

Unearthing structural uncertainty through neo-Kelsenian consistency: Conflicts of norms in international law

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Note: This is a shortened version of a draft chapter, reduced to 25 pages from 45 pages. While I have taken care to retain passages that give an overview of the arguments presented, the deletion of nearly half of the original article meant that, inevitably, certain sections which are potentially relevant for a full understanding of my argument are now missing. I hope nonetheless to present a coherent argument below.

Hans Kelsen's theory of a *pure* normative science achieved dialectical completion between the normative and the positive elements of a positive normative system. My development of his theories endeavours to eliminate the remaining influences of effectiveness and enforcement in his theory; I try to continue along a path that Kelsen would have taken. While Kelsen's theory could be called an *epitome* of legal modernism,¹ this does not mean that such a strict framework as the Pure Theory of Law cannot be a force for deconstruction.²

My paper will give an example of the critical force of Kelsen's theories: International law, as any normative order, becomes uncertain when too much law 'exists' and norms conflict. I believe that conflicts of norms are severe problem for any normative scientist. Conflict puts on us pressure to resolve by somehow 'privileging' one norm over the other.³ Conflicts of norms are a source of uncertainty in international law, because if, for example, more than one norm refers to subjects' same type of behaviour the possibility is very real that this subject will be in a situation where it physically cannot behave according to *all* norms applicable. Uncertainty arises in the tension between the choice of possible behaviour *vis-à-vis* every norm's *necessarily* equal claim to be observed. Thus, *the subject's choice* privileges equals – and leads to non-compliance with another norm's ideal.

Most unfortunately, the notion of conflicts of norms in international law, has, until recently, received very little attention from scholars of international law.⁴ An important attempt in this respect is Joost Pauwelyn's book published in 2003⁵ and the ILC study group on 'Fragmentation of international law', in particular Martti Koskenniemi's 2004 study on *lex specialis* and special regimes.⁶

The problem of international legal scholarship – and Pauwelyn and Koskenniemi are no exception – is their unquestioning adoption of 'traditional' resolving devices such as the *lex posterior* or *lex specialis* maxims. Both papers mentioned above, indeed, would have needed to lay an argumentative foundation why these resolving devices are licit at all, but neither does

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¹ This is evident in the philosophical theories Kelsen used to underpin his theories, namely neo-Kantianism and logical positivism.

² The method of *critique* employed is not post-modern, but anything from Kantian *Kritizismus* to traditional scepticism.

³ On this narrow point, I readily agree with the post-modern critique as against privileging 'one' over 'the other' (J.M. Balkin, Deconstructive practice and legal theory, 96 Yale Law Journal (1987) 743-786).

⁴ If so, then only incidental to the hierarchy and inter-relationship of sources, e.g.: Alfred Verdross, Bruno Simma, Universelles Völkerrecht. Theorie und Praxis (3rd ed. 1984) 412-416 (§§ 640-647).

⁵ Joost Pauwelyn, Conflict of norms in international law. How WTO law relates to other rules of international law (2003).

⁶ Martti Koskenniemi, Study on the 'Function and scope of the *lex specialis* rule and the question of "self-contained regimes"', in: International Law Commission, Documents of its fifty-sixth session, Geneva 3 May-4 June and 5 July-6 August 2004, ILC(LVI)/SG/FIL/CRD.1 and Add.1 (2004).

so. We need to be sceptical about the orthodox predisposition to resolve conflict all too easily and we need to be sceptical *vis-à-vis* the devices orthodoxy employs.⁷

I will be ‘vetting’ the three most commonly used and widely accepted ‘traditional resolving devices’ – the *lex posterior*, *lex specialis* and *lex superior* maxims. The traditional and – on its grounds unquestioned – reliance on the *lex posterior* and *lex specialis* maxims is an ideal starting-point to demonstrate the critical force of Kelsenian consistency and we will look very closely at their argumentative ‘justification’ (Sections 2-3). The other device – privileging *lex superior* – is special, because with the hierarchy of norms comes their unity in a normative order; unity achieved by validity-relationships. A consistent application of the deconstructive side to the neo-Kelsenian project will cause immense problems even for its constructive side. Questioning *lex superior* may lead us to the limits of Kelsen’s theory and may result in the endangerment of the coherence of normative orders (Section 4.2.3).

1. A preliminary (non-) definition of conflict

A preliminary skirmish we must fight is *the definition of ‘conflict of norms’*. The attribution of the label ‘conflict’ to the relationship is additional to the norms’ existence and the ‘outcome’ of that relationship is not affected by the label.⁸ Hence the focus of this section clearly lies on the questions of *resolving*, not defining conflict. In this skirmish we will mainly pit Pauwelyn and the late Kelsen against each other, for only in their works⁹ I have found extensive discussion. Kelsen’s definition is this:

Ein Konflikt zwischen zwei Normen liegt vor, wenn das, was die eine als gesollt setzt, mit dem, was die andere als gesollt setzt, *unvereinbar* ist, und daher die *Befolgung oder Anwendung* der einen Norm notwendiger- oder möglicherweise die Verletzung der anderen involviert.¹⁰

Admittedly, this is a pretty bland definition, similar to others in many respects.¹¹ The notion of ‘incompatibility’ obviously is a key element; unlike in his earlier ‘Reine Rechtslehre’, where there is a clear analogy drawn between logical contradiction of statements and incompatibility of norms,¹² there is no satisfactory definition here. The second element, also not unique to Kelsen, is the reference to factual impossibility in one form or another. Joost Pau-

⁷ James W. Harris, Kelsen and normative consistency, in: Richard Tur, William Twining (eds), *Essays on Kelsen* (1986) 201-228 at 225.

⁸ Ewald Wiederin, Was ist und welche Konsequenzen hat ein Normkonflikt?, 21 *Rechtstheorie* (1990) 311-333 at 328-329.

⁹ Pauwelyn (2003) *supra* fn 5 at 164-188; Hans Kelsen, *Allgemeine Theorie der Normen* (1979) 99-101. Joost Pauwelyn, in particular, is to be congratulated on the thorough way in which he tackled the definition and taxonomy, even though I cannot fully agree with his views. He has taken upon himself to define what the vast majority takes for granted.

¹⁰ ‘A conflict between two norms occurs when there is an *incompatibility* between what one ought to do under the first norm and what one ought to do under the second norm, and therefore *obeying or applying* one norm necessarily or possibly involves violating the other.’ Kelsen (1979) *supra* fn 9 at 99 (original emphasis removed, emphasis mine).

¹¹ E.g.: Wladyslaw Czapliński, Gennady M. Danilenkow, Conflict of norms in international law, 21 *Netherlands Yearbook of International Law* (1990) 3-42 at 12-13; Wolfram Karl, Conflicts between treaties, in: Rudolf Bernhardt (ed.), *Encyclopedia of public international law* (1984) Volume 7, 467-473 at 468; Robert Walter, Das Problem des Verhältnisses von Recht und Logik in der Reinen Rechtslehre, 11 *Rechtstheorie* (1980) 299-314 at 301; Ota Weinberger, Normentheorie als Grundlage der Jurisprudenz und Ethik. Eine Auseinandersetzung mit Hans Kelsens Theorie der Normen (1981) 98-99.

¹² Hans Kelsen, *Reine Rechtslehre* (2nd ed. 1960) 26-27, 77, 209. See also, in the same spirit, Weinberger (1981) *supra* fn 11 at 99: ‘*Normenkonflikte sind logische Konflikte*’ ‘*conflicts of norms are logical contradictions*’.

welyn, however, though wishing to ‘approach the notion of “conflict” in the most open and non-dogmatic way’,¹³ finds in favour of a most troubling definition:

Notwithstanding the varying definitions of conflict set out earlier ... it is difficult to find reasons why a conflict or inconsistency of one norm *with another norm* ought to be defined differently from a conflict or inconsistency of one norm *with other types of state conduct* (e.g., wrongful conduct not in the form of another norm). *Essentially, two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.*¹⁴

It is troubling that Pawelyn would adopt such a definition, because this approach is so *fundamentally* at odds with Kelsen’s basic *credo* that it seems inconceivable that Pauwelyn would adopt a definition without at least referring to, if not actually defending it against, predictable Kelsenian criticism: Norms ‘breaching’ other norms is simply a *non sequitur*. The normative functions of ‘prohibition’, ‘obligation’ or ‘permission’ can only refer to human behaviour, not to other norms. A norm cannot ‘prohibit’, ‘obligate’ or ‘allow’ another norm, only the *creation* of a norm or other *behaviour* associated with a norm. It may very well be that various norms of international law prohibit or obligate the *creation* of norms. Article V of the Genocide Convention 1948, for example, obligates its parties to ‘enact ... the necessary legislation to give effect to the provisions of the present Convention’.¹⁵ States are obligated to *enact* (or could be prohibited from enacting) certain norms of municipal law. The crucial point is the reference to *state behaviour* as obligated or prohibited. *The subjects* are prohibited from doing something.

If a norm indeed refers to another norm, their relationship is fundamentally different from the relationship that obtains between a norm and the behaviour it prescribes. This is so, because an ideal refers to another ideal, not to reality (norms *as such* are not matters of fact). A norm – as *claim to be observed* – relates to other norms only via the functions of ‘authorisation’ or ‘derogation’. Norms do not act upon norms in the same way as norms ‘act upon’ reality: there cannot be breach. There can in this matter be no question of a divergence between the claim to be observed and the observance itself, as is the case where a norm prohibits wilful killing, yet humans are still killed despite the prohibition. If the claim to derogate is not valid, absolutely nothing would happen to the purportedly derogated norm, it would still be valid. Pawelyn did not incorporate the most crucial aspect of Kelsen’s theory – the Is-Ought dichotomy. Had he done so, he would have seen that the ‘breach’ of a norm by a norm *as norm* (as ideal) is a violation of the dichotomy, because norms are not facts, but ideal ideas.

Coming back to the definition of norm-conflicts as ‘logical’ contradiction, the clearest example can be found where one norm *prohibits* a certain behaviour (in Ilmar Tammelo’s terms: *Pp*) and another norm *obligates* the same behaviour (*Op*), where $O\neg p = Pp$. Ota Weinberger, for example sees conflict quite clearly in logical terms: ‘[Das] “Nicht-gleichzeitig-existieren-Können” ist hier rein logischer Natur, nicht bloß eine faktische Unmöglichkeit ... [E]s sind logisch unverträgliche Sollsätze, weil sie aus rein logischen Gründen nicht zusammen realisierbar (erfüllbar) sind.’¹⁶

While this is a fascinating approach, it would require discussing the question of the role of logic in its relation to norms, which is better placed later in this paper (Section 3.1). Many scholars, including Kelsen, have included factual impossibility of simultaneous observance in

¹³ Pauwelyn (2003) *supra* fn 5 at 169.

¹⁴ Pauwelyn (2003) *supra* fn 5 at 175-176.

¹⁵ Article V Convention on the Prevention and Punishment of the Crime of Genocide (1948).

¹⁶ ‘[The] state of not being able to exist at the same time is of a purely logical nature here, it is not a factual impossibility ... [T]hey are logically inconsistent Ought-sentences, because they are not realisable (cannot be observed) for purely logical reasons. Weinberger (1981) *supra* fn 11 at 99. Ewald Wiederin in my view correctly argues that this distinction is irrelevant: Wiederin (1990) *supra* fn 8 at 316.

their definition of conflicts of norms,¹⁷ so it would be unwise to exclude them at this early stage either. I therefore propose to distinguish at least two situations along the lines of the ontological problems caused by a conflict: (1) Two norms' *Tatbestände* make the simultaneous observance of both impossible and (2) one norm explicitly claims to derogate from another norm for one reason or another. This latter situation does indeed pose an ontological problem, because at least one ideal (hence: claim) is directed against another ideal, not – as in the first case – two different ideals are directed against the same reality (behaviour).

