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Kelsen Lives

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Does it make sense, any longer, to study international law as a system of law? In both theory and practice, the impression of fragmentation and feebleness is eclipsing the traditional faith in the unity and efficacy cosmopolitan benevolence. Repeatedly, state-interest has trumped the discipline of norms; international regimes do not form one coherent system, and behind their multiplicity seems to lurk disarray. This paper proposes to meet these arguments, by reintroducing to the discipline a set of ideas about the foundations of, and the properly modest aspirations in the analysis of, international law that are associated with Hans Kelsen. To the argument that the system of public international law (as envisaged by Kelsen) is now untenable, the paper replies that phenomena such as hegemony and persistent decentralisation are quite compatible with a system of public international law. To the argument that ideas associated with classical Kelsenian legal positivism have been eclipsed by more sophisticated sociological theorising, it will be replied that Kelsen's insistence on the non-idealization of law remains a compelling answer. It will be shown that, contrary to their haughty pretensions, current sociological approaches are prey to their own unwarranted idealisation. One example is social systems theory, which seeks to expose the unity of the international system as a myth, and to convince us that enduring fragmentation is all there is. Another example is theories premised on rational choice atomism, such as the recent work of James Goldsmith and Eric Posner, which would have us believe that international law is merely the combined factual consequence of self-interested state conduct. But this sociology depends on a series of idealizations – it is a form of ideology. Insofar as this kind of sociology provides the misguided basis for arguments that public international law is in crisis, legal positivism – methodo Vindobonense – *is the essential antidote.*

Alexander Somek

I. Sobriety

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

There can be no doubt that Kelsen made one of the most notable stabs at that. Only the most sparing use of idealisations is made by him in explaining what it takes to know what the law is. Indeed, Kelsen strives to reduce idealisations to the level at which any further reduction would abandon the theory's subject altogether. He was not wrong, hence, in lik-

1. As a scholar working in the field of public international law, Kelsen and his disciples, such as Josef Kunz, have not been forgotten. See Jochen von Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (Nomos Verlag, 2001). For a review of this book, see András Jakab, 'Kelsens Völkerrechtslehre zwischen Erkenntnistheorie und Politik' (2004) 64 *Heidelberg Journal of International Law* 1045-1057. This is not the place to recognise the contribution that was made by Josef Kunz to the development of a positivist theory of public international law, nevertheless, I would like to mention that he made a foray into the discipline long before he had to move to the United States. See Josef Kunz, *Völkerrechtswissenschaft und Reine Rechtslehre* (Leipzig: Franz Deuticke, 1923) .

2. I have recently demonstrated, once more, that I am not a legal positivist, however, I did so in the mother tongue of this persuasion. See Nikolaus Forgó & Alexander Somek, 'Nachpositivistisches Rechtsdenken' In S. Buckel et al (ed.), *Neue Theorien des Rechts* (Junius Verlag, 2006) 263-290.

3. I hasten to add that there are a few holdouts. See, for example, Pierre Schlag, 'Hiding the Ball' (1996) 71 *New York University Law Review* 1681-1718.

ening his project, at a certain point, to transcendental philosophy[4] for it can be characterised, indeed, as an inquiry into the idealisations that are *necessary* for there to be *meaningful* legal claims.[5]

This may sound philosophical, but the matter is straightforward. It is straightforward precisely because it is philosophical. Through the lens of *idealisations* realities are presented as though they were the expression of norms or, alternatively, ideals.[6] The idealisation most prevalent among le-

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4. See, for example, his characterisation of the basic norm (*Grundnorm)* qua transcendental-logical hypothesis (*transzendentallogische Annahme)* in Hans Kelsen, *Reine Rechtslehre* (2d ed. Vienna: Deuticke, 1960) at 204. On Kelsen's neo-Kantian period during which the transcendental path is followed most explicitly, see Stanley L. Paulson, 'Introduction' In Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. B. L. & S. L. Paulson (Oxford: Oxford University Press, 1992) xvii-xlii, at xxix-xlii. It was recently pointed out by Paulson that Kelsen's rejection of the traditional notion of sovereignty needs to be understood in light of his rejection of naturalism. See Stanley L. Paulson, 'Souveränität und der rechtliche Monismus. Eine kritische Skizze einiger Aspekte der frühen Lehre Hans Kelsens' In S. Hammer et al. (eds.), *Demokratie und sozialer Rechtsstaat in Europa* (Vienna: WUV Universitätsverlag, 2004) 21-40 at 26. – On the current state of the transcendental project in general, see Mark Sacks, *Objectivity and Insight* (Oxford UP, 2000); Jürgen Habermas, *Wahrheit und Rechtfertigung. Philosophische Aufsätze* (Suhrkamp, 1999).

5. It is a different matter, however, how successful Kelsen was in the pursuit of this project. For a critical assessment, see Stanley L. Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 *Oxford Journal of Legal Studies* 311-332; 'Kelsens Normativismus' forthcoming in: (2006) *Juristenzeitung*. I should add, in passing, that I vindicate an understanding of "transcendental" that attends to the conditions of meaning. It is broader than the "*sinnkritische*" version of transcendental argumentation that has been discussed in German philosophical circles. See Gerhard Schönrich, *Kategorien und transzendentale Argumentation. Kant und die Idee einer transzendentalen Semiotik* (Frankfurt/Main: Suhrkamp, 1981) 189.

6. It should go without saying that my use of "idealisation" is both close to, but also broader than, the use that has been made of this term in psychoanalysis. According to Laplanche and Pontialis, "idealisation" is a psychological occurrence as a result of which something attains the quality of perfection. See J. Laplanche & J.-B. Pontialis, *Das Vokabular der Psychoanalyse* (Suhrkamp, 1972) 218. See, originally, Sigmund Freud, Massenpsychologie und Ich-Analyse (1921) In *Studienausgabe* (ed. A. Mitscherlich et al., Fischer Verlag, 1982) vol. 9, 61-133 at 105. In the text above, by "expression" I mean compliance as well as constitution.

gal scholars has it that the law, in and of itself or *in toto*, is a good thing. By many, if not most, the existence of the legal system is taken to be a manifestation of valuable ideas (the rule of law, efficiency etc.). This is exactly the type of idealisation that Kelsen wanted to avoid. He did not believe a proposition to formulate a universal truth that states that the law is a good thing. Science—legal science no less than any other science—should stay away from raising indefensible claims. It should not lend its voice, in particular, to the expression of person-relative political views or moral sentiments, for this would overdetermine law, as a social phenomenon, with avoidable attributions of meaning.[7] According to Kelsen, all idealisations are indefensible which are unnecessary in explaining what it takes to know what the law is. Unnecessary and indefensible idealisations are co-extensive. Owing to their interference the law is rendered obscure.

The significance of Kelsen's critical stance can scarcely be overrated. It explains in which respect Kelsen's version of legal positivism is clearly different from what has come to be known under this name in the Anglo-American world.[8] According to such positivism, the law is constituted by

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7. The social experience with which the transcendental project begins is the fact that in a society persons are rasing legal claims with the purport that such claims are objectively valid. See Kelsen, *Introduction*, note 4 at 9-10. Any legal theory that takes the meaning of such claims seriously needs to explore the conditions for the validity of such claims. The claim itself is not taken seriously by theories that merely study the conventions ("modalities") that are in use for the raising of legal claims. They bracket the claim to validity that is made by such claims. See Philip Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell, 1991) 12-13; Dennis Patterson, *Law and Truth* (New York: Oxford University Press, 1996) 70.

8. For a very brief sketch, see Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 116-117. A useful introduction is offered by Jules Coleman & Brian Leiter, 'Legal Positivism' In D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996) 241-259.

conventions. Nowhere is it put into question that such conventions might themselves create a wrong picture of what they are about.[9] It is never put into question, that is, whether the conventions themselves correctly appeal implicitly to what accounts for their authoritativeness (for example, the binding force of a "precedent"). By contrast, Kelsen's positivism pays attention to the self-referential constitution of what is said to be know as "law" in society. Some social acts, in contrast to natural occurrences, may come with a self-interpretation attached.[10] When someone says "I herewith declare x's property forfeit" a self-referential statement is made as to the social consequence of this verbal act. Whether or not the consequence *actually* follows depends on the validity of the act. The validity hinges, in turn, on whether the act *is* indeed what it claims to be, that is, a legal declaration of forfeiture.

II. Reductionism comes naturally

Kelsen's attention to the potential incongruence between the "subjective" self-interpretation of the act and its objective validity make is possible to tie his project to dialectics.[11] I should grant, though, that this has never been done before (in particular, Kelsen himself would have most definitely abhorred the idea). But I think it is possible to work with Kelsen's theory by assuming that any legal theory needs to take seriously an ideal

9. The critical spirit of positivism is, paradoxically, more adequately reflected in the work of Oliver Wendell Holmes than in the writings of present-day legal positivists. Holmes went at quite some length to expose the corrupting influence of morality on the conventions governing the law of torts. See his 'The Path of the Law' reprinted in (1997) 110 *Harvard Law Review* 991-1009 (first published in 1897).

10. See Kelsen, *Introduction*, note 4 at 9-10; more generally, see J.L. Austin, *How to Do Things with Words* (2d ed., Harvard University Press, 1975) 103-104.

11. On the point of the dialectical project, see Robert B. Pippin, *Modernism as a Philosophical Problem. On the Dissatisfactions of European High Culture* (2d ed., Oxford: Blackwell, 1999) 75-76.

aspiration that is build into the social practice of knowing the law, that is, the aspiration to rest upon an adequate account of what it takes to be knowing the law.[12] Kelsen applies to the accounts that he encountered in the legal theory of his time a test that examines idealisations. Kelsen's respective critical stance—which *can* be understood as the actualisation of practical self-critique—provides the key to his *reductionist* program. In the process of weeding out unnecessary (viz., corrupting) idealisations, the law is working itself pure.[13] Arguably, this process is a trivial consequence of raising a *legal*—as opposed to any other—claim.[14]

A simple example may help to illustrate this point. The claim that all sex offenders, after they have served their term, ought to be expelled from the country is indeterminate as to what is actually claimed by it. Is it an expression of moral indignation that appeals to drastic measure in order to underscore how contemptible sex offences are? Does it propose future legal policy? Is it a suggestion of a measure that is considered most apt for the protection of one's children? Or is it, finally, a claim about what the law requires? Any attempt at clarifying the meaning of such a statement will have to determine in which respect assumptions about instrumental accuracy of measures, the blameworthiness of conduct or feelings of

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

13. I do not see any point, hence, in coming up with some psychoanalytical account of Kelsen's apparent obsession with "purity". The latter is the consequence of determining what a legal claim is (in fact, its self-determination). But see Anthony Carty, 'Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt' (1995) 16 *Cardozo Law Review* 1235-1292.

14. The process can be linked, then, historically to the differentiation of the legal system. See Niklas Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt/Main: Suhrkamp, 1981) 122.

moral indignation may legitimately enter a determination of what the law is. If one is convinced, as Kelsen undoubtedly was, that *much* needs to be eliminated from the determination of legal claims, an account will for that reason have to be *reductionist*. Reductionism, for Kelsen, is a mere consequence of the drive to insulate legal analysis from the influence of misleading considerations. It does not stem, in the spirit of Adolf Loos, from the debunking of ornamentation. Kelsen's reductionism reflects his suspicion that legal claims are overdetermined and confused through the interference of false idealisations. Owing to their presence the law is rendered obscure. Purifying legal science, hence, is an eminently practical matter. It means combating, on the legal field, those who want to impress their ideological agenda upon the law.[15]

III. Sociology is ideology

Kelsen was strictly opposed to both natural law theory and sociological modes of legal reasoning because of his deep-seated distrust of substantive moral theory.[16] It may appear puzzling, at first glance, why and how his moral scepticism should affect sociological theory. Isn't such theory supposedly about facts and hence exclusively concerned with the accu-

15. From a dialectical point of view, Kelsen's project, its radical reductionism notwithstanding, partakes of a teleology that is build into the very practice of raising legal claims, namely, the drive to eliminate from law whatever cannot be universally justified as law.

16. By "substantive moral theory" I mean a theory that wishes to accomplish more than mere meta-ethics and to provide guidance for moral problem-solving. Kelsen's distrust in a sociological theory did not change after he made the encounter with American legal realism, however, the ground for distrust changed. Kelsen thought that what "goes under the name of sociological jurisprudence is hardly more than methodological postulates". Hans Kelsen, *General Theory of Law and State* (trans. Anders Wedberg, 2d ed., New York: Russell & Russell, 1961) 174.

racy of its statements as regards such facts? Why should moral beliefs have any bearing on that?

It is precisely because a sociological theory, in particular the sociological theory of the state, implicitly claims to be based on facts alone that Kelsen takes on the challenge to proof, dialectically indeed, that its claim is unfounded.[17] He goes at great lengths to demonstrate that sociological legal theory—at any rate, the theory of his time—posits reality where what is claimed to exist is in fact a shadowy projection of idealisations. His major target is the sociological concept of the state.[18] According to his analysis, what is purported to be real is merely a hypostatisation of normative claims. The state is thought to *be* an entity that is more powerful and more eminent than individuals; but this is merely the mirage of the moral belief in the greater authority of the powers that be. The state is thought to *be* something prior to the legal system; but this belief is the displaced articulation of the desire to be protected by, and to be able to identify with, a collective that could, at any given time, defy legal constraints. Indeed, Kelsen's critique of the concept of the state is the attempt to uncover that sociological theory is not sociological at all.

This is not to say that Kelsen believes that a theory of law can dispense with all idealisations. Kelsen resorts to idealisations, indeed, to describe the legal system, for example, the idea that there is conduct that actually conforms with, or is constituted by, legal norms. This, however, is about the only idealisation that is admitted to the game.

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17. See Hans Kelsen, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht* (2d ed., Tübingen: J.C.B. Mohr, 1928) 8-11.

18. See Alexander Somek, 'Stateless law: Kelsen's conception and its limits' (2006) *Oxford Journal of Legal Studies* (forthcoming).

Such a reductionism has an epistemological point. Much *less* can be known about law than is usually assumed by legal idealists. Kelsen's epistemological point has an ontological message.[19] The law is much more meagre and much less morally elevating than it may appear in the eyes of the adoring observer. The law is, essentially, the social technique for the imposition of sanctions at will.[20] In a sense, a legal system is a medium for the organisation of power. Law is about the limits that are drawn to one will by another. This ontological message has a political consequence. More can be done with the legal system than most of us would most likely morally approve of. Consequently, we should lower our normative expectation as to what it takes for a legal system to exist. We study law not to find out what we must admire but to realise what we may have reason to fear.

