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Realism and international law: the challenge of John H. Herz

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The proliferation, globalization, and fragmentation of law in world politics have fostered an attempt to re-integrate International Law (IL) and International Relations (IR) scholarship, but so far the contribution of realist theory to this interdisciplinary perspective has been meagre. Combining intellectual history, the jurisprudence of IL and IR theory, this article provides an analysis of John H. Herz's classical realism and its perspective on international law. In retrieving this vision, the article emphasizes the political and intellectual context from which Herz's realism developed: the study of public law in Germany during the interwar period and in particular the contribution of Hans Kelsen and the pure theory of law to the study of international law. Herz was deeply inspired by Kelsen but he criticized the pure theory for ignoring the sociological foundations of law. Following his emigration to the United States, Herz embraced realism but without disregarding international law. Indeed, his mature, globally oriented realism offers a balanced, fruitful perspective for thinking about the relationship between politics and law that is deeply relevant for contemporary theory: it challenges modern, law-blind variants of realism and holds considerable potential for contributing to the approaches that have most successfully studied the law–politics nexus.

Keywords: realism; IR theory; international law; John H. Herz; Hans Kelsen; the pure theory of law

Since the end of the Cold War, the continued growth of interdependence and the proliferation of institutions and law, soft and hard, have fostered an interest in re-integrating International Law (IL) and International Relations (IR) scholarship.[1] So far, realism has had little to contribute to this interdisciplinary development. Providing a historical analysis of the

[1] See Slaughter *et al.* (1998), Goldstein *et al.* (2000), Simmons (2008), Garth (2008), Beck (2009), and Snidal and Wendt (2009).

classical realism of John H. Herz (1908–2005) and its perspective on international law, I argue that this strand of realism holds considerable potential for contributing to existing scholarship and for facilitating a necessary broadening and revitalization of the realist perspective on international politics.

The ongoing attempt to rejoin IL and IR is dominated by rationalism, predominantly in the shape of neo-liberal institutionalism, and constructivism. A soft version of realism acknowledges that law can influence politics among states by providing information and reducing transaction costs but stresses how the production (and effectiveness) of law serves the powerful (Krasner, 2002). On the whole, however, realism offers a stylized position against which the relevance, growth, and nature of rules, institutions, and compliance can be posited and studied. Apparently, there are good historical reasons for this predicament. When IL and IR became estranged at mid-century, a realist critique of international law that led to a pessimistic, and occasionally dismissive, view of this body of law was central. Subsequently and following the ascendancy of neorealism, the realist critique of international law hardened. In its original and strongest version, neorealism leaves 'no room whatsoever for international law'; law is regarded as an epiphenomenon concealing temporary cooperation among power- or security-seeking states (Slaughter, 1993: 217; see also Barker, 2004; Goldsmith and Posner, 2005; Armstrong *et al.*, 2008; Cali, 2010). For realists, law is a function of power if it is not ignored outright.

Recent scholarship has, however, complicated our understanding of realism. Anticipated by Ashley's (1984) critique of neorealism, a growing literature draws attention to classical realism, its origins, richness, and continued relevance. The writings of Hans J. Morgenthau (1904–80), arguably the most important realist thinker of the twentieth century, have proved particularly fertile. With roots in interwar Germany, where the study of law and politics was inseparable from the fate of the Weimar Republic and the new international order established at Versailles in 1919, Morgenthau provided a perceptive analysis of politics, power, and authority in the international realm. With this context in mind, scholars have traced Morgenthau's German legacy and pointed to its importance for the nature of post-war American IR theory.[2] Moreover, we now have a detailed sketch of Morgenthau's background as a student of law and its significance for his post-war realism, which included a grave challenge to the project of an effective and universal system of international law

[2] For example, Barkawi (1998), Scheuerman (1999, 2009a), Frei (2001), Turner (2009), and Guilthot (2010). On Jewish émigrés and the American study of politics more generally, see Gunnell (1993) and Katznelson (2003).

(Jütersonke, 2006, 2008; Scheuerman, 2008, 2009b). For two reasons, however, it is worth revisiting the analysis of international law provided by another Jewish émigré and classical realist, John H. Herz.

First, the attempt to re-integrate IL and IR should be informed by a thorough understanding of the political and intellectual context within which the initial separation of the two academic subjects took place. Understanding Morgenthau's role in this process is indispensable, but it does not exhaust the realist critique of international law. Moreover, Herz and Morgenthau make a fruitful contrast in attempts to grasp the central insights and diversity of classical realism (Hacke and Puglierin, 2007; Scheuerman, 2009c). For both, the status and effectiveness of international law conceived as a legal system was a central preoccupation at an early stage of their careers. In contrast to Morgenthau, however, Herz identified more closely with Hans Kelsen's (1881–1973) pure theory of law and the notion of a universal legal order, and remnants of such differences can be detected in the variants of realism they defended. In short, revisiting Herz's conception of international law is important for grasping the variety and complexity of classical realism.

Second, it is particularly fitting to retrieve this complexity at a time when contemporary realist approaches to international law appear unable to fully appreciate or assess the importance of ongoing processes like the legalization of politics and the fragmentation and globalization of law. Herz's post-war realism was based on the well-known concept of the security dilemma: human social relations are characterized by fear and uncertainty, which, particularly in the absence of central authority, tend to be self-reinforcing, thereby hampering attempts to reform or improve international politics (Herz, 1951; Booth and Wheeler, 2008). In several respects, Herz went further than other realists, not least in his insistence on the viability of a realism for liberal purposes and in his attempt to develop a global realism of survival in the wake of the nuclear revolution. Realist iconoclasm, outspoken identification with liberalism, and social shyness probably conspired to keep Herz on the fringes of realism's as well as IR theory's canon. Recent scholarship has established that neither the quality nor the originality of his work is responsible for this legacy. Despite mounting interest in Herz's ideas, however, we still lack a detailed picture of his early intellectual development, his perspective on international law and their importance for his distinctive version of realism.[3]

[3] For recent interest in Herz, see Stirk (2005), Hacke and Puglierin (2007), and the essays collected in *International Relations* (2008). Apart from Herz's autobiography (Herz, 1984a), published in German, existing accounts offer a fairly general outline of Herz's early work and his relationship to Kelsen (Söllner, 1988; Stirk, 2005: 288–293).

Against this background, the article pursues three related objectives. First, it seeks to provide a better understanding of Herz's realism and the place of international law in this vision; second, it seeks to broaden and deepen our understanding of the roots of classical realism in the German study of politics and law during the interwar period, in particular the role of Kelsen and the pure theory of law in debates about international law; and finally, it seeks to elucidate some broader implications of this analysis for contemporary theoretical developments, stressing particularly the challenge Herz presents to contemporary realism and the potential contribution of a richer realism to the predominantly rationalist and constructivist study of the law–politics nexus.

The thrust of my argument is as follows. Herz's realism provides a fruitful starting point for thinking about the dynamics, limits, and potential of law in dealing with international and global problems. Understanding the attractions of this richer realism requires a sound grasp of its origins and foundations. Already in the formative years of Herz's intellectual development, we find characteristic attempts to overcome the stalemate of intellectual dualisms. The struggle that came to define Herz's intellectual project – the struggle between the real and the ideal, between the particular and the universal, between power and progress – had deep roots in his early work on jurisprudence, international law, and philosophy. Unlike Morgenthau, Herz expressed sympathy with the liberal cosmopolitan vision underlying the pure theory of law. Although he left behind the language and some of the more magnanimous ideals of the pure theory when coming to America, his sociologically based realism made possible the continued pursuit of the liberal project – albeit in a transfigured and less ambitious version. When coupled with his attempt to conceive of a global realism, Herz developed a more modest and pragmatic view of law and a 'realist liberal institutionalism' that appreciated power political as well as functionalist dynamics. Recovering and developing this vision is important, I argue, for two reasons: it could contribute to contemporary interdisciplinary scholarship on how and why law matters in international politics and could help expand and rejuvenate a realist research agenda, which has for too long paid insufficient attention to international law.

The article is structured as follows. The next section offers a sketch of the pure theory of law developed by Kelsen and the Vienna School and its contribution to the study of public and international law in Germany during the early twentieth century. The following three sections provide a historical account of Herz's early work on international law. In this narrative, three themes figure prominently: Herz's mounting critique of the pure theory of law, attempts to salvage it by turning to the philosophy

of Nicolai Hartmann, and his turn to a sociological theory of international law following a study of national socialist conceptions of international law and his emigration to America. A final, concluding section performs two functions: it turns to the contrast with Morgenthau in order to flesh out the role of law in Herz's global, post-war realism, and it emphasizes the importance of this vision for contemporary theory.