Carlos Alchourrón and Eugenio Bulygin have made a similar distinction between 'normative inconsistency', on the one hand, and 'normative contradiction', on the other hand. To illustrate they use the relationship between a theist and an atheist and a theist and an agnostic, respectively.¹⁸ While in the first pair two contradictory assertions are asserted, in the second pair the same proposition is asserted or rejected. In formal terms, *supra* (1) would be Op v. $O\neg p$, while (2) would be Op v. $\neg Op$. In the first type of conflict two norms prescribing behaviour conflict. In the second type, a norm conflicts with a norm purporting to end the first norms' validity, a derogating norm. There is considerable confusion on the matter, even at the stage of definition of this type of difference. Eugenio Bulygin in 1985 adamantly claims that "' $\neg Op$ " does not express a norm, but the derogation of a norm',¹⁹ while for Kelsen, derogation is a function of a norm, even though he himself defines 'derogation' as a 'nicht-Sollen'.²⁰

2. Traditional resolving devices I – *lex specialis legi generali derogat*

Legal scholarship has traditionally employed a number of argumentative devices to resolve conflicts of norms. The three most common – and most commonly accepted – devices are the *lex posterior*, *lex specialis* and *lex superior* 'maxim', 'rule' or 'principle'. The problem with these devices lies precisely in their acceptance being so widespread that no-one questions their 'legitimacy' as means for resolving conflict of norms. Why has the basis (rather than the modalities) of the maxims never been seriously questioned in international law?

This apocryphal status of traditional resolving devices is a function of a falsely understood pragmatism of international lawyers, one that seeks to keep apart 'theory' from 'practice'. Yet I will show how much an ostensibly 'technical' rule of conflict of laws²¹ depends on theoretical predispositions. Any doctrine of international law is automatically based on a theory, even if the writer does not consciously realise it.²² He who does not explicitly argue for one theoretical basis simply implies a theory – and since that implied theory is not expressed and discussed, it is much more likely to be incoherent, inconsistent or simply false.

¹⁷ Czaplinski (1990) *supra* fn 11 at 12; Kelsen (1979) *supra* fn 9 at 86; Walter (1980) *supra* fn 11 at 301; Wiederin (1990) *supra* fn 8 at 318.

¹⁸ Carlos E. Alchourrón, Eugenio Bulygin, The expressive conception of norms, in: Risto Hilpinen (ed.), *New studies in deontic logic* (1981) 95-124, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), *Normativity and norms. Critical perspectives on Kelsenian themes* (1999) 383-410 at 396.

¹⁹ Eugenio Bulygin, Norms and logic. Kelsen and Weinberger on the ontology of norms, 4 *Law and Philosophy* (1985) 145-163 at 151.

²⁰ Kelsen (1979) *supra* fn 9 at 85-86. See also: Ota Weinberger, The expressive conception of norms: An impasse for the logic of norms, 4 *Law and Philosophy* (1985) 165-198, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), *Normativity and norms. Critical perspectives on Kelsenian themes* (1999) 411-432 at 425

²¹ This seems to be the opinion of Wilfried Jenks: C. Wilfred Jenks, The conflict of law-making treaties, 30 *British Yearbook of International Law* 1953 (1954) 401-453 at 403 'problems which can be conveniently described, on the analogy of the conflict of laws, as the conflict of law-making treaties'.

²² Joseph L. Kunz, The problem of revision in international law ('peaceful change'), 33 *American Journal of International Law* (1939) 33-55 at 38.

I will start our discussion of the *lex specialis* maxim by describing the relationship of general and special norms. Koskenniemi makes a distinction between the special norm as *application* of the general norm, on the one hand, and as *exception* to it, on the other hand.²³ I remain sceptical about this distinction and prefer a different distinction, one where I see a difference at least in scholarly understanding of the relationship between two norms of different ‘speciality’: *Either* a norm with more special scope may form an ‘exception’ to a norm with a more general scope *or* a special norm may be a ‘justification’ (*Rechtfertigungsgrund*) for the breach of a more general norm.²⁴ I see this as falling squarely within the more general debate of the relationship of ‘rule’ to ‘exception’.²⁵

In the first option (which seems more widely accepted), a special norm is the exception from a general norm. The former creates a ‘gap’ within the latter, because it *partially derogates from* the general norm (due to its narrower scope). Behaviour falling within the purview of the special norm is only ‘evaluated’ according to that norm, while the general norm’s scope is limited and no longer covers behaviour which the special norm covers. A consistent analysis of what this situation entails may be surprising for the traditional international lawyer: The exception changes the scope of application (or ‘sphere of validity’) of the general norm. Article 2(4) UN-Charter is read as prohibiting the threat or use of force *except* if an armed attack occurs. Thus, the material sphere of validity of the prohibition is changed. Kelsen writes: ‘[Eine] Einschränkung oder Ausdehnung des Geltungsbereiches einer Norm ist eine *Änderung ihres Inhaltes*.’²⁶ Yet a partial change of a norm is not qualitatively different from a total change; a norm cannot ‘keep’ being valid through change – norms are not like real things.

What happens is that another act of will is added to the first act of will; wording used in an amendment is just a linguistic short form for the enactment of a new norm *with changed content*. Thus, ‘change’ produces a second norm, even if that norm purports only to modify the first norm. The second norm has the same form, a claim to be observed; and all such claims are *a priori* equal. A ‘change of a norm’ can mean two things: Either another norm with a different content begins to be valid and the first norm remains valid, which can lead to norm-conflict. Or a third, derogating, norm ends the validity of the first norm contemporaneously with the second norm beginning to be valid.²⁷ That derogating function is fulfilled by a ‘resolving device’ and thus we have already achieved by positive argumentation here what negative argumentation will finish *infra* – to show that the only conceivable option for the ‘nature’ of such a resolving device is that of a positive norm. Thus, a strong argument can be made that a ‘successful’ change of the sphere of validity of a norm is the end of the validity of a norm through derogation and the creation of a new norm with changed content.²⁸

If we apply this result to the *lex specialis-lex generalis* relationship and our prescription-exception view of it, the consistent conclusion would be that the special norm is not, really, a permissive norm, it is only a short form (as in an amendment) for the modified general norm:

²³ Koskenniemi (2004) *supra* fn 6 at 11 (§§ 21-22), 27-36 (§§ 61-81).

²⁴ I have made this distinction in recent publications, dealing with specific instances: Jörg Kammerhofer, *Oil’s Well That Ends Well? Critical comments on the merits judgment in the Oil Platforms case*, 17 *Leiden Journal of International Law* (2004) 695-718 at 700-701; Jörg Kammerhofer, *Uncertainties of the law on self-defence in the United Nations Charter*, 35 *Netherlands Yearbook of International Law* 2004 (2005) xxx-xxx (Section 5.1).

²⁵ Wolfram Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983) 66.

²⁶ ‘[A] narrowing or widening of the sphere of validity of a norm is a *change of its content*.’ Kelsen (1979) *supra* fn 9 at 90. Apparently (and wrongly) contra: Theodor Schilling, *Rang und Geltung von Normen in gestuften Rechtsordnungen* (1994) 549.

²⁷ Kelsen (1979) *supra* fn 9 at 90, 101.

²⁸ Kelsen (1979) *supra* fn 9 at 89-91; Adolf Julius Merkl, *Die Rechtseinheit des österreichischen Staates. Eine staatsrechtliche Untersuchung auf Grund der Lehre von der lex posterior*, 37 *Archiv des öffentlichen Rechts* (1918) 56-121, reprinted in: Dorothea Mayer-Maly, Herbert Schambeck, Wolf-Dietrich Grussmann (eds), *Adolf Julius Merkl, Gesammelte Schriften I/1* (1993) 169-225 at 188; Rudolf Thienel, *Derogation. Eine Untersuchung auf Grundlage der Reinen Rechtslehre*, in: Robert Walter (ed.), *Untersuchungen zur Reinen Rechtslehre II. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1988* (1988) 11-43 at 36-41.

Article 2(4) UN-Charter is derogated from by the *lex specialis* maxim while a new norm (with the content: ‘the threat or use of force is prohibited *except* if an armed attack occurs’) is enacted. Thus in its application to the resolution of norm-conflicts the sphere of validity of one norm is reduced by the other norm,²⁹ i.e. through the validity of one norm the other norm is changed, in effect partially, yet technically fully derogated from. In this first option the special norm *touches upon the validity* of the general norm. If we apply all the consequences of the first option to the situation given above, we will find it wholly changes our view of what Article 51 does.

By contrast, in the second option I employ a concept developed in criminal law to portray a different sort of *lex generalis – lex specialis* relationship. It is that of *justification*, what German legal language calls *Rechtfertigungsgrund*. If we again use the example of Article 51 UN-Charter, we will find that the first option above does not ‘work’ with justifications. In these cases, the special norm *depends* entirely on the general norm; if a state’s actions are not in ‘*prima facie* breach’ of the prohibition of the threat or use of force, *we cannot apply Article 51 in the first place* and actions are not (and need not be) ‘justified as self-defence’, but simply not a ‘threat or use of force’. Why would one need a justificatory norm in the first place? This is the direct result of the creation of a ‘gap’ in the sphere of validity of the general norm; since the general norm was gouged out, the special norm, which, in these cases depends upon the general norm covering the same behaviour it covers, is irrelevant.

The analogy I draw to (Austrian) criminal law is this: Any act fulfilling the *actus reus* conditions (*Tatbestand*) of a prohibition or obligation – of a criminal offence – is presumed to be illegal (*rechtswidrig*), if it is not justified. While an act justified as self-defence would be just as legal as an act not prohibited,³⁰ the former would have to fulfil the *Tatbestand* of some offence in order to be justifiable.

Justification becomes a second layer: the general norm continues to exist, but is modified nonetheless. Its modification is more subtle than in the first option: The scope *ratione materiae* of the general norm is not reduced, but remains; a ‘reference’ is added to create a further (negative) condition for violation. In this way, the specific *connection* of prohibition (or obligation) and justificatory norm which is essential for this type of constellation is upheld, unlike the *partition* between special and general norm under the first option.

The tricky question in this respect concerns the consequences for what would be required for resolving the norm-conflict under the two options of viewing the *lex specialis – lex generalis* relationship. On the first view, the matter is very clear indeed: The change of the scope of validity of the general norm is a derogation from it, in order to resolve the conflict we need to specify whether the *lex specialis* maxim allows us to derogate from one norm. On the second view, the matter does not seem so clear, because the general norm seems to remain while the special norm seems merely to ‘add’ to it.³¹ Yet in order for the two norms to be interlinked, in order for the second layer of the general norm to be established, the general norm has to be changed nonetheless. Since change, however subtle, is a derogation, we have not here evaded the uncomfortable question posed above.

Describing the *lex specialis* situation in the preceding paragraphs now helps us to focus our question of how we need to ‘justify’ the *lex specialis* maxim. We need to enquire into the foundation for derogation. Why do we need to found or justify derogation in this case? Because all norms’ claim to be observed *ex ante* has the same value; we need additional reasoning in order to elevate one above the other. Thus, when the *lex specialis* has this content: ‘Some A ought to do *p*.’ and the *lex generalis* has this content: ‘All A ought to do *p*.’ both have the same value. We would need to prove that in this case, somehow, the special norm’s claim to be observed is ‘worth’ more than the general norm’s claim. What the relationship

²⁹ Kelsen (1960) *supra* fn 12 at 211; Weinberger (1981) *supra* fn 11 at 55, 57.

³⁰ Helmut Fuchs, Österreichisches Strafrecht. Allgemeiner Teil I (1995) 129.

³¹ Koskeniemi (2004) *supra* fn 6 at 13 (§ 26).

between a more and a less general norm boils down to is the question of how the difference in content or sphere of validity influence its position vis-à-vis another norm *without* the norms essence, its claim to be observed, being different in either norm.

