Uncertainty in International Law

A Kelsenian perspective

Jörg Kammerhofer

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Re-engaging with the Pure Theory of Law developed by Hans Kelsen and the other members of the Viennese School of Jurisprudence, this book looks at the causes and manifestations of uncertainty in international law. It considers both epistemological uncertainty as to whether we can accurately perceive norms in international law, and ontological problems which occur *inter alia* where two or more norms conflict. The book looks at these issues of uncertainty in relation to the foundational doctrines of public international law, including the law of self-defence under the United Nations Charter, customary international law and the interpretation of treaties.

In viewing international law through the lens of Kelsen's theory, Jörg Kammerhofer demonstrates the importance of the theoretical dimension for the study of international law and offers a critique of the recent trend towards pragmatism and eclecticism in international legal scholarship. The unique aspect of the monograph is that it is the only book to apply the Pure Theory of Law as a theoretical approach to international law, rather than simply being a piece of intellectual history describing it.

This book will be of great interest to students and scholars of public international law, legal theory and jurisprudence.

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To my parents for their encouragement and patience.

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Foreword by Judge Bruno Simma

A book like Jörg Kammerhofer's *Uncertainty in International Law* makes me nostalgic. It reminds me of the early years of my academic life, in Innsbruck and Munich, when I was fascinated by legal theory, albeit, I must admit, less by Hans Kelsen's Pure Theory of Law than by more 'impure' ways of thinking about the law, in my case concentrating on the question of how bridges could be built between the theory of international law and theoretical approaches to international relations developed by political science. However, soon after my appointment to the Chair of International Law at Munich, my attempts to domesticate interest in theory by putting my ideas on paper found themselves stifled first, by bureaucratic burdens of university life and later by increasing involvement in practical work. This has turned me into an eclectic, a self-confessed pragmatist, lacking a basis in any singular theory, ready to accept any good theoretical idea helping me along, even though willing to appear as an 'enlightened positivist', if need be. But what I think I have still kept is the conviction that legal thinking must fulfil certain minimum requirements if it wants to be called a 'theory'.

In this regard, the present book is quite remarkable. Its author is courageous enough to confess unconditional (but note: never uncritical!) adherence to a legal theory which has set up an intellectual *Reinheitsgebot* that very few academics, even in Hans Kelsen's Viennese home turf, are still willing, or able, to follow. Kammerhofer's is a lone voice in the current theoretical wilderness characterizing international law and his *Uncertainty in International Law* is about as far apart from the international legal mainstream as one can get, but I think this is precisely where its author wants it to be. In a genuine *tour de force*, Kammerhofer sets out to prove that the Pure Theory of Law is capable of helping us to overcome fundamental uncertainties that have long plagued international legal scholarship, and he succeeds to a surprising extent. As a kind of 'anti-Brownlie', he manages to demonstrate that stringent theoretical thinking can help to solve practical problems. What I find particularly interesting (and also a little amusing at times) is that, whenever the author finds it to be necessary, he does not shy away from defending Kelsen's Pure Theory even against its creator. In essence, the added value of Kammerhofer's work is that it does not simply describe the *Reine Rechtslehre*, as others have done also recently and quite well, but actually applies it to a number of highly topical issues. In so doing, the author ruffles many scholarly feathers,

among them mine, but I (only slightly indignantly) admire him for that. Kammerhofer's *Uncertainty in International Law* is one of the books that makes one re-consider established concepts, and it is precisely for that that it deserves attention and recognition.

Bruno Simma
The Hague

Preface

Uncertainty is not a matter exclusively for legal theorists. Every practitioner experiences it on a daily basis. How else can the wide variety of opinions on what constitutes 'fair and equitable treatment' in international investment jurisprudence be called? How else can we style the divergent approaches to the relationship of world trade law to human rights norms, or of European Community Law to *ius cogens* norms? This is a book on the causes and manifestations of uncertainty.

However, this book is also an invitation to consider anew the practical consequences of a rather forgotten theoretical approach to international law. Taking the Pure Theory of Law – first developed by Hans Kelsen and his followers over ninety years ago – as a theoretical model, our current thinking about issues is subjected to the tests and criteria developed by this theory. Most importantly, the adoption of Kelsen's arguments promises to have beneficial results for the study of international law. In contrast to many other approaches which merely seek to problematise orthodoxy, the Pure Theory offers solutions. Throughout the book we will encounter problems which the application of this approach shows do not exist. The '*opinio iuris* paradox' in customary international law-making, for example, is revealed as a chimera in Section 3.3.

This is not to say, however, that the book does not also uncover problems where orthodox scholarship assumes that all is well. This is also a critique of traditional legal scholarship from the perspective of the Pure Theory of Law. International lawyers often seem unconcerned with legal theoretical debates. Pragmatism has become popular among many orthodox scholars (Section 5.4) and many do not explain their theoretical presuppositions and allegiances where their domestic colleagues might. Sometimes, international legal scholarship has taken the form of anti-intellectualism. It may from time to time be felt that theorising is a useless business, irrelevant for 'the real world'. This book was written in part to answer that argument. One of its central arguments is that in normative science, theory determines what is law (Section 7.3) and law is what even the most pragmatic lawyers have to work with. Lawyers deal in norms, not in facts.

Hence, we will seek to demonstrate the importance of legal theory for the study of international law, and show how theory and practice are most intimately connected in the study of law. This book is an attempt to show that international legal

scholarship needs to be more aware of its theoretical basis, needs to discuss it more explicitly and needs to question traditional notions for their consistency.

Another aim is to connect German-speaking scholarship and the English legal tradition. German language writings may provide novel arguments and ideas where English thought has taken a different direction. This book aims to reacquaint us with the arguments of the 'Vienna School of Jurisprudence'. But this is not an easy task. Kelsen's work unfortunately has the stigma of incomprehensibility attached, which may be due, in part, to inter-cultural misunderstandings and misguided translations of his works into English. It could be claimed that understanding Kelsen seems to be conditional upon sharing the same socialisation and culture (the 'Kakanian tradition'), and there is some truth in that. Hence, the task here is to extend an invitation to re-engage with Kelsen's thoughts and to that effect provide a fresh basis for discussing the arguments while minimising cultural or intellectual-historical biases. One of the features of this fresh basis is that all translations from Kelsen's works are the present author's own.

I am very fortunate to have had the support of many extraordinary people in writing this book, whose friendship and help I have the honour to acknowledge here. First and foremost, my heartfelt thanks go to Jason Beckett and André de Hoogh, who have been there throughout the arduous process of writing this book. We have had long discussions on international law and legal theory, they have read every chapter and their advice has always been most welcome, even if at times I have not had the good sense to adopt it. Many others have read chapters or their early manuscript versions. Christoph Kletzer, Akbar Rasulov, Erich Vranes, András Jakab and Amanda Perreau-Saussine have all provided most valuable feedback from a wide variety of viewpoints and their efforts have also considerably improved this book. My doctoral supervisors, August Reinisch and Michael Thaler, have been helpful in a number of ways, not least through their careful thesis reports. I have also received encouragement and more informal help from a wide range of people. For a number of years Philip Allott has been a 'Socratic mentor' and our talks have truly had maieutic properties. James Crawford, Bruno Simma, Martti Koskenniemi, Robert Walter, Clemens Jabloner and Karl Zemanek have all provided help and valuable advice. Last but not least I would like to thank Klaus Zeleny for his friendship and encyclopaedic knowledge of all things Kelsen and Matthias Jestaedt for providing the right environment for legal-scientific research, for many conversations and for one or two much-needed lessons in diplomacy. All errors, however, remain mine.

A word remains to be said on the previous publishing history of the ideas presented herein. Parts of this book have been previously published in other formats. An article on uncertainty in the formal sources of international law in the *European Journal of International Law* in 2004 formed the core of Chapters 3 and 6. An early version of Chapter 2 was published in 2005 as an article on uncertainties in self-defence law in the *Netherlands Yearbook of International Law* and an early and shortened version of the discussion of conflicts of norms in Chapter 5 was published on the homepage of the *European Society of International Law* in late 2005.

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1

Introduction

What is uncertainty?

> Jede Wissenschaft ist, unter anderem, ein Ordnen, ein Vereinfachen, ein Verdaulichmachen des Unverdaulichen für den Geist.[1]

This is an unusual book. Its unusual features may be able to provide a different insight into the study of international law, but they do require an explanation. How scholars conceive of what they are doing is fundamental for their work: it is their approach. The Pure Theory of Law makes a distinctly modernist claim to applying scientific methodology to law. This is the notion that what we do is a legal science in some proper sense of the word, what for the German language is *Rechtswissenschaft*. The approach also determines the relationship to other theories of 'what lawyers do',[2] more so than differences in substance.

As this monograph provides a critique of traditional international legal scholarship from a very specific point of departure, both that critique and the constructive elements are merely one possible view or approach. The existence of many rival theoretical approaches as well as some pragmatic, a-theoretical views of international law is evidence enough to suggest that other views are entirely possible and on a philosophical level equally plausible. On this philosophical level the choice of theory made here is arbitrary[3] and not justifiable.[4] And this argument for a relativistic approach is itself wholly in line with the Pure Theory's

[1] 'Every science is, *inter alia*, ordering, simplifying and making the indigestible digestible for the mind.' Herrmann Hesse, Das Glasperlenspiel (1943). Foreign language quotes will be given in their English translation in the main text, except for chapter and section mottos, and the original will be reproduced in the footnotes. All translations are the present author's, except where noted.

[2] In a recent publication, Sean Coyle and George Pavlakos contra-posit two fundamentally different views of what lawyers purport to do, utilising the concepts of 'jurisprudence' and 'legal science' to express these views: Sean Coyle, George Pavlakos (eds), Jurisprudence or legal science. A debate about the nature of legal theory (2005). Cf. Ralf Dreier, Zum Selbstverständnis der Jurisprudenz als Wissenschaft, 2 Rechtstheorie (1971) 37–54 at 38.

[3] The word 'arbitrary' is used in a specific sense throughout this book, one that differs from the common meaning, which has taken on a negative connotation. It is used in the sense of 'determined and constituted by an act of will', not expressing whim, but the 'free' and constitutive nature of human decision.

[4] See Chapter 7 for a specific, but fundamental, restriction of this argument.

consistent value-relativism, for that question may be asked normatively: what approach *ought* one to take? If this is a normative question,[5] then value-relativists cease to desire to provide a 'right' answer and will content themselves with describing the competing values. The relativity of the Pure Theory as choice will be emphasised throughout this book. The goal is to utilise that particular approach, to consistently apply it to some of the problems facing international law today and to see what benefits and problems this engenders for our study of the law – no more.

The Vienna School of Jurisprudence is a Modernist movement, embedded in the early twentieth-century Viennese *milieu* that enabled the creation of many other prominent modernisms, such as the Logical Positivism of the Vienna Circle, modernist architecture, literature and music. As Modernist theory, it has a very strong inclination towards certain aims in what it does. It is clearly an epistemological approach, based on the notion that the goal of legal science is to perceive law in the most objective fashion possible[6] and that norms constitute a 'truth' in some sense of the word that is worth perceiving. While they acknowledge that the notions of 'objectivity' and 'truth' are problematic and that epistemological problems might exist that may make the cognition of its object difficult or impossible, another modernist characteristic is that they would not consider ceasing to strive for a scientific perception of law in favour of a pragmatic or political conception.

But why would one want to write on the uncertainty of international law and describe what is not law when there is so much law left to describe? What benefits can possibly arise from not describing how international law is, but how it is not, or from knowing which areas of law we do not know? International law's uncertainty is interesting, because international law *is* uncertain, at least more so than most municipal legal systems.[7] Also, international legal writings generally do not penetrate very deeply into the realm of theory. This form of scholarship has sometimes even been called a literary genre.[8]

From a theoretical point of view, however, international law is not categorically more uncertain than any other legal system. International law and municipal laws are not categorically different legal orders, as traditional scholarship sometimes argues. Uncertainties occur in municipal settings just as much as they do in international law. The structural problems of international law are the same as those of any law or of any normative system. Municipal systems and the people involved in their operation just happen to be better at hiding these problems. Written constitutions tend to blind us to the theoretical failings and uncertainties by virtue of the domination of doctrine, the domination of 'the' constitution, the domination of the inevitable 'gap-filler' of a dominant legal culture. Also, if one

[5] Cf. Matthias Jestaedt, Perspektiven der Rechtswissenschaftstheorie, in: Matthias Jestaedt, Oliver Lepsius (eds), Rechtswissenschaftstheorie (2008) 185–205 at 205.

[6] Hans Kelsen, Reine Rechtslehre (2nd ed. 1960) vi.

[7] G.J.H. van Hoof, Rethinking the sources of international law (1983) 173.

[8] Philip Allott, Language, method and the nature of international law, 45 British Year Book of International Law 1971 (1973) 79–135.

proceeds from *certainty*, one has to presuppose much more of the theoretical underpinnings, as one inevitably does. Furthermore, it is likely that the theoretical basis remains in the scholar's subconscious and is not made part of the debate.

Explaining the *causes* of uncertainty is important, because by uncovering the causes we can at least try to avoid uncertainty in future law-making. The reasons why international law is uncertain will also help us better understand the theory of norms and its failings. International law is a good test-case for theory, because through the absence of a dominant legal culture and doctrine we can cognise the theoretical substructure (and its problems) much more clearly[9] – without first having to circumvent a municipal legal tradition's taboos.

Uncertainty is not some monolithic phenomenon or a feature of positive international law. To attempt a definition of a complex set of causes and manifestations before one has had a look at the 'lie of the land', in this case at the law and theories about it, is not likely to yield useful results. Describing uncertainty does not involve the creation of a theory from thought alone. This book as a whole is an attempt to define uncertainty by showing what it looks like in areas of positive international law and legal theory. In this respect, the book works like an induction from a mass of empirical data.

Since uncertainty is multi-phenomenal and multi-causal, a definition in the classical sense – a reduction to one simple explanation (e.g. 'because states are sovereign') – will not be successful. The only alternative is to list manifestations and to categorise them. Like an archaeologist digging test trenches to uncover a hidden structure, this book will give examples of uncertainties in international law and their causes in the following chapters.

One can distinguish four levels of uncertainty in international law. Level One concerns the uncertainty of substantive legal norms (Chapter 2). The norm may be valid or not, but we cannot know whether it is, what its content is (Chapter 4), or its content may be so indeterminate to make its subsumption to facts impossible. Level Two is an uncertainty of law-making norms, the law on sources (Chapter 3). Level Three is an uncertainty as to the 'possibility' of a source, i.e. of the constitution of international law (Chapter 6). Level Four is uncertainty in the theory of norms. The possibility of the existence of norms is uncertain, because, for example, there is too much law (Chapter 5). Even if we start assuming dogmas at the higher levels of the thought-pyramid – as we will have to (Chapter 7) – we cannot thereby fully determine the content of the lower levels. If we were, for example, to assume that customary international law exists as a source, we would not thereby have fully determined what elements are necessary to create customary law. If we were to assume that customary law came from state practice and *opinio iuris*, we could not thereby have fully determined what norms actually are customary international law.

Lastly, there is a fundamental distinction between two types of uncertainty. On the one hand we have *epistemological uncertainty*. There are inherent limits as to how

[9] Christoph Kletzer, Kelsen's development of the *Fehlerkalkül*-Theory, 18 Ratio Juris (2005) 46–63 at 62.

well we can perceive law. Practical and theoretical problems may hinder us from knowing whether a proposed norm '*Op*' is a norm of international law. We may, for example, be unclear as to what is required to create a norm of customary international law and thus not know whether the proposed norm is such a norm. We may also be certain that '*Op*' is written in a treaty, but interpretation as perception of the content or meaning of the norm is a new factor of uncertainty. On the other hand there is *ontological uncertainty*. Whereas the question of epistemological uncertainty is whether we can accurately perceive international law, here the question transcends these problems to come to the direct question of what happens when international law itself is, when the norms themselves are, problematic. When two norms conflict, we assume both to be valid, but it is an ontological question what happens when they conflict.

Thus, the only answer that can be given at the beginning of the book is that no definite answer can be given. The phenomenon of 'uncertainty' is neither confined to international law, nor is it resolvable in most cases, nor does it have a definite cause. To deny uncertainty where it exists, however, is one of the gravest failings a scholar can commit, because scholarship is a commitment to seek knowledge. Knowing where our knowledge ends is itself knowledge.

2

Self-defence under the United Nations Charter

The law on the use of force is one of the most fiercely contested areas of international law. Owing to its highly political nature, the prohibition of the threat or use of force in international relations has become the focal point for disagreements between scholars, states and even international tribunals. Mainly as a result of these disagreements that body of law is not sufficiently well established; therefore, it can be called 'uncertain'. The *existence* of a justification of self-defence is not in doubt, neither in UN Charter law nor in customary international law. However, its scope is contentious.

This chapter is an attempt to demonstrate how uncertainty manifests itself in the law on self-defence. However, it is somewhat deceptive to assume a simple and absolute duality of cause and manifestation. While we will largely leave aside the 'causes' of the uncertainties presented here, it is essential to see that they themselves are merely manifestations of uncertainty, albeit on a different level. It might be more accurate to speak of a *recursus* from the problems we face in perceiving the substantive law to those which are themselves the cause of the 'simple' problems. In a normative system perceived as hierarchical,[1] the cause for the uncertainty of substantive law might well be the hierarchically higher law – the law on law-making. As Chapter 3 will show using customary international law as an example, the law on law-making is as susceptible to uncertainty as the law it creates, if not even more so. Cause and manifestation are relative.

The method employed here is based on taking specific sub-sets of problems and analysing them, instead of trying to write an exposé on the Charter law on self-defence as a whole. Focus will be placed on the argumentative structure of scholars of international law. It is primarily the use and foundation of arguments *pro* or *contra* one or the other view of what is the positive law, and the reason for that choice that will be scrutinised, not so much the 'rightness' of any particular scholar's views. Kay Hailbronner's words may serve as an example of the intended direction:

> By varying references to this or that provision of the Charter, by creating 'concordances' between different principles of the Charter, by referring to a significant change

[1] See Section 5.5.2.

> of circumstances or by invocation of the alleged historical will of the framers of the Charter or of the 'object and purpose' of the prohibition on the use of force [what in fact happens is that] that interpretation of the Charter is preferred which the person interpreting thinks reasonable, politically expedient or subservient to national interest.[2]

There is a type of argument used in the academic debate on self-defence, however, which can be considered outside the legal framework. These are arguments of a purely political or moral nature, or calculations of efficacy on the part of the scholars using them. Legal scholarship whose task it is to find valid positive law must rely only on those arguments which can shed light on what is valid positive law. For example, in proposing that positive international law allows anticipatory self-defence, some scholars argue that a state must be allowed to strike first, because modern weapons technology is highly destructive and waiting for an attack to occur could mean certain destruction. In contrast, others believe that (because modern weapons technology is highly destructive) allowing a state to strike because an attack might happen would mean certain mutual destruction.[3] In this case it is quite obvious that the two arguments cancel each other out and neither argument can be used – irrespective of its 'legitimacy' as legal argument – without being defeated by the other. However, neither argument is a legal argument. Whether or not a norm produces undesirable effects if applied to reality is irrelevant for the validity (its specific form of existence)[4] – or for the interpretation of a norm.

An important factor which cannot be considered an uncertainty of *norms* is the question of how far one must prove the existence of facts which allow the use of force or which prove the breach of the general prohibition of the threat or use of force. The determination of facts (which are measured against the norm – a comparison of the real with the ideal) is often of crucial importance in solving a case, not only before national courts, but also before international tribunals.[5] This is especially the case regarding the use of force in international relations, since

[2] 'Mit wechselnden Bezug auf diese und jene Charta-Bestimmungen, durch Herstellung einer "Konkordanz" zwischen verschiedenen Charta-Prinzipien, unter Hinweis auf die Veränderung wesentlicher Umstände oder auch unter Berufung auf den angeblichen historischen Willen der Charta-Schöpfer oder den "Sinn und Zweck" des Gewaltverbotes wird derjenigen Auslegung der Charta letztlich der Vorzug gegeben, die der jeweilige Interpret für vernünftig, politisch zweckmäßig oder auch den nationalen Interessen förderlich hält.' Kay Hailbronner, Die Grenzen des völkerrechtlichen Gewaltverbotes, in: Dietrich Schindler, Kay Hailbronner (eds), Die Grenzen des völkerrechtlichen Gewaltverbotes (1986) 49–111 at 56.

[3] Both arguments are mentioned, for example, in Stephen Schwebel's 1972 Hague lecture: Stephen M. Schwebel, Aggression, intervention and self-defence in modern international law, 136 Recueil des Cours 1972 II (1973) 411–497 at 481. See also: John F. Murphy, Force and arms, in: Oscar Schachter, Christopher C. Joyner (eds), United Nations Legal Order (1995) Volume 1, 247–317 at 258.

[4] Hans Kelsen, Allgemeine Theorie der Normen (1979) 4 (Ch 1 VIII).

[5] In the *Nicaragua* case the International Court of Justice had to grapple with questions of the determination of facts much more complex than the problems it had to resolve regarding the applicable law. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports (1986) 14 at 45–92 (paras 75–171).

military activities are often kept secret and the 'fog of war' often makes a determination of who did what, when and to whom very difficult, if not impossible. These questions are not the focus of the present research and will be excluded. We will concentrate instead on the uncertainty of the existence and scope of the international legal norms.

As mentioned above, examples of contentious issues regarding self-defence will be analysed. Whereas most commentators tend to argue for a specific answer to the questions they have set themselves, the follwing will focus on how little certainty there is. Academic opinion and jurisprudence will be critically appraised and internal inconsistencies and differences to other authors' views will be portrayed. This is a kind of 'meta-interpretation', demonstrating that uncertainty is a feature of the perception of norms by humans, not just a result of humans' intransigence and argumentative nature. A further difference of this chapter from conventional analyses of Charter law is that 'practice' has little relevance here.[6] Hans Kelsen once wrote that '[o]nly indiscriminate dogmatism could pretend that a positive legal system is possible without [theoretical] assumptions'.[7] This chapter, like the rest of the book, contains a number of methodological and theoretical commitments. One of these is that subsequent practice to the UN Charter, or indeed any practice to any treaty, cannot influence either their interpretation or even change the treaties in question themselves. This issue will be expanded on in Section 4.4.

2.1 The 'black hole' theory

There is an academic debate regarding the first ten words of Article 51. They read, 'Nothing in the present Charter shall impair the inherent right' of self-defence. It is the opinion of a number of scholars that '[t]he effect of this article is not to create the right but explicitly to recognise its existence.'[8] Their contention is that the Charter does not regulate – or regulates only partially – the law on self-defence. Because one could imagine such a doctrine as leaving a hole in the normative framework of the Charter and possibly sucking life from the rest of the Charter, this doctrine can be called the 'black hole' theory.

This theory might be or has been proposed in different variants. First, it can be claimed that the right of subjects of any given legal order to defend themselves may not, or cannot, be abrogated and that it is inherent in their existence as

[6] See: Christine Gray, International law and the use of force (3rd ed. 2008); Rosalyn Higgins, The legal limits to the use of force by sovereign states: United Nations practice, 37 British Year Book of International Law 1961 (1962) 269–319, for approaches laying stress on practice.

[7] '[n]ur unkritischer Dogmatismus kann vermeinen, ein System positiven Rechts sei voraussetzungslos möglich'; Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre (1920) vi. See Josef L. Kunz, The theory of international law, 32 American Society of International Law Proceedings (1938) 23–34 for a discussion of the role of theory in international law.

[8] Leland M. Goodrich, Edvard Hambro, Anne P. Simmons, Charter of the United Nations: commentary and documents (3rd ed. 1969) 344.

subjects. In international law self-defence is sometimes seen as inherent in state sovereignty.[9] The essential difference from the other variants and the reason why it is seldom claimed today is that it seems to rely on facts alone. Such a right, if it existed, would be based only on the existence of the state, not on international law. The state has no 'right' beyond the law or without a norm granting it.[10] Right flows only from norms and norms belong to a normative system. If the alleged right does not belong to the normative system 'public international law', it is not a right from the perspective of this normative system. The second variant is based on the thought that Article 51 is declaratory of a right established by another normative system. That system may be natural law and, indeed, the French version of Article 51 uses the term 'droit naturel'. None of the works reviewed here espouse such a basis of the right. Derek Bowett, one of the most prominent proponents of the 'black hole' theory, explicitly disavows any connection of Article 51 with natural law.[11]

The most popular version is a reference to customary international law.[12] It is claimed that Article 51 does not purport to regulate the right of self-defence and leaves the customary international law norm on self-defence to do so. The Charter is not a codification of international law as a whole, it is argued, but merely the statute of an international organisation.[13] Therefore, it is 'fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter.'[14] On this view, the Charter is not all-encompassing and seems to bow to

[9] See Yoram Dinstein, War, aggression and self-defence (4th ed. 2005) 181; Roberto Ago, Eighth report on state responsibility [A/CN.4/318/Add.5–7], 32 Yearbook of the International Law Commission 1980 (1982) Volume II, Part One, 51–70 at 16 (para 7), 53 (para 87): 'The theory of "fundamental rights" of States, as then conceived, was the product of pure abstract speculation with no basis in international legal reality, and has since become outdated . . .'.

[10] This would be contrary to the duality of Is and Ought. For criticism of sovereignty as a *summa potestas*: Kelsen (1920) *supra* note 7; Alfred Verdross, Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung (1923).

[11] Derek W. Bowett, Self-defence in international law (1958) 187.

[12] This variant is espoused *inter alia* by: Bowett (1958) *supra* note 11 at 184–188; Hans-Georg Franzke, Schutzaktionen zugunsten der Staatsangehörigen im Ausland als Ausfluss des Rechts auf Selbstverteidigung der Staaten (1965) 133; Myres S. McDougal, Florentino P. Feliciano, Law and minimum world public order (1961) 235; Schwebel (1973) *supra* note 3 at 480; C.H.M. Waldock, The regulation of the use of force by individual states in international law, 81 Recueil des Cours 1952 II (1953) 451–517 at 497; unclear: Timothy L.H. McCormack, Anticipatory self-defence in the legislative history of the United Nations Charter, 25 Israel Law Review (1991) 1–42. The Court in *Nicaragua* espouses a *renvoi* to customary law: 'The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.' *Nicaragua* (1986) *supra* note 5 at 94 (para 176). In effect, however, the Court sharply diverges from the authors listed.

[13] Franzke (1965) *supra* note 12 at 133.

[14] Bowett (1958) *supra* note 11 at 185.

general (customary) international law.[15] The problem with this argument is that the Charter itself seems intent on completely regulating the law on the use of force. The main purpose of the United Nations was the establishment of a collective security system (and thereby to maintain international peace and security) and the pacification of inter-member relations, and that means not allowing members to use force. This contradicts the argument that the Charter does not fully regulate that body of law. Also, the proponents of the 'black hole' theory are faced with the general prohibition of the threat or use of force established in Article 2(4) of the UN Charter. That paragraph seems to prohibit all threats or uses of force – whether allowed by pre-Charter customary law or not. This charge, in turn, is countered, on the one hand, by acknowledging that the prohibition in Article 2(4) is indeed general, but that the drafters intended to *completely* exclude self-defence from the prohibition,[16] i.e. not as a justification, but as a 'gap' in Article 2(4)'s application.

> Action undertaken for the purpose of, and limited to, the defence of a state's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) *cannot by definition involve a threat or use of force* 'against the territorial integrity or political independence' of any other state. . . . For these reasons we would maintain that the obligation assumed under Art. 2(4) is in no way inconsistent with the right of self-defence recognised in international law.[17]

The other thrust of the proponents' writings has the same result, but achieves that aim by a different method. Their argument is that Article 2(4) is not and never was meant to be a prohibition of all threats or uses of force, but only of those threats or uses which are directed 'against the territorial integrity or political independence or [which are] in any other manner inconsistent with the Purposes of the United Nations'.[18] Self-defence is, therefore, also excluded *a priori* from the purview of Article 2(4), but by a slightly different means.

[15] Franzke (1965) *supra* note 12 at 133 (FN 211) extracts such a meaning from para 3 of the Preamble of the UN Charter.

[16] McDougal and Feliciano (1961) *supra* note 12 at 235; Franzke (1965) *supra* note 12 at 132. One might argue that Article 51 itself trumps Article 2(4), because of the use of the words '[n]othing in the present Charter shall impair'. That formulation seems to exclude self-defence from the ambit of the prohibition and points directly to customary international law. McCormack (1991) *supra* note 12 at 24 seems to partially base his arguments on these words. For Combacau, on the other hand, it seems clear that 'the use of force which the exception permits is the same as that which the rule forbids.' Jean Combacau, The exception of self-defence in U.N. practice, in: Antonio Cassese (ed.), The current legal regulation of the use of force (1986) 9–38 at 11. See also Section 2.5.1.

[17] Bowett (1958) *supra* note 11 at 185–186 (emphasis added).

[18] Bowett (1958) *supra* note 11 at 151–152. D'Amato, while espousing the view that Article 2(4) does not prohibit all threats or uses of force, holds a somewhat different view as to the relation to the exception of self-defence: Anthony Alfred D'Amato, International law: process and prospect (1987) Chs 2–4. This chapter will not focus on the debate regarding the scope of Article 2(4). However, there is vociferous and overwhelming opposition to these designs, e.g. Dinstein (2005) *supra* note 9 at 86–88; Albrecht Randelzhofer, Article 2(4), in: Bruno Simma (ed.), The Charter of the United Nations. A commentary (2nd ed. 2002) 112–136 at 123–124; Waldock (1953) *supra* note 12 at 493.

If we were to adopt the 'black hole' theory, would this significantly influence the doctrine of self-defence in the post-Charter era? For several reasons this seems unlikely. Most writers intermingle a decision on this point with the question of anticipatory self-defence or with the 'armed attack condition'. This is problematic, because the phrases 'Nothing . . . right' and 'if . . . occurs' are *not* two completely incompatible phrases pointing to two diametrically opposite directions with respect to the nature and scope of self-defence. Making Article 51 declarative of customary law is merely portrayed as leading to a specific stance, e.g. on the legality of anticipatory self-defence. On the contrary, the adoption or non-adoption of the *recursus* to customary international law in Article 51 is of no significant consequence for the scope of self-defence.

Three reasons can be given why the relevance of that doctrinal decision would be severely diminished. First, the recognition of some sort of pre-existing right of self-defence is likely to have been the recognition of the *concept or principle* of self-defence, not of any specific *form or scope* of self-defence. While it may be true that most legal orders know the concept of self-defence, it is certainly also true that the rights in domestic laws each have very different content.[19] There is no 'natural' concept, no 'natural' meaning to the term 'self-defence' which endures over time. Self-defence is dependent – as all positive law is – upon positive regulation, not only for its existence (the fact that it is found in many legal systems does not make it positive law in yet another legal system) but also for its scope (the concept is not a static notion which defies the whim of human regulation).

Second, before the imposition of the general prohibition of the threat or use of force the notion of self-defence was not sufficiently distinguished from other forms of self-help to have acquired a distinct standing as a principle of positive law.[20] Indeed, one can argue that there cannot be self-defence without a prohibition of force;[21] an exception is meaningless without a prohibition. A justification of 'self-defence' may have been relevant only with respect to the violation of sovereignty[22]

[19] Josef L. Kunz, Individual and collective self-defense in article 51 of the Charter of the United Nations, 41 American Journal of International Law (1947) 872–879 at 876.

[20] Ian Brownlie, The use of force in self-defence, 37 British Year Book of International Law 1961 (1962) 183–268 at 222–223, 241; Stanimir A. Alexandrov, Self-defense against the use of force in international law (1996) 23–26.

[21] Bowett (1958) *supra* note 11 at 119: 'The right of self-defence could only achieve a full, juridical connotation in a legal system which could characterise every use or threat of force, whether within the technical definition of war or not, as either a delict, or self-defence, or a sanction'; Ago (1982) *supra* note 9 at 52 (para 83).

[22] As late as 1949 the International Court of Justice in the *Corfu Channel* case – which is frequently cited as a precedent for the law on self-defence (e.g. Waldock (1953) *supra* note 12 at 499–503; Robert Y. Jennings, Arthur Watts (eds), Oppenheim's international law (9th ed. 1992) Volume 1, 421) – did not refer in its deliberations to the *ius contra bellum* and its exceptions, but deliberated only upon the question of a violation of Albania's sovereignty, which can be violated by non-forcible means as well as by the use of force. 'The Court . . . gives judgment that the United Kingdom did not violate the sovereignty of the People's Republic of Albania . . .' *Corfu Channel (United Kingdom* v. *Albania)*, Merits, Judgment of 9 April 1949, ICJ Reports (1949) 4 at 36. It seems that the Court and the parties were still arguing and thinking in terms of pre-Charter legal categories.

or territorial integrity, which were then prohibited in times of peace as well. The Charter prohibits a means of action (use of force) not prohibited in 1837 and one can argue that the remarks in the correspondence pertaining to the *Caroline* incident did not therefore concern self-defence as justification for an otherwise illegal use of force.[23]

Third, if Article 51 declares customary international law competent to regulate Charter-based self-defence, is that reference not dynamic rather than static? Is it not customary international law on self-defence as it stands today, rather than that of 1837, 1920 or even of 1945?[24] Is it not conceivable, or even more likely, that customary international law has evolved after the coming-into-force of the Charter? Is it not more likely that it has changed in the direction of the Charter's aims – the minimisation and outlawry of the unilateral threat or use of force?[25] Thus it would be for those who argue this theory to prove that the conduct they favour is still allowed under customary international law *as it stands today*.

In the end the decision we make regarding the 'black hole' theory decides where one's 'source' of the law of self-defence lies: it is either exclusively an interpretation of the Charter or an integration into the framework of the Charter of content from other sources such as customary or natural law. The source remains the Charter in either case because as a matter of treaty obligation Article 51 is still valid for member states. That article contains the words 'if an armed attack occurs', whether or not there is a black hole. The power of that hole cannot un-write the Charter. This leads us to the next task: to ascertain whether an 'armed attack' is a necessary condition for the exercise of self-defence under the UN Charter.[26]

[23] Roberto Ago classifies the *Caroline* incident under the heading of 'necessity', rather than 'self-defence'. Ago (1982) *supra* note 9 at 39–40 (para 57), 65–66 (para 113). He is critical of those who do not see Article 51 as all-encompassing: 'The reason is largely that many of these writers remain wedded to notions and to a terminology – which this writer regards as incorrect – drawn from a relatively antiquated portion of State practice with which they are more familiar. It is no accident that, in their arguments, they often cite practical cases, such as that of the *Caroline* and others . . .' Ago (1982) *supra* note 9 at 65 (para 113).

[24] In favour of a dynamic declaratory theory (and consequently restrictive): Gray (2008) *supra* note 6 at 117–118. Even those who deny a declaratory function would rather support a dynamic reference: Mary Ellen O'Connell, The myth of preemptive self-defense, ASIL Task Force Papers (August 2002), at: www.asil.org/taskforce/oconnell.pdf at 13. Favouring – if accepted – a static reference (as of 1945), but denying the declaratory theory: Brownlie (1962) *supra* note 20 at 195–196, 241, 243.

[25] Indeed some authors claim that the customary law as it stood in 1945 was equivalent to Article 51, rather than the other way around. Ago (1962) *supra* note 9 at 67 (para 114); Ian Brownlie, International law and the use of force by states (1963) 279–280.

[26] In the judgment in the *Armed Activities* case, the Court has rejected going outside the Charter: 'Article 51 of the Charter may justify a use of force in self-defence only within the strict confines *there laid down. It does not allow the use of force by a State . . . beyond these parameters*.' *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Merits, Judgment of 19 December 2005, ICJ Reports (2005) 168 at 223 (para 148) (emphasis added).

2.2 Defining armed attack

2.2.1 Whether 'armed attack' is a necessary condition

We know now that the uncertainty surrounding the 'origin' of the concept of self-defence in Article 51 is largely irrelevant for its scope. The focus of recent debates on self-defence under the Charter has therefore been on the sixteenth to twentieth words of Article 51, which read: 'if an armed attack occurs'. This section will discuss whether an 'armed attack' needs to be in some sense 'present' for a threat or use of force to be justifiable as self-defence, i.e. whether an 'armed attack' is a necessary condition for self-defence. Later sections will discuss what is meant by 'armed attack' (Sections 2.2.2 and 2.2.3) and 'presence' (Section 2.2.4).

The question is narrow and must be distinguished from the legality of anticipatory, preventive or pre-emptive self-defence. Some writers base their arguments in favour of these modes of self-defence on the absence of an 'armed attack condition', but most of the recent proponents of such kinds of doctrines do acknowledge the conditionality. The converse argument, namely that the armed attack conditionality necessitates negating the possibility of anticipatory or pre-emptive self-defence, is also made,[27] but this conclusion is not unassailable, as Section 2.2.4 will show.

The debate is familiar to any student of the modern *ius ad bellum*, but it may be beneficial to review the most important arguments and to ascertain their soundness. Most writers believe that an armed attack is required.[28] The opposite view is

[27] For example by Ian Brownlie. This argument does not detract from the strength or weakness of the de-coupling of the 'presence' requirement and the armed attack conditionality.

[28] Ago (1982) *supra* note 9 at 65, 67 (para 114); Alexandrov (1996) *supra* note 20 at 95; Brownlie (1962) *supra* note 20 at 242; Brun-Otto Bryde, Self-defence, in: Rudolf Bernhardt (ed.), Encyclopedia of public international law (2000) Volume 4, 361–364 at 362; Georg Dahm, Das Verbot der Gewaltanwendung nach Art. 2(4) der UNO-Charta und die Selbsthilfe gegenüber Völkerrechtsverletzungen, die keinen bewaffneten Angriff enthalten, 11 Jahrbuch für Internationales Recht (1962) [Festschrift für Rudolf Laun zu seinem achtzigsten Geburtstag] 48–72 at 51; Dinstein (2005) *supra* note 9 at 182; Michael Donner, Die Begrenzung bewaffneter Konflikte durch das moderne jus ad bellum, 33 Archiv des Völkerrechts (1995) 168–218 at 180; Terry D. Gill, The law of armed attack in the context of the *Nicaragua* case, 1 Hague Yearbook of International Law (1988) 30–58 at 35; Gray (2008) *supra* note 6 at 117–118, 128; Kaiyan Homi Kaikobad, Self-defence, enforcement action and the Gulf wars 1980–88 and 1990–91, 63 British Year Book of International Law 1992 (1993) 299–366 at 304–305 ('self-defence is predicated upon and is the logical outcome of an armed attack'); Hans Kelsen, Collective security and collective self-defense under the Charter of the United Nations, 42 American Journal of International Law (1948) 783–796 at 791; Hans Kelsen, The law of the United Nations. A critical analysis of its fundamental problems (1950) 797–798; Klaus Kersting, 'Act of aggression' und 'armed attack'. Anmerkungen zur Aggressionsdefinition der UN, 23 Neue Zeitschrift für Wehrrecht (1981) 130–143 at 136; Friedrich Klein, Der Begriff des 'Angriffs' in der UN-Satzung, in: Karl Carstens, Hans Peters (eds), Festschrift Herrmann Jahrreiss. Zu seinem siebzigsten Geburtstag – 19. August 1964 – gewidmet (1964) 163–188; Kunz (1947) *supra* note 19 at 877; O'Connell (2002) *supra* note 24 at 6; Albrecht Randelzhofer, Article 51, in: Bruno Simma (ed.), The Charter of the United Nations. A commentary (2nd ed. 2002) 788–806 at 793; Carsten Stahn, 'Nicaragua is dead, long

held by a minority of scholars in relatively dated publications[29] and all opponents base their conclusion on the 'black hole' theory. There are additional arguments which we will discuss below, but in every case the linchpin of the argumentative train of thought is the 'cut-out' of Article 51's terms. The reason why this theory is utilised will become clear during our review of the linguistic weapons employed in this battle.

The exchange of fire begins with the assertion that while Article 51 acknowledges the right to individual or collective self-defence 'if an armed attack occurs', that does not mean that 'it must therefore follow that self-defence is valid *only* against an armed attack'.[30] The thrust of this charge seems to be that it is a logical fallacy to conclude from the assertion of one possibility that other possibilities are excluded; in this case that the assertion of a right to self-defence in case of an armed attack cannot be interpreted to mean that other conditions may not justify self-defence.[31] Stephen Schwebel demands of the Drafters that they should have written 'if, and only if, an armed attack occurs' if they had wanted to make it a necessary condition.[32] According to him, the word 'if' does not indicate a necessary condition (and, perhaps, a logical equivalent),[33] but rather one *sufficient* condition[34] for the lawful exercise of the right of self-defence. One might be able to reply to this argument that it seems odd that the Drafters would have included in the Charter only the most obvious case – the highest level of infringement – rather than define a threshold for the lawful exercise of defence.[35] Is it not more likely that the Drafters, assuming *arguendo* that they did intend to make 'armed attack' a necessary condition, would have used the confident 'if', rather than the overly cautious 'if, and only if' one would perhaps use as a lawyer drawing up a private contract? Third, it might be ventured to argue that the assertion: 'to

live Nicaragua' – the right to self-defence under Art. 51 UN Charter and international terrorism, in: Christian Walter *et al.* (eds), Terrorism as a challenge for national and international law: Security versus liberty? (2004) 827–877 at 840–841; Robert F. Teplitz, Taking assassination attempts seriously: did the United States violate international law in forcefully responding to the Iraqi plot to kill George Bush?, 28 Cornell International Law Journal (1995) 569–617 at 580–581; Alfred Verdross, Bruno Simma, Universelles Völkerrecht. Theorie und Praxis (3rd ed. 1984) 288; Wilhelm Wengler, Das völkerrechtliche Gewaltverbot (1967) 4; Luzius Wildhaber, Gewaltverbot und Selbstverteidigung, in: Wilfried Schaumann (ed.), Völkerrechtliches Gewaltverbot und Friedenssicherung (1971) 147–173 at 153. See also: *Armed Activities* (2005) *supra* note 26 at 223 (para 148).

[29] Bowett (1958) *supra* note 11 at 187–188; Franzke (1965) *supra* note 12 at 133–134; McCormack (1991) *supra* note 12 at 35; McDougal and Feliciano (1961) *supra* note 12 at 232–241; Edward Miller, Self-defence, international law, and the six day war, 20 Israel Law Review (1985) 49–73 at 66; Schwebel (1973) *supra* note 3 at 479–480; Waldock (1953) *supra* note 12 at 496–498.

[30] Bowett (1958) *supra* note 11 at 188 (emphasis added).

[31] Franzke (1965) *supra* note 12 at 133–134; McDougal and Feliciano (1961) *supra* note 12 at 232; Schwebel (1973) *supra* note 3 at 479–481; Waldock (1953) *supra* note 12 at 495.

[32] Schwebel (1973) *supra* note 3 at 480; *Nicaragua* (1986) *supra* note 5, Dissenting Opinion Schwebel at 347–348.

[33] Rather than merely $A \Rightarrow B$, this would mean that $A \equiv B$.

[34] $A \rightarrow B$.

[35] Dinstein (2005) *supra* note 9 at 183–185.

construe Article 51 as containing a necessary condition would be a logical flaw' is itself based on a logical flaw, because the inclusion of only one (sufficient) condition in the text does not imply that there are *other* sufficient conditions. Indeed, the absence of such other conditions in a treaty means that, as a matter of treaty law, one condition is the only condition able to fulfil the requirement. Hence on this train of thought, the one condition is a necessary condition, evoking the Latin phrase *expressio unius exclusio alterius est*.

Edward Miller poses the question 'whether the word "if" has a meaning of condition or hypothesis'.[36] He erroneously believes that the French version of Article 51 uses the phrase 'dans un cas où',[37] concluding that '[t]he use here of the indefinite article is clearly suggestive of hypothesis.'[38] The French version of Article 51, however, employs the French equivalent of 'if', namely 'dans le cas où'. He himself admits, '[h]ad the drafters wished to imply condition, they would have used the form "*dans le cas où*".'[39] For Ian Brownlie the French text is *less* equivocal than the English version.[40]

Thus, the wording of the first part of the first sentence of Article 51 is sufficiently clear to establish a logical condition.[41] Another argument left with respect to the wording of Article 51 is to argue that 'neither Article 51 nor any other word formula can have, apart from context, any single "clear and unambiguous" or "popular, natural and ordinary" meaning that predetermines decision in infinitely varying particular controversies.'[42] This is a valid argument, but an argument that is not persuasive within the boundaries of international legal scholarship. First, if one were to reduce the importance of legal text vis-à-vis some other influence one would give up something which *is* a norm and therefore does not need to be established as authoritative – unlike the norms of customary international law – but only requires interpretation within a given frame. That relative certainty is replaced by other influencing factors (what other factor but a text is as certain to express the meaning of the norms?) which are very uncertain. Second, one can argue that that argument is self-defeating. Why would one 'believe' Article 51 when it claims to receive the 'inherent right' of self-defence if words do not mean anything? Third, if one were to impute that the argument is that written norms (legal texts) demand interpretation and that a text does not predetermine every

[36] Miller (1985) *supra* note 29 at 66.

[37] Cf. also Higgins (1962) *supra* note 6 at 299: 'It should be noted that the French text is considerably less restrictive, reading 'dans un cas où un Membre des Nations Unies est l'objet d'une aggression [*sic*] armée.'

[38] Miller (1985) *supra* note 29 at 66.

[39] Miller (1985) *supra* note 29 at 66.

[40] Brownlie (1962) *supra* note 20 at 242.

[41] Brownlie (1962) *supra* note 20 at 242; Dahm (1962) *supra* note 28 at 52: 'unequivocal and internally consistent wording' 'eindeutiger und in sich sinvoller Wortlaut'; Claus Kreß, Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater (1995) 172; O'Connell (2002) *supra* note 24 at 13; Verdross and Simma (1984) *supra* note 28 at 288.

[42] McDougal and Feliciano (1961) *supra* note 12 at 234.

case, every future interpretation, then the author's assertion will find universal consent – as long as it is within the the frame of possible meaning.[43] To deny the phrase 'if an armed attack occurs' the role of logical connector would transcend the possible meanings that can be attached to it and would thus stand outside the norm (see Section 4.2).

At this point the battleground shifts to the preparatory works of Article 51 at the San Francisco conference. Timothy McCormack uses the *travaux préparatoires* as his main argument against the conditionality thesis.[44] The main thrust of this argument is that nothing in the process of drafting shows that the Drafters wanted to restrict the pre-Charter right of self-defence.[45] McCormack makes several arguments from the silence of the Drafters, e.g.:

(*a*) There was no discussion of the phrase at issue at San Francisco. 'If there had been an intention to deliberately restrict anticipatory self-defence by the inclusion of these words, then surely that would have been commented on by at least some of the delegates.'[46]
(*b*) The French text and the English text contain several inconsistencies. McCormack argues that there was no intention to restrict self-defence to cases of armed attack, because the English text was not reconciled with the French text. This was not done, because the phrase was not considered of sufficient importance.[47]
(*c*) 'If Article 51 had been intended to determine the limits to the right of self-defence under the Charter, the Article ought to have mentioned the *amount* of force that is permissible. However, Article 51 is silent as to this important requirement.'[48] In his mind, therefore, there was no intention to restrict.

The counter-argument is that nothing shows intent to restrict a pre-Charter right, because nothing exists which could show such intent. There is no discussion in the *travaux préparatoires* of the phrase 'if an armed attack occurs'.[49] Albrecht Randelzhofer states categorically that 'nothing can be drawn from the *travaux préparatoires*, either in support of this interpretation or against it'.[50] Indeed, one could argue that nothing in the preparatory works restricts privileging a pre-Charter right of self-defence, except the clear wording of the resultant paragraph.

[43] Section 4.2.
[44] McCormack (1991) *supra* note 12.
[45] Bowett (1958) *supra* note 11 at 188; Hans-Georg Franzke, Die militärische Abwehr von Angriffen auf Staatsangehörige im Ausland – insbesondere ihre Zulässigkeit nach der Satzung der Vereinten Nationen, 16 Österreichische Zeitschrift für öffentliches Recht (1966) 128–175 at 141; McDougal and Feliciano (1961) *supra* note 12 at 235–236; Waldock (1953) *supra* note 12 at 496–497.
[46] McCormack (1991) *supra* note 12 at 35.
[47] McCormack (1991) *supra* note 12 at 36.
[48] McCormack (1991) *supra* note 12 at 37.
[49] Brownlie (1962) *supra* note 20 at 242.
[50] Randelzhofer (2002b) *supra* note 28 at 792 (MN 10).

Modern international law has shown a clear tendency to privilege text over original intent, as evidenced by Article 32 Vienna Convention on the Law of Treaties 1969 (VCLT).[51]

After reviewing the debate we are left with a clear picture. Even if we were to support the 'inherent right' doctrine (Section 2.1), it is not correct to assume that such a relationship could unmake the clear words of Article 51. The phrase 'if an armed attack occurs' is written in a treaty text and cannot be unwritten by these arguments. Mary Ellen O'Connell recently put it thus:

> Even if earlier custom allowed preemptive self-defense, arguing that it persisted after 1945 for UN members requires privileging the word 'inherent' over the plain terms of Article 2(4) and the words 'armed attack' in Article 51. Indeed, it requires privileging one word over the whole structure and purpose of the UN Charter.[52]

One could not be clearer than the majority in *Nicaragua*:

> In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this.[53]

The 'inherent right' of self-defence may be framed as declaration, but it is only part of the Charter *because Article 51 admits it.* If that text had not included the

[51] The International Court of Justice has become convinced that the VCLT essentially reflects customary law, in particular its rules on interpretation. It has repeatedly said so: *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)*, Judgment of 12 November 1991, ICJ Reports (1991) 53 at 70 (para 47); *Territorial Dispute (Libyan Arab Jamahiriya* v. *Chad)*, Judgment of 13 February 1994, ICJ Reports (1994) 4 at 21–22 (para 41); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports (1996) 66 at 75 (para 19). Cf. Santiago Torres Bernárdez, Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties, in: Gerhard Hafner *et al.* (eds), Liber amicorum Professor Ignaz Seidl-Hohenveldern – in honour of his 80th birthday (1998) 721–748.

[52] O'Connell (2002) *supra* note 24 at 13.

[53] *Nicaragua* (1986) *supra* note 5 at 103 (para 195). This understanding of the law was recently reiterated and reinforced by the Court in *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Merits, Judgment of 6 November 2003, ICJ Reports (2003) 161 at 186–187 (para 51): 'Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show *that attacks had been made* upon it for which Iran was responsible; *and that those attacks were of such a nature as to be qualified as* "*armed attacks*" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force' (emphasis added). Cf. Jörg Kammerhofer, Oil's Well That Ends Well? Critical comments on the merits judgment in the *Oil Platforms* case, 17 Leiden Journal of International Law (2004) 695–718; Dominic Raab, 'Armed attack' after the *Oil Platforms* case, 17 Leiden Journal of International Law (2004) 719–735. In a more recent advisory opinion, the Court again reaffirmed that the presence of an armed attack is a necessary condition for the lawful exercise of the right of self-defence. Thus, the 'orthodox view' is for the moment supported by the Court's *jurisprudence constante: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 June 2004, ICJ Reports (2004) 136 at 194 (para 139): 'Article 51 of the Charter thus recognises the existence of an inherent right of self-defence *in the case of armed attack* by one State against another State' (emphasis added).

right, there would have been no right – in Charter law – to self-defence: a right does not exist unless it is a norm. In this case, one might argue that customary international law has established such a right. However one might view the interrelationship of the sources of international law, it is tautological that the Charter alone governs Charter law, even if the Charter itself were to refer to customary international law (as it might have done in Article 51). Therefore, if the 'inherent right' of self-defence of some wide, pre-Charter, scope, without the need for an armed attack, had been recognised by Article 51, it would have only done so 'if an armed attack occurs'. Short of denying that words have any meaning, saying that the Charter does not say what it does could be described as a rhetorical clutching at straws. It is not a matter of uncertainty whether the presence of an armed attack is required for self-defence to justify a threat or use of force. The dissent we hear is an echo of a different time and no longer debated today. Today's support for an extensive view of self-defence instead specialises on adapting the term 'armed attack' and the precise definition of 'armed attack' is the modern battleground; indeed it is within the core meaning of 'uncertainty' in international law. Within the frame of possible meanings the true questions of interpretation start.

2.2.2 What is an 'armed attack'?

Because the possibility that events other than an armed attack may trigger self-defence under the UN Charter has been excluded from the ambit of this chapter, it is not necessary to contemplate their existence and scope here. Even without discussing these other events there is ample room for uncertainty in self-defence law. There is a large margin of interpretation of what exactly counts as an 'armed attack' under Article 51. These two words have been called the 'key notion of the concept of self-defence'[54] and the remainder of this section will shed some light on the uncertainty regarding this phrase.

In order to avoid the confusion of topics, questions and arguments often found in writings on self-defence, it is proposed that a correct understanding of the term 'armed attack' requires knowledge of the specific *modus operandi* of the attacker, i.e. the nature of the acts committed. In order to understand *what* an armed attack is, one need not know *who* committed the act[55] or against *whom* or *what* they were committed. Here at issue is the question of what is an armed attack *ratione materiae*. Questions of attribution, especially the attribution of attacks by guerrilla fighters, have frequently been conflated with the question at hand, even though discussing the 'who' tends to impede a discussion of the 'how', which is just as important.

As preliminary categories we will use the terms 'core meaning' and 'marginal meaning', which are loosely based on Herbert Hart.[56] The distinction is not based on a normative-ontological truth of any sort (the distinction is not based on the

[54] Randelzhofer (2002b) *supra* note 28 at 794 (MN 16).

[55] See Section 2.4.

[56] H.L.A. Hart, The concept of law (1961) 121–132 (Ch VII.1), e.g. 'plain cases' at 123.

correct or incorrect, legal or illegal meaning of a word), but merely upon convention. 'Core meaning' simply signifies what kinds of acts scholars, states and the ICJ accept as constituting an armed attack, whereas 'marginal meaning' refers to recent, unusual and contested interpretations.

What, then, is the mode of action that is generally agreed upon,[57] well established,[58] or even considered self-evident[59] as the essence or typical manifestation of an armed attack? Two elements can be extracted: (1) the use of military or paramilitary means (hence: 'armed');[60] (2) some form of trespass,[61] border crossing,[62] or a violation of territorial inviolability or of the state apparatus.[63] In short, if any act is an armed attack, it is the classical form of aggression,[64] an invasion.[65] As the Court put it in *Nicaragua*: 'In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border . . .'.[66]

There is, however, no authoritative or even generally recognised *definition* of 'armed attack';[67] the permissible content of the term is not normatively fixed. The term was not discussed at San Francisco[68] and no further textual clarification than the plain words in Article 51 can be found in the Charter. Nevertheless, scholars are tempted by the apparent proximity in meaning of two other phrases in the Charter: 'threat or use of force' in Article 2(4) on the one hand and 'aggression' in Article 39 on the other.[69] In addition, the French version of Article 51 translates 'armed attack' as 'agression armée' rather than 'attaque armée'.[70] For this reason and others many either proclaim 'aggression' and 'armed attack' as equivalent or draw analogies from the first to the second.

The term 'aggression' was defined by the General Assembly in the Definition

[57] *Nicaragua* (1986) *supra* note 5 at 103 (para 195).

[58] Bryde (2000) *supra* note 28 at 366.

[59] Alexandrov (1996) *supra* note 20 at 96; Gill (1988) *supra* note 28 at 36.

[60] Bryde (2000) *supra* note 28 at 366; Donner (1995) *supra* note 28 at 180; F. Michael Higginbotham, International law, the use of force in self-defence and the South African conflict, 25 Columbia Journal of Transnational Law (1987) 529–592 at 550–551; Kersting (1981) *supra* note 28 at 135: 'durch Anwendung von Waffengewalt gekennzeichnete Schädigungshandlung'; Kunz (1947) *supra* note 19 at 878; Verdross (1984) *supra* note 28 at 289–290.

[61] Brownlie (1962) *supra* note 20 at 245; D'Amato (1987) *supra* note 18 at 31.

[62] Gill (1988) *supra* note 28 at 36.

[63] Bryde (2000) *supra* note 28 at 366; *e contrario*: Wengler (1967) *supra* note 28 at 7.

[64] Klein (1964) *supra* note 28 at 179.

[65] Kunz (1947) *supra* note 19 at 878. Teplitz concedes that the UN 'has consistently interpreted the term to mean only a direct physical invasion by one state into the territory of another.' Teplitz (1995) *supra* note 28 at 613; though cf. Combacau (1986) *supra* note 16 at 22–23.

[66] *Nicaragua* (1986) *supra* note 5 at 103 (para 195).

[67] Donner (1995) *supra* note 28 at 179; Randelzhofer (2002b) *supra* note 28 at 796 (MN 19).

[68] Alexandrov (1996) *supra* note 20 at 96; Brownlie (1962) *supra* note 20 at 244; Kersting (1981) *supra* note 28 at 135.

[69] Combacau (1986) *supra* note 16 at 22.

[70] Ago (1982) *supra* note 9 at 67–68 (paras 116–117); John Norton Moore, The secret war in Central America and the future of world order, 80 American Journal of International Law (1986) 43 at 83; Schwebel (1973) *supra* note 3 at 470 *et seq*.

of Aggression in 1974.[71] Whilst this does not constitute an authoritative definition of the term – the General Assembly not being explicity so authorised by the Charter – the limited clarification it involves has provided writers with a welcome reference point.[72] The Court in *Nicaragua* thought that at least Article 3(g) of the Definition of Aggression reflected customary international law.[73] Albrecht Randelzhofer is in line with the Court's reasoning when he considers that Article 3 of the Definition of Aggression:

> does in fact give some useful indications on how to interpret this term. The provision lists examples of 'acts of aggression', all of which can, subject to certain qualifications, be taken to characterise 'armed attacks' within the meaning of Art. 51 as well.[74]

The qualifications he envisages mainly relate to a certain minimum gravity of the armed attack, which will be discussed in Section 2.2.3. One must, however, qualify the similarity. First, it is not proven that the two terms ('armed attack' and 'aggression') are similar or equal in normative content.[75] Second, even if they were similar, the *travaux préparatoires* of the Definition of Aggression (due to political disputes surrounding the adoption and especially the differences in opinion between states of the law of self-defence) illustrate that a definition of 'armed attack' was not intended.[76] Third, it can be alleged that not all acts in the Definition *necessarily* qualify as an armed attack.[77] Some argue that 'armed attack' is a much narrower and less flexible term than 'aggression'.[78]

Marginal meanings have exploded in more recent writings, partially because novel forms of doing harm have been discussed there. The common argument of commentators who widen the scope of the phrase is that because new dangers have arisen, we must protect against them. We must be allowed to protect against them and therefore we are already allowed to protect against them by forceful means. After the events of 11 September 2001 much emphasis has been placed on terrorism and the number of international lawyers who argue that terrorism is a mode of action subsumable under the term 'armed attack' has increased. A passage in the preamble of S/RES/1368 (2001), which condemned those attacks, recognises the right to individual and collective self-defence. That recognition is thought to communicate that the United Nations Security Council now believes

[71] G/RES/3314 XXIX (1974), Annex. For an analysis of the history of that resolution with reference in particular to self-defence e.g. Alexandrov (1996) *supra* note 20 at 105–114.

[72] Gill (1988) *supra* note 28 at 36; Kaikobad (1993) *supra* note 28 at 305; Miller (1985) *supra* note 29 at 55.

[73] *Nicaragua* (1986) *supra* note 5 at 103 (para 195).

[74] Randelzhofer (2002b) *supra* note 28 at 796 (MN 21). Kersting also believes that all cases of aggression in Article 3 of the Definition of Aggression are armed attacks. Kersting (1981) *supra* note 28 at 136.

[75] Randelzhofer (2002b) *supra* note 28 at 795 (MN 17).

[76] Randelzhofer (2002b) *supra* note 28 at 795 (MN 17).

[77] Ago (1982) *supra* note 9 at 68 (para 117).

[78] Klein (1964) *supra* note 28 at 177, 183–184; Stahn (2004) *supra* note 28 at 840.

that terrorist acts may amount to an armed attack.[79] It is notable that often the question of imputability is confused with the question of *modus*, i.e. if a state can be blamed for an act, the question whether the act is, strictly speaking, an armed attack, is not seriously considered.[80]

There is very little guidance for us to decide upon these claims. Some of them may sound outlandish, an attempt at *ex post facto* justification of a particular state's foreign policy. We have not got much more than the blank words 'armed attack' to go on and here we have the uncertainty for all to see. How do we know that these words signify a multi-division armoured attack? What about a lone terrorist or an intelligence operative planting a bomb in a crowded nightclub? What about a group of computer scientists causing the national electricity grid of a state to collapse?[81] We do not know – unless there is an authoritative decision. However, even if we were agreed on a formulation of 'armed attack', the question remains of what this means in actual fact: an attack by a platoon, by a battalion? One single ICBM? What about a single non-WMD-tipped ballistic missile? Where is the threshold *in fact*? Even if the formula were clear, the transposition of the formula to 'the real world' is a new source of uncertainty.

2.2.3 The scale of the armed attack

We can only know approximately *what* an armed attack is. The next question is the quantity of activity needed to constitute an armed attack. It is not submitted here that more than one event of the type 'armed attack' is required to trigger the justification of self-defence; it is rather that the event 'armed attack' itself may have a quantitative threshold. In particular, it is asserted that that threshold is higher than that of the corresponding prohibition of threats or uses of force in Article 2(4).

[79] *Armed Activities* (2005) *supra* note 26, Separate Opinion Kooijmans at 313–314 (para 28), Separate Opinion Simma at 337 (para 11); Thomas M. Franck, Terrorism and the right of self-defense, 95 American Journal of International Law (2001) 839–843 at 839–840; Jörg Kammerhofer, The *Armed Activities* case and non-state actors in self-defence law, 20 Leiden Journal of International Law (2007) 89–113 at 99–101; O'Connell (2002) *supra* note 24 at 10; Randelzhofer (2002b) *supra* note 28 at 802 (MN 35); Stahn (2004) *supra* note 28 at 834, 836. See Section 2.4.1.

[80] Stephen R. Ratner, *Jus ad bellum* and *jus in bello* after September 11, 96 American Journal of International Law (2002) 905–921 at 907–909. Especially egregious: Teplitz (1995) *supra* note 28 at 613–614, who bases his theory that the alleged assassination attempt on ex-President George Bush senior in 1993 constituted an armed attack on two steps: first he claims that the Charter's language does not require a direct armed attack, i.e. an attack committed by the armed forces of a state. He does not ask whether it was done in such a way as to constitute an *armed* attack and in his second step simply *assumes* the result: 'The attempt meets the basic definition of "aggression," since it was the use of "armed force" against the "sovereignty . . . of another State . . ." ' Teplitz (1995) *supra* note 28 at 615.

[81] Jason Beckett, New war, old law: Can the Geneva paradigm comprehend computers?, 13 Leiden Journal of International Law (2000) 33–51 at 49–51.

The majority of scholars[82] as well as the International Court of Justice in *Nicaragua* hold that only acts 'on a significant scale'[83] qualify as armed attacks and that 'frontier incidents' are excluded. The significance is measured by reference to the prohibition of force: 'not every use of force contrary to Art. 2(4) may be responded to with armed force.'[84] The reference to Article 2(4) is made because the act in question seems to need to at least violate the prohibition of force to qualify as an armed attack. Self-defence is a justification for unlawful behaviour, an exception to a prohibition. Not only does the behaviour purportedly in self-defence have to be justifiable (that is, fulfil the *actus reus* condition of the prohibition), but the act to which the defender responds needs to be illegal (not justified). If it were otherwise, one could defend against a perfectly innocent (legal) act. Second, if that were the case, one could legally use self-defence against measures of self-defence or enforcement actions under Article 42 of the UN Charter. The dichotomy of prohibitions and exceptions/justifications in law makes contrary positive regulation illogical (though not impossible); we will discuss this topic in more detail in Sections 2.4.1 and 2.5.1. This explains the reliance and response to 'threat or use of force' when writers look for a definition of 'armed attack'; this explains why many conclude that 'attack' is something above and beyond 'force'. The following will describe the legal situation according to the dominant doctrine and the proposed solutions to the problems that are perceived to result from this doctrine.

The phenomenon has been called a 'gap'[85] and, accordingly, this doctrine will be called the 'gap theory'. The starting point for the proponents of this theory is the different wording in the two Charter provisions: if the Drafters use different words they mean different things, otherwise they would use identical words. The majority also assumes that the difference in terms means a difference in 'gravity', apparently in continuation of the analogy to the term 'aggression' and the Definition of Aggression described above (Section 2.2.2). Article 2 of that definition is held to imply that certain acts 'or their consequences are not of sufficient gravity' to constitute an act of aggression.[86] While that article may be a point of origin for the doctrine, a *caveat* above and beyond the doubts about the analogy of the two terms seems apposite.[87] The Definition of Aggression establishes the

[82] Donner (1995) *supra* note 28 at 180; Gill (1988) *supra* note 28 at 36; Klein (1964) *supra* note 28 at 179. See Randelzhofer (2002b) *supra* note 28 at 790 (MN 11); Kreß (1995) *supra* note 41 at 187 (FN 793) for lists of scholars supporting this contention. Against: Dinstein (2005) *supra* note 9 at 193 (minimal threshold required), 176; John Lawrence Hargrove, The *Nicaragua* judgment and the future of the law of force and self-defense. Appraisals of the ICJ's decision: Nicaragua v. United States (Merits), 81 American Journal of International Law (1987) 135–143 at 139; Kersting (1981) *supra* note 28 at 141; Kreß (1995) *supra* note 41 at 194; Kunz (1947) *supra* note 19 at 878.

[83] *Nicaragua* (1986) *supra* note 5 at 101 (para 191), 103–104 (para 195), 110 (para 210).

[84] Randelzhofer (2002b) *supra* note 28 at 790 (MN 4).

[85] For example by Miller (1985) *supra* note 29 at 54; Dinstein (2005) *supra* note 9 at 193.

[86] Kersting (1981) *supra* note 28 at 141. Kersting does not believe, however, that this result may be transposed to the term 'armed attack'.

[87] Bowett (1958) *supra* note 11 at 192: 'It is well recognised that an armed attack is by no means the only form of aggression, of imperilling a state's rights'.

priority principle in Article 2 and in particular the Security Council's unfettered power under Article 39 to determine the existence of, *inter alia*, an act of aggression, in the exercise of which the Council might well find that an act does not constitute aggression.[88]

For the majority opinion, the arguments of the minority are efforts to close the gap. Albrecht Randelzhofer's approach to this issue will be adopted here. Assume that a threat or use of force is 'x' and an armed attack is 'y'. The majority's position is that x<y; the minority's position is that x=y. The gap may be closed by one of two methods: either by arguing that because y=2, x must equal 2, or because x=1, y must equal 1. In legal terms, according to the first approach 'Art. 2(4) proscribes only the use of force on a substantial scale and with considerable effect, i.e. just the kind considered an armed attack within the meaning of Art. 51.'[89]

> [T]he second approach which, in order to close the gap between Arts. 2(4) and 51, does not regard 'armed attack' in Art. 51 as being restrictive, compared to 'use of force' in Art. 2(4) and thus permits self-defence by forcible means in response to any use of armed force.[90]

The first method of closing the gap is an interpretation of the general prohibition of the threat or use of force and therefore not within this chapter's purview. Less fundamental and to some more readily acceptable as a matter of legal policy[91] is the way in which the second group of scholars bridges the gap. It involves putting the two terms on the level of the general prohibition. Their main argument is – as mentioned above – that 'as a matter of semantics, the term "armed attack" includes the use of force irrespective of its intensity'[92] and that a differentiation cannot be based upon the differing wording of the two provisions.

While the scholarly writing on the subject is focused on the above, two ambiguous paragraphs of the judgment on the merits in *Nicaragua*[93] have given rise to controversy over the consequences that follow from perceiving a gap. The question that the Court set itself was framed in the following way (deliberately taken out of context and having the context quite deliberately taken out):

> Similarly, it must now consider the following question: if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State . . .? A right to act

[88] For a similar conclusion: Gray (2008) *supra* note 6 at 182–183.

[89] Randelzhofer (2002b) *supra* note 28 at 791 (MN 7).

[90] Randelzhofer (2002b) *supra* note 28 at 791 (MN 8).

[91] Randelzhofer (2002b) *supra* note 28 at 791–792 (MN 8).

[92] '[s]emantisch erfaßt der Begriff "bewaffneter Angriff" Gewaltanwendung unabhängig von ihrer Intensität'. Kreß (1995) *supra* note 41 at 188. Also: Franzke (1965) *supra* note 12 at 133; Franzke (1966) *supra* note 45 at 146; Hargrove (1987) *supra* note 82 at 139; Kunz (1947) *supra* note 19 at 878.

[93] *Nicaragua* (1986) *supra* note 5 at 110–111 (paras 210–211).

> in this way . . . would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond . . . going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force.[94]

However, an ambiguous sentence a few lines below the quoted passage reads: 'It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.'[95] John Lawrence Hargrove is not alone in interpreting this as strongly suggesting that these acts may involve the use of force.[96] While this passage has raised considerable confusion – is there some kind of distinction between 'real' self-defence and 'light' forceful countermeasures?[97] – it is rather a storm in a teacup. The Court had at this point in the judgment concluded its deliberations on the applicable law on the use of force (paragraphs 183–201) and considered the prohibition of intervention and possible justifications for it (paragraphs 202–211). Three references to 'intervention' have been taken out of the above citation to show how much one must remove from this passage in order to come to the conclusion Hargrove and others have reached. The prohibition of intervention is not the prohibition of the threat or use of force, even though both can be violated at the same time by an interstate use of armed force. Acts *prima facie* constituting intervention could be justified if the fulfilment of the conditions of an exception can be shown and 'self-defence' may be one of those exceptions. Whatever the scope of that exception, it seems incorrect to assume that all acts that are justified interventions by virtue of an analogous right of self-defence against interventions are also justified threats or uses of force as self-defence under Article 51.[98] In a nutshell, the Court was not talking about the use of force, even though it expressed this in a rather curious way. Also, the Court made its position perfectly clear in the next paragraph:

> In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – *States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'*.[99]

94 *Nicaragua* (1986) *supra* note 5 at 110 (para 210).

95 *Nicaragua* (1986) *supra* note 5 at 110 (para 210).

96 Hargrove (1987) *supra* note 82 at 138; Dinstein (2005) *supra* note 9 at 195, for whom the *dictum* remains 'baffling'.

97 Dahm (1962) *supra* note 28 at 50, 56–57; Verdross (1984) *supra* note 28 at 290 (para 472). Specifically against this construct: Randelzhofer (2002b) *supra* note 28 at 791 (MN 7).

98 All S are P. ≠ All P are S.

99 *Nicaragua* (1986) *supra* note 5 at 110 (para 211) (emphasis added), see also 127 (para 249).

The word 'collective' denotes no more than the fact that the Court had to decide a case brought before it and that individual self-defence was not claimed by the Respondent.[100] The United States alleged that its actions vis-à-vis Nicaragua were justified as *collective* self-defence, because the latter had committed armed attacks against certain third states.

It is difficut to bring substantial evidence of a 'gravity' requirement to such an interpretation of the Charter.[101] As long as an act is an armed attack the threshold of self-defence is reached; there are no indications that the terms of Article 51 demand a particular level of violence. However, there are no arguments to be gained from the Charter that would support the opposite result either. The use of different words remains and without further explanation we are left with the plain words and thus able only to produce further tautologies. The non-identity in the wording of 'threat or use of force' and 'armed attack' means only that they are not identical wording and the two norms are different. This does not necessitate that 'armed attack' is of greater gravity than 'use of force'; it may simply mean that 'armed attack' is a special case of 'threat or use of force'.

The majority's best argument is a broad systematic or teleological interpretation of the Charter. Armed attacks are events of greater scale and effect, because the Charter does not want an escalation of tit-for-tat 'border incidents' into a fully fledged war with self-defence being claimed by both parties. If state A were to use force against B which did not amount to an armed attack, B cannot legally rise to the provocation and thus the law discourages games of 'Escalanto', where two adversaries 'up the ante' gradually until the stakes get too high to 'fold'. The Charter wants to minimise the use of force; the peoples of the United Nations are determined 'to save succeeding generations from the scourge of war'.[102] However, this is not the place for a discussion of the Charter's aims and goals. Some of these issues will be covered by Section 2.5.

2.2.4 When does an armed attack occur?

The question of the legality of 'interceptive', 'anticipatory', 'pre-emptive' or 'preventive' self-defence is one of the most debated topics in international law and has been for over fifty years. Whether armed reprisals or punitive measures are legal is also a well-trodden path in writings since the inception of the United Nations. Both questions raise a host of issues, including the aim or goal of self-defence (Section 2.5), whether there is a 'black hole' (Section 2.1) or the conditionality of an armed attack (Section 2.2.1). The crucial point, however, is *how* an armed

[100] Some lawyers thought that the Court wanted to differentiate between individual response – where forceful actions are allegedly allowed – and collective response, where this is not so. See e.g. Tom J. Farer, Drawing the right line. Appraisals of the ICJ's decision: Nicaragua v. United States (Merits), 81 American Journal of International Law (1987) 112–116 at 113.

[101] Kreß (1995) *supra* note 41 at 187–195.

[102] UN Charter, Preamble (para 1). See the importance attributed to the phrase 'scourge of war' by Klein (1964) *supra* note 28.

attack needs to be present. It can be argued that if one admits that 'armed attack' is a condition for the lawful exercise of self-defence, all the concepts mentioned above refer to illicit forms of response. The only armed attack activating self-defence is a present armed attack. Neither an imminent nor a concluded armed attack suffices, because the condition makes the ending of an armed attack the only valid objective of self-defence under Article 51.[103] Therefore, most early proponents of anticipatory self-defence base their support for that concept on a denial of the conditionality of an armed attack, which most, in turn, rest upon the 'black hole' theory.

There is an interesting line of thought especially among international lawyers educated in Germany that requires an armed attack, but also argues that self-defence is available against an imminent armed attack.[104] It makes no sense to repeat the arguments of Sections 2.1 and 2.2.1 if no further conclusions can be drawn. Hence, we will ask whether the 'presence' demanded by Article 51 can be squared with the sufficiency of 'imminence'. A domestic law analogy may be at the root of this conception. Just like Article 51 UN Charter, Section 32(2) of the German Penal Code only speaks of a present attack: 'Necessary defence is the defence which is required to avert a *present* unlawful attack from oneself or another.'[105] However, the word 'gegenwärtig' in the German original is interpreted by domestic criminal law doctrine to mean 'imminent and present'. This would explain why the 'presence' criterion in Article 51 ('if an armed attack *occurs*') is seen in such a light by German scholars, for it can be argued that the terms used there are analogous to the wording of Section 32(2). 'Occurs' includes 'is imminent' just as much as 'gegenwärtig' includes 'unmittelbar bevorstehend'. The municipal criminal codes of two other German-speaking countries expressly include imminent attacks, which points to the conclusion that, for Austrian lawyers at least, 'present' does not include imminent: Section 3(1) of the Austrian Penal Code reads: 'It is not unlawful to use such [means of] defence necessary to repel a *present or imminent* unlawful attack'.[106] The law in Switzerland is similarly worded: 'If somebody is being *attacked or threatened by* an unlawful

[103] See Brownlie (1962) *supra* note 20 at 242 for a list of authors believing that the ordinary meaning precludes preventive action.

[104] Alexandrov (1996) *supra* note 20 at 163–165; Dahm (1962) *supra* note 28; Dinstein (2005) *supra* note 9 at 190–191; Donner (1995) *supra* note 28 at 180; Hailbronner (1986) *supra* note 2 at 81; Higgins (1962) *supra* note 6 at 301 (the basis for her support is unclear.); Hanspeter Neuhold, Internationale Konflikte – verbotene und erlaubte Mittel ihrer Austragung (1977) 137–138; (in effect also:) Verdross and Simma (1984) *supra* note 28 at 287–289; Wengler (1967) *supra* note 28 at 5–6; Wildhaber (1971) *supra* note 28 at 153.

[105] 'Notwehr ist die Verteidigung, die erforderlich ist, um einen *gegenwärtigen* rechtswidrigen Angriff von sich oder einem anderen abzuwenden.' § 32 Abs. 2 Strafgesetzbuch vom 15. Mai 1871, RGBl. S. 127 (emphasis added).

[106] 'Nicht rechtswidrig handelt, wer sich nur der Verteidigung bedient, die notwendig ist, um einen gegenwärtigen oder *unmittelbar drohenden* rechtswidrigen Angriff . . . abzuwehren.' § 3 Abs 1 Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB), BGBl 1974/60 (emphasis added).

attack, the attacked and any other person is entitled to repel the attack by means appropriate to the situation.'[107] However, as noted in the introduction to this chapter, the existence of a right of self-defence within one legal order does not necessitate the existence or a certain scope for self-defence in another legal order.[108]

How is the 'slight expansion' argument made? Frequently it is an assertion to the effect that one ought to admit self-defence in certain narrowly defined cases where prevention is necessary.[109] This is sometimes 'buttressed' by an *argumentum ab inconvenienti*[110] to the effect that '[i]n conditions of modern warfare it is unreasonable for a state to have to wait for an armed attack'.[111] This is a political, not a legal argument and as such this kind of argument will be excluded, because this does not provide an insight into how the law is shaped. Law does not change because its application may be perceived as inconvenient.

If one assumes – as the majority of scholars do – that it is certain that an armed attack is a necessary condition of the exercise of self-defence under Article 51 UN Charter (Section 2.2.1), the key issue regarding the temporal scope of self-defence becomes what counts as 'armed attack occurs' and the key term becomes 'occurs'. The question, then, 'which should be posed is not when is anticipatory action justified but, when has an attack occurred?'[112] A typological classification of the precise moment (as distinct from a determination of the factual circumstances sufficient to constitute an 'occurrence') results in three logical possibilities: an armed attack occurs (1) when an armed attack begins (an attack is launched), (2) when it takes effect (the harm at the intended target starts occurring) or, even, (3) when it ends (the attack is consummated).

One of the features of the 'sitting duck' argument – states do not have to present themselves as stationary targets and may therefore take action before the attacker does – is that its proponents use a straw man. They impute that their opponents restrict the right of self-defence to a great degree and thus try to show that these doctrines are absurd. The view that '[s]ome authorities . . . have interpreted "if an armed attack occurs" to mean "*after* an armed attack *has occurred*" ',[113] does not reflect the other side's view correctly. Indeed, if self-defence

[107] 'Wird jemand ohne Recht angegriffen oder *unmittelbar mit einem Angriffe bedroht*, so ist der Angegriffene und jeder andere berechtigt, den Angriff in einer den Umständen angemessenen Weise abzuwehren.' Art. 15 Schweizerisches Strafgesetzbuch vom 21. Dezember 1937, AS **54** 757 (emphasis added).

[108] Josef Kunz acknowledges that an imminent attack suffices in municipal laws, but he is adamant as far as the Charter is concerned: 'The "imminent" armed attack does not suffice under Art. 51.' Kunz (1947) *supra* note 19 at 878.

[109] Donner (1995) *supra* note 28 at 180; Hailbronner (1986) *supra* note 2 at 81; Wengler (1967) *supra* note 28 at 5–6: 'Art. 51 is not to be taken quite literally' 'Art. 51 [ist] nicht ganz wörtlich zu nehmen'; Wildhaber *supra* note 28 at (1971) 153.

[110] Brownlie (1962) *supra* note 20 at 243.

[111] Jennings and Watts (1992) *supra* note 22 at 422.

[112] Brownlie (1962) *supra* note 20 at 258.

[113] Waldock (1953) *supra* note 12 at 497.

could only be employed after an attack it would defy the logic of self-defence: to repel an attack. A right of this sort would be legalised revenge.

Those scholars who admit action against imminent attacks as well as those who do not admit imminent action regard the *beginning* of an armed attack as the relevant moment for self-defence. The question thus becomes when an armed attack can be said to have begun. The approach taken by the 'slight expansion' doctrine is to interpret the attack to have begun earlier than orthodoxy would have done. Unlike the proponents for a wide right of self-defence, the 'slight expansionists' do not claim that self-defence is legal if an armed attack has not (yet) begun. It is thus a reinterpretation of the same point of reference, not its denial. This reinterpretation occurs by two means: by altering the meaning of the word 'beginning' and by a change in the way facts are interpreted.

There are four different, but frequently intertwined grounds on which the slight expansion is based. First, it is claimed that the presence of an *animus belligerendi*, the will to make war, constitutes the beginning of an armed attack.[114] The reason for such an approach is the fact that frequently there is very little physical evidence of force in the time between the decision to attack and the attack; therefore, these scholars make the forming of a *mens rea* (the decision, not its execution) the relevant point of reference. The most expressive and convincing example is where the putative attacker gives notice of his intention to attack the future victim; even restrictionists would tend to admit preventive actions in such a case.[115] The second, difficult to distinguish, approach is a shift to the epistemological plane. Instead of relying upon the fact of an attack occurring, 'evidence' of a future attack is demanded:

> Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.[116]

However, what is in evidence here is not the armed attack itself, but the prediction of a future attack. A probability, not a certainty is evidenced – its perception or, rather, the epistemological viewpoint the law demands. That is the topic of Section 2.3 and will be discussed there.

A third and enticing variation is to interpret an armed attack as occurring as soon as there is an irreversible course towards the attack. Yoram Dinstein's 'interceptive' self-defence could be subsumed under this heading. Dinstein argues that '[i]nterceptive [unlike anticipatory] self-defence . . . takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way.'[117]

[114] Verdross and Simma (1984) *supra* note 28 at 288–289.

[115] Brownlie (1962) *supra* note 20 at 259 (not if the declaration is not accompanied by action; equivocal acts, however, may become univocal); Randelzhofer (2002b) *supra* note 28 at 803–804 (MN 39).

[116] Waldock (1953) *supra* note 12 at 498; similarly: O'Connell (2002) *supra* note 24 at 8–9.

[117] Dinstein (2005) *supra* note 9 at 191.

This argument approaches the point of launching of an attack. Stanimir Alexandrov argues that this is the case when 'the aggressor State "pulled the trigger", . . . when there is *no possibility of the aggressor State changing its mind*'.[118] He refers to imminent *harm* resulting from forceful action, rather than imminent attack,[119] thus changing the nature of the 'imminence' required. Dinstein's view, on the other hand, is broader. He does not require the firing of the first shot, but only a commitment by the other side – not the actions themselves, but the decision. The difference is obvious in the application of the theories to historic facts: whereas for Dinstein the United States could legally have destroyed the Japanese Fleet even before Japan launched its aeroplanes on Pearl Harbor (provided that this event were transposed to the post-Charter world), and whereas for him the Egyptian behaviour in 1967 signified that 'Egypt was bent on an armed attack',[120] an application of Alexandrov's concept would have meant that the United States could only have attacked the planes after they had taken off for their targets and the Israeli Defence Force could only have defended against Egyptian formations moving to attack, even though they might not have passed the border. Ian Brownlie restricts the right even further than Dinstein and Alexandrov. In his opinion only rockets in flight may legally be intercepted in foreign airspace. Brownlie does not allow this exception to be extended to aeroplanes,[121] because his standard hinges on the last human decision *versus* the automatism of machines. He demands a virtually unstoppable mechanism, the last human interaction for an armed attack to have occurred when the territorial inviolability of the target is not yet violated, e.g. ICBMs being launched or aeroplanes firing missiles or dropping bombs.

A fourth argument bases its claim partially on the fact that, because in certain cases counter-force would not be *effective* if one waited until the enemy had entered the territorial domain, the right of self-defence exists from an earlier moment.[122] This, again, is a political argument. If, for example, a municipal statute fails to give effective protection against some danger, this in itself does not invalidate or change the statute. The same logic applies in international law: if the correct application of international law leads to a result deemed unsatisfactory, it is not the law's validity that is in question (a normative problem), but the wisdom of its terms (hence a problem of legal politics).

We are once again reminded by this discussion that there is no definitive clarification of the issue, neither by the terms of Article 51 nor by its preparatory works.[123] There are some difficulties with the various arguments presented above: the solutions employing a *mens rea* of the state must grapple with the immense

[118] Alexandrov (1996) *supra* note 20 at 164 (emphasis added).
[119] Alexandrov (1996) *supra* note 20 at 165.
[120] Dinstein (2005) *supra* note 9 at 192.
[121] Brownlie (1962) *supra* note 20 at 259.
[122] Brownlie (1962) *supra* note 20 at 259; Donner (1995) *supra* note 28 at 180; unclear: Jennings and Watts (1992) *supra* note 22 at 421–422.
[123] Verdross and Simma (1984) *supra* note 28 at 288.

difficulty of ascertaining the intentions of governments[124] for such a linchpin concept of international law (similar, but more complex than the establishment of *opinio iuris*).[125] Also, 'imminence' cannot be assessed by objective criteria and the law[126] – if it were shaped thus – would have to take the claims of defending states at face value. Third, 'there may in fact be no "last irrevocable act" '[127] which could give the protection the proponents of the 'slight expansion' seek. Fourth, to some extent all these constructions, all extensions or re-interpretations of the moment an armed attack is said to occur, involve the assumption that armed attacks can occur 'constructively',[128] because the infringement is not yet fully manifested in physical form. However, there is a wide degree of latitude, because the text of Article 51 sets limited textual boundaries and because the factual uncertainty makes the doctrine intimately connected to particular cases and thus makes all constructions highly casuistic (Section 2.2.2).

2.3 The perception of armed attack

Two problems are very rarely discussed in the literature, yet still have the potential to make the scope of self-defence highly uncertain. Both are connected to the key notion 'armed attack', but this section is not concerned with defining that notion and does not clarify the normative ontology, as uncertain as that may be. What we have to go on is very little. The problems will to an extent sound construed, for these issues are merely the ignored root of more common phenomena, such as the question of 'auto-interpretation', on the one hand, or the 'accumulation of events doctrine' on the other. The cause for disagreements over these doctrines are to be found in the question of 'perception'. The lack of scholarly interest in the matter or, rather, the lack of conviction that these issues are within the framework of normative regulation of the law on self-defence, makes such questions of perception very much uncertain.

2.3.1 Objective or subjective determination?

The first problem is about which determinative method the law requires for the ascertainment of the existence of an armed attack. An armed attack might be determined objectively – *ex post* (was there *actually* an armed attack) – or subjectively – *ex ante* (could one have reasonably expected the act to constitute an armed attack?). Is 'armed attack' a *perceived* action-condition or an *objective* one? While most scholars do not explicitly support a subjective theory, Beth Polebaum seems to: 'A nation that reasonably determines that nuclear weapons are about to

[124] Brownlie (1962) *supra* note 20 at 227.
[125] Section 3.3.
[126] Randelzhofer (2002b) *supra* note 28 at 803 (MN 39).
[127] McDougal and Feliciano (1961) *supra* note 12 at 240.
[128] Brownlie (1962) *supra* note 20 at 243.

be used against it should be entitled to act *upon that perception* and defend itself.'[129] However, she tempers the 'reasonable nation standard' by introducing a two-tier analysis. Not only a state's perception ought to count, but also the 'reasonableness' of the perception ought to be determined – making it an objective standard, however vague.[130] It seems as though implicitly most international lawyers support the objective approach. Ian Brownlie demands an '*actual* armed attack',[131] and Wilhelm Wengler argues that the prohibition of the threat or use of force would practically be worthless, 'if one were to allow a provoked and timid [state] to preventively counter-attack, because *he suspects* [that there exists] an intention to attack.'[132]

The objective method is in keeping with the terms of Article 51 ('if . . . occurs'). It fits the Charter regime better and is more rational, but it has the problem of not being able to work effectively in some cases. The subjective method is nearer to self-defence law as understood by criminal law doctrine in many municipal jurisdictions and works better, but is probably not law. In effect this is an epistemological problem: How can we know whether there is an attack? On the one hand, cognisance of the 'thereness' of an attack is always subjective (i.e. dependent on 'subjects') and can only be *perceived* in one way or another (and thus always requires an epistemological medium). On the other hand it is questionable whether subjective perception is a good way to write law or (crucially) whether the law actually demands it. Normative systems which do not authorise persons to determine the existence of normatively relevant facts must assume that that existence is objective and independent of perception. Objective existence is unmediated for the purposes of such a normative system. The same is the case with the subsumption of facts to laws without a determination of organs authorised to make a subsumption. Even absent the jurisdiction of an international tribunal (authorised by international law *via* treaty law), a state has either committed a violation of Article 2(4) UN Charter, or it has not. In the theoretical realm of the relation of norms to facts, a breach has objectively occurred or it has not and can thus be assumed to be 'determined' independently of the opinion of states or

[129] Beth M. Polebaum, National self-defense in international law: an emerging standard for a nuclear age, 59 New York University Law Review (1984) 187–229 at 208 (emphasis added). For a similar view, though expressed in more general terms and talking about a recent crisis: John Yoo, International law and the war in Iraq. Agora: Future implications of the Iraq conflict, 97 American Journal of International Law (2003) 563–576 at 567: 'What is important for *ius ad bellum* purposes is what the United States and its allies *reasonably understood the facts to be at the start* of hostilities, not what turned up [in Iraq] afterwards' (emphasis added).

