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The Logic of Absence in Customary International Law

by Anna Irene Baka

university of groningen
faculty of law

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Anna Irene Baka*

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1. Introduction

The paper focuses on the logic of absence in Customary International Law (CIL). CIL bears an *ab initio* element of absence and thus abstractness: the lack of written formality, which, as such, can spur multitudinous interpretative debates. The profound ambiguity surrounding all elements of customary international law particularly as regards the subjective, psychological element of *opinio juris* is further accentuated by the prevailing element of absence, silence or non-action and their often-monolithic interpretation as non-objection or, even, acquiescence.

There also appears to be a fundamental presumption against the existence of semantic voids in CIL -a presumption that attaches negativity to silence and positive value to affirmative propositions. Indeed, negative premises appear to be less valuable and less informative than affirmative ones, while affirmatives are given semantic priority and added value over negatives. But is that true, according to the rules of logic? If a positive statement corresponds to a positive affirmation, to what state of affairs does a negative statement or non-statement, refer or correspond? What is a negative fact? What is a non-fact? What is the value of non-doing? Non-acting or abstaining? Non-believing towards the formation of a certain *opinio juris*? Is every absence, or negation, necessarily a denial of a state of affairs?

The legal positivist eagerness to evaluate and attach negativity to absence has its roots in the Wittgenstenian, contextual and consensual origins of legal positivism and the subsequent rejection of metaphysics, i.e. the premise that there is no a-contextual, a-consensual meaning, namely meaning outside communitarian semiotics.[1] However, according to the rules of logic and the canons of

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* Senior Legal Associate at the Greek National Commission for Human Rights; Adjunct Lecturer in Jurisprudence, Human Rights and EU Law at the University of London International LL.B. in Athens (annbaka@gmail.com). The paper was presented at the ECTPIL and TRICI-Law Conference on “The Theory and Philosophy of Customary International Law and its Interpretation”, on 24-25 May 2019 at the University of Groningen.

[1] Jean D’ Aspremont, *Formalism and the Sources of International law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011) 15.

reasoning, negation may correspond to multiple values, a variety of propositions and modalities, which in international jurisprudence have been either equated or largely ignored. The mainstream interpretation of CIL overlooks the quantifications and varieties of meaning in non-appearances, such as the conceivable neutrality of absence.

The modalities of absence are not mere academic exercises. They affect the rationality and soundness of international legal doctrine and even have a real impact on international relations when overlooked.

2. Setting up the standards: is international legal reasoning a scientific method of reasoning?

The answer to this question necessitates a twofold examination, namely a) how science and the scientific method of reasoning are generally defined and b) whether law as a discipline, and international legal reasoning in particular, fit into these definitions.

To respond to the first question, science is traditionally considered to refer to any kind of methodical study that "has a definite subject matter, is systemic and comprehensive and […] its aim is to discover the truth as far as possible",[2] whereas scientific method "is just taking things in order, simplifying as far as necessary and possible, endeavouring to leave out nothing that ought to go in, and distinguishing true from false."[3] Science is characterized by systematization, linguistic and conceptual accuracy, the application of rules of logic and a concrete methodology for the purpose of generating knowledge. The scientific method, on the other hand, consists of techniques of "argument, conceptual clarification, logic and discussion"[4] or, if the subject matter is the investigation of natural phenomena, the application of the empirical method, namely qualitative or quantitative techniques and the process of hypothesis testing and verification.[5] The process of concept formation is an essential part of scientific knowledge, which traditionally consists of a logically ordered, hierarchical pyramid of concepts.[6] In most disciplines this pyramid takes the form of axioms, principles and derived theories that subsequently produce valid deductive inferences, provided that the working concepts are clear and unambiguous.[7]

Regarding the second question, i.e. on the scientificity of international legal reasoning, it is necessary to first inquire into the object and method of law in general. One should first distinguish between such terms as 'the sociology of law' or 'sociological approaches to law' or 'socio-legal studies', and such prepositions as 'law as a social science'. Whereas the former form part of a distinct discipline that examines law as a social phenomenon[8] the latter investigates the scientificity of law as such. In universities, law is traditionally classified among the social sciences. It is, however, questionable whether such attribute is accurate. There have been arguments in favor, namely that law "is not just a social science but one that is central to social thought in general,"[9] as well as arguments against, that law cannot be categorized as a social science because "it is preoccupied with normative judgments and

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[2] A. D. Ritchie, 'Scientific Method in Social Studies' [1945] 20 Philosophy 3, 4.
[3] Ibid 4.
[4] Christopher McCrudden, Legal Research and the Social Sciences in Maksymilian Del Mar and Michael Giudice (eds), *Legal Theory and the Social Sciences Vol II* (Routledge 2010) 633.
[5] Ibid.
[6] Erhard Oeser, *Evolution and Constitution: the Evolutionary Self-Construction of Law* (Kluwer Academic Publishers 2003) 40.
[7] Ibid.
[8] Roger Cotterrell, Why Must Legal Ideas Be Interpreted Sociologically*?* in Maksymilian Del Mar and Michael Giudice (eds), *Legal Theory and the Social Sciences Vol II* (Routledge 2010) 101.
[9] Geoffrey Samuel, Is Law Really a Social Science? A View from Comparative Law in Maksymilian Del Mar and Michael Giudice (eds), *Legal Theory and the Social Sciences Vol II* (Routledge 2010) 178.

not with human interaction and behaviour […].”[10] Another argument against law as a social science is that its theories cannot be falsified, according to Karl Popper’s falsification test.[11]

The dominant view from both the legal and the sociological perspective is that law cannot be considered to be a social science a) because of its very narrow subject matter which is distinct from the one of sociology and the sociology of law, and b) because legal doctrine does not apply the traditional methods of the social sciences, i.e. the qualitative and quantitative techniques. The narrow reading of law as a closed system of knowledge has attracted serious criticisms due to its isolation from the social and political settings, as well as its autopoietic nature and stringent self-referentiality.[12] Law as a closed, isolated system of knowledge inevitably leads to “a body of knowledge [that] has nothing to contribute, epistemologically speaking, to our knowledge of the world as an empirical phenomenon,” whereas it is a narcissistic discipline that “is of little interest intellectually speaking to those outside [it], save perhaps to those social scientists interested in studying the corps of lawyers as a social phenomenon itself.” [13]

Geoffrey Samuel, a sociologist, draws a parallel between traditional theology and law in that both disciplines are governed by the *authority paradigm*, which restricts their capacity “to make an epistemological contribution to social science thinking.”[14] He argues that, in order to escape from the authority paradigm and be properly scientific and not just ‘theologians’, legal theorists should adopt an external, interdisciplinary approach to law.[15] Law is not a social science. From this assertion alone it does not follow, however, that international legal reasoning should not conform to rules of informal logic. In fact, Samuel identifies a historical authority shift from the narrow linguistic authority of legal texts to a more inclusive (yet always abstract) scientific authority. The scientific authority of law is a quasi-logical requirement for internal coherence and causality, which, together with other logical principles, have built a closed system of logic.[16] In this closed system of logic deductive inferences are produced from a matrix of consented legal axioms. This process forms the ‘scientific’ authority of the legal syllogism.[17] It is obvious that, from this perspective, legal reasoning is at best quasi-logical and therefore cannot be considered properly scientific.

