktion des Naturrechts' (1796), in K.F.A. Schelling (ed.), *Sämtliche Werke* (1856–1861), i/3.

¹⁴¹ Hence, the idea that there can be something like 'moral rights' is nonsensical. See Somek, 'Die Moralisierung der Menschenrechte. Eine Auseinandersetzung mit Ernst Tugendhat', in C. Demmerling and T. Rentsch (eds.), *Die Gegenwart der Gerechtigkeit. Diskurse zwischen Recht, praktischer Philosophie und Politik* (1995), at 48–56.

¹⁴² See Kelsen, *Introduction*, *supra* note 4, at 28.

¹⁴³ See Kelsen, *supra* note 135, at 7.

¹⁴⁴ Kelsen, *Introduction*, *supra* note 4, at 27.

¹⁴⁵ The nihilism underlying this image of the legal system as a perpetually norm-generating machine should not go unnoticed.

¹⁴⁶ Kelsen, *supra* note 135, at 22. This question is rephrased several times on the same page.

a legal system, no matter how inefficiently the system may work in singular cases. In other words, if and when war and reprisals are conceived of, on the level of *discourse*, as sanctions for breaches of international norms, public international law exists.¹⁴⁷ This is, indeed, a condition that Kelsen cannot dispense with.

13 The Mute Principal

This position raises many questions, in particular as regards the *objective* meaning of acts that purport to enforce international obligations. How can there be legal authority without final interpretive authority? How is objective meaning possible if all legal talk is irredeemably disseminated and scattered in the subjective meanings of parties who take the law into their own hands? Interestingly, Kelsen thinks that he can dispose of these questions in one fell swoop by pointing to the ‘primitive’ nature of the international system.¹⁴⁸ More precisely, he believes that the *hermeneutic challenge* can be met with an *axiological commitment*. Despite scattered and conflicting interpretations the international legal order remains intact so long as the invocation of international legality appeals to the community constituted by it.¹⁴⁹ This may be the case, arguably, as long as an implicit reference is made to one and the same legal system that is supposedly underwritten by all participants. Under this condition, the community also avails over a *monopoly of force* since every authorization of the legal use of force – even if it concerns the notorious bully in the schoolyard¹⁵⁰ – is intended to be derived from that one legal system.

Apparently, the unity of appeal is all it takes for the system to be *one* system.¹⁵¹ Once this *necessary* condition of efficacy is met, Kelsen has no qualms about accepting

¹⁴⁷ Kelsen endorsed the *bellum iustum* theory, for he deemed it to be indispensable for attributing to public international law the quality of law. It is an essential component of this doctrine. See Kelsen, *supra* note 135, at 59; Kelsen, *supra* note 17, at 341. See also Kelsen, ‘The Essence of International Law’, in H. Kelsen, *The Relevance of International Law. Essays in Honor of Leo Gross* (1968), at 85, 86–87. For a discussion see Rigaux, ‘Hans Kelsen on International Law’, 9 *EJIL* (1998) 325, at 333–341.

¹⁴⁸ See, e.g., Kelsen, *supra* note 17, at 338–339. In other words, Kelsen thought that the contrast between a primitive coercive order and no coercive order whatsoever was greater than the contrast between a decentralized and a non-decentralized order. See Bull, ‘Hans Kelsen and International Law’, in R. Tur and W. Twining (eds.), *Essays on Kelsen* (1986), at 321, 325.

¹⁴⁹ See Kelsen, *supra* note 135, at 13.

¹⁵⁰ As a legal positivist, Kelsen was always ready to take asymmetries of power into account. He had a very ‘realistic’ perspective on the role that is played by the major powers in the generation of customary international law: see Kelsen and Tucker, *supra* note 117, at 445.

¹⁵¹ From a Kelsenian perspective it would be pointless to deny that the asymmetry of power affects the efficacy of sanctions. See J.L. Kunz, *The Changing Law of Nations. Essays on International Law* (1968), at 622: ‘[e]ach state is *judex in causa sua*, has a right of auto-interpretation of international law, a right of auto-determination of the delict and the state guilty of it must carry out the sanctions itself. Where collective security is absent, the states, for their individual security, follow the policy of armaments, alliances, and the balance of power. Under such a system a weak state can hardly go to war or take reprisals against a more powerful state, whereas the latter may abuse its power.’ It is beyond the purview of this article to explore the question whether a legal positivist would not have to grant that public international law is for the major powers to write.

a decentralized mode of enforcement pursuant to which sanctions are imposed on behalf of the community by each individual actor:¹⁵²

The force monopoly of the community is decentralised if the principle of self-help prevails, that is to say, if the legal order leaves these functions to the individuals injured by the delict, as in the case of blood revenge. Although in this case the individuals appear 'to take the law in their own hands', they may nevertheless be considered as acting as organs of the community. Even if the principle of self-help prevails, legal and illegal employment of force are to be distinguished.

If the commonly agreed upon distinction between legal and illegal self-help (acts of vengeance as opposed to attacks) were not *used* even by those who are taking the law into their own hands, the 'force monopoly' of the community would disappear.¹⁵³

I grant that this may appear to be terribly paradoxical. However, never before has the monopoly of force been formulated in a less state-centred manner. It is at this point, again, that Kelsen's destruction of sociological 'realism' makes itself felt.¹⁵⁴

First, the force that accounts for the monopoly of force, according to Kelsen, is nothing short of the legal system. The community that is constituted by the system imposes the sanction by empowering the harmed entity to act as its agent.¹⁵⁵ To the community's indulgence to let someone act on its behalf corresponds the activity by the agent who claims to act on behalf of the mute principal. One may wonder whether this does make any sense. How is a mute principal to deal with presumptuous imputations? Conceiving of the international community along the lines of a mute principal, however, makes just as much sense as conceiving of 'the people' or 'the state' from a similar point of view. These principals would not speak either if it were not for the intervening attributions by agents.

Second, one should not be troubled by the fact that the 'monopoly of force' is not concentrated in some central operative unit. The monopoly of force can never be the real physical possession of a state or some other institution. The means for the use of violence will always be subject to the control of some real human being whose acts are linked to a centre through a chain of command. This chain, however, is not composed of the iron links but *mediated by norms* that constitute a certain degree of subordination and centralization. The monopoly of force, hence, is not a *quaestio facti* but an idealization. It is constituted by legal norms.

A system avails over a monopoly of force only if it satisfies one or the other normative condition. In determining these conditions, Kelsen's minimalism comes to the fore. Departing from the nation-state as the paradigmatic example of a legal system, we are inclined to believe that a monopoly of force exists only if the system is endowed with two forms of centralization, namely, supreme adjudicative tribunals on the one hand

¹⁵² Kelsen, *supra* note 135, at 14.

