Leiden Journal of International Law, 22 (2009), pp. 225–249
 Printed in the United Kingdom doi:10.1017/S0922156509005809

ARTICLES

Kelsen – Which Kelsen? A Reapplication of the Pure Theory to International Law

JÖRG KAMMERHOFER*

Abstract
Hans Kelsen is known both as a legal theorist and as an international lawyer. This article shows that his theory of international law is an integral part of the Kelsenian Pure Theory of Law. Two areas of international law are analysed: first, Kelsen's coercive order paradigm and its relationship to the *bellum iustum* doctrine; second, the Kelsenian notion of the unity of all law vis-à-vis theories of the relationship of international and municipal law. In a second step, the results of Kelsenian general legal theory of the late period – as interpreted and developed by the present author – are reapplied to selected doctrines of international law. Thus is the coercive order paradigm resolved, the unity of law dissolved, and the UN Charter reinterpreted to show that the concretization of norms as positive international law cannot be unmade by a scholarship usurping the right to make law.

Key words
Hans Kelsen; legal theory; monism; sanctions; UN Charter

Hans Kelsen, one of the greatest legal minds of the twentieth century, did not concern himself solely with abstract theory. A large percentage of his works deal with international law,[1] and his move to a professorship at the University of Cologne in 1930 forced him to focus on that subject more than he would have done had he remained in Austria.[2] The first aim of this article is to show that international law was never a minor or neglected part of Kelsen's writings and that his theory of international law is an integral part of the Pure Theory of Law, a theory consistently applied to the doctrine of international law, and a doctrine essential for the Pure Theory. The second point to be made is to ask what a neo-Kelsenian theory would mean for the development of a doctrine of international law, how this theory would result in a

* Friedrich Alexander University Erlangen-Nuremberg, Germany. This article was originally commissioned for a BIICL conference, entitled 'International Legal Positivism: Images of a Tradition', on 15 December 2004, and has subsequently been substantially rewritten.

1 C. Leben, 'Hans Kelsen and the Advancement of International Law', (1998) 9 EJIL 287, at 288.

2 H. Kelsen, 'Autobiographie', in M. Jestaedt (ed.), *Hans Kelsen Werke* (2007), I, 29, at 77; see also, regarding his emigration to the United States in 1940, R. A. Métall, *Hans Kelsen. Leben und Werk* (1969), 107.

changed outlook on international law.[3] If the main body of works cited stems from the 1945–60 period, it is only because Kelsen's most important international law writings originated in that period,[4] not because emphasis will be placed on possible changes to the Pure Theory or on its intellectual-historical periodization.

1. Hans Kelsen's multiple views?

Was Kelsen consistent in the implementation of his theory to international law doctrine? This section will attempt a comparison of the two bodies of opinion. The two topics chosen – sanctions (section 1.1) and monism and pluralism (section 1.2) – are mere examples, but they are important parts of Kelsen's international law doctrine. We shall seek to compare the relevant parts of his legal theory with his views on the two international law topics and with traditionalist views. This will not be a discussion of whether Kelsen's theories 'fit' international law itself.[5] Instead, we shall focus on how the 'Pure Theory of International Law' contrasts with doctrines of international law. Kelsen's theory may well turn out to be so radically different as to make the wholesale adoption of his views highly inconvenient for any international lawyer.[6] Radical consistency (*Konsequenz*) may be a force for deconstructing international law (section 3).

Consistency in Kelsen's writings is to a certain degree predictable. The very idea of a Pure Theory necessitates *Konsequenz*:[7] for a theory to be purified it needs to be thought through to the (bitter) end. Any acute reader of Kelsen's work will notice that he held consistency in high esteem. Kelsen's style also ensures consistency over a broad range of topics. His theoretical writings contain sections on international law,[8] international law doctrines are utilized as practical examples for theoretical arguments,[9] and his international law writings contain extensive theoretical passages.[10] While the general consensus seems to be that his theory and his doctrine

3 I have previously formulated a theory of international law along neo-Kelsenian lines in J. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', (2004) 15 EJIL 523; J. Kammerhofer, 'Unearthing Structural Uncertainty through Neo-Kelsenian Consistency: Conflicts of Norms in International Law', 2005, www.esil-sedi.org/English/pdf/Kammerhofer.pdf; J. Kammerhofer, 'The Benefits of the Pure Theory of Law for International Lawyers, or What Use Is Kelsenian Theory?', (2007) 12 *International Legal Theory* 5.

4 In particular H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950); H. Kelsen, *Principles of International Law* (1952); H. Kelsen, *Reine Rechtslehre* (1960). As a rule only one Kelsenian source will be given, even if he made the same point in many publications.

5 Section 1.1 will deviate from this rule and take Kelsen's interpretation of the UN Charter as an example for 'fit', because we have the law of the Charter as a concrete text.

6 This seems to be implied in L. Sucharipa-Behrmann, 'Kelsens "Recht der Vereinten Nationen". Welche Relevanz hat der Kommentar heute noch für die Praxis?', in R. Walter, C. Jabloner, and K. Zeleny (eds.), *Hans Kelsen und das Völkerrecht. Ergebnisse eines internationalen Symposiums in Wien (1.–2. April 2004)* (2004), 21; contra, J. L. Kunz, *Völkerrechtswissenschaft und Reine Rechtslehre* (1923); J. L. Kunz, 'The "Vienna School" and International Law', (1934) 11 *New York University Law Quarterly Review* 370.

7 See Kelsen, *Reine Rechtslehre*, *supra* note 4, at iv; P. Allott, 'Language, Method and the Nature of International Law', (1973) 45 *British Yearbook of International Law 1971* 79, at 98.

8 Kelsen, *Reine Rechtslehre*, *supra* note 4, at 283–345 (Parts VI and VII).

9 See the use of the concept of collective security as an example within the 'coercive order' postulate, Kelsen, *Reine Rechtslehre*, *supra* note 4, at 38–41, or of the 'general principles of law', 1945 Statute of the International Court of Justice, Art. 38(1)(c), within the discussion of Esser's distinction between 'norm' and 'principle', H. Kelsen, *Allgemeine Theorie der Normen* (1979), 99, 266–7.

10 Kelsen, *Principles of International Law*, *supra* note 4, at 3–18, 403–28 (sections I.A and V.B.1–6).

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

of international law diverge, most specialists on Kelsen disagree. We shall look at two topics in turn to ascertain whether that is the case.

1.1. The coercive order paradigm and the *bellum justum* doctrine

Kelsen's search for a typological differentiation of normative orders is predicated by the pureness of the resulting theory. In order to keep morals out of law, one has to be able to point to a difference between these two normative orders. The question is thus whether a *legal* norm, whether a *legal* normative order, is a unique type of norm or normative order: 'Es gilt festzustellen, ob die gesellschaftlichen Phänomene, die mit diesem Wort [Recht] bezeichnet werden, gemeinsame Merkmale aufweisen, durch die sie von anderen, ihnen ähnlichen Erscheinungen unterschieden werden können.'[11] Precisely what does this differentiation mean with respect to the kind of difference and differentiation? On the one hand, a mere empirical differentiation according to word use, as employed by Kelsen in *Reine Rechtslehre*, could produce the result 'daß mit dem Wort "Recht" und seinen anderssprachlichen Äquivalenten so verschiedene Gegenstände bezeichnet werden, daß sie unter keinem gemeinsamen Begriff zusammengefaßt werden können',[12] because we would employ a descriptive approach, seeking the common denominator. On the other hand, certain criteria could be made part of the very idea of law, thus becoming necessary, a priori elements of 'law'. However, the only necessary element for any norm is *that it is a norm* – that is, that it is an 'ought', the claim to be observed.[13] On that basis there can be no difference between norms.

Kelsen, however, chooses an empirical approach. The key element distinguishing positive legal orders from other kinds of positive normative orders for him is that legal orders are coercive orders (*Zwangsordnungen*):

> Ein anderes den als Recht bezeichneten Gesellschaftsordnungen gemeinsames Merkmal ist, daß sie Zwangsordnungen in dem Sinne sind, daß sie auf bestimmte für unerwünscht, weil sozial schädlich angesehene Umstände, insbesondere auf menschliches Verhalten dieser Art, mit einem Zwangsakt, das heißt mit einem Übel – wie Entziehung von Leben, Gesundheit, Freiheit, wirtschaftlichen und anderen Gütern – reagieren, mit einem Übel, das dem davon Betroffenen auch gegen seinen Willen, wenn nötig unter Anwendung physischer Gewalt, also zwangsweise zuzufügen ist.[14]

Thus coercion *prescribed* as reaction against certain behaviour is the distinguishing feature of law – the *Zwangsnormpostulat* (coercive order paradigm). Every legal order contains coercive norms; they prescribe certain human behaviour by attaching a coercive act to the opposite behaviour. The typical coercive norm would make

---

11 'We need to ascertain whether the societal phenomena called law have common characteristics which distinguish them from other, similar, phenomena.' Kelsen, *Reine Rechtslehre*, *supra* note 4, at 32. Unless noted otherwise, all translations are the present author's.

12 '[T]hat "law" and its equivalent expressions in other languages denote such diverse objects that they cannot be subsumed under a common term.' Kelsen, *Reine Rechtslehre*, *supra* note 4, at 32.