Apart from the quasi-logical nature of legal reasoning, the ambiguity of language, as well as the various legalist approaches that normally complement the legal syllogism, such as functional, hermeneutical and dialectical approaches, lead to an obscure model of reasoning that is not open to testability.[18] The legal syllogism is complemented by an erratic series of variables that include a peculiar understanding of logic, interpretation, functionalism and systematization, as well as an abstract appeal to general principles such as democracy, legal certainty and the rule of law.[19] All these variables attract dialectical instrumentalism, inasmuch as they impose an additional burden to the legal theorist to be consistent “with the multitudinous rules” of legal systems which “should [also] make sense’ when taken

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[10] Ibid 173.
[11] Ibid 175.
[12] “From a legal internal perspective, modern law is formally a self-contained system that creates itself, amends itself, and justifies itself through itself.” Nir Kedar, The Political Origins of the Modern Legal Paradoxes in Oren Perez and Gunther Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Hart Publishing 2006) 112. Helmut Willke argues that legal auto-referentiality leads to ontological perplexity and fragmentation. Helmut Willke, The Autopoietic Theory of Law: Autonomy of Law and Contextual Transfer in Paul Amselek & Neil MacCormick (eds), *Controversies About Law's Ontology* (Edinburgh University Press 1991) 108-19.
[13] Samuel (n 9) 295.
[14] Ibid 169.
[15] Ibid 195.
[16] Ibid 197.
[17] Ibid.
[18] Ibid 198.
[19] Ibid.

together."[20] It follows from the above that legal reasoning does not concur with logical reasoning. Then, our initial question needs to be reformulated as thus: should this closed system of logic with its demand for coherence operate at the expense of logical rationality? And how is this logical rationality to be measured?

From a historical perspective, Leibniz praised the precision of Roman jurisprudence, which he compared to the method of geometry.[21] Following Leibniz, Savigny considered Roman law to be the 'model of juridical method' namely a model that combined the deductive with the inductive method of logical reasoning. Savigny reads: "their theory is perfectly developed to the point of application, and their practice is ennobled on the basis of scientific treatment. In every principle they simultaneously see a case of application, in each legal case –the rule that determines the case, and one cannot but appreciate the mastership demonstrated in their aptitude to switch over from general to special, and from special to general."[22] For Savigny the role of the judge is to apply the law in an objective and strictly logical fashion, namely via logical inferences.[23] For purposes of syllogistic credibility, the civil legal thought moved, during modernity, from *ars judicandi* to *mos geometricus*, namely from judging to logical formalism.[24] Kelsen himself claimed that law is a normative science and it is necessary for legal norms to be logically explained and connected.[25] One can therefore observe a traditional association of law with the requirement of objective rationality. And rightly so: without objective standards of logic, legal theory and jurisprudence are condemned to drift into speculation. From the perspective of both legal theory and jurisprudence the requirement of rationality is always relevant. Such requirement, however, cannot be considered fulfilled at the narrow level of external coherence.

In the discipline of law, Weber was the first to distinguish between logically formal rationality and simple formal rationality. Whereas simple formal rationality is understood as the case where legal thought simply relies on "some justification that transcends [a] particular case, and is based on existing, unambiguous rules […] that are intrinsic to the legal system,"[26] logically formal rationality relies on "a highly logical systematization, and […] decisions [to] specific cases are reached by processes of specialized deductive logic proceeding from previously established rules or principles."[27] Habermas developed Weber's concepts of legal rationality and argues that law is formally rational to the extent that "it is structured according to standards of analytical conceptuality, deductive stringency, and rule oriented reasoning."[28] In his critical theory of legal institutions Habermas asserts that formal rationality is superficial and essentially leads to the logical drainage of legal systems, which facilitates the mediatisation of law for the purpose of relieving the system "from permanent questioning by the life

[20] Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 152. For the internal approach and demand for coherence see also McCrudden (n 3) 150.
[21] Oeser (n 6) 29.
[22] Quoted in ibid 129.
[23] Ibid 155.
[24] Samuel (n 9) 175.
[25] Oeser (n 6) 7. According to Kelsen it is 'common' logic and not some special, 'juridical' logic that is applied in legal science. For Kelsen, however, rules of Syllogistic Logic are inapplicable to prescriptive statements because "truth and falsity are properties of a statement, whereas validity is not the property of a norm, but is its existence, its specific ideal existence. That a norm is valid means that it is present. That a norm is not valid means that it is absent… the validity of a norm, which is the meaning of an act of will, is conditioned by the act which posits it." Hans Kelsen, *Essays in Legal and Moral Philosophy* (D. Reidel Publishing 1973) 230-1, 251. On the contrary, Kelsen argues, logical inference can be applied to descriptive statements, i.e. 'theoretical statements' about the validity of norms. *See* ibid. 245. All this redirects to Hume's is-ought, fact-value distinction.
[26] David M. Trubek, Max Weber on Law and the Rise of Capitalism in Kahei Rokumoto (ed), *Sociological Theories of Law* (New York University Press 1994) 227.
[27] Ibid.
[28] Gunther Teubner, Substantive and Reflexive Elements in Modern Law in Kahei Rokumoto (ed), *Sociological Theories of Law* (New York University Press 1994) 429.

world of the legitimacy of its internal mechanisms of integration."[29] Moreover, the imposition of superficial procedural (deductive) rationality destroys developing forms of communicative rationality and ultimately leads to indifference and fragmentation of consciousness.[30]