[130] Polebaum (1984) *supra* note 129 at 209–212. It may be added that she overlooks that doctrines of common law (such as 'reasonable man' which forms the basis of her standard) – or of any other legal 'culture' for that matter – cannot be made international law (international treaty law, in this case) merely by the fact that some municipal legal systems acknowledge it.

[131] Brownlie (1962) *supra* note 20 at 238 (emphasis added).

[132] 'wenn man dem Gereizten und Ängstlichen den präventiven Gegenschlag wegen einer *von ihm vermuteten* . . . Angriffsabsicht erlauben würde.' Wengler (1967) *supra* note 28 at 5 (emphasis added).

international organisations. That 'subsumption' exists on the plane of normative ontology, but its cognisance is made difficult, because in the absence of authoritative decision (i.e. authorised by the normative system) all opinions remain opinions and are not determinations.

Hans Kelsen and others assume that if a given normative order does not have such authorised organs, every subject of that order is authorised to authoritatively determine the relevant fact:

> Since general international law does not establish – as national law does – special organs competent to ascertain the facts to which the law attaches legal consequences, it is always left to the states concerned, that is, the states interested in the fact, to fulfil this function by an agreement (if two or more states are involved). But, if no such agreement can be brought about, each state is authorised to ascertain the existence of the fact concerned for itself.[133]

This doctrine is known in international law as 'auto-determination' or 'auto-interpretation', and quite a few authors support its application to the determination in question.[134] The conclusion is assailable, because if a normative order does not specify person(s) authorised, then nobody is authorised, because positive norms do not regulate the matter and no one is authorised.[135] Besides, auto-determination is concerned with the question of who is competent to make a decision on the existence of an armed attack. The question posed here is: does the armed attack have to exist *objectively*, that is independently of anyone's determination, or is it merely the subjective *expectation* of the existence by someone?

2.3.2 Zoom

Does the law on self-defence presume that the subsumption of facts happens at a certain absolute level? What is the 'zoom' of self-defence? This is a difficult question to even formulate and one that is even more difficult to answer without speculation. The following is an example of the issue at hand: assume that there is a

[133] Hans Kelsen, Principles of international law (1952) 265–266. It is noteworthy that Kelsen is talking here about general (i.e. customary) international law only; in the case we are concerned with he does not seem to mind that the determination is one of treaty law, however.

[134] Kelsen (1948) *supra* note 28 at 791; Kelsen (1950) *supra* note 28 at 798: 'However competent to interpret the term "armed attack" and to ascertain that an armed attack has occurred in a concrete case is the state which considers itself as being attacked'; Kelsen (1952) *supra* note 133 at 61; Oscar Schachter, Self-defense and the rule of law, 83 American Journal of International Law (1989) 259–277 at 264. See generally: Leo Gross, States as organs of international law and the problem of autointerpretation, in: Alfred P. Rubin (ed.), Leo Gross: Selected essays on international law and organization (1993) 167–197.

[135] Thre cannot be legal regulation by default, negative regulation. Since positive international law is dependent upon an actual act of will, the validity of such norms cannot be presumed, neither for the purpose of founding a 'default' legal freedom to act nor for a 'default' authorisation to determine, whether in international law or in morals.

long history of hostilities between states A and B. State A sends a battalion of troops across the border and they attack one of B's towns; five days later, five soldiers of A's army on a patrol cross the border for ten minutes without any further action taken by these soldiers except for their presence. Such lists of infractions can be extended *ad infinitum*. Before continuing we will extract two questions best discussed elsewhere. This is necessary, because they tend to confuse and blind us to the real issue that is rarely discussed, but is more fundamental. First, we must ignore that such scenarios have implications for the question of the proportionality of the response. Proportionality, if it is an element of the Charter law of self-defence at all,[136] is a question of *how* self-defence can legally be executed, not whether actions are justified in the first place. While the absolute amount of proportionate response vis-à-vis action increases as one takes more actions into account, this determination depends on the legality of 'taking into account' more actions. Second, we must mention the relationship of and the distinction between the 'zoom' to the quantitative dimension of 'armed attack' (Section 2.2.3).[137] The latter determines how much activity is necessary to fulfil the criterion of 'armed attack'; the former decides the time frame and number of acts to be considered as cognitive focus. Continuing the example given above: do we consider A's first act independently from the second in a subsumption of facts to the law?[138] What about activities where a clear distinction between single and independent acts is impossible, especially if activities are ongoing? What is the relevant unit, if applied to the Vietnam War?[139] Every incursion by a unit of the North Vietnamese army? Do we judge the whole relationship between A and B for purposes of self-defence?[140] Do we take only their *present* relationship or their whole history? What about the Falklands/Malvinas conflict?[141] How far back do we extend the determination of who invaded first? May we go back further than 1945?

This flood of questions can be stemmed somewhat by examining situations where different zoom gives different legal results. In the example of the A–B relationship, A's second incursion could arguably be described as not crossing the threshold of an armed attack. If we were to calculate the justification from act to act, state B might legally defend against A's first act, but not against its second act. If we were to zoom out to the level of *present A–B relations*, B might be entitled

[136] Negative: Kunz (1947) *supra* note 19 at 878; Affirmative (majority view): Randelzhofer (2002b) *supra* note 28 at 805 (MN 42). See generally Neuhold (1977) *supra* note 104 at 139.

[137] Confusing the quantitative element, 'zoom' and the particular wording of Article 3(g) Definition of Aggression ('of such gravity'): Randelzhofer (2002b) *supra* note 28 at 801 (MN 32).

[138] A narrow 'zoom' seems to be the majority view, e.g. Dietrich Schindler, Die Grenzen des völkerrechtlichen Gewaltverbotes, in: Dietrich Schindler, Kay Hailbronner (eds), Die Grenzen des völkerrechtlichen Gewaltverbotes (1986) 11–48 at 37–38.

[139] We will assume here that North Vietnam and South Vietnam were at all times during the conflict states under international law.

[140] Derek W. Bowett, Reprisals involving recourse to armed force, 66 American Journal of International Law (1972) 1–36 at 3–4.

[141] Albrecht Randelzhofer, Der Falkland-Konflikt und seine Bewertung nach geltendem Völkerrecht, 38 Europa-Archiv (1983) 685–694 at 688–692.

to defend against the cluster of actions described above. In our example, the difference would mainly be a question of the proportionate response and precise timing of the defensive actions, purely because A's first act is a classic case of aggression amounting to armed attack and not problematical. However, what about a series of actions, singly of insignificant scale but cumulatively reaching worrying proportions?

That is the starting point of the 'accumulation of events' doctrine, developed by Israel during its early years of existence.[142] Israel's argument is this: 'if a State is not in a position to respond to individual attacks (terrorist attacks or incursions of armed bands), it would be entitled to respond to a whole series of such attacks, accumulated over time.'[143] This doctrine is highly controversial[144] and the Security Council seemed to reject it.[145] A severe blow against an enemy conducting sporadic small-scale incursions can simultaneously have three vices. First, it may seem like armed reprisals[146] after an attack has ended, designed to punish, not repel. Second, it may seem like preventive self-defence for attacks that may occur in the future (as an extrapolation of past behaviour).[147] Third, a massive blow against a small-scale armed attack may be thought disproportionate if that armed attack is seen in isolation. The construct loses many of its controversial features if one supports a view that sees even small-scale border incidents as crossing the threshold of 'armed attack' (Section 2.2.3),[148] because every single act may then be repelled by force. If the threshold is regarded as relatively high, then the only possible method of making the doctrine legal is to view a multitude of activities as constituting one armed attack.[149] However, this argument is in a vicious circle, for it presupposes that the law on self-defence has a certain 'zoom', namely one that looks at a majority of activities.

142 Bowett (1972) *supra* note 140 at 5: 'After the Qibya raid in 1953, Israel was perforce obliged to shift away from this restrictive view of self-defense and, for the first time, argued that its action was justified in the whole context of repeated theft, pillaging, border raids, sabotage and injury to Israeli property and life. This argument of an "accumulation of events" became a recurring theme in Israeli statements long before the June, 1967 hostilities'.

143 Alexandrov (1996) *supra* note 20 at 166.

144 *Contra*: Alexandrov (1996) *supra* note 20 at 165–166; Hailbronner (1986) *supra* note 2 at 83–84; Ago does not support the accumulation of events theory, because he is talking purely about proportionality vis-à-vis several *armed attacks*. Ago (1982) *supra* note 9 at 69–70 (para 121). *Pro*: Bowett (1972) *supra* note 140 at 6–7; Dinstein (2005) *supra* note 9 at 202, 230–231; Schindler (1986) *supra* note 138 at 35–36. Unclear, but broadly supportive: Kreß (1995) *supra* note 41 at 196–204.

145 Hailbronner (1986) *supra* note 2 at 83.

146 Alexandrov (1996) *supra* note 20 at 166–167; Robert W. Tucker, Reprisals and self-defence: the customary law, 66 American Journal of International Law (1972) 586–596 at 595: 'the "accumulation of events" theory is but one demonstration . . . of the thin line separating reprisals from self-defense'.

147 Alexandrov (1996) *supra* note 20 at 166 sees the 'accumulation of events' theory entirely in terms of the temporal dimension; Kreß (1995) *supra* note 41 at 197.

148 Kreß (1995) *supra* note 41 at 197.

149 Dinstein (2005) *supra* note 9 at 202, 230–231; Kreß (1995) *supra* note 41 at 198.

Michael Donner is one of only a few scholars who has taken up the question of what the law says in protracted conflict. For him a narrow focus of the cognition of self-defence situations is unacceptable, because:

> It would lead to the inapplicability of the law on self-defence to protracted conflict, because the defender would be forced to strip down the threat posed by the whole military situation into a multitude of 'small' self-defence situations and [he would be forced] to wait in order to be able to justify [his] counter-actions. . . . Threats or adverse effects of this kind thus constitute a self-defence situation triggered by an armed attack. *The whole duration of this situation constitutes an 'armed attack' in the sense* [*used in*] *Article 51 of the Charter* . . .[150]

Unfortunately, he does not reveal the *legal* grounds on which he bases the view that protracted conflict is to be treated differently to singular actions. He prefers the 'argument from inconvenience' which is so frequently used in the debate on the use of force. It seems that Donner sees the 'zoom' of self-defence as dependent on proportionality – maybe it is?

The International Court of Justice has recently given an indication on what it regards as the proper 'focus' of self-defence. In the 2003 merits judgment in *Oil Platforms* it examined single incidents (and pairs of incidents) involving the use of force in order to determine, in effect, whether force was justified as self-defence.[151] However, in the judgment in *Armed Activities on the Territory of the Congo* delivered in late 2005, the Court remarked that it 'will not examine *whether each individual military action* by the UPDF *could have been characterised as action in self-defence*, unless it can be shown, as a general proposition, that Uganda was entitled to act in self-defence in the DRC',[152] which seems to suggest that the Court is leaning towards a broader focus. This seems as if the Court itself is unsure whether to focus on single incidents or on the whole situation between the parties to a dispute.

The two problems are important. If the law is such as to accept subjective perceptions of a threat, self-defence could be lawfully exercised in more and different situations than if only 'real' attacks counted. If the law would take into account a whole complex of situations, e.g. the relationship between long-standing enemies, self-defence would be a different instrument than if the prescribed viewpoint were somewhat more atomised. Clearly, the difference in perception leads to differences in legitimate exercise of the right. The two problems mentioned are also uncertain in the terms of this book. The Charter does not explicitly mention

[150] 'Sie würde nämlich die Unanwendbarkeit des Selbstverteidigungsrechts in längeren Konflikten herbeiführen, weil der Verteidiger gezwungen wäre, die Bedrohung durch eine militärische Gesamtlage in eine Vielzahl von "kleinen" Notwehrsituationen auseinanderzudividieren und abzuwarten, um seinerseits Gegenstöße rechtfertigen zu können. . . . Bedrohungen oder Beeinträchtigungen dieser Art stellen insoweit eine durch einen bewaffneten Angriff ausgelöste *Notwehrlage* dar, *die für ihre gesamte Dauer einen "bewaffneten Angriff" im Sinne von Art. 51 der Charta begründet* . . .' Donner (1995) *supra* note 28 at 204 (emphasis added).

[151] *Oil Platforms* (2003) *supra* note 53 at 184–196 (paras 46–72).

[152] *Armed Activities* (2005) *supra* note 26 at 216 (para 118) (emphasis added).

them; legal arguments are not to be found in academic debate – as far as it exists. Once again we are left in the dark about these matters, which is an incentive, but not a justification, to speculate on the content of the law on this matter.

2.4 The nature of the attacker

This section discusses whether the exception of self-defence is applicable only in inter-state relations or whether individual human beings have a role to play. Ever since non-state actors have become more prominent in transnational interaction involving force[153] (such as the activities of armed bands, guerrillas or terrorists), international lawyers and states have tried to bring them within the purview of the *ius ad bellum*. Their anxiousness is warranted by the capabilities of private individuals and groups, as they may endanger the security of states to a great degree. The success of insurgencies and warfare by guerrilla tactics, e.g. against the French colonial regime by the Viet-Minh shows that such groups can be as strategically effective as conventional armed forces used in open-plain armoured warfare. This potential effectiveness often results in the employment of military means by the state attacked.

There are a host of different issues that one could discuss in a section dealing with the role of individuals under Article 51. One might discuss, for example, who or what needs to be the target of an attack in order to be able to exercise self-defence. If a state harms foreign nationals on its own soil, could one consider these individuals a 'valid target' so that harm done to them is an armed attack in the sense employed in Article 51?[154] One might also ask whether a state's actions on its own soil can be completely excluded from the scope of the prohibition of the threat or use of force and thus potentially exclude a forcible confrontation between states from being considered a violation of the prohibition, and thus from being justified as self-defence (e.g. forcible reaction to airspace violations by single foreign military reconnaissance aircraft).[155] But these questions – though certainly sources of uncertainty – will not be discussed here. Instead, we will have a look at a legal question that has become highly charged in the last few years, ever since a group of private individuals executed a terrorist attack of great magnitude. What kind of entity is capable of committing an armed attack? How, if at all, must private individuals or groups be linked to a state in order for their actions to be counted as 'armed attack'? May a state react with military force to a terrorist attack and may this state justify its actions as self-defence?

[153] Take as an example of the growing importance of such entities the following: the International Institute for Strategic Studies (IISS, London), the world's premier research institute for geo-strategy, has recently begun to include a list of 'selected non-state armed groups' in its primary publication comparing the world's military forces, see e.g.: International Institute for Strategic Studies, The military balance 2005/2006 (2005) 421–432.

[154] Teplitz (1995) *supra* note 28 at 608–610.

[155] See Kay Hailbronner, Der Schutz der Luftgrenzen im Frieden (1972); Verdross and Simma (1984) *supra* note 28 at 289–290.

2.4.1 Acts by private individuals as armed attacks

The actions of what kind of entity can be qualified as 'armed attack' under Article 51 (armed attack *ratione personae*)? It is perhaps best to deal with this extraordinarily complex topic in two stages. First, it is to be decided whether only states can commit an armed attack. Second, assuming the first question is answered in the affirmative, the issue becomes what connection individuals ought to have to a given state to call their actions an armed attack (Section 2.4.2).

This is the second argumentative strategy employed by recent proponents of a wide reading of self-defence (next to a widening of the meaning of 'armed attack', see Sections 2.2.2 to 2.2.4). They submit that in this traditionally state-centred field of law, self-defence is not conditioned upon an armed attack committed by a state. In effect, 'armed attack' is interpreted to mean that it is not dependent upon the actor's status in international law: 'armed attack' does not mean 'armed attack by a state'. This is held by a minority of international lawyers,[156] but their legal arguments are brief.[157]

This interpretation can be seen as reasonable from a textual viewpoint, for clearly Article 51 does not make explicit who ought to be the actor involved in an armed attack. Accordingly, the argument is developed that 'armed attacks' as used in Article 51 need not necessarily be armed attacks committed by or on behalf of a state, because the text is open to this interpretation.[158] Article 51 does not use the words 'armed attack *by a state*'. One could argue that the wording: 'if . . . occurs' does suggest an occurrence independent of state action rather than an act of state. Article 51's 'armed attack' can be approximated to a natural disaster, an occurrence not necessarily dependent on wilful action by a state.

The argument that private acts cannot be excluded from Article 51 is also based on various passages in Security Council Resolutions. Resolution 241, for example, expresses the Council's concern at 'the serious situation created in the Democratic Republic of the Congo following the *armed attacks* committed against that country by foreign forces of mercenaries'.[159] However, the text of that resolution is less clear than it seems. The Council does not mention a link between the connection these 'foreign forces of mercenaries' might have with certain states and the classification of the acts as 'armed attack' under Article 51. In fact, the resolution does not mention self-defence at all. Because the French version of Resolution 241 translates what the English version calls 'armed attack' as 'attaque armée' rather than 'agression armée' (as used in Article 51), the drafters might not have intended to use 'armed attack' in its narrow technical sense. The

[156] This minority has grown considerably since 11 September 2001 and the attendant changes in US policy.

[157] Though cf. Kreß (1995) *supra* note 41 at 149–153, 206–249.

[158] Dinstein (2005) *supra* note 9 at 244–245; Franck (2001) *supra* note 79 at 840; Kreß (1995) *supra* note 41 at 207; Miller (1985) *supra* note 29 at 57.

[159] S/RES/241 (1967) Preamble (para 1) (emphasis added). Kreß (1995) *supra* note 41 at 207–208.

same argument can be used for Resolution 405, whose French version mentions an act of 'agression armée' against Benin, but speaks of 'armed aggression' in English.[160]

In the aftermath of the events of 11 September 2001 the Security Council expressly referred to the inherent right of self-defence in Resolution 1368,[161] which has led to the contention that this amounted to a recognition of that right within the specific context of the Al-Qaeda terrorist attacks against targets in the United States irrespective of attributability of these acts to Afghanistan.[162] However, the Council did not acknowledge that the right to self-defence applied vis-à-vis Afghanistan (or even vis-à-vis the non-state group 'Al-Qaeda'), but only 'recognised' or 'reaffirmed'[163] *generally* the right to self-defence. It did not even specify that this right applies in the fight against terrorist acts or as against terrorist groups. Furthermore, it may be doubted whether the Charter has empowered the Security Council to make authoritative decisions on the existence *vel non* of armed attacks or to pronounce on the legality of armed force as self-defence.[164]

The most interesting arguments are teleo-systematic interpretations of the Charter (mostly by contrahents) or appeals to necessity (mostly by proponents). In order to unravel the tangled strands of this argument it is best to present the argument of the majority[165] (denying that armed attacks can be private in nature)

[160] S/RES/405 (1977) Paragraph 2.

[161] S/RES/1368 (2001) Preamble (para 3).

[162] Franck (2001) *supra* note 79 at 840. Carsten Stahn takes that resolution, together with NATO's North Atlantic Council statement (NATO Press Release (2001) 124, 12 September 2001, at: www.nato.int/docu/pr/ 2001/p01–124e.htm) as 'a limited clarification of the law' (Stahn (2004) *supra* note 28 at 836–838) which significantly loosened the required connection to allow for an attack with merely an 'external link' – and thus independent of state action – to be counted as an armed attack (Stahn (2004) *supra* note 28 at 849–852). See also Randelzhofer (2002b) *supra* note 28 at 802 (MN 35). Cf. *Armed Activities* (2005) *supra* note 26, Separate Opinion Kooijmans at 313–314 (para 28), Separate Opinion Simma at 337 (para 11). Judge Kooijmans has recently criticised the present author's opinion on this point (as formulated in Kammerhofer (2007) *supra* note 79 at 99–100): Pieter H. Kooijmans, The legality of the use of force in the recent case law of the International Court of Justice, in: Sienho Yee, Jacques-Yvan Morin (eds), Multiculturalism and international law. Essays in honour of Edward McWhinney (2009) 455–466 at 463–465.

[163] S/RES/1368 (2001) Preamble (para 3); S/RES/1373 (2001) Preamble (para 4), respectively. The present author is indebted to André de Hoogh for his arguments against using the resolutions in this way.

[164] The Council is authorised to decide when it has 'taken measures necessary to maintain international peace and security' (Article 51, first sentence, second part), but that is a categorically different determination; one based on its Chapter VII competences and one utterly divorced from the legality of the action purportedly in self-defence. The Council cannot in any sense 'authorise' self-defence, contrary to Thomas Franck's theory (Thomas M. Franck, Recourse to force. State actions against threats and armed attacks (2002)).

[165] As Claus Kreß notes, there is a marked absence of argument by the majority, perhaps because the notion discussed here has been, until recently, a radical and marginal opinion. Kreß writes that 'often, [this opinion] is implicit in [the authors'] words on Art. 51' 'häufig liegt diese [Meinung] den Ausführungen zu Art. 51 unausgesprochen zugrunde'. Kreß (1995) *supra* note 41 at 206 (FN 879).

as a coherent argument, whereas the counter-arguments are presented as interjections. While this puts the minority at a disadvantage, it is preferable to proceed in this way, because the majority has a more coherent argument, irrespective of its merits.

The majority starts with the argument that the 'use of force' *against* private individuals is not a threat or use of force and thus not prohibited by Article 2(4) UN Charter. Of course, harm to individuals may be a factual element of a breach of the prohibition, but only when military force is used between states.[166] Therefore, the employment of military means only against individuals – since it does not constitute a violation of the *ius contra bellum* – does not need to be justified as an exercise of the right to self-defence. This would be the case when combating a domestic insurgency by military means or in the unlikely cases that an individual were swimming on the high seas or were to stay on territory considered *res nullius*. However, if the 'defender' uses military means against a private individual or group staying on the territory of another state, the use of force impinges on the other state – even if the defender seeks to do harm only to the private entity. As Article 2(4)'s content is defined by the majority, the employment of military means by a state *against another state* is categorically prohibited. Therefore, the 'defender' violates Article 2(4) only vis-à-vis the territorial state, not vis-à-vis the individual or group. This use of force needs to be justified vis-à-vis the state in order to be lawful, not vis-à-vis the individual or group.

The acts of private individuals or groups, on the other hand, cannot be a use of force in the sense employed by Article 2(4). The majority contends that the prohibition of the threat or use of force is specifically inter-state in character: 'All *Members* shall refrain in their inter*national* relations from the threat or use of force against . . . any *state*. . . .'[167] Private persons violate international law by committing acts of terrorism, but they are not bound by Article 2(4). Purely private actions cannot violate the prohibition of the threat or use of force. On a more general plane it can be argued that individual humans cannot violate a state's sovereignty, because for a state's sovereignty to be violated there needs to be an act of state. There needs to be a violation of the sovereign equality of states, for example through unlawful intervention or an act of aggression. Private acts cannot violate the maxim '*par in parem non habet imperium*'.

The use of military means by a state against individuals staying on another state's territory constitutes a violation of the prohibition of Article 2(4) exclusively

[166] While usually a trans-frontier use of force is required to classify as violation of Article 2(4), there are certain cases in which no crossing of frontiers takes place, e.g. the attack upon military forces stationed abroad or upon warships on the high seas. The necessary condition is the employment of military force by one state against the other.

[167] Article 2(4) UN Charter (emphasis added). See Randelzhofer (2002a) *supra* note 18 at 121 (MN 28); Randelzhofer (2002b) *supra* note 28 at 802 (MN 34) as examples of the consensus opinion. The content of the obligation in Article 2(4) is not contested by opponents, e.g. Kreß (1995) *supra* note 41 at 212: 'requirement of state action in Article 2(4) UN Charter' 'Staatlichkeitserfordernis des Art. 2 Ziff. 4 SVN'; Dinstein (2005) *supra* note 9 at 85–91.

vis-à-vis the second state. That violation must be justified vis-à-vis that very state. The armed attack as necessary condition for the legality of self-defence under Article 51 must be committed by the state against which force is directed. The defender's *prima facie* unlawful action is after all taken against that state (the use of force is always directed against a state) and the defender's acts are in need of justification. In other words, the territorial state (the guerrillas' base state) needs to have committed an armed attack for the defender's actions to be justified under Article 51. Thus, an 'armed attack' as used in Article 51 can only be an act attributable to a state.

This conclusion rests on two crucial – but assailable – premises on the nature of self-defence. This is the point where the minority can employ particularly effective counter-arguments, made effective by the fact that they show that this is not the only way the law on self-defence could be conceived, which is implied in the majority argument. However, showing that a solution is not the only conceivable version does not mean that this solution is excluded. Indeed, that might still be how the law is shaped.

The first premise is *the identity of acts*: self-defence justifies otherwise illegal acts of the defender only because the attacker has itself committed an unlawful act. Self-defence presupposes illegal conduct by the attacker. In the Charter this means that the event 'armed attack' – the main necessary condition for self-defence[168] – must be an international wrong. Furthermore, the majority believes that the offending act must be the same sort of infraction as the one to be justified,[169] because the trigger for the justification must be a violation of the prohibition violated. Thus, 'armed attack' must contain 'threat or use of force'. Self-defence is conditional upon a threat or use of force[170] amounting to an armed attack. Since the general prohibition may only be violated by states, only states *can* commit an armed attack.

The interjections against this premise proceed from the assumption that armed attacks *as such* are not prohibited; they merely form the trigger for lawful self-defence. Force is prohibited and the Charter makes it abundantly clear that only states can threaten or use force vis-à-vis other states. The trigger is not necessarily a violation of international treaty law, because the violation can only be committed by a state. The negative connotation of the French term 'agression armée' compared with 'attaque'[171] ought not to be read as containing a specific reference to an international wrong in the technical sense.[172]

168 Section 2.2.1.

169 Ago (1982) *supra* note 9 at 54 (para 89): '[T]he only international wrong which, exceptionally, makes it permissible for the State to react . . . by recourse to force . . . is an offence which itself constitutes a violation of the ban.'

170 On this narrow point Bowett agrees: '. . . the right of self-defence is only available against a use or threat of force which is delictual as being contrary to international law.' Bowett (1958) *supra* note 11 at 11.

171 Klein (1964) *supra* note 28 at 182.

172 Kreß (1995) *supra* note 41 at 208.

Why, continues the minority, ought the violation of international law to be the *only* trigger for self-defence as justification? The only hindrance is that the attacker's acts might themselves be justified either as action authorised under Article 42 or as self-defence and thus themselves be justified, which, in turn, would violate the maxim: 'No self-defence against self-defence.' This causes a logical problem: if action against self-defence can be self-defence, then the first defender can itself exercise self-defence against the self-defence of the second defender and so cause a vicious circle. Claus Kreß argues that we avoid this happening by supposing that Article 51 requires an attack not itself justified by international law as self-defence or military sanctions, which would mean that private attacks could never be justified.[173]

Even if one were to suppose that self-defence needs unlawful conduct as a trigger, the minority doubts whether the unlawful conduct specifically needs to be a use of force.

> Rather, one could say that self-defence 'if an armed attack occurs' is exercised, when an unlawful act under international law is connected to an armed attack in such a way that the existence of the armed attack creates a self-defence situation.[174]

This means that the connection established by the majority is severed and the event 'armed attack' does not have to be a wrong. In the case of a private attack a second necessary condition is added and the first condition ('armed attack') is modified. The majority requires that the unlawful threat or use of force *is* the armed attack (force amounting to an armed attack – Section 2.2.2) in order to trigger self-defence. Kreß, on the other hand, needs, first, an 'armed attack' (though using an expanded understanding of that term) committed by any person or group and, second, unlawful conduct by some state in connection with that 'attack'. The problem with this argument is, however, that if the connection between the unlawful act and the armed attack is severed, the attacker and the entity defended against are different (which will be discussed *à propos* the second premise).

Minority scholars argue that the mechanics of prohibition and exception are not such as to require the exact contraposition of the trigger and the justified reaction as the same *prima facie* unlawful acts. The duality of rule and exception does not mean that positive regulation need specify that a wrong constitute the trigger, only that the prohibition obliges states and that the exception may only be exercised by states. This is fulfilled in the case of Articles 2(4) and 51.[175] States

[173] Kreß (1995) *supra* note 41 at 208 (FN 885).

[174] 'Vielmehr kann auch dann von einer Selbstverteidigungssituation "im Falle eines bewaffneten Angriffs" gesprochen werden, wenn völkerrechtliches Unrecht derart mit der Begehung eines bewaffneten Angriffs im Zusammenhang steht, daß mit der Vornahme des bewaffneten Angriffs der Eintritt einer Selbstverteidigungsituation verbunden ist.' Kreß (1995) *supra* note 41 at 209.

[175] Kreß (1995) *supra* note 41 at 211–212.

would still remain the addressees of rule and exception, even if one were to argue that 'armed attacks' may also be committed by private individuals. This argument merely brings to light the problem already mentioned in the preceding paragraph. States do not need to justify their forcible acts against private individuals. Only if they act forcibly against another state do they need to justify their acts – vis-à-vis that state, not the individuals concerned. If a state attacked by the defender cannot be said to have itself committed the armed attack, then the attacker and the entity 'defended' against are different.

The second premise is *the identity of entities*: self-defence needs (*a*) an illegal act *by the attacker* and (*b*) that the entity that attacks is the *only valid target* for the defender. Should the defender violate a third entity's rights (not the attacker) in the course of its defence, the acts against that third party cannot conceivably be justified as 'self-defence'.[176] The only possible justification would be 'necessity',[177] as codified in Article 25 of the 2001 Articles on State Responsibility.[178] The UN Charter, however, does not recognise such an exception to the prohibition of force. Therefore, the majority concludes that the state which is the target of defensive action has to have committed the armed attack *itself*. It would be disjointed to allow state A to act against state B because person C not under B's control had harmed A. States cannot be made responsible, and much less attacked, for persons they cannot control. It would be a mere fiction if states were thought to control everything happening on their territory.[179]

The opposite position is put to us by Dinstein:

> The armed bands or terrorists in Arcadia are not cloaked with a mantle of protection from Utopia. . . . Just as Utopia is entitled to exercise self-defence against an armed attack by Arcadia, it is equally empowered to defend itself against armed bands or terrorists operating from within the Arcadian territory. . . . Utopia may, therefore, dispatch military units into Arcadian territory, in order to destroy the bases of the hostile

[176] Even Bowett admits this: Bowett (1958) *supra* note 11 at 56.

[177] Ago (1982) *supra* note 9 at 61–62 (para 106); Kreß (1995) *supra* note 41 at 208. Interestingly, Albrecht Randelzhofer argues that '[f]or the purpose of responding to an "armed attack", the State acting in self-defence is allowed to trespass on foreign territory even when the attack cannot be attributed to the State from whose territory it is proceeding' (Randelzhofer (2002b) *supra* note 28 at 799 (MN 29)). For him, actions against non-attacking states may also be justified by self-defence, although the remark above is made with respect to Article 3(f) Definition of Aggression (Placing territory at another state's disposal) as applied to self-defence.

[178] General Assembly, Articles on responsibility of states for internationally wrongful acts, A/RES/56/83, Annex, 12 December 2001 (ARS 2001). See also two earlier versions: (*a*) International Law Commission, Draft articles on responsibility of states for internationally wrongful acts 2001 (DARS 2001), in: International Law Commission, Report of the International Law Commission on the work of its fifty-third session 23 April to 1 June and 2 July to 10 August 2001, A/56/10 (2001) at 29–365. (*b*) International Law Commission, Draft articles state responsibility 1996 (DASR 1996) Article 33, in: International Law Commission, Report of the International Law Commission on the work of its forty-eighth session 6 May–26 July 1996, A/51/10 (1996).

[179] *Corfu Channel* (1949) *supra* note 22 at 18.

armed bands or terrorists (provided that the destruction of the bases is the 'sole object' of the expedition).[180]

The minority severs the connection between the response against the private persons attacking and the defender's violation of Article 2(4) vis-à-vis the 'base state'. Thomas Franck believes that self-defence may be exercised not only against the attacker, but does not give any legal reason for this conceptual expansion of self-defence.[181] Claus Kreß employs another approach to the problem of the divorce of attacker and state entity impinged by the use of force, for only if certain unlawful state acts are connected to the 'private armed attack' may self-defence be exercised.[182] Carsten Stahn employs a similar argument. For him the question of attributability of armed attacks (Section 2.4.2) is relevant only in the context *against whom* (against which state) the forcible response may be directed, but not in the context of the definition of 'armed attack' (armed attack *ratione personae*).[183] These minority approaches consider it lawful that the defender uses force against a state which did not itself commit an armed attack. Their argument can be reconstructed as pleading:

(1) a state incurs absolute responsibility for individuals acting on its territory;
(2) the legality of the employment of force against a state is not dependent upon its acts; or
(3) the legality is dependent only upon infractions other than an armed attack.

Claus Kreß admits that the genesis and history of the term 'armed attack' was confined to state action.[184] He distinguishes between collective and individual self-defence and tends to construct the law as to largely prohibit collective responses to non-state attacks, whereas individual responses ought to be allowed.[185] This does not seem to be a convincing distinction, because Article 51 clearly puts collective and individual self-defence on the same footing: either both kinds of self-defence are allowed against private attacks or none are.

Can we say that there is uncertainty as to what an armed attack *ratione personae* is? It is submitted that there is. Neither position has 'knock-down arguments',

[180] Dinstein (2005) *supra* note 9 at 245.

[181] Franck (2001) *supra* note 79 at 840–841. He conceives of a number of trends in *ius ad bellum* since 1945 as developments of the concept of self-defence: Franck (2002) *supra* note 164, Chs 2–4. Edward Miller believes that armed attacks may be perpetrated by individuals, but goes on to argue that self-defence may only be invoked against states and thus seems to partially contradict himself: 'Firstly, it is clear that the right of self-defence may only be invoked *against the attackers themselves*, or against the state substantially involved. Israel could only, therefore, claim a right of self-defence in this respect against *Syria and Jordan, not against Egypt*.' Miller (1985) *supra* note 29 at 58 (emphasis added).

[182] Kreß (1995) *supra* note 41 at 208–209.

[183] Stahn (2004) *supra* note 28 at 850–851.

[184] Kreß (1995) *supra* note 41 at 215–217.

[185] Kreß (1995) *supra* note 41 at 233–235.

nor is the text on this point clear enough. There simply is no more than the words 'armed attack' to go on. Thus there are no textual grounds either for excluding or for including private individuals' or groups' actions in the definition of armed attack (though systematic interpretation may tend to support the majority view). Article 51 simply does not mention the entity or state from which an attack must originate. There are hints, though, that may point to the weakness of the minority's arguments, although these are not strong enough to dispel these doubts, especially regarding the careful and precise argumentation developed by Claus Kreß. Why should the involvement of private individuals or groups be 'an extraordinary case demanding, and getting, an extraordinary solution in international law',[186] when the Charter in all other respects relevant to its *ius contra bellum* – not merely single provisions, but the tenor of the whole instrument – is directed exclusively towards inter-state action? What is the nature of this 'demand'? Is treaty-law shaped by utility as perceived by a few states and a minority of scholars, by a political 'necessity'? It would seem that since the text is silent, the simpler solution – applying Occam's razor – is not that the Charter is state-oriented save in this respect, but that the same regime applies throughout the law on the threat or use of force under the Charter.[187] But this is a sceptic's argument, bringing doubt, not establishing a different regime.

2.4.2 Attribution of acts to a state as armed attack

If the question whether only states can commit an armed attack is answered in the affirmative, the issue becomes what connection non-state entitites ought to have to a state to call their actions an armed attack. This question has been discussed under the heading of 'attribution' or 'imputability' and the law of state responsibility has been used as a fount of 'normative ideas' to discover what norm governs this specific case. And here we have an issue that does not simply divide legal cultures, but one of immense importance, great reach and great uncertainty. It also is an incredibly complex issue, made such through what the International Law Commission has called 'the fragmentation of international

[186] Dinstein (2005) *supra* note 9 at 245.

[187] In the advisory opinion of 9 June 2004 the International Court of Justice held that the right of self-defence under Article 51 UN Charter is confined to inter-state relations. *Wall* (2004) *supra* note 53 at 194 (para 139): 'Article 51 of the Charter thus recognises the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*. However, Israel does not claim that the attacks against it are imputable to a foreign State. . . . Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case' (emphasis added). Several judges did not share the Court's view of the inter-state character of the right of self-defence in international law (*Wall* (2004) *supra* note 53, Separate Opinion Higgins at 215 (paras 33–34), Separate Opinion Kooijmans at 229–230 (paras 35–36), Declaration Buergenthal at 241–243 (paras 4–6). In *Armed Activities* the Court again seemed to require attributability of private acts to the state against which self-defence was claimed to have been exercised: '[t]he attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC'; *Armed Activities* (2005) *supra* note 26 at 223 (para 146).

law'.[188] This complex of problems will be approached by way of a dissection, starting with a look at the two groups of approaches on their own merit and proceeding to a discussion of how and why the two 'worlds' conflict and what, if any, *synthesis* might be drawn.

(*a*) The 'traditionalist' debate is concerned with the specific question of under what circumstances a state is allowed to resort to forcible means in self-defence – when an armed attack can be said to have occurred – against 'action by armed bands'.[189] The fountainhead of traditional views on the topic can be seen in the *Caroline* incident.[190] However, for the present purposes scholars are not primarily interested in the formulation of the doctrine of self-defence by Webster and Ashburton, but the fact that they classified the incident as an instance of self-defence.[191] Because the incident involved armed bands, and because self-defence was claimed and not disputed, and because the attacker was not the United States itself, but private individuals, the inference is drawn that self-defence properly so called may involve action against private individuals.

This traditional debate is also remarkable in other respects. First, while a state is not normally responsible for either its citizens' actions or for other persons staying on its territory,[192] a consistent application of the *facts* of the *Caroline* incident as if they were an example of lawful self-defence would mean that a state may use force in self-defence even when the 'base state' is powerless to act against the individuals concerned, thus imposing a sort of absolute duty to tolerate other states' actions against it. Second, it may be noted that since the International Law Commission (ILC) first started laying down rules for the attribution of private behaviour to states,[193] and since the International Court of Justice's judgment in the *Nicaragua* case,[194] the terms of the debate have shifted markedly towards a differing standard (described below) connected to the law on state responsibility.[195]

188 Fragmentation of international law: difficulties arising from the diversification and expansion of international law, in: International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006) (A/61/10) (2006) 400–423.

189 For the origins of the concept of 'armed bands', encompassing a whole host of phenomena, from uncontrolled tribal groups to terrorists, see Ian Brownlie, International law and the activities of armed bands, 7 International and Comparative Law Quarterly (1958) 712–735 at 713–719.

190 See generally: Robert Y. Jennings, The *Caroline* and *McLeod* cases, 32 American Journal of International Law (1938) 82–99.

191 Dinstein (2005) *supra* note 9 at 248–249; *Contra*: Ago (1982) *supra* note 9 at 39–40 (para 57), 65–66 (para 113).

192 That is, a state may violate a duty to prevent individuals from acting, but an individual's acts themselves are not an 'act of state'. Jennings and Watts (1992) *supra* note 22 at 549 (para 166). See below.

193 Roberto Ago's Third Report on State Responsibility, proposing what later became Article 8(a) DASR 1996 and Article 8 ARS 2001, was issued in 1971. Roberto Ago, Third report on state responsibility [A.CN.4/246, A.CN.4/246/Add.1–3], 23 Yearbook of the International Law Commission 1971 (1973) Volume II, Part One, 262–267.

194 *Nicaragua* (1986) *supra* note 5.

195 Francis A. Boyle, Determining U.S. responsibility for Contra operations under international law. Appraisals of the ICJ's decision: Nicaragua v. United States (Merits), 81 American Journal of International Law (1987) 86–93 at 87; Farer (1987) *supra* note 100 at 113; Higginbotham (1987) *supra* note 60 at 548–549, 550; Schindler (1986) *supra* note 138 at 35.

Third, those seeing the facts of the *Caroline* incident as an example of self-defence and positing a low standard of connection between state and individual are more likely to be earlier authors,[196] although the events of 11 September 2001 have created a revival of the traditional standard.[197]

What were the proposed standards under the traditional debate and was there a consensus view? It is to be noted that views that do not require a link between state and private entity, whether 'traditional' or not, have been discussed elsewhere (Section 2.4.1) and thus will not be mentioned again here. In contrast, views considering some sort of state 'complicity'[198] or involvement to be necessary will be addressed here. Ian Brownlie's words, written in 1958, may be taken as typical:

> However, it is conceivable that a co-ordinated and general campaign by powerful bands of irregulars, *with obvious or easily proven complicity of the government* of the State from which they operate, would constitute an 'armed attack', more especially if the object was the forcible settlement of a dispute or the acquisition of territory.[199]

There is also a diffuse, if later, trend to completely exclude certain categories of state action. 'Assistance', it is said, merely providing supplies to an armed group, cannot conceivably be sufficient to fulfil the link-criterion of armed attack in the case of armed bands. The Court's pronouncements in *Nicaragua* can be read independently of questions of attribution under state responsibility and as merely being concerned with defining *what* an 'armed attack' under Article 51 is.[200] Higginbotham, for example, draws a clear distinction between assistance, on the one hand, and control, on the other hand.[201] The words of Robert Jennings, in his dissenting opinion to the above-cited judgment, make one aware, however, that there is a problem of confounding a connection with the proof of its existence:

> It may readily be agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may, nevertheless, be a very important

196 Brownlie (1958) *supra* note 189 at 731; Kaikobad (1993) *supra* note 28 at 311–314; Miller (1985) *supra* note 29 at 58.

197 Randelzhofer (2002b) *supra* note 28 at 801–802 (MN 33–36); Ratner (2002) *supra* note 80 at 908. The views of those supporting the proposition discussed in Section 2.4.1 often come close to these voices and scholars' writings are often difficult to pinpoint, both with respect to what precise 'dimension' of armed attack they discuss and what precise position they take. *Vide* Jonathan I. Charney, The use of force against terrorism and international law, 95 American Journal of International Law (2001) 835–839 at 836 as an example.

198 The term 'complicity' is used here in a very wide sense, not merely as a 'complicity doctrine'. Cf. Kreß (1995) *supra* note 41 at 150–151.

199 Brownlie (1958) *supra* note 189 at 731 (emphasis added).

200 Contrast *Nicaragua* (1986) *supra* note 5 at 103–104 (para 195), 119 (para 230), 126–127 (para 247) with the discussion, in the same judgment, of questions of attributability: *Nicaragua* (1986) *supra* note 5 at 62 (para 109).

201 Higginbotham (1987) *supra* note 60 at 549–550.

> element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement.[202]

Judge Jennings is not contradicting himself, for while the majority of judges saw assistance as necessarily excluded (this kind of activity cannot constitute the link required), he considered 'assistance' as one kind of *proof* of such link. The link would be established if proof of supply of arms were supplemented with proof of other involvement.

(*b*) The starting point of the newer line of argument to connect private attacks to a state is the law of state responsibility. This, the 'international law of torts', has had to deal with linking the state to human behaviour, because a state as a juridical person acts through human behaviour. The juridical link between real behaviour and legal person is commonly called 'attribution' or 'imputability'. Within the International Law Commission's project elaborate rules were developed, *inter alia* for our kind of link, the attribution of acts of persons or groups which are not formally organs of that state. While it is not necessary and impossible for this chapter to go into detail concerning the law of state responsibility, the most relevant elements of the debate will be summarised here.

An individual's or a group's actions can be attributed to a state – a state may be held responsible for these actions just as if its own organs had committed it – if these private entities were 'in fact acting on behalf of'[203] that state ('agents' or 'agencies').[204] The abstract standard that the International Law Commission has codified in Article 8 ARS 2001 and that is generally accepted by international lawyers and judges (*nota bene*: as concerns state responsibility) is one of 'control'. Article 8 reads:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is *in fact acting on the instructions of, or under the direction or control of*, that State in carrying out the conduct.[205]

Two arguments make the 'Article 8 approach' relevant to the debate of the present subsection. First, many scholars expressly import the language of control or even Article 8 itself into the debate on armed attack against armed bands.[206] Second, the notion of 'control' has been adopted by the Court in *Nicaragua*[207] as

[202] *Nicaragua* (1986) *supra* note 5, Dissenting Opinion Jennings at 543.

[203] Article 8(a) DASR 1996.

[204] André J.J. de Hoogh, Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* case and attribution of acts of Bosnian Serb authorities to the Federal Republic of Yugoslavia, 72 British Year Book of International Law 2001 (2002) 255–292 at 268.

[205] Article 8 ARS 2001 (emphasis added).

[206] Boyle (1987) *supra* note 195 at 87; Farer (1987) *supra* note 100 at 113; Higginbotham (1987) *supra* note 60 at 548–549, 550; Schindler (1986) *supra* note 138 at 35. Also: Kreß (1995) *supra* note 41 at 149–150.

[207] *Nicaragua* (1986) *supra* note 5 at 62 (para 109).

well as by other tribunals[208] as the generally applicable standard.[209] But the real question, the most relevant source of uncertainty, arises not from the construction of either the traditional or the 'state responsibility' approaches, but from their *synthesis* or confrontation. Are the two standards materially the same, or are they incompatible? Are they two different norms and how do they conflict? This situation seems to constitute a paradigm case of *lex specialis* and *lex generalis*; it seems that here two different regimes govern the same set of circumstances and that the norms of the first regime proscribe behaviour different from that of the second regime.[210] We seem to have a conflict of norms.

An 'armed attack' is not *as such* illegal: Article 51 does not prohibit it. It is merely a condition for a threat or use of force to be justified (allowed) as self-defence. Therefore, an armed attack itself does not entail state responsibility. Thus, since no 'breach of an international obligation' has occurred, there is no need to attribute the actions of natural persons to a state[211] and the standard developed in Article 8 ARS 2001 is not applicable as such.

However, the majority opinion requires a threat or use of force in order for an armed attack to occur. It needs the acts constituting an 'armed attack' to fulfil the *actus reus* condition of Article 2(4), which, in turn, is a breach of an international obligation and requires attribution. However, the question remains whether 'threat or use of force' is *equivalent* with 'armed attack' or whether a breach of Article 2(4) is merely one precondition. Thus the violation of the prohibition of force is seen as a necessary condition, but not an integral part of an armed attack.[212] Furthermore, the person who advocates making 'armed attack' illegal in this roundabout way will have to contradict the Court's reasoning in *Nicaragua*:

[208] The substantive standard employed varies slightly between different tribunals: 'on the occasion . . . the militants acted on behalf of the State, having been charged . . . to carry out a specific operation'; *United States Diplomatic and Consular Staff in Tehran* (*United States of America* v. *Iran*), Judgment of 24 May 1980, ICJ Reports (1980) 3 at 29 (para 58) (emphasis added); '*actually exercised* such a degree of control *in all fields* as to justify treating the *contras* as acting on its behalf'; *Nicaragua* (1986) *supra* note 5 at 52 (para 109) (emphasis added); effective control *Nicaragua* (1986) *supra* note 5 at 53–55 (paras 113–116); effective overall control (ECHR, *Loizidou* v. *Turkey*, Merits, Judgment of 18 December 1996, ECHR Reports (1996-VI) 2216 at 2235–2236 (para 56)); overall control (ICTY, *Prosecutor* v. *Duško Tadić*, Appeals Chamber, Judgment of 15 July 1999 AC (1999), at: www.icty.org (para 145)). For an excellent article comparing differing judicial views on the Article 8 standard see de Hoogh (2002) *supra* note 204.

[209] Contrast de Hoogh (2002) *supra* note 204, with Kreß (1995) *supra* note 41.

[210] It seems somewhat artificial to construe the difference here as different 'prescribed behaviour' of subjects of law. However, in this case there would be a difference in prescribed behaviour: if action against certain armed bands were classified as self-defence, then the 'victim state' *could* legally threaten or use force (within the limits set by self-defence law), whereas if such action were not so classified, the 'victim state' ought neither to threaten nor use force. Therefore, the difference is visible in theory and practice.

[211] Article 2(b) and Article 2(a) ARS 2001, respectively.

[212] In logical terms: force⇒armed attack, but not: force≡armed attack.

> But the Court *does not believe that the concept of 'armed attack' includes* not only acts by armed bands where such acts occur on a significant scale but also *assistance to rebels* in the form of the provision of weapons or logistical or other support. Such assistance *may be regarded as a threat or use of force*, or amount to intervention in the internal or external affairs of other States.[213]

The Court's argument is that whereas a state act of assisting rebels cannot be an 'armed attack', but may well constitute 'use of force', the two concepts cannot be identical. If material assistance to rebels as such cannot be considered a breach of the prohibition of force (but might well constitute intervention), the majority's thesis could at least remain internally consistent. This would come at the price of having to contradict the Court.

One could speak of the question of indirect attack along the lines of a two-step process. First, the act is attributed to a state; second, the gravity of the act amounts to an armed attack *ratione materiae*. This would mean that – once the 'one-size-fits-all' criterion of attribution is fulfilled – it depends entirely on the private entity's behaviour what the act will be classified as. Against this the Court seems to hold that there should be a stronger connection vis-à-vis 'armed attack' than vis-à-vis 'intervention' or 'threat or use of force'. According to the Court it seems the state must do less to have a private act considered as its own *intervention* than as its own *aggression* or armed attack. In *Nicaragua* there obviously is a connection between the degree of involvement of the state and the acts it is held responsible for. If the connection is of a certain kind and scale, the insurgents' acts may be armed attacks, but if it is not, the attribution may only result in a threat or use of force or intervention. However, attribution is not gradual: an act either is an act of a state or it is not and it seems impossible to prescribe differing degrees of connection for every single type of wrong in international law.

There are two arguments that might show that the 'conflict' of rules, as the situation could tentatively be described, might not exist at all. What if the difference between the two regimes is neither a definition of a *lex specialis* standard on the attribution of private actions to a state for the purposes of Article 51, nor a further standard in addition to Article 8 ARS? What if the '*specialis* approach' merely defines the Article 8 standard within the factual context of aid to insurgents or guerrillas as a 'concrete standard'? Maybe one could speak of the same standard manifested in different acts within different situations or legal regimes (e.g. *ius ad bellum*, international humanitarian law, human rights law or classical 'international tort law') without it being a *lex specialis*? The standard of 'direction or control' would be the same in all areas, but the acts required to establish either direction or control by a state would be different.

On the other hand, we might follow the hint dropped by Judge Ruda in his separate opinion to *Nicaragua*:

[213] *Nicaragua* (1986) *supra* note 5 at 103–104 (para 195) (emphasis added). Higginbotham (1987) *supra* note 60 at 546.

> From my point of view it would have been sufficient to say, just as the Court does in its conclusions, that even if there was such assistance and flow of arms, that is not a sufficient excuse for invoking self-defence, because, juridically, the concept of 'armed attack' does not include assistance to rebels.[214]

The implication is that the question of whether assistance to rebels can be considered an armed attack is one of means (Section 2.2.2) and that 'armed attack' lacks a *ratione personae* dimension. This would mean a *renvoi* of the whole matter to state responsibility. Whether an act can be attributed to a state seems irrelevant; the only valid question is whether the act can be called an armed attack.[215] This argument leads to the minority view portrayed in Section 2.4.1 and is vulnerable to the counter-arguments presented there. Here we have yet another manifestation of uncertainty. Two bodies of norms happen to be applicable to the same situation where the two sets of do not match exactly. Even if the content of the norms were the same, it would be two different norms stipulating the same ideal (see Chapter 5).

2.5 The *telos* of self-defence

The source of many of the uncertainties of self-defence law seems to lie in the lack of words in Article 51. It is not so much an inherent vagueness of words that causes the problems described in Sections 2.1 to 2.5, but an *absence of words*. There does not seem much to uncover regarding the law on self-defence, if one is only taking the text of the norm into account. Due to the peculiarity of Article 51's genesis,[216] the history of the text and its *travaux préparatoires* do not tell us much, because the Drafters did not seem to attach much thought to that article. Therefore, the content or scope of self-defence under the United Nations Charter seems to depend utterly on what aim or goal that institution in its concrete condensation within the positive legal realm of the Charter seems to have. The arguments of scholars are guided by their relative perceptions of that goal. However, to leave the text (or, rather, the lack of textual manifestation) and to place one's hopes in any 'obvious' or 'natural' form self-defence always takes is highly speculative and seems very much limited in its faculty to describe positive international law. To take non-normative 'hints' and to try to construct from them what concrete regulation is valid at a given moment is tantamount to performing a conjuring trick.

2.5.1 The mechanics of prohibition and exception

Yet the differences over what self-defence 'is all about' add to the uncertainty surrounding this vital norm of international law; therefore, it will be beneficial to

[214] *Nicaragua* (1986) *supra* note 5, Separate Opinion Ruda at 176 (para 13).

[215] Dinstein (2005) *supra* note 9 at 244–247.

[216] It seems settled opinion that Article 51 was added merely to ensure that action taken under the Act of Chapultepec (and similar arrangements) would be considered legal by the new organisation. Cf. Goodrich, Hambo and Simmonds (1969) *supra* note 8 at 342–344.

discuss some of the issues, arguments and differences that have arisen. Two issues have already been mentioned above: the nature of the 'right' or 'exception' of self-defence[217] and the question of whether self-defence presupposes illegal conduct on the part of the attacker (Section 2.4.1).

The crux of both issues lies in the difference between two underlying theoretical models. The difference may seem slight, but it is one of kind, rather than degree. On the one hand, one can perceive of an exception as a mere 'gap' within a prescriptive norm, as some scholars tend to do. Thus, conduct that falls under the exception is *excepted* from the purview of the prohibition or prescription altogether. For example, the International Law Commission's commentary on its Draft Articles on State Reponsibility 2001 states that 'a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter *is not*, *even potentially*, *in breach of Article 2*, *paragraph (4)*.'[218] The idea seems to be that a threat or use of force justified as self-defence is not even a threat or use of force in the sense employed by Article 2(4). However, if the state is not in at least *prima facie* breach of Article 2(4), then it need not justify its acts as self-defence, so why would one need a norm (Article 51) to justify self-defence in the first place?

On the other hand, one can argue that a justification is a norm which makes a *prima facie* breach lawful, i.e. which justifies breaches. An act which is justified differs from an act which is not even prohibited. Drawing an analogy from the model employed in Austrian criminal law doctrine, if an act has fulfilled the preconditions of a criminal offence (*Tatbestand*), e.g. 'wilful killing' in the case of murder, it is presumed to be *prima facie* illegal (*rechtswidrig*) unless it is justified by a permissive norm (*Rechtfertigungsgrund*). A *prima facie* illegal act justified as self-defence is in the end result just as legal as a perfectly legal act[219] – in effect, sharpening a pencil is as legal as killing someone in self-defence. However, in order to be justifi*able* as self-defence, the defender's actions do have to be *prima facie* illegal, whereas the person sharpening the pencil does so without committing an illegal act at all.

The difference is between a 'hole' in the prohibition and a multi-layered system, in which the prescriptive or prohibitory norm forms the first layer ('*prima facie* breach') and a second layer determines whether the act is exceptionally justified. One may ask: *Cui bono*? Why discuss these fine distinctions? First, because it is the expression of a struggle over which legal culture is applied to international law. Second, because some scholars have used the former position to support the 'black hole' theory (Section 2.1).[220]

[217] Section 2.1 at note 18–19.

[218] DARS 2001, Commentary Art 21 para 1, *supra* note 178 at 177 (emphasis added); Bowett (1958) *supra* note 11 at 185–186.

[219] Helmut Fuchs, Österreichisches Strafrecht. Allgemeiner Teil I. Grundlagen und Lehre von der Straftat (7th ed. 2008) 133. In comparison, the way in which the common law tradition approaches this issue is illustrated by: Vaughan Lowe, Precluding wrongfulness or responsibility: A plea for excuses, 10 European Journal of International Law (1999) 405–411.

[220] The difference discussed above may be caused by a 'legal cultural bias'. Perceiving the mechanics is merely a question of different socialisation rather than conscious intellectual choice. This 'bias' is behind more than just this cause of uncertainty.

Regarding illegal conduct as precondition, there are some observations one could add to Section 2.4.1. First, it seems to be settled opinion that the legal system must prohibit the use of force for self-defence to make sense:

> The absolutely indispensable premise of the idea of self-defence, with its intrinsic meaning, into a particular system of law is that the system must have contemplated, as a general rule, the prohibition of the indiscriminate use of force by private subjects, and hence admits the use of force only in cases where it would have purely and strictly defensive objectives, in other words, in cases where the use of force would take the form of resistance to a violent attack by another.[221]

Second, most scholars would agree that one can call an exception 'self-defence' only if some other state has committed an act which is a breach of some international obligation, illegal and unjustified. Even Derek Bowett – in other respects diverging from the majority view – agrees: 'The essence of self-defence is a wrong done, a breach of a legal duty owed to the state acting in self-defence. . . . It is this precondition of delictual conduct which distinguishes self-defence from the "right" of self-preservation and the "right" of necessity.'[222] One must not confuse this argument with an assertion that the concept of self-defence demands that the infraction be a breach of Article 2(4). One must also not confuse it with the discussion about the role of non-state actors in self-defence law and the responsibility of those states which are connected to private entities and which endure forcible measures which are justified as self-defence. These are two different claims which are discussed in Section 2.4.1. Some scholars would not see an unlawful act as the trigger of self-defence,[223] for neither were Webster and Ashburton in the exchange of letters following the *Caroline* and *McLeod* affairs[224] conscious that self-defence demanded an infraction nor would the simple reading of Article 51's terms as discussed in Section 2.4.1 be conducive to the inclusion of such an element.

2.5.2 *Telos*

The *telos* of a norm is a relatively ephemeral or metaphysical thing, even if that norm happens to be written down in some document. This is not the place to speculate about the existence or importance of such a concept, merely to note that differences over what may be considered self-defence's 'aim', 'goal' or 'object

[221] Ago (1982) *supra* note 9 at 52 (para 83); Combacau (1986) *supra* note 16 at 9; Kunz (1947) *supra* note 19 at 876.

[222] Bowett (1958) *supra* note 11 at 9; Dinstein (2005) *supra* note 9 at 178: 'The thesis of self-defence . . . is inextricably linked to the antithesis of employment of unlawful force by [the attacker]' (Dinstein seems not to note the incompatibility of this statement with theories developed later in connection with the actions of non-state actors); Kunz (1947) *supra* note 19 at 876–877.

[223] Tucker (1972) *supra* note 146 at 588; Kreß (1995) *supra* note 41 at 208 (note 885); Waldock (1953) *supra* note 12 at 464 (requires only threat of infraction).

[224] Jennings (1938) *supra* note 190.

and purpose' may be behind the more 'technical' scholarly differences described above. Differences over 'technicalities' usually point to higher-order problems.[225] Using the 'zoom' of self-defence (Section 2.3.2) as an example, if one believes that self-defence ought to guarantee the effective protection of a state's national security and interests, one would tend to argue that an armed attack is comprised of the whole relationship between the attacker and defender. If, on the other hand, one only allows the repulsion of an acute infraction, then one would see armed attacks as constituted only by concrete actions (the *General Belgrano* incident). To make a better distinction between the differing dimensions of *telos*, this topic will be approached from two angles: one, from the meaning of 'self-defence' within the Charter system and two, from the 'aim' of self-defence itself.

(*a*) Self-defence is a right within the United Nations Charter and as such it is bound up with it.[226] The right as regulated in Article 51 of this Charter is part of the greater construct. It shares one *telos*, for the Drafters intended (we might presume) to create a sensible, internally coherent body of norms, not a patchwork of disparate single norms. There was a guiding idea behind the Charter and we will have to let it influence our views on the law of self-defence found within it.[227] This warrants a short look at the differing perceptions of this 'normative neighbourhood' within which the right of self-defence in Article 51 UN Charter is embedded.

There is no debate about the United Nations' basic orientation. Because of the horrors of the two world wars, absolute priority was placed on the absence of inter-state force which still remains the most destructive form of human conflict. All other values were clearly subordinated to peace (in the negative sense), including protection of a state and its interests as well as justice. Not by accident, the text of the Charter commences with the following words: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankin'.[228] 'Whatever the benefits of acting against non-state actors,' the Drafters might have

[225] This trend was identified in some of the present author's other publications: Jörg Kammerhofer, The binding nature of provisional measures of the International Court of Justice: The 'settlement' of the issue in the *LaGrand* case, 16 Leiden Journal of International Law (2003) 67–83 at 83; Jörg Kammerhofer, Uncertainty in the formal sources of international law: Customary international law and some of its problems, 15 European Journal of International Law (2004) 523–553 at 551–553.

[226] It is not, as Waldock argues, a 'necessary exception to Article 2 (4)' (Waldock (1953) *supra* note 12 at 495), that is, a regulation which any prohibition of force would *have to* incorporate. It is not logically impossible to have a system of norms that would prohibit the threat or use of force *without* either a provision for a collective monopoly on force or a possibility of self-defence for the individual subject. To perceive such a system is to superimpose another normative level upon positive human regulation, a meta-level which would not be willed as a positive norm. For the difference between positive and fictional norms see Section 6.2.2.2.

[227] Also because 'systematic' and 'teleological' methods of interpretation are considered important elements of the canon of interpretation; see Section 4.1.3.

[228] UN Charter, Preamble (para 1). The word 'war' is not used in the technical sense here.

thought, 'using force against another state necessarily houses an infinitely greater risk of major war.' The Charter's primary *telos* is the greatest possible restriction of *inter-state armed force*.

However, there is debate about the 'rigidity' of this basic orientation; some believe that the Charter never intended to restrict a basic freedom of states to utilise force. They are adamant that this 'old' freedom must be utilised for the right reasons nowadays (cf. Section 2.1), but that does not cover up the difference in kind. Such a position seems incompatible with the view of the basic orientation of the Charter given above:

> Nor can it be said that the protection of those same substantive rights by the exercise of self-defence is 'in any other manner inconsistent with the Purposes of the United Nations'; those purposes hinge primarily on the maintenance of international peace and security, and *it would be a strange conclusion if a state's protection of its own legitimate interests were inconsistent with that end*. Indeed it is in the interests of its own security that the state exercises the right of self-defence and there can be no inconsistency between the security of a state's legitimate interests and the general security.[229]

This view expressed by Derek Bowett can be countered by two arguments. First, Bowett identifies *individual interests* with the purposes of the United Nations. The interests of a particular state, whether 'legitimate' or not, are not a value that the Purposes intend to uphold. Article 1 contains many references to community-type interests ('international peace and security'; 'to take *collective* action'; 'international co-operation'; 'centre for harmonizing the actions of nations'),[230] but no such references to the interests of individual member states. This sounds as if there would be some way of determining in advance who the aggressors and defenders are. On that view, the law only needs to specify 'reasonableness'[231] as a criterion of how force ought to be used. Such arguments find further expression in Austen Chamberlain's famous quote that a definition of aggression would be a 'trap for the innocent and a signpost for the guilty'.[232] If a state (or group of states) is *a priori* accorded the status of 'innocent' and others are always 'guilty', then an abstract definition of aggression is certainly not desirable, just as it is desirable for a state to have its interests identified as community interest. The test for a special plea is whether one would have another state accorded the same privilege as one would give to one's own state or a friendly state. If the United States, France or Australia have a 'reasonable interest' in defending themselves, then surely Iran or the Democratic People's Republic of Korea have the same 'reasonable interest'? Second, does it not follow from the community-orientation of the Charter that

[229] Bowett (1958) *supra* note 11 at 186 (emphasis added).

[230] All citations: UN Charter, Article 1.

[231] Beth Polebaum wishes to found self-defence on a 'reasonable nation' standard. Polebaum (1984) *supra* note 129 at 208.

[232] Sir Austen Chamberlain to the House of Commons on 24 November 1927, cited in: Schwebel (1973) *supra* note 3 at 424.

vigilante actions are prohibited? Self-defence is not generally thought of as a form of sanction;[233] self-defence and sanctions are different in logic.

(*b*) Quite apart from the systematic position of self-defence in the Charter structure, the abstract concept of self-defence as such is also being perceived differently by different people. This is the second dimension of *telos*: what is the legal aim self-defence is supposed to fulfil? This question is quite abstract and quite specific at the same time. The aims are to be found independently of the Charter, but the aims are that of a specific provision of the Charter, not of some eternal right as a Platonic Idea. Here, as elsewhere, there is a distinct divergence in views as to what self-defence is meant to accomplish. Here, as elsewhere, this 'fault line' may be traced between the Common and Continental legal cultures.

It does not seem so simple if one merely glances at the formulations of what international lawyers hold to be the valid aims of self-defence. There seems not to exist much of a difference between Ago's definition of self-defence as 'action taken by a State in order to defend its territorial integrity or its independence against violent attack . . . with the object of preventing another's wrongful action from proceeding, succeeding and achieving its purpose'[234] and Bowett's formulation:

> [A] 'privilege' or 'liberty' which justifies conduct otherwise illegal which is necessary for the protection of certain rights *strictu sensu*. . . . In essence the right of self-defence operates to protect essential rights from irreparable harm . . . its function is to preserve and restore the legal *status quo* . . .[235]

Bowett is textually removed from, but spiritually close to D'Amato and Hargrove, who see self-defence as that which is necessary to defend certain values[236] or 'the means and to the extent reasonably necessary to *protect itself*'.[237] The 'Anglo-Saxon' view is reasonable enough, but it is precisely the 'reasonableness' of the concepts presented by representatives of common law-schooled international lawyers that gives rise to the obscure irritations.

'Reasonableness' is the key notion here; it is the verbal manifestation of the essential difference between the two legal cultures. Reason has a place in the operation of any legal system. However, to ascribe to it a specific function as a *panacea* or gap-filler in law is unscientific. If a legal system specifies certain very vague criteria, such as 'reasonableness' or '*bona fides*', it may of course do so. But why should one import such a criterion into international law without positive regulation? Even if one were to attempt such a feat[238] – to import into

[233] Ago (1982) *supra* note 9 at 15 (para 4), 54 (para 90); Kunz (1947) *supra* note 19 at 875–876; *contra*: D'Amato (1987) *supra* note 18 at 28–29; Waldock (1953) *supra* note 12 at 464.

[234] Ago (1982) *supra* note 9 at 54 (para 90).

[235] Bowett (1958) *supra* note 11 at 8–11.

[236] D'Amato (1987) *supra* note 18, *passim*.

[237] Hargrove (1987) *supra* note 82 at 139 (emphasis added).

[238] Polebaum (1984) *supra* note 129 at 208.

international law notions of a diiferent legal culture – international law still is not a common law and does not have a system of courts whose jurisprudence could define such a vague criterion. To measure the exercise of the right of self-defence on the criteria of 'reasonableness' or 'necessity', rather than on the criteria of Article 51, means to ignore the Charter and to establish a criterion above and beyond positive law to evaluate the content of that positive law. This is analogous to Chamberlain's pre-positive allocation of the roles of 'guilty' and 'innocent' in the case of aggression[239] and to natural law making the personal value-preference of the writer become 'law'.[240]

Another crucial difference is a certain de-linking of 'means' and 'ends' within the debate on the aims of self-defence, the Continental side focusing on 'means', whereas Anglo-Saxon scholars tend to prioritise 'ends'. For example, it could be argued that a state incurs international responsibility for harbouring terrorists – and the previous government of Afghanistan certainly did. However, there are voices[241] which seem to suggest that the end (the combating of terrorism) alone justifies the means (the threat or use of force). This is a most disconcerting trend, for the prohibition of force becomes a mere guideline, only one further factor in the calculation of the proportionality of forcible action.[242] In effect, what is meant to be an absolute becomes relative. This is in stark contrast to the purpose of the Charter. The Charter prohibits the use by its member states of a *means* of acting – the threat or use of force – and therefore independently of the *ends* states wish to achieve. Generally speaking, even if A had a reflexive right resulting from B's obligation, such a right does not allow A to enforce B's obligation, but is merely a right to have B behave according to the obligation. For example, citizens may have a reflexive right to good roads. However, one private citizen may not force workers to improve roads at gunpoint, partially because the right to good roads does not give that citizen a concrete legal claim and partially because the means chosen (coercion at gunpoint) is prohibited. Not every end may be pursued by forceful means; not every breach of obligation may be responded to by force.

But the most important difference is that between the ideas of 'protection' and 'repulsion'. Anglo-Saxon lawyers may conceive of self-defence as oriented toward the protection of the defender or of the victim's rights. Bowett sees self-defence as a means of enforcing rights violated;[243] the means to redress the right are restricted by 'reasonableness' and 'necessity' and therefore these means are on a continuum rather than there being an essential difference between the peaceful and forcible enforcement of international law. Roberto Ago has described the difference thus:

239 See *supra* note 232.
240 Kammerhofer (2004b) *supra* note 225 at 542–543.
241 Franck (2001) *supra* note 79 at 841.
242 Cf. Bowett (1958) *supra* note 11 at 54 *et seq*.
243 Bowett (1958) *supra* note 11 at 8–11.

> [A] number of writers rely on a notion of self-defence that is in fact much closer to that which we have characterized as 'state of necessity' than to the notion designated here by the term 'self-defence'. The writers in question, mostly from the English-speaking world, speak of 'self-defence' to indicate the circumstances in which a form of conduct occurs that is designed to *ward off danger* . . .[244]

Continental scholars would tend to see the goal of self-defence quite differently. The key idea for them is the *repulsion* of an armed attack.[245] The sole *telos* of Article 51 is to end a present armed attack and the victim state may do no more. It may not prevent possible armed attacks by forceful means; it may not punish past attacks or vindicate its rights by forceful means; it may not enforce international law by forceful means or protect its interests and values by forceful means. The protection of the victim is only an incidental result or gain, not the *raison d'être* of self-defence. If the interests and values of the victim are preserved by an application of the Charter, this happens incidentally, not as its goal. Self-defence may fall well short of an effective protection. This may sound harsh, but this view of self-defence stems from the belief that a general war is in any case worse than subtotal protection of individual states, a belief that the Drafters seemed to have in mind when they affirmed that they were determined 'to save succeeding generations from the scourge of war'.[246]

2.6 Conclusion

At the end of a survey of uncertainties of self-defence law we can say that nearly wherever one looks in the law on self-defence within the United Nations Charter one can find uncertainty as to what exact behaviour the law demands. Those who argue that the Charter does not touch upon self-defence will find this result encouraging. A representative of this group of scholars might say that the present author, though he may be a self-professed opponent, in reality argues for the other camp, because the absence of detailed regulation in Article 51 cannot be seen other than that the Drafters did not intend to regulate the law on self-defence. But what certainty do we have of the norms that lie beyond the Charter, on which some place their hopes? Even less than we do of the scant formulation in Article 51! To prove customary international law is a far more formidable task than to interpret a treaty; uncertainty abounds in the meta-law on custom-creation.[247]

It is uncertain, for example, whether armed attack can be extended beyond the paradigm case of military trespass by armed forces, whether this event needs a certain quantitative threshold, what connection, if any, humans need to have with a state for their actions to count as armed attack, or whether an *ex ante* or an *ex post*

[244] Ago (1982) *supra* note 9 at 61 (para 106) (emphasis added).

[245] That 'repulsion' is the dominant idea in scholarship can tentatively be shown by remarks in Combacau (1986) *supra* note 16 at 25.

[246] UN Charter, Preamble (para 1).

[247] Chapter 3 will deal with these problems at length.

view of the event is required by the law. It is less uncertain that the Charter does regulate the 'inherent right of individual or collective self-defence' itself and that the event 'armed attack' is a necessary condition for the exercise of that right. Uncertainty of language will remain whenever language is used – and written norms are a construct based upon language. One can question whether such a thing as norms and law 'really' exist. It is and will forever remain a dogma, neither verifiable nor falsifiable. But in these cases the Charter at least tells us *something*: 'if an armed attack occurs'. Not so in the other cases.

Pragmatically speaking, the importance of a majority opinion cannot be overestimated. If all but a few scholars see the law shaped in a certain way, then, for all practical intents and purposes, it is. States will normally argue in accordance with the majority opinion and judges will favour the party that argues as the majority does. Where there is no overwhelming agreement and especially where the view of the law is divided along national or cultural lines, the conflict of opinion produces practical uncertainty. There cannot be a winner, and such a disagreement cannot be resolved,[248] because there are no 'knock-down arguments' in international law.

[248] Note the explanations Thomas Franck thought necessary in describing – for what is a predominantly American audience – the views he was confronted with during a symposium on the legality of the Allied actions against Afghanistan held in Göttingen, Germany: '[M]any [of the participants] answered that question in the negative. This may surprise American colleagues, but their doubts need to be addressed seriously for they may be more widely shared.' Franck (2001) *supra* note 79 at 839.

3

Customary international law

> O Kate, nice customs curtsy to great Kings. Dear Kate, you and I cannot be confin'd within the weak list of a country's fashion: we are the makers of manners, Kate; and the liberty that follows our places stops the mouth of all find-faults.[1]

This chapter will provide an exemplary cross-section of the uncertainties in the law on customary international law-making, the meta-law of customary international law. Uncertainty of customary international law mainly manifests itself in doctrinal disputes. States usually do not publish their abstract views on how international law is made. Judicial decisions, such as the judgments of the International Court of Justice, are concerned primarily with solving the dispute the parties have put before them and tailor their response to that task. The range of uncertainty will be demonstrated by emphasising the argumentative structure of jurists' writing, since our understanding of a concept of law is based to a large extent on what other lawyers before us have said, not on any objective 'proof'. It is not intended to show the range and structure of the argument comprehensively, but exemplarily.

At this point it is crucial to keep in mind the different levels of law and uncertainty mentioned in Chapter 1. Not only are there substantive customary international norms (e.g. 'innocent passage'), but also norms which regulate the making of first-order norms, i.e. the meta-rules on the making of customary law (state practice and *opinio iuris*).[2] Third, there is the question whether and how customary international law is a source of international law, i.e. regarding the very concept of customary norms. This chapter will be confined to discussing the second-level source-law.

Chapter 3 is concerned with some of the specific, 'technical' uncertainties as to how customary international law can be created. Chapter 6, in contrast, will discuss some of the fundamental problems beyond the meta-law of law-making,

[1] William Shakespeare, King Henry V, Act V, Scene II.

[2] For this distinction see Raphael M. Walden, Customary international law: A jurisprudential analysis, 13 Israel Law Review (1978) 86–102 at 87, who uses Herbert Hart's terminology of 'secondary rules' (H.L.A. Hart, The concept of law (1961) 77–96).

i.e. of international law's 'constitution'. Whereas here customary international law's conditions for validity will be discussed on the assumption that it is a source of international law, Chapter 6 questions that assumption and seeks to analyse the concept and 'existence' of sources of international law.

Few scholars in arguing for substantive customary norms seem to conduct empirical research to ascertain whether their claim is supported by sufficient state practice and *opinio iuris*. To do so seems rather unfeasible and is perhaps impossible for any one scholar to do. Accordingly, many doctrinal statements on customary international norms merely claim that the statement is law and do not prove it to be law by pointing out a sufficient mass of state practice and *opinio iuris*. However, because such difficulties and omissions say nothing about the uncertainty of the law itself, only of the factual problems of its ascertainment, this chapter will forego an analysis of this phenomenon.

Finding customary law means knowing how the law is formed. Customary law is not written and has no 'authoritative' text which has an inherent 'thereness' and whose meaning needs only to be extracted from it. However, extracting meaning from texts is a difficult problem in its own right, as the disputes on legal interpretation show (Chapter 4). In contrast, the ascertainment of customary law involves a re-creation of its genesis. Scholars need to show how the requisite state practice and *opinio iuris* have accumulated and that this process has been consistent with the meta-law on custom-creation. In accordance with the method used in other chapters, we do not seek to force a consensus or lowest common denominator upon academic differences here,[3] but to demonstrate the extent and nature of uncertainty.

This chapter will highlight a few key problems associated with finding customary law. Uncertainty here is mainly epistemological uncertainty.[4] It is difficult to know what the meta-law on custom-creation looks like. Even if one knew what it says, perceiving whether the conditions thus set are actually fulfilled may not be easy. Three key theoretical problems of customary international law transcend the epistemological fog of war and require particular attention:

(1) the relationship of the 'elements of customary law' (state practice and *opinio iuris*) to the methods used to prove that they are present, i.e. the evidence (Section 3.2.2);
(2) the limits of regulation by customary law (Section 3.2.5);
(3) the true extent of the '*opinio iuris* paradox' (Section 3.3.3).

All three problems are relatively obscure, but they have immense power to destroy or to make highly uncertain customary international law as conceived of in orthodox scholarship.

[3] Jörg Kirchner, Völkergewohnheitsrecht aus der Sicht der Rechtsanwendung: Möglichkeiten und Grenzen bei der Ermittlung völkergewohnheitsrechtlicher Normen (1989).

[4] Mark Villiger, Customary international law and treaties. A manual on the theory and practice of the interrelation of sources (2nd ed. 1997) 60.

3.1 One-element theories

While the following will be limited to approaches including both an objective ('state practice') and a subjective element ('*opinio iuris*'), this section will briefly consider theories making do with one element. The focus in this book lies on a critique of orthodox theories of international law, but this is a purely pragmatic step because considerations of space permit only the presentation of a cross-section of problems and make a comprehensive treatment prohibitive.

There are scholars who, implicitly or explicitly, deny the need for one or the other element.[5] One of those who believe that *opinio iuris* is the only required element of custom-formation is Bin Cheng.[6] Starting from a consensualist viewpoint he finds that 'in international society States are their own law-makers'.[7] The logical conclusion is to 'say that the role of usage in the establishment of rules of international customary law is purely evidentiary: it provides evidence of the contents of the rule in question and of the *opinio iuris* of the States concerned'.[8] It is clear that under these conditions customary international law has 'only one constituent element, the *opinio iuris*'.[9] Cheng himself and others have observed that, without practice, customary law is no longer based on custom, but constitutes mere *general* international law;[10] the specific element[11] that makes customary law based on custom is missing.

It is considerably more difficult to find writers who place exclusive emphasis on the second element of state practice.[12] This is not surprising since practice alone cannot create law: a collection of facts can only be *de*scriptive, not *pre*scriptive. A non-factual (subjective) element of belief is generally seen as necessary to make reality into law. Without *opinio* custom is a mere fact, not a norm. The view espoused by Maurice Mendelson, for example, is slightly, but crucially, short of a complete disavowal of the subjective element.

[5] On single-element theories see: Jason Beckett, The end of customary international law? A purposive analysis of structural indeterminacy (2008) 114–116.

[6] Bin Cheng, United Nations resolutions on outer space: 'Instant' international customary law?, 5 Indian Journal of International Law (1965) 23–48.

[7] Cheng (1965) *supra* note 6 at 37.

[8] Cheng (1965) *supra* note 6 at 36.

[9] Cheng (1965) *supra* note 6 at 36.

[10] Bin Cheng, Custom: The future of general state practice in a divided world, in: Ronald St. John Macdonald, Douglas Millar Johnston (eds), The structure and process of international law: Essays in legal philosophy doctrine and theory (1983) 513–554 at 548; G.J.H. van Hoof, Rethinking the sources of international law (1983) 86.

[11] Gennady M. Danilenko, The theory of international customary law, 31 German Yearbook of International Law (1988) 9–47 at 31: 'It is important that according to Art. 38 *opinio iuris* must be based on practice. The view that the expression of *opinio iuris* without accompanying usage or practice can lead to the creation of custom disregards the specifics of custom as a source of law.'; Herman Meijers, How is international law made? – The stages of growth of international law and the use of its customary rules, 9 Netherlands Yearbook of International Law 1978 (1979) 3–26 at 13.

[12] Lazare Kopelmanas, Custom as a means of the creation of international law, 18 British Year Book of International Law (1937) 127–151; Hans Kelsen, Théorie du droit international coutumier, 1 (N.S.) Revue internationale de la théorie du droit (1939) 253–274.

Following an exhaustive analysis of the ICJ's jurisprudence, Mendelson concludes that the subjective element is a sufficient, but not a necessary condition for the coming-into-existence of a customary norm.[13] But this does include state will, because subjective notions are contained in his conception of state practice, as will be discussed in Section 3.2.1. On this view, therefore, the subjective element is presumed.[14] Such a conception raises difficult questions of epistemology, however. Claiming the existence of a norm means having to prove it; also, an inference or implication remains a fiction and is open to doubts as to whether the fact or opinion inferred or implied is 'really' there (Section 3.3.1). The real issue for this approach is that the duality of custom-forming elements and the evidence for its existence is obscured.

The following sections will describe the two-element theory of customary international law. This theory stipulates that, in order for a norm of customary international law to be created, state practice and *opinio iuris* must be cumulated. This narrower focus means turning to the problem of the necessary mistake (*opinio iuris* paradox) as the purported cause for uncertainty (Section 3.3.2).

3.2 State practice

State practice, the 'objective' element, is the essential factor creating a source of law based on *customs*. There is therefore a close connection between custom or *usus* – what is regularly done or omitted – and the content of the resulting customary norm (Section 3.2.5). After an analysis of the nature of state practice (Section 3.2.1), we will turn to the question of the relationship of element to its evidence (Section 3.2.2). Then we will look at the quantity of practice required (Section 3.2.3) and the influence of reception of state practice on the law-making process (Section 3.2.4). The discussion of state practice will close with a discussion of the theory that change of customary law is impossible (Section 3.2.6).

3.2.1 What is state practice?

Before deciding whether oral statements to the press, for example, are a form of state practice, one has to ask oneself what practice means in general. This question is not to be confused with a decision on which precise events are state practice and which are to be discounted, but concerns a higher level of abstraction. What is the *nature* of state practice? There are diverging views on that question. Behind the

[13] Maurice H. Mendelson, The subjective element in customary international law, 66 British Year Book of International Law 1995 (1996) 177–208 at 188.

[14] International Law Association, Committee on the formation of rules of customary (general) international law, Final report of the committee: Statement of principles applicable to the formation of general customary international law (2000) at 32.

apparent duality of 'acts' and 'statements'[15] lies a more important dispute. On one side is the theory that sees practice merely as *usance* and thus only as exercise of the behaviour which is the object of a separate *opinio iuris*. On the other side is a more inclusive understanding of the concept of practice. Such an understanding includes a subjective element in the occurrence of state practice and so blurs the border between the concepts of 'state practice' and '*opinio iuris*'. For this theory, actions by a state also communicate that state's opinions of what the law is. Admittedly, this distinction is relatively obscure in orthodox scholarship and has not been formulated in this manner. It hides behind the question of the eligibility of statements and other verbal acts as state practice. In one sense, all that states do or omit to do can be classified as 'state practice', because their behaviour is what they do. State behaviour in a wider sense, however, is also our only guide to what they want or believe to be the law.[16]

The classical debate may be exemplified by looking at the views of Anthony D'Amato[17] and Michael Akehurst.[18] D'Amato is clear: 'a claim is not an act . . . claims themselves, although they may *articulate* a legal norm, cannot constitute the material component of custom.'[19] The making of a claim is not crucial, but 'enforcement action' is – 'what the state will actually do'.[20] This category also includes decisions *not* to act in situations where the state could have acted, as well as commitments to act. In contradistinction, Michael Akehurst argues that the majority view, as evidenced by judgments of international tribunals, is that statements are a form of state practice. As against D'Amato's argument that while statements of a state may conflict with its actions, a state 'can only act in only one way at one time',[21] Akehurst observes that physical acts can conflict with each other, either with those of other states, at different times or within different government departments.[22] Akehurst thinks that it is 'artificial to distinguish between what a State does and what it says'. Important acts of state behaviour, such as recognitions of other states, do not need a physical act.

[15] For the general acceptance of 'verbal acts' as somehow relevant to the customary process see e.g. Michael Akehurst, Custom as a source of international law, 47 British Year Book of International Law 1974–75 (1977) 1–53; Maarten Bos, The identification of custom in international law, 25 German Yearbook of International Law (1982) 9–53; Michael Byers, Custom, power and the power of rules: International relations and customary international law (1999); Anthony Alfred D'Amato, The concept of custom in international law (1971); Danilenko (1988) *supra* note 11; ILA (2000) *supra* note 14; Maurice H. Mendelson, The formation of customary international law, 272 Recueil des Cours 1998 (1999) 155–410; Villiger (1997) *supra* note 4 at 19.

[16] For the difficulties associated with the 'subjective element' of customary law see Section 3.3.

[17] D'Amato (1971) *supra* note 15. Even though his theory cannot be called an 'orthodox' theory, it is one that is relatively clear on this point; Akehurst uses D'Amato's theory as a springboard for his own ideas.

[18] Akehurst (1977a) *supra* note 15.

[19] D'Amato (1971) *supra* note 15 at 88.

[20] D'Amato (1971) *supra* note 15 at 88.

[21] D'Amato (1971) *supra* note 15 at 51.

[22] Akehurst (1977a) *supra* note 15 at 3.

This is the starting point of the traditional debate and few international lawyers would unambiguously deny the validity of verbal acts for the formation of customary law if the debate were confined to the issues just presented. Before we take the 'acts *versus* statements' debate one step further, we need to look at the consequences of the integration of opinions of states into the concept of practice. Maurice Mendelson confirms this when he writes:

> Verbal acts, then, can constitute a form of practice. But their *content* can be an expression of the subjective element – will or belief. . . . Whether we classify a particular verbal act as an instance of the subjective or of the objective element may depend on circumstances, but it probably does not matter much which category we put it into.[23]

The problem with such an approach becomes obvious as we read on:

> What must, however, be avoided is counting the same act as an instance of *both* the subjective and the objective element. If one adheres to the 'mainstream' view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by 'real' practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will).[24]

This collapse therefore either results in double counting, or, as Mendelson goes on to argue, state practice as such *implies* the subjective element[25] and thus is not merely one phenomenon giving rise to two conclusions, but results in a denial of the separate proof of the subjective element (except in certain circumstances).

An important interjection is offered at this point, for 'the origin of misunderstanding caused by considering verbal acts as custom-creating practice lies in confounding such practice with its evidence or with the evidence of acceptance of the practice as law'.[26] Karl Zemanek believes that such 'distinctions between "constitutive acts" and "evidence of constitutive acts" . . . are artificial and arbitrary because one may disguise the other'.[27] Yet it can reasonably be argued that the only way either state behaviour or the views of states can be discovered is through what states do or do not do and that such a distinction might be an essential element of custom-formation. This interjection will be taken up in Section 3.2.2.

Which scholars have taken up the higher-level question behind the traditional duality of acts and statements? Three authors make promising remarks. Hugh

[23] Mendelson (1999) *supra* note 15 at 206.

[24] Mendelson (1999) *supra* note 15 at 207.

[25] Mendelson (1999) *supra* note 15 at 283–293.

[26] Karol Wolfke, Custom in present international law (2nd ed. 1993) 42; Hugh Thirlway, International customary law and codification (1972) 57.

[27] Karl Zemanek, What is state practice and who makes it?, in: Ulrich Beyerlin *et al.* (eds), Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt (1995) 289–306. He follows Akehurst in adopting an inclusive view of state practice, but does so for a rather more pragmatic purpose than suggested in this discussion.

Thirlway argues that whether 'States have done, or abstained from doing, certain things in the international field' is the 'substance of the practice required'.[28] It is difficult to determine whether he makes a distinction between certain types of practice only or whether this is a determination of the nature of practice. However, Thirlway also determines that state practice is material, i.e. that the 'occasion of an act of State practice . . . must always be some specific dispute or potential dispute',[29] and denies the validity of a mere assertion *in abstracto* as an act of state practice. His theory merely expands the scope of an 'acts only' approach to state practice and it thus seems that he is concerned with the traditional duality.[30]

Rein Müllerson discusses the meaning of the word 'practice' by distinguising 'between a state claiming the right of innocent passage through territorial waters of other states on the one hand, and an exercise of such a passage on the other'.[31] But he also believes that it may be impossible to differentiate 'actual' practice and other forms of practice. Müllerson does talk about the issue at hand, for if one were to adopt a wide meaning of 'practice', one would have to ask 'how to separate practice from what is usually called *opinio iuris sive necessitatis*'.[32] In the scholarly literature that is analysed by him, 'different manifestations of subjective attitude of participants of international legal relations to various patterns of behaviour'[33] are included as state practice. He argues that 'state practice always includes both elements – objective and subjective',[34] but does not think that this subjective element always qualifies as *opinio iuris*. Subjective attitude of states towards behaviour may be implicitly present in the act of behaviour itself; the deed may imply the opinion of the state.

Karol Wolfke sets out to discuss the conventional problem of acts versus statements and begins by arguing that 'customs arise from acts of conduct and not from promises of such acts.'[35] We are faced with a counter-argument against the contention that the 'real' question does not concern the kinds of practice, but what practice is in an abstract sense:

> True, repeated verbal acts are also acts of conduct in their broad meaning and can give rise to international customs, but only to customs of making such declarations etc., and not to customs of the conduct described in the content of the verbal acts.[36]

[28] Thirlway (1972) *supra* note 26 at 58.

[29] Thirlway (1972) *supra* note 26 at 58.

[30] He is accordingly criticised by Akehurst within the traditional debate. Akehurst (1977a) *supra* note 15 at 4–8.

[31] Rein Müllerson, The interplay of objective and subjective elements in customary law, in: Karel Wellens (ed.), International law: Theory and practice: Essays in honour of Eric Suy (1998) 161–178 at 161.

[32] Müllerson (1998) *supra* note 31 at 162.

[33] Müllerson (1998) *supra* note 31 at 164.

[34] Müllerson (1998) *supra* note 31 at 164.

[35] Wolfke (1993) *supra* note 26 at 42.

[36] Wolfke (1993) *supra* note 26 at 42, with regard to the role of treaties 70.

