International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond[1]

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Keywords:
International Law, Revolution, Kelsen, Legality, Politics, Rhodesia, Russian Revolution, History, Unilateral Declaration of Independence, Judicial Practices, Scholarly Practices, Revolutionary Legality, International Relations, Legal Change, Temporality, Justice.

Introduction:

The late Fred Halliday, International Relations doyen and clairvoyant on revolution and the Middle East, put his finger on something profound when he noted that 'the study of revolution is not at home in any of the social sciences….'.[3] Halliday's recognition of revolution's lack of 'fit' in social science disciplines was an echo of the comments made by the legal theorist HLA Hart in *The Concept of Law*. Setting out his psychologically- and sociologically-inspired framework for theorising the normative and descriptive underpinnings of a legal system, Hart characterised revolution as a *pathology* – a legal aberration or abnormality that sometimes founds or destroys legal systems.[4] These comments speak to the concept's out-of-place-ness, its homelessness in the social science disciplines of International Relations (IR) and International Law (IL). Although there are positive signs that some IR theorists are beginning to recognise the trouble - conceptual, theoretical and practical - that revolution poses,[5] the dearth of modern, post-ColdWar IR contributions that theorise

[1] I am greatly indebted to the editors of this collection - Nik, Tanja and Thomas - for their erudite and indispensible comments on this paper; to COST for funding my participation at the EUI Workshop in Florence in 2013; to Guglielmo Verdirame, Matthew Craven, Paul Jackson, and Lee Jones for their helpful comments on this paper; to David Dyzenhaus for his feedback on my original ideas; to the Munk School of Global Affairs at the University of Toronto for my research fellowship which supported this work; to David Kennedy and the *Institute of Global Law and Policy (IGLP)* at Harvard University for continuous support of my research; to Fleur Johns, Thomas Skouteris, Andrew Lang, Mazen Said, Sujith Xavier, Zoran Oklopcic for inviting me to give various incantations of this paper at the American University in Cairo, LSE's Law Department, Osgoode Hall Law School and Carleton University; to Veronica Rodriguez-Blanco for being a kindred spirit; and last but not least, to Sebastian Perry for indispensible editorial assistance and unlimited patience. All errors and omissions are my own.
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[3] F Halliday, '*'The Sixth Great Power': On the Study of Revolution and International Relations'* (1990) 16 Review of International Studies 207-221 at 207.
[4] HLA Hart, *Concept of Law* (Oxford OUP 1961) at 117-119. Hart also identified anarchy, enemy occupation and decolonisation as pathologies of a legal system.
[5] G Lawson, 'Halliday's Revenge: Revolutions and International Relations' (2011) *International Affairs* 1067**,** D Armstrong, *Revolution and World Order: The Revolutionary State in International*

revolution in a sustained and comprehensive manner is curious, though the culture of liberal triumphalism after the fall of the Soviet Union in 1989 offers a partial explanation.[6] The discipline of IL is no better. With few exceptions, the significance and importance of revolution itself - its legal implications for, effects upon, and possibilities within international law – have been under-theorised, if not entirely neglected.[7] Although the 2011 Arab Spring has certainly inaugurated a renewed interest in the study of revolution among legal academics and international legal scholars, much of this has been limited in its context, nature and scope.[8] To date, there has been no comprehensive or sustained post-Wall[9] scholarly work that examines revolution as an *organizing category* or *concept in-itself* in international law. Revolution, if it is mentioned at all, is addressed in international law literature mainly as a mode, subset or derivation of a number of international legal categories and events *inter alia*: self-determination, decolonisation, secession, state creation, state succession, recognition, peremptory norms, and treaties.[10] Unlike war - revolution's twin master-process of the 20th century[11] - revolution, if it is mentioned at all, lurks in the unconscious of IL textbooks, scattered through its indexes and indices, never deserving a Chapter or other spotlight of its own.[12]

This omission is surprising in light of the wide-ranging international legal implications of revolution, and in particular, if one considers that international law long ago created a doctrine that professes to determine the legality of a revolution.[13] This doctrine - Hans Kelsen's *'doctrine of revolutionary legality'* - attempts 'to deal with the lacunae… in the law

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Society (Oxford: Clarendon Press, 1993); D Philipott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton, New Jersey: Princeton University Press 2001).

6 E Hobsbawm, *The Age of Extremes: The Short 20th Century 1914-1991* (2nd edition) (London: Abacus, 1995).

7 Exceptions include: O Taylor, 'Reclaiming Revolution' (2013) 22 *Finish Yearbook of International Law* 2011; E McWhinney, *International Law and World Revolution* (Michigan, USA: A. W. Sijthoff, 1967*)*; and A Casesse, 'The Diffusion of Revolutionary Ideas and the Evolution of International Law' in P Gaeta and S Zappalà (eds) *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford: OUP, 2008).

8 PJ Schraeder, 'Tunisia's Jasmine Revolution, International Intervention, and Popular Sovereignty' (2012) *13 Whitehead J. Dipl. & Int'l Rel. 75;* JJ. Paust, 'International Law, Dignity, Democracy, and the Arab Spring' (2013) 46 *Cornell International Law Journal* 1, R Brooks, 'Lessons for International Law from the Arab Spring' (2012-2013) 28 *Am. U. Int'l L.* Rev. 713.

9 Slavoj Žižek, 'Post-Wall' (Vol 31) *London Review of Books* (19 November, 2009).

10 A Cassese, *Self-Determination of Peoples* (Cambridge: CUP 1995) at 11; J Crawford, *Creation of States in International Law* (Oxford: OUP, 2006) at 129 and 34; Sir H Lauterpact, 'Part II: International Law and Revolutionary Changes of Governments' in *Recognition in International Law* (Cambridge: CUP 1948); A Orakhelashvili, *Peremptory Norms and International Law* (Oxford: OUP, 2006) at 377; M Craven, *The Decolonisation of International Law: State Succession and the Law of Treaties* (Oxford: OUP, 2007), 'Revolutions, Treaties, and State Succession' (1967) 76 *Yale Law Journal* 1669.

11 SC Neff, *War and The Law of Nations: A General History (*Cambridge: CUP, 2005).

12 MN Shaw, *International Law* (6th edition) (Cambridge: CUP, 2008); J Crawford (ed), *Brownlie's Principles of Public International Law* (8th edition) (Oxford: OUP, 2012); MD Evans, *International Law* (4th edition) (Oxford OUP 2014); A Aust, *Handbook of International Law* (2nd edition) (Cambridge: CUP, 2010); M Dixon, *Textbook on International Law* (7th edition) (Oxford: OUP, 2013).

13 Kelsen's doctrine has been described repeatedly as a doctrine of international law by both courts and legal scholars. The doctrine forms a part of the growing role played by national courts in the creation and development of international law. See: Sir H Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Yearbook of International Law* 65; R Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press, New York, 1964); Lord Bingham, 'Foreword' in S Fatima (ed), *Using International Law in Domestic Courts* (Oxford: Hart Publishing, 2005), and A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 5792.

during revolution.'[14] It been applied by numerous courts to revolutionary events not only in the 20th and 21st centuries, in colonial and post-independence contexts alike. In Pakistan, Uganda, Rhodesia, Nigeria, Seychelles, Grenada, Lesotho, Transkei, and most recently Fiji, the doctrine of revolutionary legality has been employed by judges and legal scholars not only to identify *when* a revolution can be said to have legally occurred, but also, to identify who is the legal and legitimate revolutionary *sovereign* authority.[15]

Although there have been many attempts to decipher the enigmas which inhere in Kelsen's unfathomably vast body of work on international law,[16] I explore a different mystery in this Chapter namely: how revolution - a homeless, aberrant, and pathological creature - comes to be clothed in the power of legality. To unravel this mystery, I delineate various legal practices that have brought the doctrine of revolutionary legality into being, sustained it, and allowed it to continue to occupy a place as a doctrine of international law. I begin by tracing how this doctrine has evolved through and been shaped by various competent performances of judicial and scholarly actors, and do so by excavating the social and interpretive practices[17] these actors use to construct the concept of a revolution's 'legality' in and after particular revolutionary moments with a focus upon the 1965 Rhodesian Revolution, its antecedents, and its immediate aftermath.[18] Though I do so elsewhere, I do not address whether the Rhodesian Revolution was 'in fact' a revolution.[19] My focus here is instead on those legal practices characterising an event as revolutionary. It is therefore an examination of how international legal practices have clothed revolution in legality. I argue that the doctrine of revolutionary legality is the product of the confluence and contestation of particular historically-contingent judicial and scholarly practices which have carried the doctrine across time and space, and which shape and have shaped the international legal imaginary on revolutionary change. This Chapter explores the role these competent practices play to dress revolution in legality.

