

INTERNATIONAL LAW AS A COERCIVE ORDER: HANS KELSEN AND THE TRANSFORMATIONS OF SANCTION

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“Submission to *law*: how the consciences of noble tribes all over the earth resisted the abandonment of vendetta and were loath to bow before the power of the law! ‘Law’ was for a long time a *vetitum*, an outrage, an innovation, it was characterized by violence—it was violence to which one submitted. . .”

– Friedrich Nietzsche, *On the Genealogy of Morals*, 114 (1887)

“It is the essential characteristic of law as a coercive order to establish a community monopoly of force.”

– Hans Kelsen, *Peace Through Law*, 3 (1944)

I. INTRODUCTION

As was the case during much of his life, the Austrian legal philosopher Hans Kelsen (1881-1973) is still best known today for his “pure theory of law” (*reine Rechtslehre*).¹ Distilled to its core claim, this theory holds that all of the valid rules of a legal system must be mutually consistent and, ultimately, derive their shared force from a single, fundamental *Grundnorm* (basic norm).² Because this hierarchy of legal rules exists, every rule can be accurately defined and applied by reference to the legal system of which it is a part. Any apparent gaps in the law can be filled with more law.³ As a self-contained system built on the foundation of the *Grundnorm*, law does not need to be supplemented by morality (as natural law advocates claim) or political influences (as “realists” argue).⁴ Law is its own

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1. See HANS KELSEN, *PURE THEORY OF LAW* 8 (Max Knight trans., 2nd ed. University of California Press 2008) (1967) (1960). Unless otherwise noted, references to Kelsen’s pure theory of law will be to the 1967 English translation of the German 1960 second edition, rather than to the 1934 German original. The differences between the two editions are, however, significant for the argument advanced by this Article, and will be discussed in further detail *infra*.

2. *Id.* at 8-9.

3. See *id.* at 46; see also the critical appraisal of this idea in PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 70-78 (Columbia University Press 2011).

4. For a notable example of natural law-based critiques of positivism (including Kelsen’s version), see John Finnis, *On the Incoherence of Legal Positivism*, 75 *NOTRE DAME L. REV.* 1597 (1999). On modern variants of “realism,” including their compatibility with the fundamental doctrines of traditional positivism (to the extent the latter claim only to provide the means for ascertaining the law’s formal content, not its real-world operation), see, e.g., Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *LEGAL THEORY* 2, 111 (2010); Brian Leiter,

universe.⁵

Moreover, law for Kelsen is a single and unified (“monistic”) universe.⁶ The domestic and international levels are not fundamentally different in nature or in tension with one another. Because the norms of both derive their validity by their adherence to the *Grundnorm*, they must be mutually consistent. Where any incompatibility between particular norms does exist, the one that complies with higher norms and the *Grundnorm* is valid; the one that (relatively) fails to do so is invalid.⁷ With regards to the enforcement of international law against violating states and individuals—a subject that Kelsen found important throughout his life and that at times dominated his theoretical labors—such enforcement can be considered valid despite the protests of the punished state (or those under behind the shield of its legal personality) if and only if the *Grundnorm* provides the rationale for invalidating these asserted sovereign prerogatives.⁸

The validity of any international legal sanction thus depends on the content of *Grundnorm*. But what is it? Rather surprisingly, Kelsen himself changed his mind about the answer to this question, even as he maintained the crucial role of the concept in his theory. The first version, advanced in 1920 as part of his earliest sustained treatment of international law, is the traditional rule *pacta sunt servanda*.⁹ However, by the time he published the *General Theory of Law and*

Legal Realism and Legal Positivism Reconsidered, 111 ETHICS 2, 278-301 (2001). For an interpretation of “realism” as a distinct theoretical position on international law that is compatible with key aspects of international legal positivism (and that engages at length with the views of Hans Kelsen’s longtime intellectual rival Carl Schmitt (1888-1985)), see Ryan Mitchell, *Sovereignty and Normative Conflict: International Legal Realism as a Theory of Uncertainty*, 58 HARV. INT’L L.J. 421 (2018). The present article, similarly, will claim that Kelsen’s version of positivism (specifically in its later, post-World War II form) is in many ways “realist” in its premises and implications—if nonetheless still quite distinct from Schmitt’s views. Arguably, the best way to understand the relationship between Kelsen’s later views and those of Schmitt is via Kelsen’s own categorization of “two monistic constructions,” one based on the primacy of international law, and the other based on the primacy of individual sovereign states. KELSEN, *supra* note 1 at 339-347. It is also worth noting Kelsen’s own admission that although “[h]e who values the idea of a legal organization of the world[] will prefer the primacy of international law[, t]his does not mean . . . that the theory of the primacy of national law is less favorable to the idea of a legal organization of the world[.]” *Id.* at 346. National monism and international monism are two sets of lenses that anyone can wear.

5. Cf. Frederick Schauer, *The Path-Dependence of Legal Positivism*, VA. L. REV. 101, 957, 975 (2015) (characterizing Kelsen’s project in Kelsen, *supra* note 1 as “identify[ing] the universe of law as such.”).

6. KELSEN, *supra* note 1 at 339-47.

7. This dynamic is illustrated in relation to the particularly hard problem (for Kelsen’s project) of classifying “invalid” judicial decisions (i.e. judgments that “get the law wrong”) in *id.* 265-70.

8. *Id.* at 214-15.

9. HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VOLKERRECHTS: BEITRAG ZU EINER REINEN RECHTSLEHRE [The Problem of Sovereignty and the Theory of

State in 1945, he had definitively replaced this earlier formulation with an alternative formula: “States ought to behave as they have customarily behaved.”¹⁰ The first edition of his influential *Pure Theory of Law* (1934) included the *pacta* version of the *Grundnorm*, whereas the second edition (1960) replaced this with the version based on custom.

At some point between 1934 and 1945 then, Kelsen transformed the concept at the core of his theoretical project—its literal foundation. The striking changes to Kelsen’s later theory have been the subject of occasional comments but have seldom been addressed at length or in depth, which also tends to be true of the various other shifts in Kelsen’s postwar thought.¹¹ What, exactly, is at stake in the shift from “the sanctity of agreements” to (a form of) “custom” as the normative basis for law, and especially the international legal system? A closer examination of the process by which Kelsen elaborated his theories suggests that the phenomenon of sanction, in the sense of international law’s concrete forms of enforcement, was at the core of this shift.

This Article presents the argument that out of all the legal phenomena that Kelsen’s pure theory was called upon to confront and to explain, it was the enforcement of international law against states (or individuals protected by the traditional immunities conferred by the state) that posed its most difficult challenge. Writing during a time of rapid innovations in international order, Kelsen struggled and, initially, failed to provide a systematic justification for new forms of international regulation such as the prohibition of wars of aggression or the emergence of international criminal law. This failure caused Kelsen to turn towards a new form of international legal argument that has been accurately characterized as “pragmatic,” but that also retained key features of his earlier

International Law: Contribution to a Pure Theory of Law] 96 (2d ed. JCB Mohr, 1928) (1920).

10. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369 (Lawbook Exchange, 2007) (1945). It should be noted that *pacta* is still explicitly identified as a key aspect of this 1945 definition of the *Grundnorm*. However, Kelsen makes very clear here that *pacta* is itself subsidiary to custom. *Id.*

11. An exception to this lack of attention is Stanley L. Paulson, *Metamorphosis in Hans Kelsen’s Legal Philosophy*, 80 MOD. L. REV. 860, 860-94 (2017). Paulson notes, however, that “writers who have addressed this [later] period, the so-called *Spätlehre*, have confined their discussion to Kelsen’s shift on the applicability of logic to the law without offering a clear picture of the scope of the shift.” *Id.* at 861. Other relatively comprehensive contextual treatments include Stanley L. Paulson, *Four Phases in Hans Kelsen’s Legal Theory? Reflections on a Periodization*, 18 OXFORD J. LEGAL STUD. 153, 153-66 (1998) (book review); EUGENIO BULYGIN ET AL., ESSAYS IN LEGAL PHILOSOPHY 69-74, 136-45, 235-51, 311-23, 337-53 (Carlos Bernal et al. eds., Oxford University Press 2015), and Neil Duxbury, *Kelsen’s Endgame*, 67 CAMBRIDGE L.J. 51, 54 (2008). Though these analyses of Kelsen’s later theory indeed go further than the traditional narrow focus on Kelsen’s position with regards to the relationship between law and logic, they still do not address in detail the implications of Kelsen’s shifting ideas for the interpretation and application of international law. Nor do these discussions mention Kelsen’s specific views on the “hard question” of justifying innovations in international legal sanction, which is developed in this Article.

insights and commitments.¹² Instead, Kelsen's post-World War II reformulation of key aspects of his theory built upon the core claims of his previous thought (while modifying aspects that had become incompatible with his empirical observations).

The aim of this Article is less to track the changes in Kelsen's thought over time, however, than to explore how his reactions to specific international legal problems provide insights into perennial questions of theory and practice. In particular, Kelsen's later, "realist"-inflected *Grundnorm* provides one of the most powerful lenses for analyzing difficult questions about the potential validity and scope of sanctions for the violation of international law. Continuing ongoing academic conversations that suggest there is still much in Kelsen's thought that can contribute to understanding—or reimagining—the current functioning of international law,¹³ this Article will make the case for a specific "late Kelsenian" approach as a source of solutions to currently pressing issues in the application of international legal sanctions via the UN Security Council, the International Criminal Court, and in international tribunals.

Both in terms of its current relevance today and its historical development, this "late Kelsenian" approach to international legal sanction is best viewed in connection with specific, concrete examples. For example, why was it possible for aggressive war to become retroactively "outlawed" and made subject to punishment at the Nuremberg and Tokyo Tribunals?¹⁴ Did the principle of *nullum crimen sine lege*, requiring prior existence of an explicit statutory authority for

12. See David Kennedy, *Symposium: The International Style in Postwar Law and Policy*, 7 Utah L. Rev. (1994); cf. Carl Landauer's interpretation in Landauer, *Antinomies of the United Nations: Hans Kelsen and Alf Ross on the Charter*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 4, 767 (2003). Landauer notes that in many academic discussions of Kelsen's thought, the later and more realistically-inclined "Kelsen who could write Collective Security under International Law for the US Naval War College in the 1950s is nowhere in sight." Similarly, it is true that Kelsen's book *Peace Through Law* of 1944 seems to have little left of the pure theory." However Kelsen's subsequent postwar writing on international law, including his work on the UN Charter as well as his revised version of the *Pure Theory of Law*, might also be read less as an abandonment than as a systematic attempt at *synthesis* of the Pure Theory's core claims with key "realist" premises about the pragmatics of real world legal orders.

13. See especially JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE 176-79 (Routledge 2011).

14. The problems that the birth of international criminal law posed for traditional positivism are discussed in, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 12, 43-52 (2nd ed. Oxford University Press, 2016). At the time, the Nuremberg Tribunal was subject to criticism on related grounds by Kelsen's rival Carl Schmitt (himself facing potential prosecution as a Nazi collaborator). See Carl Schmitt, *The International Crime of the War of Aggression and the Principle 'Nullum crimen, nulla poena sine lege'* in TIMOTHY NUNAN (ED.), WRITINGS ON WAR 30-74 (Polity Press Cambridge, 2011) (1945). On the similar qualms of the Tokyo Tribunal judges Pal and Röling, see Robert Cryer, *Justice Röling (The Netherlands)* in YUKI TANAKA, TIMOTHY L.H. MCCORMACK, AND GERRY SIMPSON (EDS.), BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED 109-26 (BRILL 2011).

criminal punishment, render these and other war crimes prosecutions invalid?¹⁵ Do modern arguments about *jus cogens* norms overriding countervailing sovereign rights and immunities suffer from similar obstacles?¹⁶ How can innovative changes to the structure and functionality of international institutions be reconciled with the authority of existing positive sources of law?¹⁷

Critiques have never been lacking either of Kelsen's approach to international law or his legal theory more generally. The chief sources of opposition tend to come from two directions. For many traditional positivists or "realists,"¹⁸ Kelsen's attempt to account for the normative consistency of legal systems (e.g., by engaging in an "internal" analysis of why certain rules are valid) is misguided. For such critics, Kelsen's *Grundnorm* appears like an attempt to provide philosophical foundations for social practices that may simply lack such foundations, and attribute logical consistency to sets of rules that may simply lack any such consistency.¹⁹ On the other flank, natural law advocates and Dworkinian

15. *Id.* at 32-52.

16. *See, e.g.*, Art. 53, Vienna Convention on the Law of Treaties (1969). Kelsen was not inimical to existence of *jus cogens* norms, i.e. core norms of general international law that can limit the scope of valid treaties, though he argued that existing doctrine was unclear on their scope. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 344 (The Lawbook Exchange 2003) (1952) ("[As to] whether a treaty at variance with norms of general international law is to be considered as valid[, i]t is the question as to whether the norms of customary general international law have the character of *jus cogens* or of *jus dispositivum*. No clear answer to this question can be found in the traditional theory of international law."). Jörg Kammerhofer applies Kelsen's *Grundnorm* to determine that *jus cogens* can only be valid as a subsidiary norm of customary international law, not as a separate body of norms superior to it. Kammerhofer, *supra* note 13 at 176-79 ("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."). This Article is in agreement with that conclusion. With regards to international legal sanction, specifically, a key difference between enshrining *jus cogens* norms as invariable trumps to other sources of law versus, e.g., the development of the Nuremberg and Tokyo Tribunals in contravention of the general law principle of non-retroactivity is that in the latter case a specific form of sanction is being created and applied by a new organization (in that case the nascent United Nations) that is making a claim to be inaugurating a new customary relationship in which other legal actors will be obedient to such deployments of sanction. *Jus cogens*, by contrast, by itself has no inherent connection with any specific form of sanction, or any concrete institution, organization of states, or concrete relationships between legal actors. Customs must be "willed" into existence by legal actors, whereas general principles per se cannot be "willed." Kelsen's overriding preference for "custom" likely reflects this distinction. *See* KELSEN *supra* note 1, at 9.

17. Kelsen's student and interlocutor Josef L. Kunz discusses this issue in Kunz, *The Problem of Revision in International Law*, 33 AM. J. INT'L L. 33, 33-55 (1939) in a manner that reflects Kelsen's own process of struggling to provide it with a satisfactory answer.

18. *See* discussion of realism and its relationship to traditional positivism in note 4 *supra* and the cited sources.

19. *See, e.g.*, David Dyzenhaus, *Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought*, 16 THEORETICAL INQ. L. 337, 337-66 (2015).

liberal theorists recoil at Kelsen's insistence on the total separation between morality and law—that the hierarchy among norms is not a product of “truth” or even “justice,” but rather of a *Grundnorm* with no inherent moral content.²⁰ In the face of these two alternative legal visions, Kelsen has been seen as trying to offer a “third way” between the extremes of a morally (or ideologically) determined view of law and one that is reductively “fact-based” and unaffected by normative “should” statements.²¹

Other legal theorists have also tried to chart this kind of “third way.” Perhaps most influentially, H.L.A. Hart developed a version of positivism emphasizing the distinction between “external” and “internal” views of law.²² Hart's approach in many ways drew from Kelsen's, but rejected his notion of a single, unifying *Grundnorm* in favor of socially-contingent “rules of recognition” as the determining factors for valid law.²³ Both would recognize that a mere “habit of obedience” by members of society to a lawgiver was not sufficient to explain the validity of legal rules, and validity instead required a social custom consisting in the recognition of specific processes by which valid laws could be made.²⁴ While the Kelsen of 1934 would not have fully agreed with this point (because his first version of the *Grundnorm* would not allow existing valid rules based on agreements to be subsequently considered invalid due to a change in custom), the later Kelsen with the second version of the *Grundnorm* could certainly do so.²⁵

Despite their overlapping on such points, however, Hart and the late period Kelsen still maintained essential differences. Kelsen alluded to these during a 1961 public discussion between the two at UC Berkeley, in which, as Hart

20. See, e.g., Finnis, *supra* note 4, arguing for universally valid moral truths as sources of law. Like both Kelsen and natural lawyers, Ronald Dworkin also famously claimed that there is a “right answer” to every legal problem. However, he viewed this “right answer” as emerging from the “shared moral beliefs” of particular communities, rather than from positive legal provisions themselves. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 428 (Harvard University Press 1986). He thus subordinates positive law to moral norms in a manner that closely resembles that of natural law theorists, and that does not restrict itself to legal (as opposed to moral) sources of law as Kelsen does.

21. See Paulson, *supra* note 11, at 862.

22. HERBERT L.A. HART, *THE CONCEPT OF LAW* 89 (Oxford University Press 2012).

23. Michael Giudice, *Hart and Kelsen on International Law* in LESLIE GREEN AND BRIAN LEITER (EDS), *OXFORD STUDIES IN PHILOSOPHY OF LAW: VOL.2* 148 (Oxford: Oxford University Press, 2013).

24. On the habit of obedience see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED: BEING THE FIRST PART OF A SERIES OF LECTURES ON JURISPRUDENCE, OR, THE PHILOSOPHY OF POSITIVE LAW* 206, 286 (J. Murray, 1863). For a critique of this concept, see HART, *supra* note 22 at 50-53. For an incisive reading of Austin that suggests his conception of sovereignty was actually more sophisticated than its strawman characterization by some 19th century opponents (with implications for later critiques), see John Dewey, *Austin's Theory of Sovereignty*, 9 *POLITICAL SCIENCE QUARTERLY* 1, 31 at 36 (1894).

25. Kelsen's later openness to the derogation of *pacta* norms based on custom is the main subject of Parts III-IV, *infra*.

subsequently recalled “Kelsen remarked that our dispute was of a wholly novel kind because though he agreed with me, I did not agree with him.”²⁶ Above all, Hart could not agree with Kelsen’s continued insistence that valid legal rules could not contradict each other. He considered Kelsen’s *Grundnorm*, even in its later version, to be an idealized phantasm inasmuch as it promised to systematically provide “right answers” to reconcile conflicting rules or fill potentially unfillable gaps in the existing positive law.²⁷ In the same anecdote, he recalls (literally) falling startled out of his chair during the debate when Kelsen defended his “pure” Is / Ought distinction by loudly declaring: “Norm [is] Norm.”²⁸

Much international legal analysis today reflects an approach resembling that of Hart. Rules of recognition (above all those associated with Article 38 of the International Court of Justice statute) determine valid law,²⁹ but do not promise that it will form a coherent normative universe. Many international law scholars view Kelsen’s claims in this direction as “inspiring,” but may be less apt to view them as providing practical guidance in legal interpretation.³⁰

In fact, as this Article will argue, Kelsen’s interventions during his late period are of considerable practical relevance—so much so that in some of their specific applications they may put his “inspiring” reputation in jeopardy. For on various issues (including but not limited to skepticism about *jus cogens*),³¹ Kelsen’s reimagined *Grundnorm* suggests less idealistic cosmopolitanism than a geopolitically contingent, sanction-oriented, state-centric vision.³² The normative unity of law can be based only on some widely shared *a priori* premise about legal order, not on any shared vision of justice.³³ This point is reflected many times in Kelsen’s oeuvre, but one revealing instance is in an essay on Nietzsche, written between 1952 and 1964 but only posthumously published in 2012 as part of a collection entitled *Secular Religion*.³⁴

26. Herbert L.A. Hart, *Kelsen Visited*, 10 UCLA L. REV. 709, 710 (1962).

27. Giudice, *supra* note 23.

28. Hart, *supra* note 26.

29. Cf. Aldo Zammit Borda, *A Formal Approach to Article 38 (1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUROPEAN J. INT’L L. 2, 649 (2013).