The crucial point of Wolfke's argument is that 'conduct' and 'statements' (as one type of conduct describing other conduct) are two different things. While the passage of a ship simply is the passage of a ship, a verbal act is the verbal act itself and a reference to its content. A statement on the continental shelf can be used as state practice on making statements. What Wolfke cannot accept, however, is that that statement on the continental shelf is an act of state practice on the continental shelf. He continues:

> The unquestionably possible role of verbal acts in the formation of international custom is the source of additional confusion in doctrine, because it mixes up the basic practice – the material element of custom – with various practices consisting, *inter alia* also of verbal acts, which, depending on their content and other circumstances, can constitute direct or indirect evidence of subjective element of custom, that is, the acceptance of the basic practice as law.[37]

The underlying difference may become clear at this point. There are two different concepts of state practice. One does not extract meaning from practice: state practice needs additional *opinio iuris* to give it relevance in the norm-making process. The other concept describes state behaviour in a wide sense; state behaviour can additionally contain evidence of *opinio iuris*.

The first option is a narrow and purposeless concept of state practice. A state acts or omits to act in international relations. These actions and omissions of themselves do not contain an indication that the state wishes this behaviour to be law. Ships regularly passing through straits is regular behaviour, nothing more. These regularities of behaviour constitute the material element of the prospective norm and can only be employed for customary law-making if the subjective element (states' will or belief) is added. Only the subjective element lets us know which behavioural regularities will form the core of a customary norm. State practice is merely a regularity of fact. Yet at the same time, the material element will form an important part of the customary norm. While the subjective element is the condition which makes the regularity a norm, the regularity determines what behaviour will be prohibited, allowed or required – the prescribed behaviour.[38] It may form the *actus reus* condition of a typical legal norm: if 'action or omission', then 'legal consequence'. One could call this element the *prospective prescribed behaviour*. No other function is fulfilled by state practice according to this concept: the regular making of statements on the continental shelf, seen as state practice, may lead to no other rule than a prescription on the making of statements (on the continental shelf). However, such statements are not disqualified from evidencing the will or belief that something be or is law; in contradistinction only the act, not its content, is eligible as state practice.

The second option is a wide and purposive (subjective) concept. 'State practice means', writes Michael Akehurst, 'any act or statement by a State from which views

[37] Wolfke (1993) *supra* note 26 at 43.

[38] As discussed above: Wolfke (1993) *supra* note 26 at 70.

about customary law can be inferred.'[39] It certainly includes states' normative convictions and some writers admit only behaviour from which such a normative element can at least be inferred as state practice. The essence of state practice, according to the second concept, is its autonomy as against *opinio iuris*. Because the content of the manifestations of the will of states is necessarily incorporated within the concept, one can clearly identify what state practice is without looking at what states want to have prescribed.

A second, ancillary, question concerns the role of omissions in state practice. Most commentators would more or less readily admit non-actions.[40] Maurice Mendelson restricts the role of abstentions to those which are not ambiguous in the circumstances.[41] This is a reasonable precaution within the framework of his theory, because if one can infer the subjective element from behaviour and if one admits abstentions as behaviour, one might find that a norm could be created by a state simply doing nothing and meaning nothing by it. A distinction between 'abstention from acts' and 'passive practice' is introduced by Gennady Danilenko. Whereas the first category refers to the reaction of other states vis-à-vis a state's active practice – and, according to his theory, increases the precedental value of the active practice – the second category refers to omissions. He sees the value of that type of practice in the fact that 'usual or habitual abstentions from specific actions may constitute a practice leading to a rule imposing a duty to [a]bstain from such actions in similar situations, i.e., a practice constituting a prohibitive norm of international law.'[42]

Again it is tempting to shift the focus of the problem away from state practice. The views scholars adopt on the eligibility of abstentions, omissions, non-acts or passive practice will probably depend on the view one adopts of the nature and function of *opinio iuris* – as evidenced by the Permanent Court of International Justice in *Lotus*:

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstention were based on their *being conscious of having a duty to abstain* would it be possible to speak of an international custom.[43]

[39] Akehurst (1977a) *supra* note 15 at 53.

[40] *Inter alia*: Akehurst (1977a) *supra* note 15 at 10; Rudolf Bernhardt, Customary international law, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law (1992) Volume 1, 898–905 at 900; Herbert Günther, Zur Entstehung von Völkergewohnheitsrecht (1970) 123–127; Josef L. Kunz, The nature of customary international law, 47 American Journal of International Law (1953) 662–669 at 666; Wolfke (1993) *supra* note 26 at 61.

[41] Mendelson (1999) *supra* note 15 at 108.

[42] Danilenko (1988) *supra* note 11 at 28.

[43] *The Case of the SS.* '*Lotus*' (*France* v. *Turkey*), Judgment of 7 September 1927, PCIJ Series A, No. 10 at 28 (emphasis added).

If a subjective element is included in the concept of state practice, as some hold, then one will have a basis for discrimination. If one does not follow that theory, then one will have to distinguish by reference to an external element of state intentions, will or belief.

3.2.2 The element and its evidence

A slightly different view of these contentious questions may also bear rich theoretical fruit and may even alleviate some of the more notorious problems regarding state practice, however unlikely this move is to help much in the way of uncertainty. It seems that the wide or inclusive view of state practice sees *opinio iuris* incorporated in 'state practice' because it sees the latter as *evidence* of the former. The background to the dispute described is thus a different dichotomy: the two elements of customary law-making (state practice and *opinio iuris*) against the methods and evidences to prove their 'existence' in a concrete case, or what may legitimately be used to prove the existence of the elements for customary international law-creation.[44] Many scholars overlook the distinction between the ontology of the meta-law's requirements and our epistemological situation which is similar to the distinction between the traditional notions of 'formal' and 'material source of law'. Rudolf Bernhardt draws this conclusion: 'There is an unlimited multiplicity of material sources [methods of proof] both regarding the existence of the practice relevant for the creation of customary law and regarding the connected legal conviction [*opinio iuris*].'[45]

State practice and *opinio iuris* may be categorically different things, but we may look for proof of either element in the same place. This, however, should not conflate the underlying categorical difference. The subjective element as the sense of an act of will[46] is not immediately perceptible, but perceived through its manifestations in reality only. Everything states can do or omit to do, if it is a manifestation of their will, can become a manifestation of *opinio iuris*:

> There seem to exist no means for the ascertainment of the presence of the psychological element which would be independent of an ascertainment of . . . practice. In this sense, the material element is primary and the *opinio* merely a hypothesis based on it.[47]

Maurice Mendelson's theory,[48] for example, already incorporates the distinction in his 'choice' of what is state practice and he may, therefore, not need the

[44] See Section 3.2.1 and Wolfke (1993) *supra* note 26 at 42; Thirlway (1972) *supra* note 26 at 57.

[45] 'Es gibt eine offene, nicht abgeschlossene Vielzahl unterschiedlicher Erkenntnisquellen sowohl für das Bestehen einer für die Bildung von Gewohnheitsrecht relevanten Praxis als auch für die damit verbundene Rechtsüberzeugung.' Rudolf Bernhardt, Ungeschriebenes Völkerrecht, 36 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1976) 50–76 at 65.

[46] Hans Kelsen, Allgemeine Theorie der Normen (1979) 131 (Ch 41).

[47] Martti Koskenniemi, From apology to utopia. The structure of international legal argument (1989, 2005) 380 (428–429).

[48] Mendelson (1996) *supra* note 13; Mendelson (1999) *supra* note 15.

subjective element, because he talks about the *evidentiary* function of physical reality, rather than the objective element as such. So while this does not 'solve' the problem of the nature of state practice, it helps us because we become aware that because state will is not immediately perceptible by revelation, we are exclusively stuck with the physical manifestations thereof.

This insight into the distinction may be a great relief to the much-beleaguered orthodox theory of customary international law. Akehurst's 'any act or statement'[49] definition is not trivial, because we have stopped taking scholars at their word when they claim that 'state practice' is evidence of *opinio iuris*: the term 'state practice' does not refer, we now know, to the objective element, but merely to the evidentiary superstructure to prove *either* element. Much of Martti Koskenniemi's critique – 'doctrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio iuris* and the latter to be evidence of which behaviour is relevant as custom'[50] – falls away with the acceptance of that distinction.[51]

If, however, we need to take some scholars' use of the term 'state practice' with a pinch of salt in order to reconcile it with the 'element versus evidence' distinction, the danger of mistakes and of confounding the two elements is apparent. Jason Beckett argues that 'state action becomes *state practice* through contextual endorsement, as it is precisely this contextual endorsement which creates the *opinio iuris* which transforms the former into the latter'.[52] Some of the difficulties he presents are due to the mixing of element and evidence which would be rendered harmless once we make the distinction.[53]

But what if we were to distinguish? Would that, in the end, disprove uncertainty? Koskenniemi's counsel that '[c]ircularity could be avoided if there existed a general rule (whatever its status) as to which practices are custom-forming and which not'[54] is very good, quite apart from the interesting question of the precise status of a 'rule' of this type (cf. Section 6.1). However, the problem that arises once we distinguish between the element and its methods of proof is anterior to positive law. It thus becomes a problem of cognition – how do we know which fact is legitimate evidence of an element? What evidentiary value does this or that type of 'manifestation' have? Is there a free appraisal of evidence in the sense that as long as some manifestation has value, it can be used? Would that not presuppose knowing the object to be proven beforehand and thus

[49] Akehurst (1977a) *supra* note 15 at 53.

[50] Koskenniemi (1989, 2005) *supra* note 47 at 388 (437).

[51] His second major issue, the *opinio iuris* paradox, is not eliminated by *this* manoeuvre, though; see Section 3.3.3.

[52] Jason A. Beckett, Countering uncertainty and ending up/down arguments: Prolegomena to a response to NAIL, 16 European Journal of International Law (2005) 213–238 at 236.

[53] In an earlier version of this text (Jörg Kammerhofer, Uncertainty in the formal sources of international law: Customary international law and some of its problems, 15 European Journal of International Law (2004) 523–553 at 529) the far-reaching implications of the distinction or of ignorance towards it had not yet been fully elaborated on.

[54] Koskenniemi (1989, 2005) *supra* note 47 at 382 (431).

make evidence irrelevant? Are there 'rules of evidence' for the proof of the elements of customary international law? Where are they to be found; what is their 'status' as norms? Nothing is solved even by correctly cognising the difference between element and proof; the questions shift and we are put on the spot. We realise that our faculties of cognition are limited, even on finding what methods of cognition to use. Hence, we are left with epistemological uncertainty on multiple levels.

3.2.3 How much state practice and for how long?

Others have devoted much more space to these questions than is possible here and it is not necessary to duplicate their efforts[55] in order to show where the uncertainties lie. At the outset it might be helpful to explain or to clarify the 'dimensions of quantity' that are in use today. First, the number of states participating in the practice may be called its 'generality'. Second, writers use the term 'repetition' to designate the requirement that there be a number of acts. Third, 'uniformity', i.e. the consistency of the repetition, is seen as relevant. Fourth, some see the passage of time as a necessary or at least sufficient condition for an eligible practice.[56]

One exposition of the quantity of state practice needed is found in *North Sea Continental Shelf* before the International Court of Justice (ICJ). The Court's pronouncements in this case have become standard fare:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked . . .[57]

The 'dimensions of quantity' have found general acceptance among writers; that is to say that in one form or another most scholars would argue that a practice has become customary law[58] if it has exhibited longer, more consistent usage by more states than a rival practice which has had less time, repetition and generality

[55] Akehurst (1977a) *supra* note 15 at 12–22; ILA (2000) *supra* note 14 at 20–29; Mendelson (1999) *supra* note 15 at 211–227.

[56] For a discussion of the necessity of time see: Ryszard W. Piotrowicz, The time factor in the creation of rules of customary international law, 21 Polish Yearbook of International Law (1994) 69–85. Time is not a necessary element concludes Lukashuk: Igor I. Lukashuk, Customary norms in contemporary international law, in: Jerzy Makarczyk (ed.), Theory of international law at the threshold of the 21st century: Essays in honour of Krzysztof Skubiszewski (1996) 487–508 at 503, 508.

[57] *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)*, Judgment of 20 February 1969, ICJ Reports (1969) 3 at 44 (para 74).

[58] . . . questions of *opinio iuris* aside . . .

than the first. Karol Wolfke disagrees: 'The requirement of a practice being uninterrupted, consistent and continuous also no longer holds good.'[59] Read in context it becomes clear that this is merely an argument that modern society moves at a faster pace and therefore needs less time and repetition than was required in the past. Bin Cheng, in his article on space law, is able to make do without repetition or time – instant customary law – but this comes at a price: state practice is no longer a required element for the formation of customary law.[60] This puts him outside the spectrum we are considering here, for if one does not need practice, one needs neither a little nor a lot of it.

One particular thought has been expressed *inter alia* by Michael Akehurst. He proposes that 'one can never prove a rule of customary law in an absolute manner but only in a relative manner – one can only prove that the majority of the evidence *available* supports the alleged rule'.[61] While this sounds more like a general principle of legal practice, he drew conclusions from it for the requirement of quantity. 'The number of States needed to *create* a rule of customary law varies according to the amount of practice which conflicts with the rule.'[62] Thus Akehurst makes the quantity of the practice required contingent on the type of rule and the legal situation before the establishment of the rule. Furthermore, this view is dependent on a concrete claim-conflict situation in which the evidence for and against a proposed rule can be evaluated and a decision made. However, even within a claim-conflict situation the respondent might not necessarily use counter-precedents, but might simply deny that these precedents suffice.

No scholar imposes exact limits on the amount of state practice needed to create law. While there might not be significant disagreement among writers and the tribunals on the abstract criteria, there still is uncertainty. Thus, uncertainty in international law is not just a function of academic and judicial disagreements. It is arguably impossible or impractical to delimit the quantity, but the question of whether a known number of precedents is enough to create law is highly relevant in practice. In an imaginary dispute one might argue, for example, over whether state A invading state B was lawful. State A claims that a customary international law norm of 'humanitarian intervention' has come into validity and legalises this use of force. What if both parties agree on the number of cases there have been but while A says that these were enough to create international law, B denies that the number was adequate? The number required remains uncertain as long as the law does not make the number known or knowable.[63]

[59] Wolfke (1993) *supra* note 26 at 60.

[60] Cheng (1965) *supra* note 6 at 45.

[61] Akehurst (1977a) *supra* note 15 at 13.

[62] Akehurst (1977a) *supra* note 15 at 18 (emphasis added).

[63] International law does not specify a number nor can we calculate a number from a formula the law provides. For the consequences see: Cheng (1965) *supra* note 6 at 522–526.

3.2.4 The reception of state practice – does it depend on others?

This topic might have featured among the questions of *opinio iuris* as well, but some authors believe that contesting or accepting state practice by other states has a direct influence on whether these instances are to be properly counted as state practice, even before one goes on to ask whether the practice proposed has the requisite *opinio*. We are led back to the question of the nature of state practice.[64] Those who take a 'wide' or 'inclusive' view of state practice will count the reaction by other states, such as protests, as part of state practice.[65] Judge Read in the *Fisheries* case, for example, had reason to believe that 'it is necessary to rule out seizures made by Norway at and since the commencement of the dispute. They met with immediate protest by the United Kingdom and must therefore be disregarded.'[66] On the other hand, those whose views of state practice are more restrictive usually include protests or acquiescence as elements of *opinio iuris*.[67] The reason, as explained above (Sections 3.2.1 and 3.2.2), is that a reaction may or may not include subjective elements.

3.2.5 The limits of regulation by customary norms

The process of customary norm-creation is a primitive form of regulation. It is not created in order to achieve a specific regulatory aim, because it is based on usage (customs), rather than a conscious act of writing a text, as happens when domestic legislation or treaties are drafted. This method of creation being archaic, however, has consequences, for customary law is limited in scope and cannot be used as a legal-political tool. Also, because the basis of customary law is usage, there are limits to the type of norms that can be created. The objective element, state practice, can also be called a usage. Usages are repetitive factual behaviour, a series of more or less similar events in reality,[68] a *behavioural regularity*. The relevance of usages makes customary law *customary* – the presence of such a behavioural regularity is required to make customary norms (see Section 3.1). The reason for this lies beyond the semantic tautology of 'customary law requires customs because it is customary law'. Customary norms receive their content from the repetition of similar behaviour. State practice, e.g. the repeated passage of ships through straits, becomes the norm's content or 'prescribed behaviour' (*Tatbestand*); see Section 3.2.1. The practice of using white paper can give rise only to a norm prescribing the use of white paper, e.g. 'white paper ought to be used' or 'white

[64] See Section 3.2.1.

[65] Akehurst (1977a) *supra* note 15 at 10, 39; Mendelson (1999) *supra* note 15 at 226.

[66] *Fisheries (United Kingdom* v. *Norway*), Judgment of 18 December 1951, ICJ Reports (1951) 116, Dissenting Opinion Read at 191.

[67] D'Amato (1971) *supra* note 15 at 89, 174; Ian C. MacGibbon, Customary international law and acquiescence, 33 British Year Book of International Law 1957 (1958) 115–145 at 117.

[68] Ulrich Fastenrath, Lücken im Völkerrecht. Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts (1991) 157.

paper may be used'. Hence, state practice forms the content of the customary norm,[69] wheras *opinio iuris* delivers its normativity (e.g. that ships *may* pass through straits); see Section 3.3. In addition, it is clear now that customary norms do not prescribe certain behaviour as words, but as historically accumulated behaviour – customary international law has no text.

Customary norms can therefore only have such content that can be classified as accumulated factual behaviour (as a pattern in reality). This is the most important limit of customary regulation, which, while overlooked by most scholars, has far-reaching consequences for the doctrine and theory of international law. A content that refers to other norms cannot be reflected as factual pattern. The normative content of 'real world' behaviour is not itself part of facts; behavioural patterns cannot themselves refer to the level of ideals. An act like signing a piece of paper with one's name has a normative meaning only if norms are superimposed on facts and used as an interpretive scheme for reality (*Deutungsschema*).[70] The specific ideal significance is not part of the behaviour itself, but is ascribed by norms. Hence, trying to use repeated acts of signing a paper as practice for a norm empowering the creation of contracts (*pacta sunt servanda*) does not work, because with this the scholar ascribes normative significance solely to the factual level. The objective element does not and cannot extend to the ideal realm; normative interpretations of reality are not part of the reality itself.

G.J.H. van Hoof writes that the problem mentioned can be solved by a widening of the two requirements of customary international law, 'encompass[ing], for instance, also abstract or general declaration on the part of States'.[71] This is an interesting avenue of argumentation to counter the rather restrictive theoretical limitation given above. What if the normative characterisation of practice (e.g. of the signing of papers) is added by the *opinio iuris*? What if there is a practice of signing papers (and ancillary behaviour, such as mostly behaving according to the text), but one part of the content of the later customary norm '*pacta sunt servanda*', the empowerment to create treaties *as* norms, is added by the *opinio iuris*? The problem with this argument is that within custom-creation the *opinio iuris* does not have the power to change the content, as it is merely the normative *imprimatur* upon a behavioural regularity established prior to the *opinio*.[72] In terms of formal logic, *opinio iuris* provides the normative factor '*O*' only, rather than the the prescribed behaviour or *actus reus* element '*p*' in '*Op*', i.e. 'somebody ought to do *p*'. *P* can theoretically be more than factual behaviour, but not with customary norms.

The most far-reaching consequence of the limits of customary norm-creation

[69] Hans Kelsen, Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze (1911) 236–237 (FN 1); Hans Kelsen, Reine Rechtslehre (2nd ed. 1960) 9 (Ch 4 b).

[70] Kelsen (1960) *supra* note 69 at 3–4 (Ch 4 a).

[71] Hoof (1983) *supra* note 10 at 107. The argumentation in this paragraph ties in with the crucial question of the nature of state practice (Section 3.2.1).

[72] In Section 3.3 we will return to the question of what the *opinio iuris* can be.

is that two important types of norms cannot be created thus: authorisation (empowerment to create other norms) and derogation (destruction of other norms).[73] In both cases the norm refers to another norm, rather than only to human behaviour. Customary international law is incapable of empowering the creation of further norms, because the norm-creation does not happen as a factual pattern. We only know whether signing of papers successfully creates treaties by superimposing a normative interpretation on reality, which is only possible once a norm of norm-creation is established. Thus, customary law can also not create a subordinate source of law (Section 6.3.2). Second, a customary international law norm can at best only add another norm which is factually incompatible to another norm (Section 5.1), but cannot formally claim to derogate from the customary norm. Again, the element required, e.g. 'this norm is repealed', does not refer to a factual pattern, but in order to formally derogate, a norm does have to refer to the norm itself. A closer treatment of this and other difficulties of derogation will be undertaken in Chapter 5; a preliminary look at the mechanics of change follows in Section 3.2.6. Thus, the wide-ranging consequences of the inherent limits of customary norm-creation cut into the possibilities of international law-creation and derogation (cf. Sections 4.1.2, 4.4.3, 5.2.3 and 6.1.2).

3.2.6 Is customary international law impossible to change?

A widely held but problematic view holds that orthodox customary law theory leads to the conclusion that change in customary international law is not possible, because the practice that seeks to establish a diverging norm must necessarily be a violation of the previously established norm. It is argued that since 'this line of reasoning . . . runs counter to the maxim *ex iniuria jus non oritur*' law cannot be formed in this way. 'It must be an extraordinary system of law which incorporates as its main, if not the only, vehicle for change the violation of its own provisions.'[74]

The peculiarity of this mode of creating law is that it partially depends for its creation upon behaviour which can be seen both as application and as creation of law; its norms are created in part by acts which are also an application of the resultant norm. It is the very idea of customary law that factual behaviour patterns of the subjects of law (customs) count as building-blocks for law-making, irrespective of their legality. Those who adopt the 'narrow' view of state practice (Section 3.2.1) see this distinction more sharply than those who prefer the second option. Let us assume, for example, that most subjects wear a red hat. They also

[73] Kelsen talks about four functions of norms: prescription, permission, authorisation, derogation. Kelsen (1979) *supra* note 46 at 76–92 (Chs 25–27). In a 1962 paper, he acknowledges that '[t]he derogating norm, however, cannot be established by custom' (Hans Kelsen, Derogation, in: Ralph A. Newman (ed.), Essays in jurisprudence in honor of Roscoe Pound (1962) 339–355 at 343; Kelsen (1979) *supra* note 46 at 87 (Ch 27 V)).

[74] Hoof (1983) *supra* note 10 at 99.

believe that the law obligates wearing a red hat. The first element becomes the content of the obligation. The same act makes the law and can be subsumed under the law. Wearing a red hat creates the 'red hat norm', but as soon as the red hat norm is valid, the act of wearing of a red hat (or of not wearing one) is a question of the application of the red hat norm. If one were to distinguish legal and illegal behaviour and only legal behaviour could be counted as state practice, then customary law could not change.

The maxim *ex iniuria ius non oritur* is breached only if the law (e.g. the 'red hat norm') can solely be changed by the puissance of facts which constitute a violation of the law. The difference here is that the *meta*-law on customary law creation requires practice for the creation of new customary law. This can possibly lead to the confusion of two separate norms. On the one hand we have a substantive norm; on the other hand there is the meta-norm on custom-creation. The creation and the application of norms are two different functions which may be united in the same process. The creation of law is at the same time the application of the meta-law on law creation. In contrast, the application of the norm created under the meta-law to concrete human behaviour may or may not involve further norm-creation. If a court is competent to sanction violations of the red hat norm, it applies that norm (together with procedural and other norms) to create an individual judgment sanctioning an offender.

In our case, this amounts to a *dédoublement fonctionnel* of factual behaviour. Mr X wears a green hat. As the application of the 'red hat norm', it is a violation. As the application of the 'change in customary law' norm, it is a building block for a possible new norm. After the red hat norm has become valid, Mr X's acts of practice are an application of the red hat norm and, if they break the red hat norm, they are violations of the red hat norm. Yet, they are not disqualified from constituting the building blocks of a different 'green hat norm'. Once the event horizon of the green hat norm is crossed, it becomes law. Deviating instances between the coming-into-existence of the red hat norm and the green hat norm remain violations of the red hat norm. Why could usage which violates law not be eligible as state practice? Customs as mere behavioural regularities have no 'legality' for their purpose as building blocks of new law. Human behaviour has two meanings, given to it by two different norms. The legal consequences of the two norms might be considered incompatible, but only from a political or practical, not from a logical or normative point of view. There is no logical contradiction in saying that wearing a green hat is to be punished and that it is part of law-making at the same time. There is no contradiction partly because there are two norms at work here.[75]

This is not the only question that can be asked with respect to the possibility of change in a normative order. Later on (Section 5.3) we will probe further into the concept of 'change' in connection with the discussion of the (apparently

[75] For a more precise formulation of the relationship between the application and creation of law see Kelsen (1960) *supra* note 69 at 240 (Ch 35 f).

self-evident) *lex posterior* maxim. This topic is much better placed in the chapter on norm-conflicts and the arguments brought to bear there do not influence the non-contradictoriness of the relationship between creative and applicative behaviour portrayed *supra*.

3.3 *Opinio iuris*

The concept of *opinio iuris* is the centrepiece of the conception of customary law. It may be the most disputed and least comprehended component of the workings of customary international law. At the heart of the debate lies an important conflict. On the one hand, customary law-making seems by nature indirect and unintentional. On the other hand, the creation of *positive* norms requires an act of will. In the international legal system, great value has traditionally been placed on the states' agreement or consent to create obligations binding upon them; 'no state can be bound without its will' might be a typical statement. Whether that is indeed the real requirement is debatable, but it is certain that one of the core uncertainties of any doctrine of customary international law is the problem of reconciling the customary nature of customary law with its positivity (Section 3.3.3).

The ascendancy of the *opinio iuris* theory is an interesting development. Earlier surveys of the literature on customary law had included many other theories which radically differed from the subjective element as it is understood now.[76] It is true that nowadays the *opinio iuris* theory is neither clearly defined nor the only interpretation of the subjective element,[77] but while it used to be just one theory among others, it has advanced to the status of orthodoxy, a standard which all concurrent theories are measured against.[78]

Within the complex of problems associated with the subjective element, the first and elemental question to be solved is the nature of *opinio iuris*: what exactly is it; what is it meant to represent? Is it a necessary or a contingent ingredient of customary law-making? The uncertainty on this point influences many other problems associated with the subjective element, just as the question of the nature of state practice decides many questions commonly asked in connection with the objective element. This section will expose the breadth of opinions in today's discussions of customary international law.

For this exposition to work properly it is necessary to assume, just for a few paragraphs, that orthodox *opinio iuris* theory is not orthodox at all. For an

[76] Günther (1970) *supra* note 40 at 15–58, 149–154; Kirchner (1989) *supra* note 3; R. Fidelio Unger, Völkergewohnheitsrecht – objektives Recht oder Geflecht bilateraler Beziehungen: Seine Bedeutung für einen 'persistent objector' (1978).

[77] For a reinterpretation of *opinio iuris* see: Anthea Elizabeth Roberts, Traditional and modern approaches to customary international law, 95 American Journal of International Law (2001) 757–791.

[78] David P. Fidler, Challenging the classical concept of custom: Perspectives on the future of customary international law, 39 German Yearbook of International Law (1996) 198–248.

understanding of the fundamental questions – and for an understanding of the subtle differences of opinion within orthodoxy – we need to analyse the nature of the subjective element on a level playing field, without giving preference to orthodoxy as it now stands. This can be achieved by counterposing two somewhat polarised concepts, namely that of 'voluntarism' and the '*opinio iuris* approach'[79] – discussing their merits and demerits – and by subsequently clouding the strict dichotomy by loosening the strictures of the theoretical models. We will thus find the thesis of consent (Section 3.3.1), the antithesis of *opinio* as true belief (Section 3.3.2) and the apparent synthesis of the orthodox *opinio iuris* theory (Section 3.3.3). All of these have their own theoretical, philosophical and ideological foundations, which will largely be left aside in this chapter. The theoretical 'justification' for source-law will be discussed in Section 6.2.

3.3.1 Customary international law resolved as consent

The theory of consent[80] requires that every state needs to *agree* to being bound by a norm of customary international law. It is said that this theory can easily describe intentional customary law-making, the processes of 'initiation, imitation and acquiescence',[81] as may have happened with the law on the continental shelf through the Truman Proclamations 1945. Another advantage is that the '*opinio iuris* paradox', one of the problems plaguing the antithetical approach, is avoided by taking the element of 'belief in a law' away and supplanting it with 'consent that something be law'. As Raphael Walden argues: 'The tacit consent theory, in all its forms, has the great merit of recognising the *constitutive* nature of custom.'[82]

Its greatest problem is inferred consent.[83] It is unlikely that the majority of states actively or intentionally participate in the making of any one norm of customary international law. Most states will neither consent nor protest most developments. The question is – and it is one that has puzzled many commentators over the years – how to connect this 'inert mass' of non-participating states to the creation of customary law. The staple solution has been to *infer* consent by way of a kind of 'qualified silence' called acquiescence.[84] Only affected states which knew, or might have been expected to know, of a practice can be said to have acquiesced to it.[85] This raises the valid question and, indeed, is the *crux* of consent

[79] The distinction is taken from Mendelson (1996) *supra* note 13, but the dichotomy is older and will not be treated in this way here.

[80] Danilenko (1988) *supra* note 11; Olufemi Elias, The nature of the subjective element in customary international law, 44 International and Comparative Law Quarterly (1995) 501–520; Wolfke (1993) *supra* note 26.

[81] Mendelson (1996) *supra* note 13 at 185.

[82] Raphael M. Walden, The subjective element in the formation of customary international law, 12 Israel Law Review (1977) 344–364 at 355 (emphasis added).

[83] Hans Kelsen, Principles of international law (1952) 311.

[84] MacGibbon (1958) *supra* note 67.

[85] Aptly distilled by Mendelson (1996) *supra* note 13 at 186, from the ICJ's reasoning in *Fisheries* (1951) *supra* note 66 at 138–139.

theories, of whether implied or inferred views can really be evidence of state will.[86] At best acquiescence is a legal fiction, but one may ask whether silence does in fact equal consent.[87] Its proponents are open to the charge of being inconsistent,[88] since individual consent means a positive emanation of will by every single state that will be bound, not only by some.

3.3.2 *Opinio iuris* properly so called

The second appraoch is the theory of the *opinio iuris sive necessitatis*,[89] understood as the requirement of a genuine, true belief in customary law's existence (or necessity). This view has traditionally[90] been summed up by quoting from the Court's judgment in *North Sea Continental Shelf*:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a *belief that this practice is rendered obligatory by the existence of a rule of law requiring it*. The need for such a belief, *i.e.* the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequence or even habitual character of the acts is not in itself enough. There are many international acts e.g., in the field of ceremonial or protocol, which are performed almost invariably, but which are motivated only by consideration of courtesy, convenience or tradition, and not by any sense of legal duty.[91]

While this may be how the theory turned out to be, it has other roots. The origins of the concept lie in theories for which customary law is merely a manifestation of pre-existing law.[92] This does not present a particular problem, because the belief in a law that already exists is not constitutive, only declaratory. In fact, were the belief to be seen as constitutive, one might ask what the point of the customary process is if we have and are able to prove pre-existing law? With François Gény's *Methode d'interpretation et sources en droit privé positif* (1899), international legal

[86] Byers (1999) *supra* note 15 at 144.

[87] *Qui tacet consentire videtur*? Mendelson (1996) *supra* note 13 at 186; Torsten Gihl, The legal character and sources of international law, 1 Scandinavian Studies in Law (1957) 51–92 at 79: 'On the whole it is difficult to draw any conclusion from the fact that a state has taken up a passive attitude.'

[88] Kirchner (1989) *supra* note 3 at 17.

[89] Also called the '*Zwei-Elementelehre*', '*Theorie von der Rechtsüberzeugung*' or 'belief theory'.

[90] Akehurst (1977a) *supra* note 15 at 31.

[91] *North Sea Continental Shelf* (1969) *supra* note 57 at 45 (para 77) (emphasis added).

[92] For example in the *Volksgeist* ('spirit of the people') of the German *historische Rechtsschule*: Georg Friedrich Puchta, Vorlesungen über das heutige römische Recht (4th ed. 1854) 25–33 (para 11); Friedrich Carl von Savigny, System des heutigen Römischen Rechts, Erster Band (1840) 34–38 (para 12). Described by D'Amato (1971) *supra* note 15 at 47–48; Kelsen (1952) *supra* note 83 at 309–311; Hans Mokre, Theorie des Gewohnheitsrechts. Problementwicklung und System (1932) 7–31; Walden *supra* note 82 at 357–359.

scholarship has identified a turning point in the development of this view of the subjective element. He is said to have coined the expression *opinio iuris sive necessitatis* and he gave up the requirement of a necessarily pre-existing law.[93]

The *opinio iuris* paradox has become a persistent problem in international legal scholarship. If the belief that something *is already* law is what counts for law-making, then it can only be used to identify existent customary international law.[94] With respect to a new norm, e.g. a norm governing conduct that had either hitherto not been covered by a norm, the belief that something is law which is only just *becoming* law cannot be true. Therefore, the belief is necessarily mistaken.[95]

> Gény concludes that at the source of the formation of custom, there *must* be an erroneous belief on the part of those who are the creators of custom that they are already legally bound by the very rule which they are in the process of creating: 'an error seems at least at the beginning of a usage a *sine qua* condition for the conviction that such usage is binding. . . .'[96]

Many arguments have been developed to circumvent this problem.[97] There is, for example, a tempting invitation by Hans Kelsen to accept that states act in error in making new customary law. However, this invitation is quickly withdrawn, 'because this "norm" does not exist during the procedure of custom-formation.'[98] The usability of the belief is thereby conditioned upon the truth of the belief. It bears pointing out, however, that 'really *is* law' is a different concept to 'states really *believe* it to be law' and this, again, is different from 'states *express* their belief that it is law' (Section 3.3.3).[99] Kelsen later modified his views on the subjective element (he had originally rejected a need for *opinio iuris*)[100] to the point that states ought only to believe in the existence of *a* norm, not just a legal norm.[101] But this misses the point: the subjective element, formulated as *opinio iuris*, is necessary to distinguish between a factual pattern of behaviour and customary norms. Hugh Thirlway and Raphael Walden widen the concept to include both the

93 Peter Benson, François Gény's doctrine on customary law, 20 Canadian Yearbook of International Law 1982 (1983) 267–281.

94 D'Amato (1971) *supra* note 15 at 73: 'Here, *opinio iuris* is at worst a harmless tautology.'

95 Kelsen (1939) *supra* note 12 at 263.

96 Benson (1983) *supra* note 93 at 276.

97 Nearly every monograph and many articles on customary law contain descriptions of those efforts; e.g.: Jo Lynn Slama, *Opinio iuris* in customary international law, 15 Oklahoma City University Law Review (1990) 603–656 at 620–625; Sienho Yee, The news that *opinio iuris* 'is not a necessary element of customary [international] law' is greatly exaggerated, 43 German Yearbook of International Law (2000), 227–238 at 231–234.

98 'puisque cette "norme" n'existe pas encore tant que dure la procedure de la création coutumiere'; Kelsen (1939) *supra* note 12 at 263.

99 Akehurst (1977a) *supra* note 15 at 36.

100 Kelsen (1939) *supra* note 12 at 264.

101 Kelsen (1952) *supra* note 83 at 307.

belief that the practice is required by law (whether erroneously or not – *opinio iuris*) and the belief that practice ought to be law (*opinio necessitatis*).[102]

> Only if the view that the custom *should* be law has the effect of making it law (provided it is coupled with sufficiently general usage), can subsequent practice be coupled with the correct view that the custom is law.[103]

A supplementary charge as against this theory is that the subjective element can never be a psychological study of the minds of states, because this is an impossible anthropomorphism.[104] To evade the charge by pointing to the will of decision-makers is not to have seen the charge for what it is – that we cannot attribute subjective will (or belief) to a juridical person like the state. Decision-makers are not the state; their psychological states are not the state's, even as a collective.[105]

3.3.3 Is the orthodox synthesis only an illusion?

The orthodox theories of customary international law have resolved the dichotomy between the voluntarist and intellectualist camps into a synthesis. While they do not recognise pre-existing law as the basis of customary international law, they also do not approximate it to an unwritten agreement. Traditionally the elements of 'consent' and '*opinio iuris*' (as true belief) are seen as irreconcilable antagonists. Modern theories tend to smudge the two extreme notions into a quasi-synthesis. The key to this smudging is the tendency towards the inclusion of an act of will within their notion of the subjective element of customary law-making. It is an acknowledgement of the constitutive function of *opinio iuris*. This smudging, however, leads to further uncertainty and that is a direct result of not distinguishing between 'will' and 'belief'. The difference between the two concepts becomes unclear: can one say that a belief, especially if formulated as belief that a practice ought to be law, is not an act of will? Also, is the 'belief that something is law' really an act of will? We will return to this, one of the key questions of all customary norm-making, presently.

The orthodox *opinio iuris* paradox, on the other hand, is a slightly different problem. As mentioned above, the question there is how the belief of the subjects of law can be true that something is law when it is by definition not yet law, but is only just being created. Two reasons make a solution to that problem – that there needs to be a *mistaken* belief in law where there is none – no longer quite as unattractive. The first reason is pragmatic, for the epistemic uncertainties of customary international law provide support to the orthodoxy. Because of our poor epistemic position vis-à-vis the elements of custom-creation and their evidence

[102] Walden (1978) *supra* note 2 at 97.
[103] Thirlway (1972) *supra* note 26 at 55.
[104] D'Amato (1971) *supra* note 15 at 194; Koskenniemi (1989, 2005) *supra* note 47 at 374–375 (423).
[105] Human beings do not have a collective consciousness.

(Section 3.2.2), it is virtually impossible to distinguish between what the law is and what it ought to be.[106] One would have to know what the law is in order to be able to distinguish between the *lex lata* and *lex ferenda* in the first place. The object of ascertaining the *opinio iuris* is to find out what the law is and that is what has to be proven. Due to this large measure of uncertainty, it is difficult to tell when a norm of customary law has emerged. Thus, if a state believes some norm to be valid customary international law, it has no means of knowing whether this belief is true – i.e. whether the norm believed in is valid (in 'existence'). States are not in a position to know whether the proposed norm they are championing has actually become law. The 'mistake' involved in the *opinio iuris* paradox is no longer clear nor 'necessary' and the constitutive function of states' beliefs comes to the fore.[107]

The constitutive function of the subjective element is the second tactic to lessen the impact of the traditional paradox. Because the subjective element does not have to correspond to some pre-existing legal 'reality', i.e. the claims made do not have to be truthful, but are themselves constitutive of customary law, it is the fact that the claim is made, not the value of the claim that is relevant. A constitutive view of *opinio iuris* requires that the veracity of the beliefs be secondary to the existence of the belief. Bruno Simma has argued thus as early as 1970:

> Kelsen, for example, had earlier [1939] held that this theory is nothing but 'évidemment fausse', because it is founded on an error, nay, on a logical contradiction . . . This charge is unfounded. The orthodox theory could only then be found logically contradictory, if it were to postulate the *validity* of a norm with the same content as condition for the creation of customary law. However, it only demands that the states creating customary law *believe* that such a norm is valid, that they thus act in error.[108]

The orthodox synthesis may thus involve making an error of judgment into a condition for the creation of customary law; 'error [is] the father of a customary law'.[109] If that is so – and it is doubtful whether a mistake need necessarily be

[106] Koskenniemi (1989, 2005) *supra* note 47 at 375 (424).

[107] In a sense this was discussed by Walden (1978) *supra* note 2, reinterpreting the 'internal aspect' of rules developed by Herbert Hart (H.L.A. Hart, The concept of law (1961) 55–56, 86–88).

[108] 'So vertrat etwa Kelsen früher [1939] die Meinung, daß diese Lehre nichts weniger als "évidemment fausse" sei, weil sie auf Irrtum, ja auf einem logischen Widerspruch basiere . . . Dieser Vorwurf ist aber unberechtigt. Logisch widersprüchlich wäre die herrschende Lehre nämlich nur, wenn sie zur Entstehung einer Norm des Völkergewohnheitsrechts die Voraussetzung aufstellen würde, daß eine Norm desselben Inhalts bereits *gilt*. Sie fordert aber lediglich, daß die Staaten, die das Gewohnheitsrecht zur Entstehung bringen, *glauben*, daß eine derartige Norm gilt, daß sie also im Rechtsirrtum üben.' Bruno Simma, Das Reziprozitätselement in der Entstehung des Völkergewohnheitsrechts (1970) 34 (FN 77) (emphasis on name removed).

[109] 'der Irrtum [ist] der Vater eines Gewohnheitsrechts'; Carl Schmitt, Der Hüter der Verfassung (1931) 126, citing: Richard Thoma, Der Vorbehalt des Gesetzes im preußischen Verfassungsrecht, in: Festgabe für Otto Mayer. Zum siebzigsten Geburtstag dargebracht von Freunden, Verehrern und Schülern, 29. März 1916 (1916) 165–221 at 213.

made – it might well violate our sense of aesthetics, but there are no *a priori* reasons why this should not be a method of making law. Orthodoxy does not demand 'that *existence* [of law] is made a condition for [its] creation',[110] but rather that the existence of the *belief* is made a condition for the validity of customary international law. The difference is the essence of the constitutive function – its presence, not its content is the decisive factor in the creation of law. The truth-value of the belief is irrelevant, because the subjective element in no case requires *knowledge* as *true* belief,[111] but – at best – belief, i.e. the presence of a conviction that *p* is prescribed.

This paradox is soluble, hence not a paradox at all; *here* we do not face a problem. However, this freedom from one paradox costs us dearly, for we immediately stumble into another paradox which cannot be resolved so easily. This paradox becomes obvious if we do not accept pragmatic smudging so easily (cf. Section 5.4) and if we try to apply a pure theory of law, one that manages to explain both international law's normativity and its positivity. A theory that attempts to do so must face, *inter alia*, Martti Koskenniemi's critique,[112] or at least the part not resolved by the distinction in Section 3.2.5, which is an attempt to show that no such reconciliation is possible. Such an attempt will also show the critical force of the Pure Theory of Law vis-à-vis orthodox conceptions of doctrine[113] by consistently applying the positive normative order.

The 'new *opinio iuris* paradox' follows from *opinio*'s constitutive function. Hans Kelsen and his followers have always had a problem in fitting customary law into a positivist framework. How can customary norm-creation be reconciled with customary law's status as positive law? The 'positivity problem' of the subjective element is caused by the very idea of (the Pure Theory's) positivism, which requires human-willed activity to recognise a norm as positive. Only if a norm is the 'sense of an act of will'[114] can it be called a 'positive norm' and all other norms are fictional (see Section 6.2.2). Since the objective element – practice – by definition cannot contain will, but consists of factual patterns, the subjective element needs to contain an act of will in order for customary international law to be able to exist as positive norms. Customary international law, however, seems to be unintentional, undirected and unwilled human activity.[115]

This strict requirement of an 'act of will' has led a number of scholars to criticise Kelsen's theory. Herbert Günther, while in other respects agreeing with the Pure Theory, believes that the postulate adopted necessitates an artificial

[110] Hoof (1983) *supra* note 10 at 93 (emphasis added).

[111] Peter Baumann, Erkenntnistheorie (2002) 36–37.

[112] In particular: Koskenniemi (1989, 2005) *supra* note 47.

[113] Clemens Jabloner, Kein Imperativ ohne Imperator. Anmerkungen zu einer These Kelsens, in: Robert Walter (ed.), Untersuchungen zur Reinen Rechtslehre II. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1988 (1988) 75–95 at 87.

[114] Kelsen (1979) *supra* note 46 at 4 (Ch 1 VIII), 221 (N 1): 'Sinn eines Willensaktes'. 'Sinn' could also be translated as signifying 'meaning'.

[115] Kelsen (1952) *supra* note 83 at 308.

search for an act of will within the customary process.[116] He thinks that this is the result of the methodological mistake on Kelsen's part of drawing an illegitimate analogy from municipal law to international law. He alleges that this constitutes a narrowing of the very concept of 'positive law'; it seems wrong to conclude from law's positivity that it needs to be enacted in a formal and goal-orientated manner. For Günther, positivity ought 'to be understood as a property only of norms, only of those norms, which . . . were in some way "man-made", whose content was determined by a human act'.[117] Yet the real problem lies elsewhere, as Koskenniemi points out:

> The psychological element might either be: 1) the belief or conviction that something is law; 2) the will of the State that something be law. The *opinio* might be understood as pertaining to what the State knows or believes or it might be thought of as a *voluntas*, a conscious, law-creating will. . . . *They are not merely different, but mutually exclusive* and defined by this exclusion.[118]

How, indeed, can a *belief* (opinion, statement) be a *will*? That is the question and that is the new paradox. When 'men do not necessarily know that they create by their conduct a rule of law, nor do they necessarily intend to create law',[119] this creation is automatic, and customary norms would be based on an Is alone, which is a breach of the dichotomy of Is and Ought.

Koskenniemi's critique unfortunately acts as a distraction, for he may have chosen a different category in identifying the *crux*. He argues that the orthodox synthesis holds 'the psychological element as partly an object of knowledge, partly an object of will',[120] because the *opinio iuris* is belief, not knowledge, It has thus not, as he claims, an 'existence independent from the process of knowing'[121] and *opinio iuris* therefore is not bound up with the 'extra-voluntary reality';[122] it simply is independent of the existence of the object of the belief.

Does not the belief contain the will to create the norm in some form? Kelsen is silent on the details of the will that is necessary. Is it the will to create norms? Is the positive norm as the sense (meaning) of an act of will created by the specific form or content of the sense of the act of will? Could we not say that the act of will need not be a specific will to create a norm, but can also be a belief that implicitly accepts that a norm *may* be created, in analogy to *dolus eventualis* in criminal law? Would it not be possible to argue that an unspecific will is contained in the belief?

116 Günther (1970) *supra* note 40 at 81–83.

117 'demnach als Eigenschaft verstanden werden, die ausschließlich Rechtsnormen und darunter nur denjenigen zukommt, die . . . in irgendeiner Weise "man-made" sind, ihren Inhalt durch einen von Menschen sich herleitenden Kreationsakt empfangen haben.' Günther (1970) *supra* note 40 at 83.

118 Koskenniemi (1989, 2005) *supra* note 47 at 369–370 (417–418) (emphasis added).

119 Kelsen (1952) *supra* note 83 at 308 (emphasis added).

120 Koskenniemi (1989, 2005) *supra* note 47 at 373–374 (422).

121 Koskenniemi (1989, 2005) *supra* note 47 at 374 (422).

122 Koskenniemi (1989, 2005) *supra* note 47 at 374 (422).

Hans Kelsen's own arguments on customary law and its subjective element seek to reconcile the problem of will and belief in this fashion. For him 'custom is, just like a legislative act, a mode for *creating* law'.[123] Both enactment of a statute and the customary process represent acts of will, but are merely different ways of manifesting that will. He explains the change from belief to will thus:

> Only when these acts [the practice] have been occurring for a certain amount of time, the idea develops in an individual that it ought to behave, as the members of the society usually behave, *and the will* that other members of society ought to behave in this manner. . . . Thus custom becomes a *collective will*, whose subjective sense is an Ought.[124]

The concept of a collective act of will – however much its possibility may be in doubt[125] – is not the real issue. A better reading of the Pure Theory's customary theory is that the will that subjects of law ought to observe the factual pattern has become a collective, but not a 'legislative' will. Norms resulting from the customary process are positive norms by virtue of that collective will (*opinio iuris*).[126]

For Clemens Jabloner, the weakness of the doctrinal arguments brings the Pure Theory's critical side to the fore. If customary international law cannot fulfil the strict criteria for positivity, then customary international law simply is not positive law.[127] A consistent theory relentlessly cuts through long-established doctrinal constructs which ultimately are flawed. The distinction between 'legislative' and 'customary' acts of will is enticing, but it cannot satisfactorily explain away the chasm between 'belief' and 'will'. Either the customary process cannot even abstractly work to make norms – which would mean that customary international law cannot be a source of international law – or the conception of *opinio iuris* as belief is wrong and the subjective element needs to be an act of will properly speaking. Either possibility makes unintentional and unwilled international law-making impossible. The point here is not that orthodox doctrine is incommensurate with a particular scholar's ideas, but that it is incommensurate

[123] 'la coutume est, tout comme l'acte législatif, un mode de *création* du droit'; Kelsen (1939) *supra* note 12 at 259; Kelsen (1979) *supra* note 46 at 113–114 (Ch 34 III).

[124] 'Erst wenn diese Akte [der *usus*] durch eine gewisse Zeit erfolgt sind, entsteht in dem einzelnen Individuum die Vorstellung, daß es sich so verhalten soll, wie sich die Gemeinschaftsmitglieder zu verhalten pflegen, *und der Wille*, daß sich auch die anderen Gemeinschaftsmitglieder so verhalten sollen. . . . So wird der Tatbestand der Gewohnheit zu einem *kollektiven Willen*, dessen subjektiver Sinn ein Sollen ist.' Kelsen (1960) *supra* note 69 at 9 (Ch 4 b) (emphasis added); Hans Kelsen, Was ist juristischer Positivismus?, 20 Juristen-Zeitung (1965) 465–469, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 941–953 at 944.

[125] Ota Weinberger, Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen (1981) 28–30; Jabloner (1988) *supra* note 113 at 87.

[126] Kelsen (1960) *supra* note 69 at 9 (Ch 4 b).

[127] Kelsen (1960) *supra* note 69 at 232 (Ch 35 b).

with international law's nature as a *positive normative* order. Thus we are left with this paradox as a dangerous manifestation of uncertainty in customary international law.

3.4 *Desuetudo* in customary law – how do customary norms die?

Desuetude is a rarely discussed problem of the customary process. Can customary international legal norms fall into desuetude and lose their validity? It seems generally accepted, though one may doubt this (Section 5.3), that customary norms can be derogated from by another norm of the same kind, i.e. another customary norm. We are not concerned here with the replacement of norms by norms, but with their desuetude:

> [A] single norm or a normative order as a whole lose their validity when they lose their effectiveness or the possibility of their effectiveness; as far as general norms are concerned: when they stop being generally observed and if not observed, being applied.[128]

If we apply this mode of losing validity to customary international law, the question can be reformulated. Once a norm of customary law is established, does it need to be continuously supported by practice and *opinio iuris* or only by one element to remain customary law? The first position could be called 'statist' or 'establishment' theory. Once established, a norm of customary law continues to exist until a new norm has come into existence in accordance with the rules of custom-formation or it is derogated from by a new norm.[129] A norm no longer supported by any practice or *opinio iuris* remains valid unless there is practice and *opinio iuris* sufficient to create a norm to supersede it. The second theory might be termed 'dynamic' or 'upholder' theory. Custom is upheld by the continued presence of its constituent elements and as soon as it is not upheld in this manner, it falls into desuetude and ceases to be a norm.[130] If states behave differently and believe differently to the established norm, the old norm is suddenly no longer valid, even if this trend is not yet a new customary norm.

Neither position necessarily implies that the effectiveness of a norm is its validity. Kelsen, who espoused the second, 'dynamic', option as a matter of general normative theory, saw effectiveness not as a basis for the validity of laws, but as a

[128] '[E]ine einzelne Norm und eine ganze normative Ordnung ihre Geltung verlieren, aufhören zu gelten, wenn sie ihre Wirksamkeit oder die Möglichkeit einer Wirksamkeit verlieren; soweit generelle Normen in Betracht kommen: wenn sie aufhören im großen und ganzen befolgt, und wenn nicht befolgt, aufhören angewendet zu werden.' Kelsen (1979) *supra* note 46 at 112–113 (Ch 34 II).

[129] Bernhardt (1992) *supra* note 40 at 901.

[130] Bos (1982) *supra* note 15 at 15–16; Robert Kolb, Selected problems in the theory of customary international law, 50 Netherlands International Law Review (2003) 119–150 at 140–141; Thirlway (1972) *supra* note 26 at 56; Villiger (1997) *supra* note 4 at 55.

condition for losing its validity.[131] What are the logical possibilities? On the one hand, desuetude could be a logically necessary collorary of all normative systems. Without positive regulation within a particular normative order, any norm could lose validity if it becomes utterly ineffective. However, the very idea of pre-positive desuetude is inconsistent with a positivist normative theory, because only norms can change norms. On the other hand, a norm of positive international law which specifies that 'ineffective norms are no longer norms' could be valid. The second possibility raises the question of proving such a positive norm and of the effect of such a derogating norm (Chapter 5).

[131] Kelsen (1979) *supra* note 46 at 112 (Ch 34 II): 'Because the *effectiveness* of a norm is constituted by its general observance and by its application in cases of non-observance, its *validity*, however, is that it *ought* to be observed and [that it *ought* to be] applied in cases of non-observance, the validity has to be divorced from the norm's effectiveness as an Ought from the Is . . . effectiveness is a condition for validity.' 'Da die *Wirksamkeit* einer Norm darin besteht, daß sie im großen und ganzen tatsächlich befolgt und wenn nicht befolgt, im großen und ganzen angewendet *wird*, ihre *Geltung* aber darin, daß sie befolgt oder wenn nicht befolgt angewendet werden *soll*, muß die Geltung von der Wirksamkeit der Norm als ein Sollen von einem Sein geschieden werden. . . . Wirksamkeit ist eine Bedingung der Geltung.'

4

Interpretation and modification

Many of the problems surrounding self-defence (Chapter 2) are insurmountable within the framework of the conventional debate on substantive law. Here we will transcend this debate and explore why an answer to many of the problems cannot be given. The Charter law of self-defence is concerned with the text of an international treaty, so interpretation is the first method to look to when searching for a text's meaning. Accordingly, most of the following is concerned with our understanding of that particular method. But interpretation is not the sole structural reason for uncertainty in seeking to understand the self-defence law of the UN Charter. Subsumption – matching facts (*Sachverhalt*) and norms (*Tatbestand*) – is plagued by vagueness, as exemplified by the 'How-much-hair-spoils-a-bald-head' (*falakros*) problem (Section 4.3.2).[1] Also, it is commonly held that behaviour after a treaty is concluded influences how it ought to be interpreted and can even change the treaty norm, which raises theoretical problems as well (Section 4.4). This issue in particular is intimately connected to international law's 'constitutional problems' (Chapter 6). All the problems discussed herein are interlinked and form the complex of phenomena that can be described as uncertainty.

Interpretation is an epistemic tool. It is a method of cognising the law[2] if law is understood as an ontology of norms. We must be careful not to confuse the question of what norms there are and how they come to 'exist' (normative ontology) with the issue of how we are able to know what the ontology looks like (epistemology of norms). In this sense, this chapter is concerned with the epistemological problems of international law. While there are other structural problems producing uncertainty in international law and questions of cognition can be identified in other areas as well, how we do and whether we can cognise law is an important cause of uncertainty.

[1] A formalist would say, 'One hair is enough to make a person's head not bald', because the formalist has *a priori* defined 'bald' as meaning 'no hair', cf. H.L.A. Hart, The concept of law (1961) 125–126. The question is, do we allow the common usage of a word (an empirical *a posteriori* definition – which may be vague – to spoil our legal definitions, which *create* the category and do not find it?

[2] Interpretation as external manifestation of the act of cognition, as its articulation and objectification: Joachim Hruschka, Das Verstehen von Rechtstexten. Zur hermeneutischen Transpositivität des positiven Rechts (1972) 6–7.

Why is interpretation a cause of uncertainty? Does it cause uncertainty in our understanding of Charter law? This is the topic of the next three subsections. First, the traditional debate amongst international lawyers will be discussed and the most salient points highlighted (Section 4.1). This orthodox debate will be confronted with a fundamental challenge – the critique applied by Hans Kelsen and others is highly relevant for, but largely unknown to international legal scholarship (Section 4.2). The 'synthesis' of the two preceding steps, despite the thesis and antithesis and notwithstanding the influx of analytical philosophy and hermeneutics, will show that uncertainty is an unavoidable part of our understanding of any written norm (Section 4.3).

4.1 Treaty interpretation – the conventional debate

This first step is only an extraction of the most important threads of thought running through the large amount of scholarly writings and cases on treaty interpretation. It is not necessary to dissect the literature in detail in order to observe the basic tendencies and underlying problems and to repeat what has been written many times before. The goal is to go beyond the usual terms of reference, to learn from it in order to transcend it. Presented below is a survey of some of the topics that have persisted over the years in the doctrine and jurisprudence on treaty interpretation. Three debates are relevant to or point towards the more theoretical problems of UN Charter interpretation. As is to be expected, international law doctrine on treaty interpretation is less rooted in legal theory and philosophy than general works on interpretation in law, which often appear as part of scholarly writings on general legal theory.[3] This lack of theoretical basis will become apparent in Sections 4.2 and 4.3 and is an unavoidable consequence of the increating specialisation of scholarship in the nineteenth to twenty-first centuries.

4.1.1 The dichotomy of terms and intent

In textbooks discussing treaty interpretation, one of the first things mentioned is the split between at least two basic views of what treaty interpretation is 'all about'. It is 'the question of precedence of the text of the treaty with its objective meaning as against true party intent, or of precedence of true party intent as against the text'.[4] It is the age-old question of declared and true intent, between the objective and the subjective theories. Owing to the decentralised nature of

[3] E.g.: Hans Kelsen, Reine Rechtslehre (2nd ed. 1960) 346–354 (Chs 45–47); Karl Larenz, Methodenlehre der Rechtswissenschaft (6th ed. 1991). For international law: Maarten Bos, A methodology of international law (1984); Maarten Bos, Theory and practice of treaty interpretation, 27 Netherlands International Law Review (1980) 3–38, 135–170.

[4] 'die Frage nach dem Vorrang entweder des Vertragstextes in seiner objektiven Bedeutung vor dem wirklichen Parteiwillen oder aber des wahren Parteiwillens vor dem Text.' Rudolf Bernhardt, Die Auslegung völkerrechtlicher Verträge insbesondere in der neueren Rechtsprechung internationaler Gerichte (1963) 15.

international treaties, which sometimes closely resemble contracts, private law or even Roman law (*ius civile*) is the model which has traditionally been applied to treaty interpretation.[5] The extent of the traditional debate on that point will be discussed now; we will leave a critique of that tradition to later sections.

In a sense, the view that the intentions of the parties are the ideal of treaty interpretation is congenial to international law.[6] The traditional view is that all international law derives from the will of states.[7] If a treaty is a meeting of wills and states will a treaty into 'existence', then the resultant text is a manifestation of that will. The will of the parties is on this view not only a logical moment. The will has content; therefore, that juncture of wills is an intent or intention. Here, the 'party intention' is the treaty *an sich*. Assuming all that, should not our cognition then aim for the 'true' treaty, i.e. party intent?[8] This approach has been described as the 'juridically natural view'.[9] And some scholars believe that this view is generally agreed; Gerald Fitzmaurice argues that 'no one seriously denies that the *aim* of treaty interpretation is to give effect to the intentions of the parties.'[10]

Granted that party intent is the aim of treaty interpretation – as was majority opinion before the Vienna Convention on the Law of Treaties 1969 – the argument brought to bear by the opposing camp (the textualists) is that the text of the treaty can be the only reliable source for the joint intentions of the parties. Only the treaty text is signed, only its terms are agreed upon and only its terms the parties promise to abide by.[11] The treaty text is specifically designed to express the intentions of the parties.[12] Yet this traditional (moderate) textualism is not inconsistent with a focus on intentions, because a categorical shift takes place behind the rhetoric against intentions. The moderate textualists switch their arguments to the epistemological plane, the means to reliably find out what the ontology looks

[5] Bos (1980) *supra* note 3 at 15; Hersch Lauterpacht, Private law sources and analogies of international law (with special reference to international arbitration) (1927) 155–188.

[6] Francis G. Jacobs, Varieties of approach to treaty interpretation: With special reference to the draft convention on the law of treaties before the Vienna diplomatic conference, 18 International and Comparative Law Quarterly (1969) 318–346.

[7] *The Case of the S.S. 'Lotus' (France* v. *Turkey)*, Judgment of 7 September 1927, PCIJ Series A No. 10 (1927) at 18: 'The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.'

[8] György Haraszti, Some fundamental problems of the law of treaties (1973) 28; Hersch Lauterpacht, Restrictive interpretation and the principle of effectiveness in the interpretation of treaties, 26 British Year Book of International Law (1949) 48–85 at 83.

[9] Gerald G. Fitzmaurice, The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points, 28 British Year Book of International Law 1951 (1952) 1–28 at 3.

[10] Gerald G. Fitzmaurice, The law and procedure of the International Court of Justice 1951–4: Treaty interpretation and other treaty points, 33 British Year Book of International Law 1957 (1958) 203–293 at 204; Heribert Franz Köck, Vertragsinterpretation und Vertragsrechtskonvention. Zur Bedeutung der Artikel 31 und 32 der Wiener Vertragsrechtskonvention 1969 (1976) 26.

[11] Bernhardt (1963) *supra* note 4 at 31.

[12] Fitzmaurice (1958b) *supra* note 10 at 205; Arnold Duncan McNair, The law of treaties (1961) 365; Ian Sinclair, The Vienna Convention on the Law of Treaties (2nd ed. 1984) 115, 141.

like, yet both see 'intentions' as the ontology that forms the law and as the goal of interpretation. While both want to cognise party intentions, the textualists claim to have found '*where* those intentions are to be found, . . . where they are (primarily) to be looked for'.[13]

However, it is also said that the methods of interpretation are not at issue here. We are told that we are being confused by detractors wishing to argue that it is all about whether recourse to *travaux préparatoires* is a 'licit' method of treaty interpretation.[14] If one accepts that it is the goal or aim of treaty interpretation to find something beyond the text of the treaty and if one argues that that goal can only validly be reached by reference to the text, rather than extra-textual references such as *travaux préparatoires* – as the traditional textualists were forced to argue – then the issue is indeed about the 'legitimacy' of recourse to such other methods.

Strict subjectivists counter by assaulting the traditional formulation of the textualist position. The hypothesis is that a text has a meaning, not merely one given specifically to the term by the drafters, but a 'plain'[15] or 'ordinary meaning'. This is understood as a meaning customarily used by most speakers of a particular language and as can be found in a dictionary. The corollary of that hypothesis is the assumption that each word has one meaning, or, at least, one meaning that can be fixed contextually. Also, if the drafters of a treaty used a word, they are presumed to have intended its 'ordinary' meaning, unless they specified a 'special meaning', such as *termini technici* by way of a purpose-built definition. Upon these assumptions rests the textualist theory that an interpreter needs to find *the* meaning of a text. The Vienna Convention is classically texualist. Article 31 sets the standard of 'ordinary meaning' as well as context, while keeping open the option that a term has a 'special meaning'. The critique proceeds upon two main arguments which are interlinked. First, focusing on the 'plainness' of the meaning is putting the cart before the horse:

> This rule [of 'plain meaning'] seems pre-eminently reasonable. Its obviousness explains the frequency with which it is invoked. Its only – but, upon analysis, decisive – drawback is that it assumes as a fact what has still to be proved and that it proceeds not from the starting point of the inquiry but from what is normally the result of it.[16]

Thus, interpretation is seen as always necessary, however clear the words may sound:

> If Article 3, according to the natural meaning of its terms, were really perfectly clear, it

[13] Fitzmaurice (1952) *supra* note 9 at 4.

[14] Bernhardt (1963) *supra* note 4 at 20; Fitzmaurice (1958b) *supra* note 10 at 206; Sinclair (1984) *supra* note 12 at 116.

[15] McNair (1961) *supra* note 12 at 364–382.

[16] Hersch Lauterpacht, The doctrine of plain meaning, in: Elihu Lauterpacht (ed.), International law. Being the collected papers of Hersch Lauterpacht (1978) Volume 4, 393–403 at 396.

> would be hardly admissible to endeavour to find an interpretation other than that which flows from the natural meaning of its terms. But I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto.[17]

The opponents of the textual view deny that there can be such a thing as 'ordinary meaning'. For them, words have no fixed meaning that need only be extracted; words can portray the intentions of the parties only imperfectly.[18] Indeed, ordinary meaning is disqualified as an impossible concept. 'Language constantly varies and meanings may fluctuate from one age to the next.'[19] Language contains 'subjective elements'[20] and there is doubt as to the objective reality of the 'meaning' or of the possibility of its reliable ascertainment.[21] If followed, this line of argument would lead to the conclusion that ascribing a meaning to a text is impossible, because, in the end, no such thing can exist. This, however, would 'lead to a denial of the very possibility of verbal communication'[22] – a radical sceptic's view which negates cognition.

However, a general term like 'party intentions' cannot fare better, like any concept that needs a definition. Using 'intentions' assumes what has yet to be established, namely that the text does not adequately reflect intent.[23] Further, one may question what 'intention' is. Is it the intention of *a* party or a joint intention? Surely the latter, subjectivists interject, because treaties are made by a meeting of wills, not by unilateral will. If common intentions are sought, what do they look like? Do the original intentions have to 'cover' every possibility that may arise – as otherwise there is no law on the issue? Hersch Lauterpacht points out that there may in fact be no common intention of the parties on a certain issue, *inter alia* because they simply did not intend the same result or were merely seeking a dilatory compromise formula.[24] '[T]reaties . . . are often a political substitute for

[17] *Interpretation of the 1919 Convention Concerning Employment of Women During the Night*, Advisory Opinion of 15 November 1932, PCIJ Series A/B No. 50 (1932), dissenting opinon Anzilotti at 383. It needs to be stressed that in this opinion Judge Anzilotti primarily constructs the meaning from the context of the article in question, despite his allusions to the subjective and teleological view. His references to *travaux préparatoires* come only *after* he has found sufficient reasons for supporting his dissenting view in the context, and only to support the conclusion previously reached. Only his rhetoric is subjectivist, not his argument.

[18] Bernhardt (1963) *supra* note 4 at 16.

[19] Bos (1980) *supra* note 3 at 149.

[20] Fitzmaurice (1952) *supra* note 9 at 2 (FN 1).

[21] Such epistemological doubts are hedged by: Illmar Tammelo, Treaty interpretation and practical reason. Towards a general theory of legal interpretation (1967) 6; Myres S. McDougal, The International Law Commision's draft articles upon interpretation: Textuality *redivivus*, 61 American Journal of International Law (1967) 992–1000 at 997.

[22] Jacobs (1969) *supra* note 6 at 340.

[23] Fitzmaurice (1958b) *supra* note 10 at 205.

[24] Lauterpacht (1949) *supra* note 8 at 76–78. The phrase 'dilatorischer Formelkompromiß' was apparently coined by Carl Schmitt, e.g. Carl Schmitt, Legalität und Legitimität (1932) 91.

rather than a legal expression of the agreement of the parties.'[25] Also, how is common will, the will of a majority of persons, possible? This is a problem in municipal legislation where hundreds of members of parliament form some sort of will to enact a statute (or do not, but merely vote on command), but it becomes exacerbated in treaty-making, where there is a multitude of factions within the state party (the actual drafters from the foreign ministry, the members of parliament agreeing to a signed treaty, the head of state ratifying it) and a multitude of state parties seeking to form a common intention.[26] Could one say that this conglomerate of 'states of mind' is either capable of forming a will to enact or – much more dangerous to the subjectivist cause – that this multitude forms intentions as to the *content* of the treaty law independently of the text? This can be doubted. To seek to cut the Gordian knot and to 'presume – to imply – intention is to predicate that intention does not matter'.[27]

4.1.2 What are rules of interpretation?

Another classical debate, which has all but stopped since the signing of the Vienna Convention and the persistent invocation of Articles 31–33 VCLT by the International Court of Justice,[28] is the precise status of the 'rules' of treaty interpretation. The question is primarily whether any of these 'rules', 'principles' or 'maxims' are norms of international law. Despite the confusion sown by implying that there is a choice between 'obligatory' rules and other rules[29] – obligatory norm (or rule) being an analytical term[30] – it is possible to portray and discuss the writings on the matter with some degree of clarity.

Before the adoption of the Vienna Convention there seemed to be unwillingness, especially among scholars from the common law tradition, to see interpretation as guided by rules. Arnold McNair typifies this approach: 'The many maxims and phrases which have crystallised out and abound in the text-books and elsewhere are *merely prima facie guides* to the intention of the parties.'[31] However, it is difficult

[25] Lauterpacht (1949) *supra* note 8 at 82.

[26] Tammelo (1967) *supra* note 21 at 5–6.

[27] Lauterpacht (1949) *supra* note 8 at 75.

[28] Santiago Torres Bernárdez, Interpretation of treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties, in: Gerhard Hafner *et al.* (eds), Liber amicorum Professor Ignaz Seidl-Hohenveldern – in honour of his 80th birthday (1998) 721–748.

[29] McDougal (1967) *supra* note 21 at 992.

[30] For Immanuel Kant, analytical terms are such where the subject contains the predicate. Immanuel Kant, Kritik der reinen Vernunft (1781, 1787) A 6–7, B 10. There cannot be a non-obligatory norm, because 'norm' itself is defined as obligatory. Hence, the term 'non-obligatory norm' is a *contradictio in adiecto*.

[31] McNair (1961) *supra* note 12 at 366 (emphasis added). Also denying rule status, but for widely differing reasons, e.g.: Bos (1980) *supra* note 3 at 21–22; Köck (1976) *supra* note 10 at 80; Pollux, The interpretation of the Charter, 23 British Year Book of International Law (1946) 54–82 at 66 (There are some indications that the author of that article, using the pseudonym 'Pollux', is Edvard Hambro); Tammelo (1967) *supra* note 21 at 48.

to ascertain what precise position some hold, because the differentiation between phenomena differs for each scholar. The ILC's last Rapporteur on the law of treaties, Humphrey Waldock, for example, distinguishes between 'principles and maxims' and 'methods' of treaty interpretation. Phrases such as *ut res magis valeat quam pereat* or *argumentum a contrario* are held to belong to the former group: '[t]hey are for the most part principles of logic and good sense valuable only as guides to assist in appreciating the meaning'.[32] The textual, subjective and teleological approaches are examples of methods. Waldock does not assert 'that there is no obligatory rule in regard to methods of interpretation',[33] but he does not claim the opposite either. Some statements imply that there are some legal rules of interpretation: 'Accordingly, the choice before the Commission *is believed to be* either . . . or to seek to isolate and to codify the comparatively few rules *which appear to constitute* the strictly legal basis of the interpretation of treaties.'[34] There is some difficulty in extracting a clear position from a text containing multiple qualifiers.

Let us assume for a moment that the rules of interpretation are norms of international law. A norm of international law must have been created in accordance with its meta-law on law-creation – it must belong to one of the 'sources' of international law. Therefore, a 'stock-taking of the sources of international law'[35] is required. Taking Rudolf Bernhardt's analysis as a model, we will look at the sources enumerated in Article 38(1)(a)–(c) of the Statute of the International Court of Justice (ICJ Statute) in turn to see whether rules of interpretation are and can be treaty or customary international law or 'general principles of law'.[36]

(1) There is treaty law on the matter in force today. The Vienna Convention on the Law of Treaties has three articles devoted to treaty interpretation, with the title of Article 31 expressly proclaiming the general *rule* of interpretation. Within its confines it is law. However, these confines are rather narrow: first, treaty law is only valid as treaty law *inter partes*;[37] second, the Vienna Convention applies only to treaties concluded after 27 January 1980;[38] third, its provisions apply only to parties to the Vienna Convention. This puts the UN Charter outside its direct applicability. Nevertheless, there are international treaty law norms concerning treaty interpretation in force today.

The claim by Heribert Köck of the irrelevancy of conventional norms thus may mean that he seeks to superimpose upon treaty norms another ideal; that of

[32] C.H.M. Waldock, Third report on the law of treaties [A.CN.4/167, A.CN.4/167/Add.1–3], 16 Yearbook of the International Law Commission 1964 (1965) Volume II, 1–65 at 54 (para 6).

[33] Waldock (1965) *supra* note 32 at 54 (para 7).

[34] Waldock (1965) *supra* note 32 at 54 (para 8) (emphasis added).

[35] 'Bestandsaufnahme der Völkerrechtsquellen'; Bernhardt (1963) *supra* note 4 at 28.

[36] This is without prejudice to the question of which sources of international law there are and what role Article 38 ICJ Statute has to play (Chapter 6).

[37] For the ICJ's claim that the VCLT's norms on treaty interpretation are customary international law see Torres (1998) *supra* note 28 and *infra*.

[38] Article 4 VCLT states that it is not retroactive, applicable only to treaties concluded after its own entry into force.

(general) hermeneutics. He asks whether these norms can adequately portray cognition:[39]

> The rules of interpretation laid down in the VCLT are 'hermeneutic rules'. . . . Because one cannot lay down a canon of hermeneutic interpretation as norms, there is no possibility of judging the correctness and completeness of these 'rules' *in abstracto*. Only in connection with a concrete case can it be proven whether the 'rules of interpretation' of the VCLT *are adequately describing the interpretative and cognitive act in this case*.[40]

If, therefore, in a concrete case the rules of the Vienna Convention were found not to be effective in adequately describing the interpretative act, their value as norms would be null – voided by the claimed superior hermeneutic ideal of how textual cognition *actually* does work; positive law is declared void by reason of theoretical predispositions.[41] Such a strong claim transcends the categorical duality of Is and Ought and puts in place a fictional norm that does not belong to the legal system 'international law'.

Köck is right in drawing our attention to an important distinction. One can understand the function of these rules or maxims either as norms imposed on how a text ought to be understood, or as 'laws of nature', as a description of the process of understanding, abstracted from those cases where the text was correctly understood. Whereas the latter are a mere guide ('If you follow these rules, you will get the correct meaning'), the former are norms properly speaking (claiming to be observed) whatever method may work best. This challenge, while it impinges upon the question at hand is a matter of general hermeneutics, a science devoted to *describing* cognition of texts, and will be discussed in Section 4.3.3.

Codifications such as the Vienna Convention have a galvanising effect. Academic uncertainty diminishes, the norms become a dogma transcending the scope of the codification instrument, critique is stifled – all because of the psychological impact of a written text. Strictly speaking, however, Articles 31–33 VCLT are legal norms of interpretation[42] – they *make their content obligatory*, whatever the merit of the method(s) they contain. In a sense, therefore, the rules of 'interpret-

[39] Köck (1976) *supra* note 10 at 70, 80. See *infra*.

[40] 'Die insoweit in der WVK gegebenen Interpretationsregeln sind hermeneutische "Regeln". . . . Da sich kein hermeneutischer Interpretationskanon normieren läßt, fehlt es auch an der Möglichkeit, in abstracto über die Richtigkeit und Vollständigkeit dieser "Regeln" zu urteilen. Nur im Zusammenhang mit einem konkreten Fall kann sich erweisen, ob die "Interpretationsregeln" der WVK jeweils den Auslegungs- und Verstehensvorgang adäquat beschreiben.' Köck (1976) *supra* note 10 at 91 (second emphasis added).

[41] Such a move is akin to the argument that the law that does not fulfil certain moral criteria is non-law; for a critique of such arguments cf.: Adolf Julius Merkl, Zum Interpretationsproblem, 42 Grünhutsche Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart (1916) 535–556, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1059–1077 at 1076.

[42] Bos (1980) *supra* note 3 at 21.

ation' are not interpretation as cognition of law, but are an addition to the set of norms to be interpreted:

> 'New legal rules are often disguised as rules of interpretation.' *These new legal rules* are precisely these statutory rules of interpretation. They can exclude a meaning otherwise possible; they can declare a merely possible meaning to be the prescribed meaning.[43]

Statutory rules of interpretation (like Articles 31–33 VCLT) – because they are norms themselves – modify the law by superimposing themselves upon all norms to which they are applicable. A treaty provision subject to the Vienna Convention has to be read 'through the lens' of Articles 31–33 and thus these rules change the treaty provision. Conversely, norms of interpretation need to be interpreted as well. Article 31 is interpreted together with the substantive treaty norms to which it is applied. To 'stress their essential unhelpfulness'[44] cannot hurt the provisions of the Vienna Convention; norms do not depend for their validity on their 'usefulness'.

(2) The second possibility is that rules of interpretation are customary international law norms.[45] Two problems may arise in this context. The 'practice' considered by scholarship is not state practice, but mostly the pronouncements of international tribunals. If the ICJ's practice is capable of forming the behavioural regularity that is the objective element of customary law, the pronouncements are statements of how the tribunal concerned thinks the law is shaped. Admitting such '*opinio iuris*' may be difficult as a matter of positive law: states are the makers of customary international law, and it is their will expressed in the subjective element that counts. To argue that the repetitive judicial pronouncements make customary international law, 'unless one denies a law-making function to judicial practice in flagrant contradiction *to actual developments*',[46] is to commingle law and fact and to assume in the last consequence that whatever happens is law. If courts make pronouncements, do they become law merely by being made and without a superior norm making these pronouncements the building block of new law? No; that would mean that whatever happens ought to happen.

The second problem, much more formidable, is that customary international law is dependent upon *customs*, accumulated factual behaviour as a pattern in reality (Section 3.2.5). Rules of interpretation cannot be grounded in a factual pattern, because they refer to a non-factual cognitive process. State practice cannot be accumulated from an interpretation of 'ordniary meaning', because – as

[43] ' "In der Form von Auslegungsregeln verbergen sich sehr oft neue Rechtsvorschriften." Diese neuen Rechtsvorschriften sind eben die gesetzlichen Auslegungsregeln. Einen – sonst möglichen – Sinn des Gesetzes sind sie in der Lage auszuschließen, eine nur mögliche Bedeutung zur gebotenen zu erheben.' Merkl (1916) *supra* note 41 at 1076.

[44] Lauterpacht (1949) *supra* note 8 at 51; McNair (1961) *supra* note 12 at 366.

[45] Bernhardt (1963) *supra* note 4 at 29; Haraszti (1973) *supra* note 8 at 212.

[46] 'es sei denn, man bestreitet der Gerichtspraxis in offensichtlichem Widerspruch *zu der tatsächlichen Entwicklung* die rechtsbildende Kraft'; Bernhardt (1963) *supra* note 4 at 30 (emphasis added).

pointed out in the previous chapter – the factually observable events in the process of interpretation are not interpretation itself and we can only describe these extraneous events. In order to be able to utilise the facts as practice, we would have to employ an interpretive scheme for reality. This we cannot do, since customary law-making as primitive method allows only the usage of the facts and cannot pierce the factual veil. Just as a customary international law norm cannot be a meta-law of law-creation, because the law-creation is not real behaviour, so an ideal, customary law cannot regulate interpretation, because it too is divorced from observable reality.

(3) One could also discuss the validity of rules of interpretation as 'general principles of law'. Surely, the ideal source from which to draw rules of interpretation would be a comparison of municipal legal orders, which frequently contain statutory rules of interpretation? The general question is whether the fact that the municipal law of many states contains norms with similar content is enough to create a norm of positive international law. What is missing to make it positive is an act of will. While the municipal norms all have their own act of will,[47] this does not encompass the will to create *international* law. Comparative legal scholarship is not international law-making, despite Article 38(1)(c) of the Statute. In this particular case, the rules applicable to international law do not, by their nature, appear in the municipal setting, where the rules are far too diverse anyway.[48]

So, if, apart from the rules laid down in Articles 31–33 VCLT, 'rules' of interpretation are not norms after all, what are they? The most promising avenue is that they are a description of the cognitive-hermeneutic processes when humans read texts. We might be able to distil, to induce, a manual of right cognition, where following the rules would ensure that the text be understood, while otherwise the text would not be cognised correctly. But we will discuss this further below, in Section 4.3.3.

4.1.3 Particularities of UN Charter interpretation

The third orthodox debate has later origins and was sparked by the creation of the UN Charter and the early practice of its organs. In two early advisory opinions – *Reparation for Injuries* (1949) and *Certain Expenses* (1962) – the Court started to differentiate between the interpretation of the UN Charter and of, say, a Bilateral Investment Treaty or a Treaty of Friendship, Commerce and Navigation.[49] That different approach in essence relates to a redefined focus on the elements of 'change' and 'telos' to the detriment of 'genesis', 'party intent' and 'text'.

One can trace parallel argument in other international regimes, for example

[47] Hans Kelsen, Allgemeine Theorie der Normen (1979) 113–114 (Ch 34 III).

[48] Bernhardt (1963) *supra* note 4 at 29; indirectly: Haraszti (1973) *supra* note 8 at 215–220.

[49] See the recent judgment of the International Court of Justice in the *Oil Platforms* case: *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Merits, Judgment of 6 November 2003, ICJ Reports (2003) 161.

in the European Convention on Human Rights. Here the European Court of Human Rights also seeks to impose a specific form of viewing the constituent instrument. In *Tyrer* v. *United Kingdom*, the Strasbourg court interpreted 'degrading punishment' in Article 3 of the European Convention on Human Rights 'in the light of present-day conditions', including the import of 'commonly accepted standards in the penal policy of the member States'.[50] The following remarks, however, will focus on the claims made for the UN Charter.

It has been contended in scholarly writings that the UN Charter is subject to a different regime of interpretation. The Charter, statutes of important international organisations or even all so-called 'law-making' treaties are construed as analogous to a municipal constitution, whereas other treaties, in turn, are to be treated analogously to contracts in private law.[51] This section describes some of these claims. Claims relating to subsequent practice, even as a method of interpretation, are deferred to Section 4.4. It is significant that nearly all of the scholars who describe the principles of UN Charter interpretation support this different form of interpretation.[52] Of course, those who do not think so perhaps omit to discuss their opinion in this respect explicitly, so the tally may not be quite as overwhelming as it seems at first glance.

A special approach to the interpretation of the UN Charter, of constituent instruments of international organisations in general, or of *traités-lois* demands, however, that this status is 'justified'. If the rules of treaty interpretation are norms, then the different norms of Charter interpretation will have to have been based on international law. If they are not norms, one will also have to prove a substantive difference in the object of cognition (in this case, the UN Charter) to merit a a different method of cognition. Where cognition becomes *change* – as in the implied powers doctrine or the influence of subsequent practice – the debate shifts to a new level. A change of international treaty law may only be brought about by such international law which is authorised to change international treaty law. While this will be the main focus of Section 4.4, some elements of that debate will appear in this section also.

Four phenomena characterise this special approach to the interpretation of the Charter. First, a dynamic approach to interpretation; second, the pre-eminence of teleological interpretation; third, the *effet utile* doctrine; and fourth, the implied powers doctrine. They are all closely related and the last two can be seen as a

[50] *Tyrer* v. *United Kingdom*, Merits, Judgment of 25 April 1978, ECHR Series A, No. 26 (1978) 15–16 (para 31); See also: *Marckx* v. *Belgium*, Merits, Judgment of 13 June 1979, ECHR Series A, No. 31 (1979) 19 (para 41); Alfred Verdross, Bruno Simma, Universelles Völkerrecht. Theorie und Praxis (3rd ed. 1984) 499.

[51] Bos (1980) *supra* note 3 at 156–157. Kelsen criticised that distinction as early as 1920: Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre (1920) 261–263, 282–285.

[52] Notable exception Gaeatano Arangio-Ruiz, The 'federal analogy' and UN Charter interpretation: A crucial issue, 8 European Journal of International Law (1997) 1–28 and perhaps Hans Kelsen, The law of the United Nations. A critical analysis of its fundamental problems (1950).

logical consequence of the first two.[53] The dynamic approach to treaty interpretation sees the treaty not as ossified text, but as a 'living organism',[54] changing with its 'environment'. This view applies in particular to the Charter and many scholars support viewing it in a dynamic way.[55] The origin of such a view lies in analogy drawn from national constitutions: the Charter is seen as a constitution[56] of the world; it is hence a kind of public law and to be interpreted as such.[57] This is the argumentative base for the implied powers doctrine. Not all are convinced, however, with Gaetano Arangio-Ruiz disputing the bases of the analogy, as well as the outcome: '[T]he Charter is not "the constitution" or "a constitution" of the community of the member States or of the community of all existing states, let alone the community of mankind.'[58] Krzysztof Skubiszewski has a more complex opinion on the matter:

> [The] similarities do not suffice to make it possible to approach the . . . Charter along the lines . . . of national constitutions . . . Analogies derived from the place, role and development of constitutional law, if at all relevant, call for great caution. . . . The meaning of the word 'constitution' changes when transposed from the domestic to the international scene . . . For all that, it cannot be denied that the constitutional nature of the treaty has an influence on its interpretation.[59]

Whereas the dynamic approach takes the meaning of words at the time of interpretation as relevant, traditional inter-temporal law requires that the meaning at the time of the adoption of the text be adopted.[60] The latter approach is often,

[53] In addition it can be argued that the teleological method itself 'belongs to the "creative or dynamic methods of interpretation" ' (Krzysztof Skubiszewski, Remarks on the interpretation of the United Nations Charter, in: Rudolf Bernhardt *et al.* (eds), Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte: Festschrift für Hermann Mosler (1983) 891–902 at 893).

[54] Skubiszewski (1983) *supra* note 53 at 893 citing: GAOR 14th Sess., Supp. No. 1A [A/4132/Add.1].

[55] Bos (1980) *supra* note 3 at 160; Ervin P. Hexner, Teleological interpretation of basic instruments of public international organizations, in: Salo Engel (ed.), Law, state and international legal order. Essays in honor of Hans Kelsen (1964) 119–138; Wolfram Karl, Die spätere Praxis im Rahmen eines dynamischen Vertragsbegriffs, in: Roland Bieber, Georg Ress (eds), Die Dynamik des europäischen Gemeinschaftsrechts. Die Auslegung des europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organe (1987) 81–100 at 82–83; Georg Ress, The interpretation of the Charter, in: Bruno Simma (ed.), The Charter of the United Nations. A commentary (2nd ed. 2002) 13–32 at 15 (MN 1); Ignaz Seidl-Hohenveldern, Gerhard Loibl, Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften (7th ed. 2000) 247 (MN 1601b); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports (1971) 16 at 31 (para 53).

[56] Ress (2002) *supra* note 55 at 15 (MN 1).

[57] Bos (1980) *supra* note 3 at 157.

[58] Arangio-Ruiz (1997) *supra* note 52 at 16–17.

[59] Skubiszewski (1983) *supra* note 53 at 892–893 (emphasis added).

[60] Robert Y. Jennings, Arthur Watts (eds), Oppenheim's international law (9th ed. 1992) Volume 1, 1282; *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier Between Turkey and Iraq)*, Advisory Opinion of 21 November 1925, PCIJ Series B No. 12 (1925) at 24. Cautiously dynamic: Verdross and Simma (1984) *supra* note 50 at 496–497.

though not necessarily, combined with the subjective position,[61] as party intent at the time of the conclusion of the treaty is seen as creating the agreement that is the treaty. What will become clear below is that one's approach to the character of a treaty such as the UN Charter directly influences the outcome of that interpretation.[62] Doctrines such as 'implied powers' or 'subsequent practice' would not have been developed were it not for the differentiation between *traités-lois* and *traités-contrats*.

Scholars also seem agreed that in interpreting the Charter and other 'law-making' treaties the teleological method of interpretation has pride of place.[63] But where does the interpreter get the Charter's *telos* or 'object and purpose'? It can be explicit in the text, such as the Preamble or Article 1 of the UN Charter.[64] The interpreter can also extract an aim and purpose through a systematic interpretation of the whole document, viewed within the 'hermeneutic circle' of going from the part to the whole and back. 'One must study the "entire framework" of an instrument in order to ascertain its "role", "scope", "tenor", or "spirit".'[65] Third, *telos* can be imported from external ideas, independently of the treaty itself. The *travaux préparatoires*, for example, may provide an insight into what the Drafters intended to achieve and which overarching goals the treaty was meant to serve. Although the *travaux préparatoires* are traditionally considered an element of subjective interpretation, this belief confounds method of proof and the object of proof. Preparatory works can be used as an epistemological tool to ascertain the treaty's *telos*, yet they are expressions of the will of the parties. Therefore, it is difficult to understand the trend to argue that the preparatory works hold a diminished importance in teleological interpretation.[66] Their use as a means to establish *telos* is tautologically limited if they are used to prove the intentions of the parties, not if they are used as a means to discover the aim and scope of the treaty.

[61] Haraszti (1973) *supra* note 8 at 28. Compare, as a counterpoint, Lauterpacht's opinion: 'The intention of the parties . . . is the law. Any considerations – of effectiveness or otherwise – which tend to transform the ascertainable intention of the parties to secondary importance are inimical to the true purpose of interpretation.' Lauterpacht (1949) *supra* note 8 at 73.

[62] Ress (2002) *supra* note 55 at 23 (MN 19).

[63] C.F. Amerashinge, Interpretation of texts in open international organizations, 65 British Year Book of International Law 1994 (1995) 175–209 at 193; Bos (1980) *supra* note 3 at 160; Hexner (1964) *supra* note 55 at 130–131; Ress (2002) *supra* note 55 at 30 (MN 34); Seidl-Hohenveldern and Loibl (2000) *supra* note 55 at 247 (MN 1601b); Oscar Schachter, Interpretation of the Charter in the political organs of the United Nations, in: Salo Engel (ed.), Law, state and international legal order. Essays in honor of Hans Kelsen (1964) 269–283 at 279; Skubiszewski (1983) *supra* note 53 at 893; Verdross and Simma (1984) *supra* note 50 at 494.

[64] Rüdiger Wolfrum, Article 1, in: Bruno Simma (ed.), The Charter of the United Nations. A commentary (2nd ed. 2002) 39–47, at 40 (MN 2, 4).

[65] Pollux (1946) *supra* note 31 at 67.