2.1 The *lex specialis* maxim as a ‘rule of logic’

Bruno Simma recently justified the *lex specialis* maxim thus: ‘[T]he *lex specialis* rule is a principle of “legal logic” rather than a general principle or a rule of customary law.’³² Apart from a reference to the idea of state sovereignty, he does not further elaborate why this should be a matter for logic. How could logic decide between a special and a general norm? I fail to see an application for logic. Do the two norms contradict? Perhaps; let us assume they do. Classical logic excludes contradiction (A and ¬A cannot both be true), only the true statement ‘survives’. Here, we are faced with two norms which (arguably) are in a similar position. Posing the question in a clear form already amply demonstrates how absurd the connection of *lex specialis legi generali derogat* with logic is: Why on earth would the generality be relevant for logic in avoiding a contradiction? Is ‘special’ ‘true’ and ‘general’ ‘false’? The *lex specialis* maxim does not exclude contradiction, because its base is not one of logic.³³

2.2 The *lex specialis* maxim as a positive norm

Thus we turn to the question whether the *lex specialis* maxim is a norm of positive international law. One of the least controversial applications of the *lex specialis* maxim is the treaty-based *inter se* abrogation from a norm of customary international law.³⁴ The Court observed in *North Sea Continental Shelf*: that ‘in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties’,³⁵ the connection to the *lex specialis* maxim was made in *Nicaragua*: ‘treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule’.³⁶

Now this feature of customary international law is known as its *ius dispositivum* character: certain civil codes will provide regulation only if the parties do not include a different regulation in their *inter se* contract. The VCLT also includes several such *ius dispositivum* provisions, formulated along the lines of ‘unless the treaty otherwise provides’ (e.g. Article 20(5) VCLT). Thus, customary international law’s claimed *ius dispositivum* character is just an expression of the claim that the *lex specialis* maxim is a norm of customary international law. A *ius dispositivum* character of a norm *is never a default* and needs to be part of positive law. All norms by default claim observance without respect for the internal ‘arrangements’ of its subjects, they are – in the original Roman law sense – *ius cogens*. That such arrangements are legally relevant needs to be stipulated by law; derogation (even if only via an *inter se* agreement) needs a basis in norms, only norms can influence norms’ validity.

If the question is whether there is a norm of customary international law with the content ‘*lex specialis legi generali derogat*’ several further issues arise. *First*, I would doubt that *customary* law is capable of ‘referring’ to norms at all. I have discussed my doubts in previous

³² Bruno Simma, Dirk Pulkowski, *Leges specialis* and self-contained regimes, in: James Crawford, Alain Pellet (eds), *Le droit de la responsabilité internationale* (2005) *not yet published* – as English manuscript – at 1.

³³ Robert Walter, *Über den Widerspruch von Rechtsvorschriften* (unpublished doctoral thesis, University of Vienna 1955) 90.

³⁴ Koskenniemi (2004) *supra* fn 6 at 18-19 (§ 136), 23-24 (§ 52-54); Pauwelyn (2003) *supra* fn 5 at 155-157, 212-236, 391-392; Verdross (1984) *supra* fn 4 at 414 (§ 643).

³⁵ *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, ICJ Reports (1969) 3 at 42 (§ 73).

³⁶ *Military and paramilitary activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, ICJ Reports (1986) 14 at 137 (§ 274).

publications³⁷ and will be brief here: Because *customary* law is based on behavioural regularities (customs), customary law can only have *such* content (*Tatbestand*) which can be reflected as behavioural pattern; these patterns are required to form state practice. The problem is that this ‘real-world’ behaviour, e.g. the passage of a ship through straits, or the signing of a piece of paper *cannot refer to the ideal*, to the normative content of such action. The *opinio iuris* can only confirm the factual behaviour patterns as content: in our first case, that the passing of ships through straits is allowed. The *sense* of the signing, its specific *ideal significance* (in the second case the proposed norm *pacta sunt servanda*) is not part of the behavioural pattern and cannot form part of the content of a customary norm. A norm of the content ‘*lex specialis legi generali derogat*’ cannot even emerge, a ‘behaviour’ that shows the loss of validity of a norm is impossible is an impossibility.

Second, the assumption of customary law-character for the maxim solves nothing, because we are once again confronted with a conflict of norms: one norm claiming observance *versus* another norm of the same type, normative order, nay, even ‘rank’, claiming to derogate from any norm exhibiting certain characteristics. The question becomes in which constellations norms derogate and when they do not. Now here is *the key question* – norms’ derogating is not dependent upon conflict and conflict does not determine whether one norm derogates from another.

Third, we are faced with the problem of the inter-source relationship between a customary international law norm postulating the *lex specialis* maxim and an international treaty law norm which the customary norm claims to derogate from. We are talking about two different formal sources of international law and their inter-relationship. We must not simply bow to majority opinion and accept that there is no hierarchy as between the sources of international law,³⁸ yet I fail to see a subordination myself:³⁹ Treaties are not derived from custom (*pace* Kelsen),⁴⁰ because customary international law cannot contain an authorisation to create international treaty law: *pacta sunt servanda*. Custom could theoretically be derived from treaty, but that would only establish a subordination to one treaty; also, the only candidate for such an authorisation, Article 38(1)(b) of the ICJ Statute, by its own words does not found the validity of a formal source of international law, it merely states what is the applicable law before the Court.⁴¹ The ‘default solution’, as I have called it, is that the two sources are not normatively connected and are (unfortunately) in a similar position as my derogation of a court judgment is *vis-à-vis* the Austrian legal system: they belong to two unconnected normative orders, hence any derogation seems excluded *a priori*.⁴²

Fourth, what if the *lex specialis* maxim were either a norm of international treaty law or a ‘general principle of law recognized by *civilised* nations’? Either status would result in the same inter-source relationship problems; if the maxim were a norm of either type, the same questions of its relationship to norms of the same source would arise.

³⁷ Jörg Kammerhofer, Uncertainty in the formal sources of international law: Customary international law and some of its problems, 15 *European Journal of International Law* (2004) 523-553 at 539-540; Kammerhofer (2005b) *supra* fn 24 at xxx-xxx (‘6-7’ Intro, penult §). See also Thienel (1988) *supra* fn 28 at 24-25.

³⁸ E.g. Michael Akehurst, The hierarchy of the sources of international law, 47 *British Yearbook of International Law* 1974-1975 (1977) 273-285 at 275; Karl (1983) *supra* fn 25 at 86; Koskenniemi (2004) *supra* fn 6 at 25 (§ 58); Pauwelyn (2003) *supra* fn 5 at 94; Verdross (1984) *supra* fn 4 at 322 (§516).

³⁹ Kammerhofer (2004b) *supra* fn 37 at 548-550.

⁴⁰ Hans Kelsen, *Principles of international law* (1952) 314.

⁴¹ Gerald G. Fitzmaurice, Some problems regarding the formal sources of international law, in: F.M. van Asbeck *et al.* (eds), *Symbolae Verzijl. Présentées au Prof. J.H.W. Verzijl á l'occasion de son LXX-ième anniversaire* (1958) 153-176 at 173.

⁴² To remind the reader: the unconnectedness means that there is no influence upon the other’s norms’ validity, because the claims to be observed are *a priori* equal.

3. Traditional resolving devices II – *lex posterior legi priori derogat*

The key question for this section far surpasses the topic of norm-conflict as traditionally conceived. It is this: can norms change over time? It is the very possibility of *change in normative orders* (at least over time) that is at stake here. The *lex posterior* maxim is the most popular⁴³ – yet not a well-founded – answer to that question.

3.1 The *lex posterior* maxim as a ‘rule of logic’

To claim that derogation and change is connected to formal logic is actually a highly complicated claim. International law doctrine does not bother explaining this in detail and in legal theory only the Pure Theory⁴⁴ and certain analytic (logico-linguistic) jurists⁴⁵ have gone into sufficient detail to be able to speak of a full scientific discussion that would be utilisable here. However, the scholarly debate on deontic logic is so vast that I will limit my discussion in this section to a short overview.

There are a whole host of problems which conspire to make the easy connection of logic to the *lex posterior* maxim difficult. In order to untangle the various strands, I propose to tackle three interlocking questions that are only cumulatively a sufficient condition for the existence of the *lex posterior* maxim: (1) Can norms be accorded the labels of ‘true’ and ‘false’ or be brought into the frame of formal logic in an analogous way? (2) If so, does the application of the principle of excluded contradiction extend directly or indirectly to the inter-relationship of norms and does the contradiction cause derogation of positive norms? (3) If so, does the later norm derogate from the former? Why?

First, can the conflict of norms be described as a logical contradiction or as analogous to it? The more Hans Kelsen questioned the soundness of the assumption of a role for logic in certain legal ‘operations’, the less convinced he became of a logical ‘automatism’ in the face of positive norm-creation and destruction. I am convinced that his scepticism is well-founded, even on the narrow point of ascribing truth-values to norms. Ascribing truth-value seems a necessary condition for ‘[r]elations of condition and of logical consequence’.⁴⁶ Nobody

⁴³ Czaplinski (1990) *supra* fn 11 at 19.

⁴⁴ Hans Kelsen, Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, 31 Philosophische Vorträge (1928), in: Hans Klecatsky, René Marčić, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 281-350 295-297 (§ 10); Kelsen (1960) *supra* fn 12 at 26-27 (Ch 5a), 76-77 (Ch 16), 209-212 (Ch 34e), 271-282 (Ch 35k-j); Hans Kelsen, Recht und Logik, 12 Forum (1965) 421-425, 495-500, in: Hans Klecatsky, René Marčić, Herbert Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross (1968) 1469-1497; Kelsen (1979) *supra* fn 9 at 84-92 (Ch 27), 99-103 (Ch 29), 166-179 (Ch 58), 266-267 (FN 82); Merkl (1918) *supra* fn 28; Adolf Julius Merkl, Die Lehre von der Rechtskraft, entwickelt aus dem Rechtsbegriff. Eine rechtstheoretische Untersuchung (1923) 228-244; Stanley L. Paulson, Zum Problem der Normenkonflikte, 66 Archiv für Rechts- und Sozialphilosophie (1980) 487-506; Stanley L. Paulson, On the status of the *lex posterior* derogating rule, in: Richard Tur, William Twining (eds), Essays on Kelsen (1986) 229-247; Wiederin (1990) *supra* fn 8.

⁴⁵ By that term I mean to denote such legal theoreticians who have adopted the philosophy of the linguistic turn (Wittgenstein *et al.*). See, e.g.: Alchourrón (1981) *supra* fn 18; Bulygin (1985) *supra* fn 19; Bruno Celano, Norm conflicts: Kelsen’s view in the late period and a rejoinder, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1999) 343-361; Weinberger (1981) *supra* fn 11; Ota Weinberger, The expressive conception of norms: An impasse for the logic of norms, 4 Law and Philosophy (1985) 165-198, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1999) 411-432; Georg Henrik von Wright, An essay in deontic logic and the general theory of action (1968); Georg Henrik von Wright, Is and Ought, in: Eugenio Bulygin *et al.* (eds), Man, law and modern forms of life (1985) 263-281, reprinted in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1999) 365-382.

⁴⁶ Wright (1985) *supra* fn 45 at 367.

nowadays would directly claim that a norm could be called ‘true’ or ‘false’ – scholarly argument over the years has reached that level – but there have been various attempts to make an indirect connection between norms (or their properties) and a bivalent logical system.

To equate the truth of a statement with the validity of a norm does not work for two reasons: At least a positive norm is the sense not of an act of thought (*Denkakt*), but of an act of will (*Willensakt*), norms are not created by merely *thinking* them or by thinking what they entail.⁴⁷ Claiming that willing entails thinking simply ignore that the *content* (*Tatbestand*) of the norm can be described as a modally indifferent substrate, capable of existing in both realms, and thus they illicitly *transfer* that substrate to the other realm in order to make will into thought. Thought is not immanent in will, writes Kelsen.⁴⁸ The other reason is that validity is not a property of a norm; *it is norms’ specific form of existence*.⁴⁹ A non-valid norm *does not exist*, it is a nullity. A system of logic that would attempt to assimilate ‘validity’ to truth would ignore the difference between proposition and norm:

Daß eine Norm gilt, bedeutet, daß sie *existiert*, vorhanden ist. Daß eine Aussage “gilt”, bedeutet nicht, daß die Aussage existiert, daß sie vorhanden ist, sondern daß sie *wahr* ist. Auch eine unwahre Aussage existiert, ist vorhanden, aber sie ‘gilt’ nicht, denn sie ist nicht wahr, sie existiert, aber sie ist ‘ungültig’. ... [D]ie Existenz der Norm ist ihre Geltung; während die Existenz einer Aussage nicht ihre Wahrheit ist.⁵⁰

Another much more thought-out and philosophical, but ultimately failed, approach seeks to adapt certain aspects of analytic-linguistic philosophy to normative theory in order to create the basis for a ‘deontic logic’. John Searle’s concept of ‘speech act’⁵¹ is the key notion for these scholars. Essentially, they seek to *reduce norms to utterances*, to linguistic empirical facts.⁵² The terms used, such as Amedeo Conte’s ‘prescriptive sentence’⁵³ or Riccardo Guastini’s ‘ought-sentence’⁵⁴ all refer to the same reduction: norms are but a special kind of speech act. Despite some room for different interpretations of their statement, Alchourrón’s and Bulygin’s description of 1981 seems to hit the nail on its head:

For the *expressive conception* [i.e. their view-point], norms are the result of the *prescriptive use* of language. A sentence expressing the same proposition can be used ... to do different things ... [N]orms are essentially *commands* ... if *p* has been commanded, then the proposition that *p* is obligatory is true. ... The selection of the propositions that form the basis of the [normative] system ... is based on certain empirical facts: the acts of commanding or promulgating.⁵⁵

The proponents seem to implicitly ascribe a post-analytic-turn philosophy to (at least the pre-1960’s) Kelsen and thus seem to claim that he espouses this sort of reduction himself in

⁴⁷ Kelsen (1979) *supra* fn 9 at 166.