The German legal tradition and the pure theory of law

From the late nineteenth century to the 1920s, the German study of law was dominated by a variety of legal positivisms that in determining the validity of law variously stressed its derivation from facts, statutory law, and sharp legal logic. Alongside the family feuds of positivism that straddled the political spectrum, approaches based on natural law were less popular. Already before the war, however, a rival school of legal *science* – promising a new and properly scientific approach to the study of law – was emerging from the writings of Hans Kelsen. In contrast to existing approaches, Kelsen sought to make the study of law scientific by closing off the possibility of basing law on subjective political views, facts masquerading as political ideology or the moral metaphysics of natural law. Most legal scholars, Kelsen argued, could not resist the temptation to ask what provided the *real*, substantial foundation of law, and in answering this question they, inadvertently or not, went beyond the scientific study of the law, delving into the abyss of morality, ideology, and politics (Stolleis, 2001, 2004; Paulson, 2005).

Based on neo-Kantian philosophy and epistemology, Kelsen's rival approach sought to overcome the dualism of positivism and natural law in defining and studying law. It was the task of the philosopher of science to discover (through a critique of existing epistemological and interpretative perspectives) the principles that bestowed validity on research within specific sciences. For example, mathematics made it possible to create (*erzeugen*) a conceptual infrastructure through which the discoveries of physics could be comprehended. Similarly, the principles that bestowed validity on scientific discovery in other disciplines should be identified. This neo-Kantian epistemology animated Kelsen's quest for scientific legal knowledge. Essentially, he fought a battle on two fronts. Against fact-based positivism, he argued that law could not be based on facts alone: law entirely dependent on enforcement had no 'should character' or 'oughtness'. Legal validity could not then be reduced to efficiency. Nor could a legal science be based entirely on the model of the natural sciences, because law was not to be thought of as a causal

proposition: the violation of a law *will* not entail a given sanction; a norm or a legal proposition (*Rechtsatz*) merely entails that a sanction *should* result. Likewise, and against the natural law approach veering off in the opposite direction: law was not law because it was morally right. A morally objectionable law would still be law by virtue of carrying a *promise* of sanctions. Therefore, a natural law rooted in morality could very well exist, though not as law. In Kelsen's approach, then, the concept of the legal norm is the epistemological perspective (*Deutungsschema*) that makes law scientifically intelligible. His 'positivism' is primarily positivism qua denying any necessary connection between morality and law (the *separation thesis*), but he rejects the view also associated with positivism that law is fact-based (the *facticity thesis*). The latter position is also, however, what introduces (or so many would argue) an element of naturalism into Kelsen's theory: though law is distinct from morality (*pace* the *morality thesis*), it can be explicated without reference to facts (the *normativity thesis*) (Paulson, 1998: xxx–xxxv).

Important consequences followed from this approach. Purging law of ideology and mythology necessarily meant that the *content* of law could vary substantially. Moreover, the systematic and scientific view of law led to a controversial understanding of the state. Contrary to received wisdom, Kelsen argued that it made little sense to distinguish between an empirical, sociological, or historical state and a legal, normative state. Social activity might be described by references to 'the state', but such descriptions constantly invoked legal norms (e.g. concerning obligation). The best scientific conception of the state was that of a normative order or a juridical system. Norms and rules depended on a delegation of competence from rules located in the higher echelons of the system's hierarchical structure. This thesis of the identity of the state and the legal system (*die Identitätsthese*) was a trademark of the pure theory of law (e.g. Kelsen, 1981a: 75–81; Kelsen, 1998a: 14–20).

Kelsen was the leading advocate of the 'Vienna School'[4] that also counted Adolf J. Merkl (1890–1970), Alfred Verdross (1890–1980), and Josef L. Kunz (1890–1970). As outlined in *Hauptprobleme der Staatsrechtslehre* (1911), Kelsen's theory was static and unable to account for legislation. Merkl was central in developing the concept of the pyramid of law (*Stufenbau der Rechtsordnung*), which introduced dynamism. The pyramidical mental image of the law shifted attention to the production of law and the force of existing law, which helped pure theorists distinguish

[4] The school is not to be conflated with the contemporary Vienna circle that advanced logical positivism.

their approach from the logical jurisprudence of concepts. Traditional *Begriffsjurisprudenz* was essentially static in its adamant insistence that the judge, armed solely with logic, was a neutral purveyor of the law. Merkl and Kelsen (who in 1923 took over the concept of the pyramid) argued that law could not merely be deduced from fundamental principles: a legal *system* consists of norms that can be traced back to a basic norm. The *Grundnorm* is a hypothetical norm that the legal scientist can only grasp by a combined process of induction and deduction. It is what gives meaning to the legal system: law is delegated from the basic norm to lower strata in the pyramid of law, strata that progressively apply, specify, and create law (Kelsen, 1998a: 11–14).

The reception of the pure theory of law in the interwar period was overwhelmingly hostile, which can partly be explained by its Austrian origins, the ambitious all-out assault on existing jurisprudence, lingering anti-Semitism, political differences, and Kelsen's neo-Kantianism and biting style. Yet the combination of *Ideologiekritik* and a serene relativism that flew in the face of the politicized nature of interwar German theories of law and state created particular animosity. The professedly scientific approach to the study of law was perceived to be limited and empty, relegating judgement of many fundamental ethico-political questions to the consciousness of the individual. It was either a form of bloodless scientific utopianism – 'an exercise in logic but not in life' (Lacey, 2004: 250) – or a political project in scientific robes. Kelsen did not refrain from engaging in public debate, providing unflinching support for democracy, though he respected the dividing line between law and politics and accepted the fight for democracy as personal and political. To critics concerned with the deeper roots of state, law, and nation, Kelsen's relativism appeared decadent, weak, and misguided (Koskenniemi, 2001: 245–249; Stolleis, 2004: 156–160; Paulson, 2005).

The theory of international law put forward by pure theorists was also controversial. The quest to purge the study of international law from muddled thinking and ideology made it increasingly evident that the pure theory was in itself an ideological strategy that left only one political project feasible. Pure theorists set their sights on four major themes in the study of international law – the dualism between national and international law, traditional notions of legal personality, sources of international law, and the limits of international justiciability – that through careful, logical analysis would be revolutionized, paving the way for a novel understanding of international law coalescing with a liberal cosmopolitan project. Indeed, as von Bernstorff has persuasively argued, the pure theory of international law was an attempt 'to construct international law as an autonomous medium without any predetermined content', which served

as 'an instrument of international legal experiment, indeed as a truly "universal" law in the sense of (a) a cure-all for social conflict and (b) of global validity'.[5]

The background against which this project was launched was a German discourse of international law, in which moralism played a modest role. During the second half of the nineteenth century, and accelerating after the unification of Germany in 1871, the centre of gravity in public political discourse moved towards state power and nationalism. The centrality of the state and a concomitant focus on sovereignty and authority as master concepts were strengthened by the intimacy between international legal scholars and the state apparatus. At the same time, liberalism was weak. In a country bent on achieving a more prominent place in the international order, the peace movement struggled. As in other parts of Europe, there was during the late nineteenth and early twentieth centuries a tendency to move away from natural law as the foundation of international law and focus instead on custom and treaties, an important development that should not, though, be exaggerated. The character of German politics and the increasing volume of international rules gave rise to the central question with which German theories of international law grappled throughout this period: given the sovereignty and authority of the modern state, how is the international legal order to be conceived, on what foundation does such an order exist, and with what political and legal consequences? Or more simply, how 'to square the circle of statehood and an international legal order' (Koskenniemi, 2001: 181)?

Simplifying somewhat, there were three different responses to this conundrum:[6] The predominant answer was subjectivist, essentially reducing international law to a voluntary legal order. Drawing on Hegelian notions of state and law and reflecting the intimacy between the study of constitutional law and international law in Germany, this position (defended most prominently by Adolf Lasson) emphasized state will and power, acquired through the German people, in the production of law (*äusseres Staatsrecht*) (Hegel, 1991: §§330–340). The second and much less prominent answer, developed by C. Kaltenborn at mid-century, was a mirror image of the first: envisioning a European community of states, it stressed the objective, supranational character of international law (Bernstorff, 2001: 13–18). The third position reacted against this dichotomy and essentially attempted a synthesis that ended up rather as an oscillation between thesis and anti-thesis and, in the end, tilted

[5] Bernstorff (2001: 208). See also Stern (1936: 740), Jones (1935) and Kunz (1968).

[6] On German IL during this period, see Bernstorff (2001: Ch. 1), Koskenniemi (2001: Ch. 3), and Hueck (2004).

