Can Kelsen's Legal Positivism Account for International Regime Change?

by

Christoforos Ioannidis

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Graduate Supervisory Committee:

Peter de Marneffe, Chair
Aaron Fellmeth
Peter French

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ABSTRACT

In this discussion I will state fundamental principles of Kelsen's Legal Positivism in International Law and explain four problems with his theory. I will then propose two suggestions in the light of which Kelsen's theory is modified in this discussion and explain how these two suggestions address the four problems and help the theory account for regime change. Finally, I will address possible objections to the view advanced in this discussion.

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Chapter 1

INTRODUCTION

Legal Positivism is the view that whether a given norm is legally valid depends on its sources, not its merits. In Kelsen's Legal Positivism, the sources of legal validity are higher legal norms. For Kelsen, law is a self-contained normative, hierarchical system, in which the validity of every norm depends on a higher norm. Ultimately, the validity of a legal order depends on the highest norm, namely the Grundnorm. Since the validity of a legal order depends on this highest norm, the Grundnorm is not only the highest norm in the hierarchy of the legal order, but also its fundamental norm. Therefore, the absence of the Grundnorm deprives the entire legal order of validity. In other words, the Grundnorm of a legal order makes the legal order valid.

Regime change is the substitution of one legal order by another. As stated above, according to Kelsen, the Grundnorm is the foundation and the reason of validity of the legal order and is its highest norm. Therefore, the Grundnorm is sine qua non for a valid legal order to exist. Therefore, since regime change means the substitution of one legal order by another, in the case of regime change, the Grundnorm of the previous legal order somehow disappears and respectively the Grundnorm of the new legal order appears. Therefore, the premise that a valid legal order is necessarily based on the Grundnorm implies that there is no regime change without a change of Grundnorm. (This is so according to Kelsen's theory,

but the modifications of Kelsen's theory in this discussion will change this premise regarding the Grundnorm of the international legal order, as I will explain below). But how can one Grundnorm be replaced by another? Kelsen holds that the international legal order is superior to national legal orders. A new legal order derives its validity from its recognition as a valid legal order by international law. The international law makes this judgment based on the principle of effectiveness. Thus, if a national legal order is, by and large, effective, then it is valid according to international law.

If so, then four questions arise. First, how can Kelsen's Legal Positivism account for international regime change? Like any legal order, the international legal order is based on a Grundnorm, which I will call the international Grundnorm. As explained above, substitution of one legal order by another, i.e. regime change, necessarily entails the substitution of the Grundnorm of the previous legal order by the Grundnorm of the next legal order. At the level of the national legal orders, the substitution of the previous Grundnorm by the next one is explained by recognition of the new Grundnorm and the new legal order by the international legal order which is superior. If no legal order is superior to the international legal order, how can Kelsen's Legal Positivism account for international regime change?

Second, how does Kelsen's theory account for change in custom? In other words, how does Kelsen's theory recognize the validity of a change in custom?

Custom has to do with how states have behaved in the past. Specifically, custom is state practice, i.e. actual consistent practice of states, and 'opinio juris', i.e. the acceptance by states of that practice as law. Kelsen maintains that the content of the Grundnorm of the international legal order is 'states ought to behave as they customarily behaved'. This essentially means that states have to behave as they behaved in the past, so states cannot behave differently opposite to previous practice, i.e. opposite to already existing custom, so states in effect cannot change custom. If the content of the international Grundnorm is 'states ought to behave as they customarily behaved', then how is Kelsen's theory able to account for the validity of a change in custom?

Third, the premise of supremacy of international law over national law is inconsistent with a national government having the power to reject international law, which is also implied by Kelsen's view. Kelsen maintains that in international law, law can arise from injustice (*ex injuria jus oritur*). This is extremely important as most readers of international law are used to learning the opposite principle as a principle of international law, namely that 'law does *not* arise from injustice' (*ex injuria jus non oritur*), or, in other words, that illegal acts cannot create law. This principle, 'law does *not* arise from injustice', entails e.g. that an illegal invasion of a state by another state does not give the invading state any legal rights to the land it occupied. However, Kelsen disagrees. He maintains that this principle is not valid in international law, and thus he holds that in international law, law does arise from injustice (*ex injuria jus oritur*). He also

maintains that an effective legal order is a valid legal order (principle of effectiveness). Therefore, in our previous example, if a state illegally invades another state and the invading state, with pure power, effectively establishes its own legal order, or effectively expands its legal order to the land it now occupies, then the legal order of the invading state in the recently occupied land is valid. The invading state occupied the land and effectively established a legal order not by exercising a legal right, but with illegal use of force, with pure power. Thus, it seems to follow that 'whoever has the power makes law'. But if that is the case, then how can the international legal order be superior to national legal orders, when a national government might have sufficient power to reject international law? Some explanations and exemplifications of this problem are the following. How can international law be supreme, if a national government can invade another state contrary to international law and therefore affect international law? How can international law be supreme, if it is at least possible that a clause of the constitution of a domestic legal order is applied by the courts, expected to apply by the people of that legal order and generally accepted as a valid legal rule by that legal order, even though it is in direct opposition to international law (let us say to a clause of an international treaty to which the state in question is party)?

Fourth, how can externally imposed regime change ever be legal? If Kelsen's account for regime change is committed to the principle that 'might makes right', then it seems that external regime change, namely regime change performed after conquest or invasion by other states or international

organizations, is always and everywhere permitted as long as an agent has the power to change the regime. However, this is in conflict with positive law, and in particular with Article 2(4) of the UN Charter. Kelsen's view, being a Legal Positivist view, cannot ignore positive law, especially this fundamental legal clause of a very important international treaty, namely the UN Charter. Indeed, international lawyers and other self-consistent positivists, maintain that in international law, sovereign states have an absolute right against the external use of force to effectuate regime change under Article 2(4) of the UN Charter. If that is the case, how can externally imposed regime change be legal?

In this thesis I will argue that two suggestions proposed by the New Haven School can address these four problems. The two suggestions are the following. Firstly, the Grundnorm of international law is the principle of world public order based on human dignity. Secondly, international law can be regarded as including not only custom and international treaties, but also stable patterns of expectations of politically relevant actors which are grounded in a belief in someone's authority and the threat of coercion. I believe that these two suggestions can address the four questions.

Firstly, how can Kelsen's Legal Positivism account for international regime change? According to the first suggestion, the Grundnorm of international law is 'Actors of international law ought to act in a way so as to facilitate a world public

order based on human dignity'. The international Grundnorm does not change, it just *is*. What can change is the interpretation of the international Grundnorm, but not the international Grundnorm as such. Thus, if international regime change takes place, what will have happened in reference to the Grundnorm is not that the international Grundnorm will have changed, but the *interpretation* of the international Grundnorm will have changed. Since the international Grundnorm cannot change and it remains 'idle', there is no need for a superior legal order that will account for a change of the international Grundnorm. The fact that the international Grundnorm does not change is not a problem when accounting for regime change. On the contrary, the different interpretations of the unchangeable international Grundnorm can account for international regime change. This obviously departs from the necessary implication of Kelsen's theory mentioned above, namely that 'no regime change without change of Grundnorm' and this will be addressed below. The non-changeability of the international Grundnorm is a necessary commitment of the international order being the supreme international legal order.

Secondly, how can Kelsen's theory account for the change in custom? In other words, how can Kelsen's theory explain how and why one customary rule can be validly replaced by another? Since, according to the first suggestion, the international Grundnorm does not maintain that states ought to behave the way they customarily behaved, a valid change of custom can be accounted as follows.

Custom can validly change because the international actors change opinions and attitudes as to what world public order based on human dignity is. As already mentioned, the international Grundnorm does not change, it remains ‘idle’, but the interpretation of it can change.

Thirdly, how can the international legal order be superior to national legal orders, when a national government might have sufficient power to reject international law? Here, the second suggestion relating to the sources of international law is useful. Kelsen follows the traditional approach as regards the sources of international law: international law is treaties and custom. According to my proposal, in the light of the New Haven School, international law is not only treaties and custom, but also expectations of politically relevant actors which are grounded in a belief in someone’s authority and the threat of coercion. When a national government rejects international law, Kelsen’s traditional sources of international law fail to maintain the supremacy of international law over national legal orders, because a national legal order disobeys international law. But by adding stable patterns of expectations of politically relevant actors to the list of sources of international law, the judge of international law will be able to maintain the supremacy of international law in such cases. Judges will do so by looking for new evidence in expectations of politically relevant actors. If, for example, these expectations have the content that, despite a contrary norm or clause of international law, a clause of the US Constitution is valid, then this is

reflected in international law. The expectations of politically relevant actors that this constitutional clause is valid, is evidence that international law allows this clause to be valid. Therefore, with this broader list of sources of international law, the judge can maintain the superiority of international legal order over national legal orders.

Fourthly, how can externally imposed regime change ever be legal? The first suggestion of my proposal is to change the content of the international Grundnorm from ‘states behaving as they customarily behaved’ to world public order based on human dignity. Human dignity is no longer merely an issue international law ought to address, but it must be regarded as the very purpose of the international legal order. It is in the light of this purpose that Article 2 (4) of the UN Charter is to be interpreted. This clause does grant a right to states, but this right is not absolute. Therefore, states do have a right against external use of force to effectuate regime change based on Article 2 (4), but if the target state is obviously operating against a world order based on human dignity, thus clearly against the very purpose of the international legal order, then the purpose of the international legal order is a justification that can override Article 2 (4) and grant other states and/or international organizations the right to intervene in order to perform the kind of regime change that will bring about a national legal order based on human dignity. According to this interpretation, might does not make

right. It is rather the Grundnorm that makes externally imposed regime change right, merely in some cases.

Chapter 2

HANS KELSEN'S LEGAL POSITIVISM - THE GRUNDNORM

In order to make the explanation of how Kelsen accounts for regime change clearly understood, I will first explain the hierarchy of law in Kelsen's Legal Positivism. According to Kelsen, the legal validity of a law, and the legality of an act prohibited or allowed by such law, depends on the validity of the source of that law according to a higher law. Thus, law is hierarchical. What determines the legal validity of a law and legality of an act depends on the validity of that law according to a higher law. Kelsen answers the question of validity with what can be called a 'bottom-up' approach. That is to say, he starts from the lowest norms and asks the source of their validity and so on and so forth. To the question why an act of coercion, e.g. imprisonment of an individual, is a legal act, the answer is: because imprisonment has been prescribed by an individual norm, namely a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. The act of coercion and the statute can be called lower norms. Finally, this statute receives its validity from the constitution, since it has been established by the competent organ according to the process the constitution prescribes. The constitutional norms that describe how law is made are called higher norms. If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is historically the first and that was laid down by an individual usurper or by some kind of

assembly. The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of the legal order depends. This is the Grundnorm and it states that one ought to behave as the individual or the individuals who have laid down the first constitution have ordained.