30. This is a generalized observation based on various conversations with international law practitioners and scholars.

31. See *supra* note 16 and the cited sources.

32. In this sense, Kelsen’s views on law must be distinguished from his views on politics. His vision of international legal order always remains based on the state. However his writings on democracy invariably seek to emphasize how individuals, not states, are the true subjects of political authority. This is a major theme of, e.g., HANS KELSEN, *THE ESSENCE AND VALUE OF DEMOCRACY* (Rowman & Littlefield 2013) (1920).

33. See, e.g., Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, HARV. L. REV. 55, 44 (1941) in which Kelsen describes the task of the Pure Theory of Law as being “to free the concept of law from the idea of justice.”

34. Hans Kelsen, “Nietzsche the Metaphysician” in KELSEN, *SECULAR RELIGION: A POLEMIC*

In the essay, Kelsen comments on this curious statement by Nietzsche in his *Untimely Meditations*, in which the latter appears to assert a relationship between “truth” and “justice”:

The search for truth is often thoughtlessly praised: but it only has anything great in it if the seeker has the sincere unconditional will for justice. Its roots are in justice alone: but a whole crowd of different motives may combine in the search for it . . . curiosity for example, or dread of ennui, envy, vanity, or amusement. Thus the world seems to be full of men who ‘serve truth’: and yet the value of justice is seldom present, more seldom known, and almost always mortally hated.³⁵

Defending Nietzsche against allegations of metaphysical natural law speculation by Martin Heidegger and Eric Voegelin,³⁶ Kelsen argues that the statement “does not refer to the relation between ‘truth’ and ‘justice,’ but to a relation between the ‘search for truth’ and the ‘will for justice,’ two psychic facts.”³⁷ In other words, Nietzsche cannot be read as holding that “justice is the basis of truth,” but rather only that “the roots of the *value* of the search for truth are in the will for justice.”³⁸ Kelsen is adamant that Nietzsche should not be read as conflating justice with truth:

Emotionally . . . [Nietzsche] rejects the value of truth, but as a logician he must recognize it as a value, although not as an absolute one. Justice, however, he emotionally affirms, but as a relativist, he can maintain it, too, only as a relative value.³⁹

Kelsen, too, recognizes truth and justice as socially and psychologically important but relative values, and he does not equate them. As will be further demonstrated below, this value relativism is a facet of his theory that holds true from its earliest expressions to its very latest stages, although it does become deeper and more thorough overtime. His eventual embrace of the custom of states as the basis for the revised *Grundnorm* of international law (and thus, for an international law monist, of *all* law) is very much an expression of this deepening value relativism.⁴⁰ The postwar turn in Kelsen’s international law thinking

AGAINST THE MISINTERPRETATION OF MODERN SOCIAL PHILOSOPHY, SCIENCE AND POLITICS AS “NEW RELIGIONS” 225 (Springer 2012).

35. *Id.* at 248.

36. Kelsen’s book *Secular Religion* was written in response to Eric Voegelin’s 1952 book *THE NEW SCIENCE OF POLITICS: AN INTRODUCTION* (University of Chicago Press 1987) (1952), which posits that much modern philosophy and political thought is in essence “Gnostic,” or makes claims to absolute knowledge in order to infringe upon individual freedom. Kelsen rejects this view.

37. Kelsen, *supra* note 34, at 248.

38. *Id.* (emphasis added).

39. *Id.*

40. The earlier emphasis on *pacta* would indicate that the relativity and shifting nature of values, including those incorporated into legal norms, can be overcome through legal agreements

examined in this Article occurs in roughly the same period that he writes in defense of “Lessing, Comte, Marx, [and] Nietzsche, [who] tried to liberate human thinking from the bondage of ideology[.]”⁴¹

In contrast with his frequent stereotyping as an otherworldly prophet of norms unmoored from reality, Kelsen’s late views on international legal sanction are in fact a resource for better understanding the international legal system as a dynamic and contingent body of law—one that may emerge as a systematic product of its various participants’ “will for justice” but which need not have any permanent “truth” value as the expression of that will. Consisting of widely shared core normative premises while remaining capable of open-ended change, the international legal system is neither reducible to the momentary self-interest of sovereign states (as some, but not all, “realists” contend)⁴² nor hermetically insulated from real-world institutions in the form of a body of transcendental ideals (as proposed in natural law theory).⁴³ The international legal system may be an organic whole and normative unity, but it is also organically dynamic and even unpredictable—its necessary ties to subjective wills for justice do not at all imply that any particular vision of justice will chart its future course. Law is its own universe, but it is a “bubble universe”⁴⁴ in an otherwise chaotic and relative cosmos.

In examining this late Kelsenian approach, this Article proceeds first in Section II by examining the relationship of state sovereignty and international law in Kelsen’s early thought, focusing on the development of the *Grundnorm* concept. Section III then explains how Kelsen’s theoretical views informed his reimagining of *jus ad bellum* as a kind of municipal law of the world community with a centralized enforcer, and how this conception faced a crisis due to the innovations in international sanction associated with the Second World War. Section IV recounts how Kelsen reimagined his monistic theory of law in the context of the early Cold War era, applying his reimagined *Grundnorm* based on custom to the task of justifying the use of war as a legitimate international sanction.⁴⁵ Section V explains how Kelsen’s revised theory of international legal sanction can be used as a unique (though by no means uncontroversial) lens on contemporary problems regarding international legal sanctions. It considers some

/ binding contracts. The later emphasis on custom indicates that such contracts last only as long as the underlying customs that entail their recognition as binding, and that existing agreements can also be radically reinterpreted through shifts in customs of interpretation.

41. *Id.* at 3.

42. *See* discussion of overly reductive forms of “realism,” primarily in the field of international relations, in Mitchell, *supra* note 4.

43. *See* Finnis, *supra* note 4.

44. *Cf.* overview of the origins of the quantum physics concept of the “bubble universe” in J. Richard Gott, *Universe in a Bubble*, AEON, October 5, 2017 (“Multiple bubble universes form in an inflating ‘sea’ of space, and each expands forever. Our own expanding Universe is just one of the bubbles.”). <https://aeon.co/essays/did-our-cosmos-emerge-from-a-sea-of-inflating-bubbles>. The term is of course deployed here simply by way of analogy.

45. *Cf.* sources cited in note 14 *supra* (discussing the obstacles to this development).

contemporary legal questions, such as head of state immunity questions before the ICC and the status of *ius cogens* in international law, in light of Kelsen's revised *Grundnorm* and related concepts such as so-called "negative custom" (*negative Gewohnheit*).⁴⁶ Ultimately, this Article shows that even core legal principles will be treated as relative to geopolitical realities when viewed in light of Kelsen's reimagined *Grundnorm*.

II. EARLY ATTEMPTS TO UNIFY DOMESTIC AND INTERNATIONAL LEGALITY

A. Identifying a Founding Principle

Kelsen's first attempt at asserting a *Grundnorm* for international law was, as mentioned, not based on custom but instead on the maxim *pacta sunt servanda*: "agreements are to be complied with."⁴⁷ This traditional rule, although relatively simple and straightforward, does seem a promising basis for an account of the international legal system that is not meant to beg the question as to "natural" moral beliefs or presume agreement as to contestable normative commitments. Like statutes, the written agreements of states are a type of *formal* legal instrument that entails the maximum specificity and explicitness. As in other positivist accounts, Kelsen's privileging of explicit formal sources of law was an attempt to reduce or eliminate the elements of uncertainty in determining the nature and scope of legal obligations.⁴⁸

However, even in his earliest attempts to define a *Grundnorm* for international law, Kelsen had already taken major steps away from the approach of traditional positivism and towards a new variant. He hoped that the approach would more fully account for those aspects of legal reasoning that positivists tended to ignore, and which natural law-influenced theorists had (in Kelsen's view inadequately)⁴⁹ attempted to account for. Why is international law treated

46. KELSEN, *supra* note 2, at 213; HANS KELSEN, *REINE RECHTSLEHRE* 220 (2d ed. Franz Deuticke 1960). This Article will interpret Kelsen's somewhat cryptic references to "negative custom" as meaning the *retroactive* derogation of once-valid legal norms due to shifts in custom at more fundamental levels of a legal system's normative hierarchy. Kelsen's idiosyncratic notion of desuetude as "negative custom" has rarely been addressed, and has not been examined in detail in terms of its role in Kelsen's thought. However, a significant critical engagement with Kelsen's views on desuetude, which nonetheless does not draw out the implications for international law specifically, appears in JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 61-63 (Oxford University Press 1970). Raz's objections are discussed in more detail in Part IV.C. *infra*.

47. Kelsen, *supra* note 9, at 171. ("International law would be distinct from or superior to the state legal order if the legal proposition [*Rechtssatz*] underlying international law's binding nature, *pacta sunt servanda*, were ascribed to a legal order distinct from or superior to that of the state.")

48. *But see* Hart, *supra* note 22, at 251 ("[T]he exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged[.]").

49. *See* Kelsen, *supra* note 9, at 86-87 ("Positivism . . . declines to further justify the legitimacy of a [valid] norm or . . . to deduce a higher order of which [existing positive] law is one qualified component[.]"); MÓNICA GARCÍA-SALMONES ROVIRA, *THE PROJECT OF POSITIVISM IN*

as valid by its subjects? Despite the presence of inconsistencies in the norms of legal systems, can these nonetheless make up a coherent, consistent body of rules?⁵⁰ Moreover, and perhaps most importantly, when and how is it legitimate and logically justified for the norms of this legal system to change?⁵¹

These concerns were at the core of Kelsen's theorizations of international law and of the *Grundnorm*. They can all be observed as key elements of his first sustained scholarly treatment of international law, in his 1920 book: *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* ("The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law").⁵² This book is not only where Kelsen first deals at length with international law, it also marks his first high-profile reference to the idea of a "pure theory of law" (*reine Rechtslehre*), which would become the theoretical project most closely associated with his body of work taken as a whole. Relatedly, this same work marks an early discussion of Kelsen's *Grundnorm* (here called the *Ursprungsnorm*).⁵³

As is evident in the work's title, *The Problem of Sovereignty* was focused on assessing the relationship between state sovereignty and the norms of international law. This work, which was written during World War I, was highly topical and intimately connected with the geopolitical and legal developments of the time in which it was conceived and composed. One of its primary concerns is with defining the legal obligations that can exist between states, as well as the degree to and manner in which sovereign, Westphalian states can become integrated with each other and subject to international law as a superior legal order. These were matters of great theoretical concern at a time when the Central Powers' war liability was being assessed and the League of Nations system was being formed.⁵⁴

In turning theoretical attention to such topics, Kelsen wrote against the background of traditional positivist views of international law that had viewed its norms as being fully reducible to the "will" of states. Leading jurists such as Carl Bergbohm, Franz von Liszt, Paul Laband, Dionisio Anzilotti, Heinrich Triepel, Lassa Oppenheim, and other positivists of the late 19th and early 20th centuries

INTERNATIONAL LAW 274 (OUP Oxford, 2013) ("the concept of rights in natural law theories was [for Kelsen] . . . non-judicial due to its attitude of being 'in war' with the legislator.").

50. García-Salmones Rovira, *supra* note 49, at 234-35 ("A mathematical-logic turn had an important appeal for Kelsen . . . which was, essentially, attributable to its potential for universalization. Kelsen's long-standing and clear opposition to contradictions of norms may be traced back to the renunciation [] in the realm of ought [of] the laws of causality.").

51. Cf. Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUROPEAN J. INT'L L. 5, 1075 (2008); Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 850-66 (1989).

52. Kelsen, *supra* note 9.

53. *Id.* at 92-98.

54. Cf. discussion in Stephen Wertheim, *The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914-1920*, 35 DIPL. HIST. 797, 797-836 (2011).

all accepted some variant of the idea that international law's validity is premised on state will (*Staatswille*).⁵⁵ These will-based accounts were generally premised upon the idea of a *dualism* between the legal order of the state and that which existed between states.⁵⁶ Viewing the state as the ultimate subject capable of creating international norms,⁵⁷ they would not permit international legal rules to be conceived of as superior to the internal rules of each state and would as a result identify inherent differences "between treaties and statutes."⁵⁸

However, these views posed various paradoxes. Kelsen's comments on the thought of Heinrich Triepel are among the most illuminating in this regard. As Kelsen points out with regards to Triepel's views (which he characterizes as "the most extreme representation of dualist thought in contemporary international law"), if both domestic legislation and international treaties are expressions of state will, then they stem from the same phenomenon, and cannot be treated as comprising separate legal orders.⁵⁹ If they are instead part of the same legal order, then they must exist in some sort of hierarchical superior/inferior relationship.

In fact, Triepel himself was sympathetic to the idea of a special normative force for international law. However, in his attempt to reconcile this idea with dualism he generated new paradoxes. Triepel described international law as being the unique expression of a "common will" (*Gemeinwille*) among states,⁶⁰ a view that Kelsen considered to be flawed in part because it did not provide any objective way to assess which norms are valid: The content of the "common will" would consist of all valid international norms; meanwhile, all valid international norms would be those derived from the "common will." This was simply "a tautology."⁶¹ Moreover, based on Triepel's own premises the "common will" of the community of states consisted primarily in various agreements between

55. See generally Kelsen, *supra* note 9; see also, e.g., FRANZ VON LISZT, DAS VÖLKERRECHT: SYSTEMATISCH DARGESTELLT [International Law: Represented Systematically] (Springer, 2013); CARL BERGBOHM, STAATSVERTRÄGE UND GESETZE ALS QUELLEN DES VÖLKERRECHTS [International Treaties and Legislation as Sources of International Law] (C. Mattiesen, 1877); but see HEINRICH TRIEPEL, VÖLKERRECHT UND LANDESRECHT 131-32 [International Law and National Law] 77 (C. L. Hirschfeld, 1899) (disagreeing with the proposal that "in international law the state encounters *only its own will*" (emphasis added)).

56. KELSEN, *supra* note 9, at 120-24 (describing *inter alia* Triepel's dualistic concept of international law).

57. See, e.g., BERGBOHM, *supra* note 55, at 41-42 ("International law . . . principally comes into view as positive law to the extent it is the actual will of states, less so as witness to a greater ethical or historical process of development or 'mark of the collective legal consciousness of mankind.'").

58. See KELSEN, *supra* note 9, at 217 discussing the proposition by Liszt that "international law is based on treaty, not statute."

59. *Id.* at 134-35.

60. TRIEPEL, *supra* note 55, at 32 ("Only the common will of some number of states flowing together towards unity of will, via unification of [their] wills, can be the source of international law.").

61. KELSEN, *supra* note 9, at 135.

individual states (and evidence of international law was to acts of states). Occam's razor would demand that a new speculative entity, "the community" with its "common will," is not added unnecessarily to the group of states taken as individuals.⁶²

On the other hand, given that states did consider their treaties and other agreements to be binding, as the traditional positivists acknowledged, then this meant that there had to be another, higher norm that explained and justified their binding force. *Pacta sunt servanda*, the premise that agreements should be treated as binding, was already widely recognized as a fundamental norm.⁶³ Indeed, as Kelsen notes throughout *The Problem of Sovereignty*, the principle was indispensable to the understanding of international law propounded by even the most committed dualists, although it was generally paired with the "limiting" principle *rebus sic stantibus*, or the excuse of non-compliance with agreements due to changed circumstances.⁶⁴ As Kelsen is at pains to point out, putting the *pacta* and *rebus* principles on the same level "reduces international law to the formula: 'do what you will'; and degrades the science of international law into a description of interests and means of [exercising] power, [that is] in reality abolishes it."⁶⁵

B. Abandoning the Dualist Model of the State

The most direct precedent for Kelsen's development of his own, new variant of "positivism" was the liberal positivist Georg Jellinek (1851-1911). In his writings on international law from the 1870s, Jellinek had discussed the concept of *Selbstbeschränkung* ("self-limitation") as the foundation of all international legal obligation.⁶⁶ Specifically, he attempted to ground the operation of states' limitation of their own wills as lying in certain psychological tendencies—such as the tendency to maintain rather than renounce obligations once explicitly announced before a community of peers.⁶⁷ Even if states were technically free to

62. *Id.* at 136 ("After translating this . . . psychology . . . into normativity, all that is left over [for Triepel's theory] is the individual state's own will[.]"). There is no mention of Occam's razor in Kelsen's text. However, the notion of "*Denkökonomie*" (economy of thought) may lead to similar applications. See JOCHEN VON BERNSTORFF, *THE PUBLIC INTERNATIONAL LAW THEORY OF HANS KELSEN: BELIEVING IN UNIVERSAL LAW* 105 n.124 (Cambridge University Press, 2010) (Thomas Dunlap trans.) (2001).

63. *See, e.g., id.* at 186 (Discussing Paul Schoen's views regarding "a proposition that is necessarily regarded as generally valid by all states . . . *pacta sunt servanda*.").

64. *Id.* at 308.

65. *Id.* at 202.

66. *See* in particular the helpful overview and analysis provided in Bernstorff, *supra* note 62, at 15-42; *see also* RÜDIGER VOIGT, *DER MODERNE STAAT [THE MODERN STATE]* 27 (Springer, 2015).

67. GEORG JELLINEK, *SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE* 195-96 (Mohr Siebeck, 1892); *see also* Jochen Von Bernstorff, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law*, 4 *GOETTINGEN J. INT'L L.* 3, 659 (2012).

change their minds or exercise their free will, the legal system among states as a whole could be described as incorporating those principles upon which states based what they regarded as binding expressions of that same will. Although individual states were not in any sense subordinate to the international community taken as a whole, they were nonetheless embedded within it, and so their expressions of will could only be interpreted against the context of needing to act upon, and in coordination with, the rest of that community. Except where the evidence was clearly to the contrary, it could be assumed that states abided by certain core principles of “objective international law,” which allowed for certainty and predictability in their mutual relations.⁶⁸

Jellinek’s formula of self-limitation became influential as a means of reconciling the insistence on the ultimate autonomy of sovereign states with a binding character for international legal norms—its imprint is apparent in later attempts by Triepel and others.⁶⁹ Jellinek’s version of dualism, however, in some ways went further than its later positivist interpreters (aside from Kelsen) in seeking to establish legal norms as a distinct and separate realm from political reality. This was reflected in his “two-sided” (*Zwei Seiten*) approach,⁷⁰ which he compared to the way that a symphony can be perceived either in terms of physics or as an aesthetic experience.⁷¹ In the same way, the state could be perceived either as a political / social reality or as a legal entity.⁷² Nonetheless, even if “self-limitation” could function reasonably well to describe the usual legal dealings among states that exercised mutual self-restraint in their attempts to cooperate peacefully and profitably in diplomacy and commerce, it did not provide a final resolution or “dissolve the antagonism between the view of international law as based on the concrete will of individual states, and the universalistic view of international law as a legal order binding upon states.”⁷³

In particular, conceptions based on “self-limitation” could do little to explain

68. JELLINEK, *supra* note 67 at 195-96 (“Because there is no lawgiver above the state, thus a law binding upon the community of states, to the extent that it is not founded upon custom, can only emerge based on a common arrangement built upon an identical manifestation of intent [*Willenserklärung*] . . . Thus the proposition: ‘Privateering is and shall remain abolished’ emerges not from a treaty but from a consensus [*Vereinbarung*]. It is not agreed based on the achievement of the changing interests of this or that state, but rather based on the permanent interests of the community of states. Hence it is a proposition of objective international law [*objektiven Völkerrechts*], which cannot be claimed of any particular treaty norm *senso strictu*. Its cancellation would not be the [mere] repeal of a treaty, but rather the loosening of the ties of international law and a decline back into barbarism.”).