Table 1. The pure theory of law and the jurisprudence of international law

	Positive law			
Natural law	I. Negation	II. Dualism	III. Monism	
			(a) Primacy of constitutional law	(b) Primacy of international law
Jus naturæ, jus rationis, jus divinum	Austin, Hegel, Lasson	Triepel		
Grotius, the Salamanca school, Kaltenborn			Jellinek	Verdross, Kunz (Kelsen)

*Adapted from Kunz (1924: 124).

towards subjectivism. Georg Jellinek's 'two-sided' theory of the social and the legal state sought the kernel of an objective international legal order in the state's self-imposed duty to honour international law (*Selbstverpflichtung*) and in the constraining nature of international politics (Kelly, 2003: 93–113). In a similar fashion, Heinrich Triepel's dualism – the notion that municipal and international law were essentially separate systems – identified a rational, free will among states as the glue that could hold together international law.

In *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), Kelsen attempted to square the notorious circle. Continuing the assault on rival approaches, the book logically developed the pure theory through an examination of sovereignty and its implications for international law (Kelsen, 1981b). The solution bore the trademarks of the pure theory. While dualism was untenable, not least from the perspective of scientific universalism, Kelsen found no *scientific* means by which to choose between two competing monistic visions: that of the domestic legal order, which makes state will the foundation of international law, or that of a monistic international legal order, in which states and domestic legal orders were among the most important (though not the only) subjects (Kelsen, 1981b: 123, 150; see also Kelsen, 1998b). The contours of this jurisprudential landscape are summed up in Table 1.

Deciding between the two monistic conceptions of (international) law was, Kelsen argued, inescapably an ideological and political exercise. Far from agnostic about this question, Kelsen's solution resembled his defence of democracy in the domestic context. A monism of state law harboured a 'subjectivist tendency' that led to a denial of (the force of) IL, a negation of the idea of law, and an assertion of power politics. The *political* choice was between untrammelled sovereignty, subjectivism, and imperialism

on the one hand and pacifism and the legal unity of humanity within an inclusive and universalist conception of world community (*civitas maxima*) on the other (Kelsen, 1981b: 317–319; Zolo, 1998). So although Kelsen could not scientifically resolve this quandary, he made no secret of his own preferences or of the considerable political struggle that lay ahead if international law was to triumph: developing social consciousness beyond and across states could lift international law out of its miserable condition. While Kelsen's argument against dualism found favour among pure theorists, the positing of a political choice between two monisms and its underlying relativism (*die Wahlhypothese*) was greeted with scepticism. Kunz and Verdross tried to corroborate the hypothesis of the primacy of international law by examining customary and positive law.[7] Despite disagreements on the scientific foundation of monism, however, the Vienna School shared a common cosmopolitan project (Kelsen, 1935, 1942; Bernstorff, 2001: part II).

Herz, the identity of states and the primacy of IL

With great enthusiasm, Hans Herz (who only changed his name to John after crossing the Atlantic) had discovered Kelsen's pure theory of law while studying in Berlin in the late 1920s. When Kelsen moved to the University of Cologne in 1930, Herz who grew up in nearby Düsseldorf became his first doctoral student. The topic for Herz's *Inaugural-Dissertation*, the identity of the state in relation to international law, was doubly compelling. First, the birth and death of states and the conditions under which the state remains identical with itself had profound implications for the entire edifice of political and legal theory in Weimar Germany, including conceptions of the state, revolution, and the relationship between state and international law. This was advantageous to a prodigious young scholar keen to combine the study of international law with jurisprudence and political theory.[8]

Second, the topic was attractive for someone wanting to defend monism and the primacy of international law. As a general rule, changes in the territory of a state or revolutions within states do not have any effect on

[7] See Verdross (1914, 1923), Kunz (1924), and the discussion in Starke (1998). Verdross later left behind the pure theory for a neo-thomist naturalist vision (Simma, 1995).

[8] Herz (1931). Kelsen commented upon drafts of the thesis in much detail, an uncommon practice for supervisors at the time (Interview with John H. Herz, 19 September 1980, John M. Spalek Collection, Tape 1). Herz was closely identified with Kelsen: a short version of the dissertation was published in the leading journal of the Vienna School (Herz, 1935a), and two early articles were later reprinted in Métall (1974). See also Kelsen's reference for Herz, 9 July 1938 (Herz Papers, Box 34, Folder: 'List of Publications, Testimonials and Similar Materials').

the continuity of the state and its obligations with respect to international law. Herz surveyed the theory and practice of international law on this issue, and found that only very few (including the French and Russian) revolutions brought this convention into question. Turning to state law and legal doctrine, Herz found no consistent line of argument. All attempts to deal with the problem of the identity of states in international law required a *theory* of the state, and in the analysis of rival theories, Kelsen's student was given ample opportunity to demonstrate the impurity of these conceptions of law and state. Gierke's organic theory of the state, the *Verbandstheorie* of Jellinek, and neo-Hegelian theories of the state, primarily represented by the writings of Carl Schmitt, were all castigated for reducing the state to its *real* properties, thus failing to treat the state scientifically. By theorizing the state as a legal system, the pure theory of law offered a way forward.

In his attempt to make the problem of the identity of states intelligible, Herz subscribed to further crucial elements of the pure theory of law, including the general presumption of the continuity of the legal order, except when actions or events involve a violation of the *Grundnorm*, the notion of the pyramidical structure of law, the Kelsenite critique of impossible dualism, and the presumption of a universal legal order. This was par for the course for the Vienna School. Following Verdross and Kunz, and *pace* Kelsen, Herz argued for the primacy of international law. His reasoning was twofold. On the one hand, the primacy of IL could be demonstrated through analysis of existing rules (Herz, 1935a: 263n.). On the other hand, Herz argued that a revolution's overthrow of the foundation of a legal system (its authority, constitution, or basic norm) and its simultaneous continuity as a subject of international law was only comprehensible from the perspective of the pure theory and the primacy, despite its primitiveness, of international law: discontinuity could here be accommodated by the force of a higher legal principle. Indeed, in a somewhat convoluted fashion, Herz argued that the conundrum of the identity of states was the decisive case for conceiving of a universal legal order that accorded primacy to international law (Herz, 1931: 80, 83–84).

True to the spirit of Kelsen, this argument allowed Herz to speculate on the future consolidation of international law from an evolutionary, gradualist perspective. The fact that this primitive system of law delegated enforcement to its subjects (legal orders placed lower in the pyramid of law) was a fundamental weakness. However, the combined effect of a universal legal order that could only be discontinued by a violation of its basic norm – something which could only happen through great power dictatorship or a world revolution – and the existence of the League of Nations as the germs of a personality that could represent and personify

this order, carried a promise in line with the liberal aspirations of Kelsen. Already at this early stage, however, Herz was uncomfortable with Kelsen's excessive idealism. The key to this reservation was the relationship between norm and facticity in the pure theory of law. For in using the problem of the identity of states as a vehicle for demonstrating the primacy of international law, Herz realized that this could only be done by referring to the state as a legal *as well as* sociological fact (see also Jones, 1935: 14–16). A definition of the state that went beyond the *Identitätsthese* was needed if the problem of the identity of the state should be solved. In providing this theory, he returned to the discarded distinction between the state as a legal concept and the state as a sociological concept, which signified a community's interest in ordering social relations through law. The sociological state (*Staatsgemeinschaft*) guaranteed the effectiveness of the legal state (*Rechtsordnung*), while the latter was a personification of the former (Herz, 1931: 65–72). Thus, Herz's vindication of the pure theory involved a revival of the dualist understanding of the state that had long been a prime target for Kelsen and his followers.

The tension between the normative and its reliance, however indirectly, on practice left a crack in the pure theory of law, particularly in relation to international law. Although sanctions need not materialize in case of breaches of the law, Herz pointed to the shady territory between the promise of sanctions and the amount of *effectiveness*, a sociological element, on which the proper existence of law was also based. In combating theories of the state that derived the validity of law from groups like classes or the *Volk*, Kelsen was in danger of ignoring the sociological foundations of the existence of the state and law altogether. In other words, he came close to treating the sociological state as a *product* of the legal state. 'It is going too far to argue that only "the legal state" and not "the sociological state" should be analysed in the study of law'.[9] The relationship between the legal and the sociological state referred to a deeper tension in the pure theory of law between *is* and *should* (*Sein* and *Sollen*). Commenting on this tension, Kunz argued in 1934 that although the pure theory accepted the necessary relation between the normative juridical order and 'the realizing acts of *factual* happenings', it did not 'identify the spiritual existence of the law with this relation between normative order and factual reality'. Those acts that realized norms were the *conditio sine qua non* of the juridical order, not its *conditio per quam* (Kunz, 1968: 72).