[66] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports (1951) 15, Separate Opinion Alvarez at 53 (special conventions must not be interpreted with reference to *travaux préparatoires*, they have a life of their own). Amerashinge (1995) *supra* note 63 at 193; Bos (1980) *supra* note 3 at 160; Skubiszewski (1983) *supra* note 53 at 194.

Finally, *telos* may be imported from independent sources, such as natural law or the particular scholar's politico-moral value-preferences. In scholarship, this distinction is expressed as whether the object and purpose should be reflected in the text or not.[67] Judge Spender writes in *Certain Expenses*: 'The *stated purposes* of the Charter should be the prime consideration in interpreting its text.'[68]

Yet all these views counter-posit teleological interpretation to a textual or 'literal' interpretation. The analogy to domestic public law is taken to imply a particular 'legal culture' of public law interpretation, one that is liberal in its construction of terms and orientated towards overarching principles rather than 'hard law':

> It may perhaps be questioned whether these and other theoretical concepts are appropriately classified as 'legal' norms since they are not formulated as such in the Charter. But are not constitutions generally considered to have certain underlying and implicit premises, which . . . provide a 'higher-law' rationale to justify choices between competing principles?[69]

Such a view of a constitutional or public law method of interpretation is not common to all or perhaps even most municipal traditions of public law scholarship. The doctrine of 'implied powers' has its origins in United States constitutional interpretation. In Austrian public law, for example, a literal, strict interpretation, not departing from the constitution's terms, is considered appropriate, as opposed to the approach in private law. Maarten Bos is irritated that the Court 'applied a strict method of interpretation in two questions of *an undeniable public law character*',[70] but the 'public law character' of certain questions does not necessarily have to lead to a liberal approach. Bos is making an analogy to a specific municipal legal tradition.

The doctrine of *effet utile*, or *ut res magis valeat quam pereat*, is an older institution whose application to the Charter has occured by way of a reformulation of that doctrine. It is no coincidence that it is reminiscent of the Roman law principle of *favor testamenti*. While the *effet utile* doctrine has traditionally been defined subjectively: 'The parties are presumed to intend the provisions of a treaty to have a certain effect and not to be meaningless',[71] the focus in interpreting a testament is on the testator's will, rather than the words the testator used. The doctrine of

[67] Bernhardt (1963) *supra* note 4 at 89; Isabelle Buffard, Karl Zemanek, The 'object and purpose' of a treaty: an enigma?, 3 Austrian Review of International and European Law (1998) 311–343 at 330.

[68] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962) 15, Separate Opinion Spender at 185 (emphasis added). The emphasised words make it clear that he considers those purposes to be most relevant – or only those purposes to be relevant – which are written down in the Charter itself. Amerashinge (1995) *supra* note 63 at 193.

[69] Schachter (1964) *supra* note 63 at 278.

[70] Bos (1980) *supra* note 3 at 158 (emphasis added).

[71] Jennings and Watts (1992) *supra* note 60 at 1280.

favour testamenti evolved into a positive legal rule in many civil codes as an instrument to alleviate the harshness of the formalist Civilian law of succession.

The rule of effectiveness in international law, as applied to instruments like the Charter within the dynamic-teleologic approach to interpretation, is markedly different to the *effet utile* doctrine of old. While the (presumed) will of the parties to make the treaty effective was the starting point for the historicist-subjectivist approach, this new doctrine is objectified. Lauterpacht defends the subjectivist roots:

> The intention of parties . . . is the law. Any consideration – of effectiveness or otherwise – which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation. . . . Moreover, it is idle to pretend that a particular presumption – that of effectiveness – follows invariably from the attitude usually adopted by states . . . Parties to treaties often wish the treaty to be only partially effective.[72]

Today, effectiveness is linked to the text of the treaty; Rudolf Bernhardt identifies *effet utile* as preference given to an interpretation which gives best effect to the aim of the treaty and its provisions.[73] Thus, teleology is closely connected to effectiveness – the realisation of the effects is measured from what is considered the treaty's object and purpose,[74] even if that means not taking the text into account.[75] A 'general measure of aim or effectiveness',[76] unrestrained by text or will, is criticised,[77] for this merely replaces the positive norm with a scholar's personal value-preferences. To choose an interpretation which is effective over one that is not (if the difference can be measured at all) is to choose as arbitrarily as to select an interpretation by a throw of the dice. Effectiveness is a fact; when it is present things *do happen*. Norms are an Ought; when they are valid things *ought to happen*. The two modes are categorically different; that things are more likely to happen is neither indicative nor does it change how things ought to happen.

The most far-reaching emanation of the differentiated approach, one that borders on law-changing, is that of implied powers. In *Reparation*, the International Court of Justice formulated the doctrine (and its application to international law) most prominently:

> Under international law, the Organization must be deemed to have those powers

[72] Lauterpacht (1949) *supra* note 8 at 73; Seidl-Hohenveldern and Loibl (2000) *supra* note 55 at 247 (MN 1602).

[73] Bernhardt (1963) *supra* note 4 at 96; Ress (2002) *supra* note 55 at 31 (MN 35).

[74] *Certain Expenses* (1962) *supra* note 68, Separate Opinion Spender at 186: 'Interpretation of the Charter should be directed to giving effect to that purpose [maintaining international peace and security], not to frustrate it.' See also Fitzmaurice (1952) *supra* note 9 at 19.

[75] Amerashinge (1995) *supra* note 63 at 195.

[76] 'allgemeines Zweck- und Effektivitätsdenken' Bernhardt (1963) *supra* note 4 at 96.

[77] E.g.: Bernhardt (1963) *supra* note 4 at 96; Verdross and Simma (1984) *supra* note 50 at 494.

> which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.[78]

We cannot expect an international tribunal to justify what it thinks is international law during the course of its giving a judgement or opinion. Yet we might expect to find such justification in scholarly literature; but such an expectation would largely be unfulfilled. Apart from remarks about its origins in US constitutional doctrine,[79] the apprarent obviousness of a specific tradtion of public law interpretation mentioned above and a reference that founds implied powers in the principle of good faith,[80] there is little in the way of justification. The doctrine can be seen as analogous to teleological interpretation, because it is the treaty's purposes that shall guide the application.[81] One could argue that the basis for the implication of powers is a contextual reading of the Charter, taking into account relevant international law, as mentioned in Article 31(3)(c) VCLT. The Court alludes to such a solution in *Reparation*; its declaration of the applicability of the doctrine comes after it finds that 'the situation is dominated by the provisions of the Charter *considered in the light of the principles of international law*'.[82]

In effect, the doctrine is only alleged to be applicable in international law. One can give counter-arguments, at least with respect to the degree the Court has used the doctrine in *Reparation*. First, the Court's formulation of '*necessary* implication'[83] is based on a logical error, for there is no causal necessity to imply anything from anything – all implication is an act of will creating the implication, just as an analogy is an act of creation, not cognition. Whenever a regulation is not 'complete' – complete, that is, in the mind of the person looking at the regulation – filling the gap is the person's doing and does not happen on its own.[84] Filling a 'gap' is creation, not cognition. Why should we presume an international organisation to have more, rather than fewer powers? Some would rather the United Nations had fewer powers,[85] or would agree that the doctrine of implied powers can also reduce the United Nations' powers,[86] but that is not the argument here.

[78] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949) 174 at 182.

[79] E.g. Krzysztof Skubiszewski, Implied powers of international organisations, in: Yoram Dinstein (ed.), International law at a time of perplexity. Essays in honour of Shabtai Rosenne (1989) 855–868 at 855.

[80] Bernhardt (1963) *supra* note 4 at 97. He adds 'und der Natur der Sache', where 'Natur der Sache' is an untranslatable phrase roughly meaning 'nature of the thing', a phrase reminiscent of natural law, where law is derived from nature's order (see Alfred Verdross, Statisches und dynamisches Naturrecht (1971)). Kelsen shows what this reliance leads to and paraphrases Goethe's 'Faust' in the process: 'What the "nature of the thing" men call, is merely their own spirit after all . . .' 'Was man "Natur der Sache" heißt, das ist des Herren eigener Geist . . .'; Kelsen (1979) *supra* note 47 at 98 (Ch 28).

[81] Skubiszewski (1989) *supra* note 79 at 857.

[82] *Reparation* (1949) *supra* note 78 at 182 (emphasis added).

[83] This phrase is echoed by Bernhardt (1963) *supra* note 4 at 98.

[84] Kelsen (1960) *supra* note 3 at 255 (Ch 35 g γ).

[85] Arangio-Ruiz (1997) *supra* note 52.

[86] Ress (2002) *supra* note 55 at 31 (MN 36); Seidl-Hohenveldern and Loibl (2000) *supra* note 55 at 248 (MN 1604).

One simply cannot presume that norms regulate a situation one way or the other when they do not regulate the situation at all.

Second, the doctrine of 'implied powers' is an idea which is not common among all – or even most – traditions of public law scholarship. The example of Austria has been given above: Article 18 of the Federal Constitution[87] expressly prescribes that all administrative acts must be based on laws, which shows that the Administrative Court, for example, may not create an implied power of an organ where such powers are not made explicit in the law. The Lisbon Treaty, to take another example, makes it clear that 'competences not conferred upon the Union in the Treaties remain with the Member States'.[88] Thus – despite some contrary jurisprudence of the European Court of Justice[89] – it is likely that there can be no implied powers of the European Union organs either. Even if the United Nations were a federative state, this would not automatically (necessarily) mean that such a doctrine is law within the federation. It is merely one way of shaping the relationship, not the only way.

In so far as the implied powers doctrine is argued to be able to change treaties, the doctrine must be part of positive international law in order to work, which has not been attempted. Krzysztof Skubiszewski writes: 'Obviously, the perception of the Charter as a constitution does not entail the power to extend, alter or disregard its provisions under the guise of interpretation.' The question of change poorly disguised as interpretation will be tackled in Section 4.4. Even in a revolutionary moment establishing a wholly new international law based on a claim to supremacy, such a new law – while not barred by the constraints of traditional positive international law – would also have to explicitly incorporate implied powers among its norms in order for it to work. The Charter as it stands does not claim supremacy in this respect, despite Article 103. It does not and cannot fill the mould of such a radical design, which is truly utopian and would demand a complete reconception of international society.[90]

Having thus dredged the traditional debate, we have been able to find uncertainty. The debate on whether terms or intent count in treaty interpretation continues to go back and forth and Martti Koskenniemi makes a valid point when he sees the traditional objective and subjective positions as 'hopelessly circular'.[91]

[87] Art 18 Abs 1 Bundes-Verfassungsgesetz, BGBl 1930/1.

[88] Articles 4, 5(2) Treaty on European Union, Official Journal of the European Union C 306 (17 December 2007). See, however the explicit 'flexibility clause' in Article 352.

[89] E.g.: ECJ, *Fédération Charbonnière de Belgique* v. *High Authority of the European Coal and Steel Community*, C 8/55, Judgment of 16 July 1956; ECJ, *European Agreement on Road Transport (Commission of the European Communities* v. *Council of the European Communities)*, C 22/70, Judgment of 31 March 1971; ECJ, *Migration Policy – Competence of the Community (Federal Republic of Germany and Others* v. *Commission of the European Communities)*, C 281, 283–285, 287/85, Judgment of 9 July 1987. For a recent overview of the judicial practice and scholarly discussion on the implied powers doctrine in the UN and EU/EC, cf. Jan Klabbers, An introduction to international institutional law (2nd ed. 2009) 53–73.

[90] Philip Allott, Eunomia. New order for a new world (1990).

[91] Martti Koskenniemi, From apology to utopia. The structure of international legal argument (1989, 2005) 295 (337).

While the dynamic approach, the teleological method and the doctrines of effectiveness and implied powers are very close, their results are connected to the text of the treaty rather peripherally. With respect to the UN Charter we can identify a particular tendency among scholars and the Court:[92]

> [That] tendency [is] to justify in law everything that happens in the UN by assuming too easily either the modification or abrogation of Charter rules by tacit agreement, or through the formulation of customary rules; rules which, if need be, would change when the UN practice changes direction.[93]

As was shown in Chapter 2, on certain questions a textual interpretation and the *travaux préparatoires* do not provide indications for one or the other conclusion. It seems spurious to ascribe either one or the other meaning to a norm on that basis. Even more problematic is the presupposition of traditional doctrine that interpretation has to have *one* result and that the interpreter has to find *the* meaning to the text. However, there is not always one result to an interpretation. If it is possible to ascribe more than one meaning to a text, the text as it stands simply does not give an answer to the question of 'what is the one correct meaning?' It may be considered defeatist to admit that one cannot find a solution, but it is erroneously overzealous to simply create a 'gap-filler'. In the next subsection, we will see whether the critique applied by the Vienna School provides a better approach to the problem of interpretation and whether it can make interpretation less uncertain.

4.2 The Kelsenian challenge

The first notable fact in this connection is that the literary bases of interpretation in international law, on the one hand, and of critical *theoretical* approaches, on the other hand, do not overlap. Apart from a limited number of papers on international legal theory,[94] in-depth discussion of the theoretical dimension of interpretation has only happened in municipal law settings. Critical approaches tend, therefore, to be present within the municipal academic debates on legal theory, and tend not to be cited in international legal scholarship. The following will present Hans Kelsen's and Adolf Merkl's writings on interpretation in law, which span the divide and are therefore relevant to the problems of treaty interpretation.

The Vienna School of legal theory around Hans Kelsen is known for its innovative approach to many problems of jurisprudence. So it is with interpretation.

[92] Regarding the Court's view that permanent members of the Security Council abstaining is compatible with Article 27(3) UN Charter: *Namibia* (1971) *supra* note 55 at 22 (para 22).

[93] Arangio-Ruiz (1997) *supra* note 52 at 25.

[94] E.g.: Waldemar Hummer, 'Ordinary' versus 'special' meaning. Comparison of the approach of the Vienna Convention on the Law of Treaties and the Yale-school findings, 26 Österreichische Zeitschrift für öffentliches Recht (1975) 87–163.

It may prove beneficial for international lawyers to be confronted – in a virtual dialogue in the pages of this book – with the objections of that theory. It seems not to have been done before and it may at least result in a clarification of terms, a more precise knowledge of the issue. Kelsen's paper *Zur Theorie der Interpretation* (1934), his nearly identical Part VIII in the second edition of *Reine Rechtslehre* (1960) and the preface of *The Law of the United Nations*, (1950) as well as Adolf Merkl's early article *Zum Interpretationsproblem*, (1916) will mainly be used to present the Vienna School's position.[95]

4.2.1 The Pure Theory of Law's theory of interpretation

For Kelsen, interpretation is intimately connected with the hierarchical structure of legal orders – the *Stufenbau*.[96] Interpretation is largely a means which concretises a more general norm. For example, a judgment of a criminal tribunal interprets and applies a section of the penal code; its creation of the individual norm that is its judgment is an application. Therefore, he distinguishes sharply between authentic and non-authentic interpretation (although he uses the word 'authentic' in a specifc way).[97] Whereas authentic interpretation is the application of law (*Vollziehung*), there is also the scientific cognition of the law. The former is an act of norm-creation, the concretisation of a general norm, while the latter is a scientific quest for the 'meaning-content', as Guastini puts it,[98] of the norm.

The higher-order norm cannot fully determine the content of the lower norm, and that norm cannot be logically derived from the higher norm.[99] The lower norm has to be created by an act of will, a judgment from a penal code just as much as a law from the constitution. The lack of determination inherent in such relatively indeterminate norms results in discretionary freedom (*Ermessensfreiheit*). The authors of the higher norms (e.g. a parliament) are not alone in specifically granting such discretion to executive organs and thus creating deliberately indeterminate norms. The use of language as a medium causes unintended indeterminacy as well. Indeterminacy creates multiple possible meanings; norms may well not be univocal. The norm is merely a frame of possible meanings:

[95] Hans Kelsen, Zur Theorie der Interpretation, 8 Revue internationale de la théorie de droit (1934) 9–17, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1363–1373; Kelsen (1960) *supra* note 3; Kelsen (1950) *supra* note 52; Merkl (1916) *supra* note 41, respectively. Because Kelsen (1934b) and Kelsen (1960) *supra* note 3 are virtually identical in content on the topic of interpretation, they are cited indiscriminately throughout this chapter.

[96] Robert Walter, Das Auslegungsproblem im Lichte der Reinen Rechtslehre, in: Günther Kohlmann (ed.), Festschrift für Ulrich Klug zum 70. Geburtstag (1983) 187–197 at 188.

[97] Kelsen (1960) *supra* note 3 at 346 (Ch 45). See Section 4.2.4.

[98] Riccardo Guastini, Kelsen on legal knowledge and scientific interpretation, in: Letizia Gianformaggio, Stanley L. Paulson (eds), Cognition and interpretation of law (1995) 107–115 at 108.

[99] Kelsen (1979) *supra* note 47 at 185–187 (Ch 58 IX).

> In all these cases the law to be applied only provides a frame, within which there is more than one possibility of application. Any act that stays within this margin and gives the frame a possible sense is legal. . . . If 'interpretation' is to be understood as epistemic ascertainment of the meaning of the object to be interpreted, the result of a legal interpretation can only be the ascertainment of a frame (which is the law to be interpreted) and thus the cognisance of multiple possibilities [of meaning], which are possible within the frame.[100]

Kelsen disagrees strongly with scholars who believe that norms necessarily have *one right meaning*.[101] While this is one of the claims of 'traditional jurisprudence', they are wrong to expect this to be the result. If one's scholarly focus lies only on positive law, one cannot decide between multiple meanings, because it is positive law that is indeterminate (uncertain). If one imports external standards, such as morals, justice or political ideologies, one imports something that is not part of positive law and hence 'justifies' one's decision by a standard incommensurate with legal scholarship's exclusive focus on law.[102]

Interpretation by an authorised organ *decides* by creating a lower-level norm; scientific interpretation by a scholar *cognises*. The possibilities of legal cognition, however, are limited.[103] Legal scholarship can only define the frame of possible meanings for us.[104] It cannot replace the application by organs:

> Non-authentic interpretation of the law, that is interpretation by persons not authorised by the law itself, is legally as irrelevant as the judgment of a private person on the guilt or innocence of an individual accused before a competent court of having committed a crime.[105]

4.2.2 Are the methods of interpretation irrelevant?

The 'frame theorem' is the core of the Vienna School's theory of interpretation, but it is not the centre of the controversy surrounding that theory. It is rather the

[100] 'Das anzuwendende Recht bildet in allen diesen Fällen nur einen Rahmen, innerhalb dessen mehrere Möglichkeiten der Anwendung gegeben sind, wobei jeder Akt rechtmäßig ist, der sich innerhalb dieses Rahmens hält, den Rahmen in irgendeinem möglichen Sinn ausfüllt. . . . Versteht man unter "Interpretation" die erkenntnismäßige Feststellung des Sinnes des zu interpretierenden Objektes, so kann das Ergebnis einer Rechtsinterpretation nur die Feststellung eines Rahmens sein, den das zu interpretierende Recht darstellt, und damit die Erkenntnis mehrerer Möglichkeiten, die innerhalb dieses Rahmens gegeben sind.' Kelsen (1960) *supra* note 3 at 348–349 (Ch 45 d).

[101] Larenz (1991) *supra* note 3 at 314.

[102] Kelsen (1934b) *supra* note 95 at 1368–1369. Such a standard can be found in: Franz Bydlinski, Gesetzeslücke, § 7 ABGB und die 'Reine Rechtslehre', in: Christoph Faistenberger, Heinrich Mayrhofer (eds), Privatrechtliche Beiträge. Gedenkschrift Franz Gschnitzer (1969) 101–116 at 103, 106; Günther Winkler, Rechtstheorie und Erkenntnislehre (1990) 222.

[103] Heinz Mayer, Die Interpretationstheorie der Reinen Rechtslehre, in: Robert Walter (ed.), Schwerpunkte der Reinen Rechtslehre (1992) 61–70 at 62.

[104] Winkler (1990) *supra* note 102 at 213.

[105] Kelsen (1950) *supra* note 52 at xvi.

theory's presuppositions that are problematised and are the cause for criticism of Kelsen's theory of interpretation. Criticism of the Kelsenian theory of interpretation is more often than not directed against the Pure Theory of Law as a whole.[106] The curious fact that Kelsen seems to have been *blasé* about the methods of interpretation[107] will be our starting point for our analysis of the origins of the frame theorem and how it is connected to the notion of 'purity' of positive law.

Kelsen seems less than enthusiastic about discussing the traditional methods of interpretation (such as textual, contextual, subjective or teleological interpretation). This is strange, as even Kelsen's close collaborator Adolf Merkl is emphatic about the logical priority of what he calls the 'logico-grammatical method'.[108] Kelsen writes:

> To ignore the text and to care for the presumed will of the legislator, or to follow the text and ignore the . . . will of the legislator has . . . equal value.[109]

Yet is he really just blasé about the methods of interpretation, and why would he be? Again (cf. Section 4.1.1) the real issue is not the method, but the goal or object of interpretation, that is, the ascertainment of the sense of a norm.[110] However, other scholars in the same tradition have adopted different positions. Merkl adopts a clearly objectivist viewpoint. For him, the logico-grammatical method is merely the taking-into-consideration of the means by which the law expresses itself, of language and thought. Robert Walter and Heinz Mayer take the opposite view. Kelsen had defined positive norms as the 'sense [or meaning] of an act of will'[111] and consequently, interpretation as hermeneutic tool must be directed at finding the content of that act of will – the will of the legislator.[112] Thus, they are part of the subjectivist camp. Yet Kelsen himself did not decide. The reason for Kelsen's noncommittal stance may have been that there are good grounds for rejecting either opinion. Also, the Pure Theory could be argued never to have managed to solve a key problem of its normativist construct (Section 4.2.3) and so Kelsen could not commit to one camp or another before he had solved the problem, which he did not.

Merkl's objectivist view presupposes that law texts follow the rules of grammar and logic. This is a common presumption among lawyers: law and its textual manifestations are assumed to be logically and grammatically correct, because

106 Kurt Ringhofer, Interpretation und Reine Rechtslehre, in: Adolf Julius Merkl *et al.* (eds), Festschrift für Hans Kelsen zum 90. Geburtstag (1971) 198–210 at 206–207.

107 Kelsen (1960) *supra* note 3 at 350 (Ch 45 e); *contra*: Bydlinski (1969) *supra* note 102 at 108.

108 'grammatisch-logische Interpretation'; Merkl (1916) *supra* note 41 at 1073.

109 'Sich unter Vernachlässigung des Wortlauts an den mutmaßlichen Willen des Gesetzgebers zu halten oder den Wortlaut streng zu beobachten und sich dabei um den . . . Willen des Gesetzgebers nicht [zu] kümmern, ist . . . durchaus gleichwertig.' Kelsen (1934b) *supra* note 95 at 1367.

110 'Feststellung des Sinns der . . . Norm'; Kelsen (1934b) *supra* note 95 at 1366.

111 'Sinn eines Willensaktes'; Kelsen (1979) *supra* note 47 at 2 (Ch 1 III).

112 Mayer (1992) *supra* note 103 at 68; Walter (1983) *supra* note 96 at 192.

'principles of rational organization are at the heart of the normative concept'.[113] Michael Thaler differentiates between a legal order defined by membership of norms to the order ('positive legal order 1') and one that combines membership with the criterion that the norms contained therein are meaningful ('positive legal order 2'). He argues that Kelsen subscribed to positive legal order 2 until 1960, whereas in his late works he did away with the role of logic in law, most forcefully demonstrated in *Allgemeine Theorie der Normen* (1979). Thaler himself espouses legal order 2,[114] but the position that Kelsen never argued for a 'meaningful' legal order in Thaler's sense seems closer to the spirit of the Pure Theory of Law.

Kelsen was sceptical of the role of logic in law even before 1960, and for good reasons.[115] In 1928, Kelsen published a paper delimiting positivism from natural law. There, he argues that to add the criterion of a sensibleness, logical consistency or meaningfulness to the definition of 'legal order' means to add something to positive law and hence to transcend the Pure Theory's positivism. 'The postulate of a *meaningful*, i.e. logically consistent, order means that legal science crosses the boundary of pure positivism. The abandonment of this postulate would mean its dissolution.'[116] In that paper, Kelsen seeks to portray law as 'a meaningful whole', yet law, he argues, does not necessarily need to be taken at its word.[117] He does not contradict Thaler's assumption, but Kelsen is less enthusiastic about logic in law than Thaler. In later writings, Kelsen explicitly allows for senseless positive regulation:

> The statute here simply makes no sense. This cannot be excluded, because laws are made by humans. A norm can have non-sensical content. In that case no interpretation will be able to make sense of its terms. *That is, because interpretation cannot extract something from a norm which it did not have in the first place.*[118]

Yet the question remains why we should think that the textual formulation of a norm has to make sense. The act of will whose meaning is the norm is willed by

[113] Bos (1980) *supra* note 3 at 18.

[114] Michael Thaler, Mehrdeutigkeit und juristische Auslegung (1982) 25–44.

[115] *Contra*: Winkler (1990) *supra* note 102 at 222.

[116] 'Mit dem Postulat einer *sinnvollen*, d.i. widerspruchslosen Ordnung überschreitet die Rechtswissenschaft bereits die Grenze des reinen Positivismus. Der Verzicht auf dieses Postulat wäre aber zugleich ihre Selbstauflösung.' Hans Kelsen, Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus (1928), reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 281–350 at 339.

[117] '. . . insbesondere nicht, daß es in dem Sinne als Recht angenommen werden müsse, den es sich selbst beilegt.' Kelsen (1928) *supra* note 116 at 298 (para 11).

[118] 'Das Gesetz bestimmt hier eben etwas Unsinniges. Das ist, da Gesetze Menschenwerk sind, nicht ausgeschlossen. Eine Norm kann auch einen sinnlosen Inhalt haben. Dann ist aber keine Interpretation imstande, ihr einen Sinn abzugewinnen. Denn durch Interpretation kann aus einer Norm nicht herausgeholt werden, was nicht schon vorher in ihr enthalten war.' Kelsen (1934b) *supra* note 95 at 1371–1372 (para 10) (emphasis added).

humans; the textual formulation of a norm is created by humans and statutes are written by humans. Humans can make mistakes in grammar, in meaning and in logic.[119] As a human product, norms are meaningful and non-contradictory only incidentally and not necessarily. To presume correctness may be a beneficial lie, a pragmatic fiction to reduce uncertainty in daily life. While nobody will object to this white lie in the daily administration of a legal order, the legal theorist must be held to a different standard:

> The practitioner is and ought to be a jurist and a human, not just as the same person, but also within the same act! One might even forgive him for being a bit unjuristic in favour of the ethical postulate of being human. The matter is different for the legal theorist, however . . . To curtail his cognition of the law on account of humanitarian objectives is an offence against the postulates of pure cognition.[120]

The subjectivist reading of Kelsen's theory of interpretation is faced with a different objection. Positive norms are the sense of an act of will (*Sinn eines Willensaktes*); the subjectivist faction sees the ascertainment of that will (of the objective sense of certain human acts of will) as the goal of interpretation.[121] Apart from the obvious question of what to do when a divergence of meanings occurs between the sense of the norm resulting from the text and that resulting from the will of the law-making authority,[122] it may be asked whether the notion of 'sense of an act of will' does not denote the wrong idea within the confines of the Pure Theory. The factual occurrence of an act of will – an act of will with a certain sense or meaning, namely that of an Ought – is the 'positivity factor', rather than the 'normativity factor' of a positive norm. The 'claim to be observed' makes an idea a norm (normativity factor), whereas the actual occurrence of an act of will makes a norm a positive norm (positivity factor). If that is so, and admittedly this to some extent means contradicting Kelsen, the act of will is not capable of enlightening us as to the *content* of a norm.

Second, Kelsen himself distinguished sharply in *Allgemeine Theorie der Normen* between the norm as the sense of an act of will, on the one hand, and the sense of a norm, on the other hand:

> The sense of an act of will directed at the behaviour of another is the *meaning* of the expression of my act of will. . . . He who gives an order means to express something. . . . In giving his order, he means that the other person ought to behave in a certain way.

[119] Thaler (1982) *supra* note 114 at 156.

[120] 'Der Rechtspraktiker ist und sei Jurist und Mensch nicht bloß in einer Person, sondern auch in derselben Handlung! Sogar etwas unjuristisch zu werden zugunsten des ethischen Postulates, ganzer Mensch zu sein, wird man ihm verzeihen dürfen. Beim Rechtstheoretiker trifft aber eine solche Sachlage nicht zu . . . Aus irgendwelchen Menschlichkeitsrücksichten etwa seine Rechtserkenntnisse beschneiden, das ist Vergehen gegen die Postulate der reinen Erkenntnis.' Merkl (1916) *supra* note 41 at 1066.

[121] Mayer (1992) *supra* note 103 at 68.

[122] Bydlinski (1969) *supra* note 102 at 108.

> That is the sense of his act of will. . . . The person giving the order expects that the recipient understands the order, i.e. that he understands the sense of the statement of the person giving the order as an order, that he knows: 1. that he ought to behave in a certain way; and 2. how he ought to behave, what he should do or omit to do. The former is the sense, the latter is the content of the act of will constituting the order.[123]

Thus the meaning of a norm (the content of a norm) is different from the sense of an act of will, which is a necessary condition for the creation of a positive norm.[124] The discovery of the content of a norm is not dependent upon the content of the will. The act of will is form, not content. The act of will is denaturised and formalised.[125] The entities that create norms are of secondary importance. This is analogous to the Kelsenian critique of traditional notions of sovereignty.[126] International law is sovereign, not states. Even when states are authorised to create law, they are authorised *by* international law. So it is with this problem: the norm is to be cognised, not the will of states.

Another objection (mentioned above on occasion of the discussion of the dichotomy of terms and intent, Section 4.1.1) is that the act of will is not physical and as such is not immediately cognisable.[127] This is obvious in any unwritten law such as customary international law. If the Kelsenian framework is consistently applied to international law, the subjective element is also a mental act and also constitutes the act of will (Section 3.2). Yet in international treaty law, that act is expressed in the text. It can be argued that the text is the only authentic manifestation of the act of will and that therefore the subjective method collapses into the objective method. It can, however, also be argued that the terms of the treaty merely express the 'real' law and that all linguistic expressions are a mere *façade*. On this view, sense and meaning of legal norms are implied rather than expressed

[123] 'Der Sinn meines auf das Verhalten eines anderen gerichteten Willensaktes ist das, was ich mit dem Ausdruck meines Willensaktes meine. . . . Wer einen Befehl gibt, meint etwas. . . . Er meint mit seinem Befehl, daß sich der andere in bestimmter Weise verhalten soll. Das ist der Sinn seines Willensaktes. . . . Der Befehlsgeber erwartet, daß der Befehlsadressat den Befehl versteht, d.h., daß er den Sinn der Äußerung des Befehlsgebers als Befehl versteht, das heißt, daß er weiß: 1. daß er sich in bestimmter Weise verhalten soll; und 2. wie er sich verhalten soll, was er tun soll oder unterlassen soll. Das eine ist der Sinn, das andere der Inhalt des einen Befehl darstellenden Willensaktes.' Kelsen (1979) *supra* note 47 at 25–26 (Ch 9 II).

[124] Kelsen (1979) *supra* note 47 at 221 (N 1); Kasimierz Opałek, Überlegungen zu Hans Kelsens 'Allgemeine Theorie der Normen' (1980) 22.

[125] Winkler (1990) *supra* note 102 at 209; in international legal scholarship: Wolfram Karl, Vertrag und spätere Praxis im Völkerrecht (1983) 271.

[126] Kelsen (1920) *supra* note 51 at 9–10, 16; Alfred Verdross, Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung (1923) 35: 'Thus, "sovereignty" is the specific competences allocated to "states" *by international law*. "Statal sovereignty" and "immediate subject of international law" are one and the same thing.' 'Denn "Souveränität" ist gerade die besondere Kompetenz, die die "Staaten" *auf Grund des Völkerrechts* besitzen. "Staatliche Souveränität" und "unmittelbare Völkerrechtsunterworfenheit" bedeuten daher ein und dasselbe.'

[127] Walter (1983) *supra* note 96 at 192.

in legal texts.[128] Transcending this argumentative circle may be possible by arguing that it is irrelevant which methods (or approaches) of interpretation are used, as long as they are expedient in cognising the norm.

4.2.3 The nature of the norm

We have come to the core issue, the problem Kelsen did not solve. Behind the apparent dichotomy of objective and subjective approaches lies a much more important problem. What is the *nature* of the norm? What does the norm look like? Even if we assume that the norm is nothing but the claim to be observed, this question is on a different level. In international treaty law, is the norm the text or is it the will of the treaty-makers? More generally speaking: is it language or will that constitutes the 'real' norm?[129] Adolf Merkl notes: 'The choice of method of interpretation determines the outcome of interpretation. *In extremis*: There are as many legal orders as there are methods of interpretation.'[130] He does so having made us aware at the beginning of the article cited that the question of how we should interpret is determined by what we interpret. Thaler says:[131]

> When there is a choice between two methods of interpretation – the objective and subjective approaches – *the real choice is between two objects of interpretation, which in effect can be seen as the positive law*.[132]

Written norms are made of language, because that is what humans use to communicate complex contents. Thus, written norms are formulated as words and sentences.[133] Hence the words, the text are the norm itself.[134] Riccardo Guastini argues for a diametrically opposed viewpoint:

[128] Winkler (1990) *supra* note 102 at 218, 222–223.

[129] Walter (1983) *supra* note 96 at 195.

[130] 'Mit dem Auslegungsmittel wandelt sich das Auslegungsergebnis. In extremer Formulierung kann man sogar behaupten, daß es eben so viele Rechtsordnungen als Auslegungsmethoden gibt.' Merkl (1916) *supra* note 41 at 1071.

[131] Merkl (1916) *supra* note 41 at 1060.

[132] 'Wenn einem zwei verschiedene Interpretationsmethoden – nämlich die Verbal- und die Willensinterpretation – zur Wahl präsentiert werden, *so werden einem in Wirklichkeit zwei verschiedene Interpretationsgegenstände präsentiert, die beide als positives Recht angesehen werden können*.' Thaler (1982) *supra* note 114 at 154 (FN 14) (emphasis added).

[133] Thaler (1982) *supra* note 114 at 10 (FN 12).

[134] *Contra*: Hruschka (1972) *supra* note 2 at 52, but he argues against positivism and sees the 'Sache Recht' as 'u-topisch', as not having a place (*topos*) in language. *Vide* also: 'In principio erat Verbum, et Verbum erat apud Deum, et Deus erat Verbum. / Hoc erat in principio apud Deum. / Omnia per ipsum facta sunt, et sine ipso factum est nihil, quod factum est'; Novum Testamentum, Evangelium secundum Ioannem 1,1–3. The demonstrative pronouns 'ipsum' and 'ipso' in 1,3 relate to 'Verbum' in 1,1, but since John sets Verbum≡Deum, the matter is of little significance. 'Holy Scripture is God's word, this means that scripture has inherent primacy over its interpreters' theories.' 'Die heilige Schrift ist Gottes Wort, und das bedeutet, daß die Schrift vor der Lehre derer, die sie auslegen einen schlechthinnigen Vorrang behält.' Hans-Georg Gadamer, Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik (6th ed. 1990) 336.

> As a matter of course, norms should not be confused with norm-formulations. . . . In common usage, indeed, 'norm' sometimes refers to norm-formulations and sometimes, depending on the context, it refers to norms stricto sensu, i.e. the meaning-contents of norm-formulations. I take for granted that legal interpretation deals with norm-formulations, which are the result, e.g. of legislation, while norms (as opposed to norm-formulations) are but the result of interpretation.[135]

Guastini argues that while Kelsen's thoughts mirror his in the general theory of legal knowledge, his writings on interpretation seem to espouse the opposite result, i.e. 'that in this context the word "norm" is to be understood as referring . . . to norm-formulations themselves.'[136] Kelsen's dogma of the Is–Ought dichotomy – writes Guastini – does not make sense if the concept 'norm' were to refer to the linguistic formulations, rather than their meaning. He does not elaborate why the dichotomy should be broken by admitting that in this case the ideal is language, rather than the empirical speech act. The existence of norms as ideal is metaphysical, as they are a human thought-object.[137] The formulation of norms utilises human language, even though, as argued above, that language may not be correctly employed and the human thinking behind it may not be logical. And, as Guastini admits, his own position is not tenable under Kelsen's express cognitive limit for scientific interpretation. 'According to Kelsen, scientific interpretation just amounts to listing the various possible meanings of "norms". If "norm" were used in the sense of meaning-content of a norm-formulation, such a tenet would amount to nonsense.'[138] If there is an open area of multiple, equally possible meanings (where a choice cannot be made without using extraneous input), the view of norms as different from their formulation makes no sense. Norms are no more precise than their text; the norm itself and its manifestation collapse. Single 'meaning-contents' attributed to a norm are narrower than the norm itself.

Thus, interpretation is not cognition of norms existing 'beyond' the text. Where norms are textual, the norm is the text. The norm is no more precise than the text; scholars are left trying to find the possible meanings of the norm. As concerns international treaty law, one can agree with Merkl's priority of textual and contextual interpretation – if the written norm is its formulation. Since interpretation is a hermeneutic process, norms of interpretation are not a process of cognition, but acts of will purporting to modify the frame of the possible meanings of norms. Interpretation is anterior to all norms, including rules of interpretation. That rules

[135] Guastini (1995) *supra* note 98 at 108 (emphasis added).

[136] Guastini (1995) *supra* note 98 at 110.

[137] Karl Bergbohm, Jurisprudenz und Rechtsphilosophie. Kritische Abhandlungen (1892) 132 ('Gedankending'). A similar distinction is made by Searle: 'brute facts' *versus* 'institutional facts'. John R. Searle, Speech acts. An essay in the philosophy of language (1969) 50–53; Donald Neil MacCormick, Das Recht als institutionelle Tatsache, in: Donald Neil McCormick, Ota Weinberger (eds), Grundlagen des institutionalistischen Rechtspositivismus (1985) 76–107 at 76.

[138] Guastini (1995) *supra* note 98 at 110; See also Ulrich Fastenrath, Lücken im Völkerrecht. Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts (1991) 157–161.

on interpretation must be interpreted as well is not an idle tautology. Where positive international law specifies different norms of interpretation, they gain relevance only as objects of cognition and are interpreted together with the norms that are to be interpreted in the first place. The textual approach is merely faced with a norm in a narrower context.[139] For example, a norm of international law could specify that preparatory works determine the meaning of treaty law. Assume further that the text of a treaty would have allowed for meanings M_1, M_2 or M_3, whereas the preparatory works would show that M_2 was intended. Interpretation as method transcending positive law is faced with a further norm which relates to the cognition of the original norm, which 'filters' our cognition. In effect, the original norm is modified by another norm to exclude M_1 and M_3.

4.2.4 Back to the frame theorem?

Despite the earlier argument, the theory of a frame of possible meanings can nonetheless be said to lie at the heart of Kelsen's theory of interpretation. It is the frame itself that scholars ought to be concerned with, not the choice between the possible meanings. Here is the key passage again with changed emphasis:

> If 'interpretation' is to be understood as epistemic ascertainment of the meaning of the object to be interpreted, *the result of a legal interpretation can only be the ascertainment of a frame* (which is the law to be interpreted) and thus the cognisance of multiple possibilities [of meaning], which are possible within the frame.[140]

Three aspects of Kelsen's frame theorem are worth discussing briefly. It is alleged that Kelsen believed that norms necessarily have multiple meanings and that in no case would there be only one possible meaning. Eugenio Bulygin[141] would support such an argument on a different reasoning. He sees this as given by the necessary vagueness of language. Kelsen, however, writes that 'the interpretation of a statute does *not necessarily* [have to lead] to one single correct decision, but it [could] *possibly* lead to multiple [decisions]'.[142] However, it is irrelevant for our purposes

[139] Merkl (1916) *supra* note 41 at 1076–1077.

[140] 'Versteht man unter "Interpretation" die erkenntnismäßige Feststellung des Sinnes des zu interpretierenden Objektes, *so kann das Ergebnis einer Rechtsinterpretation nur die Feststellung eines Rahmens sein*, den das zu interpretierende Recht darstellt, und damit die Erkenntnis mehrerer Möglichkeiten, die innerhalb dieses Rahmens gegeben sind.' Kelsen (1960) *supra* note 3 at 349 (Ch 45 d) (emphasis added).

[141] Eugenio Bulygin, Cognition and interpretation of law, in: Letizia Gianformaggio, Stanley L. Paulson (eds), Cognition and interpretation of law (1995) 11–35 at 13; Ringhofer (1971) *supra* note 106 at 204–205.

[142] 'die Interpretation eines Gesetzes *nicht notwendig* zu einer einzigen Entscheidung als der allein richtigen [führen muß], sondern *möglicherweise* zu mehreren führen [kann]' Kelsen (1934b) *supra* note 95 at 1366 (emphasis added). In his 'Allgemeine Theorie der Normen' Kelsen is even more clear: 'The possibility of unequivocal legal norms cannot be denied.' 'Die Möglichkeit unzweideutig formulierter Rechtsnormen kann nicht geleugnet werden.' Kelsen (1979) *supra* note 47 at 151 (Ch 50), 325 (N 145). Mayer (1992) *supra* note 103 at 65; Walter (1983) *supra* note 96 at 190–191.

whether or not Kelsen believed in the necessity of multiple meanings, because it is the *non*-necessity of one correct meaning which is at the heart of the frame theorem.

The second aspect is the danger inherent in the theory that there is necessarily one correct meaning for norms. Traditional doctrines deny that a norm can have multiple possible meanings (*Mehrdeutigkeit*); 'traditional approaches claim that the law-makers cannot seriously be presumed to have made law of this kind',[143] hence they claim that the law has not been understood properly and that somewhere one has 'overlooked' some premise which allows one to deduce the correct meaning. If traditional jurists are confronted by a norm having multiple possible meanings, they add an extraneous norm which serves to eliminate all but one meaning, which is declared to be the only meaning.[144] However, this has the drawback that 'traditional jurisprudence', which ostensibly is committed to legal positivism, becomes a sort of natural law doctrine, i.e. a form of legal idealism. Legal positivism has the objective of portraying only the positive norms of the normative order to be described. The tactic above adds norms which do not belong to the normative order[145] and disguises an arbitrarily selected ideal law as positive law.[146] Interpretation as cognition of norms is thus made impossible. Legal scholarship has to admit where the norm fails to be more precise[147] and where it reaches the limits of legal cognition.[148] At best, scholarship can show us what the norms look like and if it were to restrict the meaning of norms to sub-meanings, or if it were to 'create' a meaning which the norm does not have, it would be untrue to its nature of merely cognising law.[149]

There is a neglected third aspect to the frame theorem, for the frame of possible meanings and those meanings themselves are different things. If the choice between these possible meanings is free, if the norm only gives a frame of possible meanings,[150] and if scholarship's task is to cognise the frame – not, though, to authoritatively determine it – then how is the frame determined?[151] This question

143 '[d]ie herkömmliche Jurisprudenz behauptet, dem Rechtssetzer könne nicht ernstlich unterstellt werden, Recht in dieser Form geschaffen zu haben'; Thaler (1982) *supra* note 114 at 9 (FN 9).

144 Thaler (1982) *supra* note 114 at 10, 12, 153.

145 Merkl (1916) *supra* note 41 at 1063, 1069–1070.

146 Thaler (1982) *supra* note 114 at 159.

147 Merkl (1916) *supra* note 41 at 1067; Winkler (1990) *supra* note 102 at 218.

148 Walter (1983) *supra* note 96 at 191; Mayer (1992) *supra* note 103 at 62

149 Merkl (1916) *supra* note 41 at 1063: '[A] legal textbook cannot contain one *iota* more of legal content than its object, than the law it purports to describe.' '[D]as umfangreichste Werk über positives Recht enthält um kein Jota mehr an Rechtsinhalt als sein Objekt, als der behandelte Ausschnitt des geschriebenen Rechts.'

150 Thaler (1982) *supra* note 114 at 17 (FN 35).

151 The determination of the frame is the determination of the meanings themselves: Pierluigi Chiassoni, Varieties of judges-interpreters, in: Letizia Gianformaggio, Stanley L. Paulson (eds), Cognition and interpretation of law (1995) 39–50 at 71, Kelsen (1960) *supra* note 3 at 349 (Ch 45 d); Inés Weyland, Idealism and realism in Kelsen's treatment of norm conflicts, in: Richard Tur, William Twining (eds), Essays on Kelsen (1986) 249–269 at 258–259.

leads to a particulary interesting intramural debate, because the *determination* of the frame (what the frame looks like, how many possible meanings there are) is not free, even if it happens without human intervention in the ideal realm through the existence of the norms. The frame is immanent in the very validity (existence) of the norm. It is part of the ontology of the norm and not influenced by its cognition or application. But the question remains: if the 'width' of the frame is not within the discretion of organs, what happens if that organ chooses a meaning outside the frame? Is the cognition of the frame itself by legal science a self-contradictory 'non-authoritative determination' (Section 5.5.3.3)?

Before we end this look at the Kelsenian challenge, an outstanding issue can appositely be discussed here. It is the unusual distinction between 'scientific' and 'authentic' interpretation in Kelsen's writings. The distinction is threefold. (1) *Who* is to perform the interpretation? Authentic interpretations, for Kelsen, are performed by organs, that is by humans authorised by the law to apply it.[152] This is in contradistinction to traditional international law doctrine, which sees an interpretation as 'authentic' only if done by the law-makers themselves, in the case of treaty law, by the parties in a different agreement. Kelsen, however, distinguishes between a general and individual authentic interpretation. (2) The *result* of authentic interpretation is a norm, as the word 'application' intimates. 'Authentic interpretation, whether general or individual, is a law-creating act.'[153] (3) Authentic interpretation is an act of will, scholarly interpretation is an act of cognition; one determining what is law, the other finding the law. Because an act of will is necessary for the creation of positive law, authentic interpretation as law-creation must be an act of will; mere cognition cannot create norms.[154]

From the standpoint of traditional doctrine it may be questioned whether we are properly speaking of authentic interpretation whenever a norm is applied (is the result of an act of interpretation, is created). Is there a difference between an authentic interpretation in the classical sense and a mere application?[155] In the first case the organ which had previously created a general norm (e.g. a treaty) now creates another norm of the same kind, e.g. the 'subsequent agreement between the parties regarding the interpretation of the treaty' with the intention

[152] Kelsen (1960) *supra* note 3 at 346 (Ch 45).

[153] Kelsen (1950) *supra* note 52 at xv; Stanley L. Paulson, Kelsen on legal interpretation, 10 Legal Studies (1990) Number 2, 136–152 at 146. See also the interesting parallel theory of 'choice' and a system of precedent in Hart (1961) *supra* note 1 at 121–132 (Ch VII.1), 200–201; cf. Claudio Luzzati, Kelsen vs. Bulygin on legal interpretation: how not to read Kelsen through Hart's eyes, in: Letizia Gianformaggio, Stanley L. Paulson (eds), Cognition and interpretation of law (1995) 85–106 at 85–87.

[154] Kelsen (1960) *supra* note 3 at 351 (Ch 46).

[155] Carl Schmitt agrees with Kelsen: 'Any organ which authentically clarifies the questionable content of a law is in this case a law-maker.' 'Jede Instanz, die einen zweifelhaften Gesetzesinhalt authentisch außer Zweifel stellt, fungiert in der Sache als Gesetzgeber.' Carl Schmitt, Der Hüter der Verfassung (1931) 45.

of 'clarifying' certain terms of the first treaty, envisaged in Article 31(3)(b) VCLT. In the second case, an organ (e.g. the Security Council or an arbitrator) applies a general norm (e.g. the UN Charter or a *compromis*) which it had not created. In so doing, it creates a further – perhaps individual – norm (e.g. a resolution or a judgment) which determines the meaning of certain terms for the purpose of the lower-level norm. The difference between the two cases is that in the first case the frame of meanings of the general norm itself is ostensibly changed[156] by the latter act and not 'applied' by it, while in the second case the meaning is merely fixed for the purposes of the lower-level norm, for one specific instance, while the frame of possible meanings of the higher-level norm itself is not changed.

There may be a difference between these two methods of 'interpretation', but it is not particularly relevant with respect to interpretation, properly speaking. The term 'authentic interpretation' is a *contradictio in adiecto*, because interpretation is not a 'legal act' if that means an act having some influence on the norms themselves. Interpretation is an act of cognition, which, though usually performed by jurists, itself is not performed as determination (creating law) but as a cognitive or hermeneutic function.[157] Scholarly interpretation – an analysis of the possible meanings – may precede a decision – an act of will – in the mind of the human acting as organ, a human who has hermeneutic faculties. However, norm-creation as act of will is a categorically different function.[158] The classical definition of 'authentic interpretation' fares no better, for the modification of a norm by a later norm cannot be described as an act of cognition. It may have happened incidentally, but is not necessary. The divergence is even greater here than in the case of an application of law. If L_2 were to define 'rubber duck' in L_1 (where L_1 is an earlier law) as a flying object stabilised by fins carrying nuclear warheads over ranges greater than 1500km, then for the purpose of L_1 – as modified by L_2 – that is what a rubber duck is.

However, only norms authorised by the normative system to change the norm in question, usually only a norm of the same kind, can possibly change the norm in question. One problem of international legal theory is that there is uncertainty as to which norms can change international treaty law. The doctrine of *acte contraire*, that a treaty can only be changed by a treaty, is under attack by the proponents of a 'dynamic' view of treaties.[159] Therefore, the term 'authentic interpretation' is laden with problems. We will consider this problem further in Section 4.4.

Have the Vienna School's theories, has its critique been useful to the theory of treaty interpretation? It seems so. Kelsen's theory of interpretation can be used as a means of showing the uncertainty inherent in the interpretation of legal texts, one that can only be filled by adding external elements to positive international

[156] The possibility of change in law will be discussed in Chapter 5.

[157] Hruschka (1972) *supra* note 2 at 95.

[158] Robert Walter, Heinz Mayer, Gabriele Kucsko-Stadlmayer, Grundriß des österreichischen Bundesverfassungsrechts (10th ed. 2007) 64 (MN 126); Kelsen (1979) *supra* note 47 at 246 (N 43).

[159] An overt 'dynamicist' is Wolfram Karl: Karl (1983) *supra* note 125.

law. The Pure Theory purifies legal science; its critique of other theories makes their problems obvious. If one then applies this strict standard to international law, one uncovers the failures of the dogmatic structure. This epitome of modernist legal theories, this positivist theory ironically but intentionally serves as a tool for the deconstruction of traditional international legal doctrine. It makes explicit that our results depend upon our assumptions and dogmas (and that the Pure Theory is but another dogma).

4.3 Language, facts and beyond – further confusion?

This section deals with the importation by legal theorists of the theories of general hermeneutics, analytical philosophy – the 'linguistic turn' in philosophy – and of the science of linguistics into the theory of interpretation. This move is likely to clarify only what is *unclear* and how it is unclear – thus to increase uncertainty. This section will only give a brief overview of some of the relevant issues and draw tentative conclusions from this before moving to the distinction between cognition and change in Section 4.4.

4.3.1 Language and law – semantic uncertainty

If we proceed from the assumption that written norms are language – even if we only claim that language is the manifestation of norms – the question of the limits of a natural language's performance becomes relevant in ascertaining the limits of interpretation. Language is not something having inherent value or giving a fixed reference to extrinsic concepts. It is not an unchangeable entity. A word can mean anything we choose it to mean. After all, it is only a word, as a classical passage from *Through the Looking-Glass* (1871) illustrates.

> 'I don't know what you mean by "glory," ' Alice said.
> Humpty Dumpty smiled contemptuously. 'Of course you don't – till I tell you. I meant "there's a nice knock-down argument for you!" '
> 'But "glory" doesn't mean "a nice knock-down argument," ' Alice objected.
> 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'
> 'The question is,' said Alice, 'whether you can make words mean so many different things.'
> 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'[160]

Language can only do so much. Scholars – in particular some analytical philosophers[161] – argue that its powers are limited. 'In all fields of experience . . . there

[160] Lewis Carroll, *Through the looking-glass and what Alice found there* (1871), in: Martin Gardner (ed.), The annotated Alice. The definitive edition (2000) 224.

[161] Bernd Schünemann, Die Gesetzesinterpretation im Schnittfeld von Sprachphilosophie, Staatsverfassung und juristischer Methodenlehre, in: Günther Kohlmann (ed.), Festschrift für Ulrich Klug zum 70. Geburtstag (1983) 169–186 at 170.

is a limit, *inherent in the nature of language*, to the guidance which general language can provide.'[162] Indeterminacy of language results in uncertainty of law – 'the uncertainty which is inherent in certain legal concepts is due to the uncertainty of their expression'[163] – and thus we cannot know law because language cannot be ultra-precise.

What are the reasons for indeterminacy? Michael Thaler distinguishes between two phenomena: ambiguity or equivocation (*Mehrdeutigkeit*) and vagueness (*Vagheit*). Ambiguity is a lack of determination of a term's connotation (*Bedeutung*). The connotation is determined *a priori* by a language's rules of semantics.[164] A word can connote two entirely different things: 'star' is a person and a heavenly body, and its context cannot always determine the 'correct' meaning for us.[165] In contrast, vagueness is the lack of determination of a term's denotation (*Bezug*). The denotation is determined by the class of objects properly signified by the term, based on empirical experience. Thaler argues that few scholars distinguish between the two phenomena,[166] even though the connotation–denotation distinction is as old as semantics itself. Among jurists it seems that linguistic indeterminacy is identified exclusively with vagueness. Herbert Hart, for example, writes that '[p]articular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule'[167] which clearly refers to a term's denotation only.

The particular problem of vagueness will be discussed below (Section 4.3.2), while linguistic indeterminacy on the general plane will be discussed further here. The notion of 'connotation' is moot if 'the meaning of a word is its use in the language',[168] as Ludwig Wittgenstein held – though he did not define meaning exclusively by reference to use. Is a 'norm of meaning' thus established by mere fact, i.e. by mere behavioural regularity, or is it perhaps a customary norm? Is the meaning of a word established not as norm, but as mere induction from instances of use, which would change with changed use? This would do two things: words

[162] Hart (1961) *supra* note 1 at 123 (emphasis added).

[163] Hummer (1975) *supra* note 94 at 88.

[164] Thaler (1982) *supra* note 114 at 2 uses the following example: 'We can say that the terms "bachelor" and "unmarried man" are synonymous without an empirical enquiry whether any bachelors are married, merely by knowing the rules of semantics. This argument is not quite convincing, since the equivalence here is based on logic. "Unmarried bachelor" would be a mere analytical statement, because the "bachelor" logically encompasses "unmarried man". But Thaler is correct, for the definition of a word (which is his *Intension* or *Bedeutung*) is defined not by logic; however, how are we to hinder the connotation's collapse into the denotation?'

[165] Thaler's example in German 'der Star' has three partially differing meanings to its English *pendant*: (*a*) the eye diseases 'glaucoma' or 'cataract' are called 'grüner Star' or 'grauer Star', respectively, (*b*) a starling or (*c*) a film or pop star. When one says, thus: 'Der Star singt' ('The star is singing'), the ambiguity is not context-sensitive as it would be in English. Thaler (1982) *supra* note 114 at 5 (FN 31).

[166] Thaler (1982) *supra* note 114 at 8.

[167] Hart (1961) *supra* note 1 at 123.

[168] 'Die Bedeutung eines Wortes ist sein Gebrauch in der Sprache.' Ludwig Wittgenstein, Philosophische Untersuchungen (1953) 20 (para 43) (translation in the text: G.E.M. Anscombe at 20e).

would only have a denotation (*Begriffsumfang*), no connotation (*Begriffsinhalt*) and there could not possibly be one or more correct or possible meanings.

> [Wittgenstein] seeks to transform semantics from the science of meaning or meanings into the science of signifying activity. He rejects the traditional idea of linguistic forms and their meanings as classes of entities which are correlated among themselves . . . He seeks to impose a new vision in which linguistic forms have the meaning they do because they are used by man, the guarantee of their validity being found only in their use.[169]

The question is what 'meaning' means. What does the text of a statute refer to? Does it refer to facts? – How can it? A norm refers to an Ought, not an Is! How can it not? All norms themselves refer to human activity, which *is* an Is! Does the text of a norm refer to a norm as its transcendent 'meaning', as Guastini would argue (Section 4.2)? But how can this be, if the term's extension is classes of facts and hence presupposes a subsumption, which can only happen *after* (in a logical, not temporal sense) the norm is cognised (Section 4.3.2)?

This indeterminacy is the result of our use of natural languages to construct norms. Waldemar Hummer argues that the 'uniform designation of legal concepts as a result of a standardized colloquial usage undergoes continuous change through the influx of subcultural neologisms and other semantic "deviations" '.[170] Indeed, 'experience shows that the context may determine a *complete* change in the meaning of a word.'[171] Unlike pure logic and unlike the unattainable goal of a 'mathematical language', the meanings of words in colloquial language are flexible.[172] To summarise: language has limits; it is arbitrary, conventional, fluctuating, subjective and imprecise and hence it produces uncertainty.

Do the arguments of analytical philosophy regarding linguistic indeterminacy square with the Vienna School's theory of interpretation? Kelsen explicitly recognises the weakness of language as a factor leading to the denial of one correct meaning.[173] Hans-Joachim Koch writes that '[t]he limits of linguistic precision of positive law postulated by the Pure Theory of law can be refined by analytic philosophy by using the theory of semantic indeterminacy',[174] hence the Pure Theory remains current even taking into account later developments in philosophy.

169 Hummer (1975) *supra* note 94 at 146.

170 Hummer (1975) *supra* note 94 at 88.

171 Hummer (1975) *supra* note 94 at 137.

172 Larenz (1991) *supra* note 3 at 312.

173 Cf. Bulygin (1995) *supra* note 141 at 13–14; *contra* Luzzati (1995) *supra* note 153 at 130–132.

174 '[d]ie von der Reinen Rechtslehre postulierte Grenze sprachlicher Bindungskraft des positiven Rechts läßt sich sprachanalytisch durch die Lehre von den semantischen Spielräumen präzisieren.' Hans-Joachim Koch, Die Auslegungslehre der Reinen Rechtslehre im Lichte der jüngeren sprachanalytischen Forschung, 17 Zeitschrift für Verwaltung (1992) 1–8 at 7.

Analytical philosophy, however, can only provide an approach to explain uncertainties of interpretation as a result of linguistic indeterminacy,[175] not as a result of other causes for the uncertainty of the cognition of law. Not all uncertainty results from the open texture of language itself. The law-maker may have – even inadvertently – included elements making cognition uncertain, e.g. discretion by organs, dilatory formulas particularly popular in multilateral treaties, or a simple lack of text (Chapter 2).

4.3.2 From vagueness to subsumption – application of law to facts

Vagueness is not a matter of interpretation. It does not concern the meaning – narrowly understood as a term's connotation – of the norm itself, and its connection to the law is merely that of a lack of precision of the objects ('brute facts') the norm refers to. Vagueness in its specific position at the fringe of interpretation was characterised by John Austin in 1832:

> The truth is that they are questions neither of law nor of fact. The fact may be perfectly ascertained, and so may the law, as far as it is capable of being ascertained. The rule is known, and so is the given species, as the Roman jurists term it; the difficulty is in bringing the species under the rule; in determining not what the law is, or what the fact is, but whether the given law is applicable to the given fact.[176]

As mentioned above, many take vagueness as the only relevant reason for linguistic indeterminacy,[177] perhaps because their definition of meaning defines terms by their use, rather than by some 'semantic rules of language'. The use of general terms in (general) norms is a necessary abstraction. It is necessary, because such regulation is directed at the behaviour of an unspecified or at least large group of subjects of law with respect to relatively unspecified behaviour. Law-makers 'can have no . . . knowledge of all the possible combinations of circumstances which the future may bring';[178] they may not concretise the aims which they strive towards sufficiently to extend to the different factual circumstances. They may not even want to use specific terms, because they *want* a vague term – whether for legal political reasons (they may want to delegate the decision-making to the organ applying the law),[179] or as a matter of *Realpolitik* (the dilatory compromise formula again).

[175] Koch (1992) *supra* note 174 at 3.

[176] John Austin, The province of jurisprudence determined (1832) (Weidenfeld and Nicolson edition 1954) 207 (emphasis added).

[177] Bulygin (1995) *supra* note 141 at 14; Hart (1961) *supra* note 1 at 123; Hummer (1975) *supra* note 94 at 89; Larenz (1991) *supra* note 3 at 312; Claudio Luzzati, Discretion and 'indeterminacy' in Kelsen's theory of legal interpretation, in: Letizia Gianformaggio (ed.), Hans Kelsen's legal theory: A diachronic point of view (1990) 123–137 at 125–127; Schünemann (1983) *supra* note 161 at 177.

[178] Hart (1961) *supra* note 1 at 125.

[179] Timothy Endicott, Law is necessarily vague, 7 Legal Theory (2001) 379–385 at 381.

We thus have a general term and (typically, though not exclusively) a fact and the task is to find out whether the fact is part of the class of objects fitting in that term's denotation. That procedure, subsumption, is, however, a categorically different action to interpretation. It is no longer cognition, but an application of the law. It is not a logical deduction, but either an act of law-making or nothing at all.[180]

> If understanding in general be defined as the faculty of laws or rules, the faculty of judgement may be termed the faculty of *subsumption* under these rules; that is, of distinguishing whether this or that does or does not stand under a given rule (*casus datae legis*). General logic contains no directions or precepts for the faculty of judgement, nor can it contain any such.[181]

Thus for lawyers vagueness is a matter which concerns the act of law-applying (i.e. law-making), not that of interpretation, but only because the linguistic process of subsumption collapses into the legal process. Vagueness has its roots in the beginnings of rhetoric, cf. the *falakros* and *sorites paradoxa*.[182] 'Plain cases', the core meaning (*Begriffskern*), will be found in most terms, yet it is 'hard to think of any empirical predicate which we are capable of applying, for which it is not at least conceivable that it admits of borderline cases'[183] and a fuzzy border of the term's extension, the marginal meanings (*Begriffshof*), can be found in any term. The point is: how is the extension of *legal* terms determined? Is it determined by the same means as in ordinary language, even within law-application by inferior organs, e.g. in judgments? Even if the authorised organ's view of what are cases of 'danger to life and limb'[184] would not match up with the cases to which the term applies in ordinary language – if the term were more precise than it is – their subsumption would be binding.

4.3.3 Conclusion on interpretation

General hermeneutics, understood as the technique of finding a text's sense or meaning developed in the sciences of the mind (*Geisteswissenschaften*), has

[180] See *supra* note 99.

[181] 'Wenn der Verstand überhaupt als das Vermögen der Regeln erklärt wird, so ist Urteilskraft das Vermögen unter Regeln zu subsumieren, d.i. zu unterscheiden, ob etwas unter einer gegebenen Regel (casus datae legis) stehe, oder nicht. Die allgemeine Logik enthält gar keine Vorschriften für die Urteilskraft, und kann sie auch nicht enthalten.' Kant (1781, 1787) *supra* note 30 at A 132, B 171 (translation John Miller Dow Meiklejohn).

[182] Dorothy Edgington, The philosophical problem of vagueness, 7 Legal Theory (2001) 371–378 at 371: 'Surely, if we take but one grain from a heap of sand, the heap does not cease to be properly called a "heap". If you repeat this, the heap will still remain a heap. Yet if you are left with one grain, this will certainly not constitute a heap, even if you add another grain, and another, etc.'.

[183] Edgington (2001) *supra* note 182 at 374.

[184] § 89 Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB), BGBl 1974/60 idF BGBl I 2001/130.

formulated several canons of interpretation, abstracted here from Helmut Coing's 1959 paper.[185] (1) The canon of objectivity, of the autonomy of the text – the interpreter must will to respect the text's integrity and not to import ideas, to develop only the text: *sensus non inferendus, sed efferendus*. (2) The canon of unity (the 'hermeneutic circle') – a part of the text ought to be understood in light of the whole text and vice versa. (3) Genetic interpretation, interpretation of a text from its origins – every text is the expression of the author's (subjective) personality, yet every text has been created within a historical, objective situation. (4) Technical interpretation – every text has its own inner structure, yet also refers to an objective context (*innerer Sachzusammenhang*) beyond the linguistic expression itself, which is what the language wishes to express. (5) The canon of comparison – the given text should be compared to similar texts (hence a reference to external factors). (6) All these canons ought, argues Coing, citing Schleiermacher, to be treated as equally valid and interpretation ought to consider and use all canons at the same time.

These canons sound a lot like the well-known juridical methods of interpretation. Indeed it was Coing's purpose in the 1959 paper to show the commonalities between the two sets of canons.[186] (*ad* 1) The point of jurisprudential interpretation is not to import external elements and only to consider the law. (*ad* 2) The hermeneutic circle is a form of systematic interpretation and the postulate of the internal consistency of the law. (*ad* 3) The genetic interpretation is easily identified as the historical method. (*ad* 4) The *ratio legis* (or *telos*) is the juristic equivalent of the *innere Sachzusammenhang*. Thus, there are common points, but there is one main difference in legal theories of the methods of interpretation to the canons espoused by general hermeneutics, and that is the nature of their canon.

An overview of the problem can be found in Section 4.1.2 above. The hermeneutic argument is that such rules are 'general rules for the use of language'[187] and as such not norms at all. The aim of the hermeneutic question is not methodical:

> The question concerning the phenomenon of understanding legal texts . . . is not concerned with how the 'interpreter' *ought to interpret*, but how the interpreter *has always been behaving* in the process of understanding a legal text. Which preconditions have to be fulfilled in order to be able to call it 'understanding legal texts'?[188]

In a sense, the question is transcendental in the Kantian sense – it is not about finding criteria for the 'right' interpretation, but about finding the conditions for

[185] Helmut Coing, Die juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik (1959) 13–18.

[186] Coing (1959) *supra* note 185 at 18–21.

[187] Hummer (1975) *supra* note 94 at 91.

[188] '[Der] auf das Phänomen des Verstehen von Rechtstexten gerichtete Frage . . . geht es nicht darum, wie sich der "Ausleger" verhalten soll, vielmehr fragt sie danach, wie sich der Verstehende schon immer verhält, wenn er einen Rechtstext versteht. Welche Voraussetzungen müssen erfüllt sein, wenn von einem Verstehen von Rechtstexten überhaupt soll gesprochen werden können?' Hruschka (1972) *supra* note 2 at 10.

the possibility of cognition (*Bedingungen der Möglichkeit des Verstehens*).[189] Such canons or 'rules' would be akin to 'laws of nature'. They would constitute an induction from instances of understanding by scholars to explain the occurrence of a regularity of human nature. Just like a law of nature, the 'rule' would try to fashion itself to reality and not claim to be observed, as a norm does. Norms and 'laws of nature' are categorically different – no 'law of nature' can ever be broken, because it is a proposition by scientists to try to explain a given reality. If reality falsifies such a mathematical model, the model has to be changed. If, for example, apples were not to fall down from a tree, the law of gravity would have to be abandoned or changed. If, however, a murder is committed contrary to the prohibition against it, the law would still be valid.[190]

In the case of the theories proposed by hermeneutic scholars, however, there would be no such 'claim to be observed'; unlike 'methodological rules', which try to influence the process of cognition,[191] hermeneutic rules cannot influence the process of cognition.[192] Köck, however, while agreeing that there are such 'hermeneutic rules', does not think that we could actually establish them, because the act of cognition is of an original nature and we are not able to coerce it into *a priori* constructed models.[193] Joachim Hruschka does not want to see these rules established in an empirico-psychological process of induction. He sees them as *a priori*, much like Kant's categories, and more directly so than was mentioned a few paragraphs above. For him, the constituent factors occurring necessarily in every act of (textual) cognition cannot be induced from empirical research.

Bernd Schünemann argues that the canons of interpretation have a mere heuristic function, that they are argumentative schemata.[194] The question posed indirectly with respect to the interpretation of norms is whether the quality of the *interpretandum* as Ought changes the reasoning concerning the canons or hermeneutic rules. Gadamer disagrees; in his discussion of the parallel problems of the two dogmatic sciences of theology and law – both are concerned with the interpretation of normative texts[195] – he notes that they have taken different developments. Whereas juridical hermeneutics have left the general theory of understanding texts behind, because their texts have dogmatic elements, theological hermeneutics

189 Hruschka (1972) *supra* note 2 at 11; Kant (1781, 1787) *supra* note 30 at A 56, B 80.

190 Hans Kelsen was emphatic about this distinction, as it is essential for the duality of Is and Ought. Kelsen (1979) *supra* note 47 at 16–19 (Chs 5–6). See the parallel debate on the nature of the principles of logic in Kelsen (1979) *supra* note 47 at 141–143 (Ch 45 III), where he argues that the 'rules' of logic cannot be norms properly speaking, i.e. not an Ought, because truth is not an ethical value.

191 Hruschka (1972) *supra* note 2 at 11; cf. Köck (1976) *supra* note 10 at 67.

192 Köck (1976) *supra* note 10 at 75.

193 Köck (1976) *supra* note 10 at 75.

194 Schünemann (1983) *supra* note 161 at 171.

195 Stig Jørgensen, Lawyers and hermeneutics, 40 Scandinavian Studies in Law (2000) 181–188 at 181.

were dissolved within the more general philological-historical (hermeneutic) method, because theological method neglected the dogmatic elements:

> The case of juridical hermeneutics is not a special case. It is apt to enrich historical hermeneutics with the full range of problems and thus to restore the old unity of the hermeneutic problem, which forms the meeting place for the jurist and the theologian, [on the one hand,] and the philologer, [on the other hand].[196]

Yet the problem is not so easy to dissolve. There is a categorical difference in the object of interpretation. Both a novel and a statute are text, language, and the difference in approach cannot lie there. The statute is norms, however, and its text is an Ought, not an Is. The difference in the texts remains categorical. In this case, language does not refer to facts, but to a norm, to the claim to be observed. It is difficult to give an answer to this tricky question. If one does not want to circumvent it by introducing metaphysical theories, one will have to concede that this meta-level – the methods of cognition of norms as texts – is uncertain.

The three approaches to the problem of interpretation (the traditional doctrine of international law, the Pure Theory of Law and hermeneutics and analytical philosophy) have been mixed into a cocktail of ideas. Three entirely different worldviews, presumptions and theoretical superstructures have clashed. It is not intended to reconcile them here and it does not seem possible. However, some pieces do fit together to some degree, for example Kelsen's scepticism about one correct interpretation and analytical philosophy's indeterminism vis-à-vis language.[197]

Uncertainty in interpretation is caused by a conglomerate of factors and not all of these are rooted in the nature of human language. Not all, indeed, are unwanted – some are necessary. Humans are limited beings and cannot process data on its own merits. We need general terms; we need vagueness to be able to understand what is demanded of us by norms. This need makes law uncertain, but it is the price to pay for using language.

On the most general level, we must be careful not to confuse the question of what norms there are and how they come to 'exist' (normative ontology) with the issue of how they can be perceived and cognised, in how far we are able or unable to know what the ontology looks like (epistemology of norms). The validity and creation of norms (even the creation of individual norms by judges) belongs to the former realm, whereas the interpretation of norms is a question of epistemology. That is why Kelsen's 'theory' of interpretation is no theory at all – methods and acts of cognition simply are not part of a normative theory, of an ontology of norms. The smudging of these two worlds is the topic of the next section: the creeping change to treaties by their application.

[196] 'Der Fall der juristischen Hermeneutik ist also in Wahrheit kein Sonderfall, sondern er ist geeignet, der historischen Hermeneutik ihre volle Problemreichweite wiederzugeben und damit die alte Einheit des hermeneutischen Problems wiederherzustellen, in der sich der Jurist und der Theologe mit dem Philologen begegnet.' Gadamer (1990) *supra* note 134 at 334 (emphasis removed).

[197] Koch (1992) *supra* note 174.

4.4 Subsequent practice to treaties

4.4.1 Interpretation versus modification of treaties

The role of 'subsequent practice' in the law of treaties is a test case, though we will not test a theory on a set of facts, but whether a particular doctrine fits into a given theoretical framework. Subsequent practice is an ideal candidate for this, because it connects with nearly all of the topics we have discussed above. Subsequent practice is riddled with uncertainty. Not only is there academic disagreement about its precise importance and breadth, but the very placement of this concept at the fringe of debates on interpretation gives rise to higher-level problems. Thus it forms the basis for a discussion of uncertainty at the highest echelons of international legal theory in the next chapters. Not only are we here at a junction between perception and action, we can also see the clash of two different sources of international law and thus it is exemplified here (Section 4.4.3) what will be discussed below (Chapters 5 and 6).

The recently reinvigorated doctrine of subsequent practice claims that the behaviour of states parties to an international treaty after its entry into force and, within international institutions, of international organs created by the constituting instruments, is important from a legal perspective. In its original form (codified in Article 31(3)(b) VCLT) subsequent practice is a factor in the interpretation of the treaty, but there are also claims that subsequent practice can modify treaty law.

The difficulty, say those wishing to see subsequent practice modify treaties, lies in distinguishing interpretation from change. The makers of the treaty in question – the states parties – declare by their acts and statements how they see the treaty. Where does determination of the meaning end and the change begin, especially as the states parties as *Herren der Verträge*[198] can make, unmake and do what they like to a treaty? It can be pointed out, however, that interpretation is not change, even though it may seem so. Interpretation may seem difficult or even impossible to distinguish from change,[199] but one can only show that we experience difficulty in ascertaining the borderline, not that it does not exist. That would be confounding the ontology of norms with the problems of epistemology.

[198] Rudolf Bernhardt, Völkerrechtliche und verfassungsrechtliche Aspekte konkludenter Vertragsänderungen, in: Hans-Wolfgang Arndt *et al.* (eds), Völkerrecht und deutsches Recht. Festschrift für Walter Rudolf zum 70. Geburtstag (2001) 15–22 at 16.

[199] Rudolf Bernhardt, Interpretation and implied (tacit) modification of treaties. Comments on arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties, 25 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1967) 491–506 at 499; Karl (1983) *supra* note 125 at 39; Georg Ress, Die Bedeutung der nachfolgenden Praxis für die Vertragsinterpretation nach der Wiener Vertragsrechtskonvention (WVRK), in: Roland Bieber, Georg Ress (eds), Die Dynamik des europäischen Gemeinschaftsrechts. Die Auslegung des europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organe (1987) 49–79 at 61, 64; Sinclair (1984) *supra* note 12 at 138; Waldock (1965) *supra* note 32 at 60 (para 25).

As Wolfram Karl points out in his exhaustive study of the subject,[200] the confusion has to do with the perception of what the 'treaty' is. This, in turn, determines what a change of treaty is. Karl identifies three uses of the term. First, 'treaty' could refer to the legal transaction which creates the treaty norms; second, it could mean the norms themselves; third, it could denote the instrument, the document which is the result of the transaction and the expression of the norm. He therefore argues that 'change' could refer to a change of the instrument or text 'which does not necessarily include a change of the [norms themselves]',[201] or to a change of the norm itself.[202]

The question is: what is the nature of the norm in international treaty law? This has already been discussed in Section 4.2.3. If the text is the norm (as was argued there), one could say that only a change in the text would constitute a change of the treaty, while experience shows that the text remains, even if subsequent practice ignores it. The notion of the *Wortlautschranke* comes in at this point. If an alleged meaning is beyond the frame of possible meanings,[203] if it transcends anything the words could 'legitimately' mean – being aware that the determination of the frame itself exists, but may be impossible to ascertain (Section 4.2.4) – then the treaty would be changed if it could (legally) be changed without touching the text. It is the *approach* that is different with interpretation and modification. On the one hand, there is the scholarly search to cognise the meaning,[204] while on the other hand there is a decision, an authoritative act, as mentioned in the discussion of 'authentic interpretation' (Section 4.2.4).

Traditionally, subsequent practice has been used as a tool in treaty interpretation and as such it is admitted by most writers[205] and in numerous *dicta* of international tribunals.[206] We will begin with a discussion of the doctrine's value as interpretation before looking at the justification for claims that subsequent

200 Karl (1983) *supra* note 125.

201 'mit dem nicht unbedingt auch eine Änderung der Rechtslage einhergeht'; Karl (1983) *supra* note 125 at 10.

202 Karl (1983) *supra* note 125 at 9–10.

203 Hexner (1964) *supra* note 55 at 124.

204 Ress (1987) *supra* note 199 at 62–63.

205 Amerashinge (1995) *supra* note 63 at 198; Bernhardt (1963) *supra* note 4 at 126; Bernhardt (2001) *supra* note 198 at 17; Salo Engel, Procedures for *de facto* revision of the Charter, 59 American Society of International Law Proceedings (1965) 108–116 at 114; Fitzmaurice (1952) *supra* note 9 at 20–21; Fitzmaurice (1958b) *supra* note 10 at 223; Jacobs (1969) *supra* note 6 at 327; Karl (1983) *supra* note 125 at 123–194; Karl (1987) *supra* note 55 at 84; Köck (1976) *supra* note 10 at 42; McNair (1961) *supra* note 12 at 424; Pollux (1946) *supra* note 31 at 78; Ress (1987) *supra* note 199; Ress (2002) *supra* note 55 at 27–30 (MN 27–33); Sinclair (1984) *supra* note 12 at 136; Skubiszewski (1983) *supra* note 53 at 896; Waldock (1965) *supra* note 32 at 59 (para 23).

206 The list is far too large to give at this point. Wolfram Karl provides a comprehensive overview of the relevant jurisprudence (Karl (1983) *supra* note 125 at 123–194). The Permanent Court of International Justice as early as 1922 intimated that the practice of states parties to a treaty was relevant for its interpretation: '[T]he Court might . . . consider the action which has been taken under the Treaty.' *Competence of the International Labour Organisation*, Advisory Opinion of 12 August 1922, PCIJ Series B No. 2, 3 (1922) 39.

practice can change treaties. When reading through the numerous references, in particular those of older date, one is struck by their uniformity. For McNair, for example, 'the relevant conduct of the contracting parties after the conclusion of the treaty . . . has a high probative value as to the intention of the parties at the time of its conclusion.'[207] His statement is typical of older writings, for there subsequent practice is admitted as a means of discovering *original party intent*.[208] These three words have relevance for how one sees the role of subsequent practice in treaty interpretation. Indeed, their use is indicative of the approach one takes to interpretation, which determines what one makes of subsequent practice. The key to understanding the role of subsequent practice lies in a number of dichotomous pairs of concepts.

The '*ratione temporis*' distinction perceives the treaty either as static or as dynamic order (Section 4.1.3). On a static approach, the conclusion of a treaty is the key moment for treaty interpretation. The norms created are fixed; Baxter's 'photograph'[209] is put into the fixing-bath with the meaning of words to remain as they are at that moment. The dynamic approach[210] sees the treaty's conclusion as merely one important moment among others. The meaning of treaties changes over time, with the circumstances – and without the parties being involved. The choice of approach *ratione temporis* determines one's position with respect to 'inter-temporal law': the meaning of words is taken *ex tunc* or *ex nunc*, respectively. If one follows Kelsen to define legal interpretation as finding the possible meanings of a norm, the point here would be the different temporal reference points where meanings would be 'fathomed'. These would either be the possible meanings at the time of a treaty's conclusion or at the moment of interpretation.

The problem is: why would a treaty text have dynamic properties? At the point of its conclusion and barring formal amendments, the text will remain the same. The question then becomes: what is the text or what does it represent? Is it the expression of party consent or of some trans-positive norm, in any case something beyond the words? Or is the text the law itself, as argued in Section 4.2.3? It may be impossible to decide. If the 'true' treaty lies beyond the text, why do we need a text? The temporal reference point for the possible meanings is also unclear; would the possible meaning necessarily be static or even a-temporal? Kelsen himself agreed that his frame theorem allowed for an *ex nunc* interpretation:

[207] McNair (1961) *supra* note 12 at 424.

[208] *Treaty of Lausanne* (1925) *supra* note 60 at 24: 'The facts subsequent to the conclusion of the Treaty of Lausanne can only concern the Court insofar as they are calculated to throw light on the *intentions* of the *Parties* at the *time of the conclusion* of that Treaty' (emphasis added).

[209] Richard R. Baxter, Multilateral treaties as evidence of customary international law, 41 British Yearbook of International Law 1965–66 (1968) 275–300 at 299.

[210] Karl (1983) *supra* note 125; Karl (1987) *supra* note 55; Ress (1987) *supra* note 199; Ress (2002) *supra* note 55.

> That the law is open to more than one interpretation is certainly detrimental to legal security; but it has the advantage of making the law adaptable to changing circumstances, without the requirement of formal alteration.[211]

It is conceivable within Kelsenian theory that either the 'interpretative [frame itself] may (and probably will) shift in the process of time in conformity with changing circumstances'[212] or that some possible meanings become impossible while other meanings become possible. A shift of the choice of one meaning to another by an authoritative organ would also bring dynamism, whether the one or the other is considered a correct meaning or not.[213] The difficult question is whether the frame of possible meanings can shift over time. It could be said that it cannot – international treaty law is the text which remains; therefore, its meanings remain. The correct temporal reference point is *ex tunc*; anything else constitutes a change.[214]

The '*ratione personae*' distinction takes either a subjective, party-oriented, or an objective, independent, view of what the meaning of the treaty is. What goal does the use of subsequent practice have? Is it directed at proving intent or expression (Section 4.1.1)? A subjective approach sees the parties in a position of exclusive control over the existence as well as the interpretation of the treaty. They truly are its masters and state will and sovereignty are to be the guiding principles.[215] Consequently, subjectivists tend to see the meaning expressed in party intentions; the proper aim of treaty interpretation is finding these intentions. Objectivists, on the other hand, tend to see a treaty as a given ideal, transcending its makers' wishes. They wish to discover either the meaning of the text or of the aims and goals as something 'objectively given'.

Why would a treaty need to be subjected to its creators; why would it need to be viewed in a subjectivist manner? States may make and unmake treaties, but they may do so only because there is a legal order *authorising* them to create law. In principle, states are not in a privileged position vis-à-vis the law of treaty-creation (meta-treaty law), no more than a national judge is as against his

[211] Kelsen (1950) *supra* note 52 at xiv–xv.

[212] Bernhardt (1963) *supra* note 4 at 132; Hexner (1964) *supra* note 55 at 123; Engel (1965) *supra* note 205 at 109.

[213] *Contra*: Karl (1983) *supra* note 125 at 38.

[214] Bos (1980) *supra* note 3 at 152; Fitzmaurice (1958b) *supra* note 10 at 212; Georg Schwarzenberger, Myths and realities of treaty interpretation. Articles 27–29 of the Vienna Draft Convention on the Law of Treaties, 22 Current Legal Problems (1969) 205–227 at 213; *contra*: Ress (2002) *supra* note 55 at 23 (MN 19). Kelsen himself seems to argue *obiter* that the meaning of a norm can change over time (Kelsen (1979) *supra* note 47 at 151 (Ch 50)). However, as he makes clear in the accompanying endnote, only a theory which asserts 'that the meaning of an interpreted norm is constant as long as it is not changed explicitly in appropriate action by the normgiving authority' (Jerzy Wróblewski, Semantic basis of the theory of legal interpretation, 6 (N.S.) Logique et Analyse (1963) 397–416 at 415), only such a 'static' theory can be proposed from a positivistic point of view; the 'dynamic' theory is a fiction. Kelsen (1979) *supra* note 47 at 303 (N 128).

[215] Karl (1983) *supra* note 125 at 25, 148.

country's code of penal procedure. States may have a much greater leeway in creating norms than the judge, but both create valid norms only because their respective legal order authorises them to. There is no natural or inherent power of states to create international treaty law. The only true sovereign in international law is international law itself; no state is *legibus solutus* vis-à-vis international law. Treaties ought to be observed whatever the actions of their makers – unless the legal conditions for a change of law are fulfilled. On the other hand, it is the act of will of the states parties that creates positive treaty law. As argued in Section 4.2.2, however, only the fact, not the content, of that will is relevant: a treaty's content is determined by the language of the treaty.

These two dichotomous choices make four differing combinations of approaches to treaty interpretation possible. Because this section is concerned with the role of subsequent practice in interpretation, we will test them against the doctrine of subsequent practice to see what role it would be able to play in each. (1) The static/subjective combination was traditional doctrine's approach and as such static ('original'), subjective ('party') and directed towards discovering meanings attributed rather than expressed ('intent'). For this view, the parties' subsequent practice gives an indication as to what they understood the treaty to mean when they concluded it.[216] (2) The dynamic/subjective choice reflects the parties' current views. While it is still the treaty-makers whose intentions are reflected in their practice or in the practice of organs they have created, shifts in their understanding of the terms become relevant. This approach is justified as (current) consensus among states parties,[217] which appears before the Court as a variant of what can be called the 'mental economy'[218] argument – the Court declines to discuss an issue, because the parties to the dispute before it agree on a notion

[216] Bernhardt (1963) *supra* note 4 at 131 (referring to prior international jurisprudence); Fitzmaurice (1952) *supra* note 9 at 20; Fitzmaurice (1958b) *supra* note 10 at 212; Haraszti (1973) *supra* note 8 at 143; McNair (1961) *supra* note 12 at 424; Pollux (1946) *supra* note 31 at 78; probably also Waldock (1965) *supra* note 32 at 59 (para 24). Also, the Permanent Court's and the present Court's jurisprudence seems to support this approach, e.g.: *Treaty of Lausanne* (1925) *supra* note 60 at 24; *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 3 March 1928, PCIJ Series B No. 15 (1928) 18; *Case Concerning the Payment of Various Serbian Loans Issued in France*, Judgment of 12 July 1929, PCIJ Series A No. 20 (1929) 38; *Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France*, Judgment of 12 July 1929, PCIJ Series A No. 20 (1929) 119; *Corfu Channel (United Kingdom* v. *Albania)*, Merits, Judgment of 9 April 1949, ICJ Reports (1949) 4 at 25; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, ICJ Reports (1960) 150 at 167; *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand)*, Merits, Judgment of 15 June 1962, ICJ Reports (1962) 6 at 33, 35. For a detailed analysis Karl (1983) *supra* note 125 at 127–135.

[217] Karl (1983) *supra* note 125 at 144–156; Ress (1987) *supra* note 199 at 57; Ress (2002) *supra* note 55 at 27 (MN 27). This argument will return as a construct to justify change in Section 4.4.2.

[218] Jörg Kammerhofer, Oil's Well That Ends Well? Critical comments on the merits judgment in the *Oil Platforms* case, 17 Leiden Journal of International Law (2004) 695–718 at 707–708.

anyway.[219] Also, estoppel can be argued as being capable of determining the interpretation by subsequent practice as a matter of a state's current opinions.

(3) On the dynamic/objective combination subsequent practice becomes important because it is said to put the treaty in touch with reality (*Vertragswirklichkeit*). For this approach it seems imperative that the norm must not diverge too much from reality and must remain effective to remain law. But law, even international law, is something categorically different from reality, an ideal idea specifying an Ought, no matter what actually happens. For Wolfram Karl, an objective approach is always dynamic; he does not believe that an objectively given norm would not sway with the vagaries of treaty application. (4) The static/objective approach seems to coincide well with the Pure Theory's ideas. On this approach, a treaty norm is a valid norm and thus beyond change through subjective perception. Being an objective 'thereness', the treaty text is ossified at the moment of its conclusion or formal amendment. Thus a treaty equals Baxter's photograph: it is fixed for eternity until it is burnt, torn or taken anew.

The relevance of subsequent practice in a static/objective approach is this: interpretation is about finding the meaning(s) of a treaty, even when we use subsequent practice. It, in turn, can only be a method to help discover the meaning. Practice can at best be evidence of the meaning.[220] The connection between practice and meaning is coincidendental, not necessary. Wolfram Karl's warning against using subsequent practice merely as a supplementary means of interpretation, because that would further weaken practice's importance,[221] could be seen as a *petitio principii*: the importance of subsequent practice for interpretation has yet to be proven. To see an approach as useless because it would minimise practice's value presupposes what has to be proven. It must be established that subsequent practice is capable of cognising the norms of international treaty law correctly. It is doubtful that this is the case, because the norms already are the text and practice cannot add to or remove from the text. However, practice could be argued to be capable of determining the possible meanings of the norm. However, like other factors of interpretation it has no necessary or automatic claim to epistemic value, much less of discovering the 'normative truth'. On the contrary, practice as application of norms by its subjects can be observance just as likely as it can be breach of a given norm. Who is to say that the subjects' actions, even if they are the law-makers, will always, sometimes or at any time reflect the prescription? Take the private behaviour of parliamentarians in their function as

[219] *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, Advisory Opinion of 11 December 1931, PCIJ Series A/B No. 43 (1931) 140. The Court does not make this a rule, however. In *Nicaragua* it was satisfied that both parties were in agreement as to the law on the use of force, but decided to ascertain the law for itself: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports (1986) 14 at 99 (para 188).

[220] Fitzmaurice (1952) *supra* note 9 at 21; Fitzmaurice (1958b) *supra* note 10 at 224; McNair (1961) *supra* note 12 at 424.

[221] Karl (1983) *supra* note 125 at 126, 138.

subjects of domestic law as an example. Who would seriously claim that the personal behaviour of members of parliament is a guide to the laws they had created? This may well be a rehash of the old notion of sovereignty. States cannot be absolute sovereigns in international law. They are not always authorised to determine what is law at any time and as it suits them.