In Kelsen's Legal Positivism, higher norms derive their validity from the Grundnorm. Therefore, the Grundnorm is the foundation of a legal order. Without this basic norm, there is no valid legal order. The Grundnorm itself is not a norm of positive law[1], so it is meta-legal. It is a norm which we presuppose when we interpret social relations in legal terms, when we speak of rights, duties, jurisdictions, etc. It is a hypothesis of juristic thinking, the fundamental condition under which our juristic propositions are possible. We may or may not accept this hypothesis because we may or may not interpret human relations as legal relations. We may consider them as cause and effect. However, if we consider them as legal relations, i.e. if we consider them as regulated by a legal order, then we presuppose that the historically first constitution, on which this legal order is established, is a binding norm, that people ought to behave in conformity with that constitution. The Grundnorm is a necessary condition, or a precondition, of any legal order. The Grundnorm is not a procedural norm. It is not itself a procedure. It does not explain how law is made. The Grundnorm is a value norm which poses a procedure for deciding what law is. The procedure for deciding

[1] Kelsen, Hans. 1952. *Principles of International Law*. New York; Rinehart & Company Inc. p. 411.

what is law are the higher norms mentioned in the previous paragraph. These higher norms are in the constitution, and presuppose the Grundnorm. The Grundnorm is a value norm and could at best be phrased as ‘We ought to obey the constitution’. Higher norms are procedural and dictate how the law is made. The Grundnorm itself is not procedural and it is a content-neutral norm. It is content-neutral because the Grundnorm itself does not tell us what the law is. The higher procedural norms, whose validity is derived from the Grundnorm, are the norms that will tell us what the substantive law is.

It is often stated that the constitution is the foundation of a legal order. This is true, in the sense that the constitution is the highest law of a legal order. Therefore, any law that is contrary to the constitution is not legally valid. However, it is wrong to assume that the constitution itself *is* the Grundnorm. The constitution is indeed the ‘backbone’ of a legal order and the legal order depends on its constitution, but the constitution itself *is* a law. For example, constitutional clauses that grant specific individual rights to people are themselves substantive law. (Therefore, it is correct to say that we have ‘constitutional rights’, i.e. substantive legal rights that are granted directly from constitutional clauses, regardless of laws, lower in the hierarchy, which may elaborate on the scope of these rights.) However, as stated in the previous paragraph, the Grundnorm itself is not a law. It is a meta-legal norm. Therefore, the constitution itself cannot be

the Grundnorm. The Grundnorm is a meta-legal norm that is a precondition of validity of the constitution.

Chapter 3

KELSEN'S ACCOUNT ON REGIME CHANGE

By regime change I mean the substitution of one legal order by another. Regime change can be brought about in several ways, either internal or external (or both). Internal regime changes are usually revolutions and coup d'états. External regime changes are interventions from international organizations, as in the case of the NATO intervention at Kosovo, or from other countries as in the case of the US/UK attack and occupation of Iraq. The ways in which regime change is brought about will not be discussed here. I will focus on regime change per se and how Legal Positivism can be modified in order to account for regime change. Every legal order is necessarily based on a Grundnorm. Therefore, all domestic legal orders have their own Grundnorm. With national regime change, i.e. with the substitution of one national legal order with another, the Grundnorm of the previous national legal order is replaced by the Grundnorm of the next national legal order. How does this happen?

Kelsen is a monist, which means he believes that the international legal order is a part of a universal order which also comprises all the national legal orders. The international legal order is superior to the national legal orders and it determines the validity of the national legal orders. Therefore, the international law is superior to national law. It is for this reason that if a legal order, even if through its constitution, violates international law, then this national order breaches

international law and is liable in international law. Since the international legal order is a *legal* order, it necessarily has its own Grundnorm. Since the international legal order is a superior legal order, the Grundnorm of the international legal order is superior to the Grundnorm of the national legal orders. The Grundnorm of the international legal order is superior because it is the precondition of a legal order that confers validity on all the other legal orders. Therefore, to avoid confusion, I will call the Grundnorm of the international legal order the *international Grundnorm*, and the Grundnorms of the national legal orders as *sub-Grundnorms*. National regime change means that one national legal order is substituted by another. Therefore, regime change is the substitution of one sub-Grundnorm by another.

What is the content of the international Grundnorm? Kelsen follows the same 'bottom-up' approach as in national legal order. He starts from the lowest norm within international law, namely the decision of an international tribunal. If we ask why the norm created by such a decision is valid, the answer is furnished by the treaty in accordance with which the tribunal was instituted. Then, if we ask why this treaty is valid, we are led back to the general norm which obligates the states to behave in conformity with the treaties they have concluded, a norm commonly expressed by the phrase *pacta sunt servanda*. This basic norm of international law is a customary norm. Therefore, the basic norm of international law is a norm which countenances custom as a norm-creating fact, and is

formulated as follows: the states ought to behave as they have customarily behaved. Customary international law, developed on the basis of this norm, is the first stage within the international legal order. The next stage is formed by the norms created by treaties. Therefore, according to Kelsen, the international Grundnorm is that the states ought to behave as they have customarily behaved.

Interestingly, it can be argued that Kelsen contradicts himself here. One the hand, the international Grundnorm is a meta-legal norm, a presupposition, which seems to suggest that it exists regardless of any empirical facts, but on the other hand, Kelsen, in the aforementioned 'bottom-up' approach, refers to empirical facts in order to find the content of the international Grundnorm. My conjecture is that Kelsen's reply here could be that the quest for empirical basis is not an ontological question, thus it is not about the existence of the international Grundnorm, but this empirical basis answers the epistemological question of how we come to find out what the exact content of the international Grundnorm is. In any case, this issue does not influence the view advanced in this discussion, because the view advanced here does not regard the international Grundnorm as being that the states ought to behave as they have customarily behaved.

Having identified the international Grundnorm, I will now continue to explain how Kelsen accounts for regime change. Kelsen accounts for regime change based on the principle of effectiveness. This is a principle of positive international

law according to which people ought to behave in conformity with a coercive order which is effective. It is implied in the rule usually formulated in the statement that according to international law an effective and independent government is the legitimate government of the state. That means that, according to international law, an actually established authority is the legitimate government, the coercive order enacted by this government is the legal order, a valid legal order, and the community constituted by this order is a state in the sense of international law, insofar as this order is, by and large, effective.

Parenthetically I would like to address here why the principle of effectiveness should not, in my view, be the international Grundnorm. Since the principle of effectiveness identifies the legal order that people in a certain area should obey, it is admittedly a very attractive candidate for the international Grundnorm. However, if this is so, then international law cannot escape the 'might makes right' problem: if the principle of effectiveness itself is the international Grundnorm, then invading a state in order for the invading state to impose its own effective legal order in the invaded state would be not only in accordance with the legal order, but also encouraged by the very foundation of the international legal order.

Kelsen's account of regime change is in accordance with the hierarchy of law, which is a key feature of his theory. His monism and the primacy of the

international legal order over national legal orders dictates that the international legal order is superior to national legal orders. This is a foundation of the claim that national legal orders are recognized as such by international law based on the principle of effectiveness. Focusing on the details, the following should be noticed: the legality of an action depends on the legal order that is in place at the time the action is performed. Therefore, when legal order A is in place and A is then replaced by legal order B, by an illegal action, e.g. coup d'état, revolution, or invasion by another country, the legality of the action that brought about the substitution of the legal orders must be judged in accordance with the legal order that was in place when the action was performed, namely legal order A. According to legal order A, this action is illegal. Besides, no legal order provides for its own termination. No constitution has an 'expiration date'. On the contrary, constitutions and the legal orders based on them are supposed to last forever. Admittedly, there have been voices arguing for the opposite. For example, Thomas Jefferson held that 'the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants' and seemed to welcome revolution, at least for certain reasons, e.g. in order to preserve liberty. Notably, it can perhaps be argued that what Thomas Jefferson meant is that a permissible revolution is one that supports liberty, provided that the rulers ignore liberty. Thus, it could be argued that if the legal order is of the kind that Thomas Jefferson suggests, i.e. the kind of legal order that preserves liberty, then revolution is not permissible. It may be the case that Thomas Jefferson meant that revolution is permissible only

to preserve liberty, when rulers fail to do so. In any case, for the sake of the argument I will suppose that Thomas Jefferson simply meant that there should be revolution every generation or so. Even if that is so, it can be seen as a realistic observation or even a moral command when rulers abuse their power, but not a legal rule. Revolution is not provided by the legal system. Revolution that invalidates the constitution is not provided by the legal order. Revolution is a fact of empirical reality and if it prevails, then it can replace the previous legal order – the principle of effectiveness will allow international law to recognize the new legal order. However, this recognition comes from the international legal order, not from the (previous) national legal order which is substituted. Constitutions and legal orders are supposed to last forever, regardless if national legal orders are in fact replaced, e.g. by revolutions. The reasons that terminate national legal orders are not reasons provided by the legal order. These reasons are factual, empirical, in no way legal. The question that inevitably arises is how can a new valid legal order (here, legal order B) arise from a violation of law? According to Kelsen's hierarchical theory, the answer could only be because a higher law allows it. This higher law is the international legal order which is superior to the national legal orders. A new legal order, namely legal order B, is established because it is regarded as a legal order by the higher legal order, namely the international legal order. A new sub-Grundnorm is established, namely the sub-Grundnorm of legal order B, as it is recognized by the higher international legal

order which is based on the international Grundnorm, which is superior to any sub-Grundnorm. However, there are number of problems with Kelsen's account.

In the introduction, I briefly stated the problems with Kelsen's account and stated two solutions that can address these problems. Having referred to Kelsen's Legal Positivism and explained how Kelsen accounts regime change, I will now explain the problems with Kelsen's account in more detail, present the solutions fully and explain more analytically how the solutions can address the four problems with Kelsen's account.