Part I: History and the Pasts and Practices of Revolutionary Legality

Historical-epistemic lines of inquiry into the fraught, stake-laden and complex relationship between international law and revolution are countless. This is no less true when approaching this relationship through the narrower aperture of the concept of revolutionary legality. Where one begins any story of revolutionary legality is as important, and as telling, as where one chooses to end it. The perils of periodising anything - let alone a concept as suffused (and

[14] See Brookfield at 352 below (note 106).
[15] *State v Dosso* [1958] PLD SC 533 (SC, Pakistan); *Uganda v Commissioner of Prisons* [1966] EA 514 (HC, Uganda); *Lakanmi v. Attorney-General* [1971] U. Ife L.R. 201 (SC, Nigeria); *Jilani v Government of the Punjab* [1972] PLD SC 139 (SC, Pakistan) 162; *Bhutto v Chief of Army Staff* [1977] PLD SC 657 (SC, Pakistan); *Valabhaji v. Controller of Taxes* (1981) 7 Commonwealth L. Bull. 1249 (Court of Appeal, Seychelles) *Mitchell v. Director of Public Prosecutions* [1986] L.R.C. Const. 35 (Court of Appeals, Grenada); *Mokotso v. King Moshoeshoe II* [1989] L.R.C. Const. 24 (HC, Lesotho); *Matanzima v. President of the Republic of Transkei*, (1989) 4 S. Afr. L.R. 989 (General Division Court, Transkei), *Prasad v Republic of Fiji* [2001] NZAR 21 (HC Fiji); *Republic of Fiji* v. *Prasad* [2001] NZAR 385 (Court of Appeal, Fiji); *Qarase v. Bainimarama* [2009] FJCA 9 (Court of Appeal, Fiji).
[16] For a selection of attempts which do this in international law see: J von Bernstorff and T Dunlap, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge: CUP 2010); J Kammerhofer, 'Hans Kelsen in International Legal Scholarship' in J Kammerhofer, and F Rigaux, *Hans Kelsen on International Law* (1998) 9 EJIL 325.
[17] For an indepth analysis of social and interpretive practices, see the 'Introduction' of this collection.
[18] The legal characterisation of revolution explored here can be juxtaposed with the more common one expressed in social and political science literature (i.e. widespread radical social, political, and economic change to the established ruling order). See J Foran *Taking Power: On the Origins of Third World Revolutions* (Cambrigde: CUP, 2005). Thus, I use the phrase 'Rhodesian Revolution' to refer to the *legalistic* definition (and understanding) of revolution employed by judges and scholars to describe Ian Smith's *UDI*.
[19] I address this issue in a paper delivered at Osgoode Hall Law School, below (note 148).

afflicted) with historical, social, economic, legal, political and international significance (and trauma) as 'revolutionary legality' – are unlikely to be overcome. One salient peril flows from the observation that periodisation 'is always a critical intervention into "the now", always a bid to set the conditions for the present experiment.'[20] This observation holds as much for attempts to proffer a genealogy of legal concepts or doctrines, as it does for attempts, much like the one made here, to explore, interrogate and demystify the legal practices which give such concepts and doctrines their legal form, meaning and force through space and time.

As they are central to understanding this particular account of revolutionary legality, a brief word on practice theory is in order. The tradition of examining 'practices' that informs much of this analysis, takes its cue in particular from Bourdieu's groundbreaking work on *habitus*, legal worlds and fields,[21] as well as from various scholars who have taken the 'practice turn' in the discipline of IR and who have produced a rich and illuminating body of literature examining how practices both shape and embody both ideas *and* material structures.[22] The definition of practices employed here is a specific one that breaks down many familiar dichotomies operating in the social sciences, and refers specifically to *competent performances* by various actors (legal, scholarly, judicial, policy-making etc…) in the world. Competent performances are 'socially meaningful patterns of action which in being performed, more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world.'[23] They are actions that are *inter alia*: material and meaningful; individual (agential) and structural; based on background knowledge; and influencing continuity and change in the world.[24] Exploring the practices of legal actors is especially helpful to investigate their role and impact in the world as well as how they shape the reception and categorisation of revolutionary events and ideas.

Practices, far from being isolated, hermetically-sealed acts of individuals, are 'patterned actions… embedded in particular organised contexts and, as such, are articulated into specific types of action and are socially developed though learning and training.'[25] Importantly, practices do not exist in a power vacuum. Ideas about, and individual dispositions towards, 'revolution' and 'legality' are often pre-configured in and by various legal communities;[26] they do not arise in an ahistorical, apolitical, asocial, aeconomic or indeed alegal context. Both as actions that challenge and unsettle hierarchies and patterns of (re)distribution, and as actions formed within material and social relations and constraints, practices produce false contingency *as much as* false necessity.[27] As such, they play a crucial role in ideas about agency and possibilities for social change. Thus, one must not understate the influence that structural and material limits can have on the aims and effects of fluid and malleable legal and scholarly practices to either facilitate or impede legal, social, political or economic change. But so too must one also recognise such limits can never always or entirely determine the nature or effects of practices which pursue or undermine social change. It is therefore important to study the practices themselves to discern *how* competent performances by legal scholars and actors can also generate or obstruct the creation of subversive or reactionary

[20] On these limits, see K Davis, *Sense of an Epoch: Periodisation, Sovereignty and the Limits of Secularisation,* in A Cole and DV Smith (eds.), *The Legitimacy of the Middle Ages: On the Unwritten History of Theory* (Duke University Press, 2010) at 42.
[21] P Bourdieu, 'The Force of Law: Towards a Sociology of a Juridical Field' (1987) 38 *Hastings Law Journal* 805, and P Borrdieu, *The Outline of a Theory of Practice* (Cambridge: CUP, 1977).
[22] F Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014), see also E Adler and V Pouliot (eds.), *International Practices* (Cambridge: Cambridge University Press, 2011) at 6.
[23] Adler and Pouliot, 'Introduction and Framework' in *International Practices* at 13-16.
[24] Ibid.
[25] Ibid.
[26] C Palley 'The Judicial Process: UDI and the Southern Rhodesian Judiciary' (1967) 20 *Modern Law Review* 263.
[27] S Marks, 'False Contingency' (2009) 62 *Current Legal Problems* 1.

forms of revolutionary legality. Practices are not then *sui generis*, but are actions borne from (i) *shared understandings held by judicial and scholarly legal actors* both about what constitutes - and what ought to constitute - a revolutionary event *and* about the appropriate relationship between international law and power; (ii) *the interaction between various legal actors (judicial and scholarly)* about the appropriate (or competent) way to categorise and interpret the legal significance of revolutionary events; and (iii) *the material political and legal architecture* (i.e. the backdrop of relations of domination informing practices) which may also circumscribe and enable the possibilities of revolutionary change. It is argued here that the patterned and embedded practices of various scholarly and judicial communities have contributed to the development of a *particular* authoritative, yet limited, vision of revolutionary legality.

This study recognises its many limitations: that the excavation of competent legal practices in (and of) an imperial past will necessitate committing the historian's cardinal sin of anachronism; [28] that any story recounting and evaluating the practices that have configured and sustained the doctrine of revolutionary legality in international law will not meet fantastical expectations of historical certainty; that the story of revolutionary legality will always and at once be a story with *'a plurality of pasts'* (and indeed with many presents and futures), not least 'because constituting a past always depends to some degree on socially-mediated negotiations of a fit between descriptions and experience';[29] and finally that no authoritative account of the doctrine of revolutionary legality exists 'out there', waiting only to be disinterestedly distilled and transcribed by the diligent, conscientious social or legal scientist.[30] No such transcription is sought or desired, no *punctum Archimedis* assumed. Consequently, no 'true' or singular past or ending about the doctrine of revolutionary legality is, or can be, offered here, but only the beginning of one narrative, to be found in multiple, overlapping, mutually-constituting, contested narrations of decolonisation, revolution, positivism, legality, Empire, Africa, the 'International', constitutionalism, and even history itself.

Part II: Revolution and Legality: Revolutionary Russian Antecedents to Kelsen

Although the history of the doctrine of revolutionary legality has been widely regarded as traceable to the *Grundnorm* cases,[31] another reading of the origin of revolutionary legality contends that it arose shortly after the 1917 Bolshevik revolution, as a term to replace the Tsarist conception of 'legality' as meaning 'that which is in conformity with law'.[32] In contrast to this Tsarist legality, Soviet 'revolutionary legality' referred to specific legal practices – namely, how, in a *post-revolutionary* context, an authority *translated* the goals of widespread social and economic change through law. In essence, this incarnation of revolutionary legality was concerned with the legal *implementation* and *fulfilment* of the comprehensive or radical, social, economic and political goals of the revolution, whether this be though the use or the dis-application of law. The concept of revolutionary legality went through various transitions since its use in 1928, and was replaced by the Stalinist concept of 'socialist legality' in 1933.[33] Decades before 'revolutionary legality' became a legal doctrine

[28] A Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in E Jouannet, H Ruiz-Fabri and M Toufayan (eds) *Tiers Monde: Bilan et Perspectives* (Paris: Societe de Legislation Comparee).
[29] P Roth, 'The Pasts' (2012) 51 *History and Theory* 313 at 313.
[30] F Kratochwil, 'History, Action and Identity: Revisiting the 'Second' Great Debate and Assessing its Importance for Social Theory' (2006) 12 *European Journal of International Relations* 5 at 7. For a similar discussion about the concept 'globalisation' see V Kumar, '*A Critical Methodology of Globalisation: Politics of the 21st Century?'* (2003) 10 *Indiana J of Global Legal Studies* 87-111.
[31] See Honoré, Brookfield, and Finnis, below (note 106).
[32] H Oda, 'Revolutionary Legality in the USSR: 1928-1930' (1980) 6 *Rev. Socialist Law* 141 at 141.
[33] Oda describes the three stages or shifts as the following: *first*, between 1928-1930, revolutionary legality referred to the revolution's strict conformity with the law; *second* between 1928-1930, it meant

of contestation in and after Rhodesia, the battle over 'legality' in the post-revolutionary Russian context was being fought on two fronts: between Soviet legal scholars themselves (Bolshevik and Stalinist)[34] and between Soviet legal scholars and their external critics, the most prominent being the renown Austrian jurist and positivist scholar, Hans Kelsen.[35]

