

PROVISIONAL TO PERFECT: A KANTIAN THEORY OF HUMANITARIAN
INTERVENTION

by

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DISSERTATION ABSTRACT

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Provisional to Perfect: A Kantian Theory of Humanitarian Intervention

Thesis directed by Associate Professor David R. Mapel

Several scholars claim that Kant's ethical and political theories are inconsistent. These "inconsistencies" become apparent when scholars attempt to apply Kant's ethical and political framework to problems in international relations, such as humanitarian intervention (HI). Kok-Chor Tan argues that HI is an imperfect duty of benevolence (ethics), for example, while Carla Bagnoli argues that HI a perfect duty of right (justice). I argue the parties in this debate are misguided, though much of the disagreement is owing to a failure on Kant's part to provide a robust conception of justice in the state of nature. First, I argue that to make Kant's account fully consistent, a "provisional" duty must be included in his taxonomy. Next, I argue that HI ought to be considered a provisional duty of justice. I then consider whether HI can be a perfect duty of justice, that is, a duty that all actors are capable of fulfilling. This would require the institutionalization of a duty of HI. I argue that Kant's permissive law authorizes the coercion of states into such an institution but that the United Nations Security Council should be the only agent to undertake the task of such coercion. Moreover, existing juridical institutions such as the International Criminal Court ought to be reformed and a United Nations led Rapid Reaction Force should be established to carry out interventions.

DEDICATION

For my husband, Christopher Michael Perkins, who is my best friend, my partner, and the greatest gift I ever received. I also dedicate this to my mother, Kerri Lynn Roff Ungureit, and to my mentors David R. Mapel, Terry Nardin, and B. Sharon Byrd. All of you have made me who I am today, and it is with much love and respect that I dedicate this project to you.

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While writing this dissertation, I had the great fortune to travel to Friedrich-Alexander Universität Nürnberg to work under the direction of B. Sharon Byrd and Joachim Hruschka. Over many afternoons of discussion, cake, and coffee, we agreed that Kant's theory of politics is much more nuanced and complex than most current Kant scholars want to admit. While we disagreed on several issues, as will become apparent throughout this dissertation, our primary source of consensus was: the need for supranational juridical institutions is a requirement of Kant's theory of justice, and coercing states into such an institution is not merely permitted, it is necessary. Such agreement is not often found in those studying Kant.

In the course of this project, I have sought the expertise of many Kant scholars, international ethicists, friends, and family. Thus a number of people should be mentioned for their patience, efforts and insight. I owe a very large debt to Jason Robles, without whom, I would still be banging my head against a wall over Kant's permissive law. Moreover, his keen editorial eye and criticisms have helped me with substantial portions of this project. I owe him a great debt. In addition, I thank Terry Nardin, the "amazingly amazing" Robert Hanna, Horst Mewes, Steve Vanderheiden, and Elisabeth Ellis for their guidance and comments. I would also like to acknowledge Aubrey Westfall for valuable conversation and observations on the importance of empirical data (over glasses of wine and many miles of road). Thanks also are due to Ajume Wingo and the University of Colorado at Boulder Philosophy Department's Center for Social Values for providing me with an opportunity to present my work and receive valuable feedback, and the University of Colorado at Boulder Department of Political Science's monetary support

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Several of the chapters are reproduced elsewhere. Chapter 1, “Kantian Provisional Duties” appears in the *Annual Review for Law and Ethics*, Vol. 18 (2010). Additionally, a shorter version of Chapter 2, “A Provisional Duty of Humanitarian Intervention” will appear in *GR2P* in 2011. Some ideas from Chapter 2 also appear in “Response to Pattison: Whose Responsibility to Protect” in the *Journal of Military Ethics* (2009). Thanks go to the editors and anonymous reviewers of these two journals.

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Introduction

In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.

– Albert Einstein

Humanitarian intervention (HI) is not a new topic of debate. Scholars, politicians, policy analysts, aid workers, and even military commanders continue to spend a considerable amount of time arguing the merits of intervening militarily in another state's territory without that state's consent for the sake of protecting the rights and lives of civilians. Indeed, there is little consensus when it comes to the practice and governance of HI, even in the face of growing support for the "Responsibility to Protect" (R2P) doctrine.

Nevertheless, the speed with which the R2P is gaining success is impressive. The International Commission on State Sovereignty's report "The Responsibility to Protect" released a mere seven years ago, and the United Nation's acceptance of the new R2P norm a mere five years ago, marks the beginning of a new era for the protection of human rights. Yet, little has been done since this time to institutionalize R2P in the international system's governance structures, and nothing has been done to actualize the protection of peoples.

While the International Coalition for the Responsibility to Protect identifies nine current crises that meet R2P's threshold conditions, only two of these identified crises currently have United Nations (UN) peacekeeping missions deployed.¹ Of those two UN

¹ R2P's threshold conditions are: large scale loss of life, ethnic cleansing, mass human rights violations, and crimes against humanity (A/60/150). <http://www.responsibilitytoprotect.org/index.php/crises>. <http://www.un.org/en/peacekeeping/currentops.shtml>. I will cover R2P more thoroughly in Chapter 2.

missions, only one is planned to extend beyond July of 2010.² The other seven crises wax unabated. Sri Lanka continues to resist international pressure to address its alleged human rights violations and war crimes, and not only refuses to allow the UN access to investigate these crimes, but stonewalls any attempt to pass a UN mandated investigation. The more recent crisis in Kyrgyzstan received little international press, and even slighter concern from international society.³ States and non-governmental organizations can continue to “call for” an end to such situations, write letters to state leaders, issue joint statements or publically express disgust over such crises, but such actions amount to very little. The Sri Lankan government continues to act with impunity, and its citizens have no source of protection and guarantee of their human rights.⁴ Kyrgyzstan still waits for assistance from its repeated calls for help.

What, then, are academics, states, nongovernmental organizations, international organizations, or any other agents in international society to do in the face gross crimes against humanity, genocide, war crimes, and other massive human rights violations?

While the international community may agree that it has a responsibility to protect, it

² The joint African Union and UN mission in Darfur (UNAMID) is set to expire in July 2010, while the UN mission in the DRC (MONUC) extended its mandate in 2009 to June 30, 2011. The new mandate, now termed the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) reduces the military troop force by 2000 personnel. The total troop allowance will be 19,815 military personnel, but that it appears is open to the 2000 reduction “where the security situation permits.” MONUSCO’s mandate ranges from protection of civilian lives to providing “technical and logistical support” for elections to fighting “illegal exploitation and trade of, natural resources [sic]” in the DRC. S/Res/1925 (2010) at [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1925\(2010\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1925(2010)). It is easy to say that MONUSCO’s mandate is over-extended and under-budgeted for its goals. The United States Military currently has 98,000 troops in Afghanistan alone, and its mandate there does not cover the scope of MONUSCO.

http://afpak.foreignpolicy.com/posts/2010/05/25/daily_brief_more_us_troops_in_afghanistan_than_iraq

³ Both Russia and the United States have military bases in Kyrgyzstan, but neither state currently plans any peacekeeping mission. Russia has merely agreed to send in helicopters and transport vehicles for the interim Kyrgyzstan government to use in its attempts at quelling violence.

<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kyrgyzstan>.

⁴ <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-sri-lanka>.

does not so easily agree on when it must act to fulfill its obligations.⁵ Moreover, the bureaucratic behemoth that is the UN is not only mired in red tape, but also (and often) incapacitated by a dysfunctional Security Council (SC).

This dissertation is an attempt to answer the question, “what should be done?” I contend that all of the current questions about the practice of HI (who ought to intervene, when, to what extent and when to leave) are associated with its status as a duty of justice in what amounts to a “state of nature.” The international system lacks the requisite executive, judicial and legislative authorities to properly call it a *civil* society. It is what Kant would call a “society compatible with rights” but not a Rightful society.⁶ In other words, international society does not enable a condition “under which alone everyone is able to enjoy his rights,” where such enjoyment consists in the equal recognition and protection of such rights and freedoms.⁷ I argue that if we are to solve some of the problems facing the practice of HI, we must first understand the nature and requirements of justice in international society. This in turn requires us to understand whether, in a state of nature, there are duties of justice (such as a duty to intervene), and if so, how we might categorize and assign them to delineate what is required for their fulfillment. Our first task in determining what ought to be done is to understand the scope and limits of international justice. Only when we have cleared the conceptual underbrush can we begin to make normative prescriptions about fulfilling a duty of HI. As Kant reminds us:

[T]he canon of reason is related to practice in such a way that the value of the practice depends entirely upon its appropriateness to the theory it is based on; all is lost if the empirical (hence contingent) conditions governing the execution of the law are made into conditions of the law

⁵ I will address the issue of whether the amorphous international community can even have a responsibility in Chapter Two.

⁶ *RL*, 6:306.

⁷ *RL*, 6:306, 6:314.

itself, so that a practice calculated to produce a result which previous experience makes probable is given the right to dominate a theory which is in fact self-sufficient.⁸

Thus the academic, “who works for them all, for their own good, on matters of theory” is not “a pedant” whose work is of little practical value.⁹ We must first understand have a theoretical understanding of justice and then apply it to the case.