13 Kelsen, *supra* note 9, at 3.

14 'Another feature common to societal orders designated as law is that they are coercive orders in the sense that they react to antisocial "facts", especially to such human behaviour, by [prescribing] an evil – like the taking of life, health, freedom or economic or other goods. [They prescribe] an evil which ought to be inflicted upon its target against his will, if necessary using physical force, hence is inflicted as a coercive measure.' Kelsen, *Law of the United Nations*, *supra* note 4, at 34.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

that behaviour – the unwanted behaviour – the condition for a prescription to organs to sanction the human responsible: if someone commits murder, they are to be punished by life imprisonment. This, for Kelsen, is the crucial difference between law and morals: while positive moral orders proscribe certain behaviour and may or may not attach a sanction to behaviour in a second norm, law prohibits behaviour *specifically by attaching negative sanctions* to the contrary behaviour.[15]

In order to apply such a norm, an 'organ' is needed. An organ is nothing more than a bundle of norms referring to human behaviour which authorizes the application of the law and thus the creation of norms. For example, a penal procedure code authorizes a human to apply the penal code and to create individual norms stipulating sanctions. Hence if this judge authoritatively finds that A has committed murder, the individual norm thus created might prescribe that A ought to be punished by life imprisonment.[16] For Kelsen there is a development of social orders to restrict progressively the use of physical force in intra-societal relations, to establish a force monopoly of the community. Thus the use of physical coercion becomes either sanction authorized by the legal order or a delict, against which sanctions are to be directed. The exclusive legal classification of physical force as either sanction or delict is not a logical necessity; it has to be proved to be part of a given positive normative order.[17] Primitive legal orders, however – legal orders with a low grade of centralization and no division of labour – do not have special organs for that task and will most likely authorize decentralized enforcement. Such legal orders typically authorize self-help; that is, 'the legal order leaves these functions to the individuals injured by the delict':[18]

> [A]lso in this case, we may speak of a force monopoly of the community: for the conditions under which and the individuals through which the force may be employed *are determined by the legal order* constituting the community. It is a characteristic feature of the law to constitute a force monopoly of the legal community.[19]

However, there is a danger of concluding that a norm is only a member of a legal order if and when it stipulates a sanction. The Kelsen of the second edition of *Reine Rechtslehre* makes it plain that a norm's validity – hence both its existence and its membership in a given normative order – derives from superior norms, not from its stipulating a sanction: 'Eine einzelne Norm ist eine Rechtsnorm, sofern sie zu einer bestimmten Rechtsordnung gehört, und sie gehört zu einer bestimmten Rechtsordnung, *wenn ihre Geltung auf der Grundnorm dieser Ordnung beruht*.'[20] The element of coercion for Kelsen merely identifies an order as legal order and does not unmake non-coercive laws contained in a positive legal order.

---

15 Kelsen, *supra* note 9, at 77–8, 108.
16 Kelsen, *Reine Rechtslehre*, *supra* note 4, at 37–8.
17 The 'sanction' for failing that proof is nothing more than withdrawal of the label 'legal order' from that normative order. A. Rub, *Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung* (1995), 230.
18 Kelsen, *Principles of International Law*, *supra* note 4, at 14.
19 Ibid., at 14–15 (emphasis added).
20 'A norm is a legal norm if it belongs to a legal order and it belongs to a legal order, *if its validity is derived from the Grundnorm of that legal order*.' Kelsen, *Law of the United Nations*, *supra* note 4, at 32 (emphasis added). Contra, J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (1980), 77–85.

Kelsen *had to* 'successfully' apply this theory to positive international law, for had he not been able to do so, he would have been forced to deny international law as law[21] or, alternatively, to abandon his formulation of the specifically legal formulation of norms.[22] He attempted to apply his theory by simply asking whether international law fulfilled the criteria he had set for law in general, namely whether international law prescribes coercive acts as sanctions:[23]

> International law is true law if the coercive acts of states, the forcible interference of a state in the sphere of interests of another state, are, in principle, permitted only as a reaction against a delict, and accordingly the employment of force to any other end is forbidden; in other words, if the coercive act undertaken as a reaction against a delict can be interpreted as a reaction of the international legal community.[24]

What institutions of international law could possibly be called sanctions? Kelsen's answer – as far as general international law is concerned[25] – is: reprisals and war. Reprisals are a form of self-help,[26] a decentralized enforcement mechanism: 'a reaction of one state against a violation of its right by another state'[27] which justifies the sanctioning state's *prima facie* violation of international law. That is the crux: action normally prohibited is justified as a sanction – that is, as enforcement of law. The International Law Commission has recently reaffirmed that view of the law in its Articles on State Responsibility 2001 with respect to their concept of reprisals severely restricted in scope and rechristened 'countermeasures':

> Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.[28]

Kelsen is adamant that (at that time, i.e. in 1960) *general* international law would allow for the enforcement of reprisals by physical force, if necessary,[29] which would not only sound odd to any international lawyer brought up on a steady diet of the prohibition of the use of force, but – as Kelsen admits – makes reprisals difficult to discern from war. Indeed, for him the 'difference between armed reprisal and war is only one of *degree*'.[30] Retortion, on the other hand, is not a sanction,

---

21 As others before him, most notably John Austin, had to do because they saw coercion (in some sense) as a defining characteristic of all law: J. Austin, *The Province of Jurisprudence Determined* (1954), 141–2. The difference between Austin's and Kelsen's theories cannot be overrated, and it is quite clear that Kelsen was not in any way an 'Austinian', as has sometimes been claimed. There are numerous differences, *inter alia* that for Kelsen subjects were not *sub homine sed sub lege*: Leben, *supra* note 1, at 288–9.

22 J. Bernstorff, *Der Glaube an das universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001), 77.

23 Kelsen, *Law of the United Nations*, *supra* note 4, at 321.

24 Kelsen, *Principles of International Law*, *supra* note 4, at 18.

25 Ibid., at 19. Cf. his interpretation of UN Charter law under that aspect *infra*.

26 A. Verdross and B. Simma, *Universelles Völkerrecht* (1984), 907–12 (paras. 1342–1346).

27 Kelsen, *Principles of International Law*, *supra* note 4, at 23.

28 International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ARS 2001), Commentary, introduction to Part III, Chapter II 'Countermeasures', para. 1, in International Law Commission, Report of the International Law Commission on the Work of its Fifty-Third Session, UN Doc. A/56/10 (2001) 29, at 296, reprinted in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), 281.

29 Kelsen, *Principles of International Law*, *supra* note 4, at 25.

30 H. Kelsen, 'The Essence of International Law', in K. W. Deutsch and S. Hoffmann (eds.), *The Relevance of International Law: Essays in Honor of Leo Gross* (1968) 85, at 86 (emphasis added).

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

because the employment of physical force is not permitted,[31] which means that the ILC's 'countermeasures' are not reprisals, since these may not involve the use of force.[32]

The legal nature of war, on the other hand, at that time was a far more tricky issue.[33] In order to interpret war as either delict or sanction within positive international law, and thus fulfil the coercive order paradigm, Kelsen had to see war as regulated by international law, not as actions 'beyond' or 'outside' the law, as had been the general view during the nineteenth century and up to the Kellogg-Briand Pact of 1928.[34] In order to 'legalize' war, he postulated a simplified and secularized version of the *bellum iustum* doctrine,[35] as always with Kelsen a mere formal idea without ideological or political baggage. 'Ohne den sogenannten Grundsatz des "bellum iustum" gibt es kein Völkerrecht'.[36] Yet if there were a total prohibition of the use of force without the possibility of justifying forcible actions as sanctions, international law would also lose its legal 'label'.[37]

It cannot be proved by theoretical argument that these institutes form the basis of a coercive order, for if it were to be proved whether, say, war were a delict, one would have to prove that it has a sanction attached – which could only be a counter-war. That counter-war is a sanction could only be a presupposition.[38] Therefore Kelsen tries to prove his scheme by seeing it manifest in positive international law. The proof offered with respect to the embodiment of the *bellum justum* principle in Chapter VII of the United Nations Charter not only shows Kelsen's consistency most clearly, but will also be of continued relevance for a jurist working in the twenty-first century. A second layer of arguments will explore how Kelsen's theoretical model squares with positive law, namely the provisions of the Charter – made necessary by scholars alleging that Kelsen's model fits international law only up to the beginning of the First World War.[39] This is the only time in this study where 'fit' will be at issue, for this is an example where we do have an unquestionably authoritative text to scrutinize in the first place. However, there is no objective criterion of 'fit'. In normative sciences, the theoretical framework determines on what conditions the object of its study is valid, hence existent. Legal theory could thus negate the validity of practice by changing the theoretical framework, where natural scientists could not do so vis-à-vis their object of study.

In keeping with the promise of his preface in *The Law of the United Nations* 'to present all the interpretations which according to his opinion might be possible',[40]

---

31 Kelsen, *Principles of International Law*, *supra* note 4, at 25.
32 Article 50(1)(a) ARS 2001. H. Isak, 'Bemerkungen zu einigen völkerrechtlichen Lehren Hans Kelsens', in O. Weinberger and W. Krawietz (eds.), *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (1988) 255, at 259.
33 Bernstorff, *supra* note 22, at 77.
34 Ibid., at 78–9.
35 D. Zolo, 'Hans Kelsen: International Peace through International Law', (1998) 9 EJIL 306, at 312.
36 'Without the so-called principle of "bellum justum" there is no international law'. H. Kelsen, 'Völkerrechtliche Verträge zu Lasten Dritter', (1934) 14 *Prager Juristische Zeitschrift*, col. 419, at 427.
37 Kelsen, *Principles of International Law*, *supra* note 4, at 58; Rub, *supra* note 17, at 230.
38 Rub, *supra* note 17, at 230.
39 Isak, *supra* note 32, at 260–1.
40 Kelsen, *Law of the United Nations*, *supra* note 4, at xvi; cf. Schachter's accusation of inconsistency: O. Schachter, 'The Law of the United Nations', (1951) 60 *Yale Law Journal* 189, at 190–3.