To return to our reformulated question, namely whether law should be governed by something more than the superficial requirement of coherence, the paper answers in the affirmative. Among the variables that determine the legal syllogism, namely interpretation, systematization, functionalism and the appeal to abstract principles, the rules of informal logic appear to be the crucial constant, in the mathematical use of the term, which can direct the legal syllogism to rational, i.e. syllogistically sound conclusions. It is only by transcending the authority paradigm, the closed logic of law and the limitations of legal formalism and coherence that the syllogistic credibility of law can be restored. Law cannot be rational if it operates autonomously and self-sufficiently. Law should not operate beyond logic; legal theorists need to resort to the classical understandings of logic in order to avoid superficial formal rationality (which may or may not coincide with logical rationality) as well as unscientific instrumentalist thinking. It has been argued that law has teleology and is both "natural, in the sense that it has to be found out and is not made by any arbitrary act of will and rational because it is not solely a fact of observation."[31] One can study law scientifically, and not by necessarily having to step out of it, like Bourdieu and Samuel so emphatically assert. In his Elementary Lessons in logic, Stanley Jevons provides the definition of logic:

> "Logic may be most briefly defined as the Science of Reasoning. It is more commonly defined, however, as the Science of the Laws of Thought […]. By a Law of Thought we mean a certain uniformity or agreement which exists and must exist in the modes in which *all persons think and reason*, so long as they do not make what we call mistakes, or fall into self-contradiction and fallacy. The Laws of Thought are natural laws *with which we have no power to interfere, and which are of course not to be in any way confused with the artificial laws of a country, which are invented by men and can be altered by them*."[32]

The laws of thought and the so-called canons of reasoning[33] operate in accordance with a *natural* mind process, which is independent from social institutions. Whether such laws of thought can be applied in social settings in the same way that they are applied in natural sciences has been the object of a heated debate, famously initiated by Hume with his fact-value/is-ought distinction. Although the purpose of the paper is not to get into the details of the debate, it should be nonetheless noted that even for traditional logicians like John Stuart Mill the 'mathematical inexactness' of the humanities and the social sciences is not a conviction to unscientificity. For Mill "whenever it is sufficient to know how the great majority of the human race or of some nation or class of persons will think, feel, and act, these propositions are equivalent to universal ones. For the purposes of political and social science this *is* sufficient."[34] Likewise, in his Novum Organum, Francis Bacon insisted that his method is applicable to both normative and factual issues alike.[35]

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[29] Koen Raes, Legalisation, Communication and Strategy: A Critique of Habermas' Approach to Law in Kahei Rokumoto (ed), *Sociological Theories of Law* (New York University Press 1994) 395.
[30] Ibid.
[31] Ritchie (n 2) 12.
[32] Stanley Jevons, *Elementary Lessons in Logic: Deductive and Inductive* (MacMillan and Co. 1948) 1.
[33] The three primary laws of thought are for Jevons the Law of Identity (whatever is, is), the Law of Contradiction (Nothing can both be and not be) and the Law of the Excluded Middle (Everything must either be, or not be). Ibid 117.
[34] John Stuart Mill, *Philosophy of Scientific Method* (Hafner Publishing 1950) 313.
[35] Jonathan Cohen, *An Introduction to the Philosophy of Induction and Probability* (Clarendon Press 1989) 8.

3. The logic of absence in CIL: arguments from silence, arguments from ignorance and the fallacies thereof

Of particular relevance to international legal doctrine are the notions of acquiescence in custom formation and change, such as with territorial claims, as well as the so-called persistent objector doctrine. It could be the case that acquiescence be inferred from states' failure to react to certain claims. In relations among sovereign states, the lack of explicit protest often equals recognition, or at least formal non-objection to a certain legal state of affairs that is under law-creation. For instance, in the process of annexing a new territory, the exercise of formal protest means that the objecting State does not acquiesce in the situation, and that it has no intention of abandoning its territorial rights over the region. Conversely, when a State does not raise an objection, such silence may often be considered as acquiescence. A question that obviously arises is whether passivity or non-denouncement tantamounts always to implicit approval.

According to informal logic, absence and silence are not monosemic. I also need to clarify the following: by referring to the logic of absence, I distinguish -yet I mean both- a) silence qua non-expressed *opinio juris* and b) absence proper, qua the lack of (positive) state practice/action. The debate falls into the broader discourse relating to arguments from silence, or *argumenta e silentio*, as well as arguments from ignorance, or *argumenta ad ignorantiam*. These are normally classified as informal logical fallacies or weak arguments (weak types of induction) that are somewhat strengthened when evidence is produced at a later stage.

a) Misinterpretation of absence proper

In CIL, the element of absence qua inaction relates to the so-called 'negative' custom, which is very debatable, and particularly the evaluation of the consistency and uniformity of state practice as such. The absence of state practice may be thus deemed as producing inconsistencies, or breaching an existing custom. This, however, assumes a necessarily 'negative' evaluation of state inaction. There is a danger of a logical fallacy ensuing from this assertion alone.

Arguments from silence occur when someone interprets someone's silence as meaning anything other than silence, basically arguing that silence is either communicating implicit approval or disapproval. On the other hand, the fallacy *ad ignorantiam* occurs when someone argues in favor or against something, in our case state practice, because the opposite has not been proven to be the case.[36] In other words, something is said to be true because we do not know whether it is not true. The issue typically has to do with the so-called burden of proof or *onus probandi*: the ignorance fallacy is a dialectical maneuver aiming at unfairly shifting the burden of proof. Normally, in a legal debate between two parties, when one makes a claim that the other party disputes, then the party who makes the claim or assertion has the burden of proof, i.e. needs to prove, justify or substantiate the claim.

The fallacy of ignorance occurs when the burden of proof is arbitrarily and unjustifiably reversed, i.e. shifted towards the party who disputes the claim. The fallacy of ignorance assumes that something is the case because it has not yet proved to be false or vice versa. This is essentially a false dichotomy providing for forced options, inasmuch as it excludes the possibility that the truth is simply unknowable, i.e. not necessarily true or false, or that there has been insufficient investigation of the matter.