4.4.2 Subsequent practice as justification for treaty modification?

What happens when there is a claim that the law has changed, because the states parties to a treaty have in their application of the treaty seen the matter in a way that is different from the text of the treaty? Such a claim seems not to have been formulated in the judgment in the *Namibia* case regarding the 'concurring votes' requirement of Article 27(3) UN Charter.

> [T]he proceedings of the Security Council extending over a long period supply abundant evidence that . . . the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote.[222]

This statement seems nothing less than a claim of *change* through subsequent practice.[223] How could a vote of abstention – not silence – possibly be interpreted as a concurring vote? The Court's wording, 'signify its objection to the approval', hints at the real theoretical difficulty. How can one presume consent when the point of a vote on a draft resolution is to make the choice of the members of the Council explicit, rather than implied? States members of the Council do not have to signify an objection to the approval; they have to approve, or object to, the proposal. The text of Article 27(3) UN Charter seems clear on this point – the meaning given by the Court in *Namibia* is not within the frame of possible meanings. The nine affirmative votes required shall *include* the concurring votes of the permanent members. To concur requires explicit action. Even though such an interpretation would make a great number of resolutions invalid under Charter law and might therefore rightly be called unrealistic or even destructive, adopting the Court's meaning would constitute a change in the law.[224]

Grave doubts can be voiced about the lawfulness of subsequent practice changing treaties in international law. There are several approaches to justify this

[222] *Namibia* (1971) *supra* note 55 at 22.

[223] Karl (1983) *supra* note 125 at 234; Ress (2002) *supra* note 55 at 30 (MN 33).

[224] For a thorough analysis of the situation under Article 27(3) UN Charter see: Bruno Simma, Stefan Brunner, Hans-Peter Kaul, Article 27, in: Bruno Simma (ed.), The Charter of the United Nations. A commentary (2nd ed. 2002) 476–523 at 493–501 (MN 46–74).

possibility. Weighty theoretical arguments can be brought to bear against each of them, despite their valid claim that without such informal modification of treaties the workability of the international legal system could be endangered. However, one line of reasoning needs to be dispatched before we enter the substantive discussion, namely that the facts directly change the law without the need for an authorisation by the legal order. Scholars making this argument usually point out that change actually has happened through subsequent practice; this quote from Salo Engel exemplifies this presumption: '[I]n the daily practice of Members and organs, the Charter has undergone far-reaching changes even without the adoption of formal amendments.'[225] This proposal is a *petitio principii*, for to prove that change can happen because change has allegedly already happened is begging the question of whether change can happen. This argument also transcends the Is–Ought duality. The acts of the subjects of law seem to be determining the law applicable to them at every moment and without the law's authorisation. If thought through, breaches of treaty norms would not merely be the basis for new law, but would become a theoretical impossibility, because the subject's every action determines anew what is law. This leads to the dissolution of the idea of law as norms, as an ideal, as something to measure behaviour upon. Scholars making this kind of argument are, in the end, not lawyers, but political scientists:

> For as regards nature, experience presents us with rules and is the source of truth, but in relation to ethical laws experience (alas!) is the parent of illusion, and it is in the highest degree reprehensible to limit or to deduce the laws which dictate what I *ought to do*, from what *is done*.[226]

The legal maxim *ex iniuria ius non oritur*[227] is not applicable here and cannot be used against subsequent practice. It is irrelevant whether the actions the meta-law describes as law-creating are violations of the norm to be changed (see Section 3.2.6).

There are two main lines of attack to justify the modifying power of subsequent practice to treaties. Either subsequent practice is evidence of a subsequent tacit treaty which would (partially) supersede the formally concluded treaty, or it forms part of a subsequent customary international law norm which would derogate from the treaty. The first argument will be discussed in the remainder of this section, while the difficult question of the relationship of customary international law to international treaty law will be discussed in Section 4.4.3.

[225] Engel (1965) *supra* note 205 at 108.

[226] 'Denn in Betracht der Natur gibt uns Erfahrung die Regel an die Hand und ist der Quell der Wahrheit; in Ansehung der sittlichen Gesetze aber ist Erfahrung (leider!) die Mutter des Scheins, und es ist höchst verwerflich, die Gesetze über das, was ich tun soll, von demjenigen herzunehmen, oder dadurch einschränken zu wollen, was getan wird.' Kant (1781, 1787) *supra* note 30 at A 318–319, B 375 (translation John Miller Dow Meiklejohn).

[227] E.g.: Hexner (1964) *supra* note 55 at 129. Hans Kelsen agrees that it is beside the point to argue about the legality of law-creating acts: Hans Kelsen, Recent trends in the law of the United Nations. A supplement to 'The law of the United Nations' (1951) 912.

As far as the possibility of change in a treaty through subsequent practice is acknowledged and its judicial basis discussed, a justification as a subsequent and informal agreement is by far the most popular:[228]

> If the masters of a treaty [its parties] are agreed, they are neither bound with respect to a treaty's content in its interpretation, application or development . . ., nor do they have to observe rules of form and procedure. . . . If all parties to a treaty agree, they can modify or end a treaty explicitly or tacitly.[229]

The problems with the contractual theory are multifarious and start with the act of will as necessary condition for all positive law-making. Any contract is a meeting of wills and so it is in international treaty law. However, if the treaty is tacitly concluded, how do we prove that this meeting of wills has taken place and that the act of will required to make it a positive treaty has occurred? The behaviour of persons can be interpreted in many different ways and it is unlikely that similar behaviour by multiple persons – a pattern of behaviour (Section 3.2.5) – evidences a meeting of wills by the states parties concerned. Practice would be relegated to evidence of the real agreement[230] and not as the legal foundation for change itself.

One answer to this would be to presume from the parties' uniform subsequent practice that they had the requisite will. Karl agrees that we should accept real existing will as 'guiding principle', but for him what counts is not the actual will, but the social significance of typical objective behaviour, the impression made on the other subjects of law. For him, the basis of tacit treaties is the protection of trust (*Vertrauensschutzprinzip*). Trust worthy of protection is protected by doctrine by construing a legal act through a 'quasi-liability' (*haftungsartig*).[231] However, this construct is based on a fiction that replaces law. Positive regulation is needed to create a 'silence gives consent' situation and if there is no such regulation, the opposite applies. Contrary to Karl's argument that 'assent is the most natural interpretation of silence where all circumstances would lead one to expect protest',[232] consent is not natural even where the circumstances would require explicit

[228] Amerashinge (1995) *supra* note 63 at 200; Bernhardt (1963) *supra* note 4 at 126–127; Bernhardt (1967) *supra* note 199 at 498–499; Bernhardt (2001) *supra* note 198 at 16–17; Fitzmaurice (1958b) *supra* note 10 at 212; Karl (1983) *supra* note 125 at 268–313 (one possibility *inter alia*); Ress (2002) *supra* note 55 at 32 (MN 39); Waldock (1965) *supra* note 32 at 61 (para 32).

[229] 'Die Herren des Vertrages sind, wenn sie sich einig sind, bei seiner Auslegung, Anwendung und Fortentwicklung weder inhaltlich gebunden . . ., noch müssen sie Form- und Verfahrensregeln beachten. . . . Wenn alle Vertragspartner übereinstimmen, können sie sowohl ausdrücklich als auch konkludent den Vertrag modifizieren oder auch ganz beenden.' Bernhardt (2001) *supra* note 198 at 16–17. See also *Aegean Sea Continental Shelf (Greece* v. *Turkey)*, Jurisdiction, Judgment of 19 December 1978, ICJ Reports (1978) 4, Dissenting Opinion Stassinopolous at 72 (para 3).

[230] Karl (1983) *supra* note 125 at 274.

[231] Karl (1983) *supra* note 125 at 271–273.

[232] 'Zustimmung ist noch immer die natürlichste Deutung des Stillschweigens, wenn alle Umstände einen Protest erwarten lassen.' Karl (1983) *supra* note 125 at 276.

protest. Acquiescence cannot be presumed, despite Karl's operationalisation of acquiescence for the present situation.[233] In creating obligations, states must be trusted to say 'aye' and not have scholars say 'aye' for them.

But the Pure Theory does not believe that international law is an informal legal order or that treaty change is not bound by formality.[234] Because international law is a normative order and norms are a formal arrangement of claims to be observed, a hierarchy of norms, law is defined as form and without form it would cease to be norm. Therefore, despite the particularities of international law one cannot say that international law is *nonchalant* about informal modification. Unless informality is explicitly, formally, allowed, the prescribed forms for changing the law have to be observed in order for change to be successful. A treaty can only be derogated by another treaty, not by informal consensus[235] or by practice. One could also argue that the formality of law requires a contrary act to derogate, i.e. an act of the same kind. A treaty can also provide for its change by a special procedure (Article 108 UN Charter). The law itself defines the means of changing the law and thus makes them formal, whereas in an informal order, the possible means of change are not defined *a priori*.

Even if we accept that another treaty has tacitly been created *inter* (*omnes*) *partes*, the question remains whether that later treaty can derogate from the former treaty, because it is a clash of treaty against treaty.[236] Arguing that the implied will to conclude a treaty implies a will to derogate from the earlier treaty,[237] especially where the former will was made explicit, while the latter is a scholar's presumption, is not going far enough. It cannot be overstated how important and uncertain the matter is and how deep into theory the disagreement can be traced. The role of logic in legal scholarship is at stake, a topic far too weighty to discuss in depth here. In 1960 Kelsen wrote that a legal order ought to be cognised by legal science as a meaningful whole, that is as an internally consistent unit and that therefore the principle of *lex posterior derogat legi priori* must be presumed to be included in an authorisation (by superior norms) to create law.[238] In a posthumous book of 1979, the exact opposite seems to obtain: '*lex posterior derogat priori* [is] not a logical principle, but a principle of positive law.'[239] If that principle should not

233 Karl (1983) *supra* note 125 at 276–281.

234 Karl (1983) *supra* note 125 at 74; Verdross and Simma (1984) *supra* note 50 at 424, 505.

235 Verdross and Simma (1984) *supra* note 50 at 505, 323–327.

236 Karl (1983) *supra* note 125 at 280.

237 Karl (1983) *supra* note 125 at 281.

238 Kelsen (1960) *supra* note 3 at 210 (Ch 34 e): 'als in der Ermächtigung mitinbegriffen angenommen werden'.

239 'lex posterior derogat priori [ist] kein logisches, sondern ein positiv-rechtliches Prinzip'; Kelsen (1979) *supra* note 47 at 103 (Ch 29 IV), 84–92 (Ch 27). Adolf Merkl had come to this conclusion early in his work, e.g.: Adolf Julius Merkl, Die Rechtseinheit des österreichischen Staates. Eine staatsrechtliche Untersuchung auf Grund der Lehre von der lex posterior, 37 Archiv des öffentlichen Rechts (1918) 56–121, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1115–1165.

be part of positive law and if both norms are on the same hierarchical level, a conflict of norms ensues, which implies that a legal order may contain two contradictory prescriptions.[240] Accordingly, Wolfram Karl claims that the maxim is a norm of international law and a rule of interpretation.[241] In Section 5.3 we will discuss the role and capability of the *lex posterior* rule in more detail.

4.4.3 The relationship between customary international law and treaties

The second argument is that subsequent customary international law can modify a prior treaty. One might think such a construct is very unlikely to succeed, since the text remains and withers all storms of changing customs, but this claim deserves a closer treatment, since it is evidence of difficult problems of traditional approaches to the architecture of sources of international law, to be discussed later (Chapter 6). There also seem to be far fewer proponents of such a solution.[242]

(1) Accepting for the moment the contention that later customary international law can change treaties, we are faced with pragmatic difficulties. What is the role of subsequent *practice* in the modification of a treaty by subsequent *customary law*? Certainly, these two are not identical, for if they were they would be faced with the duality of Is and Ought, as mentioned above (Section 4.4.2), but practice may be meant to constitute the objective element of custom-creation. But if subsequent practice equals state practice, much of what is claimed to be 'subsequent practice' belongs to the class of 'statements', which on one view of the nature of state practice (Section 3.2.1) do not evidence their content, but merely the practice of making statements. Also, since international lawyers have had to resort to the construct of subsequent practice for the possibility of change, the evidence of the subjective element (*opinio iuris* as act of will required for positive law-making) is not usually to be found in the factual constellations here at issue. If there were open manifestations of state will, scholars eager for change would be able to construe a tacit treaty and would not have to resort to this indirect justification. Thus it is doubtful whether one will find 'good quality' *opinio iuris* on the modification of most treaties, *inter alia* because it is likely that states parties to a treaty will believe that the treaty is being kept intact.[243] Lastly, even the proponents believe that a general customary international law norm cannot modify a treaty norm (plainly

[240] Kelsen (1979) *supra* note 47 at 101–103 (Ch 29 III–IV).

[241] Karl (1983) *supra* note 125 at 66–68.

[242] Michael Byers, Custom, power and the power of rules: International relations and customary international law (1999) 177–180; Karl (1983) *supra* note 125 at 86–110, 248–268; Nancy Kontou, The termination and revision of treaties in the light of new customary international law (1994); Hugh Thirlway, International customary law and codification (1972) 130–132.

[243] Another application for 'Baxter's paradox': Richard R. Baxter, Treaties and custom, 129 Recueil des Cours 1970 I (1971) 25–105 at 64.

because customary international law is generally thought of as *ius dispositivum*) and prefer to accord the privilege of modificability only to 'treaty-specific' (*inter se*) customary law, i.e. particular customary law created by (all) the parties to a given treaty.[244]

(2) Unlike legislation (understood in a broad sense), customary norms are limited in their powers to create, modify and derogate from norms (Sections 3.2.5 and 4.1.2). Customary law is a primitive source of law, because it is based on behavioural regularities (customs) which define the prospective prescribed behaviour. Only such *behaviour* can be prescribed as can be expressed in customs. Norms, however, are not customs; they are an ideal. If customary law were to refer to norms, its referral to the *fact* of custom would be perverted, because it would refer not to the real, but to the ideal, to the Ought, not the Is, as is the specific function of customary norm-creation. Therefore, as mentioned above, customary law cannot itself authorise the creation of law and cannot create a subordinate source of law. Meta-international treaty law cannot be customary international law, because customary international law cannot create norms regulating norms. In our specific case, customary law could only supply a new additional norm with different content (material derogation), and could not formally claim to derogate from the treaty, because such a customary law norm cannot refer to any behavioural pattern. To formally derogate, it would have to refer to the treaty norm itself, which it cannot (see also Sections 5.2.3 and 5.3.2). If the new customary norm therefore does not even claim to modify the older treaty norm, would not the more reasonable view be that the two norms exist side by side (as has traditionally been held)?[245]

(3) What exactly is the relationship between customary international law and international treaty law as two formal sources of international law? Are the two sources in a hierarchical relationship; is treaty subordinate to custom? Hans Kelsen makes that claim in *Principles of international law*. The norm '*consuetudines sunt servanda*' is the *Grundnorm* of international law, with *pacta sunt servanda* as the basis of validity for international treaty law only being one particular customary international law norm.[246] Verdross counters:

> Renowned scholars see the norm *pacta sunt servanda*, which forms the basis of all international treaty law, as a norm of customary international law. How is that possible, since the customary international law norm concerning the conclusion of such treaties can only be created by state practice consisting in the conclusion of such treaties? From the first such treaty the principle *pacta sunt servanda* governed; it cannot have been created by custom. . . . If this principle is to be the basis of all international treaty law, it cannot have been created through the custom concerning

[244] Byers (1999) *supra* note 242 at 179; Karl (1983) *supra* note 125 at 106–110, 249; Thirlway (1972) *supra* note 242 at 132, 139.

[245] *Nicaragua* (1986) *supra* note 219 at 93–96 (paras 174–179).

[246] Hans Kelsen, Principles of international law (1952) 418.

the application of that treaty. Customary international law can only confirm and refine it.[247]

Wolfram Karl, taken here as a proponent of the theory of modificability of treaties by subsequent custom, echoes orthodox international legal scholarship when he insists that custom and treaty are on the same hierarchical level.[248] At this point we are in the privileged position to be able to watch two firm and simultaneoulsy held doctrines of orthodox international legal scholarship collide. On the one hand, treaties can dispose of earlier custom, as it constitutes *ius dispositivum* if the customary law norm is not *ius cogens*.[249] On the other hand, however, later custom can modify earlier treaties. Maybe one can explain these phenomena away by admitting a non-hierarchy and by proposing two positive norms:

(*a*) a *meta*-customary international law to allow for the specific and temporal 'retreating into the background' of customary international law norms of a *ius dispositivum* character by treaty;
(*b*) another of *meta*-treaty law to allow for subsequent customary law to modify, suspend or terminate treaties or single provisions?

But it could also be argued that if no hierarchy can be proven between two sources of law, neither can derogate from the other (Section 6.3.2). It can also be argued that even subordination cannot decide the issue of derogability (Section 5.5).

(4) What if subsequent practice simply remains illegal under treaty law and does not change it, but is authorised by 'general international law'?[250] Ervin Hexner states that 'under certain circumstances law can be created by means other than "legal" . . . extra-legal changes of positive law'.[251] This is highly problematic vis-à-vis the idea of norms. It seems unlikely that he would want all the consequences that follow from this theoretical stance to occur. Norms can only

247 'Verschiedene angesehene Schriftsteller betrachten die dem völkerrechtlichen Vertragsrecht zugrundeliegende Norm pacta sunt servanda als eine Norm des VGR. Wie ist das möglich, da das VGR über den Abschluß von solchen Verträgen doch erst in der sich darüber entwickelnden Staatenpraxis entstehen könnte? Da aber schon der erste solche Vertrag vom Grundsatz pacta sunt servanda beherrscht war, kann er nicht durch die Übung erzeugt worden sein. . . . Bildet aber dieser so bestimmte Grundsatz die Voraussetzung des ganzen völkerrechtlichen Vertragsrechts, so kann er unmöglich erst in der Übung über die Anwendung dieses Vertrages entstanden sein. Das VGR kann ihn nur bestätigen und näher entfalten.' Alfred Verdross, Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts, 29 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1969) 635–653 at 642–644.

248 Karl (1983) *supra* note 125 at 86–87, 109, 249.

249 *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)*, Merits, Judgment of 20 February 1969, ICJ Reports (1969) 3 at 43 (para 72): 'Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties'.

250 Ress (1987) *supra* note 199 at 72.

251 Hexner (1964) *supra* note 55 at 129.

change in a way that norms prescribe. If action is taken which does not fulfil the criteria set by law-changing law for changing law, law simply does not change, however much we might want the change. It does not matter whether the law – as in the case of customary law – makes actions of application of a substantive law also partly able to change that law and thus an application of the meta-law of custom-creation.

5

Conflict of norms in international law

Conflicts of norms are a far worse problem for legal theory than the issue of gaps in the law (*lacunae*) could ever be. This is not because jurists would prefer 'less' to 'more' regulation, but because 'absence' does not ask us to choose between two 'existences', between two valid norms. Gaps may put on us the pressure to 'fill' them with what norms we would like to be valid; conflict puts on us the pressure to resolve it by somehow 'privileging' one norm over the other.[1] Conflicts of norms are a cause for uncertainty in international law, because if more than one norm refers to the same type of behaviour, the danger is very real that the subject of law which is confronted by this phenomenon will be physically unable to behave in conformity with both applicable norms. Where reality has been made to accord with the *actus reus* of one norm it may be impossible to do so with respect to another norm. Uncertainty arises from the tension between the choice of behaviour and the necessary equality of either norm's claim to be observed. Thus, the subject's choice privileges equals – and leads to non-compliance with at least one norm.

As a matter of normative ontology, however, the case where two norms refer to the same behaviour is not uncertain (Section 5.3). This happens, for example, where the same behaviour is the object of an administrative and a criminal sanction at the same time. There is a multiplicity of norms 'applicable' to the behaviour; two or more norms are valid. Too much normative ontology in the above case presents no ontological problems. If the subject were to observe norm 'A', it would have violated norm 'B'; if it were to observe B, it would violate A. Both observance and breach are possible behaviour in relation to a norm.[2] The mere breach of a norm does not change or negate its validity.

[1] On this narrow point, it is easy to agree with the postmodern critique as against privileging 'one' over 'the other' (J.M. Balkin, Deconstructive practice and legal theory, 96 Yale Law Journal (1987) 743–786).

[2] Kelsen argues that the possibility of a norm not being observed is not a negation of the norm. Indeed, using sections of a penal code as example, he makes the case that not acting according to the norm's prescription is the condition for the application of a norm that may be framed thus: 'If someone wilfully kills another human being, that person ought to be imprisoned for life.' The act of 'wilfully killing', though clearly prohibited by the imposition of life imprisonment, is actually

The problem with respect to normative ontology arises – and is thus the focus of this chapter – when it is claimed that the conflict is either a logical contradiction that solves itself or when devices are employed in order to resolve the conflict in favour of one norm. While the situation referred to above may not concern the ontology of norms, 'resolving' it by one means or another does.

The notion of conflicts of norms in international law has until recently received very little attention from international legal scholarship. If conflicts were discussed, it was done implicitly and incidental to the question of hierarchy and the inter-relationship of sources.[3] An important step forward in this respect is Joost Pauwelyn's book published in 2003.[4] Also, stemming from an initiative of Gerhard Hafner, the International Law Commission decided to include the topic of 'Fragmentation of international law' in its programme of work in 2002. Martti Koskenniemi, as the chairman of the study group, submitted a final report in 2006, which tackles conflicts of norms head-on.[5]

A feature of traditional international legal scholarship is its adoption of resolving devices such as the *lex posterior* or *lex specialis* maxims without critically analysing their theoretical basis. It can be argued, however, that we need to justify whether these resolving devices can be used at all. If the task of legal scholarship is to find the law, it is highly problematic to simply assume that traditionally adopted *dogmata* are valid. We need to be sceptical about orthodoxy's predisposition to resolve conflicts too easily and about the devices orthodoxy employs in order to do so.[6] Resolving conflicts may be impossible; conflicts of norms may be unavoidable. On the other hand, what appears to be a conflict may not be one and the device employed may not be necessary. Finally, it might be the case that resolving devices are applicable after all. We need to find out what, exactly, is the case in international law, but academic legal scholarship cannot simply assume these problems away into non-existence. We must distinguish sharply between what is law and what is wishful or lazy thinking.

In this chapter, the way in which three major streams of scholarship have tackled the problem of conflict of norms will be analysed. First, international legal scholarship following pragmatic or orthodox lines of argument; second,

in accordance with the norm's prescription. In this formulation of the prohibition it constitutes a *condition* for the existence of a norm prescribing a sanction against all murderers. Kelsen, accordingly, discourages calling it a 'breach' of a norm (e.g. Hans Kelsen, Reine Rechtslehre (2nd ed. 1960) 119 (Ch 27 b)).

[3] Afred Verdross, Bruno Simma, Universelles Völkerrecht. Theorie und Praxis (3rd ed. 1984) 412–416.

[4] Joost Pauwelyn, Conflict of norms in international law. How WTO law relates to other rules of international law (2003).

[5] Martti Koskenniemi, Fragmentation of international law: Difficulties arising from the diversification and expansion of international law. Report of the study group of the International Law Commission, in: International Law Commission, Documents of its fifty-eighth session, A/CN.4/L.682 (2006).

[6] James W. Harris, Kelsen and normative consistency, in: Richard Tur, William Twining (eds), Essays on Kelsen (1986) 201–228 at 225.

logico-analytical scholars focusing on the logical aspect of the conflict of norms and third, the Pure Theory of Law, in particular Kelsen's late work (concerned with the relativisation of the role of logic) and Adolf Merkl's writings on the hierarchical ordering of law (*Stufenbau des Rechts*). This chapter will also deal with the three most commonly used and widely accepted resolving devices, i.e. the *lex posterior, lex specialis* and *lex superior* maxims. The traditional and uncritical reliance on the *lex posterior* and *lex specialis* maxims is an ideal starting point to demonstrate the deconstructive force of an analysis looking solely on the law. In Sections 5.2 and 5.3 we will focus on the basis or justification for these maxims of law. The third maxim which privileges *lex superior* is special, because the hierarchy of norms is connected to the notion of unity and coherence of normative orders; a unity achieved by validity-relationships. Critical remarks on this resolving device (Section 5.5) are bound to affect the Pure Theory's normativist-positivist project as well. A consistent application of the deconstructive side of the neo-Kelsenian project may cause considerable problems for its constructive side. Questioning *lex superior* may lead us to the limits of Kelsen's theory and may endanger the coherence of normative orders (Section 5.5.3.3).

5.1 A preliminary definition of conflict of norms

As a collorary to the point made at the beginning of this chapter we must add that the attribution of the label 'conflict' to the relationship between two norms does not itself suffice to alter the validity of the norms and does not itself solve the conflict in a particular way.[7] Hence the focus of this chapter must lie on the process of resolving conflicts of norms, not in defining them. Pauwelyn's book and Kelsen's post-1960 writings will be used as examples[8] due to their sustained focus on the notion of conflict of norms. Kelsen's definition is this:

> A conflict between two norms occurs when there is an *incompatibility* between what one ought to do under the first norm and what one ought to do under the second norm, and therefore *obeying or applying* one norm necessarily or potentially involves violating the other.[9]

[7] Ewald Wiederin, Was ist und welche Konsequenzen hat ein Normkonflikt?, 21 Rechtstheorie (1990) 311–333 at 328–329.

[8] Pauwelyn (2003) *supra* note 4 at 164–188; Hans Kelsen, Allgemeine Theorie der Normen (1979) 99–101 (Ch 29 I–II).

[9] 'Ein Konflikt zwischen zwei Normen liegt vor, wenn das, was die eine als gesollt setzt, mit dem, was die andere als gesollt setzt, *unvereinbar* ist, und daher die *Befolgung oder Anwendung* der einen Norm notwendiger- oder möglicherweise die Verletzung der anderen involviert.' Kelsen (1979) *supra* note 8 at 99 (Ch 29 I) (original emphasis removed, emphasis added). For an approach closely modelled on Kelsen's cf.: Erich Vranes, The definition of 'norm conflict' in international law and legal theory, 17 European Journal of International Law (2006) 395–418. Cf., though, Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre (1920) 110.

This is an unremarkable definition, similar to many others.[10] The element of 'incompatibility' is key. While there are examples of incompatible norms in *Allgemeine Theorie der Normen* there is no exhaustive definition, unlike in *Reine Rechtslehre*, where an analogy is drawn between logical contradiction of statements and incompatibility of norms.[11] The second element, also not unique to Kelsen, is the reference to a factual impossibility to simultaneously conform to the prescriptions of all applicable norms. Despite Pauwelyn's characterisation of Kelsen's definition as 'strict or technical',[12] on a closer study of the *Allgemeine Theorie der Normen* and on a comparison of Kelsen's definition and of other 'broad' definitions,[13] one could call Kelsen's definition 'broad'. Pauwelyn himself, though seeking to 'approach the notion of "conflict" in the most open and non-dogmatic way',[14] finds in favour of a particular form of conflict:

> Notwithstanding the varying definitions of conflict set out earlier . . . it is difficult to find reasons why a conflict or inconsistency of one norm *with another norm* ought to be defined differently from a conflict or inconsistency of one norm *with other types of state conduct* (e.g., wrongful conduct not in the form of another norm). *Essentially, two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.*[15]

Despite a close reading of Kelsen's works,[16] Pauwelyn's definition is fundamentally at odds with the Pure Theory of Law and it is surprising that Pauwelyn adopts a definition without referring to or defending it against predictable Kelsenian counter-arguments. The critique from a Kelsenian approach is that it is not possible for a norm to 'breach' another norm. The normative functions of 'prohibition', 'obligation' or 'permission' can only refer to human behaviour, not to other norms. A norm cannot 'prohibit', 'obligate' or 'allow' another norm, only the *creation* of a norm or other behaviour associated with a norm. Various norms of international law do prohibit or obligate the creation of norms. Famously, the Genocide Convention 1948 obligates its parties to 'enact . . . the necessary

[10] E.g.: Wladyslaw Czapliński, Gennady M. Danilenkow, Conflict of norms in international law, 21 Netherlands Yearbook of International Law (1990) 3–42 at 12–13; Wolfram Karl, Treaties, conflicts between, in: Rudolf Bernhardt (ed.), Encyclopedia of public international law (2000) Volume 4, 935–941 at 936; Robert Walter, Das Problem des Verhältnisses von Recht und Logik in der Reinen Rechtslehre, 11 Rechtstheorie (1980) 299–314 at 301; Ota Weinberger, Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen (1981) 98–99.

[11] Kelsen (1960) *supra* note 2 at 26–27 (Ch 5 a), 77 (Ch 16), 209 (Ch 34 e). See also, in the same spirit, Weinberger (1981) *supra* note 10 at 99: '*conflicts of norms are logical contradictions*' '*Normenkonflikte sind logische Konflikte*'.

[12] Pauwelyn (2003) *supra* note 4 at 167.

[13] Pauwelyn (2003) *supra* note 4 at 167–169.

[14] Pauwelyn (2003) *supra* note 4 at 169.

[15] Pauwelyn (2003) *supra* note 4 at 175–176.

[16] He models his theory of the functions of norms along the late Kelsenian theory (Pauwelyn (2003) *supra* note 4 at 158 (FN 2)); there is also a discussion of the 'logical turn' in Kelsen's writings after 1960 (Pauwelyn (2003) *supra* note 4 at 172 (FN 40)).

legislation to give effect to the provisions of the present Convention'.[17] Equally, the Chemical Weapons Convention 1993 contains various obligations with respect to national legislation. The parties, for example, shall '[p]rohibit natural and legal persons . . . from undertaking any activity prohibited to a State Party under this Convention'.[18] In all these cases, states parties are obligated to enact (or could be prohibited from enacting) certain norms of municipal law. The crucial point is not the reference of an international treaty to a different (municipal) legal system – although this may be relevant with respect to resolving conflicts – but the reference to state behaviour as obligated or prohibited.

One could try to overcome this by claiming that the semantic difficulties are not reflections of a normative-ontological difficulty, and by arguing that the obligation, prohibition or permission is one of result, rather than behaviour. States ought not to allow this or that norm to emerge. Hence, one could argue, the norm in question itself is prohibited and if it were to emerge at some point, it would 'be' a breach. However, even if one were to reformulate in such a fashion, the subjects would breach the norm, not the offending norm itself. Subjects' behaviour in allowing the norm to be valid would constitute the breach of the other norm. A norm cannot be a breach of another norm.

Where a norm does refer to another norm, their relationship is fundamentally different from the relationship that obtains between a norm and the behaviour it prescribes. This is so because an ideal refers to another ideal, not to reality. Norms as such are not matters of fact. Norms can relate to other norms only if they take the functions of 'authorisation' or 'derogation'. Norms do not act upon norms in the same way as norms 'act upon' reality. There cannot be a breach of a norm by a norm. A norm, for example, claims to derogate from another norm. Where that is validly possible, the other norm simply disappears, loses its validity ('existence'). There can be no question of a divergence between the claim to be observed and the observance itself in this matter. In the case of a norm prohibiting wilful killing this is possible due to the dichotomy of Is and Ought. Humans ought not to murder each other, yet humans are still killed despite the prohibition. If a claim to derogate is not valid – as would manifestly be the case between two different and unconnected normative orders – nothing would happen to the purportedly derogated norm. It would still be valid. If person 'A' were to claim, for example, that he herewith derogates from the individual norm of a municipal legal order that orders him to pay € 100 as a fine, then, from the point of view of that legal order, the individual norm in question would not suddenly lose its validity. From the point of view of abstract legal theory, A's claim to derogate (within A's personal normative order) is worth exactly the same as the order to pay the fine under municipal law. There cannot be a divergence between claim and observance in the case of derogation since *the ideal is confronted by another ideal*. In this example,

[17] Article V Convention on the Prevention and Punishment of the Crime of Genocide 1948.

[18] Article VII(1)(a) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993.

moreover, the ideals are not in a hierarchical position and cannot influence each other.

Pauwelyn's use of Kelsen's *Allgemeine Theorie der Normen* does not incorporate the Is–Ought dichotomy, an important aspect of the Pure Theory (Section 7.2). For the Pure Theory, to admit the 'breach' of a norm by a norm is to transcend the dichotomy, because norms are not facts, but ideal ideas and have a categorically different 'existence' to facts.

Pauwelyn's warning that 'we do not want to prejudice the question of *how to resolve* an alleged conflict by opting for one or the other technical *definition* of conflict'[19] is apposite, but by excluding certain constellations of conflict through the criterion of 'breach' one does not solve them.[20] The question of how conflicts may be resolved is not relevant for the existence of a conflict of norms. In *Reine Rechtslehre* Kelsen argues that, strictly speaking, there can be no 'conflict of norms', because the analogous applicability of the logical principle of excluded contradiction means that one of the norms automatically loses validity, hence the conflict would be resolved as soon as it occurred.[21] Because this chapter will question whether there are such resolving devices and which ones there are in international law, we must include even resolvable conflicts in our definition.

The clearest example of a 'logical' contradiction can be found where one norm *prohibits* a certain behaviour (in Illmar Tammelo's terms: *Pp*) and another norm *obligates* the same behaviour (*Op*), where $O\neg p = Pp$. Ota Weinberger, for example, defines conflict in logical terms:

> [The] state of not being able to exist at the same time is of a purely logical nature here, it is not a factual impossibility . . . [T]hey are logically inconsistent Ought-sentences, because they are not realisable (cannot be observed) for purely logical reasons. 'Close your eyes for half an hour' and 'Drive your car across town now' are norms, which cannot be observed at the same time, yet they are not in a logical contradiction to each other, their simultaneous observance is only empirically impossible.[22]

This approach requires discussing the question of the role of logic in its relation to norms, which is better placed later in this chapter (Section 5.3.1). Many scholars,

[19] Pauwelyn (2003) *supra* note 4 at 170.

[20] Pauwelyn (2003) *supra* note 4 at 170–171.

[21] Kelsen (1960) *supra* note 2 at 209–210 (Ch 34 e). It bears pointing out, however, that Kelsen's position in 1960 was not quite as simplistic as portrayed here; it was clearer at earlier points (Hans Kelsen, Reine Rechtslehre. Einleitung in die rechtswissenschafltiche Problematik (1934) 135–136) – Weinberger (1981) *supra* note 10 at 100 (FN 13).

[22] '[Das] "Nicht-gleichzeitig-existieren-Können" ist hier rein logischer Natur, nicht bloß eine faktische Unmöglichkeit . . . [E]s sind logisch unverträgliche Sollsätze, weil sie aus rein logischen Gründen nicht zusammen realisierbar (erfüllbar) sind. "Schließe jetzt für eine halbe Stunde die Augen" und "Fahre jetzt mit dem Auto durch die Stadt", sind Normen, die gleichzeitig nicht erfüllt werden können, sie stehen aber miteinander nicht in logischem Konflikt, sondern ihre gleichzeitige Erfüllung ist nur empirisch unmöglich.' Weinberger (1981) *supra* note 10 at 99. Ewald Wiederin correctly argues that this distinction is irrelevant: Wiederin (1990) *supra* note 7 at 316.

including Kelsen, have included factual impossibility of simultaneous observance in their definition of conflicts of norms,[23] so it would be unwise to exclude this element at this stage. As mentioned above, the ontology of norms is not touched by this form of conflict.[24] Therefore, one can distinguish at least two conflictual situations along the lines of the ontological problems caused by a conflict: (1) The combined *actus reus* conditions of two norms make the simultaneous observance of both norms impossible. Two different ideals are directed against the same reality (behaviour). (2) One norm explicitly claims to derogate from another norm for some reason. This does pose an ontological problem, because one ideal is directed against another. In the light of the discussion on the difference between the ideal–real and ideal–ideal relationships they now seem fundamentally different situations.

Carlos Alchourrón and Eugenio Bulygin have made a similar distinction between 'normative inconsistency' on the one hand and 'normative contradiction' on the other hand. In order to illustrate this distinction they use the relationship between a theist and an atheist and a theist and an agnostic, respectively.[25] While in the first pair two contradictory assertions are asserted, in the second pair the same proposition is asserted or rejected. In formal terms, the relationship between a theist and an atheist (conflict type 1) is Op *v.* $O\neg p$, while that between a theist and an agnostic (conflict 2) is Op *v.* $\neg Op$. In the first type of conflict two norms prescribing different behaviour conflict. In the second type, a norm conflicts with a norm purporting to destroy the other norm (a derogating norm). There is considerable confusion on the matter, even at the stage of definition of this type of difference. Eugenio Bulygin in 1985 adamantly claims that ' "$\sim Op$" does not express a norm, but the derogation of a norm',[26] while for Kelsen derogation is a function of a norm, even though he himself defines 'derogation' as a 'non-Ought'.[27] Weinberger, in a 1985 paper, repudiates the second distinction.

[23] Czapliński and Danilenkow (1990) *supra* note 10 at 12; Kelsen (1979) *supra* note 8 at 86 (Ch 27 III); Walter (1980) *supra* note 10 at 301; Wiederin (1990) *supra* note 7 at 318. Article 103 UN Charter could also be seen to follow that theory: Koskenniemi (2006) *supra* note 5 at 168–169 (para 331); cf. Riad Daoudi, The modification of multilateral treaties between certain of the parties only (Article 41 of the Vienna Convention on the Law of Treaties), in: International Law Commission, Documents of its fifty-sixth session, Geneva 3 May-4 June and 5 July-6 August 2004, ILC(LVI)/SG/FIL/CRD.4 (2004) 15 (para 39).

[24] Bruno Celano, however, sees the establishment of a relationship between the possibility of obeying and norms' existence as *Sollen* in the impossibility of complying with both norms. Bruno Celano, Norm conflicts: Kelsen's view in the late period and a rejoinder, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 343–361 at 354–355.

[25] Carlos E. Alchourrón, Eugenio Bulygin, The expressive conception of norms, in: Risto Hilpinen (ed.), New studies in deontic logic (1981) 95–124, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 383–410 at 396.

[26] Eugenio Bulygin, Norms and logic. Kelsen and Weinberger on the ontology of norms, 4 Law and Philosophy (1985) 145–163 at 151.

[27] 'nicht-Sollen'; Kelsen (1979) *supra* note 8 at 85 (Ch 27 I).

> Derogation as elimination does not produce but rather eliminates conflicts, whereas Alchourrón and Bulygin's rejection of '*p*' ('¡*p*') leads to a conflict if the normative system concerned embraces '*p*' ('!*p*'). According to Kelsen, a derogated norm ceases to exist; it is no longer a norm of the system . . .[28]

5.2 *Lex specialis legi generali derogat*

Legal scholarship has traditionally employed a number of argumentative devices to resolve conflicts of norms. The three most common – and most commonly accepted – devices are the *lex posterior, lex specialis* and *lex superior* 'maxims', 'rules' or 'principles'. The problem with these devices is that they are so universally accepted that no one questions their legitimacy as means for resolving conflict of norms. As this is a monograph on international law, the focus here will lie on the use of these 'traditional resolving devices' in international legal argument, where uncertainty in this area will be unearthed by employing the critical force of the Pure Theory of Law. Why has the basis (rather than the modalities) of the *lex posterior* maxim, for example, never been seriously questioned in international law? In this way, we will proceed from a critical look at these three concrete maxims to more general insights into the nature and causes of uncertainty in international law.

Martti Koskenniemi's final report of the ILC Study Group on fragmentation is the first major effort to describe the workings of the *lex specialis* rule. Unfortunately, neither the ILC study nor Pauwelyn's book venture very far into legal theory.[29] International legal scholarship does not develop a theoretical basis or justification for any of the three maxims – to a certain degree this has to be reconstructed from scant remarks. This apocryphal status of traditional resolving devices is a function of the pragmatism of international lawyers, one that seeks to keep 'theory' apart from 'practice'. Yet ostensibly 'technical' rules of conflict of laws[30] to a large degree depend on theoretical predispositions. Any doctrine of international law is automatically based on a theory, even if the writer does not consciously realise it.[31] The problem with the unconscious adoption of elements of a theory is not so much that writers do not realise that they are nonetheless

[28] Ota Weinberger, The expressive conception of norms: An impasse for the logic of norms, 4 Law and Philosophy (1985) 165–198, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 411–432 at 425; Kelsen (1979) *supra* note 8 at 86 (Ch 27 III).

[29] Dirk Pulkowski, Book review [of Pauwelyn (2003) *supra* note 4], 16 European Journal of International Law (2005) 153–160 at 154; Jörg Kammerhofer, Systemic integration, legal theory and the ILC, 19 Finnish Yearbook of International Law 2008 (2010) 343–366.

[30] This seems to be the opinion of Wilfred Jenks: C. Wilfred Jenks, The conflict of law-making treaties, 30 British Year Book of International Law 1953 (1954) 401–453 at 403: 'problems which can be conveniently described, on the analogy of the conflict of laws, as the conflict of law-making treaties'.

[31] Josef L. Kunz, The problem of revision in international law ('peaceful change'), 33 American Journal of International Law (1939) 33–55 at 38.

adopting a theory. The problem lies in adopting an internally inconsistent theory – this 'subconscious theory' is constructed on an *ad hoc* basis and thus a hodgepodge of elements which tend to jar. Not explicitly arguing a theoretical basis means implying a theory. Since that implied theory is not expressed and discussed, it is much more likely to be incoherent and inconsistent.

While we will discuss the theoretical presumptions of the traditional debate on the resolving devices later, some can be mentioned here to demonstrate the important theoretical issues that need to be faced. (*a*) Any reference to provisions of the Vienna Convention on the Law of Treaties 1969 (VCLT) immediately raises the question of the status of the Vienna Convention vis-à-vis the treaties covered by it as well as outside its sphere of application (Section 4.1.2). (*b*) Discussing the possible status of the traditional resolving devices as *positive* norms of customary international law means discussing the question of the limits of regulation through customary rules (Sections 3.2.5 and 5.2.3). (*c*) We will also have to ask how customary international law's alleged *ius dispositivum* nature comes about and how that is justified by theory. (*d*) When debating the special–general relationship, we need to tackle the issue of the relationship of rule to exception and its precise legal-theoretical nature (Sections 2.5.1 and 5.3.2). (*e*) The notion of 'resolving' conflict leads us to the question of what this actually means in the realm of norms and what the two outcomes of 'derogation' and 'non-applicability' are (Section 5.4). (*f*) When we advance to the idea of a 'hierarchy' of norms we need to be aware of the distinction between a hierarchy based on the derivation of validity (*Geltungsbegründung*) and claims by norms which do not form the basis of validity of other norms, such as Article 103 UN Charter and *ius cogens* (Section 5.5.1).

The discussion of the *lex specialis* maxim will begin by describing the relationship of the two norms, rather than by discussing when, exactly, a norm is more 'general' than the other.[32] The ILC report distinguishes between the special norm as application of the general norm and as exception to it.[33] This distinction has some important drawbacks. With respect to the first part of the distinction, the Study Group report argues:

> A rule may thus be *lex specialis* in regard to another rule as an application, updating or development thereof, or . . . as a *supplement*, a provider of instructions on *what a general rule requires in some particular case*.[34]

Such a constellation may seem as if it were outside the ambit of this chapter. It may seem as if norms detailing the requirements of a different norm (of more general scope) cannot be in conflict with that norm – and to some extent this is

[32] Pauwelyn (2003) *supra* note 4 at 387–391; Bruno Simma, Dirk Pulkowski, Of planets and the universe: Self-contained regimes in international law, 17 European Journal of International Law (2006) 483–529 at 488–489.

[33] Koskenniemi (2006) *supra* note 5 at 34–35 (paras 56–57), 49–59 (paras 88–107).

[34] Koskenniemi (2006) *supra* note 5 at 54 (para 98) (emphasis added).

true.[35] Yet this distinction does not hold the key to understanding the *lex specialis* situation. First, conflict may still occur where a more special norm ostensibly regulating the 'execution' of a more general norm does partially contradict it or creates exceptions from the 'general rule'. Second, the question remains of the interrelationship between the two norms. Take the case where the more general norm does not allow (or provide for) a further norm to provide the modalities of its 'execution' or to provide concrete standards or schedules. In such a case the question of how the more general norm is in any way influenced by the more special norm persists. Third, on this view, the outcome is the same in both categories:

> In both cases, the special, as it were, steps in to become applicable instead of the general. Such replacement remains, however, always only partial. The more general rule remains in the background providing interpretative direction to the special one.[36]

If the outcome is the same, the distinction of two *lex specialis* 'references' as conflict-resolution techniques is a redundant element. Moreover, the focus on an interpretative solution to norm-conflicts is at odds with the nature of legal scholarship (Section 5.4).

A different distinction is preferable, where there is a difference in scholarly understanding of the relationship between two norms of different speciality. Either a norm with more special scope may form an exception to a norm with a more general scope or a special norm may be a justification (*Rechtfertigungsgrund*) for the breach of a more general norm (Section 2.5.1).[37] This falls squarely within the more general debate of the relationship of 'rule' to 'exception'.[38]

In the first option, which seems more widely accepted, the special norm is an exception from a general norm. The special norm creates a 'gap' within the general norm, because it partially derogates from the general norm due to its narrower scope. Behaviour falling within the purview of the special norm is only 'evaluated' on the special norm's terms, while the general norm's scope is limited and no longer covers behaviour which the special norm covers. The language used by the International Law Commission in its commentary on the Articles on State Responsibility 2001 is telling: 'a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter *is not, even potentially, in breach of Article 2, paragraph (4)* [UN Charter].'[39] In this case, the ILC seems to express the

[35] Koskenniemi (2006) *supra* note 5 at 49 (para 88) citing: Pauwelyn (2003) *supra* note 4 at 386.

[36] Koskenniemi (2006) *supra* note 5 at 56 (para 102). In the same vein: Robert Walter, Über den Widerspruch von Rechtsvorschriften (unpublished doctoral thesis, University of Vienna 1955) 89–90.

[37] See also: Jörg Kammerhofer, Oil's Well That Ends Well? Critical comments on the merits judgment in the *Oil Platforms* case, 17 Leiden Journal of International Law (2004) 695–718 at 700–701.

[38] Wolfram Karl, Vertrag und spätere Praxis im Völkerrecht (1983) 66.

[39] Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001) [A/56/10], Chapter VI: Draft Articles on State Responsibility, commentary on Article 21 (para. 1) (emphasis added); Derek W. Bowett, Self-defence in international law (1958), at 185–186.

notion that action qualifying as 'self-defence' cannot at all be classified as 'threat or use of force'.

A consistently legal analysis of what this situation entails may be surprising to traditional international legal scholars. The exception changes the scope of application (or 'sphere of validity') of the general norm. In our example, Article 2(4) UN Charter is read as prohibiting the threat or use of force *except* if an armed attack occurs. Thus, the material sphere of validity of the prohibition is changed. Kelsen writes: '[A] narrowing or widening of the sphere of validity of a norm is a *change of its content*.'[40] Yet a partial change of a norm is not qualitatively different from a total change. A norm cannot keep being valid during change, norms differing from real things in this respect. Another act of will is added to the first act of will; the wording typically used in an amendment is just a linguistic short form for the enactment of a new norm with changed content. Thus, 'change' in law means the creation of a second norm, even if that norm purports to modify the first norm. The second norm has the same normative form, a claim to be observed, and all such claims are *a priori* equal. More precisely, 'change of a norm' can mean two things. Either a norm with different content is created and the first norm remains valid, which can lead to norm-conflict. Or a third, derogating, norm ends the validity of the first norm contemporaneously with the second norm beginning to be valid.[41] That derogating function can be fulfilled by a 'conflict-resolving maxim' and thus we have already proven here what will be shown by exclusion below, that such resolving devices can only be a positive norm. Thus, a strong argument can be made that a successful change of the sphere of validity of a norm is the end of the validity of a norm through derogation and the creation of a new norm with changed content.[42]

If we apply this result to the *lex specialis–lex generalis* relationship and our prescription–exception dichotomy, we can conclude that the special norm is not really a permissive norm but a short form (as in an amendment) for the modified general norm. On this view, Article 2(4) UN Charter is derogated from by the *lex specialis* maxim, while a new norm (with the content: 'the threat or use of force is prohibited *except* if an armed attack occurs') is enacted. Hans Kelsen consistently saw the relationship as one of exception:

[40] '[Eine] Einschränkung oder Ausdehnung des Geltungsbereiches einer Norm ist eine *Änderung ihres Inhaltes*.' Kelsen (1979) *supra* note 8 at 90 (Ch 27 VIII). Apparently *contra*: Theodor Schilling, Rang und Geltung von Normen in gestuften Rechtsordnungen (1994) 549.

[41] Kelsen (1979) *supra* note 8 at 90 (Ch 27 VIII), 101 (Ch 29 III).

[42] Kelsen (1979) *supra* note 8 at 89–91(Ch 27 VIII); Adolf Julius Merkl, Die Rechtseinheit des österreichischen Staates. Eine staatsrechtliche Untersuchung auf Grund der Lehre von der lex posterior, 37 Archiv des öffentlichen Rechts (1918) 56–121, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1115–1165 at 1132; Rudolf Thienel, Derogation. Eine Untersuchung auf Grundlage der Reinen Rechtslehre, in: Robert Walter (ed.), Untersuchungen zur Reinen Rechtslehre II. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1988 (1988) 11–43 at 36–41.

> Such a permission in a positive sense occurs also when the [sphere of] validity of one norm, which prohibits certain behaviour [, for example,] is limited by a different derogatory norm . . . In these cases 'permission' is the function of a norm, namely that of a norm which *repeals* or *limits* the validity of another norm, i.e. it is the function of a derogatory norm. . . . The normative function of 'positive permission' is reducible to the function of derogation, i.e. to the repeal or limitation of the validity of a norm prohibiting certain behaviour.[43]

And thus, in its application to the resolution of norm-conflicts, the sphere of validity of one norm is reduced by the other norm.[44] The other norm is changed through the validity of one norm – in effect partially, yet technically it is completely derogated from. In this first option the special norm *touches upon the validity* of the general norm. If we apply all the consequences of the first option to the situation given above, we will find it wholly changes our view of what Article 51 does.

By contrast, in the second option one could employ a concept developed in criminal law to portray a different form of *lex generalis–lex specialis* relationship, that of justification. In our example of Article 51 UN Charter we will find that the first option above does not work for justifications. In these cases, the special norm depends entirely on the general norm. If a state's actions are not in '*prima facie* breach' of the prohibition of the threat or use of force, we cannot apply Article 51 in the first place and actions are not and need not be justified as self-defence, because they are not a 'threat or use of force' that needs to be justified (see also Section 2.4.1). So why would one need a justificatory norm in the first place? This is the direct result of the creation of a gap in the sphere of validity of the general norm; since the general norm was gouged out, the special norm, which in these cases depends upon the general norm covering the same behaviour that it covers, is irrelevant.

The analogy drawn to Austrian criminal law doctrine in Section 2.5.1 still applies here. Any act fulfilling the preconditions of a criminal offence is presumed to be illegal unless it is not justified. While an act justified as self-defence is just as legal as an act not prohibited, in order to be justifiable, the act to be justified would have to fulfil the conditions of some offence. Koskenniemi's discussion of the same example is apposite here:

> But Article 51 may also be seen as an 'application' of Article 2 (4) inasmuch as self-defence covers action against a State that has *violated* 2 (4). . . . Article 51 now appears not so much an exception as a supplement to Article 2 (4).[45]

[43] 'Ein solches Erlauben im positiven Sinne liegt auch vor, wenn die Geltung einer Norm, die [zum Beispiel] ein bestimmtes Verhalten verbietet . . ., durch eine andere derogatorische Norm eingeschränkt wird . . . In diesen Fällen ist "Erlauben" die Funktion einer Norm, nämlich der die Geltung einer anderen Norm *aufhebenden* oder *einschränkenden*, d.h. derogierenden Norm. . . . Die normative Funktion des positiven Erlaubens ist auf die Funktion des Derogierens, d.h. auf die Aufhebung oder Einschränkung der Geltung einer ein bestimmtes Verhalten verbietenden Norm reduzierbar.' Kelsen (1979) *supra* note 8 at 78–79 (Ch 25 IV).

[44] Kelsen (1960) *supra* note 2 at 211 (Ch 34 e); Weinberger (1981) *supra* note 10 at 55, 57.

[45] Koskenniemi (2006) *supra* note 5 at 53 (para 95).

Thus, justification becomes a second layer: the general norm continues to exist, but is modified nonetheless. Its modification is more subtle than in the first option, however. The scope *ratione materiae* of the general norm is not reduced, but remains. A 'reference' is added to create a further (negative) condition for violation. In this way, the specific connection of prohibition (or obligation) and justificatory norm which is essential for this type of constellation is upheld, unlike the partition between special and general norm under the first option.

What would be required to resolve the norm-conflict in either approach to the *lex specialis–lex generalis* relationship? If the special norm is conceived as a gap, the change of the scope of validity of the general norm is a derogation from it. In order to resolve the conflict and in order to clarify the relationship between the two norms we need to find out whether the *lex specialis* maxim actually allows us to derogate from the general norm.

When the special norm is conceived as justificatory norm, the matter is not so clear. In this case, the general norm remains while the special norm only adds further normative content.[46] Yet in order for the two norms to be interlinked and for the second layer of the general norm to be established, the general norm has to be changed – in a subtle way, but changed nonetheless. Since change, however subtle, is a derogation, we have not evaded the uncomfortable question posed above. To circumvent the problems of the second approach by pointing to methods of interpretation will be unsuccessful as well (Section 5.4).

Describing the *lex specialis* situation can now help us to better focus on how to justify the *lex specialis* maxim. We need to enquire into the justification for derogations, because resolving this situation in any case means derogating from one norm. The question becomes why the *lex specialis* maxim is relevant as 'derogating maxim', loosely so called. It might not always be correct to speak of 'derogation' and what a 'maxim' can be in normative terms is yet to be determined.

Why do we need to found or justify derogation in this case? Because the claim to be observed of every norm has the same value and we need additional reasoning in order to elevate one above the other. Thus, when the special norm reads: 'Some A ought to do *p*.' and the general norm reads: 'All A ought to do *p*.', both have the same value *prima facie*. We need to prove that somehow in this case the claim to be observed of the special norm is 'worth' more than the claim of the general norm. What the relationship between a more and a less general norm boils down to is the question of how the difference in content influences a norm's position vis-à-vis another norm without the two norms' claims to be observed being of a different kind.

In the following, the reasoning will be drawn from the arguments espoused in international legal scholarship. As mentioned above, there is very little in the way of explicit justification, thus the reasoning for the potency of the *lex specialis* maxim is only mentioned briefly in most writings; apparently its validity is deemed self-evident. Three groups of justifications can be extracted:

[46] Koskenniemi (2006) *supra* note 5 at 22–23 (para 32).

(*a*) the *lex specialis* maxim is a rule of logic;
(*b*) the maxim is an expression of effectiveness or the intention of the parties;
(*c*) it is a positive norm of international law.

5.2.1 *Lex specialis* as a rule of logic

Pauwelyn states that the maxims 'deduce logical consequences from the fact that a norm is later or more specific' and continues in a footnote that '[i]n that sense they are rather "principles of legal logic" '.[47] How can logic help to decide between a special and a general norm? This relationship seems unlikely to be able to be successfully based on an application of logic. Do the two norms contradict? Perhaps; let us assume they do. Classical logic excludes contradiction (A and non-A cannot both be true) and only the true statement 'survives'. Here we are faced with two norms which (arguably) are in a similar position. While the role of logic in norms will be discussed in Section 5.3.1, here we need not do so. Posing the question in a clear form already amply demonstrates the absurdity of the connection of the *lex specialis* maxim with logic. Why would the generality be relevant for logic in avoiding a contradiction? Is 'special' 'true' and 'general' 'false'? The *lex specialis* maxim does not exclude contradiction, because it is not and cannot be based on logic.[48]

5.2.2 *Lex specialis* as more effective or reflective of party intentions

The most common justifications given in international legal writings in favour of preferring the *lex specialis* – higher effectiveness and stronger 'state consent' – both suffer from the same legal theoretical problem:[49]

> [T]the following two reasons for letting a more specific norm prevail over a more general norm can be given: (i) the special norm is the more effective or precise norm, allowing for fewer exceptions . . . and; (ii) because of this, the special norm reflects most closely, precisely and/or strongly the consent or expression of will of the states in question.[50]

Each of the elements will be dealt with in turn. A norm with a narrower scope of validity is felt to be more effective than one with a more general scope and thus it is said to 'prevail':[51] it can be doubted whether a narrower norm is *necessarily* more effective than a wider norm. Effectiveness is a matter for empirical research and

[47] Pauwelyn (2003) *supra* note 4 at 388, 126.
[48] Walter (1955) *supra* note 36 at 90.
[49] Jörg Kammerhofer, Uncertainty in the formal sources of international law: Customary international law and some of its problems, 15 European Journal of International Law (2004) 523–553 at 546.
[50] Pauwelyn (2003) *supra* note 4 at 387.
[51] In the same vein: Jenks (1954) *supra* note 30 at 446; Koskenniemi (2006) *supra* note 5 at 36 (para 60).

there may well be constellations of norms where the relationship is different. Even if empirical research showed that special norms were always more effective, this fact could not constitute a reason for the more general norm to lose its validity or be changed by the special norm, i.e. for the *lex specialis* maxim. Effectiveness is not validity; the effect (or lack thereof) of a prescription in reality cannot have an influence on the existence of that prescription. This is a necessary precondition for the very notion of 'norms' – norms have an ideal existence: No Ought from Is, no Is from Ought alone.[52] We will return to the necessity of the Is–Ought dichotomy for legal scholarship in Section 7.2, but we can already see here that the conclusion drawn from effectiveness to the loss of validity transcends the dichotomy. Transcending the dichotomy means that we can no longer see norms as prescription. Prescription, however, is the only way the concept of 'norm' makes sense.

Using state intentions as argument fails for the same reason. For Pauwelyn, 'the principle of *lex specialis* is . . . grounded in the idea that the "most closest, detailed, precise or strongest expression of state consent" . . . ought to prevail'.[53] The traditional resolving devices are merely 'practical methods in the search for the "current expression of state consent" '.[54] The underlying assumption is that 'state consent' is relevant in resolving the dispute. A number of arguments can be advanced against this contention. First, as positive norms of international law both norms are an expression of state consent. The idea that one kind of consent is necessarily better than another would be problematic even in the traditional approaches to international law. If we were to assume state consent as the *a priori* source and end of all international law, how are we to choose between the different expressions of consent? From the assumed relevance of consent it is difficult to see how one could deduce a 'special' consent to be more valuable than a 'general' consent.

Second, the argument from state consent as the ultimate authority merely begs the question, a question that should be asked when dealing with the relative value of the sources of international law. Can state consent be the ultimate source of all international law? It cannot be, because international law's sovereign is not the states, but international law *itself*. The focus upon the subjects of law – states only being constituted as subjects by the law in the first place – is an expression of the denial of the duality of Is and Ought. On a legal view, states are authorised to create law only because a meta-law on law-making authorises them. If we assume that states need no authorisation, then a norm (e.g. a treaty) would be created out of fact alone. The reference to the brute fact of state consent must fail, because brute fact neither is nor makes law. If state consent were a source of international law, then the question would assume a different dimension, but then consent would be a norm. If the more special state consent were superior to the more

[52] Kelsen (1960) *supra* note 2 at 5 (Ch 4 b); Kelsen (1979) *supra* note 8 at 44 (Ch 16).

[53] Pauwelyn (2003) *supra* note 4 at 388.

[54] Pauwelyn (2003) *supra* note 4 at 388; Karl (1983) *supra* note 38 at 107–108; Koskenniemi (2006) *supra* note 5 at 37 (para 60).

general variant, then this also would need to be a norm in order to influence law-making and derogation.

5.2.3 *Lex specialis* as positive norm

Is the *lex specialis* maxim a norm of positive international law? One of the least controversial applications of the *lex specialis* maxim is the treaty-based *inter se* abrogation from a norm of customary international law.[55] The Court observed in *North Sea Continental Shelf*:

> Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties . . .[56]

The connection to the *lex specialis* maxim was made in *Nicaragua*:

> In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim.[57]

This is customary international law's *ius dispositivum* character; a feature known from municipal legal systems, where certain civil codes will provide default regulation if the parties do not provide different rules in a contract. The VCLT also includes several such *ius dispositivum* provisions, formulated along the lines of 'unless the treaty otherwise provides' (e.g. Article 20(5) VCLT). Hence, the alleged *ius dispositivum* character of customary international law turns out to be an expression of the claim that the *lex specialis* maxim is a norm of customary international law. A norm is never dispositive by default and this feature needs to be included in positive regulation. In contrast, all norms claim observance without respect for the *inter se* 'arrangements' by default. In the original Roman law sense they are all by definition *ius cogens*. This argument will be further substantiated below (e.g. Section 5.5.1). Derogation (even if only by an *inter se* agreement) needs a basis in norms, for only norms can influence the validity of norms. Both the *North Sea Continental Shelf* and the *Nicaragua* judgments also contain the alternative view: customary international law and international treaty law exist side by side and do not derogate from each other.[58] Assuming that the maxim is a norm of customary international law, several problems arise.

[55] Koskenniemi (2006) *supra* note 5 at 39–40 (paras 66–67), 23–24 (paras 52–54); Pauwelyn (2003) *supra* note 4 at 155–157, 212–236, 391–392; Verdross and Simma (1984) *supra* note 3 at 414.

[56] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, ICJ Reports (1969) 3 at 42 (para 73).

[57] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports (1986) 14 at 137 (para 274).

[58] *North Sea Continental Shelf* (1969) *supra* note 56 at 38–39 (paras 61–65) *Nicaragua* (1986) *supra* note 57 at 93–96 (paras 174–179).

(1) It is doubtful that customary law is capable of 'referring' to other norms at all (Section 3.2.5).[59] Because customary law is based on behavioural regularities (customs), customary law can only have such content which can be reflected as behavioural pattern; these patterns are required to form state practice. This 'real-world' behaviour, e.g. the passage of a ship through straits, or the signing of a piece of paper cannot refer to the ideal or normative content of such action. The specific ideal significance is not part of the behavioural pattern, hence is not part of state practice and thus cannot form part of the content of a customary norm. A norm with the content 'earlier norms are repealed, if . . .' cannot emerge, because the state practice that would be necessary for its formation – a 'behaviour' that shows the loss of validity of a norm – cannot exist.

(2) Even if we discount the doubts regarding the capability of customary regulation and assume the *lex specialis* maxim to be a norm of customary international law, the problems persist. Such a move does not solve the problem that we are once again confronted with a conflict of norms. One norm claims observance and another norm of the same type, normative order and even 'rank', claims to derogate from it or from any norm with certain characteristics. The relationship of norm to human behaviour is indirect due to the Is–Ought divide: norms can only postulate a claim. The norm–norm relationship, however, is direct; either a norm which claims to derogate does or it does not; there is no prescription–reality disconnect.[60] A widely accepted example from traditional international legal doctrine has a *ius cogens* norm simply end the validity of a contrary treaty (cf. Section 5.5.1). On the other hand, if a human were to create a derogating norm that claimed to derogate from a judgment issued against himself, nobody would argue that the judgment 'actually' loses its validity.[61] Norms can influence the validity of other norms; mere behaviour cannot. The prohibition against murder is not dependent upon whether murders actually occur.

The question thus becomes which constellations cause norms to derogate and which fail in doing so. This is the key question and the reason why a definition of the notion of 'norm conflict' is not really important at all. Derogation of norms is not dependent upon conflict and conflict does not determine whether one norm derogates from another. This problem will not be discussed just yet; we will mention here that the hierarchy of norms and the unity of normative orders are key notions in this determination, because norms both lose and also derive their validity from other norms (Section 5.5).

One can argue at ths point that it is only the *content* of certain norms in purporting to regulate conflict that gives them special powers to end the validity of another norm. Such an argument is not likely to succeed either, because the specific function of norms lies in their *form* (the Ought, the claim to be observed), not in their content. Thus form equals existence equals validity and norms

[59] See also Thienel (1988) *supra* note 42 at 24–25.
[60] Kelsen (1979) *supra* note 8 at 86 (Ch 27 III), 168 (Ch 57 IV).
[61] Merkl (1918b) *supra* note 42 at 1125.

differing by content would still share the same existence as validity. Their validities might clash, but that clash is not decided by their content. Indeed, this may toll the death knell for the very idea of a conflict resolution technique based on speciality.

(3) We are also faced with the problem of the inter-source relationships when a customary international *lex specialis* maxim claims to derogate from an international treaty norm. An example might be where the *lex generalis* is itself a treaty, as is the case in the relationship between the International Covenant on Civil and Political Rights 1966 and the European Convention on Human Rights 1950. The problem is similar to the one described above, but with the complicating factor of the inter-relationship of two different formal sources of international law. While it seems unwise to bow to majority opinion and accept that there is no hierarchy between the sources of international law,[62] it is also difficult to accept a subordination.[63] Treaties cannot be derived from custom (*pace* Kelsen)[64] because customary international law cannot contain the authorisation to create international treaty law (*pacta sunt servanda*). Custom could theoretically be derived from treaty, but that would only establish subordination to one specific treaty. Also, the only candidate for such an authorisation, Article 38(1)(b) of the ICJ Statute, by its own words does not found the validity of a formal source of international law. It merely states what the applicable law before the Court is. The 'default solution' is that the two sources are not normatively connected and are in a similar position as if a single individual purports to derogate from a criminal judgment. They belong to two unconnected normative orders, hence any derogation seems *a priori* excluded (Sections 6.2.1 and 6.3.2).[65]

(4) What if the *lex specialis* maxim is a norm of international treaty law or a 'general principle of law recognised by civilised nations' (Article 38(1)(c) ICJ Statute)? Both would result in the same inter-source *problematique* and the same questions of its relationship to norms of the same source would arise. In addition, each treaty is its own normative island;[66] the principle of *pacta tertiis nec nocent nec*

[62] E.g: Michael Akehurst, The hierarchy of the sources of international law, 47 British Year Book of International Law 1974–1975 (1977) 273–285 at 275; Karl (1983) *supra* note 38 at 86; Koskenniemi (2006) *supra* note 5 at 47 (para 85); Pauwelyn (2003) *supra* note 4 at 94; Verdross and Simma (1984) *supra* note 3 at 322.

[63] Kammerhofer (2004b) *supra* note 49 at 548–550.

[64] Hans Kelsen, Principles of international law (1952) 314.

[65] The unconnectedness means that there is no influence upon the other's norms' validity, because the claims to be observed are *a priori* equal.

[66] Hans Kelsen, Reichsgesetz und Landesgesetz nach österreichischer Verfassung, 32 Archiv des öffentlichen Rechts (1914) 202–245, 390–438 at 209: 'Like the corporeal world of Is, also the intellectual world of Ought has its own law of impenetrability. When I argue that a norm of one authority is repealed by a norm of another authority, I merely negate the first authority [as authority] and put the second authority in its place' 'Wie die körperliche Welt des Seins hat auch die geistige Welt des Sollens ihr Gesetz der Undurchdringlichkeit. Wenn ich die Norm der einen Autorität durch die Norm einer anderen Autorität für aufgehoben ansehe, bedeutet das einfach, daß ich die erstere Autorität negiere und die zweite an ihre Stelle setze.'

prosunt merely expresses that each treaty is based immediately on the *Grundnorm* '*pacta sunt servanda*' and its relationship to other treaties is different from that between norms of the same treaty.[67] However, this necessary connection obtains only in the relationship of treaty to treaty. Norms may very well have more subjects (its scope *ratione personae*) than law-makers, e.g. domestic statutes. International treaties' contractual nature and their being part of international law does not change that theoretical possibility – it depends on positive law. Despite the interjection of 'sovereignty!' and despite a naturalistic preconception of the nature of the contract, the third party rule is not an absolute necessity and needs to be laid down in positive law, i.e. we need the meta-law on international treaty law-creation to specify that their product may only have a certain personal scope.[68]

If the *lex specialis* maxim is a 'general principle',[69] one additionally has to contend with grave theoretical doubts as to the very possibility of this source as positive international law. How can a comparison of scientific abstractions from diverse legal systems in any shape be willed as part of international law? Verdross has shown that general principles of law are essentially a natural law-construction and are not positive law at all.[70] Their 'positivisation' in Article 38(1)(c) ICJ Statute is relevant only for the Court, adds Kelsen: '[The general principles of law] are norms, which become international law applicable before the International Court of Justice, [only] because Article 38(1)(c) authorises the International Court of Justice to apply them.'[71]

5.3 *Lex posterior legi priori derogat*

The key question of this section goes beyond the topic of norm-conflict as traditionally conceived. Can norms change over time? The very possibility of change in normative orders (at least over time) is at stake here and the *lex posterior* maxim is the most popular[72] answer to that question. While it seems obvious how the problem of change is a problem of norm-conflict, what is being argued is the reverse, namely that change in law presupposes the *lex posterior* maxim. 'As with any law, [international law] *may change over time*. . . . As a result, any later norm can, in principle, overrule an earlier one (*lex posterior derogat legi priori*).'[73] This

[67] See Section 5.3.2.

[68] For a similar argument: Robert Kolb, The formal source of ius cogens in public international law, 53 Zeitschrift fur öffentliches Recht (1998) 69–104 at 82–83.

[69] Czapliński and Danilenkow (1990) *supra* note 10 at 21.

[70] Alfred Verdross, Völkerrecht (3rd ed. 1955) 11–12, 22–23.

[71] 'Es [handelt] sich [bei den allgemeinen Rechtsgrundsätzen] um Normen . . ., die dadurch von dem Internationalen Gerichtshof anzuwendendes Völkerrecht werden, daß Art. 38 § 1c den Internationalen Gerichtshof ermächtigt, sie anzuwenden.' Kelsen (1979) *supra* note 8 at 99 (Ch 28).

[72] Czapliński and Danilenkow (1990) *supra* note 10 at 19.

[73] Pauwelyn (2003) *supra* note 4 at 14.

confusion of the concepts of change, derogation and of the role of maxims[74] leads to the apocryphal status of the *lex posterior* maxim in international law, and to the 'argument by necessity' for its existence, in legal theory. This section will accordingly focus on the argument that the *lex posterior* maxim is a rule of logic and that its existence is necessary by virtue of the very existence of 'prescriptive sentences'.[75]

A typical argument in favour of the *lex posterior* maxim might look something like this, with 'A' taking the role of proponent, while 'B' plays the sceptic: *A*: Law can change. *B*: Why should it? *A*: Because the law-makers can create successive norms N_1 at t_1, N_2 at t_2. *B*: But why would the law change just because there is a multiplicity of norms which are successively created? *A*: Because the later modifies the former. *B*: Why should the later norm necessarily be 'better' than the former? *A*: Because the two norms contradict each other, the former becomes 'false' in accordance with the principle of the unity of the legal order and is deleted due to principle of excluded contradiction. *B*: Norms are not true or false statements. Both norms were created and none was not created. What makes the original norm-creation invalid? *A*: Because the current will of the law-maker trumps his prior will. *B*: How so? *A*: Because the current will derogates from the older will, we can infer from the law-maker's different and later norm-creation that he wills a derogation of prior conflicting norms. *B*: It is begging the question to say that a later norm derogates a former norm because it is later. In order to do so we have to presuppose derogating power to later norms and where should that presupposition come from?

As in Section 5.2 above, there are three avenues of justification:

(*a*) *lex posterior* as a rule of logic;
(*b*) *lex posterior* as an expression of effectiveness or intentions (which will not be treated again);
(*c*) *lex posterior* as a positive norm.

In this section we will focus on the first justification, because of its prevalence in scholarly discussion.

5.3.1 *Lex posterior* as a rule of logic

The claim that derogation and change – whether by way of the 'primacy' of the later norm or not – is connected to formal logic is highly complicated. International legal doctrine does not explain this in detail and in legal theory only

[74] Karl (1983) *supra* note 38 at 59.

[75] Amedeo G. Conte, Hans Kelsen's deontics, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 331–341 at 331. From this terminology alone one can see why the reasoning by logic is unable to prove the point at issue and why such approaches transcend the Is–Ought dichotomy.

analytic (logico-linguistic) jurisprudence[76] and the Pure Theory of Law[77] have gone into greater detail. However, the scholarly debate on deontic logic is so vast that the following will be limited to a short overview. As there are a whole host of problems which conspire to make the easy connection of logic to the *lex posterior* maxim difficult, this section will tackle three interlocking questions that are only cumulatively able to found the *lex posterior* maxim.

(1) Can norms be accorded the labels of 'true' and 'false' or be brought into the frame of formal logic in an analogous way?
(2) If so, does the application of the principle of excluded contradiction extend directly or indirectly to the inter-relationship of norms and does the contradiction cause derogation of positive norms?
(3) If so, does the later norm derogate from the former and how so?

5.3.1.1 Conflict of norms as logical contradiction?

As mentioned above, Hans Kelsen radically changed his position after 1960. The more he questioned the soundness of the assumption of a role for logic in certain legal 'operations', the less convinced he became of a logical 'automatism' in the face of positive norm-creation and destruction. His scepticism seems well founded, even on the narrow point of ascribing truth-values to norms. Ascribing truth-values is a necessary condition for '[r]elations of condition and of logical consequence'.[78] Nobody nowadays would directly claim that a norm could be

[76] By that term are denoted legal theorists who have adopted the philosophy of the linguistic turn (Wittgenstein *et al.*). See, e.g.: Alchourrón and Bulygin (1981) *supra* note 25; Bulypin (1985) *supra* note 26; Celano (1998) *supra* note 24 at; Weinberger (1981) *supra* note 10; Weinberger (1985) *supra* note 28; Georg Henrik von Wright, An essay in deontic logic and the general theory of action (1968); Georg Henrik von Wright, Is and Ought, in: Eugenio Bulygin *et al.* (eds), Man, law and modern forms of life (1985) 263–281, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 365–382.

[77] Hans Kelsen, Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus (1928), reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 281–350 at 295–297 (para 10); Kelsen (1960) *supra* note 2 at 26–27 (Ch 5 a), 76–77 (Ch 16), 209–212 (Ch 34 e), 271–282 (Ch 35 k–j); Hans Kelsen, Derogation, in: Ralph A. Newman (ed.), Essays in jurisprudence in honor of Roscoe Pound (1962) 339–355; Hans Kelsen, Recht und Logik, 12 Forum (1965) 421–425, 495–500, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1469–1497; Kelsen (1979) *supra* note 8 at 84–92 (Ch 27), 99–103 (Ch 29), 166–179 (Ch 58), 266–267 (N 82); Merkl (1918b) *supra* note 42; Adolf Julius Merkl, Die Lehre von der Rechtskraft, entwickelt aus dem Rechtsbegriff. Eine rechtstheoretische Untersuchung (1923) 228–244; Stanley L. Paulson, Zum Problem der Normenkonflikte, 66 Archiv für Rechts- und Sozialphilosophie (1980) 487–506; Stanley L. Paulson, On the status of the *lex posterior* derogating rule, in: Richard Tur, William Twining (eds), Essays on Kelsen (1986) 229–247; Wiederin (1990) *supra* note 7.

[78] Wright (1985) *supra* note 76 at 367.

called 'true' or 'false' – scholarly argument over the years has reached an agreement on that point – but there have been various attempts to make an indirect connection between norms (or their properties) and a bivalent logical system.

(*a*) To equate the truth of a statement with the validity of a norm does not work for two reasons. At least a positive norm is the sense of an act of will (*Willensakt*), not of an act of thought (*Denkakt*). Norms are not created by merely thinking them or by imagining what they entail.[79] Claiming that willing entails thinking does not take into account that the content of the norm can be described as a modally indifferent substrate. This is capable of existing in both realms and thus they illicitly transfer the norm to the other realm in order to make will into thought; thought is not immanent in will.[80] The other reason is that validity is not a property of a norm; it is the specific form of existence of norms.[81] A non-valid norm does not exist. A system of logic that would attempt to assimilate 'validity' to truth would ignore the difference between proposition and norm:

> That a norm is valid means that it *exists*. That a proposition is 'valid' does not mean that the proposition exists, but that it is *true*. A false proposition exists, but it is not 'valid', because it is not true, it exists, but it is 'invalid'. . . . [T]he existence of a norm is its validity, while the existence of a proposition is not its truth[-value].[82]

(*b*) Another much more philosophical, but equally problematic, approach seeks to adapt certain aspects of analytic-linguistic philosophy to normative theory in order to create the basis for a 'deontic logic'. John Searle's concept of 'speech act'[83] is a key notion in this respect. Essentially, norms are reduced to utterances, i.e. linguistic empirical facts.[84] The terms used, such as Amedeo Conte's 'prescriptive sentence'[85] or Riccardo Guastini's 'ought-sentence'[86] all refer to the same reduction: norms are but a special kind of speech act. Despite some room for

[79] Kelsen (1979) *supra* note 8 at 166 (Ch 57 I).

[80] Kelsen (1979) *supra* note 8 at 167 (Ch 57 II).

[81] Kelsen (1979) *supra* note 8 at e.g. 22 (Ch 8 VI), 136–138 (Ch 44 I–II); Lothar Philipps, Normentheorie, in: Arthur Kaufmann, Winfried Hassemer, Ulfrid Neumann (eds), Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart (7th ed. 2004) 320–332 at 328–329.

[82] 'Daß eine Norm gilt, bedeutet, daß sie *existiert*, vorhanden ist. Daß eine Aussage "gilt", bedeutet nicht, daß die Aussage existiert, daß sie vorhanden ist, sondern daß sie *wahr* ist. Auch eine unwahre Aussage existiert, ist vorhanden, aber sie "gilt" nicht, denn sie ist nicht wahr, sie existiert, aber sie ist "ungültig". . . . [D]ie Existenz der Norm ist ihre Geltung; während die Existenz einer Aussage nicht ihre Wahrheit ist.' Kelsen (1979) *supra* note 8 at 139 (Ch 44 IV). A similar conclusion is reached by Conte (1998) *supra* note 75.

[83] John R. Searle, Speech acts. An essay in the philosophy of language (1969).

[84] Searle explicitly claims to derive Ought from Is in his 1969 book: Searle (1969) *supra* note 83 at 175–198.

[85] Conte (1998) *supra* note 75 at 330. Implied: Koskenniemi (2006) *supra* note 5 at 60–61 (para 111).

[86] Riccardo Guastini, Normativism and the normative theory of legal science: Some epistemological problems, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 317–330 at 319.

different interpretations of their statement, Alchourrón's and Bulygin's description of 1981 seems to be apposite:

> For the *expressive conception* [i.e. their viewpoint], norms are the result of the *prescriptive use* of language. A sentence expressing the same proposition can be used . . . to do different things . . . [N]orms are essentially *commands* . . . if *p* has been commanded, then the proposition that *p* is obligatory is true. . . . The selection of the propositions that form the basis of the [normative] system . . . is based on certain empirical facts: the acts of commanding or promulgating.[87]

At some points in their discussions of the role of logic in norms, proponents implicitly ascribe a post-analytic-turn philosophy to Kelsen and thus seem to claim that he espouses this sort of reduction himself. Yet even if norms were reducible to linguistic utterances, could an argument be made that they are subject to logic? Only by negating – as Searle does – the dichotomy of Is and Ought: 'the question of whether the alleged gap between Is and Ought can be bridged or not is crucially related to the question of whether norms can be true or false'.[88] Reduced, as it appears to be, to an empirical entity, a special use of language, norms could be said to be false or true, since they are no more than propositions on facts.

Logico-analytic jurisprudence does not seem to espouse this without reservations and it is conceded frequently that norms can neither be true nor false.[89] The main thrust – through the reduction of Ought to Is – is that the logical contradiction of the conflict of norms is reduced to a conflict of the contents of norms (see also Section 5.1). To call Kelsen a post-analytic philosopher is incorrect, despite his apparent closeness to the Vienna Circle of logical positivism.[90] Neo-Kantianism, the philosophy with which he is most often associated,[91] is pre-linguistic-turn:

> *Kelsen's* critics all assume that he starts his deliberations from the question of the applicability of logic to law and that only from the answers to that question he develops his theory of validity. I would like to propose to approach the matter from the opposite viewpoint. *Kelsen* writes on the problems of validity and uses this to formulate a theory according to which the logic of norms is not applicable to questions of validity.[92]

[87] Alchourrón and Bulygin (1981) *supra* note 25 at 385, 386, 402.

[88] Wright (1985) *supra* note 76 at 369.

[89] Bulygin (1985) *supra* note 26 at 152; Wright (1985) *supra* note 76 at 371.

[90] Clemens Jabloner, Kelsen and his Circle: The Viennese Years, 9 European Journal of International Law (1998) 368–385.

[91] It bears pointing out, however, that his philosophical basis is too idiosyncratic to fit in neatly either with Kant, his successors or with logical positivism, see Section 7.2.1.

[92] 'Die Kritiker *Kelsens* gehen durchweg von der Annahme aus, er beschäftige sich mit der Frage der Anwendung der Logik auf das Recht und entwickle erst aus der Antwort darauf seine Lehre über die Rechtsgeltung. Ich möchte aber vorschlagen, die Sache genau umgekehrt anzusehen. *Kelsen* behandelt die Problematik der Rechtsgeltung und formuliert von daher eine These, nach der die Normenlogik auf Fragen der Rechtsgeltung nicht anwendbar ist.' Paulson (1980b) *supra* note 77 at 489.

Kelsen disavows any connection with linguistic philosophy in *Allgemeine Theorie der Normen*:

> It needs to be stressed that the act of will, whose sense is a norm, *needs to be distinguished from the speech-act*, in which the sense of an act of will *is expressed*. The norm, which is the sense of an act of will, is the meaning of a sentence, which is the product of a speech-act, in which the sense of an act of will is expressed.[93]

In Herbert Hart's paper *Kelsen Visited* (1963),[94] which contains Hart's recollections of a discussion between him and Kelsen, he discusses the concept of 'statements on the validity of norms'. He demonstrates the problem he has with such a concept by way of an example that is also ideal in order to demonstrate the problems of analytic philosophy in cognising norms:

> Suppose a German commandant in a prisoner-of-war camp barks out to his English or American prisoners the order '*Stehen Sie auf!*' The interpreter, doing his duty, shouts out 'Stand up!' No doubt, without consciously mimicking the tone or mien or gesture of the commandant, the interpreter will reproduce enough to make clear to the men that the original was an order . . . How shall we classify in relation to its German original the interpreter's speech-act in uttering the English sentence 'Stand up'? Shall we say that it was the giving of an order?[95]

This quote demonstrates the difference between Hart's and Kelsen's philosophical schooling. The commandant issues an individual norm with the content: 'The prisoners ought to stand up.' The norm is directed at the prisoners and is valid from that moment. That the prisoners cannot understand the commandant's order is irrelevant. The translator utters a statement on the existence of a norm, but does so in a short form. He ought to have said: 'The commandant orders you to stand up.' The translator's 'tone, mien or gesture' in the utterance of the statement is irrelevant as well; it merely clarifies his statement on the content of the commander's norm and does not create another norm. Hart, as adherent to the 'speech-act' theory senses trouble, because for him the utterance itself is the

[93] '[Es] ist zu beachten, daß der Willensakt, dessen Sinn eine Norm ist, *von dem Sprech-Akt unterschieden werden muß*, in dem der Sinn des Willenaktes *ausgedrückt wird*. . . . Die Norm, die der Sinn eines Willensaktes ist, ist die Bedeutung des Satzes, der das Produkt des Sprechaktes ist, in dem der Sinn des Willenaktes zum Ausdruck kommt.' Kelsen (1979) *supra* note 8 at 131 (Ch 41) (emphasis added). Note also here the difficult relationship between linguistic utterance (as empirical fact), norm (as ideal entity) and a norm's meaning (as result of human cognition) mentioned in Section 4.2.3. However, Clemens Jabloner – one of the protagonists of the modern 'Kelsen orthodoxy' – wrote in 1988 that the *Allgemeine Theorie der Normen* can be seen in terms of Searle's 'speech-act' theory: Clemens Jabloner, Kein Imperativ ohne Imperator. Anmerkungen zu einer These Kelsens, in: Robert Walter (ed.), Untersuchungen zur Reinen Rechtslehre II. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1988 (1988) 75–95 at 79–84.

[94] H.L.A. Hart, Kelsen visited, 10 UCLA Law Review (1963) 709–728, reprinted in: H.L.A. Hart (ed.) Essays in jurisprudence and philosophy (1983) 286–308.

[95] Hart (1963) *supra* note 94 at 293.

order. The translator's utterance was not made on the basis of his own act of will *creating a norm*, but on the basis of his own act of thought *describing a norm*.

In the end, analytic philosophy is unable to found a *normative* science, since its commingling of Is and Ought means that it cannot conceive of norms, of Ought (Section 7.2). As mentioned above, however, most analytic jurisprudes use a different avenue of attack.

(*c*) That avenue is an equation of truth and the observance (observability) of a norm's terms (Section 5.1). Most scholars would define norm-conflict as a situation where the two norms cannot at the same time be 'observed'. Bruno Celano, for example, argues – in explicit reference to Kelsen's rebuttal in *Allgemeine Theorie der Normen* of the type of argument Celano uses – that one can nevertheless speak of some sense in which a norm conflict can present a logical contradiction.[96] The question for him is in what sense compliance vis-à-vis one norm *necessarily* violates another norm, which is a definition adopted by Kelsen himself. Celano answers that 'the conjunction of the descriptions of the acts constituting obedience is a description of a logically contradictory state of affairs'[97] because the statements on norm-compliance cannot both be true. This, in turn, is due to the fact that '[a]n agent cannot both carry out and forbear from carrying out the same act at one and the same time'.[98] Thus, because both acts cannot be carried out simultaneously, statements on these actions would be contradictory (the one being carried out being true, the other statement false). He sees a logical contradiction in the 'obedience-statements' in some sense presenting a logical contradiction between norms themselves.

Celano's theories are fraught with difficulties which he may not have wanted to avoid. A norm and its observance are not in any way linked.[99] Observance of a norm (human behaviour in relation to the norm's content) is irrelevant for the norm in its ideal existence. A norm merely claims to be observed. The ideal itself does not create real events, just as real events do not influence the ideal 'existence'; 'a norm does not show it being violated or observed, it does not change, whether it is being violated or observed.'[100] Kelsen tells us that a norm being observed or not is not a property of the norm, but the property of real acts.[101] Thus, it is difficult to see a relevance of observance (or observability) for the interrelationship of norms.

Celano does not contrast behaviour, but statements on behaviour. Just as norms (as ideal 'existence') cannot be contradictory, because they are not propositions, real acts cannot contradict, because the act that exists exists, and reality cannot be

[96] Celano (1998) *supra* note 24 at 352.

[97] Celano (1998) *supra* note 24 at 352.

[98] Celano (1998) *supra* note 24 at 352. In a similar vein: Alchourrón and Bulygin (1981) *supra* note 25 at 396, 401; Weinberger (1981) *supra* note 10 at 99; Wright (1985) *supra* note 76 at 373.

[99] Celano notes that this is Kelsen's position: Celano (1998) *supra* note 24 at 355 (FN 34).

[100] 'das Verletzt- oder Befolgt-Sein kann man einer Norm nicht ansehen, an ihr selbst ändert sich nichts, wenn sie verletzt oder befolgt wird.' Kelsen (1979) *supra* note 8 at 174 (Ch 57 IX).

[101] Kelsen (1979) *supra* note 8 at 173 (Ch 57 VIII).

be called 'true' or 'false'. Kelsen's own *Rechtssatz*[102] is a proposition, i.e. a statement on the 'existence' (validity) of a norm, and thus one is able to distinguish between true and false only in relation to the norm it purports to describe. Analogously, an 'obedience-statement' also is a mere description of reality and is true if and only if the real event described therein has taken place. If two norms exist, both statements on validity are true – two factual statements are true if both events occur. 'Truth is not a property of this fact, but of the proposition.'[103] Kelsen's 1960 proposal to indirectly apply logic to norms via their respective norm-statements[104] does not work, because norms and statements on the existence of norms are categorically different entities. In the same manner, Celano's proposal does not work, because obedience and obedience-statements are categorically different things.

Also, Kelsen's modally indifferent substrate (*modal indifferentes Substrat*) or 'norm content' is not an 'indicative factor'[105] or 'non-imperative factor' within a norm. It is not an inroad of Is into Ought; it is modally indifferent. The content 'window-closing', for example, can be contained both in a norm and in a statement.[106] Celano may already presume a sort of 'Seinsollen' as part of the ontology of norms. Thus if one does not see the problems of compliance as normative-ontological factor (Section 5.1) one does not come to the same conclusion on conflict either. Indeed, as detailed by the majority, norm conflict is ancillary to the norm and does not make sense from a purely normativistic point of view. It is not a conflict of the ontology of the ideal, but of the empirical consequences.[107] Under a strict distinction of Is and Ought this 'incompatibility' (the fact that observance of all norms at the same time is factually impossible) is irrelevant and not an uncertainty of the ontology of norms. If anything, it may well contribute towards practical uncertainty, for here is a dilemma of 'What ought I to do?'[108] However, it is not a question of whether a norm is valid or whether we can correctly cognise it. The incorporation of a conflict of norms as defined by Celano, Weinberger *et al.* only shows that they seek to undo the dichotomy of Is and Ought[109] and thus are unable to cognise norms as norms.

5.3.1.2 The consequences of conflict as contradition

Assuming for a moment that norm-conflicts are a logical contradiction does not answer the second question, which also needs to be answered in the positive. Does

[102] Kelsen (1960) *supra* note 2 at 83 (Ch 18).

[103] 'Wahrheit ist nicht eine Eigenschaft dieser Tatsache, sondern der Aussage.' Kelsen (1979) *supra* note 8 at 173 (Ch 57 IX).