My strategy throughout this dissertation is to balance theoretical and practical considerations. On the one hand, I begin from Kant’s theory of justice and examine its fundamental underpinnings. On the other hand, I apply this theory (or a version of it) to the case of HI. Kant’s theory of justice is universal in form, and that means that it requires what Garrett Wallace Brown terms “a tripartite system of jurisprudence.”¹⁰ In other words, because justice is ultimately concerned with regulating the external actions of moral agents, a system of jurisprudence that regulates actions between individuals, between states, and between states and peoples, is required. For Kant, justice requires systems of domestic, international and cosmopolitan law. Without each of these systems in place, individual and state rights are merely provisional.¹¹ Yet, up until now, no other scholar has attempted to pull apart and examine the moral requirements of agents in the interim periods, or transitional stages, of Kant’s theory of justice. No scholar has as closely considered Kant’s account of duties of justice in states of nature.

Most scholars influenced by Kant who have debated about a duty of intervention argue over what kind of duty it is. They attempt to categorize it as either imperfect or

⁸ Kant, Immanuel. “Theory and Practice” in *Kant: Political Writings*, (Ed.) H.S. Reiss (Cambridge University Press, 2003): 63.

⁹ Ibid, 63.

¹⁰ Brown, Garrett Wallace. *Grounding Cosmopolitanism: From Kant to the Idea of a Cosmopolitan Constitution*. (Edinburgh University Press, 2010).

¹¹ *RL*, 6:350.

perfect.¹² No one appears to realize that a duty of HI does not fit neatly within either category; instead, the attempt to push the proverbial square peg into a round hole is simply repeated. Once familiar with this debate, it became clear to me that what is required is an examination of the very nature of duties in Kant's framework, and duties of justice in particular, before we can determine what Kant's theory implies for HI. Questions about the categorization of a duty of HI are secondary to understanding what is required of agents when civil society is absent.

At this point, the reader may ask: Why Kant? I am not positing that Kant's theories are the only way to understand or to practice international justice. I admit, there may be other productive ways of addressing these issues. Kant also provides a fruitful approach, however.¹³ Kant's highly organized and analytic framework allows us to thoroughly examine the structure of his arguments about justice in a methodical way and then attempt to apply them to current problems of international justice. Of course, there is still debate about how Kant's moral and political theory should be applied to the international and cosmopolitan levels. There is disagreement about whether state sovereignty is sacrosanct, about the legitimacy of states' territorial interventions, and about the issue of coercing states into a supranational juridical state. Some scholars, such as Fernando Tesón, Georg Cavallar, Hauke Brunkorst and Alyssa Bernstein, argue that

¹² Bagnoli, Carla. 2006. Humanitarian Intervention as a Perfect Duty in *Nomos XLVII: Humanitarian Intervention*, Eds. Terry Nardin & Melissa Williams. New York University Press: 117-140. Tan, Kok-Chor. 2006. The Duty to Protect in *Nomos XLVII: Humanitarian Intervention*, Eds. Terry Nardin & Melissa Williams. New York University Press: 84-116.

¹³ For a consequentialist approach to the problem of intervention, cf. Pattison, James. *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: Oxford University Press, 2010). While I applaud Pattison's attempts to formulate a theory of who should ought to intervene and when, I disagree with his consequentialist framework. The motivating force behind interventions is to stop massive human rights violations, and so the motivating factor is about the right – not the good. Cf. Roff, H.M. "Response to Pattison: Whose Responsibility to Protect?" *Journal of Military Ethics*, Vol. 8, No. 1 (2009):79-85.

Kant's theory of justice emphasizes the legitimacy of domestic state institutions, but that "state sovereignty is relative in the sense that it is dependent upon popular sovereignty."¹⁴

Popular sovereignty, these scholars argue, can be separated from formal state sovereignty. They allow that when a government's expressed will and actions are opposed to the will of the people (i.e. popular sovereignty), formal sovereignty may be infringed for the sake of protecting the rights of the people.¹⁵ Thus, these scholars argue that Kant "defends state sovereignty with his principle of nonintervention," while concurrently providing "arguments in favour [sic] of qualified humanitarian intervention in failed or despotic states."¹⁶

Interestingly, though, such scholars also maintain that "Kant claims that in international relations, no country is entitled to end the state of nature by means of force."¹⁷ Coercion of states into anything resembling a world state, or even "a federation (like that of the American states) based on a constitution," is impermissible.¹⁸

Intervention, which is by its very nature a coercive activity, is only justified when either the will of the people in the target state is not affected or the state has dissolved to a point where there is no state to coerce. Coercion is not, and indeed cannot be, justified to put an end to the international state of nature (which seems to be one of the roots of the problems associated with a duty of HI).

¹⁴ Cavallar, Georg. *Kant and the Theory and Practice of International Right*. (Cardiff: University of Wales Press, 1999): 57. Cf. Tesón, Fernando. *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational Publishers, 1988); Brunkhorst, Hauke. "Paradigmenwechsel im Völkerrecht? Lehren aus Bosnien", in Matthias Lutz-Bachmann and James Bohman (eds.) *Frieden durch Recht: Kants Friedensidee und das Problem einer neuen Weltordnung* (Frankfurt am Main, Suhrkamp, 1996); Bernstein, Alyssa. "Kant on Rights and Coercion in International Law: Implications for Humanitarian Military Intervention" *Jahrbuch für Recht und Ethik*, Band 16 (2008): 57-100.

¹⁵ Cavallar, op. cit., fn 14, pp. 89-93 Cavallar cites Brunkhorst, Van der Linden, Lillich, Tesón, Taylor and Mulholland as proponents of this view.

¹⁶ Ibid, 57.

¹⁷ Ibid, 55.

¹⁸ *RL*, 6:351.

Another group of scholars in this debate, represented primarily by B. Sharon Byrd and Joachim Hruschka, argues that sovereignty, whether popular or formal, is not the central issue. They do not particularly address the issue of humanitarian intervention, but instead, the issue of justified coercion into what they term a state of nation states.¹⁹ In other words, Byrd and Hruschka are concerned with the practical and theoretical requirements of Kant's complete theory of justice. They attempt to show that Kant's tripartite system of domestic, international and cosmopolitan law requires formal institutionalized public Right that regulates the behavior of all agents capable of affecting the rights of another. Until public law, arbitrated by a neutral judge, and enforced by a legitimate and authoritative coercive mechanism, can secure the rights of persons and states, they argue, justice is merely provisional. Byrd and Hruschka claim, then, that coercion of states into a state of states is legitimate.²⁰ For them, the question of intervention is peripheral; though, because they endorse coercion of states into a state of nation states, they may too endorse a qualified right of intervention to push states down the juridical path.

¹⁹ Byrd, Sharon and Joachim Hruschka. "From the State of Nature to the Juridical State of States." *Law and Philosophy*, Vol. 27 (2008):

²⁰ While neither Byrd and Hruschka nor Cavallar explicitly address each other, their arguments about Kant's justification for coercion into civil society are diametrically opposed. On the one hand, Byrd and Hruschka argue that it is Kant's presumption of evil (that is, his assumption that all men are naturally evil), and the lack of an authoritative judge in a state of nature that gives rise to the authorization to coerce. It is both the tendency of man to act in his own self-interest, and it is also the high probability for dispute (honest or otherwise) in a state of nature, that leads to their argument that agents in a state of nature are justified in coercing all others into a civil society that will secure rights and render "final binding decisions as to what our rights are." (Byrd, Sharon and Joachim Hruschka. "From the State of Nature to the Juridical State of States." *Law and Philosophy*, Vol. 27 (2008): 611.) Cavallar, on the other hand, argues that "it is not the (alleged) empirical fact of human wickedness that makes it necessary to leave the state of nature, but its very structure." The sole factor is "the very lawlessness of the state of nature" that authorizes and individual "to force or compel others to enter a civil society, or a common rightful condition." (Cavallar, op. cit., fn. 14, p. 119). I agree with Byrd and Hruschka that it is both the presumption of badness about human nature *and* the structure of the state of nature that authorizes coercion into civil society. I do so because there must be either a presumption or empirical conjecture of the behavior of the agents interacting in a state of nature, and not merely an argument about structure alone. If the agents are, say, angels, then it is not immediately apparent that structural anarchy will produce rights violations.

A third group of scholars in this debate about Kant's theory of justice takes the notion of sovereignty and public international justice as maintainable, though only through the voluntary acceptance of international laws to regulate the international community. They stress Kant's assertion that the domestic state has "out grown" the need for coercion, and so "in principle, there could be no justification whatsoever for the forcible interference by one state in the constitution and government in another state."²¹ What is required is the voluntary coming together of all states into a federation of free states where they "express their will and agreement to be bound by the law that the federation was to base."²² In effect, scholars such as Thomas Pogge and Charles Beitz, and to some extent Charles Covell, argue that "states jointly practicing [sic] self-restraint" apply to themselves "the principles [they have] co-legislated with all others."²³ To this end, states "view themselves as co-legislators" and "acknowledge their membership in the community of states."²⁴ The question of intervention, then, can be resolved if states agree to intervention when they fail to abide by the communally established rules.²⁵

Katrin Flikschuh makes a fourth argument about the nature of Kantian international justice. She frames the problem in terms of a dilemma between the requirements for absolute sovereignty in the domestic state and the achievement of universal (and thus international and cosmopolitan) Right. Instead of arguing that domestic right ought to be applied by analogy to international relations, she argues that Kant's theory of right should

²¹ Covell, Charles. *Kant and the Law of Peace*. (New York: St. Martin's Press, 1998): 105.