69. *But see* TRIEPEL, *supra* note 55, at 132 (explaining why he seeks to go beyond Jellinek’s theory to present his aforementioned conception of the “common will” of states, as otherwise “there cannot be found a distinction between the sources of international law and national law.”).

70. Kelsen takes aim at Jellinek as a representative of the “*Zwei Seiten*” approach in KELSEN, *supra* note 9, at 11-12.

71. JELLINEK, *supra* note 67, at 13.

72. *Id.*

73. VON BERNSTORFF, *supra* note 62, at 37-38.

the legal ramifications of a global conflict such as the First World War, in which the victorious alliance sought both to impose extensive liability upon the defeated states as well as to erect new international organizations that would exercise an unprecedented degree of supervision and punitive authority over member states.⁷⁴ For the “self-limitation” theory as for other forms of positivism prior to Kelsen, no superior authority is able to punish the individual state—except for a peer state that has been aggrieved. The traditional view of war as a legitimate means for states to prosecute their justified claims against one another, already present in the classic writings of Gentili and Grotius, remained valid even in this “new” positivist account of international law.⁷⁵

By the time Kelsen published his “Problem of Sovereignty,” it was clear that Jellinek’s “two-sided-theory” approach to international law could not suffice as a description of the existing international legal order or its impending transformations.⁷⁶ It makes little sense, after all, to describe the attempts at prosecuting German officials for war crimes or the establishment of international commissions to manage the industrial activity of territories as “self-limitations” by the German state.⁷⁷ Nor could the newly established League of Nations be reconciled with the principle of state free will as the ultimate basis for legal order, even given Jellinek’s modifications regarding objective principles of obligation.⁷⁸

At a time when international law was plunging into the internal management of the state itself, and into the individual responsibility of its officials for specific policies, a “two-sided theory” of state sovereignty was no longer viable.⁷⁹ The *Grundnorm*, and indeed the entire project of a “pure theory of law,” emerge in the course of Kelsen’s attempt to develop a theory that could account for the consistency and validity of a system in the process of undergoing radical change.⁸⁰

74. See Wertheim, *supra* note 54.

75. For an analysis of the intellectual background of such views, including their origins in the writings of early international law publicists, see, e.g., Carl Schmitt, *The Turn to the Discriminating Concept of War* in TIMOTHY NUNAN (ED.), *WRITINGS ON WAR 30-74* (Polity Press Cambridge 2011) (1937); cf. JAMES Q. WHITMAN, *THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR* (Harvard University Press 2012). Kelsen expresses his disagreement with arguments regarding the legal function of war as a judicial decision in Kelsen, *supra* note 9 at 265 (describing the doctrine that a war can decide which of two states is correct about a legal norm as “no more than the naked principle of power” rather than a legal concept).

76. KELSEN, *supra* note 9, at 9-15.

77. On the debates surrounding the (largely unprecedented) efforts to prosecute German officials, see, e.g., WILLIAM SCHABAS, *THE TRIAL OF THE KAISER 18* (Oxford University Press 2018) (discussing the statement by UK Secretary of State George Curzon that the “supreme and colossal nature of [Kaiser Wilhelm’s] crime seems to call for some supreme and unprecedented condemnation.”).

78. Cf. Wertheim, *supra* note 54.

79. See, KELSEN, *supra* note 9, at 11-12.

80. The sections of the Pure Theory of Law dealing with the “dynamic” aspect of legal systems are especially relevant to this aspect of Kelsen’s theoretical project. See KELSEN, *supra*

It was against this background that Kelsen proceeded to develop his theory of sovereignty as an emanation of an overarching legal order which lay at the core of the pure theory of law as he would later develop it. Between *The Problem of Sovereignty* and his first edition of *The Pure Theory of Law*, Kelsen further developed his Kant-influenced argument that state sovereignty is merely one expression of an order of legal norms.⁸¹ In relation to international law, it is true that states have certain rights against one another and a great deal of autonomy, but it is also the case that in their acts of agreeing to *pacta* they create obligations in a legal sense identical to those of domestic constitutional norms. Just as the German Empire had been created in 1871 via a constitutional process incorporating multilateral agreements among the various German *Länder*, so could a League of Nations be created via the Paris Peace Conference with just as much legitimacy and legally binding force. The League was no empire, but it was (originally) meant to act as a supranational authority with a genuine power to sanction states—something unprecedented in the Westphalian age.⁸² The state would thus (in any of its aspects relevant to any instance of legal interpretation) be identical with the law.

Kelsen echoed Jellinek's view that the state was like a symphony that could be viewed either based on physics or aesthetics. However, he suggested, "it would be more accurate to say that there is no *symphony* except for aesthetics [because for physics it is just a sequence of air vibrations]."⁸³ In the same manner, "the state as the object of a juristic-normative understanding [. . .] is not available for observation based on natural sciences or sociology!"⁸⁴ Kelsen's equation of the state with law was also closely tied with his evolving views on modern politics and popular sovereignty, as he explained in his book on *The Essence and Value of Democracy*,⁸⁵ published in the same year as *The Problem of Sovereignty*. Not only had the traditional positivist emphasis on state will had the effect of

note 1 at 193-217.

81. See, e.g., KELSEN, *supra* note 9, at 13 ("Law is—to speak with Kant—authorized coercion"); on the specific topic of the state as an emanation of law, see *id.* at 18, in which Kelsen cites the Kantian philosopher Hans Vaihinger to explain his view that the state is best viewed as a legal fiction or "As-If"; cf. Hans Kelsen, *The Function of the Pure Theory of Law*, in ALISON REPPY (ED.), *LAW: A CENTURY OF PROGRESS 1835 TO 1935* 231-241 (Oxford University Press 1937).

82. Kelsen would later write post-mortems seeking to analyze the causes of the League's failure, pointing out that "an international organization for the maintenance of peace has to fulfill three tasks: to oblige its members to settle their disputes in a peaceful way and to establish a procedure for the peaceful settlement of all disputes; to guarantee the execution of decisions . . . and to provide sanctions against members which . . . employ force against other members. The Covenant of the League of Nation has not fulfilled these tasks in a satisfactory way." Hans Kelsen, *The Old and the New League: The Covenant and the Dumbarton Oaks Proposals*, *AM. J. INT'L L.* 39, 45 at 58 (1945).

83. KELSEN, *supra* note 9, at 11 (emphasis added).

84. *Id.*

85. KELSEN, *supra* note 32.

sabotaging international law, it was also poisonous for democracy and for human individuality, as he muses in a passage invoking Nietzsche's *Thus Spoke Zarathustra*:

[I]t is a fiction when the unity, which the state legal order fashions out of the multiplicity of human actions, poses as a 'popular body' by calling itself the 'People.' It creates the illusion that individuals belong to the People with their whole being, when in actuality they only belong to it through certain actions which are either commanded or prohibited by the political order. It is this illusion that Nietzsche tears down in his *Zarathustra* when he says of the "New Idol": "State is the name of the coldest of all cold monsters. Coldly it tells lies too; and this lie crawls out of its mouth: 'I, the state, am the people.'"⁸⁶

C. The Role of Sanction

The late 19th-early 20th century dualists with whom Kelsen was dueling in 1920 were not his only opponents. In order to situate the state in a monistic international legal system, he also had to overcome the even more strenuous objections of those who denied international law a "legal" character in the first place. In this regard, the views of John Austin (1790-1859) were especially influential. Austin had written in his 1832 manifesto of positivism *The Province of Jurisprudence Determined* that, because law is in its essence "command, duty, and sanction,"⁸⁷ and because international law cannot meet this definition, the latter could at best constitute only "positive morality."⁸⁸ In fact, contrary to later caricatures of his views, Austin did not mean to say by this that international law was without any real-world effects. He spends a considerable amount of time in his 1832 book discussing the significance of "positive morality," a body of norms that could make all the difference in some cases, as: "[t]he weaker of such societies as are deemed political and independent, owe their precarious independence to positive international morality, and to the mutual fears or jealousies of stronger communities."⁸⁹

International legal rules, even if only "moral," could thus combine with politics to, for example, ensure that the Vatican maintained some independence vis-à-vis the vastly more powerful Italian state surrounding it, or that other weak states were not consumed by neighbors.⁹⁰ However, even if international norms

86. *Id.* at 36 (citing FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA: A BOOK FOR NONE AND ALL*, 48 (Penguin Books 1978) (Walter Kaufmann trans.)). The English translation of Kelsen's text has been corrected here to replace "New Man" with "New Idol." The original German in both the 1920 and 1929 editions of the book has *Neuen Götzen*.

87. AUSTIN, *supra* note 24, at 11.

88. *Id.* at 377-78.

89. *Id.* at 221.

90. In the Austinian view, the "prohibition on wars of aggression" established by the Kellogg-Briand Pact of 1928 would thus be no more than a somewhat more universal restatement

could help shape which sovereign states could continue to exist, that still did not mean that international law should be confused with states' internal laws. Sovereign states were thus those in which the people had a shared "habit of obedience" to an individual or group that itself did not have a "habit of obedience" to anyone else.⁹¹ Meanwhile, the "habit" itself did not actually refer to simply tending to do what one was told (after all, people followed each other's moral suggestions all the time without being sovereigns over one another). Rather it required actual commands, issued with a genuine threat of sanction for failure to comply, in order to constitute a real legal relationship.⁹²

The idea that law requires sanction in order to be "law" continues to be unpopular among many modern legal theorists of various different alignments,⁹³ not least those engaged in international legal theory.⁹⁴ In his own era, as now, Austin's emphasis on sanction confronted considerable criticism from those who saw a conflation of law's normative validity with its enforcement as cynical, amoral, or a sign of pathological obsession with state power.⁹⁵ Given Kelsen's commitment to international law and desire to dispel the "cold monster" state's claims to sovereign omnipotence, one might expect him to agree with these critiques. But in fact he consistently took Austin's side on the issue of sanction.⁹⁶ In his 1934 first edition of *The Pure Theory of Law*, as elsewhere, Kelsen upheld the claim that a valid legal norm logically required an associated sanction.⁹⁷ In

of a longstanding rule of positive international morality against unjustified acts of aggression or conquest: laudable, but not effecting any discernable major change to the international legal system. Compare OONA A. HATHAWAY AND SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (Simon and Schuster, 2017).

91. Cf. discussion of the "habit of obedience" in *supra* note 24 and accompanying text.

92. AUSTIN, *supra* note 24, at 195 (describing sanctions as "evils enforcing compliance with the laws.").

93. See, e.g., HART, *supra* note 22, at 50-53; FINNIS, *supra* note 4; DWORKIN, *supra* note 20.

94. See Tom Ruys, *Sanctions, Retorsions and Countermeasures: International Concepts and International Legal Framework*, in LARISSA VAN DEN HERIK (ED.), *RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW* 19-20 (2017) (arguing, e.g., that "the availability of tools for enforcement relates to the effectiveness of the law, rather than to its qualification as 'law.'") (citing, e.g., Gerald Fitzmaurice, *THE GENERAL PRINCIPLES OF INTERNATIONAL LAW CONSIDERED FROM THE STANDPOINT OF THE RULE OF LAW* (AW Sijthoff, 1957) for the claim that "[l]aw' is not 'law' because it is enforced: it is enforced because it is 'law'; and enforcement would otherwise be illegal.").

95. For a sense of some of these critiques, see Dewey, *supra* note 24.

96. Kelsen did not explicitly comment on Austin's ideas in his German-language writing before 1945, however he engaged with Austin in some detail in 1945's *General Theory of Law and State*, and, at various points his thought in general is clearly in conversation with that of Austin and those inspired by his influential form of positivism. See Lars Vinx, *Austin, Kelsen, and the Model of Sovereignty: Notes on the History of Modern Legal Positivism* in MICHAEL FREEMAN AND PATRICIA MINDUS (EDS.), *THE LEGACY OF JOHN AUSTIN'S JURISPRUDENCE* 51-71 (Springer, 2013).

97. KELSEN, *supra* note 9, at 13; see also, e.g., HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY. A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE*

order to understand where Kelsen differs with Austin, it is helpful to first understand the points on which they agree.

Modern reluctance to follow Austin on the issue of sanction's importance to the definition of law has been greatly influenced by Hart, who argued that inducements or rewards (or simply a desire to "arrange [one's] affairs")⁹⁸ could motivate compliance with law just as well as fear of sanction could.⁹⁹ The claim that all valid legal norms must convey a sanction would also seem to fail as regards norms that confer benefits or powers rather than prohibit behavior: e.g., rules for making a will or contract.¹⁰⁰ Can it really be said that the voiding of an agreement because of its failure to follow legal requirements (i.e. a "nullity") is a *sanction*, rather than simply "refus[ing] to confer a benefit"? After all, in such cases the law leaves no one worse off than they were before being legally regulated.¹⁰¹ On the contrary, it simply seeks to inform society's "puzzled" individuals as to how they can procure the boons it hopes to bestow on them.¹⁰²

Is Kelsen's restriction of valid legal norms to only those associated with a sanction thus unjustified, whether in the sphere of international law or as regards law more generally? Frederick Schauer has recently questioned the decades-long tendency to reject Austin's focus on sanction based on Hart's jurisprudential critiques.¹⁰³ He points out that "coercion . . . is present in all real legal systems and largely absent from many other normative systems."¹⁰⁴ If one were trying to establish the unique and essential characteristics of legal systems as really existing things in the world (rather than as idealized normative constructs), then

OR PURE THEORY OF LAW 24-25 (Clarendon Press, 1992) (Bonnie Litschewski Paulson & Stanley L. Paulson, eds. and trans.) (1934) (also stating that the imposition of sanction has "a normative import, not a causal import"; i.e. that sanction is part of very concept of a legal norm, not just a measure of its efficacy).

98. HART, *supra* note 22, at 40.

99. *Id.* Hart makes this point most explicitly not when commenting directly on Austin, but rather on Oliver Wendell Holmes, Jr.'s proposition that law should be evaluated in relation to "the bad man" who has no desire to comply with it, only to avoid sanction (i.e. reiterating Austin's basic view on this issue). Hart suggests that the perspective of the "puzzled man" is just as relevant when analyzing the law. If law is conceived of as a *collaborative* way for social actors to order their affairs, or as a form of "planning," then this point stands. See SCOTT SHAPIRO, LEGALITY 70-71 (Harvard University Press, 2011) ("While the law certainly cares to control the bad man, and for this reason normally threatens sanctions, it also wishes to guide the behavior of the good citizen . . . Sanctions, in other words, are only one kind of tool that the law may use to motivate behavior. Duties are another; rewards yet a third type. A general theory about the nature of law must adequately represent all of the techniques that law has at its disposal and not myopically privilege one to the exclusion of all others.").

100. See discussion in SHAPIRO, *supra* note 99, at 62-66.

101. *Id.* at 64.

102. See *id.*; HART, *supra* note 22, at 40.

103. Frederick Schauer, *Was Austin Right After All? On the Role of Sanctions in a Theory of Law*, 23 *RATIO JURIS* 1, 1 (2010).

104. *Id.* at 17.

coercion would be one of the first shared factors one noticed, regardless of time or place.¹⁰⁵ It is also what serves to distinguish law from other normative activities such as sports or religion: violating rules in either of those could result in loss of benefits (points or divine favor) or ostracism from a community (expulsion from a team or excommunication)¹⁰⁶ but these are inherently different from law's penalties which do indeed potentially leave one worse off than they were before (fined, imprisoned, executed, etc.).¹⁰⁷ If the job of legal theory is to "help[] us understand and navigate the world in which we now live," then it must take this real core feature of law into account. Schauer specifically notes that he shares with Kelsen the view that "the focus of legal theory is dependent on a conception of what a legal theory is supposed to accomplish," and that in relation to the study of law this entails attempting to understand its coercive aspects.¹⁰⁸

Schauer's restatement of Austin's insights on sanction helps to put Kelsen's similar views into context. For Kelsen, too, it was necessary to view law in terms of both its unique characteristics (what separated it from morality or other normative systems) and its real-world empirical existence. Already in *The Problem of Sovereignty*, Kelsen had made clear that he would "consider law as a coercive order [*Zwangsordnung*], that is as a system of norms regulating [acts of] coercion."¹⁰⁹ At the same time, "coercion is to be construed as the characteristic content of [legal] norms, not as [mere] fact."¹¹⁰ Law could not be reduced to mere sanction-backed commands (as Austin's conception risked doing), because this would abandon the normative element that are required to make coercion valid.¹¹¹ It would reduce the symphony of the law to the senseless noise of vibrating particles.¹¹²

105. *Id.*

106. For the argument that these forms of denied benefits, collectively described as "outcasting," are sufficient to support a legal system at the international level analogous to that of the state's domestic law, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, YALE L.J. 252 (2011).

107. Schauer, *supra* note 103, at 15-16.

108. *Id.* at 16. Schauer also points out that "Kelsen was concerned with the purity of a theory and not the purity of what the theory was a theory of." *Id.* In the subsequent book further articulating his views on the function of force as an essential characteristic of legal systems, Schauer again notes overlap with Kelsen on this point. FREDERICK SCHAUER, *THE FORCE OF LAW* 175 (Harvard University Press, 2015) (citing Kelsen's statements that law is a "coercive order" that "monopolizes the use of force" in Hans Kelsen, *The Law as a Specific Social Technique* in HANS KELSEN, *WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 231-56, 235-44 (UNIVERSITY OF CALIFORNIA PRESS, 1957).

109. KELSEN, *supra* note 9, at 13.

110. *Id.*

111. KELSEN, *supra* note 10, at 31 ("A command is binding, not because the individual commanding has an actual superiority in power, but because he is 'authorized' or 'empowered' to issue commands of a binding nature.").

112. See KELSEN, *supra* note 9, at 11; cf. KELSEN, *supra* note 10, at 39 ("[o]nly a normative order can be 'sovereign', that is to say, a supreme authority, the ultimate reason for the validity of

How, though, could Kelsen reconcile the appreciation for sanction's crucial role with his commitment to placing international law, not the sovereign state, at the center of legal authority? He accomplishes this chiefly through the perspective he adopts on war. As he would later summarize, "[t]he specific sanctions of international law are reprisals and war."¹¹³ However, this did not mean that he agreed with the traditional view that wars were the sovereign prerogative of states to be used at will to settle their disputes.¹¹⁴ That would be to view war as mere force, without a normative content (air vibrations without music).¹¹⁵ On the contrary, the monistic system required that war instead be viewed as simply an extreme case of legal sanction, with a normative content specifying under what conditions it could be validly utilized and against which lawbreakers.¹¹⁶ By elevating *pacta sunt servanda* as the *Grundnorm* (thus as superior to all limiting doctrines such as those concerning state immunity, sovereign rights, or the qualifications arising from the doctrine of *rebus sic stantibus*, etc.), Kelsen could explain both why states *lacked* the right to wage war at will and why *some* wars could be treated as valid acts of "pact" enforcement—and thus constitute the *Zwang* [coercion] upholding the international legal system as a whole.¹¹⁷ In this manner, international law would move from the sphere of "positive morality" to that of genuine, force-backed law.

III. DEFINING THE *ZWANGSORDNUNG*

A. *Pure Theory and Interstate Violence*

By the 1930s, Kelsen was more explicitly and thoroughly advancing his view that war should be considered an international delict except in the special case that it functioned as a legitimate international sanction.¹¹⁸ Earlier in *The Problem of Sovereignty*, Kelsen had already sought to argue the position that any state norm that is incompatible with a norm of international law must be regarded as both invalid and ineffective.¹¹⁹ As a consequence it would be necessary that "[a] war other than a war required (or positively allowed) by international law must be considered . . . just as an act of force, a delict (*Unrecht*), and a violation of international law."¹²⁰ All future invocations of military force should be legally

norms which one individual is authorized to issue as 'commands' and other individuals are obliged to obey. Physical power, a mere natural phenomenon, can never be 'sovereign' in the proper sense of the word.").