At times this was more than a tension. Kelsen came close to considering effectiveness and facts irrelevant for the science of law, as long as the

[9] Herz (1931: 71). Here and in what follows translations from the German are my own.

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system on the whole was efficacious (a rather opaque criterion; e.g. Kelsen, 1981b: viii). Inspired by contemporary philosophy (more on which below), Herz took on this problem by arguing that law was a doubly rooted phenomenon. The legal norm is peculiar by being part of the 'sphere of the legal ought' (or 'idealistic real', *Sphäre des idealen Seins*) that can be traced back to a hypothetical basic norm but, at the same time, the effectiveness of norm, rooted in the sphere of real, is crucial for its validity. Thus, the quality of law was one of 'lesser' ideality ('*minderer*' *Idealität*) than, for example, the laws of nature, and that led him to put more emphasis than his *Doktorvater* on the real, sociological roots of legal norms and their validity (Herz, 1931: 68).

Herz was adamant that this attempt to steer a middle way between the legal and the sociological state, between 'idealist' and 'sociological' theories of law and state, did not jettison the fundamentals of the pure theory. Distancing himself from conventional 'two-sided' theories of the state, Herz reaffirmed the fundamental validity and universal insights of the pure theory of law, arguing that '[t]he hypothetical basic norm is despite its rootedness in a system of facticity still the necessary pinnacle from which the legal order stems … ' (Herz, 1931: 72; Herz, 1935a: 259, 268). The seeds of doubt were sown, however. Although communicated in a fairly deferential style, Herz had located a problem within the pure theory that could perhaps be solved by returning to its philosophical foundations. Meanwhile, the tension between the ideal and the real, between norm and will, was to acquire both greater urgency and more political relevance in the context of Nazi Germany's bid for world hegemony. It was a problem that inevitably transgressed the porous border between law and politics – and Herz was to follow in its trail.

A rescue mission: Hartmann's philosophy and the importance of sociology

Having taken up a job in the German civil service after completing his university education, as a Jew, Herz was dismissed within months of Hitler coming to power in 1933. After deciding to pursue an academic career, Herz ended up (on Kelsen's suggestion) as a student at the Geneva Graduate Institute of International Studies (HEI). During the late 1930s, he returned to both the empirical and theoretical implications of his *Inaugural-Dissertation*. One important theme was the philosophical foundations of the pure theory of law. Herz had grappled with questions of truth and objectivity, and his position reflected what was essentially a Weberian solution to these problems. On the one hand, he argued that

social facts are always produced from a particular perspective – they are *standortsgebunden*. On the other hand, Herz refused to accept that this existential condition compromised the scientific truths produced by the pure theory of law. So while historical, political, and social context influenced the perspective of the legal or social scientist, this influence was not *prima facie* a proof against the objectivity of such observations (Herz, 1931: 92–93; Weber, 1949). The pure theory of law offered a scientific analysis, a phenomenology of law not weighed down by factual or historical concerns. It was perhaps paradoxical that having criticized the pure theory of law for going too far in its rejection of the sociological basis of legal norms, Herz turned to highly abstract philosophical considerations in his attempt at a rescue mission. Yet Kelsen's neo-Kantian foundations were challenged not only by the rise of neo-Hegelianism in social theory but also from within the more technical genres of philosophy, where focus shifted from epistemological to ontological concerns. Enter Nicolai Hartmann (1882–1950).

Educated in St Petersburg and at the neo-Kantian fortress of Marburg, Hartmann moved to the University of Cologne as professor of philosophy in 1925. He stayed until 1931 – the year of Herz's *Inaugural-Dissertation* – before moving to Berlin. Hartmann was the stereotype of an otherworldly philosopher: while country and continent descended into chaos, he was at his desk deeply immersed in the attempt to reach a better understanding of the world and the place of human beings within it. Beginning from our everyday experience, Hartmann argued that we find an independent reality. The epistemological lenses we employ to grasp reality can lead to distortion, but epistemology nevertheless presupposes ontology. Thus, Hartmann moved away from the cardinal neo-Kantian point that human cognition generates *(erzeugen)* reality. Reality exists independently of human cognition and there is, therefore, a need for a 'metaphysical epistemology' to account for Hartmann's enlarged reality. This project began from phenomenological premises and ended in a natural realism 'this side' (or beyond) idealism and (metaphysical) realism. The result was a new ontology, a wide-ranging theory of reality (*das Seienden*) that in contrast to the phenomenological interest in representation of reality in the consciousness of individuals sought to grasp the essence of reality in itself and in its forms and structures (Werkmeister, 1990; Spiegelberg, 1994).

A significant feature of this system was a structured view of reality. Proceeding from the premise that the stratification of Being was observable, Hartmann identified four distinct levels – the material, the organic, the mental, and the spiritual – in which each level contains a number of categories with complex interrelations. Hartmann conceived of these levels or strata in a scheme, where the material stood at the bottom and the spiritual

at the top, and where the higher strata are dependent on the lower: categories from the lower strata would recur in the higher strata, but the reverse was not the case. No stratum was more 'real', no stratum had priority, which in turn coalesced with Hartmann's quest to avoid the fallacies of both idealism and materialism: the world is a stratified reality, where all levels matter; the lower might be more solid, but the higher are more complicated.

To Hartmann, the dependency of the higher strata on the lower was fundamental in the sense that the lower strata supported the higher strata, while each higher stratum also had a measure of autonomy by virtue of the *novum* that it added to the lower strata. Synthesising dependence and autonomy, the organic supersedes the material, the mental supersedes the organic, and the spiritual level of reality supersedes the mental, whereby human existence reaches its completion (Werkmeister, 1990: Ch. 2, 157–158). The spiritual stratum was divided into three modes: the *personal* spirit, the *objective* spirit, and the *objectified* spirit. While the first referred to the existence of phenomena like will and consciousness, the second encompassed collective historical manifestations like culture, ethics, law, and science. Both the personal and the objective spirit were temporally bound. In contrast, the *objectified* spirit referred to the timeless in history, a realm of ideas that nonetheless requires a medium, for example, art, literature, or philosophy, to emerge 'for us' (*ein Für-uns-Sein*; Hartmann, 1933: 364–365, 383–390; Werkmeister, 1990: 184–191).

Several factors explain why the liberally educated Herz was receptive to this philosophy. It encapsulated his taste for abstract philosophy, while combining it with music, art, and sociology. The spiritual stratum was the most important factor for the study of human social life, including law and politics, and the book Hartmann dedicated to its study, *Das Problem des Geistiges Seins* (1933), was conceived during the period when Herz was among the students at Hartmann's lectures at Cologne (Hartmann, 1933: Vorwort; Herz, 1984a: 101–103). This philosophy could be deployed to clarify and potentially solve the underlying problems in Kelsen's neo-Kantian theory of law, an idea that already loomed large in the *Inaugural-Dissertation*. Indeed, Herz later recalled how, during the preparation of the thesis, his infatuation with Hartmann's *Schichtenlehre* led him to 'struggle a little' with Kelsen, 'a 100% neo-Kantian, who insisted on the complete separation of the normative sphere … and the actual or factual reality of social life'.[10] Yet Herz's systematic attempts to amalgamate Kelsen and Hartmann's projects were only published during his Geneva years.[11]

[10] Consequently, 'I was never in his view a 100% member … of the Vienna School'. Herz interview (Spalek collection), Tape 1.

[11] The key texts are Herz (1935b, 1937a) and Bristler (1938).

Kelsen had clearly exposed the methodological syncretism of conventional approaches. Distinguishing between what is, what ought to be, and what the law stipulates should be, he had dismissed crypto-naturalist or crypto-sociological approaches to the study of law. Yet, picking up his earlier critique, Herz argued that the pure theory's distinction between 'the sphere of the legal ought' (*Sphäre des idealen Seins*) and 'the spatiotemporal sphere of is' (*Sphäre des raumzeitlichen Seins*) was too absolute, which in turn contradicted the true insights of the pure theory (Herz, 1935b: 283). Kelsen occasionally conceded that neo-Kantianism entailed difficulties with respect to reality's importance for the validity of a (normative) legal system, but he tended to treat the two as polar opposites. Perhaps, Herz asked rhetorically, the distinction was not as clear-cut as Kelsen assumed.