IV. The current

In what follows, I would like to reclaim Kelsenian sobriety for the study of public international law. I would like to highlight, in particular, that Kelsen's theory allows us to perceive a well-working legal system where others would already observe a lack of organisation or even nothing at all. In the final sections of this essay I would like to challenge two currently fashionable ways of thinking about public international law that seem to expose international legality as a myth. What I have in mind, in particular, are approaches that promise, each in their own way, to infuse more "realism" into the study of international law.[21] Such increased "realism" is

19. On the relation between epistemology and ontology in legal thought, see Schlag, note 3.

20. See Kelsen's reconstructed concept of the legal norm in *Introduction*, note 4 at 26-27.

21. I know that I am entering a linguistic minefield when talking loosely, in the text above, about "realism". I am aware, however, that the term stands for a very distinct ap-

based—at any rate outside the United States—on different and, indeed, opposing, sociological persuasions, one assuming that international society is composed of rationally behaving individual actors,[22] be they local constituencies or states, and another one believing that world society is articulated in different social systems that are essentially the product of self-referential communications.[23]

The first variant of taking the social realities into account has dominated international relations theory in the United States for most of the

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proach in international relations theory that—despite resting on a conception of rational action that is shared by other approaches as well—has its distinct perspective on the role and influence of state power in international relations. For a useful characterisation, see Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935-2042, at 1944-1945. For an illuminating discussion, see also Robert O. Keohane, 'Rational Choice Theory and International Law: Insights and Limitations' (2002) 31 *Journal of Legal Studies* 307-318. Hans Morgenthau, the intellectual founding father of what was to be called "realism" in international relations theory, had been a critic of Kelsen's theory since the days when he had published his first works in German. See Hans Morgenthau, *Der Kampf der deutschen Staatslehre um die Wirklichkeit des Staates* (Inaugural Lecture at the University of Geneva, 1932, manuscript HJM-B110, Library of Congress). On the significance of this work for the development of Morgenthau's thought, see Christoph Frei, *Hans J. Morgenthau. An Intellectual Biography* (Baton Rouge: Lousiana State University Press, 2001) at 117; Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002) 455-459; On his relation to the thought of Carl Schmitt, see id. at 459-465 and William E. Scheuerman, *Carl Schmitt. The End of Law* (Lanham: Rowman and Littlefield, 1999) at 245-251. For Morgenthau's later engagement of Kelsen, see Hans Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 *American Journal of Public International Law* 260-284; *Law and Politics in the World Community: Essay's on Hans Kelsen's Pure Theory and Related Problems in International Law*, ed. G. A. Lipsky (Berkeley: University of California Press, 1953). For a useful discussion of the inconsistencies of "realism", see Charles R. Beitz, *Political Theory and International Relations* (2d. ed., Princeton UP, 1999) 23-27.

22. For a brief overview, see Stephen D. Krasner, 'International Law and International Relations: Together, Apart, Together' (2000) 1 *Chicago Journal of International Law* 93-99.

23. On this basic tenet of social system's theory, see Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt/Main: Suhrkamp, 1997) 14.

second half of the twentieth century.[24] Increasingly, it is also spilling over into the domain of public international law.[25] From the angle of the idealisations that are made about the conduct of the relevant agents, it makes sense to bundle the dominant strands of international relations and public international law theory in the United States[26] under the name of "rationalism" if by "rationalism" is understood the belief that the shape of international society can be explained by looking at an alleged composite unit that uses scare resources or engages in co-operation in order to attain its own ends.[27] According to Elster, rational action requires that an agent choose the action that best satisfies the agents desires provided that the desires themselves are internally consistent and "optimally related" to the pertinent evidence.[28] From a philosophical perspective, however, it may be even more accurate to speak of *atomism* for in all of its forms rationalism rests on the conviction that the existence of a social fabric between and among states is to be explained by looking at the interest and actions of original units.[29] Such units are taken as a given.[30] It is this basic atomist

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24. For an overview, see R. Beck et al (eds.), *International Law Rules. Approaches from International Law and International Relations* (Oxford: Oxford University Press, 1996).

25. This spillover is associated, mostly, with the work of Anne-Marie Slaughter. See, in particular, her 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205-239.

26. The explanation for the currency of this type of theorising may lie in the Protestant heritage of this nation. See Max Weber, *Gesammelte Aufsätze zur Religionssoziologie* (Tübingen, J.C.B. Mohr, 1920) vol. 1 at 32-37.

27. See Oona A. Hathaway & Ariel N. Lavinbuk, 'Rationalism and Revisionism' (A review of Goldstein and Posner, *The Limits of International Law*) (2006) 119 *Harvard Law Review* 1404-1443, at 1410, 1421.

28. See Jon Elster, *Solomonic Judgements. Studies in the Limitations of Rationality* (Cambridge: Cambridge University Press, 1989) 3-4; *Nuts and Bolts for the Social Sciences* (Cambridge: Cambridge University Press, 1989) 30-32.

29. See Charles Taylor, 'Atomism' In his *Philosophy and the Human Sciences* (= Philosophical Papers, vol. 2, Cambridge: Cambridge University Press, 1985) 187-210; the term is borrowed from Hegel. See G. W. F. Hegel, Grundlinien der Philosophie des Rechts, *Werke*

creed in the existence of agents prior to society that sets it apart from "constructivism", according to which the interests and the identity of international agents is actually shaped by international institutions and modes of interaction.[31]

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in zwanzig Bänden, ed. E. Moldenhauer & K. Michel (Suhrkamp 1969-71) vol. 7 § 155 Zusatz, p. 305.

30. As is well known, international law atomism comes in different forms. The classical form is called "realism". It sees the world of international relations composed of states that use scarce resources in seeking their own advantage. The most essential ingredient of "realism" is the belief that international relations are a zero sum game, with each country seeking its gain at the expense of others. For a discussion of realism, see Jeffrey W. Legro & Andrew Moravcsik, 'Is Anybody Still a Realist?' (1999) 24 *International Security* 5-55, at 6-9, 16-18. Institutionalism, by contrast, even though sharing the same ontological commitment, believes that the major problem that is to be solved through international co-operation consist in creating common gains. Hence, international co-operation is conceived of as a positive sum game. See Legro & Moravscik, id at 10; Hathaway & Lavinbuk, note 27 at 1430-1431. The most prominent work reflecting this perspective is Robert Keohane's *After Hegemony, Co-operation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984). Liberalism fits into the picture of atomism, too, however, with the atoms changing from states to local constituencies that exert influence on their governments. See Andrew Moravscik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *International Organization* 513-553.

31. On "constructivism", see David Bederman, 'Constructivism, Positivism, and Empiricism in International Law' (2001) 89 *Georgetown Law Journal* 469-497, at 477; Philip A. Karber, '"Constructivism" as a Method of International Law' (2000) 94 *Proceedings of the American Society of International Law* 189-192; Jutta Brunée & Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19-73; Hathaway & Lavinbuk, note 27 at 1411, 1439-40 (with further references). I am taking the liberty to bemoan, briefly, the fact that modern international law and international relations theory uses terminology that does not reflect the philosophical schools of thought with which certain ideas could be associated. For example, the point of "constructivism" would be better captured by calling it pragmatism or even symbolic interactionism. See, for that matter, merely George Herbert Mead, *Mind, Self & Society from the Standpoint of a Social Behaviourist* (Chicago: University of Chicago Press, 1934); Herbert Blumer, *Symbolic Interactionism. Perspective and Method* (Berkeley: University of California Press, 1969).

By contrast, social system's theory—not too dissimilar to constructivism—sees organizations, such as states and businesses, merely as instantiations of social systems that can be identified by their mode of communication and function.[32] Individual units, if there are assumed to be any, are always seen as being constituted in the context of networks of communication. The claim of this type of theory is, in a legal context, that traditional beliefs in the regulatory import of norms and the governing effect of a legal hierarchy have no reality.[33] They are bound to collapse in practice.[34] As regards public international law, it is the very belief in the existence of a (unified) system of public international law that is put into question.[35]

The two modes of realistic infusion cannot be further apart. Whereas in the first case collective agents are depicted as though they were just large-scale individuals pursing their ends, in the case of the latter agency and action matter only inasmuch as they are attributed instances of self-referential system reproduction;[36] action, therefore, is experienced as a moment in the continuous life of a system. On the basis of both approaches, nonetheless, it has been claimed that sobering insights are to be

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32. For a more general theoretical statement, see Dirk Baecker, *Organisation als System* (Frankfurt/Main: Suhrkamp, 1999).

33. See, for example, Gunther Teubner, '"And God Laughed…": Indeterminacy, Self-Reference and Paradox in Law' In C. Joerges & D. M. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (Nomos: Baden-Baden, 1989) 399-434.

34. See, in particular, Gunther Teubner, 'The King's Many Bodies. The Self-Deconstruction of the Law's Hierarchy' (1997) 31 *Law and Society Review* 763-784.

35. See, for example, Peer Zumbansen, 'Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law' (2004) 15 *European Journal of International Law* 197-211; 'Die vergangene Zukunft des Völkerrechts' (2001) 32 *Kritische Justiz* 46-84.

36. On this difference, see Niklas Luhmann, 'Handlungstheorie und Systemtheorie' In *Soziologische Aufklärung*, vol. 3 (Opladen: Westdeutscher Verlag, 1981) 50-65.

obtained with regard to the normative purport of public international law. While some atomists contend that an examination of the reasons for compliance reveals that public international law is normatively empty, some social system theorists say that, as a legal system, it has already disappeared. I would like to argue, in a Kelsenian vein, that both claims rest on unwarranted idealisations. What they do, in effect, when seemingly "unmasking" public international law, is to talk about their own unexamined normative presuppositions.

Thus understood, we are currently witnessing the emergence (or, where atomism is concerned, the recrudescence) of unhealthy ways of thinking about public international law. I am choosing the adjective "unhealthy" deliberately and, needless to add, by giving it a polemical twist. According to modern psychology, "idealisation" is a defence mechanism that splits a phenomenon about which a person is ambivalent into two separate entities, one that is good and one that is bad.[37] I already mentioned that owing to idealisations realities are given a normatively transfigured shape. *Some part* of reality thus is made to appear much better than it really is. Conversely, *other parts* of the same reality are rendered particularly deficient when perceived as falling short of what thus has been idealised. The relation between idealisation and devaluation is of particular interest here. In the cases I would like to discuss in the later parts of this article, idealisations are in play that bestow on public international law an *unnecessarily* deficient and feeble appearance. I would like to explain why from their point of view Kelsen's take on international law appears to be seriously in trouble. First, the type of international system that Kelsen seems to have envisaged and supported may already be in

37. See above note 6.

demise. Second, with the demise of this type of system its intellectual underpinnings are losing their persuasive force.

I would like to reply (in sections XVI-XVIII) by exposing the idealisations underlying such claims. In the course of expressing my "scepticism about scepticism", public international law will not be recast in a format in which it becomes assimilated to some ideal version of state law. It will be seen, rather, how the realities of international law can be used to shed light on the perplexities of domestic legal systems (see section XV). Consequently, we may come to realise that it is doubtful whether "more public international law" is in and of itself desirable, after all.[38]

V. Kelsen's legacy

The reason why scepticism as regards public international law might be indirectly of relevance to Kelsen's theory goes back to the fact that much of modern public international law appears to coincide with his ideas.[39] In

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38. Public international law—from the conduct of war all the way down to humanitarian intervention—has no qualms about letting innocent people suffer for the conduct of their government. Hence, public international law may be in a far too primitive state to have moral appeal.

39. From my Viennese perspective, there is something puzzling about Kelsen's career in international law. Kelsen's emigration marked, in a sense, Kelsen's death as a publicly recognised scholar. Even though it was known, by no less a figure than Roscoe Pound, that Hans Kelsen, at the time of his arrival to the United States, was the most eminent legal scholar of his time, the reception of his legal theory in the United States turned out to be simply disastrous (see Paulson, note 4 at 17; see also Stanley L. Paulson, 'Die Rezeption Kelsens in Amerika', in: W. Krawietz & O. Weinberger [eds.] *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* [Vienna & New York: Springer-Verlag, 1988] 179-202; Roscoe Pound ‚Law and the Science of Law in Recent Theories' [1933-4] 43 *Yale Law Journal* 525-536 at 532). One of the greatest constitutional scholars of his time did not get to be perceived as such in his new intellectual environment. Indeed, I am inclined to look at Kelsen's career in the field of public international law as his, however late, second career. The perspective is myopic, I need to grant, for much of the groundwork for his later work in public international law had already been done at a fairly early stage of his career. For an

retrospect, it seems as though Kelsen, indeed, had been particularly prescient about the future development of public international law.[40] Kelsen seems to have anticipated, or maybe even precipitated, many modern developments.[41] It was clear to him that the international system can be strengthened only by increasing the degree of centralisation. Kelsen was aware that adjudicative bodies would be indispensable to that end.[42] It was also clear to him that under the then (and still today) prevailing political circumstances the organisation of collective security had to be asymmetrical. Even though emphasising the sovereign equality of states,[43] he understood that collective security was for the grand powers to realise.[44] Kelsen also pioneered recognising the role of the individual in public international law, and he did so *on the basis* (but not as a normative consequence of) his theory. According to Kelsen, most public international law

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account that situates Kelsen's theory in the context of early twentieth century Viennese culture, see Clemens Jabloner, 'Kelsen and His Circle: The Viennese Years' (1998) 9 *European Journal of International Law* 368-368.

40. See Antonio Cassese, *International Law* (2d ed., Oxford: Oxford University Press, 2005) 216: "The Kelsenian monistic theory, an admirable theoretical construction, was in advance of its time; in many respects it was utopian and did not reflect the reality of international relations. However, for all its inconsistencies and practical pitfalls, it had a significant ideological impact. It brought new emphasis to the role of international law as a controlling factor of state conduct. It was instrumental in consolidating the notion that state officials should abide by international legal standards and ought therefore put international imperatives before national demands." In many respects, this assessment is terribly flawed, in particular in attributing to monism a specific normative aspiration.

41. For an assessment along these lines, see Charles Leben, 'Hans Kelsen and the Advancement of International Law' (1998) 9 *European Journal of International Law* 287-305.