[104] Kelsen (1960) *supra* note 2 at 77 (Ch 16).

[105] Jørgen Jørgensen, Imperatives and logic, 7 Erkenntnis (1937) 288–296 at 291.

[106] Kelsen (1979) *supra* note 8 at 46 (Ch 16 II).

[107] Similar arguments: Bulygin (1985) *supra* note 26 at 153; Wright (1985) *supra* note 76 at 373.

[108] 'Was soll ich tun?' Immanuel Kant, Kritik der reinen Vernunft (1781, 1787) A 805, B 833.

[109] Celano (1998) *supra* note 24 at 360–361.

the logical contradiction lead to a loss of validity of at least one norm in a norm-conflict? Despite its spirited fight for an assimilation of norm-conflicts to logical contradictions, logico-analytic legal theory is unanimous in its acceptance that the application of logic does not touch the validity of the conflicting norms.[110] This is an entirely beneficial outcome of Kelsen's post-1960 'logical turn'. The problem again is that norms are 'existent' (valid) or they are not and that their existence is determined by the meta-norm on norm-creation (the source law) and an act of will, rather than only the relationship between norms. Statements about the existence of norms do not influence a norm's existence. Only if a norm is valid is such a statement true; both statements on two conflicting norms are true, because they refer to two different objects.[111] On the other hand, extending the analogy to making propositions about norms and norms themselves proves that there is no analogy in the above case: even a false statement remains said or written.[112] A statement's existence in the real world compares to the existence of norms in the ideal world (their validity). A logical basis for the *lex posterior* maxim could be said to have been defeated at this point; nonetheless, we will now consider the third question.

5.3.1.3 Loss of validity of the earlier norm?

While the logical basis for the *lex posterior* maxim is discussed above, international legal scholarship and municipal dogmatic scholarship sometimes claims without a philosophical foundation that *lex posterior* must prevail because law can always change. Adolf Merkl, Kelsen's first student and close colleague, laid the groundwork for the theories of the Vienna School in several areas. Merkl was the *avant-garde* with respect to Kelsen's position. He held a position on the *lex posterior* maxim in 1918 that Kelsen only fully adopted and substantiated after 1960.[113] Merkl's path-breaking article *Die Rechtseinheit des österreichischen Staates*[114] remains crucial to understanding what the *lex posterior* maxim is and what it cannot be.

As mentioned above in Section 5.1, a change of law is merely an abbreviation for the addition of new norms to a normative system[115] with a possible derogation of old norms. An authorisation to create norms, however, does not automatically (or logically) incorporate an authorisation to derogate from norms. 'Not everyone

[110] Alchourrón and Bulygin (1981) *supra* note 25 at 403; Bulygin (1985) *supra* note 26 at 154; Celano (1998) *supra* note 24 at 351; Conte (1998) *supra* note 75 at 333, 339; Guastini (1998) *supra* note 86 at 329; Weinberger (1985) *supra* note 28 at 427. For international lawyers: Karl (1983) *supra* note 38 at 61–66.

[111] Conte (1998) *supra* note 75 at 333.

[112] With respect to Weinberger's 'normenlogisches Konsistenzpostulat' (Weinberger (1981) *supra* note 10 at 69–70) see: Bulygin (1985) *supra* note 26 at 154.

[113] Stanley Paulson tracks the development of Kelsen's thought on the *lex posterior* maxim: Paulson (1986) *supra* note 77.

[114] Merkl (1918b) *supra* note 42.

[115] Merkl (1923) *supra* note 77 at 233.

who has created something can also undo it.'[116] While authorisation can extend to norms of any content, it cannot extend to any function of norms, because the normative basis for creation is hierarchically higher, while a norm created by the organ thus authorised – even when it purports to derogate – is on the same hierarchical level as all other norms thus created. This argument, however, presupposes a position on *lex superior*, which we will develop later (Section 5.5). We can at least take on the negative arguments in Merkl's statement: 'Only *that* factor is able to occupy the seat taken by [the statute], which has reserved it in the first place – the constitution – not the legislator, who only created law because he was authorised by the constitution to do so.'[117]

Traditional scholarship argues that if a legislator has created acts that are contradictory over time, how else could we ensure unison and how else could we ensure that law can change over time if not by privileging *lex posterior* over *lex prior*? How indeed or, rather, why? What makes the avoidance of 'inconsistent' regulation, the avoidance of norm-conflict more than a legal-political wish? What turns it into a logical necessity of all normative orders, a 'meaningful ordering'[118] necessarily devoid of conflict? And why – and the question is the same as with the *lex specialis* maxim – would the criterion of 'time' be relevant for logical consistency? Why, even if time were relevant, would the later regulation trump the earlier? Merkl thinks that we can – *arguendo* – make a much better case for the *prior* norm:

> It is, of course, not age conferring priority for the older vis-à-vis the younger law – such a temporal priority would be made up out of as thin air as the dogma of temporal posterity – but the fact (*ex hypothesi*) that the earlier law has been enacted according to the constitution and that it has therefore (with its specific content out of all possible contents) taken a specific place in the legal system and thus taken the place of any contrary legal content.[119]

But still, the voice of traditional doctrine cries out, change is a necessity of law; all law can change. How else is it possible? The depressing news of a consistent

[116] 'Nicht jeder, der etwas geschaffen hat, kann es wieder ungeschehen machen.' Merkl (1918b) *supra* note 42 at 1132; *contra*: Rainer Lippold, Recht und Ordnung. Statik und Dynamik der Rechtsordnung (2000) 405–407. Cf. also Erich Vranes, *Lex Superior, Lex Specialis, Lex Posterior* – Zur Rechtsnatur der 'Konfliktlösungsregeln', 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2005) 391–405 at 397.

[117] '[Dem Gesetz] den besetzten Platz zu nehmen, ist nur *der* Faktor imstande, der ihm den Platz eingeräumt hat – die Verfassung – und nicht der Gesetzgeber, der nur mit Ermächtigung der Verfassung Recht gesetzt hat.' Merkl (1918b) *supra* note 42 at 1133–1134.

[118] 'sinnvolle Ordnung'; Kelsen (1928) *supra* note 77 at 295–296 (para 10).

[119] 'Freilich ist es nicht das Alter, das dem früheren Gesetze vor dem späteren einen solchen Vorrang verleiht – diese zeitliche Priorität wäre ein ebenso aus der Luft gegriffenes Prinzip wie das fast dogmatisch geltende der zeitlichen Posteriorität –, sondern *die* Tatsache, daß (voraussetzungsgemäß) das frühere Gesetz verfassungsmäßig zustande gekommen ist, daß somit dadurch eine bestimmte Stelle im Rechtssystem mit einem bestimmten aus den möglichen Rechtsinhalten eingenommen und damit ferner jedem widersprechenden Rechtsinhalte den Platz genommen hat.' Merkl (1918b) *supra* note 42 at 1133.

analysis and critique is that change of norms is not possible, unless it is expressly permitted. Merkl's great triumph over sloppy legal argumentation was a defeat for the practicability of normative regulation, at least as it is usually done. Lawmakers, under the erroneous impression that all law can change, have unwittingly underestimated their own powers. Norms cannot change, unless provision is made for their change. Just as the creation of positive norms needs to be authorised, so does the destruction (and thus change) of norms. Permanence is the default; change needs to be stipulated.[120] 'Law is unchangeable, except by observance of the conditions for its change it has set itself.'[121]

The dubious fiction that a later (or any) norm has derogatory force by its very existence rather than by its express claim[122] is rebutted. The following conclusions emerge: if norms do not automatically 'change' (i.e. lose their validity), norms simply accumulate[123] and conflicts are not resolved. Therefore, in order to avoid accumulation, the validity of a norm can be ended only by another norm derogating from it. If the *lex posterior* maxim exists at all in international law, it would therefore have to be a positive norm prescribing derogation.

There is no logical necessity for the *lex posterior* maxim or for any sort of 'automatic' derogation based only on logical rules. Logic does not create law and logic does not destroy law. Logic can actually create and destroy where law is not positive, but fictional, thought-product, rather than the sense of an act of will.[124]

> A norm's *positivity* lies in its validity being conditioned by an act of will; the problem here is the applicability of logical principles on *positive* norms of morality and law. No imperative without emperor, no norm without a norm-creating authority, i.e. no norm without an act of will, whose sense it is.[125]

5.3.2 *Lex posterior* as positive norm

Hence, the only way the *lex posterior* maxim might work is as positive international law. We will now look at whether and how the *lex posterior* maxim could work as positive norm (as in Section 5.2.3 with respect to the *lex specialis* maxim). A diligent critique shows that in such a fragmented normative order as international law

120 Merkl (1918b) *supra* note 42 at 1136–1137; Lippold (2000) *supra* note 116 at 405.

121 '[D]as Recht [ist] – außer nach selbst gesetzten Bedingungen seiner Abänderung – unveränderlich.' Merkl (1923) *supra* note 77 at 240.

122 Merkl (1923) *supra* note 77 at 237.

123 Pauwelyn correctly discusses accumulation as one possibility of norm-conflicts: Pauwelyn (2003) *supra* note 4 at 161–164.

124 Kelsen (1979) *supra* note 8 at 202–203 (Ch 58 XXIII)

125 'Darin, daß die Geltung einer Norm durch den Willensakt bedingt ist, dessen Sinn sie ist, liegt ihre *Positivität* und das hier vorliegende Problem ist die Anwendbarkeit eines logischen Prinzips auf *positive* Normen der Moral und des Rechts. Kein Imperativ ohne Imperator, keine Norm ohne eine normsetzende Autorität, d.h. keine Norm ohne einen Willensakt, dessen Sinn sie ist.' Kelsen (1979) *supra* note 8 at 187 (Ch 58 X).

even positive regulation is limited in its effect.[126] Such an assumption leaves us with a sceptical outlook on what even a positivised maxim can do.

(1) If *lex posterior legi priori derogat* is a customary international law norm, the problems are the same as those of a customary norm encompassing the *lex specialis* maxim (Section 5.2.3):

(*a*) Customary norms are incapable of derogating from another norm, because 'derogation' as an occurrence on the ideal level cannot form practice as a pattern of facts. The norm-function 'non-ought' ($\neg O$) cannot be portrayed as behavioural regularity.
(*b*) Such a norm has the same hierarchical status as other customary international law norms. Despite its claim to derogate, we have yet to establish a valid justification for derogation to actually work.
(*c*) A customary international law norm that claims derogation of *all* later norms of international law will, when faced with an international treaty law norm, be seeking to impinge on a norm of a different normative order.[127]

The assumption of equality of sources does not transfer to a mutual derogability,[128] whether or not by preference for the *lex posterior*, because the two sources create different norms which are not normatively connected. In the absence of a hierarchical ordering or a constitution regulating the sources, there is not even a claim of hierarchy, but only two normative orders. 'Derogation can only occur within one and the same normative order,'[129] Kelsen reminds us. What would then stop us from derogating from a court judgment directed against us?

(2) If a treaty contains the *lex posterior* maxim, the inter-source hierarchical problems would certainly persist. The Vienna Convention on the Law of Treaties 1969 clearly codifies the *lex posterior* maxim. In Article 30, for example, the maxim is made positive law[130] and Articles 39 and 58 also contain the maxim. The Vienna Convention is, however, only a treaty *on treaties* and the question is not its effect on its parties,[131] but on the treaties to which it is applicable (Articles 3–4 VCLT). More importantly, do the treaties falling under the VCLT derive their validity from the Vienna Convention, rather than directly from the *Grundnorm*? Only if Article 1 and the enunciation of the maxim *pacta sunt servanda* in Article 26 mean that treaties falling under the VCLT actually derive their validity from the Vienna Convention (which was probably not intended by the states parties) would the VCLT be a meta-law on treaty-making. Only then would the treaties be

[126] Contrary to Merkl's lack of emphasis (Merkl (1923) *supra* note 77 at 240–244), this question is both important and problematic.
[127] Kammerhofer (2004b) *supra* note 49 at 549–550.
[128] Karl (1983) *supra* note 38 at 109.
[129] 'Derogation kann nur innerhalb ein und derselben normativen Ordnung erfolgen.' Kelsen (1979) *supra* note 8 at 102 (Ch 29 III).
[130] Koskenniemi (2006) *supra* note 5 at 128–134 (paras 251–266).
[131] A treaty is binding for its parties, which is international treaty law's *Grundnorm: pacta sunt servanda*.

capable of a closer relationship vis-à-vis each other. Such a move would put the Vienna Convention in a *lex superior* position, because the treaties would derive their validity from it. Moreover, this move would push the question towards the *lex superior* maxim.

(3) Kelsen sometimes claimed – having changed his views on the issue[132] – that while the *lex posterior* maxim can only be a positive norm, it is tacitly included in new norms:

> In the case of an amendment, the legislator does not expressly formulate a derogating norm. That is, because the legislator thinks it self-evident that a norm created by him and in conflict with an older norm ends the validity of that older norm . . . Even a norm which the legislator thinks self-evident and does not expressly formulate, but tacitly assume, is a posited, a positive norm.[133]

Tacit regulation is particularly problematic, for not only are implications very difficult to prove, but one could doubt the very positivity of tacit regulation. The act of will whose sense is a norm simply does not exist in the case of tacit norm-'creation'. We are left with fictional norms, thought about in the mind of the legal scientist who wishes to admit such designs.[134] Law-makers will have to live with their mistakes; legal science cannot correct them. Even if law-makers erroneously believe that all law is changeable by default, what they hold to be self-evident does not become law merely by being so held. In the process of legislation it can happen that 'the consequence of the creation of a constitution may well be the opposite of what the law-makers creating the constitution thought to be self-evident'.[135] In any case, the content of norms is not determined by the psychological element 'act of will', at least not with customary international law and international treaty law. In these two cases, the *actus reus* is determined by state practice or by the treaty text.[136] Finally, even if we were to assume such a tacit regulation as an addition to new norms (i.e. the old norm is: *Op* and the new norm consists in $Pp \wedge \neg Op$), the derogating part would still have to prove to us that its derogation actually can derogate.

[132] Paulson (1986) *supra* note 77.

[133] 'Daß im Falle einer Neuregelung die derogierende Norm von Gesetzgeber nicht ausdrücklich formuliert wird, kommt daher, daß der Gesetzgeber für selbstverständlich hält, daß, wenn er eine Norm setzt, die mit einer älteren in Konflikt steht, er die Geltung dieser älteren Norm aufhebt . . . Aber auch eine Norm, die der Gesetzgeber für selbstverständlich hält und daher nicht ausdrücklich formuliert, sondern stillschweigend voraussetzt, ist eine gesetzte, positive Norm.' Kelsen (1965a) *supra* note 77 at 1480; Kelsen (1960) *supra* note 2 at 210 (Ch 34 e).

[134] It can be doubted that a positive normative order *can* contain fictional norms and (largely) vice versa (Section 6.2.2.2).

[135] 'sich aus den Verfassungen das Gegenteil dessen ergeben [würde], was die Verfassungsgesetzgeber für selbstverständlich angesehen haben'; Merkl (1918b) *supra* note 42 at 1137. Vranes takes Merkl's argument to be its opposite: Vranes (2005) *supra* note 116 at 397.

[136] In other words: the meta-law on customary international law-creation makes the *usus* the prescribed behaviour, while the meta-law on international treaty law-creation specifies that the text contains a description of the prescribed behaviour (Sections 3.2.5 and 4.2.2).

(4) Another early proposal of Kelsen's is that the *lex posterior* maxim could be part of the *Grundnorm*.[137] The problem is that the *Grundnorm* is merely a hypothesis on the basis of which positive 'material' can be interpreted as norm (Section 7.2). In Merkl's terms, all possibilities of normative regulation are only potentially within the *Grundnorm* and are not actually positive law. The possibility of change is not actualised changeability.[138] 'Just as the basic norm cannot tell us whether and how the whole mass of actual law is created, it cannot tell us whether and how that law is destroyed.'[139] Again, a location within the highest hierarchical level of a normative order would point to the *lex superior* maxim and our discussion of it below.

Yet again we must face the question of the 'actual' derogating force of one norm vis-à-vis another, specifically the relationship of a norm to a norm claiming to end the first norm's validity. That any derogating norm automatically derogates from any norm it refers to is not possible as this would transcend any given normative order. Even within normative orders, questions of hierarchical positioning or of the lack of a hierarchy persist. At this point it may be apposite to introduce Merkl's distinction between the hierarchy of validity (*Stufenbau nach der rechtlichen Bedingtheit*) and the hierarchy of derogation (*Stufenbau nach der derogatorischen Kraft*).[140] According to this theory, which does find parallels in international legal doctrine,[141] there are two hierarchies in normative orders, one static and the other dynamic. While any norm's validity can be traced to the norm which authorised its creation (up to the *Grundnorm*), there is a different hierarchy according to how and when norms validly lose their validity, which need not coincide with their meta-law on law-creation.

Mapping out that second hierarchy is difficult, but discussing the possibility of derogation is the key issue in this chapter. Alchourrón and Bulygin distinguish the two kinds of normative conflicts mentioned in Section 5.1, i.e. between *Op v.* $O\neg p$ and *Op v.* $\neg Op$. Their answer for the second type of conflict is the existence of 'criteria or rules of preference' (where the term 'rule' does not necessarily refer to a norm) – *auctoritas superior, posterior* and *specialis*. These regulate when a norm

[137] Kelsen (1920) *supra* note 9 at 115 (FN 1).

[138] Merkl (1923) *supra* note 77 at 240–244, esp. 242–243 (FN 1).

[139] 'Ebensowenig, wie man schon der Ursprungsnorm entnehmen kann, ob und wie das gesamte auf ihr tatsächlich beruhende Recht entsteht, gibt sie Aufschluß, ob und wie das entstandene Recht vergeht.' Merkl (1923) *supra* note 77 at 241.

[140] Jürgen Behrend, Untersuchungen zur Stufenbaulehre Adolf Merkls und Hans Kelsens (1977); Adolf Julius Merkl, Prolegomena einer Theorie des rechtlichen Stufenbaues, in: Alfred Verdross (ed.), Gesellschaft, Staat und Recht. Festschrift für Hans Kelsen zum 50. Geburtstag (1931) 252–294, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1311–1361 at 1342; Robert Walter, Der Aufbau der Rechtsordnung. Eine rechtstheoretische Untersuchung auf Grundlage der Reinen Rechtslehre (1964) at 53–68. The *Stufenbau* theory will be more fully discussed in Section 5.5.2.

[141] Alfred Rub, Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung (1995) 315; Pauwelyn (2003) *supra* note 4 at 147.

claiming to derogate actually derogates.[142] Their status vis-à-vis the level of norms is unclear and Weinberger's criticism is all the more effective for that.[143] Even in his late phase Kelsen categorically states that the conflict of a norm and a derogating norm cannot exist; the derogated norm simply disappears:

> When one [norm] lays down that such-and-such behaviour ought to happen, the other, the derogating norm does not lay down that such-and-such behaviour ought *not* to happen, but that such-and-such behaviour *not-ought* to happen. If the second [norm] is valid, the first one cannot be valid, because its validity is ended by the second [norm].[144]

That statement does not help us either and does not solve our problem. If this is the conflict of two ideals of 'Ought' and 'non-Ought' (despite our problem of conceiving of 'non-Ought' as norm) and even if this conflict happens within one normative order, the crucial decision of when a derogating norm actually does derogate remains. Kelsen might be asked the following questions in response to the claim that *any* derogating norm actually derogates: What if the derogation goes against the hierarchy of validity? What if an administrative order claims to end the validity of a provision of the constitution (without the constitution providing for such an event)? Would derogation still occur against the *lex superior*? This, then, is uncertainty in the sense discussed throughout this chapter; it is a clash on the level of the ontology of norms (as mentioned in Section 5.1). No *a priori* solution seems possible and, indeed, no *a posteriori* solution seems capable enough.

Stripped of its myths of a 'brave old world' of a *logical* international law, what actually happens is an accumulation of norms without much derogation.[145] Lawyers and subjects of law conveniently 'forget' about the old norms – which upon legal-theoretical analysis may not have lost their validity – under the rhetorical cloak of the *lex posterior* maxim, perhaps even within an 'informal' hierarchy, with international lawyers' reasonable consideration and weighing of various norms on a pragmatic level. We shall discuss this form of pragmatism further in the next section (Section 5.4). We have also seen in this section the crucial importance of the *lex superior* maxim within normative orders, which of necessity have a hierarchy. What precise effect this hierarchy can have and what may happen if the effect turns out to be less than expected will be the topic of Section 5.5.

142 Alchourrón and Bulygin (1981) *supra* note 25 at 396–398.

143 Weinberger (1985) *supra* note 28 at 425.

144 'Statuiert die eine das Sollen eines sich so und so Verhaltens, statuiert die andere, die derogierende Norm, nicht das Sollen des sich *nicht* so und so Verhaltens, sondern das *Nicht-Sollen* des sich so und so Verhaltens. Wenn die zweite gilt, kann die erste nicht gelten, denn ihre Geltung ist durch die zweite aufgehoben.' Kelsen (1979) *supra* note 8 at 178, 170 (Ch 57 VI), 178–179 (Ch 57 XIII).

145 Behrend (1977) *supra* note 140 at 41.

5.4 Pragmatic non-resolving

The ultimate triumph of pragmatism over a form of scholarship that is not afraid to follow the ideas of norms and of their relationship to the bitter end is reached when scholars propose to circumvent that *Konsequenz* by simply forgetting about the (disagreeable or negative) consequences of consistency and arguing in favour of informality, convenience or casuistry. On one end of this spectrum of approaches is the appeal of a Pure Theory of Law as envisaged by the Vienna School of Jurisprudence. No half measures, no fudging of problems, only a clear idea of normative scholarship and the resolve not to admit non-legal influences taint the construction of a theory or doctrine based on the essential duality of Is and Ought. From afar, Kelsen's efforts may seem ridiculously formalistic and even otherworldly. The more one looks at how the Vienna School's arguments are applied to concrete problems, the less otherworldly his theory becomes.

On the other end are those who could arguably be seen as anxious not to seem to be causing controversy. They might try to incorporate their ideas and theories within what has traditionally been held to be international law. They may seek not only to please tradition, but also to avoid upsetting 'the real world' with their designs. For them, law should not stray too far from reality for, if it does, it will become irrelevant. These are the pragmatics and they are neither evil nor ignorant, but persons often have to operate within very tight parameters and may have no choice but to be pragmatic. Adolf Merkl wrote in 1916:

> The practitioner is and ought to be a jurist and a human, not just as the same person, but also within the same act! One might even forgive him for being a bit unjuristic in favour of the ethical postulate of being human.[146]

Yet, as Merkl continues, a scholar's task is to cognise the law without modifying cognition for extra-juridical concerns, without becoming inconsistent. This short section is about scholars becoming pragmatic and about the means that are employed to 'resolve' conflicts of norms, 'resolve' them in a very wide sense of the word, to unmask these comfortable myths as such.

(1) While the notion of 'conflict' may be flexible and while it may include non-ontological conflict between norms (of the type: Op *v.* $O\neg p$) where the divergence lies in the mere empirical impossibility of observance, the notion of 'resolving' conflict for a normativist approach is a narrow one, because as long as both conflicting norms continue to be valid, they continue to conflict. Any theory that leaves both norms valid does not resolve the conflict, even if that may seem to be

[146] 'Der Rechtspraktiker ist und sei Jurist und Mensch nicht bloß in einer Person, sondern auch in derselben Handlung! Sogar etwas unjuristisch zu werden zugunsten des ethischen Postulates, ganzer Mensch zu sein, wird man ihm verzeihen dürfen.' Adolf Julius Merkl, Zum Interpretationsproblem, 42 Grünhutsche Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart (1916) 535–556, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1059–1077 at 1066.

the case. The ILC Study Group Final Report on fragmentation[147] and Joost Pauwelyn's 2003 book[148] argue that resolving is not to be seen exclusively in terms of the validity of norms.

> [T]he point of the *lex specialis* rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to become applicable instead of the general. . . . The more general rule remains in the background providing interpretative direction to the special one.[149]

But how could that work? How could a norm 'retreat to the background'? What does it mean for a norm to 'prevail' over another without derogating from it? The proposed solution seems to be to ignore one of the conflicting norms. For a normativist scholarship this method cannot produce a result, because 'retreating' is *ex hypothesi* not the loss of validity. Pauwelyn expressly stipulates that '[t]he initial question is hence not . . . which of the two norms *survives*'[150] and thus precludes that avenue. Another explanation is given: 'The conflict is then resolved in favour of one of the two rules because that rule has been, or can be, labelled as the more "prominent" or "relevant" one.'[151] Yet from the value-relativistic normativist standpoint there is no such thing as a more 'relevant' norm – two norms that are valid are valid; neither claim to observance is *a priori* more 'relevant' than the other. On a pragmatic or empirical level there may well be norms more 'relevant' than others. When an illegal use of a firearm may be subsumed under firearms law (resulting in a fine) and as murder under criminal law (resulting in lifelong imprisonment), the latter norm may very well seem more 'relevant'; but for legal scholarship – cognising norms – it cannot be.

Pauwelyn's theory could be re-read to try to make it conform to the normativistic approach. When he argues that 'the result [of this type of norm-conflict] is that only one of the two rules applies to the particular situation at hand',[152] it could be seen as an argument in favour of the reduction of the sphere of applicability of the 'retreating' norm. This norm would then no longer be applicable, because its sphere *ratione materiae*, *ratione personae* etc. would be reformulated accordingly. Thus the second norm would be the only one applicable to the situation. Two problems could emerge if the argument is re-read, however. On the one hand, the theory presumes that customary international law, for example, 'will continue to apply in the background *and become fully applicable* for instance when the treaty no longer is in force'.[153] But how is that to be accomplished? Why should

147 Koskenniemi (2006) *supra* note 5 at 47–48 (paras 85–86), 51–52 (para 92); cf. Daoudi (2004) *supra* note 23 at 11 (para 31).
148 Pauwelyn (2003) *supra* note 4 at 327.
149 Koskenniemi (2006) *supra* note 5 at 56 (para 102).
150 Pauwelyn (2003) *supra* note 4 at 327.
151 Pauwelyn (2003) *supra* note 4 at 327.
152 Pauwelyn (2003) *supra* note 4 at 327.
153 Koskenniemi (2006) *supra* note 5 at 46 (para 82).

the scope of application change back when the other norm (with which the first norm *ex hypothesi* does not conflict) loses its validity? On the other hand, the change of spheres of applicability of a norm is a change of the norm – which can only be done through its derogation and the renewed creation of a norm with changed content (Section 5.2). Theories which seek to change law by non-legal methods transcend the Is–Ought divide.

(2) Pragmatic scholarship sometimes ascribes the solution of norm-conflicts to interpretation.[154] At first glance this looks like a promising approach. Stanley Paulson argues that there cannot be a basis for claiming a conflict of norms without a prior interpretation of the norms.[155] This approach is intriguing because of the absence of a 'clash' of the norms in the non-ontological variant. An accumulation of norms could *a priori* not be seen as capable of conflict; only through the medium of interpretation (by finding meanings of norms) could we find out whether the norms demand something incompatible.

Yet there are problems with such an approach as well. First, within the frame of possible meanings the choice between them is no longer determined by the norm – it may have a multitude of possible meanings (Section 4.2.1). Choices made by humans cannot determine or fix meanings and multiple meanings stay multiple. The conflict, if it exists in normative ontology at all (e.g. Op *v.* $\neg Op$), is one of the frame (the norm) itself, not of possible meanings. Second, the ontology of norms is not changed by interpretation. Norms are not their meanings – meanings are ancillary. In treaty or statutory law, for example, the norm is in the form of the text, the language may have multiple meanings and its 'meaning-contents' are not the norm (Section 4.2.3). Interpretation cannot resolve norm-conflict, because that is not what interpretation does:

> Interpretation of legal norms is legal *cognition*. Cognition of law can, however, neither create legal norms, i.e. give them validity, nor can it repeal the validity of legal norms. Therefore, interpretation is not able to resolve norm-conflicts.[156]

Interpretation as cognitive tool has nothing to do with the existence of norms; the norm itself is not affected by our cognition. Yet if we did not cognise one of the conflicting norms, if we were to ignore it – that is to say if we would espouse the theory discussed here – then we would on a pragmatic, trivial or even epistemological level have resolved the conflict. On the ontological level, the validity of a norm can only be ended (if at all) by another norm, just as only a norm can

[154] Jenks (1954) *supra* note 30 at 428; Karl (2000) *supra* note 10 at 940; Kelsen (1960) *supra* note 2 at 210 (Ch 34 e); Koskenniemi (2006) *supra* note 5 at 34–35 (para 56); Pauwelyn (2003) *supra* note 4 at 244–274 (only as 'conflict-avoidance technique'); Vranes (2005) *supra* note 116 at 398–400.

[155] Paulson (1986) *supra* note 77 at 234; Schilling (1994) *supra* note 40 at 462.

[156] 'Da Interpretation von Rechtsnormen Rechts*erkenntnis* ist, Erkenntnis des Rechts aber eben so wenig wie Rechtsnormen erzeugen, d.h. in Geltung setzen, die Geltung von Rechtsnormen aufheben kann, kann Interpretation die Lösung eines Normenkonflikts nicht leisten.' Kelsen (1979) *supra* note 8 at 179 (Ch 57 XIV).

authorise the creation of a norm. An act of thought (*Denkakt*), i.e. an act of cognition vis-à-vis positive norms, is not an act of will (*Willensakt*) itself creating a norm.

(3) The third pragmatic strand of arguments is to introduce a casuistic response to general problems. Wilfred Jenks' words may be taken as paradigmatic: 'None of these principles has any *absolute* validity or can be applied *automatically* and *mechanically* . . . They have to be weighed and reconciled in the light of circumstances.'[157] This approach faces the objection that in legal scholarship a difference in norms is dictated solely by norms, for the Is–Ought divide demands such consistency. In this sense we can also understand Adolf Merkl's chiding remarks on casuistry in norm-conflict resolution: 'The problem of changeability . . . is a question which *has to be posed and solved* for the whole area of legal norms *in the same manner*.'[158]

Yet in a different sense the emphasis on positive decision rather than deduction from reason is correct. As will be discussed further in Section 5.5, positive norm-creation and the creation of hierarchy in normative orders are not a matter of logical deduction from superior norms, but also depend on a positive (real) act of will. Thus, a tribunal may be faced with an instance of norm-conflict. Where tribunal judgments are individual norms binding upon the parties, then for the individual norm a choice between two conflicting norms (on whatever grounds) becomes an individual norm. The tribunals's act of will has decided for this case that the other norm is officially being ignored and for the resulting judgment the conflict is resolved. On the general level the conflict remains,[159] because the validity of the 'defeated' norm is not ended by the judgment. In the case of a constitutional court positive law may very well provide it with the power to derogate from statutory law, but that power has to come from positive law – and any such norm is subject to the criticism brought against the *lex superior* maxim.

Hence on a normativist approach to law pragmatic solutions are only able to create pragmatic results; the ontology of validity neither is nor can be changed by extra-legal factors.

5.5 *Lex superior legi inferiori derogat*

Lex superior's superiority is key to the concept of norms. Normative systems come about because norms can create futher norms and because only norms can create norms. Unlike the other maxims discussed in this chapter, the *lex superior* maxim has to be taken very seriously if one takes the idea of norms as formal ordering of ideals seriously. In another important sense, the primacy of *lex superior* includes the

[157] Jenks (1954) *supra* note 30 at 453 (emphasis added).

[158] 'Das Problem der Veränderlichkeit . . . ist eine für [den ganzen] Bereich der Rechtsnormen *gleicherweise zu stellende und zu lösende* Frage.' Merkl (1923) *supra* note 77 at 233 (emphasis added).

[159] Kelsen (1979) *supra* note 8 at 179 (Ch 57 XIV); Kelsen (1960) *supra* note 2 at 211 (Ch 34 e); Walter (1980) *supra* note 10 at 302.

primacy of *lex posterior* and *lex specialis*. 'The *lex posterior* and the *lex specialis* do . . . not prevail, because they are younger or more "special" . . ., but because their primacy . . . *is prescribed* and these prescriptions themselves prevail.'[160] The idea of a *lex superior* could be called the basis of all attempts at resolving conflict, because it is *superiority* that 'privileges' one claim over another. Yet precisely how this superiority is achieved – and how far it can be achieved – is the topic of this section. What is the result of a norm being 'superior' to another in international law?

5.5.1 International law's *sui generis* hierarchies

Large parts of traditional international legal scholarship[161] do not believe that the sources of international law are ordered so that one source is dependent for its validity upon another source (one possible exception being acts of international organs). Yet this form of validity-dependence is the core of the Pure Theory of Law's conception of superiority of norms. Without a co-ordinating superstructure of norms from which the sources derive, the consequence is unavoidable that customary international law and international treaty law are separate normative orders (Section 6.3.2). As noted above, such a claim must overcome the hurdle of separation of normative orders. 'Derogation can only occur within one and the same normative order.'[162]

Yet in international legal doctrine hierarchy has been utilised in a different manner[163] akin to Merkl's hierarchy of derogation (Sections 5.3.2 and 5.5.2). Scholars have ascribed a hierarchically higher position to certain phenomena of international law, with powers to derogate from or not to allow the creation of conflicting international law norms. We will look at *ius cogens* and Article 103 UN Charter as the two least controversial claims to superiority in international law in turn to find out whether they are stong enough to found such a hierarchy on their own merits and whether their claim to be a *lex superior* can resolve conflicts between norms of international law independently of the validity-dependence relationship discussed in the other sections of this chapter.[164]

(1) *Ius cogens*, as envisaged by international legal doctrine[165] and as partially expressed in the Vienna Convention, has multiple features. (*a*) A *ius cogens* norm is

[160] 'Die lex posterior und lex specialis gehen . . . ja nicht deshalb vor, weil sie jünger bzw. spezieller sind . . ., sondern deshalb, weil ihr Vorrang . . . *angeordnet ist* und diese Anordnung ihrerseits Vorrang genießt.' Schilling (1994) *supra* note 40 at 400–401.

[161] *Pace* Kelsen: Kelsen (1952) *supra* note 64 at 314.

[162] 'Derogation kann nur innerhalb ein und derselben normativen Ordnung erfolgen.' Kelsen (1979) *supra* note 8 at 102 (Ch 29 III).

[163] The ILC cautions against using domestic analogies, for it sees 'hierarchy' in a specific international law sense as well: International Law Commission, Report on the work of its fifty-fourth session (29 April–7 June and 22 July–16 August 2002), A/57/10 (2002) 240.

[164] Robert Kolb, for example, argues that '[h]ierarchical value is . . . often to be found in the norm itself, rather than in the source of the norm'. (Kolb (1998) *supra* note 68 at 77).

[165] The idea of *ius cogens* is supported by positivists (Kelsen (1952) *supra* note 64 at 323, 344) and natural lawyers alike (Verdross and Simma (1984) *supra* note 3 at 328–334).

created in a qualified procedure as against other international law. Article 53 VCLT requires that it be 'accepted and recognised by the international community of States as a whole', whereas customary international law-creation does not require that the states 'as a whole' support practice by their *opinio iuris*. This difference is reminiscent of a higher quorum for the creation of constitutional norms as against other statutes. Like many other constitutional documents, the Austrian Federal Constitution requires a consensus-quorum of two-thirds of votes cast in the first chamber of Parliament for the creation of constitutional laws.[166] (*b*) Scholarship often describes *ius cogens* norms as so qualified by virtue of the substance of their content. 'The content of a *jus cogens* rule . . . has to be of great or even fundamental importance to the international community.'[167] The concept of peremptory norms is argued to introduce an element of 'international public order'[168] into what seems to be regarded as a voluntaristic and private law-oriented legal system. The notion of 'public order' is invariably influenced by natural law thinking, e.g. treaties *contra bonos mores*.[169]

(*c*) Another element of *ius cogens* as conceived in international legal scholarship is that it constitutes *ius non dispositivum*, i.e. *ius cogens* in the original Roman law sense (cf. Section 5.2.3). Civil Codes allow private individuals to 'contract out' of certain of its provisions. Article 3 of the Rome Convention on the Law Applicable to Contractual Obligations 1980[170] gives priority to the contractual regulation of the applicable law for a private contract. In certain cases, however, a statute may reserve the 'right' to exclusively regulate a matter – thus curtailing the private freedom of contract. (*d*) Closely connected hereto is the other original Roman law feature. Because *ius cogens* is *ius non dispositivum*, any contrary regulation would be derogated from or would be void *ab initio* (not become a valid norm). Thus, Articles 53 and 64 VCLT purport to void treaties in conflict with *ius cogens* and claim to establish a hierarchy of derogation[171] independent of the hierarchy of validity-dependence.

However, the concept of *ius cogens* as envisaged in doctrine – at least outside the Vienna Convention's scope of application – is problematic, especially as concerns its justification and its effects in a norm-conflict. First, it is unlikely that customary international law is *ius dispositivum* by default. As mentioned above (Section 5.2.3), norms claim to be observed. Prohibitions or obligations posit how their subjects

166 Art 44 Abs 1 Bundes-Verfassungsgesetz, BGBl 1930/1 idF BGBl I 2003/100.

167 G.J.H. van Hoof, Rethinking the sources of international law (1983) 153; Alfred Verdross, Jus dispositivum and jus cogens in international law, 60 American Journal of International Law (1966) 55–63 at 58.

168 Czapliński and Danilenkow (1990) *supra* note 10 at 10; Georg Schwarzenberger, The problem of international constitutional law in international judicial perspective, in: Jost Delbrück, Knut Ipsen, Dietrich Rauschnig (eds), Recht im Dienst des Friedens. Festschrift für Eberhard Menzel zum 65. Geburtstag am 21. Januar 1976 (1975), 241–148 at 243.

169 Verdross (1966) *supra* note 167 at 61; Verdross and Simma (1984) *supra* note 3 at 328.

170 European Communities, Official Journal L 266, 9 October 1980 at 1–19.

171 Pauwelyn (2003) *supra* note 4 at 98.

ought to behave. No norm of international law, whether customary or conventional, *by default* requires observance only in the case that no opting-out has taken place. The assumption of the *ius dispositivum* character by scholars does not make it true. If a norm does not actually require observance unless there is *inter se* regulation, it simply does not contain such an exception. The presumption is actually the reverse of the orthodox position: all law is *ius cogens* (*ius non dispositivum*) unless it says it is *ius dispositivum*. The question is not 'whether *all* norms of international law have the character of *jus dispositivum*',[172] but whether any do. Individual customary norms (or the law on customary law-creation) would have to specify this – and that is not likely. On the other hand, as a non-dispositive quality is the default for norms, there is no *a priori* necessity for an increased quorum for their creation.

Second, there are few arguments on the normative foundation or basis of the concept of *ius cogens* in international law. The concept would have to have a foundation in positive law. Proponents have to show that *ius cogens* fulfils the criteria of law-making of one of the sources of international law. Plainly, *ius cogens* is part of the VCLT. There is no problem with this, only with the absolutisation that occurs when its scope is extended outside the limit of what the VCLT can achieve (Section 5.3.2). If *ius cogens* itself is a customary international law norm, the problems would start mounting up. As a norm of customary international law, would the concept of *ius cogens* itself be a *ius cogens* norm? How can it justify itself? If it is a simple norm of customary law, can the very notion be changed by a later customary norm or 'opted out' in treaties? The argument here is not that there is absolutely no such thing as *ius cogens*, but that outside the Vienna Convention's scope it does not exist as conceived by the Vienna Convention and traditional legal scholarship.

Third, throughout this chapter the claimed power to derogate of certain 'logical rules', *effectivités* or norms has been questioned. If one applies this to *ius cogens*, one may find that there is little reason to allow for derogating force there either. Why should one norm – even if 'accepted and recognised by the international community of States as a whole' – destroy another norm simply because it says so? The *sui generis* hierarchy created by international legal scholarship does not accord with the hierarchy of validity, so why should *ius cogens*' claim be privileged?[173] Verdross argues that natural lawyers have fewer problems with this notion than positivists do. After all, the 'idea of a necessary law which all states are obliged to observe'[174] is the claim of a fictional norm of a normative order beyond positive international law. What distinguishes that claim from a person's personal claim to void any judgments directed against that person by a municipal criminal court?

[172] Verdross (1966) *supra* note 167 at 55 (emphasis added).

[173] *Ius cogens* is not *lex superior* through its form, but its content, argue: Kolb (1998) *supra* note 68 at 76, 80; Vranes (2005) *supra* note 116 at 400.

[174] Verdross (1966) *supra* note 167 at 56.

(2) The case for a *sui generis* hierarchy can be countered with respect to Article 103 UN Charter as well. Article 103 is an obligation binding upon the member states of the United Nations,[175] but what makes the Charter different from other treaties? Article 103 does not specify exactly what happens to the obligations under other treaties[176] – it does not say whether the validity of the other norm is ended – except that the Charter shall 'prevail'.[177] This could mean that international lawyers ought to pragmatically ignore the non-Charter norm (Section 5.4). Rudolf Bernhardt argues that at least in some cases the other treaty is either void *ab initio* or voided.[178] Yet even if '[w]orld peace itself may depend on respect for the higher rank and binding force of the Charter as emphasised by Art. 103',[179] the maintenance of world peace is not a sufficient justification for derogatory powers. Also, because in norms bindingness equals existence and because existence is not gradual, there can be no higher binding force. All norms *a priori* have binding force and equal force at that. Politically, the Charter is the most important treaty valid today; it has a fundamental position in international relations. This politico-moral importance itself does not translate to a status as superior norm. It does not translate into derogatory power vis-à-vis other treaties. There still is a conflict between two treaties. Even if one of them claims to 'prevail' over the other, that does not mean that it actually does.

The traditional international law hierarchies, as they are not based upon validity-dependence by law-creation, are claims. They face the same problems as all other such claims discussed above. Perhaps Kelsen wanted to avoid the difficult and seemingly unsolvable questions of norm-conflicts in international law through the establishment of a clear hierarchy between the sources of international law. We will next turn to the question whether Merkl's and Kelsen's concept of the *Stufenbau*, i.e. a hierarchy based upon a norm's source of validity, fares better at 'privileging' one norm over another. Does norm-conflict vanish before a 'truly' superior norm?[180]

175 Zdizislav Galicki, Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules, in: International Law Commission, Documents of its fifty-sixth session, Geneva 3 May-4 June and 5 July-6 August 2004, ILC(LVI)/SG/FIL/CRD.5 (2004) 4 (para 7).

176 Rudolf Bernhardt, Article 103, in: Bruno Simma (ed.), The Charter of the United Nations. A commentary (2nd ed. 2002) 1292–1302 at 1295 (RN 6).

177 Re-emphasised by the Court: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, ICJ Reports (1984) 392 at 440; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, Preliminary Objections, Judgment of 27 February 1998, ICJ Reports (1998) 9 at 31 (para 39).

178 Bernhardt (2002) *supra* note 176 at 1297 (RN 15).

179 Bernhardt (2002) *supra* note 176 at 1302 (RN 37).

180 Kelsen (1979) *supra* note 8 at 178–179 (Ch 57 XIII).

5.5.2 The hierarchy of legal orders

The concept of the hierarchy of legal orders (*Stufenbau*) is in many ways one of the most important contributions of the Pure Theory of Law's normativist-positivist approach[181] and will briefly be introduced here. The dichotomy of Is and Ought, and, with it, the theory of the *Grundnorm* forms the foundation of the Pure Theory as a whole (Chapter 7). Hierarchical ordering as a concept is a direct consequence of that core theory[182] – not, though, the concrete arrangement of hierarchy that may obtain in concrete normative orders. If the existence of a norm as validity can only be based on another norm[183] – if there can be no Ought from Is alone[184] – then a connection between norms is established. This hierarchy is the dependence of one norm upon another norm for its validity. Since that dependence is one-sided, it makes sense to call the dependent norm a 'lower' norm and the norm it depends upon the 'higher' norm. The dependence in the sense described above is established by norm-creation. The question 'Why ought I to obey this statute?' is answered by referring to the norm that has *authorised* its creation, for example a constitution. The higher law empowers law-creation; that empowerment is the reason the resultant law is valid.[185]

> The dynamic character of law makes a norm valid, if and when it was created in a certain fashion determined by another norm. This other norm is the immediate source of validity of the first norm. The relationship between the norm which regulates the creation of another norm and the norm thus created can be visualised as a spatial super-ordination and subordination. . . . The legal order is not a system of coordinate legal norms existing alongside each other, but a hierarchical ordering of various strata of legal norms. Their unity is constituted because a norm which has been created according to the terms of another norm derives its validity from that latter norm, whose creation is, in turn, determined by yet another norm; a *regressus* ending in the *Grundnorm*, [whose validity] is presumed.[186]

[181] András Jakab, Probleme der Stufenbaulehre, 91 Archiv für Rechts- und Sozialphilosophie (2005) 333–365 at 333; Theo Öhlinger, Der Stufenbau der Rechtsordnung. Rechtstheoretische und ideologische Aspekte (1975) 9.

[182] Behrend (1977) *supra* note 140 at 61.

[183] Kelsen (1960) *supra* note 2 at 196 (Ch 34 a).

[184] Kelsen (1960) *supra* note 2 at 5 (Ch 4 b).

[185] Kelsen (1979) *supra* note 8 at 82 (Ch 26 I).

[186] 'Da bei dem dynamischen Charakter des Rechts eine Norm darum gilt, weil und sofern sie auf eine bestimmte, das heißt durch eine andere Norm bestimmte Weise erzeugt wurde, stellt diese den unmittelbaren Geltungsgrund für jene dar. Die Beziehung zwischen der die Erzeugung einer anderen Norm regelnden und der bestimmungsgemäß erzeugten Norm kann in dem räumlichen Bild der Über- und Unterordnung dargestellt werden. . . . Die Rechtsordnung ist nicht ein System von gleichgeordneten, nebeneinanderstehenden Rechtsnormen, sondern ein Stufenbau verschiedener Schichten von Rechtsnormen. Ihre Einheit ist durch den Zusammenhang hergestellt, der sich daraus ergibt, daß die Geltung einer Norm, die gemäß einer anderen Norm erzeugt wurde, auf dieser anderen Norm beruht, deren Erzeugung wieder durch andere bestimmt ist; ein Regreß, der letztlich in der – vorausgesetzten – Grundnorm mündet.' Kelsen (1960) *supra* note 2 at 228 (Ch 35 a).

It is creation that establishes hierarchy; it establishes the hierarchy of legal conditionality (*Stufenbau nach der rechtlichen Bedingtheit*).[187] If, and only if, all conditions imposed by the meta-law on law creation (*Rechtserzeugungsregel*)[188] are met, can the norm created be cognised as a norm of the normative order in question.[189] Only then can the norms be ordered in a multitude of spheres between delegating and delegated norms.[190] Only then can both norms be seen as belonging to one normative order.[191] Because Ought can only come from an Ought, law necessarily orders its own creation.[192]

Yet because an authorising norm usually authorises the creation of a multitude of norms, and because usually a multitude of norms are created under it, this multitude of norms with a common 'pedigree' has been called a *Rechtsform*,[193] what international lawyers would probably describe as 'norms belonging to the same source' (Section 6.1). 'The form legal rules take is determined by the rule that created them; the legal rules that were created according to the same rule of [law-]creation have the same form.'[194] Thus in international law, we could call 'customary international law' one *Rechtsform*, because all norms belonging to it were created according to the same rules on custom-creation.

A problem with this deduction appears if we take this conditionality seriously. In complex modern municipal legal systems the meta-norms on law-creation in its totality may consist of a large part of that legal order, because it is all the conditions put together, including norms on who is authorised to create norms having which content observing which procedure.[195] This not only creates a very complex network of norms, which may very well lead to epistemological uncertainty. It may also be and is the case that a norm belonging to a lower *Rechtsform* is a condition for the creation of a norm belonging to a higher *Rechtsform*. A 'simple' statute may contain one of the conditions for the creation of a constitutional law.[196] This has the potential to destroy the notion of a uniform and simple

[187] Walter (1964) *supra* note 140 at 60.

[188] Walter (1964) *supra* note 140 at 61.

[189] Kelsen (1960) *supra* note 2 at 239 (Ch 35 e–f).

[190] Merkl (1923) *supra* note 77 at 286–287; Alfred Verdross, Die Verfassung der Völkerrechtsgemeinschaft (1926) 43.

[191] Merkl (1931a) *supra* note 140 at 1335–1336.

[192] Kelsen (1960) *supra* note 2 at 73 (Ch 15).

[193] Merkl (1931a) *supra* note 140 at 1311.

[194] 'Der Bestimmungsgrund für die Form der Rechtsvorschriften ist ihre Erzeugungsregel; die gleiche Form haben jene Rechtsvorschriften, die nach der gleichen Erzeugungsregel geschaffen wurden.' Walter (1964) *supra* note 140 at 55 (emphasis removed).

[195] Walter (1964) *supra* note 140 at 59–60, 61 (FN 111).

[196] This is the case with an oft-discussed provision of the Austrian constitution, where observance of the Law on the Federal Gazette (Bundesgesetz über das Bundesgesetzblatt 2004 (Bundesgesetzblattgesetz – BGBlG), BGBl I 2003/100) – i.e. publication in the Gazette – is made one of the conditions for law-creation even of constitutional laws by virtue of Article 49 of the 1920/1929 Federal Constitution (Art 49 Abs 1 B-VG 1920 *supra* note 166). For a discussion of this particular case: Lippold (2000) *supra* note 116 at 394–398; Walter (1964) *supra* note 140 at 62.

hierarchy of *Rechtsformen* in a hierarchical-pyramidal structure, because the conditions transcend the hierarchy of form and partially overturn it.[197] Robert Walter diverges from Merkl's view by denying that *Rechtsform* can be a criterion for hierarchy.[198] One could agree with Rainer Lippold that while it may be highly counter-intuitive to think of a statute as 'higher' than the constitution, if one consistently defines 'form' as 'condition of law-creation', then this statute is indeed part of a higher layer.[199]

In international law this is not such a problem. While international law necessarily has a hierarchy (a constitution in the material sense), it is quite uncertain how and whether a *unified* hierarchy exists. In international law, the problem is not a highly complex network,[200] but the apparent lack of any positive rules on rule-making. We will look at this problem more closely in Chapter 6.

But there is that other *Stufenbau* in the Pure Theory, the hierarchy of derogatory force (*Stufenbau nach der derogatorischen Kraft*),[201] also developed by Merkl, but not explicitly distinguished by Kelsen.[202] This hierarchy is highly relevant to our topic, since norm-conflicts can only be solved by derogation. We need to know when norms can validly derogate from each other. In other words, we need to know which norms have that sort of derogatory force. Expecting clear answers from the Pure Theory's protagonists, one may be disappointed to read time and again that they approach the matter from the other angle. 'A legal norm which has derogating force vis-à-vis another legal norm, while the latter . . . has no such derogating force therefore holds a higher rank.'[203] Adolf Merkl is interested in portraying hierarchies, not in derogating force as such, which in this case is merely the criterion for the ordering of norms.

This is because the first *Stufenbau* is a necessary element of all normative orders. Every normative order has at least two layers of norms. It has at least the positive norm created and the presumed (quasi-fictional) *Grundnorm*. If 'A' had never issued a norm and would now do so, this norm, e.g. 'All humans ought to wear red hats', can only be cognised as a norm if the *Grundnorm*: 'Follow A's orders' is presupposed. Thus, there are at least two levels in any normative order, although there can be more. However, for the reasons developed in Sections 5.2 and 5.4, the hierarchy of derogatory force is not a necessary element of every normative order. Derogation never is a logical operation and needs to be stipulated by

197 Öhlinger (1975) *supra* note 181 at 16–17.
198 Walter (1964) *supra* note 140 at 62.
199 Lippold (2000) *supra* note 116 at 399.
200 Öhlinger (1975) *supra* note 181 at 17.
201 Walter (1964) *supra* note 140 at 55.
202 Behrend (1977) *supra* note 140 at 42.
203 'Ein Rechtssatz, der gegenüber einem anderen Rechtssatz derogierende Kraft hat, während dieser . . . ihm gegenüber keine derogierende Kraft hat, ist aus diesem Grunde von höherem Range.' Merkl (1931a) *supra* note 140 at 1340; Walter (1964) *supra* note 140 at 54; Robert Walter, Der Stufenbau nach der derogatorischen Kraft im österreichischen Recht. Zum 75. Geburtstag von Adolf Julius Merkl, 20 Österreichische Juristen-Zeitung (1965) 169–174 at 169.

positive norms; derogability is a feature of positive regulation.[204] Hence it depends on the positive norms within a concrete normative order whether such a hierarchy of derogation exists and what it looks like.[205] However, we must not fall into the trap of begging the question thus: if a hierarchy is created by derogation, the higher norm will derogate the lower norm, thus any derogating norm is higher and any norm that claims to derogate derogates. In this way one would only have proven that the hierarchy of derogation comes from derogation, while the derogating force comes from hierarchy.[206] This sounds like a tautology, but we must have a closer look at this, since this argument has been used frequently.

In particular, we must answer the question whether the hierarchy of legal conditionality can be the basis for the hierarchy of derogation. Is norm-creation the argumentative basis that identifies the *lex superior* in the *lex superior* maxim? (It needs to be said, however, that the question of identifying the *lex superior* is a different question to that of whether the *lex superior* maxim truly obtains by necessity.) *Prima facie* this option seems attractive, even natural. Should not the norm that has created another norm also determine when it should end? Why should not a constitutional provision simply destroy a statute? Erich Vranes argues that '[i]f there is hierarchically higher and lower law in a legal order, the *lex inferior* has in principle to yield to the *lex superior*, if the structure of the legal order is not to be led *ad absurdum*.'[207]

In contrast, Merkl holds that the two hierarchies may diverge significantly. For him, a norm being called 'higher' than another does not automatically mean that it is higher in every respect.[208] A good example of the divergence of the two hierarchies may be the relationship that obtains between a statute and the judgment of a constitutional court derogating from that statute.[209] At best, the authorisation for the constitutional court to derogate from statutes will be found in the same constitution as the parliament's authorisation to create statutes. Thus, at best, they have the same rank in the hierarchy of validity. In the hierarchy of derogation, however, the judgment claims to derogate from the statute and thus there is at least the possibility that it is higher than the statute. It may not be the case that equal origin means equal rank, for solely from the fact that one source (a constitution, for example) provides a multitude of authorising norms for a multitude of *Rechtsformen*, e.g. statutes and administrative orders, one cannot conclude that they are of equal rank.[210]

[204] Behrend (1977) *supra* note 140 at 36–38.

[205] Robert Walter portrayed this type of hierarchy for the Austrian legal order in 1965: Walter (1965) *supra* note 203.

[206] Schilling (1994) *supra* note 40 at 400.

[207] 'Soweit es in der Rechtsordnung höherrangiges und niederrangiges Recht gibt, muss die *lex inferior* im Grundsatz der *lex superior* weichen, wenn nicht die Struktur der Rechtsordnung *ad absurdum* geführt werden soll.' Vranes (2005) *supra* note 116 at 397–398.

[208] Merkl (1931a) *supra* note 140 at 1342.

[209] Behrend (1977) *supra* note 140 at 39.

[210] Merkl (1931a) *supra* note 140 at 1340–1341.

Here we have the first moves towards a collapse of the two *Stufenbauten* into one unified hierarchy, or at least the recipe for a close connection. In *Der Aufbau der Rechtsordnung* Robert Walter argues that while positive law determines what derogatory force a norm has, it does not say so explicitly. Therefore, we have to deduce the amount of derogatory force from other rules, in particular from the norms on law-creation. These are important, because the importance (*Bedeutung*) of the resulting norms within the legal system is determined by how complicated the procedure of law-creation is shaped. If, he argues, the creation of norm X is tied to conditions a–c, while the creation of norm Y is tied to conditions a–e, one has to deduce from this that Y as the law created by a more complex procedure cannot be derogated from by X as a norm created under simpler conditions.[211]

While this may work in the relationship between two modes of norm-creation within a domestic legislature, such a differentiation seems less likely in international law. Is customary international law more complex to create than international treaty law? Without attempting to answer this question we can say that these two sources are not comparable. Neither constitutes a more 'complex' mechanism, because they are different. While treaties are forms of contract, the other is a customary process. The most effective counter-argument against Walter's distinction is that the criterion used (the complexity of norms) is at heart an empirical distinction and within the Pure Theory this would mean the introduction of an extraneous element into norms which cannot change the ontology of ideals. The particular method with which norms are created *itself* cannot determine whether a norm can derogate from another norm.

Walter continues that it has to be assumed that norms having the same conditions for law-creation, as stipulated by the validity-hierarchy (*Rechtsform*), also have the same derogatory force, because if that were not so, a differentiation of *Rechtsformen* according to their derogatory force would be impossible. If it is so assumed, the norms on law-creation (*Erzeugungsregel*) determine not only form, but also derogatory force. Walter holds that assumption to be true, for 'derogatory force' is nothing but a specific form of competence necessarily granted by the *Erzeugungsregel*.[212]

At this point the gauntlet is picked up by Theo Öhlinger, who counters that the last argument is not a necessary conclusion from the Pure Theory's conception of hierarchy. The *Erzeugungsregel* only determines that the norm has a derogating function – it only determines the derogating norm. The norms on norm-creation do not tell us what it can do to the norm whose validity it purports to end. They do not tell us whether the derogating norm is in a position vis-à-vis the norm purportedly derogated from that allows it to actually derogate. 'But *this relationship* between derogating and derogable norm is what matters for the hierarchy of

[211] Walter (1964) *supra* note 140 at 59.

[212] Walter (1964) *supra* note 140 at 59–60; Walter (1965) *supra* note 203 at 170; cf. Schilling (1994) *supra* note 40 at 401.

derogation.'[213] Öhlinger believes that he has detected un-Merklian thoughts in Walter's argument. If there is a connection between the conditions of law-creation and derogation, it is only a matter of positive law being pragmatically made in this form, not a logical necessity.[214] Merkl himself strongly doubted such a connection.[215] Öhlinger's admission that Walter's thesis does admit a divergence between the two hierarchies[216] may not be helpful in determining the source of the justification for derogation.

5.5.3 Types of conflict between *lex superior* and *lex inferior*

This seems to be a particularly muddled issue, but it is an immensely important issue for all legal systems and for international law in particular. We must determine under which conditions a norm designated as 'higher' actually derogates from a lower norm, otherwise uncertainty will increase to the point that the very existence of a normative *order* is endangered. Three categories of *lex superior–lex inferior* conflict situations will be presented and discussed. However, these problems might be systemic and a matter of the very nature of positive normative orders. We may at least be able to clarify how the structure of international law is made uncertain by analysing this type of norm-conflict.

Three types of conflict will be discussed below:

(1) A substantive norm of a normative order may conflict with a higher norm of the same order. It is a norm-conflict of observability (the first type defined in Section 5.1). A norm of a statute prescribes *Op*, while some constitutional norm prescribes $O\neg p$.
(2) That norm may conflict with a 'higher' norm of the same order expressly derogating from it, which is a conflict of conflicting ideals (the second type in Section 5.1). A constitutional law prescribes 'the statute *Op* is repealed herewith', $\neg Op$.
(3) Despite appearances the most complex case is where a norm does not fulfil all the conditions of the meta-law on law-making (*Erzeugungregel*), which was not mentioned above. A statute, for example, is not passed with the correct majority present and voting. This is not only the most complex case, but potentially also the most destructive.

5.5.3.1 Which is the 'higher' norm?

In this case, the problem is defining which norm is 'higher' and which is lower. This problem can be exemplified in the relationship between normative orders:

[213] 'Auf *diese Relation* zwischen derogierender und derogierbarer Norm kommt es aber im Stufenbau nach der derogatorischen Kraft an.' Öhlinger (1975) *supra* note 181 at 23.
[214] Öhlinger (1975) *supra* note 181 at 25–26.
[215] Merkl (1923) *supra* note 77 at 299.
[216] Öhlinger (1975) *supra* note 181 at 26.

we cannot simply believe a norm's claims to be superior to another – even if that claim does not amount to an attempt to derogate. A positive moral norm or normative order may claim to be superior to a legal order. A fictional normative order (e.g. natural law) may make the same claim to be anchored in the 'cosmos of values', as Verdross put it in 1926,[217] and thus to be superior to 'contingent' positive regulation. Indeed, a norm an individual creates may claim to be superior to international law. Nobody would, however, honestly argue that in this case personal regulation 'actually' is superior to international law. Because the claim to be observed is inherently equal in all norms, the super-ordination of norms cannot be based on mere claims. A norm can claim to be subordinate to another norm, but this works only because it incorporates that other norm.

However, what other criteria can validly be used to establish superiority? Even within a normative order, a norm may not be directly connected to another – why should there be a hierarchy? We can, however, identify one clear case of hierarchy: a norm depends for its validity on the norm authorising its creation. Only the direct *regressus* of validity-dependence establishes a hierarchy and it creates a chain of norms leading from the *Grundnorm* to the lowest norm.[218]

A norm authorising the creation of norms (norm 'A') can be the source of many norms, including a prohibition ('B') as well as another authorising norm ('C'). If a norm created by the authorising norm C ('D') conflicts with B as a 'brother norm' of the authorising norm C, one might be tempted to conclude that B is higher than D, but this is not so. The lower norm D depends only upon its source-law (directly on C, indirectly also on A) and not upon other, indirectly higher norms like B. 'A rule is only erroneous with respect to the rules which are directly conditional for its validity.'[219] Kelsen saw conflict as impossibility only in this sense:

> There cannot exist a conflict between a higher norm and a lower norm, i.e. between a norm *determining the creation* of another [norm] and that other norm, because the lower norm's validity derives from the higher norm.[220]

Therefore, unless a potentially higher norm can be interpreted as part of the meta-norm on norm-creation of the lower norm, it is not *lex superior* in our sense (Section 5.5.3.3).

[217] Verdross (1926) *supra* note 190 at 31: 'im Kosmos der Werte verankert'.

[218] Schilling (1994) *supra* note 40 at 402.

[219] '[D]ie Fehlerhaftigkeit einer Rechtsvorschrift besteht immer nur Hinblick auf die direkt bedingende Regelung.' Lippold (2000) *supra* note 116 at 390 (emphasis removed).

[220] 'Zwischen einer Norm höheren Stufe und einer Norm niederen Stufe, das heißt zwischen einer Norm, die die Erzeugung einer anderen bestimmt, und dieser anderen Norm kann kein Konflikt bestehen, da die Norm der niederen Stufe in der Norm der höheren Stufe ihren Geltungsgrund hat.' Kelsen (1960) *supra* note 2 at 212 (Ch 34 e); Kelsen (1979) *supra* note 8 at 207 (Ch 59 I e).

5.5.3.2 A power to derogate?

If a potentially higher norm not only conflicts with, but claims to derogate from, the lower norm – if, in our case, B claims 'norm D is herewith repealed' – the situation becomes more complicated. We cannot simply take derogating norms at their word and admit derogation of norms vis-à-vis *any* norms that claim to do so. In addition to the problems of defining a higher norm outside the realm of the *Erzeugungsregel* we are still left here with our uncertainty as to the actual derogatory force of derogating norms. As mentioned above, to claim that higher norms derogate from lower norms because they are higher is a tautology. The matter seems to be different if the meta-norm on norm-creation itself (in our case: C) were to stipulate the conditions for derogation as well. 'Only the source of validity can also be the source of loss of validity of a norm.'[221] However, conditions for law-destruction are precisely not conditions for law-creation; therefore, any derogation-conditions are not creation-conditions (*Erzeugungsregeln*). Therefore, C in this case is not in a different position from B as other 'higher' norms claiming to derogate.

5.5.3.3 The paradox of truly higher law

What about the case where a norm does not conform to the conditions for its creation? The easy answer is that such a norm simply does not exist. No derogation is necessary, because no norm was created in the first place:

> Legal science has to acknowledge as law each act pretending to be law, seemingly having legal quality, . . . if it is in fact determined by delegating higher law; and it has to deny [the act's] claim to validity . . . if it is not determined by the condition [in higher] law.[222]

There no need to invoke powers of derogation nor to worry about the *lex superior* maxim, because an automatic relationship obtains between these two norms – or so it seems. The Pure Theory of Law, however, has problematised norm-conflicts which occur when erroneous acts are created in positive legal orders. Its responses are the concepts of the Error Calculus (*Fehlerkalkül*) and the Tacit Alternative Clause (*Alternativermächtigung*) to reconcile the unique nature of norms with the reality of positive enactment. The *Fehlerkalkül* theory is a crucial, often misunderstood and complex part of the Pure Theory of Law.[223] While a full discussion of

[221] '[N]ur die Quelle der Geltung kann zugleich auch Grund der Nichtgeltung einer Norm sein.' Merkl (1923) *supra* note 77 at 256 (emphasis removed); Thienel (1988) *supra* note 42 at 26–27.

[222] 'Die Rechtswissenschaft nun hat jeden solchen mit dem Prätexte der Rechtsnatur auftretenden, mit dem Scheine von Rechtsqualität begabten Akt als Recht anzuerkennen, . . . wofern er sich durch das delegierende höhere Recht tatsächlich determiniert erweist; und sie hat dem Akte seinen Geltungsanspruch abzuerkennen, . . . wenn er die Determination durch das bedingende Recht vermissen läßt.' Merkl (1923) *supra* note 77 at 286–287 (emphasis removed).

[223] This discussion of the *Fehlerkalkül* theory draws heavily on Christoph Kletzer's paper on the subject: Christoph Kletzer, Kelsen's development of the *Fehlerkalkül*-Theory, 18 Ratio Juris (2005) 46–63.

the minutiae is neither possible nor necessary here, we will briefly analyse the impact of the two concepts on the conflict of norms in international law.

What happens if a court judgment delivers a 'wrong' verdict? What happens if the Security Council finds a 'threat to the peace' under Article 39 UN Charter when there is no such threat? A student of the Kelsenian theory of the hierarchy of norms up to this point might answer that these two decisions are void, they are a nullity. This statement is in principle correct, yet there are problems with this view:

> [E]ven the slightest violation of a condition for the validity of, for instance, a judgement would result in the immediate *nullity* of the judgement. . . . Thus, only two kinds of judgements could be said to exist, neither of which would allow for appeal: (*a*) perfect judgements, against which appeal is per definition impossible, and (*b*) non-judgements, which cannot have legal effect and against which appeal is thus useless.[224]

Any positive regulation of appeals procedures would be useless. Since these procedures do not exist with respect to the Security Council, this would not matter anyway. Even if that did not matter (and ontologically it does not), there is another problem. In such cases we are indeed faced with an act of will whose sense is a norm and hence we do have the pretence of norm-creation. Yet on the other hand that act did not fulfil the conditions laid down by the rules on law-making. The Pure Theory of Law developed the two theories in order to reconcile two sets of dichotomies. First, there is the impossibility of 'law contrary to law'[225] which clashes with the partial acceptance of it in various positive legal orders. Second, we have the presence of a positive act of will which clashes with the partial non-fulfilment of the meta-law on law-making.

(1) Adolf Merkl invented the Error Calculus in order to reconcile this first dichotomy. It is a feature of positive law that allows us to cognise acts as law, despite a modicum of errors in their creation. Positive law, he believes, sometimes distinguishes between voidness (*absolute Nichtigkeit*) and voidability (*Vernichtbarkeit*); this is reflected in a two-stage process of law-creation. The conditions are bifurcated into maximum and minimum conditions for law-creation. An act that does not fulfil the minimum conditions is not a norm in the first place; an act that fulfils all minimum conditions, but does not fulfil at least one of the maximum conditions is law, but faulty law.[226] The positive regulation of the bifurcation is usually accomplished by stipulating grounds of appeal. If the act of law-creation does not fulfil the conditions a–c, no norm results; if a norm fulfils conditions a–c, but not d–f, it is open to appeal and can be voided there.[227]

Yet there are three problematic features of Merkl's theory. First, it does not answer the theoretical question raised in the second dichotomy of positive acts of

[224] Kletzer (2005) *supra* note 223 at 47.
[225] Kelsen (1960) *supra* note 2 at 271 (Ch 35 j α).
[226] Lippold (2000) *supra* note 116 at 324.
[227] Kletzer (2005) *supra* note 223 at 48.

will not fulfilling the conditions. This is why Kelsen invented the Tacit Alternative Clause, discussed *infra*. Second, the Error Calculus depends upon positive regulation for its existence. If, as in most of international law, including the Charter, there is no distinction between minimum and maximum conditions, *all* conditions, even the least 'important' ones, are by default minimum conditions. All conditions for law-creation have to be fulfilled for law-creation to work.

Third, it can be argued that all true conditions are minimum conditions anyway and that Merkl's Error Calculus is not truly a differentiation between conditions for law-creation. If successful creation of a norm – however 'faulty' the resultant norm may seem – no longer requires some of the original conditions stipulated by the meta-law (e.g. conditions d–f of the original a–f), then these are not conditions for the creation of law! On a consistently normativist reading of the Error Calculus doctrine, it is no more than the creation of a possibility of derogating from a certain category of norm (those fulfilling a–c, but not d–f). This possibility is perhaps enshrined in a different norm altogether and the 'faulty norms' (fulfilling a–c, but not d–f) are properly valid, but are destroyed after they are created. Derogation, however, is not conditional upon a 'faulty' norm; derogation can be conditioned on any set of facts, e.g. that the norm in question is a *lex prior*. Hence, because in our case the norm in question is validly created, it is also a member of the legal order. Rudolf Thienel takes the example of the derogation of a norm by virtue of an automatic condition for law-destruction enshrined in the norm's source of validity, e.g. a 'sunset clause', and distinguishes it from the case where another norm claims to derogate.[228] Once a norm is valid, however, its derogation by whatever norm is no longer part of the condition for law-creation. As a matter of ideology, the voiding of a statute by a constitutional court may seem to be the court's cognition of the unconstitutionality of that statute, but legally it is a derogation by the court using a provision defining certain conditions for the derogation of statutes by the court.

(2) The second dichotomy is tackled by Kelsen's own Tacit Alternative Clause (*Alternativermächtigung*), a doctrine that has proven rather difficult to interpret. It was created because the Error Calculus is unable to hinder a 'faulty' decision from being perpetuated to the highest judicial instance of a legal order which is no longer subject to appeal. The rulings of such organs as the International Court of Justice or the Supreme Court of the United Kingdom are not final because that quality is 'accorded by the positive law itself'.[229] Rather, the opposite is the case. Since appeals procedures are created by positive regulation, all norm-creation is by default final unless an appeals procedure is expressly enacted.

As Christoph Kletzer points out, there are only three possible solutions to an 'unlawful' final decision. (*a*) The norms are valid, but annullable – which would make the decision anything but final. (*b*) They are void *ab initio*, a solution which he criticises for being unascertainable without the law specifying someone to

[228] Thienel (1988) *supra* note 42 at 26–27.
[229] Kletzer (2005) *supra* note 223 at 51.

ascertain – which would not make the decision final either. (*c*) The only option left is that they are fully valid and not subject to appeal. In this case 'we have to find legal rules in which the validity of these "unlawful" final decisions is grounded'.[230]

Kelsen's train of thought is that finality means more than non-annulability. Finality means that all organs authorised to create norms are not bound only by the meta-law on law-creation. They are bound by the concrete *Erzeugungsregel*, but also by a completely different norm:

> That the legal order confers the force of law to a judgement of a court of last instance means that not only is a general norm valid that predetermines the content of the judgment, but also a general norm according to which the court may for itself determine the content of the individual norm to be created. The two norms form a unit, because the court of last instance is authorised to create either an individual legal norm whose content is predetermined by the general norm, *or* an individual norm whose content is not so predetermined, but is to be determined by the court of last instance for itself.[231]

This solution is counter-intuitive, but seems to be the only way to reconcile the finality and the possibility of error. The problem is, however, that if the alternative clause is part of the positive law, it is not the Tacit Alternative Clause, but part of the positive conditions for law-creation. A *tacit* clause, on the other hand, is not positive law. Only positive norms can be members of a positive normative order; fictitious norms cannot (Section 6.2.2.2). To impute a tacit meta-norm is to introduce a fictional norm into an otherwise positive normative order. This is a still-born child of aberrance from the ideal of purity of method in the Vienna School's programme.

Thus even in the most obvious case of a norm-conflict being resolved *ex ante*, even in this easy case we have to face a problem that becomes a paradox. On the one hand, the duality of Is and Ought – the very idea of norms – demands of us to found the validity of norms only on norms. Norm-creation is such a founding exercise, for in creation the validity (existence) of norms is established. The opposite must therefore also obtain: without a basis in norms, alleged norms cannot be norms – it cannot be otherwise, for basing a norm on fact alone would transcend the duality of Is and Ought and therefore make it impossible for us to cognise a 'something' as norm. *The normativity of normative systems demands a strict foundation in norms.*

[230] Kletzer (2005) *supra* note 223 at 52.

[231] 'Die Tatsache, daß die Rechtsordnung einer letztinstanzlichen Gerichtsentscheidung Rechtskraft verleiht, bedeutet, daß nicht nur eine generelle Norm in Geltung steht, die den Inhalt der gerichtlichen Entscheidung vorausbestimmt, sondern auch eine generelle Norm, derzufolge das Gericht den Inhalt der von ihm zu erzeugenden individuellen Norm selbst bestimmen kann. Diese beiden Normen bilden eine Einheit; so zwar, daß das letztinstanzliche Gericht ermächtigt ist, entweder eine individuelle Rechtsnorm, deren Inhalt durch die generelle . . . Norm vorausbestimmt ist, *oder* eine individuelle Rechtsnorm zu erzeugen, deren Inhalt nicht so vorausbestimmt ist, sondern durch das letztinstanzliche Gericht selbst zu bestimmen ist.' Kelsen (1960) *supra* note 2 at 273 (Ch 35 j α).

On the other hand, only an authorised organ is authorised to decide – and its decision is a decision, not cognition of law. If and when the Security Council says there is a 'threat to the peace' under Article 39 UN Charter, there is a threat to the peace because it (and no one else) is authorised by law to make that decision.[232] The Council, courts, and law-makers in general are authorised to decide – and it is their actual decision that counts. There is no logical deduction of a norm from a higher norm, as Kelsen shows in the second part of his critique of the role of logic in normativist legal scholarship,[233] the first part being directed against the principle of excluded contradiction (Section 5.3.1). A criminal court's judgment is not a logical deduction from the Penal Code, for the act of will is a necessary condition for the creation of a *positive* norm. The authorising norm does not 'contain' the norms that can potentially be created under it. Only a real act of will creates them. Therefore, positive law-making takes on a quasi-autonomous form – the creation is constitutive, whether or not it conforms to the conditions. *The positivity of norms gives positive acts of will creative powers.*

This is the paradox of positive normative orders: a truly superior norm endangers positivity, while a truly positive norm endangers the unity of the normative order. It is not a paradox of the Vienna School, but of the very nature of positive normative orders. The Pure Theory only brings to light what other theories manage to hide behind pragmatism. With his dialectical completion between the traditional positivists' emphasis on empirical creation of law, on the one hand, and the naturalists' emphasis on the normative on the other hand – with his Copernican revolution in legal thought – Hans Kelsen created a viable normativist-positivist theory of norms. Yet this creation has its weak points, for as we face the paradox we find that Kelsen can solve it only by introducing an 'impure' element – the Tacit Alternative Clause. A pure theory of law as norms must be consistent – *sans peur et sans reproche* – wherever the cognition of what is there may lead us. In this spirit, it is hoped to present a more consistent (if not more 'user-friendly') approach here.

(3) The take on the paradox adopted here is that any act of will purporting to create a norm does indeed do so, whether or not it fulfils the conditions for norm-creation of one given normative order. If it fulfils these conditions, it is a norm belonging to that normative order. If it does not, it is a norm not belonging to this order, but belongs to its own normative order, consisting of it and a *Grundnorm* necessary to perceive it as norm. The *Grundnorm*, as a supposition[234] that is necessary to be able to conceive of norms (Section 7.1.2), serves as an 'as if'-element. Presupposing a basic norm means that the 'faulty norm' can be seen as norm. If, for example, the creation of a statute under the municipal law of a country specifies conditions a–f and the act in question fulfils a–c only, it is a norm as long as there is an act of will to that effect; yet it is not a norm of that particular municipal system.

[232] Kelsen (1960) *supra* note 2 at 274 (Ch 35 j α).
[233] Kelsen (1979) *supra* note 8 at 179–203 (Ch 58).
[234] Kelsen (1979) *supra* note 8 at 206–207 (Ch 59 I d).

There may be a hint of this solution in Merkl's and Kelsen's writings: when Merkl writes that it is a question 'how . . . a norm, which claims to be a valid legal norm, [can be said to] belong to a certain [legal order]'[235] or when Kelsen tells us that a norm not determined by a higher norm 'cannot be valid as a norm *enacted within the legal order*'[236] and therefore cannot belong to it, they are starting to distinguish between a norm's validity and its membership in a particular normative order. However, any norm as norm belongs in some normative order simply by being a norm. Kletzer draws our attention to the fact that from the point of view of one normative order a legal nullity cannot exist, because a nullity is by definition outside the normative order's frame of reference. Any attempt by a normative order to even begin to define 'nullity' means immediate incorporation of the entity into the scope of that normative order.[237]

Kelsen distinguishes between the 'subjective' and 'objective' sense of an act of will,[238] where an imperative is 'subjective' if its creation is not based on an empowering norm and 'objective' if it is[239] – which implies that a 'mere' subjective act has no normative quality whatever. Lippold renames these as 'immanent' and 'systemic' acts.[240] This is apposite, because empowerment can always be presupposed by the *Grundnorm*, i.e. the norm's immanent sense. Belonging to a normative system, i.e. a norm's systemic sense, however, depends upon foreign empowerment, except, of course, for the 'historically first constitution' (Section 6.3.1).

The paradox portrayed above – that cognition of norms is not authorised, while authorised cognition is not cognition, but decision – persists under the approach adopted here as well. However, our cognisability of empowerment is irrelevant for the ontological plane. Even if there is no 'objective' level of cognition,[241] an erroneous norm is automatically not part of the normative order in question; we might simply not know whether a norm is or is not erroneous.

(4) Yet at this point the anti-logical sting of the late Kelsen comes into play again. In *Allgemeine Theorie der Normen* Kelsen does not discuss the implications of his 'logical turn' for the *Stufenbau* and the Error Calculus doctrine in any detail. The following will very briefly touch on what an application of Kelsen's late theory to the concept would entail.

The principle of logical deduction does not apply to positive norms, because their validity is not one of their properties, as is the case with truth vis-à-vis propositions, but their specific form of existence. Just as the act of stating a

[235] 'wodurch sich . . . eine Norm, die als Rechtsnorm Geltung beansprucht, als *einer bestimmten* [*Rechtsordnung*] *zugehörig* erweist'; Merkl (1931a) *supra* note 140 at 1344 (emphasis added).

[236] 'kann nicht als eine *innerhalb der Rechtsordnung gesetzte* Norm gelten'; Kelsen (1960) *supra* note 2 at 241 (Ch 35 f) (emphasis added).

[237] Kletzer (2005) *supra* note 223 at 55–56.

[238] We will return to the dichotomy of 'objective' and 'subjective senses in Section 7.2.2.

[239] Kelsen (1979) *supra* note 8 at 21–22 (Ch 8 V).

[240] Lippold (2000) *supra* note 116 at 288–289.

[241] Stanley L. Paulson, Material and formal authorisation in Kelsen's Pure Theory, 39 Cambridge Law Journal (1980) 172–193 at 191.

proposition is not the condition for its truth,[242] the existence of a fact does not follow from the existence of a different fact.[243] The validity (existence) of positive norms is conditional upon an act of will, not upon a logical derivation.[244] Yet if norms cannot be derived from others, how can we say that an act not fulfilling the conditions for its creation can automatically not become a norm when there is, after all, a real act of will? Validity as such and 'validity' as membership in a normative order need to be clearly distinguished. Only the validity equals existence of a norm, whereas membership is a mere property of norms. Norms 'exist' whether or not they do belong to a specific normative order.

However, this does not solve the problem of the unity of normative orders. The connection between norms in a normative order – in particular between the *Erzeugungsregel* and the norms created under it – becomes weak, if norms can exist through an act of will without a positive empowering norm, which, in turn, is reduced to becoming a condition for membership in a particular normative order. Norms become quasi-autonomous, because if they can exist on their own – and a consistent application of the *Grundnorm* theory would make this possible – then we could presuppose a *Grundnorm* at any step and autonomise not just 'faulty' norms, but any part of a normative order. What is more, we can extend this thought to the monism and pluralism as conceptions of the relationship between municipal and international law. If we presuppose a *Grundnorm* to tower over a particular country's constitution, then its connection to international law is severed.[245] Indeed, in a footnote in *Allgemeine Theorie der Normen* Kelsen implies that his logical turn destroys the necessity of the monism relationship, a theory he had held for fifty years.[246] There is no reason to suppose that this argument would not work within a legal order as well. Ultimately, the unity of legal orders is predicated upon where the cognising legal scholar puts the *Grundnormen*.

It seems, then, that if one is willing to accept the constitutive nature of legal science's theories (Section 7.3), the conflict between a norm and its meta-norm on norm-creation is resolved or avoided (for there is no derogation). This can be achieved by simply not recognising 'faulty' norms – norms that conflict with truly higher law – as norms of the normative order in question.

5.6 Conclusion

We have seen that there are three types of conflict between norms:

(1) Two norms can conflict if they demand behaviour that cannot both be

[242] Kelsen (1979) *supra* note 8 at 182–183 (Ch 58 VI).

[243] Kelsen (1979) *supra* note 8 at 186 (Ch 58 IX).

[244] Kelsen (1979) *supra* note 8 at 187 (Ch 58 X–XI).

[245] Jörg Kammerhofer, Kelsen – which Kelsen? A re-application of the Pure Theory to international law, 22 Leiden Journal of International Law (2009) 225–249 at 240–244. On the *Grundnorm* as creating unity in a normative order: Kelsen (1960) *supra* note 2 at 209 (Ch 34 e); Section 7.1.3.

[246] Kelsen (1979) *supra* note 8 at 330 (N 154).

engaged in at the same time. While this may very well be a problem for someone faced with such incompatible claims, there is no ontological uncertainty and both norms exist.

(2) Two norms conflict if one claims to derogate from the other. This is an ontological problem, for there is no absolute standard to decide upon the claims of derogating norms. Any standard the normative order itself sets is just another part of the normative order and subject to the criticism of not establishing a deciding factor for privileging one claim over the other.

(3) We face a very special conflict of norms when a norm and its meta-norm on norm-creation (its 'source') conflict. While it is possible to resolve the ontological conflict, this is done at the price of endangering the coherence and unity of normative orders.

We have also had a look at how the three 'traditional resolving devices' most commonly used in doctrine have fared. The justifications for the *lex specialis* maxim are extremely weak. The maxim has no basis in logic and the problems start to mount if it is to be part of positive law. The same applies to the *lex posterior* maxim. While legal theory (deontic jurisprudence) has made a concerted effort to apply formal logic and the principle of excluded contradiction, the Pure Theory's sceptical approach remains better founded. Orthodox international legal scholarship's approach to the concept of *lex superior* cannot fare any better. However, the hierarchical ordering of norms is a necessary element of the very existence of norms. Ultimately, derogation on the basis of superiority faces many of the same problems as derogation due to other factors. Only the relationship of a norm to its own 'mother', to its source-norm, is special. Like a mother, it gives birth to a norm. Without it, a norm *of that normative system* simply does not come to life.

The discussion of conflicts, their causes and the impossibility of their solution has shown how much depends upon international law's constitution. It is the constitution we must look at now to demonstrate uncertainty in the source-law of international law.

6

A constitution for international law

> Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.[1]

The notion of 'constitution' was discussed incidentally in Chapter 5 but was not the main focus of that chapter. This chapter builds upon that discussion; if we were bound to discuss matters only in their proper place we should have delayed introducing constitutional questions. Ideally, however, Chapters 5 and 6 ought to be read simultaneously, since constitution has a positive and a negative quality – the two *Stufenbauten* discussed in Section 5.5.2 – which must always be considered together. On the other hand, 'conflict of norms' and 'sources of law' are two topics sufficiently diverse and on different levels of abstraction to demand separate treatment. Therefore, this chapter will discuss the notion of 'sources' and 'constitution' in international law, but where appropriate will merely build upon Section 5.5.

Nonetheless, this chapter finds itself squashed between concepts discussed in several other chapters. The notion of 'constitution' is closely interlinked with the hierarchy of law-creation of Chapter 5 and is equally close to the basis of obligation in the Pure Theory's terms, i.e. the *Grundnorm* or basic norm, which will be discussed in Chapter 7. Equally, this chapter builds upon the discussion of the source-law of customary international law, which formed Chapter 3. While it seems quite difficult to eke out an independent 'existence' for Chapter 6, it is not superfluous either.

The task set for this chapter is very specific: it is to emphasise a problem which bedevils law-making and its methods of perception. International law does not seem to have a constitution which regulates the nature, foundation and

[1] Article I-1(1) Treaty establishing a Constitution for Europe 2004, Official Journal of the European Union Series C 310 (16 December 2004).

inter-relation of sources. It is an all-pervading problem, one that will haunt us throughout this chapter. The idea that there is no (perceptible) constitution of international law[2] threatens to cripple the whole endeavour of 'finding the law'. We cannot adequately know, for example, how the norms of custom-formation come about. In Chapter 3 we asked what the meta-law of customary international law-creation is; here we will question the existence of such sources as customary international law. The core issue in this chapter is the determination of the sources of international law – or, rather, the uncertainty that arises when we try to determine the sources.[3] This, then, is international law's constitution. Why ought one to equate sources with constitution? The easy answer would be to say that we do so, because this book uses a Kelsenian approach and Kelsen did. The complex answer is to try to explain why even international law has a constitution – and necessarily so – and what this has to do with the notion of 'sources'.

Putting forward the idea that international law as a constitution can provoke outrage. '[T]he use of the term "constitution" with respect to international law carries the danger of confusion by putting international law at par with national legal systems', argues G.J.H. van Hoof, and adds that 'international society does not possess a constitution in the sense most national societies do.'[4] It is clear that no one has enacted a statute called 'constitution of international law'. We certainly do not have a written constitution and even if we did (the United Nations Charter could be viewed as a written constitution of sorts),[5] the question of extra-constitutional and pre-constitutional law remains. In domestic situations, the domestic constitution tends to be the sole focus of lawyers. In the Austrian legal order the 1920/1929 constitution[6] and law created or incorporated under it is simply assumed as the only valid Austrian law.

The point made here, however, is different, for in this book 'constitution' does not refer to a statute entitled 'constitution', Kelsen's 'constitution in the formal sense'.[7] It also does not denote norms regulating certain matters in a certain substantive manner, i.e. *constituing* a state's organisation, creating specialised organs under a separation of powers, such as parliaments and governments. We are closing in on the real issue, though. The emphasis here is on the necessary constitution of normative orders, one that any normative order has, even though its form may be determined by positive regulation. Constitution as used here is the

[2] Anthony Alfred D'Amato, The concept of custom in international law (1971) 91: 'There is no international "constitution" specifying when acts become law.'

[3] G.J.H. van Hoof, Rethinking the sources of international law (1983) 6–7.

[4] Hoof (1983) *supra* note 3 at 58.

[5] Bardo Fassbender, The United Nations Charter as the constitution of the international community (2009).

[6] Bundes-Verfassungsgesetz, BGBl 1930/1.

[7] Hans Kelsen, Reine Rechtslehre (2nd ed. 1960) 228–229 (Ch 35 a).

highest echelon of a particular positive legal order, the first positive norms below the *Grundnorm*,[8] Kelsen's 'constitution in the material sense'.[9]

Before we continue, it may be helpful to briefly situate the current chapter within the range of types of uncertainty identified earlier. Here we are faced with a mixture of ontological and epistemological uncertainties. It is uncertain both how international law's constitution is shaped and how we can know how it is shaped. Not to distinguish the two types of uncertainty (as is sometimes done)[10] means that the limitations of human cognition are ascribed to normative ontology (positive norms) and *vice versa*, something which this book tries to avoid.

6.1 What is a 'source' of international law?

This section – and with it, the answer to the question posed in its title – could be no longer than a paragraph. International legal scholarship, however, insists on making this a complex question. This particular probematisation is not helpful – or only to the extent proposed in Section 5.5. Here we have a clear instance where the Pure Theory of law reduces uncertainty in international law by showing how unproblematic the notion of sources is if its concept is applied consistently. The chapter will begin by describing the solution of the Vienna School before presenting traditional scholarship's problematisation. The orthodox position is continued and to an extent is determined by the results of Section 6.2, namely the traditional foundations and justifications for the sources of international law.

6.1.1 The concept of 'source of law' in legal theory

For Kelsen, sources are themselves norms authorising humans to create norms[11] – the norm-function of *Ermächtigung* (empowerment)[12] – rather than an absolute concept. The term 'source' is not the core of the matter:

> The term 'source of law' is used only figuratively and has more than one meaning. It may denote any higher norm in its relationship to a lower norm, whose creation the former regulates. Thus, the term 'source of law' may denote also the basis of validity and especially the ultimate basis of validity of a legal order: the *Grundnorm*. In fact,

[8] Robert Alexy, Hans Kelsens Begriff der Verfassung, in: Stanley L. Paulson, Michael Stolleis (eds), Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts (2005) 333–352 at 333: 'Verfassung als . . . letzten positivrechtlichen Grund für die Geltung von positivem . . . Recht'; Josef L. Kunz, The 'Vienna School' and international law, 11 New York University Law Quarterly Review (1934) 370–421 at 412.