113. KELSEN, *supra* note 1, at 320.

114. *See supra* note 75 and accompanying text.

115. *Cf.* KELSEN, *supra* note 9, at 11.

116. *Id.* at 265.

117. HANS KELSEN, UNRECHT UND UNRECHTSFOLGE IM VÖLKERRECHT [Delict and Sanction in International Law] 596-97 in HANS KELSEN, DREI KLEINE SCHRIFTEN (Scientia, 1994) (1932).

118. *Id.*

119. KELSEN, *supra* note 9, at 68.

120. *Id.* at 265.

cognizable as either instances of policing—appropriate sanctions for the violation of international norms—or as “offenses” themselves potentially warranting such sanction.¹²¹ The possibility of “a war required . . . by international law” that he mentions in the above passage could be understood to suggest the idea of a new regime of collective security that some would (generally unsuccessfully) seek to incorporate into the League of Nations system.¹²² In 1932, he more clearly articulated this view in his essay on “Delict and Sanction in International Law,” in which he specifically expounded on war’s function as either delict (*Unrecht*) or sanction (*Unrechtsfolge*).¹²³

This was a view that was in various respects ahead of its time.¹²⁴ On the one hand, under the League of Nations system, wars did indeed prove to be divisible into (something like) “just” and “unjust,” conflicts.¹²⁵ Even before the Treaty of Versailles, the Hague Conventions had already committed states to seek the peaceful resolution of disputes, and not to resort to war as a legal prerogative of their state will.¹²⁶ The 1928 Kellogg-Briand Treaty further committed states to “renounce war as an instrument of national policy,” although it left open various loopholes.¹²⁷ The norm of discriminating between legitimate and illegitimate types of war had thus already been established. On the other hand, violations of this and other League norms lacked any clearly defined mandatory sanction, or *Unrechtsfolge*.¹²⁸

The advent of the Second World War might have seemed certain to unite the international law community (at least, of the Allied Powers) in support of a

121. KELSEN, *supra* note 117.

122. George W. Egerton, *Collective Security as Political Myth: Liberal Internationalism and the League of Nations in Politics and History*, 5 THE INT'L HISTORY REV. 496 (1983).

123. See generally KELSEN, *supra* note 117.

124. See, e.g., criticisms in Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, BRIT. YB INT'L L. 127, 134 n.3 (1937) (“[I]n the international law of the nineteenth, and beginning of the twentieth, century the right to make war is absolutely free and does not depend on a previous violation of international law by the opponent.”).

125. See QUINCY WRIGHT, A STUDY OF WAR 886 n96 (Univ. of Chicago Press, 1942) (“While the recent distinction between defense and aggression is not the same as the medieval distinction between just and unjust war, the two are related.”).

126. See, e.g., Simeon E. Baldwin, *The Membership of a World Tribunal for Promoting Permanent Peace*, 12 THE AMERICAN J. OF INT'L L. 453 (1918).

127. *General Treaty for Renunciation of War as an Instrument of National Policy*, Art. 1 (1928) Cf. Hathaway & Shapiro, *supra* note 90, at 120-21 (discussing adoption of this specific formula); compare JAMES THOMSON SHOTWELL, WAR AS AN INSTRUMENT OF NATIONAL POLICY AND ITS RENUNCIATION IN THE PACT OF PARIS 59-65, 218 (Harcourt, Brace, and Company, 1929) (discussing *inter alia* the UK’s reservation with regards to any military actions implicating its “vital interests”). The United States, similarly, continued to engage in military intervention in Latin America despite signing and ratifying the Kellogg-Briand Treaty, indeed having issued a reservation to this effect.

128. This is the main problem with the League that Kelsen would retroactively identify in 1945 in Kelsen, *supra* note 82.

Kelsenian view. In fact, however, even the war would not overcome widespread disagreement with his claim that wars could be considered as sanctions / *Unrechtsfolgen*. Even sympathetic scholars such as Quincy Wright of the University of Chicago had very different understandings of war's legal status and ramifications. Wright argued that aggressive war should indeed be considered firmly outlawed by the Kellogg-Briand Pact, but did not support the idea that war could also serve as an (or rather the ultimate) international sanction.¹²⁹ For Wright, the *bellum iustum* (just war] theory was a historical artifact that had been abandoned by the time of Vattel, who established the principle of states' equal legal rights to go to war.¹³⁰ Then, in 1928, the Kellogg-Briand Pact had made war illegal, on an equal and homogenous basis, for all states parties. The idea of war as sanction was incompatible with this new order.¹³¹

Kelsen argued against Wright on several related grounds. First, he noted that Vattel had actually not renounced the doctrine of *bellum iustum*. Instead, Vattel had actually clearly supported it with observations such as “[w]ar cannot be just on both sides.”¹³² Second, he suggested that the actual reason for the presumption of the legality of wars among Western powers was actually related to an epistemic deficiency in the international legal system: the lack of a judicial authority capable of applying the *bellum iustum* norm:

according to general international law, there is no objective impartial authority competent to decide the question whether, in a given case, a state has committed a delict and, consequently, whether a war to which a state has resorted is a just or an unjust war . . . The true meaning of Vattel's statement is that the radical decentralization characteristic of general international law makes the application of the *bellum iustum* principle, stipulated by the same general international law, very difficult. It does not mean that the *bellum iustum* principle is not valid.¹³³

The key problem was thus the lack of a central interpreter of the norm against war and the corresponding sanction. To “ban” war but not establish a corresponding sanction would “make[] the Pact of Paris a practically useless and futile instrument,” for interpreting the prohibition on war in this manner would mean that “the use of force, the *only effective sanction in international law*, is eliminated without being replaced by another kind of sanction.”¹³⁴ Based simply on the necessary logical relationship between norm and sanction—that a norm

129. WRIGHT, *supra* note 125 at, 791, 856-57.

130. *Id.* at 736-37.

131. *Id.* at 1072-74 (Advocating “[a] more adequate co-ordination of moral and physical sanctions,” but stopping short of saying that any central organ of international law could use war as a sanction.)

132. Hans Kelsen, *Quincy Wright's A Study of War and the Bellum Justum Theory*, 53 *ETHICS* 208, 208-11 (1943).

133. *Id.* at 209.

134. *Id.* (emphasis added).

with no corresponding sanction is no norm at all¹³⁵—war could be legally constrained only by becoming the sole prerogative penalty of the international community taken as a whole. The best reading of the Kellogg-Briand Pact's agreement to "renounce war as an instrument of national policy" would have to be elevating it into "an instrument of *international* policy."¹³⁶

Ironically, it was often those more thoroughly opposed to Kelsen's views that better recognized the logical consistency of his arguments. Law of nations traditionalists such as the Yale law professor Edwin Borchard criticized Kelsen's new views as dangerous departures from the traditional rules of neutrality, typical of general international law.¹³⁷ In his view, "there is and can be no centralized community force." Meanwhile, in calling for the establishment of such a force, Kelsen was abandoning the limited, but indispensable, role that existing international law had played in reducing or moderating conflicts among states without pretending to eliminate or ban them.¹³⁸ Nonetheless, Borchard esteemed Kelsen's approach far more than that of more absolute pacifists like Wright; for the former, at least, consistently "points out what should always have been plain, that the execution of a sanction by a confederacy against a member State having control of its own army means war."¹³⁹ To propose a "ban" on war having any sanction but war itself is to articulate not a legal norm but instead merely a moral ideation.

Similarly, Kelsen's intellectual adversary Carl Schmitt, whose early comments on the Kellogg-Briand Pact tended to dismiss it as consisting of a moral critique of law and politics rather than a genuine legal or political event, saw in the explicit espousal of the *bellum justum* theory a far more credible, and in his view dangerous, legal development.¹⁴⁰ The new doctrine could attempt to turn the "Geneva League of Nations" into a centralized community force for the world, capable of making determinations regarding just and unjust wars. This would, he argued, create a system in which wars would inevitably take on the character of total conflicts—of "humanity" taken as a presumed whole versus an "inhuman" opponent, whose legal rights could be disregarded.¹⁴¹

135. See generally KELSEN, *supra* note 117.

136. Kelsen, *supra* note 132, at 211.

137. Edwin Borchard, *Book Review: Law and Peace in International Relations*, 28 IOWA L. REV. 161 (1942-1943).

138. *Id.*

139. *Id.* at 166.

140. Schmitt, *supra* note 75, at 32 (criticizing the new doctrines on just and unjust wars as "chaotic perplexity regarding the concept of war.").

141. *Id.* at 31 ("[T]he justice of a war is, more than anything else, fundamental to its totality. Without the claim to justice, every claim to totality would be but an empty pretension, just as, conversely, the grand-scale just war of today is in itself a total war."). See also CARL SCHMITT, *THE CONCEPT OF THE POLITICAL: EXPANDED EDITION* 36 (University of Chicago Press, 2008) (1932) ("[A] war against war . . . is necessarily unusually intense and inhuman because . . . it [] degrades the enemy . . . and is forced to make of him a monster that must not only be defeated but also utterly destroyed.").

In fact, at least part of Schmitt's prophecy would be realized in a surprisingly literal sense. When proposals emerged for the prosecutions of Axis officials as war criminals, Kelsen provided his support with some rather surprising arguments, suggesting that the fundamental general principle of law regarding individual criminal responsibility could be derogated.

Writing in the *Harvard Law Review* in 1941, Kelsen noted that the sanctions of international law are collective not just in terms of the agent of punishment, but also its object: Sanctions of "reprisal and war[,] are directed against the state as an entity [and] in effect, therefore, against the citizens of the state whose organ has violated the law."¹⁴² This statement flies in the face not just of existing doctrines regarding the international legal character of war,¹⁴³ but also of traditional general principles of law accepted throughout the civil and common law worlds. The principle of individual criminal responsibility was already present in the Roman law, e.g., in the maxim *qui in culpa non est, natura ad nihil tenetur* ("whoever is lacking in fault, nature does not hold him to anything [i.e. any obligation]")¹⁴⁴ and was incorporated into international law treatises by Grotius, Pufendorf, and others.¹⁴⁵ Yet Kelsen now explicitly suggests here that this principle should be disregarded in order to ensure the liability of those contributing to aggressive wars.¹⁴⁶ The same passage goes on to more specifically draw distinctions between the *duty* that is violated in commission of a delict and the *liability* for that delict's commission. As he writes:

The liability rests upon the individual against whom the sanction is directed. The duty rests upon the potential delinquent who may by his

142. Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 59 (1941).

143. International humanitarian law, for example, had been founded in part on the basis of the idea that wars are waged between governments, not against the general citizenry of the opposing state.

144. See, e.g., VLADYSLAV LANOVY, *COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY* 33 (Bloomsbury Publishing, 2016).

145. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [The Rights of War and Peace] (1704).

146. Kelsen, *supra* note 142; Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530 (1942). It may be useful to contrast Kelsen's frank references to collective punishment of the citizens of an aggressive state with later doctrines of humanitarian intervention, which inevitably claim to act *on behalf* of the citizens of states targeted, rather than to impose penalties upon them. In reality, of course, military interventions do almost invariably cause great suffering to the individual citizens of states they target. See, e.g., Stephen Wertheim, *A Solution from Hell: The United States and the Rise of Humanitarian Interventionism, 1991–2003*, 12 J. OF GENOCIDE RESEARCH 149 (2010). Kelsen's formulation might actually be seen as more honest or consistent than any justification of intervention that does not seek to identify the real *Unrechtsfolge*—including the infliction of general suffering upon the collective population of a targeted state—of the corresponding *Unrecht* it seeks to punish.

behavior commit the delict. Normally, in modern law the subjects of the duty and of the liability are one and the same. But as an exception collective responsibility is still possible – is, indeed, the rule of international law today.¹⁴⁷

In 1920, Kelsen had argued against conflating individuals with the “cold monster” of the state.¹⁴⁸ Now, in the early 1940s, he argued that even if individual officials (or others) could not be found personally guilty of initiating an illegal war, they should still be punished for it on their state’s behalf; indeed, the whole citizenry must bear a form of collective responsibility. This was a dramatic “reevaluation” of the state for a thinker that had earlier lambasted state-based theories of law as “fetish cult[s] . . . to a superhuman being [*übermenschlichen Wesen*].”¹⁴⁹

B. Pacta’s Failure

Kelsen’s views at this juncture retain their basic logical consistency (certainly more so than Wright’s claim that war can be banned without any particular sanction attaching to it). They are also fairly successful when considered in light of the goal of a theory of law to “help[] us understand and navigate the world in which we now live.”¹⁵⁰ However, they fares less well when held up to Kelsen’s own exacting standards regarding the role of the *Grundnorm*.

Some insight into the difficulties that faced Kelsen’s pure theory of law at this juncture can be noted by reference to the critical retrospective comments of his pupil Josef L. Kunz, writing in 1951 as he looked back over the reemergence of “just war” doctrine in modern times:

Hans Kelsen, the bitter antagonist of natural law, became the principal champion of the doctrine of *bellum iustum*, which he felt compelled to defend for wholly logical reasons: If war cannot be interpreted either as a delict or as a sanction against a delict, then it is no longer possible to consider international law as law at all. But . . . he does not decide whether this doctrine is a norm of positive international law, and states forcefully voice the grave objections against the workability of this doctrine.¹⁵¹

147. Kelsen, *supra* note 142, at 59.

148. Kelsen, *supra* note 32, at 36.

149. Hans Kelsen, *Der Staat als Übermensch: Eine Erwiderung* [The State as Superman: A Rejoinder] in HANS KELSEN, *DER STAAT ALS INTEGRATION* [THE STATE AS INTEGRATION] 27, 28 (Springer, 1930) (criticizing the “integration theory” of law expounded by Rudolf Smend).

150. Schauer, *supra* note 103.

151. Josef L. Kunz, *Bellum Justum and Bellum Legale*, 45 AM. J. INT’L L. 528, 529 (1951). Here as elsewhere in Kunz’s work, he seeks to articulate a positivist understanding of international law that retains some of Kelsen’s insights but remains skeptical about certain core features (here, just wars). The willingness of Kelsen’s disciples to challenge him on basic tenets was remarked upon by Kunz in a 1924 review of a book by a fellow disciple, Alfred Verdross. After listing

As Kunz's account suggests, Kelsen's attempt to give the international law prohibition on war secure footing had run afoul of his own supposed central norm of *pacta sunt servanda*. How could states be obligated to adhere to international norms that had no discernable basis in the positive agreements to which they had bound themselves? The new developments seemed to embody Kunz's comment of 1924 that insights from the Pure Theory would help to put into context "the growth, the change and the death of principles and rules in International Law."¹⁵²

Kelsen's new views on sanction, with their stark presentation, did not find wide acceptance among even officials involved in implementing the very policies he was justifying. Even though Kelsen soon found himself serving as a consultant on war crimes to the US War Crimes Commission as it formulated its approach to the Nuremberg Tribunal,¹⁵³ neither there nor at Tokyo was Kelsen's point regarding general punishment of offending states' populations endorsed.¹⁵⁴ At the same time, of course, the principle of individual criminal responsibility was indeed being increasingly relaxed in practice, for example in the form of wide-ranging conspiracy charges for involvement in the war effort.¹⁵⁵

Even more notable than the suspension of the individual criminal responsibility principle, though, was the changed posture of the postwar tribunals with respect to the "principle of legality," often equated with the maxim *nullem crimen, nulla poena sine lege* (no crime and no punishment without a [preexisting] law).¹⁵⁶ While some war crimes had already been defined, and prosecuted, in previous tribunals before the end of World War II, a "crime of aggression" had not been.¹⁵⁷ For many observers, introducing such a crime would have to be justified via "substantive justice."¹⁵⁸ To *retroactively* posit a legal basis

fundamental topics on which Verdross disagreed with their mutual mentor, Kunz cites Nietzsche's *Zarathustra* for the statement that "one repays a teacher poorly if one always remains a student." Josef L. Kunz, *Book Review: Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* [The Unity of the Legal World-Picture on the Basis of the Constitution of International Law], 46 *Archiv des öffentlichen Rechts* 1, 120 (1924). *See also* Josef L. Kunz, *On the Theoretical Basis of the Law of Nations*, 10 *TRANSACTIONS GROTIUS SOC'Y* 115, 119 (1924) ("Although I do not agree with everything Kelsen teaches, yet it is to me the starting-point[.]").

152. Josef L. Kunz, *On the Theoretical Basis of the Law of Nations*, 10 *TRANSACTIONS GROTIUS SOC'Y* 115, 118 (1924).

153. *See, e.g., News and Notes: Personal and Miscellaneous*, 39 *AMERICAN POLITICAL SCIENCE REVIEW* 6, 1181 (1945).

154. *See, e.g., Schmitt, supra* note 14, at 184-85 (discussing the scope of the charge for conspiracy to commit a war of aggression).

155. *Id.* Many of these changes, such as those relating to conspiracy, pushed at the limits of existing theories of criminal liability but have since become foundational to international criminal law. *See, e.g., Quincy Wright, Legal Positivism and the Nuremberg Judgment*, 42 *AM. J. OF INT'L L.* 405 (1948).

156. *See* CASSESE; Schmitt; and Cryer, *supra* note 14.

157. *See* SCHABAS, *supra* note 77.

158. *Id.*; CASSESE, *supra* note 14, at 43-44.

for the normative validity of such prosecutions would pose an even greater challenge for the *Grundnorm*.

Nullum crimen, nulla poena sine lege, had long been considered as important general principles of law; indeed, intimately bound together with the coherence and self-consistency of a legal system.¹⁵⁹ In 1945, Schmitt wrote an essay invoking *nullum crimen, nulla poena sine lege* as the chief line of defense against attempts to assert jurisdiction over German officials to be prosecuted at Nuremberg.¹⁶⁰ As he wrote, this general principle of law, common to both the civil and common law legal systems, had been seen as including “a triple prohibition[. . .] bar[ring] not only the retroactive application of penal laws, but also any common law attempting to found or intensify a punishment as well as any analogous application from existing penal law.”¹⁶¹

There was indeed little to no precedent for the idea that the leading officials of a defeated state could be prosecuted as criminally liable for the manner in which they had waged a war.¹⁶² Nor was there much evidence to support the notion that a war of aggression was prohibited by any criminal norm valid under existing law. No international instrument had defined it as a crime giving rise to individual liability—except perhaps the Treaty of Versailles, which had called for the prosecution of Kaiser Wilhelm II for “supreme offense against international morality and sanctity of treaties,” though he had escaped to Holland and was never effectively tried.¹⁶³

It is of course possible to argue that the *attempt* to prosecute Wilhelm II, along with the principle articulated in the Kellogg-Briand Pact, etc., added up to state practice and *opinio juris* to establish a custom prohibiting aggressive war. This was (and remains) enough to convince many international lawyers, especially given the moral case for punishing Axis war atrocities.¹⁶⁴ But it would not suffice for Kelsen’s Pure Theory, which required a definite *Unrecht* matched with a definite *Unrechtsfolge*, based on a positive law foundation of *pacta*.¹⁶⁵ Schmitt ironically found himself adopting a similar perspective in his efforts to discount prewar precedents:

A delict of international law . . . in no way amounts to a crime in the criminal sense as occurs in domestic penal law. War in all its severity was interpreted as a relation of state to state, not one of individuals to individuals or of groups to groups. War was, as far as international law

159. See, e.g., Franz von Liszt, *The Rationale for the Nullum Crimen Principle*, 5 J. INT’L CRIMINAL JUSTICE 4, 1009, 1010 (2007) (1893) (“These two maxims are the citizen’s bulwark against the State’s omnipotence; they protect the individual against the ruthless power of the majority, against Leviathan.”); cf. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 2, 165 (1937).