¹⁵³ See *ibid.*, at 15; it should not go unnoticed, though, that as a matter of legal policy Kelsen favoured the establishment of an international court with compulsory jurisdiction. See his *Peace Through Law*, *supra* note 47, at 13–14, 21; Leben, *supra* note 41, at 290–292.

¹⁵⁴ For a sceptical perspective on Kelsen's claim that a monopoly of force can even exist under conditions of decentralisation see Bull, *supra* note 148, at 329, 336. Bull contends that Kelsen ignores the force of states.

¹⁵⁵ See Kelsen, *supra* note 135, at 14.

and a hierarchical system of enforcement on the other. Kelsen must have thought (even though he did not put it in these terms) that both conditions express unnecessary – and hence *false* – idealizations. We have come to live with an international system in which acts of enforcement remain decentralized, even where adjudication (or something remotely similar to it) has already been centralized, albeit at the price of functional specification.¹⁵⁶ We have no qualms about calling such a system ‘law’. Kelsen seems to have thought that the belief in the necessity of centralized adjudicative institutions is nothing short of a moral expectation with regard to the (alleged) impartiality with which an authorization to impose a sanction is granted. Whether or not it is desirable to have those who have rights also determine the conditions of their exercise is not a question of law, but of legal policy.¹⁵⁷

Hence, there remains only one necessary condition for the existence of a monopoly of force, namely that the various acts of violence or other sanctions are claimed to be authorized by one and the same system. This is the case as long as even nearly complete regime isolation remains traceable to general public international law.¹⁵⁸ There is no reason to limit the attribution of monopoly to cases where command structures exist. As long as it is clear to the members of the community that force ought to be exercised legally only on the community’s behalf, the community avails over a monopoly of force. Public international law remains, thus, in a state in which legal systems have been for much of human history, namely, in a ‘primitive’ state.¹⁵⁹ The currently belaboured ‘regime fragmentation’ is just another chapter in this story. No regime has yet been found to be ‘outside the box’ of general international law.¹⁶⁰

14 The System of Universal Hypocrisy

The one question that is left open, of course, is whether a positivist theory could even accord the existence of mere discourse priority over the effectiveness of the link between sanction and offence. What if the schoolyard bully were to get away with impunity for everything he does because he is feared by everyone else? What if no state complied with international obligations while, at the same time, constantly

¹⁵⁶ See Koskeniemi and Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden J Int’l L* (2002) 553, at 556–562.

¹⁵⁷ Kelsen was aware, however, that decentralized enforcement matters less than decentralized adjudication. This is reflected in his proposals in *Peace Through Law*, *supra* note 47. According to Kelsen, ‘decentralization’ means the decentral determination of sanctions, less so the decentral imposition. Kelsen would have surely welcomed a system of international law in which centrally determined sanctions are imposed by one state or groups of states playing the role of a world policy force. These are the steps that Kelsen advocated: First overcome primitivism of determination through centralization. Then overcome primitivism of sanction through the introduction of a police force.

¹⁵⁸ For an argument that uses the effective interpretation principle in order to buttress and to limit self-contained regimes see Simma and Pulkowski, *supra* note 89, at 508–509, 512, 516, 519, 525.

¹⁵⁹ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 323–324. The absence of a legislature is also what accounts for the primitive nature of public international law, according to Kelsen.

¹⁶⁰ See the International Law Commission report, *supra* note 89, at 65–101; Koskeniemi, *supra* note 36, at 17.

using them to censor the conduct of others? In other words, would a system of universal hypocrisy be a system of law?

As I tried to explain above, a common vanishing point of reference is merely a necessary condition for the existence of a legal system. Would there be a legal system where the commission of delicts is not followed by sanctions? I am afraid that I am not able to answer this question conclusively, but I think I am able to clarify what it is about.

Kelsen discusses the case of the revolutionary change of legal orders. In such a situation one legal order is replaced by another without a legal rule governing the transition from one to the next. The validity of the new legal order depends on the *Grundnorm*, which invites attribution of validity to a normative order only if such an order is effective, that is, 'largely followed and enforced'.¹⁶¹ Under circumstances of change it makes sense to say that the new legal order has taken the place of the old because the new rather than the old legal order is treated *as if it were objectively valid* and consequently applied.¹⁶² One order superseded the other.

This situation is different from one where the alternative is between the existence of a decentralized legal order and the absence of any legal order whatsoever. In the case of the succession of legal orders, arguably, both the axiomatic condition, according to which participants in the system treat norms and acts of enforcement as elements of one and the same system, and the condition of effectiveness are fulfilled for the new legal order. Neither holds true for the order that has been superseded. More importantly, the axiomatic condition (i.e., reference to the system) is prior to the effectiveness of enforcement for otherwise we could not tell *what* the effective acts are actually effective of.

Public international law existing under the condition of 'bullyness' or universal hypocrisy meets only the axiomatic condition. Is an international system a *legal* system when the bully has the power to act as he sees fit while others who are invested with the legal power to impose a sanction consider themselves too powerless to do so? How would the lack of what *can* be done affect the characterization of what *ought* to be done? Do sanctions lose their meaning when norms devolve to the level of the 'impotent ought' (*bloßes Sollen*), which has been so gloriously debunked by Hegel?¹⁶³ In other words, is effectiveness of enforcement, as opposed to the effectiveness of indictment, an idealization¹⁶⁴ necessary for a legal system to exist? I am strongly inclined to believe that it is because otherwise all assertions of illegality would be absorbed into the zeal of political bickering.

¹⁶¹ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 214.

¹⁶² On what it takes, according to Kelsen, to make such an 'as if' statement see Somek, *supra* note 16, at 72–77.

¹⁶³ See Hegel, 'Enzyklopädie der philosophischen Wissenschaften', in G.W.F. Hegel, *Werke in zwanzig Bänden* (ed. K.M. Michel and E. Moldenhauer, 1970), viii, § 60, at 143. The question is important. The normative meaning of 'sanction', that is, the legally authorized coercion of someone into doing something, would be altered if the sanction could not be enforced. To be sure, norms do not become invalid because of non-compliance. Persistent non-compliance, however, changes the meaning of what is either guaranteed or proscribed by a norm. In a world full of taboos and social restrictions, the normative meaning of liberty changes, for it can no longer be exercised. Liberty becomes a mockery of itself.

¹⁶⁴ It would be an idealization, after all, for *some* degree of effectiveness would be seen as corresponding to a normative standard that is deemed sufficient.