[9] Kelsen (1960) *supra* note 7 at 228 (Ch 35 a); Rudolf Aladár Métall, Skizzen zu einer Systematik der völkerrechtlichen Quellenlehre, 11 Zeitschrift für öffentliches Recht (1931) 416–428 at 421.

[10] Lazare Kopelmanas, Essai d'une théorie des sources formelles du Droit International, 22 Revue de Droit International (1938) 101–150 at 119–120; Joost Pauwelyn, Conflict of norms in international law. How WTO law relates to other rules of international law (2003) 92.

[11] Hans Kelsen, Principles of international law (1952) 303.

[12] Hans Kelsen, Allgemeine Theorie der Normen (1979) 82–84 (Ch 26).

> however, only the positive basis of validity of a legal norm, i.e. the higher positive legal norm regulating its creation, is called its 'source'.[13]

The function of empowerment is to identify the norms created under it and for this reason belonging to it (Section 5.5.2). 'A norm belongs to a legal order only because it is created under the terms of another norm of the same order.'[14] In a specific sense we can say with Petev that the Pure Theory is nothing but a theory of sources,[15] because its construction of normative orders largely depends upon the authorisation to create norms. Yet the notion of 'sources' as law regulating law-creation (*Rechtserzeugungsregel*) is doubly relative. Not only is a hierarchy thus established between any authorising norm and the norms created under that norm, even if it is not what international legal scholarship calls an 'original source' (custom and treaty). Also, the totality of the conditions for norm-creation may on occasion not be confined to one *Rechtsform* and a constitutional statute may have to fulfil not only constitutional provisions for its creation, but provisions of ordinary statutes as well.

In line with the Pure Theory of Law, the concept of sources in this book is that of sources as *meta-norms on norm-creation*. They are on a meta-level, because the validity-relationship it establishes between the source and law created by it creates a hierarchy between the two norms, because the validity (existence) of one norm depends upon another. Thus a necessary *Stufenbau* exists even in international law.[16] The source is a norm, because the source establishes membership in the normative order; the source-norm itself has to be a norm of that selfsame order.[17] The process is norm-creation, because source-norms make other norms of that normative order[18] and thus may very well be called their 'source'.

What the term 'source of law' means for scholars naturally depends on their

[13] 'Rechtsquelle ist ein bildlicher Ausdruck, der mehr als eine Bedeutung hat. Man kann damit jede höhere Norm im Verhältnis zu der niederen Norm bezeichnen, deren Erzeugung sie regelt. Daher kann unter Rechtsquelle auch der Geltungsgrund und insbesondere der letzte Geltungsgrund, die Grundnorm, einer Rechtsordnung verstanden werden. Doch wird tatsächlich nur der positivrechtliche Geltungsgrund einer Rechtsnorm, das heißt die höhere, ihre Erzeugung regelnde, positive Rechtsnorm als "Quelle" bezeichnet.' Kelsen (1960) *supra* note 7 at 238–239 (Ch 35 e).

[14] 'Eine Norm gehört zu einer Rechtsordnung nur, weil sie gemäß der Bestimmung einer anderen Norm dieser Ordnung gesetzt ist.' Kelsen (1960) *supra* note 7 at 239 (Ch 35 f); Kelsen (1979) *supra* note 12 at 247 (N 45); Alfred Verdross, Die Verfassung der Völkerrechtsgemeinschaft (1926) 21. Perhaps also: Torsten Gihl, The legal character and sources of international law, 1 Scandinavian Studies in Law (1957) 51–92 at 72.

[15] Valentin Petev, Rechtsquellenlehre und Reine Rechtslehre, in: Werner Kawietz, Helmut Schelski (eds), Rechtssystem und gesellschaftliche Basis bei Hans Kelsen (1984) 273–287 at 273.

[16] Alfred Verdross, Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung (1923) 129.

[17] Alexy (2005) *supra* note 8 at 341.

[18] Though, as also pointed out in Section 5.5, the autonomisation of norms through their positive nature may be a hiccup of sorts in this matter.

theoretical approach.[19] Yet in international legal doctrine there seems to be a remarkable co-incidence of views on the question, which Alfred Rub argues is surprisingly close to the position of the Pure Theory: 'The . . . recently received Kelsenian understanding of the term source of international law as method of law-creation.'[20]

It is doubtful whether this notion fully reflects the ideas behind Kelsen's theory on the sources of law. Rub focuses on Kelsen's definition of a source as *method* of law-creation, as evidenced by citations of works by Maarten Bos, and emphasises the rejection 'of the view that they are only declarative manifestations of law that is already in the process of creation without involvement [of the sources]'.[21] The problem is that Rub's connection of the word 'method' to the one-sided rejection is liable to cause a misunderstanding of Kelsen's theory. On his portrayal, Kelsen could be seen as arguing that at some point (at the mystical point of 'sources') norms are no longer based on norms, but on facts alone and of thus disavowing the Is–Ought dichotomy – which is not in accord with the Pure Theory. Alfred Verdross, whose natural law approach to sources will be discussed later (Section 6.2.2), held as late as 1955 that sources are norms on the creation of law.[22] Verdross himself was influenced by the Pure Theory, but his *Universelles Völkerrecht* (co-authored with Bruno Simma) utilises a different argument. In this work, sources are defined as 'formalised methods of creation'[23] and the introduction of an original and originary 'consensus' (Section 6.3.1) shows that he moved away from Kelsen's position to a more pragmatic argument.[24]

Generally speaking, however, orthodox international legal scholarship's theory of sources has several traits which are problematic from our theoretical point of view. (1) It is common among scholars of international law not to recognise that sources themselves are norms, but to speak of them as 'methods' or 'procedures'[25]

[19] Pauwelyn (2003) *supra* note 10 at 90.

[20] 'Der . . . in neuester Zeit rezipierte Kelsensche Hauptbegriff der Völkerrechtsquelle als Rechtserzeugungsart' Alfred Rub, Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung (1995) 335.

[21] 'der Vorstellung, sie seien nur deklarative Manifestationen ohne ihr Hinzutreten bereits im Rechtsbewusstsein entstehenden Rechts'; Rub (1995) *supra* note 20 at 310.

[22] Alfred Verdross, Völkerrecht (3rd ed. 1955) 118.

[23] 'formalisierte Erzeugungsarten'; Afred Verdross, Bruno Simma, Universelles Völkerrecht. Theorie und Praxis (3rd ed. 1984) 321.

[24] Rub disagrees: 'Kelsen's term "source of international law" is . . . the same as Verdross' and Simma's term "formal source of international law" ' 'Kelsens Begriff der Völkerrechtsquelle ist . . . der gleiche wie der von Verdross/Simma vertretene Begriff der formellen Rechtsquelle'; Rub (1995) *supra* note 20 at 312.

[25] Peter Fischer, Heribert Franz Köck, Allgemeines Völkerrecht (6th ed. 2004) 69; Gerald G. Fitzmaurice, Some problems regarding the formal sources of international law, in: F.M. van Asbeck *et al.* (eds), Symbolae Verzijl. Présentées au Prof. J.H.W. Verzijl á l'occasion de son LXX-ième anniversaire (1958) 153–176 at 154; Georg Schwarzenberger, International law (3rd ed. 1957) Volume 1, 25–27; Robert Y. Jennings, Arthur Watts (eds), Oppenheim's international law (9th ed. 1992) Volume 1, 23 (paras 8–9); Hanspeter Neuhold, Waldemar Hummer, Christoph Schreuer (eds), Österreichisches Handbuch des Völkerrechts (4th ed. 2004) 31 (RN 166); Clive Parry, The sources and evidences of international law (1965) 4; Malcolm N. Shaw, International law

or to explicitly deny that sources are norms.[26] This is based on the idea that sources are not meta-law, but facts or evidences. Ulrich Fastenrath argues that 'empirical positivism' (including Herbert Hart and his followers) sees sources 'only as empirical description of procedures which usually create norms, which are regularly obeyed . . . or are seen as being obligatory'.[27] Often international legal scholars do not elaborate on what is the basis of the designation of sources as mere 'methods' and might even be unaware of what such a statement entails. When we stop worrying about international law once we get to the level of sources, international law is not adequately theoretically based. If we define sources as that which usually creates norms, how would we know a source when sources themselves determine when a norm is created? It would be begging the question, because it is a creation *according to rules* (according to meta-rules of rule-creation) that a norm can be the basis of validity of another norm. Defining sorces as the usual processes invariably means transcending the Is–Ought dichotomy, which, in turn, makes cognition of norms possible in the first place.

(2) In scholarly writings 'the sources of international law' are sometimes considered as somehow residing on an absolute level.[28] Only on that absolute level is international law created (which explains the propensity to deny that the sources are norms themselves) and above them we will find nothing but a doctrine of the basis of obligations of international law. It is indicative in this respect that subordinate sources, such as certain decisions of international organisations, are sometimes held to be co-equals to treaty norms as source of international law,[29] even though the creation of the decisions is authorised by a treaty. However, if we adopt Merkl's *Stufenbau* (Sections 5.5.2 and 5.5.3), we cannot see 'sources' as an absolute level. Law-creation within a normative order is done on the basis of norms empowering norm-creation and thus law-creation is always also

(6th ed. 2008) 69–71; Helmut Strebel, Quellen des Völkerrechts als Rechtsordnung, 36 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1976) 301–346 at 302–303; Michel Virally, The sources of international law, in: Max Sørensen (ed.), Manual of public international law (1968) 116–174 at 120.

[26] Maarten Bos, The recognised manifestations of international law. A new theory of 'sources', 20 German Yearbook of International Law (1977) 9–76 at 10–11; Antonio Cassese, International law (2nd ed. 2005) 154–155; Gihl (1957) *supra* note 14 at 83; Peter Hulsroj, Three sources – no river: A hard look at the sources of public international law with particular emphasis on custom and 'general principles of law', 54 Zeitschrift für öffentliches Recht (1999) 219–259 at 234; Alf Ross, A textbook of international law (1947) 80, 83; A.J.P. Tammes, Inter-action of the sources of international law, 10 Netherlands International Law Review (1963) 225–238 at 225–227; Verdross and Simma (1984) *supra* note 23 at 323–324.

[27] 'lediglich als empirische Beschreibung der Verfahren, in denen üblicherweise Normen entstehen, die regelmäßig befolgt werden . . . bzw. als verpflichtend erlebt werden'; Ulrich Fastenrath, Lücken im Völkerrecht. Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts (1991) 86.

[28] Hints of this may be found in: Jennings and Watts (1992) *supra* note 25 at 15 (para 5), 23 (para 9); Fitzmaurice (1958a) *supra* note 25 at 154.

[29] Bos (1977) *supra* note 26.

law-application (with the exception of the *Grundnorm*). Merkl's 'Janus-face of law' (*doppeltes Rechtsantlitz*)[30] is an apposite metaphor in this respect.

(3) Another argument, mentioned above, is to distinguish the sources of international law and the basis of obligation of international law. 'Commentators . . . do not seem to have a clear idea of the signification of the word "sources". Most of them have confused it with the foundation of international law,'[31] writes Menon, for example. Apart from wishing to keep apart chapters one and two of international law textbooks on the subject, what would be the reason for such a distinction? This contention can be made when we deny that the source of a norm is also its source of 'bindingness':

> In the domestic field there is a fairly close identity, or *apparent* identity, between the source of the obligation (the obligation to obey a given rule) and the source of the law (i.e. of the rule itself) – between what the rule is, and what makes it law.[32]

The implication here is that this does not obtain in international law. As argued throughout this book, on the basis of a normativist-positivist legal theory the existence, validity, 'bindingness' or 'obligatoriness' of norms is one and the same thing and cannot be distinguished. On the approach adopted here, the concept of a 'non-valid' or 'non-binding' norm is a contradiction in terms. Therefore, the source of the validity of a norm is that norm's source properly speaking.[33] The origin of the content of one or the other norm may be percieved as 'external' to the normative order in question. The prohibition of operating a motor vehicle while intoxicated in many domestic legal systems may 'originate' from the wish of a large part of the population to reduce the number of road traffic accidents caused by intoxicated drivers, and as a historical explanation this may be accurate. But in a legal explanation, legal scholarship's view can only be on the influence of norms on other norms. Legal scholarship would explain the origin of that law by pointing to the provision of the constitution empowering parliament to create statutes, and to the act of will whose sense is the enactment of the prohibition. A mixture of incompatible methods, e.g. of the legal-normative with the sociological-empirical, is a syncretism of method (*Methodensynkretismus*) which hinders scholarly cognition.

[30] Adolf Julius Merkl, Das doppelte Rechtsantlitz. Eine Betrachtung aus der Erkenntnistheorie des Rechtes, 47 Juristische Blätter (1918) 425–427, 444–447, 463–465, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1091–1113.

[31] P.K. Menon, An enquiry into the sources of modern international law, 64 Revue de Droit International, de Sciences Diplomatiques et Politiques (1986) 181–214 at 181. See also: Percy E. Corbett, The consent of states and the sources of the law of nations, 6 British Year Book of International Law 1925 (1925) 20–30; Hoof (1983) *supra* note 3; Parry (1965) *supra* note 25 at 4–5.

[32] Fitzmaurice (1958a) *supra* note 25 at 155 (emphasis added).

[33] Robert Y. Jennings, What is international law and how do we tell it when we see it?, 37 Schweizerisches Jahrbuch für internationales Recht 1981 (1982) 59–88 at 60; Petev (1984) *supra* note 15 at 273; Virally (1968) *supra* note 25 at 118.

6.1.2 The nature of the sources of international law

Before we continue to discuss the views of the theoretical basis or justification for sources, it might be worth discussing the 'nature' of the meta-norms on international law-creation. What is meant by this term? Alf Ross identifies a problem with the idea of sources as commonly conceived, for:

> the doctrine of the sources can never in principle rest on precepts contained in one among the legal sources the existence of which the doctrine itself was meant to prove. The basis of the doctrine of legal sources is in all cases actual practice and that alone.[34]

That would mean that customary international law could not be the source for customary international law, because it would in this case be based on itself. The question of what *Rechtsform* these meta-norms of law-creation take might be considered secondary. It is important, however, for international legal scholarship to know where one might find the laws on law-creation; that, in turn, depends on the form of these meta-laws. If law is an ontology of norms, we can describe the *Rechtsform* (Section 5.5.2) as the phenomena the norms manifest themselves.[35] Taking customary international law as an example, the question is answered in different ways.

(1) Some scholars contend that norms on the making of customary international law are themselves customary international law. Herman Meijers and Raphael Walden transpose Herbert Hart's idea of secondary rules to international law:[36] international law's secondary rules of law-creation are customary rules.[37] Gennady Danilenko ascribes to Kelsen the view that 'a positive customary rule cannot determine custom as a law-creating procedure'.[38] In the work cited by Danilenko, however, Kelsen does not support that view:

[34] Ross (1947) *supra* note 26 at 83.

[35] Cf. Wolfram Karl, Vertrag und spätere Praxis im Völkerrecht (1983) 38: 'This view, however, is based on a very narrow conception of [legal] science and reduces the theory of law to a mere theory of the forms the law takes. It has been overcome, because even the "new Vienna School [of Jurisprudence]" (starting with Nawiasky) has rediscovered the purpose of law and adds a theory on the substance of law to the theory of the forms of law.' 'Doch ist diese Auffassung, die einem besonders engem Wissenschaftsbegriff entsprang und die Rechtslehre auf eine bloße Rechtsformenlehre beschränkte, heute überwunden, da selbst eine "neuere Wiener Schule" (aufbauend auf *Nawiasky*) den Zweck im Recht und in der Rechtsnorm neu entdeckt hat und der Rechtsformenlehre eine Rechtsinhaltslehre an die Seite stellt.'

[36] Herman Meijers, How is international law made? – The stages of growth of international law and the use of its customary rules, 9 Netherlands Yearbook of International Law 1978 (1979) 3–26 at 3 (FN 1): 'These constitutive requirements [for the making of treaty and customary law] are themselves also rules of treaty law and customary law.'; Raphael M. Walden, Customary international law: A jurisprudential analysis, 13 Israel Law Review (1978) 86–102 at 88 *et seq*. In contradistinction see H.L.A. Hart, The concept of law (1961) 208–231 (Ch X).

[37] The specifics of Hart's theory and its espousal by international lawyers will be discussed below (Section 6.2.2).

[38] Gennady M. Danilenko, The theory of international customary law, 31 German Yearbook of International Law (1988) 9–47 at 17.

> [I]f the constitution of a legal community was not created by legislation, but by way of custom . . . This situation cannot be seen as the constitution which has been created by custom, that is [a] positive [constitution], *empowering* custom as law-making *actus reus*. That would be a *petitio principii*. If the positive constitution . . . can be created by custom *one must presuppose* that custom is a law-making *actus reus*.[39]

Kelsen is arguing that the contention is a *petitio principii*[40] only if the constitution is itself customary law. Because the constitution would already be made up of customary law, customary law would already be included among the sources of law before one got to a subordinate source called 'customary law'. Yet here we face two objections. One is mentioned by Alf Ross in the quotation given above and refers to the apparent vicious circle in basing customary international law on itself. This is a problematic conclusion, for the *form* a norm takes is irrelevant for its position in the hierarchy of validity. As already demonstrated, a form can take multiple points in the hierarchy (Section 5.5.2) – in Austrian constitutional law a statute in part regulates the creation of statutes and constitutional statutes. The objection raised by Ross may not be directed against this specific point, but his theory of law requires all Ought to be reduced to Is. Being a form of legal realism, his theory needs to base norms on facts alone: the basis 'is in all cases actual *practice and that alone*'.[41] Ross does not allow for a *Grundnorm* as restatement of the dichotomy of Is and Ought, because this concept is at its core an expression of idealism which cannot find a place in this theory. Consequently, norms cannot be based on norms, but must be based on facts alone. In consequence, there is also no such thing as a *Stufenbau* for Ross. The other objection to customary international law as the source-norms of international law, however, cannot but prove fatal. As mentioned at various points in this book (especially in Section 3.2.5), customary law as a primitive form of norm-making cannot adequately conceive of an Ought in its formulation of a norm-content and cannot, therefore, formulate the norm-functions of empowerment and derogation, which are directed at other norms, not at human behaviour.

(2) One could imagine a kind of constitutional law of a different and unique form; a form different from all of international law's sources – something that we might call 'international consitutional law' (*Völkerverfassungsrecht*). Positive international law, however, does not support such a co-ordinating meta-meta-level above the sources of international law (Section 6.3).

[39] '. . . wenn die Verfassung der Rechtsgemeinschaft nicht im Wege der Satzung, sondern im Wege der Gewohnheit zustande gekommen ist . . . Diese Situation kann man nicht dahin deuten, daß Gewohnheit von der durch Gewohnheit erzeugten, also positivrechtlichen, Verfassung als rechtserzeugender Tatbestand *eingesetzt* wird. Das wäre eine *petitio principii*. Denn wenn die positivrechtliche Verfassung . . . im Wege der Gewohnheit erzeugt werden kann, *muß schon vorausgesetzt werden*, daß Gewohnheit ein rechtserzeugender Tatbestand ist.' Kelsen (1960) *supra* note 7 at 232 (Ch 35 b) (emphasis added).

[40] The existence of the *petitio principii* was pointed out by Danilenko as reason for Kelsen's purported rejection of the thesis.

[41] Ross (1947) *supra* note 26 at 83 (emphasis added).

(3) In a 1969 paper Alfred Verdross proposed a multiplicity of custom-creative processes:

> Because it is probable that each of the different theories [on customary law] contain some correct elements, the presumption of one mode of creation for all norms of customary international law is probably not correct. . . . It is impossible to found all unwritten norms of international law on the same basis of validity.[42]

He was guided by the deficiencies he identified in common theories about custom-formation and he proposed to accept all procedures that usually succeed in creating customary international law. The adoption of this theory would mean that the unity of customary international law as a source of international law no longer exists and that 'unwritten international law' would take its place as a mere empirical collection, not as a normative system,[43] whereas there would be a multitude of sources, one each for every method of creating 'customary' law.' The theory proposed by Verdross also means begging the question and transcending the Is–Ought dichotomy. How can we find out what 'process' *usually* creates customary international law if we do not know when law has *validly* been created? Knowing when law is usually created requires knowing the meta-norm of customary international law-creation – and finding this is the object of the exercise. Dispensing with the need for a norm to create another norm would at best mean abandoning the idea of normative orders; at worst it would mean the inability to cognise norms as norms.

(4) The view is not uncommon that constitutional norms originate outside any sources, for example as direct product of a formless consensus of states[44] (cf.

[42] 'Da es aber wahrscheinlich ist, daß in jeder der verschiedenen Theorien ein richtiger Kern steckt, liegt die Vermutung nahe, daß die Annahme einer einheitlichen Entstehungsart aller Normen des VGR der Kritik nicht standhalten kann. . . . Es ist unmöglich, alle ungeschriebenen Normen des VR auf denselben Geltungsgrund zurückzuführen.' Alfred Verdross, Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts, 29 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1969) 635–653 at 636 and 649, respectively. This problematic approach is widespread: Albert Bleckmann, Die Aufgaben einer Methodenlehre des Völkerrechts. Probleme der Rechtsquellenlehre im Völkerrecht (1978) 19–20; Robert Kolb, Selected problems in the theory of customary international law, 50 Netherlands International Law Review (2003) 119–150 at 128–130. Helmut Strebel talks about the 'the dilemma created, [on the one hand] by the dogma of the generality of the term "customary law" and, on the other hand, [by] the unmistakeable diversity of the conditions for the creation of customary law' 'durch das Dogma von der Allgemeingültigkeit des Gewohnheitsrechtsbegriffs und, andererseits, die unverkennbare Unterschiedlichkeit der Entstehungsbedingungen und Erfordernisse von Gewohnheitsrecht geschaffenen Dilemma' Strebel (1976) *supra* note 25 at 322.

[43] Verdross had earlier sought to base *both* treaty and customary international law on a *Grundnorm* with the content *pacta sunt servanda* (which differed from Kelsen's conception of that term). Verdross (1926) *supra* note 14.

[44] Alfred Verdross, Die Quellen des universellen Völkerrechts (1973) 20 (This is one possible interpretation of that theory; another is introduced in Section 6.3.1); Hermann Mosler, The international society as a legal community (1980) 16; cited in: Danilenko (1988) *supra* note 38 at 17.

Section 6.1.1); Danilenko espouses a similar position.[45] The argument that law is not just ultimately based on facts or on external ideals but that even its sources are directly based on these factors and that law has no role in determining what procedure creates law[46] is surprisingly widely held. We will not repeat the objections against transcending the fundamental dichotomy of Is and Ought at this point.

The debate on the nature of this kind of norms (or 'processes') merely hides the uncertainty about the constitution of international law. Too much depends on what solution one has for that problem to be able to pronounce a winner here; therefore, we shall leave the realm of terms and forms and enter the murky waters of bases and justification.

6.2 How are the sources of international law justified?

Imagine a very persistent student asking a lecturer who has just named the sources of international law where these sources come from. How is it determined, that student might ask, which sources international law has? This is one of the crucial questions of international law, yet one that seems to go relatively unnoticed. We seem to take international treaty law, customary international law and 'general principles of law' as sources without asking *why* customary international law, for example, is part of the normative order 'international law'. For the Pure Theory of Law, the matter is clear. If international law is to be one normative order, there must be a meta-meta-norm authorising the creation of norms that authorise the creation of norms. Yet even on this consistent view there are problems, for we seem to come to the edge of the 'known world' of positive international law norms, as Chapter 3 has attempted to show. Yet the question here goes one step further to the law that creates that meta-law in the first place. Even if the Pure Theory is adopted, uncertainty abounds (Section 6.3). Here, however, we will look at traditional international legal scholarship and its attempts at a solution of the problem.

In the following sections, the dichotomy of deduction and induction is adopted as a basic classification. One could also have used the old favourites of 'natural law' and 'positivism', but not only have the terms by now become so clouded as to be positively unhelpful if they are not defined by reference to their underlying 'method of justification', but this 'method of justification' – described here as 'deduction' and 'induction' – is far more relevant to unearthing the real reasons why the common approaches fail and produce uncertainty.

All legal scholarship on sources must find a method of stabilising the findings of its research, i.e. must have a set of criteria which determine whether those

[45] Danilenko (1988) *supra* note 38 at 17: 'In practice, the recognition of custom by States as a source of international law, as well as the recognition of other sources, is determined by objective extra-legal factors inherent in the structure of the international community.'

[46] For a scorching criticism of that view, see Herbert Günther, Zur Entstehung von Völkergewohnheitsrecht (1970) 97.

findings are 'valid'. There are two basic justificatory moves: deduction and induction. The criterion of the inductive method is correspondence of the thesis developed with the 'facts' of international life. Authors who espouse that method will try to induce the law on customary law-making, for example, from instances where customary law has been created in the past, a sort of state practice concerned not with rules of customary law, but with the way in which these rules come about. The criterion of the deductive method is more abstract. Since this method deduces the rules from more general propositions, scholars who take this as their method are left with an argument from logic or an extraneous normative order, such as natural law or morals. In any case they must use extra-legal methods or sources of stabilising or proving the findings of research of a non-factual manner.

Both approaches have strengths and weaknesses. The results from induction immediately resemble provable facts, an empirical correspondence. Deduction results in an internally coherent system which has the benefit of logical consistency. However, induction transcends the duality of norm and fact; law is precisely not facts and it is not a description of reality – unless everybody obeys the law – but a prescription for future behaviour. Deduction, on the other hand, cannot be proven; its arguments are based on anything but the law (or things the law says determine the relevant law) and it must remain a fiction.

The counter-positing of these two views is to some extent reminiscent of Martti Koskenniemi's dichotomy of 'Apology' and 'Utopia'.[47] The duality of 'normativity' and 'concreteness'[48] is a view of how international law in general is made. The dichotomy discussed here is close but different in some key respects.

(1) Whereas Koskenniemi sees the two patterns as mutually exclusive and irreconcilable, and 'law' (understood as a specific way of using language) as trapped in constant movement between those two patterns, and whereas he regards the patterns as tending towards their logical conclusion (the extreme), one could doubt that the extreme is the tendency or the patterns *a priori* irreconcilable. The basic assumption of his and David Kennedy's, namely that international law has as *a priori* foundations either consent or abstract substantive principles of justice and that either, but not both, principles must be the pre-positive foundation of that legal system, are not adopted here. This is *inter alia* because it depends on the positive normative order one is describing. Koskenniemi shows us how the two approaches fail and in this respect his project is similar to Kelsen's. If one were to draw a parallel to Kelsen's theoretical project of a Pure Theory, however, one would miss the synthesis Kelsen establishes. The purely inductive and deductive trends fail, because they do not heed the dichotomy of Is and Ought (Sections 6.2.2 and 6.2.3). A theory that perceives a 'constant movement' will necessarily

[47] Martti Koskenniemi, From apology to utopia: The structure of international legal argument (1989, 2005).

[48] He calls them 'descending' and 'ascending' patterns of justification. Koskenniemi (1989, 2005) *supra* note 47 at 40–41 (59). For a similar distinction see David Kennedy, International legal structures (1987) 29 *et seq*.

transcend the dichotomy on which – on the approach adopted herein – the possibility of perceiving norms depends (Section 7.2).

(2) When discussing customary international law, for example, Koskenniemi bases his fundamental critique on the duality of 'psychologism' and 'materialism',[49] which was reconstituted as an important detail problem of customary law in this book, rather than as an essential problem of international law. While the 'descending', non-consensual pattern is represented by the material element (state practice), the 'ascending' state will, belief or interest is embodied in the subjective element (*opinio iuris*). On Koskenniemi's view, the *crux* lies within the two constituent elements of the law:

> [W]e cannot automatically infer anything about State wills or beliefs – the presence or absence of custom – by looking at the State's external behaviour. The normative sense of behaviour can be determined only once we first know the 'internal aspect' – that is, how the State itself understands its conduct. . . . [D]octrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio iuris* and the latter to be evidence of which behaviour is relevant as custom.[50]

In Sections 3.2.1 and 3.2.2 it was proposed that the problem described above belongs in a different category. It can only become fundamental if one does not differentiate behavioural regularities that constitute state practice from the factual evidence for *opinio iuris*. Only the view of state practice that was then called the 'wide concept' can be subject to Koskenniemi's criticism and only if the proponent for a wide view cannot distinguish the elements and its evidence contained within 'state practice'. Lawyers will always have to work with the factual for the determination of the non-factual. Every criminal court, for example, must determine the *mens rea* of the defendant without being able to open up his brain and read his thoughts. It is the same with the ascertainment of *opinio iuris* in customary international law.

(3) Koskenniemi does not lay emphasis on what is a core tenet of this book: that it is not *law* that is pulled toward both concreteness and normativity; it is lawyers' approaches to and understanding of the law that must reconcile the extremes. This is so because Kokenniemi does not define 'law' in the same sense as the normativist approach adopted here. International law is norms and norms are by definition 'normative', i.e. specify an Ought. Norms are also not facts and description; because they are norms, they are prescription. It is not law that is pulled, but our perception of that ontology of norms that needs to reconcile facts and aspiration.

How will we proceed to expose the two trends and their problems in this section? We begin by analysing Article 38 of the ICJ Statute; its peculiar position of authority is unrelated to the two trends, but its prominence in scholarship needs to be explained (Section 6.2.1). The views of Alfred Verdross are used to

[49] Koskenniemi (1989, 2005) *supra* note 47 at 362–389 (410–438).
[50] Koskenniemi (1989, 2005) *supra* note 47 at 388 (437).

represent the deductive trend (Section 6.2.2) and Herbert Hart and his followers in international legal scholarship will be our representatives of the inductive trend (Section 6.2.3). Both views are in one way or another related to Kelsen's without being considered as belonging to the Vienna School of Jurisprudence. Verdross, an early student of Kelsen's, having become a natural lawyer early in his career, nevertheless considered Kelsen's contribution important and was aware of his views. So it is with Hart, whose linguistic-analytic positivism also referred to Kelsen while distancing itself from Kelsen's position. These two scholars represent the two trends, problematic in their exclusivity, problematic also as represented in the works of the two scholars. Hart's Rule of Recognition, just as the neo-Aristotelian *entelechia* and *telos* of Verdross, cannot found the validity of positive norms, for both transcend the duality of Is and Ought. The only possible way in which we can conceive of positive norms is the dialectical conclusion between deduction and induction. This is Kelsen's greatest achievement. Once again, however, it is impossible to distinguish between the basis for the sources of international law and the basis of international law itself, for where the edge of positive international law is reached, the further justification is a justification of the very idea of norms.

6.2.1 Article 38(1) of the Statute of the International Court of Justice

'Inescapably,' Robert Jennings writes, 'the inquiry [into the sources of international law] begins with Article 38 of the Statute of the International Court of Justice';[51] inescapably also, it is a rallying point for most debate on the topic. This pragmatic status, to which we shall return below, is the reason why we begin our quest for the basis of sources here. We need to find out how Article 38 can accomplish this justification.

Nobody sees Article 38 as the meta-meta-law on sources-creation in international law.[52] If one were to hold that view, one would state that, in the case of custom, Article 38(1)(b) of the Statute *itself* is the norm which gives all (presumably post-1921)[53] customary international law norms their validity, makes them part of international law and is their 'pedigree'. It seems curious to find such a fundamental norm of international law in an (admittedly important) treaty[54] defining the applicable law for an, admittedly important, but nevertheless particular international tribunal. Also, how can a treaty include the formal source of treaties (Article 38(1)(a)) without forming a vicious circle? On what legal basis does the Charter operate? What legal basis did treaty or customary norms have which

[51] Jennings (1982) *supra* note 33 at 60.

[52] Though cf.: Ben Chigara, Legitimacy deficit in custom: A deconstructionist critique (2001) xvii–xviii.

[53] The Statute of the Permanent Court of International Justice was opened for signature on 16 December 1920 and entered into force on 1 September 1921.

[54] The Statute of the International Court of Justice is an 'integral part of the [United Nations] Charter' (Article 92 UN Charter).

were concluded or have evolved before the entry into force of the UN Charter?[55] Nobody doubts, however, that it is authoritative for the Court as 'applicable law' clause, because the Court is a creation of the Charter.[56] If, indeed, Article 38 were the formal source of all sources of international law, the very formulation of Article 38(1)(b) would have repercussions on customary theory. Meta-law would have to conform to its particular wording.

Most do not to subscribe to such an extreme view. They see Article 38 as somehow relevant to finding out what the formal sources of international law are.[57] The difference between the two views, however, is one of kind, not of degree. This position is epistemological in nature. Rather than Article 38 being the meta-meta-law, orthodoxy sees it as a tool to find out what the sources are, helping to find the sources of international law. The usual course of argument is that, on its face, Article 38 is only the applicable law provision for one particular court. However, the Article enjoins the Court to 'decide *in accordance with international law*'; therefore, one can argue that the parties to the Statute (nearly all states) believe that they have enumerated in Article 38(1)(a)–(c) the procedures which create international law.[58] Thus, either this article is seen as a codification of non-Statute norms[59] or as somehow a manifestation of what is accepted as law-creating[60] (in terms of Hart's Rule of Recognition). In effect, this argument holds that Article 38 is merely an authoritative description of the sources of international law.[61] (The first-named argument is that the Charter provision is a norm itself giving binding force to the sources.)

It is doubtful whether Article 38 is even of much epistemological value or has a declarative function. There may yet be other sources of international law not

[55] The UN Charter entered into force on 24 October 1945.

[56] Bos (1977) *supra* note 26 at 18; Jonathan Charney, International lawmaking – article 38 of the ICJ statute reconsidered, in: Jost Delbrück (ed.), New trends in international lawmaking – international 'legislation' in the public interest (1997) 171–191 at 174; Fastenrath (1991) *supra* note 27 at 89; Fitzmaurice (1958a) *supra* note 25 at 153–176 at 173; Menon (1986) *supra* note 31 at 182; Alain Pellet, Article 38, in: Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm (eds), The statute of the International Court of Justice. A commentary (2006) 676–792 at 693–735; Shaw (2008) *supra* note 25 at 70–71; Virally (1968) *supra* note 25 at 121.

[57] R.S. Pathak calls it the '*repository* of those sources'. R.S. Pathak, The general theory of the sources of contemporary international law, 19 Indian Journal of International Law (1979) 483–495 at 484 (emphasis added); Danilenko (1988) *supra* note 38 at 17: 'is at present incorporated into treaty law by Art. 38'. See also: Rudolf Bernhardt, Ungeschriebenes Völkerrecht, 36 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1976) 50–76 at 64; Cassese (2005) *supra* note 26 at 183; Charney (1997) *supra* note 56 at 174; Fastenrath (1991) *supra* note 27 at 88–89; Fischer and Köck (2004) *supra* note 25 at 70; Fitzmaurice (1958a) *supra* note 25 at 173; Kennedy (1987) *supra* note 48 at 12; Shaw (2008) *supra* note 25 at 70–71; Hugh Thirlway, International customary law and codification (1972) 36; Virally (1968) *supra* note 25 at 122.

[58] Fastenrath (1991) *supra* note 27 at 89.

[59] Cassese (2005) *supra* note 26 at 183.

[60] Fitzmaurice (1958a) *supra* note 25 at 173; Thirlway (1972) *supra* note 57 at 36; Shaw (1997) *supra* note 25 at 70–71.

[61] Virally (1968) *supra* note 25 at 122.

mentioned in Article 38.[62] Also, the basis for the epistemic exceptionality of the ICJ Statute is unproven by these assertions.[63] The enumeration of sources in Article 38 is correct only if it corresponds to the ontology of meta-norms. The reasoning behind the 'declaratory theory' is that it is generally accepted as such, which is a claim that the meta-norms on international law-creation (the sources) are created by general acceptance. Thus the real claim is that Article 38's epistemic position arises from its correspondence with the meta-meta-law's condition for meta-law creation (in that case, that of 'general acceptance'). If it does not, then the epistemic position of Article 38 is not authoritative. If it does, its placement in the statute of the most important international tribunal is irrelevant. Article 38 cannot be a basis independent from the normative ontology.

However, there is no denying that the *pragmatic* status of Article 38 is very high. Almost all works on the sources of international law and the relevant chapters in general works on international law start with Article 38 of the Statute of the International Court of Justice as the fountainhead of their discussion of the sources.[64] Few works go beyond the well-known *trias* and most of those only present supplemental and additional sources[65] but do not question or do away with Article 38 as basis. Its pragmatic importance cannot alter the content of the norms, however. If Article 38 were not to reflect meta-meta-law, then its universal use would not make it a correct statement. The validity of norms depends upon norms, not upon practice alone. Reliance on pragmatism holds the danger that scholarly cognition may become skewed (Section 5.4).

6.2.2 Deduction: Alfred Verdross and natural law as fictional normative order

The next two sections will portray a polarised view of two theoretical approaches to international law. They are both extreme in the sense that from the point of view of the Pure Theory of Law they are both removed from its synthesis or middle ground. Yet, the actual writings of Verdross and Hart natually contain qualifiers and details. In order to show their incompatibility with the normativist-positivist theory espoused here – in the Pure Theory's parlance: their 'failure' to correctly grasp the nature of norms – their position will be thrown into somewhat sharper relief than they themselves have done.

The objection may be made that the choice of the two scholars to represent

[62] Menon (1986) *supra* note 31 at 181–214 at 182: 'Nowhere it is laid down that the list in Article 38 is exhaustive, hence it is possible to have other sources of law'; Neuhold (2004) *supra* note 25 at 31 (RN 169); Parry (1965) *supra* note 25 at 109; Pauwelyn (2003) *supra* note 10 at 90; Virally (1968) *supra* note 25 at 122.

[63] Parry (1965) *supra* note 25 at 5.

[64] E.g.: Verdross and Simma (1984) *supra* note 23 at 321–412; Jennings and Watts (1992) *supra* note 25 at 24; Pathak (1979) *supra* note 57 at 484.

[65] Such as 'certain decisions of international organizations'. Maarten Bos, The hierarchy among the recognised manifestations ('sources') of international law, 25 Netherlands International Law Review (1978) 334–344 at 334.

deduction and induction was unwise. It may very well be argued that neither Verdross nor Hart are archetypical representatives of natural law scholarship or of traditional positivism. Their importance, their frequent references to Kelsen together with their self-reflective and self-conscious approach, however, make them better candidates than someone whose theory may be more sharply defined, but less well thought-out.

Deduction seeks to base the source of (international) law on a higher instance. Sources are not based on decisions by organs authorised by the legal order in quesiton, but on an external normative order – natural law, for example – whose norms are not created by human willing. It could, in a sense, be argued that deduction's problems are less grave than induction's. Deductive theories can be interpreted to respect the nature of norms, their ideal existence and their non-factuality. This type of theory can potentially keep norms apart from facts, the ideal from the real. Kant certainly believed that of the two ethico-theoretical poles – empiricism and mysticism – the former was more dangerous than the latter:

> However, the caution against *empiricism* of practical reason is much more important, for *mysticism* is quite reconcilable with the purity and sublimity of the moral law, and, besides, it is not very natural or agreeable to common habits of thought to strain one's imagination to supersensible intuitions; and hence the danger on this side is not so general. Empiricism, on the contrary, cuts up at the roots the morality of intentions . . ., and substitutes for duty something quite different, namely, an empirical interest, with which the inclinations generally are secretly leagued . . .[66]

This, however, is a point which needs to be proven. What is more, far more scholars today hold relatively clear inductive views than purely deductive views. While natural law may still be popular in a subdued form, a derivation of a legal system from pure reason or God's will alone cannot be found. An element of human interaction is present in every theory. Also, the main problem of inductive approaches is far more easily overlooked and muddled with a bit of creative writing than that of deduction. It is easy to say that one merely wishes to 'ground' a theory in 'the facts of life'.

Alfred Verdross is among the most important international legal scholars of the twentieth century.[67] The development of his position over more than 60 years

[66] 'Indessen ist die Verwahrung vor dem *Empirismus* der praktischen Vernunft viel wichtiger und anratungswürdiger, weil der *Mystizismus* sich doch noch mit der Reinigkeit und Erhabenheit des moralischen Gesetzes zusammen verträgt und außerdem es nicht eben natürlich und der gemeinen Denkungsart angemessen ist, seine Einbildungskraft bis zu übersinnlichen Anschauungen anzuspannen, mithin auf dieser Seite die Gefahr nicht so allgemein ist; da hingegen der Empirismus die Sittlichkeit in Gesinnungen . . . mit der Wurzel ausrottet, und ihr ganz etwas anderes, nämlich ein empirisches Interesse, womit die Neigungen überhaupt unter sich Verkehr treiben, statt der Pflicht unterschiebt . . .'; Immanuel Kant, Kritik der praktischen Vernunft (1788) A 125–126, AA V 71 (translation Thomas Kingsmill Abbott).

[67] The European Journal of International Law has included him in the series of symposia held on 'The European Tradition of International Law' (in: 6 European Journal of International Law (1995) 32–115).

is important due to the remarkable closeness this natural lawyer maintained to the normativist positivism of the Vienna School. While we will give an overview of the core of his natural law theory below, we must first ask why scholars would adopt a natural law theory and justification. Kelsen expressed it well in an article on the topic from 1963.

> The subjectivity and relativity of 'value' is a consequence which is hard to take for some . . . If the validity of a norm, with which we can often comply only with a great effort, because compliance goes against our inclinations, is in the end based upon an arbitrary decision and if, therefore, the validity of a contrary norm is by no means excluded, one's trust in the goodness of one's behaviour in complying with that norm is not as high as in the truth of a statement [of fact]. Also, however, . . . because one is not disposed to believe that the authority and thus the motivating force of a moral or legal order is sufficient if the humans subject to these orders hold that the values constituted by them are merely subjective and relative. This is how [we can explain] the attempt to prove the validity of norms, which are not . . . 'posited', which do not have to be 'positive', in order to be valid, which are binding by virtue of their content, which are binding directly and independently from the will of a human and which constitute values, which are as objective as the truth of statements about reality.[68]

6.2.2.1 Verdrossian natural law theory

Alfred Verdross explicitly bases his natural law theory on Aristotle and St Thomas Aquinas.[69] For Aristotle, all entities strive towards their perfection, because only if and when they have reached that goal (*telos*), they have reached their true nature (*physis*). Thus, all beings or entities have an imminent purpose (or goal) – this

[68] 'Die Subjektivität und Relativität des Wertes ist aber eine Konsequenz, die für viele . . . schwer zu ertragen ist. . . . Wenn die Geltung einer Norm, der wir – oft nur unter gewaltiger Anstrengung, weil gegen unsere Neigungen – entsprechen, sich als letzten Endes willkürlich erweist und daher die Geltung einer entgegengesetzten Norm keineswegs ausschließt, ist man des Wertes seines, einer solchen Norm entsprechenden Verhaltens nicht so sicher wie die Wahrheit einer Aussage. Dann aber . . ., weil man die Autorität und damit die motivierende Kraft einer Moral- oder Rechtsordnung nicht für hinreichend hält, wenn die diesen Ordnungen unterworfenen Menschen die durch die Normen dieser Ordnungen konstituierten Werte nur für subjektiv und relativ halten. Daher der Versuch, die Geltung von Normen nachzuweisen, die nicht . . . "gesetzt", nicht "positiv" sein müssen, um zu gelten, die, kraft ihres Inhalts, unmittelbar und unabhängig von dem Willen eines Menschen verbindlich sind und die Werte konstituieren, die so objektiv sind wie die Wahrheit von Aussagen über die Wirklichkeit.' Hans Kelsen, Die Grundlagen der Naturrechtslehre, 13 Österreichische Zeitschrift für öffentliches Recht (1963) 1–37, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 869–912 at 872–873.

[69] In the first edition of 'Abendländische Rechtsphilosophie' of 1958, the Aristotelian foundation is already quite clear, whereas in an important paper of 1931 (Alfred Verdross, Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle. Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts, in: Alfred Verdross (ed.), Gesellschaft, Staat und Recht. Untersuchungen zur reinen Rechtslehre. Festschrift Hans Kelsen zum 50. Geburtstage gewidmet (1931) 354–365) the tone is resolutely natural-lawyerly, but there is no mention of Aristotle or Thomas.

purpose-oriented nature is their *entelechia*.[70] This, then, is an objective nature. The teleological metaphysics of Aristotle alone, however, do not yet amount to much in the sphere of practical philosophy. The crucial 'twist' comes when he considers the nature of humans. Human *telos* is (forms) a norm which they have to observe in order to reach completion – the goal prescribes the means.[71] Thus, an Is (human nature) alone creates an Ought (an *objective norm*).[72] Human nature is societal (man as a *zoon politikón*, as a state-building being): '[Human beings] thus by their nature are directed towards community with other humans.'[73]

Like Aristotle, Verdross sees human nature in this particular objective and teleological sense. Human nature is not simply a neutral 'Is', Verdross contends; our nature has an inherent moral sense (*Wertbewußtsein*) that guides us toward certain goals.[74] It may be difficult to accept this different and pre-modern meaning of the term 'nature'. Verdross points out that if one takes it to mean a post-Kantian 'mere causally linked phenomena in space and time',[75] the deduction of Ought from Is cannot work. He is clearly hinting at Kelsen's neo-Kantian epistemology, which distinguishes between *noumena* and *phenomena*.[76] Yet it is exactly this pre-Kantian-revolution belief in the absolute entity, in this case in the *telos* – the goal or purpose within matter – that makes Verdross differ from Kelsen. Verdross takes 'nature' to include not only causal, but also final connections (what he calls the 'the whole of reality'),[77] because 'reality' includes the Aristotelian form (*eidos*) besides matter, *telos* besides existence. Because nature in this metaphysical tradition is not simply that of a physical nature, the term to an extent becomes counterfactual and is not simply existence, but constitutes an Ought of sorts.

The connection to the existence of an objective normative order – to natural law – is made, as with Aristotle, through the social nature of man. Human finality is peculiarily self-conscious, because humans have the ability to abstract and therefore to cognise causal connection of events, which means that we know which forces to bring to bear to reach a set goal.[78] In a move typical of natural law scholarship, Verdross postulates that the preservation and development of human life is this general and natural goal; furthermore, that under this *telos* the objective value of society and its order cannot be denied.[79] He argues that 'empirische

[70] Alfred Verdross, Abendländische Rechtsphilosophie. Ihre Grundlagen und Hauptprobleme in geschichtlicher Schau (1958) 39–40.

[71] Alfred Verdross, Statisches und dynamisches Naturrecht (1971) 98–99.

[72] Verdross (1958) *supra* note 70 at 40; Verdross (1971) *supra* note 71 at 20–21.

[73] '[Der Mensch] ist also durch die Dynamik seiner Natur auf die Gesellschaft mit anderen Menschen hingerichtet.' Verdross (1958) *supra* note 70 at 41.

[74] Verdross (1955) *supra* note 22 at 20.

[75] 'bloß kausal verknüpfte Erscheinungen in Raum und Zeit'; Verdross (1971) *supra* note 71 at 60. In the same vein, but asserting the opposite opinion: Kelsen (1960) *supra* note 7 at 227 (RR 34 j).

[76] Immanuel Kant, Kritik der reinen Vernunft (1781, 1787) A 235–260, B 294–315.

[77] 'Gesamtheit der Wirklichkeit'; Verdross (1971) *supra* note 71 at 60.

[78] Verdross (1971) *supra* note 71 at 61.

[79] Verdross (1971) *supra* note 71 at 64, 61.

Wertlehre' – a kind of social science of values – shows these basic values to be such as determined by human nature.[80] It is questionable whether a social science could actually provide the data for the metaphysical presupposition of *eidos*. It is even more problematic to see 'preservation and development of human life' as constituting human nature, worse still to connect this goal to society by a mere assertion.

Natural law as objective normative order is derived from these existential goals of human nature,[81] because natural law (through the transformation from Is to Ought) has the purpose of ordering human cohabitation so that humans can live in dignity. Verdross argues that this *telos* can be proven empirically, 'because all [humans] actually strive towards it'.[82] Thus natural law as objective principles of human interaction which can be ascertained rationally[83] (practical reason) is created. Verdross admits, however, that this is only the case:

> if one acknowledges with Aristotle that humans as social beings can found a legal community to secure their existence, to advance their [personal] development and to make it possible to lead a life with human dignity.[84]

How does Verdross envisage the relationship between natural law and positive legal orders? Here his early membership of the Vienna School of Jurisprudence shows clear traces and here we can at least reconstruct how, if not why Verdross came to be a natural lawyer. Verdross may have been disappointed with the hypothetical nature of the *Grundnorm*. As early as 1926 he writes that with the help of the basic norm we can only presuppose or feign the validity of a positive legal order, but never prove its objective validity. His frustration with the Pure Theory's relativism is palpable when he demands that the *Grundnorm* has to be a 'norm anchored in the *cosmos* of values'[85] and that the *Grundnorm* cannot be a legal philosopher's last word on the topic.[86]

Therefore, the *Grundnorm* for Verdross is not a legal-scientific assumption (a Kantian category of cognition) as with Kelsen, but a norm of natural law, both basing positive law in objective values and founding the validity of positive law.[87] The *Grundnorm* not only empowers some humans to create positive law, but also – and here, again, is a typical natural law element – limits that power by reference to the objective values established by the superior natural legal order.[88]

[80] Verdross (1955) *supra* note 22 at 20.
[81] Verdross (1955) *supra* note 22 at 20.
[82] 'da es tatsächlich von allen angestrebt wird'; Verdross (1971) *supra* note 71 at 62.
[83] Verdross (1971) *supra* note 71 at 92, 100.
[84] 'wenn man mit Aristoteles anerkennt, daß die Menschen als soziale Wesen eine Rechtsgemeinschaft begründen können, um ihre Existenz zu sichern, ihre Entfaltung zu fördern und ein menschenwürdiges Leben zu ermöglichen.' Verdross (1971) *supra* note 71 at 94–95.
[85] 'im Kosmos der Werte verankerte Norm'; Verdross (1926) *supra* note 14 at 31.
[86] Verdross (1926) *supra* note 14 at 32.
[87] Verdross (1926) *supra* note 14 at 24.
[88] Verdross (1955) *supra* note 22 at 21.

This theory of the relationship between natural law and positive law remained the same throughout Verdross' long career as a scholar. The application of that theory to the concrete relationship of natural law to international law, however, varies. In the 1920s, Verdross holds that the *Grundnorm* of international law and indirectly (due to his monistic theory of the relationship of international law to municipal law)[89] of all law is the norm '*pacta sunt servanda*', which, in turn, is part of the natural legal order.[90] In the 1930s to 1950s we find him arguing that the general principles of law[91] fulfil that role, or at least that natural law makes them the highest echelon of positive international law.[92] Later still, that crucial role – with a different theoretical basis and modified to some extent by Bruno Simma – is fulfilled by an original consensus, to which we will turn at a later juncture (Section 6.3.1).

The point here is that we need not look at the various concepts in detail, because the basic theory remains the same. The highest echelons of positive international law – its sources – are determined by natural law, which, in turn, is determined by the objective nature of man. In order for Verdross to reconcile his natural legal construct with the Pure Theory, he seeks to distinguish between different sorts of validity. He argues that validity of positive law as positive-legal validity is different to its validity as natural-legal validity. For a natural lawyer such as Verdross, only the latter can be a truly normative validity, while the creation of law in accordance with its (positive) meta-law of law-creation ('positivrechtlich ordnungsmäßige Erzeugung') is belittled as an effluence of sociological effectiveness.[93]

Yet Verdross nonetheless claims that Kelsen's theory and his are commensurable:[94]

> [The Pure] Theory of Law therefore can exist *beside* a natural law theory, because it only tries to give a value-free analysis of positive law, while natural law theory seeks to solve the problem of the value of positive law, i.e. its justice or injustice. This is a problem that lies outside the scope of Kelsen's legal theory.[95]

Verdross and Kelsen are to an extent incommensurable and Verdross' search for a

[89] E.g.: Verdross (1923) *supra* note 16.

[90] Verdross (1926) *supra* note 14 at 27–28, 31.

[91] As codified in Articles 38(3) and 38(1)(c) of the Statutes of the Permanent Court of International Justice and of the International Court of Justice, respectively.

[92] Verdross (1931) *supra* note 69 at 362, 364; Verdross (1955) *supra* note 22 at 22–25.

[93] Verdross (1931) *supra* note 69 at 357; Verdross (1971) *supra* note 71 at 107.

[94] Verdross (1955) *supra* note 22 at 19; Verdross (1958) *supra* note 70 at 253–254; Verdross (1971) *supra* note 71 at 94.

[95] '[Die Reine] Rechtslehre kann deshalb *neben* einer Naturrechtslehre bestehen, da sie nur auf eine wertfreie Analyse des positiven Rechts zielt, während die Naturrechtslehre das Problem des Wertes des positiven Rechts, das heißt seiner Gerechtigkeit oder Ungerechtigkeit zu lösen sucht, ein Problem, das außerhalb der von Kelsen vertretenen Rechtslehre liegt.' Verdross (1958) *supra* note 70 at 253.

'symbiotic model'[96] was in vain. While a full critique will be attempted in the next section, the Pure Theory cannot, as Verdross believes, be reduced to an analysis of 'legal manifestations'. In order to cognise norms as norms, one necessarily has to presuppose a *Grundnorm*, which works as a cognitive tool.[97] In order to perceive any normative order as norms, one needs to presuppose a *Grundnorm*, including for a natural legal order.[98] This 'perception' of a norm is its validity and it founds its 'ideal existence'. Thus one could partially disagree with Verdross' statement. The Pure Theory does found validity, but only on an 'as if' basis. Verdross is correct insofar as the Pure Theory does not purport to necessarily found one particular normative order (e.g. a legal order called 'international law') on another normative order ('natural law'), which Verdross' theory does. But the hypothetical ('as if') validity is wholly sufficient to sustain the ideal existence – validity – of norms and one could argue that any further foundation, even if found in 'the cosmos of values', is superfluous. But then, of course, Verdross' metaphysical basis is different to Kelsen's.

Thus we can see the deductive reasoning of Verdross in developing his natural law theory and with it his justification of the sources of international law. From an objective Is that contains a teleological element – human nature as a *zoon politikón* – is deduced an objective value, from which, in turn, one receives a natural legal order which, in turn, determines the sources of international law. The theory does contain empirical elements – Verdross claims to deduce this from an empirically given 'human nature' – but there is enough deduction here to illustrate how deduction works.

6.2.2.2 The critique of the Pure Theory

Kelsen's critical stance against natural law has its origins in the perceived 'impurity' of natural law thinking, based on its transcending the Is–Ought dichotomy. At some junctures he also attacks the philosophical foundations of Aristotle's and Thomas' theories,[99] but we will focus on specific issues, foremost on transcending the dichotomy.[100]

(1) In order for natural law to work properly, at least some norms have to be based on some form of fact. In other words, a natural law theory depends upon transcending the duality of Is and Ought.[101] It was shown above that Alfred

[96] Manfred Rotter, Die Reine Rechtslehre im Völkerrecht – eine eklektizistische Spurensuche in Theorie und Praxis, in: Robert Walter, Clemens Jabloner, Klaus Zeleny (eds), Hans Kelsen und das Völkerrecht. Ergebnisse eines Internationalen Symposiums in Wien (1.–2. April 2004) (2004) 51–81 at 61.

[97] Kelsen (1960) *supra* note 7 at 223–225 (Ch 34 i).

[98] Kelsen (1960) *supra* note 7 at 227 (Ch 34 j); Rudolf Bindschedler, Zum Problem der Grundnorm, in: Friedrich August von der Heydte *et al.* (eds), Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross (1960) 67–76 at 72.

[99] Kelsen (1963) *supra* note 68 at 875–904.

[100] Kelsen (1979) *supra* note 12 at 52–57 (Ch 17 II–III).

[101] Kelsen (1963) *supra* note 68 at 873–874; Kelsen (1979) *supra* note 12 at 54–55 (Ch 17 II).

Verdross makes this an important part of his theory, but the problem is that while he is very much aware of Kelsen's opinion that natural law necessarily involves transcending the duality of Is and Ought, he does not explicitly discuss it. It is perhaps not that Verdross agrees with Kelsen (in that there can be no Ought from Is alone) and sees an error in Kelsen's theory, but rather that he disagrees – he explicitly says so[102] – and simply omits to discuss the higher philosophical issue of the difference between description and prescription. Verdross simply presupposes the matter as settled (in his sense) and simply draws upon the possibility of deducing Ought from Is to base his view of natural law.[103]

There are two possible stages of an argument that can be gleaned from Verdross' writings. Verdross argues, as mentioned above (Section 6.2.2.1), that his understanding of 'human nature' is not limited to causally linked phenomena, but includes a teleological element, which is based on a different metaphysical conception of what 'Is' (reality) is. In a 1963 paper on natural law, Kelsen claims that this is in reality a theological element and natural law presupposes belief in a supernatural being like God.[104] Verdross agrees insofar as the *causa essendi* of a *telos* can only be a transcendental authority. He argues, however, that it is possible to prove the objectivity of such a *telos* for natural law within the realm of empirical knowledge (*Erfahrungswelt*), 'because everyone actually aspires to it'.[105] As mentioned above, Aristotelian metaphysics differ from Kantian critical Idealism or the empirical Positivism of the Vienna Circle, both of which influenced Kelsen. On such a basis we can only enter the realm of speculative philosophy proper. However, even the assumption of an inherent (empirical or otherwise) goal in all beings still does not explain *how* that goal becomes a norm, how a 'striving towards *p*' suddenly becomes 'ought to do *p*', i.e. how an Ought is deduced or created from an Is.[106]

In 1971, Verdross used Victor Kraft's theory of values (*Wertlehre*) to prove the deduction by way of the relationship between means and ends:

> The norms of [Victor Kraft's system of] morality are, therefore, 'not arbitrary determinations, but are factually determined as means to reach the natural goals'. . . . From this we can see that it is possible to deduce an Ought from a fact. That fact is the volition of an end [goal], because everyone who affirms an end *ought* to do everything necessary for the attainment of that end. . . . The fact of striving toward an end thus forms . . . the only exception to the idea . . . that norms cannot be deduced from facts.[107]

[102] Verdross (1971) *supra* note 71 at 59–60.

[103] Verdross (1971) *supra* note 71 at 98–99, 101–102.

[104] Kelsen (1963) *supra* note 68; see also: Kelsen (1960) *supra* note 7 at 227 (Ch 34 j); Kelsen (1979) *supra* note 12 at 5 (Ch 1 IX b).

[105] 'da es tatsächlich von allen angestrebt wird.' Verdross (1971) *supra* note 71 at 62.

[106] Kelsen (1979) *supra* note 12 at 52 (Ch 17 II).

[107] 'Die Normen [Viktor Krafts] Moral sind demnach "nicht willkürliche Festsetzungen, sondern als Mittel zur Erreichung der natürlichen Ziele sachlich bestimmt". . . . Daraus ersehen wir, daß es möglich ist, aus einer bestimmten Tatsache ein Sollen abzuleiten. Die Tatsache ist das Wollen eines Zieles, da jeder, der ein Ziel bejaht, alles tun *soll*, was zur Erreichung dieses Zieles notwendig

This line of argument includes the error of identification of Must and Ought, a confusion, as Kelsen points out, of a normative 'necessity' with a teleological necessity.[108] Indeed, a person may want the end or goal to be realised, but not the – or certain – means to realise it; much less that wanting something creates a norm, an Ought to this effect. Kelsen demonstrates this difference with reference to a poisoner. If a person *wants* to kill another by poisoning the other, the poisoner *must* use a lethal dose, yet from this act of will a norm that requires the use of a lethal dose of poison does not arise. It remains, in Kant's terms, a hypothetical imperative. Even if the poisoner creates a positive norm with the content: 'I ought to kill my victim', this does not entail that the poisoner thereby also creates a norm with the content 'I ought to use a lethal dose of poison',[109] because the deduction of positive norms from positive norms is also not possible, as we saw in Chapter 5.

Thus, Kraft's and Verdross' goal, purpose or end (*Ziel, telos*), even if they were immanent, are at best psychological states of mind. The means to reach that end are not implied[110] and much less are they norm-creative.[111] Verdross' argument does not go beyond the assertion that one can deduce an Ought from an Is, i.e. that there is no dichotomy. As argued throughout, the consistent distinction between the two realms is a necessary for the cognition of norms as norms. And, since natural law theory, in particular Verdrossian theory, purports to cognise norms as norms, i.e. not 'resolved' as sociological facts or as psychological states of mind,[112] that theory is caught up in logical contradictions. This is exactly the reason why the Pure Theory strives to make legal science pure: for it to finally constitute a truly consistent theory.

(2) Taking natural law theory at its word leads to its failure in the eyes of the Pure Theory. However, it is possible to reinterpret natural law so that it is commensurate with a strict distinction between Is and Ought. Natural legal theory is, according to this view, possible, yet it is not taken at its word and this leads to the loss of most of its prestige and appeal. In our reinterpretation we start from the problem identified above, namely that no normative order can be created the way

ist. . . . Die Tatsache des Erstrebens eines Zieles bildet also . . . die einzige Ausnahme von der . . . Erkenntnis, daß aus Tatsachen keine Normen abgeleitet werden können.' Verdross (1971) *supra* note 71 at 98–99 (emphasis added). Victor Kraft was a prominent member of the Vienna Circle of Logical Positivism.

108 Kelsen (1979) *supra* note 12 at 8 (Ch 2).

109 Kelsen (1979) *supra* note 12 at 8–9 (Ch 2).

110 Kelsen (1979) *supra* note 12 at 7–15 (Chs 2–4).

111 Robert Walter, Die Rechtslehren von Kelsen und Verdroß unter besonderer Berücksichtigung des Völkerrechts, in: Robert Walter, Clemens Jabloner, Klaus Zeleny (eds), Hans Kelsen und das Völkerrecht. Ergebnisse eines Internationalen Symposiums in Wien (1.–2. April 2004) (2004) 37–49 at 48.

112 Hans Kelsen, Die Idee des Naturrechtes, 7 Zeitschrift für öffentliches Recht (1927) 221–250, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 245–280 at 253.

natural law theory wants to create norms. A meta-norm of norm-creation is needed yet is missing; natural law theory deduces its norms from facts alone. Kelsen does not dispute that there can indeed be normative orders that are not legal, even one called 'natural law'. But in order to be *positive* norms, they have to be the sense of a real act of will; a human has to will them. This does not mean exchanging one fact (human nature) for another (human will), because a norm as a sense of an act of will is only the positivity of a norm, not its validity as a norm. However – and this is perhaps a crucial, but overlooked, argument of the Pure Theory – norms (positive or otherwise) are always created by human behaviour, even if there may be ideological 'glossing over' in the manner of presupposed transcendent authorities. This is the core of the re-interpretation of natural law and we will return to it shortly.

Before that, however, we need to mention Kant's 'practical reason', which is equivalent to Aristotle's *nous praktikos* (and therefore relevant for Verdross). Ostensibly, this is the theoretical construct that makes a true *Vernunftrecht* possible. Practical reason, the self-contradicting conjunction of cognition and volition,[113] necessarily abolishes the dichotomy of Is and Ought. For Kant, practical reason is equivalent to volition,[114] because he acknowledges that norms can only be created through an act of will.[115] Yet on the other hand, he distinguishes reason as cognition from will as *Begehrungsvermögen*. However, reason can only influence will if will is distinguished from reason. If practical reason only cognises norms, but does not create them, it is irrelevant as a 'source' of natural law or of any norms. Kantian practical reason is the result of the admixture of two categorically different faculties in the truest sense of the word.[116]

> Because human reason is a faculty of cognition or the ability to think, the norms of the so-called *Vernunftrecht* cannot be created by reason. . . . Reason as moral law-maker is the central ideal of Kant's ethics. This reason, however, is what Kant calls *practical reason* and it is – like divine reason – at the same time thought and will, and is nothing but . . . divine reason in man . . .[117]

If, therefore, all norms are necessarily created by humans and if positive norms are the sense of an act of will, what are non-positive norms, e.g. norms of natural law? Kelsen's reinterpretation is that humans 'create' non-positive norms by

[113] Kelsen (1979) *supra* note 12 at 6 (Ch 1 IX d). 63 (Ch 18).

[114] Kant (1788) *supra* note 66 at A 96, AA V 55.

[115] Kelsen (1979) *supra* note 12 at 63 (Ch 18); Immanuel Kant, Metaphysik der Sitten (1797) AA VI 226.

[116] Kelsen (1979) *supra* note 12 at 64 (Ch 18).

[117] 'Da die menschliche Vernunft ein Erkenntnis- bzw. Denk-Vermögen ist, können die Normen des sogenannten Vernunftrechts nicht durch die Vernunft gesetzt sein. . . . Die Vernunft als moralischer Gesetzgeber ist der Zentralbegriff der Kantischen Ethik. Aber diese Vernunft ist nach Kant die *praktische Vernunft*, und diese ist – wie die göttliche Vernunft – zugleich Denken und Wollen, und ist . . . die göttliche Vernunft im Menschen . . .'; Kelsen (1979) *supra* note 12 at 6 (Ch 1 IX d) (emphasis on names removed).

thinking them – by an act of cognition (*Denkakt*) rather than an act of will – by presupposing an act of will that does not exist in reality:

> I can think of a norm not created by any authority in reality, which is not the sense of a real act of will present in reality. But I can think of such a norm only as the sense of a *presupposed* act of will. I can think of a norm in such a way *as if* it had been enacted by an authority, even though it has not been, in fact, created, [even though] there is in fact no act of will whose sense is [the norm]. The basic principle of 'no norm without an authority creating it' remains valid, even if the authoritative act of will whose sense is the norm, is feigned. . . . In general terms: No Ought without volition – even if volition is feigned.[118]

These norms are 'thought-up' or fictional (*gedachte* or *fingierte*) norms,[119] because they operate only on the fiction that there is an act of will. A scholar thinks up a normative order and feigns the act of will (i.e. thinks *as if* the norms were the sense of acts of will) despite there not being such an act of will.[120] The two types of normative order[121] are both valid and both exist in the ideal realm, but positive normative orders exist as the sense of *real* human acts of will[122] (positive norm-creation), while fictional normative orders are the creation of humans who *think up* that normative order.

This has consequences. Positive normative orders are dynamic, while fictional normative orders are static. In a dynamic order, the norms on norm-creation authorise humans to set acts of will whose sense can become positive norms of that normative order. The principle of unity binding together a normative order (*Einheitsbezug*) is different in a static system. The *Grundnorm* is to the other norms like a general term to other terms subsumable under it. All other fictional norms are *a priori* contained in the *Grundnorm*.[123] The connection is not made by authorising norms, but by content,[124] thus is the logical deduction of general and specific terms.

[118] 'Ich kann mir eine Norm denken, die von keiner Autorität tatsächlich gesetzt wurde, der Sinn keiner realen, in der Wirklichkeit vorhandenen Willensakte, ist. Aber ich kann mir eine solche Norm nur als den Sinn eines von mir *mitgedachten* Willensaktes denken. Ich kann mir eine Norm so denken, *als ob* sie von einer Autorität gesetzt wäre, obgleich sie tatsächlich nicht gesetzt wurde, es tatsächlich keinen Willensakt gibt, dessen Sinn sie ist. Der Grundsatz: Keine Norm ohne eine normsetzende Autorität, bleibt aufrecht, auch wenn der autoritäre Willensakt, dessen Sinn die bloß gedachte Norm ist, fingiert ist. . . . Ganz allgemein formuliert: Kein Sollen ohne ein – wenn auch nur fingiertes – Wollen.' Kelsen (1979) *supra* note 12 at 6 (Ch 1 IX c).

[119] Kelsen (1979) *supra* note 12 at 6 (Ch 1 IX d), 187–88 (Ch 58 XI).

[120] Kelsen (1979) *supra* note 12 at 187 (Ch 58 XI).

[121] Verdross (1923) *supra* note 16 at 77, referring to Bergbohm as having first made the distinction.

[122] Clemens Jabloner, Kein Imperativ ohne Imperator. Anmerkungen zu einer These Kelsens, in: Robert Walter (ed.), Untersuchungen zur Reinen Rechtslehre II. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1988 (1988) 75–95 at 77.

[123] Hans Kelsen, Naturrecht und positives Recht. Eine Untersuchung ihres gegenseitigen Verhältnisses, 2 Internationale Zeitschrift für Theorie des Rechts (1927) 71–94, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 215–244 at 217.

[124] Kelsen (1960) *supra* note 7 at 198 (Ch 34 b).

How well this description fits natural law theory! Not only is the connection of norms by content, rather than authorisation, stressed in natural law theory, but there is also a logical deduction of norms from each other, something we have excluded for positive normative orders (Section 5.5). Therefore, since it can be said that 'the "positivity" [of a normative order] is the dynamic principle',[125] it is also true that '[t]he opposition between natural law and positive law can in a certain sense be portrayed as the opposition between a static and a dynamic normative system.'[126]

However, an admixture of the two types of normative order is not possible. A positive normative order can only contain positive norms (bar *Grundnorm*, see below and Chapter 7) and its norm-creation can only work by authorising norms and actual acts of will, not by static deduction. In contrast, a fictional normative order can only contain norms thought up by presupposing an act of will in an act of thought. Its norm-'creation' is more accurately a deduction of 'norms' (better: 'contents') contained in the thought-up norm. If a theory of natural law, in order to make its normative order more closely connected to 'the real world', or in order to found positive law, must somehow incorporate the principle of delegation (authorising norms), 'that natural law suddenly mutates . . . into a positive legal order',[127] Kelsen warns. One could even be more pessimistic and argue that fictional normative orders cannot contain such connections.[128]

There are several pressing issues with this alternative of fictional normative orders, the very idea of which shows that Hans Kelsen was not a traditional positivist in any sense. One could start by asking, for example, what happens if the fictional object of that act of thought – the (fictional) act of will – could not possibly exist in reality. In other words, if the alleged act of will could not create a positive norm, would the fictional normative order still be a valid order? This is uncertain in the sense employed throughout this book, even though this question is not of great relevance for the resultant normative order. While the fictional act of will is not the constitutive element of a fictional normative order, the act of thought incorporating the fictional act of will is. Whether the act of thought presupposes a realisable act of will is not important, since it is the presence of the specially qualified act of thought that establishes a fictional normative order. Kelsen did not elaborate on fictional orders enough to give us any arguments for either side. But what about an act of thought without a fictional act of will? The answer is clear: mere cognition without volition (even if fictional and unrealisable)

[125] '[d]ie "Positivität" [einer Normenordnung] besteht geradezu in diesem dynamischen Prinzip'; Kelsen (1927b) *supra* note 123 at 218.

[126] 'Der ganze Gegensatz zwischen Naturrecht und positiven Recht läßt sich in einem gewissen Maße als Gegensatz zwischen einem statischen und einem dynamischen Normensystem darstellen.' Kelsen (1927b) *supra* note 123 at 218.

[127] 'wandelt sich das Naturrecht unversehens . . . zu einem positiven Rechte'; Kelsen (1927b) *supra* note 123 at 218.

[128] Kelsen (1927b) *supra* note 123 at 224.

means transcending the Is–Ought dichotomy. It is impossible to cognise norms without acknowledging that dichotomy.

One could also problematise the purity of the two types of normative order. Can fictional normative orders contain positive norms or can positive normative orders contain fictional (thought-up) norms? Can a norm of one type be spawned from a normative order of the other type? We have denied this possibility above, but a more detailed second look is in order at this juncture. There are four logical possibilities of norm-deduction, given two types of normative order.

(*a*) Can a positive norm be deduced from a fictional norm? No, a positive norm is the sense of an act of will authorised by an authorising norm. Authorising norms, however, cannot be fictional. The deduction of norms is not an authorisation to create norms. An authorising norm is not deducible in a static (fictional) system, because the relationship is one of content, not of delegation. Delegation is inconsistent with the idea of a fictional normative order and with natural law theory.[129] A positive norm requires a real act of will, so even if fictional normative orders could contain authorising norms, the positive norm created under them would require that act of will; it would not in any sense be 'deduced' from the fictional authorising norm. As mentioned above, static norm 'creation' can only produce fictional norms. The exception here is the relationship of the *Grundnorm* to the norms of its positive normative order, which is crucially different – its content conforming to the historically first constitution, not *vice versa* (see below).

(*b*) Can a positive norm be deduced from another positive norm? No, for the same reason: a positive norm requires a real act of will (Section 5.5).

(*c*) Can a fictional norm be deduced from a positive norm? The answer would generally be yes. In this case – Kelsen describes it in relationship to a general norm being deduced from a more general positive norm[130] – the result is not norm-creation available in positive normative orders. If a scholar imagines that the general norm 'it is prohibited to kill other humans' can be deduced from the even more general norm 'it is prohibited to harm other humans', the scholar is making a statement about the possible meanings of the more general norm and thus does not create a norm. Scholars presupposing a judge's act of will creating a judgment do not create a norm belonging to that normative order, for the authorising norm for judgments requires a real act of will of that judge. The scholar may indeed have created a fictional norm, but due to the non-fulfilment of the *Erzeugungsregel* of the relevant positive normative order, that fictional norm is not part of that positive order.

(*d*) Can a fictional norm be deduced from another fictional norm? Above we argued for that possibility, but the question could be asked whether it is possible to deduce norms from each other, even if they are fictional. Each and every norm's act of will, in order for a norm to count as separate norm within the fictional normative order, has to be included in the act of cognition creating the fiction.

[129] Kelsen (1927b) *supra* note 123 at 218, 224.

[130] Kelsen (1979) *supra* note 12 at 201–202 (Ch 58 XXII).

Given Kelsen's fundamental doubts about the possibility of logical contradiction in norms (Section 5.3.1), if we cannot know whether two norms contradict, how can we know when they do not and thus form part of the same static order? Would not the very existence of fictional normative orders be in doubt because of this? Again, even in this reinterpretation there are grave theoretical uncertainties.

The next issue with respect to natural law as a fictional (thought-up) normative order is its relationship to positive law. We have seen above that the deduction of positive norms from fictional norms is not possible. The *Grundnorm*, however, is a fictional norm of sorts. More precisely, it is the condition for the cognition of the normative order as normative order and thus conforms to the order, not the other way around. While it is the ultimate source of validity, it authorises any norm that one wishes to see as norm, whether the most pious and righteous moral norm or an absurd claim by some individual. *If* one wishes to cognise these as norms, one *must* presuppose a *Grundnorm*. Therefore, its foundation is only relative and hypothetical, not absolute (Chapter 7). As mentioned above, any normative order has to have a *Grundnorm*, even natural law. Any normative order therefore has a relative and hypothetical foundation. If it were possible to deduce a positive norm from a fictional normative order – which is highly uncertain and which was denied above – that fictional normative order, that figment of the theorist's imagination, is also only valid if we behave *as if* it were valid. There simply cannot be an absolute foundation. 'Even natural law theory can only give a provisional answer to the question of the source of validity of positive law.'[131]

One question remains. In many ways the most important question is how natural law can influence positive law. It is frequently the core of the natural lawyers' claim to an absolute foundation for all law that this hierarchically higher order can derogate from the lower (positive) order.[132] After what has been said throughout this section (and Chapter 5), however, the question loses much of its importance, because of the inherent theoretical limitations we have already established for inter-norm influencability. Natural legal systems can be valid (exist) as fictional normative orders in the heads of those who think them up. Yet the claims to be observed of two different normative orders are different and *a priori* equal. Thus any derogation is excluded because natural and positive law are two different normative entities.[133] Even within one normative order, the possibilities for inter-hierarchical derogation are highly limited. Even if a norm does not comply with its *Erzeugungsregel*, that non-compliance could only lead to non-membership in a particular normative order (Section 5.5.3.3). In our concrete case, if positive international law's validity could be based on natural law (which it cannot) and if international law would not comply with natural law's authorisation (if it could exist, which it cannot), then all that would happen is that from the viewpoint of

[131] 'Auch die Naturrechtslehre kann auf die Frage nach dem Geltungsgrund des positiven Rechtes nur eine bedingte Antwort geben.' Kelsen (1960) *supra* note 7 at 227 (Ch 34 j)

[132] Kelsen (1960) *supra* note 7 at 225 (Ch 34 i).

[133] Kelsen (1979) *supra* note 12 at 169 (Ch 57 V).

natural law international law would not be valid law. In other words, international law would not be part of natural law, which is what positivists argue for anyway.

Alfred Verdross and his version of a deductive natural law justification for international law and thus of its sources fail on a normativist-positivist account. However, one can agree with Lippold when he solicits sympathy for Verdross' position as one of Kelsen's former students who was equally aware of both sides of the divide:

> Taking Verdross as an example one can see how difficult it must be for a proponent of natural law theory to consistently apply a weak form of relativism. The temptation of wishful thinking, of including one's own moral values in positive law is [overwhelming]. From this perspective, Verdross' position . . . may very well earn more admiration than Kelsen's . . .[134]

6.2.3 Induction: Herbert Hart and the problem of law from facts

Why can it be argued that the theoretical challenges of induction are the same as those of the deductive method when these two approaches are so clearly different and even appear to be diametrically opposed? Why can it be argued that if either deduction or induction is consistently applied, they transcend the dichotomy of Is and Ought and thus make cognition of norms *as norms* impossible? One can do so because both sides of the positivism–naturalism divide are actually much closer than they appear and because both argue from an absolute and foreign element. From the Pure Theory's point of view both make the same sort of mistake. For this reason, the treatment of Herbert Hart's theory – and its application to international law by G.J.H. van Hoof – will be shorter than that of Alfred Verdross' natural legal designs.

In order to be able to speak of a *legal system* rather than a set of rules, Hart argues that one needs secondary rules, which are rules 'about [primary] rules'.[135] In particular, one needs a 'rule of recognition':

> This will specify some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.[136]

This may sound unconnected to our quest to find out how the sources of

[134] 'Am Beispiel von Verdross ist aber auch zu sehen, wie schwer es einem Anhänger der Naturrechtslehre fällt, einen schwachen Relativismus konsequent durchzuhalten. Groß ist die Versuchung des Wunschdenkens, die eigenen moralischen Bewertungen in das positive Recht hineinzutragen. So gesehen verdient Position eines Verdross . . . vielleicht größere Bewunderung als die Kelsens, . . .'; Rainer Lippold, Recht und Ordnung. Statik und Dynamik der Rechtsordnung (2000) 274 (emphasis removed).

[135] Hart (1961) *supra* note 36 at 91.

[136] Hart (1961) *supra* note 36 at 92.

international law are justified, but 'basis' and 'sources' are on the same line of argument and Hart himself acknowledges a close connection:

> Plainly, there will be a very close connection between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules . . .[137]

Upon introducing the idea of 'rules of recognition' in *The Concept of Law* (1961), Hart argues that the Rule of Recognition is merely good evidence that norms are valid. This is a bit like recommending to someone wishing to find Austrian or German domestic law to look at the Federal Law Gazette (*Bundesgesetzblatt*).[138] The Rule of Recognition, however, is more important than this. Conformity to it is the test for the validity of a primary rule;[139] in effect it is the source of that rule. 'We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.'[140] However, a foundation for the Rule of Recognition itself is not needed. It is not valid; it simply 'exists'. Unlike Kelsen, for whom validity and existence (in an ideal sense) are one and the same, Hart distinguishes between validity and existence. Whereas other norms correspond to it, the Rule of Recognition does not correspond to another norm.[141] 'No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply *accepted as appropriate* for use in this way.'[142]

For Hart, 'the question of whether a rule of recognition exists and what its content is . . . is regarded throughout this book as an empirical, though complex, question of fact.'[143] The justification shifts from finding another norm to a question of fact; Rules of Recognition come about through their acceptance by certain human beings in a society:

> If a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists.[144]

[137] Hart (1961) *supra* note 36 at 93.

[138] It needs pointing out, however, that the role of the Rule of Recognition as an epistemic tool in cognising 'law' needs to be distinguished conceptually from the Kelsenian idea of norms as interpretation of reality (Kelsen (1960) *supra* note 7 at 3–4 (Ch 4 a). The former relates to cognition of the 'law', while the latter is 'law' as shaping our view of reality.

[139] Hart (1961) *supra* note 36 at 92.

[140] Hart (1961) *supra* note 36 at 100.

[141] Norbert Hoerster, Kritischer Vergleich der Theorien der Rechtsgeltung von Hans Kelsen und H.L.A. Hart, in: Stanley L. Paulson, Robert Walter (eds), Untersuchungen zur Reinen Rechtslehre. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/86 (1986) 1–19 at 8; Matthew Kramer, The rule of misrecognition in the Hart of jurisprudence, 8 Oxford Journal of Legal Studies (1988) 401–433 at 425–426.

[142] Hart (1961) *supra* note 36 at 105–106 (emphasis added), cf. also 245–246.

[143] Hart (1961) *supra* note 36 at 245.

[144] Hart (1961) *supra* note 36 at 246.

We are asked to study which rules are *in fact* seen as creating rules, aptly exemplified by the English constitution where Parliament and the courts are simply recognised as law-givers, which makes them the valid law-givers.

What does this mean and why would one adopt such a theory; what are its problems? The key to Hart's understanding of the Rule of Recognition is the difference between the internal and external views of a legal system. In effect, acceptance of a legal system as law means internalisation of behavioural standards.[145] This is not the place to go into detail regarding this aspect of Hart's theory; suffice to say that his view of what it means to be obligated by a rule is different from Kelsen's in that Hart defines it as 'reasons for action'. 'Acceptance is rather something like the *acceptance of a reason* to act in conformity with a norm by the person accepting.'[146]

The problem with this and similar approaches[147] is that they mix the description of reality and prescription. This approach in effect does not acknowledge the nature of norms as an *ideal*, the Ought. According to Herbert Hart, the fact of acceptance is necessarily the basis of validity of a constitution, since all the various (and different) Rules of Recognition are always those accepted as such. This argument presupposes just the same type of absolute and external standard as natural law does. Just as in natural law doctrines, the essential dichotomy[148] of Is and Ought is transcended. Norbert Hoerster's interjection that Hart does not deduce Ought from Is, but that 'he rather understands a norm-descriptive Ought as *a specific form of Is*'[149] cannot solve the problem, because it is the admixture of the dichotomic categories (not merely their deduction, but also their identification) that transcends the dichotomy. If Ought is reduced to Is, the effect is the same as if Ought is ultimately based on Is.[150]

By placing a fact (i.e. acceptance) as the ultimate arbiter, Hart psychologises norms as matters of belief. The argument that in the end the Rule of Recognition and, with it, the 'existence' of law 'is a matter of fact'[151] is a negation of the very possibility of Ought. Ideals cannot be deduced from reality alone; all law needs to be based on a law authorising its creation. 'A norm can base its validity

145 Hoerster (1986) *supra* note 141 at 12.

146 'Die Akzeptanz ist vielmehr so etwas wie die *Anerkennung eines Grundes* zu normkonformen Verhalten seitens der Akzeptanten.' Hoerster (1986) *supra* note 141 at 12.

147 Charney, Mendelson and Walden adopt a methodology explicitly based on Hart: Jonathan Charney, Universal international law, 87 American Journal of International Law (1993) 529–551; Walden (1978) *supra* note 36; Maurice H. Mendelson, The formation of customary international law, 272 Recueil des Cours 1998 (1999) 155–410.

148 Kelsen (1979) *supra* note 12 at 44–46 (Ch 16 I). In a similar, but unspecific vein: Kramer (1988) *supra* note 141 at 432.

149 'er versteht vielmehr ein normdeskriptiv . . . beschriebenes Sollen, als . . . *eine spezifische Seinsform*'; Hoerster (1986) *supra* note 141 at 17 (emphasis added).

150 One must not confuse Hoerster's statement with the Kelsenian idea of norms' 'existence' in an ideal realm – the ideal idea. Hart sees norms as a form of Is, whereas Kelsen sees norms' existence *as Ought*, as an *ideal, not as a real, ontology* (Chapter 7).

151 Hart (1961) *supra* note 36 at 107, 245.

only on a norm.'[152] This is one of the lasting accomplishments of Hans Kelsen's theoretical work. Kelsen would not be able to stop at the level of 'material constitutional norms', because one must not base a legal system's validity on empirical facts. Rather, Kelsen accepts the fact that the foundation will have to be laid in a self-referencing epistemological assumption: in order to cognise norms one has to think as if they were valid (Chapter 7). Thus, Hartian positivism cannot found the normative character of positive norms, just as a (reinterpreted) natural law theory cannot conceive of law's positivity. Hart's statement that *The Concept of Law* 'may also be regarded as an essay in descriptive sociology'[153] dovetails neatly with the predicable Kelsenian critique that seeing law as fact is not legal science, but sociology.[154]

We will next discuss Hartian international legal doctrine. Hart is known for arguing that international law is not a fully developed legal system, but merely a 'set of rules', i.e. without a Rule of Recognition and without any form of secondary rules. Hart did not see international law as sufficiently developed to presume that this system had secondary rules. He argues that secondary rules are a luxury found in 'developed' legal systems but not in primitive ones like international law.[155] The factual basis of law is transferred to the primary rules themselves. Its rules are valid 'simply because "they are accepted and function as such".'[156] Hart denies the necessity (rather than the possibility) for 'rules' to be within a developed system; he denies the necessity of a Rule of Recognition providing unity to rules and making it a system:[157]

> [W]e shall question the assumption that it must contain such an element . . . why should we make this *a priori* assumption . . . and so prejudge the actual character of the rules of international law? For it is surely conceivable . . . that a society may live by rules imposing obligations on its members as 'binding', even though they are regarded simply as sets of separate rules, not unified by or deriving their validity from any more basic rule. *It is plain that the mere existence of rules does not involve the existence of such a basic rule.*[158]

In contrast, G.J.H. van Hoof has applied Herbert Hart's theory of 'secondary rules of recognition' to international law in *Rethinking the Sources of International Law* (1983). Van Hoof is not convinced by what he calls Hart's presumption that international law has such a simple structure. Rather, he turns the tables on Hart. The alleged non-necessity of Rules of Recognition becomes a presumption that a set of rules has none, which is just as speculative as the opposite assumption;[159] he

[152] '*Nur eine Norm* kann der Geltungsgrund einer anderen Norm sein.' Kelsen (1979) *supra* note 12 at 206 (Ch 59 I c) (emphasis added).
[153] Hart (1961) *supra* note 36 at vii; Kramer (1988) *supra* note 141 at 409.
[154] Kelsen (1960) *supra* note 7 at 89–93 (Ch 21).
[155] Hart (1961) *supra* note 36 at 230.
[156] Hoof (1983) *supra* note 3 at 53, citing Hart (1961) *supra* note 36 at 230.
[157] Hart (1961) *supra* note 36 at 226–231 (Ch X.5).
[158] Hart (1961) *supra* note 36 at 228 (emphasis added).
[159] Hoof (1983) *supra* note 3 at 53–56.

points out that Hart's problem is the non-necessity of a foundation of validity for norms itself.

Hart is merely being true to his identification of Is and Ought when he argues against Kelsen's *Grundnorm* that '[it] seems a needless reduplication to suggest that there is a further rule to the effect that the constitution [is] to be obeyed'.[160] That is why the Rule of Recognition cannot be reinterpreted as a *Grundnorm* of sorts. Despite Hart's claim, the Rule of Recognition does not actually provide validity (strictly speaking) to other norms and is merely of evidential value. In contrast, Kelsen thinks that the *Grundnorm* is a logical necessity for all normative systems:

> The basic norm of a positive moral or legal order is . . . not a positive, but merely a hypothetical norm, that is, a fiction . . . Only *if* it is presupposed . . . can the contents of these significations be seen as binding moral or legal norms.[161]

Hart's internal consistency[162] is clearly articulated, for Hart's criticism of Kelsen's *Grundnorm* as redundant reduplication is based on the idea that Ought is caused by the fact of acceptance alone. Since the *Grundnorm* is just a concretisation of the Is–Ought dichotomy (Section 7.2), and since Hart does not admit to such a dichotomy, he does not seem to need a *Grundnorm* either.

Yet every normative order necessarily has a *Grundnorm*, because only through it can we cognise the alleged norms as norm. Hart fundamentally disagrees about the nature of the basic norm, for it is not the *Grundnorm* that is imposed upon or that determines the normative order, but the *Grundnorm* is a presumption tailor-made for a normative order *in order to allow for the cognition of norms*. Thus it is also difficult to see how Hart can call the rules that make up 'international law' a 'set of rules' – an identifiable group of norms – when the unifying element is missing:

> In the simpler case we cannot ask: 'From what ultimate provision of the system do the separate rules derive their validity or "binding force"?' For there is no such provision and need be none. . . . It is not the case that there is some mystery as to why the rules in such a simple social structure are binding, which a basic rule . . . would resolve. The rules of the simple structure are, like the basic rule of the more advanced systems, binding if they are accepted and function as such.[163]

This argument is contradictory, for either (if there is no ultimate provision) a 'set' is not in any way unified as normative order and therefore not a 'set' or 'system',

[160] Hart (1961) *supra* note 36 at 246.

[161] 'Die Grundnorm einer positiven Moral- oder Rechtsordnung ist . . . keine positive, sondern eine bloß gedachte, und das heißt eine fingierte Norm . . . Nur *wenn* sie vorausgesetzt wird . . . können diese Sinngehalte als verbindliche Moral- oder Rechtsnormen gedeutet werden.' Kelsen (1979) *supra* note 12 at 206 (Ch 59 I c–d). (The second sentence is located a few lines above the first in the original.)