Kelsen presents two ways of construing Chapter VII: one not conforming to the *bellum justum* doctrine[41] and another in complete conformity.[42] Under the first interpretation he doubts whether the enforcement measures provided for in the Charter can be characterized as sanctions. These actions do not have to be taken exclusively against a state which violates its obligations. The key clause in Article 39 – 'threat to the peace, breach of the peace, or act of aggression' – is not formulated as prohibition, and the prohibition of the threat or use of force in Article 2(4) does not have the same meaning as the terms of Article 39.[43] The Security Council has a very wide discretion to determine what situations fall under the three clauses. It might order measures against a state not having violated its obligations, or even against a non-member. On the other hand, it is not under an obligation to direct enforcement measures against a state which has used force.[44] Kelsen summarizes this position thus:

> It may be argued that the enforcement measures determined in Articles 39, 41 and 42 are no 'sanctions' since they are not established as reaction against a violation of obligations established by the Charter. . . . The enforcement actions taken under Article 39 are purely political measures, that is to say, measures which the Security Council may apply at its discretion for the purpose to maintain or restore international peace.[45]

The other interpretation of the Charter's provisions, Kelsen argues, would be 'in accordance with general international law',[46] since to be in accordance 'a forcible interference in the sphere of interest of a state . . . is permitted only as a reaction against a violation of law, that is to say as sanction'.[47] Kelsen goes on to argue that under this interpretation 'enforcement actions determined by Articles 39, 41 and 42 must be interpreted as sanctions'.[48] In a transposition of the *bellum justum* doctrine from (traditional) general international law to the particular regime of the UN Charter, the term 'war' is transformed into 'threat or use of force', and 'reprisals' into 'non-forcible intervention'. Consequently, measures under Article 41 are seen as playing the role of traditional reprisals while enforcement under Article 42 fulfils the function of war in the Charter regime.[49] That transposition has weaknesses, however. In pre-Charter times reprisals could be forcible, while now countermeasures may no longer involve the use of force. Thus en*force*ment, strictly speaking, is no longer possible (see *supra*). With the notable retention of an element of self-help – that is,

41 Kelsen, *Law of the United Nations*, *supra* note 4, at 727–35.
42 Ibid., at 735–7.
43 Ibid., at 727. Hubert Isak draws this consequence: 'Mit der Verankerung eines absoluten Gewaltverbotes in Art 2 Ziff 4 der Satzung der Vereinten Nationen ist die Existenz eines allgemein anerkannten Grundsatzes des "gerechten Krieges" äußerst fragwürdig geworden.' 'The imposition of an absolute prohibition of the use of force in Article 2(4) UN Charter has made the existence of a generally recognized principle of "just war" highly questionable.' Isak, *supra* note 32, at 258–9.
44 Kelsen, *Law of the United Nations*, *supra* note 4, at 727–31, 734.
45 Ibid., at 732–3.
46 Ibid., at 735.
47 Ibid.
48 Ibid.
49 Kelsen, *Principles of International Law*, *supra* note 4, at 46–7.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

of decentralized enforcement in the provisions allowing for self-defence in Article 51[50] – the enforcement of Charter law is centralized.[51]

Kelsen is adamant that measures under Article 41 (seen as reprisals) can only be interpreted as sanctions, because 'reprisals are permissible only against a violation of international law'.[52] In contrast, the nature of measures involving the use of force under Article 42 is called 'disputed', because for Kelsen the transposition of 'war' into 'use of force' has brought into the discussion the old question of the legal nature of war. The question is whether measures involving the use of force are permitted only as a reaction against a delict (presumably a prior use of force, but not necessarily so) and thus constitute a sanction,[53] which again begs the question. The key argument is that 'threats to the peace', 'breaches of the peace', or 'acts of aggression' are indeed prohibited. Kelsen's connection – admittedly a connection of rather weak nature – would be that the term 'in any manner inconsistent with the Purposes of the United Nations' in Article 2(4) refers to the phrase 'to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace' in Article 1(1), which, in turn, would refer to Article 39's 'threat to the peace, breach of the peace, or act of aggression'.[54] Kelsen's further conclusion is that if force is prohibited unless it constitutes a collective response, which, in turn, can only be a measure under Articles 41 and 42, then Article 39 would take on – via that flimsy connection to Articles 1(1) and 2(4) – the prohibitory character of Article 2(4) and would precisely *prohibit* threats to the peace, breaches of the peace, or acts of aggression *by authorizing sanctions under Articles 41 and 42*. Kelsen concludes,

> If the enforcement actions are sanctions, then any conduct against which the Security Council is authorized by the Charter to react with enforcement actions must have the character of a violation of the Charter. *Consequently the Members of the Organisation have . . . also the obligation to refrain from any conduct which the Security Council under Article 39 declares to be a threat to, or breach of, the peace.*[55]

Does the *bellum justum* doctrine fit international law? Since customary international law norms are very difficult to prove and since there would not be any different law required for this theoretical *Überbau* (except, perhaps, for the role of non-forcible reprisals, rechristened countermeasures), general international law can be seen in Kelsen's light. Does the *bellum justum* doctrine fit the UN Charter? Kelsen has demonstrated that while the doctrine is not a logical necessity, the Charter – given a few tight fits here and there[56] – *can* be seen in this light. Whether that is

50 Ibid., at 60. It is questionable whether self-defence as it is shaped today is a measure of law enforcement, rather than of mere repulsion of an act irrespective of its legality. Cf. J. Kammerhofer, 'Uncertainties of the Law on Self-Defence in the United Nations Charter', (2005) 35 *Netherlands Yearbook of International Law 2004* 143 for an overview. See *infra* section 2.3.1.

51 Kelsen, *Law of the United Nations*, *supra* note 4, at 726.

52 Ibid., at 735.

53 Ibid., at 735–6.

54 Ibid., at 726.

55 Ibid., at 736 (emphasis added).

56 John Herz is highly sceptical whether international law really 'fits'. J. H. Herz, 'The Pure Theory of Law Revisited: Hans Kelsen's Doctrine of International Law in the Nuclear Age', in S. Engel (ed.), *Law, State and*

the only approach possible, whether the drafters saw their creation in this light, or whether this or any other approach is the 'correct' view of the United Nations Charter is quite another matter.

1.2. Unity as absence of contradictions and logical monism

Kelsen is considered to be one of the staunchest proponents of a radical monist construction of the relationship between international law and municipal law. Dualism or, as he calls it, 'pluralism'[57] is to him an (epistemo)logical impossibility, and he sets out to discard it on purely theoretical grounds – that is, not by comparing it with the state of the positive legal orders in question. Unlike in section 1.1, Kelsen's consistency and thorough integration of international law theories, or, in this case, his thorough 'theorization' of questions of international law mean that both elements of his argument, the theoretical presupposition and the application to international law, have to be integrated here.

The arguments Kelsen employs are also intimately connected with that of the legal nature of international law. That is so because he takes the 'coercive order' paradigm and adds to it his opinions on the relationship between norms to come to his view of a logically necessary monism. As we have seen in the preceding section, law is defined – or rather delimited vis-à-vis other kinds of normative order – as coercive order. This definition has two sides: not only is law thus different from other kinds of order, but all law is made one uniform kind of normative order.

The argument starts with the assertion that all jurists wish to perceive both international law and municipal law as 'gleichzeitig gültige Normen[systeme]'.[58] A view that would simply deny the validity (hence existence) of one or the other legal order, Kelsen argues, would be logically consistent, yet dualists do not go that far.[59] If one wishes to perceive both as valid, however, one has already decided in favour of unity:

> Wenn von einer Beziehung zweier Normensysteme gesprochen wird, muß ihre gleichzeitige Geltung vorausgesetzt sein. Ist aber eine solche 'Beziehung' angenommen, dann ist damit schon die endgültige 'Zweiheit' aufgegeben und nur als eine vorläufige erkannt, die letzten Endes in der Einheit jener 'Beziehung' aufgeht.[60]

This statement asserts that, but does not give any reasons why, the perception of two normative orders as simultaneously valid would necessitate a connection. Two reasons can be extracted from Kelsen's writings, one positive and one negative.

International Legal Order: Essays in Honor of Hans Kelsen (1964), 107, at 109–11. Cf. Rub, *supra* note 17, at 269 ('verankert die UN-Charta . . . kaum unzweifelhaft das bellum-iustum-Prinzip', 'it is doubtful whether the UN Charter imposes the *bellum justum* principle').

57 Kelsen, *Principles of International Law*, *supra* note 4, at 404.

58 '[N]ormative [systems] valid at the same time', Kelsen, *Reine Rechtslehre*, *supra* note 4, at 329.

59 Ibid., at 330.

60 'If one speaks of a relationship of two normative systems, one must presuppose their contemporaneous validity. Once such a "relationship" has been assumed, their "duality" is essentially abandoned and it is recognized as interim [idea], which is resolved in the end in the unity of the "relationship"'. H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (1920), 111.

The positive aspect is that the defining and delimiting criterion of law *as a special kind of normative order* is that it is a coercive order, a *Zwangsordnung*. This delimitation creates a unity of all law and thus all law is an *epistemological unit* – no more[61] and no less. This view is a direct result of Kelsen's reliance on neo-Kantian epistemological constructs;[62] in *Kritik der reinen Vernunft* Kant 'transcendentalizes' logical principles of classification[63] and thus transforms them into principles of epistemology.[64] The first principle is adopted, in turn, by Kelsen: *entia praeter necessitatem non esse multiplicanda* (Occam's Razor).