Ever concerned with overcoming stultifying dualisms, Herz used Hartmann's ontology as a philosophical basis for the argument that law has roots in both *Sollen* and *Sein*. Surely, the legal norm expressed a measure of autonomy above and beyond the sphere of spatio-temporal reality. Yet, translating the ontic dependency between strata of reality into the study of law, Herz argued that the sociological dimension of law had to be taken into account: the sphere of the legal ought was based on (*aufruhen*) the sphere of the spatio-temporal. In contrast to laws of nature, man-made laws were more dependent on the lower levels for their effectiveness, which directed attention to sociological concepts like authority and the efficiency of norms, in particular in relation to fundamental questions concerning the constitution and delimitation of legal systems. Such sociologically founded analyses were the precondition for unfolding the 'system-immanent logic' of the pure theory of law (Herz, 1935b: 293, 294). It was this complex argument that Herz sought to capture in the exceedingly abstract title '*Das Recht im Stufenbau des Seinsschichten*' ('Law within the Stratified Totality of Existential Layers').

Flashing out the implications of his philosophical critique, Herz (1937a) identified ways in which reality encroached upon the legal norm. Even concepts and categories within the pure theory of law, for example, the authority of law or the category of the legal person, were partly based on elements in the sphere of the spatio-temporal (*realfaktische Momente*), which in turn undermined the strong distinction between the spheres of reality and legal norms. At this stage, however, it was becoming increasingly clear how the philosophical critique propelled Herz towards a more wide-ranging critique of the pure theory of law: 'Law and power are not identical, but neither are they absolutely antithetical. Law cannot exist without power, although it is not completely determined by the categories of power' (Herz, 1937a: 2–3). This was still a friendly critique

from inside the camp of the pure theory, but in terms of the development of Herz's vision of international law and international politics, it was an important step on the intellectual journey away from Kelsen.

Philosophical doubt conspired with the harsh political realities of the 1930s to pave the way for a more sociological conception of law that found the exposure of ideology and politics in conceptions of the law sound but, ultimately, insufficient. In the late 1930s, Herz began commenting from a more overtly political perspective on developments in the practice of international law. He later described how his chief concern in this type of work – published in *Die Friedenswarte*, edited by Hans Wehberg – was 'to fight for those ideals and procedures that might strengthen the collective security system, and to indict the policies of member states or organs of the League itself running counter to those principles'.[12] In this context, the notion of a universal legal order and Kelsen's value-relativism regarding the content of laws appeared increasingly problematic (Herz, 1984a: 99–100). If further evidence was needed, it was readily available in the material on which his Diploma was based: national socialist conceptions of international law.

Leaving Europe, abandoning law?

The years Herz spent at Geneva from 1935 to 1938 were academically successful and politically depressing. His main preoccupation during these years was his Diploma thesis on national socialist doctrines of international law. The study, published in Zürich in 1938 under a pseudonym (Eduard Bristler) in an attempt to protect the members of Herz's family remaining in Germany, reflected Herz's suspension between the pure theory of law and the search for more robust solutions in a fragile world. Herz shared the liberal political ideals of the most prominent international lawyers of the day. At HEI, he took courses with Wehberg, Hersch Lauterpacht, and Kelsen. George Scelle, whose idiosyncratic legal universalism was grounded on the solidarity of humans (Thierry, 1990), eventually wrote the foreword to Herz's first book.[13] Nevertheless, Herz's

[12] John H. Herz, 'On Human Survival: How a World-View Emerged', unpublished English translation of Chs 1–7 of Herz's autobiography, Herz Papers, Box 6, p. 124; Herz (1936, 1937b).

[13] The German book was based on Herz's English thesis, the first submitted at HEI. A copy of the Diploma is in Herz papers, Box 6. Through Lauterpacht and Harold Laski, Herz tried unsuccessfully to find a publisher for the thesis in England. See Lauterpacht to Herz, 2 May 1938 and Laski to Herz, 30 November 1938, Herz papers, Box 40, untitled folder. The research led to two English publications (J. Herz, 1939; Florin and Herz, 1940). Contemporary studies of the subject include Preuss (1935) and Gott (1938).

vision and vocabulary underwent a profound change towards the end of the 1930s.

In *Die Völkerrechtslehre des Nationalsozialismus*, Herz deployed traditional Kelsenian weapons to expose the political and ideological basis of recent national socialist scholarship and its enmeshment in a larger political and propaganda project for clandestinely advancing Hitler's expansionist ambitions under the cloak of respect for international law. The analysis was, according to Herz, scientific and not political. Through objective exposition that formed the basis for immanent critique, the 'scientist' could inch closer to the nature of international law, while exposing the true (ideological) character of national socialist scholarship. Since a detailed exposition and analysis has been provided by Stirk (2008), I shall focus primarily on the role of the book in the development of Herz's perspective on international law.[14]

Two important distinctions informed the analysis. First, Herz distinguished between the foreign policy implications of national socialism before and after 1933. The former was a logical extension of Hitler's *Mein Kampf*: it began from a racial definition of politics and defined Germany's objective as a fight for expansion and *Lebensraum* in a world of untrammelled power relations. Before 1933, law and science were clearly subordinated to the political objectives of the racially defined *Volk* organized in the state. After coming to power, however, Hitler stressed Germany's peaceful intentions while insisting on its claim to political equality, an objective that was to be achieved through revision of the Versailles settlement. This new face of national socialism involved a (temporary) reversal of its positions on a right to expansion and the principle of non-intervention. Second, Herz distinguished between national socialist scholarship on international law based (largely) on notions of natural law, state rights, and the existence of an international community, and scholarship based (largely) on notions of race or *Volkstum*. Political opportunism and a paradox inherent in the influential national socialist jurisprudence of Helmut Nicolai (where an international legal system was, at the same time, voluntarist, a source of state rights and binding if based on race) helped explain this configuration (Bristler, 1938: 71).

Either way, the result was a hollowing out of international law. The 'natural law' school consisted primarily of experienced legal scholars trying to accommodate the new regime. They used state rights and the

[14] Herz's conclusions have been supported by later students of the subject: Vagts (1990: 661n.) terms Herz's book 'the most valuable work' and Scheuerman (1999: 305n.) has described it as 'groundbreaking research' and 'a superb monograph'.

principle of sovereign equality to argue against existing law, i.e. the Versailles settlement. Although riddled by theoretical problems – including an unclear concept of rights and a vague notion of international community – this approach mapped on helpfully to the foreign policy doctrines of Hitler during his first years in power. Herz concluded that the groups' real purpose was not to extend and embed an international community; rather, this was a mere façade behind which emerged a purely individualistic conception of IL based on the freedom of states to deploy violence (Bristler, 1938: 107–108). The race-based school was more outspoken in its denial of any potential for supranational law. Its starting point – a racial definition of the *Volk* and the insistence that no people can act legally against its will – gave away its implication: a complete 'minimalization' of international law, a rejection of the League of Nations, and a naked realism professing the naturalness of war and enmity between peoples.[15] This doctrine bolstered Hitler's aggressive pre-1933 and post-1936 foreign policy and combined effortlessly with prevalent national socialist rhetoric by providing a romantic yet hollow prophecy of a racially based European order.

Pointing to the stifling implications of censorship in Germany, the analysis unveiled the logical contradictions and the opportunist, self-serving character of national socialist scholarship.[16] From the racist perspective of national socialism, squaring the circle between statehood and international law was particularly treacherous: it was simply impossible 'to demonstrate how international law, having its source in the legal consciousness of the single races or peoples, can have an obligatory character' (J. Herz, 1939: 545). Both 'the natural law' and 'the race school' were ambivalent, mixing utopian aspirations with a project of minimization. As intellectual smokescreens for Nazi foreign policy they sought, ultimately, the continuation of a system based on power and interests. Despite internal differences, national socialist doctrines of international law exemplified 'the great extent to which science [*Wissenschaft*] can be put in the service of external pursuits and interests' (Bristler, 1938: 193).

The analysis reinforced Herz's increasing discomfort with the pure theory of law. Stressing that '[c]ognition is perspectivist [*standortsgebunden*] in

[15] Herz associated Carl Schmitt with this position (Bristler, 1938: 147–149, 152–162, 169–170). Herz later wrote two shorter articles on the penetrating ideas and moral failures of Schmitt (Herz, 1975; Herz, 1992). In an unpublished letter to the *New York Times* in 1988 on Heidegger and Schmitt, Herz's attitude was summed up in the dictum 'as all too often: Great thinkers, small characters' (Herz papers, Box 3, Folder: 'Unpublished letters to editors').