⁴⁸ Kelsen (1979) *supra* fn 9 at 167.

⁴⁹ Kelsen (1979) *supra* fn 9 at e.g. 22, 136-138; Lothar Philipps, Normentheorie, in: Arthur Kaufmann, Winfried Hassemer, Ulfrid Neumann (eds), Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart (7th ed. 2004) 320-332 at 328-329.

⁵⁰ ‘That a norm is valid means that it *exists*. That a proposition is “valid” does not mean that the proposition exists, but that it is *true*. A false proposition exists, but it is not “valid”, because it is not true, it exists, but it is “invalid”. ... [T]he existence of a norm is its validity, while the existence of a proposition is not its truth [-value].’ Kelsen (1979) *supra* fn 9 at 139. A similar conclusion is reached by Amedeo G. Conte, Hans Kelsen’s deontics, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1999) 331-341.

⁵¹ John R. Searle, Speech acts. An essay in the philosophy of language (1969).

⁵² Searle explicitly claims to derive Ought from Is in his 1969 book: Searle (1969) *supra* fn 51 at 175-198.

⁵³ Conte (1999) *supra* fn 50 at 330. Implied: Koskenniemi (2004) *supra* fn 6 at 37 (§ 86).

⁵⁴ Riccardo Guastini, Normativism and the normative theory of legal science: Some epistemological problems, in: Stanley L. Paulson, Bonnie Litschewski Paulson (eds), Normativity and norms. Critical perspectives on Kelsenian themes (1999) 317-330 at 319.

⁵⁵ Alchourrón (1981) *supra* fn 18 at 385, 386, 402.

their discussions of the role of logic in norms. Yet even if norms were reducible to linguistic utterances, could an argument be made that *they* are subject to logic? Only, I submit, by negating – as Searle does – the dichotomy of Is and Ought; ‘the question of whether the alleged gap between Is and Ought can be bridged or not is crucially related to the question of whether norms can be true or false.’⁵⁶ Reduced, as it appears to be, to an empirical entity, a special use of language, norms could be said to be false or true, since they are no more than propositions on facts (via the norms’ *Tatbestand*).

Correctly, however, logico-analytic jurisprudes themselves do not seem to espouse this without reservations, they frequently concede that norms can neither be true nor false.⁵⁷ Their main thrust – through the reduction of Ought to Is – seems to be to reduce the logical contradiction of the conflict of norms to one of their contents, something discussed in Section 1 and in the next paragraphs. To call Kelsen a post-analytic philosopher is ludicrous, despite his apparent closeness (not only in the spatial sense) to the Vienna Circle of logical positivism.⁵⁸ Neo-Kantianism, the philosophy with which he is most often associated (even though I believe that his philosophical basis is too idiosyncratic to fit in neatly either with Kant, his successors or with Moritz Schlick *et al.*) is pre-linguistic-turn. Kelsen disavows any connection with linguistic philosophy in ‘Allgemeine Theorie der Normen’:

[Es] ist zu beachten, daß der Willensakt, dessen Sinn eine Norm ist, *von dem Sprech-Akt unterschieden werden muß*, in dem der Sinn des Willenaktes *ausgedrückt wird*. ... Die Norm, die der Sinn eines Willensaktes ist, ist die Bedeutung des Satzes, der das Produkt des Sprechaktes ist, in dem der Sinn des Willenaktes zum Ausdruck kommt.⁵⁹

In the end, analytic philosophy is unable to found a *normative* science, since its confusion of Is and Ought means that it cannot correctly conceive of norms, of Ought in the first place. However, most analytic jurisprudes use a different avenue of attack. That avenue is one that we have identified in Section 1 above, namely an equation of truth and the observance (observability) of a norm’s terms. I noted then that most scholars would *define* norm-conflict as a situation where the two norms cannot at the same time be ‘observed’. Bruno Celano, for example, thinks – in explicit reference to Kelsen’s rebuttal in ‘Allgemeine Theorie der Normen’ of the type of argument Celano uses – that one can nevertheless speak of *some sense* in which a norm conflict can present a logical contradiction.⁶⁰ The question for him is what sense compliance *vis-à-vis* one norm *necessarily* violates another norm (which, the reader will remember, is a popular definition adopted by Kelsen himself). Celano’s answer is that ‘the conjunction of the descriptions of the acts constituting obedience is a description of a logically contradictory state of affairs’⁶¹ because the statements on norm-compliance cannot both be true, due to the fact that ‘[a]n agent cannot both carry out and forbear from carrying out the same act at one and the same time.’⁶² Thus, because both acts cannot be carried out simultaneously he argues that statements on these actions would be contradictory (the one being carried out

⁵⁶ Wright (1985) *supra* fn 45 at 369.

⁵⁷ Bulygin (1985) *supra* fn 19 at 152; Wright (1985) *supra* fn 45 at 371.

⁵⁸ Clemens Jabloner, Kelsen and his Circle: The Viennese Years, 9 *European Journal of International Law* (1998) 368-385.

⁵⁹ ‘It needs to be stressed that the act of will, whose sense is a norm, *needs to be distinguished from the speech-act*, in which the sense of an act of will *is expressed*. The norm, which is the sense of an act of will, is the meaning of a sentence, which is the product of a speech-act, in which the sense of an act of will is expressed.’ Kelsen (1979) *supra* fn 9 at 131 (emphasis mine) (see generally Ch 41). Note also here the difficult relationship between linguistic utterance (as empirical fact), norm (as ideal entity) and a norm’s meaning (*qua* result of human cognition).

⁶⁰ Celano (1999) *supra* fn 45 at 352.

⁶¹ Celano (1999) *supra* fn 45 at 352.

⁶² Celano (1999) *supra* fn 45 at 352. In a similar vein: Alchourrón (1981) *supra* fn 18 at 396, 401; Weinberger (1981) *supra* fn 11 at 99; Wright (1985) *supra* fn 45 at 373.

being true, the other statement false); because, then he sees a logical contradiction in the ‘obedience-statements’ *in some sense* presenting a logical contradiction between norms themselves.

Celano’s theories are fraught with difficulties which a closer reading of Kelsen would have avoided (but which, I suspect, he did not *want* to avoid): A norm and its observance are not in any way linked;⁶³ observance *vel non* of a norm (human behaviour in relation to the norm’s *Tatbestand*) is irrelevant for the norm in its ideal existence: A norm merely *claims* to be observed, the ideal itself does not create real events, just as real events (in this case: observance) do not influence the ideal ‘existence’. A norm being observed or not is not a property of the norm, but the property of real acts, Kelsen tells us.⁶⁴ Thus, I fail to see the relevance of observance (or observability) for the inter-relationship of norms (*infra*).

Celano does not contrast behaviour, but statements on behaviour. Just as norms (as ideal ‘existence’) cannot be contradictory, because they are not propositions, real acts cannot contradict, because the act that exists exists, and nothing in reality can be ascribed the label of ‘true’ or ‘false’. Just as Kelsen’s own ‘Rechtssatz’⁶⁵ is a proposition, a statement on the ‘existence’ (validity) of a norm, and thus one is able to distinguish between true and false *only in relation to the norm it purports to describe*, the ‘obedience-statement’ also is a mere description of reality and is true if, and only if, the real event described therein has taken place. Just as if normative ontology is such that two norms exist and their respective *Rechtssätze* are both true, with factual statements two statements are true if *both* events occur. ‘Wahrheit ist nicht eine Eigenschaft dieser Tatsache, sondern der Aussage.’⁶⁶ Just as Kelsen’s 1960 proposal to indirectly apply logic to norms via their respective norm-statements⁶⁷ did not work, because norms and statements on the existence of norms are categorically different entities, so Celano’s proposal cannot work, because obedience and obedience-statements are categorically different things.

Also, Kelsen’s *modal indifferentes Substrat* (‘modally indifferent substrate’), *Tatbestand* or ‘norm content’ is not an ‘indicative element’⁶⁸ or ‘non-imperative factor’ within a norm, it is precisely not an inroad of Is into Ought. As Kelsen argues it is *modally indifferent*, the content ‘window-closing’, for example can be both contained in a norm or in a statement.⁶⁹ I submit that Celano already presumes this false ‘Seinsollen’ as part of norms’ ontology; thus if one does not see the problems of compliance as normative-ontological factor (Section 1) one does not come to the same conclusion on conflict either. Indeed, norm conflict as detailed by the majority, including Celano, is ancillary to the norm and does not make sense from a purely normativistic point of view. It is not a conflict of the ontology of the ideal, but of the empirical ‘consequences’ (in a non-causal sense).⁷⁰ Under a strict distinction of Is and Ought *this* ‘incompatibility’, the fact that observance of all norms at the same time is factually impossible, is irrelevant and not an uncertainty of the *ontology of norms*. The incorporation of a conflict of norms as defined by Celano, Weinberger *et al.* only shows that they explicitly seek to undo the dichotomy of Is and Ought,⁷¹ and thus are unable to cognise norms as norms, are unable to conduct a *normative science*.

Second, even the assimilation of norm-conflicts to logical contradictions does not answer the question of the consequences of such a conflict *qua* contradiction. Thus, the second question which needs to be answered in the positive is whether the logical contradiction (assuming

⁶³ Celano notes that this is Kelsen’s position: Celano (1999) *supra* fn 45 at 355 (FN 34).

⁶⁴ Kelsen (1979) *supra* fn 9 at 173.

⁶⁵ Kelsen (1960) *supra* fn 12 at 83.

⁶⁶ ‘Truth is not a property of this fact, but of the proposition.’ Kelsen (1979) *supra* fn 9 at 173.

⁶⁷ Kelsen (1960) *supra* fn 12 at 77.

⁶⁸ Jørgen Jørgenssen, Imperatives and logic, 7 Erkenntnis (1937) xxx-xxx.

⁶⁹ Kelsen (1979) *supra* fn 9 at 46.

⁷⁰ Similar arguments: Bulygin (1985) *supra* fn 19 at 153; Wright (1985) *supra* fn 45 at 373.

⁷¹ Celano (1999) *supra* fn 45 at 360-361.

for now that norm-conflicts are a logical contradiction) leads to a loss of validity of at least one norm in a norm-conflict. Surprisingly, despite their spirited fight for an assimilation of norm-conflicts to logical contradictions, the logico-analytic legal theoreticians are *unanimous* in their acceptance that the application of *logic* does not touch the conflicting norms' validity⁷² – an entirely beneficial outcome, I submit, of Kelsen's post-1960 'logical turn'. The problem is, of course, again that norms are 'existent' (valid) or they are not and that their existence is determined by the meta-norm on norm-creation (the source law) and an act of will, rather than only the norms' relationship to each other. Plainly, statements about norms' existence do not influence a norms existence; if, and only if, a norm is valid such a statement is true, *both* statements on two conflicting norms are true, because they refer to two different objects.⁷³ On the other hand, an analogy between propositions themselves and norms proves that there is no analogy here: even a false statement remains said or written.⁷⁴ A statement's existence in the real world compares to norms' existence in the ideal world (its validity) – both are existent when they exist. Thus, a *logical* basis for the *lex posterior* maxim dies here; nonetheless, we will now consider the third question.