²² Ibid, 96.

²³ Flikschuh, Katrin. "Kant's Sovereignty Dilemma: A Contemporary Analysis" *Journal of Political Philosophy*, Vol. 18, no. 3 (2010): 15.

²⁴ Ibid, 15.

²⁵ Ibid, 15.

be viewed as “systemic,” meaning domestic, international and cosmopolitan Right are interdependent. Arguing by analogy produces the “sovereignty dilemma” where, on the one hand, Right requires the establishment of a fully sovereign domestic state, and on the other, this fully sovereign state is supposed to be then coerced into a fully sovereign state of states. She maintains this is conceptually incoherent. Her solution is to view Kant’s theory of Right as a system where “domestic rights relations are not fully just unless embedded in just relations between states,” and that “international right is not complete without cosmopolitan right.”²⁶ For her, the domestic state cannot be coerced into a state of states, and the internal affairs of a state are not open to coercive interference by other states. In other words, Flikschuh does not endorse a principle of humanitarian intervention, and she claims that only in exceptional cases would intervention be permitted (via Kant’s permissive law).²⁷

Each of these interpretations addresses what might be thought of as a Rubik’s Cube of Kant’s theory of justice, which requires us to align correctly sovereignty, coercion, rights, law, freedom, and juridical institutions. When one starts with sovereignty, the problem of intervention raises its head. When one starts with freedom, the problem of coercion comes to the fore. Or, when one attempts, like Flikschuh, to examine the problem from a systemic vantage point, Kant’s own worry arises that justice, and the goal of perpetual peace, will prove an “empty chimera”.

Looking at the possibility that there is a duty of HI allows us to see that the

²⁶ Ibid, 19.

²⁷ Ibid, 21. Flikschuh’s arguments are not persuasive. While she rightly views Kant’s theory of justice as a system, claiming that there are different notions of Right at each level makes little sense. Right entails the authorization to use coercion, and so if there is to be international and cosmopolitan Right, then even these “different” types of Right must be coercive. She does not want to grant this point, but not granting it means that we have left behind Kant’s theory of justice. Furthermore, she does not explain why only “exceptional” circumstances would permit intervention, as all interventions are by their nature exceptional.

aforementioned elements of Kant's theory are connected. One cannot privilege right at the expense of freedom, and one cannot forsake international juridical institutions for the sake of sovereignty. The international community's (or individual state's) acknowledgement that it possesses a responsibility to protect (and to intervene when prevention fails) highlights the tensions inherent in an incomplete system of justice. Acknowledging that one has a juridical duty to X, while simultaneously refusing to create a juridical condition, undermines the very notion of having a juridical duty.

One may approach Kant's work through strict exegesis or reconstruction. Ultimately, this project demands the latter, as obviously Kant did not address the question of humanitarian intervention. I look to his writings to find exegetical support for my arguments about HI, but I cannot simply point to one passage and claim that Kant is an adamant interventionist, nor can I point to a passage and claim that he is a strict noninterventionist. His theory is too complex to make such easy judgments. Thus, I attempt to extend or supplement Kant's moral framework when it does not directly address an issue or is particularly ambiguous or contradictory. Whenever possible, I try to make these arguments on the basis of careful exegesis of the texts we have.

Many critics of reconstruction complain that political theorists take too much license with Kant's works, and that these theorists make interpretive choices that are clearly unsupported by many of Kant's theories.²⁸ However, scholars who choose to do narrow exegesis will find themselves unable to address many contemporary political and moral problems because Kant did not explicitly address such problems. It is necessary to walk a difficult line between exegesis, interpretation, and reconstruction. Following

²⁸ Flikschuh is an example of one of these critics. Cf: Flikschuh, *op. cit.*, fn 22, p. 23.

Höffe, I believe “one can still make use of Kant in order to go beyond Kant,”²⁹ but I am of course also wary of “slapping the morally reassuring label ‘Kantian’” on an argument to provide it with legitimacy.³⁰ One can remain true to Kant’s texts and still find a place for critical evaluation and reconstruction. This project engages both Kant and Kantians, and attempts to provide a particular account of Kant’s theory of justice as applied to the case of humanitarian intervention. For the most part, I am engaged in exegetical reconstruction to support my prescriptions. However, when some of Kant’s more specific arguments about political theory cannot be clearly applied to the current state of international affairs,³¹ I attempt to provide support for my views by returning to more foundational Kantian commitments. I cannot claim that my arguments are all Kant’s, but I try not to be too hermeneutically generous

My dissertation is organized into five chapters, each beginning with some theoretical considerations and then moving toward more practical problems. Chapter One, “Kantian Provisional Duties” argues that Kant’s traditional dichotomized framework of perfect and imperfect duties is not complete. Duties of justice in a state of nature ought to be considered provisional, as they are correlates of provisional right. Such duties, require that institutions of justice be established; that is, provisional duties must transcend their provisional status and become perfect.

Chapter Two applies the theoretical framework of provisional duties to the case of HI. I argue that repeated attempts to categorise a duty of intervention as either perfect or imperfect misrepresent the nature of this duty. We must first understand the categorization as one of right (justice) not benevolence (ethics), and only then can we

²⁹ Höffe, Otfried. *Kant’s Cosmopolitan Theory of Law and Peace* (Cambridge University Press, 2006): 16.

³⁰ Flikschuh, op. cit., fn 22, p. 3.

³¹ I address this issue in depth in Chapter Four.

understand the need for the duty to be institutionalized. Institutionalization is not merely a route to the best consequences; but is necessary because of the logic of justice.

Chapter Three explores Kant's permissive law as apparently the most appropriate principle for authorizing the coercion of states into an International Humanitarian Intervention Institution (IHII). An IHII is necessary to make a provisional duty of HI, perfect. I argue, that Kant's permissive law applies in what I term "Supreme Moral Emergencies," or conditions where following the dictates of reason as if one were in the ideal world would threaten to undermine the ends of reason in the nonideal world. For the sake of reason, the permissive law allows agents to do something they otherwise are prohibited from doing.

Chapter Four then applies Kant's permissive law to the current international system. I argue that the international system is currently in a SME due to two factors: a majority of states consistently violating the rights of their peoples and the lack of effective juridical institutions at the supranational level. I argue that Kant's assumption that the domestic state will adequately secure and protect the rights of its people is empirically false. Using data from the Failed State Index, I show that well over half of the worlds' states violate the rights of their peoples. Moreover, I also argue that Kant's second assumption that the greatest threat to Right will come from outside the domestic state is also false. Civil wars account for a loss of life and property perhaps five times greater than the destruction visited by inter-state wars.³² Since Kant's assumptions do not hold, I argue that the blanket prohibition on international coercion cannot be sustained. The domestic state cannot be held inviolable.

³² Fearon, James D. and David D. Laitin. "Ethnicity, Insurgency, and Civil War" *American Political Science Review*, vol. 97, no. 1 (2003): 75-90.

Chapter Five concludes with an argument for an IHII. I argue that an IHII should promulgate public rules to govern the practice of HI, thereby solving the problem of indeterminacy. This kind of institution should have the ability to monitor human rights violations (in all countries) that have the potential to trigger a humanitarian crisis, and should provide a centralized information network to the United Nations (UN) and society of states. However, an IHII must be an autonomous institution from the UN. At the international level, an IHII ought to mirror the independent status of National Human Rights Institutions (NHRI) at a domestic level. The UN should execute the IHII's rules, and, when individuals or states do not comply with those rules, a strengthened International Criminal Court or International Court of Justice should adjudicate controversies about noncompliance. Moreover, I suggest that to execute effectively the rules of the IHII, the UN ought to have a rapid reaction volunteer military force. I also argue that the UN ought to be the agent that coerces states into the IHII via its Chapter VII powers. I conclude with an explanation of how reforms to the international system can satisfy Kant's requirements of protective, commutative and distributive justice, thereby rendering a provisional duty of HI peremptory.

As Kant was a cautious optimist, so am I. We should remember that moral progress in international society is achievable, though not easily won. As Kant reminds us, states are capable of regulating their behavior in accordance with laws of Right, and it is not a "pedantically childish academic idea" to think that they cannot.³³ There will undoubtedly be many "unsuccessful" attempts at bringing state's behavior under the rule of law, but it is not an impossible task.

³³ *TP*, 8:313.