15 International Law Is No Special Case

On a deeper level, Kelsen's endorsement of the legal nature of public international law reveals an almost unruly primitiveness at the heart of law itself. This can be seen by comparing international law, as a system, with any ordinary system of law in which precedents are considered to be pivotal. Whereas systems of precedent are diachronically primitive, public international law is primitive in a synchronic way. But in both cases, the actual link between conditioning conduct and conditioned sanction is established by forces that obtain in the situation of application.

The key to understanding the family resemblance between decentralized enforcement and case law lies in the notion of 'flexibility', which is introduced by Kelsen in his discussion of a case law system.¹⁶⁵ Intriguingly, 'decentralization' makes an appearance there, too.¹⁶⁶ Kelsen discusses different degrees of the generalization of norms. He sketches one system that is fully centralized. The enactment of general norms is vested in a legislature. The adjudicating bodies are strictly bound by what has been laid down by the former. He then discusses a system that does not avail of any centralized norm-setting institution at all. It is a system in which the adjudicating bodies create norms on an individual case-by-case basis *for each case*.¹⁶⁷ Such a system allows for great flexibility, but it does not generate legal certainty.¹⁶⁸

The only difference that remains between 'primitive' international law and any other legal system that allows for greater or lesser flexibility is that in the case of 'primitive' international law the adjudicating organ is party to the conflict. The difference would disappear, however, in a case law system where the adjudicating body, e.g. a constitutional court, has been staffed by the party that runs the government. The situation would resemble international law under the influence of one hegemonic power. We may find such a situation undesirable, but it is difficult to see why we would deny the resulting system the quality of law.

16 The King's Many Bodies in Emperor's New Clothes

I mentioned above in Section 4 that public international law is currently apprehended by at least two challenges. In the remainder of this article I would like to explain how Kelsen's theory can be used as a guide in assessing the merits of recent attempts at debunking public international legality.

One major contemporary challenge for an international legal system of the type described by Kelsen seems to arise from what is seen to be the increasing 'fragmentation'

¹⁶⁵ See Kelsen, *Reine Rechtslehre*, *supra* note 4, at 256–258.

¹⁶⁶ *Ibid.*, at 256, explains that the greater the influence of adjudicating bodies is on the formulation of legal rules the more the legislature is decentralized in such a system.

¹⁶⁷ Echoing early twentieth century debates in German jurisprudence, Kelsen refers to the system as a system of *freie Rechtsfindung*. See *ibid.*, at 257.

¹⁶⁸ Kelsen realizes that for there to be *application* there needs to be the generation of general norms, yet he does not perceive the dialectical challenge posed by the puzzle that a general norm might be created for each individual case. See *ibid.*, at 258.

of the international system.¹⁶⁹ The fragmentation thesis comes in at least two different major forms. First, fragmentation is said to originate from the ‘disintegration’ of different branches of the state into networks of international cooperation.¹⁷⁰ Second, fragmentation is also alleged to be manifest in the insolubility of jurisdictional disputes in the relation between different international ‘regimes’.¹⁷¹ In a more moderate form, the second fragmentation thesis simply states that different regimes, such as the WTO, human rights regimes, the EC or the ICC, apply international law with an in-built bias that threatens to undermine the coherence of the overall system.¹⁷²

I do not want to explore the first version of the fragmentation thesis here. It is of limited relevance to Kelsen for he did not, after all, accept the premise that the legal universe is made up of states. Hence, from his point of view a potential withering away (or ‘disaggregation’) of the state would not appear to be particularly disturbing. He prided himself on having exposed as a conservative political mirage the belief in the state as something that existed prior to and above the legal order.¹⁷³

The greater challenge seems to be posed by the second version of the fragmentation thesis. It has been advanced, most pointedly, by Gunther Teubner¹⁷⁴ and his associates, such as Peer Zumbansen¹⁷⁵ and Andreas Fischer-Lescano.¹⁷⁶ In a more recent article, Fischer-Lescano and Teubner¹⁷⁷ claim that we live in an age of ‘global legal pluralism’,¹⁷⁸ an expression that designates the absence of a unified legal system providing the basis for the resolution of jurisdictional conflict between and among regimes.¹⁷⁹ According to Fischer-Lescano and Teubner, such pluralism is not merely due to the pursuit of different legal policies by different international regimes; rather, it shows that the legal system has come to reflect enduring and profound social fragmentation.¹⁸⁰

Global legal pluralism ... is not simply a result of political pluralism, but is instead the expression of deep contradictions between colliding sectors of global society.

The colliding sectors of society are nothing short of the subsystems of global society.¹⁸¹ The metaphysical baggage shouldered by the authors is quite weighty. As the *noumena* of

¹⁶⁹ For valuable and accessible introductions to the problem see Koskeniemi and Leino, *supra* note 156; Koskeniemi, *supra* note 36.

¹⁷⁰ See, notably, Slaughter, *supra* note 58.

¹⁷¹ See *infra* note 177.

¹⁷² I think it is fair to attribute the more modest view to Koskeniemi. See Koskeniemi, *supra* note 36, at 5–6; Koskeniemi and Leino, *supra* note 156, at 575–576.

¹⁷³ For a summary see Kelsen, *supra* note 17, at 188–192.

¹⁷⁴ See his ‘The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy’, 31 *Law and Society Review* (1997) 763, and ‘Global Bukowina: Legal Pluralism in the World Society’, in G. Teubner (ed.), *Global Law Without a State* (1997), at 3–30.

¹⁷⁵ See Zumbansen, *supra* note 35.

¹⁷⁶ See A. Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte* (2005).

¹⁷⁷ See Fischer-Lescano and Teubner, ‘Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan J Int’l L* (2004) 999. For an expanded book-length exposition of the thesis see A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts* (2006).

¹⁷⁸ *Ibid.*, at 1000–1001.

¹⁷⁹ The international legal system is hence viewed as an aggregate of different regimes. See the apt characterisation by Simma and Pulkowski, *supra* note 89, at 502.

¹⁸⁰ *Supra* note 177, at 1004.