Chapter 4

PROBLEMS WITH KELSEN'S ACCOUNT

4.1. First problem: how can international regime change be accounted for?

The first problem relates to the international Grundnorm. At the national level, a new legal order can replace a previous one, and respectively the new Grundnorm of this new legal order can replace the previous Grundnorm of the previous legal order, because the international legal order, which is superior to national legal orders, recognizes the new Grundnorm and the new legal order. The sub-Grundnorms can change because the international legal order, based on the international Grundnorm, can justify the change. If it is true that:

a) the international legal order is superior to national legal orders, and

b) there is no legal order superior to the international legal order,

then one has to conclude that the international legal order is *the* supreme legal order. Respectively, since the international Grundnorm is the source of the international legal order, i.e. the reason for its validity, then the international Grundnorm is *the* ultimate norm. The change of sub-Grundnorms is justified by superior norms. Since the international Grundnorm is *the* supreme norm, then there is no norm that is hierarchically superior to it. So there is no norm according to which it could change. So the international Grundnorm can never change. Although this may not pose direct problems when thinking practically of

international law as accounting for the changing of national legal orders, I believe this issue poses a theoretical-philosophical problem.

The problem is that Kelsen's account of regime change seems to necessarily entail that an international regime change is conceptually impossible. For the sake of the argument, let us suppose that an international regime change does take place. Just like in a national regime change, whether the causes are internal or external is irrelevant. An international regime change could be brought about internally, namely by states, or externally, e.g. imposed by space aliens. The point is that there is no law or norm superior to the international Grundnorm that can justify its change. Therefore, if an international regime change does take place, Kelsen's theory will be unable to account for it, unable to justify it.

4.2. Second problem: how can Kelsen's theory account for change in custom?

As already mentioned, according to Kelsen, the content of the international Grundnorm is that the states ought to behave as they have customarily behaved. This content of the international Grundnorm makes the theory unable to account for the validity of a change in custom.

If the norm is that states ought to behave as they have customarily behaved and this norm cannot change, then it seems that states may not start behaving

differently from custom and states may not create opposite custom. This seems wrong. Let us suppose that it is a customary international rule that the exclusive economic zone of a state is two hundred nautical miles from its coast. Let us suppose that a significant number of coastal states have acted in accordance with this rule for purely practical reasons, e.g. because it was thought that all the marine sources of interest were within this zone. Let us suppose that with advancement of technology, states discover marine sources of interest beyond the two hundred nautical miles, up to three hundred miles. In cases where this causes no conflict, states change their behavior and start behaving in accordance to a new rule, according to which the exclusive economic zone extends up to three hundred nautical miles from the coast, in so far as this causes no overlap of exclusive economic zones, in the case of which states can only extend their exclusive economic zone only up to two hundred nautical miles. This is a simple and rational change of behavior of states and a change of state behavior that, other things being equal, everyone would accept as permissible. However, this is impermissible if the international Grundnorm is that states ought to behave as they have customarily behaved.

4.3. Third problem: how can the international legal order be superior to national legal orders, when a national government might have sufficient power to reject international law?

This problem relates to *ex injuria jus oritur* ('law arises from injustice'). Kelsen justifies regime change by clearly stating that 'Under general international law (i.e. customary law), the states are obliged to respect the territorial integrity of the other states; but a violation of this obligation does not exclude the change of the legal situation. The principle advocated by some writers – *ex injuria jus non oritur* ('a right cannot originate in an illegal act') – does not, or not without important exceptions, apply in international law.' Thus, according to Kelsen, when it comes to regime change, law can arise from injustice. If we add to this the principle of effectiveness according to which any effective legal order is a valid legal order, which Kelsen also accepts[2], it seems to follow that whoever has effective power, makes the valid law. Respect for territorial integrity of states is a customary rule, but based on the above two premises, one has to conclude that in case of an invasion and regime change, there are two outcomes: a) if the invading state fails to establish an effective legal order, the invading state is liable in international law for having violated the territorial integrity of the attacked state, and b) if the invading state is successful and imposes its own legal order in the territory that was previously a state, the invading state's legal order will be valid because it is effective. Therefore, the norm that seems to be observed here is that 'whoever has the power makes law'.

[2] Kelsen, Hans. 1952. *Principles of International Law.* New York; Rinehart & Company Inc. pp. 412-414.

If that is accurate, then monism must be rejected, because it is perfectly possible that a lower law will usurp a higher law through the exercise of power by the proponent of the lower law. The following example can illustrate this. Let us suppose that a constitutional clause of the US Constitution is in violation with international law. According to monism, international law is superior and therefore the US is liable to international law. Let us suppose that the US government ignores international law and insists in not amending the constitution in accordance with international law. Let us suppose that the American people expect the Constitution and not international law to solve their disputes and problems and the entire legal order of the US follows the Constitution instead of international law. Let us suppose that many other states follow the same trend with the same constitutional clause that is in violation of international law. In this example, a lower law, namely a constitutional clause, has usurped a higher law, namely the relevant international law that is being violated, through the exercise of power by the proponent of the lower law, namely the US. It seems that the foundation of the legal order is not that states ought to behave but that might makes right, as law is whatever power dictates. Besides, since *ex injuria jus oritur*, an illegal action or a norm contrary to valid legal norms becomes legal if enforced.

4.4. Fourth problem: no norm permitting external regime change

If Kelsen's account for regime change ends up being committed to the principle that might makes right, then it seems that external regime change is always and everywhere permitted as long as the agent performing the regime change has the power to do so. However, this is in contrast with positive law, and in particular with Article 2(4) of the UN Charter. Kelsen's view, as a Legal Positivist view, cannot ignore positive law, especially this fundamental legal clause of a very important international treaty, namely the UN Charter. Indeed, international lawyers and other self-consistent positivists, maintain that in international law, sovereign states have an absolute right against the external use of force to effectuate regime change under Article 2(4) of the UN Charter. If that is the case, how can externally imposed regime change ever be legal? What is the higher legal norm that allows it?

Chapter 5

SUGGESTED SOLUTIONS

Two modifications are suggested here that will change Kelsen's Legal Positivism significantly. However, this is not a substitution of Legal Positivism with an entirely different theory. I endorse Legal Positivism in the international realm, as well as Kelsen's monism. I agree with the primacy of international law over the national legal orders and believe that this indeed explains regime change: a new national legal order is valid because the higher international law counts it as valid. States do not make international law, but international law makes states. However, two important amendments of Kelsen's view are suggested as solutions to the four problems I have identified:

a) First, I propose that we understand the Grundnorm of international law to be the principle of world public order based on human dignity[3]. Public order means effective, peaceful and law-governed society. A society based on human dignity is one that is egalitarian, democratic and guarantees certain fundamental human rights.

b) My second proposal is that we expand the sources of international law. Kelsen's view of the sources of international law is the traditional view:

[3] McDougal, Myres, Lasswell, Harold, Reisman, Michael. 1967. The world constitutive process of authoritative decision. *Journal of Legal Education* 19 (253); pp. 403 – 437, p. 416. Also: Chen, Lung-chu. 1993. Perspectives from the New Haven School. *Proceedings of the Annual Meeting (American Society of International Law)* 87; pp. 407-411, p. 409 Stable URL: http://www.jstor.org/stable/25658754 accessed: 13/02/2012 15:56.

international law is international custom and international treaties. In this discussion, I am adding another set of rules that comprise international law, namely stable patterns of expectation of politically relevant actors that are grounded in a belief in someone's authority and the threat of coercion, along the lines suggested by the New Haven School. Although I endorse Legal Positivism in the international realm, the international legal order has one qualitative difference from the national legal orders: it is decentralized, or in any case, not as centralized as the national legal orders. Therefore, it is possible that a lower law will usurp a higher law through the exercise of power by the proponent of the lower law as illustrated in the example above with the US Constitution violating international law. Evidence of positive law in the international law most certainly includes custom and international treaties. It is now suggested that evidence of positive law also includes stable patterns of expectation of politically relevant actors that are grounded in a belief in someone's authority and the threat of coercion. This expansion of what counts as evidence of positive law in international law will consequently allow the international legal order to retain its superiority against national legal orders with no conceptual problems.

Before I move on to the solutions to the problems, I will explain the relation between the international Grundnorm, the constitution of international law, and

the particular international laws, e.g., stable patterns of expectations that constitute rules of law. International Grundnorm is the meta-legal norm which is the reason of validity of the ‘constitution’ of the international legal order and the international legal order in general. The stable patterns of expectations are a source of international law, like custom, treaties and general principles of law. There is no other direct connection between them, which is why they are two separate suggestions.

Chapter 6

SOLUTIONS TO THE PROBLEMS

6.1. The first problem: how to account for international regime change

According to the first suggestion, the Grundnorm of international law is not that 'States ought to behave the way they customarily behaved' as Kelsen suggests, but in the light of the New Haven School, the international Grundnorm is 'Actors of international law ought to act in a way so as to facilitate a world public order based on human dignity'. There is one qualitative difference between the international Grundnorm and the sub-Grundnorms. The latter Grundnorms can change, if the international legal order recognizes a new sub-Grundnorm in the place of a previous one, whereas the international Grundnorm cannot change because there is no legal order superior to the international legal order, no superior norm than the international Grundnorm that can justify a change of the international Grundnorm. The international Grundnorm does not change.

However, although the international Grundnorm as such cannot change, the *interpretation* of the international Grundnorm can change and that is exactly what can account for international regime change[4]. Thus, if international regime change takes place, what will have happened in reference to the Grundnorm is not that the international Grundnorm will have changed, but the interpretation of the

[4] As stated in paragraph 2 in the Introduction (page 1), this is a departure from the Kelsen's premise that regime change always necessarily entails change of Grundnorm.

international Grundnorm will have changed. The non-changeability of the international Grundnorm is a necessary commitment of the international order being the supreme international legal order. Different interpretations of the unchangeable international Grundnorm can account for international regime change. Indeed it could be hard to distinguish, on first glance, the difference between international regime change and international regime modification, but this will be addressed later on at the objections section.

Conceptions of world public order and especially human dignity change from time to time. Therefore, the international Grundnorm can account for international regime change. If states perform a regime change in international law – if, for example, the UN and the UN Charter cease to exist or are replaced by another international organization with a different charter as the League of Nations was replaced by the UN - then the international Grundnorm will remain the same. States will be acting in what they think is the best way to bring about a world public order based on human dignity.

Notably, if the international Grundnorm is, as Kelsen suggests, ‘states ought to behave as they customarily behaved’, then there is no room for interpretation. In such a case, the only way for a new international regime to be established is for the international Grundnorm to be substituted by another one. However, this is impossible since there is no superior Grundnorm than the international

Grundnorm, and there is no superior legal order than the international legal order, so there is no higher norm or legal order to recognize a new international Grundnorm.