42. See, for example, Hans Kelsen, *The Legal Process and International Order* (London: Constable & Co Ltd, 1935).

43. See Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organisation' (1944) 53 *Yale Law Journal* 207-220.

44. See Hans Kelsen, *Collective Security under International Law* (= [1954] 49 *Naval War College International Law Studies*) at 34-52.

is addressed at states; but this does not mean that public international law does not regulate human conduct. It does so, however, only indirectly by delegating to states the task of obligating individuals to abide by its precepts.[45] But such a delegation is not a necessary feature of the system. Kelsen had no qualms about conceiving of individuals as the direct addressees of international laws, either as the addressees of obligations or the bearers of rights. Kelsen also recognised that international law is in a primitive state.[46] In order to overcome this primitiveness he recommended to increase both centralisation and individual responsibility.[47] Kelsen, in a sense, is an early champion of two developments that are often invoked in praise of modern international institutions, namely, the rise of adjudicating bodies[48] on the one hand and individual responsibility for violations of international norms on the other.[49] In a sense, the Interna-

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45. See Kelsen, *Reine Rechtslehre* note 4 at 327; see also Kelsen, note 61 at 526: "That international law imposes obligations and confers rights on the state to behave in a certain way means that international law leaves it to the state legal system to specify the human beings who are to behave in such a way as to fulfil these obligations and to exercise these rights; in other words, international law delegates powers to the state legal system to make this determination."

46. See sections XII-XIII below.

47. See, in particular, his *Peace Through Law* (Chapel Hill: University of North Carolina Press, 1942).

48. See Hans Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940-41* (Cambridge, Mass.: Harvard University Press, 1942) at 146-151 (for an evolutionary perspective on the development of centralized adjudicative bodies); 'International Peace—By Court or Government?' (1941) 46 *American Journal of Sociology* 571-581; 'Essential Conditions of International Justice' (1941) 34 *Proceedings of the American Society of International Law* 70-85 at 76-77; 'Compulsory Adjudication of International Disputes' (1943) 37 *American Journal of International Law* 397-406. See Anthony Carthy, 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law' (1998) 9 *European Journal of International Law* 344-354 at 353-354 on Lauterpacht's indebtedness to Kelsen.

49. For a discussion of the state of development of public international law at that time, see Hans Kelsen, 'Collective and Individual Responsibility for Acts of State in Inter-

tional Criminal Court, which is an outgrowth of both developments, is the epitome of a Kelsenian political aspiration. In his eyes, international tribunals and individual responsibility were means to increase compliance with international obligations prior to the creation of a world state.[50] Most interestingly, Kelsen was also keenly aware that with increasing international co-operation and interpenetration public international law will begin to look more like administrative law.[51] As a consequence, more and more norms will be addressed to the individual.

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

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national Law' (1948) *Jewish Yearbook of International Law* 226-239 (with a critical discussion of the theory employed by the Nuremberg Tribunal).

50. His belief that adjudicative centralisation could precede large-scale political integration of the international community set him again apart from Hans Morgenthau who thought that sovereignty would render such incrementalism ineffective. According to Morgenthau, sovereignty is compatible only with a weak and decentralized international order. See Hans Morgenthau, 'The Problem of Sovereignty Reconsidered' (1948) 48 *Columbia Law Review* 341-365 at 343.

51. See Kelsen, *Reine Rechtslehre* note 4 at 328. For a reconstruction of the "geology" on modern international law that seems to confirm that direction, see J.H.H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law (ZaöRV)* 547-562.

52. See Letter from Condoleeza Rice, U.S. Secretary of State, to Kofi Annan, UN Secretary-General (Mar. 7, 2006), http://www.discourse.net/archives/2005/03/us_announces_withdrawal_from_consular_convention.html (acknowledging that the United States proclaimed its withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, done at Vienna, on 24 April 1963). The recent decision to withdraw from the optional protocol stems from the perceived adverse effects on the autonomy of the American criminal justice system in light of a previous ICJ decision that required new State court hearings for fifty-one Mexican nationals on death row who claimed that their respective cases suffered due to a lack of contact with consular officials

Through the past withdrawing from the International Criminal Court[53]

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as mandated under the protocol. *See* Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, NY TIMES, Mar. 10, 2005, at A16 (describing how the U.S. desires to insulate its courts from future ICJ rulings that may interfere in ways that were unanticipated "when [it] joined the optional protocol"). Although the U.S. proposed and ratified the optional protocol in 1963—giving the ICJ jurisdiction when a signatory's nationals claim illegal denial of "the right to see a home-country diplomat when jailed abroad"—the U.S. has faced recent challenges from other signatory countries whose citizens suffered capital punishment without access to diplomats in contravention of the Optional Protocol. Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01. Before the withdrawal took effect, however, the United States decided to honor the latest ICJ ruling regarding the 51 Mexican nationals in accordance with international law and the Optional Protocol. *See* Memorandum from President George W. Bush to Attorney General Alberto Gonzales (Feb. 28, 2005), http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html (citing 2004 ICJ 128 (Mar. 31)) (requiring that "State courts give effect the decision in accordance with general principles of comity").

53. On May 6, 2002, the Bush administration formally rejected the U.S. signature of the Rome Statute of the ICC, which President Clinton authorized previously on December 31, 2000. Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, UN Secretary-General (May 6, 2002), http://www.state.gov/r/pa/prs/ps/2002/9968.htm. The rationale behind the bold move to "unsign" the treaty stemmed from unsubstantiated fears that Americans may be subject to unfair or politically motivated prosecution. Kenneth Roth, *Is America's Withdrawal From the New International Criminal Court Justified?*, HUMAN RIGHTS WATCH, Jul. 17, 2002, http://www.hrw.org/editorials/2002/icc0731.htm. The negative effects of this maneuver on American foreign policy, however, seem clear: (1) public repudiation of the ICC will hardly foment international cooperation in the U.S.-led war on terrorism; (2) with an uncompromising and unilateralist approach, the U.S. "risks finding itself on the wrong side of history;" and (3) perpetuating the idea that America considers itself to be "above international law" promotes increased isolation at a juncture in history when the U.S. can ill-afford to act alone as a global policeman. *Id*. For more background as to why U.S. fears of the ICC are unwarranted, see generally Justice Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, INTERNATIONAL CRIMINAL COURT MONITOR (Jun. 2002), http://www.thirdworldtraveler.com/International_War_Crimes/USWithdrawal_ICC_Goldstone.html. The ICC is not a rogue court that indiscriminately wields power; instead, it was intended as court of "last resort" whereby complementarity offers domestic judicial systems to investigate and prosecute if they so choose. *Id*. From the Nuremburg trials to ad

and the conclusion of non-extradition agreements with third states[54] the United States have effectively ambushed a major step towards universalising individual responsibility for heinous acts.[55] The allocation of veto rights in the Security Council does no longer command respect, for it is taken to reflect a now indefensible distribution of power.[56] The prohibi-

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hoc tribunals, the United States consistently exhibited its leadership in serving international justice; that is, until now when it chooses to alienate itself from "key allies, especially in Europe." *Id*. For additional insight into America's refusal to cooperate with the ICC, see generally America Service Members Protection Act 2002, H.R. 4775, 107th Cong. (2002) (enacted).

54. The U.S. desires the completion of as many bilateral Article 98 Agreements as possible because they are thought to afford American "citizens with essential protection from the jurisdiction of the International Criminal Court, particularly against politically motivated investigations and prosecutions." Press Release, White House Spokesman Richard Boucher, Article 98 Agreements (Sept. 23, 2003), http://www.state.gov/r/pa/prs/ps/2003/24331/htm. By May 2, 2005, the U.S. had concluded one hundred such agreements. Press Release, White House Spokesman Richard Boucher, U.S. Signs 100thl Article 98 Agreement (Sept. 23, 2003), http://www.state.gov/r/pa/prs/ps/2005/45573/htm. These "bilateral immunity agreements" that require the non-extradition of American nationals to the World Court without the express consent of the U.S. have been criticized by the international community on several grounds. *See* Letter from Kenneth Roth, Executive Director of Human Rights Watch, to Colin Powell, U.S. Secretary of State (Dec. 9, 2003), http://www.hrw.org/press/2003/us120903-ltr.htm (describing the most egregious elements of these agreements as the U.S. legal misinterpretation of Article 98 of the Rome Statute; and coercive tactics employed (e.g., threats to curb military/humanitarian/economic assistance) to obtain desired signatures.

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

56. Other Security Council Members and the world community at large expressed vehement opposition to U.S. unilateralism and the use of its veto power as a tool to manipulate important international treaties like the Rome Statute. *See The ICC in the Security Council*, GLOBAL POLICY FORUM, http://www.globalpolicy.org/intljustice/icc/crisisindex.htm

tion on the unilateral use of force has come under serious attack by adherents to the doctrine of "pre-emptive self-defence".[57] Finally, states themselves seem to be in the process of dis-aggregation.[58]

VI. Monism debunked

Kelsen's project appears to be even more deeply embarrassed and discredited on a theoretical level. Kelsen was a monist. He was convinced, that is, of the unity of public international law and the domestic (Hart: "municipal")[59] legal order.[60] Both are parts of one and the same legal system.[61] More precisely, he was not convinced that public international law and domestic law are two separate legal spheres that can only be connected on the basis of the recognition of international obligations by states.

(describing how the U.S. threatened to veto UN peacekeeping missions if it could not obtain adequate assurances of immunity from prosecution in the ICC).

57. For a discussion, see Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2d ed. 2004) 159-194.

58. See, of course, Ann-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

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

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

61. See Hans Kelsen, 'Sovereignty' reprinted In *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, ed. S.L. Paulson & B. Litschewski Paulson (Oxford: Clarendon Press, 1998) 525-536 at 527.

Why should one be a monist? Dualism, it seems, is the most straightforward manner of conceiving of public international law. Indeed, dualism seems to be very much alive, while monism seems to be dead. Dualism is alive inasmuch as every constitutional order seems to presuppose an independently existing international legal order. If this were otherwise it would be difficult to understand why constitutions contain provisions that state something about the relevance of international law.[62] In particular, the notorious conflicts that have arisen in the European Union as regards the supremacy of either European Union law or the law of the Member States seem to have taught that there *is no* unifying perspective.[63] In fact, the conclusion has been drawn that, using Kelsenian parlance, there is no single *Grundnorm* encompassing both legal orders.[64] This is a classical reinstatement of the dualist position.[65] In the words of Kelsen:[66]

> The dualistic construction would not be warranted unless there were, between norms of international law and the norms of state law, conflicts that could only be described in contradictory statements by a legal science having legal systems

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

63. See Neil MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press 1999) 131-133, and, more recently, Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty' 11 (2005) *European Law Journal* 262-307.

64. See Markus Heintzen, 'Die 'Herrschaft' über die Europäischen Gemeinschaftsverträge – Bundesverfassungsgericht und Europäischer Gerichtshof auf Konfliktkurs?' (1994) 119 *Archiv des öffentlichen Rechts*, 564-589. For a critique of such positions, see Theodor Schilling, 'The Jurisprudence of Constitutional Conflict: Some Supplemenations to Mattias Kumm' (2006) 12 *European Law Journal* 173-193.

65. See Kelsen, note 61 at 526.

66. Kelsen, note 61 at 527.

> of equal validity as its subject matter. For then a unity of the two systems—which is simply an epistemic unity—would be out of the question.

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

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67. Kelsen did not think that this was an empirical question even though he states that the existence of an international norm that determines the sphere of the validity of the state legal system "also" speaks in favour of a monist construction. See Kelsen, note 61 at 527.

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

69. See Cassese, note 40 at 217.

70. For a stimulating discussion, see Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369-408; a more extensive exploration of the issue is offered by Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

71. I shall return to the remarkable return of right-wing Hegelianism in current American jurisprudence in note 206.

Common misperceptions aside,[72] however, the persuasiveness of Kelsen's monist construction does not turn on the substance of international relations or on what happens to be international law. Whether or not one is a monist depends on whether or not one takes the normativity of law—its validity—seriously. Monisms basic contention is that conflicts between norms that originate from different systems cannot be resolved on dualist grounds.[73] It can be the case, according to dualist premises, that while public international law demands x the domestic legal order commands non-x.[74] Joint obedience is impossible.[75] Two different systems with different basic norms give rise to an external conflict of norms. Or, using a Hartian description, two different judicial tribunals that attribute primacy to the norms of their requisite systems accept two different rules of recognition—with no metarule in sight that could be used by either tribunal in order to resolve the conflict (and that would be susceptible to description from the external point of view).

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72. See Malcolm N. Shaw, *International Law* (5th ed., Cambridge: Cambridge University Press, 2003) 50, 122-123.

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

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

75. I take this to be an intuitively acceptable formulation of a conflict of norms. See H.L.A. Hart, 'Kelsen's Doctrine of the Unity of Law' In *Normativity and Norms*, note 61, 553-581, at 566-567.

VII. Monism defended

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

In his discussion of the monism-dualism alternative, Kelsen usefully compares the potential conflict between international law and domestic law with a potential conflict between law and morality.[79] Conceivably, there are conflicts between what the law requires and what one imagines

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76. See above p. 4.

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

78. On this point, see generally, Pinkard, note 12 at 175, 221.

79. See Kelsen, *Reine Rechtslehre* note 4 at 329. Much sophistry can be invested, at this point, in discussing whether Kelsen was right in speaking of a logical contradiction in this context. See Hart note 75 at 571. What is most often not discussed, in such a context, is how the line ought to be drawn between "logical" and other forms of "impossibility". For an introduction to the problem see W.V. Quine, 'Carnap and Logical Truth' In his *The Ways of Paradox and other essays* (2d. ed., Cambridge, Mass.: Harvard University Press, 1976) 107-132.

to be morally commendable. Any positivist legal theory is expected to establish the conditions under which we are able to clarify what the law is regardless of whether what the law is, is also defensible from a moral point of view. The notion of legal validity needs to *instruct* even if it need not tell us what we ought to *do*, all things considered.

If, alternatively, one did not believe either in the resolvability of conflicts between legal norms or in the possibility of attributing conflicting norms to systems *of a different kind* one would not take the notion of *legal* validity seriously. In other words, from a Kelsenian perspective a dualist or pluralist theory of law is possible only on the basis of surreptitiously altering the meaning of the predicate "legal validity" from one system to the other.[80]

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

The statements that x is legally valid according to system A and that non-x is legally valid according to system B can both be true only if in one of the statements "legally valid" is used in quotation marks.[82] That is, it is impossible to disquote both predicates ("is legally valid") for the simultaneous disquotation would divest "legal validity" of its predicative value. One could say, of course, that Judge Grimm thinks 'x is legally valid' while Judge Iglesias thinks 'non-x is legally valid'. But a statement of this

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80. That is exactly, by the way, what Derrida has in mind in speaking of the *différance*, understood as an iteration that alters. See Jacques Derrida, 'Différance' In his *Margins of Philosophy* (trans. Alan Bass, Chicago: University of Chicago Press, 1982) 1-28; *Limited Inc* (trans. Samuel Weber, Evanston: Northwestern University Press, 1988) 130. Whoever defends pluralism is not in conflict with Kelsen when granting, at the same time, that the meaning of "legal validity" is thus rendered indeterminate.