Kelsen was very familiar with Soviet revolutionary legality having extensively critiqued Marxist and Soviet legal philosophers in *The Communist Theory of Law* and in *The Political Theory of Bolshevism: A Critical Analysis*.[36] Though latterly expressing nostalgic sympathy with Marxist aims in his autobiography,[37] Kelsen was highly disparaging of Soviet legal philosophy in general (arguably *too* disparaging[38]) and in particular, of the concept of 'revolutionary legality' advanced in 1933 by the influential Stalinist jurist Andrey Vyshinsky,[39] accusing him and other Soviet jurists of attempting to 'inculcate its citizens with the ideal of legality' whilst at the same time failing to avoid the error of 'reduc[ing] law to politics'. [40] Kelsen concluded that these legal theorists' attempts to distinguish their view of legality from that of bourgeois legality was simply 'a contradiction in terms'.[41] A new and better view was needed.

As a part of his quest for a 'pure theory' of law, Kelsen proposed a different view of revolutionary legality, one unlike its Soviet forebear, was ostensibly consistent with 'legality'.[42] Understandably, for Soviet revolutionaries, the crucial question that revolution posed for law and legal theory was 'how can law and legal practices facilitate and fulfil the social, economic and political goals of a revolution?' For positivistic Kelsen, the crucial question revolution posed for law (and legal theorising) was: 'What effect, if any, does revolution have on the *identity* or *existence* of a legal system?' Kelsen rightly recognised that the phenomenon of revolution raised vitally important legal and practical questions for jurists and legal scientists, questions that had hitherto not been addressed. The most pressing questions were: how does one know a legal system has come into being or has been destroyed?; did a revolution instantiate a (new) legal system (has the old system been thus displaced)?; and if not, under what conditions could it do so?. Kelsen sought to provide jurists

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a disregard of the law *where law was not expedient* to accomplish the revolutionary's goals of social transformation; *third* stage between 1930-1933 it aside laws which impeded revolutionary transformation in a systematic way – a 'revolution from above' where the 'leading [Stalinist] organs of the proletariat' determined whether party functionaries could abrogate the law. Oda, 'Revolutionary Legality 'at 142, 145 and 149.

[34] Approaches to 'Soviet legality' varied between Soviet legal theorists: compare P Stučka & E Pashukanis with A Vyshinsky.

[35] Soviet jurists viewed Kelsen as a 'bourgeoise international lawyer' and jurist: J N. Hazard (ed) *Soviet Legal Philosophy* (Cambridge: Harvard University Press, 1951) and G I Tunkin, *Theory of International Law* (London (English Trans): George Allen & Unwin Ltd, 1974).

[36] H Kelsen, *The Communist Theory of Law* (New York: Fredrick A Praeger Inc, 1955). In this text, Kelsen responded to Soviet legal theorists attacks that his writings were bourgeois (1920s writings which ultimately formed the foundation of the first edition of *The Pure Theory of Law* in 1934). See also Kelsen, *The Political Theory of Bolshevism: A Critical Analysis* (Berkley: University of California Press, 1948).

[37] See Kelsen's autobiography critiques economic liberalism for not providing economic security to the great mass of have-nots: M Jestaedt (ed.), *Hans Kelsen Werke* (Tübingen: Mohr Siebeck, 2007) at 58-59 (translated in J von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Part of Cambridge Studies in International and Comparative Law) at 277).

[38] Hart argued Kelsen was *too* disparaging of Soviet international theorists in his book review: HLA Hart (Book Review) 'Kelsen's Theory Communist Theory of Law' (1956) 69 *Harvard Law Review* 772 at 777.

[39] A Vyshinsky, *Revolutionary Legality on the Present Stage* (Moscow 1933).

[40] Kelsen, *The Communist Theory of Law* at 122.

[41] Ibid.

[42] Kelsen's understanding of revolutionary legality was considerably influenced by Scandinavian realism, particularly K Olivercrona's *Law as Fact* (Oxford: OUP, 1939) at 66.

and scholars with a *"legal test*" that would answer these and other intractable questions in his seminal works *General Theory of Law and the State* and the *Pure Theory of Law.*

This legal test was later widely referred to as 'the doctrine of revolutionary legality' and as a doctrine of international law.[43] The doctrine is best encapsulated in the following passage of his *General Theory of Law and The State*:[44]

> It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic state, and to introduce a republican form of government. *If they succeed, if the old order ceases and the new order begins to efficacious because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal*. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to abolish remains efficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.[45]

It is important to note that Kelsen regarded both *the means* though which the revolution occurs (whether violent or peaceful) and *the objectives or aims* of a revolution (whether to transform a political order into a democracy or a republic, to restore a monarchy, or to empower a dictator, military regime or communist proletarian order) as irrelevant to the determination of a revolution's 'legality'. Kelsen's view of revolution's significance for law and legal study was preternaturally formalistic: it had nothing to do with the nature or content of the political, social or economic order revolutionaries sought to establish. What was needed to determine the 'legality' of a revolutionary order was a straightforward legal test where the revolution's success and efficacy meant the old *Grundnorm* was replaced by a new one: a jurist need only query whether the old order ceased and the new order had begun to be efficacious because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order.[46]

Kelsen's doctrine, as a part of his pure theory of law, must be understood foremost as, though not exclusively, *a heuristic tool* – one that would and could help legal scientists and jurists to *identify* the moment a new legal system emerged and the concomitant moment an old legal order was destroyed.[47] As an *interpretive* tool allowing legal scientists to distinguish between the beginning and end of legal systems – *and to thereby distinguish actions and practices that were legal from those that were not* - Kelsen's doctrine of revolutionary legality shored-up the binary legacy of Cartesian thought.[48] Kelsen sought to discipline the pathology of

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[43] See Lewis J., General Division at 9.
[44] Kelsen, *General Theory of Law and The State'* at 118. Great care must be taken not to crudely reduce Kelsen's legal theory on this matter to these passages, as one must read Kelsen's view of law and legality in light of his entire *ouevre*, arguably his most influential contribution being the *Pure Theory of Law*. The citation used in this article is H Kelsen, *Pure Theory of Law* (New Jersey: Lawbook Exchange Ltd, 2005) translated by M Knight – a similar discussion of revolutionary legality occurs in this text at 208-210.
[45] Kelsen, *General Theory of Law and The State'* at 118 (emphasis added).
[46] Kelsen, *General Theory of Law and The State'* at 118.
[47] See Harris below (note 106).
[48] F Kratochwil, 'International Law and International Sociology' (2010) 3 *International Political*

revolution, to make it interpretable within a legal framework and thus undermine the concept's disruptive and unsettling effect on legal systems, categories and modes of thinking.

Part III: Judicial & Scholarly Practices: Revolutionary Legality in Rhodesia

A. The 1965 Rhodesian Revolution

Famously, Kelsen's doctrine migrated from the purity of scholarly textbooks to the practices of Rhodesian and British courts, practices that would determine the legality of the Rhodesian Revolution. The cases were contentious not only because they ended up endorsing Kelsen's test as the *correct* legal doctrine to determine a revolution's legality, but also because of the nature of the revolution at issue and the colonial politics and context surrounding it. Read along with the caveats in this paper on historical certainty and sins of anachronism, a brief and partial account of one history of the Rhodesian Revolution is provided.[49]

On 11 November 1965, Ian Smith, the then Prime Minister of the British colony of Southern Rhodesia, proclaimed a *Unilateral Declaration of Independence* (*UDI*) renaming the UK colony simply 'Rhodesia'. This revolutionary act followed failed negotiations between Smith's governing party (the Rhodesian Front) and the United Kingdom on the terms and conditions under which Southern Rhodesia would be granted permission to become an independent sovereign state (i.e. the six *HMS Tiger* principles).[50] As a largely self-governing colony since 1923, Southern Rhodesia enjoyed extensive political and legislative autonomy as well as significant economic prosperity,[51] and possessed limited international personality.[52] Smith's Rhodesian Front, strongly opposed the British Empire's decolonisation policy of 'no independence before majority rule' (i.e. the '*NIBMAR'* rule), which constituted the first of the six *HMS Tiger* principles governing decolonisation.[53] His *UDI* sought instead to create a new political and legal order that would transform the British colony of Southern Rhodesia into a *sovereign* state and subject under international law with continued white minority rule.[54] In addition to securing White domination, it was an act intended to endow Rhodesia with full international legal personhood, ending its colonial status. Rhodesia's *UDI* was deliberately modelled on the anti-colonial American Declaration of Independence.[55] It also announced the supersession of the existing 1961 Constitution by a new 1965 Constitution of Rhodesia. Following the *UDI*, the United Kingdom, the United Nations, the Organisation of African Unity (OAU), and the Commonwealth condemned the move as *illegal* in international law, with the UN Security Council passing Resolution 216 describing Smith's government as an 'illegal racist minority regime'.[56]

Sociology 311 at 3.