¹⁸¹ *Ibid.*, at 1007.

a functionally differentiated society, these subsystems make their *appearance* in what the authors call 'regimes'.¹⁸² Such regimes, in turn, are rendered institutionally articulate by international organizations and adjudicating bodies. The point of this observation is that, since such organizations are the surface manifestation of subsystems, they operate according to the specific rationalities constitutive of such systems.¹⁸³ Apparently, the rationality of the economic system is different from – or even incommensurate with – the rationality of other systems, such as health, science, culture, technology, the military, transportation, etc.¹⁸⁴ The absence of rules for the resolution of interjurisdictional conflicts is taken to signal the absence of an overarching rationality. Indeed, jurisdictional intractability is understood to be the consequence of a collision of rationalities:

Standard contracts within the *lex mercatoria* reflecting the economic rationality of global markets collide with WHO norms that derive from fundamental principles of the health system. The *lex constructionis*, the worldwide professional code of construction engineers, collides with international environmental law. The WTO Appellate Panel is confronted with cases encompassing collisions between human rights regimes, environment protection regimes and economic regimes. International law dedicated to the maintenance of peace, more particularly its ban on the use of force, has a highly uneasy relationship with international human rights law. [...] Indeed, the tempestuous rationality conflicts have even fragmented the very centre of global law, where courts and arbitration tribunals are located. In this core, they act as a barrier to the hierarchical integration of diverse regime tribunals, and foreclose a conceptual doctrinal consistency within global law.¹⁸⁵

Clearly, what the authors have in mind is not merely a conflict of values or a contest between institutions but rather a conflict of rationalities that translates, in their view, into a jurisdictional impasse.¹⁸⁶

¹⁸² 'Regimes' are characterized by the authors as follows: '[a] regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches': *ibid.*, at 1013. One is inclined to rephrase this characterization of regimes, in the spirit of H.L.A. Hart, as a unity of primary and secondary rules. For an introduction see also Calliess, 'Systemtheorie: Luhmann/Teubner', in Buckel, *supra* note 2, at 57, 73–74. This is a very broad interpretation of what used to be called 'self-contained regimes'; however, it matches the trends in international legal scholarship. For an overview see Simma and Pulkowski, *supra* note 89, at 490–493.

¹⁸³ See Fischer-Lescano and Teubner, *supra* note 177, at 1013. Such a far-reaching claim is not made by Koskeniemi, *supra* note 36, at 23, who nonetheless observes that 'each regime is hegemonic'.

¹⁸⁴ See Fischer-Lescano and Teubner, *supra* note 177, at 1006.

¹⁸⁵ See *ibid.*, at 1013–1014.

¹⁸⁶ This is a strong claim, to be sure, which is unfortunately nowhere bolstered by additional arguments explaining what the purported 'contradiction' between and among 'incompatible' rationalities is all about. Is the fact, e.g., that, while economics relies on arguments from efficiency, health advocates appeal to the value of health indicative of a clash of rationalities? Or is it merely a difference in the weight attributed to the requisite normative standards? Why would such a difference in weight be tantamount to a contest of rationalities? Nowhere is it made clear in what sense a 'contradiction' is supposed to be in play here. How can there be a logical contradiction between supporting economic growth and concern for human health? Or is, again, merely a tension between different values to be observed here? Koskeniemi, *supra* note 36, at 23, appears to hold the latter view. Similarly, it is difficult to tell the difference between what Teubner und Fischer-Lescano haughtily refer to as a 'mere compromise' on the one hand and the 'compatibilization technique' on the other, the use of which is recommended by them under conditions of fragmentation. I do not see how the recognition of non-trade values by the WTO regime allows for a 'compatibilisation' of 'rationalities' that would be decidedly different from striking a balance between trade and other values. But see Fischer-Lescano and Teubner, *supra* note 177, at 1030–1032.

Interestingly, the legal system is viewed as the stage where this latent conflict becomes manifest, as though it were a symptom of the latter.¹⁸⁷ But the legal system is incapable of providing a resolution.¹⁸⁸ In a manner reminiscent of Marx, the legal system is taken to be the place where the conflict surfaces, though not concealed by a smokescreen of idealizations.¹⁸⁹ The result is drift. Societal fragmentation ‘impacts on law’ in a way that social spheres ‘parcel out issue-specific policy-arenas, which for their part, juridify themselves’.¹⁹⁰ These legal regimes are linked with social sectors and, through networks, cooperate with other regimes and sectors.¹⁹¹

According to the authors, this situation spells doom to the idea that there can be one system of international law. No unified perspective on international law is available, not even from the vantage point of *jus cogens*, for *jus cogens* itself is likely to be rendered differently by different social sectors.¹⁹² All that can be accomplished, according to the authors, is the management of fragmentation through strategies of ‘compatibilization’ and ‘default reference’.¹⁹³ The former stands for the requirement that each international regime take into account the values that are actively pursued by others, for example, the WTO with regard to non-trade values (Article XX GATT comes to mind here);¹⁹⁴ the latter for the attempt to refer, where possible, to decisions by other bodies without attributing to these the normative force of a precedent. A ‘default reference’ creates merely the presumption that decisions by international regime tribunals have persuasive authority for one another.¹⁹⁵ Instead of impressing unity, the legal system has to allow for mutual accommodation, which is always going to be accommodation of different rationalities.

At first glance, this diagnosis insinuates that Kelsenian legal ideas may have finally lost their social base. In the world of modern international law, not monism but pluralism (even though the pluralism of regimes and not of states)¹⁹⁶ is carrying the day. The rule of regimes is a ‘de facto rule’, unmediated by the international system. ‘Compatibilization’ and ‘default reference’ are modes of coordination.¹⁹⁷ However, at a second glance, it is less clear why this should be the case.

¹⁸⁷ From the perspective of social systems theory, this seems to imply that the legal system plays a special role in the relation of other subsystems.

¹⁸⁸ See *ibid.*, at 1045: ‘[r]ather than secure the unity of international law, future endeavours need to be restricted to achieve weak compatibility between the fragments. In the place of an illusory integration of a differentiated global society, law can only, at the very best, offer a kind of damage limitation. Legal instruments cannot overcome contradictions between different social rationalities. The best law can offer – to use a variation upon an apt description of international law – is to act as a “gentle civiliser of nations”’ (in the footnote there follows a reference to M. Koskenniemi’s *The Gentle Civiliser of Nations*).

¹⁸⁹ See K. Marx and F. Engels, *Werke* (1976), ii, 33.

¹⁹⁰ Fischer-Lescano and Teubner, *supra* note 177, at 1009.

¹⁹¹ See *ibid.*, at 1017.

¹⁹² See *ibid.*, at 1039.

¹⁹³ See *ibid.*, at 1044–1046.

¹⁹⁴ See *ibid.*, at 1024.

¹⁹⁵ See *ibid.*, at 1044.

¹⁹⁶ For perceptive observations regarding the fact that for Teubner and Fischer-Lescano regimes play the role that states play for rational choice-based approaches to international law see Koskenniemi, *supra* note 36, at 26.