A typical example in most legal traditions is the presumption of innocence: there is a benefit of assumption, i.e. the accused is presumed to be innocent until, and if, evidence is produced to the contrary. Those who are accused of committing a crime are not burdened with proving themselves innocent. One

[36] Benjamin McCraw, Appeal to Ignorance in Robert Arp, Steven Barbone and Michael Bruce (eds), *Bad Arguments:100 of the Most Important Fallacies in Western Philosophy* (Willey Blackwell 2019) 106.

can never shift the burden of proof, which generally rests on the one who sets forth a claim. In criminal proceedings, it is the prosecutor who must show, beyond reasonable doubt, that the accused person is guilty. Not providing adequate evidence of innocence is irrelevant to the verdict. Therefore, an *ad ignorantiam* fallacy of the type "the defendant is guilty because he could not prove his innocence" would never stand in a criminal court. As we will see later on, in international customary law the fallacy *ad ignorantiam* occurs when there is a judicial misinterpretation of the absence of evidence, i.e. instances of state practice, and is normally tightly connected to the fallacy of silence.

From the above it follows that the **lack of evidence, i.e., in our case, state practice, is not necessarily neutral.** There are times when the absence of evidence may prove or disprove a claim. In that case, however, one needs to take into account the context of the case: suppose that John needs to rent an apartment in Groningen, Netherlands, but he needs to make sure that the house has no cockroaches. He hires a specialist who, after investigating the apartment, reaches the conclusion that it does not have any swarms or cockroaches or other insects. The lack of evidence in this case is not neutral. In the evaluation of evidence, the authority that makes a certain claim is taken into account. Moreover, although it appears as though we have a typical case of argument *ad ignorantiam*, the truth is that the negative inference (absence of cockroaches) is based on a positive evaluation of evidence. A fallacy *ad ignorantiam* occurs when there is no evidence and no proof whatsoever is offered for the claim, i.e. when one argues that there are no cockroaches in the apartment simply because they have not seen any. The argument that there is no God simply because one cannot see Him, and vice versa, the argument that there is God because the atheists cannot disprove His existence, are both arguments from ignorance, and thus informal fallacies.

b) Misinterpretation of silence

We have seen that arguments from silence occur when someone interprets someone's silence as meaning anything other than silence, basically arguing that silence is either communicating implicit approval or disapproval. Generally, when we are dealing with a silent authority (i.e. a State) we should ask ourselves: would the silent authority have known about the claim and consciously chose to remain silent? Is the silent authority definitely aware of the claim? Is the silent authority most likely to be honest about the claim? Do we have a complete record of everything written/done by the authority? Is this record true and reliable record, and not just a presumption based on lack of evidence? If the answer to any of the above questions is negative, it is quite possible that we are dealing with a fallacious argument from silence. However, even if we answer in the affirmative, even a good argument from silence is a weak argument that should be treated as inconclusive or uncertain when no other evidence is provided.

From the perspective of informal logic, the argument from silence is also tightly connected to the relation between negation and belief. Let us assume that someone does hold a certain belief or *opinio juris*. Is it monosemic or could it express various modalities? Indeed, there are various modalities governing the belief-universe, a misunderstanding/misapplication of which could generate logical fallacies and lead to distortions. For instance, there are the so-called internal and external negations of belief, and thus, *opinio juris*. Let us diagnose the fallacy:

1. *John believes that God does not exist. (Internal negation)*
2. *John does not believe that God exists. (External negation)*
3. *John believes that God exists.*

These three examples depict the so-called withhold/deny fallacy.[37] The fallacy is to read 1 and 2 as meaning the same, whereas according to informal logic 1 entails 2, but not vice versa. Accordingly, the denial of 3 is sometimes wrongly taken to be 1 (case of false alternatives), whereas the contradictory/true denial of 3 is 2. **In other words, one's denial to hold a belief does not affirm that one holds the opposite belief. Not believing does not amount to disbelieving.** This is what distinguishes agnosticism from atheism: the choice between belief and disbelief is not a forced choice: there is a third way, the way of withhold or non-belief. In everyday argumentation, it is quite often the case that we commit the withhold/deny fallacy for the sole reason that the practical consequences are seemingly indistinguishable. However, that would only make sense if the object of belief was entirely factual/practical rather than conceptual. Generally, the occurrence of the withhold/deny fallacy also produces the fallacy of false alternatives: i.e. a State either accepts a regional custom or not.[38] There is no in-between. **The fallacy of false alternatives in CIL has been formally incorporated in legal doctrine via the Lotus principle, as it manifests itself in the Kosovo advisory opinion, among others**. Let us assume that the assertion 'Anna believes in ghosts' is 'Ag'. The variations of negation can be further symbolized as those contained in the box.

Ag

A-g

-Ag

-A-g

The legal positivist eagerness to evaluate and attach negative meaning to silence has its roots in the Wittgenstenian, contextual and consensual origins of legal positivism, assumed in both Kelsen's and HLA Hart's theories, and the subsequent rejection of metaphysics, i.e. the premise that there is no a-contextual, a-consensual meaning –essentially meaning outside communitarian semiotics. Therefore, even silence has to be socially meaningful. Apart from the short-lived principle of terra nullius, what is rather prominent in legal positivism is the social semantic thesis. Contextual meaning and social use are the foundations of late Wittgentstein's language-game theory, which has had a significant impact upon legal positivist thinking.[39] The Wittgensteinian logic of language dictates that the lack of context and social use deprives words (and even entire sentences) from their concrete meaning and renders them completely nonsensical.[40] Indeed, Wittgenstein's ultimate point is precisely that there is no essential or acontextual meaning, and, consequently, should we attempt to examine the meaning of a word merely intellectually, i.e. independently of context and social use considerations, then we end up seeking the meaning *in the realm of subjectivity and the psychological*.[41] Wittgenstein employs the terms 'nonsense', 'nonsensical' and 'unintelligible' in order to describe words that lie outside a concrete context.[42] Although he does not contest that words bear a certain, abstract meaning, he argues that the latter can be grammatically and semantically asserted only in use.

Both Hans Kelsen and H.L.A. Hart have embraced social context, albeit in different ways. Kelsen follows Austin in stressing "the primary character of the concept of duty in relation to that of right."[43] To be a bearer of a right means to either have a right to act in a certain way, or to have a right which imposes a certain obligation to someone to behave in a certain way.[44] Kelsen stresses that "[t]o say

[37] Jonathan Adler, 'Belief and Negation' [2000] 20 (3) Informal Logic 207-222.
[38] Ibid 212.
[39] *See* generally Hans Kelsen, *What Is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays* (University of California Press 1971) 277-8; Alexandre Lefebvre, 'Law and the Ordinary: Hart, Wittgenstein, Jurisprudence' [2011] 154 Telos 99.
[40] Wittgenstein uses the paradigm of 'obeying a rule'. This sentence, he argues, cannot be meaningful, without actual practice: "to *think* one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it." Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell Publishing 2009) 81.
[41] James Conant, 'Wittgenstein on Meaning and Use' [1998] 21 Philosophical Investigations 239.
[42] Ibid 229.
[43] Kelsen (n 39) 276.
[44] Ibid 277.

that someone has a right to behave so, may only mean that he has *no* duty to behave otherwise."[45] Freedom, on the other hand, can be only conceptualized as negation of duty and thus absence of external, social constraints. This suggests that other persons (and the state as well) are under the obligation not to disturb the various expressions of freedom.[46] The Kelsenian philosophy on rights and freedom has found its way into the mainstream through the classical, doctrinal distinction between 'positive' and 'negative' rights. According to this dichotomy, positive rights correlate with duties of the State for positive action, whereas negative rights correlate with a general obligation for noninterference from the part of the State and its citizens alike.[47] All this is another expression of the withhold/deny fallacy.