[16] Fittingly, the book was promptly forbidden by the Nazi regime after its appearance. See the 'Bekanntmachung', 9 August 1938, reprinted in *Europäische Ideen* (1978: 68).

the widest sense of the term … ', while maintaining that the object of cognition was not, Herz argued that every perspective on international law offered a degree of approximation to 'truth' (Bristler, 1938: 178–179). Hartmann and Kelsen's aspirations on behalf of science and the Enlightenment notion that the application of reason heralded a promise of human emancipation loomed large. But because law, a human artefact, was often studied in a way that serves political and ideological purposes, legal scholars shaped the law in an indirect (and possibly unconscious) fashion. These features were only exacerbated in the study of international law due to the vaguer nature of the subject. Clearly subordinating scientific results to political objectives, national socialist scholarship on international law was a fitting if extreme example of this. Although '[t]heir real aims merge in the ideas and ideals of *Mein Kampf*',[17] this did not preclude the possibility that the perspective of national socialist scholars contained some insight. Indeed, they had identified, though disappointingly, never analysed or theorized dimensions of international law that other scholars had not contemplated sufficiently.

Obviously, Herz had in mind the sociological, *realfaktische* foundation of international law, the precondition of its effectiveness and growth. What characterized real international law, how did it emerge, by what elements of organization and compulsion was it supported, did it involve a minimum of formal equality among its subjects, and how could it be changed? These were some of the questions that national socialist scholars, indirectly and in their idiosyncratic, bewildering ways, amplified. Indeed, even if national socialist scholarship on international law obscured theoretical insight, it 'serve[d] a purpose in clarifying our perspective on law and its characteristics' (Bristler, 1938: 216). Herz came to the conclusion that there exists *degrees* of law depending on its real, sociological foundations. This brought him ever closer to a showdown with Kelsen. International law was not a complete legal *system* but a *patchwork* of different laws (classical, customary, treaty, etc.) with varying degrees of effectiveness, and it was doubtful that reprisals and war constituted sanctions, as Kelsen argued. True international law would emerge only when an adjustment of interest could be imposed and guaranteed by a legal organization (c.f. Kelsen 1935: 12–17; Bristler, 1938: 200, 202). Racial ideologies, expansionist power states, and new technologies of warfare made for an explosive and deeply troubling condition. To continue the current arrangement of international law

[17] J. Herz (1939: 554). Bolshevist theories were also ideological but in a more outspoken fashion (Bristler, 1938: 207–213; Florin and Herz, 1940).

based on power and vague rules 'would not only perpetuate the international anarchy, but simultaneously involve a relapse into barbarism' (Bristler, 1938: 215).

In this light, Kelsen's insistence on the separation of legal and political matters and on the perfect, hypostatized international legal order appeared unattractive. The practical, political task of providing a sociological foundation for the operation of law could not (merely) be a matter of individual conscience. The late 1930s afforded no such luxury. Thus, in the years bracketing his emigration to America, Herz relinquished cardinal points of the pure theory of international law and turned towards a sociological conception, which in turn eased the transition to his new identity in the United States as a political scientist and foreshadowed his political realism. Finalized at the Institute of Advanced Study at Princeton University after his emigration to America in 1938, Herz's ode of farewell to the theory he had discovered in Berlin in the late 1920s was the logical conclusion of the intellectual development he underwent at Geneva (H. Herz, 1939). Apart from some remarks in *Political Realism and Political Idealism* (1951) and a contribution to Kelsen's *Festschrift* (1964), reiterating and developing his original critique, Herz abandoned the pure theory in favour of a series of critical observations about the foundations, status, and strength of international law. International law did indeed develop gradually, but it was closer to the patchwork of authority and unregulated territory in a failed state than to Weber's ideal-typical state. *Pace* Kelsen, war could not be conceived as a sanction of a legal system; apart from a few unrepresentative cases, this simply flew in the face of facts (H. Herz, 1939). If anything, war was a way of *challenging* and *changing* the legal system.

The strength of the pure theory of law was its most debilitating weakness: it began from an ideal-type that turned out to be deeply inadequate, if not dangerous,[18] because many accepted norms were not delegated norms of competence but norms of expediency. In short, the pure theory of law was itself ideological, reflecting a particular context and serving certain political purposes. This understanding of ideology and the unmasking of the self-interested character of thought have in IR

[18] Herz would later argue (1964: 108–109, 114) that the approach of his former mentor constituted a sort of Kantian conceptual overstretch, which invited hubris and lent itself to abuse. His submission to the editor of Kelsen's *Festschrift* was accompanied by the following note: 'Vòilà. After some 20 years' absence from the battle-field of 'Pure Theory of Law' I got excited about it again … I hope it's not too critical … there are a couple of admiring remarks (not just for the effect, but meant so)'. Herz to Sálo Engel, 2 April 1963 (Herz Papers, Box 39, Folder: 'Correspondence 1959–63').

become associated with Karl Mannheim and E.H. Carr, and it is, arguably, a distinguishing feature of classical realism (Jones, 1998: Ch. 6; Oren, 2009). While the pure theory of law deployed similar strategies in criticizing rival theories, it was unreflexive, harbouring a tendency to rationalize facts from the perspective of a universal legal order. Kelsen's supposedly positivist theory of international law constituted 'in a way, the most sophisticated natural law theory which has been developed during this century in the field of international affairs'.[19]

Herz now proposed to view international law *formally* as a legal system with a complex of basic norms (based on customary and treaty law), but *practically* as a patchy and partly contradictory legal order (H. Herz, 1939: 288). The incipient dualism between the legal and the normative conception of the state had developed into a distinction between ideal and real international law. In effect, this was a concession to 'realists' who poked fun at the legal scholar by pointing to the part of interstate relations based purely on power and interest. Although Herz continued to focus on (and teach) international law as a way of making his way into American academia, his writings reflected the turn to social science and an unabashedly sociological approach to international law as nothing but 'a barely veiled legal and ideological superstructure upon the relationships of power'.[20] The aim of social science was to supply an adequate description of reality, not fulfil dreams of clarity and scientific ordering.

On the face of it, this hard-nosed perspective on international law left little room for a liberal project. Yet Herz continued to insist on the existence of rules and norms, particularly in less politicized realms, and a precarious historical trend towards legal progress in international politics. The social scientist had to avoid denying or overrating the effect of international law. International law existed but so did very real impediments to developing the international legal order beyond the technical or the trivial. This was reflected in a much muddier situation, in which the dual role of diplomacy was 'to try to settle issues in reference to general norms … [and] to deal with them by political negotiation'. It was an attempt at coordination between a teleological postulate of the unity of legal systems and the political character of the international legal system

[19] Herz (1964: 108). See also Herz (1951: 96–99, 101–102), which contains interesting parallels to Bull's (1986) critique of Kelsen. It is not without irony that it was Kelsen who on Herz's behalf accepted the Woodrow Wilson Foundation Award that this book received at the American Political Science Association's meeting in California in 1951 (see Herz Papers, Box 38, Folder: 'Book reviews and Correspondence on *Political Realism and Political Idealism*').

[20] Herz (1941: 63). This view has distinct similarities with that of other classical realists like Morgenthau (1940) and Carr (1946: Ch. 10).

symbolized in the shifting operation of the balance of power (Herz, 1964: 112–113). The inescapable conclusion was that the international legal order was both extremely complex and extremely precarious, forever threatening to self-destruct (H. Herz, 1939: 289–290, 298–300; Stirk, 2005). Here lay the kernel of Herz's later vision of international politics and its attempt to harness the insights of realism for the realization of essentially liberal values. His wartime writings exuded a modest liberal strategy of searching for compromises, for example, in relation to detailed rules of international law or with respect to an improved system of collective security (as against more wide-reaching proposals for world government; Herz, 1941, 1942). This liberal, reformist sentiment was also, of course, a trademark of Herz's most important post-war books (Herz, 1951, 1959). Thus, Herz's realism project was never limited to appreciating the implications of sociological dynamics like the security dilemma in changing contexts. With the development of his global realism from the late 1950s onwards, the broader liberal and universalist ambitions reasserted themselves. And in this vision, law and institutions came to play a transfigured and more modest, yet still important, role.

Reflections on realism and international law

To grasp the nature of Herz's realism, it is appropriate to contrast it with Morgenthau's version. As apostles of realism, the two were clearly in sympathy. Despite being in Geneva at the same time, they only met in America; they became friends, albeit never close. Morgenthau was instrumental in having Herz's first English book published, resubmitting it to Chicago University Press in 1950 after an initial rejection.[21] For his part, Herz admired Morgenthau's intellect and respected him as the leading American post-war realist, not least for insisting on the ethical dimension of political life and for his critique of American foreign policy during the Vietnam era. On the other hand, Herz was critical of several aspects of Morgenthau's realism, including its basis in stifling assumptions about human nature[22] and of the vagueness that surrounded the core concept of the national interest. The latter made Morgenthau prone to misinterpretation, but it was the former that, according to Herz, locked his fellow realist into a tragic stalemate. Morgenthau was resigned to the

[21] Herz Papers, Box 40, Folder: 'Correspondence 1948–52'.