Third, if a logical contradiction causes the loss of at least one of the two norms' validity, why should it be the earlier norm that loses its validity? While, indeed, we have discredited the logical basis for the *lex posterior* maxim above, international legal scholarship (and frequently also municipal dogmatic scholarship) is not as thorough in thinking a claim of logical necessity through and simply claims that *lex posterior* must prevail because law can always change. Adolf Merkl, Kelsen's first student and close colleague, laid the groundwork for the Vienna School's theories in several areas. Merkl was a true *Vorreiter* with respect to Kelsen's position. He held a position on the *lex posterior* maxim in 1918 that Kelsen only fully adopted and substantiated after 1960.⁷⁵ Merkl's path-breaking article 'Die Rechtseinheit des österreichischen Staates'⁷⁶ remains crucial to understanding what the *lex posterior* maxim is and what it cannot be:

A change of law, as mentioned above in Section 1, is merely an abbreviation for the addition of new norms to a normative system⁷⁷ – with a *possible* derogation, i.e. 'destruction' of old norms. An authorisation to create norms, however, does not automatically (or logically) incorporate an authorisation to derogate from norms. 'Nicht jeder, der etwas geschaffen hat, kann es wieder ungeschehen machen.'⁷⁸ Certainly, authorisation can extend to norms of any *content*, yet not of *any* function of norms, purely because the normative basis for creation is hierarchically higher, while a norm created by the organ (thus authorised) is on the same hierarchical level as all other norms created, whether it purports to derogate or not. This line of thought, however, presupposes a position on *lex superior*, which we will still have to develop (Section 4). Basically, however, we can at least take on the negative arguments in Merkl's statement below: '[Dem Gesetz] den besetzten Platz zu nehmen, ist nur *der* Faktor imstande,

⁷² Alchourrón (1981) *supra* fn 18 at 403; Bulygin (1985) *supra* fn 19 at 154; Celano (1999) *supra* fn 45 at 351; Conte (1999) *supra* fn 50 at 333, 339; Guastini (1999) 329; Weinberger (1985) *supra* fn 45 at 427. For international lawyers: Karl (1983) *supra* fn 25 at 61-66.

⁷³ Conte (1999) *supra* fn 50 at 333.

⁷⁴ With respect to Weinberger's 'normenlogisches Konsistenzpostulat' (Weinberger (1981) *supra* fn 11 at 69-70) see: Bulygin (1985) *supra* fn 19 at 154.

⁷⁵ Stanley Paulson tracks the development of Kelsen's thought on the *lex posterior* maxim in the very thorough manner typical for Paulson's work: Paulson (1986) *supra* fn 44.

⁷⁶ Merkl (1918) *supra* fn 28.

⁷⁷ Merkl (1923) *supra* fn 44 at 233.

⁷⁸ 'Not everyone, who has created something can also undo it.' Merkl (1918) *supra* fn 28 at 189; contra: Rainer Lippold, *Recht und Ordnung. Statik und Dynamik der Rechtsordnung* (2000) 405-407. Erich Vranes, claiming to follow Merkl, actually makes the same mistake Merkl explicitly uncovers: Erich Vranes, *Lex Superior, Lex Specialis, Lex Posterior – Zur Rechtsnatur der 'Konfliktlösungsregeln'*, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) 391-405 at 397.

der ihm den Platz eingeräumt hat – die Verfassung – und nicht der Gesetzgeber, der nur mit Ermächtigung der Verfassung Recht gesetzt hat’.⁷⁹

If a legislator over time has created acts that are contradictory, how else (traditional scholarship asks) could we ensure unison (*Einklang*), how else could we ensure that law can change over time if not by privileging *lex posterior* over *lex prior*? How indeed or, rather, why? What makes the avoidance of ‘inconsistent’ regulation, the avoidance of norm-conflict more than a mere legal-political wish and into a logical necessity of any normative order – a ‘sinnvolle Ordnung’⁸⁰ necessarily devoid of conflict? And why on earth – and the question is the same as with the *lex specialis* maxim – would the criterion of ‘time’ be relevant for logical consistency? Why, even if time were relevant, would the *later* regulation trump the earlier? Merkl thinks that one can – *arguendo* – make a much better case in favour of the *prior* norm:

Freilich ist es nicht das Alter, das dem früheren Gesetze vor dem späteren einen solchen Vorrang verleiht – diese zeitliche Priorität wäre ein ebenso aus der Luft gegriffenes Prinzip wie das fast dogmatisch geltende der zeitlichen Posteriorität –, sondern *die* Tatsache, daß (voraussetzungsge-
mäß) das frühere Gesetz verfassungsmäßig zustande gekommen ist, daß somit dadurch eine bestimmte Stelle im Rechtssystem mit einem bestimmten aus den möglichen Rechtsinhalten einge-
nommen und damit ferner jedem widersprechenden Rechtsinhalte den Platz genommen hat.⁸¹

But still, I hear the voice of traditional doctrine cry out, change is a necessity of law, all law can change – how else is it to be made possible? This is the depressing news of a consistent analysis and critique: Change of norms is not possible, unless it is expressly permitted; Merkl’s great triumph over sloppy legal argumentation was a defeat for the practicability of normative regulation (at least as it is actually done). Law-makers, under the erroneous impression that all law can change, whether they want it or not, have *underestimated* their own powers; norms cannot change, unless provision is made for their change; just as the creation of positive norms needs to be authorised, so does the destruction (and thus change) of norms. Permanence is the default, change needs to be stipulated:⁸² ‘[D]as Recht [ist] – außer nach selbst gesetzten Bedingungen seiner Abänderung – unveränderlich’.⁸³

The dubious fiction that a later (or any) norm by its very existence (rather than by its express claim) has derogatory force⁸⁴ rebutted, we come to these conclusions: if norms do not automatically ‘change’ (i.e. lose their validity), norms simply would accumulate⁸⁵ and conflicts would not be resolved. Therefore, in order to avoid accumulation, the validity of a norm may be ended only by another norm, one derogating from it. If the *lex posterior* maxim exists at all in international law, it would therefore have to be a general norm prescribing derogation.

3.2 The *lex posterior* maxim as a positive norm

⁷⁹ ‘Only *that* factor is able to occupy the seat taken by [the statute], which has reserved it in the first place – the constitution – not the legislator, who only created law because he was authorised by the constitution to do so’ Merkl (1918) *supra* fn 28 at 190.

⁸⁰ Kelsen (1928) *supra* fn 44 at 295-296.

⁸¹ ‘It is, of course, not age conferring priority for the older *vis-à-vis* the younger law – such a temporal priority would be made up out of as thin air as the dogma of temporal posterity – but the fact (*ex hypothesi*) that the earlier law has been enacted according to the constitution and that it has therefore (with its specific content out of all possible contents) taken a specific place in the legal system of and thus taken the place of any contrary legal content.’ Merkl (1918) *supra* fn 28 at 190.

⁸² Merkl (1918) *supra* fn 28 at 192-193; Lippold (2000) *supra* fn 78 at 405.

⁸³ ‘Law is unchangeable, except by observance of the conditions for its change it has set itself.’ Merkl (1923) *supra* fn 44 at 240.

⁸⁴ Merkl (1923) *supra* fn 44 at 237.

⁸⁵ Pauwelyn correctly discusses accumulation as one possibility of norm-conflicts: Pauwelyn (2003) *supra* fn 5 at 161-164.

The only way the *lex posterior* maxim might actually work is if it were a positive norm of international law. Just as in Section 2.2 with respect to the *lex specialis* maxim, we will now look at whether and how the *lex posterior* maxim could work as positive norm. Just as it was with the first maxim, a diligent critique shows that in such a fragmented normative order (if it is that at all) as ‘international law’, even positive regulation is limited in its effect.⁸⁶ Such an assumption (for, again, there is no need to actually *prove* the validity of the maxim as positive norm) leaves us with a sceptical outlook on what even a *positive* maxim can do.

Assuming, *first*, that there is a norm of customary international law with the content: ‘*lex posterior legi priori derogat*’, the problems are the same as those of a customary norm encompassing the *lex specialis* maxim (Section 2.2). A customary norm is incapable of derogating from another norm, because there cannot be a practice that refers to ‘derogation’ as an occurrence on the ideal level. Such a norm – as a member of the source ‘customary international law’ – has the same hierarchical status as other customary international law norms, despite its claim to derogate. A customary international law norm that claims derogation of *all* later norms of ‘international law’ will, when faced with a international treaty law norm, for example, be faced with a norm of a different normative order.⁸⁷

Second, if one or more treaties contained the *lex posterior* maxim as a norm, the inter-source hierarchical problems would certainly persist. At least one treaty clearly codifies the *lex posterior* maxim: The Vienna Convention on the Law of Treaties 1969. Its Article 30, for example, is the maxim made positive law, despite the article’s cautions formulation.⁸⁸ Do the treaties falling under the VCLT derive their validity from the Vienna Convention, rather than from the *Grundnorm* directly? If that were the case the Vienna Convention would be in a *lex superior* position, because the treaties would derive their validity from it (Section 4)

Third, Kelsen sometimes claimed – having changed his point of view on the issue⁸⁹ – that while the *lex posterior* maxim can only be a positive norm, that norm is tacitly included in new norms.⁹⁰ *Tacit* regulation is always a problem: Not only are implications most difficult to cognise, but against Kelsen I would very much doubt the *positivity* of tacit regulation. The act of will whose sense is a norm simply does not exist in the case of tacit norm-‘creation’, we are left with hypothetical norms, thought about in the mind of the legal scientist who wishes to admit such designs.⁹¹ In any case, the *content* of norms is not determined by the act of will, at least not with customary international law and international treaty law, where the *Tatbestand* (*actus reus*) is determined by state practice, the behavioural regularity, on the one hand, and by the treaty text,⁹² on the other hand.

Yet again we must face the question of the ‘actual’ derogating force of one norm *vis-à-vis* another, specifically the relationship of a norm to a norm claiming to end the first norm’s validity. That any derogating norm automatically derogates from any norm it refers to is not

⁸⁶ Contrary to Merkl’s lack of emphasis (Merkl (1923) *supra* fn 44 at 240-244), I believe this question to be both important and problematic.

⁸⁷ Kammerhofer (2004b) *supra* fn 37 at 549-550.

⁸⁸ Teodor Melanescu, Study on the ‘Application of successive treaties relating to the same subject matter (Article 30 of the Vienna Convention on the Law of Treaties)’. Preliminary report, in: International Law Commission, Documents of its fifty-sixth session, Geneva 3 May-4 June and 5 July-6 August 2004, ILC(LVI)/SG/FIL/CRD.2 (2004).

⁸⁹ Paulson (1986) *supra* fn 44.

⁹⁰ ‘In the case of an amendment, the legislator does not expressly formulate a derogating norm. That is, because the legislator thinks it self-evident that a norm created by him and in conflict with an older norm ends the validity of that older norm ... Even a norm which the legislator thinks self-evident and does not expressly formulate, but tacitly assume, is a posited, a positive norm.’ Kelsen (1965) *supra* fn 44 at 1480; Kelsen (1960) *supra* fn 12 at 210.

⁹¹ I very much doubt that a positive normative order *can* contain hypothetical norms and (largely) *vice versa*.

⁹² In other words: The meta-law on customary international law-creation makes the *usus* into the prescribed behaviour, while the meta-law on international treaty law-creation specifies that the text contains a description of the prescribed behaviour.

possible, that would transcend normative orders; even within normative orders, questions of hierarchical positioning or of the lack of a hierarchy persist. Discussing the possibility of derogation is the key issue of this paper. Kelsen in the late phase categorically states that the conflict of a norm and a derogating norm does not exist; the norm derogated from simply disappears.⁹³

This does not solve our problem. Even if this is the conflict of two ideals of ‘Ought’ and ‘non-Ought’, even if this conflict were to happen within one normative order, the crucial decision of when a derogating norm actually derogates remains. Kelsen might be asked in response to the claim that *any* derogating norm actually derogates, ‘what if the derogation goes against the hierarchy of validity? Would derogation still occur against the *lex superior*?’ This, then, is uncertainty in the sense discussed throughout this paper; it is a clash on the level of the ontology of norms (as mentioned in Section 1), no *a priori* solution seems possible and, indeed, no *a posteriori* solution seems capable enough!