The richness of belief: There is also the problem of belief itself. Let us also take as a given that a State is an entity that can be conceptualized as a Leviathan who thinks and reasons, which is of course not the case, so the induction is already arbitrary so to speak. The State is an enormous political-bureaucratic machine, and so one may naturally wonder how many beliefs by state-agents, legal advisors, and high-ranking officials need to coordinate towards a certain belief or idea. Whose belief is of greater value, if so? How many views are considered enough to formulate the so-called *opinio juris* as a belief-reservoir? Or, even more profoundly, how will these individual beliefs be measured, attested and evaluated? Should we resort to official archives? Either official or unofficial communications? General Assembly Resolutions? How intense or strong should the negation or affirmation be in order to qualify as a positive or negative belief regarding the perceived bindingness of a norm? And what about plain indifference? What type of formality should be attached to this set of beliefs? Moreover, we cannot simply assume that a certain belief - *opinio juris* is always in full awareness.

The richness of silence: Accordingly, we, as international lawyers, may indeed have to deal with either conscious silence or unconscious silence: intended or unintended silence. Should we assume that there are no variations in silence itself? What if silence qua the consciously or unconsciously omissive passage of time is not semantically homogenous throughout (the silent) time, i.e. transforms into something semantically different at some point, given new circumstances? Judge Sørensen in the *North Sea Continental Shelf* noted "[i]n view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of other governments."[48]

Some of these questions have been addressed by the ICJ but most of them have not. For instance, in the 1951 *Fisheries* case, the ICJ seems to have taken into deeper consideration the context of British silence and ruled that "[t]he notoriety of the facts, ... Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her (straight baseline) system against the United Kingdom."[49] Accordingly, in the North Sea Continental Shelf Cases, the Court stated: "[w]ith respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, *provided it included that of States whose interests were specially affected*."[50] Normally, however, the evaluation of silence is much more superficial and narrow. In the *Military and Paramilitary Activities in and Against Nicaragua*, the Court ruled that *opinio juris* may also be deduced from the attitude of States towards certain General Assembly

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[45] Ibid 277-8. Emphasis added.
[46] Ibid 278.
[47] Joel Feinberg, '[from] Social Philosophy in Patricia Smith (ed), *The Nature and Process of Law* (Oxford University Press 1993) 71; Alan Gewirth, *The Community of Rights* (The University of Chicago Press 1996) 31.
[48] Judge Sørensen's dissenting opinion, *North Sea Continental Shelf Cases* [1969] ICJ Reports 242 (ICJ).
[49] *UK. v. Norway* [1951] ICJ Reports 117 (ICJ).
[50] *North Sea Continental Shelf Cases* [1969] ICJ Reports 3 (ICJ). Emphasis added.

resolutions.[51] This was confirmed in the *Nuclear Weapons* advisory opinion.[52] In the Lotus case, the Permanent Court of International Justice deduced from the freedom of the seas' principle that "vessels on the high seas are subject to no authority except that of the State whose flag they fly".[53]

4. Lack of formal rationality and recourse to persuasive argumentation

Habermas asserts that law has its own system rationality, which is basically a Weberian, formal rationality to the extent that "it is structured according to standards of analytical conceptuality, deductive stringency, and rule-oriented reasoning."[54] For Habermas, due the scarcity of inductive arguments (which are the only means for the production of new information and truth-values) the procedural-decisionistic character of law reduces the rationality discourse and the striving for discursive truth and reason to a mere analytical and superficial testing of consistency.[55]

The lack of formal rationality in international legal reasoning has led to persuasive- teleological argumentation. Argumentation is a mode of discursive expression and interaction "characterized both by the nature of the goals being pursued (an alteration of the opinions, attitudes, or behavior of the audience), and by the nature of the means put to use (a discourse presenting characteristics of a certain rationality, able to accommodate certain criticisms, and whose form tends to result from a specific structure, namely an argument)."[56] Argumentation is teleological, in the sense that the person or agency producing the argument aims at a certain conclusion, and is thus characterized by a certain 'argumentative orientation' towards the preferred conclusion. Generally, an argument serves three main purposes: a) to establish a truth by giving proof or justification, b) to refute or criticize and c) to provide an explanation.[57] Argumentation is mostly of linguistic value, and is often paralleled to the concept of "justificationanism', while "argumentative behavior is always motivated to a certain extent by the anticipation of a disagreement or an objection, and that consequently, whether it be monological or dialogical, it is intrinsically polemical."[58]

In this spirit, the ICJ has developed several techniques of superficial, persuasive argumentation, teleologically governed by the *non liquet* principle, while often aiming at the containment of international crises, or the effective resolution of international disputes. For instance, in the *Burkina Faso/Mali Frontier Dispute*, and without any substantive justification, the ICJ made a leap and asserted the general scope of the *uti possideti juris* altough at that time the principle had only been applied in the context of Latin America and Africa: "[i]t is a *general principle*, which is logically connected with the phenomenon of the obtaining of independence, *wherever it occurs*."[59] In the *Land, Island and Maritime Dispute* the *uti possideti juris* was extended to offshore islands and historic bays and in the *Territorial and Maritime Dispute in the Caribbean Sea*, to the territorial sea.[60] No substantive justification was sought in the *Construction of a Wall* case, where the ICJ asserted that the right of peoples to self-determination is a

[51] *Nicaragua v United States of America* [1986] ICJ Reports 14 (ICJ).
[52] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Reports 226 (ICJ).
[53] *France v Turkey* [1927] 10 A PCIJ Publications (PCIJ).
[54] Teubner (n 28) 429.
[55] Jürgen Habermas, *Legitimation Crisis* (Polity Press 1988) 105.
[56] Deniz Apothéloz, Pierre-Yves Brandt and Gustavo Quiroz, 'The Function of Negation in Argumentation' [1993] 19 Journal of Pragmatics 23-38.
[57] Ibid 29.
[58] Ibid 24.
[59] *Burkina Faso v Republic of Mali* [1986] ICJ Reports 554 (ICJ) para 20.
[60] *Nicaragua v Honduras* [2007] ICJ Reports 659 (ICJ).

right *erga omes*.[61] At no stage did the Court examine the practice and *opinio juris* of states. Indeed, it is quite often the case that the Court simply 'asserts' the rules of customary international law.