160. Schmitt, *supra* note 14.

161. *Id.* at 132.

162. *Id.* at 137.

163. SCHABAS, *supra* note 77, at 3.

164. See, e.g., Cryer, *supra* note 14.

165. KELSEN, *supra* note 117.

was concerned, led not by individual men, or personally by the head of state, but rather by the state as such.¹⁶⁶

The Nuremberg and Tokyo tribunals indeed relied heavily on “conspiracy to commit crimes against peace” as the core of their indictments of leading officials. While Kelsen argued that retroactive sanction per se was not an obstacle because in this case, it simply meant specifying a criminal sanction for what had already been recognized as a delict, it was still fairly clear that this *Unrechtsfolge* did not match the *Unrecht* that had been established by any of the Axis powers’ actual international agreements. *Pacta sunt servanda* could hardly serve as the ultimate normative authority in the absence of any explicit, criminal liability-creating *pacta*.

Over the course of various efforts to justify restricting the principle of legality’s applicability to Nazi war criminals, Kelsen found himself at times reaching for arguments based on “international public opinion” (something he previously considered irrelevant to his positivistic theory of legal sources).¹⁶⁷ Never before had he cast such doubt on the “purity” of the pure theory. Even more remarkable, though, was his invocation of another possible justification. Writing in March 1945 in the US military’s *Judge Advocate Journal*, Kelsen advanced the “supplementary argument” that because Nazis themselves had violated the principle of retroactivity in their own administration of the German legal system, they had effectively “waived” it before international prosecutors:

[N]obody has a right to take advantage of a principle of justice which he himself does not respect. Otherwise a murderer could object against capital punishment the commandment “you shall not kill.” Any sanction provided by law, be it deprivation of life, freedom, or property, is, by its very nature, the infliction of an evil which, if not carried out as a sanction, that is to say, a reaction against a wrong, is a wrong itself. The non-application of the rule against *ex post facto* laws is a just sanction upon those who have violated this rule and hence have forfeited the privilege to be protected by it.¹⁶⁸

In this striking passage concluding his March 1945 essay, Kelsen is seemingly open to abandoning not just the *Grundnorm*, but also even the pretense of describing a legal “system.” He maintains the idea that legal norms are defined by *Unrecht* and *Unrechtsfolge*, but the attempt to justify the new international

166. Schmitt, *supra* note 14, at 137.

167. Hans Kelsen, *The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*, 1945 JUDGE ADVOC. J. 8, 10 (1945) (“[T]he conviction that an aggressive war is a crime was so generally recognized by the public opinion of the world, that subsequent international agreements providing individual punishment for these violations of international law were certainly not unforeseeable.”).

168. *Id.* at 12, 46. Kelsen does not present this argument without preceding qualms and qualifications, but he does indeed endorse it. The other arguments presented in the essay will be discussed further *infra*.

criminal law's sanctions has become a crisis for the consistency of his theory of law in general, and for *pacta sunt servanda* in particular. This argument could not even meet the basic requirements of consistency, logic, or coherency associated with traditional positivism, let alone Kelsen's (once) more demanding version.¹⁶⁹

C. Sanctions Beyond Time and Space

The conclusion of Kelsen's March 1945 essay, which goes so far as to claim that criminals forfeit basic due process rights when they violate the rights of others, could justly be seen as the nadir of his brilliant career as a legal philosopher. There are basic logical flaws with this idea. For example, if a legal system's enumerated due process rights cannot be invoked reliably by criminal suspects, the only class of people that actually has use for them, then what purpose could they possibly serve? Further, as noted, with this suggestion to simply ignore the *ex post facto* rule Kelsen is violating not only his own system built upon *pacta sunt servanda* but also even the less ambitious forms of traditional positivism he had claimed to surpass.¹⁷⁰ He needed better justifications for the tribunals, and, soon, he would find them.

The Nuremberg and Tokyo Tribunals did, of course, secure convictions and execute sentences on the basis of crimes against peace. Though challenges based on individual criminal responsibility and *nulla poena sine lege* were raised by Schmitt and others, these were not treated as sufficient obstacles to carrying out the Tribunals' mandate to enforce liability for the planning and conduct of illegal war. The rationale for the prosecutions, however, was not premised on Kelsen's *Grundnorm* of *pacta sunt servanda* nor on his arguments regarding war's dual role as *Unrecht* and *Unrechtsfolge*. The decision not to follow Kelsen's approach was ultimately taken by Chief Prosecutor Robert Jackson, who also received advice from Quincy Wright.¹⁷¹ The prosecutions more clearly embodied "justice"

169. See, e.g., Liszt, *supra* note 159; Hall, *supra* note 159. Aside from *nullum crimen*, other general principles relating to due process, such as *audi alteram partem* [both sides deserve to be heard], *nemo debet esse iudex in sua causa* [no one should be judge in their own case], the right of *habeas corpus*, etc., are all premised on the assumption that accused criminals do not, in fact, give up all procedural rights due to having infringed upon the rights of others.

170. See *id.*; see also AUSTIN, *supra* note 24, at 270 ("[P]unishment ought to be inflicted agreeably to prospective rules, and not in pursuance of particular and *ex post facto* commands."); but see *id.* at 272-73 ("The *ex post facto* statutes which are styled acts of attainder, may be called *unconstitutional*, though they cannot be called *illegal*. For they conflict with a principle of legislation which the parliament has habitually observed, and which is regarded with approbation by the bulk of the British community . . . [W]hen we style an act of a sovereign an *unconstitutional* act . . . we mean . . . [t]hat the act is inconsistent with some given principle or maxim . . . habitually observed[.]").

171. See, e.g., Daniel Gorman, *International Law and the International Thought of Quincy Wright, 1918-1945*, 41 *DIPLOMATIC HISTORY* 336, 360 (2017) (Wright favored the idea that individuals were directly responsible for violations of international law, not that these resulted from "punishment" of their states.).

than any determinate *Grundnorm*.¹⁷²

Even if this was enough for many others involved in international law scholarship and practice, the weak connection of the unprecedented sanctions to validation by the *Grundnorm* remained disturbing for Kelsen. To make this model of ICL a common practice would risk destroying the very systemic quality of international law that Kelsen had always hoped to establish:

If the principles applied in the Nuremberg trial were to become a precedent—a legislative rather than a judicial precedent—then, after the next war, the governments of the victorious States would try the members of the governments of the vanquished States for having committed crimes determined unilaterally and with retroactive force by the former. *Let us hope that there is no such precedent.*¹⁷³

The birth of international criminal law left the idea of building a positivist “coercive order” (*Zwangsordnung*) of international legal rules in a shambles. If prosecutions based on “substantive justice” were to be a feature of the international legal system, did it make sense to speak of a *Grundnorm* at all? If so, it was now clear that it must be able to function not only as a principle to resolve conflicts among legal norms, but also as a basis for potential derogation of even the most venerable existing norms. Far from a quasi-natural law doctrine asserting a body of transcendent, irrevocable norms, Kelsen’s positivism now had to be committed to the idea that international legal order can be radically changed via new acts of legislation.¹⁷⁴

The revised version of the *Grundnorm* that Kelsen would settle on, as mentioned *supra*, was that “states should behave as they have customarily behaved.”¹⁷⁵ This already appears in his 1945 book *General Theory of Law and State*, although it is there still combined with *pacta sunt servanda*¹⁷⁶ (later on,

172. See Kelsen, *supra* note 167.

173. Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law*, 1 INT’L L. Q. 153, 171 (1947) (emphasis added).

174. It is also important to connect this profound shift in Kelsen’s legal thought, evident by 1940, with an underlying change in his position regarding fundamental questions of epistemology. See especially Paulson, *supra* note 5 (“Unremarked by virtually everyone who has written on Kelsen, he had already thrown overboard the entire Kantian-inspired Pure Theory of Law in 1939–40, expressly associating himself with the empiricist philosophy of David Hume. Kelsen wrote at the time that to ally himself with Kant rather than with Hume would be ‘a step backward rather than forward.’”). This Article presents a somewhat different interpretation—rather than “throwing overboard” the Pure Theory of Law, Kelsen was (rather desperately) attempting to find ways to preserve it in the face of challenges to the coherency of this legal theory presented by the new international situation.

175. See Kelsen, *supra* note 10 and accompanying text.

176. *Id.* (“If [] we ask why [a] treaty is valid, we are led back to the general norm which obligates the States to behave in conformity with the treaties they have concluded . . . *pacta sunt servanda*. This is a norm of general international law, and general international law is created by custom constituted by acts of States. The basic norm of international law, therefore, must be a norm

pacta will no longer feature in his discussions of the *Grundnorm*).¹⁷⁷ It seems highly likely that the revised version of the *Grundnorm* was inspired in significant part by the difficult problems of justifying the new forms of sanction then being developed. First, in the same 1945 essay on *ex post facto* sanctions that concluded with the bizarre suggestion that accused criminals forfeit their due process rights by denying them to others,¹⁷⁸ Kelsen also made some much more insightful comments on the *ex post facto* rule. First, he noted that in the context of the United Kingdom, the principle of legality “was never interpreted as a limitation of the sovereign legislative power of Parliament.”¹⁷⁹ It was always possible for Parliament to pass a retroactive law, and the principle was simply a jurisprudential guide, not a limit on this power.¹⁸⁰

Shortly afterward, Kelsen brings up how “custom” as a source of law has an inherent retroactive dimension. In a system of law based on custom, it is not possible to fully avoid retroactivity, as:

Any rule of customary law is retroactive in the first case in which it is applied as a rule of law. Any rule of law created by a precedent is retroactive in the case in which it is first applied. The doctrine that custom is not a creation of law but merely evidence of a pre-existing law is the same fiction as the doctrine that tries to hide the retroactive character of a precedent by presenting the judicial decision as an interpretation rather than a creation of law.¹⁸¹

An accurate understanding of the English common law system would thus entail acknowledging that retroactivity is one of its dominant features, and that this is especially the case with regards to newly-emerging customary norms. At the same time, he also stressed that:

A law may be retroactive not only by providing sanctions to be inflicted upon subjects on behalf of actions performed by them before the law has been enacted. A law may be retroactive by abolishing or changing rights and freedoms acquired before the law has been enacted.¹⁸²

If the international legal system were similar to the English common law, then, it would indeed be possible to introduce retroactive sanctions, or invalidate old defenses and immunities, by means of newly-emerging customs. That this idea underlies the revised *Grundnorm* of 1945’s *General Theory of Law and State* is also suggested by that book’s preoccupation with retroactivity. In sections discussing the thought of John Austin, Kelsen points out that the command theory

which countenances custom as a norm-creating fact, and might be formulated as follows: ‘The States ought to behave as they have customarily behaved.’”)

177. Kelsen, *supra* note 1, at 8-9.

178. Kelsen, *supra* note 167.

179. *Id.* at 8.

180. *Id.*

181. *Id.* at 9.

182. *Id.*

of law is flawed because holding that law's normativity arises from its subjects' fear of sanction cannot account for retroactive laws.¹⁸³ Even under the straightened circumstances of having had to replace his *Grundnorm*, Kelsen is still trying to ensure that the goal of a normative unity of the legal system is not abandoned, but he also seeks to ensure this system can accommodate the new sanctions to be applied at Nuremberg and Tokyo.¹⁸⁴ Elsewhere, he continues to emphasize that “[t]he moral and political value of retroactive laws may be disputed, but their possibility cannot be doubted[,]”¹⁸⁵ and that “[l]egal acts with retroactive force are possible according to general international law.”¹⁸⁶

In another section of the same book, Kelsen comments upon the related civil law concept of *desuetudo* (desuetude).¹⁸⁷ This term, originating in Roman law, referred to legal norms that are rendered ineffective through disuse.¹⁸⁸ Without tying the concept directly to international law, Kelsen nonetheless suggests that it has profound implications. As he writes, “‘Desuetudo’ is *the negative legal effect of custom*.”¹⁸⁹ Because “a norm may be annulled by custom . . . as well as it may be created by custom,” any coherent theory of a legal order must confront the question whether such “negative custom” is capable of overriding statutes, or whether it is possible that “custom as a source of law may be excluded by statute within a legal order.”¹⁹⁰ This latter question Kelsen answers in the negative.¹⁹¹ By implication, even international norms premised on *pacta sunt servanda* are liable to be overridden by the effects of “negative custom.” This idea is not explicitly tied to his new custom-based *Grundnorm*, nor to his writings of the same year on justifications for the prosecutions at Nuremberg. However, it would arguably become the dominant theme of his subsequent reimagining of the international legal system.

IV. RE-ENCOUNTERING THE CONTINGENCY OF INTERNATIONAL LAW

A. Cold War and Epistemic Crisis

Rethinking international law as a custom-based system akin to the Anglo-American common law would appear to be an admission of defeat for Kelsen's legal positivism.¹⁹² At the very least, it marked an acknowledgment of the failure

183. KELSEN, *supra* note 10, at 72.

184. *Cf.* discussion of Kelsen's views in relation to those of Austin *supra* note 97-117 and accompanying text.

185. KELSEN, *supra* note 10, at 44.

186. *Id.* at 226

187. *Id.* at 119-20.

188. *Id.*

189. *Id.* at 119 (emphasis added).

190. *Id.*

191. *Id.*

192. The idea that something like this might be the case (albeit not developed in relation to international law or other specific areas of legal doctrine) is suggested by the discussion of Kantian

of his pre-World War II version premised on *pacta sunt servanda*. Ironically, however, the new world order that emerged after the war promised, for the first time ever, to found itself precisely upon a new, “world constitution”-approximating pact: the UN Charter.¹⁹³ Perhaps *pacta sunt servanda* could reign after all.

Even if reeling from the collapse of his previous *Grundnorm*, Kelsen saw the UN system as the best chance for a new, genuinely monistic legal order to be established. In an article published in the Iowa Law Review, Kelsen went so far as say that “if the enforcement actions provided for by the Charter are true sanctions, the Charter is a perfect realization of the *bellum-justum* principle.”¹⁹⁴ The UN, especially by monopolizing the legitimate use of force via the provisions of Article 2, seemed to represent a new positive legal authority that could accomplish Kelsen’s longstanding goals of centralizing legal sanction at the international level with war as the ultimate form of coercion against law violating states.¹⁹⁵

In 1950, Kelsen published a book on *The Law of the United Nations* that emphasized just these points. Although not delving into theoretical concerns over the *Grundnorm*, he nonetheless portrayed the UN system as a consistent, pact-based world constitution of formal law. Just one year later, however, he had cause to reprint the book with a supplement entitled *Recent Trends in the Law of the United Nations*, which examined a new emergency that had yet again seriously called into question the possibility of international law serving as a monistic system, the Korean War.¹⁹⁶

The Korean Peninsula had been split between competing regimes at the end of World War II, with the North sponsored by the Soviet Union and the South by the United States.¹⁹⁷ Neither had yet been accepted as a UN member.¹⁹⁸ However, when Kim Il Sung’s regime launched an assault on South Korean forces, the US response was to treat this as an act of aggression by one state against another in

versus Humean influences on Kelsen’s epistemology in Paulson, *supra* note 5, as well as by the critique of Kelsen’s variant of positivism in Stephen Guest, *Two Problems in Kelsen’s Theory of Validity*, 2 LIVERPOOL L. REV. 101, 101 (1980) (“Kelsen’s principles of *lex posterior derogat priori* and *desuetudo* are found, particularly in the context of his theory of revolution, to undercut the clear and simple conception of positivity that at first sight makes his general theory of law attractive.”).

193. The idea that the Charter approximates a Constitution remains appealing to many today. See, e.g., Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Brill, 2009).

194. Hans Kelsen, *Sanctions in International Law under the Charter of the United Nations*, 31 IOWA L. REV. 499, 501-02 (1946).

195. See generally KELSEN, *supra* note 117.

196. HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS: WITH SUPPLEMENT* (The Lawbook Exchange 2000) (1951).

197. William Stueck, *The Soviet Union and the Origins of the Korean War*, 28 WORLD POL. 622, 622-35 (1976).

198. KELSEN, *supra* note 196 at 930-31.

violation of UN Charter Article 2,¹⁹⁹ giving rise to a “breach of the peace” under Article 1,²⁰⁰ and also sufficient to justify “collective self-defense” under Article 51.²⁰¹ On June 25, 1950, the UN Security Council passed Resolution 82, with the leadership of the United States and the abstention of the Soviet Union (which was boycotting the Council over the exclusion of the People’s Republic of China).²⁰² Resolution 82 labelled North Korea’s military activities a “breach of the peace,” and was quickly followed by Resolution 83 which recommended that UN member states “furnish assistance” to South Korea “to repel the armed attack.”²⁰³

Several important legal questions that had been raised in the context of the Second World War reappeared in the Korean conflict but in the new context of a world political order divided by US-Soviet rivalry and a world legal order defined by the positive law of the United Nations. In his 1951 supplement, and in related writings at the same time and over the following years, Kelsen sought to describe the norms of the UN regarding war as a system of delict and sanction in keeping with his longstanding monistic theory.²⁰⁴ The question with regards to the Korean conflict, then, was whether the *Unrechtsfolge* of UN intervention was being applied to an appropriate *Unrecht*. On this question, despite some equivocation, Kelsen was forced to answer in the negative.²⁰⁵ As he argued, only if North and South Korea were both sovereign states could the invasion of the latter by the former be persuasively considered a “breach of the peace” in the meaning of Article 1 or an act of aggression as described in Article 2—yet even while using this language as the basis of the intervention, the US and its allies at the UN refused to characterize North Korea as a sovereign state.²⁰⁶

If North Korea was not a state, then the intervention must constitute providing assistance to a state government (that of the Republic of Korea) against an *insurgency*—in other words, participation in a civil war.²⁰⁷ Yet a civil war per se could not be described as a breach of “international peace and security” permitting of UN intervention.²⁰⁸ On the other hand, if individual members states (such as the US) were to provide armed assistance in suppressing a rebellion, this would necessarily constitute “war”—and should be subject to, and consistent with, the general regulation of war by the international system. It is with keen

199. *Id.*

200. *Id.*

201. *Id.*

202. Stueck, *supra* note 197; Josef L. Kunz, *Legality of the Security Council Resolutions of June 25 and 27, 1950*, 45 AM. J. INT’L L. 137, 137-42 (1951).

203. KELSEN, *supra* note 196, at 931.

204. *Cf.* KELSEN, *supra* note 117.

205. KELSEN, *supra* note 196, at 934.

206. *Id.* (“The formula used in the resolution of June 27 is justified only if the Security Council was of the opinion that the armed conflict in Korea at least before the Council recommended military intervention by Members of the United Nations was an international war between the Republic of Korea and another state.”).