Chapter 1

Kantian Provisional Duties

From Kant's critical works to his ethical works he never viewed the world in simplistic terms. He continually sought to find new, more complicated, ways of answering fundamental philosophical questions. Instead of taking sides in a debate, he often sought out a third option: an option between the dichotomy of empiricism and rationalism, a position for human beings between the noumenal and phenomenal realms, an understanding of moral action for beings subject to both freedom and nature. Kant uses dichotomies in his thinking quite often, but he does so to show that, while they are helpful, they are often incomplete and not the end of the story. Inevitably, though, like all great theories, his are not immune from criticism. Despite these criticisms, like "empty formalism" or an inability to take into account particular cases or cultural practices, Kantian moral and political theory still provide one of the major approaches in contemporary moral and political philosophy. However, his moral theory still continues to puzzle scholars when it comes to the relationship between right and virtue and his resulting taxonomy of duties. As Marcus Willaschek charges, the *Doctrine of Right* does not belong in Kant's moral theory, and that, due to its inclusion, "Kant's system of moral duties is neither consistent nor complete."¹ Others, like Nelson Potter and Otfried Höffe, find no problem with Kant's derivation of right from the moral law, and therefore find no

¹ Willaschek claims that because juridical laws can be obeyed for heterogeneous reasons, juridical laws cannot be derived from a categorical imperative that demands obedience for the sake of the law and nothing else. Willaschek, Marcus. "Why the Doctrine of Right does not belong in the *Metaphysics of Morals*" *Annual Review for Law and Ethics* Vol. 5, (1997): 208.

problems with the duties derived from it.² While some, like Katrin Flikschuh, explain the relationship as separate yet complementary.³ Yet, these scholars point to a fundamental tension in Kant's moral theory, a tension which then gives rise to questions of moral guidance in situations where we know what duty requires, and we may be physically capable of acting, but remain highly doubtful or even certain that our actions will fail to bring about their goal. The result being that acting to fulfill our duty may end up violating a tenet of the categorical imperative: respecting humanity in oneself and others. A timely and often discussed example is that of humanitarian military intervention. Do states that have a capacity *to do something*, but not a capacity to fully alleviate the suffering or stop genocidal killings, have a duty to intervene militarily? Do states have a duty to intervene if they know their actions will fail or make the situation worse? If we consult Kant's moral theory for guidance in this kind of situation, we may be puzzled by what it tells us to do. This puzzlement arises from the fact that Kant seems to place moral duties in various cross-cutting categories (right or virtue), which permit or require different sorts of things. Moreover, these categories seem to yield different conclusions with respect to the kind of problem I have just described, where we can act, but where our action seems bound to fail or worse. What is required, then, is to understand the relationship between right and virtue and to ask ourselves, in the spirit of Kant: Is there a third option?

² Cf. Potter, Nelson. "Applying the Categorical Imperative in Kant's Rechtslehre" *Annual Review of Law and Ethics* Vol. 11 (2003): 37-51. Höffe, Otfried. *Categorical Principles of Law*, Mark Migotti trns., (University Park: Penn State Press, 2002).

³ Flikschuh, Katrin. "Justice without Virtue," in Lara Denis ed.: *Kant's Metaphysics of Morals: A Critical Guide*, (Cambridge: Cambridge University Press, forthcoming). Flikschuh argues that one can be just without being virtuous, and that Willaschek's worry that heteronomous, and therefore nonautonomous, lawgiving robs justice of its moral status is unfounded because justice does not depend so much on individual subjective, traditionally autonomous, willing as it does on a public objective unified will.

I will argue, appearances to the contrary notwithstanding, Kant's moral theory (and thus his taxonomy of duties) is not inconsistent, and that it does provide more guidance than I have just suggested. To show this, I must do two things. First, I must say more about the Kantian distinctions between justice and virtue, perfect and imperfect duties and negative and positive duties. In other words, it is necessary to lay out in more detail that taxonomy of duties that seems to create the problem or the confusion I have just outlined above. Second, I will then show that interpreters have missed a third kind of duty in Kant, which I call provisional duty. Provisional duty resolves the suspected tension between right and virtue, and it helps us determine what is required in these especially problematic situations. As I believe Kantian theory is still a fruitful approach in contemporary moral and political philosophy, I think the results of this essay will also help us think about some urgent practical problems we currently face, particularly, as I have motioned toward, in cases of duties of justice in the international realm.

I believe that Kant's concept of provisionality is the key to understanding how right and virtue fit together in his moral system. Unfortunately, this concept has been ignored in the literature, save by one scholar: Elisabeth Ellis. Ellis argues that all of Kant's political works have a "provisional" feature to them. Further, she posits that a regulative ideal is always explicit or implicit in his political works, and that in his political theory this ideal is a republican government regulated by a judging public. Ellis' focus on Kant's idea of provisional acquisition of property, allows her to build a Kantian theory of "provisional right," where one's maxim is: "act in such a way that one does not render the eventual realization of the ideal state impossible."⁴

⁴ Ellis, Elisabeth. *Kant's Politics: A Provisional Theory for an Uncertain World*, (New Haven: Yale University Press, 2006): p. 114.

My interpretation differs from Ellis in that I look specifically to Kant's taxonomy of duties and not to the role of a regulative ideal of republican government and its relationship to provisional right. My argument proceeds at a fundamental level, rather than assuming it, and thus it provides Ellis' argument for a maxim of provisional right with a stronger and clearer deontic framework. Second, and more importantly, my argument explains the relationship between duties of right and virtue and provides action guiding principles for agents who find themselves in situations of moral ambiguity, due to juridical problems like states of nature or breakdowns of civil society.

I. Kant's Taxonomy of Duties

A. Right & Virtue

In the *Metaphysics of Morals*, Kant divides his moral system into two categories: *Recht* (translated in different contexts as "right," "justice," and "law") and *Tugend* (virtue). *Recht* pertains to all actions having to do with the right of another person. For Kant, only one "innate" right exists: a right to freedom.⁵ *Tugend*, or virtue, on the other hand, pertains to acts having to do with moral perfection. Kant insists that virtue is "the strength of a human being's maxims in fulfilling his duty."⁶ Virtuous actions express a

⁵ Kant, Immanuel. "Doctrine of Right" (1797) in: Mary Gregor, trans. and ed.: *The Metaphysics of Morals*, (Cambridge: Cambridge University Press, 1996): pp. 29-31. When citing this translation, I hereafter refer to the *Metaphysics of Morals*, the "Doctrine of Right" or the "Doctrine of Virtue" with the use of the abbreviations "*MM*," "*DR*," or "*DV*," respectively. When referring to Kant's essays: "Idea for a Universal History with a Cosmopolitan Purpose" (1784), "An Answer to the Question: What is Enlightenment" (1784), "On the Proverb: That May be True in Theory, But is of No Practical Use" (1793) and "Towards Perpetual Peace" (1795), unless otherwise noted, I use Ted Humphrey, trns.: *Perpetual Peace and Other Writings*, Indianapolis: Hackett Publishing Co., Inc., 1983/1985. I will use the abbreviations, "*UH*," "*WE*," "*TP*," and "*TPP*," respectively. Furthermore, for all Kant's works cited here, unless otherwise noted, I will follow with the *Gesammelte Schriften*, ed. Preussische Akademie der Wissenschaften citation format.

⁶*DV*, 6:394.

person's internal freedom, and internal freedom is manifested by an agent acting autonomously, that is, choosing to act in accordance with the moral law.⁷

For Kant, *Recht* and *Tugend* are different mainly in terms of lawgiving. In other words, if an action is self-imposed, then that action is for the sake of one's inner freedom. If an action is externally imposed, through positive law, then it is for the sake of her external freedom.⁸ A person is internally free, and autonomous, when she has given herself a law to follow without any influence from outside forces (i.e., inclinations, desires, fears). A person is externally free when she can go about her life, make projects and plans, unrestrained from the unjust physical hindrances of others. This rule-governed external freedom allows agents to coordinate their actions with a high degree of certainty because there is a system of law that dictates what actions are licit and illicit, a neutral judicial institution to adjudicate disputes, and a system of punishment to enforce these laws. External freedom must be limited to allow for the full exercise of internal freedom, as a person's internal freedom is affected by her physical security and ability to self-legislate. *Recht* paves the way for *Tugend*.⁹ Using lawgiving as the primary explanation for the difference between *Recht* and *Tugend* is useful, and *internal versus external lawgiving* is one of the clearest distinctions Kant makes.

⁷ "Hence autonomy is the ground of the dignity of human nature and of every rational nature," and dignity for Kant is "unconditional and incomparable worth [i.e. respect]" that is attributed to legislation, "which [itself] determines all worth." More clearly, autonomy is self-legislation, and the manner in which one legislates; thus an act receives more or less worth depending upon how one wills it. Kant, Immanuel. *Grounding for the Metaphysics of Morals* (1785), (Trans.) James Ellington, (Indianapolis: Hackett Publishing Co, Inc., 1993): 41. Hereafter, I will abbreviate the Grounding as "*G*" and follow Kant's *Gesammelte Schriften*, ed. Preussische Akademie der Wissenschaften citation format.

⁸ *DR*, 6:220; 6:383.

⁹ I disagree with Flikschuh here, that "Right is not 'prior to' Virtue, nor is Virtue 'prior to' Right, [and that] Right is not a condition of Virtue" Flikschuh, op. cit., fn 3, forthcoming. Kant's works on the progress of humanity and the necessity of the state as a fundamental vehicle for all of man's progress incline me to believe that right is prior to virtue – at least if both are to be universal. I take right and virtue to be symbiotic, one needs the other, but for the entire human race to progress towards moralization, then the state is necessary first.