[49] For a history of Southern Rhodesia starting with the Kingdom of Mapungubwe in 1075 up until the 1965 *UDI* see: C P Watts, *Rhodesia's Unilateral Declaration of Independence: An International History* (New York, Palgrave MacMillan, 2012); B Robert, *A History of Rhodesia* (London Eyre Methuen, 1977); DG Boyce, *Decolonisation and the British Empire, 1775-1997* (Basingstoke: MacMillan 1999); C Michael, *The Last Colony in Africa: Diplomacy and the Independence of Rhodesia* (Oxford Blackwell, 1990).

[50] The Commonweath Releations Office (CRO) devised five principles intended to form the basis of negotiations for Southern Rhodesian independence. Watts, *Rhodesia's UDI* at 34. A sixth principle was later added preventing oppression of a majority by minority, or by minority of majority. *Statement on Anglo-Rhodesian Relations* December 1996 to May 1969 (Salisbury: Prime Ministers Office).

[51] Watts, *Rhodesia's UDI* at 31.

[52] Y Ronen, *Transition from Illegal Regimes under International Law* (Cambridge: Cambridge University Press, 2011) at 27.

[53] Watts, *Rhodesia's UDI* at 31 and 34. 'The principle and intention of unimpeded progress to majority rule, already enshrined in the 1961 constitition.'

[54] The *UDI* followed a referendum on independence for the white electorate. The result was a 60% turn out, with 58,000 voting in favour of independence, and 6,000 against. Watts *Rhodesia's UDI* at 25.

[55] Watts, *Rhodesia's UDI* at 1.

[56] See *UNSC Resolutions 202, 216, 217, 221 & 232* and *UNGA Resolutions 1747, 1760, 1889, 2012,*

Interestingly, the legal grounds in international law that United Nations resolutions used to categorise Rhodesia's *UDI* as 'illegal' are ambiguous. Neither the OAU resolutions, nor the Security Council or General Assembly resolutions clearly identify the legal basis grounding the illegality of the Rhodesian Revolution, although contemporary scholars retrospectively identify the legal ground to be the peremptory or *jus cogens* norm of the right to self-determination.[57] Importantly, when Rhodesia declared its independence in 1965, 'the existence of a right to self-determination was controversial' at best,[58] and even today there are questions concerning its legal status.[59] Although the 1960 *Declaration on the Granting of Independence to Colonial Countries*[60] adopted by the General Assembly stipulated the right of peoples to self-determination, it was not clear in international law at the time of the revolution that this right [or the prohibition on racial discrimination] had acquired the status of a peremptory norm. Indeed, as one scholar has noted, it would be an 'innovation' to say that, at the time of Rhodesia's *UDI,* 'the right to self-determination was of such importance that its violation would have the consequence of precluding an entity from becoming a state.'[61]

Further, the Rhodesian Revolution cannot be viewed as simply the unconstitutional change of a municipal government within a State (or colony), and thus not a matter of the creation of a new state in international law. Security Council resolutions framed the Rhodesian Revolution as an issue of contested statehood,[62] calling for the suspension of the illegal regime's *membership* in international and regional organisations (rather than for the prevention of the government's participation in those organisations).[63] Accordingly, the revolution's legality cannot be settled by recourse to these resolutions or to extant peremptory norms alone. It is here where Kelsen's doctrine of revolutionary legality becomes relevant. This doctrine is best understood as operating as a means to determine the "effectiveness" of a government, one of the four essential criteria set out by the 1933 Montevideo Convention for the creation of a new state in international law.[64] As international law had, and still has, no clear authoritative rules governing the legality of revolutions in general, nor clear rules governing the legality of the Rhodesian Revolution in particular, Kelsen's doctrine should be revisited by international legal theorists, judges and practitioners. A good place to start then would be to examine closely the intertwined practices of legal scholars and judges employed to construct the revolutionary il/legality of the Rhodesian revolution.

B. Judicial Practices - Adjudicating Revolution in the *Grundnorm* cases

2022, 2024, 2105, 2138 & 2151. See also Organisation of African Unity (Council of Ministers): Sixth Ordinary Session of the Council of Ministers held in Addis Ababa, Ethiopia, from 28 February to 6 March 1966. CM/Res 75 (VI) paragraph 1. The UN Security Council later imposed oil and other sanctions on Rhodesia.

[57] Orakhelashvili, *Peremptory Norms* at 377; Dixon, *Textbook* at 122.

[58] Ronen, *Transition from Illegal Regimes* at 32.

[59] D Cass, 'Rethinking Self-Determination: A Critical Analysis of Current International Law Theories' (1992) 18 *Syracuse Journal of International Law and Commerce* 21; J Summers, 'The Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance' (2003) 14 *Finnish Yearbook of International Law* 271 at 283.

[60] UNGA Resolution 1514 (XV) (14 December 1960).

[61] Ronen, *Transition from Illegal Regimes* at 32; DJ Devine, 'Status of Rhodesia in International Law' (1974) *Acta Juridica* 77; JES Fawsett, 'Security Council Resolutions On Rhodesia' (1965-1966) 41 *British Yearbook on International Law* 102-112-113; JES Fawcett, *The Law of Nations* (London, Penguin Press, 1968) at 38; Crawford, Creation of States at 129-131.

[62] UNSC 277 (19 March 1970).

[63] Ronen, *Transition from Illegal Regimes* at 34: Devine, 'Status of Rhodesia' at 158.

[64] *The Montevideo Convention on Rights and Duties of States***,** Article 1, Dec. 26, 1933, 165 L.N.T.S. 19 (1933) [hereinafter '*Montevideo Convention'*]. This Convention has since been criticised for under- and over-inclusive: Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1999) 37 Colum. J. Transnat'l L. 403.

The legality of the Rhodesian revolution was the issue brought before both Rhodesian courts and the United Kingdom's Judicial Committee of the Privy Council (JCPC) in the cases of *Madzimbamuto v Lardner-Burke (1966) and Baron v Ayre NO (1966).* These cases, along with *R v Ndhlovu (1968),* have been referred to collectively as the *Grundnorm* cases in light of the central role that Kelsen's doctrine played in them.[65] After talks failed with the UK government, but before the *UDI*, the Governor of Southern Rhodesia, acting on advice of Rhodesian Ministers, proclaimed a state of emergency under Section 3 of the *Emergency Powers Act 1960*. Section 3(2) of the *Act* provided that a state of emergency lapses after 3 months, unless it is renewed by the Legislature. Two men, Daniel Nyamayaro Madzimbamuto and Leo Solomon Baron were served with detention orders prior to the *UDI*, i.e. before the new 'revolutionary' constitution was proclaimed. However, their detention orders were renewed three months later under the new 1965 Constitution proclaimed by the *UDI*. Both detainees challenged the renewal of their detention as 'being carried out without lawful authority as the Parliament of Rhodesia has no legal existence', arguing 'everything done by it is invalid'.[66] They argued that all acts passed by this Parliament, including the new 1965 Constitution, must be regarded as illegal and of no force and effect in international law, and that the detention orders be set aside on this basis.[67]

The validity of the detention orders was first challenged before Justices Lewis and Goldin in the General Division of the High Court of Rhodesia at Salisbury on June 28, 1966. Both Justices concluded that to decide whether the new constitution and revolutionary regime are lawful, one must apply to international law's doctrine of revolutionary legality, expounded by Kelsen.[68] Goldin J asserted that not only is this a doctrine of international law, but it is 'a statement of the obvious proposition that what is destroyed no longer exists' as 'history… abounds with examples of this nature'.[69] Applying this doctrine, neither judge found Smith's revolutionary order to have been successful: revolutionary legality was not achieved.[70] For both judges, the determination of revolutionary legality was complicated (and undermined) by the colonial context and the existence of 'rival (imperial) sovereign'. That is to say, although they endorsed Kelsen's doctrine to decide the question of legality of Rhodeisan Revolution, they found that it did not apply to *colonial* entities. Justice Lewis concluded that new basic norm had *not* replaced the old one, because even if it did so 'internally' (i.e. within Rhodesia), the 1965 Constitution must also 'successfully untie the apron-strings of the mother State' (i.e. in international law). The colonial actor was unable to establish 'revolutionary legality' in light of the UK's unabandoned claim of sovereignty over the colony of Southern Rhodesia. Sovereign ambiguity was also the reason underlying Goldin J's denial of 'revolutionary legality' to Smith's regime, as the question of who was the sovereign was still to be decided.[71] For Goldin J, Britain still had both the power (via economic and political sanctions) and the will to maintain or reassert its sovereignty.[72] Until Britain's claim to sovereignty was extinguished or relinquished, the revolution and its attendant 1965 Constitution were illegal. Accordingly, the old 1961 Constitution was still the law.[73]

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[65] The decisions which are generally viewed to comprise the *Grundnorm* cases include *Madzimbambuto v Lardner-Burke NO*, *Baron v Ayre NO* (1966) (4) S.A. 462 (Gen Div Rhodesia H.C.); [1968] 2 S.A. 284 (App. Div.H.C.); and [1969] 1 A.C. 645 (J.C.P.C.). A later related decision which is discussed only briefly is *R v Ndhlovu* (1968) (4) S.A. 515.
[66] Ibid.
[67] Ibid.
[68] Lewis J. (General Division) at 9-11 and 15.
[69] Goldin J. (General Division) at 89-90.
[70] Lewis J. (General Division) at 17, 23 and 25.
[71] Goldin J (General Division) at 91-92: 'Irrespective of who is more likely to succeed, the outcome of the struggle has still to be awaited.'
[72] Goldin J. (General Division) at 90.
[73] Goldin J. (General Division) at 91.