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

82. See Donald Davidson, *Inquiries into Truth and Interpretation* (Oxford: Oxford University Press, 1986) 65, 79-86. I would like to avoid, however, delving into the intricacies of quotation theory here.

kind would not state the validity of either x or non-x. It would merely attribute beliefs and propositional attitudes. The validity of a norm, however, does not turn on whether a judge believes it to be valid. On the contrary, once the validity of a norm has been established it has to be recognised by a judge.

A statement about validity would be made, however, if one were to say that, while x is legally valid, Judge Iglesias believes in the validity of non-x. This would be a polite way of saying that Judge Iglesias is mistaken. However, one cannot say that x is legally valid and that non-x is legally valid without either quoting one or the other proposition or by altering the meaning of legal validity when moving from one to the next. If both were valid the concept of validity would be devoid of its pragmatic content. It would no longer have any import, that is, it would not inform about what ought to be—or can be—legally done. It follows that if the predicate of validity is used in both cases the predicate necessarily alters its meaning.[83]

Kelsen draws on the difference in the meaning in order to explain how the conflict between legal norms and moral norms can be resolved. Legal validity and moral validity differ with regard to their meaning. Owing to this difference they can be used in different systems. An external resolution of normative conflicts is possibly on the basis of differentiating between "validities". The validity of law is one and indivisible. It needs to be one and indivisible for otherwise a legal statement would not do what it is supposed to do, namely, *instruct*. If it were not for this unity the question would be unanswerable what, in light of conflicting considerations, *the law* requires. This is not to say that a legal statement determines what

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

one ought to *do*. There may be sound moral reasons for breaking the law (or good legal reasons for eschewing morality).

It can be seen, then, that, according to Kelsen, the unity of the legal system, which finds its expression in the doctrine of monism, is a consequence of the unity and indivisibility of legal validity. For legal statements to be instructive, the unity and indivisibility of legal validity are indispensable.[84] There is only one legal validity. Hence, there can be only one legal system. Of course, among different types of validity there can be validity relative to morality and validity relative to law; however, there can be no system-relative legal validities.

The purveyors of legal pluralism and "polycontexturality"[85] may have interesting insights to offer, however, they should make explicit, too, that in speaking about a plurality of legal systems they produce an equivocation in the concept of legal validity. Legal validity may well be in the process of deconstruction;[86] but this should give the advocates of pluralism all the more reason to acknowledge that what they are talking about is no longer "law" as we have known it.

Dualism can be a serious doctrine only at the cost of according legal validity to one system and another type of validity to the other. Consequently, dualism undermines itself. A dualism that in cases of collision accords primacy to domestic law treats public international law not as law

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84. It is a different matter whether this same commitment needs to be made from a post-positivist point of view.

85. The term means that in a complex society there is no privileged position for understanding and influencing social life but merely a multitude of bounded and incommensurable points of view. See, for example, Peter Fuchs, *Die Erreichbarkeit der Gesellschaft. Zur Konstruktion und Imagination gesellschaftlicher Einheit* (Frankfurt/Main: Suhrkamp, 1992) 43-52.

86. For an observation from a completely different angle, see Alexander Somek, *Rechtliches Wissen* (Frankfurt/Main: Suhrkamp, 2006) 100-103.

but as something that may resemble more closely "morality".[87] Of course, one may prefer to decide on the spot and with regard to the exigency of the situation which order ought to take precedence; but this would amount to exactly the denial of normativity that Kelsen is concerned about. Moreover, if one were to say that in cases of doubt some superior normative principle needs to be invoked, such a principle would represent the order that encompasses both international and domestic law. Unity—in the misleading sense of the absence of contradiction[88]—is indispensable in order to make sense of legal validity.

VIII. A brief rebuttal of Hart

One of the most powerful criticisms of Kelsen's doctrine was put forward by H.L.A. Hart.[89] We are already in a position, at this point, to understand why Hart may have been mistaken.

According to Hart, Kelsen's doctrine of the unity of law comes in a weaker and in a stronger form. Whereas the weaker version claims that as a matter of international law domestic law is a component of international law, the stronger version says that the relation of inclusion of either one into the other is a necessary one.[90] Alas, Hart's distinction between these

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

88. See Kelsen, *Reine Rechtslehre* note 4 at 329. I shall leave aside here the thorny question of whether Kelsen believed, at the later stages of his life, that the rules of logic are actually applicable to norms. For a discussion, see Ota Weinberger, 'Logic and the Pure Theory of Law' In R. Tur & W. Twining (eds.), *Essays on Kelsen* (Oxford: Clarendon Press, 1986) 187-199.

89. See note 79.

90. See Hart, note 75 at 554, 564. The effectiveness principle is not a necessary component of a monistic theory for it is conceivable to construct the unity of the system from a different angle, for example, from the perspective of overlapping fundamental rights stan-

two different versions of monism cannot be sustained because Kelsen would have never considered it acceptable. Nowhere does Kelsen expound monism in a "weaker form", that is, by pointing *exclusively* to the existence of the effectiveness principle, which is the principle of public international law that anchors recognition of states in the existence of efficacious territorial systems of coercive rule.[91]

But even if Kelsen had undertaken to do just that[92] Hart would have to criticise Kelsen *on his own terms*. This is what Hart fails to do. Hart thinks that Kelsen's monism cannot withstand scrutiny because it conflates relationships of validation proper[93] with what Hart calls "validating purport".[94] Hart has in mind here, obviously, two different intentional states.[95] Validation proper obtains if a norm becomes adopted with the intent of creating it on the basis of another one; it also occurs when judges identify a standard as valid law on the basis of an accepted rule of recognition.[96] When a national parliament adopts a law pursuant to constitutional procedures the relation of validation proper obtains. If, however, the same law is declared to be the relevant legal standard for certain

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dards. Public international law and national law could then be seen as lending expression to one overarching system of value.

91. Hart, note 75 at 560-561 regards it as Kelsen's "central mistake" to have based monism on the principle of effectiveness.

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

93. I take it that Hart explained what I call here "validation proper" already at the outset of his article where he identifies the "kind of error which […] infects Kelsen's interpretation". See Hart, note 75 at p. 556.

94. See id. at 560-561.

95. My reconstruction of the first state is an extrapolation from the example that Hart introduces to alert readers to Kelsen's "error". See id. at 556.

96. See id. at 562.

transactions by the conflict of law statutes of another state, this is an instance of mere validating purport.[97] Validating purport means that rules that fit a certain description are to be deemed valid regardless of whether they were generated in order to become members of the legal system containing the description. Hart exemplifies what he has in mind here by entertaining the hypothetical possibility of a law of state A which declares that all laws adopted by the legislature of state B are to be considered valid laws of A or, more disturbingly, of B. The point of Hart's observation is that the laws of B are legally valid in B regardless of the validating purport by A because their validity is derivative of the accepted rule of recognition in state B. *Mutatis mutandis*, Hart concludes that the validity of domestic laws is derivative, indeed, of the relevant national rules of recognition and that the effectiveness principle is merely an expression of the validating purport built into public international law.[98]

Hart's criticism cannot be sustained.

First, the identification of the weaker version of monism—a monism embracing validating purport from the perspective of positive public international law—presupposes a premise that is tacitly rejected by Kelsen. Weak monism is possible only if validating purport clearly needs to be distinguished from validation proper, that is, if the distinction is a necessary component of a workable theory of legal validity. Hart wishes to ascribe relevance to this distinction in order to explain what he presupposes to exist, that is, system-relative validity. But Kelsen clearly thinks that

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97. See id. at 561-562.

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

relative validity can be dispensed with. It follows that Hart's critique is weak, at best, for it rests on a premise that is not shared by Kelsen, namely, the existence of different rules of recognition for different legal systems.[99] One may wonder, already at that point, whether Hart's criticism can be relevant to Kelsen's project for it betrays, if anything, Hart's quite explicit commitment to methodological nationalism.[100]

In defence of Hart, it could be replied, of course, that positivist theories should take heed of social facts and, hence, attend to the conventions that are established in different "municipal" legal systems. With dualism (or rather: pluralism) being the ruling convention, national legal systems operate *in fact* with recourse to their own rule of recognition. Hart's distinction between validation proper and validating purport captures this important reality about legal systems. Moreover, a variation of Hart's hypothetical example may further help to drive home its point.[101] Imagine that country A declares all laws of country B to be valid, however, for country B only and not for country A. Why should country B depend on such a declaration by A in order to have its own laws validated? This is exactly, however, what monism with primacy of public international law asks everyone to accept.

It bears emphasis, once more, that Kelsen was a legal positivist *without* also being a conventionalist.[102] He distrusted conventions because of the *distorting* influence they may have on the perception of the conditions

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99. See id. at 575-576.

100. See id. at 576.

101. See id. at 562.

102. Hart, without doubt, was a conventionalist. See Jules Coleman, *The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford UP, 2001) 75-76; Leslie Green, 'Positivism and Conventionalism' (1999) 12 Canadian Journal of Law and Jurisprudence 35-52 at 37-41.

that are really necessary to explain the existence of a legal system. Kelsen wanted to uncover these conditions in spite of whatever views may be conventionally entertained by legal officials about such conditions. For example, a judge adjudicating a fundamental rights question may consider herself to be bound by some conventional standard of morality; contrary to what she believes to be binding upon her, however, Kelsen would explain that what makes her act authoritative is not some moral principle but the bounded exercise discretion because moral standards simply *cannot* underpin the authority of a judicial decision. Conventions, according to Kelsen, are often the source of false beliefs or, indeed, false consciousness. Similarly, the national legal system *needs* not to be seen as grounded in some customarily accepted practice of recognition as long as there is a straightforward monistic mode of accounting for its validity. Kelsen was interested in uncovering the true conditions of validity and not in interlocking conventions with various pedigrees. As a consequence of this concern with validity, he tried to construct a legal system that avoids norm conflicts. If what is valid is to instruct then conflict is what obstructs the inferential mediation of validity.

Second, Hart's distinction between validation proper and validating purport is immaterial to a theory which explores, not substance, but the form in which substance is to be accounted for by legal science. Hart's distinction is a substantive one. Some processes of norm-creation or the constitution of legally relevant facts may require *some* intentional use of a rule or a standard. No law can be validly adopted by the legislature unless the relevant rules of procedure are painstakingly adhered to. It is possible, nonetheless, to establish contractual relations, as it the case for so-called "exercises of will",[103] through mere conduct that is not intended to create

103. The German term is "*Willensbetätigungen*". See Karl Larenz, *Allgemeiner Teil des deutschen bürgerlichen Rechts. Ein Lehrbuch* (7th ed., Munich: C.H. Beck 1989) at 317.

a norm. Whether or not a relation of validation is based on what Hart imagines to be validation proper or mere validating purport turns on the substance of the legal norm in question. In a sense, the commission of a tort can be seen as an act that creates liability. The normative consequence attached to a wrongful act may not appear to be desirable to the tortfeasor, but this does not change the fact that the tortfeasor's act is a condition for the generation of new (individual) law.[104] Such relations should not be dismissed as anomalies when constructing a legal system, indeed, their role may be important for sustaining a non-deconstructed notion of validity.

Third, the example that Hart introduces at the outset of discussion is deeply flawed. He attempts to explain why validating purport has nothing to do with validation proper by referring to an act—the writing of an article—that does not create a norm but merely involves the doing of something. Evidently, whether or not a norm is the cause of an act is irrelevant for the purpose of inheriting validity. Norms are schemes of interpretation.[105] They are used in order to bestow meaning on social facts and not used as schemes of causal explanation. If someone kills another person the norm for murder or manslaughter can be used to attribute significance to the act from a normative point of view but not to explain its occurrence. Analogously, the bare existence of a legal system attains normative significance from the perspective of the effectiveness principle.

Even if Hart's distinction between weak and strong monism cannot be sustained because of its underlying commitment to methodological nationalism and conventionalism, both of which are revealed in his con-

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104. It is a different matter, though, whether it would make sense to describe the rules of tort law as power-conferring rules. See Joseph Raz, 'Voluntary Obligations and Normative Powers' In *Normativity and Norms* note 61, 451-470 at 453.

105. See Kelsen, *Reine Rechtslehre*, note 4 at 3-4.

struction of a "rule of recognition", it may still not be apparent why Hart's critique of strong monism cannot be sustained. Why should norms that are simultaneously valid not conflict, that is, give rise to two contrary or contradicting descriptive ought statements (for example, in the sense of "It is the case that Op and ~Op.")? Kelsen contends that the law is one and only one for otherwise it would only instruct those who happen to believe in the validity of a certain system. Hart, however, has nothing more to offer than the opposing contention that validity is (necessarily?) system-relative. The impression that matters cannot possible be otherwise does not, in and of itself, amount to an argument against Kelsen's monotonous notion of legal validity according to which legal validity is always the same, and always of the same kind, regardless of where it may arise. It cannot be an argument against Kelsen, in particular, when taking into account that at the end of the day the "harshness" of the legal code[106] requires the resolution of normative conflicts. Only one *or* the other norm is going to be lawfully applied.