However, the distinction between *Recht* and *Tugend* cannot be wholly reduced to different kinds of lawgiving, and Kant employs other ways of explaining the *Recht/Tugend* distinction. A second, and related, way of understanding the difference between the two is by incentive. Kant claims that “all lawgiving can therefore be distinguished with respect to the incentive [...]”¹⁰ In other words, the motivating reason for acting (the action’s incentive) plays a deciding role in how the act is categorized. If an agent takes her motivating reason to be the moral law, for the sake of the moral law, then her act is virtuous. If, on the other hand, an agent takes fear of punishment as her motivating reason for acting, then her action is merely right. If, however, an act is in accordance with the dictates of *Recht*, and is done from the motive of duty, then it is deemed “moral.” Kant states that “mere conformity or nonconformity of an action with law [...] is called its *legality* (lawfulness); but that conformity [what law requires] in which the idea of duty arising from the law is also the incentive to the action is called its *morality*.”¹¹ Actions are judged as “moral” if an agent freely, that is autonomously, acts; however, if one acts in conformity with a moral or legal rule (say not stealing) but does so from some external cause (like the fear of being caught and punished), then it is not a “free” action. That action is “just” or “legal” but not “moral.” Virtuous actions are all moral actions by definition. It is, perhaps, easier to think of right and virtue as subsets of morality, where all legal duties can be externally motivated or coerced and are the subject of juridical legislation. All ethical or virtuous duties are, by virtue of their lawgiving, “moral.”

¹⁰ *DR*, 6:218-6:219.

¹¹ *Ibid*, 6:219 (italics in original).

A third way to distinguish right and virtue is through the doctrine of obligatory ends. Here, Kant argues that the moral law prescribes actions such that “one can think of the relation of end to duty in two ways: one can begin with the end and seek out the maxim of actions in conformity with duty or, on the other hand, one can begin with the maxim of actions in conformity with duty and seek out the end that is also a duty.”¹² Acting in accordance with the moral law requires, Kant thinks, that all men adopt certain ends. If one takes the concept of duty to be the primary incentive for all action, then one “will have to establish maxims with respect to ends we ought to set ourselves,” and these ends are our moral perfection and the happiness of others.¹³ The moral law requires that we treat “humanity in ourselves and others always as an end and never as a means,” and if we truly hold this conviction, then we must seek to perfect our own humanity and to help others perfect theirs. Examples of virtuous actions are giving to charity, not being insulting, and showing courage in trying times.

Actions in accordance with *Recht*, though, do not necessarily set particular ends for an agent. *Recht* permits an agent to “set [ends] for himself and in accordance with them prescribe the maxims he is to adopt [...]”¹⁴ These juridical maxims are also adopted “on empirical grounds” and are based in “self-seeking” motives.¹⁵

Finally, *Recht* and *Tugend* can be divided on the basis of coercion. Kant claims:

To every duty there corresponds a right in the sense of an *authorization* to do something (*facultas moralis generatim*); but it is not the case that to every duty there correspond *rights* of another to coerce someone (*facultas iuridica*). Instead, such duties are called, specifically, *duties of right*. [...] What essentially distinguishes a duty of virtue from a duty of right is that external constraint to the latter kind of duty is morally possible, whereas the former is based on free self-constraint.¹⁶

¹² *DV*, 6:382. Kant identifies the first of these as in accordance with the *DR*, and the second, the *DV*.

¹³ *Ibid*, 6:386-6:388.

¹⁴ *Ibid*, 6:382.

¹⁵ *Ibid*, 6:382.

¹⁶ *Ibid*, 6:383 (italics in original).

Some actions, those that deal with a person's external freedom, are subject to the reciprocal right to coerce. Any act an agent performs that hinders another agent's external freedom is wrong, and any act that is opposed to this wrong is right. This is why Kant claims that "if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom [...], it is right."¹⁷ But, an agent's decision to adopt an end for herself, cannot be coerced. One cannot force another to adopt an end or a maxim of action, as this is an exercise of someone's internal, as opposed to external, freedom. Thus *right* can coerce actions, but it cannot coerce maxims of actions (i.e. it cannot coerce virtue).

As we can see, *Recht* and *Tugend*'s differences are mainly concerned with law, lawgiving, incentives for following law, and coercion. All of these distinctions are important to note because all of these meanings are bound up in the definition of *Recht*. *Recht* covers right, rights, being "in the right," equal rights and responsibilities, being under law (civil, common, and canon), claims, titles (to something), what is due, privilege, being or what is justified and justice.¹⁸ Kant also seems to employ most, if not all, of these same meanings throughout his works. His is a specifically legal understanding, where justice and law are codependent.

Virtue, though, is concerned with the realm of action that is freely chosen by an agent. Freely, here, means a rational exercise of choice, where an agent is not determined by any "pathological" determinant (inclination, desire, fear). Virtue is the realm where one, in theory, has no need of claims, titles and guarantees because an agent is always

¹⁷ *Kant*, DR, 6:231.

¹⁸ <http://dict.tuchemnitz.de/dings.cgi?lang=en&service=deen&opterrors=0&optpro=0&query=Recht&iservice=&comment=>

capable of acting freely if an agent is rational (and thus recognizes the moral law) and employs his will (*Wille*).

However, this is not to say that all people are virtuous or that virtuous action does not require empirical factors. Quite the contrary, because human beings possess rational capacity, we can *become* virtuous, but we must also accept that we are subject to and affected by the empirical world and “pathological forces.” Kant’s more developed views on virtue are more tempered than his famous, earlier, view that moral action can only be judged by a “good will” that “like a jewel, still shine[s] by its own light.”¹⁹ As David Heyd notes, “virtue is an intermediary concept between the rational motive and psychological set up of action in the world. Its inculcation is partly the outcome of moral reasoning, but partly the product of exercise, habit, education, or *Bildung*.”²⁰ The “purely good will” of the *Groundwork* is a “*holy*, or absolutely good will,” something that human beings cannot actually achieve, but only approximate through its status as a regulative ideal.²¹ As Heyd argues, this is why Kant, in his later work the *Metaphysics of Morals*, does not focus on the necessary presence of an absolutely good will for virtuous action.²² In Kant’s later work, “such constraint [the categorical imperative], therefore, does not apply to rational beings as such (there could also be *holy* ones) but rather to *human beings*, rational *natural* beings, who are unholy enough that pleasure can induce them to break the moral law, even though they recognize its authority.”²³ Human beings require character formation and education, and these things require law, society, teaching,

¹⁹ *G*, 4:394.

²⁰ Heyd, David “Moral and Legal Luck: Kant’s Reconciliation with Practical Contingency,” *Annual Review of Law and Ethics*, Vol. 5, (1997): 36.

²¹ *G*, 4:439.

²² Heyd, op. cit., fn 20, p.14.

²³ *DV*, 6:379 (italics in original).

parenting, norms and various opportunities for virtuous action. Virtue, then, requires a protected sphere of action for it to emerge and flourish: it requires external freedom (guaranteed through laws of *Recht*).

The relationship between right and virtue, then, is symbiotic. *Recht* supplies external protection necessary for *all* agents to exercise their rational capacities in relative freedom. It provides the formal public framework of laws that ensures agents' actions "can coexist with the freedom of everyone."²⁴ Virtue, however, provides agents with opportunities to become moral beings. Kant argues that "[h]uman morality in its highest stage can still be nothing more than virtue, even if it be entirely pure (quite free from the influence of any incentive other than that of duty)" because human beings are not "finite *holy* beings (who could never be tempted to violate duty)."²⁵ This is so because human beings lie "between the animal and the holy: purely animal operation is not agency, and purely holy action is not human."²⁶ Thus to make up for our tendencies towards unholiness, or rational egoism, we must provide external guarantees for our freedom; we must provide law.

Both *Recht* and *Tugend* are ruled by the moral law. *Recht* must follow the moral imperative in form, while *Tugend* must provide the moral imperative with content. Both are necessary for one another, for as Kant famously states "Like the wooden head in Phaedrus's fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain."²⁷ Right must be ruled by morality, and virtue is morality employed in the empirical world.

²⁴ *DR*, 6:231.

²⁵ *DV*, 6:383.

²⁶ Heyd, op. cit., fn 20, p. 32.

²⁷ *DR*, 6:230.