¹⁹⁷ See *ibid.*, at 23–24, 26.

The unity that the authors diagnose to be absent is the substantive unity of principles, possibly in the sense of coherence that is relevant to Dworkin's project.¹⁹⁸ This type of unity is of no interest to Kelsen since it is associated with a substantive basic norm whose existence Kelsen deemed to be indemonstrable.¹⁹⁹ The fact that different courts of final appeal (or final tribunals) reach different conclusions and strike a different balance between conflicting values does not affect the membership of these decisions to one system, at any rate, not as long as their pedigree indicates that they originate from one and the same system of international law.²⁰⁰ On the contrary, the finality of decisions and the respect for their, using Dworkinian parlance, 'enactment force'²⁰¹ in the course of 'default reference' show that they are treated as members of one and the same legal system from a *dynamic* point of view. Put differently, when confronted with a decision by another tribunal, each tribunal has to come up with some conception of the decision's normative force. The unity of law is presupposed in every instance in which such a conception becomes tacitly or explicitly applied to a case at hand. The mode of constructing the unity may well be contested when it is formally presupposed by all participants.

I suspect, hence, that what Teubner and Fischer-Lescano have in mind, when speaking of 'fragmentation',²⁰² is the absence of a substantive *Grundnorm*.²⁰³ Consequently, they bring to bear to their project a much more demanding idealization of systematic unity than had been advanced by Kelsen,²⁰⁴ who left ample room for substantive conflicts between norms occupying different levels of the legal system. In fact, their appeal to 'compatibilization' is a consequence of assuming that what explains the current situation is the lack of such a substantive *Grundnorm*.²⁰⁵ 'Compatibilization' is the ersatz for the latter. In their opinion, regimes should strive for mutual accommodation since this would curb the 'self-destructive tendencies' within purported 'rationality collisions'²⁰⁶ on the basis of some compromising mode of accommodation that is to be constructed from within each regime.²⁰⁷ I do not see why such a precept does not amount to the regime-transcendent maxim that unity creates legitimacy because some ideal of 'integrity' is built into the system of international law.²⁰⁸ Regime fragmentation theory thus turns out to be natural law theory in post-modernist disguise.

¹⁹⁸ See Dworkin, *supra* note 8, at 219.

¹⁹⁹ See Kelsen, *Introduction*, *supra* note 4, at 55.

²⁰⁰ See Simma and Pulkowski, *supra* note 89, at 494.

²⁰¹ See Dworkin, *supra* note 138, at 113.

²⁰² I suspect that the same holds true in the case of Koskeniemi: see *supra* note 36, at 13 and *supra* note 156.

²⁰³ On Kelsen's rejection of a substantive basic norm see Paulson, *supra* note 4, at 30.

²⁰⁴ See Kelsen, *Introduction*, *supra* note 4, at 57–58.

²⁰⁵ See Fischer-Lescano and Teubner, *supra* note 177, at 1045–1046.

²⁰⁶ For a critique of Teubner's earlier work that also assumed something close to the incommensurability of rationalities see J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (trans. William Rehg, 1996), at 53–55.

²⁰⁷ See Fischer-Lescano and Teubner, *supra* note 177, at 1045–1046.

²⁰⁸ See Simma and Pulkowski, *supra* note 89, at 511.

17 Born-again Prussian Statism

The puzzling fact that regimes come to be depicted as though they were law-defying actors reveals a strange coincidence of currently fashionable European theorizing with an approach that is currently widely debated in the United States of America.²⁰⁹

The behaviour of the defiant superpower²¹⁰ has reinvigorated old 'realist' scepticism about international law.²¹¹ Paradoxically, some scholars²¹² believe that public international law would be a legal system with significance *of its own* only if compliance were supported by moral reasons, that is, by the belief that norms are to be adhered to even when this is contrary to the perceived self-interest of the state.²¹³ If there is no evidence of morality, then, by default, public international law can rest only on the convergent self-interest of states.²¹⁴

The belief that public international law needs to be, and is indeed, supported by morality has been attributed by Goldsmith and Posner to most legal scholars working in the discipline.²¹⁵ In contrast, Goldsmith and Posner offer what they believe to be a less idealistic approach.²¹⁶ There is no moral obligation for a state to submit itself to an international community²¹⁷ to begin with, not even as a consequence of pure practical reason.²¹⁸ According to what they take to be a 'descriptive account', actual compliance with international legal rules is the consequence of four different types of behaviour revealing self-interest as the motive of states.²¹⁹ Goldsmith and Posner present this as if it were a sobering insight. Public international law is merely *äußeres Staatsrecht*, not even law proper, but some reflection of the combined effects of state conduct. Clearly, Goldsmith and Posner are 'international law nihilists':²²⁰

²⁰⁹ See, e.g., merely in response to the book cited *infra* in note 213: Hockett, 'The Limits of their World', 90 *Minnesota L Rev* (2006) 1720; Berman, 'Seeing Beyond the Limits of International Law', 84 *Texas L Rev* (2006) 1265; Gray, 'Rule-Skepticism, "Strategy," and the Limits of International Law', 46 *Virginia J Int'l L* (2006) 563; Swaine, 'Restoring (and Risking) Interest in International Law', 100 *Am J Public Int'l L* (2006) 259; Hathaway and Lavinbuk, *supra* note 28.

²¹⁰ See, generally, A.J. Bacevich, *American Empire. The Realities and Consequences of US Diplomacy* (2002); Zemanek, 'Is the Nature of the International System Changing?', 8 *Austrian Rev Int'l and European L* (2003) 3.

²¹¹ See above section 4.

²¹² On the recklessness with which I use the term 'realism' in the text above see *supra* notes 22 and 31. It would be more accurate, to be sure, to refer to these scholars as atomists. See *supra* note 30.

²¹³ See J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005), at 183.

²¹⁴ See *ibid.*, at 10–13.

²¹⁵ Goldsmith and Posner, *supra* note 213, at 14–15, 165, 185. The authors profess to apply rational choice theory to international law: *ibid.*, at 7.

²¹⁶ The conflation of compliance and validity in much of the literature on the subject needs to be noted here. For an overview of the literature that seeks to uncover the reasons for compliance see M. Burgstaller, *Theories of Compliance with International Law* (2005).

²¹⁷ In a similar vein see A. Lasson, *Princip und Zukunft des Völkerrechts* (1871), at 12–17.

²¹⁸ See Goldsmith and Posner, *supra* note 213, at 14, 205–224.

²¹⁹ See *ibid.*, at 10–12 (coincidence of interest, co-ordination, co-operation, coercion). For a useful discussion see Hathaway and Lavinbuk, *supra* note 28, at 1416–1417.