> Das logische Prinzip der Gattungen setzt also ein transzendentales voraus . . . Nach demselben wird in dem Mannigfaltigen einer möglichen Erfahrung notwendig Gleichartigkeit vorausgesetzt . . . , weil ohne dieselbe keine empirischen Begriffe, mithin keine Erfahrung möglich wäre.[65]

The same ought to be cognized as the same and since law is in Kelsen's view *typologically* different from other normative orders all law ought to be seen as one *genus* and thus cognized as one. This is the unity of the object of cognition, which is to be presupposed. An oft-cited sentence of Kelsen reads, 'Die Einheit des Erkenntnisstandpunktes fordert gebieterisch eine monistische Anschauung.'[66]

However, a student of Kant's works might add that Kant has a second principle standing in exact opposition, namely the law of specification: *entium varietates non temere esse minuendas* – the variety of entities is not to be reduced blindly. If the difference is sufficient, one must create a new species, 'unter jeder Art, die uns vorkommt, Unterarten, und zu jeder Verschiedenheit kleinere Verschiedenheiten zu suchen. Denn, würde es keine niederen Begriffe geben, so gäbe es auch keine höheren'.[67] In contradistinction to Kelsen's plan, the questions to be asked are *both* whether the different laws are sufficiently uniform to create an epistemological unit (*genus*) *and* whether they are sufficiently different to create an epistemological distinction (*species*).[68]

---

61 Kelsen, *Law of the United Nations supra* note 4, at 328–9; Zolo, *supra* note 35, at 307–8.

62 It is less than certain, however, whether Kelsen can be called 'neo-Kantian' *sensu stricto*. To some extent the use of philosophical constructs serves a didactic function in Kelsen's writings – to demonstrate the result of his own presuppositions by reference to similar philosophical theories.

63 O. Höffe, *Kants Kritik der reinen Vernunft: Die Grundlegung der modernen Philosophie* (2003), 270.

64 Herbert Hart, however, points out that J. L. Mackie had told him that Kelsen's postulate of unity could best be taken from the unity of Kantian *Raum*. H. L. A. Hart, 'Kelsen's Doctrine of the Unity of Law', in H. L. A. Hart (ed.), *Essays in Jurisprudence and Philosophy* (1983) 309, at 322 n. 32, citing I. Kant, *Kritik der reinen Vernunft* (1st edn 1781 (A), 2nd edn 1787) (B)), A 25, B 39.

65 'The logical principle of *genera*, accordingly . . . presupposes a transcendental principle. In accordance with this principle, homogeneity is necessarily presupposed in the variety of phenomena . . . , because without it no empirical conceptions, and consequently no experience, would be possible.' Kant, *supra* note 64, at A 652, B 680 (trans. John Miller Dow Meiklejohn).

66 'The unity of the epistemic point of view demands a monistic approach.' Kelsen, *supra* note 60, at 123. Contra, S. Griller, 'Völkerrecht und Landesrecht – unter Berücksichtigung des Europarechts', in Walter, Jabloner and Zeleny, *supra* note 6, 83 at 87.

67 '[S]earching for subspecies to every species, and minor differences in every difference. For, were there no lower conceptions, neither could there be any higher.' Kant, *supra* note 64, at A 656, B 684 (trans. John Miller Dow Meiklejohn).

68 The terms *genus* and *species* are used in the Kantian sense, not in the sense employed by biology: Höffe, *supra* note 63, at 270 n. 44. Cf. Griller, *supra* note 66, at 105.

The negative criterion of the unity of all law is logical consistency (*Widerspruchslosigkeit*). The Kelsen of the relevant period – before the 'normological turn' – saw any given normative order as a logical unit within which the conflict of norms is excluded, because of the (indirect) applicability of the principle of excluded contradiction.[69] Since the principle is applicable, there cannot be a 'conflict of norms'. Only one of the norms can be valid; a conflict of norms is as senseless as a logical contradiction, because neither can exist. Since legal cognition seeks to portray its object as consistent, it seeks to eliminate conflicts of norms by way of interpreting them away.[70] Therefore – and that is the reason for the prefix 'negative' – if insoluble conflicts of norms between international law and municipal law can exist, the possibility of a unity of these two normative orders is excluded.[71]

In all works of relevance for this topic Kelsen seeks to demonstrate that what we might think are conflicts between international law and municipal law are not, properly speaking, insoluble conflicts.[72] He compares a municipal statute violating international law to the analogous case of a statute violating the constitution, where the result is not a conflict, but merely the void*ability* of the lower-level norm with a tacit provision that the statute is considered valid as long as it is not annulled.[73] This is not the place to discuss this doctrine in detail, even though it is an important topic within Kelsen's Pure Theory of Law. Suffice it to say here that this proof once again comes directly from legal theory.

Some scholars, taking their cue from Herbert Hart's 1968 paper,[74] suggest that there were two lines of argument in Kelsen's rejection of the pluralist construction: one arguing for a *necessary* connection of all normative orders and another merely arguing that a relationship is established in positive law – that is, that there is a positive delegating norm. This discussion is mentioned only briefly here, because the second argument cannot be independently made within Kelsen's theory before the mid-1960s. Afterwards it is still problematic (section 2.2). Alfred Verdross had explained why this is so in 1923: 'Allein jeder dieser positiv rechtlichen Regelungen [Verweise] setzt schon eine bestimmte *Hypothese* über das Grundverhältnis der beiden Normensysteme voraus.'[75] Without a theory that declares that delegation creates unity, all norms purporting to delegate a subordinate order would merely make the *claim* to create unity, and a statute's claim to create the subordinate source 'administrative ordinances' would have just as much a claim to unity as a madman's claim

69 Until the mid-1960s Kelsen held that norms themselves do not logically contradict each other, because they cannot be true or false, but the sentences purporting to describe a norm – a *Rechtssatz* – can be either true or false, because they can either correctly describe a norm that exists or not. Kelsen, *Reine Rechtslehre*, *supra* note 4, at 76–7, 209–11. See, however, the change of view due to the 'normological turn' described in section 2.2.

70 Kelsen, *Reine Rechtslehre*, *supra* note 4, at 210.

71 Ibid., at 329.

72 Kelsen, *supra* note 60, at 107–11, 113; Kelsen, *Principles of International Law*, *supra* note 4, at 419–23; Kelsen, *Reine Rechtslehre*, *supra* note 4, at 330–2.

73 Kelsen, *Principles of International Law*, *supra* note 4, at 422. For an excellent overview see Rub, *supra* note 17, at 463–70.

74 Hart, *supra* note 64, at 309–10.

75 'Any of these positive [delegating] norms presupposes a certain *hypothesis* on the relationship of these two normative systems.' A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (1923), at 76; Kelsen, *supra* note 60, at 103.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

to subordinate all the world's laws. If, however, there can be no argument B without argument A, can argument A (necessary unity) exist alone? Again, it does not seem possible, because if a higher norm does not delegate norm-creation it simply does not thereby create a partial, subordinate normative order. If a municipal legal order were *not* to create a subordinate order 'customary law' among its sources of law, this – arguably 'pre-existing' – partial legal order would not derive its validity from that municipal legal order and the two would not be connected.[76] Kelsen argues that this would be a criterion for disunity:

> Hier ist festzustellen, daß nur dann zwei voneinander verschiedene, gänzlich unabhängige Normensysteme vorliegen, wenn sie aus zwei verschiedenen, gänzlich unabhängigen, d. h. *auseinander in keiner Weise ableitbaren, aufeinander in keiner Weise rückführbaren* 'Quellen' oder Grundsätzen, Ursprungsnormen entwickelt werden müssen.[77]

If we do not question whether theory fits positive law, but only whether doctrine fits theory and vice versa, the answer is obvious: Kelsen was consistent.

2. A TENTATIVE REAPPLICATION

This section will develop a different line of argument about the 'coercive order' paradigm (section 2.1) and about the relationship between normative orders (section 2.2). The theoretical position expounded here diverges from Kelsen's, but it still remains Kelsenian, if slightly 'neo-Kelsenian'. The third section (section 2.3), in contrast, develops an international law doctrine to accompany the theoretical basis. It is submitted that the different position taken in this section is best seen as amicable further development of the Pure Theory, guided by how one could imagine Kelsen's theory would have developed. The Vienna School of Jurisprudence never stifled dissent; Kelsen himself encourages the further development of his theories: '[Das Unternehmen Reine Rechtslehre] hat seinen Zweck erreicht, wenn es [der] Fortführung – durch andere . . . – für würdig erachtet wird.'[78]

2.1. The coercive order paradigm resolved

Resolving the 'coercive order' paradigm requires a paradigm shift. This shift has to take place at the root of Kelsen's argument that led him to assume that all law is coercive in nature. That root lies in the choice to determine the term 'law' and to distinguish it from other norms *by reference to a comparison* of various normative orders called 'law'.[79] Kelsen can be seen as taking what arguably constitutes an empirical property of 'law' and transposing it into a necessary element of law, and

76 Rub, *supra* note 17, at 457; M. Jestaedt, 'Konkurrenz von Rechtsdeutungen statt Koexistenz von Rechtsordnungen', in H. Brunkhorst and R. Voigt (eds.), *Rechts-Staat. Staat, internationale Gemeinschaft und Völkerrecht bei Hans Kelsen* (2008) 233, at 236–7.

77 'It can be said here that two different, completely independent normative systems can only exist when they are derived from two different, completely independent "sources" or principles, basic norms, i.e. *not in any way derivable from each other or reducible to the other*.' Kelsen, *supra* note 60, at 107 (emphasis added).