B. Further Subcategories of Duties & Willaschek's Charge

Kant further subcategorizes *Recht* and *Tugend* into perfect and imperfect duties. He distinguishes these kinds of duties in a wide and at times somewhat bewildering variety of ways. According to Kant, perfect duties are: coercible; subject to external legislation; juridical; directly contradictory to the categorical imperative; concerned solely with actions (as opposed to motives); pass the “contradiction in conception” formulation of the categorical imperative; identify a specific agent; have a specified content for fulfillment; fully dischargeable; and demanded by right. In contrast, imperfect duties are: uncoercible; subject to internal legislation; ethical; solely concerned with “ends;” judged by an agent’s internal motivations; unable to produce a “contradiction in willing;” specify no particular agent; specify no particular content; not fully dischargeable; not demanded by *Recht*.²⁸

Duties can also be characterized as positive or negative. Positive duties require a specific action, while negative duties require an agent to refrain from acting. Kant’s work on right indicates that he views duties of right as mainly negative: to forbear from interfering with the freedom of another person. Examples of negative duties include: not wronging another person and refraining from actions that disrespect another person, say by mocking or “exalting oneself” above another.²⁹ Duties of virtue are typically positive, in that they require an agent to do something for someone else or oneself. Examples of

²⁸ The first five distinctions between Kantian perfect and imperfect duties are noted by Pippin, Robert. *Idealism as Modernism: Hegelian Variations*, (Cambridge: Cambridge University Press, 1997): 56-91; the next three by Nardin, Terry “Introduction,” in: Terry Nardin/Melissa S. Williams eds.: *Humanitarian Intervention: NOMOS XLVII*, (New York/London: New York University Press, 2005): 1-28; and the remaining two by Murphy, Jeffrie. *Kant and the Philosophy of Right*, (Macon: Mercer University Press, 1994): 34-37.

²⁹ Duties of respect are perfect duties of virtue that require an agent to forbear from acts of lying, suicide, “defiling by lust”, “stupefying oneself by excessive food or drink”, and not defaming or ridiculing others (*DV*, 6:421-6:427; 6:449; 6:462-6:468).

positive duties include: giving to charity, coming to the aid of someone in distress, establishing institutions or mechanisms that allow agents to live a moral life. However, there are negative duties of virtue, and, as I must assume for now, positive duties of right.³⁰

At some points in Kant's work, he also suggests that perfect duties are "strict" and "narrow," while imperfect duties are "wide."³¹ These last two distinctions are meant to highlight how much leeway an agent has in fulfilling her duty. For example, a perfect duty will inform an agent that she must repay a debt of five dollars to her friend. Agent, recipient, scope, possible coercion (if there is a contract involved), and the ability to know when the duty is discharged are all present here. An imperfect duty, of charity, say, will only stipulate that agents ought to be charitable and take other's happiness as their own. For an imperfect duty the agent is identified, but recipient is left up to the agent, scope is left up to the agent (should she donate money or time), coercion impermissible, and the duty is never in a sense fully or once and for all "discharged."

For the most part, Kant takes all duties of right to be perfect duties and duties of virtue to be imperfect duties.³² As Marcus Willaschek notes:

Duties of right are all and only those duties which concern external actions, are based on external lawgiving and which one can be externally coerced to observe; these duties Kant identifies with narrow duties, which in turn are implicitly equated with perfect duties. Correspondingly, duties of virtue primarily concern inner maxims and ends, are based on internal legislation, and allow only of internal coercion; they are wide or imperfect duties.³³

³⁰ Some might object that all duties are *Recht* are negative and derived from a "do no harm" principle. However, while it is not within the scope of this essay to argue for positive duties of right, I believe there to be such positive duties in Kant's Doctrine of Right. A good example is the state's duty to have a basic minimum welfare system. Kant claims that wealthy citizens may be taxed, and the monies received distributed to attend to the basic needs of the poor (*DR*, 6:325-326).

³¹ *DV*, 6:390.

³² *DV*, 6:390.

³³ Willaschek, *op. cit.*, fn 1, p. 206.

Duties of right, since they only concern external actions, are therefore only concerned with others. Duties of virtue, contrarily, concern ends and can apply to oneself and to others. Unfortunately, Kant's discussion of these distinctions is not always consistent.

However, Kant also argues that human beings have perfect duties of virtue – to themselves and others. Perfect duties of virtue to oneself fall under the precept: “respect the end of humanity in our own person.”³⁴ These actions include: abstaining from suicide³⁵, defiling oneself by lust³⁶, stupefying oneself with food or drink³⁷, lying to others³⁸, avarice³⁹ and servility.⁴⁰ A perfect duty of virtue to others includes the duty of respect. Here, Kant does not use the term “perfect” duty, but only “narrow,” because the action owed permits no leeway for an agent, and is “strictly speaking, only a negative one (of not exalting oneself above others).”⁴¹ Acts of respect include: recognizing the dignity in others⁴², forbearing from contemptuous action⁴³, refraining from scandal⁴⁴, abstaining from arrogance⁴⁵, foregoing from defamation⁴⁶, refraining from ridiculing others⁴⁷. Thus it appears that there is not a one to one ratio (*Recht*: perfect duties and *Tugend*: imperfect duties).

³⁴ *DR*, 6:240.

³⁵ *DV*, 6:422.

³⁶ *Ibid*, 6:424-425.

³⁷ *Ibid*, 6:427.

³⁸ *Ibid*, 6:429-430. It is not immediately clear that lying to others is a perfect duty to oneself. For a good discussion of this cf. Korsgaard, Kristine. “The Right to Lie: on Dealing with Evil,” *Philosophy and Public Affairs* Vol. 15, (1986): 325-349.

³⁹ *DV*, 6:432-433.

⁴⁰ *Ibid*, 6:434-436.

⁴¹ *Ibid*, 6:450.

⁴² *Ibid*, 6:432.

⁴³ *Ibid*, 6:463.

⁴⁴ *Ibid*, 6:464.

⁴⁵ *Ibid*, 6:465.

⁴⁶ *Ibid*, 6:466.

⁴⁷ *Ibid*, 6:467.

At one point in the *Doctrine of Right*, Kant provides a table to elucidate how the perfect/imperfect and right/virtue distinctions are to be made.⁴⁸ However, this table is quite unhelpful, as it does not take into account any of the perfect duties of virtue noted in the previous paragraph. Furthermore, Kant's attempt to schematize his system of duties with his division of right and virtue is rather unsatisfactory and leaves him open to Willaschek's charge that his "system of moral duties is neither consistent nor complete. [And that] there are moral duties which are neither duties of right nor duties of virtue."⁴⁹ While Willaschek does not give us any hint as to what these other duties may be, or why they do not fit in the imperfect/perfect and right/virtue distinctions, he has identified (albeit from a different and in my opinion incorrect perspective) a serious problem in Kant's theory: the need for an expansion of Kant's taxonomy of duties.⁵⁰

This problem arises because of Kant's reliance on a particularly legal understanding of *Recht*. *Recht*, again, encompasses law, right, being in the right, having rights, and justice. This conceptualization forces Kant to require the establishment of a

⁴⁸ *DR*, 6:240.

⁴⁹ Willaschek, op. cit., fn 1, p. 208.

⁵⁰ I believe Willaschek to be incorrect because his argument is that the entire *DR* does not belong in the *MM*, as *Recht* cannot be derived from the categorical imperative. He claims that "Kant nowhere really says that the principle of right can be derived from, or is based on, the categorical imperative. The moral law and the categorical imperative are not even mentioned in §§ A-E of the 'Introduction to the Doctrine of Right', where Kant introduces the principles of right" (Willaschek, op. cit., fn 1 p. 220). In response, I want to make several points. First, the "Introduction" is hardly the entirety of the *DR*. Second, Kant does claim in § B that without the moral law, i.e. something to guide "sources of judgment in reason alone", an empirical doctrine of right is empty – like "Phaedrus' head." Third, Kant specifically mentions the categorical imperative in three places in the *DR*. In the first instance Kant is referring to the possibility of "intelligible" possession – i.e. the ability to own a piece of property without having to have physical control over it. He says that possession of property is necessary for freedom, and that freedom "can only be inferred from the practical law of reason (the categorical imperative) as a fact of reason" (*DR*, 6:252). In the second instance, Kant is attempting to square unjust or dishonorable punishments and honor with a civil constitution. He states "The knot [of violating the CI and maintaining the CI] can be undone in the following way: the categorical imperative of penal justice remains (unlawful killing of another must be punished by death); but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and undeveloped, is responsible for the discrepancy between the incentives of honor in the people (subjectively) and the measures that are (objectively) suitable for its purpose" (*DR*, 6:337). Third, Kant states "the law of punishment is a categorical imperative" (*DR*, 6:331). Thus, I refute Willaschek, Q.E.D.

civil condition to guarantee universal justice because only public law (not private or natural) can guarantee the rights and freedoms of everyone, regardless of their physical capacities. Individuals in a state of nature, where law is not public and not backed by a legitimate coercive force, can only secure their rights by their own strength.

Furthermore, if we recall my previous claim that virtue and right are codependent, then it is apparent that for both types of duty a state is required. Absent a state, or a condition of what Kant calls “public right,” his taxonomy of duties is problematic at best.

C. Public & Private Right

To better understand this problem, we must look at how Kant attempted to solve it himself. Kant’s argument runs roughly as follows. There is only one natural right⁵¹, the right to freedom, and there are natural (moral) laws. For people to be free and to pursue their projects, people must secure property to actualize their freedom. However, in a state of nature there is no guaranteed way to secure property beyond what one can physically possess because there is no neutral judge to adjudicate disputes and no public and agreed upon laws backed by a coercive force to protect individuals. In a state of nature, each person is judge in his own cause and “might makes right.” Property and *Recht* can only be deemed “provisional.” Yet, the natural law requires us to i) maintain our freedom and ii) establish a condition to secure acquired rights to property. The only way to do both of these is to join a civil society ruled by law, arbitrated by a neutral judge and backed by a coercive force to enforce laws and punish offenders.⁵²

⁵¹ This is not the same “natural right” of Natural Law Theory. The innate right to freedom, for Kant, is a moral right, and so is required by reason. Humans by nature have reason, and thus it is a “natural right.”