Therefore, it seems that the first suggestion, namely the international Grundnorm being ‘states ought to act in such a way so to bring about a world public order based on human dignity’, addresses the problem of international regime change, a problem which cannot be solved by the international Grundnorm as stated by Kelsen.

6.2. The second problem: how to account for change in custom

We can also account for how changes in custom can be legally valid if we regard the Grundnorm of international law along the lines that I propose. Custom is a higher norm in international law, because it creates law. What custom is, i.e. what consistent state practice is, changes from time to time. Since the new international Grundnorm no longer maintains that states ought to behave the way they customarily behaved, the change of custom can be accounted for as follows. Custom changes because the international actors change opinions and attitudes as to what world public order based on human dignity is. This is an empirical claim and it can be supported by a few examples. In ancient times, enslaving the population of a territory that had lost a war and was occupied was not regarded as

a behavior contrary to human dignity. In the Hellenic world, it was well established that a victorious state had complete discretion over how to treat the soldiers and civilians of its vanquished enemy[5]. Xenophon states that 'there is an eternal law among all mankind, that whenever a city is taken in warfare, both the people and their possessions belong to those who captured the city,'[6] and Aristotle notes that 'the law is an agreement by which they say that the things conquered in war are the property of the conquerors.'[7] It is safe to say that these opinions and attitudes are no longer supported. Genocide and slavery, under any circumstances, are now regarded as behaviors that are contrary to human dignity. The international Grundnorm proposed in this discussion justifies the changes in custom provided that the changes are warranted by defensible interpretations of the international Grundnorm.

6.3. The problem of *ex injuria jus oritur* and primacy of international law

I will now turn to the problem of how international law could be supreme if it is true that wrongdoing can create (legal) justice. According to my proposal, another set of rules that comprise international law, apart from treaties and custom, is stable pattern of expectations about the behavior of politically relevant actors that is grounded in a belief in someone's authority and the threat of coercion. Thus, in

[5] Lanni, Adriaan. 2008. The laws of war in ancient Greece III Specific norms, Treatment of captives. *Law and History Review 26(3)*; http://www.historycooperative.org/journals/lhr/26.3/lanni.html accessed at April 10th 2012.
[6] Xenophon *Cyropaedia* 7.5.73 in ibid.
[7] Aristotle *Politics*, bk. 1, chap. 6, lines 6–7, 1255a6–8; see also Polybius 5.11 in ibid.

the example mentioned of the US constitutional clause violating international law, it seems possible to address the issue with, the new class of evidence of international law upholding the primacy of international law over national legal orders, which is necessary to account for regime change. The judge has now more evidence to use to determine what the law is. Apart from treaties and custom, the judge is authorized to search for stable patterns of expectations. Therefore, if it is obvious that in the US legal order there is a clear expectation that the US Constitution will prevail over international law and everyone expects it to do so, then international law reflects that, in order to retain its superiority. International law is seen as acknowledging the constitutional clause in question. According to Kelsen, the sources of international law are custom and treaties. Thus, the judge cannot use the expectations about the behavior of politically relevant actors as evidence for law and the judge can regard as international law only the norm of international law that in the example is being violated. Since the US keeps ignoring and violating international law by following their national constitution which violates international law, international law seems to be unable to receive obedience from national legal orders and thus international law seems inferior rather than superior to national legal orders. With my proposal, the judge can maintain the superiority of international law, because the norm of international law that is violated will be changed in the light of new evidence of international law, so international law will no longer be violated by the US constitution. International law will be changed in the light of new evidence of international

law, that being expectations about the behavior of politically relevant actors. The mere fact that international law might seem to change in the light of national law does not necessarily entail that international law is not superior to national law. Similarly, if in a domestic legal order a constitutional clause changes in the light of specific laws, the constitution is not regarded as inferior than the laws in the light of which the constitutional clause was amended. The supremacy of the constitution over the other laws – and the same can be argued here for international law in respect to national law – does not consist of what changes in the light of what. That said I will refer to primacy of international law over national law further on, when dealing with objection 7.3.

A sensible objection could be raised here. According to Kelsen, the legal order is a normative[8] self-contained order. Laws (specific laws, e.g. statutes) are norms because they prescribe or permit a certain human behavior. Law (legal order), is a normative order because it is a set of norms (laws) organized in a unit that we call normative order. Legal norms are issued by legal authorities and applied by the judges. According to Kelsen, judges only apply this specific kind of norms, i.e. legal norms. This is both a normative claim, i.e. it refers to how things should be, and a descriptive claim, i.e. it refers how things are. Therefore, Kelsen's Legal Positivism does not allow jurists to resort to non-legal norms when adjudicating a case and this makes a legal order a self-contained order. Judges can apply only positive law. However, expectations seem to be a psychological phenomenon.

[8] Kelsen, Hans. 1952. *Principles of International Law.* New York; Rinehart & Company Inc. p. 6.

Thus, identifying stable patterns of expectations seems to be a matter of psychological research rather than of legal reasoning; application of such psychological patterns in law seems to be application of psychological expectations, not application of legal norms. Therefore, this is in opposition with Kelsen's Legal Positivism, according to which law is a self-contained order and judges apply only legal norms.

Although I find this objection reasonable, it can be answered. Indeed, Kelsen believes that juristic science is a separate science, different from other sciences like psychology or sociology. When a judge is deciding a case, he is making/applying juristic science. A legal order is a self-contained order, and a jurist does not reach outside this order just like a psychologist does not reach for norms outside psychology. When deciding a case, a judge does not apply sociological, psychological or moral norms, but legal norms. Therefore, law being a self-contained order has to do with what rules the judge initially applies. However, this does not mean that the content of a norm that is applied cannot be non-legal. Custom is a good example. Kelsen agrees that the sources of international law are custom and treaties. Custom itself is consistent state behavior, which is itself not a legal norm. It is a law-creating fact and thus can create law. State practice is also a kind of behavior, which is often empirical, not legal (although it can sometimes be legal, e.g. in the case of legislative behavior). However, the application of a customary rule is not exceeding the self-contained

international legal order. The process a judge engages in when trying to identify whether a proposed norm is a norm of customary international law, is rather empirical ranging from actions of states to political statements rather than purely legal. How does Kelsen still maintain that the international legal order is a self-contained legal order?

The answer is that custom is a source of law because positive law states so. Article 38 (1b) of the Statute of the International Court of Justice (ICJ) states that the ICJ shall apply custom in the cases it decides. Judges engage in empirical research trying to identify whether a proposed norm is a norm of customary international law or not because positive law authorizes them to do so. In the international legal order, it is codified law that makes custom a source of law. In the contemporary international legal order in particular, according to Article 38 (1) of the Statue of the International Court of Justice (ICJ), the ICJ shall apply not only international conventions (point a) but also international custom (point b). Therefore, when the ICJ applies international custom in order to adjudicate a case, it is not using law as an empirical fact nor is it setting aside positive law in order to apply rules from empirical sciences. It is referring to custom in accordance with Article 38 (1) of the Statute, which is codified law. The judges are not free to set aside positive law and use any norms they like, e.g. ethical, social, or other norms. They are legally obligated to use only legal norms. Kelsen believes that a judge would be breaking the law if the judge set aside positive law and solved a case by

directly appealing to ethical norms without going through positive law[9]. Judges are legally obligated to use only legal norms. However, when legal norms authorize them to refer to non-legal norms or engage in empirical research, they are legally authorized and expected to do so, and this reasoning does not entail that the legal order is not a self-contained order. By engaging in empirical research, the judge of the ICJ is actually applying positive law, and in particular the Article 38 (1) of the aforementioned statute.

Similarly, it can be argued that an ICJ judge can resort to stable patterns of expectations through the same article. Article 38 (1) of the Statue of the ICJ, which states what rules the ICJ shall apply, states, at point d, that 'subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. Article 59 simply states that 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' From Article (1d) it becomes obvious that apart from treaties, custom and general principles of law (1 a-c), the ICJ can even refer to teachings of publicists. Admittedly, the wording of the clause gives these teachings a

[9] One could raise the question in what sense a judge is legally obligated to use only legal norms. I can see many kinds of obligations, e.g. legal and moral obligations, but I cannot see more than one sense of legal obligations, and I think Kelsen would agree with this. Legal obligation is an obligation, or duty, imposed by law, i.e. positive law. It is what positive law commands. Kelsen makes it clear that the legal and moral orders are independent and that the jurist applies legal norms. See e.g. Kelsen, Hans. 1952. *Principles of International Law.* New York; Rinehart & Company Inc. p. 431 'like law and morality, as two different and mutually independent orders', 'Just as the jurist ignores morality, …'.

secondary power compared to treaties and custom. Notably, the clause states that the teachings are ‘subsidiary means for the determination of the rules of law’. Thus, the judge is to apply rules of law, not teachings. Teachings are the way with which the judge can identify these rules. Similarly, ICJ judges can use the stable patterns of expectations not as a source of international law like treaties and custom, but as a subsidiary means to determine what the law is. ‘What the law is’ could mean, depending on the case, either what the meaning is of a clause of an international treaty, or what the content is of an international customary norm. Thus, when judges are trying to determine what the law is, and they detect relevant stable patterns of expectations, they can use Article 38 (1d) in order to be justified in regarding these stable patterns of expectations as evidence of international law that they can apply to the case.

In order for this argument to work, one would still have to subsume this in an interpretation of Article 38 (1d). First of all, if the judges are to look for stable patterns of expectations, one would inevitably have to ask whose expectations the judge is to refer to. The answer is the expectations of actors who are politically relevant, those who are in a position of relevant authority and can threaten coercion. In the example of the US Constitution, such authority, though perhaps not the only relevant one, would be the Supreme Court of the US (although they cannot really ‘threaten coercion’ since they have no police power).

The issue is now whether the people whose expectations the judges shall look for are the same people, that is, can be interpreted as being the same people, that Article 38 (1d) refers to. This clause refers to 'qualified publicists'. It is not even necessary to resort to a fancy teleological interpretation in order to regard politically relevant people in authority that can threaten coercion as being 'qualified publicists'. A grammatical interpretation alone can yield this result. According to the Oxford dictionary[10], the word 'publicist' has three meanings. From those three, the archaic meaning of the word is 'a writer or other person skilled in international law'. Heads of states, delegations of states to other states or international organizations, judges of supreme courts of the national legal orders, etc. are presumably skilled in international law. Therefore, these 'qualified publicists' can be the same people whose expectations the judge shall look for in order to determine what the law is. It is hereby suggested that the teachings of qualified publicists can be read as referring to, perhaps among other things, expectations of politically relevant actors that are grounded in a belief in someone's authority and the threat of coercion. In this discussion, I will not refer to what the ICJ has so far interpreted Article 38 1 (d) to mean. The argument is that, perhaps among other things, the term 'teachings of qualified publicists' could also be interpreted as meaning stable patterns of expectations of politically relevant actors.