In more 'extreme' cases, it is not just the lack of justification but also the emergence of serious rationality deficits that affect international legal reasoning. This often occurs due to the semantic abstractness of absence and silence in international relations, the indeterminacy of which allows playing with words, doing more 'magic' argumentative tricks, while serving essentially political purposes. A characteristic example of this is the *Asylum* case,[62] where the ICJ aimed at containing the global expanse of a regional custom in Latin America, namely a regional customary rule requiring a host state to grant safe passage from the embassy where a political refugee has sought diplomatic asylum to the Asylum State. In order to suppress the international distillation of the regional custom, the ICJ reversed, without any substantive justification, its settled jurisprudence and ruled that, where a regional custom was concerned, state silence in the face of an emerging regional practice meant that States' *opinio juris* was to object/protest to the emerging rule. This assertion, however, ran counter to the general, customary law presumption that states have to raise objections if they wish to avoid being bound by an emerging custom. A year later, in the *Fisheries* Case,[63] Norway had attempted to claim ocean areas by mapping them through "straight baselines", drawn from points along its coastline, and asserted that the enclosed areas were exclusively Norwegian. Norway's argument was also based on Britain's lack of protests, which according to Norway meant that Britain had waived its rights by not objecting. However, the ICJ asserted that Norway's straight baselines were not against international law, for the additional reason that "[t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it."[64]

It seems that the ICJ rulings regarding the formation of CIL are particularly troublesome, and, with the exception of regional CIL, they favor aggression and pro-activeness in staking claims, while other states' absence or silence is, as a rule, taken as acquiescence or implicit approval. However, by not making use of substantive arguments, the ICJ's argumentation techniques often lead to irrational or even absurd results. A typical example is the Kosovo advisory opinion, where the ICJ committed, among others, typical informal logic fallacies due to *argumenta e silentio*, as well as *argumenta ad ignorantiam*.

First, the ICJ implicitly applied the Lotus principle, and reformulated the legal question. Instead of examining whether unilateral declarations of independence are in accordance with international law, the Court, without providing any substantive justification for this choice, decided to examine whether international declarations of independence are forbidden under international law, **thus substantially changing the question, while at the same time committing the fallacy of false alternatives.** Moreover, the judicial argument did not entail any substantial evaluation of evidence of state practice, *opinio juris*, or any substantial evaluation of absence or silence, but merely took note of the historical fact that:

> During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law

[61] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Reports 136 (ICJ).
[62] *Colombia v Peru* [1950] ICJ Reports 266 (ICJ).
[63] *United Kingdom v Norway* [1951] ICJ Reports 116 (ICJ).
[64] Ibid 138.

> of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. **The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases...** For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.[65]

The ICJ examined the general law applicable to the case before it and asserted that there is no general rule of international law—either treaty law or customary law—that prohibits declarations of independence and that "[i]n no case […] does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law."[66] Judges Yusuf and Simma criticized the Court's conclusion on the ground that the Lotus Principle is an outdated doctrine and the silence in international law should be understood and interpreted more broadly. Judge Simma asserted that according to the Lotus Principle "restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order."[67] He criticized the Court for being too formalistic in equating "the absence of a prohibition with the existence of a permissive rule" and drew the attention to "the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts."[68] The advisory opinion on Kosovo received robust criticisms and extensive commentaries from both the judiciary and the international legal scholarship.

We have seen that arguments from silence occur when someone interprets someone's silence as meaning anything other than silence, basically arguing that silence is either communicating implicit approval or disapproval. Again, when we are dealing with a silent authority, such as a State, we should ask ourselves: would the silent authority have known about the claim and consciously chose to remain silent? Is the silent authority fully aware of the claim? Do we have a complete record of everything written/done by the authority? Is this record true and reliable, and not just a presumption based on lack of evidence? If the answer is "no" to any of the above, it is quite possible that we are dealing with a fallacious argument from silence. On the other hand, the fallacy *ad ignorantiam* occurs when someone argues in favor or against something, in our case state practice, simply because of lack of evidence, and not because of a positive evaluation of the absence of evidence.

In the Kosovo advisory opinion, the ICJ committed both fallacies. Without any substantial argumentation and with the ultimate goal to solve the Kosovo puzzle, the ICJ construed the controversial perceived intent argument, i.e. the argument that the authors of the declaration of independence did not seek to act within the constitutional framework of the interim administration for Kosovo (i.e. as the

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[65] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Reports 403 (ICJ) para 79.
[66] Ibid.
[67] Declaration of Judge Simma, para 2.
[68] Ibid, para 3.

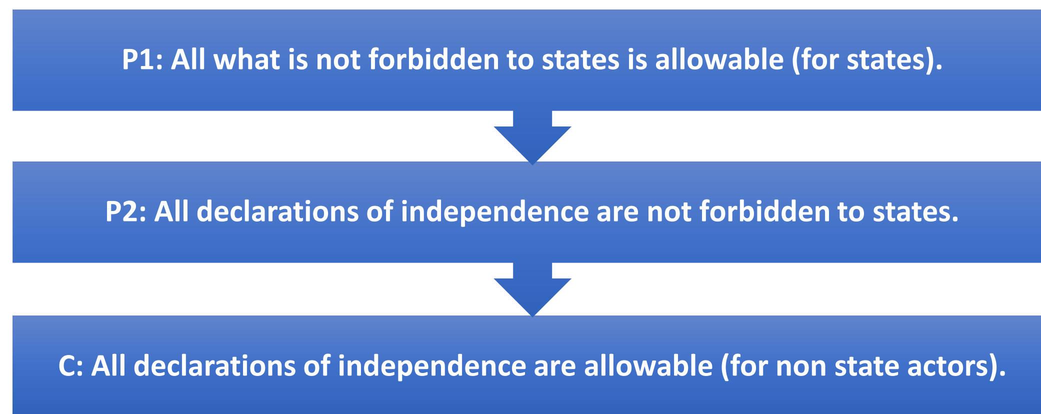
Assembly of Kosovo), but instead "acted together in their capacity as representatives of the people of Kosovo."[69] In particular, the ICJ held that "the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order."[70] Regarding the Serbian constitutional order, the ICJ concluded that the constitutional laws of Serbia were not applicable insofar as the object and purpose of the 1244 Security Council Resolution was to establish a temporary legal regime that would supersede the Serbian Constitution.