207. *Id.*

208. *Id.*

awareness of the longstanding US practice of supporting insurgencies against unfriendly governments, newly intensified with the advent of the Cold War, that Kelsen writes the following subtle admonition:

If it is assumed that general international law permits the states to assist with their armed forces the government of a state in its fight against an insurrection, and if it is admitted that in such a case the civil war assumes the character of international war, insurrection is not only a delict under national, but also under international law; then the use of armed force by the assisting state against the insurgents has the character of an international sanction, and then the participation of a state with its armed forces in a civil war *on the side of the insurgents* is illegal from the point of view of general international law.²⁰⁹

Under the UN Charter, taken as the chief *pactus* of the international legal system, UN intervention into the Korean War could thus only be justified if North and South Korea were both to be treated as states (with the goal being negotiation of a peace settlement). If North Korea was not a state, and the assistance to the South by the US and others was a matter of intervention in a civil war on behalf of the legitimate government, then (assuming the validity of the norm justifying such assistance) neither the US nor any other state should ever provide assistance to insurgents against a recognized government elsewhere.²¹⁰

These are the two possible models of legitimate intervention into the Korean conflict if the Charter is to be taken seriously as a source of positive law and indeed as the highest source of authority under the UN system (if *pacta sunt servanda* were to be applied consistently). Each model carries unfavorable implications for the United States, but also for the Soviet Union—each suggests, in other words, a legal rule that would necessitate compromise between Cold War adversaries. By contrast, the hastily issued Resolution 88 of July 7, 1950, which retroactively “welcomes” UN member states to provide assistance to the Republic of Korea, should be seen as “an *ex post facto* justification of the action which the United States of America took subsequent to the resolution of June 25.”²¹¹ As we have already seen, *ex post facto* law is not necessarily fatal to Kelsen’s monistic theory of law—but to muddle the categories of civil war and international conflict, again turning “war” into a mere political reality, not captured by strict legal definitions as either delict and sanction, dooms the epistemic certainty of legal analysis that he had hoped would be possible under the new UN system.²¹² A new crisis for the *Grundnorm*.

209. *Id.* at 935 (emphasis added).

210. *Id.*

211. *Id.*

212. *Id.* at 911 (“Lack of unanimity of the five great Powers has paralyzed the system of collective security established in the Charter, and has prevented, or at least hampered, the exercise of other important functions of the Organisation.”).

B. “Negative Custom” and the Charter

The Korean conflict would have looked something like a victory for Schmittian thought, with a hegemonic US again using its influence to determine the interpretation and application of supposedly objective rules by supposedly neutral adjudicative bodies.²¹³ A powerful sovereign, not an epistemic community of jurists or a true centralized global legal institution, would give ambiguous norms their practical meaning.²¹⁴ As of 1951, Kelsen had every reason to believe that the UN approach to sanctions was shaping up to be precisely what he had warned against four years earlier: one in which political and military considerations trumped legal consistency; in which liability was legislated unilaterally and retroactively as a matter of course; and in which fundamental norms could be picked up when useful, and ignored when inconvenient.²¹⁵

This impression was only bolstered further when the Soviet Union decided to rejoin the proceedings of the Security Council, meaning that no unity would be found on any subsequent resolutions empowering intervention in the Korean conflict. In order to provide an alternative basis for its ongoing war, the United States then sponsored the General Assembly’s “Uniting for Peace” resolution of November 3, 1950, which recommended to UN member states the use of force to defend the Republic of Korea against military threats.²¹⁶

In discussing this resolution, Kelsen pointed out several inconsistencies of the Resolution with the UN Charter, including limitations to the General Assembly’s ability to “recommend” action by states, the lack of a binding character to such recommendations, the subordination of the General Assembly to the Security Council in the hierarchy of authorities, and, finally, the Charter’s placing of decisions on the use of force exclusively with the Security Council.²¹⁷ The conclusion could hardly be avoided that “[i]f the General Assembly is of the opinion that on a question under its consideration the use of force is necessary, it must refer this question to the Security Council, without making a recommendation.”²¹⁸

Kelsen’s arguments as to the “unconstitutionality” of Western nations’ intervention in Korea were not without supporters. At the same time, similar arguments were being made by diplomats and international law specialists of

213. Cf. SCHMITT, *supra* note 24, at 30-74. In addition to its effective unilateralism at the international level, the Korean War also saw the triumph of another Schmittian phenomenon: The Executive branch making the sovereign decision to go to war without consulting the Congress. See, e.g., Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT’L L. 21, 21-39 (1995)..

214. Cf. discussion of Schmitt’s thought (specifically his view that the sovereign decision is the vehicle by which vague norms are given specific, determinate meanings) in Mitchell, *supra* note 4.

215. Kelsen, *supra* note 173.

216. See KELSEN, *supra* note 196, at 953-958.

217. *Id.* at 970-73.

218. *Id.* at 962.

Soviet bloc countries,²¹⁹ albeit to little effect on the positions of their Western counterparts. Within Western international law circles, Kelsen's critical analysis was also taken seriously. Indeed, *The Law of the United Nations*, with its supplement, was recognized as the "the most distinguished work in the field of international law" in the recent years by the American Society of International Law (ASIL) in 1952, receiving that organization's first Annual Award for an outstanding piece of legal scholarship.²²⁰

The ASIL award was conferred amid keen awareness of the geopolitical entanglements of Kelsen's arguments. The 1952 *Proceedings of the ASIL* record that "a long and somewhat controversial discussion" preceded the decision, including the explicit proviso that "the granting of the award did not imply the acceptance by the members of the Society of the particular views of the writer upon a controversial question."²²¹ Statements on the record served to distance ASIL from Kelsen's criticisms of the war, as no "endorsement by the members of the Council itself or of the Society of the point of view of the writer or of the conclusions he reached" was meant to be conveyed by the award, and the work itself, though "one of first-class scholarship," was at the same time curiously derided as "appear[ing] to reach conclusions that did not seem to take into account certain practical aspects of the problem, but confined themselves to pure theory."²²²

In fact, though, nothing of the sort was the case. To the contrary, Kelsen showed in the 1951 supplement that he was again fully willing to adapt his theory to reflect new realities. This is made extremely explicit in the striking, two-page introduction to the 1951 revised edition, in which Kelsen anticipates the practical irrelevance of his subsequent legal arguments against intervention.²²³ The correct interpretation of the Charter as a set of legal norms would not necessarily determine their customary practice, and the *latter* could then transform the *former*:

[T]he organisation of collective self-defence through the North Atlantic Treaty, the action in Korea, the re-appointment of the Secretary-General, and the resolution 'Uniting for Peace' are inconsistent with the old law of the United Nations, [but] they, perhaps, constitute one of these cases of which we may say *ex injuria jus oritur* [law is born from violation].²²⁴

219. See, e.g., Philip E. Mosely, *Soviet Policy and the War*, 6 J. INT'L AFF. 107 (1952); Ryan Mitchell, *The Korean War and the Ontology of Intervention: Chen Tiquang's "Who Is Undermining International Law?"* (1950), LEGAL FORM (Mar. 5, 2019), <https://legalform.blog/2019/03/05/the-korean-war-and-the-ontology-of-intervention-chen-tiqiangs-who-is-undermining-international-law-1950-ryan-mitchell/> [<https://perma.cc/846R-SC4A>].

220. *Proceedings of the American Society of International Law*, 46 AM. SOC'Y INT'L L. PROC. 173-75 (1952).

221. *Id.* at 174.

222. *Id.*

223. See KELSEN, *supra* note 196, at 911-12.

224. *Id.* at 912.

While clearly condemning the Cold War initiatives led by the United States as violations of existing law, indeed as “unconstitutional” under the UN Charter rules on intervention and aggression, Kelsen also offers those defending such policies an alternative basis for their legitimacy; perhaps these actions can constitute one of those cases in which:

[T]he law of a community - national or international - and especially its constitution or constituent treaty, may be changed not only by formal amendments carried out in accordance with the procedure laid down for this purpose in the law itself. It may be modified also by its actual application based on an interpretation which, more or less consistent with the letter of the law, is not in conformity with the ascertainable intention of its authors.²²⁵

In the space of six paragraphs, wholly different in tone and significance from the hundred pages of legal analysis with which they were surrounded, Kelsen made a new suggestion as quietly explosive as his early 1940s arguments for collective responsibility had been.²²⁶ While *pacta sunt servanda* had still figured into the *General Theory of Law and State* as an important subsidiary norm to the *Grundnorm* of custom, it was now apparently jettisoned.

As he had in 1945 to accommodate the international criminal tribunals, Kelsen in 1951 was willing to transform his theory to meet a changing reality of the international system. Now, though, the revised *Grundnorm* and the principle of “negative custom” gave him an explicit basis for doing so. With custom as the new *Grundnorm*, and desuetude as perhaps the most potent manifestation of custom (in its potential scope; i.e. being able to derogate any other norm), it was possible to say that the UN intervention in Korea was illegal under the Charter and thus a violation of *pacta sunt servanda*—but also that “law might be born from violation” to change the Charter’s meaning, if “Uniting for Peace” did become the new custom.²²⁷ All values could be reevaluated.

If the goal of the revised *Grundnorm* was to be sufficiently flexible to accommodate any emerging changes in state practice and *opinio juris*, it seemed well-suited to this task. Rather remarkably, both the Soviet and American delegations (among others) had cited Kelsen’s textbook in arguments during various meetings of the General Assembly’s 5th Session.²²⁸ Kelsen had not solved the ongoing dispute in any practical sense, but he had supplied a vocabulary by which it could be discussed, and by which the “As If” of a unified system could be maintained.

225. *Id.* at 911.

226. See KELSEN, *supra* notes 142-49 and accompanying text.

227. KELSEN, *supra* note 196, at 912.

228. Official Records of the General Assembly, 5th Session, 301st Plenary Meeting, 322-323, 333 (November 2, 1950). See also discussion in Oscar Schachter, *Book Review: Law of the United Nations*, YALE L.J. 60, 189 (1951).

C. "Negative Custom" and Systemic Consistency

Kelsen's experience of the 1950s seems to be directly reflected in his revisions to the text of the *Pure Theory of Law*. By the 1960 second edition, Kelsen has further intensified the centrality of negative custom to his account of the hierarchy of legal rules. The expanded discussion of desuetude is used as the conclusion to his discussion of the effectiveness of legal norms in general (and also, tellingly, placed immediately before the section of the book discussing "the basic norm of international law").²²⁹ Kelsen also more clearly explains the importance of "negative custom" as potentially overruling any other norm. He emphasizes that "[i]f custom is a law-creating fact at all, then even the validity of statutory law can be abolished by customary law[] . . . [and] the law-creating function of custom cannot be excluded by statutory law, at least not as far as the negative function of *desuetudo* is concerned."²³⁰ Ideas that were still presented tentatively and cryptically in 1945 are, by 1960, stated axiomatically.

This later discussion of desuetude then dwells explicitly on the relationship between the effectiveness of a legal norm and its validity. Noting that "[e]ffectiveness is a condition for . . . validity—but it is not validity[,]" Kelsen suggests in general terms some of the implications for negative custom functioning as a *valid* means of repealing the validity of an existing norm.²³¹ Significantly (and indicating the fundamental importance of desuetude for his theory more generally), Kelsen concludes his discussion of the concept in 1960 with the statement that:

[T]he solution attempted here is merely the scientifically exact formulation of the old truism that right cannot exist without might and yet is not identical with might. Right (the law), according to the theory here developed, is a certain order (or organization) of might.²³²

Immediately afterwards, Kelsen then proceeds to his discussion of the "basic norm of international law." Viewed systematically, desuetude indeed plays an indispensable role in preserving the possibility of Kelsen's efforts to distinguish law from politics, for it can provide a kind of escape valve for otherwise hermetically-sealed legal systems. Only if there is a process by which a legal system can manifest even radical change while nonetheless retaining its overall legal validity and without simply acknowledging dominance and determination by non-legal factors, can the notion of a consistent hierarchy of legal norms be maintained.²³³

In itself, this notion is hardly unique to Kelsen's theoretical framework. The idea that there is a particular importance to theorizing the termination and

229. KELSEN, *supra* note 1, at 211-14.

230. *Id.* at 213.

231. *Id.*

232. *Id.* at 214.

233. *Id.* at 212 ("[A] legal order does not lose its validity when a single norm loses its effectiveness.").

obsolescence of rules of international law is one that is generally well-accepted in international legal scholarship.²³⁴ Recent discussions focus on the implications of widespread breaches of existing norms, and the degree to which customary international law is contingent or malleable, including in the area of *jus ad bellum* with which Kelsen so concerned himself.²³⁵ As Michael Glennon writes: “Not all violation results in desuetude, of course; if it did, virtually no rule would be binding. Desuetude occurs only when a sufficient number of states join in breaching a rule, causing a new custom to emerge.”²³⁶

Most discussions of desuetude in international law adopt this model, in which it is seen as operating as a subset of customary international law in general, albeit one that deals uniquely with state behavior that breaches existing norms. On these lines, Monica Hakimi suggests for example that “unfriendly unilateralism,” or state non-compliance with existing obligations, can in some circumstances effectuate the derogation of violated norms and the legislation of new replacement norms.²³⁷ Like Kelsen, contemporary writers on desuetude in international law recognize that:

if the conditions necessary for effective law are not present, a rule will fail and the rule of law will be the ultimate loser, for law reform is not advanced by ignoring evidence of an old rule’s collapse or of the absence of conditions needed to make a new rule work.²³⁸

In terms of custom in general, Kelsen’s model essentially agrees with the above. However, the variant of custom that he calls “negative custom” differs in fundamental ways. The claim that “a sufficient number of states . . . breaching a rule[] caus[es] a new custom to emerge,” focuses on the replacement of one substantive norm (i.e. a legal standard mandating certain conduct) with an incompatible replacement.²³⁹ Desuetude or “negative custom,” however, involves the creation of norms whose *sole* content is to “repeal” pre-existing norms, not as asserting new substantive rights or obligations.²⁴⁰

On closer examination, “repealing” a norm in international law is primarily relevant only in the very specific context of international sanctions. That is because the norms that can conceivably be repealed will primarily be procedural, not substantive. With regards to any *substantive norm* (i.e., a norm describing an obligation), a change in custom such as a rising number of persistent objector states will produce a new, alternative norm; i.e. an alternative account of the

234. See, e.g., Marcelo G. Kohen, *Desuetude and Obsolescence of Treaties*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 350, 352 (Enzo Cannizzaro ed., 2011); Michael J. Glennon, *How International Rules Die*, 93 *GEO. L.J.* 939 (2005).

235. See, e.g., Monica Hakimi, *The Jus ad Bellum’s Regulatory Form*, 112 *AM. J. INT’L L.* 151(2018).

236. Glennon *supra* note 234, at 942.

237. Monica Hakimi, *Unfriendly Unilateralism*, 55 *HARV. INT’L L.J.* 105 (2014).

238. Glennon, *supra* note 234, at 989-90.

239. *Id.* at 942.

240. KELSEN, *supra* note 1, at 213.

scope of a state's obligations. As Glennon notes, such changes must occur gradually, when "a sufficient number of states join in breaching a rule."²⁴¹ A necessary logical consequence is that, for a period of time, there will be (at least) two alternative norms treated as valid by two different groups of states.

That situation of *practical* normative disunity is acceptable under Kelsen's model with regards to some norms. However, it cannot be accepted for norms that involve the application of sanctions.²⁴² First the international criminal tribunals, and then the UN intervention in Korea, had demonstrated that sanctions can give rise to profound normative disagreements and to difficult questions about the sources of international law. For the former to be valid, the retroactive annulment of the *nullum crimen sine lege* principle had to have taken place through a sudden customary shift in order to be a valid expression of the (revised) *Grundnorm*. In the latter case, similarly, the "Uniting for Peace" resolution had to have constituted a *sudden* customary repeal of UN Charter norms prohibiting intervention against states. On the one hand, this resembled any customary shift as "[a]ny rule of customary law is retroactive in the first case in which it is applied as a rule of law."²⁴³ On the other hand, however, new "negative customs" repealing rules that prohibited certain forms of sanction had additional requirements: they needed to render the normative disagreement of the sanctioned state instantly invalid, and also to prospectively ensure consensus or majority agreement among the community of states. That is, they required a higher degree of centralization by a legal organ embodying global customary consensus.²⁴⁴ That could be the Security Council, the General Assembly, a court, or some other organ, but in any case it had to be generally considered valid as the decisive interpreter and applier of sanction norms.²⁴⁵

This feature of the revised *Grundnorm*, its necessary association with some centralized interpreter and enforcer (as a logical prerequisite for successful immediate repeal of a procedural norms or immunities that would otherwise

241. Glennon, *supra* note 234, at 942.

242. Kelsen, *supra* note 117, at 203 ("We can only designate a community constituted by some order as a legal community when [it includes] applications of coercive force . . . [and] when applications of coercive force are limited such that they are only permitted as reactions against a disturbance to the order.").

243. Kelsen *supra* note 167, at 10.

244. That this is the case is reflected in Kelsen's arguments for a centralized international court with compulsory jurisdiction. Various commentators have remarked on how the establishment of such a court would provide no guarantee of the consistency of its judgments or success in maintaining the normative unity of the international legal system. *See, e.g.*, Bernstorff, *supra* note 62, at 214-18 ("Critics see in the possibility granted by Kelsen of a largely free and thus political law-making by the constitutional [or international] court a contradiction to the limitation on politics by the courts that he actually desired.").

245. *Id.* ("Kelsen . . . was realistic enough not to resolve the paradox of the 'undecidability of the decision.' Instead [he] sought to constructively capture the objectively uncontrollable and, in the final analysis, irrational character of the court decision through the dynamic view of the creation of law.").

prevent imposition of a sanction) allows Kelsen's 1960 version of the Pure Theory to rebut certain notable critiques. Hart, for instance, had criticized the revised *Grundnorm* as a tautology, saying that it simply implies that custom should be followed—meanwhile custom is simply a form of behavior that should be followed.²⁴⁶ Elsewhere, Hart also misconstrues the *Grundnorm* (in part because he cites Kelsen's somewhat muddled 1945 presentation of it) as requiring that “the constitution or those ‘who first laid down the constitution’ should be obeyed.”²⁴⁷ Yet, as is evident in its ability to accommodate the birth of international criminal law and the radical transformation of UN Charter norms in 1950, Kelsen's *Grundnorm* is hardly a simple restatement of the idea that custom should be followed. The “negative custom” dimension, allowing sudden repeal of existing norms to permit sanction by an empowered prosecutorial agent of the global community, is precisely not a mere “rule that [] rule[s] be obeyed.”²⁴⁸ Rather it (more radically) suggests that an applied sanction, even if unfounded in existing law, can itself *refound* the entire system of international law (provided a subsequent normative consensus arises).²⁴⁹

Critiques of Kelsen's revised *Grundnorm* by Joseph Raz are more incisive, particularly because he (almost alone among Kelsen's major subsequent interlocutors) correctly identifies “negative custom” as one of the most important facets of Kelsen's thought.²⁵⁰ However, even he underestimates how fundamental it is to the revised Pure Theory. In *The Concept of a Legal System* of 1970, Raz argues that Kelsen's “negative custom cannot be regarded as creating norms in the same way that positive custom creates norms,” because “norm[s can] simply lapse[] by default and no positive pressure to disobey is necessary.”²⁵¹ Customary international law, for example, requires both state practice and *opinio juris*. But mere non-performance of a norm does not indicate the existence of an *opinio juris* that the norm should not be obeyed. Thus, Raz thinks, for Kelsen to treat

246. HART, *supra* note 22, at 100-10, 292-93.

247. *Id.* at 293 n.3.

248. *Id.*

249. This seems to be the only reasonable interpretation (especially in its context) of Kelsen's endorsement of the maxim “*ex injuria jus oritur*” in Kelsen, *supra* note 196 at 912. It is also very likely why Kelsen tends not to refer to the revised *Grundnorm* as simply consisting in “custom” or “customary international law,” but instead uses the very particular formula (with minor variations) that “states should behave as they have customarily behaved.” By bringing “states” into the equation as an *object* of regulation the *Grundnorm* is implying that the judge of custom is not the states themselves, but rather whatever central authority is able to define the content of custom, and then use that definition to justify new acts of sanction. The formula also perhaps subtly suggests that the category of “states” can itself be redefined based on the judgment of the central authority: the content of “how states have customarily behaved” will of course be different if membership in the class “states” is changed, by providing or depriving certain “states” of recognition. All of these subtle features of Kelsen's idiosyncratic (but consistent) *Grundnorm* formula suggest a centralized norm-interpreter using the *Grundnorm* to justify acts of sanction.