[10] See Oxford University Press. Oxford Dictionaries http://oxforddictionaries.com/definition/publicist?q=publicist accessed at Mon April 9th 2012.

Therefore, just like when applying customary international law judges apply Article 38 1 (b), though they engage in empirical research to identify customary rules, similarly, in the cases when judges are to apply expectations for behavior of relevant actors as evidence of law according to my proposal, judges will apply Article 38 1 (d), though they will be engaging in a more or less research of a psychological reality.

It is important to note that the definition of international law remains a positive law definition. Indeed, stable patterns of expectations reflect a psychological reality and the judge may have to engage in a psychological research in order to identify them. However, when applying stable patterns of expectations, the judge technically applies Article 38, so it is through positive law, i.e. by applying Article 38 which is positive law, that a judge can arrive at such norms. Therefore, since the expectations of politically relevant actors are reached by applying positive law, in particular Article 38 1 (d), formally the definition of law remains a positive law definition.

6.4. The fourth problem: no norm permitting external regime change

My proposal also addresses the fourth problem. My proposal is to change the content of the international Grundnorm from ‘states behaving as they customarily behaved’ to world public order based on human dignity. As stated above, public

order means effective, peaceful and law-governed society. A world order is based on human dignity when it is egalitarian, democratic and guarantees certain fundamental human rights. Two world wars and instances of genocide have shown that a traditional international law that focuses only on states and international organizations has failed to attain universal effectiveness. The former totalitarian regime of the Soviet Union created concerns regarding the significance of fundamental individual rights in the international realm. Even after the fall of the Soviet Union, totalitarian regimes still exist, e.g. North Korea, but there are also instances of genocide and gross violations of fundamental human rights. The importance of not only states and international organizations but also individuals in the international legal order has been increasing for decades. This means that there is an increasing expectation that individuals become subjects of certain rights granted directly from international law, without the intervention of national legal orders being required to grant these rights to individuals. These rights can function as a shield of protection of citizens against their own states. Individuals are not seen merely as subjects to their states alone. Certain rights granted to them by international law protect individuals from their own states and restrict the actions that states can perform on their own citizens. Human dignity can no longer be regarded as just another issue international law ought to address but must be regarded as the very purpose of the international legal order.

This claim is much easier to accept if one accepts that states exist in order to protect the individuals under their jurisdiction, in other words, protecting individuals justifies existence of states. Traditionally, the historical reason why citizens in Europe would pay taxes to the state is because that state, often represented by the King, would provide protection to the people of its jurisdiction. The 'agreement' was that people pay taxes in order to receive protection. Protection was usually thought of as repelling a foreign army from invading. Although this has also very often been the case, especially in central and west Europe, it has become obvious that civilians are often in danger by their own governments and not merely by foreign armies. If, from this historical fact, one accepts that what justifies the existence of states is that they *protect* their citizens, then there is no justification for states when they deliberately *harm* their citizens. Of course by the term *harm* here, I do not mean any kind of harm. States harm their citizens in ways that are regarded as entirely permissible, e.g. imprisonment and other criminal punishment imposed by the justice system, obligatory military service for some citizens (usually males) which obviously restricts their freedom during their service, taxation is an economic harm, etc. By the term *harm* I mean impermissible gross violations of fundamental rights, mainly genocide and torture. When governments, namely the organs of the executive function, *harm* – in the way harm was just defined- their citizens, then other state organs, especially the organs authorized to perform the judicial function, namely the courts, are expected to be a safeguard against the impermissible use of force and cause of

harm to citizens by the governments. However, for several reasons, this is not always the case. When these safeguards fail to restrict governments from committing genocide and torture against their own citizens, or, even worse, if these other state organs positively support these impermissible actions of governments against their own citizens, then in the absence of any functioning safeguards, it is the entire state itself that *harms* – as previously defined- citizens. In such cases, one cannot expect from a state to protect the citizens of that state from the state itself, and since the international legal order is superior to the national legal orders, it does not seem absurd to hold that international law ought to protect individuals of a state from the state itself. Also, if the reason for the existence of states is the existence of a legal order that protects individuals, then by protecting the individuals, international law upholds such a legal order, and thus the states.

Chapter 7

OBJECTIONS

7.1. Vagueness of 'human dignity'

A valid objection is that 'human dignity' is vague. This is a valid objection as it is hard to imagine an absolute infallible authority on what is human dignity. However, this could be addressed by the New Haven School. What human dignity is and what specific actions and forms of behavior are in accordance with or violate human dignity can change from time to time and this can account for change in custom, as noted above. Thus, what could be asked is what most actors of the international community regard as the content of human dignity *at this time*. Supporters of the New Haven School maintain, reasonably so, that human dignity consists of certain 'bases'. These bases are minimum levels of goods that all people should have. If the international legal order guarantees that all humans have these minimum levels of some goods, then the international community successfully protects human dignity. One of these bases is a minimum level of physical and psychic well-being[11]. This base alone already makes the efficient prevention and termination of genocide and torture purposes of international law. Therefore, if prevention and termination of genocide and torture are the purpose of international law, then external regime change is justified, if the regime in power performs such atrocities. I am using the term 'purpose' in its ordinary

[11] McDougal, Myres, Lasswell, Harold, Reisman, Michael. 1967. The world constitutive process of authoritative decision. *Journal of Legal Education* 19 (253); pp. 403 – 437, p. 437.

sense: the reason why international law is necessary, apart from practical reasons, is to prevent gross violations of fundamental rights and especially to protect individuals against genocide and torture; the international legal order is seen as aiming at establishing a world public order based on human dignity. The new regime that is to be established is one which effectively prevents genocide and torture. Such a regime could be recognized as a state by the international legal order. Thus, in this reasoning, genocide and torture render the state that performs them illegitimate, so the international legal order which, as superior, grants states and their legal orders legitimacy can intervene to restore legitimacy and world public order based on human dignity, even if Chapter VII of the Charter of the United Nations does not authorize intervention.

However, there is a contradiction that still needs to be resolved. On the one hand, human dignity is what at a specific time the international actors decide that it is (relativism), whereas on the other there are certain bases that are content of world public order based on human dignity. Indeed, the New Haven School regards these bases to be fixed. Admittedly, the relativist position undermines the plausibility of the international Gurndnorm which does not change, but given the commitments of this theory, the solution suggested for this contradiction would be the following. The theory maintains the relativist position, i.e. as mentioned above, human dignity is what at a specific time the international actors decide that it is. Thus, the bases are nothing more than what human dignity is at this time, or

in other words, what the international legal order regards, at this time, that human dignity is. Although the view in this discussion uses the bases from the New Haven School, unlike the New Haven School, the view in this discussion regards these bases as not fixed.

7.2. Human dignity as the international Grundnorm

Some objections can arise from the human dignity – rather say world public order based on human dignity – being the unchangeable Grundnorm. An objection could be stipulated as follows: when the interpretation of a norm changes, the norm changes as well. There is no such thing as a scientifically objective legal norm. Norms exist only in the minds of the persons bound by them or binding with them. Therefore, when those persons change their interpretation of the norm, the norm itself changes, whatever semantic continuities are involved. Therefore, the argument that the world public order based on human dignity is the international Grundnorm and it cannot change but its interpretation can change is false.

One can only be very sympathetic to this objection. It is taken for granted that a different interpretation of a legal norm changes the exact content of the norm. Notably, the international Grundnorm is not a legal norm but a meta-legal norm, thus not the same in nature. However, this alone does not address the objection.

In the case of legal norms, there are many examples of legal norms that change content because of different interpretations. In the context of the US legal order, the cruel and unusual punishment could be used as an example. Though capital punishment was not regarded as cruel or unusual punishment in older times, there are nowadays voices arguing for the opposite. Actions that nowadays constitute cruel and unusual punishment might not have been regarded as constituting cruel and unusual punishment two centuries ago. Therefore, the content of this legal norm has changed. According to this objection, the change of content due to the interpretation is all that matters, and the rest is just empty words. This view leaves the semantics aside.

This objection is very well taken, but the semantics are not disregarded in the view advanced in this discussion. In the cases of legal norms the interpretation of which changes through time, there is continuity in the norm expressed with the exact stipulation of the norm, i.e. with the exact words. This continuity can end with the use of the opposite norm. This is how a norm could come to an end. Let's suppose the words with which a norm is stipulated is 'A'. If a norm is brought about which is stipulated as 'non-A', then this would be the end of the norm 'A'. If the example is 'cruel and unusual punishment shall not be inflicted', then this norm could end with 'cruel and unusual punishment shall be (/may be) inflicted'. Presumably, different interpretations of 'cruel and unusual punishment' in the norm 'cruel and unusual punishment shall not be inflicted' will lead to different

results regarding whether certain punishments are cruel and unusual, but none of these interpretations will yield the result that 'cruel and unusual punishment shall be, or may be, inflicted'. In the case of the norm that ' the international legal order should promote a world public order based on human dignity', different interpretations of 'human dignity' will lead to different results regarding whether certain actions are in accordance with 'human dignity', but none of these interpretations will yield the result that 'the international legal order should not promote a world public order based on human dignity'.