IX. Not a harmonious world

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

I think that Kelsen could even accommodate such a situation of conflict by claiming that even though irresolvable conflicts are in principle impossible, the *appearance* of conflict may result from the absence of legally binding conventions. Nevertheless, either a legal rule needs to be in

106. See Niklas Luhmann, *Law as a Social System* (trans. K. Ziegert, Oxford: Oxford University Press, 2004) at 190-191.

place that explains why a resolution of the conflict, brought about on political grounds, is legally binding; or, alternatively, an explanation has to be given why a certain conflict cannot be decided on legal grounds. Interestingly, the hypothetical finding that there is no legal solution always entails a legal solution, for example, a jurisdictional rule or a right to engage in certain conduct by one of the contending parties.[107]

Kelsen has another argument against dualism that caters to the thirst for power of those who, in the tradition of Hegel and Morgenthau, conceive of public international law as "external domestic public law" (*äußeres Staatsrecht*).[108] Accordingly, public international law is valid *for* a state if and only if it has been recognised *by* this state. If the norm constitutive of recognition is part of the domestic legal order then public international law cannot be different from that legal order for its validity is derived from the latter. The most steadfast defenders of state "sovereignty" are not dualists but monists.[109]

We have already seen that there are good reasons for being a monist, and these reasons are independent of what substantively is public international law. In particular, monism does neither presuppose nor entail any idealism about a *civitas maxima*.[110] From a legal point of view, public international law, like any other legal system, regulates the consequences of non-compliance. It is *not* a consequence of monism that a domestic legal act that does not conform with international norms is therefore null and

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107. The latter would be very much in line with Kelsen's contention that the law does not have any gaps. See Kelsen, note 16 at 146-148.

108. See Kelsen, note 60 at 154-159.

109. See Kelsen, *Reine Rechtslehre* note 4 at 336.

110. This is sometimes overlooked by friendly commentators of Kelsen's work. See Danilo Zolo, 'Hans Kelsen: International Peace through International Law' (1998) 9 *European Journal of International Law* 306-324 at 309.

void. Kelsen reminds us that in every legal system wrongful legal acts are allowed to exist until, upon appeal or complaint, they are eliminated from the system. Moreover, Kelsen also reminds us of a tradition that accommodates the validity of unconstitutional acts even without judicial review. Such a system does not merely delegate to organisational subunits the *task* of ensuring compliance with substantive norms, it also delegates to them the *power* to create valid acts that conflict with such norms.[111] Accordingly, the sanction for non-compliance with international obligations is not necessarily nullity. In this respect, public international law is not different from any other system of law.

This view raises the question, to be sure, how much deviation is acceptable until the norms cease to have any normative force.[112] It could be argued, that even if all states defied all international constraints their obligations would be *effective enough* for the international legal system to exist as long as universal defiance is universally *perceived* as legally wrong.[113]

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111. See Kelsen, *Reine Rechtslehre* note 4 at 326, 331-332.

112. See *id.*, at 330-332.

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

The whole system would be, at best, a system of universal hypocrisy, to be sure. It would not be worthy of praise from a Kantian perspective. I say that one *might* consider describing such as a system as a legal system and I shall return to the reasons that counsel against doing so in section XIV.

X. Systematically induced misreadings

Just as the choice between dualism and monism does not turn on the substance of the international system, neither does the choice between different versions of monism. As is well known, monism can accord primacy either to domestic law or to international law. From a constructivist perspective the choice is not very intriguing even though it needs to be said that Kelsen has to resort to quite a bit of conceptual wrenching in order to align monism that accords primacy to domestic law with the substance of modern international law.[114] Intriguingly, Kelsen submits that each type of monism is internally linked to different views of world and society and, hence, intrinsically susceptible to fallacious extrapolations and ideological misreading. More precisely, he perceives quite clearly that we would not even attribute *any* significance to these opposing versions of monism if it

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nism with the primacy of public international law? I am wondering if he answer to this question would not turn on ascribing primordial effectiveness to the domestic legal order. Fortunately, the matter does not have to be further explored here, but my guess is that the question of primacy is only of tangential relevance for a monist construction and an inheritance from dualism that ought to be dispensed with altogether.

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

were not for our inclination to attribute *more* significance to them than they really have.[115] Indeed, from a sober theoretical perspective it simply does not matter which version of monism one adopts; however, once these positions are given their respective philosophical and ideological spin, they become transmuted into means of articulating different views of objectivity and human society.[116]

The choice of monism with primacy of international law reflects an inclination to pacifism with its attendant goal to create a world legal organisation. Pacifists are also "objectivists", that is, they are capable of seeing their own point of view as one among other such points of view. They see themselves as being embedded in the general scheme of things. What counts for pacifists, also in the realm of morals, is the integrity of that order and not their subjective take on it. Objectivism has the effect of decentring the view of the individual—and of the state, respectively. However, adherents to pacifism are inclined to end up with a distorted perception of existing legal realities, such as the claim that certain norms of international law have direct effect because they *need* to have it.

Monism that accords primacy to the domestic legal order reflects a subjectivist view of the world. On the level of relevance here, it is closely associated with the collective egoism of nationalism and imperialism. Kel-

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115. This is a doctrine that Kelsen maintains until to (or even beyond) the end of his career. See Hans Kelsen & Robert W. Tucker, *Principles of International Law* (2d. ed., New York: Holt, Rinehart and Winston, Inc., 1966) 586-587. In a very thoughtful discussion of Kelsen's theory of international law, Theo Öhlinger submits that Kelsen's theory is unappealing today precisely because it tried to expel the ideologically fascinating part of legal discourse from the realm of legal science. See Theo Öhlinger, 'Die Einheit des Rechts. Völkerrecht, Europarecht und staatliches Recht als einheitliches Rechtssystem?' In: S. L. Paulson & M. Stolleis (eds.), *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts* (Tübingen: Mohr Siebeck, 2005) 160-175.

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

sen quite perceptively observes that this is the world-view of those who have to identify with a powerful state in order to boost their own self-confidence.[117] Identification offers symbolic compensation for the powerless and the oppressed. Epistemologically, imperialism is an expression of solipsism, which is the view that there is no external reality outside the sensation that the subject creates of his or her reality. The external world can only be conceived of in terms of the internal world. Not surprisingly, the adherents to this view believe that the interpretation of public international law should be in the hands of those who are submitted to it. It becomes a question of power.[118]

Far from idealising international law into one harmonious system, Kelsen uncovers a sublime dialectic. The development of the modern international legal system is driven by distorted conceptions of itself. Each conception avails over an impeccable, however unappealing, core.[119] In my view, this observation makes Kelsen's theory of public international law not only fascinating, it also lends it enduring significance. It expresses a subtle awareness not only that, as a field of law, public international law invites, systematically, its own misreading but also that its evolution is also nurtured by it. Which of the two misreadings is going to prevail is a historical question. In his early work, Kelsen expressed a clear preference in favour of the creation of a world state.[120]

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117. See *Reine Rechtslehre* note 4 at 345.

118. Moreover, this imperialism most often rests on the fallacy that conflates sovereignty in a legal sense, that is, supreme legal authority, with the almost uninhibited power of action. See Kelsen, *Reine Rechtslehre* note at 341; Kelsen & Tucker, note 115 at 584-585.

119. note 60 at 319-320.

120. See Kelsen, note 60 at 320.

XI. Constitutional deficiency

The currently fashionable "realism" as to the feebleness of public international law echoes the more radical position of classical legal positivists who concluded that since there are not, on an international level, central adjudicative or enforcing agencies, there is no international law at all.[121] Indeed, viewed against the background of this typically positivist claim, Kelsen's own position must appear paradoxical.

Classical ("uncritical") positivism tried to unmask the legal purport of the international order. According to Austin, public international law was simply positive morality.[122] Hart's take on this issue was far more nuanced, in particular as regards the inappropriate comparison with morality.[123] Nevertheless, he perceived the major deficiency of the international system to lie in the absence of a unified rule of recognition. He thought that no such unified rule existed with regard to the sources of public international law.[124] International law lacks the unity of primary and secondary rules that is the hallmark of "municipal" legal systems. Hart believed that, in the case of international law, primary rules, the rules of obligation, form a mere set and are not part of a system.[125] Systematic coherence would obtain only if their validity were derivative of a rule of recognition,

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121. See John Austin, *Lectures on Jurisprudence*, vol. 1, ed. R. Campbell (4th ed., London: John Murray, 1879) at 175; *The Province of Jurisprudence Determined* (2d. ed., reprint, New York: Burt Franklin, 1970) at 235.

122. See note 121.

123. See Hart, note 59 at 224.

124. See Hart, note 59 at 228.

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

which, in turn, would have to be accepted by the international community. The absence of systematic coherence is evidence of the "primitive" nature of public international law.[126] Strangely enough, it did not occur to Hart that rules of recognition,[127] such as the rules governing *jus cogens* or customary law, could *themselves* be part of a set only—which is a strange idea after all for there cannot be a set without rules governing the membership to that set (as a consequence of which Hart's whole idea that some rules are only part of an accepted set and not derivative of an accepted rule may not withstand scrutiny after all).

But we need not assess the merits of Hart's position here. Suffice it to say that Hart considered public international law to be *constitutionally deficient*. It is constitutionally deficient precisely because it suffers from a defect that Hart attributed to any system that consists merely of a set of primary rules, namely, uncertainty:[128]

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

The international legal system is *constitutionally deficient* in precisely the sense of the term that reflects what we have come to expect a constitutional system to accomplish. Under conditions of constitutional deficiency—in decisive matters, at any rate—obligations are not clear. When obligations are unclear the powerful have an easy time of kicking the powerless around. Conversely, a constitutionally adequate system combines rules governing impartial adjudication with a clarification of the

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126. This may be concluded from Hart's discussion of primary and secondary rules. See Hart note 59 at 90-93.

127. The plural is used by Hart himself, see Hart, note 59 at 92.

128. Hart, note 59 at 90.

forms and procedures that the creation law needs to follow in order to be given proper effect. A constitution constrains the powerful, not merely by submitting their conduct to the discipline of rules but also by setting a limit to resourceful renditions of what they purport to be law.

Kelsen would not deny that public international law is constitutionally deficient. He would, however, not concede that the perceived deficiency does in any way affect the quality of international law to be law. Constitutional deficiency is merely a consequence of the decentralised, more "primitive" mode of giving it effect. Constitutionality, as implicitly used in Hart's discussion, is an unnecessary idealisation, which has an obscuring influence on the perception of how a legal system works in reality.

XII. Sanctions

Kelsen confronted the traditional legal positivist's challenge head on by conceding that for public international law to be susceptible to description in terms of law one idealisation is indeed indispensable: it must be possible to attribute to certain acts of states the meaning of being a sanction for the breach of an international obligation.[129] No more, but no less, idealisation is necessary to establish the condition under which certain rules of international relations can be described as law. It is, of course, completely unnecessary for international law to occupy some moral high ground vis-à-vis the interest of states.

Needless to say that this idealisation lends expression to Kelsen's concept of the legal norm.[130] The legal norm, as reconstructed by Kelsen, con-

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129. See Kelsen, note 44 at 101: "It is the essence of a legal order that it tries to bring about lawful and to prevent unlawful behaviour by coercive measures—that is, by the forcible deprivation of life, freedom, property and other values as a reaction against the violation of the order."

130. See Kelsen, *Introduction* note 4 at 26-27.

sists of two parts, namely, a condition that contains a description of the unlawful act and a consequence, that is, the *sanction* that ought[131] to be imposed as a consequence of that act. Since Kelsen, as a legal positivist, abstains from characterising unlawful behaviour in moral terms (e.g., as behaviour that is socially disfavoured or considered harmful) *anything* can serve as a condition for the imposition of a sanction. Thus understood, Kelsen's theory seems to push Holmes' "bad-man-perspective"[132] to the limit, even though it is unclear whether Kelsen would have agreed to converting "sanctions" into mere costs of behaviour. In any event, the *onus explandandi* for what accounts for the normativity of a norm rests on the sanction and what it means to have authority to impose it. Using Hohfeldian parlance, without either disability or liability no normativity would obtain.[133] A sanction is any coercive act the commission of which is authorised by the legal system. Presumably, a sanction is something that affects the will—a matter that has been never really explored by Kelsen.[134]

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131. At least in his later work, Kelsen was strongly inclined to reduce the "ought" of the imposition of the sanction to the legal power of the organ to order the coercive act—or even the right to inflict it. See, notably, Hans Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952) at 7: "By the formula 'ought to be applied' nothing else is expressed but the idea that if the delict is committed the application of the sanction is legal."

132. See Oliver Wendell Holmes, 'The Path of the Law', reprinted in (1997) 110 *Harvard Law Review* 991-1009 (first published in 1897).

133. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1923) at 36.

134. I add in passing that this blind spot of Kelsenian theory explains why the critique of legal positivism that seizes on the notion of "discretion" does not affect his legal positivism at all. See Ronald Dworkin, *Taking Rights Seriously* (2d ed., Cambridge, Mass: Harvard UP, 1978) 22-45. Kelsen would have replied to Dworkin, presumably, that the notion of discretion that remains applicable even to the exercise of judgment by "Hercules" is exactly the notion of discretion that he has been talking about, that is, the exercise of judgement that lends a political dimension to adjudication. But Kelsen's theory is far from unassailable. The centrality of the notion of the sanction explains why he would have had to

What he clarified, though, was that any sanction, in the final event, needs to involve the authorisation to employ physical force.[135] A legal norm lays down the conditions under which it is permissible to use force against another person.[136] In other words, the law is a system of rights.[137]

Only if it is taken for granted that Kelsen does not have a moral conception of the sanction—in the sense of it being a necessary evil—it is possible to understand how he could come to the conclusion, already in the first edition of his *Pure Theory of Law*, that "the law cannot be broken".[138] A norm cannot be violated, on the contrary, it is essential to the validity of norms that it is possible to commit (or omit) the act that may trigger the sanction.[139] In a tongue in cheek remark, Kelsen explains that the legal

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have a conception of free—as opposed to coerced—willing and action in order to have been able to explain what the law is. Kelsen never developed such a conception, as a result of which his theory of norms remains strangely blunt. Kelsen can be superseded, not by invoking some non-relativist moral theory, but by exploring the reality of freedom (i.e., the opposite of its denial through sanctions). In other words, the adequate "reply to legal positivism" would have to be given from the perspective of Hegel (and not on the basis of an exegesis of Radbruch). But see Robert Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (trans. B. and S. Paulson, Oxford: Clarendon Press, 2002).

135. See Kelsen, note 131 at 25. As he made clear a few pages before (at 21), a sanction is a coercive act and not an obligation. Hence, the duty to pay compensation for damage caused is not a sanction but another obligation the non-performance of which is backed up by a sanction.

136. Again, in conceiving of norms in such a way Kelsen's theory can be tied to the philosophy of German idealism. See, for example, Friedrich Wilhelm Joseph Schelling, Neue Deduktion des Naturrechts (1796), *Sämmtliche Werke* (ed. K.F.A. Schelling, Stuttgart. Cotta, 1856-1861) vol. I/3.