[162] Hoerster (1986) *supra* note 141 at 10.

[163] Hart (1961) *supra* note 36 at 229–230.

or every rule of any normative structure has acceptance as its basis of validity and all rules are thus united, whether in a 'set' or 'system'.

G.J.H. van Hoof is disconcerted with this inconsistency in Hart's theory. He proposes to adopt the Rule of Recognition for international law and adapts Hart's system accordingly. Van Hoof himself sees 'consent' as international law's Rule of Recognition:

> This means that at the same time that the independence of States as a basic feature of international society and the ensuing lack of a hierarchically organised law-making body . . . results in one of the most fundamental aspects of the international law-making process, *i.e.* that the consent of States has to be regarded as the constitutive element of rules of international law. Consequently, in order to answer the question whether a given rule is binding upon a State as a rule of international law the point of departure must be whether or not that State has consented to the rule concerned.[164]

The problems of van Hoof's adaptation are the same as Hart's original, even though van Hoof manages to avoid the problem of ignoring international law. With van Hoof's clear inductive expression of Hart's theory, we can see how this method of founding the sources of international law is problematic. If we were to apply induction to customary international law, for example, we would be trying to prove the existence of custom-creating norms by the 'practice of states' alone. The proof for the formula 'customary international law is state practice plus *opinio iuris*' would be obtained by a look at facts, in this case at state behaviour. This, however, begs the question, for we would presuppose a method of proof which itself is the object of the investigation. If the explanation of the status of the law is modelled on what its subjects actually do, how can custom-based rule-conforming behaviour be distinguished from the violation of a customary norm?[165] If all behaviour can transform law, the concept of law as an ideal, as something reality can be measured against, would be negated. How could one distinguish between fact and law when every fact is made law? *Ens et bonum convertuntur* returns from its scholasticist grave.

Hart's theory is related to natural legal theory and there are important parallels in the matter of the bases or foundations of the legal system and of the sources of law between Hart and Verdross. This is not Hart's 'minimum content of natural law',[166] but a far more subconscious expression of underlying methodological communalities. The denial of the duality of Is and Ought is the same with both Verdross and Hart, even though it is an obscure denial with both. While Verdross' theory can at least be reinterpreted to make it consistent with the dichotomy, it is much more difficult (if not impossible) to do so with inductive theories, such as Hart's. Their reliance upon fact and fact alone, rather than some 'Ought inherent

[164] Hoof (1983) *supra* note 3 at 76.
[165] Kramer (1988) *supra* note 141 at 407–408.
[166] Hart (1961) *supra* note 36 at 189–195 (Ch IX.2).

in fact', makes them able to conceive of the reality of positive law, but not of the normativity of norms.

A variation of the inductive method can be found in Georg Schwarzenberger's *The Inductive Approach to International Law* (1965). The purity of the title is not reflected within and it can be considered to be not really inductive. It is not inductive if one sees the basis of validity as the object of the method; it is inductive if one wants a working method for the identification of norms. Schwarzenberger simply assumes Article 38 to be the relevant provision on which to build his theory, which is a deductive step. The inductive approach needs a referent by which to check the results of the induction or, rather, to clarify the 'arbitrary origin' of the induction. In order to do this Schwarzenberger postulates Article 38 as 'having its sheet-anchor firmly embedded in the near-universally expressed will of the organised world society'.[167] This *Überbau* of 'law-creating processes and law-determining agencies'[168] is deduced, not induced – it is the dogma Schwarzenberger does not question or validate. While the content of this *Überbau* is not objectionable from a strictly inductive viewpoint, the method employed to know it is.

The problem which this section set out to uncover is only acute if induction is used as determining the basis of validity of international law, rather than as an *epistemological tool* for the ascertainment of what is *lex lata*. A superior law must be determined deductively for the findings to be stable. Schwarzenberger did this, although he did not seem to realise that even if he could rationalise why he chose Article 38, the question remains why the reason for so choosing should be a valid one. Of course, this element of deduction opens up the question that plagues all deduction (Section 6.2.2).

Therefore, as against the inductive approach, it can be argued that it is redundant, since we cannot discover by induction the higher echelons of law merely by looking at behaviour and claims alone. If we purport to know or assume these higher echelons, we can deduce (with a limited role for induction) the lower level without constructing a system from scratch by way of induction. With the Pure Theory one can argue that the key lies in a combination of positivity and normativity rather than in the exclusion of one element.

6.3 The Pure Theory's constitutional theory

Having concluded our brief survey of polarised theoretical bases for the sources of international law and having surveyed their answers, the question may be posed how the issue would be approached under the auspices of the Pure Theory of Law. How does the Vienna School approach the issue of the sources of law? Would it not run into similar problems in their justification? Yes and no, because the difficulties encountered by Kelsen are not a function of theoretical inconsistency as with the approaches in Section 6.2. The uncertainty is a matter of the law

[167] Georg Schwarzenberger, The inductive approach to international law (1965) 126.

[168] Schwarzenberger (1965) *supra* note 167 at 129 and 19 *et seq*.

itself and its cognition or cognisability. The task here, therefore, will be to uncover the uncertainty in the constitution of international law while taking the Pure Theory of Law as a framework. Thus, we will analyse the Pure Theory's constitutional theory in order to find out where constitutional uncertainty lies.

6.3.1 The *Stufenbau* determines the sources of international law

The answer of the Pure Theory to the question 'Where do the sources of law come from?' is clear. For this theory of normative orders which are hierarchically ordered, a 'source of law' is the meta-law on law-creation,[169] irrespective of where that norm resides within the hierarchy. In other words, the source is the norm-function 'authorisation', even though we might not usually call authorising norms which hold a subordinate position within a normative order a source of law. If we combine the preliminary notion of 'constitution' as the highest echelon of authorising norms in a given normative order (in international law traditionally treaty law and customary law)[170] with the notion of the hierarchy of norms (*Stufenbau*)[171] (Sections 5.5.2 and 6.1.1), the correct question to ask in response to 'Where do the sources come from?' is, 'What norm of international law authorises the creation of the norms that authorise the creation of (for example) customary international law?'[172] The Pure Theory of Law enjoins us to ask for and find positive norms of international law that create source-law, such as the law on custom-creation (Chapter 3).[173]

How we are to proceed depends upon the answer we can give to that question. How uncertain the constitution of international law is depends (*a*) upon whether we can give an answer to that question with any degree of certainty (Section 6.3.3) and (*b*) whether definite answers to the question lead to further theoretical problems and make the highest normative ontology of international law uncertain (Sections 6.3.1 and 6.3.2). The answer, if we can give it, can take two forms, for either we find a positive norm authorising source-creation or we do not.

If there is a norm of international law authorising the creation of the sources of international law, i.e. a meta-meta-law of source-creation, it would probably fit Kelsen's 'historically first constitution' (*historisch erste Verfassung*).[174] Despite the name, that specific form of constitution is not only historically but also logically prior in the hierarchy of validity:

> If one asks why norms which regulate the creation of general norms are valid, one may

[169] Kelsen (1952) *supra* note 11 at 303; Kelsen (1960) *supra* note 7 at 238–239 (Ch 35 e); Petev (1984) *supra* note 15 at 273.
[170] Kunz (1934) *supra* note 8 at 412.
[171] Verdross (1923) *supra* note 16 at 129.
[172] Rub (1995) *supra* note 20 at 312–313.
[173] Verdross (1926) *supra* note 14 at 43.
[174] Kelsen (1952) *supra* note 11 at 411.

> find a yet older constitution, i.e. the validity of the present constitution is based in its being created according to the provisions of a previously valid constitution by way of an amendment of the constitution. Thus at the end one comes to the historically first constitution, which cannot be founded in a positive norm, a constitution which came into validity through a revolutionary process. If one asks why the historically first constitution is valid, the answer can only be that the validity of this constitution, the assumption that it is a binding norm, must be *presumed*.[175]

The passage quoted exhibits all the relevant elements of a historically first constitution we need to transpose it to the realm of international law. The historically first constitution is the highest *positive* norm of a positive normative order. Because it is historically first and hierarchically highest, it is not derived from a previous (higher) norm – if that were so, it would not be the highest norm – and thus its creation cannot be based on a previous constitution. Its creation was revolutionary (or at least 'originary').

Take the Austrian post-1945 order as an example. In a 'law' enacted just after the war ended, Austria's main political parties declared that the 1920/1929 constitution was reinstated.[176] Since that act itself did not conform to the provisions of that constitution, they actually created a new constitution identical in content with the old constitution. The validity of the new constitution, however, is based on the norm created by the parties in 1945, not by the original enactment of the constitution in 1920. Despite its claims, Austria's post-1945 constitutional order is based on a revolutionary act and the declaration of reinstatement by the parties is its highest positive norm. As Kelsen notes, where a positive norm cannot be based in another positive norm, its validity can only be presupposed if one wants to perceive it as a norm. The historically first constitution is thus directly below the *Grundnorm* of a given normative order (*Grundnormunmittelbarkeit*).[177] In

[175] '[F]ragt man nach dem Geltungsgrund der Normen, die die Erzeugung der generellen Normen regeln ... so gerät man vielleicht auf eine ältere Staatsverfassung; daß heißt: man begründet die Geltung der bestehenden Staatsverfassung damit, daß sie gemäß den Bestimmungen einer vorangegangenen Staatsverfassung im Wege einer verfassungsmäßigen Verfassungsänderung ... zustande gekommen ist; und so [gerät man] schließlich auf eine historisch erste Staatsverfassung, die nicht mehr auf eine [positive] Norm zurückgeführt werden kann, eine Staatsverfassung, die revolutionär ... in Geltung getreten ist ... [F]ragt man nach dem Grund der Geltung der historisch ersten Staatsverfassung ... dann kann die Antwort ... nur sein, daß die Geltung dieser Verfassung, die Annahme, daß sie eine verbindliche Norm sei, *vorausgesetzt* werden muß ...'; Kelsen (1960) *supra* note 7 at 203 (Ch 34 c). *Nota bene*: 'Staatsverfassung' ('constitution of a state') has been deliberately mistranslated only as 'constitution' in order to show that Kelsen's theory is not limited to the municipal realm. Due to the lack of succinctness of the German original, the translation is less literal here.

[176] The situation is more complicated, but essentially as portrayed here, see Art I, III Unabhängigkeitserklärung, in: Proklamation [über die Selbständigkeit Österreichs], StGBl 1945/1; Art 1 Verfassungsgesetz vom 1. Mai 1945 über das neuerliche Wirksamwerden des Bundes-Verfassungsgesetzes in der Fassung von 1929 (Verfassungs-Überleitungsgesetz – V-ÜG), StGBl 1945/4.

[177] Métall (1931) *supra* note 9 at 421.

our case the post-1945 Austrian legal order is valid only if we presuppose the *Grundnorm*: 'the norms of the political parties are valid norms' or something to that effect.

But why would we need to discuss the notion of a 'historically first constitution' in a book dealing with international law? Surely, one might object, this is good and proper in countries with a written constitution, but what relevance does it have for international law which clearly does not have anything approaching a constitution, let alone a 'first' constitution? The issue is dealt with here for two reasons. First, any normative order *necessarily* has a historically first constitution, just as any order has *a* constitution in the theoretical sense. The question for international law is merely what exactly it looks like (Section 6.3.2). Second, in *Universelles Völkerrecht* (1984) Alfred Verdross and Bruno Simma have used this notion in their section on sources of international law.[178] Given Verdross' knowledge of and respect for Kelsen, it is likely that he was aware of the similarity; thus it apposite to discuss their idea here.

In a 1973 publication, at the end of a historical argument regarding the development of international law, Verdross claims that history shows that:

> their original norms were thus neither created by a formal treaty nor by customary international law, *but through informal consensus of the then powerful entities*, where they acknowledged certain principles of law as binding. . . . Still, these constitutional norms are not a series of hypothetical norms, but *actual* norms constituting the basis for customary international law and formal treaty law.[179]

Verdross and Simma continue in 1984: 'The originary source of international law – international consensus – is not only the historical basis of the formalised methods of creation [in Article 38], but is still superimposed upon them.'[180] They use consent as a historically first constitution in Kelsen's sense, even if only implicitly. Consent as foundation for the sources of international law is a relatively widespread and well-established theory,[181] but we will not discuss it in the abstract, only in the specific form Verdross and Simma advocate. They consider 'consensus' to be originary and that it came into being *uno actu* with the coming-into-existence

[178] Verdross and Simma (1984) *supra* note 23 at 59–60, 324–327; cf. also: Verdross (1973) *supra* note 44 at 20–21. *Contra*: Bleckmann (1978) *supra* note 42; Fastenrath (1991) *supra* note 27 at 112–113.

[179] 'ihre ursprünglichen Normen sind also weder durch einen förmlichen Staatsvertrag noch durch die völkerrechtliche Übung, *sondern durch einen formlosen Konsens zwischen den damaligen Machthabern entstanden*, durch den sie bestimmte Rechtsgrundsätze als rechtsverbindlich anerkannt haben. . . . Gleichwohl bilden jene Verfassungsnormen kein bloß hypothetisches, sondern ein dem VGR und dem förmlichen Vertragsrecht *tatsächlich* zugrundeliegendes Normengebilde.' Verdross (1973) *supra* note 44 at 20–21 (emphasis added); Verdross and Simma (1984) *supra* note 23 at 59.

[180] 'Die originäre Völkerrechtsquelle des zwischenstaatlichen Konsenses liegt diesen formalisierten Erzeugungsarten [in Artikel 38] aber nicht nur historisch zugrunde, sondern überlagert sie nach wie vor.' Verdross and Simma (1984) *supra* note 23 at 324.

[181] To name only very few: Charney (1997) *supra* note 56; Corbett (1925) *supra* note 31; Hoof (1983) *supra* note 3; *contra*: Métall (1931) *supra* note 9 at 424.

of the modern state.[182] If one were to try to express this thought in terms of the Pure Theory one would say that this is the first positive norm of the constitution of international law, not itself based upon another positive norm.

But there are problems with re-reading Verdross and Simma in a Kelsenian light. While they consider the sources of international law to have been derived from consensus, they leave it open whether they mean to construct a hierarchical normative order. It seems they do not conceive of the historically first constitution as a meta-meta-law in the sense employed by the Pure Theory of Law. Also, they warn against misunderstanding 'consensus' as the source of *validity* of international law.[183] While this was clearly meant to distinguish their position from crude voluntarism, the other consequence is a delimitation also from the Pure Theory, for which 'source of law' and 'source of validity' are necessarily identical.

We may not be able to take Verdross' and Simma's specific theory on board in a study of the sources of international law basing itself upon the Pure Theory of Law, but what if we were to argue that consensus is the historically first constitution of international law? In this case consensus, as a positive norm of international law, would have authorised the creation of custom and treaty as the formal sources of international law. International law's *Grundnorm* would authorise consensus to create norms of international law and everything would work out – except that we would first have to prove that consensus is the originary constitutional norm of international law. That is where certainty ends and the problems begin: how can we prove this contention? How can we prove that there was a positive act of will creating, say, customary international law, at some point in the past? That is the point of a historically first constitution in the positivist theoretical edifice of the Pure Theory. All positive norms have to be *positus* (a product of human willing) and cannot be presupposed.[184] Our epistemological horizon is too limited to answer this question with more than a presumption. As long as we are presupposing, we could presuppose any norm to found international law, even absurd ones. We need to prove positivity, because mere fictional norms (Section 6.2.2) cannot found the validity of sources of *positive* law.

If, on the other hand, the answer to the question posed above – whether we are able to find a norm of international law authorising the creation of its sources – is negative, the argument stops at the *Grundnorm*. If, for example, the creation of customary international law is not authorised by a positive norm of international law, we must presuppose its validity in order to perceive customary international law as law, which means presupposing the *Grundnorm*. Apart from this authorising function, the *Grundnorm* also unifies the norms under it into one normative order.[185] While the notion of the *Grundnorm* will be discussed in Chapter 7, we

[182] Verdross (1973) *supra* note 44 at 20.
[183] Verdross and Simma (1984) *supra* note 23 at 327.
[184] Fitzmaurice (1958a) *supra* note 25 at 163–164.
[185] Métall (1931) *supra* note 9 at 416.

need to point to a problem we encounter when we presuppose it at an early stage in international law.

The basic norm unifies, but it also excludes every norm outside its purport. Furthermore, the *Grundnorm* cannot fulfil the same function as a positive meta-meta-norm. Because it is presupposed by the observer, rather than created as a positive norm, its content is determined by 'its' positive normative order, rather than *vice versa*. This means that legal scholars cannot unify two source-norms by simply presupposing a *Grundnorm* on top – it is too much of a stretch for the concept. In other words, the presupposition *Grundnorm* cannot *create* unity where none is in positive law. '[The *Grundnorm*] limits itself to appointing the law-creative authority and its content is thus by its very terms limited to singularity.'[186]

A far worse problem is the potential this has for fragmenting normative orders. If the *Grundnorm* can be presupposed at any stage – if, therefore, positive norm-creation is 'autonomised' (Section 5.5.3.3) – we do not have a fixed line where one normative order ends and another begins. It needs to be stressed that this is not the Pure Theory of Law's fault, but a feature of all *positive* normative orders which the Pure Theory helps to see clearly. Positive norm-creation has the tendency to be fragmenting, because a superior norm authorising norm-creation as one of the two elements needed for the creation of a positive norm can be 'supplanted' by presupposing the *Grundnorm*. The second element – a positive act of will[187] – if existent, could thus be regarded as sufficient for norm-creation. The observer decides where the *Grundnorm* is to be 'placed' and thus becomes the maker of normative ordering. This is uncertainty on the highest level – the divisibility of normative orders due to the ease with which the *Grundnorm* is presupposed conspires with the inability of the *Grundnorm* to combine positive sources to make the sources of international law uncertain.

6.3.2 The architecture of the constitution of international law

What is the upshot of this discussion? We now know that we can only enquire how the sources of international law *could* be arranged. We can also ask how scholars in the past have arranged them. This 'arrangement' of the sources of international law is different from the question posed in Chapter 5, however. We are not asking about derogability, but about which forms of norm derive their validity from which norms. In other words, we are asking about the hierarchy of legal conditionality (*Stufenbau nach der rechtlichen Bedingtheit*) in the relationship of the meta-norms of international law-creation to each other. What form can this architecture take? Logic allows us to formulate three options for the normative order(s) 'international law'.

[186] '[Die Grundnorm] beschränkt sich auf die Einsetzung der Rechtssetzungsautorität und ist deshalb begrifflich schon ihrem Inhalt nach immer nur singulär.' Jürgen Behrend, Untersuchungen zur Stufenbaulehre Adolf Merkls und Hans Kelsens (1977) 28.

[187] Rub (1995) *supra* note 20 at 311.

(1) One source of international law is subordinate to another or one source of international law is the supreme source and origin of all international law. All other sources are derived from the supreme source, because that super-ordinate source contains a norm authorising the creation of subordinate sources. All three sources mentioned in Article 38(1)(a)–(c) ICJ Statute have in the past been proposed as the supreme source of international law.[188]

(*a*) Alfred Verdross, in his *Die Verfassung der Völkerrechtsgemeinschaft* (1926), as well as the early Kelsen of the *Das Problem der Souveränität* (1920),[189] base their construct of the constitution on *pacta sunt servanda* as *Grundnorm*,[190] which is at once the basis for treaties and custom, because one is an express conclusion of a convention and the other is a tacit convention (*pactum tacitum*).[191] Strictly speaking, however, this construct does not propose one superior source, but two. The creation of treaties and customary law is authorised by the same *Grundnorm*.[192] This construct is problematic not only because of the difficulties encountered in construing customary international law as tacit pact (Section 3.2), but also that the *Grundnorm* as epistemological tool is not able to create unity (Section 6.3.1).[193]

(*b*) In *Principles of international law* (1952) Hans Kelsen postulates that customary international law is the highest source. International law's *Grundnorm* is: 'The states ought to behave as they have customarily behaved.'[194] The norm '*pacta sunt servanda*', as the *Grundnorm* of the subordinate legal order 'international treaty law', is merely a norm of positive (customary) law.[195] The problem with customary law as superior source is that it cannot integrate other norms as norms, because they cannot form a factual pattern of usages (Section 3.2.5).

(*c*) From about 1931 onwards, Verdross claims that general principles of law are the fount of all other sources:

> We have to assume that the validity [of the general principles of law] can be derived from the same *Grundnorm* as that of customary law . . . International law's *Grundnorm* would roughly have this content: sovereign and partially sovereign legal communities ought to behave in their inter-relationships according to the general principles of law,

188 Rub (1995) *supra* note 20 at 337.

189 Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre (1920) 217, 262, 284; cf. Rub (1995) *supra* note 20 at 313.

190 Verdross (1926) *supra* note 14 at 29.

191 Verdross (1926) *supra* note 14 at 43–44. Verdross later changed his views on the nature of custom and the foundation of the international legal order.

192 Verdross (1926) *supra* note 14 at 44.

193 Métall's arguments against this construct (Métall (1931) *supra* note 9 at 418–422), namely that since *pacta sunt servanda* is already a positive norm of international law it cannot at the same time be its *Grundnorm* cannot succeed, *inter alia* because customary law cannot conceive of '*servanda*' as state practice (Chapter 3 and *infra*).

194 Kelsen, (1952) *supra* note 418; Kelsen (1960) *supra* note 7 at 222 (Ch 34 h), 324–325 (Ch 42 c); Métall (1931) *supra* note 9 at 425.

195 Kelsen (1952) *supra* note 11 at 314, 417; Kunz (1934) *supra* note 8 at 403; Virally (1968) *supra* note 25 at 128; Rub (1995) *supra* note 20 at 314.

unless international relations have created particular valid norms which deviate from these principles.[196]

Admittedly, for the purposes of classification this statement is not quite as clear as could be hoped for. While general principles are considered originary (they are explicitly referred to in Verdross' proposed *Grundnorm*), and while treaty law is subordinate to it as particular norms,[197] customary international law has a similar value and is somehow parallel to them[198] – perhaps as a sort of 'manifestation'? As this theory relies upon natural law arguments (general principles of law as absolute standard, not posited by humans), which we have problematised above, we will not pursue this strand further.

(2) A constitution of international law or historically first constitution as a meta-meta-level of the kind mentioned in Section 6.3.1, whose task would consist in authorising the creation of sources, rather than prescribing subject behaviour (although this is not excluded by theory), could also be imagined. Thus, while 'international treaty law' as a source is not derived from customary international law, and while the two sources are 'two separate branches of law'[199] of equal standing, they would be connected by a superstructure of meta-meta-laws which regulate the relationship between the formal sources of international law. This opens up the question of a closed or open catalogue of sources of international law. If we assume a 'constitution' to govern all international law (i.e. one normative order) then the number of possible sources is closed and only if a new source conforms to the constitutional law for adding sources is it added to the catalogue of international law's sources. That special supra-law would have to be composed of positive norms – the historically first constitution cannot simply be presupposed. As mentioned above, it is doubtful whether such positive norms exist.

(3) Another version could be called the 'default theory'. The three main formal sources are not hierarchically ordered[200] and the sources are themselves not normatively connected.[201] Applied to current international law this would mean

196 'Vielmehr müssen wir annehmen, daß [die] Geltung [der allgemeinen Rechtsgrundsätze] aus derselben Grundnorm herzuleiten ist, der auch das Gewohnheitsrecht entspringt . . . Die völkerrechtliche Grundnorm würde also etwa folgenden Inhalt haben: Souveräne und teilsouveräne Rechtsgemeinschaften verhaltet Euch in Eueren gegenseitigen Beziehungen nach den allgemeinen Rechtsgrundsätzen, soweit sich nicht im internationalen Verkehre besondere, von jenen Grundsätzen abweichende, gültige Normen herausgebildet haben.' Verdross (1931) *supra* note 69 at 362.

197 Verdross (1931) *supra* note 69 at 362; Métall (1931) *supra* note 9 at 424.

198 Métall (1931) *supra* note 9 at 423–424.

199 Grigory Tunkin, Is general international law customary law only?, 4 European Journal of International Law (1993) 534–541.

200 There are cases where a subordination is obvious. Not every manifestation of norms is completely autonomous. Security Council Resolutions derive their validity from the United Nations Charter, as do International Court of Justice judgments.

201 In an early book Kelsen shows the theoretical possibility of this solution: Kelsen (1920) *supra* note 189 at 106–107.

that both '*pacta sunt servanda*' and '*consuetudines sunt servanda*' are basic norms. No constitution which binds these two types of norms in one normative order is cognisable and neither is the subordination of treaty to custom or vice versa. If no connection is proven as part of positive law, it is possible that no connection between the sources exists. Both types of law may be part of 'international law', but the connection can only be an *empirical classification*. Without an overarching constitution regulating what kinds of formal sources international law has, the two, three or more sources currently recognised might be two, three or more *different legal orders*.[202] This might well be the consequence of orthodox international legal doctrine that sees the sources as 'equals'.[203]

If, for example, the constitution of a municipal legal system does not recognise customary law (thereby denying its validity), then for the legal system characterised by the constitution, customary law does not exist, just like a concurrent and competing legal system (e.g. the People's Republic of China and the Republic of China on Taiwan). On the other hand the municipal constitution could recognise customary law and could purport or claim to subordinate customary law to its legal system. The consequence of this theory regarding the catalogue of sources – if we assume international law to be only an empirical category – is that the catalogue of sources is open and whatever claim by whomever fulfils the *empirical classification criteria* can be counted as belonging to the 'family of international law'. While a 'constitution of international law' is one normative order, the 'default theory' is not more than an empirical communality (more than one – a multitude of – normative orders and one defining empirical community). If this is how the architecture of sources is shaped, we are faced anew with the question of the derogatory power of norms of the same quality, but of a different kind,[204] which is as uncertain as all other possibilities of derogability.

Yet another solution to the two problems of the meta-norms would be to incorporate all conditions for the creation of, for example, customary law (material and subjective element, time frame, participation level, repetitions, persistent objector) into the postulated *Grundnorm* of, for example, customary international law. This, in turn, makes all the conditions for law-creation (*Rechtserzeugungsbedingungen*) part of one postulated norm. However, as mentioned repeatedly, the *Grundnorm* is not positive, but presupposed. It cannot create what is not already positive. It only gives validity as existence as Ought.

[202] This theory raises interesting problems of the succession of treaties by customary law and *vice versa*.

[203] E.g.: Bos (1977) *supra* note 26 at 73–74; Cassese (2005) *supra* note 26 at 154; Gihl (1957) *supra* note 14 at 75; Neuhold (2004) *supra* note 25 at 31 (RN 174).

[204] Wolfram Karl discusses this topic in: Karl (1983) *supra* note 35 at 86 *et seq*. The conclusion he draws from the equality and non-connectedness of treaty and custom is that both can derogate from the other; a statement that does not conform to the approach presented in this book.

6.3.3 Our epistemic situation vis-à-vis the sources of international law

The fundamental problem of the sources of international law is that no meta-meta-source-law is apparent. No such thing as a law on the formation of law, a law specifying the forms international law may take immediately appears to our senses, imposes itself upon us and blinds us to other possible architectures of the highest echelons of law. Those countries which have a written constitution are 'liberated' from the agonising search for a foundation. But that liberation is pragmatic and not theoretical. Municipal legal systems face the same legal theoretical problems, but those problems are simply easier to ignore. The assumption that Article 38 of the Statute of the International Court of Justice is the fountainhead of all international law can be questioned (Section 6.2.1). The foundations of other legal systems are not much safer; critique is merely more easily ignored.

The constitution of international law may lack positivity, i.e. it may be a product of thought, not of will. It may exist only in the minds of the scholars who have the time to muse about the theory of international law. The ontology of laws as norms, their ideal existence, is one of boundless possibility, limited and shaped only by the arbitrary act of will of those humans empowered by norms to create norms. If one wants to account for the will of the subjects of law, one must adhere to the demand to describe only positive norms. If one takes the demand for positivity seriously, this relationship cannot be pre-positive or a matter of logic only. It must be positive law. It seems that the humans empowered to will the highest echelons of international law – its constitution, the superstructure and relationship of the sources – are unlikely to ever have formed a will on these rather unpragmatic matters. While everyone would agree that a state's officials (acting as and for the state) would have helped to create the norm permitting innocent passage by contributing to the formation of the element of will within customary international law, it is much less likely that acts of will were formed with respect to the more abstract matters such as the kind and number of sources of international law or its theoretical framework.

The constitution of international law may also simply be very hard (or impossible) to perceive. Its unwritten nature, its contentiousness and the structural problem of accurately defining the definition make it impossible to ascertain which claim to the 'truth' corresponds with positive law. This epistemological difficulty results in a lack of provability. The Permanent Court of International Justice's *dictum* in the *Lotus* case[205] can be read to mean that it is not legal freedom of states

[205] *The Case of the SS.* '*Lotus*' (*France* v. *Turkey*), Judgment of 7 September 1927, PCIJ Series A, No. 10 at 18: 'The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.' The word 'restrictions' is interpreted here to mean the presence of norms of international law: of 'conventions' or 'usages'.

in international law that is to be presumed, but the absence of regulation (i.e. of norms). If the existence of a proposed norm is unclear, it should be assumed that a norm has not been created. In short, because we do not know how to perceive or prove the constitution, we do not know whether it is there or what it looks like.

What is the result of this look at the constitution of international law, even if it is an *a priori* necessary element of international law as one or more normative order(s)? We have found uncertainty and no possible way of remedying it. What, however, if we were to take a revolutionary step, a revolution of the mind, from the ad-hocery of the present situation? What if, the utopian may add, we were to simply will a written constitution of (new) international law?[206] Our epistemological situation vis-à-vis the normative order 'New international law' would certainly improve, and we would graduate from not knowing what norms there are to not knowing what the text means (Chapter 4). The ontological problems described throughout this book, including the question of conflict of norms (Chapter 5) and the fragmentation of normative orders through the proliferation of *Grundnormen* (Sections 5.5.3.3, 6.3.1 and Chapter 7), however, would persist.

[206] Some elements of Philip Allott's works are such a call to revolution, to a break with the past – perhaps for different reasons than that presented here, perhaps with different results, but certainly made in the same spirit: Philip Allott, Eunomia. New order for a new world (1990).

7

The inevitable *Grundnorm*

> Utopie bedeutet das Experiment, worin die mögliche Veränderung eines Elements und die Wirkungen beobachtet werden, die sie in jener zusammengesetzten Erscheinung hervorrufen würde, die wir Leben nennen.[1]

For the Pure Theory of Law, the *Grundnorm* is at the same time the highest echelon of norms and the purest expression of the nature of norms – the Ought. While the *Grundnorm* theory is adequately portrayed in many other publications, not least Kelsen's own *Reine Rechtslehre* (1960),[2] an application of the *Grundnorm* theory to the topics presented in this book is still necessary, rather than to leave the reader with references to the works of other scholars. This chapter thus becomes an important capstone for the present monograph for a number of reasons. First, the accessibility and accuracy in translating Kelsen's work from German is an issue of concern. Second, this is a book aimed primarily at international lawyers, rather than specialists in legal theory, and thus there is a need to explain what the *Grundnorm* is and how it works in order to avoid misconceptions. Third, the progression of this book from technical problems of international legal doctrine to the theoretical uncertainty on a higher level requires that the theoretical presuppositions on the highest level are explained. This means that the theories presented are 'capped' by discussing the basis of this theoretical structure. Fourth, at some points the views presented here diverge from the orthodox interpretation of the Pure Theory of Law.

The approach adopted in this chapter, however, is fundamentally different to that used for the other chapters. The other chapters tended to show the critical, sceptical and deconstructive side to the Kelsenian approach, a force for uncovering uncertainty caused by imprecise theoretical arguments and presuppositions. This chapter, in contrast, will be much more dogmatic. It will simply portray one interpretation of the *Grundnorm* theory. Why do we need to proceed this way? The

[1] Robert Musil, Der Mann ohne Eigenschaften (1931) Volume I, 61.

[2] Hans Kelsen, Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik (1934) 63–69 (Chs 28–30 a); Hans Kelsen, Reine Rechtslehre (2nd ed. 1960) 196–209 (Ch 34 a–d); Hans Kelsen, Allgemeine Theorie der Normen (1979) 203–208 (Ch 59 I).

dogmatic approach is necessary because of the very theoretical nature of the inquiry. At this 'altitude' the air gets very thin, so to speak, and at the very peak the reasoning inevitably becomes tautological. The purity of the Pure Theory, the dichotomy of Is and Ought, i.e. the issues discussed here, are in a sense an article of faith and can neither be proven nor reasoned.

In one sense, the *Grundnorm* is the answer to the ultimate question of normative theory: 'Why are norms valid?' In a nutshell, the theory espoused in this book is that a *Grundnorm* is *necessarily presupposed* by anyone (even non-Kelsenians) perceiving norms as norms. The dichotomy of Is and Ought is not an ideological presupposition, but is necessary in order to be able to perceive the Ought as claim to be observed (Section 7.2). On another level, however, we realise through the construct of the *Grundnorm* that normative scholarship is not 'objective' in the sense that its object of study is an extrinsic entity. In normative scholarship, theory creates its own object. Legal theory is not falsified or falsifiable by finding the black swan, as Popper puts it.

The *Grundnorm* concept has probably more often been misunderstood than fully grasped in all its revolutionary glory. It is not a simple rhetorical trick to end the *regressus ad infinitum* of the validity of law and it is not an unnecessary add-on to Hart's Rule of Recognition. To see the *Grundnorm* in such a way is to misunderstand it. The *Grundnorm* is nothing more and nothing less than the only way in which humans can conceive of (perceive) norms. This is this chapter's specific claim. The espousal of this claim means that it needs to be proven that this aspect of Kelsen's theory is not a matter of theoretical choice, but for all intents and purposes a necessity, a necessary element of conscious or subconscious thought of everyone who thinks about norms.

To perceive norms *as norms* is not necessary, however. Sociologists often do not focus on any form of norm, i.e. morals, religious norms and laws, in their analysis of human behviour. A sociologist may rely solely on 'real' phenomena and might formulate theories according to the factual regularities, patterns of real events and human behaviour that can be found. That is an acceptable approach, but it is not a juridical or a normativist approach.[3] However, as soon as an empirical scientist uses the concept 'norm', the *Grundnorm* is presupposed, because 'norm' is already perceived as norm properly speaking (Ought).[4]

Before we begin, a word on the status of discussion of the *Grundnorm* in scholarly literature seems in order. Its highly controversial and misunderstood character is difficult to explain. While any theory that claims to have found a solution to the problem of the validity of law is bound to be controversial, the level of antagonism directed toward the *Grundnorm* is striking[5] – and striking for its level of

[3] Kelsen (1960) *supra* note 2 at 89–93 (Ch 21).

[4] Hans Kelsen, Allgemeine Staatslehre (1925) 19–20.

[5] E.g.: Christian Dahlman, The trinity in Kelsen's basic norm unravelled, 90 Archiv für Rechts- und Sozialphilosophie (2004) 147–162. His critique is aptly defeated by Stanley Paulson: Stanley L. Paulson, Christian Dahlman's reflections on the basic norm, 91 Archiv für Rechts- und Sozialphilosophie (2005) 96–108.

misunderstanding. This may partially be a cultural issue, because the most divergent interpretations seem to emanate from the Anglo-Saxon and Scandinavian traditions of jurisprudence. Sharp critics of Kelsen within German jurisprudence – a legal culture not traditionally favourably disposed towards Kelsen – portray the *Grundnorm* theory within the bounds as conceived by Kelsen.[6] Some prominent Anglo-American theorists, on the other hand, seek to portray Kelsen's concept of normativity as inherently moralistic, e.g. Joseph Raz.[7] The critique of that strain by Sylvie Delacroix seems apposite. She argues that 'it is difficult not to be struck by the degree of contortion and manipulation necessary to Raz in order to be able to maintain that Kelsen does indeed adopt a "justified" conception of normativity'.[8] One might add, however, that this seems more a matter of cultural prejudice than the view of an individual scholar.[9]

> Ultimately, it seems that Raz has been trying to understand Kelsen's works while proceeding from his own reason-based and cognitive explanation of normativity, which essentially aims at understanding what it is for an individual to consider the law as normative (in opposition to what it is for a rule to be normative).[10]

This chapter has a different aim and will not fully engage with these diverging interpretations of the concept,[11] for the *Grundnorm* is not to be defended here, but

[6] E.g.: Robert Alexy, Begriff und Geltung des Rechts (1992) 155–186. Alexy's argument is problematic for assuming an Anglo-Saxon 'separation thesis', cf.: Alexy (1992) *supra* note 6 at 15–17; Deryck Beyleveld, Roger Brownsword, Methodological syncretism in Kelsen's Pure Theory of Law, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 113–145 at 113; Jens-Michael Priester, Die Grundnorm – eine Chimäre, in: Werner Krawietz, Helmut Schelsky (eds), Rechtssystem und gesellschaftliche Basis bei Hans Kelsen (1984) 211–244 at 230.

[7] Joseph Raz, Kelsen's theory of the Basic Norm, in: Joseph Raz, The authority of law (1979) 122–145, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 47–67; Beyleveld and Brownsword (1998) *supra* note 6 at 114, 119.

[8] Sylvie Delacroix, Hart's and Kelsen's concepts of normativity contrasted, 17 Ratio Juris (2004) 501–520 at 516.

[9] E.g.: Beyleveld and Brownsword (1998) *supra* note 6; Uta U. Bindreiter, Presupposing the basic norm, 14 Ratio Juris (2001) 143–175; Tony Honoré, The Basic Norm of a society, in: Tony Honoré, Making law bind (1987) 89–114, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 89–112; Alexander Peczenik, Two sides of the Grundnorm, in: Hans Kelsen-Institut (ed.), Die Reine Rechtslehre in wissenschaftlicher Diskussion. Referate und Diskussion auf dem zu Ehren des 100. Geburtstages von Hans Kelsen von 22. bis 27. September 1981 abgehaltenen internationalen Symposion (1982) 58–62; Raz (1979) *supra* note 7.

[10] Delacroix (2004) *supra* note 8 at 517. On a similar note: 'As soon as one touches upon only one of the issues raised by the doctrine one is drowned in the meandering astuteness of traditional reception or in coarse attempts of scholars that in sub-clauses criticise a doctrine they know only from hearsay.' Christoph Kletzer, The mutual inclusion of law and its science – reflections on Hans Kelsen's legal positivism (unpublished Ph.D. thesis, University of Cambridge 2004) 63.

[11] This chapter does not consider the diachronic approach, e.g.: Carsten Heidemann, Die Norm als Tatsache. Zur Normentheorie Hans Kelsens (1997); Stanley L. Paulson, Die unterschiedlichen

explained. Again this does not mean that either the way in which criticism is framed nor its substance is correct, or, indeed, that well-placed criticism of the concept is excluded.

7.1 The four functions of the *Grundnorm*

This section will portray four different functions of the *Grundnorm*. This is a short overview of the various aspects of that theoretical construct; a consolidation of this multifaceted concept into four main functions. We will ask: 'What is the *Grundnorm* and which function does it fulfil in the *Stufenbau* of a normative order?' and the answer is fourfold. (1) The *Grundnorm* is the expression of the dichotomy of Is and Ought; (2) it justifies and bases a normative order; (3) it constitutes the unity and identity of a normative order; and (4) in positive orders it identifies the human 'authorised' to create the highest norm.

Its complex nature has traditionally been simplified by splitting up the concept into various functions. Stanley Paulson and Jens-Michael Priester, for example, give the *Grundnorm* ten and nine functions, respectively.[12] It is subimitted that it is not relevant how many functions one is able to identify, because they are only different sides of the same concept. This chapter will only portray a reduced core number of widely recognised functions.[13] Portrayal of a difference in functions, of different functions, can only have pedagogical value. By showing how one concept does different things, we are made aware of the intimate connection of these functions – we are made aware that the *Grundnorm* has a *unity as concept*, despite differing functions.

The four functions portrayed in this section are intimately linked. A differentiation is only possible if we change focus. If norms are generally to be perceived as norms properly speaking, one has to presuppose the *Grundnorm* as expression of the dichotomy. If one wants to found a specific normative order, one has to presuppose the *Grundnorm* as expression of validity, as unity or as authorisation. The more one seeks to differentiate specific functions, the more one becomes aware how close or identical, the sub-concepts really are.

Formulierungen der 'Grundnorm', in: Aulis Aarnio *et al.* (eds), Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag (1993) 53–74; Robert Walter, Entstehung und Entwicklung des Gedankens der Grundnorm, in: Robert Walter (ed.), Schwerpunkte der Reinen Rechtslehre (1992) 47–59; Robert Walter, Die Grundnorm im System der Reinen Rechtslehre, in: Aulis Aarnio *et al.* (eds), Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag (1993) 85–99). The *Grundnorm* theory will be reconstructed within the *neo*-Kelsenian theory espoused here, a theory that Kelsen might have developed after 1973.

[12] Paulson (1993) *supra* note 11 at 58–63 (although later in his paper he reduces them to four functions); Priester (1984) *supra* note 6 at 211–232.

[13] Robert Alexy, Hans Kelsens Begriff des relativen Apriori, in: Robert Alexy *et al.* (eds), Neukantianismus und Rechtsphilosophie (2002) 179–202 at 191–193; Heidemann (1997) *supra* note 11 at 58–63.

7.1.1 The *Grundnorm* as the expression of the Is–Ought dichotomy

This is the heart of the matter, because the dichotomy and its 'application' (the *Grundnorm*) is the possibility of normative science, the possibility of the cognition of norms as norms. In a pure theory of law, all the other functions are entailed by this function and it is the reason for their existence. The *Grundnorm* is in this sense a concrete expression of Ought, of the dichotomy between Is and Ought. It is an epistemic tool to help us cognise the difference between reality and that counter-factual realm which posits some status or behaviour as 'necessary', as ideal.

The *Grundnorm* is necessary in order to conceive of the ideal that is Ought, that is norms,[14] and thus self-referential, yet hardly trivial. Whenever one perceives a norm, a *Grundnorm* is already presupposed. Carsten Heidemann's claim that Kelsen scholars like Paulson are wrong to assume 'that for Kelsen the *Grundnorm* is the Category of Ought'[15] is going too far. As will be shown in Section 7.2 – to which all further discussion of this, the fundamental function will be deferred – the idea of the ideal (the Ought) is not contained in every norm without the presupposition of the *Grundnorm*, but only if one presupposes the *Grundnorm* above each norm or normative order. Accordingly, it is correct to identify the source of the normativity of law and the *Grundnorm*.[16]

7.1.2 The *Grundnorm* as highest basis of validity of a normative order

The most important pragmatic facet of the *Grundnorm* is that it is the basis of validity of a normative order (*Geltungsgrund*). How do we get to the *Grundnorm* as solution to the problem of the basis of validity? Alexy's answer is that '[i]n order to reach the *Grundnorm*, one only need ask "Why?" a few times.'[17] The 'validity-*regressus*' is Kelsen's standard method of demonstrating the ultimate source of validity. If one asks, '[w]hy is a norm valid, what is its basis of validity?'[18] and if one observes the Is–Ought dichotomy (i.e. views norms as norms), the basis of validity for a norm can only be another norm, which authorises the creation of that norm.[19] This is the conceptual core of the *Stufenbau* theory (Section 5.5.2). If someone were to ask, for example, why a judgment of a municipal penal court is

[14] Walter (1993) *supra* note 11 at 85.

[15] 'die *Grundnorm* stehe bei Kelsen ganz allgemein für die Kategorie des Sollens'; Heidemann (1997) *supra* note 11 at 147; referring to: Stanley L. Paulson, Läßt sich die Reine Rechtslehre transzendental begründen?, 21 Rechtstheorie (1990) 155–179 at 170; interpreting: Kelsen (1960) *supra* note 2 at 205 (Ch 34 d).

[16] Paulson (1993) *supra* note 11 at 57; Raz (1979) *supra* note 7 at 48

[17] '[u]m zur Grundnorm zu gelangen, braucht man nur einige Male "Warum?" zu fragen.' Alexy (1992) *supra* note 6 at 155.

[18] '[w]arum gilt eine Norm, was ist ihr Geltungsgrund?' Kelsen (1960) *supra* note 2 at 196 (Ch 34 a).

[19] Kelsen (1960) *supra* note 2 at 196 (Ch 34 a).

valid, the answer might be that the Penal Code has authorised the judge to create a norm. If that person were to persist and ask why the Penal Code, in turn, is valid law, the answer might be that its creation was authorised by the constitution. The answers might proceed from that constitution to a previous constitution until we were to come to a positive norm that is no longer so authorised, the historically first constitution (Section 6.3.1).[20]

This validity-*regressus* founds the membership of norms in a normative order. Through an authorisation, higher norms are the 'source' of the lower norms. A norm's validity is its 'existence' as ideal and its bindingness as norm, as claim to be observed. This regress must end at the highest positive norm. The highest positive norm, in turn, was not created by way of a positive authorisation.[21] Yet how could the first positive norm be created (based)?[22] Only a capstone will avoid a *regressus ad infinitum* and found the validity of the whole normative order[23] without itself needing such a foundation. Only an expression of pure Ought can do this – an expression of the very idea of ideal. And this is the genius of Kelsen's *Grundnorm*: it is self-referential.[24] It redirects the question into itself by making the assumption of validity.[25] In cognising norms as norms, in cognising norms as a normative order, we act *as if* the norm or normative order were valid. 'On the precondition [assumption] that it is valid, the whole legal order under it is valid.'[26]

> In ascending the legal structure this topos of finding the ground of validity of one legal norm in another legal norm becomes habitual and leaves its imprint in the inert parts of the legal mind. When we reach the edge of the legal system and stare into the legal void the basic norm is nothing but the afterimage, the *photogene* of this topos that the tired juristic eye projects into this legal void. As an afterimage the basic norm is but the form

[20] Kelsen (1960) *supra* note 2 at 203 (Ch 34 c).

[21] Geert Edel, The *hypothesis* of the Basic Norm: Hans Kelsen and Hermann Cohen, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 195–219 at 213.

[22] Kelsen (1960) *supra* note 2 at 197 (Ch 34 a); Jürgen Behrend, Untersuchungen zur Stufenbaulehre Adolf Merkls und Hans Kelsens (1977) 64.

[23] Alexy (2002) *supra* note 13 at 192; Edel (1998) *supra* note 21 at 213.

[24] Stig Jørgensen argues that it can even be called 'tautological'. Stig Jørgensen, Grundnorm und Paradox, in: Werner Krawietz, Helmut Schelsky (eds), Rechtssystem und gesellschaftliche Basis bei Hans Kelsen (1984) 179–191 at 187–188.

[25] Alfred Verdross, Zum Problem der völkerrechtlichen Grundnorm, in: Walter Schätzel, Hans-Jürgen Schlochauer (eds), Rechtsfragen der internationalen Organisation. Festschrift für Hans Wehberg zu seinem 70. Geburtstag (1956) 385–394, reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 2203–2212 at 2203.

[26] 'Unter der Voraussetzung, daß sie gilt, gilt auch die Rechtsordnung, die auf ihr beruht.' Kelsen (1934a) *supra* note 2 at 66; also: Hans Kelsen, General theory of law and state (1945) 111; Kelsen (1960) *supra* note 2 at 201 (Ch 34 c); Kelsen (1979) *supra* note 2 at 206–207 (Ch 59 I d). Discussions on whether the *Grundnorm* is properly speaking a *Hypothese*, *Hypothesis*, fiction or assumption are not particularly fruitful and other scholars' views on this point will not be discussed. If anything the *Grundnorm* is *sui generis* (*infra*).

> that was too often seen, it is what remains of the law when the positive law is deprived of all its possible content, it is the pure form of the positive law . . .[27]

This merely hypothetical foundation of a legal order – of any normative order, be it positive or fictional – is the only possible foundation under the dichotomy of Is and Ought, because the claim to be observed cannot be absolute, only relative. The claim to be observed of norms is relative and the claim of one normative order – one normative order's validity – is not better than that of another.

Because the *Grundnorm* is only assumed to be valid, it has a special status as a norm. (*a*) It certainly cannot be a positive norm, for such a norm requires a real act of will, which by definition does not exist for the *Grundnorm*.[28] Also, the *Grundnorm* has no basis in another norm, and thus could not be validly created as a positive norm in a positive normative order.[29] (*b*) Maybe it is a fictional norm (Section 6.2.2)? A fictional norm, however, requires a real act of thought to presume a (fictional) act of will in order to create a fictional norm. The *Grundnorm* has no act of will whose sense it is, whether positive or fictional. It is true, however, that the presupposition by anyone cognising the normative order as normative order[30] comes close to the creation of a fictional norm.[31]

(*c*) The *Grundnorm* has a unique function which necessitates a *sui generis* status in normative theory, a status that is not easily described and which defies neat classification which some have found hard to accept.[32] The *Grundnorm* is a third kind of norm. Even though it is the foundation for the validity of the whole normative order under it, it does not create the law under it in the same sense as a positive empowering norm would. We presuppose that one ought to behave as the historically first constitution prescribes.[33] This presupposition, the content of the *Grundnorm*, is directed towards the highest positive norm, *not the other way around*. Its presupposition for this or that norm is not compulsory in the sense that there is a norm 'x' which has a *Grundnorm* above it.[34] If that were so, we could ask why the '*Grundnorm*' in this sense is valid. No, we presuppose the *Grundnorm* at the point

[27] Kletzer (2004) *supra* note 10 at 63–64.

[28] Behrend (1977) *supra* note 22 at 64–65.

[29] Raz (1979) *supra* note 7 at 50.

[30] Kelsen (1960) *supra* note 2 at 208–209 (FN *) (Ch 34 d).

[31] Kelsen (1979) *supra* note 2 at 206–207 (Ch 59 I d); Norbert Leser, Die Reine Rechtslehre im Widerstreit der philosophischen Ideen in: Hans Kelsen-Institut (ed.), Die Reine Rechtslehre in wissenschaftlicher Diskussion. Referate und Diskussion auf dem zu Ehren des 100. Geburtstages von Hans Kelsen von 22. bis 27. September 1981 abgehaltenen internationalen Symposion (1982) 97–104 at 102.

[32] Heidemann (1997) *supra* note 11; Carsten Heidemann, Geltung und Sollen: Einige (neu-) kantianische Elemente der Reinen Rechtslehre Hans Kelsens, in: Robert Alexy *et al.* (eds), Neukantianismus und Rechtsphilososphie (2002) 203–222 at 204; Priester (1984) *supra* note 6.

[33] Kelsen (1979) *supra* note 2 at 206 (Ch 59 I b).

[34] Walter (1992) *supra* note 11 at 54–55.

of the highest positive norm, because in order to be valid a norm has only to be cognised as a norm.

This special status and the quasi-paradoxical function in authorising the lower norms while adapting to its lower norm (rather than the other way around) is explained by the *Grundnorm* being a *condition for cognition* (*Erkenntnisvoraussetzung*).[35]

> The *Grundnorm* founds the validity of the legal order only in a very narrow sense. As Kelsen . . . has himself argued, the *Grundnorm* is primarily the *presumption* of the validity of the constitution. As such it cannot be the *basis* [justification] of the validity of the constitution.[36]

Heidemann's claim above can only be shared partially, for the presupposition of validity is enough justification for validity if the *Grundnorm* is seen as a tool for the cognition of the realm of the Ideal. But it is a norm too – and that creates its *sui generis* character. The tool for the cognition of the normative is itself the purest expression of the Ideal that is norms. But here we have reached the limit of what the second manifestation of the *Grundnorm* can tell us. We are already describing the dichotomy of Is and Ought (Section 7.2).

7.1.3 The *Grundnorm* as the unifying force of the normative order

The relationship between norms and their basis of validity – their 'source' – establishes a hierarchy of norms (Section 5.5.2). The *Grundnorm* establishes the very possibility of such a validity-relationship and therefore the possibility of normative orders. Norms, however, are not parts of a normative order, i.e. one cannot simply speak of an order as a unity and of norms as elements that are taken from the order. A normative order is not like the picture on a puzzle and the norms are not like its pieces, arbitrarily stamped out. It is much more like an agglomerate of norms. They are a bit like semolina dumplings of Ought swimming in a soup of Is; clusters of semolina tend to break off from the dumplings. The connection between norms is not absolute or *a priori*, but contingent and tentative (Section 5.5.3).

Yet by establishing the validity-relationship, the *Grundnorm* also establishes the *unity* of its normative order.[37] 'It is this *Grundnorm* which establishes the unity of the multiplicity of norms by being the basis for the validity of all norms belonging

[35] Behrend (1977) *supra* note 22 at 65.

[36] 'Die Grundnorm begründet nur in einem sehr eingeschränkten Sinn die Geltung der Rechtsordnung. Denn wie Kelsen . . . ausgeführt hat ist die Grundnorm in erster Linie die *Voraussetzung* der Verfassungsgeltung, als solche liefert sie nicht den *Grund* der Verfassungsgeltung.' Heidemann (1997) *supra* note 11 at 349.

[37] Behrend (1977) *supra* note 22 at 68–69; Bindreiter (2001) *supra* note 9 at 147; Raz (1979) *supra* note 7 at 48; Walter (1992) *supra* note 11 at 47; Walter (1993) *supra* note 11 at 92–93.

to this [normative] order.'[38] Unity is intimately connected with validity,[39] because validity of a norm means three things at once:

(*a*) 'existence' in the ideal realm;
(*b*) membership in a normative order;[40]
(*c*) bindingness as 'claim to be observed'.

Any norm is necessarily a member of a normative order, because in order to perceive norms as norms one has to presuppose the *Grundnorm* which gives a norm its existence as a norm.

We can presuppose a *Grundnorm* at any point in the normative order and thus declare any norm the highest positive norm. We cannot deny the normativity of norms if we want to perceive norms as norms; we have to presuppose a *Grundnorm* somewhere. However, we can make and unmake the unity by presupposing it here or there. But this is not a failing of the Pure Theory of Law, merely a result of the 'autonomisation' of norms in their validity-relationship (Section 5.5.3). As human beings we have it in our hands to delimit the normative order by presupposing a *Grundnorm* at the highest positive norm of a normative order. Ultimately, however, such a decision will always be arbitrary and thus constitutive of our object of cognition (Section 7.3).[41]

The unity function of the *Grundnorm* is problematic for a different reason as well (Section 6.3.1). As a presupposition orienting itself towards the historically first constitution it can only refer to one such constitution. It cannot create unity where positive norms have none. In discussing the possible architecture of the sources of international law (Section 6.3.2), we have already come across this problem in its concrete application. If customary international law and international treaty law are two separate sources on the same level, i.e. if neither is derived from the other and if no overarching positive law is valid, they each have a historically first constitution. The *Grundnorm* can only presuppose one or the other, but not *combine* (unite) both, since its content is oriented toward one or the other.

7.1.4 The *Grundnorm* identifies and authorises the norm-maker

Another pragmatic and ancillary function of the *Grundnorm*, at least in positive normative orders, is directly derived from its nature as an empowerment

[38] 'Diese Grundnorm ist es, die die Einheit einer Vielheit von Normen konstituiert, indem sie den Grund für die Geltung aller zu dieser Ordnung gehörigen Normen darstellt.' Kelsen (1960) *supra* note 2 at 197 (Ch 34 a); Kelsen (1934a) *supra* note 2 at 62; Kelsen (1945) *supra* note 26 at 111.

[39] Kelsen (1960) *supra* note 2 at 196 (Ch 34 a); Raz (1979) *supra* note 7 at 50.

[40] Paulson (1993) *supra* note 11 at 64 (regarding the identification of 'membership' and 'unity'). Paulson later criticises the identification of 'membership' and 'validity'.

[41] Walter (1992) *supra* note 11 at 49.

norm (an authorisation to create norms).[42] It identifies which human beings are authorised to create the highest positive norm of that order.[43] Returning to the example given above (Section 6.3.1) of the origins of the post-1945 Austrian legal order, the *Grundnorm* identifies the representatives of the four main political parties as authorised to create ('reinstate') the constitution and with it the whole Austrian legal order. However, neither is the entity thus identified a true sovereign (because it can be said only to be authorised by the normative order), nor is the identification the same as with all other positive authorisation norms, because the *Grundnorm* always identifies that entity which has already been created. It is only in order to be able to cognise what the entity has willed *as norm* that we need the identification function.

7.2 The *Grundnorm* is the dichotomy of Is and Ought

The crucial distinction between Is (*Sein*) and Ought (*Sollen*) has been emphasised throughout. This section will show how the dichotomy – which is older than Kelsen's theory of the *Grundnorm* – is the single crucial point in making the very idea of norms possible. It will also try to show that the *Grundnorm* and the dichotomy are identical. The *Grundnorm* is only a concrete expression of the dichotomy. In the following we will analyse some of the explanations of what the dichotomy of Is and Ought and the *Grundnorm* are.

7.2.1 The *Grundnorm* as Kantian Category?

Kelsen refers to Kantian and neo-Kantian epistemology – the transcendental method – as the source of inspiration for the core idea of his Pure Theory of Law.[44] There is lively debate among Kelsen scholars over what the influence of the Marburg and South-west German neo-Kantian schools and of three of their main protagonists, Hermann Cohen, Heinrich Rickert and Rudolf Stammler, was upon Kelsen and whether the Pure Theory is consistent with that philosophical approach.[45] The dogmatic orientation of this chapter and the extensiveness

[42] Kelsen (1934a) *supra* note 2 at 64, 66; Kelsen (1960) *supra* note 2 at 197 (Ch 34 a), 199 (Ch 34 b); Edel (1998) *supra* note 21 at 218; Paulson (1993) *supra* note 11 at 57; Priester (1984) *supra* note 6 at 223–225.

[43] Kelsen (1934a) *supra* note 2 at 65; Delacroix (2004) *supra* note 8 at 508.

[44] Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre (1920) 9–10 (FN 1); Kelsen (1934a) *supra* note 2 at 21–24; Kelsen (1960) *supra* note 2 at 204–205 (Ch 34 d); Hans Kelsen, Hauptprobleme der Staatsrechtslehre entwickelt aus dem Rechtssatze (2nd ed. 1923) iii–xxiii; Hans Kelsen, The Pure Theory of Law, 'Labandism' and neo-Kantianism. A letter to Renato Treves, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 169–175.

[45] Alexy (2002) *supra* note 13; Eugenio Bulygin, An antinomy in Kelsen's pure theory of law, 3 Ratio Juris (1990) 29–45, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 297–315; Edel (1998) *supra* note 21; Stefan Hammer, A neo-Kantian theory of legal knowledge in Kelsen's Pure Theory of Law?, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives

and philosophical and intellectual-historical orientation of that debate make a re-telling or any substantial engagement prohibitive and unnecessary here. The following will merely give a basic idea of Kelsen's loose analogy. That the analogy was loose rather than strict, however, is a major point of the argument. We will not go into the problems that may emerge by seeing the *Grundnorm* or the dichotomy as Category in the strict sense, but point out the useful in the analogy.

In *Kritik der reinen Vernunft* Immanuel Kant uses the concept of *Kategorien* (categories) as conditions (principles) of the possibility of all cognition:[46]

> Consequently all synthesis, whereby alone is even perception possible, is subject to the categories. And, as experience is cognition by means of conjoined perceptions, the categories are conditions of the possibility of experience and are therefore valid a priori for all objects of experience.[47]

It is easy to see how Kelsen adapted this for the *Grundnorm* and how it is merely the expression of the Ought. For Kant, apperception (sensual raw data) is synthesised through the categories to enable cognition. Categories such as causality allow apperception to make sense and thus enable us to *cognise* them. For Kelsen, the idea of the Ought (in the particular: the *Grundnorm*) enables us to synthesise certain data to be able to cognise norms as norms – as claims to be observed:

> Insofar as only the presupposition of the *Grundnorm* makes it possible to cognise the subjective sense of the act creating the constitution . . . as its objective sense, that is as objectively valid legal norm, the *Grundnorm* can be called the transcendental-logical

on Kelsenian themes (1998) 177–194; Heidemann (1997) *supra* note 11; Heidemann (2002) *supra* note 32; Hans Köchler, Zur transzendentalen Struktur der Grundnorm. Kritische Bemerkungen zur erkenntnistheoretischen Fundierung der 'Reinen Rechtslehre', in: Ludwig Adamovich, Peter Pernthaler (eds), Auf dem Weg zur Menschenwürde und Gerechtigkeit. Festschrift für Hans R. Klecatsky (1980) 505–517; Leser (1982) *supra* note 31; Gerhard Luf, On the transcendental import of Kelsen's Basic Norm, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1998) 221–234; Paulson (1990b) *supra* note 15; Stanley L. Paulson, Fakten/Wert-Distinktion: Zwei-Welten-Lehre und immanenter Sinn. Hans Kelsen als Neukantianer, in: Robert Alexy *et al.* (eds), Neukantianismus und Rechtsphilososphie (2002) 223–251; Günther Winkler, Rechtstheorie und Erkenntnislehre. Kritische Anmerkungen zum Dilemma von Sein und Sollen in der Reinen Rechtslehre aus geistesgeschichtlicher und erkenntnistheoretischer Sicht (1990).

[46] Immanuel Kant, Kritik der reinen Vernunft (1781, 1787) A 111, B 126, 168.

[47] 'Folglich steht alle Synthesis, wodurch selbst Wahrnehmung möglich wird, unter den Kategorien; und da Erfahrung Erkenntnis durch verknüpfte Wahrnehmungen ist, so sind die Kategorien Bedingungen der Möglichkeit der Erfahrung und gelten also a priori auch von allen Gegenständen der Erfahrung.' Kant (1781, 1787) *supra* note 46 at B 161 (translation John Miller Dow Meiklejohn).

> condition of this cognition – if it is permissible to use a term of Kantian epistemology by analogy.[48]

We will return to the difference between the 'objective' and 'subjective' senses later (Section 7.2.2). For the moment we only need to note that while Kelsen's emphasis on philosophical sources and the details of the theory vary over the decades (see the narrow conception of the duality of the category of causality and attribution in 1934[49] as against the broader conception of 'Ought' in the *opus postumum* of 1979),[50] his theory, rather than the details of his philosophical analogies, remains substantially the same throughout.

Since Kant created an epistemology for the realm of 'reality' and Kelsen one for the realm of 'values',[51] the analogy is limited in explaining Kelsenian theory.[52] Kant is adamant that categories cannot have a use except their application to objects of experience,[53] which presents a problem for Kelsen: what is the 'experience' relative to norms? He takes it to be the same as that of 'regular' cognition, i.e. sense-data. The norm is an interpretation of reality (*Deutungsschema*). A man dressed in a certain way utters certain words; two persons sign a piece of paper – these data of 'reality' are given a specific sense to become a court judgment and a treaty, respectively.

> The specific juridical sense, its specific legal meaning, is accorded to the act by a norm whose content refers to it, which confers to the act its legal meaning, so that the act may be interpreted according to this norm. The norm is a scheme of interpretation.[54]

This theory sounds a bit forced.[55] Law's 'epiphenomena' in the real world are ancillary and do not encapsulate their 'existence' as validity. The paper on which statutes are printed, a handshake or a psychological attitude can be explained both by causal reality and by normative interpretation, but the latter mode can only capture contingent and ephemeral, peripheral 'emissions', not the idea of norms, their 'existence'. It is also true, however, that *positive* norms do have a real-world 'tie-in point', i.e. the real act of will whose sense is the norm.[56] This is

[48] 'Sofern nur durch die Voraussetzung der Grundnorm ermöglicht wird, den subjektiven Sinn des verfassunggebenden Tatbestandes . . . als deren objektiven Sinn, das heißt: als objektiv gültige Rechtsnormen zu deuten, kann die Grundnorm . . . – wenn ein Begriff der Kant'schen Erkenntnistheorie *per analogiam* angewendet werden darf – als die transzendental-logische Bedingung dieser Deutung bezeichnet werden.' Kelsen (1960) *supra* note 2 at 204 (Ch 34 d).

[49] Kelsen (1934a) *supra* note 2 at 21–24.

[50] Kelsen (1979) *supra* note 2 at 2 (Ch 1 IV).

[51] Walter (1992) *supra* note 11 at 58.

[52] Heidemann (1997) *supra* note 11 at 57.

[53] Kant (1781, 1787) *supra* note 46 at B 146.

[54] 'Den spezifisch juristischen Sinn, seine eigentümliche rechtliche Bedeutung, erhält der fragliche Tatbestand durch eine Norm, die sich mit ihrem Inhalt auf ihn bezieht, die ihm die rechtliche Bedeutung verleiht, so daß der Akt nach dieser Norm gedeutet werden kann. Die Norm fungiert als Deutungsschema.' Kelsen (1960) *supra* note 2 at 3 (Ch 4 a).

[55] Köchler (1980) *supra* note 45 at 509.

[56] The same applies to fictional norms with the act of thought presupposing the act of will.

more than a psychological state; Kelsen did not succumb to psychologism. That sense is its normative interpretation; the act of will is a necessary condition for the creation of a positive norm. It is not, however, its 'existence' as validity.

Gerhard Luf's argument that 'transcendental' means 'something different in the practical sphere than in the perspective of theoretical reason, drawn upon [by Kelsen] as an analogue' is apposite,[57] but the difference may not be as Kant, interpreted by Luf, puts it. The Pure Theory of Law's analogy to the Kantian transcendental method – *pace* Kelsen and his exegetics – may be much more radical, but would tie in with another strain of Hans Kelsen's theory (Section 7.2.3). It is not the apperception of 'reality' that can be cognised either by way of theoretical categories or by the 'Ought-Category'. Rather, the apperception of 'reality' cognised through a theoretical Category is roughly analogous to the cognition of the *ontology of norms* existing as ideal ideas in an ideal sense (*Reich des Sollens*) through the *Grundnorm*. It is not so much a clumsy epistemological reorientation of the cognition of reality, but an epistemology of the second sphere, the sphere of the Ought (of all the norms that are valid) through the idea of the Ought, represented for a normative order by the *Grundnorm*. Geert Edel's interpretation of Cohen's theories as Platonic, rather than purely Kantian, may help us in this respect, even though he does not see quite the same Platonism in the idea of norms as presented here. This ideal *Ideal* may be likened to Plato's Ideals or Forms.[58] In keeping with Kant, however, cognition in this sense creates its object (Section 7.3).[59]

The search of some for a singular philosophical basis for Kelsen's *Grundnorm* theory is not very helpful. It is submitted that Kelsen only used philosophers' theories as a didactical tool, i.e. to explain the unknown by the well known. He borrows ideas and uses them for his own edifice.[60] In a specific sense his theory is eclectic, because it is oriented toward a theory instinctively felt to be true, not toward strict compliance with a philosopher's theory.[61] This means a liberation from the stringency of philosophical traditions, which allows Kelsen to build up a theory that shows the possibilities of the cognition of the Ought in the first place. The *Grundnorm* is *sui generis*. While the idea of the Kantian Category is a useful reference point and springboard, it is not exhaustive of his theory of norms.

[57] Luf (1998) *supra* note 45 at 225.

[58] Edel (1998) *supra* note 21 at 196.

[59] Alexy (2002) *supra* note 13 at 195.

[60] Heidemann (1997) *supra* note 11 at 56–57.

[61] A passage from Otto Apelt's introduction to his translation of Plato's *Parmenides* may be apposite in this respect. 'Matters of pure cognition are no different than empirical science is: discovery precedes an explanation of the discovery. The thinker draws a philosophical viewpoint from life and from *Zeitgeist*. The viewpoint is first presented to his gaze and is formed as fixed conviction, before he is able to justify [found, explain] it . . .' 'Es ist mit den Sachen der reinen Einsicht nicht anders als in den Gebieten der Erfahrungswissenschaften: die Entdeckung geht der Erklärung des Entdeckten voraus. Aus dem Leben und dem Zeitgeist bildet sich dem Denker seine philosophische Gesamtansicht; sie stellt sich seinem Blick zuerst dar und ist ihm zur feststehenden Überzeugung geworden, ehe er imstande ist sie vollständig zu begründen . . .'; Otto Apelt, Einleitung, in: Otto Apelt (ed.), Platons Dialog Parmenides (2nd ed. 1922) 29–30.

7.2.2 The subjective and objective senses of an act

The problem can also be approached from a less philosophical angle, that of the distinction between the subjective (immanent) and objective (systemic) meaning of an act.[62] Kelsen saw the nature of the *Grundnorm* largely in this sense. As we saw above, he argues that '[t]he function of this *Grundnorm* is . . . to interpret the subjective sense of these acts as their objective sense.'[63] Only the objective sense of an act is a norm; its subjective sense is of no consequence.

> Only an authorised order also has the *objective sense* of Ought, i.e. only an authorised order is a *norm* binding for its subject, . . . while the unauthorised order of a highwayman is not binding. . . . Not every Ought which is the sense of an act of will is a binding norm. . . . The *objectivity* of Ought (i.e. that the sense of an . . . act of will is a *norm*), is also manifested by a norm's *validity*, that this Ought is existent as sense . . .[64]

As the theory stands here, it is prone to misinterpretation; in order to be understood correctly it might need to be reinterpreted. Heidemann's criticism of the idea that the *Grundnorm* is the category of Ought is based on a problematic interpretation of Kelsen. This reading is that norms exist independently of whether a *Grundnorm* is presupposed, an action which merely 'objectifies' the norms.[65] This is natural law thinking and this ends the unity and validity-relationships of a normative order and cannot be maintained within the Pure Theory's ambit.

A preferable reading of the distinction between subjective and objective senses may be that the imperative which is authorised by a legal or moral order is not the only one to have an objective sense. Every norm has an 'objective' or 'systemic' validity, just as all norms only make a subjective (immanent) claim to be observed. The difference is not between *making* and *having* a claim, because the idea of norm is merely the 'existence' of the claim, not some supra-normative 'justification'.[66] As soon as a *Grundnorm* is presupposed to such an act of will, its sense is a norm.[67] Since one can do this with every act of will whose sense is a norm, even the orders of the highwayman can be cognised as a norm. The *Grundnorm* is nothing but the

[62] For the reinterpretation of the two attributes into those in parentheses: Rainer Lippold, Recht und Ordnung. Statik und Dynamik der Rechtsordnung (2000) 288–289.

[63] '[d]ie Funktion dieser Grundnorm ist: . . . den subjektiven Sinn dieser Akte als ihren objektiven Sinn zu deuten.' Kelsen (1960) *supra* note 2 at 205 (Ch 34 d); Paulson (2002) *supra* note 45 at 250.

[64] 'Nur der ermächtigte Befehl hat auch den *objektiven Sinn* des Sollens, und das heißt: Nur der ermächtigte Befehl ist eine *Norm*, die für den Normadressaten verbindlich ist, . . . während der nicht ermächtigte Befehl des Straßenräubers nicht verbindlich ist. . . . Nicht jedes Sollen, das der Sinn eines Willensaktes ist, ist eine verbindliche *Norm*. . . . Die *Objektivität* des Sollens (d.h., daß der Sinn eines . . . Willensaktes eine *Norm* ist), zeigt sich auch darin, daß die Norm *gilt*, daß dieses Sollen als Sinn vorhanden ist . . .'; Kelsen (1979) *supra* note 2 at 22 (Ch 8 V).

[65] Heidemann (1997) *supra* note 11 at 147.

[66] Delacroix (2004) *supra* note 8 at 513.

[67] Bindreiter (2001) *supra* note 9 at 148.

possibility of cognition of norms. *The presupposition of a* Grundnorm *makes a subjective sense into an objective sense.*[68]

It can be argued that a different emphasis needs to be put on the distinction between the two senses. Both senses are identical, because a norm as norm is always valid in an 'objective' ('systemic') sense in some system, because only by presupposing a *Grundnorm* and thus creating a normative order can the norm be cognised as a norm. Viewed from a different angle the systemic sense is of relevance only for the question which *specific* system (normative order) the norm in question is valid in. As such, Kelsen's distinction again is pedagogical, but the distinction between the subjective and objective senses of an act again does not exhaust the nature of the *Grundnorm*. Again, the dichotomy of Is and Ought determines the answers to the distinction between the two senses, not the other way around.

7.2.3 Epistemology and ontology of norms

Two fundamentally different approaches to legal (normative) theory are immanent in Kelsen's work. They concern the nature of norms, the nature of the Is–Ought dichotomy and of the function of the *Grundnorm*. On the one hand these concepts function as an epistemology; on the other hand, the existence of norms in the ideal realm constitutes an ontology.[69]

> Two fundamentally different representations can be extracted: according to one, Is and Ought are most general and comprehensive determinations of thought [for cognitive purposes], originary and undeducable categories. . . . According to the other, Is and Ought are rather fundamentally different 'points of view' which seem to 'manifest two separate worlds' . . . they would thus be modalities *de re.*[70]

The first approach constitutes an epistemology of norms. The *Grundnorm* (and only it) allows us to cognise norms. The concept of norms as the scheme of interpretation (*Deutungsschema*) is an interpretation of apperception and thus constitutes cognition (of a different kind). Ought as a Category[71] allows us to

[68] Hans Kelsen, Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, 31 Philosophische Vorträge (1928), reprinted in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 281–350 at 287–288 (para 4); Kelsen (1960) *supra* note 2 at 204 (Ch 34 d).

[69] Heidemann (1997) *supra* note 11 at 55; Jerzy Wróblewski, Kelsen, the Is-Ought dichotomy and naturalistic fallacy, 35 Revue Internationale de Philosophie (1981) 508–517 at 510–512.

[70] 'Zwei grundsätzlich verschiedene Darstellungen lassen sich ausmachen: Der einen zufolge sind Sein und Sollen allgemeinste und umfassende Denkbestimmungen [der Erkenntnis], ursprüngliche, nicht weiter ableitbare Kategorien. . . . Der anderen zufolge sind Sein und Sollen eher grundverschiedene "Betrachtungsweisen", die "zwei getrennte Welten erscheinen" lassen . . . sie wären gewissermaßen Modalitäten *de re.*' Heidemann (1997) *supra* note 11 at 24–25.

[71] Kelsen (1934a) *supra* note 2 at 21.

order and thus perceive reality in a certain sense.[72] A theory of cognition is an epistemology; the references to Kant's transcendental method – 'transcendental' enquiries being directed towards the possibilities of cognition[73] – prove that this was very much an aspect of the Kelsenian theory of norms.

The second approach is an ontology of norms. Heinrich Rickert, for example, put 'value' (ideal) into the second realm and validity as the 'existence' of value.[74] Kelsen can be said to have followed Rickert in this distinction into the 'realms' (*Reiche*) or 'worlds' that is the dichotomy of Is and Ought.[75] Kelsen has been called more Platonic than Rickert[76] and the distinction into 'two radically different realms'[77] can also be seen as analogous to Platonic Ideas (Forms).[78] Norms are in this sense, to borrow from Philip Allott, 'the idea of the ideal'.[79] In a quasi-analogy to Plato's theory of Ideas, the realm of the ideal is not 'real', not directly intelligible (also analogously to Kant's 'Ding *an sich*'). It is removed from our senses; it is not the reality we perceive, but a realm beyond reality. Also like Plato's forms, the Ought is an ideal, containing 'The Good'. Here the analogy ends, because it is not 'The Good', but many diverse and contradictory values (ideals) are united in that realm only because of their ideal form of existence as norms. But to define norm as *ideal idea* is a good approximation.

The two approaches seem contradictory, but they may not be. While the concrete norms 'reside' in the second (ideal) ontology and while, therefore, the second approach is valuable, the very idea of Ought (of the dichotomy, the *Grundnorm*) rightly has its place as method or possibility of cognition of Ought. The abstract idea of Ought is its epistemology (in its theoretical sense), while the concrete norm is its ontology. Christoph Kletzer put it in different words:

> [The doctrine of the 'doppeltes Rechtsantlitz'] maintains not only that the norm, *while* being the meaning of an act of will, *also* functions as a scheme of interpretation, but rather that *in* being the meaning of an act of will it serves as a scheme of interpretation. The anatomy of the law gives an ontological substance whereas the physiology of the law gives an hermeneutic function.[80]

The first approach needs to be distinguished from altogether more pragmatic issues. Throughout this book several practical problems in cognising what is a valid norm have been mentioned, e.g. the problems of interpretation of treaty

[72] Kelsen (1934a) *supra* note 2 at 66.
[73] Kant (1781, 1787) *supra* note 46 at A 56, B 80, 150.
[74] Heinrich Rickert, System der Philosophie. Erster Teil: Allgemeine Grundlegung der Philosophie (1921) 121–122.
[75] Paulson (2002) *supra* note 45 at 234.
[76] Heidemann (2002) *supra* note 32 at 218.
[77] Bulygin (1990) *supra* note 45 at 301.
[78] . . . or in a Popperian 'Welt 3' of ideal entities, opines Heidemann (Heidemann (1997) *supra* note 11 at 113).
[79] Philip Allott, Eunomia. New order for a new world (preface to the paperback edition, 2001) xxii.
[80] Kletzer (2004) *supra* note 10 at 37.

texts (Chapters 2 and 4). These pragmatic 'epistemological' problems need to be distinguished from the theoretical epistemological function of the *Grundnorm*. (*a*) The *Grundnorm* and the Ought make the cognition of norms as concept, as ideal idea, as ontology, possible. This concerns our ability to even conceive of the idea of the norm and of the Ought. (*b*) Our epistemic position as humans living in 'reality' vis-à-vis that non-real (ideal) realm is not good. Our epistemic problems in cognising single norms, 'parts' of that ontology, e.g. to prove that someone's claim that a prohibition of genocide is a norm of customary international law, this epistemic position, these epistemic problems are a second level of 'epistemology'. Kant's words – suitably misused and taken out of context – once again seem apt to explain the pragmatic problem from a theoretical point of view:

> Whatever be the content of our conception of an object, it is necessary to go beyond it, if we wish to predicate existence of the object. In the case of sensuous objects, this is attained by their connection according to empirical laws with some one of my perceptions; but there is no means of cognizing the existence of objects of pure thought, because it must be cognized completely a priori. But all our knowledge of existence (be it immediately by perception, or by inferences connecting some object with a perception) belongs entirely to the sphere of experience – which is in perfect unity with itself; and although an existence out of this sphere cannot be absolutely declared to be impossible, it is a hypothesis the truth of which we have no means of ascertaining.[81]

7.2.4 Synopsis and restatement

All that remains to do is to draw the strands of the previous discussion together and to summarise the findings so far. We can start by saying that the *Grundnorm* is *sui generis*, not conforming (and not needing to conform) to convenient philosophical categorisations, but only to the nature of the ideal as the Pure Theory of Law conceives it.

There is a fundamental and categorical division between Is (*Sein*) and Ought (*Sollen*). The dichotomy is much older than Hans Kelsen's theories; it is the difference between reality and value,[82] between description and prescription, between what is and what ought to be. They are, as Kelsen argues with Georg Simmel,

[81] 'Unser Begriff von einem Gegenstande mag also enthalten was und wie viel er wolle, so müssen wir doch aus ihm heraus gehen, um diesem die Existenz zu erteilen. Bei Gegenständen der Sinne geschieht dies durch den Zusammenhang mit irgend einer meiner Wahrnehmungen nach empirischen Gesetzen; aber für Objekte des reinen Denkens ist ganz und gar kein Mittel, ihr Dasein zu erkennen, weil es gänzlich a priori erkannt werden müßte, unser Bewußtsein aller Existenz aber (es sei durch Wahrnehmung unmittelbar, oder durch Schlüsse, die etwas mit der Wahrnehmung verknüpfen,) gehöret ganz und gar zur Einheit der Erfahrung, und eine Existenz außer diesem Felde kann zwar nicht schlechterdings für unmöglich erklärt werden, sie ist aber eine Voraussetzung, die wir durch nichts rechtfertigen können.' Kant (1781, 1787) *supra* note 46 at A 601, B 629 (translation John Miller Dow Meiklejohn).

[82] Kelsen (1979) *supra* note 2 at 47 (Ch 16 III).

each an 'originary category'[83] and neither is reducible to the other. 'That something *ought* to be cannot ensue from the fact that something *is*; that something *is* [in existence] cannot ensue because something *ought* to be.'[84] Is and Ought are completely different forms, *modi*[85] or types of 'sense' (*Sinngehalte*)[86] and belong to two different realms or ontologies. In this sense the dichotomy with Kelsen goes further than that to be found in David Hume's work.[87] Validity ('Geltung') is the specific form of 'existence' in that second realm or ontology, in that realm of ideals. The 'existence' of norms as validity has to be distinguished from the existence in reality of the facts that created them,[88] acts of will inclusive.

However, the strict and categorical division does not mean that they are without points of contact,[89] a trait of the Pure Theory that Delacroix seems to overlook.[90] Heidemann, on the other hand, takes great care to portray these points of contact,[91] in particular the creation of positive norms through real acts of will. A strict, categorical division between Is and Ought is necessary, because with the real act of law-creation (the act of will whose sense is the norm) an autonomisation, a 'passing' into the other category, and thus a fundamental 'alienation' of the norm as ideal entity occurs. The positive norm belongs firmly to the normative ontology, this ideal 'place of existence' of the category of the Ought, despite its causal roots in a real act of real will.

The dichotomy of Is and Ought is thus the necessary precondition for the very possibility of all normative scholarship and normative orders, including international law.[92] The Is–Ought dichotomy is not a matter of choice. The distinction is necessary for the purpose of being able to cognise norms as norms. 'One who wishes to conduct legal science as a science of valid norms must then assume their validity.'[93] To deny the dichotomy means to deny the nature of norms, to deny the possibility of norms and normative orders and to be unable to cognise norms *as*

[83] 'ursprüngliche Kategorie'; Kelsen (1979) *supra* note 2 at 2 (Ch 1 IV); Paulson (2002) *supra* note 45 at 228.

[84] 'Daraus, daß etwas *ist*, kann nicht folgen, daß etwas sein *soll*; sowie daraus, daß etwas sein *soll*, nicht folgen kann, daß etwas *ist*.' Kelsen (1960) *supra* note 2 at 196 (Ch 34 a), 5 (Ch 4 b); Kelsen (1979) *supra* note 2 at 44 (Ch 16 I); Edel (1998) *supra* note 21 at 216; Ulrich Klug, Die Reine Rechtslehre von Hans Kelsen und die formallogische Rechtfertigung der Kritik an dem Pseudoschluss vom Sein auf das Sollen, in: Salo Engel (ed.), Law, state and international legal order. Essays in honor of Hans Kelsen (1964) 153–169.

[85] Heidemann (1997) *supra* note 11 at 165 (referring to Kelsen's position).

[86] Kelsen (1979) *supra* note 2 at 44 (Ch 16 I); Alexy (2002) *supra* note 13 at 183.

[87] Paulson (2002) *supra* note 45 at 231.

[88] Kelsen (1979) *supra* note 2 at 2 (Ch 1 V).

[89] Kelsen (1960) *supra* note 2 at 6 (Ch 4 b).

[90] Delacroix (2004) *supra* note 8 at 506: 'Kelsen's fundamental assumption, underlying his whole work, consists in what is to be considered today as a rather peculiar methodological dualism, according to which the worlds of facticity and normativity are not only *differentiable* but also and above all totally unconnected, corresponding to two different spheres of knowledge.'

[91] Heidemann (1997) *supra* note 11 at 26–28, 63–65, 120–121, 172–173.

[92] Lippold (2000) *supra* note 62 at 500.

[93] Hammer (1998) *supra* note 45 at 193

norms in their specific function, rather than as sociologico-empirical or psychological realities (regularities).[94] Confusing and confounding these categories leads to the impossibility of the existence of any Ought.

And here we have the reason why the *Grundnorm* is the dichotomy,[95] i.e. the possibility of Ought.[96] The *Grundnorm* does nothing but restate the idea of Ought in concrete terms. It allows the cognition of the norms of a certain normative order as norms. As soon as a norm is conceived as a norm it is already binding, valid and 'existing'. But in order to be conceived as a norm, one has to be able to conceive (cognise) it as a norm, which is only possible if it is 'portrayed' as an Ought – which requires the dichotomy of Is and Ought. This cognition as norm, as Ought, is possible only if the norm in question has a presupposed *Grundnorm*.[97] Only through it is the Ought conceived by presupposing the claim to be observed. A norm cannot be even thought without presupposing the *Grundnorm*. The *Grundnorm* is thus not a consequence of the Is–Ought dichotomy; it is the dichotomy. There simply is nothing that could be 'exalted' into a 'valid norm' by adding the *Grundnorm*, because if the *Grundnorm* is not presupposed, one cannot even 'visualise' (cognise, perceive) the norm as Ought, as claim. 'Not legitimation, not affirmation, but *cognition* is the aim of transcendentally establishing the validity of positive law.'[98]

Beyond the highest positive norm, e.g. of international law, there is nothing that would in fact authorise its creation. The empowerment to create further norms by the *Grundnorm* is different than by a positive empowerment norm, because it is a tautological and self-referential presupposition, 'whose validity remains unfounded and unfoundable within the sphere of positive law',[99] because it is nothing less than the concretised possibility of cognition of norms.

7.3 Theory influences the existence of its object

Normative theory is different from empirical theory in that – for all the distortion that theory in the natural sciences can produce – in empirical science the object of study is a fact, an objectively given 'reality' (or at least claims to be). An empirical

[94] Kelsen (1928) *supra* note 68 at 286 (para 4).

[95] Alexy (2002) *supra* note 13 at 191, 193; Behrend (1977) *supra* note 22 at 62–63; Edel (1998) *supra* note 21 at 217.

[96] In this chapter the dichotomy of Is and Ought and the category of Ought have been treated as identical. People could find fault with what might be considered imprecise terminology. In doing so it has to be emphasised that as normative scientists (legal philosophers) we have to establish the Ought, rather than the Is. Thus the establishment of the dichotomy between the categories makes the Ought possible. The Is is not our concern, and therefore the delimitation between them for the normative scientist is a function of the Ought – hence the identity of the dichotomy and the second category of thought in this chapter.

[97] Kelsen (1960) *supra* note 2 at 206 (Ch 34 d); Kelsen (1979) *supra* note 2 at 206 (Ch 59 I c).

[98] Edel (1998) *supra* note 21 at 214.

[99] 'deren Geltung selbst innerhalb der Sphäre des positiven Rechtes unbegründet und unbegründbar bleibt'; Kelsen (1928) *supra* note 68 at 286 (para 3).

(social or natural) science has a 'given' which is the object of its study. Its theories have to fit and explain that 'given'. A natural science fails if it cannot adequately explain its object. When it is argued that scholars 'must do [this or that] if they want to produce satisfactory accounts of law';[100] or when the argument is that the 'theory . . . that every legal order has a *Grundnorm* as basis of validity of the constitution is *empirically false*',[101] empirical and normative sciences are commingled. What these attempt to do is impossible with respect to normative theory, because here the theory through the creation of the intellectual superstructure determines its object: the Ought. A purported 'given' that does not satisfy the criteria of normative theory is not a 'given' of normative scholarship.

When can the 'satisfactory explanation' criterion, which seems to be assumed as a necessary condition for any legal theory, be said to be fulfilled? What is this criterion? Is it merely to be able to 'explain' the maximum number of norms *held to be* valid? This question is in itself very problematic, because legal theory is not a quasi-mathematical description of real events (as natural science is). It has the power to create and undo its object: we trade in ideal ideas, not in reality. The second statement given above is equally problematic, because it also presupposes something that theory is supposed to constitute, i.e. when a norm is a norm. That a *Grundnorm* is necessarily presupposed is neither verifiable nor falsifiable, because it is the *Grundnorm* – as mental construct – that determines what is a constitution as normative order in the first place.

If one were to argue that the point of testing a positivist legal theory on positive law is not so much one of the theory being able to (or having to) explain all positive law, but that the theory is not contradicted by some positive law, we might respond that any contradictory law can also be called non-law, since the theory of norms not only describes what is (as a scientific theory would), but primarily acts as constituent – it makes law what it is.

A zoologist classifying butterflies does not create them; a legal theorist by proposing a theory can 'decide' what is to be a norm.

> What is vital at this point is simply that nature is as it is, before and even entirely independently of whether its laws are cognized by science. Not nature, but natural science is a product, something generated by human cognitive activity, whereas the positive law itself is a product, something generated by human activity, and, moreover, something eminently changeable.[102]

The choice between normative theories becomes thus at the same time trivial and existential. It is trivial, because the choice made cannot be attacked by showing that it is falsified by reality. We simply cannot prove that a theory of norms is

[100] Matthew H. Kramer, In defense of legal positivism. Law without trimmings (1999) 164.

[101] 'These . . . daß zu jeder Rechtsordnung eine Grundnorm als Geltungsgrund der Verfassung gehört, ist *empirisch falsch*'; Priester (1984) *supra* note 6 at 219 (emphasis added).

[102] Edel (1998) *supra* note 21 at 211; Adolf Menzel, Naturrecht und Soziologie, in: Festschrift zum einunddreißigsten Deutschen Juristentag 3. bis 6. September, Wien 1912 (1912) 1–60 at 59.

contradicted by reality, because we are concerned with a different realm, which does not depend on reality for its 'truth'. The choice is existential, because everyone cognising norms has already made the choice, even if they are not aware that they have done it. It is an expression of our existential freedom to choose our own dogmas and is thus most profound. We all have to live with our choice and are damned to it; we are responsible for the choices we make – even and especially for our theories – because with relentless *Konsequenz* the consequences of our choices will ensue.

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