According to the view presented in this discussion, human dignity has always been the international Grundnorm, and insofar as ancient international law was a defensible interpretation of it, it was valid. A typical premise of the argument that the ancient world did not have a notion of human dignity is the existence of slavery. Although slavery is nowadays obviously against human dignity, the existence of slavery in the ancient world does not necessarily mean that ancient legal orders did not have the concept of human dignity, because from a human dignity point of view, enslaving the vanquished enemies is better than slaughtering them and those were the only feasible choices. Interestingly, some evidence could be relevant here. I will leave aside rather isolated voices in the ancient Greek world that argue against slavery, e.g. Antiphon – 'By nature we all equally possess with all respect the same origin, both Greeks and Barbarians' – and the remarkable examples of consideration that slaves were given in ancient

Greek literature, e.g. in dialogues by Euripides in *Helen*. What is more important is that ancient Greek city states had laws protecting slaves from certain kinds of mistreatment, which seems to present a human dignity, though interpreted differently than today and having a much narrower scope. Interestingly: 'Slaves in Attica, though holding few personal legal rights, were in part *protected*[12] by Athenian law and society. The legal system in Attica investigated the death of slaves, and attempted to protect them from injury and murder, either at their master's or another's hands (Westermann 1955, p17[13]). If unfairly treated, a slave could gain 'right of sanctuary' in a temple and he could appeal for the authorities to allow him to be resold to another master (Bury 1964, p9[14]). If a slave was living away from his master's house, and was wronged, his master could go to court on his account.'[15] Personally, I believe that although they are overshadowed by the existence of slavery itself, these few legal rights that slaves had in Attica do demonstrate a notion of human dignity, even though this notion had obviously a very narrow scope. This is because the interpretation of human dignity largely varied from the one today. Another piece of evidence, this time outside the Hellenic world, is the Cyrus the Great Cylinder which is presumably the first charter of rights of nations in the world[16]. 'There were three main premises in the

[12] The emphasis is mine.
[13] Westermann, William L. 1955, *The Slave Systems of Greek and Roman Antiquity*, The American Philosophical Society, Philadelphia.
[14] Bury, J. B. et al. (editors) 1964, *The Cambridge Ancient History*, vol. 5: 'Athens 478-401 BC.', The Syndics of the Cambridge University Press, England.
[15] Cliff, Ursula. Dickson College 2009 'Slavery in ancient Greece'. http://cliojournal.wikispaces.com/Slavery+in+Ancient+Greece.
[16] Ghasemi, Shapour. 'History of Iran: The Cyrus the Great Cylinder'. Iran Chamber Soceity. http://www.iranchamber.com/history/cyrus/cyrus_charter.php.

decrees of the Cyrus Cylinder: the political formulization of racial, linguistic, and religious equality, slaves and all deported peoples were to be allowed to return to home; and all destroyed temples were to be restored.'[17]

However, whether human dignity in the ancient world was a notion of such a significance that can be argued as having been the meta-legal norm on which the international legal order of the time was based is indeed a highly controversial claim. Although the view advanced in this discussion sees human dignity as always having been the international Gurndnorm, the view can still be defended even if one maintains that the ancients did not have a notion of human dignity.

It could be argued that the ancients did not have a notion of human dignity, and that the notion of human dignity relevant to modern international law did not come into existence until around the seventeenth century, around the same time as the modern state, and it was only then that the Grundnorm became relevant to modern international law. This is an entirely defensible position to hold. In the ancient world, there was international law in a substantial sense, e.g. laws of war between nations and city-states of one nation. However, modern states developed in the seventeenth century and international law in the modern 'formalistic' sense developed later than that. It was only after the seventeenth century that most of the modern day body of international law was formed. Therefore, it can be argued

[17] Kaveh Farrokh, *Shadows in the Desert: Ancient Persia at War*, History, Page 44, 2007 in Ghasemi, Shapour. 'History of Iran: The Cyrus the Great Cylinder'. Iran Chamber Soceity. http://www.iranchamber.com/history/cyrus/cyrus_charter.php.

that though ‘substantial’ international law prior to seventeenth century was non-teleological, it was only after the seventeenth century that the Grundnorm became relevant to modern international law.

7.3. Attack on the New Haven School

Another objection consists in an attack on the New Haven School. It could be argued that sometimes the New Haven School falls into a contradiction. The contradiction is between the *expectations* based on authority, legitimacy and coercion on the one hand, which are the definition of law according to the New Haven School, and the concept of *the world public order* on the other hand, which is the teleology of this theory. This theory is teleological because it sees international law as having a telos, a purpose: the purpose of establishing a world public order based on human dignity. The world public order is the purpose that international law serves. Sometimes, these two – namely the *expectations* on the one hand and the *world public order* on the other hand- are at odds with each other. Consider the following examples. Two centuries ago, there were slavery laws in North America. These laws were positive law. They were laid down according to the appropriate procedures, followed by the people and applied by the courts. They were laws in every sense in which the term ‘law’ is used both in a Legal Positivist context and in everyday language by ordinary people (admittedly, natural law theorists like Thomas Aquinas would maintain that

though slavery laws were applied, they were not laws because they were immoral and unjust). They were laws just like any other law of that time. Also, there was the expectation that the courts would apply these laws. Everyone expected that people brought to the US as slaves would be treated as slaves, that, usually, if a slave escaped, he/she would be arrested, if caught, etc. Since these expectations were in place, then these laws were laws according to the definition of the New Haven School. However, they cannot have been laws according to the New Haven School, because they were contrary to human dignity. Thus, the definition of law and the teleology of the New Haven School are at odds with each other and the New Haven School falls into a contradiction: slavery laws were laws (definition of law) and they were not laws (teleology). Another example is the Nazi regime. The Nazi party was legally elected to power and the Nazi laws against the Jews, homosexuals and gypsies were positive law, since they were laid down according to the procedures described by law. In addition, it was expected that if any of these laws was violated, the courts would apply these laws. Therefore, these laws were laws according to the definition of the New Haven School. However, it is obvious that these laws were against a world public order based on human dignity. Notably, the problem is not entirely a problem of the past. In North Korea, draconian criminal laws impose capital punishment and confiscation of assets on anyone who listens to a foreign broadcast or writes ‘reactionary’ letters. It is expected that anyone who is arrested listening to foreign broadcasts or writing ‘reactionary’ letters will be convicted by a court of law and the

punishment provided by the law will be applied. Since these expectations exist, this is a valid law according to the definition of law of the New Haven School, whereas it is not law according to its ideology since these laws violate human dignity.

An attempt on behalf of the New Haven School to address this problem would be to prioritize the teleology over the definition of law. In other words, the definition of law of the New Haven School could be postulated as being the expectations of people in authority as stated above, with the addition of the dependent clause stating the ideology as a necessary requirement. Thus, the definition of law according to the New Haven School could be that law is the expectation of politically relevant actors that are grounded in a belief in someone's authority and the threat of coercion, unless these expectations are against a world public order based on human dignity. Admittedly, this would complicate things as a value judgment, namely whether a law is against a world public order based on human dignity, infiltrates the very definition of what is law. In practice, the judge could address this problem with the following reasoning. The judge engages in empirical-psychological reasoning and detects stable patterns of expectations. If these expectations can facilitate a world public order based on human dignity, then these expectations are interpreted as evidence of law. If it so happens that these expectations are clearly against a world public order based on human dignity, then these expectations will not play a primary role as evidence of

international law and the other sources of international law, mainly treaties and custom will be taken into consideration. This is not to be seen as ‘if the expectations are against world public order, then it is *bad law* so we do not regard these expectations as law at all’. This would be a natural law view in which the definition of ‘bad law’ would be law contrary to world public order. The New Haven School is not a Natural Law view. It is not the case that laws in accordance to world public order are ‘good’ laws and thus valid, whereas laws contrary to world public order are ‘bad’ laws and thus invalid. The world public order based on human dignity is not a criterion of validity of laws. The world public order based on human dignity is the purpose of law and thus the way with which international law ought to be interpreted in order to achieve this purpose. The point here is to look for evidence of law – treaties, custom, stable patterns of expectations - with the goal of creating a world public order. The interpretation of international law should be such that enables the international legal order to achieve this goal, this purpose, this telos. To the extent that stable patterns of expectation can be interpreted as facilitating a world public order based on human dignity, to that extent these stable patterns of expectations are evidence of international law.

Although this is indeed a problem for the New Haven School, it may not necessarily be a problem for the suggestions advanced in this discussion. This discussion is grounded on Kelsen’s Legal Positivism. The definition of

international law according to Kelsen's Legal Positivism modified in the light of the New Haven School as suggested in this discussion is that international law is international treaties, international custom and general principles of law, Article 38 of the Statute of the ICJ (1 a-c), and judicial decisions and teachings of the most highly qualified publicists (1d), which includes stable patterns of expectations, as subsidiary means for the determination of law (again, 1d). Since international treaties and international custom remain sources of international law in this new definition, the judge could more safely justify expectations that are obviously against world public order based on human dignity as violating international treaties or custom.

7.4. Why can re-interpretation of a sub-Grundnorm not bring about a domestic regime change?

The view holds that in domestic legal orders, regime change necessarily implies change of the sub-Grundnorm. On the contrary, in the case of the international legal order, regime change necessarily implies change of the *interpretation* of the one and only Grundnorm. Why not say that the sub-Grundnorm of a domestic legal order remains the same and the re-interpretation of it changes the regime?

This is a very sensible objection. Indeed, it could be argued that a domestic legal order can perform a regime change by re-interpreting the sub-Grundnorm.

However, according to the theory, it is recognition by the *international* legal order which makes a domestic regime change valid. If a domestic regime change is valid even if it is not recognized by international law, as this objection implies, then international law cannot be regarded as superior to national law.

Therefore, this objection necessarily leads to the well-known issue of whether international law is superior to national law. I personally agree with Kelsen that international law is superior to national law. Supporters of the primacy of international law over national law can thus accept the view of this discussion whereas supporters of the view that national law is superior to international law will agree with the objection. Although whether international law is superior to national law is not exactly the point of this discussion, I will present two arguments of Kelsen regarding the supremacy of international law over national law. Regardless, I understand that if one does not accept the supremacy of international law over national law, he/she cannot accept Kelsen's theory on international law, neither this modified theory of Kelsen as presented in this discussion.

The first argument is a reply to the argument often presented by voices arguing for supremacy of national law over international law. Their argument is as follows. If international law is superior to national law and international law creates states, then how can international law have come to exist since states

created international law? International law is mainly a set of rules that regulate relationships between states and international organizations. Therefore, states created international law and national law is superior to international law. This is what Kelsen calls the historic and the logico-juristic view[18] which he rejects. This view starts from the premise that the custom by which international law is created consists in acts of states. Thus, there must have been states before there could be any international law. But how can national law derive its validity from international law if the rise of the latter presupposes the existence of the former?

The fact that customary international law exists does not necessarily imply that the existence of states preceded the existence of international law. It would be quite possible that primitive social groups developed into states simultaneously with the development of international law. The fact that tribal law is, at least, not a later product of intertribal law allows such a conjecture. But even if the existence of states really preceded the existence of international law, the historical relation between national and international legal orders does not preclude the logical relation which, it is maintained, exists between their reasons of validity. As long as there was no international law, the reason of the validity of national law was not determined by international law. If international law does not exist, or is not presupposed to exist as a legal order obligating and authorizing the states, the principle of effectiveness is not a norm of positive law but only a

[18] Kelsen, Hans. 1952. *Principles of International Law.* New York; Rinehart & Company Inc. p. 418.

hypothesis of juristic thinking. When, however, an international law arose – that is to say, when legal norms created by the cooperation of two or more states came into existence – and the principle of effectiveness became a part thereof, the national legal orders were brought into a relationship to international law in which international law is superior to national legal orders.