250. Raz, *supra* note 46, at 61-63.

251. *Id.* at 63.

“negative custom” as custom is a misnomer:

If negative custom creates repealing norms, these norms [would have to be] original or derivative. They are not original, for the basic norm is the only original norm, according to Kelsen. But neither are they derivative norms, for these presuppose a norm-creating norm. And the whole point of Kelsen’s doctrine is that negative custom terminates laws, even if there is no norm in the system authorizing it as a norm-creating process.²⁵²

Raz presents another challenge when he points to a contradiction between the idea of negative custom and Kelsen’s fundamental tenet of the normative unity of the law. The vast scope of desuetude that Kelsen argues for in his writings after 1945 seems to introduce chaos:

By claiming that negative custom is always and of necessity a way in which laws [can be] terminated Kelsen abandons the Austinian position that the efficacy of a law is relevant to its validity only in so far as it affects the efficacy of the legal system as a whole.²⁵³

Thus the ability of negative custom to repeal *any* norm simply by declaring it no longer efficacious (i.e. without pointing to an existing higher norm that contradicts it) would disrupt any pretense to the unity of the law as a normative system. Both of the above criticisms are indeed valid—*unless* negative custom itself is treated as the true *Grundnorm*. Here it is useful to recall that, for Kelsen, it is always true that any valid legal norm must have a sanction for its violation.²⁵⁴ This means that there is *no* valid customary law except that associated with a sanction. Thus, any new custom can only be recognized when a sanction has been applied. In successfully applying a new form of sanction (i.e. if it is subsequently customarily treated as valid by the international community), any preexisting norms that had prohibited that sanction will be retroactively invalidated. The highest norm of the system, and what Kelsen uses to try and guarantee its overall unity, is not any *substantive* norm specifying a specific *Unrecht*, but rather a *procedural* norm stating that a customarily endorsed *Unrechtsfolge* (e.g., military interventions) can retroactively invalidate any norms that might have stood in its way. Thus, it is a necessary consequence of the *Grundnorm* that “law can[always] originate in an illegal act [of sanction by a central authority as long as that act is subsequently customarily treated as valid].”²⁵⁵ A sufficiently authoritative centralized authority (capable of motivating subsequent customary endorsement) can turn its violations of existing law into the foundation of new law.

252. *Id.*

253. *Id.* at 62.

254. *See, e.g.,* KELSEN, *supra* note 117, at 104 (defining the “legal norm” as necessarily containing “delict and sanction.”).

255. KELSEN, *supra* note 196, at 912.

V. THE SECOND *GRUNDNORM* AND CONTEMPORARY LEGAL DEBATES*A. Defining the Permissible Scope of Sanction*

In rebuilding his theory of international law on the basis of retroactive customary endorsement of acts of sanction, Kelsen provided a way to theorize the centralization of the international system. It is useful to compare Kelsen's *Zwangsordnung* with more recent debates about the appropriate scope of international legal sanction.

A good place to begin such a comparison is with the many resolutions that the UN General Assembly has periodically adopted condemning "unilateral economic measures as a means of political and economic coercion against developing countries"²⁵⁶ as well as those concerning "human rights and unilateral coercive measures."²⁵⁷ These resolutions articulate the position that unilateral coercive measures constitute violations of the UN Charter rules as well as customary rules regarding non-interference and non-intervention among sovereign states.²⁵⁸

That the UN Security Council is able to implement both military and economic sanctions (for appropriate purposes) is generally uncontroversial. In addition to the military enforcement power for "suppression of acts of aggression or other breaches of the peace" provided under Articles 1 and 2 of the Charter, Articles 41 and 42 provide the Council with the power to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions . . . [which] may include complete or partial interruption of economic relations . . . and the severance of diplomatic relations."²⁵⁹ In order to use its various sanctioning tools, the Council need only determine that a "threat to the peace, a breach of the peace or an act of aggression" exists.²⁶⁰ Articles 25 and 103, meanwhile, require that states "agree to accept and carry out the decisions of the Security Council" and that states "obligations under the present Charter shall prevail" over their horizontal obligations.

With all of these provisions, the Charter clearly identifies the Security Council as a central sanctioning authority capable of adopting the role of chief definer and applier of sanctioning norms (military, economic, or diplomatic). However, at various times individual states, or groups of states, lay claim to their

256. GA Res. 44/215, 22 December 1989; GA Res. 46/210, 20 December 1991; GA Res. 48/168, 21 December 1993; GA Res. 50/96, 20 December 1995; GA Res. 52/181, 18 December 1997; GA Res. 54/200, 22 December 1999; GA Res. 56/179, 21 December 2001; GA Res. 58/198, 23 December 2003; GA Res. 60/185, 22 December 2005; GA Res. 62/183, 19 December 2007; GA Res. 64/189, 21 December 2009; GA Res. 66/186, 22 December 2011.

257. GA resolutions 70/151, 17 December 2015; GA Res. 70/185, 22 December 2015; GA Res. 69/180, 18 December 2014, GA Res. 68/162, 18 December 2013; GA Res. 68/200, 20 December 2013; GA Res. 67/170, 20 December 2012.

258. *See, e.g.*, discussion in Ruys, *supra* note 94, at 24-30.

259. UN Charter Art. 41, ¶3.

260. UN Charter Art. 39.

own ability to act as international sanctioners.²⁶¹ When such attempts are made on a unilateral basis, they quickly run into conflicting norms regarding non-intervention. One would have to be a national monist, not a Kelsenian international monist,²⁶² to accept an unfettered right for each state to sanction its peers as it saw fit. No state can independently define the content of its customary obligations.

However, in between the Security Council and the individual state are also any number of other arrangements, international or regional organizations, and cooperative groupings that can also exert collective sanctions by conferring or denying benefits within the context of given regimes. The phenomenon by which such enforcement is carried out has been described as “outcasting,” and it has been argued that it provides an alternative path to maintaining the coercive force of legal norms at the international level (as opposed to the Kelsen-style central sanctioning authority).²⁶³ As Oona Hathaway and Scott Shapiro write:

It is not the blue-helmeted police of the United Nations that enforce the vast majority of international law, but pressures brought to bear by other states. Those states act, moreover, not by threatening physical force. Rather, they create agreements that produce benefits for all their members—and then threaten to exclude those who violate those rules from some or all of the benefits of the regime.²⁶⁴

Kelsen’s revised *Grundnorm* would accept the validity of such intermediate forms of sanction on a case-by-case basis depending upon a traditional customary international law analysis (thus he would argue that economic sanctions, even when organized via multilateral treaty-based organizations, could have limits placed upon them by customary state practice and *opinio juris*). Thus, for sanctions that are collective, but not implemented by any designated central sanctioning authority likely to generate a consensus of obedience among states in general (of which the UN Security Council is arguably the only extant example), the *Grundnorm* would necessarily assume certain custom-based limitations.²⁶⁵ This would not be the case where sanctions are coordinated by the UN Security Council, however, unless there occurred in reaction a widespread challenge (e.g., one taking place via the General Assembly) that achieved and

261. See, e.g., Devika Hovell, *Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions*, *AJIL Unbound* 113, 140 (2019).

262. See the Schmittian “realist” perspective on international law, which can also be described as national monism, described in Mitchell, *supra* note 4. See also general discussion of the two monisms in note 4.

263. Hathaway and Shapiro, *supra* note 106.

264. *Id.* at 348.

265. See Kelsen, *supra* note 16, at 709 (Describing such limitations, e.g., that “[i]f a treaty providing for enforcement measures is to be interpreted as being in conformity with general international law, the conduct which constitutes the condition of an enforcement measure must be considered to be a delict and the contrary conduct the contents of an obligation, even if it is not expressly stipulated as obligation.”).

maintained a consensus of *disobedience* to the sanction or the norm it was enforcing.²⁶⁶

That there should be a clear differentiation between central sanctioning authorities who are customarily obeyed such that their sanctions are effectively unlimited and those who, by contrast, remain under the limits of extant customary international law has major implications for the evolution of *jus ad bellum*. For example, the Kampala Amendments providing jurisdiction over the crime of aggression to the ICC were activated on July 17, 2018.²⁶⁷ A key question that arose in the process of negotiations among the Assembly of States Parties (ASP) was whether the ICC, if acting on either a Security Council referral or via *proprio motu*, would have jurisdiction over the crime of aggression when committed on the territory of states parties by nationals of non-ratifying states.²⁶⁸ It was ultimately decided to adopt a resolution saying that such jurisdiction would not be conferred—however this was closely followed by a separate clause reaffirming that the Court would have the ultimate authority to “interpret its judicial mandate” under the Rome Statute. These somewhat inconsistent clauses seemingly leave the question of authority over non-ratifying state nationals accused of the crime of aggression unclear as a matter of practical implementation.²⁶⁹

Applying the concept of negative custom to this interpretive dispute would produce a clear answer. The Court, acting on a sufficiently clear, formal referral by the Security Council, would indeed have the authority to deprive non-ratifying state nationals of the legal protections afforded by their status as third parties to the Rome Statute. The Court would have this authority, despite the traditional legal principle *pacta tertiis nec nocent nec prosunt* (neither benefit nor harm is conferred to third parties to an agreement),²⁷⁰ because in accepting a referral to prosecute an instance of the crime of aggression it would itself be acting as a subsidiary organ of the Security Council, which is a central authority capable of negating procedural norms, such as the *pacta tertiis* rule, invoked as objections or excuses against the imposition of lawful sanctions.

266. Kelsen would thus argue that the enforcement powers of voluntary organizations such as the International Coffee Council, which are only meaningful to organization members (and lack coercive force against those willing to be excluded), are best viewed as delegations from a central sanctioning authority. *Cf.* Hathaway and Shapiro, *supra* note 106, at 330. Their existence does not deprive that central sanctioning authority of its exceptional role as the ultimate interpreter and applier of the *Grundnorm* or the agent capable of *universal* sanction. The International Coffee Council cannot expect to be obeyed when it derogates norms conferring rights upon individual states, but the Security Council potentially can.

267. *See, e.g.*, Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression*, 16 J. OF INT’L CRIM. JUST. 1 (2018).

268. *See* Dapo Akande, *The ICC Assembly of States Parties Prepares to Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?*, EJIL: TALK!, (June 26, 2017) [<https://perma.cc/3J35-ZWBR>].

269. *Id.*

270. *Cf., e.g.*, Robert Y Jennings, *The Progressive Development of International Law and its Codification*, BRIT. YB INT’L L. 24, 303 (1947).

On the other hand, for cases brought by the ICC Prosecutor *proprio motu*, there would be no such presumed justification for exercising jurisdiction over nationals of non-ratifying states. The ICC is, after all, not a formal organ of the UN system, and it cannot *independently* exercise the central authority to nullify otherwise valid immunity-conferring norms for states within that system (i.e., rules such a *pacta tertiis* which are based on both custom and general principles of international law, recognized authorities under ICJ Statute Article 38(1)(b) and (c), respectively).

The Rome Statute and its Kampala Amendments are, of course, binding treaties among all members of the ASP, and thus any traditional immunities from prosecution for the crime of aggression are waived.²⁷¹ However, in the case of non-parties, it is only via either self-referral or referral by the UN Security Council that a formal agreement-based legal obligation to comply with ICC jurisdiction is created under Article 38(1)(a). Once sanctioning authority for violations of the ICL norm against aggression has been delegated to the ICC, though, the Court is also provided with the authority to negate the traditional presumption of *pacta tertiis* immunity. This is not true of the ICC—unless it were to enact such sanctions despite such obstacles and they were to be subsequently endorsed as customarily valid by the overwhelming majority of the international community at large, invoking negative custom.

B. “Negative Custom” at the ICC

The issue of head of state immunity, similarly, has been the subject of considerable recent debate in regards to the proper scope of ICC jurisdiction.²⁷² While the matter of jurisdiction for the crime of aggression over third party state nationals remains prospective, however, the question of head of state immunity has been litigated before the Court in the matter of the former Sudanese President Omar al-Bashir,²⁷³ and has already been the subject of judgments with regards to the obligations under the Rome Statute of member states to which al-Bashir traveled as a head of state, but failed to arrest and deliver him for prosecution.²⁷⁴ Jordan and South Africa have appealed rulings that they were lax in their obligations under the Rome Statute for respecting the traditional customary rule of head of state immunity and declining to facilitate ICC prosecution based on the UN Security Council’s referral (Resolution 1593).²⁷⁵ Most recently, the ICC Appeals Chamber has issued its judgment denying Jordan’s appeal.²⁷⁶

Reasoned arguments were made for both positions. The appellant states, and those sympathetic to their arguments, argued on several grounds that neither Res.

271. Rome Statute, art. 27, ¶2.

272. See, e.g., Max Du Plessis & Dire Tladi, *The ICC’s immunity debate – the need for finality*, EJIL: TALK! (August 11, 2017) [<https://perma.cc/N7J9-JASF>].

273. See, e.g., *id.*

274. Du Plessis & Tladi, *supra* note 272.

275. S.C. Res 1593, ¶3 (March 31, 2005).

276. Prosecutor v. Al Bashir, ICC-02/05-01/09 OA2 (6 May 2019).

1593, which does not mention the issue of head of state immunity, nor the Rome Statute provided a basis for the ICC to deprive al-Bashir of his protected status as a head of state: ICC member states can only delegate powers to the Court that they themselves possess,²⁷⁷ and no state in the ASP has any inherent right to ignore the head of state immunity of other states. Though member states have indeed waived immunity for their own officials, such waivers do not bind non-members given the aforementioned *pacta tertiis* rule.²⁷⁸ Security Council Res. 1593 does direct Sudan to “fully cooperate” with the ICC, but it explicitly mentions neither immunity nor Art. 27 of the Rome Statute, which contains the relevant waivers by states parties.²⁷⁹ Does ordering a state to “fully cooperate” mean putting it in exactly the same position as states parties to a treaty it has not signed, and as waiving any right waived by states parties? As for the appellant states themselves, meanwhile, Art. 98(1) of the Rome Statute makes clear that State parties are not required to arrest indicted suspects where this would violate their own obligations to a third party state.²⁸⁰

For the argument against immunity, the Trial Chamber of the ICC (despite some self-contradictory treatments of the issue across different cases)²⁸¹ articulated its own arguments for disregarding head of state immunity. In part, these rest on the idea that the order to “fully cooperate” in the Security Council referral does indeed put Sudan in effectively the same position as a state party with respect to its legal obligations.²⁸² However, the Court and those who agree with it also find support in relevant case law from the ICTY, in which the Trial Chamber had held in *Karadzic* that “[a]ccording to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals.”²⁸³ On the other hand, the *Karadzic* matter dealt

277. Gabriel M. Lentner, *Why the ICC won't get it right – The Legal Nature of UN Security Council Referrals and Al-Bashir Immunities*, EJIL: TALK! (July 24, 2017) [<https://perma.cc/76B9-2Z5Y>].

278. See, e.g., André de Hoogh & Abel Knottnerus, *ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong . . . Again*, EJIL: TALK! (Apr. 18, 2014) [<https://perma.cc/TQ5Z-DY3A>]. Cf. Dimitrios Kourtyis, Comment to *id.* (“The issue at stake, as aptly posed by the learned authors . . . is no other than the power of an international tribunal to dismantle the old maxim (equivalent to a general principle pursuant to Art. 38(1c) of the World Court's Statute) of ‘pacta tertiis nec prosunt nec nocent.’”) [<https://perma.cc/TQ5Z-DY3A>].

279. Lentner, *supra* note 277; cf. Prosecutor v. Al Bashir, ICC-02/05-01/09-38, Supplementary African Union Submission in the “Hashemite Kingdom of Jordan's Appeal Against the ‘Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al Bashir,’” (Sept. 28, 2018) [<https://perma.cc/VH4Z-S47D>].

280. See Prosecutor v. Al Bashir, ICC-02/05-01/09-38, *supra* note 216.

281. See *id.*

282. Prosecutor v. Al Bashir, ICC-02/05-01/09-302, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ¶ 45 (July 6, 2017) [<https://perma.cc/5GH4-4E7R>].

283. Prosecutor v. Karadzic, Case No. IT-95-5/18-PT, T. Ch., 17, Decision on the Accused

with a claim for amnesty resulting from an agreement not to prosecute, not with the immunity of sitting heads of state (and the defendant was the leader of an entity, Republika Srpska, that was of doubtful legal status as a state). Earlier though, the ICTY had held in its *Prosecutor v. Slobodan Milosevic* Decisions on Preliminary Motions (2001) that the same rule, against head of state immunity for *jus cogens* violations, was applicable on the basis of newly emerging custom:

Particular mention must be made of the Rome Statute of the ICC which, although not yet in force, has been signed by 139 States and now has 43 of the 60 ratifications required for its entry into force. This is a multilateral instrument of the greatest importance, which, even at this stage, has attracted fairly widespread support. The Chamber also attaches particular significance to the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, prepared in 1996. The Chamber cites these two modern instruments as evidence of the customary character of the rule that a Head of State cannot plead his official position as a bar to criminal liability in respect of crimes over which the International Tribunal has jurisdiction.²⁸⁴

It is more than slightly ironic that the ICC could base its ability to nullify head of state immunity on a customary norm of international law that was articulated in a decision relying upon the ICC's Rome Statute itself as the chief evidence of a custom. There is an MC Escher-esque, looping staircase quality to a treaty-empowered tribunal arguing that its jurisdiction extends beyond the terms of the treaty text, in part because an unrelated tribunal saw that treaty text as a sign of an emerging customary norm.²⁸⁵ And, of course, any states that do not wish to be bound to overly expansive readings of the agreements they sign will balk at the idea that joining a treaty like the Rome Statute means creating a "custom" that may impose obligations upon them different from those contained in the actual text.²⁸⁶ Nor is it at all clear that sufficient instances of state practice or *opinio juris* exist to assert that there is a clear norm for the derogation of head of state immunity in all cases of alleged *jus cogens* violations, or that this derogation of immunity applies to states themselves in their treatment of peer heads of state.

Another argument that was raised, supporting instead the possibility of reading the cancellation of al-Bashir's immunity into Res. 1593, is that UN Security Council resolutions should be read to the degree possible in a manner consistent with the UN Charter.²⁸⁷ Art. 1 of the UN Charter, meanwhile, laying

Second Motion for Inspection and Disclosure: immunity issue, ¶ 17 (Dec. 17, 2008) [<https://perma.cc/ZLE9-ZCV3>].

284. *Prosecutor v. Milosevic*, IT-02-54 Decision on Preliminary Motions, ¶ 31 (Nov. 8, 2001) [<https://perma.cc/Y9P2-MU33>].

285. Escher's staircases are, notably, used as the cover image for JEAN D'ASPREMONT ET AL., *The Oxford Handbook of the Sources of International Law* (Oxford University Press) (2017).

286. *Id.* at 696-97.