137. Hence, the idea that there can be something like "moral rights" is nonsensical. See Alexander Somek, ‚Die Moralisierung der Menschenrechte. Eine Auseinandersetzung mit Ernst Tugendhat', In C. Demmerling & T. Rentsch (eds.) *Die Gegenwart der Gerechtigkeit. Diskurse zwischen Recht, praktischer Philosophie und Politik* (Berlin: Akademie Verlag, 1995) 48-56.

138. See Kelsen, *Introduction* note 4 at 28.

139. See Kelsen, note 131 at 7.

system is like theodicy. It strips "evil of its original character as a sheer negation of the good" and accounts for "evil only as a condition for realising the good"[140]. Breaches of the law are an occasion to produce more law.[141]

No further explanation is needed to understand how Kelsen conceives of the most fundamental challenge to the international system from a legal point of view. The decisive question is whether "international law provide[s] for coercive acts (enforcement actions) as the consequence of a certain conduct of states determined by international law".[142] As long as the international system speaks of unlawful acts and sanctions, it is a legal system, no matter how inefficient the system may work in singular cases. In other words, if and when war and reprisals are conceived of, on the level of *discourse*, as sanctions for breaches of international norms, the system of public international law exists.[143]

XIII. The mute principal

This position raises many questions, in particular as regards the *objective* meaning of acts that purport to enforce international obligations. How can there be legal authority without final interpretive authority? How is objec-

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140. Kelsen, *Introduction* note 4 at 27.

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

142. Kelsen, note 131 at 22. This question is rephrased several times on the same page.

143. Kelsen endorsed the *bellum iustum* theory for he deemed it to be indispensable for attributing to public international law the quality of law. It is an essential component of this doctrine. See Kelsen, note 131 at 59; note 16 at 341. See also Hans Kelsen, 'The Essence of International Law' In *The Relevance of International Law. Essays in Honor of Leo Gross* (Cambridge, Mass.: Schenkman Pub. Co., 1968) 85-92 at 86-87. For a discussion, see François Rigaux, 'Hans Kelsen on International Law' (1998) 9 *European Journal of International Law* 325-342 at 333-341.

tive meaning possible if it is irredeemably disseminated and scattered in the subjective meanings attributed to norms by the parties who are taking the law into their own hands? Interestingly, Kelsen thinks that he can dispose of these questions in one fell swoop by pointing to the "primitive" nature of the international system.[144] More precisely, he believes that the *hermeneutic challenge* can be met with an *axiological commitment*. Despite scattered and conflicting interpretations the international legal order remains intact so long as the invocation of international norms[145] appeals to the community that is constituted by the international legal order.[146] This may be the case, arguably, as long as a reference is made to one and the same legal system that is supposedly underwritten by all participants. Under this condition, the community also avails over a *monopoly of force* since every authorisation of the legal use of force—even if it concerns the notorious bully on the schoolyard[147]—is intended to be obtained on the basis of that one legal system.

Apparently, the unity of appeal is all it takes for the system to be *one* system.[148] Once this *necessary* condition of efficacy is met Kelsen has no

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144. See, for example, Kelsen, note 16 at 338-339. In other words, Kelsen thought that the contrast between a primitive coercive order and no coercive order whatsoever is greater than the contrast between a decentralised and a non-decentralised order. See Hedley Bull, 'Hans Kelsen and International Law' In R. Tur & W. Twining (eds.), *Essays on Kelsen* (Oxford: Clarendon Press, 1986) 321-336 at 325.

145. Evidently, the hermeneutic challenge does not disappear.

146. See Kelsen, note 131 at 13.

147. As a legal positivist, Kelsen was always ready to take asymmetries of power into account. He had a very "realistic" perspective on the role that is played by the grand powers in the generation of customary international law. See Kelsen & Tucker, note 115 at 445.

148. From a Kelsenian perspective it would be pointless to deny that the asymmetry of power affects the efficacy of sanctions. See Josef L. Kunz, *The Changing Law of Nations. Essays on International Law* (Ohio State University Press, 1968) at 622: "Each state is *judex in causa sua*, has a right of auto-interpretation of international law, a right of auto-determination of the delict and the state guilty of it an must carry out the sanctions itself.

qualms about accepting a decentralised mode of enforcement pursuant to which sanctions are imposed on behalf of the community by each individual:[149]

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

If the commonly agreed upon distinction between legal and illegal self-help (acts of vengeance as opposed to attacks) were not used even by those who are taking the law into their own hands, the "force monopoly" of the community would disappear.[150]

I grant that this may appear to be terribly paradoxical. However, never before has the monopoly of force been formulated in a less state-centred manner. It is at this point that Kelsen's deconstruction of sociological "realism" makes itself felt, again.[151]

Where collective security is absent, the states, for their individual security, follow the policy of armaments, alliances, and the balance of power. Under such a system a weak state can hardly go to war or take reprisals against a more powerful state, whereas the latter may abuse its power." It is beyond the purview of this article to explore the question of whether a legal positivist does not have to grant that public international law is for the grand powers to write.

149. Kelsen, note 131 at 14.

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

151. For a sceptical perspective on Kelsen's claim that a monopoly of force can even exist under conditions of decentralisation, see Bull, note 144 at 329, 336. Bull contends that Kelsen ignores the force of states.

First, the force that accounts, according to Kelsen, for the monopoly of force, is nothing short of the legal system. The community that is constituted by the system imposes the sanction by empowering the harmed entity to act as its agent.[152] To the community's indulgence to let someone act on its behalf corresponds the activity by the agent who claims to act on behalf of the mute principal. One may wonder whether this does make any sense. How is a mute principal to deal with presumptuous imputations? Conceiving of the international community along the lines of a mute principal, however, makes just as much sense as conceiving of "the people" or "the state" from a similar point of view. These principals would not speak either if it were not for the intervening attribution by agents.

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

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

152. See Kelsen, note 131 at 14.

erarchical system of enforcement on the other. Kelsen must have thought (even though he did not put it in these terms) that both conditions express unnecessary—and hence *false*—idealisations. We have come to live with an international system in which acts of enforcement remain decentralised even where adjudication (or something remotely similar to it) has already been centralised. We have no qualms about calling such a system "law". Kelsen seems to have thought that the belief in the necessity of centralised adjudicative institutions is nothing short of a moral expectation with regard to the (alleged) impartiality with which an authorisation to impose a sanction is granted. Whether or not it is desirable to have those who have rights also determine the conditions of their exercise is not a question of law but of legal policy. Kelsen is ready to grant the international system legal status even where adjudication is completely decentralised and effectively carried out by the harmed state.[153]

Hence, there remains only one necessary condition for the existence of a monopoly of force, namely that the various acts of violence are claimed to be authorised by one and the same system. There is no reason to limit the attribution of monopoly to cases where command structures exist. As long as it is clear to the members of the community that force ought to be exercised legally only on the behalf of the community, the community

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

avails over a monopoly of force.[154] Public international law remains, thus, in a state in which legal systems have been for much of human history, namely, in a "primitive" state.[155]

XIV. The system of universal hypocrisy

The one question that is left open, of course, is whether a positivist theory could ever accord the existence of discourse priority over the effectiveness of the link between sanction and offence. What if the bully on the schoolyard were to get away with impunity for everything he does because he is feared by everyone else? What if no state complied with international obligations while constantly appealing to them in criticising the conduct of others? In other words, would a system of universal hypocrisy be a system of law?

The common frame of reference is merely a necessary condition for the existence of a legal system. Would there be a legal system even if the commission of "delicts", which would be recognised as such, were not followed by sanctions? I am afraid that I am not able to answer this question conclusively, however, I think I am able to clarify what it is about.

Kelsen discusses the case of the revolutionary change of legal orders (which was not a mere hypothetical possibility according to his life experience). He grants that in such a situation one legal order is replaced by the other without a legal rule governing transition from one to the next. The validity of the new legal order depends on the *Grundnorm*, which invites attribution of validity to a normative order only if such an order is

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154. Kelsen would not deny, however, that the norms that are appealed to by the participants who are taking the law into their own hands ought to be susceptible to adjudication. Kelsen's theory may thus be tied to the theory of Hermann Ulrich Kantorowicz.

155. See Kelsen, *Reine Rechtslehre* note 4 at 323-324. The absence of a legislature is also what accounts for the primitive nature, according to Kelsen.

effective, that is, "largely followed and enforced".[156] Under circumstances of change it makes sense to say that the new legal order has taken the place of the old because the new rather than the old legal order is treated *as if it were objectively valid* and consequently applied.[157] One order has superseded the other.

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

This situation is clearly different from public international law existing under the condition of "bullyness" or universal hypocrisy for the only condition that is met then is the axiomatic condition. Is an international system a *legal* system when the bully has the power to act as he sees fit while others would find themselves invested with the legal power to impose a sanction had they only the factual power to so? How does the lack of what *can* be done affect the characterisation of what *ought* to be done? Do sanctions lose their meaning when they devolve to the level of the "impotent ought" (*bloßes Sollen)*, which has been so gloriously debunked

156. See Kelsen, *Reine Rechtslehre* note 4 at 214.

157. On what it takes, according to Kelsen, to make such an "as if" statement, see Alexander Somek, 'Ermächtigung und Verpflichtung. Ein Versuch über Normativität bei Hans Kelsen' In Paulson & Stolleis, note 115, 58-79 at 72-77.

by Hegel?[158] In other words, is effectiveness of enforcement, as opposed to the effectiveness of indictment, an idealisation[159] necessary for a legal system to exist? I am strongly inclined to believe that it is because otherwise all talk of illegality would be assimilated to moral zeal or political bickering.

I need to grant, however, that the matter becomes more intriguing if it is perceived from a monist perspective. One may find no reason to deny effectiveness since the overall system would be effective on the level of domestic orders.

XV. International law is no special case

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

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158. See G.W.F. Hegel, Enzyklopädie der philosophischen Wissenschaften, *Werke in zwanzig Bänden*, ed. K. M. Michel & E. Moldenhauer (Frankfurt/Main: Suhrkamp, 1970). vol. 8, § 60, p. 143. The question is important. The normative meaning of "sanction", that is, the legally authorised coercion of someone into doing something, would be altered if the sanction could not be enforced. Norms do not become invalid, to be sure, merely because of non-compliance. Persistent non-compliance, however, changes the meaning of what norms are valid of. In a world full of taboos and social restrictions, the normative meaning of liberty changes, for liberty can no longer be exercised. It rather becomes a mockery of liberty.

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

The key to understanding the family resemblance between decentralised enforcement and case law lies in the notion of "flexibility", which is introduced by Kelsen in his discussion of a case law system.[160] Intriguingly, the notion of decentralisation makes an appearance there, too.[161] Kelsen discusses different degrees of the generalisation of norms. He sketches one system that is fully centralised. The enactment of general norms is vested in a legislature. The adjudicating bodies are strictly bound by what has been laid down for them. He then discusses a system that does not avail of any centralised norm-setting institution at all. It is a system, rather, in which the adjudicating bodies create norms on an individual case-by-case basis *for* each case.[162] Such a system allows for great flexibility, however, it does not generate legal certainty.[163]

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

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160. See *Reine Rechtslehre* note 4 at 256-258.

161. Kelsen, *Reine Rechtslehre* note 4 at 256, explains that the greater the influence of adjudicating bodies is on the formulation of legal rules the more the legislature is decentralised in such a system.

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

163. Kelsen realises that for there to be *application* there needs to be the generation of general norms, yet, Kelsen does not perceive the dialectical challenge posed by the idea that the general norm can be created for each individual case. See id at 258.

XVI. The king's many bodies in new clothes

I mentioned above in section IV that public international law is currently challenged from at least two perspectives. In the remainder of this article I would like to explain how Kelsen's theory can be used as a guide in assessing the merits of recent attempts at debunking public international law.

One major contemporary challenge for an international legal system of the type described by Kelsen seems to originate from what is seen to be an increasing "fragmentation" of the international system. The fragmentation-thesis comes in at least two different forms. First, fragmentation is said to originate from the "disintegration" of different branches of the state into networks of international co-operation.[164] Second, fragmentation is also alleged to be manifest in the insolubility of jurisdictional disputes in the relation between different international "regimes". I do not want to explore the first version of the fragmentation-thesis here. It is for limited relevance to Kelsen for he did not, after all, accept the premise that the legal universe is made up of states. Hence, from his perspective a potential withering away of the state would not be particularly disturbing because he prided himself for having exposed the belief in the state as something that exists over and above the legal order as the mirage of conservative political ideology.[165]

The greater challenge seems to be posed by the second version of the fragmentation thesis. It has been advanced recently by Gunther Teubner[166] and his associates, such as Peer Zumbansen[167] and Andreas Fischer

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164. See, notably, Slaughter, note 58.

165. For a summary, see Kelsen, note 16 at 188-192.

166. See his 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' (1997) 31 *Law and Society Review* 763-787; 'Global Bukowina: Legal Pluralism in the World Society' In G. Teubner (ed.) Global Law Without a State (Aldershot: Dartmouth, 1997) 3-30.

Lescano.[168] In a more recent article, Fischer-Lescano and Teubner[169] claim that we live in an age of "global legal pluralism",[170] an expression that designates, practically, the absence of a unified legal system providing the basis for the resolution of jurisdictional conflict. According to Fischer-Lescano and Teubner such pluralism is not merely owing to the pursuit of different legal policies by different international regimes, rather, it shows that the legal system has come to reflect enduring and profound social fragmentation:[171]

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

The colliding sectors of society are nothing short of the subsystems of global society.[172] As the *noumena* of a functionally differentiated society, these subsystems make their *appearance* in what the authors call "regimes".[173] Such regimes, in turn, are rendered institutionally articulate by international organisations. The point of their observation is that, since

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167. See Zumbansen note 34.

168. See Andreas Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte* (Weilerswist: Delbrück Verlag, 2005)

169. See Andreas Fischer-Lescano & Gunther Teubner, 'Regime-collisions: the vain search for legal unity in the fragmentation of global law' (2004) 25 *Michigan Journal of International Law* 999-1046.

170. Id. at 1000-1001.

171. Id. at 1004.

172. Id. at 1007.

173. "Regimes" are characterised by the authors as follows: "A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches." (id. at 1013). One is inclined to rephrase this characterisation of regimes, in the spirit of H.L.A. Hart, as a unity of primary and secondary rules. For an introduction, see also Gralf-Peter Calliess, 'Systemtheorie: Luhmann/Teubner' In Buckel, note 2, 57-75 at 73-74.

such organisations are the surface manifestation of subsystems, they operate according to the specific rationalities constitutive of these.[174] Apparently, the rationality of the economic system is different from—and maybe even incommensurate with—the rationality of other systems, such as health, science, culture, technology, the military, transportation etc.[175] The absence of rules for the resolution of interjurisdictional problems is seen as signalling the absence of an overarching rationality. Indeed, jurisdictional intractability is understood to be the consequence of a collision of rationalities:[176]

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

Clearly, it is not merely a conflict of values or a contest between institutions that the authors have in mind here but a conflict of rationalities that translates into jurisdictional impasse.[177]

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174. See Fischer-Lescano & Teubner, note 169 at 1013.