⁵² *DR*, 6:312.

Kant's method is to divide his *Doctrine of Right* into two parts: private right and public right. Private right is the condition of right in a state of nature, where only natural and private law rule. Natural law for Kant is roughly "law determined by reason which concerns the interrelation of persons in so far as one person's exercise of freedom can have an influence on the possible exercise of freedom of some or all others."⁵³ Private law regulates relationships outside of civil society (like the family), and includes one's innate rights, the right to acquisition of provisional property, and the right to compel others into a civil condition. In this condition:

[T]here are no public law courts...no public means of enforcing decisions made by law courts, [...and] natural assumptions about a person's intentions are based on what is not explicit and certain. As a result there can be irresolvable disagreement concerning what a person truly had in mind when he/ she made an agreement or performed a certain action."⁵⁴

Here, one can have justice, but it is subjective (one's interpretation of the natural law) and limited to only those who can secure it through their strength.⁵⁵

Public right, contrarily, is the condition of civil society, where laws are promulgated publically and rights are rendered peremptory. As Leslie Arthur Mulholland notes, Kant employs three different kinds of justice to explain public justice (or public right): commutative, distributive and protective. "Commutative justice only provides rights against a determinate person," while "distributive justice...[requires] a judicial decision...because only a court of law by whose judgments everyone is bound can provide the peremptory resolution of claims to property and thereby bind an entire

⁵³ Mulholland, Leslie Arthur. "The Difference Between Private and Public Law," *Annual Review of Law and Ethics* Vol. 1, (1993): 131.

⁵⁴ Ibid, 140.

⁵⁵ I am employing the common usage of "objective" and "subjective" when it comes to individual judgment in relation to a principle or law. Kant, on the other hand, typically uses these terms differently, namely he uses "subjective" to refer to what a court decides is "right" and "objective" for what an individual with his reason decides is "right" (*DR*, 6:297). I thank B. Sharon Byrd for this point.

society.”⁵⁶ Further, he writes “protective justice is the enforcement of a judicial distribution of rights through coercion, including punishment,” and “protective justice makes rights possible.”⁵⁷

Public right, and thus civil society, must have legal procedures, courts, judges and coercive mechanisms for enforcement and punishment. These procedures must be public, and courts must render decisions through “legally determined principles of judgment.”⁵⁸ Furthermore, there must be rules for determining and identifying who has “the requisite features as empowered to exercise authority within a court.”⁵⁹ Since the role of judgment in the state of nature (private law) is a major source of contention, public judgment (and judges) must resolve this tension by rendering certain, final and impartial judgments.⁶⁰

Due to the subjectivity and uncertainty of a state of nature, public law must render decisions with “*certainty* in the acquisition of rights, and *finality* in the resolution of conflicts.”⁶¹ In other words, in a state of nature people’s judgments proceed from implicit assumptions and subjective interpretations of the natural law.⁶² Because of this fact, judgments are not seen as impartial or disinterested, and individuals in this condition will continually appeal to their own senses of justice and claim that they need not submit to any authority but their own. Only a public (*öffentlich*) condition, where judgments are based on a set of publically determined criteria, can resolve this problem. Furthermore,

⁵⁶ Mulholland, op. cit., fn 33, p. 134.

⁵⁷ Ibid, 134.

⁵⁸ Ibid, 136.

⁵⁹ Ibid, 137.

⁶⁰ Ibid, 139.

⁶¹ Ibid, 139 (italics in original).

⁶² Kant’s understanding is similar to, but distinct from, Locke. Law in the state of nature, i.e. natural law, is that law we can know through our reason, and what we use our private judgment to determine. Natural law here is not “god’s law,” like it is for Locke.

these judgments must be seen as final. There must be an objective resolution of a conflict, and this is done through a public and authoritative court.⁶³

Kant's public law solution seems to tidy up many problems witnessed in a condition of private right, but it does not resolve problems of justice completely. We are still left with a nagging question in Kant's theory: If there is no state to secure justice for all, then what happens to duties of justice outside of a civil condition? Willaschek's charge that Kant's system of duties is incomplete begins to have more and more of a footing when we take into consideration duties of justice at the international level, in failed or collapsed states, or even perhaps during times of civil war. Moreover, Kant's answer in Chapter II of the *Doctrine of Right* that states ought to form:

A league of nations[...] not in order to meddle in one another's internal dimensions but to protect against attacks from without. [And] [t]his alliance need not, however, involve a sovereign authority (as in a civil constitution), but only an association (federation); the alliance can be renounced at any time and so must be renewed from time to time.⁶⁴

is rather unhelpful. Problems of justice will remain even with a league of nations, and it does not answer questions about duties of justice in failed states, collapsed states, civil wars, or states witnessing mass atrocities due to civil war, genocide, or crimes against humanity.

In the next section, I will answer Willaschek's charge that Kant's taxonomy of duties is incomplete by providing a third kind of duty for Kant's taxonomy: a provisional duty. A provisional duty is entirely in keeping with Kant's intentions and assumptions

⁶³ Mulholland, op. cit., fn 33, p. 140.

⁶⁴DR, 6:345. I deviate from Gregor's translation here. The original German reads "*das die Verbindung doch keine souveräne Gewalt (wie in einer bürgerlichen Verfassung), sondern nur eine Genossenschaft (Föderalität) enthalten müsse; eine Verbündung, die zu aller Zeit aufgekündigt werden kann, mithin von Zeit zu Zeit erneuert werden muß.*" Gregor translates the first declination of *müssen* as "must" and not "need not," which Kant was known to commonly use. Moreover, she smuggles in a "must not" in the second clause about a sovereign authority that is not present in the original. I thank B. Sharon Byrd for pointing this out.

and refines our understanding of the moral law and its requirements. Furthermore, a provisional duty will also help us make sense of duties of justice when we are faced with violations of justice outside a civil condition.

II. Kantian Provisional Duties

A. *The Necessity of Civil Society*

A perfunctory reading of Kant yields the conclusion that justice only exists in the realm of *Recht*, and that *Recht*, or a condition of right, only exists in a civil society. This is because “right” is determined in accordance with external laws, and these laws determine what is “just.” Consequently, one’s judgment of what is just or unjust can only be made when an external law is transgressed.⁶⁵ However, a closer reading of the *DR* yields a subtler conclusion: justice is, at least partially, everywhere because in every condition a form of *Recht* inheres.⁶⁶ This is so because a form of *Recht* subsists either outside of civil society or where “there are cases in which a right is in question but for which no judge can be appointed to render a decision,”⁶⁷ and for this reason there are problematic cases excluded from the *Doctrine of Right*.

⁶⁵ Ibid, 6:224.

⁶⁶ Kant acknowledges this mistake by claiming, “It is a common fault (*vitium subreptionis*) of experts on right to *misrepresent*, as if it were also the objective principle of what is right in itself, that rightful principle which a court is authorized and indeed bound to adopt for its own use...in order to pronounce and judge what belongs to each as his right, although the latter is very different from the former. – It is therefore of no slight importance to recognize this specific distinction and to draw attention to it. ... So the question here is not merely what is *right in itself*, that is how every human being has to judge about it on his own, but what is right before a court, that is what is laid down as right.” (*DR* 6:297, italics in original). Thus “right in itself” is different than cases of juridical right, even though “right” must take both the former and the latter into account.

⁶⁷ Ibid, 6:234.

These problematic cases arise in situations outside of civil society (private right) and in instances of uncertainty, situations of what Kant calls “ambiguous right.” Under private right, the existence of *Recht* for an agent is guaranteed only by physical capability. Kant claims that in this condition, objects of one’s choice (property, security, life) “[are] that which I have the *physical capacity* to use as I please, whose use lies within my power (*potentia*).”⁶⁸ Anything “external as one’s own[,] in a state of nature[,] is physical possession which has in its favor the rightful *presumption* that it will be made into rightful possession [in civil society].”⁶⁹ Thus even though Kant only argues that a presumption, or a rule that one assumes, is valid until a time when evidence disproves it, it is still a rule of *rightful* presumption, and so it has a modicum of *Recht*. Furthermore, ambiguous right is “right in a wider sense (*ius latium*), in which there is no law by which an authorization to use coercion can be determined.”⁷⁰ Here, Kant acknowledges areas of life (what he calls cases of equity and necessity) where agents have “such true or alleged rights,” but the lack of institutional mechanisms of civil society relegate agents’ claims to “the court of conscience.”⁷¹ In these instances duties of justice are provisional. I term these duties “provisional” (*provisorisch*) because they arise from Kant’s discussion of provisional rights. For Kant, provisional rights exist when there is no system of law to guarantee noninterference, no common judge to adjudicate disputes, and one’s security

⁶⁸ Ibid, 6:246. Gregor translates *vermögen* as capacity. However, I translate it as ability. *Vermögen* can mean ability, power, capability, faculty, to be in a position to do something, or to have assets (to do something with). Thus I translate *vermögen* as a can-do, learned or otherwise, and not as something innate or only generated by something psychological. Moreover, Kant discusses *vermögen* as more of a physical concept (the ability to use or control something) further in: *DR* 6:237; 6:246; 6:257; 6:258; 6:265; 6:267; 6:269; 6:271; 6:274; 6:356-357. The *DV* supports this translation at 6:383 and 6:404.