²²⁰ See Goldsmith and Posner, *supra* note 213, at 13. For a discussion of Lasson, who held the same view, see Kelsen, *supra* note 60, at 196–198.

The usual view is that international law is a check on state interests, causing a state to behave in a way that is contrary to its interests. In our view, the causal relationship between international law and state interests runs in the opposite direction. International law emerges from states' pursuit of self-interested policies on the international stage. International law is, in this sense, endogenous to state interests. It is not a check on state self-interest; it is a product of state self-interest.

Goldsmith's and Posner's approach is conspicuously reminiscent of 19th and early 20th-century right-wing Hegelian orthodoxy regarding international law.²²¹ Public international law is seen, at best, as the epiphenomenal medium for the mutual recognition of states.²²² For example, according to Lasson,²²³ public international law reflects the relative power of states. It was clear to Lasson, however, that with increasing interpenetration among states the long-term self-interest of states abides by rules that are in their mutual interest.²²⁴ But these rules are what Kant would have called 'hypothetical imperatives',²²⁵ that is, rules of prudence and not rules of law.²²⁶ Public international law is, if anything, 'the free agreement of co-ordinate agents who cannot be forced into abiding by it'.²²⁷ In a similar vein, Erich Kaufmann – nowadays mostly remembered for his remarks about the gloriousness of war²²⁸ – conceived of public international law as mere *Koordinationsrecht*, that is, law that does not rest on the subordination of states to one common authority but on a coordination of their conduct²²⁹

²²¹ See, e.g., Lasson, *supra* note 217. It is fair to say that owing to his emphasis on relentless competition among states over scarce resources (*ibid.*, at 8), Lasson was indeed a 'realist'. On Lasson see also Koskenniemi, *supra* note 22, at 32–33, 182–183. On right-wing Hegelianism in general see H. Lübke, *Politische Philosophie in Deutschland* (1974), at 63–70; on the rise of 'realism' in German public law scholarship in the late nineteenth century see *ibid.*, at 438–439. I do not mean to imply, however, that Goldsmith and Posner are sufficiently familiar with the intellectual history of the discipline in order to be aware of who their intellectual bedfellows are. A remarkable flirtation, however, can be observed for American neo-conservatives with what they take to be Hegel's political thought. See L. Harris, *Civilization and Its Enemies. The Next Stage of History* (2004).

²²² See E. Gans, *Naturrecht und Universalrechtsgeschichte* (1832–1833) (ed. M. Riedel, 1982), at 105.

²²³ Given that Lasson published his 'realist' debunking of international law in the year of the creation of the German Empire (1871) it may be more accurate to speak of the recrudescence of 'German statism' in present-day US American doctrine. However, the German empire was clearly dominated by Prussia: see M. Stürmer, *The German Empire. A Short History* (2000).

²²⁴ See Lasson, *supra* note 217, at 55.

²²⁵ See Kant, 'Grundlegung zur Metaphysik der Sitten', in W. Weischedel (ed.), *Werke in zwölf Bänden* (1968), vii, at 43.

²²⁶ See Lasson, *supra* note 217, at 49.

²²⁷ *Ibid.*, at 48 (my translation). The German original reads as follows: '[d]as Völkerrecht hingegen ist eine freie Abmachung unter Coordinierten, die zu halten sie nicht gezwungen werden können'.

²²⁸ See E. Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus. Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriffe* (1911), at 146: '[n]ot "the community of self-determined human beings" but the victorious war is the social ideal. ... In war, the state reveals itself in its true essence; it is its highest achievement in which its nature comes to its full fruition' (my translation). A reference to these sentences is made (in a very different translation) in Koskenniemi, *supra* note 22, at 179. On Erich Kaufmann see Kelsen, *supra* note 60, at 198–200, n. 3. On the broader controversies over questions of legal theory between Kaufmann and Kelsen see Paulson, 'Some Issues in the Exchange between Hans Kelsen and Erich Kaufmann', 48 *Scandinavian Studies in Law* (2005) 270.

²²⁹ See Kaufmann, *supra* note 228, at 146, 160.

that is always subject to reservation as regards their self-preservation.²³⁰ Only the latter is the *telos* of public international law.²³¹ There is no international community and no international solidarity. The coincidence of interests is all there is.²³² Whoever *can* act also *may* act. This is the 'fundamental idea' of public international law.²³³

Against this historical background, Goldsmith and Posner's work does not really strike one as original. It should not come as a surprise, then, that it implicates the same *idealizations* the accuracy of which were called into question by Kelsen early in the 20th century.²³⁴

The first and most remarkable idealization consists in the puzzling equation of 'real' law and morality. Goldsmith and Posner end up adopting the view they ascribe to 'idealistic' scholars of public international law. According to that view, public international law, in order to count as an *independent* source of law, would have to be dissociated from the self-interest of states and in some way that is not further specified be sufficiently 'like' morality.²³⁵ Were that not the case, it would not give rise to a *genuine* obligation.

Interestingly, obligation is taken to be something that involves self-sacrifice.²³⁶ Such a view of obligation is questionable even from the perspective of moral theory. Generally, it makes more sense to conceive of moral obligation as a necessary correlate of self-realization.²³⁷ Moreover, the line dividing self-interested conduct from morality is highly indeterminate in cases such as friendship and other forms of loyalty.²³⁸ Goldsmith and Posner's social universe is much too facile to account for such phenomena. The simplicity affects the accuracy of empirical analysis. Customary international law, for instance, is likely to be effective on the basis of reasons for action varying from one participant to the next. Ironically, Goldsmith and Posner share this view, although in their case it is to the detriment of their project. As Hathaway and Lavinbuk point out in their critical review, Goldsmith and Posner are consistently imprecise in explaining which of the four modes of rational behaviour²³⁹ they distinguish applies in what case.²⁴⁰ For a sociologically enlightening theory of compliance to succeed it is not enough to state that, in any event, one or the other mode may

²³⁰ See *ibid.*, at 204.

²³¹ See *ibid.*, at 192.

²³² See *ibid.*, at 193.

²³³ See *ibid.*, at 153.

²³⁴ See, in particular, Kelsen, *supra* note 60 and *supra* note 18.

²³⁵ See Goldsmith and Posner, *supra* note 213, at 192, 202.

²³⁶ See *ibid.*, at 183.

²³⁷ See C.M. Korsgaard, *The Sources of Normativity* (1996), at 102.

²³⁸ This cannot be discussed any further here. For an analysis see J. Raz, *Engaging Reason. On the Theory of Value and Action* (1999), at 288–292.