175. See id. at 1006.

176. See id. at 1013-1014.

177. This is a strong claim, to be sure, which is unfortunately nowhere bolstered with additional arguments explaining what the purported "contradiction" between and among "incompatible" rationalities is all about. Is the fact, for example, that, while economics relies on arguments from efficiency, health advocates appeal to the value of health indicative of a clash of rationalities? Or is it merely a difference between the requisite normative standards? Is a tension between such standards tantamount to a contest of rationalities?

Interestingly, the legal system is viewed as the stage where this conflict breaks out into the open.[178] But the legal system is incapable of providing a resolution.[179] In a manner reminiscent of Marx, the legal system is taken to be the place where the conflict comes to the fore, however, barely concealed by a smokescreen of idealisations.[180] The result is drift. Societal fragmentation "impacts on law" in a way that social spheres "parcel out issue-specific policy-arenas, which for their part, juridify themselves".[181] These legal regimes are linked with social sectors and, through networks, co-operating with other regimes and sectors.[182]

According to the authors, this social situation spells doom to the idea that there can be one system of international law. No unified perspective on international law is available, not even from the vantage point of *ius*

Nowhere is it made clear in which sense a "contradiction" is supposed to be in play here. Is there a logical contradiction between a supporting economic growth and concern for human health? Or is it, eventually, merely a tension between different values? Similarly, it is difficult to tell the difference between what the authors snobbishly refer to as a "mere compromise" on the one hand and the "compatibilisation technique" on the other, whose use is recommended by them under conditions of fragmentation. I do not see how the recognition of non-trade values by the WTO regime allows for a "compatiblisation" of "rationalities" that would be decidedly different from striking a balance between trade and other values. But see See Fischer-Lescano & Teubner, note 169 at 1030-1032.

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

179. See id at 1045: "Rather than secure the unity of international law, future endeavours need to be restricted to achieve weak compatibility between the fragments. In the place of an illusory integration of a differentiated global society, law can only, at the very best, offer a kind of damage limitation. Legal instruments cannot overcome contradictions between different social rationalities. The best law can offer—to use a variation upon an apt description of international law—is to act as a 'gentle civiliser of nations'" (in the footnote follows a reference to the book by Koskenniemini).

180. See Karl Marx & Friedrich Engels, *Werke,* vol. 2 (Berlin: Dietz Verlag, 1976) 33.

181. Fischer-Lescano & Teubner, note 169 at 1009.

182. See id. at 1017.

cogens for *ius cogens* itself is likely to be rendered differently by different social sectors.[183] All that can be accomplished, according to the authors, is the management of fragmentation through strategies of "compatibilisation" and "default reference".[184] The former stands for the requirement that each international regime take into account the values that are actively pursued by others, for example, the WTO with regard to non-trade values (Article XX GATT comes to mind here);[185] the latter for the attempt to refer, where possible, to decisions by other bodies without attributing to these the normative force of a precedent. A "default reference" creates merely the presumption that decisions by international regime tribunals have persuasive authority for one another.[186] Instead of impressing unity, the legal system has to allow for mutual accommodation, which is always going to be accommodation of different rationalities.

At first glance, this diagnosis appears to insinuate that Kelsenian legal ideas finally may have lost their social base. In the world of modern international law, not monism but pluralism (even though the pluralism of regimes and not of states) is carrying the day. However, at a second glance, it is less clear why this should be the case.

The unity that the authors diagnose to be absent is the substantive unity of principles, possibly in the sense of coherence that it is relevant to Dworkin's project.[187] This type of unity is of no interest to Kelsen since it seems to point into the direction of a substantive basic norm the existence of which Kelsen deemed to be indemonstrable.[188] The fact that different

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183. See id. at 1039.

184. See id. at 1044-1046.

185. See id. at 1024.

186. See id. at 1044.

187. See Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) 219.

188. See Kelsen, *Introduction*, note 4 at 55.

courts of final appeal (or final tribunals) reach different conclusions and strike a different balance between conflicting values does not affect the membership of decisions to one system. On the contrary, the finality of decisions and the respect for, using Dworkinian parlance, their "enactment force"[189] in the course of "default reference" show that they are treated as members of one and the same legal system from a dynamic point of view. Put differently, when confronted with a decision by another tribunal each tribunal has to come up with some conception of the decision's normative force. The unity of law is presupposed in every instance in which such a conception becomes tacitly or explicitly applied to a case at hand. The mode of constructing the unity may well be contested, however, as a form it is presupposed by all participants.

I suspect, hence, that what Teubner and Fischer-Lescano have in mind, when speaking of "fragmentation", is the absence of a substantive *Grundnorm*.[190] Consequently, they bring to bear to their project a much more demanding idealisation of systematic unity than the one advanced by Kelsen,[191] who leaves ample room for substantive conflicts between norms that occupy different levels of the legal system or apply to different situations. In fact, their appeal to "compatibilisation" is a consequence of assuming that what explains the current situation is the lack of a substantive *Grundnorm*.[192] "Compatibilisation" is the ersatz for the latter. In their opinion, regimes should strive for mutual accommodation since this would promise to curb the "self-destructive tendencies" within purported

189. See Dworkin, note 134 at 113.

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

191. See Kelsen, *Introduction*, note 4 at 57-58.

192. See Fischer-Lescano & Teubner, note 169 at 1045-1046.

"rationality collisions"[193] on the basis of some compromising mode of accommodation that is to be constructed from within each regime.[194] Encouraging separate regimes to work with their own conceptions of coherence, however compromised, appears to reconfirm Kelsen's view that legal knowledge claims need to presume the unity of the system of norms to which the norm that is being invoked is taken to belong. In other words, the only possible authorisation for claims that self-reflexively assert to be knowing the law lies in an endorsement of the type of system envisaged by Kelsen.

XVII. Born again Prussian statism

The overwhelming military power of the United States of America and the behaviour of its current government seem to have eclipsed the authority of international law where such authority really matters.[195] The defiant superpower has reinvigorated old "realist" scepticism about international law.[196] Paradoxically, it is held, by some more "realistic"[197] scholars, that public international law can be a legal system with significance *of its own* only if compliance with public international law is supported by moral

193. For a critique of Teubner's earlier work that also assumed something close to the incommensurability of rationalities, see Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (trans. William Rehg, Cambridge: Polity Press, 1996) 53-55.

194. See Fischer-Lescano & Teubner, note 169 at 1045-1046.

195. See, generally, Andrew J. Bacevich, *American Empire. The Realities and Consequences of US Diplomacy* (Harvard University Press, 2002); Karl Zemanek, 'Is the Nature of the International System Changing?' (2003) 8 *Austrian Review of International and European Law* 3-10.

196. See above section IV.

197. On the recklessness with which I use the term "realism" in the text above, see already notes 21 and 30. It would be more accurate, to be sure, to refer to these scholars as atomists. See note 29.

reasons, that is, by the belief that norms need to be adhered to even when compliance conflicts with the perceived self-interest of the state.[198] If no proof for a moral attitude can be found, public international law can rest only on the convergent self-interest of states.[199]

The belief that public international law needs to be, and is indeed, complied with for some reason of public morality is attributed by Goldsmith and Posner to most legal scholars working in the discipline.[200] In contrast, Goldsmith and Posner offer what they believe to be a less idealistic approach.[201] There is no moral obligation for a state to submit itself to an international community[202] to begin with, not even as a consequence of pure practical reason.[203] Moreover, according to what they take to be a "descriptive account", actual compliance with international legal rules is the consequence of four different types of behaviour that are indicative of self-interested behaviour on the part of states.[204] Goldsmith and Posner present this as if it were a sobering insight. Public international law does not occupy some high moral ground vis-à-vis domestic law. It is, indeed, *äußeres Staatsrecht*, not even law proper, but merely some reflection of the

198. See Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005) 183.

199. See id. 10-13.

200. Goldsmith & Posner, note 198 at 14-15, 165, 185. The authors profess to apply rational choice theory to international law (id. at 7).

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

202. In a similar vein, Adolf Lasson, *Princip und Zukunft des Völkerrechts* (Berlin: Wilhelm Hertz, 1871) 12-17.

203. See Goldsmith & Posner, note at 198 at 14, 205-224.

204. See id. at 10-12 (coincidence of interest, coordination, cooperation, coercion). For a useful discussion, see Hathaway & Lavinbuk, note 27 at 1416-1417.

combined effects of state conduct. Clearly, Goldsmith and Posner are international-law-nihilists:[205]

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

Goldsmith's and Posner's approach is conspicuously reminiscent of nineteenth and early twentieth century right-wing Hegelian orthodoxy regarding international law.[206] Public international law is seen, at best, as the epiphenomenal medium for the mutual recognition of states.[207] For example, according to Lasson,[208] public international law was to be seen as the expression of state-egoism. Actual international law reflects the relative power of states. It was clear to Lasson, however, that with increasing

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205. Id. at 13. For a discussion of Lasson who held the same view, see Kelsen, note 60 at 196-198.

206. See, for example, Lasson, note 202. It is fair to say that owing to his emphasis on relentless competition among states over scarce resources (id. at 8), Lasson was indeed a "realist". On Lasson, see also Koskenniemi, note 21 at 32-33, 182-183. On right-wing Hegelianism in general, see Hermann Lübbe, *Politische Philosophie in Deutschland* (Munich: dtv, 1974) 63-70; on the rise of „realism" in German public law scholarship in the late nineteenth century, see 439-438. I do not mean to imply, however, that Goldsmith and Posner are sufficiently familiar with the intellectual history of the discipline in order to be aware of who their intellectual bedfellows are. A remarkable flirtation, however, can be observed for American neo-conservatives with what they take to be Hegel's political thought. See Lee Harris, *Civilization and Its Enemies. The Next Stage of History* (New York: Free Press, 2004).

207. See Eduard Gans, *Naturrecht und Universalrechtsgeschichte* (1832/33), ed. M. Riedel (Stuttgart: Klett Cotta, 1982) 105.

208. Given that Lasson published his "realist" debunking of international law in the year of the creation of the German Empire (1871) it may be more accurate to speak of the recrudescence of "German statism" in present-day US American doctrine, however, the German empire was clearly dominated by Prussia. See Michael Stürmer, *The German Empire. A Short History* (London: Weidenfeld & Nicolson, 2000).

interpenetration among states the long-term self-interest of states abide by rules that are in their mutual interest.[209] But these rules are what Kant would have called "hypothetical imperatives",[210] that is, rules of prudence and not rules of law.[211] Public international law is, if anything, "the free agreement of co-ordinate agents who cannot be forced into abiding by it".[212] In a similar vein, Erich Kaufmann—nowadays mostly remembered for his notorious remarks about the gloriousness of war[213]—conceived of public international law as mere *Koordinationsrecht*, that is, law that does not rest on the subordination of states under one common authority but on a coordination of their conduct[214] that is always subject to the reservation as regards their self-preservation.[215] Only the latter is the *telos* of public international law.[216] There is no international community and no inter-

209. See Lasson note 202 at 55.

210. See Immanuel Kant, Grundlegung zur Metaphysik der Sitten, *Werke in zwölf Bänden*, ed. W. Weischedel, vol. 7 (Frankfurt/Main: Suhrkamp, 1968) at 43.

211. See Lasson note 202 at 49.

212. Lasson, note 202 at 48 (my translation). The German original reads as follows: "*Das Völkerrecht hingegen ist eine freie Abmachung unter Coordinierten, die zu halten sie nicht gezwungen werden können*".

213. See Erich Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus. Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriffe* (Tübingen. J.C.B. Mohr, 1911) at 146: "Not 'the community of self-determined human beings' but the victorious war is the social ideal. […] In war, the state reveals itself in its true essence, it is its highest achievement in which its nature comes to its full fruition." (my translation). A reference to these sentences is made (in a very different translation) in Koskenniemi, note 21 at 179. On Erich Kaufmann, see Kelsen, note 60 at 198-200 (footnote 3). On the broader controversies over questions of legal theory between Kaufmann and Kelsen, see Stanley L. Paulson, 'Some Issues in the Exchange between Hans Kelsen and Erich Kaufmann' (2005) 48 *Scandinavian Studies in Law* 270-290.

214. See Kaufmann, note 213 at 146, 160.

215. See id. at 204.

216. See id. at 192.

national solidarity, but merely the coincidence of interests.[217] That whoever *can* act also *may* act is the "fundamental idea" of public international law.[218]

Aside from being neither new nor original, what Goldsmith and Posner introduce with the purport of offering a sobering insight rests on a combination of idealisations whose accuracy has been long called into question by Kelsen early in the twentieth century.[219]

The first and most remarkable idealisation consists in the puzzling equation of "real" law and morality. Goldsmith and Posner end up adopting the view that they ascribe to "idealistic" scholars of public international law. According to that view, public international law, in order to count as an independent source of law, needs to be dissociated from the self-interest of states and in some not further specified way be sufficiently "like" morality.[220] Were that not the case, it would not give rise to a *genuine* obligation.

Interestingly, obligation is taken to be something that involves self-sacrifice.[221] Such a view of obligation is questionable even from the perspective of moral theory. Generally, it makes sense to conceive of moral obligation as a necessary correlate of self-realisation, however difficult it may be to achieve.[222] Moreover, the line dividing self-interested conduct and morality is highly indeterminate in cases such as friendship and other

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217. See id. at 193.