Apart from the erroneous interpretation of silence and absence, the ICJ also committed an important syllogistic fallacy. Inference, or formal inference, is the logical process of understanding what is implied in a certain proposition; the process of deriving general or particular propositions, on the basis of something previously assented to, namely the "derivation of one proposition, called the Conclusion, from one or more given, admitted, or assumed propositions, called the Premise or Premises."[71] The objective of inference is the objective of reasoning: the examination of the validity of a statement by reason of certain facts or statements from which it is said to follow.[72] According to John Stuart Mill, "[t]o infer a proposition from a previous proposition or propositions, to give credence to it, or claim credence for it, as a conclusion from something else, is to *reason*, in the most extensive sense of the term."[73] Inference could be either mediate or immediate. Immediate inference is the process of reasoning whereby the conclusion is drawn directly from one proposition, whereas mediate inference requires more propositions to reach a conclusion.[74]

Syllogism is the narrow concept of mediate inference, namely the inference for the completion of which we necessarily employ a medium or middle term. The term 'syllogism' derives from the Greek words *σύν* (together) and *λόγος* (thought) and means the bringing together in thought of two Propositions in order to compose a third proposition, commonly referred to as Conclusion. For logician William Minto, "[t]he main use of the syllogism is in dealing with incompletely expressed or elliptical arguments from general principles."[75] It is often the case where elliptical arguments are put forward, also known as enthymemes, whereby one premise is explicit and the other suppressed, namely held in the mind.[76] In this case, the purpose of the syllogism is practical: to expose the implications of the hidden premises in the most explicit, convincing and undeniable way possible, and challenge what is otherwise considered to be self-evident.

To return to the judicial syllogism on the legality of unilateral declarations of independence, we may deconstruct the judicial syllogism of the ICJ as follows:

[69] [2010] ICJ Reports 403 (ICJ) para 109.
[70] Ibid para 105. Emphasis added.
[71] William Minto, *Logic Inductive and Deductive* (John Murray 1915) 146.
[72] Mill (n 34) 109.
[73] Ibid.
[74] Minto (n 71) 146.
[75] Ibid 209.
[76] Ibid.



From the above scheme one immediately notices that the problem with the judicial syllogism does not only rest with the fallacious interpretation of absence and silence in international law according to the Lotus Principle but also with a serious syllogistic fallacy. The conclusion of the deductive judicial syllogism is logically unsound because it does not follow from the premises. The syllogism suffers from the logical fallacy of equivocation. Equivocation is not a formal fallacy but a verbal or material fallacy, which implies that the same word or phrase is used in two different ways. The predicate term 'what is allowable' has a dual meaning: in P1 it means 'allowable for states' whereas in C it means 'allowable for non-state actors'. This is a typical sophist fallacy: 'an elephant has a trunk; a car has a trunk; therefore, an elephant must be a car'. This is equivocation. The rationality crisis is camouflaged because the judicial critique (i.e. the declarations, separate and dissenting opinions) focuses on the interpretation of silence. What the Court apparently intended with the examination of State practice was to reach, by means of inductive inference, a definite conclusion with regard to the existence or not of a negative custom, namely a prohibitive rule vis-à-vis unilateral declarations of independence. In the absence of such a prohibitive rule the Court would have then concluded, on the basis of Lotus, that unilateral declarations of independence are not forbidden. However, the Court stopped short of ascertaining such a customary law and merely addressed state non-practice. However, absence of state practice alone does not lead to a negative custom and, as such, is not a formal source of international law. The judicial examination of the missing *opinio juris* would have produced a very different conclusion.

Again, the ICJ employs superficial, teleological argumentation. It is interesting to note that the unilateral declaration of independence question was treated differently at the municipal level, which of course makes perfect sense given the national interests at stake and the desired end-result. The most pertinent cases are a) the *Texas v. White* case on the secession of Texas from the United States,[77] b) a series of constitutional cases that were brought before the Constitutional Court of the Socialist Federal Republic of Yugoslavia by the constituent republics on the constitutionality of their secession,[78] and c) the landmark case on the reference regarding the secession of Québec in Canada.[79]

In the landmark case on the reference regarding the secession of Québec, the Supreme Court of Canada asked the following question: "Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National

[77] *Texas v. White* [1869] 74 U.S. 700,
[78] Such as *MiSIjenje Ustavnog suda Jugorlavije o suprotnosti amandmana ZX-XC nu ustav SR Slovenije a wtavom SFRJ* [1990] Sluibeni List SFRY, God XLVI, Broj 10, 23.2.1990, 593; *Odluka o oceniivaniu ustavnosti deklaraciie o suverenosti driave Republike Slovenije* [1991] Sluibeni List SFRJ, God XLW, Broj 23, 3.4.1991, 452. *See* Peter Radan, 'Secession and Constitutional Law in the Former Yugoslavia' [2001] 20 (2) University of Tasmania Law Review 197-199.
[79] *Reference Re Secession of Quebec* [1998] 2 SCR 217 (Can).

Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?" and "In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or Government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?"[80]

The Court concluded, after consulting with the *amicus curiae,* that there is no right of unilateral secession under international law, except where a 'people' is governed as part of a colonial empire; where a 'people' is subject to alien subjugation, domination or exploitation; and possibly where a 'people' is denied any meaningful exercise of its right to self-determination within the state of which it forms part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state."[81] As with the *Texas v. White* and the Yugoslav constitutional experience, the Supreme Court of Canada gave precedence to the constitutional framework. Emphasis was placed on a set of constitutional principles, such as the principles of federalism, democracy, constitutionalism, the rule of law and the respect for minorities.[82] The Court rejected the view that Québec, on the basis of the existing international and constitutional principles, is entitled to secede unilaterally from Canada. Nonetheless, the Court argued that a clear majority vote in favor of secession could confer to the province of Québec the necessary legitimacy to engage with the other participants of the federation in multilateral discussions towards a constitutional change of its status.[83] Accordingly, in case of a positive referendum, the other participants of the federation would have the obligation to enter such negotiations.[84] In the Court's view the legitimate interests of all parties to the federation can only be reconciled at the political level.[85] With its emphasis on the 'continuous' process of constitutional discussions among the members of the federation the Court essentially alluded to the existence (and political necessity) of a horizontal *contrat social* among the peoples of Canada as a source of legitimacy for the federal constitutional order.[86]

5. Conclusion

The predominance in international legal reasoning of superficial argumentation techniques produces serious rationality crises in the judicial treatment of CIL crises that cannot be always contained. Such rationality deficits can also lead to legitimation crises in the Habermasean sense, which, in conjunction with the rationality deficits, produce systemic destabilization and credibility damage to the international legal doctrine.