Stripped of its myths of a ‘brave old world’ of a *logical* international law, what actually happens is an accumulation of norms, without much derogation.⁹⁴ Lawyers and subjects of law conveniently ‘forget’ about the old norms – which on a legal theoretical analysis may not have lost their existence – under the rhetorical cloak of the *lex posterior* maxim, perhaps even within an ‘informal’ hierarchy, with international lawyers’ reasonable consideration and weighing of various norms on a pragmatic level. We have also seen in this section the crucial importance of the *lex superior* maxim within normative orders, which of necessity have a hierarchy. What precise effect this hierarchy *can have* will be the topic of Section 4.

4. Traditional resolving devices III – *lex superior legi inferiori derogat*

In a very profound sense, the idea of *lex superior*’s superiority is the key to the idea of norms. Normative systems come about because norms can create norms – because *only* norms can create norms. Unlike the other maxims discussed in this chapter, the *lex superior* maxim (at least if the word *derogare* is not taken literally) is to be taken very seriously indeed, if one takes the idea of norms as formal ordering of ideals seriously. The idea of a *lex superior* could be called the basis of all attempts at resolving conflict, because it is *superiority* that ‘privileges’ one claim over another. Yet how, precisely, this superiority is achieved – and how far it *can be* achieved – is the topic of the present and the next section. In other words: what is the result of a norm being ‘superior’ to another in international law?

4.1 Adolf Merkl’s Stufenbau der Rechtsordnung

The concept of the *Stufenbau* in many ways is one of the most important parts of the normativist-positivist legal theory of the Vienna School of Jurisprudence⁹⁵ and will briefly be introduced here. The dichotomy of Is and Ought, and, with it, the theory of the *Grundnorm* forms the foundation of the Pure Theory as a whole. Hierarchical ordering as a concept is a direct

⁹³ ‘If one [norm] lays down that such-and-such behaviour ought to happen and the other, the derogating norm does not lay down that such-and-such behaviour ought *not* to happen, but that such-and-such behaviour *not-ought* to happen. If the second [norm] is valid, the first one cannot be valid, its validity is ended by the second one.’ Kelsen (1979) *supra* fn 9 at 178, 170 (Ch 57 VI), 178-179 (Ch 57 XIII).

⁹⁴ Jürgen Behrend, *Untersuchungen zur Stufenbaulehre Adolf Merkl’s und Hans Kelsens* (1977) 41.

⁹⁵ András Jakab, *Probleme der Stufenbaulehre*, 91 *Archiv für Rechts- und Sozialphilosophie* (2005) xxx-xxx at 1 (cited from manuscript); Theo Öhlinger, *Der Stufenbau der Rechtsordnung. Rechtstheoretische und ideologische Aspekte* (1975) 9.

conclusion from that core theory.⁹⁶ If a norm's existence *qua* validity can only be founded on another norm⁹⁷ – if there can be no Ought from Is alone⁹⁸ – then a connection between norms is established, one based on one norm's validity being dependent upon another norm. *Prima facie* that dependency is one-sided, it makes sense to call the dependent norm a 'lower' norm and the norm it depends upon the 'higher' norm. The dependency in the sense described above is established by norm-creation: The question 'Why ought I to obey this statute?' is answered by reference to the norm that has *authorised* its creation, e.g. the constitution. The 'higher' law empowers law-creation; that empowerment is the reason the resultant law is valid.⁹⁹

It is *creation* that establishes hierarchy; it establishes the *Stufenbau nach der rechtlichen Bedingtheit*,¹⁰⁰ a 'hierarchy of legal conditionality'. If, and only if, all conditions imposed by the meta-law on law creation (*Rechtserzeugungsregel*)¹⁰¹ are met, can the norm created be cognised as a norm of the normative order in question;¹⁰² only then can the norms be ordered in a multitude of spheres between delegating and delegated norms;¹⁰³ only then can both norms be seen in one normative order.¹⁰⁴ Because Ought can only come from an Ought, law necessarily orders its own creation.¹⁰⁵

Yet because an authorising norm usually authorises the creation of a multitude of norms, and because usually a multitude of norms are created under it, this multitude of norms with a common 'pedigree' have been called a *Rechtsform*,¹⁰⁶ what international lawyers would probably call norms belonging to the same source. 'Der Bestimmungsgrund für die Form der Rechtsvorschriften ist ihre Erzeugungsregel; die gleiche Form haben jene Rechtsvorschriften, die nach der gleichen Erzeugungsregel geschaffen wurden.'¹⁰⁷ Thus in international law, we could call 'customary international law' one *Rechtsform*, because all norms belonging to it were created under the meta-law of custom-creation.

A problem with this deduction appears if we take this conditionality seriously: In a complex modern municipal legal system the *Erzeugungsregel* in its totality may consist of a large part of that legal order, because it is *all* the conditions put together, including norms on *who* is authorised to create norms with *what* content observing *which* procedure.¹⁰⁸ This not only creates a very complex network of norms (which may very well lead to epistemological uncertainty), but it may be (and is) the case that a norm belonging to a lower *Rechtsform* is a condition for the creation of a norm belonging to a higher *Rechtsform*, e.g. a 'simple' statute may form one of the conditions for the creation of a constitutional law.¹⁰⁹ This has the poten-

⁹⁶ Behrend (1977) *supra* fn 94 at 61.

⁹⁷ Kelsen (1960) *supra* fn 12 at 196.

⁹⁸ Kelsen (1960) *supra* fn 12 at 5.

⁹⁹ Kelsen (1960) *supra* fn 12 at 228 (Ch 35 a); Kelsen (1979) *supra* fn 9 at 82 (Ch 26 I).

¹⁰⁰ Robert Walter, *Der Aufbau der Rechtsordnung. Eine rechtstheoretische Untersuchung auf Grundlage der Reinen Rechtslehre* (1964) 60.

¹⁰¹ Walter (1964) *supra* fn 100 at 61.

¹⁰² Kelsen (1960) *supra* fn 12 at 239.

¹⁰³ Merkl (1923) *supra* fn 44 at 286-287; Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) 43.

¹⁰⁴ Adolf Julius Merkl, *Prolegomena einer Theorie des rechtlichen Stufenbaues*, in: Alfred Verdross (ed.), *Gesellschaft, Staat und Recht. Festschrift für Hans Kelsen zum 50. Geburtstag* (1931) 252-294, reprinted in: Dorothea Mayer-Maly, Herbert Schambeck, Wolf-Dietrich Grussmann (eds), *Adolf Julius Merkl, Gesammelte Schriften I/1* (1993) 437-492 at 464-465.

¹⁰⁵ Kelsen (1960) *supra* fn 12 at 73

¹⁰⁶ Merkl (1931) *supra* fn 104 at 437.

¹⁰⁷ 'The form legal rules take is determined by the rule that created them; the legal rules that were created according to the same rule of [law-]creation have the same form.' Walter (1964) *supra* fn 100 at 55 (emphasis removed).

¹⁰⁸ Walter (1964) *supra* fn 100 at 59-60, 61 (FN 111).

¹⁰⁹ This is the case with an oft-discussed provision of the Austrian constitution, where observance of the Law on the Federal Gazette (*Bundesgesetzblattgesetz 1996* (BGBl), BGBl 660/1996 idgF) – i.e. publication in the Ga-

tial to destroy the notion of a uniform hierarchy of *Rechtsformen* in a hierarchical structure (a pyramidal structure), because the conditions transcend the hierarchy of form and partially overturn it.¹¹⁰ Walter realises this and diverges from Merkl's view by denying that *Rechtsform* can be a criterion for hierarchy.¹¹¹ I would agree with Lippold that while it may be highly contra-intuitive to think of a statute as 'higher' than the constitution, if one consistently defines 'form' as 'condition of law-creation' then this statute is, indeed, part of the higher *stratus*.¹¹²

There is another *Stufenbau* in the Pure Theory – also developed by Merkl, but, unlike the other hierarchy, not explicitly distinguished by Kelsen.¹¹³ It is the *Stufenbau nach der derogatorischen Kraft*,¹¹⁴ the 'hierarchy of derogatory force'. As the reader will appreciate, this hierarchy is of the utmost relevance for our topic, since norm-conflicts can only be solved by derogation – and we need to know when norms can validly derogate from each other, in other words: *we need to know which norms have what sort of derogatory force*. One cannot but be disappointed, then, to read time and again that the Vienna School approaches the matter from the other angle: 'Ein Rechtssatz, der gegenüber einem anderen Rechtssatz derogierende Kraft hat, während dieser ... ihm gegenüber keine derogierende Kraft hat, ist aus diesem Grunde von höherem Range'.¹¹⁵ Adolf Merkl is interested in portraying hierarchies, not in derogating force *per se*, which simply is a criterion.

This is because the first *Stufenbau* is a necessary element of all normative orders: Every normative order has at least two strata of norms; it has at least the positive norm created and the hypothetical *Grundnorm*. The second *Stufenbau*, on the other hand, is not a necessary element of a normative order: Derogation never is a logical operation and needs to be stipulated by positive norms. Derogability is a feature of positive regulation,¹¹⁶ thus it depends upon the 'configuration' of the positive regulation within a concrete normative order whether such a hierarchy of derogation exists and what it looks like.¹¹⁷ However, one must not fall into the trap I have so far taken care to avoid, a trap that becomes a *circulum vitiosum* in the hierarchy of derogation: If a hierarchy is created by derogation, the higher norm will derogate the lower norm. Thus any derogating norm is higher and any norm that claims to derogate derogates. We seem to have proven that the hierarchy of derogation comes from derogation, while the derogating force comes from hierarchy.¹¹⁸

We must answer the question whether the hierarchy of legal conditionality can justify or found the hierarchy of derogation. Is norm-creation the argumentative basis that identifies the *lex superior* in the maxim *lex superior legi inferiori derogat*? (It needs to be said, however, that the question of identifying the *lex superior* is a different question to that of whether the *lex superior* maxim truly obtains by necessity.) On a first glance, this option seems attractive, even natural: Why should not the type of norm that has created the norm in question determine when it should end? Why should not a constitutional provision simply destroy a statute?

zette – is made one of the conditions for law-creation even of constitutional laws by virtue of Article 49 of the 1920/1929 Federal Constitution (Art 49 Abs 1, 3 B-VG). For a discussion of this particular case: Lippold (2000) *supra* fn 78 at 394-398; Walter (1964) *supra* fn 100 at 62.

¹¹⁰ Öhlinger (1975) *supra* fn 95 at 16-17.

¹¹¹ Walter (1964) *supra* fn 100 at 62.

¹¹² Lippold (2000) *supra* fn 78 at 399.

¹¹³ Behrend (1977) *supra* fn 94 at 42.

¹¹⁴ Walter (1964) *supra* fn 100 at 55.

¹¹⁵ 'A legal norm which has derogating force *vis-à-vis* another legal norm, while the latter ... has no such derogating power therefore holds a higher rank' Merkl (1931) *supra* fn 104 at 468-469; Walter (1964) *supra* fn 100 at 54; Robert Walter, *Der Stufenbau nach der derogatorischen Kraft im österreichischen Recht. Zum 75. Geburtstag von Adolf Julius Merkl*, 20 *Österreichische Juristen-Zeitung* (1965) 169-174 at 169.

¹¹⁶ Behrend (1977) *supra* fn 94 at 36-38.

¹¹⁷ Robert Walter portrayed this type of hierarchy for the Austrian legal order in 1965: Walter (1965) *supra* fn 115.

¹¹⁸ Schilling (1994) *supra* fn 26 at 400.