218. See id. at 153.

219. See, in particular, Kelsen, note 60 and note 17.

220. See Goldsmith & Posner, note at 198 at 192, 202.

221. See *id*. at 183.

222. See Christine M. Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996) 102.

forms of loyalty.[223] Goldsmith's and Posner's social universe is much too facile to account for such phenomena. Undoubtedly, their view is also highly doubtful as regards legal obligation. A legal obligation—at any rate according to Kelsen—is the correlate of someone's right to commit a coercive act.[224] Such a right is, correctly understood, a mere privilege and hence not backed up by a moral duty on the part of the addressee to endure coercion.[225] This is all there is to legal obligation. Kelsen articulated in most radical form what German philosophy had in mind when stating that law governs the "external conduct" of persons.[226]

In any event, it should emerge that an idealisation of legal obligation into the equivalent of morality is not the least necessary in the context of international law. This is true, generally, of theories that seek to uncover the grounds of compliance. Legal positivism, at any rate, can do without those. The reasons explaining efficacy are manifold and difficult to examine in a world rife with deceit and hypocrisy. Indeed, it is questionable whether the attempt to come up with causal explanations does not rest on a fatal category mistake about intention and their relevance in the realm of reasons.[227] Be that as it may, customary international law, for example, is likely to be efficacious on the basis of reasons for action that vary from

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223. This cannot be discussed any further here. For a highly stimulating analysis, see Joseph Raz, *Engaging Reason. On the Theory of Value and Action* (Oxford: Oxford University Press, 1999) 288-292.

224. This is a condensed rendering of a more complex analysis by Kelsen. See Kelsen, *Introduction*, note 4 at 42-46.

225. For an illuminating discussion of the deontic modalities of privileges, see Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990) 50-52.

226. See, for that matter, Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre*, ed. B. Ludwig (Hamburg: Meiner, 1986) at 29.

227. See Robert B. Brandom, *Making It Explicit. Reasoning, Representing, and Discursive Commitment* (Cambridge, Mass.: Harvard University Press, 1994) 253-271.

one participant to the next. Ironically, Goldsmith and Posner share this view, however, in their case it undermines their project. As Hathaway and Lavinbuk point out in their critical review, Goldsmith and Posner are consistently imprecise in explaining which of the four modes of rational behaviour[228] applies in what case.[229] For a sociologically enlightening theory of compliance to succeed it is not enough to state that, in any event, one or the other mode may explain conduct, it has to point out for what reason a specific mode is chosen by a state. A facile identification of whatever happens with self-interested behaviour will not do. On the contrary, it would be symptomatic of the idealisation of state-action from a normative angle, in this case, that of the "good national interest" that is allegedly pursued by the state.

In exploring the sources of customary international law, Kelsen pointed out that custom—"one ought to do like all the others do"—is all that matters.[230] He went at quite some length to explain why any other theory that adds to mere custom consent or some noumenal normative force, such as the spirit of community or solidarity,[231] is inclined to treat this additional element as essential and custom as a derivative surface

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228. See above note 204.

229. See Hathaway & Lavinbuk, note 27 at 1423, 1431-1432. As the authors explain, the same critique applies to the models themselves (at 1424): "Yet because these models are so poorly specified, it is impossible to know what their particular claim might be, let alone how one might falsify it. This is an important shortcoming of the book, for a theory that is impossible to contradict does not provide opportunities for advancing true understanding of its subject."

230. See Kelsen & Tucker, note 115 at 441: "The basis of customary law is the general principle that we ought to behave in the way our fellow men usually behave and during a certain period of time used to behave. If this principle assumes the character of a norm, custom becomes a law-creating fact. This is the case in the relations of states."

231. See Kelsen's discussion of Scelle in Hans Kelsen, *Auseinandersetzungen zur Reinen Rechtslehre. Kritische Bemerkungen zu George Scelle und Michel Virally*, ed. K. Ringhofer & R. Walter (Vienna: Springer, 1987) 7-21. On Scelle, see Koskenniemi, note 21 at 331-333.

manifestation thereof.[232] This observation is highly relevant to currently fashionable attempts to construct public international law from the vantage point of reasons for compliance.[233] Obviously, such theories are theories of validity in disguise, for what they are really concerned with are the *good* reasons to abide by international obligations. Their thrust is clearly at odds with legal positivism's insistence on norm-creating *facts*.[234] Compliance theories, consequently, are confronted with a recurring dilemma. They are either empirically indeterminate[235] or overcharged with idealisations, that is, attributions to agents of reasons that are taken to be "the right reasons". As has already been observed by Hathaway and Lavinbuk, Goldsmith and Posner are guilty of the former[236]; they are, however, also guilty of the latter.

Goldsmith and Posner are able to conceive of the validity of public international law only if it is backed up by force. Since morality has no force in the world of self-interested states[237] the only force there is is the force of

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232. See Kelsen & Tucker, note 115 at 441-443.

233. See, for example, Hathaway & Lavinbuk, note 27 at 1437, who regard Goldsmith's and Posner's atomism as "emblematic of the most important trends in modern international legal scholarship".

234. For Kelsen, the *opinio juris* can only be reflected in facts. Everything else would introduce a natural law component into the study of law for the student would be inclined to attribute to states compliancy for what he or she takes to be the "right" reasons. See Kelsen & Tucker, note 115 at 450-451: "To be sure, the psychological element of custom, the *opinio juris sive necessitatis*, may be inferred from the constancy and uniformity of state conduct. Indeed, in practice it appears that the *opinio juris* is commonly inferred from the constancy and uniformity of state conduct. But to the extent that it is so inferred it is this conduct and not the particular state of mind accompanying conduct that is decisive." See also Kunz note 148 at 340-342.

235. On the difficulty to sort out motives, see Hathaway & Lavinbuk, note 27 at 1442.

236. See note 229.

237. Again, this is a view that they share with Lasson, note 202 at 42.

the state.[238] The power of norms is thus assimilated to the power of overpowering force.[239] Underlying this obsession with might is another idealisation, namely, the hypostatization of the state into a superhuman entity. The authors are surprisingly candid about adopting such a dogmatic stance. Apparently, they do so with the expectation that such dogmatism conforms with the well-established "state of the art" in "rational" choice theory.[240] As a result of imagining one "undifferentiated unitary" actor, the authors fail to realise that they attribute to states different interests depending on the constituents or state institutions they tacitly refer to. They are also not sensitive to problem posed by interest-group capture in international politics.[241] States are simply taken to be rational entities with complete and consistent preferences. In reply to the likely objection that phenomena such as cycling in voting, which have been widely analysed by public choice theory, cast doubt on the accuracy of such idealisations the authors contend that without them "any explanation of international law […] would be suspect"[242]. This reply, which essentially says that the objection needs to be ignored for if it were taken seriously the project would be uncovered to be a failure from the start, is a remarkable specimen of bad social theory. The shamelessness with which it is stated speaks to the fact that the project is animated by the desire to rationalise unilateral conduct by states, in particular by the United States of America.[243]

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238. See Goldsmith & Posner, note at 198 at 202-203.

239. Kelsen thought that the attribution of overpowering force to the state is questionable in itself since it seems to bespeak a latent obsession with "the state" qua a deferred designator of the normativity of the domestic legal order. See Kelsen, note 17 at 134-135.

240. See Goldsmith & Posner, note 198 at 7-8.

241. See Hathaway & Lavinbuk, note 27 at 1432-1435.

242. Goldsmith & Posner, note 198 at 8.

243. The point is also made, more cautiously, by Hathaway & Lavinbuk, note 27 at 1427. The best rationalisation available for such "revisionist" scholarship has it that inter-

The self-interested state is taken to have good reasons for action, however, it remains profoundly unclear for whom these reasons are good—other than for the normative construct state, which is a creature— surprise— of public international law.

XVIII. The trouble with atomism

Atomism, even though widely used and accepted as a *lingua franca* in contemporary US American legal scholarship,[244] is the source of poor social theorising. Barely anything is more paradoxical, even hopeless, than the use of rational choice theory with the aim of increasing the sociological accuracy of analysis. I should like to remind readers of three reasons for the deficiency that is notoriously encountered here.

First, atomism is a bad guide because it cannot arrive at a convincing account of the integrating effect of norms. This has been known to sociological theory at least since Parsons argued that Hobbes had to "stretch" his premises in order to derive from self-interested conduct the interest to sustain social co-operation.[245] Rational choice theory suffers from "Hobbes' Problem of Order" in that it is unable to explain how self-interested agents "come to realize the situation as a whole instead of pursuing their own ends in terms of their immediate situation".[246] The gene-

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national law threatens to undermine liberal democracy. See, notably, Jed Rebenfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971-2028.

244. See Keohane, note 21.

245. See Talcott Parsons, *On Social Institutions and Social Evolution. Selected Writings*, ed. L.H. Mayhew (Chicago: University of Chicago Press, 1982) 96-102; for a useful discussion of how this problem is seminal for Parson's sociological theory, see Hans Joas, *Die Kreativität des Handelns* (Frankfurt/Main: Suhrkamp, 1992) 22-33.

246. Parsons, note 245 at 100; for a useful commentary, see Jürgen Habermas, *Theorie des kommunikativen Handelns*, vol. 2: *Zur Kritik der funktionalistischen Vernunft*

sis of social norms needs to be found elsewhere, it is not to be found, at any rate, in the combined effort of self-interested agents.[247]

Second, atomism's penchant for rationalism is misleading owing to an unbending belief in the availability of one right causal explanation. But such a belief is difficult to sustain,[248] for it is highly indeterminate as to where to construct the right chain of causation and how to conceive of an actor's intention.[249] I mention that the German sociologist and philosopher Luhmann designed his variety of "equivalence functionalism" as a reply to the inherent weakness of causal explanation in the social sciences.[250] Functional analysis was introduced by him as an attempt to bring about a Copernican reversal in the relation between systems and causation: systems are not to be explained on the basis of causation but causation needs to be seen as a scheme that is used by a system in order the reduce complexity for a itself. Accordingly, any causal explanation, such as the causal explanation of acts, presupposes a systemic context that filters for an explanation the information that is relevant for the reproduction of the system.[251] No one could give, wantonly, a more instructive example for how this works in the context of the legal system than Goldsmith and Posner themselves. In constructing the agent they deemed relevant to their analy-

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(Franfurt/Main: Suhrkamp, 1981) 315-316. Habermas is perceptive enough to extend this analysis to more recent rational choice theory. See Habermas, note 193 at 336-337.

247. See the classical work by Emile Durkheim, *Les formes élémentaires de la vie religieuse* (Paris: Presse Universitaires de France, 1968).

248. See Niklas Luhmann, *Zweckbegriff und Systemrationalität. Über die Funktion von Zwecken in sozialen Systemen* (2d. ed., Frankfurt/Main: Suhrkamp, 1977) 26-27.

249. See Niklas Luhmann, *Einführung in die Systemtheorie* (Stuttgart: Carl Auer Verlag, 2d ed., 2004) 252-256.

250. See Niklas Luhmann, ‚Funktion und Kausalität' In his *Soziologische Aufklärung. Aufsätze zur Theorie sozialer Systeme*, vol. 1. (4th ed., Opladen: Westdeutscher Verlag, 1974) 9-30.

251. See Luhmann, note 248 at 195.

sis, they use a normative idealisation that reduces complexity. By looking at "the state", they adopt an idealisation that they inherit, not surprisingly, from public international law. It is owing to such a reduction of complexity that the legal system can attribute causes of events to acts by participants. It is amusing, however, to observe that Goldsmith and Posner believe how an idealisation that presupposes the norms of public international law can be easily deployed in an argument against it.

Finally, by taking actors and preferences as given, atomism is the equivalent in the field of the theory of action of what Sellars called the "Myth of the Given".[252] With foolish recalcitrance, atomism sticks to the idea that there is something immediate with which an analysis can begin, namely actors and their preferences. Nothing can be further from the truth, as is well known,[253] particularly by so-called "constructivists", a position that is all too lightly disposed of by Goldsmith and Posner with a grand dismissive gesture.[254]

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

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252. See Wilfrid Sellars, *Empiricism and the Philosophy of Mind* (Cambridge, Mass: Harvard University Press, 1997) at 14, 33. The equivalence has been pointed out by Robert B. Brandom, *Articulating Reasons. An Introduction to Inferentialism* (Cambridge, Mass.: Harvard University Press, 2000) at 31.

253. See Habermas, note 193 at 336.

254. See Goldsmith & Posner, note 198 at 15. For a critique, see Hathaway & Lavinbuk, note 27 at 1439.

XIX. Conclusion

It may be the case that legal positivism is ultimately not a defensible position in legal theory[255] or not the most attractive approach to public international law.[256] The puzzling career of Anglo-American conventionalism,[257] however, may have also made us forget that legal positivism, correctly understood, is a position with an edge. Hart and his self-nominated disciples ventured to tame legal positivism into a complacent professional faith that is prone to ratify as "law" whatever nonsense may happen to attain the force of a convention among those who practice law. This is not the spirit of legal positivism.

I tried to explain that, in the context of international law, Kelsen's legal positivism has the potential to expose the unwarranted assumptions underlying attempts at debunking public international law. Those who stand ready to embrace the demise of a unified system of public international law in the face of increasing "fragmentation" come to the subject matter with an unnecessary expectation of coherence. Fragmentation may be a recurring experience on a cognitive plane, but it is a completely different matter how one ought to deal with it from a normative point of view. The question that would have to be asked, I grant, is whether the legal system—understood as a system of norms—is already and inescapably in demise.[258] Those who conceive of themselves as revealing the real power-structure underlying the moralistic pretensions of international le-

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255. See Somek, note 86.

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

257. See Kenneth Einar Himma, 'Inclusive Legal Positivism' In J. Coleman & S. Shapiro (eds.) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 125-165 at 130; but see Green, note 102.

258. See Somek, note 86 at 100-103.

gal discourse are themselves victim to a whole set of idealisations which they bring to the discussion. "Realism" in international law is often idealism with regard to the power of states or the discernability of the collective interest.

Kelsen made us aware, however, that public international law invites its own misreading from either a statist or a pacifist perspective.[259] Consequently, the critical task of legal positivism is a perennial one. Embracing the Kelsenian project one need not harbour high hopes about the future development of the international legal systems. Kelsen's speculations about future developments are one thing, his theoretical project quite another. The study of public international law requires what the study of law requires in general from Kelsen's point of view, namely, to lower one's expectations about the subject matter. We study law in order to find out what we may have reason to fear. Public international law is not special. It is, like any other legal system, the articulation of the self-organisation of power by normative means.[260]

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259. See Kelsen, note 16 at 387.

260. A first draft of this article was presented in a seminar on theories of public international law that was conducted at the New York University School of Law by Philip Alston, Benedict Kingsbury and Mattias Kumm. I would like to thank all participants for their comments. I benefited from Benedict Kingsbury's comments in particular. Stanley L. Paulson helped me to get on with my discussion of monism. The research assistance by Daniel Frank and Michael Wilhelm is gratefully acknowledged. As always, my wife helped me with a number of points of expression. I cannot imagine any mistakes to remain, however, if there are any they are most definitely my own.