78 '[The enterprise Pure Theory of Law] has reached its goal, if others consider it worthy of continuation.' Kelsen, *Reine Rechtslehre*, *supra* note 4, at vii.

79 Ibid., at 31–59.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

that would be highly problematical. We can explain, and one can sympathize with, the desire to design a pure theory specifically *of law*, but in that transposition lies an admixture of Is and Ought, which would violate the basic principle of the Pure Theory.

There is another way to interpret Kelsen's incorporation of the coercive element of law. In that view, the coercive order paradigm is *not* at the core of the Kelsenian approach to law; it is part of it, but not nearly as important as secondary literature[80] wants to make us believe. Kelsen was not a 'traditional' positivist and by no means an Austinian. The focus lies with the norm – the norm is the a priori element. It forms an ontology of the ideal, the norm *is its own validity* and its existence; all other elements of the term 'law' are mere appendages. In this sense Kelsen argues that his inquiry into the meaning of the term 'law' *could* come to the conclusion that there is no sufficient similarity, because 'mit dem Wort "Recht" und seinen anderssprachlichen Äquivalenten so verschiedene Gegenstände bezeichnet werden'.[81]

The crucial difference (to a degree finding support in Kelsen's writings) is that the nature of the differentiation of various 'types' of normative system is categorically different to the delimitation of norms vis-à-vis things existing in reality. The uniqueness of *legal* norms is empirical in nature – that is, an *a posteriori* description of perceived differences. These differences are typical for the configuration of legal normative orders vis-à-vis other normative orders. The 'normative' element of a law is not one of its properties – law is norms and not norm*ative* (understood in an adjectival sense). Norms are an a priori[82] – a dogma. Norms are their validity, they are their claim to be observed, they are their existence. The norm *is* (not 'has') *a trinity of bindingness, validity, and existence*. These three words express different aspects of the same thing. To declare a norm is to create; to declare a norm 'law' by way of its coercive nature is *descriptive*.

The first kind of differentiation does not 'unmake' a norm, it does not rob it of its existence, whereas the latter kind – the decision whether a given 'idea' is a norm – will determine its existence *vel non*. There are norms in existence which fail the test of being legal norms, but there can be no non-binding norm, no norm *not* claiming observance, because validity is the specific form of existence of a norm, not one of its properties, as being 'coercive' might be.

Moreover, the empirical closeness of the various legal normative orders is not in fact as great as is commonly assumed. First, the coercive elements of different orders are shaped differently. Second, the proportion and importance of the coercive element vary broadly among different areas of municipal legal systems and between legal systems. Finally, the international legal order does not fit the strict criteria

80 Raz, *supra* note 20. The present author agrees with Ota Weinberger that the stipulation of sanctions cannot be a peculiarity ('Eigentümlichkeit') of legal vis-à-vis other normative orders. O. Weinberger, *Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen* (1981), 53.

81 '"[L]aw" and its equivalent expressions in other languages denote such diverse objects.' Kelsen, *Reine Rechtslehre*, *supra* note 4, at 32.

82 The main reason why Kelsen's theory is said to be neo-Kantian is the analogous adaptation of Kant's *Kategorien* as method of cognition, but not of reality, as Kant did in *Critique of Pure Reason*, Kant, *supra* note 64, at A 65–130, B 90–169, but of the Ought.

very well (see section 2.3). The closeness of legal systems may exist and *one* of the connecting properties may very well be coercion, but it may be a loose family resemblance, not according to a strict logical definition which is based on necessary elements. Wittgenstein used the term 'game' to describe how we can subsume such things under a general term which do not have common properties, but have properties in common only with intermediary members.[83]

A particular area of dissent is that it is implied in various passages of Kelsen's writings that one of the bases of the 'coercive order' paradigm is that there is some kind of 'automatic' authorization for application by all subjects in a decentralized normative order, for example in morals or international law – that is, without positive regulation to this effect:

> Denn wenn eine Moralordnung ein bestimmtes Verhalten unter bestimmten Bedingungen als gesollt setzt, schreibt sie auch vor, daß das entsprechende Verhalten eines bestimmten Menschen von den anderen gebilligt, das nichtentsprechende Verhalten mißbilligt werden soll. . . . Indem die Moralordnung die Billigung normbefolgenden und die Mißbilligung normverletzenden Verhaltens als gesollt setzt, ermächtigt sie die Setzung der den generellen hypothetischen Normen entsprechende individuelle kategorischen Normen.[84]

When the law does not define an organ to apply a norm – that is, when no one is authorized to determine authoritatively when the law has been breached (i.e. to create an individual norm) – it is not the case that every subject of that normative order is suddenly authorized to apply the law for him-/her-/itself. To create rights out of thin air violates a core principle of positivism: no positive norms without *positive* norm creation – that is, without an act of will. Even less does each subject authorize to enforce the law without authorization. If a decentralized normative system *did have norms* that stipulate enforcement by self-help, then the normative order would have given each subject the right, but this would be positive regulation. When nobody is explicitly authorized, nobody is, and whether the relevant substantive prescription is breached or not (in case the norm is not formulated in the form Kelsen wishes to see in law – section 1.1) remains irrelevant. The norm can be breached and behaviour would in the abstract be unlawful, but it would not be applied, no individual norm would be created that stipulates sanctions.[85]

Kelsen acknowledges this in a more abstract sense: if a regulation proves to be practically useless, nobody is authorized to make it useful unless the norm is modified through the procedure prescribed:

> Ein Gesetz bestimmt unter anderem, daß ein Kollegium, um tätig zu sein, durch seinen Vorsitzenden einberufen werden muß, zugleich aber, daß es seinen Vorsitzenden selbst zu wählen hat. Läßt sich dieser Norm nicht der Sinn abgewinnen, daß, falls kein

83 L. Wittgenstein, *Philosophical Investigations* (1958), paras. 66–67.

84 'Thus, if a moral order prescribes certain behaviour under certain circumstances, it also stipulates that the others ought to approve of the compliant behaviour of a certain human being and that non-compliant behaviour ought to be met by disapproval. . . . Through prescribing approval of compliant behaviour and disapproval of non-compliant behaviour the normative order authorizes the creation of individual categorical norms corresponding to the general hypothetical norms.' Kelsen, *supra* note 9, at 37–8, 108; Kelsen, *Reine Rechtslehre, supra* note 4, at 39–40.

85 Contra: Kelsen, *Reine Rechtslehre, supra* note 4, at 324.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

> Vorsitzender vorhanden ist, jede beliebige Art des Zusammentritts gesetzmäßig ist, sondern nur der Sinn, daß auch in diesem Falle das Kollegium von seinem Vorsitzenden einberufen werden soll, dann kann dieses Kollegium auf gesetzmäßige Weise, das heißt: in Anwendung des Gesetzes, nicht funktionieren. . . . Das Gesetz bestimmt hier eben etwas Unsinniges. Das ist, da Gesetze Menschenwerk sind, nicht ausgeschlossen.[86]

Yet, unfortunately, this different view of the coercive order paradigm described in the paragraphs above is contradicted in some of Kelsen's writings.

> Um objektiv als Rechtsnorm gedeutet zu werden, muß eine Norm der subjektive Sinn eines [Willens-] Aktes sein . . . und muß einen Zwangsakt statuieren oder mit einer solchen Norm in wesentlicher Verbindung stehen.[87]

This is to be understood in the sense described above (section 1.1): Kelsen held that the coercive element is a necessary element of legal *orders*, not of all legal norms. In order to be a legal norm, a norm has to belong to a legal order – that is, a normative order containing coercive orders to enforce most, all (or even any) of its norms. Maybe the reason why he conceived of the law in such a way was not merely out of piety to traditional positivism, or even because he saw it as the only possibility for keeping the Pure Theory free of close relatives such as morals (see *infra*), but maybe the dynamic element of the *Stufenbau*, of the strict hierarchical membership in a normative order, demands that law be applied and thus enforced down to the individual norm, or even to the last non-normative act of enforcement (authorized by that individual norm).

To summarize: according to the view espoused here, to try to prove any 'inherent' facets of a law besides the norm is a problematic endeavour. Law's classification is a matter for social-scientific methodology. Norms are obligation; whether as a legal or a moral norm, the provision of enforcement elements cannot influence law's 'normativeness'. To make law's existence dependent on its coercive elements – which are designed to guarantee its effectiveness[88] – in effect means making it dependent on a factual occurrence. Hence, if a normative system that contains enforcement elements is not only just called 'law' but is thereby also made an Ought in the first place, a factual occurrence alone would determine the existence of a prescription. Such a theory would violate Kelsen's own dichotomy of Is and Ought: '[Es] kann daraus, daß etwas ist oder nicht ist, nicht folgen, daß etwas sein oder nicht sein soll.'[89] Kelsen could be read as making that mistake (i) by stipulating the 'coercive order' paradigm and (ii) by making the validity of a legal system dependent on[90] (not

86 'A statute prescribes *inter alia* that a collegiate organ, in order to function, needs to be convened by its chairman, but also prescribes that it has to elect its own chairman. If one cannot interpret this norm to mean that the organ may convene through any arbitrary procedure in case there is no chairman, but only that even in this case the collegiate organ may only be convened by its chairman, then the collegiate organ cannot function lawfully, that is: as an application of the statute. . . . The statute simply has a nonsensical content. But this is not to be excluded, because laws are the work of humans.' Kelsen, *Reine Rechtslehre*, *supra* note 4, at 255.

87 'In order to be objectively seen as legal norm, a norm has to be the subjective sense of an act [of will] . . . and has to stipulate a coercive act or be in a relevant connection to such a norm.'

