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# High Stakes and Persistent Challenges – A Rejoinder to Klabbers and Augsberg

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**Abstract**
In this separate rejoinder to Jan Klabbers' and Ino Augsberg's comments to the articles in the symposium on *New Legal Realism in International Law* (*Leiden Journal of International Law*, Volume 28:2, 2015), we respond from the point of view of the European New Legal Realism (ENLR) as propounded in our initial contribution to the symposium. Agreeing with Ingo Venzke who wrote in his introduction to the symposium that 'stakes are high' in the debate over international law and methodology, we argue that both Klabbers and Augsberg, each in their own way, fail to take sufficiently seriously the ENLR challenge to doctrinal scholarship. We argue that Klabbers underestimates the evergreen and persistent character of this challenge when he portrays the current push for New Legal Realism as merely a whimsy fashion wave. And we argue that Augsberg's essentially Kelsenian defence of doctrinal scholarship is insufficiently robust because it inherits the excess epistemological liberalism of its underlying Neo-Kantianism.

**Key words**
Alf Ross; Hans Kelsen; legal realism; Max Weber; Pierre Bourdieu

## 1. Introduction

We would like to first thank Gregory Shaffer for taking the initiative to organize last issue's symposium on international legal realism and the editors of the *Leiden Journal of International Law* (LJIL) for giving space, in the spirit of the journal, to methodological and epistemological reflection on international law (IL). Special thanks also go to the two commentators, Jan Klabbers and Ino Augsberg, for responding to the articles included in the symposium. While we share much ground with the other contributors to the symposium, we have opted to write a separate rejoinder to the critics. The reason is that our suggestion of a European New Legal Realism (ENLR) in some important ways deviates from the overall idea of International New Legal Realism, as particularly advocated by Gregory Shaffer, as a revival of American Realism.[1] We locate instead the roots of ENLR in the persistent call from key European thinkers, for more than a century, to develop a rigorous science of law involving

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1 G. C. Shaffer, 'The New Legal Realist Approach to International Law', (2015) 28 LJIL 189.

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empirical studies of how legal norms are created, interpreted, and given force. Our focal point is thus epistemology in terms of the *possibility of a science of law*, which differs from the more pragmatist concerns of the US variant.[2]

As we explain in our original piece, there is an important but largely overlooked thread in European scholarship on law, which connects Max Weber, Alf Ross, and Pierre Bourdieu to contemporary scholars of IL.[3] These authors have in common the proposition that to make (international) law intelligible, one needs to transgress the conventional and ultimately ill-founded distinction between the internal and external dimensions of law and instead construct a comprehensive science of law involving both. They also agree that legal science as doctrinal studies of law, even if persistently practised by large (legal) communities across the globe and of great significance to society at large, has problems with its epistemological foundation. As Weber cautioned a century ago, '"Empirical" validity can be ascribed to both "juristic truth" and "juristic error" in exactly the same degree'.[4] What makes for the claim of validity in law is not a scientific premise, but rather what the institutionally differently situated legal actors tend to internalize in terms of axiological validity. In other words, law certainly has an empirical existence and is of great significance to society – that is what makes it such a key object of scientific inquiry – but neither empirical existence, nor societal importance can be equated with scientific foundation.

Through the concept of empirical validity, ENLR provides a framework that accommodates the so-called external and internal dimensions in a single more complex analysis of (international) law.

It does so by making the practice of law and how it constructs its particular argumentation and logics an object of empirical inquiry *in combination* with an analysis of those societal structures which make possible the claim of legal autonomy and the associated production and reproduction of law as a set of *complexes of maxims* – the *corpus juris*.[5] While this enables ENLR to liberate itself from the dominant formalism of legal scholarship which emphasizes the claimed autonomy of law (a conceptual claim also at the heart of Augsberg's rejoinder), it also, crucially, enables the analysis to avoid the kind of instrumentalism and associated reductionism, which has made law merely a tool of domination (what Klabbers somewhat surprisingly seems to charge realism (and interdisciplinary studies of law more generally)).