Erich Vranes certainly thinks so; for him, ‘Soweit es in der Rechtsordnung höherrangiges und niederrangiges Recht gibt, muss die *lex inferior* im Grundsatz der *lex superior* weichen, wenn nicht die Struktur der Rechtsordnung *ad absurdum* geführt werden soll.’¹¹⁹

The inventor of the *Stufenbau* theory himself argues that the two hierarchies may diverge significantly. For him, a norm being called ‘higher’ than another does not automatically mean that it is higher in every respect.¹²⁰ A good example of the divergence may be the relationship that obtains between a statute and the judgment of a constitutional court derogating from that statute.¹²¹ At best, the authorisation for the constitutional court to create a derogating norm will be found in the constitution, as will the authorisation to create statutes – thus, at best they have the same rank in the hierarchy of validity. In the hierarchy of derogation, however, the judgment claims to derogate from the statute and thus there is at least the possibility that it is higher than the statute. It may not be the case that equal origin determines equal rank, for Merkl believes that solely from the fact that one ‘source’ (a constitution, for example) provides a multitude of authorising norms for a multitude of *Rechtsformen* (e.g. statute and administrative order) one cannot conclude that they are of equal rank;¹²² for him, there is a different categorisation of these forms which create their hierarchy.

Here we have the first moves towards a collapse of the two *Stufenbauten* into one unified hierarchy, or at least the recipe for a close connection. Robert Walter, in his important 1964 book ‘Der Aufbau der Rechtsordnung’, makes the following argument: Positive law determines what derogatory force a norm has, yet it does not say so explicitly. Therefore, we have to ‘deduce’ the amount of derogatory force from other regulations, in particular from the norms on law-creation (*Rechtserzeugungsregeln*). These are important, because how the procedure of law-creation is shaped can tell us the ‘importance’ (he uses the word ‘Bedeutung’) of the resultant norms within the legal system. If, he argues, the creation of law is tied to conditions a-c, while the creation of different law is tied to conditions a-e, one has to deduce from this that the law created under the more complex conditions cannot be derogated from by a norm created under the simpler conditions.¹²³

While this may work in the relationship between two legislative modes of norm-creation, at least in international law such a differentiation seems useless: is customary international law more complex to create than international treaty law? Squashing all temptations to give an answer to this question we can *a limine* say that these two sources are not comparable – neither constitutes a more ‘complex’ mechanism, because they are different modes – the one is contractual (a *vinculum iuris*) and the other is customary. Most damning should be that the criterion – complexity of norms – is at heart an empirical distinction and within the Pure Theory this would be the introduction of an irrelevant element into norms – an element which cannot change the ontology of norms: the particular way in which norms are created *itself* cannot be determinative of whether a norm can derogate from another norm – contrary theories violate the duality of Is and Ought.

Yet Walter continues: It has to be assumed that norms having the same *Rechtsform* (i.e. the same conditions for law-creation, as stipulated by the validity-hierarchy) also have the same derogatory force, because if it were not so, a differentiation of *Rechtsformen* according to their derogatory force would be impossible. If it is so assumed, it is the *Erzeugungsregel* (norms on law-creation) which determines not only form, but also derogatory force. Walter

¹¹⁹ ‘If there is hierarchically higher and lower law in a legal order, the *lex inferior* has in principle to yield to the *lex superior*, if the structure of the legal order is not to be led *ad absurdum*.’ Vranes (2005) *supra* fn 78 at 397-398.

¹²⁰ Merkl (1931) *supra* fn 104 at 471.

¹²¹ Behrend (1977) *supra* fn 94 at 39.

¹²² Merkl (1931) *supra* fn 104 at 469.

¹²³ Walter (1964) *supra* fn 100 at 59.

believes that that assumption is true, for ‘derogatory force’ is nothing but a specific form of competence *necessarily granted by the Erzeugungsregel*;¹²⁴ Theodor Schilling agrees.¹²⁵

At this point the gauntlet is picked up by Theo Öhlinger, who correctly points out that this is not a necessary conclusion. The *Erzeugungsregel* only determines that the norm has a derogating function – it only determines the derogating norm. The norms on norm-creation do not tell us what it can do to the norm whose validity it purports to end, they do not tell us whether the derogating norm is in a position *vis-à-vis* the norm purportedly derogated from that allows it to actually derogate – an argument I have made throughout this chapter. ‘Auf *diese Relation* zwischen derogierender und derogierbarer Norm kommt es aber im Stufenbau nach der derogatorischen Kraft an.’¹²⁶ Öhlinger believes that he has detected un-Merkelian thoughts in Walter’s 1964 argument – if there is a connection between the conditions of law-creation and derogation, it is only a matter of positive law being pragmatically made in this form, not a logical necessity¹²⁷ – Merkl himself strongly doubted such a connection.¹²⁸ Öhlinger’s admission that Walter’s thesis does admit a divergence between the two hierarchies¹²⁹ does not help us in determining the source of the justification for derogation.

4.2 Types of conflict between *lex superior* and *lex inferior*

We must determine under which conditions a norm designated as ‘higher’ actually derogates from a ‘lower’ norm, otherwise uncertainty will increase to the point that the very existence of a normative *order* is endangered. I intend to present three categories of *lex superior-lex inferior* conflict situations: (1) A substantial norm of a normative order may conflict with a ‘higher’ norm of the same order. It is a norm-conflict of observability: A norm of a statute prescribes *Op*, while a constitutional norm prescribes *O¬p*. (2) A norm may conflict with a ‘higher’ norm of the same order *expressly derogating from it*, which would be a conflict of conflicting ideals: A constitutional law has the content ‘The statute *Op* is repealed herewith.’ (*¬Op*). (3) A norm does not fulfil all the conditions of the meta-law on law-making (its own *Erzeugungsbedingungen*), which is a type of conflict not mentioned in my preliminary definition. A statute, for example, is not passed with the correct majority present and voting. This, as will be seen, is not only the most complex, but also the most destructive case.

4.2.1.1 The problem of the definition of the ‘higher’ norm

In the first case, the problem is defining which norm is ‘higher’ and which is lower in the *Stufenbau*. This problem can be exemplified in the relationship between normative orders: It cannot do, I submit, to simply ‘believe’ a norm’s claims to be superior to another – even if that claim does not amount to an attempt to derogate. Because of all norms’ inherent equal claim to be observed, the superordination cannot be based on mere claims; a norm can claim to be subordinate to another norm, but this works only because it incorporates that other norm.

However, what other criteria can validly be used to establish superiority? Even within a normative order, a norm may not be directly connected to another – why should there be a hierarchy? We can, however, identify one clear case of hierarchy: a norm depends for its validity on the norm authorising its creation. Only the direct *regressus* of validity-dependence

¹²⁴ Walter (1964) *supra* fn 100 at 59-60; Walter (1965) *supra* fn 115 at 170.

¹²⁵ Schilling (1994) *supra* fn 26 at 401.

¹²⁶ ‘But *this relationship* between derogating and derogable norm is relevant for the hierarchy of derogation.’ Öhlinger (1975) *supra* fn 95 at 23.

¹²⁷ Öhlinger (1975) *supra* fn 95 at 25-26.

¹²⁸ Merkl (1923) *supra* fn 44 at 299.

¹²⁹ Öhlinger (1975) *supra* fn 95 at 26.

establishes a hierarchy, it creates a ‘line’ of norms leading from the *Grundnorm* to the lowest norm.¹³⁰

A norm authorising the creation of norms may be the source of many norms, including further authorising norms. If a norm created under that further authorisation conflicts with a ‘brother norm’ of that further authorising norm, one might be tempted to conclude that the latter is higher than the former, but this is not so. The lower norm depends only upon its ‘source-law’, not upon other, indirectly higher norms: ‘[D]ie Fehlerhaftigkeit einer Rechtsvorschrift besteht immer nur Hinblick auf die direkt bedingende Regelung.’¹³¹ Therefore, unless the ‘higher’ norm can be interpreted as part of the *Erzeugungsbedingung* of the lower norm, it simply is not a *lex superior* in our sense (Section 4.2.3).

4.2.2 A power to derogate?

If that ‘higher’ norm (used in a wide sense) not only conflicts with, but claims to derogate from, the lower norm, the situation is simply more complicated. We cannot, I have argued throughout this paper, simply take derogating norms at their word and admit derogation of norms *vis-à-vis* any norms that claim to do so. In addition to the problems of defining a higher norm outside the realm of the *Erzeugungsbedingungen* we are therefore still left here with our uncertainty as to the derogatory force of derogating norms. As mentioned above, to claim that higher norms derogate lower norms, because they are higher, is an empty tautology. The matter seems to be different if the meta-norm on norm-creation itself stipulates the conditions for derogation: ‘[N]ur die Quelle der Geltung kann zugleich auch Grund der Nichtgeltung einer Norm sein.’¹³² but conditions for law-destruction are precisely not conditions for law-creation – therefore any derogation-conditions are not *Erzeugungsbedingungen*. Therefore, this case is not different from other ‘higher’ norms claiming to derogate.

4.2.3 The paradox of the possibility of *lex superior*

Now what of the case where a norm does not conform to the conditions for its creation? The easy answer is that it simply does not exist. No derogation is necessary, because no norm was created in the first place.¹³³ Therefore we also do not need to ‘justify’ derogation and we do not need to worry about the *lex superior* maxim, because an automatic relationship obtains between these two norms – or so it seems. The Vienna School, however, has problematised this aspect of norm-conflicts with respect to erroneous acts in positive legal orders and has created the theories of the *Fehlerkalkül* and the ‘Tacit Alternative Clause’ to accommodate the unique characteristics of norms, on the one hand, and of positive enactment, on the other hand. The *Fehlerkalkül*-theory (as I will cumulatively call the group of theories) is a crucial part of the Pure Theory of law, an often misunderstood and a very difficult part to boot.¹³⁴

What happens if a court judgment delivers a ‘wrong’ verdict or if the Security Council orders Chapter VII action because it believes that there exists a ‘threat to the peace’, even though there ‘really’ is no such threat? ‘Easy’, a student of the *Stufenbau*-theory up to this point will answer, ‘the decisions are void, they are a nullity.’ and she or he would be absolutely right *in principle*. Yet there are problems with this view, especially this:

[E]ven the slightest violation of a condition for the validity of, for instance, a judgement would result in the immediate *nullity* of the judgement. ... Thus, only two kinds of judgements could be said

¹³⁰ Schilling (1994) *supra* fn 26 at 402.

¹³¹ ‘A rule is only erroneous with respect to the rules which are directly conditional for its validity.’ Lippold (2000) *supra* fn 78 at 390 (emphasis removed).

¹³² ‘Only the source of validity can also be the source of loss of validity of a norm.’ Merkl (1923) *supra* fn 44 at 256 (emphasis removed); Thienel (1988) *supra* fn 28 at 26-27.

¹³³ Merkl (1923) *supra* fn 44 at 286-287.

¹³⁴ In discussing the *Fehlerkalkül*-theory I draw heavily on Christoph Kletzer’s excellent recent paper on the subject: Christoph Kletzer, Kelsen’s development of the *Fehlerkalkül*-Theory, 18 *Ratio Juris* (2005) 46-63.

to exist, neither of which would allow for appeal: (a) perfect judgements, against which appeal is per definition impossible, and (b) non-judgements, which cannot have legal effect and against which appeal is thus useless.¹³⁵

Any positive regulation of appeals-procedures would be completely useless, which, not existing with respect to the Security Council, would not matter anyway. Even if that did not matter, there is another problem: we actually have an act of will whose sense is a norm, we do have a pretence of norm-creation – yet on the other hand it did not fulfil the conditions laid down by the meta-law. To reconcile these two sets of dichotomies – (1) the impossibility of ‘law contrary to law’¹³⁶ versus positive law’s acceptance of it and, (2) the presence of a positive act of will versus the (at least partial) non-fulfilment of the *Erzeugungsregeln* – the Vienna School developed two highly controversial theories.

Adolf Merkl invented the *Fehlerkalkül* to reconcile this first dichotomy. The ‘error-calculus’ is a feature of positive law that allows us to cognise acts as law, despite a modicum of errors in their creation. Positive law, he believes, sometimes distinguishes between voidness (*absolute Nichtigkeit*) and voidability (*Vernichtbarkeit*); this is reflected in a two-stage process of law-creation – the conditions are bifurcated into maximum and minimum conditions for law-creation. An act that does not fulfil at least one of the minimum conditions is not a norm in the first place; an act that fulfils all minimum conditions, but does not fulfil at least one of the maximum conditions is law, but faulty law.¹³⁷ The positive regulation of the bifurcation is usually accomplished by the grounds of appeal: if a norm does not fulfil conditions d, e, f, it is open to appeal and can be voided there.¹³⁸

Yet there are three ‘problems’ with Merkl’s theory: First, it does not, of course, answer the theoretical question raised in the second dichotomy, which is why Kelsen invented the ‘tacit alternative clause’, discussed *infra*. Second, it depends upon positive norms for its existence: if, as in most of international law, including in the Charter, there is no distinction between minimum and maximum conditions, *all* conditions, even the least ‘important’ are by default minimum conditions: *all* conditions for law-creation have to be fulfilled for law-creation.