[22] See, for example, Herz (1951: 3, 63–64, 233) and Herz (1984a: 159, 161). This view was shared by Waltz (1959: Ch. 2), and runs parallel to a contemporary argument that Morgenthau took the sting out of his realism by basing it on rigid philosophical assumptions (Scheuerman, 2009b).

necessity and impossibility of world government in *Politics Among Nations*, and his lack of a truly global vision (extending beyond the challenge of nuclear weapons) and the theoretical means of conceiving it were connected to this posture. At a symposium entitled 'Revisiting Realism' in the early 1980s, Morgenthau wryly remarked 'why revisit; I never left it'. To Herz, the sentiment behind this statement said much about Morgenthau's conviction but also about the limitations of his realism.[23]

During the 1920s and 1930s, Morgenthau had also been deeply enmeshed in the German study of law and politics, taking a particular interest in the work of Hugo Sinzheimer, Lauterpacht, and Kelsen. Inspired by Kelsen, Morgenthau viewed international law as a system of legal norms, albeit primitive and decentralized. But the strength and efficiency of this body of law was based, according to Morgenthau, on the operation of the balance of power (Morgenthau, 1940). This was a more downbeat view of the prospects of international law than that of the leading legal scholars, and it remained central to his realist vision of international politics. For example, Morgenthau reacted to the notion, advanced above all by Lauterpacht, that justiciability was virtually unlimited in international relations. Although international law was important and often observed, legal dispute settlement mechanisms ignored political tensions among states. For Morgenthau, the importance of the balance of power and the distinct nature of the political invariably placed severe limits on the role of law in international politics.

For both Morgenthau and Herz, the turn away from international law signified an intellectual shattering of illusions that mirrored Europe's protracted and predestined descent into war. Though the sphere of international politics had revealed itself inhospitable to the rationalist underpinnings of traditional liberalism, neither lost sight of liberal values like progress, order, and liberty. Their strategies and visions differed, however. Morgenthau clearly had liberal-left sympathies during the interwar years and his realism did intermittently move in universalist directions during the Cold War – partly, perhaps, inspired by Herz (Scheuerman, 2009a: 138). Yet his realism was more ingrained and more resistant to both change and the pursuit of liberal ideals than that of Herz. The latter continued to emphasize that the security dilemma was a *social* condition, which could be manipulated, mitigated, and (possibly) transcended. This understanding of international politics was strengthened

[23] On Herz's assessment of Morgenthau, see Herz (1984b, 1981) and his address entitled 'Hans Morgenthau's Classical Realism in an Age of Endangered Human Survival', delivered at a symposium on realism in Munich, November 1989 (Herz Papers, Box 17, Folder: 'Text of and Material on Munich Lecture').

by Herz's ground-breaking analysis of the atomic age and its consequences for statehood, which in turn led him to focus on a number of related global threats such as resource depletion, the population explosion, and ecological deprivation (Herz, 1959). He anticipated the charge that this call for 'universalism' amounted to a betrayal of realism by arguing (somewhat implausibly perhaps) that 'the jolt that drove me out of my European environment healed me forever of utopianism' (Herz, 1976: 52). Yet Herz's realism became *global* in orientation; it relentlessly stressed the threat to human survival presented by an interdependent, hyper-technological, nuclear-armed, poverty-ridden, and wasteful world. The condition of globality (Herz, 1959: 319) was only made more dangerous by existing state-wedded concepts and ideologies. For Herz, then, examining realism in light of a rapidly changing world became a central preoccupation.

The sources of these differences, I would suggest, are to be found in Herz and Morgenthau's early theoretical and political orientations and the lessons they took from the failure of liberal-democratic experiments during the interwar years. A residue of their pre-war political and intellectual convictions followed them across the Atlantic. Of fundamental importance in this respect was Herz's early admiration for Kelsen and his close association with the scientific and political project of the Vienna School. Although Jütersonke (2008: 109) has suggested that Morgenthau's formulations on the necessity and unattainability of a world state were informed by this 'cosmopolitan project', such a reading perhaps underestimates the severity of Morgenthau's critique of liberal projects of international law throughout the 1930s and 1940s as well as the extent to which he bought into counter-enlightenment thought (Scheuerman, 2009b: 45–49). What Morgenthau admired in Kelsen (after all, he dedicated a volume of his essays to Kelsen) was the scientific analysis of law. He was less wedded to the liberal political project associated with the pure theory of law, and he certainly turned more decisively away from it in his immediate post-war writings than Herz. Only after the nuclear revolution did Morgenthau turn to more universalist aspirations that sat uneasily with his rather nation-bound realism. And yet, he found *some* solace in a tragic realism tied to national communities, which in turn reduced a liberal project to a few fundamental values and the protection offered by a realist foreign policy conducted by the wise statesman. Morgenthau (1978: 71) was sceptical about Herz's project precisely because he doubted whether 'it is really enough to accept both the universality of power as an empirical fact and the concern for the individual and its free development as an ideal postulate'. For Herz, realism had clearly become indispensable, but the questions were too pressing and his

orientation too liberal for him ever to feel comfortable with the element of resignation that most realisms involve. Indeed, realism could be nothing but 'Realist Liberalism' (Herz, 1951).

Crucially, in formulating what realist liberalism implied in an age of globality, Herz accorded international law a role that, though it avoided the high-minded aspirations of the pure theory of law, was not merely 'residual' (Koskenniemi 2001: 472). A precondition for this revised conception of international law was a strong interest in the actual development and continued challenges of international law. Herz strongly resisted the erosion of fundamental principles of international law and took part in campaigns for reforming the United Nations and upholding human rights.[24] His post-war view of international law clearly proceeded from the double understanding that law reflects rather than regulates (power) politics and that experience rather than logic determines law. Yet it also modified this sociological approach in several ways.[25]

First and most importantly, from the late 1950s, Herz continuously stressed how a deeply necessary change in the direction of stronger and more comprehensive rule-making to manage global survival problems was preconditioned on a 'change in perceptions'. International law was based on power, but the interests of (powerful) actors could change with perceptions. Indeed, Herz's universalism was based on a 'solid, cool-headed realism' that acknowledged how in a context of globality the distinction between national interest and internationalist ideals was, strictly speaking, invalid. They could be seen to merge in a common interest in survival, but this required changing perceptions and developing 'a "planetary mind"' (Herz, 1959: 310, 317). So while Herz often argued that law was deeply necessary, without a change in beliefs and attitudes, international law would continue to be stymied in a world of sovereign states. Fittingly, in one of the last sentences he wrote, Herz emphasized

[24] Herz's papers include a huge amount of newspaper clippings and other material on the development of international law. His support for fundamental principles of international law is evidenced, for example, in letters to the *New York Times*, 24 November 1983 and 18 May 1984. Moreover, Herz was involved in *The Commission to Study the Organization of Peace* from 1960 to the mid-1970s. Having signed every report of the commission during the 1960s, he complained in 1973 that he had, 'frankly, become a bit discouraged by the timidity of the Commission in regard to any somewhat bolder, "internationalist", approach'. Herz to Richard N. Swift, 26 April 1973 (Herz Papers, Box 5, Folder: 'CSOP Project'). During the late 1970s and early 1980s, Herz was solicited by Amnesty International to write a series of letters to heads of state, including Tito, Saddam Hussein, and Erich Honecker, regarding the disappearance or arrest of high-ranking officials (Herz Papers, Box 10, Folder: 'Amnesty International, 1977–80').

[25] There are other sociological approaches to international law than the one associated with realism. For an overview, see Carty (2008).

how '[a] radical turn in attitudes and policies is required'.[26] Second, Herz's mature approach to international law was formulated within a larger vision of realist liberalism that shared important traits with legal pragmatism, an approach that combines 'idealistic ends with realistic means' and understands law as 'a context-related creative act of problem-solving' directed towards urgent problems (Schieder, 2009: 139, 125). There were important overlaps between Herz and the New Haven School associated with Harold Lasswell and Myres McDougal. Both stressed effectiveness as central to law, both viewed law in a larger social and political context, both stressed a global perspective, and both advocated an action-oriented theory that did not exclude a relation to values and normative principles.