Against this brief restatement of our basic project, in what follows we first respond to Klabbers particularly with regard to his skepticism about interdisciplinarity in international law and the identification of the empirical object, and then to Augsberg focusing on the essentially Neo-Kantian character of his defence of the possibility conditions of doctrinal studies of law.

2 Ibid.
3 J v. H. Holtermann and M. R. Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible', (2015) 28 LJIL 211.
4 M. Weber, *Critique of Stammler* (1977), 129.
5 Y. Dezalay and M. R. Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law', (2012) 8 *Annual Review of Law and Social Science* 436.

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## 2. Response to Klabbers and the politics of radical doubt

It is well known that Klabbers is no great fan of interdisciplinary studies of IL. In a number of previous pieces, he has cautioned against the hostile takeover of the doctrinal study of IL by outsiders.[6] According to Klabbers, interdisciplinarity is often merely a thin disguise for taking over one discipline by another, typically social science making inroads into IL. In his latest piece, the position remains largely unchanged and he moreover does not hide his fatigue with yet another claim of interdisciplinary empirical studies of law. *Plus ça change, plus c'est la même chose* seems to be the mantra.

Klabbers' somewhat blasé stance is entertaining but not well suited for genuine debate. His casting of alternative theoretical approaches merely as fashions rather resembles a one-size-fits-all dismissive strategy against any perceived challenge to established positions in IL. Fashions by definition come and go, and seeing theories merely as such makes it tempting to simply rely on time as the biggest healer instead of engaging seriously with the theoretical arguments on their merits.

Most importantly, Klabbers' lack of direct engagement with the overriding argument of the special issue makes him overlook how deeply *unfashionable* the call for realism is, perhaps especially in the European version that we are outlining in our paper.[7] In Klabbers' logic, Weber, Ross and Bourdieu would probably each in their own right count as perfect candidates to be 'the newest new thing' in the academy (although we would claim that e.g. Weber is no Gramsci). Our point in putting them together, however, is precisely to emphasize the fundamental congeniality between them which cuts across all the decades and geographical distances between them and, hence, across all the many academic fashions that they each might be grouped under. What they have in common, we argue, is in particular a fundamental challenge to the epistemic soundness of traditional doctrinal IL scholarship. This challenge constitutes a century-long persistent realist push against the fundamental assumptions on which this doctrinal scholarship rests. Any perceived novelty, we submit, relates only to the continual refinement and empirical sophistication of the same fundamental approach over time.

Klabbers' main substantive criticism in the commentary is his claim that all 'five papers contain very little on what "empirical" stands for, despite the proclaimed empirical orientation of the new legal realists'.[8] This is contestable. In our particular case, he seemingly misses that we spend the main part of the article elaborating how the notoriously tricky concept of legal validity can be interpreted as a genuine object of empirical study in contradistinction with the traditional doctrinal conception of validity (i.e. as empirical versus axiological validity respectively). This may indeed be only an ostensive definition but it clearly draws on the prima facie plausible and generally recognized distinction between *is* and *ought* as at least one rough way of

6 For example J. Klabbers, 'Counter-Disciplinarity', (2010) 4 *International Political Sociology* 308; J. Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations', (2009) 23 *International Relations* 119.

7 This is however also generally true for the American variant. Please see rejoinder by Gregory Shaffer in this issue.

8 J. Klabbers, 'Whatever Happened to Gramsci? Some Reflections on New Legal Realism', (2015) 28 LJIL 469

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drawing the boundary between objects that can be empirical and objects that cannot. To the legal positivist this however seems to be a continuing source of confusion as legal positivism tends to regard the *ought* as the *is* and vice versa.

Klabbers is of course right that a turn to empirical studies of law is no silver bullet and requires serious methodological reflection. We agree that what constitute relevant empirical material differs between approaches. But we find it difficult to recognize the claim that an 'impression can be as empirical as an occurrence' in our approach.[9] Indeed, Klabbers seems to wrongly equate empirical studies with quantitative methods. The use of focused interviews with the actual agents of law and contextual readings of case law, which Klabbers rightly highlights as trademark of ENLR studies,[10] is a result of a deliberate research strategy for precisely attaining the goals of ENLR. These methods, in combination with other methods, are deployed to enable a single more complex analysis, which explores the construction of legal expressions of validity in combination with an assessment of those specific historical social structures which give force to those very expressions – hence the contextual readings of judgments and the need to deploy a set of empirical methods for understanding those contexts.