²³⁹ See *supra* note 219.

²⁴⁰ See Hathaway and Lavinbuk, *supra* note 28, at 1423, 1431–1432. As the authors explain, the same critique applies to the models themselves (at 1424): '[y]et because these models are so poorly specified, it is impossible to know what their particular claim might be, let alone how one might falsify it. This is an important shortcoming of the book, for a theory that is impossible to contradict does not provide opportunities for advancing true understanding of its subject.'

explain conduct. Rather, it has to point out when and why a specific mode is chosen by a state. The simplistic identification of whatever is done with self-interested behaviour will not do. On the contrary, it would be symptomatic of the idealization of state-action from a normative angle, in this case, that of the ‘right national interest’ that is allegedly pursued by the state.

In exploring the sources of customary international law, Kelsen pointed out that custom – ‘one ought to do like all the others do’ – is all that matters.²⁴¹ He went at quite some length to explain why any other theory that adds to mere custom consent or some noumenal normative force, such as the spirit of community or solidarity,²⁴² is inclined to treat this additional element as essential and custom as a derivative surface manifestation thereof.²⁴³ This observation is highly relevant to currently fashionable attempts to construct public international law from the vantage point of reasons for compliance.²⁴⁴ Obviously, such theories are theories of validity in disguise, for what they are really concerned with are the *good* reasons to abide by international obligations. Their thrust is clearly at odds with legal positivism’s insistence on norm-creating *facts*.²⁴⁵ Compliance theories, consequently, are confronted with a recurring dilemma. They are either empirically indeterminate²⁴⁶ or overcharged with idealizations, that is, attributions to agents of reasons that are taken to be ‘the right reasons’. As has already been observed by Hathaway and Lavinbuk, Goldsmith and Posner are guilty of the former;²⁴⁷ they are, however, also guilty of the latter.

Goldsmith and Posner conceive of public international law as backed up by force. Since morality has no force in the world of self-interested states²⁴⁸ the only force there is, is the force of the state.²⁴⁹ The validity of norms is thus assimilated to the power

²⁴¹ See Kelsen and Tucker, *supra* note 117, at 441: ‘[t]he basis of customary law is the general principle that we ought to behave in the way our fellow men usually behave and during a certain period of time used to behave. If this principle assumes the character of a norm, custom becomes a law-creating fact. This is the case in the relations of states.’

²⁴² See Kelsen’s discussion of Scelle in H. Kelsen, *Auseinandersetzungen zur Reinen Rechtslehre. Kritische Bemerkungen zu George Scelle und Michel Virally* (ed. K. Ringhofer and R. Walter, 1987), at 7–21. On Scelle see Koskeniemi, *supra* note 22, at 331–333.

²⁴³ See Kelsen and Tucker, *supra* note 117, at 441–443.

²⁴⁴ See, e.g., Hathaway and Lavinbuk, *supra* note 28, at 1437, who regard Goldsmith’s and Posner’s atomism as ‘emblematic of the most important trends in modern international legal scholarship’.

²⁴⁵ For Kelsen, the *opinio juris* can only be reflected in facts. Everything else would introduce a natural law component into the study of law, as a consequence of which its students would be inclined to see states acting on what they take to be the ‘right’ reasons. See Kelsen and Tucker, *supra* note 117, at 450–451: ‘[t]o be sure, the psychological element of custom, the *opinio juris sive necessitatis*, may be inferred from the constancy and uniformity of state conduct. Indeed, in practice it appears that the *opinio juris* is commonly inferred from the constancy and uniformity of state conduct. But to the extent that it is so inferred it is this conduct and not the particular state of mind accompanying conduct that is decisive.’ See also Kunz, *supra* note 151, at 340–342.

²⁴⁶ On the difficulty of sorting out motives see Hathaway and Lavinbuk, *supra* note 28, at 1442.

²⁴⁷ See *supra* note 240.

²⁴⁸ Again, this is a view that they share with Lasson, *supra* note 217, at 42.

²⁴⁹ See Goldsmith and Posner, *supra* note 213, at 202–203.

of overpowering force.²⁵⁰ Underlying this obsession with might is another idealization, namely, the hypostatization of the state into a superhuman entity. The authors are surprisingly candid about adopting this stance. They adopt it with the expectation that such dogmatism conforms with what is well-established ‘state of the art’ in ‘rational’ choice theory.²⁵¹ As a result of imagining one ‘undifferentiated unitary’ actor, the authors fail to realize that they attribute to states different interests depending on the constituents or state institutions they tacitly refer to. They are also not sensitive to a problem posed by interest-group capture in international politics.²⁵² States are simply taken to be rational entities with complete and consistent preferences. In reply to the likely objection that phenomena such as cycling in voting, which have been widely analysed by public choice theory, cast doubt on the accuracy of such idealizations, the authors contend that without them ‘any explanation of international law ... would be suspect’²⁵³. This reply essentially says that the objection needs to be ignored for if it were taken into account the project would be doomed to failure from the start. What a remarkable specimen of bad social theory! The shamelessness with which it is stated speaks to the fact that the project is animated by the desire to rationalize unilateral conduct by states, in particular by the United States of America. The self-interested state is taken to have good reasons for action, even though it remains profoundly unclear for whom these reasons are good – other than for the normative construct state, which is a creature – surprise – of public international law.

18 The Trouble with Atomism

Atomism, even though widely used and accepted as a *lingua franca* in contemporary US American legal scholarship,²⁵⁴ is the source of poor social theorizing. Barely anything is more paradoxical – even hopeless – than the use of rational choice theory with the aim of increasing the sociological accuracy of analysis. I should like to remind readers of three reasons for the deficiency that is notoriously encountered here.

First, atomism is a bad guide, for it cannot arrive at a convincing account of the integrating effect of norms. This has been known to sociological theory at least since Parsons argued that Hobbes had to ‘stretch’ his premises in order to derive from self-interested conduct the interest in sustaining social cooperation.²⁵⁵ Rational choice theory is cast into doubt by ‘Hobbes’ Problem of Order’ in that it is unable to explain how self-interested agents ‘come to realize the situation as a whole instead of pursuing their own ends in terms

²⁵⁰ Kelsen thought that the attribution of overpowering force to the state was a deferred expression of the normativity of the domestic legal order: see Kelsen, *supra* note 18, at 134–135.

²⁵¹ See Goldsmith and Posner, *supra* note 213, at 7–8.

²⁵² See Hathaway and Lavinbuk, *supra* note 28, at 1432–1435.

²⁵³ Goldsmith and Posner, *supra* note 213, at 8.