Despite the courts refusal to grant revolutionary legality to Smith's regime, and notwithstanding the issue of a divided sovereign, [74] both judges held the detentions to be lawful as the regime nevertheless possessed a form of legality (i.e. it was a legal authority) under the doctrine of necessity. Interestingly, the court characterised the doctrine of necessity as a common law doctrine grounded in international law, namely in the writings of Grotius, Vitoria, and Suarez as well as the principles of natural law and the law of civilised nations, *ius gentium*.[75] Each of these international law jurists was cited by the Court to support the regime's legality on the basis that '[o]ne cannot have a vacuum in the law':[76] *the law of a tyrant is better than no law*. More than this, revolutionary legality having been ruled out, the court indicated it had no option other than to recognise this legality under the doctrine of necessity in light of 'the present situation' generated by Rhodesia's *UDI* claim for independence and full international legal personhood:

> …what is described as 'the assumption of independence' had no basis of legality and those who 'gave' the 1965 Constitution had no right or power to do so. Their conduct was based on decisions and circumstances which in their opinion provided economic or political justification despite the absence of legality. But whatever their motives, *it would be completely unrealistic to even assume that the present situation can be altered by a decision of this court*.[77]

The court held that legality under the doctrine of necessity should be granted, 'regardless of whether the unlawfully constituted Government benefits or not …as it is not the function of the court to bring about the end of revolution'.[78] The court framed its ultimate endowment of legality to Smith's regime as one that was necessarily indifferent or neutral as to the success or failure of the attempted revolution.

The decision was then appealed. The majority decision of that Appeal Division of the High Court of Rhodesia, written by Chief Justice Beadle (Justices Jarvis AJA and Fieldsend AJA concurring), agreed with the General Division's finding that Kelsen's doctrine of revolutionary legality was the correct test to determine the legality of a revolution, and that of the Rhodesian Revolution. Delineating this test and its implications in international law, the Chief Justice's approval of Kelsen's doctrine is pronounced:

> It is well to start this inquiry by examining the law dealing with the establishment of a new government by a revolutionary process. It may be accepted that a successful revolution which succeeds in replacing the old *Grundnorm* (or fundamental law) with a new one establishes the revolutionaries as a new lawful government….*If in the instant case the stage is reached when it can be said with reasonable certainty that the revolution has succeeded, then in the eyes of international law Rhodesia will have become a de jure independent sovereign state, its 'Grundnorm' will have changed and its new constitution will have become the lawful constitution.* There is ample authority for this proposition….See for example Kelsen *General Theory of Law and*

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[74] Lewis J. (General Division) at 62 and Goldin J. (General Division) at 95. See also *Fiji v Prasad [2001]* above and G Williams 'The Case that Stopped a Coup' The Rule of Law and Constitutionalism in Fiji', (2001) 1 Oxford Univ Commonwealth L Rev at 73.

[75] See Lewis J (General Division) at 41-47 and Goldin J. (General Division) at 95-98. Expounding upon the doctrine of necessity, they cite *inter alia*: Grotius in *De Jure Belli ac Pads* at Bk. I, Ch. IV, s. XV; Pufendorf, *De Jure Naturae et Gentium*, Bk. VII, C. VIII, s. X (1744); Suarez, *Tractatus De Legibus*, Lib. Ill, Ch. X, s. 9 (1612); and Victoria, *De Potestate Civili* N. 23. In addition to these sources the judges also applied John Locke's notion of the need either to act for the public good where there is no law: ('*Salus populi suprema lex'*). John Locke in his *Second Treatise, On Civil Government*.

[76] See Lewis J (General Division) at 35.

[77] Goldin J. (General Division) at 94 (emphasis added).

[78] Goldin J (General Division) at 103.

> *the State* at p.118. [79]

Beadle CJ also held that Kelsen's doctrine *does* apply to revolutionary colonial entities as 'the American War of Independence is sufficient proof of that'.[80] However, he stated that it was unclear that Smith's revolutionary regime was firmly established (internationally or domestically) even though it 'seems likely to continue.'[81] Consequently, the Court found the revolution to be incomplete and therefore unsuccessful.[82] The appellate Court followed the lower court, citing again international jurists Grotius, Vitoria and Suarez,[83] and 'principles of international law,'[84] to hold that Smith's regime possessed legality (i.e. it was a legal authority) under the doctrine of necessity.[85] The Court was not unanimous on this point. Two dissenting judges, Justice Macdonald and Judge President Quenet, argued that the revolution in Rhodesia had in fact succeeded, and on this basis, it had become a independent sovereign state in international law.[86] Although the majority endowed Smith's regime with a form of legality under the doctrine of necessity, the appellate Court unanimously decided to set aside Madzimbamuto and Baron's detention orders because the regulation under which they were made was *ultra vires*.[87] Following this, new detention orders were immediately issued against both men, and the case was then appealed to the UK's Judicial Committee of the Privy Council (hereinafter 'the Board'), notwithstanding the fact that the 1965 Constitution abolished of all rights of appeal to the Board. The Board granted leave to hear the appeal.

Two aspects of the Board's decision are notable for the purposes of this Chapter. First, and most significantly, the Board, though not mentioning Kelsen directly, held that revolutions *can* found new legal orders and that this 'fact' is recognised in law:

> It is an historical fact that in many countries—and indeed in many countries which are or have been under British Sovereignty—there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or *coups d'etat*. The law must take account of that fact.[88]

The Board, naturalising the role that revolution plays in the origin of legal systems, cited in support of this 'fact', cases endorsing Kelsen's doctrine of revolutionary legality.[89] Although the Board's comments here were partially qualified,[90] the Board implicitly endorsed Kelsen's doctrine as the test to determine the legality of a revolution, citing with approval Munir CJ's reasoning in *The State v Dosso*, which relied heavily on Kelsen's doctrine.[91] Moreover, the Board approved the lower courts' finding that the Rhodesian Revolution was 'illegal': 'Both the judges in the General Division and the majority in the Appellate Division rightly still regard the 'revolution' as illegal and consider themselves sitting as courts of the lawful Sovereign and not under the revolutionary Constitution of 1965'.[92] Agreeing with Justices Lewis and Goldin (though agnostic on the question of whether Kelsen's doctrine applied to

[79] Beadle CJ (Court of Appeal) at 33 (emphsis added).
[80] Beadle CJ (Court of Appeal) at 37.
[81] Beadle CJ (Court of Appeal) at 46-47.
[82] Ibid.
[83] Beadle CJ (Court of Appeal) at 74-75.
[84] Beadle CJ (Court of Appeal) at 79.
[85] Beadle CJ (Court of Appeal) at 78-79.
[86] Quenet JP and Macdonald J (Court of Appeal) at 143, 157 and 161.
[87] Beadle CG (Appeal Division) at at 88-89, Quenet JP (Appeal Division) at 109, MacDonald J (Appeal Division) at 161.
[88] JCPC at 724. Lord Reid wrote the decision for the Board with Lord Pearce dissenting on the question of the doctrine of necessity.
[89] JCPC at 724-725.
[90] The Board 'would not accept all the reasoning in these judgments'. JCPC at 725.
[91] JCPC at 725.
[92] JCPC at 725.

revolutionary *colonial* entities *in principle*), the Board held that the Rhodesian Revolution failed to extinguish the claim by the UK to full sovereignty over Southern Rhodesia.[93] The result was that Southern Rhodesia lost its status as a semi-autonomous colony when it proclaimed its *UDI,* and this was underscored by the UK's passing of the *Southern Rhodesia Act, 1965*.[94]

The second aspect of this case that is notable for this Chapter is that the Board rejected the application of the doctrine of necessity recognising Smith's regime as a *defacto* and therefore legal government (Lord Pearce dissented on this point). The Board reasoned that UK's subjects in Rhodesia could not obey two rival sovereigns; thus, they must obey only UK legislation in light of Parliamentary sovereignty. The Board then held the new detention orders to be unlawful and of no force or effect.