Unlike the political concept of legitimacy, the Habermasean concept of legitimation has a systemic connotation. In a legitimation crisis "the legitimizing system does not succeed in maintaining the requisite level of mass loyalty while the steering imperatives taken over from the economic system are carried through."[87] Although Habermas focuses on the economic aspect, his concepts are broad and therefore applicable to a wide range of situations. In particular, he connects the concept of legitimation deficits to the incapacity of the administration "to maintain or establish effective normative structures to

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[80] Anne F. Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned: Legal Opinions Selected and Introduced by Anne F. Bayefsky* (Kluwer Law International 2000) 23.
[81] Daniel Turp, Québec's Right to Secessionist Self-Determination: The Colliding Paths of Canada's Clarity Act and Québec's Fundamental Rights Act in Julie Dahlitz (ed) *Secession and International Law: Conflict Avoidance-Regional Appraisals* (United Nations Publications 2003) 186.
[82] Ibid 183.
[83] Ibid 184.
[84] Ibid 185.
[85] Ibid 186.
[86] Peter Oliver, Canada's Two Solitudes: Constitutional and International Law in Reference Re Secession of Quebec in Stephen Tierney (ed) *Accommodating National Identity: New Approaches in International and Domestic Law* (Kluwer Law International 2000) 81.
[87] Habermas (n 55) 46.

the extend required."[88] A broad interpretation of the concept of 'administration' can encompass other types of authority such as the judiciary, international legal institutions etc.

A legitimation crisis arises when a system undergoes changes that "cannot be met by the existing supply of legitimation."[89] The existence of rationality deficits increases the need for legitimation, namely systemic justification; [90] the need for the (legal) system to appeal to a concrete legitimizing basis for the explanation of derogations, exemptions, *ad hoc* solutions or whatever argumentation games and gaps cannot be justified by virtue of the normative structure of the system itself or some generalized imperative of system maintenance, such as, in the case of law, a state of emergency. Such systemic justification is not considered necessary, or at least urgent, in instances where there is a rationality surplus that compensates for the legitimation deficit and vice versa.[91] This is normally not the case in international law and particularly CIL.

In the Kosovo advisory opinion the rationality deficit is neither counterbalanced nor compensated by a legitimation surplus but instead metastasizes into a legitimation crisis precisely because it cannot be systemically justified on the basis of some existing international legal norm or legitimate exception. The Court's *ad hoc* solution for Kosovo "cannot be met by the existing supply of legitimation."[92]The legitimation deficit and the judicial interventionism of the ICJ in the Kosovo advisory opinion have been pointed out by Judge Tomka, who in his Declaration argued that "[t]he legal régime governing the international territorial administration of Kosovo by the United Nations remained, on 17 February 2008, unchanged. What certainly evolved were the political situation and realities in Kosovo. **The majority deemed preferable to take into account these political developments and realities, rather than the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint."[93]**

For Habermas, it is an endemic structural/functional necessity that any system must make itself "as far as possible, independent of the legitimating system."[94] In the area of international law this is achieved through the 'mediatisation' of law, which relieves the system from "permanent questioning" and, thus, detaches law as a medium from inquiries into the legitimacy of its internal mechanisms.[95] This functional autonomy is achieved through the imposition of a strategic, procedural rationality, which, however, leads to the 'colonization' of the life world and induces "pathological, alienated social forms."[96] Although law as a medium is significantly detached from permanent questioning, "law as an institution requires a legitimation of legal norms and procedures by reference to valid authority and consensual rightness of decisions."[97]

In international law, a rationality crisis becomes a legitimation crisis when there is, for instance, a demonstrated judicial or scholarly incapacity to respond to legal problems by virtue of some justification that a) transcends a particular case, b) is intrinsic to the legal system and c) is construed logically, i.e. by virtue of specialized rules of deductive thought "which rely on a highly logical systemization."[98] The absence of any of these three elements produces "modern state interventionism."[99] Similarly to the

[88] Ibid 47.
[89] Ibid 48.
[90] Ibid 58.
[91] Ibid 93.
[92] Ibid 48.
[93] Declaration of Judge Tomka, para 35. Emphasis added.
[94] Habermas (n 55) 69.
[95] Koen Raes, Legalisation, Communication and Strategy: A Critique of Habermas' Approach to Law in Kahei Rokumoto (ed) *Sociological Theories of Law* (New York University Press 1994) 395.
[96] Ibid.
[97] Ibid.
[98] Trubek (n 26) 227.
[99] Teubner (n 28) 443.

concept of 'administration' that we examined above, the concept of 'interventionism' must also be understood broadly, i.e. not only as state or governmental interventionism, but also as **judicial or academic interventionism**. The Asylum case and the advisory opinion on Kosovo depict such rationality and legitimation crises in the Habermasean sense. The ICJ resorted to judicial interventionism due to its incapacity to perform a valid (and also legitimate) deductive syllogism, i.e. provide a syllogism/legal justification that would transcend the particular case in order to respond to Kosovo's claim of self-determination, remedial secession etc. This can be further personified as a credibility challenge to the international legal scholarship and the judiciary who have produced or reproduced the fallacies. A social corollary of this systemic challenge is, inevitably, a profound asymmetry between normative standards and the "interpreted needs and legitimate expectations of members of society."[100] The asymmetry between what is legally regulated and what is legitimately expected produces a cultural crisis and favors the development of anomic behavior by groups and peoples whose rights are left indeterminate.

Anomic and legitimation crises are not sustainable in the long run. According to the Habermasean theory of legitimation, when the legitimation deficits cannot be subsumed under a rationality surplus or an imperative of system maintenance (e.g. a state of emergency), then fundamental changes need to take place.

[100] Habermas (n 55) 48.