²⁵⁴ See Keohane, *supra* note 22.

²⁵⁵ See T. Parsons, *On Social Institutions and Social Evolution. Selected Writings* (ed. L.H. Mayhew, 1982), at 96–102; for a useful discussion of how this problem is seminal for Parsons’ sociological theory see H. Joas, *Die Kreativität des Handelns* (1992), at 22–33.

of their immediate situation'.²⁵⁶ The genesis of social norms needs to be found elsewhere; it is not to be found, at any rate, in the combined effort of self-interested agents.²⁵⁷

Second, atomism's penchant for rationalism is misleading owing to an unbending belief in the availability of one right causal explanation. But such a belief is difficult to sustain,²⁵⁸ for it is highly indeterminate as to where to construct the right chain of causation and how to conceive of an actor's intention.²⁵⁹ I mention that the German sociologist and philosopher Luhmann designed his variety of 'equivalence functionalism' as a reply to the inherent weakness of causal explanation in the social sciences.²⁶⁰ Functional analysis was introduced by him as an attempt to bring about a Copernican reversal in the relation between systems and causation: systems are not to be explained on the basis of causation but causation needs to be seen as a scheme that is used by a system in order to reduce complexity of its own operation. Accordingly, any causal explanation, such as the causal explanation of acts, presupposes a systemic context which selects for an explanation the information that is relevant for the reproduction of the system.²⁶¹ No one could give, unwittingly, a more instructive example of how the social construction of causality works in the context of the legal system than Goldsmith and Posner themselves. In identifying the agent they deem relevant to their analysis, they use a normative idealization that reduces complexity. By looking at 'the state', they adopt an idealization that they inherit, not surprisingly, from the norms of public international law. It is almost tragic to observe how Goldsmith and Posner employ an idealization that presupposes the norms of public international law in an argument against it.

Finally, by taking actors and preferences as given, atomism is the equivalent in the field of the theory of action of what Sellars called the 'Myth of the Given'.²⁶² With foolish recalcitrance, atomism sticks to the idea that there is something immediate with which an analysis can begin, namely actors and their preferences. Nothing can be further from the truth. This is well known,²⁶³ particularly by so-called 'constructivists', a position that is all too lightly disposed of by Goldsmith and Posner with one grand dismissive gesture.²⁶⁴

²⁵⁶ Parsons, *supra* note 255, at 100; for a useful commentary see J. Habermas, *Theorie des kommunikativen Handelns*, vol. 2: *Zur Kritik der funktionalistischen Vernunft* (1981), at 315–316. Habermas is perceptive enough to extend this analysis to more recent rational choice theory. See Habermas, *supra* note 206, at 336–337.

²⁵⁷ See the classical work by E. Durkheim, *Les formes élémentaires de la vie religieuse* (1968).

²⁵⁸ See N. Luhmann, *Zweckbegriff und Systemrationalität. Über die Funktion von Zwecken in sozialen Systemen* (2nd ed., 1977), at 26–27.

²⁵⁹ See N. Luhmann, *Einführung in die Systemtheorie* (2nd ed., 2004), at 252–256.

²⁶⁰ See Luhmann, 'Funktion und Kausalität', in N. Luhmann, *Soziologische Aufklärung. Aufsätze zur Theorie sozialer Systeme* (4th ed., 1974), i, at 9–30.

²⁶¹ See Luhmann, *supra* note 258, at 195.

²⁶² See W. Sellars, *Empiricism and the Philosophy of Mind* (1997), at 14, 33. The equivalence has been pointed out by R.B. Brandom, *Articulating Reasons. An Introduction to Inferentialism* (2000), at 31.

²⁶³ See Habermas, *supra* note 206, at 336.

²⁶⁴ See Goldsmith and Posner, *supra* note 213, at 15. For a critique see Hathaway and Lavinbuk, *supra* note 28, at 1439.

In summary, Goldsmith and Posner offer the worst of all possible worlds for those who esteem sociological theory. The theoretical grounding is tenuous, the reasoning confused. Underneath the anti-idealist mantle the work abounds in idealizations. It is the born-again American version of Prussian idealism with regard to the mighty national, imperial state.

19 Conclusion

It may be the case that legal positivism is ultimately not a defensible position in legal theory²⁶⁵ or not the most attractive approach to public international law.²⁶⁶ The puzzling career of Anglo-American conventionalism,²⁶⁷ however, may have also made us forget that legal positivism, correctly understood, is a position with an edge. Hart and his self-nominated disciples ventured to tame legal positivism into a complacent professional faith which is prone to ratify as 'law' whatever nonsense happens to attain the force of a convention among those practising law. This is not the spirit of legal positivism.

I have tried to explain that, in the context of international law, Kelsen's legal positivism has the potential to expose as unwarranted the assumptions underlying attempts at debunking public international law. Those embracing the demise of a unified system of public international law in the face of increasing 'fragmentation' come to the subject matter with an unnecessary idealistic expectation of coherence. Fragmentation may be a recurring experience on a cognitive plane, but how one ought to deal with it from a normative point of view is a completely different matter.²⁶⁸ Those believing that they can reveal the real power-structure underlying the moralistic pretensions of international legal discourse are inextricably caught up in a whole set of idealizations which they bring to the discussion. 'Realism' in international law is often idealism with regard to the power of states or the discernability of the collective interest. Finally, there is a remarkable convergence between rational choice and social system theory as regards the attribution of 'self-interest' to either the state or a regime.

Kelsen made us aware that public international law invites its own misreading from either a statist or a pacifist perspective.²⁶⁹ The critical task of legal positivism is a perennial one. Embracing the Kelsenian project one need not harbour high hopes about the future development of the international legal system. Kelsen's speculations about future developments are one thing, his theoretical project quite another. The study of public international law requires what the study of law requires in general, namely, lowering one's expectations about the subject matter. We study law in order to find out what we may have reason to fear. Public international law is no special case when it comes to this.

²⁶⁵ See Somek, *supra* note 86.

²⁶⁶ The internal criticism of legal positivism draws on philosophy of language. See most recently Christensen, 'Wortlautgrenze: spekulativ oder pragmatisch' [2006] *Archiv für Rechts- und Sozialphilosophie* (forthcoming).

²⁶⁷ See Himma, 'Inclusive Legal Positivism', in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002), at 125, 130; but see Green, *supra* note 105.

²⁶⁸ The question that would have to be asked is whether the legal system – understood as a system of norms – is already and inescapably in demise: see Somek, *supra* note 86, at 100–103.

²⁶⁹ See Kelsen, *supra* note 17, at 387.