Finally, Herz appreciated the role of institutions in world politics. The functioning of international law in the modern period was based on the 'deep' institution of territoriality. Globality challenged the territorial principle and gave rise to a difficult transitional period for international law. As the global crises of population, ecological deprivation, and nuclear weapons deepened, Herz came to stress the need for 'vastly increased international cooperation, overall global planning, and the development of new procedures of institutional rule-making in place of leisurely diplomacy and old-fashioned, complex, and slow treaty-making' (Carter and Herz, 1973: 258). Despite acknowledging the sporadic support of states and the problems of democracy and legitimacy involved in this transformation, Herz placed much emphasis on the role of institutions and organizations. Like Morgenthau, he accepted the integrative logic in David Mitrany's functionalist theory of international politics, although he was adamant that functionalism did not render power politics obsolete. The mainspring of functionalism was janus-faced: interdependence fostered international cooperation but also attempts to reassert national power (Herz, 1959: 327–328; Scheuerman 2009a: 129–134). Europe was obviously an important and successful example of the functionalist logic, but the rapid development of UN institutions and agencies directed at solving technical and economic activities should not be underestimated.

The result was a bottom-up view of international law that emphasized gradual development based on the existing infrastructure of international politics. This was a sort of 'realist liberal institutionalism' that while stressing the ever-present importance of power in determining law also

[26] Herz (2003: 416). Herz developed the theoretical basis of this emphasis on perception in 'World-views and awareness – prolegomena to a science of international relations', unpublished paper, undated (1978; Herz Papers, Box 14, material outside folder). A German version was later published (Herz, 1980).

reserved a role for other factors, including mutual understanding achieved through technical cooperation and the pure pressure of globality and interdependence. While the latter made it inevitable to gradually cede jurisdiction to supranational agencies dealing with global problems and made a change in beliefs ever more acute, the former could potentially lead to substantial cooperation in more contentious areas. Working from the ground up in a politically divided world meant respecting the vital role of diplomacy, despite its timidity. Embedding diplomacy in institutions could lead to improved stability through better communication, understanding, and mediation. It could also foster the development of procedures for applying and specifying rules. Thus, Herz had a deep appreciation for the role of rules, institutions, and organizations in fostering cooperation in world politics (Herz, 1959: 291–294, 320, 342; Herz, 1964: 117; Herz, 1982: 174–175, 190n.). Although law needed power for its existence, as Herz had argued in the late 1930s, power did not completely determine law. In particular, the attempt to develop a global realism – shifting realism's concern with survival from a sole concern with the political authority of the state to the planet and humanity – forced Herz to rethink (again) the development and role of international law in managing emerging global problems.

This vision, I submit, is still relevant and although it hardly constitutes a ready-to-use theory of international law, it clearly speaks to the ongoing attempt to understand and explain the nexus between law and politics in the international realm. In IR theory as well as in the more specialized study of rules and institutions, there are now calls for 'eclectic theorizing' (Katzenstein and Sil, 2008) and 'a richer institutionalism' (Abbott, 2005). Greater integration between IL and IR scholarship is warranted due to the importance, reach, irregularity, and complexity of modern international law. While the quest for interdisciplinarity has so far been dominated by liberal rationalist and constructivist approaches, the realist position developed here complements and goes beyond these approaches in its ability to analyse the functions, limits, and potential of law in an interdependent yet politically divided world.

Rationalists, predominantly neoliberal institutionalists, have considerably improved our understanding of why states cooperate, why rules vary in terms of precision, obligation, and delegation, and how different institutions are rationally (to be) designed. Yet this approach has also been faulted for its conservative implications, its state-centrism, its impoverished conception of politics, and its exclusion of normativity (e.g. Reus-Smit, 2001, 2004). Not all neoliberal institutionalists are equally vulnerable to this criticism, however. Paying attention to power differential dynamics, non-state actors, the role of uncertainty and perception, and the

potential for learning, some contributions to the study of legalization have pointed to 'the subtle strength of soft law over time' as well as to the usefulness and challenges associated with this type of law (Abbott and Snidal, 2000: 447; Goldstein and Martin, 2000). Similarly, a recent attempt to deploy rational choice theory to explain why states choose (instrumentally) to comply with international law despite the absence of institutionalized coercion emphasizes the role of reputation in repeated interaction between states.[27] Although the rationalist approach, committed to simplification and generalization, effectively specifies the logic of arguments about the role of law in international politics, one can still question whether its concept of politics and its underlying philosophy of science enable a full appreciation of sociological and power-political dynamics. Yet it is clear that there are overlaps with classical realist concerns and a potential for mutual enrichment of these theoretical perspectives.

Constructivists provide powerful explanations of the central role of identities and perceptions in interest formation and their impact on the quality of the environment in which world politics takes place. Such analyses have pointed to the ways in which ideas and law constrain politics (e.g. Finnemore, 2006). Constructivism has, however, been criticized for leaving unspecified its conception of politics and for failing to make clear what is distinctive about legal dynamics. As Michael Byers has remarked, 'when dealing with international law, the constructivist ambit requires broadening, deepening, and a degree of disillusioning' (Reus-Smit, 2004: 23–24; Byers, 2008: 624). Given this predicament, a normative, global realism that never loses sight of the security dilemma has much to contribute. The proto-constructivist dimensions of realist thought make it both feasible and fruitful to extend the ongoing rapprochement of realism and constructivism to the study of international law (Sylvest, 2008; Barkin, 2010).

In sum, the realist tradition harbours insights that are clearly relevant for the attempt to rejoin IR and IL scholarship. A reformulated realism that avoids state-centrism, appreciates functionalist dynamics, and shares traits with legal pragmatism's approach to law can offer a deep understanding of the demand for reliable international rules in particular issue-areas and of the political interests and conflicts involved in the production, implementation, and enforcement of these rules. Going well beyond the strategic interaction of states, the realist conception of politics is not only

[27] See Guzman (2008) and the recent symposium on Guzman's book in this journal (Brewster, 2009; Guzman, 2009a, b; Kydd 2009; Thompson 2009).

centrally concerned with power relations but also deeply sensitive to the normative aspects of international politics. Finally, with its traditional emphasis on the importance of reflexivity, responsibility, and prudence in political action, realism is well equipped to analyse the role of various forms of international law in achieving mutual understanding and building legitimacy while leaving room for politics and diplomacy.

The call for a re-engagement with international law presents a grave challenge for contemporary realists who are reluctant to seriously discuss a qualitative transformation of international politics, not to mention major international reform. This position is both morally complacent and institutionally conservative, and it bears little resemblance to the vision of classical realists (Scheuerman, 2009a: 6). While most modern-day realists pay scant attention to law, Goldsmith and Posner (2005) have recently provided a realist critique of international law. Their argument is based on the rationalist assumptions that states are unitary actors and that state interests can be identified independently of the context in which they are formulated. From this perspective, 'international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of others states and the distribution of power' (Goldsmith and Posner, 2005: 3). The ideological force of this argument is that international law is denied any independent influence on states, which in turn plays into a revisionist movement in the United States that defends a monism of state law where international obligations are voluntary.[28] Goldsmith and Posner are right to stress the role of state interest and power. But because they posit a stark dichotomy between international law as a check on state interest and international law as a product of state power and interests, the conclusion is foregone: since it is not always the former, it must be exclusively the latter.

But realism need not issue in legal nihilism. Instead of returning us to the debates of 70 years ago, realism should engage the real processes of legalization and fragmentation that have taken place in the meantime. The realist liberal institutionalism of Herz, I have argued, provides a valuable starting point. Consistently seeking to venture beyond defeatism and to overcome stultifying intellectual dichotomies, Herz stressed that confronting the problems of a nuclear-armed, overpopulated, poverty-ridden, and ecologically unbalanced world would necessarily involve legal and institutional reform. Forever flavoured by the political context of interwar Germany and the liberal, universalist project associated with

[28] See also Posner (2009). For critiques, see Berman (2006) and Hathaway and Lavinbuk (2006).

the pure theory of law, his mature and original realism was more modest, yet in some ways also more far-reaching. It left room for appreciating important empirical developments in the relationship between international law and international politics, including legalization and globalization, while keeping in mind the complexity and difficulties of such processes in a world in which substantial political conflict among states prevents easy solutions to what are incontrovertibly global problems. From a virtually law-blind perspective, contemporary (neo)realism has, alas, little to contribute to such debates. Indeed, it appears as little more than the pure theory of law stood on its head. The challenge for realists is then to rediscover and develop an understanding of global politics, in which power and law, their interplay and respective limitations, find a place. Although it might discomfort purists who fear the transgression of conventional theoretical borders, this rethinking is important for understanding the world in which we live and for the continued relevance of a realism connected to reality.

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