Appreciating this specific logic of inquiry requires taking seriously the theoretical starting-point for that precise inquiry – and that is in this case realism. We sympathize with Klabbers' conclusive comment on the need for communication between different approaches. That however also implies facing the arguments head on even when disagreeing.

## 3. Response to Augsberg: Neo-Kantian extravaganza

Augsberg, like Klabbers, has previously called for caution with regard to the so-called empirical turn in legal studies.[11] Augsberg, however, is different from Klabbers, in that he engages more directly the premises of the ENLR argument. Interestingly, in so doing, he chooses a line of argument that de facto acknowledges the evergreen philosophical character of the challenge from ENLR to doctrinal studies of IL (and doctrinal law more generally), and thus, indirectly, contradicts Klabbers' attempt to reduce New Legal Realism to yet another idiosyncratic academic fashion.

More specifically, Augsberg seems to think that in rejecting the possibility condition of traditional doctrinal legal science, the ENLR position should somehow imply that law does not *exist*, that it is not *real*, and that there is no meaningful *concept* of law.[12] Since law is undeniably real and we clearly have a notion of it, ENLR must

9 Ibid.
10 Ibid.
11 I. Augsberg, 'Von Einem neuerdings erhobenen empiristischen Ton in der Rechtswissenschaft', (2012) 51 *Der Staat* 117.
12 '[I]f we want to analyse how (international) law is produced and what effects it has, the first thing we have to do is to acknowledge that law exists in its own distinct mode of reality. Otherwise there would not be anything left to analyse. Our object of analysis would simply disappear' (at 463); '[E]ven an empiricist should accept that the legal illusion is real' (at 463); and '[Y]ou cannot talk about the production and the effects of law without having a concept of law' (at 461). I. Augsberg, 'Some Realism About New Legal Realism: What's New, What's Legal, What's Real?', (2015) 28 LJIL 457.

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by definition be mistaken according to Augsberg. As it happens, this is essentially a repetition of the core argument, which Kelsen levelled on different occasions against both Weber[13] and Ross,[14] and which claims that any valid empirical science of (international) law (in Kelsen's terminology: 'sociological jurisprudence') must necessarily presuppose a valid doctrinal legal science ('normative jurisprudence', i.e. Kelsen's pure theory of law):

> Only by referring the human behavior to law as a system of valid norms, to law as defined by normative jurisprudence, is sociological jurisprudence able to delimit its specific object from that of general sociology; only by this reference is it possible to distinguish sociologically between the phenomenon of legal and the phenomenon of illegal behavior, between the State and a gang of racketeers.[15]

The fundamental problem with this argument, however, is that it confuses epistemology with ontology and semantics. Nothing in our reconstruction of the ENLR position excludes that (international) law exists (is practised) or that we have access to a meaningful concept of such law via observing its practices. It does not, moreover, exclude that a doctrinal study of these phenomena exists which claims to be scientific, i.e. whose practitioners believe themselves to be engaged in a sound, epistemologically justifiable academic discipline. Quite the contrary. ENLR and all of its precursors manifestly rely on these assumptions right from the outset. It and they only deny that these practitioners are right in believing their undertakings are necessarily scientifically grounded in a sound way.

This is, admittedly, a quite radical, critical position to swallow for doctrinal scholars. If, however, we are to take seriously the epistemological question having to do with the possibility of knowledge – and we claim in the article that the European legal realists have indeed always taken this question very seriously – we should at least take seriously the logical possibility that this question can be answered in the negative. We should keep open the conceptual space necessary for such a reply.

Kelsen's and now also Augsberg's essentially Neo-Kantian line of argument in effect denies that this conceptual space exists. They claim that the very possibility of, in Bourdieu's words, taking the doctrinal 'science of law' as the object of a rigorous empirical legal science necessarily presupposes that the former is in fact epistemologically justified and sound. But this is fallacious – if only for the simple reason that it would literally make empirical study of pseudo-science conceptually impossible.