88 Kelsen, *supra* note 9, at 111.

89 '[That] something ought or ought not to be cannot follow from whether something is or is not.' Kelsen, *supra* note 9, at 5.

90 Kelsen, *Reine Rechtslehre*, *supra* note 4, at 215–21.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

equivalent to!)[91] its continued effectiveness. Whether Kelsen himself actually made this mistake is not as relevant as the fact that his writings are frequently interpreted in that manner. The variant of neo-Kelsenianism presented here seeks to avoid this admixture of Is and Ought.

2.2. The unity of law dissolved

Kelsen's assumption of a coercive order as the basis of all law is a major argument in favour of his theory of the unity of all law. Hence the rejection of the coercive order paradigm in section 2.1 must lead not only to a different concept of international law and, in particular, a different view of the UN Charter (section 2.3), but must also mean that normative orders called 'law' are not necessarily one ontological entity or epistemological unit. The interpretation of the 'coercive order' paradigm as an empirical–politological feature of a *legal* normative order means that from this connection by 'family resemblance' one cannot derive normative unity, because normative unity is not achieved by empirical classification, but by positive norm-making.[92] Because the *necessary uniqueness* of legal orders versus other normative orders does not exist, the positive criterion of *unity* of legal orders proposed by Kelsen is not fulfilled.[93]

In addition to rejecting the positive criterion of necessary unity it will not be surprising that this article also affirms the negative criterion that insoluble conflicts of norms are possible. Towards the end of his life Kelsen achieved the purest form of his theory, and the normological turn is the outstanding achievement of that period. That turn led to a denial of even the indirect applicability of certain logical operations to norms, in particular of the logical deduction of norms and of the principle of excluded contradiction. With the strict consistency typical of Kelsen he sets out to assert the possibility of conflict between norms from different systems. In his groundbreaking *Allgemeine Theorie der Normen* (1979) he does so in explicit contradiction to his earlier views.[94]

As mentioned in section 1.2,[95] the basic assumption throughout is that norms cannot be true or false. In the later period he asserts that we cannot even indirectly ascribe truth-values to norms by going to and from statements about the validity of norms,[96] which can be true and false, to conduct logical operations of deduction and exclusion on the norms themselves, a view he held until publication of the paper

91 Kelsen, *supra* note 9, at 112–13.

92 For an approach that misunderstands Kelsen's approach in the related area of 'spheres of validity' as attempt at an empirical, pseudo-sociological classification see H. H. G. Post, 'Classification of the Rules of International Law According to Spheres of Validity', (1976) 7 *Netherlands Yearbook of International Law* 157.

93 'Sicher ist . . . eine pluralistische Konstruktion mit einem einheitlichen Rechtsbegriff vereinbar. Nur ist dieser Rechtsbegriff dann eben nicht durch die theoretisch bejahte Geltung, sondern faktisch-empirisch . . . definiert . . .'. 'A pluralist construction is of course . . . compatible with a uniform concept of law. In this case, however, the term "law" is not defined through theoretical validity, but as empirical fact . . .'. Rub, *supra* note 17, at 454.

94 See Kelsen, *supra* note 9, at 169. Hans Kelsen's courage in radically departing from views held for half a century is remarkable. It shows that his theory was not ossified and that he was willing to revise a well-thought-out construct (cf. Kelsen, *Law of the United Nations*, *supra* note 4) and that he constantly thought about possibly revising his theory.

95 See *supra* note 69.

96 Kelsen, *supra* note 9, at 136–40.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

'Recht und Logik' (1965).[97] Thus in the case of two norms being valid which contain contradicting prescriptions, the two respective statements would both be true, yet would contradict each other.[98]

Kelsen also adamantly denies a method of excluding conflict between norms of different systems he had held for a long time:[99]

> Ein Konflikt zwischen zwei Normen verschiedener normativer Ordnungen . . . kann nicht in der Weise geleugnet werden, daß behauptet wird . . . vom Standpunkt einer bestimmten normativen Ordnung gelten nur die Normen dieser Ordnung, sodaß im Falle eines Konfliktes . . . die zu einer Norm dieser Ordnung in Konflikt stehende Norm der anderen Ordnung nicht gilt . . . und vice versa.[100]

Law and morals can prescribe the same behaviour. Even if there is no conflict between, say, law and morals, the non-validity of the other order cannot be denied, because of the relativity of values. More than one normative order can seen as valid for a given sphere.[101] In this way the argument is brought to a close, because

> Die gegenteilige . . . Ansicht beruht auf der Annahme der Möglichkeit eines als logischer Widerspruch gedeuteten Konfliktes zwischen zwei für denselben Bereich geltenden normativen Ordnungen. Mit der Einsicht, daß ein Normenkonflikt kein logischer Widerspruch ist, *fällt meine These von der Einzigkeit einer für einen bestimmten Bereich geltenden normativen Ordnung als Konsequenz des Prinzips der Einheit.*[102]

In this way Kelsen changes his mind on the *necessary* unity of all law in a posthumous publication to embrace the possibility of pluralism.[103] Insofar as the view of the impossibility of a necessary unity espoused here is only a partial variance to Kelsen, only to the Kelsen before the normological turn of the mid-1960s.

Therefore the question of a *contingent* connection of two normative orders by delegation becomes acute. The focus here is not so much on the dogmatic question of whether there is a delegation by international law of municipal law or vice versa, but on the theoretical implications. First, we need to clarify what 'delegation' means within the Vienna School of Jurisprudence. It is the dynamic properties of normative orders that allow them to form a changeable and expandable hierarchy of norms (*Stufenbau*). One of these properties is that norms can authorize humans to create further norms; for example, a code of penal procedure authorizes a judge to create

---

97 H. Kelsen, 'Recht und Logik, (1965) 12 *Forum*, 421–5, 495–500, reprinted in H. Klecatsky, R. Marcić, and H. Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1968) 1469–97.

98 Kelsen, *supra* note 9 at 178.

99 See Kelsen, *supra* note 60, at 76, 111.

100 'A conflict between two norms belonging to different normative orders . . . cannot be denied by claiming . . . that from the point of view of one normative order only the norms of this order are valid, so that in case of a conflict . . . the norm of the other order in conflict with the norm of the former order is not valid . . . or vice versa. Kelsen, *supra* note 9, at 169.

101 Kelsen, *supra* note 9, at 330.

102 'The contrary view is based on the assumption of the possibility of a conflict – interpreted as logical contradiction – between two normative orders valid for the same sphere. The realization that a conflict of norms is not a logical contradiction means that *as a consequence of the principle of unity . . . my theory of the uniqueness of a normative order valid for a certain sphere must fall.*' Ibid., at 330 (emphasis added).

103 Contrary to the early Kelsen with similar arguments later brought forth by Kelsen: Hart, *supra* note 64, at 331–2.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

individual norms or a constitution authorizes a number of humans (parliamentarians) to create laws. This authorization delegates to these humans the authority to create norms. The norm-making norm is the authority for the norm created under that authority. We can speak of a hierarchical relationship, because the latter norm is dependent for its validity (hence existence) on the former norm; it is apposite to call the authorizing norm 'higher' and the norm thus created 'lower'. The formal source of norms called 'statutory law' is thus dependent on the higher source 'constitution'; it is a subordinate and partial normative order. In effect, it is not a normative order at all. A normative order is completed by the assumption of a *Grundnorm*, that is a tautological 'as if' assumption or fiction allowing for the cognition of a normative order which has no positive authority.

How would this apply to the relationship between international law and municipal law? One of Kelsen's answers – that of his 'monism with primacy of international law' – is that there is a positive norm of international law which indirectly determines the humans which are authorized to create municipal law by stipulating that the *effective* government's legal order is 'the state' for international law.[104] The function of the 'effective government' rule is to define the organs of the state (hence of a partial legal order) for international law, just as the managing directors of a corporation as juristic person would be defined in a statute in a municipal setting.[105]

Yet, given the non-existence of a necessary connection, the question is whether this norm of international law which *claims* to create a subordinate normative order really *does* create a subordinate order or whether this is a fraudulent claim. Such questions throw the door open to a problem of fundamental significance: where do normative orders end?

The answer in Kelsenian theory can be said to be the *Grundnorm* (or the highest positive norm of a normative order, but we shall leave this thought aside here). The membership of a norm is ascertained by its 'derivation' from higher levels of norms by way of the creation of norms (section 1.1). As mentioned above, the highest norm and 'capstone' of any normative order is the *Grundnorm*. This is not a positive norm, but an assumption in order to be able to cognize the normative order. It establishes the unity of a given normative order by allowing the perception of that order and thus also postulating the reason for validity of all norms of that order.[106]

As a fiction or hypothesis,[107] however, its content is determined by the positive normative order, not vice versa.[108] When a normative order *claims* to delegate a subordinate source – as a moral order may claim to authorize the creation of a municipal legal order – the problem becomes obvious. In contrast to Hart, the question of 'fraudulent' or 'real' delegation cannot be decided by recognition by the supposedly lower order,[109] for if the relationship were to exist, the lower order's

104 Kelsen, *Principles of International Law*, *supra* note 4, at 414.
105 Cf. Rub, *supra* note 17, at 459–61.
106 Kelsen, *Reine Rechtslehre*, *supra* note 4, at 197.
107 Kelsen, *supra* note 9, at 206–7.
108 Kunz, *Völkerrechtswissenschaft*, *supra* note 6, at 81.
109 Hart, *supra* note 64, at 319.