The last *Grundnorm case* revisited the question of the Rhodesian Revolution's legality three years after the *UDI* was proclaimed. In *R v Ndhlovu*,[95] three judges of the Rhodesian Court of Appeal,[96] writing separately, concluded that the Rhodesian revolution was now successful, transforming the revolutionary regime into a lawful *de jure* authority. Two of the appellate judges based their decision on the fresh application of Kelsen's doctrine. Beadle CJ's conclusion rested on the Kelsenian basis that a 'transmogrification' of the basic norm had (now) occurred.[97] Further, he contended that legal recognition of the success of this revolutionary change was provided for by the Rule of Law.[98] Quenet JP reached the conclusion that the revolution was (now) successful by applying the Board's - and thus Kelsen's - test of the efficacy of the change.[99] MacDonald J reached the same conclusion, but on a different basis: that the Rhodesian people will not accept a sovereign that wages an illegal war against them - thus the true legal sovereign can only be the governing Rhodesian regime.[100] The Rhodesian Revolution was thus held to have passed the Kelsenian test: a new basic norm was created and the old legal order ceased to exist.[101]

What does this description of the judicial practices in the *Grundnorm* cases say about the development of the doctrine of revolutionary legality? These judgments are significant as collectively *they set down what constitutes a competent practice establishing a revolution's legality.* Taken together, the *Grundnorm* cases manifest an extraordinary judicial consensus on one point: Kelsen's test of revolutionary legality was endorsed as the legally correct way to determine the lawfulness of a revolution. In particular they have the effect of reifying Kelsen's scholarly framework as the proper epistemological basis for understanding revolutionary legality, and thus the law's relationship to revolution. Far from challenging the nature, merit or scope of the Kelsenian approach – which would have been open to the judges in light of the international community's condemnation of Smith's regime as an 'illegal racist

[93] The Board distinguished the Rhodesian Revolution from the successful revolutions in Uganda and Pakistan on the basis that in these cases, no rival sovereign existed. JCPC at 725.
[94] *Southern Rhodesia (Constitution) Order 1965* (UK).
[95] (1968) (4) S.A. 515.
[96] The three judges were Beadle CJ, Quenet JP and MacDonald J.
[97] Beadle CJ (*R v Ndhlovu*) at 10.
[98] Beadle CJ (*R v Ndhlovu*) at 24-25.
[99] Quenet JP (*R v Ndhlovu*) at 34-36.
[100] MacDonald J (*R v Ndhlovu)* at 43,44 and 48-50.
[101] Although the Rhodesian government was never formally recognised by the international community as a lawful government, before the *UDI*, the colony of Southern Rhodesia was entitled to self-determination under international law. Following the outcome of *R v Ndhlovu* on the legality of the *UDI,* confirming the effectiveness of the Rhodesian regime, Rhodesia appeared to have met the existing traditional Montevideo Convention criteria for statehood (namely defined territory, permanent population, effective government, and capacity to enter into relations with other states). DJ Devine, 'Statehood Re-Examined' (1971) 34 *Modern Law Review* 410 at 410-411.

regime'[102] - the judicial practices of the *Grundnorm* cases sustained Kelsen's formalistic approach to and understanding of law's relationship to revolution. The substance of the revolution – its objects and goal to maintain white settler domination of the black population - was irrelevant to the question of the revolution's success and therefore legality. The fundamental question to be decided in these cases was not whether Kelsen's doctrine of revolutionary legality was correct (it patently was), but whether the Rhodesian Revolution *met* Kelsen's test of legality, with the conclusion being that it fell short on the basis that the sovereignty of Rhodesia in international law was contested.[103] Revolutionary legality was viewed as contingent upon the resolution of various competing claims to sovereignty, claims employed in different ways to define social ordering and the boundaries (inside and outside) of political communities.[104] Though it was open to them to do so, the judges did not evaluate the *legitimacy* of the regime's revolutionary aims (i.e. to thwart the 'horrors' of decolonised Africa by preserving white settler rule and to create a 'utopia' for white empire and civilisation[105]) or whether the criteria Kelsen used to measure and identify the legality of a revolution were deficient or otherwise flawed (e.g. criteria focused on efficacy and success as opposed to racial equality, self-determination, decolonisation etc…). These practices instead positioned Kelsen as the avatar of revolutionary legal thought, entrenching a formalistic approach to the question of revolutionary legality and to understanding the relationship between international law and revolution.

C. Scholarly Practices: Legal Theorists Respond to the *Grundnorm* cases

Interestingly, the judicial consolidation of Kelsen's test of revolutionary legality in the *Grundnorm* cases prompted a lively and animated discursive struggle over the meaning of 'legality'. Kelsen's doctrine and its application in Rhodesia elicited a flurry of responses in the 1960s and 1970s from numerous legal theory scholars and jurisprudes.[106] In contrast to the judicial validation of Kelsen's 'revolutionary legality', the vast majority of these scholars contested the interpretive rules applied in the *Grundnorm* cases to determine a revolution's

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[102] *UN Security Council Resolution 216* (of November 12. 1965). See also *UN Security Council Resolutions 202, 216, 217, 221 & 232* and *UN General Assembly Resolutions 1747, 1760, 1889, 2012, 2022, 2024, 2105, 2138 & 2151*. Oil and other sanctions were imposed by the UN Security Council on Rhodesia.

[103] Until *R v Ndhlovu,* when Rhodesia's Court of Appeal held that the UK was – in fact - no longer a rival sovereign, the UK continued to legally claim it possessed sovereignty over Southern Rhodesia as a British colony in international law from 1965 until 1979.

[104] L Jones, 'Sovereignty, Intervention, and Social Order in Revolutionary Times' (2013) *Review of International Studies* 1 at 1.

[105] L White, 'The Utopia of Working Phones: Rhodesian Independence and the Place of Race in Decolonisation' in *Utopia/Dystopia: Conditions of Historical Possibility*, (eds) M Gordin, H Tilley and G Prakash (Princeton: Princeton University Press, 2010) 94 at 105.

[106] A Honoré, 'Reflections on Revolutions' (1967) *The Irish Jurist* (N.S.) 268; J M Eekelaar, 'Splitting the Grundnorm' (1967) 30 *MLR* 156; J M Eekelaar, 'Rhodesia: The Abdication of Constitutionalism' (1969) 32 *MLR* 19; J M Eekelaar, *'Principles of Revolutionary Legality'* in AWB. Simpson (ed), *Oxford Essays in Jurisprudence* (2nd Series) (Oxford: Clarendon Press, 1973) at 22; RWM Dias, 'The UDI: The Grundnorm in Travail' (1967) 25 *CLJ* 5; RWM Dias, 'Legal Politics: Norms Behind the Grundnorm' (1968) 26 *CLJ* 233; RWM Dias, 'Temporal Approach Towards a New Natural Law' (1970) 28 *CLJ* 75; SA de Smith 'Constitutional Lawyers in Revolutionary Situations' (1968) 7 *Western Ontario Law Journal* 93; FM Brookfield, 'The Courts, Kelsen, and the Rhodesian Revolution' (1969) 19 *University of Toronto L.J.* 326; JW Harris, 'When and Why Does the Grundnorm Change?' (1971) *CLR* 103; J Finnis, 'Revolutions and the Continuity of Law' in Simpson (ed), *Oxford Essays* above; TC Hopton, 'Grundnorm and Constitution: The Legitimacy of Politics' (1978) 24 *McGill Law Journal* 72; H Hahlo, 'The Privy Council and the Gentle Revolution' (1970) 16 *McGill Law Journal* 92; L Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity' (1979) 1 *Third World Quarterly* 97; H H Marshall, 'The Legal Effects of UDI' (Based on Madzimbamuto v Lardner-Burke) (1968) 17 *International and Comparative Law Quarterly* 1022; C Palley 'The Judicial Process: UDI and the Southern Rhodesian Judiciary' (1967) 20 *MLR* 263.

'legality'. These legal scholars disputed whether Kelsen's 'doctrine of revolutionary legality' and its judicial application were in conformity with the law in three ways. First, they questioned *the sources of law* that were held to be dispositive of the question of revolutionary legality. Second, they questioned the courts' *legal epistemology* (i.e. its correct reading of the law) and whether extra-legal knowledge should have been applied to determine the 'legality' of the revolution. Finally, legal scholars questioned the *legal teleology* of Kelsen's doctrine of revolutionary legality – that is, whether it was consistent with the ultimate aims and purposes of law. Through these various acts of interpretive contestation, these scholarly practices challenged and repudiated the consensus developed by the judicial practices in the *Grundnorm* cases.

Two scholars in particular[107] offered contestations of the *sources of law* used to determine the question of 'legality' in the *Grundnorm* cases. In his *Reflections on Revolutions*, Anthony Honoré questioned not only the legal source undergirding Kelsen's test, but also the test's very characterisation as 'legal' in nature. For Honoré, the salient question of legal theory that the *Grundnorm* cases raised was: 'What sort of law is it, if indeed it is law at all, by virtue of which revolutions are treated as legally efficacious when they succeed?'[108] This question reframes a similar puzzle preoccupying Scandinavian legal realists well before Kelsen: 'The traditional puzzle about revolution has been, as Olivercrona says, "how acts of violence can give rise to binding rules".'[109] For Honoré, the *Grundnorm* cases failed to offer a logical or coherent explanation of the *source* of a successful revolution's legality, as there was 'some inconsistency or contradiction in a legal doctrine which treats wrongful acts as a source of lawful power'.[110] Though he offered various limited alternatives to Kelsen's doctrine,[111] Honoré doubted whether Olivercrona's puzzle is ultimately resolvable in or by law, a discipline unable to regulate or control the unruly and aberrant nature of revolution. Honoré contended that far from solving this puzzle, Kelsen's doctrine was really a dubious political ideology needing to be unmasked. It aimed to propagate a 'political ideology' of political quietism in order 'to minimize conflicts' over claims to revolutionary authority. It expressed a clear preference for the political goal of stability and valorised the *status quo* to ensure that law will side with whomever can *demonstrate* their power through force.[112] In essence, by revealing the inadequate legal source upon which the doctrine rested, Honoré exposed Kelsen's doctrine as ideology masked as *law*.[113]