Moreover, neither Kelsen, nor Augsberg seems to realize the *ad absurdum* lurking just around the corner, and which, in spite of the prominent pedigree, brings out the more general problem with the epistemological liberalism inherent in Neo-Kantianism. If the very possibility of taking any actually or previously practised belief system as the object of empirical study implies that that belief system *is*

13 H. Kelsen, *General Theory of Law and State* (2009), especially Part One, XII. Normative and sociological jurisprudence.

14 H. Kelsen, 'Eine "Realistische" und die Reine Rechtslehre. Bemerkungen zu Alf Ross: On Law and Justice', (1959–60) 10 *Österreichische Zeitschrift Fur Offentliches Recht* 1.

15 See Kelsen, *General Theory of Law and State*, *supra* note 13, 177.

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a valid science this would not only imply that dogmatic theologies of virtually any belief system from Christianity to Scandinavian Neopaganism are bona fide sciences. It would imply handing out free transcendental possibility conditions to any putative subject of empirical (pseudo-) science studies thus making such studies the epistemological equivalent of the box from which Schrödinger's cat always comes out alive.

This is of course not to say that the doctrinal study of (international) law necessarily *is* pseudo-science. But it does mean that there are no Neo-Kantian shortcuts in epistemology. And this applies equally to Kelsen and to Augsberg. Defenders of traditional doctrinal IL scholarship will therefore have to engage head on with the arguments of both a priori and a posteriori nature launched by proponents of ENLR and others against the foundations of doctrinal studies of IL as legal science.

To be fair, Augsberg does provide an additional constructivist argument against ENLR, which focuses more specifically on the self-presentational character of law:

> What marks a decision off as legal from the legal point of view, that is to say, what qualifies it as "right" or "wrong" in the normative sense, is not the decision itself. It is the reasoning given to the decision in the aftermath. Law re-constructs rather than constructs itself. What we call law comes "after the fact", thus creating its own causes.[16]

While undeniably given an elegant literary twist in Augsberg's piece, this argument essentially invokes the distinction between the context of discovery and the context of justification, and claims that empirical approaches can only study the former. We agree with Augsberg that this distinction is important and too often overlooked in legal scholarship. However, it is not clear to us why, unlike the context of discovery, the context of justification should necessarily be impermeable to empirical studies – especially if, unlike Augsberg, we resist the temptation of awarding agency to 'the law' and instead focus on the actual agents of this reconstruction. In fact, we suggest in our original piece that both elements – context of justification and context of discovery – are central empirical objects to ENLR if we are to provide a single more comprehensive analysis of the phenomenon of law.

Augsberg does seem to anticipate this kind of rather disenchanted reply from the realist side but in so doing, he arguably falls back on the Neo-Kantian/Kelsenian argument already discussed above. That being said, these criticisms should not hide the fact that Augsberg provides a sophisticated attempt at defending traditional doctrinal scholarship, yet we disagree that it rebuts New Legal Realism's critique of the very same position.

## 4. Concluding remarks

In his brief editorial to the symposium on New Legal Realist approaches to IL Ingo Venzke remarks that the debate is all about shaping 'assessments of what amounts to good practice in international law. *Stakes are high*'.[17] In our view, Venzke points

16 See Augsberg, *supra* note 11, at xxx.

17 I. Venzke, 'International Law and its Methodology: Introducing a New Leiden Journal of International Law Series' (2015) 28 LJIL 185, at 187 (emphasis added).

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to something very important here. Stakes are indeed high. Yet, it is perhaps this assumption that Klabbers and Augsberg do not agree with as they both argue that traditional normative doctrinal IL scholarship is basically epistemologically sound – if not sounder than competing ideas. And either because we can rest assured that doctrinal legal scholarship always buries its undertakers (Klabbers), or because the widespread belief among doctrinal IL scholars in the epistemic soundness of their own discipline is thought to imply its own justification (Augsberg). This, however, is not likely to put realism to rest. Distinctively unfashionable as it seemingly is, at least if we use the two commentators as empirical benchmark, European Legal Realism will continue to play the role as the devil's advocate for purpose of a epistemologically sound science of international law.

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