'recognition' would be irrelevant.[110] In contrast, if the relationship were not to exist, the 'recognition' would constitute a simplified act of norm creation by the lower order and the supposedly higher order would be norms of the lower order.[111]

If the *Grundnorm* is an assumption by anyone cognizing a normative order, it cannot be the objective end to a normative order. In any given normative order there can only be one *Grundnorm* and if a partial legal order is 'given' a *Grundnorm*, the unity is destroyed. Thus if the constitution of a given state is given a *Grundnorm* – for example, in the case of post-1945 Austria, 'The constitution claimed to be reactivated by the leading political parties ought to be observed'[112] – the delegation by international law is no longer a 'real' normative link and the Austrian municipal legal order is detached from the 'unity of all law'.

This is the fundamental problem: there is no objective criterion to cognize the coherence of a normative order. This is a problem of Kelsenian theory, a problem merely hidden behind the veil of the coercive order paradigm, but which further purification has brought to the fore. The partial legal order 'Administrative orders of the Minister of Defence under the Military Exclusion Zone Statute',[113] for example, is part of the legal order 'Austrian law', but Austrian law, in turn, is not a subordinate order to some moral order, or subordinate to the whim of, say, Mr Smith of Birmingham, but we cannot *prove* whether there is or is not a normative connection. Both the claim made by the Military Exclusion Zone Statute and by Mr Smith's command are mere claims to be observed – as all norms are.

This is an incredibly destructive force, and the *very possibility of normative systems* could be denied. On the other hand, it could have an incredibly *constructive* effect, gluing together the most unlikely norms and normative systems into one whole. According to this view, Kelsen's unity is established, yet it is a unity of all norms, under the general *Grundnorm* repeated in every particular *Grundnorm*: norms are to be observed, or, in other words, norms are norms.

The theory of norms does not have to be that dramatic, however. We must realize what Kelsen had taken on from Kant, namely that one's epistemological position influences the world we perceive, that the world is only what we perceive.[114] Ultimately it is predicated on the presumption by the person cognizing law whether he or she wants to see it as one or not and where he or she assumes the *Grundnormen*. For the monism–pluralism debate we can say that while both constructions are possible, neither construction is *necessary*.[115] It is both a normative scientific assumption (where does one assume one's *Grundnorm*?) and predicated upon positive regulation (does international law claim super-ordination or even some municipal law?). Or perhaps – in the light of the relativeness of the claim to subordination – the

110 For a similar argument see Rub, *supra* note 17, at 459.
111 Jestaedt, *supra* note 76, at 5.
112 See in particular Art I Proklamation [vom 27. April 1945 über die Selbständigkeit Österreichs], Staatsgesetzblatt 1945/1 and Art I Verfassungs-Überleitungsgesetz, Staatsgesetzblatt 1945/4.
113 § 1 Abs 1 Sperrgebietsgesetz 2002, Bundesgesetzblatt I 2002/38.
114 Kant, *supra* note 64, at A 42, B 59; Kelsen, *Reine Rechtslehre*, *supra* note 4, at 74; W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983), 28–9.
115 Griller, *supra* note 66, at 92, 125; Hart, *supra* note 64, at 315; Rub, *supra* note 17, at 462.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

positive regulation is no different whether they are seen as one or not; it is merely a matter for epistemology.

Behind Kelsen's problematization of the question of which normative system is valid for a given sphere, and his answer that there can 'really' only be one 'true' law, lies piety more than consistency. It is the absolutization of law, the traditional opinion that there can only be one 'real', 'true', or 'correct' law, that, independently from natural law doctrines, there cannot be concurrent legal orders in one state; one of them has to be *the* legal order, only *one* legal order can be subject of international law. Piety is this motive's origin, piety to the absolute, incommensurable with a consistently relativistic *Weltanschauung* and normative theory. The late Kelsen moved in the direction espoused here. His scepticism towards certain logical operations and his acceptance of the conflict of normative systems in one sphere are expressions of a relativistic theory. The super-elevation of *law* was traditional positivism's greatest vice, 'Rechtspositivismus, welcher der Kundgebung rein menschlicher Gesetze eine trügerische Majestät verleih[t]', as Pope Pius XII wrote in 1942.[116]

2.3. A concept of international law

What would a theory of international law look like if it were based on a neo-Kelsenian view? To answer that question exhaustively would require more space, effort, and wisdom than is available here, hence this last subsection will remain a cursory glance. Taking the basic theoretical assumptions derived from sections 2.1 and 2.2 and combining them with earlier writings, the following is a selection of topics from the vast field of international law.

2.3.1. The Charter reinterpreted

We shall begin by giving a short description of the Charter regime on the use of force and Security Council enforcement. This topic was chosen in order to show how the elimination of the 'coercive order' paradigm leads to a different interpretation of the UN Charter, one different from Kelsen's view under the *bellum justum* doctrine (section 1.1).

1. The United Nations Charter eliminates all forms of self-help. Self-help is law enforcement by the subjects of law themselves. The only conceivable form of self-help left in the Charter – apart from the 'enemy state clauses' in Articles 53 and 107, which are of negligible importance today[117] – is the right of self-defence under Article 51. However, that right in the form given to it by Article 51 does not stipulate a form of self-help, properly speaking. The wording speaks of the right 'if an armed attack occurs' as if this were some kind of natural disaster, not a violation of law to be redressed by counter-violation. To be sure, it is not contended here that the condition of the exercise of the right of self-defence under Article 51 has nothing

116 '[L]egal positivism, which imparts upon the enunciation of human laws an illusory dignity', 35 *Acta Apostolicae Sedis* (1943), 9–24, cited in G. Radbruch, 'Nachwort-Entwurf', in *Gustav Radbruch. Rechtsphilosophie. Studienausgabe*, ed. R. Dreier and S. L. Paulson (2003), 204, n. 30.

117 Recently, a much-publicized report on the reform of the Charter suggested that these two articles are outdated and ought to be revised (read: eliminated). High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc. A/59/565, at 77 (para. 298).

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

to do with the violation of the prohibition of the threat or use of force. Rather, self-defence is not a reaction specifically to the *wrong*[118] involved in order to redress or sanction the wrong, as Kelsen can be interpreted.[119] The right of self-defence as laid down in Article 51 is a *right to repulse an ongoing armed attack*.[120] As such it has nothing to do with law enforcement by single member states, but gives members merely the right to repulse an occurrence which the drafters held to be contrary to international peace and security. In no way could self-defence in the Charter be considered 'reprisals'.

2. The Charter de-emphasizes physical enforcement. The importance of the recommendations under Article 39 and of Article 41 in the Charter system is greater than that of physical enforcement under Article 42. Indeed, the latter kind of measures may only be taken if 'measures provided for in Article 41 would be inadequate or have proved to be inadequate', as Article 42 provides. Of course, the factual importance of one or the other provision is irrelevant for a legal scientific evaluation, but it shows that the drafters of this document did not intend to provide the legal means for forcible enforcement of the Charter all the time.

3. The prohibition of the threat or use of force in Article 2(4) is absolute. Law enforcement is not a goal that it is possible to achieve lawfully under that prohibition. The justification for uses of force in Article 51 does not have the character of a justification for law enforcement, to redress any sort of wrong. Also, Article 42 does not partake of any such quality; we shall discuss this below. The Charter thus prohibits a *means* of acting, not certain ends, and the nature of the justifications it has created demonstrates this orientation.

4. Chapter VII does not conform to the *bellum justum* doctrine, and this article follows Kelsen in his alternative interpretation of the Charter's structure. Under this interpretation, 'coercive actions' by the Security Council are not exclusively to be directed at member states violating their obligations[121] and thus are not necessarily *a response to a wrong*. The three clauses of Article 39 are not formulated as a prohibition and Security Council action is not directed specifically against acts fulfilling the *actus reus* of the clauses – much less to redress a 'violation' of the *actus reus* conditions in Article 39.[122] The Council's freedom to find concrete occasions for enforcement – not only specific obligations breached – as long as they can be called a 'threat to the peace, breach of the peace, or act of aggression' also undermines law enforcement *sensu stricto*.[123] Therefore the measures under Articles 41 and 42 cannot be seen as sanctions in the Kelsenian sense of the word; it is not established that they constitute a reaction to a violation of international law – or of obligations under the Charter.[124] It is quite clear – *inter alia* from the Preamble and Article 1(1) – that the point of this mechanism is to keep international peace (non-use of force), not to enforce law.

---

118 See *supra* note 50.
119 Kelsen, *Principles of International Law*, *supra* note 4, at 60. Interestingly, he does not say so in the relevant chapter of his commentary on the Charter, Kelsen, *Law of the United Nations*, *supra* note 4, at 791–805.
120 Kammerhofer, *supra* note 50, at 201.
121 Kelsen, *Law of the United Nations*, *supra* note 4, at 725.
122 Ibid., at 726.
123 Ibid., at 729.
124 Ibid., at 733.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

2.3.2. International law's multiple constitutions?

International law has no constitution. However, just as self-evidently, it *does*, and necessarily so. Just as there is no written constitutional document[125] there must be a constitution if norms are norms. Every normative order necessarily has an origin in norms, has a hierarchically highest echelon of norms,[126] even if the normative order should only consist of one norm. The following is a fleeting glimpse into what is elsewhere called '"the penultimate giant" amongst international legal theoretical problems'[127] – international constitutional law. Its purpose again is to provide a contradistinction between Kelsen's views and a different view, or rather the different possible views based on different assumptions.

Hans Kelsen's view of the *Stufenbau* of international law did not change during the period discussed here. The *Grundnorm* of international law for him is *consuetudines sunt servanda*, founding the validity of customary international law. Treaties, on the other hand, are not directly valid, but their potential *Grundnorm* – *pacta sunt servanda* – is a positive norm of customary international law and thus international treaty law is a subordinate source of customary international law.