287. Talita de Souza Dias, *The 'Security Council Route' to the Derogation from Personal*

out the purposes of the organization, makes clear that “promoting and encouraging respect for human rights” is one of those purposes.²⁸⁸ This raises the possibility that the Security Council, in issuing its referral of Sudan, should be understood as having to the greatest degree possible sought to “promot[e] . . . respect for human rights” by requiring the waiver of head of state immunity.²⁸⁹

On the other hand, a cursory glance at Art. 1 shows that the fundamental purposes of the United Nations also include “develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” (Art. 1(2)); “achiev[ing] international cooperation in solving international problems of an economic, social, cultural, or humanitarian character” (Art. 1(3)); and “be[ing] a center for harmonizing the actions of nations in the attainment of these common ends” (Art. 1(4)). The appellant states would certainly argue that being required to arrest the visiting President of a foreign state, in violation of traditional customary obligations and of international comity, is in contravention of each these three clauses and should not be read into Res. 1593 without an explicit statement to that effect. Should Security Council resolutions be read conservatively, in the interests of maintaining peaceful ties and cooperation among states within the UN system?²⁹⁰

This dispute, and in particular the fact that the referring resolution is so vaguely worded, has raised a number of questions including those noted above. Taken in a more abstract sense, it also raises the issue of how to reconcile vertical versus horizontal legal obligations, with a lack of clear guidelines as to whether treaty texts (such as the UN Charter and the Rome Statute) override countervailing customary norms where these partially impede the execution of the former but do not contradict more limited interpretations of the obligations they create. Should horizontal customary obligations among states be simply nullified by the Security Council, or by the ICC itself, based on the precedence of vertical obligations, even though the text, in saying simply ‘fully cooperate,’ remains rather vague?²⁹¹

Kelsen’s *Grundnorm* was, of course, developed precisely in order to solve the problem of the unity of international law by functioning as the metric by which all lower norms could be evaluated, and conflicts between them reconciled. In its earlier incarnation as *pacta sunt servanda*, it would be of little help here, however. What is at issue, primarily, is precisely the question as to what states agreed to, either under the UN Charter or under the Rome Statute and only secondarily the question as to which legal authorities are to be treated as hierarchically superior to which others. The reinvented *Grundnorm* of Kelsen’s late theory would hold that the ultimate deciding factor should be the norm that

Head of State Immunity in the Al-Bashir Case: How Explicit must Security Council Resolutions be?, EJIL: TALK! (Sept. 19, 2018) [<https://perma.cc/UT2A-DF8X>].

288. UN Charter art. 1, ¶ 3.

289. De Souza Dias, *supra* note 287.

290. Lentner, *supra* note 277.

291. Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities*, 7 J. INT’L CRIM. JUST. 2, 333, 340 (2009).

“states should behave as they have customarily behaved.”

What this means in practice can be illustrated with respect to the ICC Court of Appeal’s eventual decision on Jordan’s objections. In the end, the Court of Appeal held that head of state immunity was not available.²⁹² It did so on three grounds: that Art. 27 applies to prevent ICC States Parties invoking head of state immunity for non-state parties;²⁹³ that the UNSC order to “cooperate fully” includes a requirement to surrender anyone whose arrest is sought;²⁹⁴ and finally that “there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court.”²⁹⁵

These three rationales are of very different merits. The third invokes a highly contestable interpretation of “custom” that fully commits to the “Escher’s staircase” ethos noted *supra*.²⁹⁶ The Court cannot deny that there is indeed a customary rule of head of state immunity among states, but asserts sweepingly that such rules simply do not apply to international courts: “the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court.”²⁹⁷ The ICC (or possibly any international court, no matter how many or which states have signed treaties to empower it) thus asserts a right to disregard any and all customary immunities, or indeed, any customary norms based on interstate practice it might dislike.

As the simple claim of a positive “custom” asserting lack of immunity before international tribunals, the Court’s argument is clearly empirically wrong. The Al Bashir case itself only arose on appeal because of a large number of states demonstrating their view that head of state immunity was still available. Thus the only way to properly understand the Court of Appeal’s “custom” logic is as a manifestation of Kelsen’s “negative custom.” For Kelsen’s revised *Grundnorm*, it is indeed possible for any central sanctioning authority to remove customary immunities if it can expect subsequent customary agreement. However, the ICC, which has 123 member states, can claim widespread support but cannot reasonably portray itself as a central sanctioning authority for the entire world community on its own merits. With the third ground for its denial of Jordan’s appeal, it is laying claim precisely to Kelsen’s derogating power, but doing so in an unsubstantiated manner that is likely to produce a backlash.²⁹⁸

292. Prosecutor v. Al Bashir, ICC-02/05-01/09 OA2 (6 May 2019).

293. *Id.* ¶ 122.

294. *Id.* ¶ 126. The Court of Appeal found that this reading was in part appropriate because “[t]he obligation to cooperate with the Court reinforces the obligation *erga omnes* to prevent, investigate and punish crimes that shock the conscience of humanity, including in particular those under the jurisdiction of the Court and it is this *erga omnes* character that makes the obligation of States Parties to cooperate with the Court so fundamental.” *Id.* ¶ 123.

295. *Id.* ¶ 113.

296. See *supra* note 284-85 and accompanying text.

297. *Id.* ¶ 115.

298. Various states have already withdrawn from the ICC in recent years due in part to

The first of the three grounds, meanwhile, is simply a blatant violation of the *pacta tertiis* rule. Nonetheless, the second ground, ruling that the order to “fully cooperate” with prosecutions includes the derogation of any immunities, would have been sufficient to decide the result. The Security Council is, as the ICC itself is not, the central sanctioning authority *par excellence* of the international community. In referring Sudan, the Council was not merely playing a role within the legal framework of the Rome Statute itself, but was more importantly making the executive decision to sanction Sudan and its officials in the interests of international peace and security. In other words, the “punishment” of Sudan as a state—the *Unrechtsfolge* to its *Unrecht*—had already been imposed with adoption of Res. 1593. But neither that, nor the various international tribunals that have previously been created with Security Council blessing, can show that there is a “custom” of derogating immunity before international tribunals.

C. Overcoming Interpretive Uncertainty

Moving beyond immunity to issues of international legal interpretation more generally, an appreciation for Kelsen’s sanction-centric international law monism, and the *Grundnorm* of negative custom upon which it depends, can also serve as a lens to clarify key aspects of international law currently under debate in connection with the International Law Commission’s recent studies on the “identification of customary international law,”²⁹⁹ as well as “general principles of international law”³⁰⁰ and, in particular, “peremptory norms of general international law (*jus cogens*).”³⁰¹

The ILC study on custom has generated a set of draft conclusions that include endorsement of the idea that the customary norms regarding immunity should be defined with “particular significance” attached to “the judgments of national courts.”³⁰² That approach is only systemically consistent from the perspective of domestic monism, and not from that of international monism, which requires that

perceptions that it is over-broadly interpreting its authority. Expansive rulings like that on Jordan’s appeal seem likely to worsen that trend.

299. See U.N. GAOR, 73rd Sess., Supp. No. 10, ¶¶ 58, 60, 65 & 66, U.N. Doc. A/73/10 (Aug. 10, 2018).

300. See U.N. GAOR, 72nd Sess., Supp. No. 10 at 224, U.N. Doc. A/72/10 (Aug. 4, 2017).

301. Dire Tladi (Special Rapporteur on Jus Cogens), *First Rep. on Jus Cogens*, U.N. Doc. A/CN.4/693 (Mar. 8, 2016).

302. Int’l Law Comm’n, *Draft conclusions on identification of customary international law, with commentaries*, 7 at 127 (2018) (“[i]n the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts [etc.]”) (Quoting *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, I.C.J. Reports 2012). Though primarily referring to State immunity in general, head of state immunity should generally be considered upon similar grounds. See, e.g., Dapo Akande, *Head of State Immunity is a Part of State Immunity: A Response to Jens Iverson*, EJIL: TALK! (Feb. 27, 2012).

the derogation of customary immunities be conducted on a “top-down” basis by an empowered central sanctioning organ of the international community, typically the UN Security Council.

This point is reinforced when one juxtaposes the Draft’s very general discussion of determining custom in the context of immunities with the doctrine of “specially affected states” that is supposed to modify it.³⁰³ As the Draft notes, for both the determination of custom in general and for its determination by reference to specially affected states, the “practice . . . should have been both extensive and virtually uniform.”³⁰⁴ Yet what are specially affected states with regards to the issue of immunity, for example? As Kevin Heller notes, “the outcome of a dispute over custom can depend on the degree of specificity required for specially-affected status . . . [of which [f]unctional immunity is an excellent example.”³⁰⁵ Positive custom is bound to run into interpretive aporias such as whether “the category of specially-affected states [should be] limited to those that have squarely faced the issue,” in which case functional immunity would be maintained, or whether instead immunity should be denied on the basis of either a reading of custom that does not take into account the views of the states most directly affected by the issue:

[T]hose very few jurisdictions that have declined to afford immunity in the few cases to have proceeded so far to judicial determination have all been western European. Conversely, African states jointly and severally, Chile, China, Israel, Mongolia and the United States—many of them states with a strong claim to being considered “specially affected” by any purported customary “international crime” exception—have all vociferously insisted on the grant of immunity *ratione materiae* to their serving and former officials in the face of foreign investigations or proceedings pertaining to alleged international crimes.³⁰⁶

International courts and criminal tribunals, for the most part, find themselves naturally attuned to the more “progressive” views on immunity of northern states—as seen *supra* in the ICC’s decision on Jordan’s appeal. Yet an attempt to assert the universality of a custom does not make it so. Alternative interpretations, often based on alternative (and sometimes more defensible) definitions of the class of specially affected states, will always be possible in interpreting custom, especially for the most geopolitically weighty norms. Negative custom, and the *Grundnorm* that puts its interpretation and application in cases of sanction in the hands of a centralized sanctioning authority, requires

303. See *Draft conclusions on identification of customary international law, with commentaries*, *supra* note 286, at 136.

304. *Id.* (citing *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*).

305. Kevin John Heller, *Specially-Affected States and the Formation of Custom*, 112 AM. J. INT’L L. 2, 191, 215 (2018).

306. *Id.* (Citing Roger O’Keefe, *An ‘International Crime’ Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely*, 109 AJIL UNBOUND 167, 168 (2015)).

that the vain search for universal rules on immunity (or other such matters relating to sanction) is replaced with a decision by a plausible central authority likely to generate a subsequent consensus of approval.

Much the same analysis is applicable to the ILC's studies of general principles of international law and of *jus cogens*. Indeed, even more so than custom, general principles and *jus cogens* present a minefield of dissent, contention, and ambiguity. This is acknowledged by states, international law scholars, and even by the ILC report drafters themselves.³⁰⁷ Nonetheless, they hold out the hope that general principles can be defined, and described, in such a manner as to constitute a clear, and practically applicable, body of agreed-upon norms. This hope is referred, in part, to the original idea of "*jus publicum*" (public law) which, under the Roman law, had acted as a limiting factor in terms of assessing the validity of legal agreements.³⁰⁸ Indeed, the initial report on *jus cogens* relates the origins of the idea directly to the Codex of Justinian, which states "agreements contrary to laws or constitutions, or contrary to good morals, have no force."³⁰⁹ This is then extrapolated to support the idea that, in international law today, there is a "superior law, from which no derogation [is] permitted."³¹⁰ Of course, the Roman law *jus publicum* was simply the public law of a domestic jurisdiction, not a universal code.

The ILC aims to determine the content of this superior law, in a manner that will be interpreted and applied uniformly, and that will not simply leave *jus cogens* to be a vague principle adopted by courts when convenient as a means to override doctrines more well-established in positive sources of law. This goal is unlikely to be achieved, for in any practical case there will still emerge a background of political factors and cross-purpose motivations that dictate the position of states on the definition and application of *jus cogens*, and its relationship to other norms. Paeans to a Roman law history of subordinating positive law to "good morals" or to "public law" which took the form of a domestic legal system's constitutional principles are of little value in providing certain content to a norm as contestable, and contested, as is this one. The question of *quis judicabit* will not be quarantined simply by virtue of the moral urgency felt by those on the "right" side of a legal dispute (whichever side that is).

It is thus striking that Hans Kelsen is cited in the initial working report regarding general principles of international law, albeit in a somewhat inapposite

307. See U.N. GAOR, 69th Sess., 20th mtg. ¶ 109, U.N. Doc. A/C.6/69/SR.20 (Nov. 10, 2014) (South Africa stated that "the concept of *jus cogens* norms remained nebulous"); see also U.N. GAOR, 69th Sess., 22nd mtg. ¶ 37, U.N. Doc. A/C.6/69/SR.22 (Nov. 11, 2014) (France noted the "disagreement about the theoretical underpinnings of *jus cogens*, [and moreover that] disagreements about its scope of application and its content remained widespread").

308. Tladi, *supra* note 301, ¶ 19.

309. *Id.* (citing *Domini Nostri Sacratissimi Principis Iustiniani Codex, Libri Secundus*, 2.3.6. (*Pacta, quae contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere indubitati iuris est.*)).

310. *Id.* ¶ 20.

manner. The document states that the “ambivalence of positivism towards the ideal of an ‘immutable law’ is aptly explained by Hans Kelsen in his Pure Theory of Law,”³¹¹ with the associated footnote drawing on Kelsen’s 1934 first edition of the *Reine Rechtslehre* for the following statement:

Law is, indeed, no longer presumed to be an eternal or absolute category . . . The idea of an absolute legal value, however, is not quite lost but lives on in the ethical notion of justice [to] which positivist jurisprudence continues to cling . . . The science of law is not yet wholly positivistic, though predominantly so.³¹²

The Special Rapporteur’s choice to cite Kelsen’s *first* version of the pure theory, without any reference to his later views is (while hardly uncommon) symptomatic of an approach to international legal interpretation that ignores the advances made in his late theory. He is cited here for the position that law is not immutable. . . but only in order to posit the immutability of a notional “higher law” which is meant to stand above all positive legal authorities. In fact, even the Kelsen of 1934 would not have agreed with this position as it is deployed in the report.³¹³

Kelsen would by contrast agree with the claim that “[i]n the last analysis, the final arbiter of divine law is the triviality of procedural norms.”³¹⁴ His *second* version of the pure theory explains that the real pragmatic content of *jus cogens* cannot be extrapolated either from ethical ideals or the inconsistent and shifting interpretations of tribunals, but rather from the practice of real institutions when they define the sanctions that give international law its actual content as a legal system capable of enforcement by an executive authority. From a late Kelsenian perspective, *jus cogens* can be no more than a category of norms potentially authorized by custom, but also subject to derogation by custom.³¹⁵ Just as Nietzsche should not be misread as conflating “truth” with “justice,” neither should Kelsen be misread as conflating “law” with “justice”; even though the will for justice might be “what gives [law] its [subjective] value.”³¹⁶

311. *Id.* ¶ 22, p.12 n53.

312. *Id.* (citing HANS KELSEN, *THE PURE THEORY OF LAW: ITS METHOD AND FUNDAMENTAL CONCEPTS*, 50 L. Q. REV. 474, 483-84 (Charles H Wilson, trans., 1934)).

313. Hans Kelsen, *Die Platonische Gerechtigkeit* [Platonic Justice], 38 *Kant-Studien* 91, 117 (1933) (“[R]ational science will never provide an answer to the question as to what is the essence of justice . . . this ideal [of absolute justice] is an illusion . . . Instead of justice there necessarily comes into the rational sphere the thought of peace.”).

314. Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 *EUR. J. OF INT’L L.* 4, 566, 578 (1997) (Citing GERHARD TEUBNER, *LAW AS AN AUTOPOETIC SYSTEM* 3 (Blackwell, 1993)).

315. *See* sources cited and discussion in *supra* note 16.

316. *Cf.* Kelsen, *supra* note 34 at 248; Kelsen, *supra* note 313 (“However the need, the desire for a justice that is more than compromise and more than mere peace, and above all the belief in such a higher, indeed highest, absolute value is too strong to be unsettled by any such rational considerations . . . [Even] if this belief [in justice] is indeed an illusion, it is an illusion that is

VI. CONCLUSION

“*Positive and negative.*—This thinker needs nobody to refute him: for that he suffices himself.”

– Friedrich Nietzsche, *The Wanderer and His Shadow* (1880)

Kelsen’s revisions to the *Grundnorm* in 1945 and after reflect a high degree of awareness that international legal interpretation, like other forms of jurisprudence, “takes place in a field of pain and death.”³¹⁷ The legal doctrines and processes comprising the international order are not only tools for ordering cooperation among nation-states; they are also sites of struggle between the advocates of varying normative and even epistemic commitments,³¹⁸ as well as mechanisms for the administration of various forms of violence both visible and hidden.³¹⁹ Increasingly, international law scholars have sought to uncover these coercive and asymmetrical aspects of their object of study. The legal thought of Hans Kelsen, too often associated with formalistic doctrinal orthodoxy or an otherworldly dedication to logical “purity,” in fact offers highly practical, overlooked resources for better understanding international law as a *Zwangsordnung*: a system of ordered violence.

It also offers tools to those who look to ascend the heights of that system and command it. It was no mere coincidence that the US and Soviet delegates both reached for Kelsen’s *Law of the United Nations* as their grimoire of choice at the UN General Assembly sessions in 1950.³²⁰ As the examples reviewed *supra* in Parts III-V have indicated, the post-1945 Pure Theory of Law was capable of according legal validity to any act of international sanction that is successfully carried out and subsequently customarily endorsed by the global community. In practice, this would be most likely to be achieved by an organ that embodies genuine consensus among states and a heightened degree of centralization resulting from delegated authority within an international organization. But that “consensus” might also simply be another way of saying hegemony.

The Nuremberg and Tokyo Tribunals, despite their repeal of procedural

stronger than reality.”).

317. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1985).

318. Cf. DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (Princeton University Press) (2018); Mitchell, *supra* note 14, at 423.

319. Cf. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge University Press, 2007); with regards to inequalities inherent to customary international specifically, as well as suggestions for addressing them see B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT’L L. 1 (2018) (explaining how custom can be reconceived to better reflect norms originating from the Global South or from non-state civil society actors traditionally excluded from norm-setting under international law).

320. See *supra* note 228 and associated text.

safeguards relating to *ex post facto* sanctions, do seem to have reflected a genuine “political and historical consensus in the international community in 1945”³²¹ and a delegation of sanctioning authority satisfying the *Grundnorm*. Notably, even the sanctioned states have subsequently treated them as valid. However, the 1950 Korean intervention, read in the context of subsequent disagreement over international interventions into internal conflicts, seems a much less persuasive case.³²² Though Kelsen was open to justifying both examples, in practice the *Grundnorm* would seem to authorize the former far more clearly than the latter. It articulates a metric by which claims to a custom-based sanctioning power—that of the US in 1950, of modern proponents of humanitarian intervention, or that of the ICC in its recent rulings—can be put to the test.

The revised *Grundnorm* thus does not function solely as an apology³²³ for hegemony. Nonetheless, taken as a whole, it does embody Kelsen’s position in the 1940s and after that *any* central sanctioning authority with sufficient customary obedience is capable of overriding *any* norm that might stand in the way of its legal interpretations and applications. The late Pure Theory thus actually portrays an international legal system that is in a radical sense contingent and “up for grabs.” Any new consensus on a sanction might reevaluate the whole system. The sovereignty of the individual state is fully relativized as subordinate to international norms of sanction undertaken by (those claiming to represent) centralized organs of enforcement.

Thus, although the “late Kelsenian” approach to international legal order may be a unique and at times highly useful lens for legal analysis, there are strong reasons for those who see value in the formal legal equality of states, or who are opposed in principle to ever-expanding doctrines of intervention and global managerialism, to be wary of any exclusive commitment to it. There are, of course, other lenses available, or yet to be crafted. In adapting his Pure Theory to cope with the impurities of the existing global order, Kelsen created a system that can maintain its normative consistency regardless of what sort of reality it operates in and upon. Law retains its value as “a tool for transforming the world,” but abandons any pretensions it may have had to articulate a substantive vision of how, or by whom, the world should be transformed.

321. See, e.g., B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 533 (Second ed. Cambridge University Press, 2017).

322. See Mitchell *supra* note 219.

323. Cf. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge University Press, 2006).