Third, it can be argued that all *true* conditions are minimum conditions anyway. Merkl’s *Fehlerkalkül* is not truly a differentiation within the *Erzeugungsbedingungen* of a norm, because if the creation of a norm – however ‘faulty’ – no longer requires certain conditions (e.g. conditions d, e, f above), *then plainly these are not conditions for the creation of law!* On a consistent reading, the *Fehlerkalkül* is no more than the prescription of a *Tatbestand* for a norm derogating from a certain category of norm *after they were created*. Derogation, however, does not need a ‘faulty’ norm, the *Tatbestand* can include any conditions for derogation (e.g. that the norm in question is a *lex prior*).

The second dichotomy is tackled by Kelsen’s ‘tacit alternative clause’ (*Alternativermächtigung*). This theory was created because the *Fehlerkalkül* is unable to hinder a ‘faulty’ decision from perpetuating itself up to the last instance, where there is no possibility of appeal. Such organs’ rulings are *not*, as Kletzer claims, final, because that ‘quality’ is ‘accorded by the positive law itself’¹³⁹ – rather, the opposite is the case: appeals procedures are accorded by positive law, all norm-creation is final unless such regulation is enacted.

As Kletzer correctly points out, there are only three possible solutions to an ‘unlawful’ final decision (norm): (a) The norms are valid, but annulable – which would make the decision anything but final. (b) They are void *ab initio*, a solution which he criticises for being unascertainable without specifying someone to ascertain – which would not make the decision

¹³⁵ Kletzer (2005) *supra* fn 134 at 47.

¹³⁶ Kelsen (1960) *supra* fn 12 at 271.

¹³⁷ Lippold (2000) *supra* fn 78 at 324.

¹³⁸ Kletzer (2005) *supra* fn 134 at 48.

¹³⁹ Kletzer (2005) *supra* fn 134 at 51.

final either. (c) The only option left is that they are fully valid and not subject to appeal. In this case ‘we have to find legal rules in which the validity of these “unlawful” final decisions is grounded’.¹⁴⁰

Kelsen’s train of thought is this: Finality means more than non-annulability, it means that all organs authorised to create norms are not *bound* by the meta-law on law-creation; in fact they are *not only* bound by the concrete *Erzeugungsregel*, but also by another norm:

Die Tatsache, daß die Rechtsordnung einer letztinstanzlichen Gerichtsentscheidung Rechtskraft verleiht, bedeutet, daß nicht nur eine generelle Norm in Geltung steht, die den Inhalt der gerichtlichen Entscheidung vorausbestimmt, sondern auch eine generelle Norm, derzufolge das Gericht den Inhalt der von ihm zu erzeugenden individuellen Norm selbst bestimmen kann. Diese beiden Normen bilden eine Einheit; so zwar, daß das letztinstanzliche Gericht ermächtigt ist, entweder eine individuelle Rechtsnorm, deren Inhalt durch die generelle ... Norm vorausbestimmt ist, *oder* eine individuelle Rechtsnorm zu erzeugen, deren Inhalt nicht so vorausbestimmt ist, sondern durch das letztinstanzliche Gericht selbst zu bestimmen ist.¹⁴¹

This solution is counter-intuitive, but it seems the only way to reconcile the finality and the possibility of error. The problem with it is, however, that the *tacit* clause simply is not positive law. To impute a tacit meta-norm – as Kelsen unfortunately does – is to introduce a hypothetical norm into an otherwise positive normative order, a still-born child of a violation of the ideal of purity that is the Vienna School’s programme.

Thus even within the most obvious case of a norm-conflict being ‘resolved’ *ex ante* (the term is not apposite here anyway), even in this easy case, do we have to face a problem that becomes a paradox: On the one hand, the duality of Is and Ought – the very idea of norms – demands of us to found norms’ validity *only in norms*. Norm-creation is such a founding exercise, for in creation the validity of norms is established. The opposite must therefore also obtain: without a basis in norms, alleged norms cannot be norms – it cannot be otherwise, for basing a norm on fact alone would violate the duality and therefore make it impossible for us to cognise norm *qua* norm. *The normativity of normative systems demands a strict foundation in norms.*

On the other hand, only an authorised organ is authorised to decide – and its decision is a decision, not cognition of law. If and when the Security Council says there is a ‘threat to the peace’ under Article 39 UN-Charter, there is a threat to the peace *because no-one else is authorised by law to make that decision*.¹⁴² The Council, courts, law-makers in general are authorised to make a decision – and it is their *positive decision* that counts. There is no logical deduction of a norm from a higher norm, as Kelsen showed in the second part of his critique of the role of logic in normative science.¹⁴³ A criminal court’s judgment is not a logical deduction from the Penal Code, for the act of will is *conditio sine qua non* for the creation of a *positive norm* – the authorising norm does not ‘contain’ the norms creatable under it; only a real act of will creates them. Therefore, any positive law-making takes on a quasi-autonomous form – the creation is constitutive, whether or not it conforms. *The positivity of norms gives positive acts of will creative powers.*

Here is the paradox of positive normative orders: a truly superior norm endangers positivity, while a truly positive norm endangers the unity of the normative order. This is not a para-

¹⁴⁰ Kletzer (2005) *supra* fn 134 at 52.

¹⁴¹ ‘That the legal order confers the force of law to a judgement of a court of last instance means that not only is a general norm valid that predetermines the content of the judgment, but also a general norm according to which the court may for itself determine the content of the individual norm to be created. The two norms form a unit, because the court of last instance is authorised to create either an individual legal norm whose content is predetermined by the general norm, *or* an individual norm whose content is not so predetermined, but is to be determined by the court of last instance for itself.’ Kelsen (1960) *supra* fn 12 at 273 (Ch 35 j α).

¹⁴² Kelsen (1960) *supra* fn 12 at 274.

¹⁴³ Kelsen (1979) *supra* fn 9 at 179-203 (Ch 58).

dox of the Vienna School, but of the very nature of positive normative orders; the Pure Theory's purity only brings to light what other theories manage to hide behind pragmatism. With his dialectical completion between the traditional positivists' emphasis on empirical creation of law, on the one hand, and naturalists' emphasis on the normative on the other hand, with his Copernican revolution in legal thought second only to Kant's revolution of metaphysics, Hans Kelsen created the only viable normativist positivist theory of norms. Yet this creation has its weak points, for as we face the paradox we find that Kelsen can solve it only by introducing an 'impure' element – the *Alternativeermächtigung*. A pure theory of law, of norms must be consistent – *sans peur et sans reproche* – wherever the cognition of what is there may lead us. In this spirit, I hope to present a more consistent (if not more 'user-friendly') approach in the next few paragraphs concluding this section.

In a nutshell, my take on the paradox is this: any act of will purporting to create a norm necessarily creates a norm, whether or not it fulfils the creation-conditions of the normative order in question. If it fulfils these conditions, it is a norm belonging to the normative order, if not it is a norm belonging to its own normative order, consisting of it and its *Grundnorm*. The *Grundnorm*, as a supposition by legal science¹⁴⁴ in order to be able to conceive of norms, serves 'as if': if we presuppose the basic norm, the 'faulty' norm can be conceived as norm. If, for example, the creation of a statute under the municipal law of a country specifies conditions a-e, and the act in question fulfils a-d only, it is a norm as long as there is an act of will to that effect; yet it is not a norm of that particular municipal system.

There may be a hint of this solution in Merkl's and Kelsen's writings: When Merkl writes that it is a question 'wodurch sich ... eine Norm, die als Rechtsnorm Geltung beansprucht, als einer bestimmten [Rechtsordnung] zugehörig erweist'¹⁴⁵ or when Kelsen tells us that a norm not determined by a higher norm 'kann nicht als eine innerhalb der Rechtsordnung gesetzte Norm gelten'¹⁴⁶ and therefore not belong to it, they are beginning to distinguish between a norm's validity and its membership in a *certain* normative order (not, though, in any normative order whatever).

Kelsen also distinguishes between the 'subjective' and 'objective' sense of an act of will, where an imperative is 'subjective' if its creation is not empowered and 'objective' if it is¹⁴⁷ – which implies that a 'mere' subjective act has no normative quality whatever. Lippold's re-names these to 'immanent' and 'systemic' acts,¹⁴⁸ an apposite action, because empowerment can always be presupposed by the *Grundnorm* (i.e. its immanent sense), while belonging to a normative system depends upon foreign empowerment (except, of course, for the historically first constitution) – i.e. its systemic sense.

The problem persists even under this approach, that cognition of norms is not authorised, while authorised cognition is not cognition, but decision. However, our cognisability of empowerment *vel non* is irrelevant for the ontological plane. Even if there is no 'objective' level of cognition,¹⁴⁹ an erroneous norm is automatically not part of the normative order in question, we might simply not know whether a norm is or is not erroneous.

Yet at this point the anti-logical sting of the late Kelsen comes into play again. While in 'Allgemeine Theorie der Normen' Kelsen did not discuss the implications of his 'logical turn' for the *Stufenbau* and the *Feherkalkül*-theory in any detail; I will very briefly try to present what an application of the late theory to the concept would entail.

¹⁴⁴ Kelsen (1979) *supra* fn 9 at 206-207.

¹⁴⁵ 'how ... a norm, which claims to be a valid legal norm, [can be said to] belong to a certain [legal order]' Merkl (1931) *supra* fn 104 at 473 (emphasis mine).

¹⁴⁶ 'cannot be valid as a norm enacted within the legal order' Kelsen (1960) *supra* fn 12 at 241 (emphasis mine).

¹⁴⁷ Kelsen (1979) *supra* fn 9 at 21-22.

¹⁴⁸ Lippold (2000) *supra* fn 78 at 288-289.

¹⁴⁹ Stanley L. Paulson, Material and formal authorisation in Kelsen's Pure Theory, 39 Cambridge Law Journal (1980) 172-193 at 191.

The principle of logical deduction does not apply to positive norms, because norms' validity is not one of their properties, as is the case with truth *vis-à-vis* propositions, but their specific form of existence. Just as the truth of a proposition is not conditional upon the act of making the proposition,¹⁵⁰ the existence of a fact does not actually follow from the existence of a different fact.¹⁵¹ Positive norms' validity (*qua* existence) is conditional upon an act of will, not upon a logical derivation.¹⁵² Yet if there is no such derivability, how can we *a contrario* say that an act not fulfilling the conditions for its creation can automatically not become a norm when there is an act of will? My approach makes a clear distinction between validity *an sich* and 'validity' *qua* membership in a normative order – only the former is the existence of the norm, whereas the latter (belonging to a certain normative order) is a mere property – norms 'exist' whether or not they do belong to a certain (*not*: 'any') normative order).

However, my approach does not solve the problem of the unity of normative orders: the connection between norms in a normative order – in particular between the *Erzeugungsregel* and the norms created under it – becomes weak, if norms start to exist with an act of will irrespective of the empowering norm, which is reduced to becoming the lower norm's membership criterion. Norms become quasi-autonomous, because if they can exist on their own – and a consistent application of the *Grundnorm* theory would make this possible – then we could presuppose a *Grundnorm* at any step and autonomise not just 'faulty' norms, but any part of a normative order. Ultimately it is predicated upon the presumption by the cognising legal scientist whether she or he wants to see them as one or not and where he or she assumes the *Grundnormen*.

It seems, then, that if one is willing to accept the constitutive nature of legal science's cognition, at least the conflict between a norm and its meta-norm on norm-creation is resolved, nay, avoided (for there is no derogation) by simply not recognising 'faulty' norms – that is: norms that 'conflict' with a special sort of higher law – as norms of the normative order in question.

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¹⁵⁰ Kelsen (1979) *supra* fn 9 at 182-183.

¹⁵¹ Kelsen (1979) *supra* fn 9 at 186.

¹⁵² Kelsen (1979) *supra* fn 9 at 187.