Secondly, supporters of the primacy of national law over international law hold the well-known statement that international law is valid for a state only if it is 'recognized' by the state[19]. Although this rule certainly sounds more democratic as it gives states the ability to choose what rules they have to obey, it sadly does not explain reality. As Kelsen replies, this rule is not a rule of positive international law. Positive international law does not make its validity for a state dependent upon recognition by this state. When a new state comes into existence, this state, according to international law, immediately receives all obligations imposed and all rights conferred upon a state by this legal order, independently of whether or not the state recognizes international law. According to international law itself, it is not necessary to prove that a state has consented to a norm of general international law in order to be able to assert that, in a specific case, in a concrete case, this state has violated an obligation, or another state has infringed upon the former's right, stipulated by the norm in question. A norm of international law which makes its own validity for the state dependent upon its

[19] Kelsen, Hans. 1952. *Principles of International Law.* New York; Rinehart & Company Inc. p. 433.

recognition by the state is logically impossible because the validity of such a norm presupposes a validity of the international law independent of its recognition. Thus, an international legal norm A which is valid for a state X only if A is recognized by X is logically impossible because the validity of A presupposes a validity of international law independent of its recognition. For A to exist, there must already be international law that created it.

In any case, it is clear that the validity of the theory in this discussion is contingent upon the primacy of international law over national law.

7.5. Is this 'theory' a modification of Kelsen's Legal Positivism, or a different theory?

The view advanced in this discussion makes two radical departures from Kelsen's Legal Positivism, with the two suggestions discussed above. This inevitably raises two similar questions. Firstly, is this view really just a modification of Kelsen's Legal Positivism, or are the departures from Kelsen's view so radical that this view is really a totally different positivist view? Secondly, is this view really a Legal Positivist view at all?

I will firstly address the second question. Although the view advanced in this discussion is characterized by two important departures from Kelsen's Legal

Positivism, it is still a Legal Positivist view, because it maintains the main proposition of Legal Positivism. There are several theories of law, which may agree on certain points but also disagree in many others, but they are all Legal Positivist views. What makes these theories Legal Positivist theories, and not Natural Law theories of law for example, is the fact that they accept the main proposition of Legal Positivism.

The main proposition of Legal Positivism is stated by John Gardner: 'In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)'[20]. This proposition must not be confused with Kelsen's Legal Positivism which is a complete theory of law. The main proposition of Legal Positivism has barely any content and it only makes a rather mild claim. This is merely a proposition about the conditions of validity of certain norms[21]. Thus, it answers not the *lege ferenda* question, i.e. how law *should be*, but on the contrary it merely answers the *lege lata* question, i.e. what the law actually *is*. If one wants to know what the law in a specific legal order is, the answer would be that law is the norms that are legally valid.

[20] Gardner, John. 2011. Legal Positivism: 51/2 myths. *American Journal of Jurisprudence 46*; pp. 199-227 Content downloaded/printed from HeinOnline (http://heinonline.org) Sat Feb 11 16:44:05 2012 at 201.
[21] Ibid at 202.

The main proposition of Legal Positivism states the criterion of legal validity but it does not make any further claims besides that. The heart of Legal Positivism is that the legal validity of a norm depends on its sources and does not depend on its merits, e.g. whether it is just or unjust, a good policy or bad policy. Sources are not determined by this main proposition of Legal Positivism. Thus, according to positivism, there can be valid law in a dictatorship in which the dictator is the only one authorized to lay down law, because the legal validity of a norm depends on its sources, and the source here is the dictator's command. Also, as John Gardner explains, the main proposition of Legal Positivism does not entail certain commitments that many people think it does. It does not entail that judges are under the professional obligation not to refuse to decide any case that is brought before them and that lies within their jurisdiction; and it does not entail that judges are under the professional obligation to decide cases only by applying valid legal norms to them[22]. This is not to say that according to Gardner judges are under no professional obligation to decide cases only by applying valid legal norms. This is to say that the professional obligation judges have to decide cases only by applying valid legal rules to them, assuming this is so in all legal orders, is a characteristic of contemporary legal orders but not a necessary entailment of the main proposition of Legal Positivism.

What makes a view a Legal Positivist view is the acceptance of the main proposition of Legal Positivism. Both Kelsen's theory and the view advanced in

[22] Ibid at 211.

this discussion accept the main proposition of Legal Positivism as stated by John Gardner, so they both fall under the umbrella of Legal Positivism. The view advanced in this discussion is a modification of Kelsen's theory and it adopts the hierarchy of law of Kelsen's theory as the criterion of validity: whether a given norm is legally valid depends on its sources, not its merits and the source is that the rule in question is in accordance with higher legal norms and has been laid down by the proper procedures. Thus, generally speaking, rules of jus cogens are superior to other international customary rules, international customary rules are superior to clauses of international treaties, etc. Furthermore, one could still ask how the validity of a sub-Grundorm is explained in terms of its sources, rather than its merits. The answer is that the validity of a sub-Grundnorm is explained, just like in Kelsen's theory, in terms of its sources: the sub-Grundnorm and its national legal order is valid because it is recognized as valid by the source of recognition of the national legal orders, namely the international legal order. The sub-Grundnorm is valid because it is in accordance with the higher legal norms, namely the international legal order. The recognition of the sub-Grundnorm on behalf of the international legal order takes place according to the process that has been laid down by international law. This process is the principle of effectiveness. According to the principle of effectiveness, if a national legal order is, by and large, effective, then it is valid according to international law. 'Effective' is not a value judgment; it is not a 'merit' of a rule or of an order. International legal order recognizes a sub-Grundnorm as valid not based on its merits, e.g. not based on

whether it is good or bad, moral or immoral, democratic or non-democratic, but based on the principle of effectiveness, which is not a value judgment as good and bad, moral and immoral etc. are. The view advanced here maintains Kelsen's monism and primacy of international law over national law, so the international legal order that recognizes the sub-Grundnorm is superior to the sub-Grundnorm. This is in accordance with Kelsen's hierarchy of law: national law derives its validity from international law. Indeed, it seems that primacy of international law over national law is interconnected with hierarchy of law. The issue of the superiority of international law over national law and the fact that both Kelsen's theory and the theory advanced in this discussion are contingent on accepting the primacy of international law over national law have been addressed in the previous objection. It is expected that supporters of the idea that national law is superior to international law will obviously reject both Kelsen's theory and the theory advanced in this discussion. I have now explained that both Kelsen's theory and the view advanced in this discussion accept the main proposition of Legal Positivism and therefore both theories fall under the umbrella of Legal Positivist views. This answers the second question, i.e. whether the view advanced in this discussion is a Legal Positivist view.

However, the first question still remains unanswered, since many Legal Positivist views, although they all accept the main proposition sated above, still radically disagree with each other, and the one cannot be called a modification of the other.

For example, HLA Hart's theory of law is a Legal Positivist theory, but it differs from Kelsen's theory in many important points. (Hart maintains that international law is 'law' but not a 'legal system'. He arrives at this conclusion on the basis of a comparison of the international legal order with the municipal legal system. Thus, by following Hart's theory of law, one cannot talk about a positivist theory of *international* law that can account for regime change). In any case, Kelsen not only provides a complete theory of legitimacy, explains how law operates, how it changes and develops and how it is enforced, but also his theory is the most influential and the most developed theory of Legal Positivism in the international realm.

I will now address the first question, i.e. whether this view is really just a modification of Kelsen's Legal Positivism, or if the departures from Kelsen's view are so radical that this view is really a totally different Legal Positivist view. This view is not a totally different Legal Positivist view. It is indeed a modification of Kelsen's Legal Positivism because the most important component of Kelsen's Legal Positivism remains a necessary component of this view: the Grundnorm. Important changes have been made here. At the very beginning of this discussion, I stated that according to Kelsen, since regime change means the substitution of one legal order by another, in the case of regime change, the Grundnorm of the previous legal order somehow disappears and respectively the Grundnorm of the new legal order appears. In the view advanced in this

discussion, this happens with the sub-Grundnorms but not with the international Grundnorm which always remains the same, 'idle', and in the case of which only the interpretation changes. This is a significant difference, but the view is still based on the Grundnorm and thus it is still based on Kelsen's theory. This view is a modification of Kelsen's theory of international law.

7.6. International regime change or international regime modification?

The view advanced in this discussion is based on Kelsen's theory, according to which the constitution is the highest law and the foundation of a legal order and the constitution is based on the Grundnorm. When it comes to domestic legal orders, change of the sub-Grundnorm and of the constitution means regime change. On the contrary, change of the interpretation of the constitution, means no regime change. That could be characterized as regime modification. However, according to the view advanced in this discussion, when it comes to the international legal order, the Grundnorm does not change and international regime change does not consist of change of the Grundnorm but it consists of change of the interpretation of the Grundnorm. Why is this change of interpretation an international regime change and not an international regime modification? A relevant question that needs to be addressed simultaneously is the following: what set of facts constitute regime change?

In order to reply to this objection, it is necessary to draw a line between regime change and regime modification. As stated at the beginning, regime change is the substitution of one legal order by another. A legal order is based on its constitution. Thus the substitution of a constitution of a legal order with another constitution is a substitution of a legal order by another, which means regime change. As explained above, according to Kelsen and according to the view advanced in this discussion, in domestic legal orders, this would entail substitution of one sub-Grundnorm by another. On the contrary, a change of interpretation of the constitution of a domestic legal order does not amount to regime change. Borrowing the terminology of the objection, that could be called regime modification. Therefore, to put it simply, in domestic legal orders, change of constitution means regime change whereas change of the interpretation of the constitution means regime modification. The same happens in the international legal order. A change of the constitution of the international legal order amounts to regime change, whereas change of the interpretation of the constitution amounts to international regime modification. At the current state of international law, I take the constitution of the international legal order to be the UN Charter. Therefore, a substitution of the UN Charter by another 'constitution' of the international legal order would be a regime change, whereas a change in the interpretation of the UN Charter would be an international regime modification. Indeed, there are differences between the international legal order and the domestic legal orders when it comes to regime change. In domestic legal orders,

change of constitution would necessarily entail change of the sub-Grundnorm. On the contrary, in the international legal order, change of the UN Charter with another constitution of the international legal order would not bring about a change of the Grundnorm of the international legal order. Also, in the domestic legal orders, the sub-Grundnorm is not subject to different interpretations; only the constitutions can be interpreted in different ways. On the contrary, in the international legal order, not only the constitution, but also the Grundnorm can be subject to different interpretations, and, as stated above, it is the change in interpretation of the international Grundnorm that accounts for regime change.