In his article '*Principles of Revolutionary Legality*'[114] John Eekelaar also criticised the sources of law judges used to determine revolutionary legality in the *Grundnorm cases*, but did so on a different basis. He contended that - *in addition to* Kelsen's doctrine of revolutionary legality (which he reclassified as 'the principle of effectiveness') – other legal *principles* were valid sources of law that should have been used to determine the Rhodesian Revolution's legality. Eekelaar's intervention into the messy revolutionary aftermath of Rhodesia's *UDI* was an attempt to 'rescu[e] the law governing revolutionary situations from "the operation of

[107] Both natural law scholars and fellow Oxonians.
[108] Honoré, 'Reflections' at 269 (*emphasis added*).
[109] Honoré, 'Reflections' at 268, citing Karl Olivercrona, *Law as Fact* at 66.
[110] Honoré, 'Reflections' at 269.
[111] Honoré argues there are three ways a judge can ascertain a revolution's legality: *first*, if a provision in the old constitution permits a revolution; *second*, though the application of a higher moral law or natural law; and *last*, through a social or political duty of a judge to protect a citizens right to regular administration of the law – put another way to protect 'the right to be governned by the sort of substantive rules to which people have become accustomed'. Honoré, 'Reflections' at 274-277.
[112] Honoré, 'Reflections' at 272-273.
[113] Honoré, 'Reflections' at 272: 'As so often, Kelsen is propagating an (acceptable) political ideology ….to minimize conflicts – under the guise of a theory of law, and so committing the sin of which he does not hesitate to accuse others.'
[114] Eekelaar. 'Principles' at 22

positivist dogmatism"[i.e. Kelsen's formalism].'[115] He challenged positivists' dismissal of the application of *principles* in revolutionary cases on the grounds that such principles 'cannot form the basis of a truly legal decision'.[116] Following Ronald Dworkin on the proper role principles should play in adjudication,[117] Eekelaar argued that courts should decide the legality of revolutions on the basis of a number of principles *including* – but not limited to - 'the principle of effectiveness'.[118] He enumerates a long list of legal principles that ought to have been used to determine the Rhodesian Revolution's legality including, *inter alia*:[119] the principle of necessity; the principle that a court will not permit itself to be used as an instrument of injustice; the principle of legitimate disobedience to authority exercised for improper purposes; the principle that no one should profit from his wrongful act; the principle that it is in the public interest that those in *de facto* impregnable control should be accorded legal recognition;[120] the principle that government should be by the consent of the governed, whether voters or not;[121] and finally, the principle of the right to self-determination and of the unacceptability of racial discrimination,[122] including the *UN Declaration of the Elimination of All Forms of Racial Discrimination*.[123] For Eekelaar, the *Grundnorm* cases were wrongly decided on the basis that they ignored these other principles as legitimate sources of law to decide revolutionary legality. Eekelaar's reason for identifying *principles* as sources of law to determine a revolution's legality was meant to offer an alternative to the 'absolutist' legal-versus-illegal framework of Kelsen's doctrine; principles offered judges a more nuanced, differentiated, complete and precise set of guidelines to decide revolutionary legality (e.g. one that took into account the *reasons* for the revolution and the revolutionary authority's character and behaviour).[124]

Legal scholars also responded to the *Grundnorm* cases by challenging not only the sources of law but the legal epistemology and the legal teleology of Kelsen's doctrine. With a few notable exceptions,[125] the dominant scholarly response to the *Grundnorm* cases was that the courts' *reading* of the law was incorrect. Some scholars argued that Kelsen's doctrine was thus incorrectly applied, as it was a doctrine of international law,[126] and international law doctrines cannot determine the legality of a municipal constitution.[127] Others argued that Kelsen's work was misinterpreted in the *Grundnorm* cases, as some judges erred both in their assumptions that the *Grundnorm* was the same as 'the constitution'[128] and also in their view that 'efficacy alone confers validity' upon a new basic norm.[129] Others noted that judges failed to resolve 'all of the practical problems caused by the *UDI'*.[130] More egregious than these errors, they argued, was the fact that Kelsen was *ever* applied to the *Grundnorm* cases in the first place: Kelsen's treatment of the subject of revolution was intended as a guide for

[115] Eekelaar, 'Principles' at 39.
[116] Eekelaar, 'Principles' at 23.
[117] R Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) (Chapter 2).
[118] Eekelaar, 'Principles' at 39-40.
[119] Ibid.
[120] Eekelaar, 'Principles' at 40.
[121] 'There is nothing new in this principle. Authority can be found in political writings at least from the Middle Ages to the present day.' Eekelaar, 'Principles' at 40 (fn 41): 'See Gierke, *Political Theory of the Middle Ages* (1900), at 39. The medieval writers supported the principle by reference to a maxim taken from the Roman law: *quod amnes tangit debet ab omnibus apporbari*.'.
[122] Eekelaar, 'Principles' at 39-40.
[123] Eekelaar, 'Principles' at 25, 40-43.
[124] Eekelaar, 'Principles' at 42.
[125] Brookfield, Hahlo and Harris argued the *Grundnorm* cases were correctly decided. Brookfield 'The Courts Kelsen, and the Rhodesian Revolution' at 352; Hahlo, 'The Privy Council' at 104; Harris, 'When and Why Does the Grundnorm Change?' at 104-106.
[126] Honoré, 'Reflections' at 272.
[127] Eekelaar, 'Rhodesia: The Abdication of Constitutionalism' .
[128] Hopton, 'Grundnorm and Constitution' at 81-84.
[129] Hopton, 'Grundnorm and Constitution' at 85.
[130] Marshall, 'The Legal Effects of UDI' at 1034.

legal scientists and scholars, not judges.[131] What judges did in these cases with Kelsen was thus 'a betrayal'.[132]

In addition to contesting the correctness of the decision, legal scholars also debated whether 'extra-legal' knowledge should have been applied to determine the 'legality' of the revolution. Some argued that the cases were flawed precisely because of the presence of certain kinds of extra-legal knowledge. Chief Justice Beadle's decision in *R v Ndholvu* was flawed as it was made partly on the basis of 'personal choice [and].., judicial conscience.'[133] Kelsen's doctrine simply served as a cover for the political opinions of judges who agreed with the politics of the usurper.[134] Others saw extra-legal and moral reasons as being important to the question of whether the judge should resign when asked to adjudicate a revolution: the legal duty to sit on the case may 'be outweighed by a political duty not to give support to an immoral regime or by a personal moral duty to observe a judicial oath.'[135] Moral reasons and natural law should play a role in determining the legality of a revolution.[136]

Legal scholars also responded to the *Grundnorm cases* by questioning the legal teleology of Kelsen's doctrine of revolutionary legality. Reginald Walter Michael Dias and John Finnis questioned whether the doctrine was consistent with the ultimate aims and purposes of law, and in particular, with law's pursuit of justice. Dias argued that Kelsen's doctrine fails to recognise law's pursuit of justice, which is a part of law's temporality.[137] For him, legality must be understood in terms of two time frames: the present (which involves the act of identifying laws), and 'endurance' (which involves doing justice).[138] If it is to have legality, the *Grundnorm* of the Rhodesian revolution must be moral – it must based on justice.[139] Similarly, Finnis argues that Kelsen's 'doctrine of legal discontinuity' failed to recognise that the basis of all legal rules, and all legal systems, is society: only a society's acceptance of legal rules gives a legal system and its rules a common identity.[140] Finnis's interest in the *Grundnorm* cases has to do with how we understand and explain legal continuity in legal theory. Kelsen's theory posits a succession of legal orders, each displacing (through revolution) the previous one wholly and completely - such that no legal continuity can be said to exist from one legal system to the next. As some pre-revolutionary laws were not re-enacted by the new revolutionary regime, nor were they repealed by the regime, Finnis contends that 'something else' must give them their continuing legal force. That something else, which bridges the sequence of sets of legal systems of the past present and future legal systems, is and will always be, society. For him, a *legal* revolution can only occur when *justice* demands that the existing or new legal system be discontinued as a part of the legal system that is grounded in society's continued identity.[141] Although Finnis does not explicitly say that the Rhodesian Revolution lacked legality according to the demands of justice, this claim is heavily implied by the Rhodesian Revolution's unjust 'character'.[142] This means the character (and substance) of a revolution, including whether it is a 'good' (i.e. just or moral) revolution, *is* relevant to the question of its legality.