This conceptual manoeuvre is similar to that employed earlier. Just as the assumed basic norm of a municipal legal order is supplanted by the 'effective government' rule, which is held to be a norm of customary international law as well, so here the assumed, hypothetical, basic norm of all international treaties is supplanted by a norm of positive customary law. The only difference is that in the first operation the content of the norms changes, whereas here it does not.

The decision of international organs, for example the judgments of the International Court of Justice, are valid because the treaty creating them gives them normative quality (in the Court's case Article 94(1) UN Charter). This creates a third layer of positive norms in international law. To recapitulate: Kelsen's *Stufenbau* is *consuetudines sunt servanda* – customary international law – *pacta sunt servanda* – international treaty law – decisions of treaty organs.[128]

Alfred Verdross held a slightly different view[129] in his *Verfassung der Völkerrechtsgemeinschaft* (1926). At that time he had just recently split from the Vienna School and his views – apart from the 'naturalistic' interpretation of the *Grundnorm* as 'eine objektiv gültige, im Kosmos der Werte verankerte Norm'[130] – were still very much Kelsenian.[131] His position on the *Stufenbau* of international law came close to views Kelsen had held earlier.[132] For Verdross it is *pacta sunt*

125 For a proposal for a constitutional text for a radically re-formed international law see P. Allott, *Eunomia: New Order for a New World* (2001), at xxxv–xl.

126 Kammerhofer, 'Uncertainty in the Formal Sources of International Law', *supra* note 3, at 548.

127 Ibid., at 538.

128 Kelsen, *Principles of International Law*, *supra* note 4, at 417–18; identical in substance: Kelsen, *Reine Rechtslehre*, *supra* note 4, at 222–3, 324–5.

129 See R. Walter, 'Die Rechtslehren von Kelsen und Verdroß unter besonderer Berücksichtigung des Völkerrechts', in R. Walter (ed.), *Hans Kelsen und das Völkerrecht* (2004) in Walter, Jabloner, and Zeleny, supra note 6, 37–49, for an excellent comparison of Kelsen's and Verdross's international law theories.

130 '[A]n objectively valid norm, anchored in the *Kosmos* of values'. A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) 31.

131 Cf. ibid., at 42–3.

132 Kelsen, *supra* note 60, at 262, 282.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

servanda which forms the *Grundnorm* of international law, because any explicit or tacit agreement presupposes that it is binding (hence a norm) and makes sense only if it is binding.[133] That basic norm refers directly to international treaty law, which can be concluded either explicitly or tacitly. In the latter case the resultant *pactum tacitum* is customary international law.[134] Therefore the difference is that one *Grundnorm* creates two sources, treaty and custom, because both are essentially the same: agreements.

The *pactum tacitum* theory of customary international law is all but abandoned now. To interpret customary law creation as *pactum* would necessitate implying a will to create law within customs alone. It is highly artificial to speak of behaviour as a *do ut des* agreement.[135] Also, it is unlikely that a *Grundnorm* can be the simultaneous basis of more than one delegated source of law, for it is a construct of legal science, not a positive norm. A mere 'as-if' fiction, a hypothesis, cannot create a connection where none exists in positive law.

On the other hand it is doubtful whether customary international law *can* create a subordinate source of law.[136] A customary law depends – apart from its subjective element – on *behavioural regularities*, that is, on humans behaving in a pattern. That behaviour, however, takes place in the realm of the 'real'. Norms, on the other hand, cannot be expressed as behaviour; their existence is ideal. Two states purportedly making a treaty by signing a document or making a statement can form the basis of a custom of signing papers or making statements. The crucial point is: *the norm is the sense of such acts of will*,[137] not the acts themselves, as Kelsen pointed out repeatedly. The specifically ideal in such acts cannot be taken on, as it were, by such a limited lawmaking tool as customary law, which only looks at behaviour as facts.

In the absence of some overarching and all-encompassing meta-meta-law, the result of a consistently reinterpreted Kelsenian theory of international law is that the two main sources of international law – customary international law and international treaty law – may not be normatively connected.[138] 'International law' might not be one normative order, but a number of different normative orders merely 'held together' by an empirical classification. In this case, the question of inter-sources derogation is, however, simpler than if they were one normative order. A claim by a norm not connected to a certain normative order is irrelevant to that normative order. If a norm of international treaty law were to claim to derogate from a previous customary norm, it could not do so. Even if there were a hierarchical ordering as Kelsen imagines, the validity-*Stufenbau* and the derogation-*Stufenbau*[139] are different in kind (Merkl), the *lex posterior* and *lex specialis* maxims are not a pre-positive

133 Verdross, *supra* note 130, at 32.
134 Ibid., at 43–4.
135 Kammerhofer, 'Uncertainty in the Formal Sources of International Law', *supra* note 3, at 533; A. Bleckmann, 'Monismus mit Primat des Völkerrechts. Zur Kelsenschen Konstruktion des Verhältnisses von Völkerrecht und Landesrecht', (1984) 5 *Rechtstheorie* 337, at 345.
136 Kammerhofer, 'Uncertainty in the Formal Sources of International Law', *supra* note 3, at 539–40.
137 Kelsen, *supra* note 9, at 2.
138 The tricky question of the status of 'general principles of law' in Art. 38(1)(c) of the ICJ Statute will be left aside here.
139 Rub, *supra* note 17, at 315.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

quasi-mathematical mechanism; they have to be part of positive law to solve conflicts of norms.[140] If international treaty law and customary international law are not connected and therefore not hierarchically ordered, the meta-law of law-creation of one source will have to contain these derogation maxims in order to effect derogatory subordination.

3. Conclusion

> Der Aberglaub', in dem wir aufgewachsen,
> Verliert, auch wenn wir ihn erkennen, darum
> Doch seine Macht nicht über uns – Es sind
> Nicht alle frei, die ihrer Ketten spotten.[141]

The result of applying neo-Kelsenian positivism strictly to international law may seem like a postmodern exercise in deconstruction, but it is not. This attempt to further purify Pure Theory entails interpreting Kelsen's international law doctrine to avoid any remaining 'impurities', where the term 'impurity' is not meant in a pejorative sense, but to indicate an element of theory not in conformity with the most basic assumptions of Kelsen's theory. The connections between effectiveness and enforcement, on the one hand, and the creation and derogation of norms – for example, the role of *desuetuto* and of the *Zwangsnorm* – need to be radically severed for a normative theory to maintain the dichotomy of Is and Ought. Of course, a theory combining normativeness and positiveness can always be said to involve an impure syncretism or 'theoretical pendulum' between the two extremes,[142] but Kelsen's approach is not opportunistic syncretism, but dialectic completion. Seeing positive norms as the sense of human acts of will does not, however, mean that human behaviour alone can unmake a legal order.

International law is not a legal tradition that copes well with the strictness required by the normativist approach.[143] It is a tradition of flexibility and undoctrinaire thinking, sometimes akin to diplomatic speech. Categories are not formed and not differentiated; everything is thrown into one pot. Dilatory compromise formulas may be the only viable way to agree on a text in international diplomacy and are often intended. The result is a badly drafted document and all of us have to pay for bad draftsmanship. In no case is legal science authorized to ignore or remedy what is, after all, positive law. Writers such as Oscar Schachter, who chide Kelsen for locating weaknesses in the Charter's drafting,[144] will have to account for

140 A. J. Merkl, 'Die Rechtseinheit des österreichischen Staates. Eine staatsrechtliche Untersuchung auf Grund der Lehre von der lex posterior', (1918) 37 *Archiv des öffentlichen Rechts* 56, reprinted in *Adolf Julius Merkl, Gesammelte Schriften I/1*, ed. D. Mayer-Maly, H. Schambeck, and W. D. Grussmann (1993), 169 at 192.

141 G. E. Lessing, *Nathan der Weise* (1779), Act 4, Scene 4.

142 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

143 J. Bernstorff, 'Kelsen und das Völkerrecht: Rekonstruktion einer völkerrechtlichen Berufsethik', in Walter, Jabloner, and Zeleny, supra note 6, 143 at 163; M. Rotter, 'Die *Reine Rechtslehre* im Völkerrecht – eine eklektizistische Spurensuche in Theorie und Praxis', in Walter, Jabloner, and Zeleny, supra note 6, 51 at 51–2.

144 Schachter, *supra* note 40; Sucharipa-Behrmann, *supra* note 6.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press

the weaknesses without resorting to 'changing' the law as they cognize it. It is the duty of legal scientists to cognize the law as it is, not as they wish it to be.

A radically consistent neo-Kelsenian approach has the salutary effect of getting to the failures of the structure of international law doctrine itself, of finding out why international law is uncertain. However, neo-Kelsenianism is a dogma as any other such theory is. In the end it cannot be falsified, because a normative science has as its basis ideas, not facts. But it is not merely destructive, it wishes to show how dangerous 'self-evidence' can be in the creation of law, how very important theoretical underpinnings are to each and every norm. 'Nur unkritischer Dogmatismus kann vermeinen, ein System positiven Rechts sei voraussetzungslos möglich,'[145] wrote Kelsen in 1920, and should we not rather think about dogma than have it presented as preordained?

145 'Only indiscriminate dogmatism could pretend that a positive legal system is possible without [theoretical] assumptions.' Kelsen, *supra* note 60, at vi. See J. L. Kunz, 'The Theory of International Law', (1938) 32 *American Society of International Law Proceedings* 23, for a discussion of the role of theory in international law.

https://doi.org/10.1017/S0922156509005809 Published online by Cambridge University Press