7.7 Is reliance on Article 38 (1) of the ICJ Statute necessary?

If Article 38 (1) of the Statute is used in the discussion solely in order to bring in the New Haven School's psychological sources, namely the stable patterns of expectations, then the use of the Article 38 (1) is unnecessary because whether state political and legal elites rely on these psychological sources in their own decision making should be the way to introduce the psychological sources. If by definition, legal elites do rely on these sources, there is no need to argue further and the use of Article 38 (1) is unnecessary to say the least.

The response has to do with the nature of the theory. I will not object to legal elites, as a matter of fact (not as a matter of law), relying on psychological sources

in their decision making. If this factual, ontological premise was not accepted by the view advanced in this discussion, the view would not use these psychological sources as one of the two suggestions with which Kelsen's view is hereby modified. The view advanced in this discussion accepts that legal elites rely on these psychological sources as a matter of fact, not as a matter of law. This means that this view accepts that legal elites in reality might indeed rely on stable patterns of expectations in their decision making, but they cannot use these psychological sources as justifications in their decisions. Indeed, decisions are currently mostly justified on legal clauses, custom, previous decisions and legal principles, not on stable patterns of expectations. How could it be the case that judges can use these psychological sources as justifications in their decisions? Legal Realism, i.e. the school of thought that sees law as behavior, international relations approaches to law or policy oriented perspective on international law as the New Haven School could use these psychological sources as source of law because of the mere fact that these psychological sources are actually used by legal elites. However, this is not the case with Legal Positivism based on Kelsen. Only if these psychological sources are regarded as a source of positive law, alongside with treaties, custom and principles of law, can the Legal Positivist view advanced in this discussion treat these psychological sources as a source of law. As it has already been discussed, the view advanced in this discussion is, just like Kelsen's view, a Legal Positivist view, not a view grounded on the New Haven School or Legal Realism.

The objection could continue by placing a different argument within a positive law perspective. First, judges are not the only (or even primary) authoritative makers and interpreters of international law. States themselves are the primary makers and interpreters. Other actors, too, such as international organizations and treaty bodies (such as the UN Human Rights Committee or North Atlantic Fisheries Organization), can make and interpret international law. Second, judges are not bound by Article 38(1) of the ICJ Statute unless they happen to sit on the ICJ. The ICJ is only one of dozens of international, regional, and national tribunals that is an authoritative interpreter of international law, and its jurisprudence is a small fraction of all those judicial decisions. Third, the ICJ itself regularly resorts to sources not listed in Article 38 (e.g., resolutions of the UN General Assembly). Therefore, Article 38 is not really relevant here even from a positive law perspective.

There is no doubt that these observations are entirely true. Admittedly, this view relies on approaching some major key components of the international order with a slightly different view than they have in real, in the current international realm. For example, the view advanced in this discussion sees the UN Charter more or less as the constitution of the international legal order. This is how this view suggests that we see the UN Charter. However, this is not exactly how the entire international community always sees the UN Charter, especially when political

interests come into play, which is often the case. Similarly, regarding the objection at issue, this view sees the Article 38 (1) of the Statute as having a somewhat greater role in the international legal order than what it really does. The view advanced in this discussion sees this Article as an expression of the sources of international law that not only the ICJ but also other international tribunals use in their decision making. According to Kelsen, the two sources of international law are treaties and custom. If it is asked how positive law shows that these are indeed the two main sources of international law, the answer advanced by this discussion is that positive international law states so in Article 38 of the Statute. Similarly, alongside with treaties, custom and general principles of law, this view, being a Legal Positivist view, needs to include the psychological sources in a positive legal clause in order to be able to present it as a source of law in Legal Positivism.

7.8. Principle of effectiveness and hierarchy of law

What if a judicial decision conflicts with the statute the decision supposedly enforces, and the decision is implemented by the parties? On a hierarchical positive law theory, the decision is illegal. The view advanced in this discussion, based on Kelsen's positions, holds that that a judge would be breaking the law by departing from a higher norm of positive law. However, on a principle of effectiveness, the decision embodies the law. Since it cannot be both, then it

seems that the principle of effectiveness and hierarchy of law cannot be reconciled.

This objection seems very sensible and coherent, but it rests on a misconception of the principle of effectiveness. The issue here is not ‘a’ principle of effectiveness but ‘the’ principle of effectiveness. This is a principle of positive international law which has a specific meaning and this is how it is used both by Kelsen and the view advanced in this discussion. Thus, the principle of effectiveness is a principle of positive international law and it does not aim to see if a specific law or a specific decision is valid, but only if the national legal order in its entirety is valid, according to the international legal order. Also, Kelsen does not hold that a legal order is valid if every single law and/or every single decision is always valid or in accordance to a higher norm etc. On the contrary, he states that according to the principle of effectiveness, the legal order need not be entirely effective, but 'by and large effective'. The key point though is that the principle of effectiveness refers to a legal order in its entirety, not to a specific decision or law.

However, the objector could insist by arguing the following. Kelsen specifically states that a judicial decision or ‘lower’ law contra legem can nonetheless be valid law. For example, Kelsen states that: ‘Those who accept the hypothesis of the primacy of international law, however, are just as mistaken when they maintain

that international law overrides national law, that a norm of national law is null if it is not in conformity with international law. This would be the case only if there existed a positive norm providing a means of annulling a norm of national law because of its nonconformity with international law. General international law, at any rate, does not contain any such norm.'[23] His demand for a 'means of annulling' a lower law indicates that he believes, absent an enforcement mechanism, that higher laws necessarily allow themselves to be overridden by lower laws. If the hierarchy of norms breaks down when a lower norm is more 'effective' (enforceable) than a higher norm, what we have is an expression of the principle of effectiveness.

Again, a lower norm becoming enforceable is not an application of the principle of effectiveness, which refers, as stated above, to the international legal order granting validity to a national legal order which by and large effective. However, even leaving the principle of effectiveness per se aside, the objection does seem to demonstrate a problem: how can the international legal system be regarded as hierarchical when a lower norm can violate a higher norm and still become enforceable?

This could, however, be answered, though the answer is more likely to satisfy merely legal positivists. In this case, lower norm violated the higher norm and the

[23] Kelsen, Hans. 1952. Principles of International Law. New York; Rinehart & Company Inc. p. 446.

lower norm was implemented by the parties. The latter ought not to have happened. Indeed positive international law often lacks the means to annul such a decision and states themselves are expected to do so. If the court that issued the decision is a court of the domestic legal order, then the respective state in violation of international law. As Kelsen states 'Illegality of a norm means possibility of abrogating the norm or inflicting a sanction upon the norm-creating organ. The framing of a norm violating a higher norm may be a delict to which the legal order attaches a sanction. … The delict is not in contradiction to law; it is not a negation of law; it is a condition determined by law.'[24] Thus, in such a case, the state, through its judiciary, is in violation of international law, even though the parties implemented the decision.

However, what if the court is an international tribunal? In such a case, an international court issues a decision, which violates a higher international legal norm. The answer here could be something similar to the one in a national legal order. If a court decides a case in a way which is against a higher norm, let us say the constitution, and the decision is implemented by the parties, no one would seriously argue that the lower norm of the courts is higher than the constitution. It is generally accepted that the constitution is the highest law of a national legal order. The hierarchy of law remains intact, even though the lower norm which was implemented violated the higher norm. A decision is 'unconstitutional'

[24] Kelsen, Hans. 1952. Principles of International Law. New York; Rinehart & Company Inc. p. 423.

means nothing more than that if a competent court decides that the decision is unconstitutional, the competent court can annul the decision, even if it was implemented by the parties. (Of course in such cases the legal order protects the parties who relied on the decision, but that is an entirely separate issue.) Similarly, in international law, in the rare exception where an international tribunal decides a case in clear violation with the statute the decision supposedly enforces, then if a competent international court decides that the aforementioned decision was in violation of the relevant statute, the competent court can annul the decision. Just like in national legal orders, unconstitutional laws and decisions are valid and enforceable until (and if) a competent court decides that the law or decision in question is unconstitutional, in the international legal order, a decision of an international tribunal is valid and enforceable, until (and if) a competent court decides that the decision is in violation with the statute. Just like in national legal orders hierarchy of law is not overridden by the fact that occasionally unconstitutional laws and decisions are valid, the same is so in the international legal order. Notably, the quote advanced by the objection regarding international law not having means to annul a decision, refers to positive international law not having the means to annul a decision of a national court - although international law can sanction states for violating international law - not to international law being unable to annul a decision of an international court.

Chapter 8

CONCLUSION

This discussion addressed four problems with Kelsen's account on regime change and advanced two solutions in the light of the New Haven School, to try to address these problems. This is obviously neither a new theory of law nor a complete theory of regime change. This is merely an attempt to advance the discussion regarding Kelsen's Legal Positivism account on regime change forward. I hope it has been made clear that Kelsen's account has problems and thus his theory needs to be somehow modified in order to account for regime change. This discussion has provided some suggestions on which concrete solutions can be built upon.

This is in line with the general concern that the international community has been trying to address over the last decades, namely ensuring that national orders do not grossly violate fundamental rights of their citizens. Traditionally, actors of international law were only states and international organizations, not individuals. Domestic issues of a state were not a concern of international law. This led to inability of international law to act when states were suppressing their own

citizens. The so called principle of humanitarian intervention, a controversial customary rule of international law, has a limited scope: it permits a state to violate the state sovereignty of another state, if the latter state is suppressing the citizens of the former state that happen to be in the latter state. Even if there is such an international customary norm, it does not permit the intervention of a state to protect citizens of the target state. Therefore, international law at its current state does not have the tools to efficiently protect citizens from their own states. External regime changes to protect citizens from their own states, even if when they are regarded as moral, are also seen as illegal, at least from those who want to be consistent with positive international law.

A reformed conception of international law can perhaps help the international community to justify intervention and regime change in order to protect citizens from their own states. Individuals have gained much ground in the international realm and international law now starts to consider individuals as subjects of international law to a certain extent. Regime change, internal or external, must establish a legal order which protects citizens at least from gross violations of certain fundamental rights. This discussion has tried to make a small contribution towards that direction.

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