In sum, legal scholars concluded that judicial practices adjudicating revolutionary legality in

[131] Wolf-Phillips,'Constitutional Legitimacy' at 97.
[132] Hopton, 'Grundnorm and Constitution' at 87.
[133] Brookfield, 'The Courts, Kelsen, and the Rhodesian Revolution' at 341.
[134] Marshall, 'The Legal Effects of UDI' and de Smith, 'Constitutional Lawyers in Revolutionary Situations' at 106-107.
[135] Harris, 'When and Why Does the Grundnorm Change?' at 127.
[136] Eekelaar, 'Principles', Honoré, 'Reflections' and Dias, 'Legal Politics' at 256.
[137] Dias, 'Legal Politics' at 255. See also Dias, 'Temporal Approach towards a New Natural Law'.
[138] Dias, 'Legal Politics' at 256.
[139] Dias, 'Legal Politics' at 257.
[140] Finnis, 'Revolutions and the Continuity of Law' at 70.
[141] Finnis, 'Revolutions and the Continuity of Law' at 76.
[142] Ibid.

the *Grundnorm* cases were not in conformity with the law for a variety of reasons: the source of law buttressing them was either not established or incorrect; extra-legal factors were either not considered or wrongly considered; and finally, Kelsen's doctrine of revolutionary legality was not consistent with the aims and purposes of law. These critiques aimed to reinstate the legal academe as the proper institutional authority to evaluate the adjudication of, and to discern the correct meaning of 'revolutionary legality'.

Part IV: Clothing Revolution With Legality: Critically Assessing the Politics Behind Legal Practices

How do revolutions come to be clothed in legality? What does the preceding exposition of judicial and scholarly practices tell one about how revolutions come to be clothed in legality? *First*, it is clear from the above account that the doctrine of revolutionary legality was never purely a judicial construct. Rather, it was the product of migrating ideas about, and cross-pollinating practices configuring the relationship between, revolution and legality - *from* scholars to judges and back again. These processes happened across continents (from Soviet Russia, to Austria, to colonial Southern Rhodesia, to imperial Britain), across time (from early- to mid- and late- 20th century) and spanning momentous yet dissimilar international geopolitical ruptures (the Bolshevik revolution and the decolonialisation of Africa).[143] Revolution thus comes to be clothed in legality through a diverse array of legal practices, a complex set of intertwined historical, political, trans-chronological circumstances and events, as well as the absence of a singular defining legal system, jurisdiction or culture. The concept of revolutionary legality then, is a product of the confluence of competent judicial and scholarly practices formed in, and influenced by historical circumstances and events; it is a concept that underscores international law's inherent genealogical ontology.[144]

Second, judicial practices can be seen to both construct and deny a revolution's legality in a way that augments the institutional power of the judiciary. They do so in at least two ways. First, the astonishing judicial pattern of consensus in the *Grundnorm* cases over the correctness of Kelsen's doctrine to determine a revolution's legality had the effect of sustaining judicial objectivity in a time of political and legal crisis. By endorsing a doctrine that simultaneously legalises and depoliticises the question of rulership, judges attained an 'absolute standpoint'[145] they arguably otherwise would have lacked to determine who rules in a time of revolutionary change. Second, the judiciary repeatedly offered an alternative to the Kelsenian doctrine by recognising the existence of a competing conception of 'legality', also germinating from international law, which is *not* revolutionary but applies to revolutionary rulers: that of the laws and actions of an unlawful usurper under the doctrine of necessity. These *two modes of legality* – revolutionary (i.e. Kelsen's doctrine) and non-revolutionary (i.e. the doctrine of necessity) – enabled the judiciary to arrogate to themselves the option of deferring a legal revolution whilst simultaneously declaring legality to endure. As judges are viewed as institutionally best placed to decide complex legal questions – i.e. choosing between alternate modes of legality - this arrogation secures the judiciary's role as the ultimate power-broker, and thus kingmaker in revolutionary situations.

Third, although scholarly interpretive practices critiqued the sources of law and Kelsenian epistemology and teleology applied in the *Grundnorm cases*, in many ways, these practices, reified the law-politics divide underpinning Kelsenian reasoning and formalism. Those scholars who pointed to the inadequate source of law underpinning the Kelsenian doctrine also suggest that *if only* revolutionary legality could find a legitimate and authoritative source in international law, the problem(s) that revolution poses for law can be resolved. In so doing,

[143] This migration and cross-pollination continued in Grenada and Fiji in the late 20th and 21st century.
[144] 'Law is inherently genealogical, depending as it does upon the movement of concepts, languages and norms across time and even space.' Orford, 'The Past as Law or History? at 9.
[145] Kratochwil 'Making Sense of 'International Practices' at 37.

these legal scholars inherit the problems entailed in adopting a positivist approach to revolutionary legality - one being that a treaty, custom, norm, imperial statute, constitution or other source of revolutionary legality would settle once and for all the issue of whether a revolution is or ought to be legal. Differing views on the relative weight and authority to be given to these sources, to their authorship and legitimacy, to their intended and inadvertent political, economic and social goals, to their terms and language and to the interpretation and indeterminacy of these, suggest that the quest for an uncontested source of revolutionary legality will forever be in vain. These critiques fail to recognise that political contestation *continues* on a number of grounds *after* the sources of a doctrine of revolutionary legality have been clearly identified or accepted. In addition to suggesting that politics end when a source of revolutionary legality can be identified, scholarly practices questioning Kelsen's epistemology do not challenge or promblematise the law-politics dichotomy, or the law-morality dichotomy, upon which they rely. By viewing politics and morality as '*extra-legal'* categories needing either to be brought into the adjudication of revolutionary legality or to be clearly separated from it, legal scholars *sustain* the conception of the possibility of a bright-line law-politics divide (without offering a guide on how to navigate this divide). Critiques positing Kelsen's doctrine as law on the one hand, and everything else as politics/morality on the other, not only reify the bright-line divide between law and politics, but depoliticise Kelsen's law-revolution relationship. Finally, scholarly practices advocating that justice and morality should become a feature of international law's teleology fail to recognise the 'givenness' of these concepts in their critique. They fail to recognise that what justice or morality means in any given case, and in a revolutionary situation in particular, is not self-evident or self-explanatory but perennially disputed, and embedded in a context of political struggle and relations of domination.[146]

The above conclusions are important as they say something about how these practices affect both continuity and change in the juridical world.[147] If judicial and scholarly practices intertwine to produce a dominant doctrine or narrative of revolutionary legality, both judges and scholars then share responsibility for how the relationship between international law and revolution hereinafter unfolds. Leaving aside the role of revolutionary (and counterrevolutionary) actors themselves and that of social, economic and political forces in the success or failure of a particular revolution,[148] this study demonstrates that neither judges nor scholars determine 'revolutionary legality' alone. At the very least, it has demonstrated that 'revolutionary legality' is the product of a symbiotic, mutually-constituting relationship between the academic and judicial institutions, and suggests further that judges and legal scholars will likely continue to play a combined role configuring how revolution will (or will not) be clothed in legality in international law. Second, although they do so differently,[149] both judicial and scholarly practices can be seen to shore-up and sustain the law-politics divide in ways that ultimately enhance their respective institutional competence(s) and legitimacy to decide questions of revolutionary legality. This suggests that the contestation of the boundary between law and politics continues to be the main spectre haunting the concept of 'revolutionary legality' and that an approach that ably moves beyond this binary framework has yet to come. Such an approach, if it does arrive, will no doubt affect the existing international legal imaginary of revolutionary change.

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[146] S Marks, *The Riddle of All Constitutions* (Oxford: OUP, 2003), Chapter 1.
[147] Alder and Pouliot, 'Introduction and Framework' at 13-16.
[148] This is an important caveat – although I do not address these factors here, I do so elsewhere: *'Can The Revolutionary Subject Speak in International Law?'* Paper Delivered at Osgoode Hall Law School, Toronto Canada, *Law and Revolution in the Middle East* (*LRME*) Conference (2012) (on file with author).
[149] *Judges* clothe revolutionary legality in international law doctrines which aggrandise their office and *scholars* shift existing (and reinscribe new) boundaries between 'the legal' and 'the political' or between 'law' and 'justice' or 'morality'.

Conclusion:

There is some truth in the claim made by IR scholars that '[l]egal change is under-theorised in IL'.[150] This also goes for the study of *revolutionary* change in international law. This Chapter offers one modest attempt to (partially) fill this gap in the legal literature. It aims to critically intervene into 'the now' by situating the dominant doctrine of revolutionary legality, a doctrine which continues to be applied in the 21st century,[151] within a broader historical account of patterned and embedded judicial and scholarly practices. By excavating the landscape of the politics and practices which co-produce 'revolutionary legality', this Chapter aims to make revolution become less of an aberrant being within the social sciences, and in particular international law. Fred Halliday successfully foregrounded revolution as a worthy object of inquiry that could offer insights into the disciplinary practices of IR: the same now needs to be done for the discipline of IL. Although this historical account does not view judicial or scholarly practices as acts of self-perfection,[152] it is also clear that international legal history plays an important role in understanding developments that continue to shape the legal imaginary on the nature and possibilities of revolutionary change. Such a conclusion is unsurprising once we acknowledge that 'we choose our past in the same way that we choose our future'.[153]

[150] D Armstrong, T Farrell and H Lambert, *International Law and International Relations*, 2nd edition (Cambridge University Press, 2012) at 115.
[151] *Prasad v Republic of Fiji* [2001] NZAR 21 (HC Fiji); *Republic of Fiji* v. *Prasad* [2001] NZAR 385 (Court of Appeal, Fiji); *Qarase v. Bainimarama* [2009] FJCA 9 (Court of Appeal, Fiji).
[152] Kratochwil ' Making Sense of 'International Practices' at 37.
[153] H White 'The Burden of History' (1966) 2 *History and Theory* 5 at 123.