⁶⁹ *DR*, 6:257 (italics in original).

⁷⁰ Ibid, 6:234.

⁷¹ Ibid, 6:235. Kant also claims “ambiguity really arises from the fact that there are cases in which a right is in question but for which no judge can be appointed to render a decision” (*DR*, 6:234). There can be cases of equity in civil society, but the courts cannot resolve them in accordance with Right because of certain contractual stipulations.

depends on one's own strength. One's right here is provisional and not "conclusive" or peremptory because agents do not have the ability to make *legitimate* claims on others.⁷²

Only a civil society is capable of legitimizing these claims and establishing full (or absolute) *Recht*. Kant notes:

It [civil society] is the final end of all public right, the only condition in which each can be assigned *conclusively* what is his; on the other hand, so long as those other forms of state are supposed to represent literally just so many different moral persons invested with supreme authority, no ***absolutely rightful condition*** of civil society can be acknowledged, but only *provisional* right within it.⁷³

Here is the rub: (i) morality is made up of right and virtue; (ii) morality requires that we fulfill our duties of right; (iii) a duty is unconditional; but (iv), sometimes, due to empirical conditions, our duties are in fact conditional. Accordingly, I must make a distinction between two different meanings of "conditional." Famously, Kant declares that all duties are *ipso facto* necessitations to act. Under this definition, it would be incoherent to claim that one can have a merely conditional or contingent necessitation. That is not what I am claiming here. Instead, "conditional" or "provisional" duties are conditioned by structural requirements, i.e., they have *enabling* conditions. As long as people are enabled, then they are under a strict necessitation to act. But if some people are disabled or disempowered, then there is (or at least might be) no duty for those agents. If it is determined that an agent has a duty, then that duty still stands as a necessitation to act. Thus *provisional here means limited by some special nullifying*

⁷² "I am therefore not under obligation to leave external objects belonging to others untouched unless everyone else provides me with assurance that he will behave in accordance with the same principle with regard to what is mine....[I]t is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance....So only in a civil condition can something external be mine or yours." Anything but a general will would "infringe upon freedom in accordance with universal laws." (DR, 6:256 italics added).

⁷³ This quote is drawn from Kant's later discussion of international society, but it shows two things of importance. First, Kant believed that the international society is one ruled by provisional right. Second, the terminology "absolutely rightful condition" alludes to conditions that are not "absolutely" rightful but may have elements or gradations of *Recht*. (DR, 6:341 italics added).

hindrance of a temporary nature, e.g. the hindrances of a state of nature, civil war, civil breakdown during a natural disaster, or anything *which makes some incapable of fulfilling duties of justice*. In the absence of an authoritative neutral judge and the rule of law backed by a coercive force, duties of justice are provisional. Some examples might be helpful here. Looking solely at Kant's works, four provisional duties are easily identifiable: initial acquisition of property, initial institution of civil society, autocrats governing in accordance with republican principles, and sovereigns delaying the institution of preliminary articles 2, 3, and 4 of *Perpetual Peace*.⁷⁴

A provisional duty, then, is a duty that *permits an exception on the basis of ability*. In the *Groundwork*, Kant asserts in a footnote that "I understand here by a perfect duty one which permits no exception in the interest of inclination."⁷⁵ Yet, he does not give what one would think is the logical converse, that imperfect duties permit exception on the basis of inclination. Duties, as I have noted, cannot make room for inclination in the sense that if one does not feel like fulfilling a duty, then one does not have a duty. I take Kant to mean, instead, that perfect duties "permit no exception in the interest of inclination" *on how or when to fulfill them*. Perfect duties stipulate who, when, what, where and how. Imperfect duties, on the other hand, do allow for an agent's inclination – on how, when and to whom – to fulfill them. Therefore, if Kant's puzzling footnote about perfect duties permitting no exception for inclination is to actually work,

⁷⁴ Kant discusses the acquisition of private property in a state of nature is noted at *DR* 6:267; institution of civil society at *DR* 6:312-313. The argument for autocrats acting as republicans appears in the *Conflict of the Faculties*. Kant, Immanuel. *The Conflict of the Faculties*, trns. Mary Gregor, (Lincoln/London: University of Nebraska Press, 1992): 122. Hereafter abbreviated as "*CF*." *TPP*'s preliminary article 2 states that "no independent nation, be it large or small, may be acquired by another nation by inheritance, exchange, purchase, or gift; preliminary article 3 states "standing armies (*miles perpetuus*) shall be gradually abolished, and preliminary article 4 states "no national debt shall be contracted in connection with the foreign affairs of the nation" (*TPP*, 8:344-346). Kant notes that there is a permission to delay in implementing such articles "depending on circumstances" (*TPP*, 8:347).

⁷⁵*G*, 4:422 Footnote 12.

then we have to add a clause that reflects Kant's later use of the terms "wide" and "narrow."⁷⁶ Provisional duties, on the other hand, have nothing to do with the question of inclination and everything to do with the *ability* to act. *If one has the ability to act in a condition outside of civil society or highly degenerated civil society, one has an unconditional "provisional" duty of justice.* Not all agents have duties of justice in these conditions, only those that have the ability to fulfill them do; the duty of justice is provisional because justice itself is provisional and not peremptory.

However, if my argument that a provisional duty is a duty that permits exception on the basis of ability is to state anything further than the obvious "ought implies can," I must show that provisional duties have something unique about them that warrants our attention. First, from an exegetical standpoint, I argue that Kant is aware of the "ought implies can" distinction, but that this assumption works its way into a question about physical and material means and not one solely concerned with rational capacities. Second, empirical and contingent material factors play a role Kant's theory of morality because:

- i) Morality must be universal in scope,
- ii) Justice is a part of morality, so
- iii) Justice must be universal.
- iv) If justice is to be universal, then human beings must have a universalizing and equalizing mechanism that protects their rights equally (i.e. civil society), but
- v) Absent civil society duties of justice apply only to those people that have the physical capacity to fulfill them.

B. Capacity & Material Considerations

⁷⁶ It also could be argued that because Kant explicitly claims in footnote 12 that he "reserve[s] the division of duties for a future *Metaphysics of Morals*. The division presented here stands as merely an arbitrary one (in order to arrange my examples)" (Ibid, 4:422). He had not yet employed the sharper linguistic distinction of "narrow" and "wide" as he does in his later *MM*.

To understand why provisional duties are an important addition to Kant's taxonomy, we must look to his discussion of duties. His clearest case of the differentiation between duties is in the *Grounding*.⁷⁷ Kant uses the famous four examples to highlight the different kinds of duties: perfect duties to oneself, perfect duties to others, imperfect duties to oneself and imperfect duties to others. Importantly though, the relevant section in the *Grounding* is concerned solely with duties of virtue, not justice. One might object that his concern with duties of virtue is not helpful for our discussion of provisional duties, but this is mistaken.⁷⁸ His discussion of the distinctions between perfect and imperfect duties shows why a third category of duty is required.

I will not go into much detail of Kant's examples, as they are thoroughly rehearsed, and I assume some familiarity with them. However, I will briefly remind the reader about the four cases: *Suicide*, *Borrower*, *Loafer* and *Miser*. *Suicide* is about a man so "reduced to despair" that he desires to exit this world and relieve his sufferings by committing suicide; *Borrower* desires to obtain a loan he knows he cannot repay; *Loafer* wants to wallow in laziness and gluttony and neglect perfecting his talents; *Miser* desires to hoard his money and refuse to help those in need. In the cases of *Suicide* and *Borrower* Kant assumes the empirical condition of one having rationality. Both men are capable of recognizing the moral law, and they are not hindered by any sort of physical pathological hindrance. In the cases of *Loafer* and *Miser*, Kant assumes the same empirical but adds further material capabilities (time and money) to the equation. The

⁷⁷ Kant also discusses the same examples in the *DV*; however, the examples are much clearer and succinct in the *G*.

⁷⁸ I am focusing primarily on provisional duties of justice in this essay. However, there may be some provisional duties of virtue too. Not all duties of virtue in a state of nature are provisional though, as not all require some type of institutionalization of the state. It is perfectly possible to have charity in a state of nature, and because agents are authorized to choose when, where, how and to whom to fulfill such a duty, no special institution is required. Duties of justice in a state of nature are the largest thorn though.

point I wish to make is that in each example, Kant assumes the agent's ability to act. From *Suicide* to *Miser*, each person has the means (rational and material) to will his maxim. The man contemplating suicide can rise above his sufferings and abstain. The borrower, while in need, is able to understand the ramifications of his decisions and to choose not to undertake a debt he cannot repay. The loafer, while completely content to indulge in his hedonistic lifestyle, understands that as a human being he possesses certain faculties that ought to be developed, and so employs his material wealth to do so. Finally, the miser recognizes that the world may be able to go on consistently with his maxim of stinginess, but he could not will this stingy maxim universally. He may, in his own time of need, want others to help him, so he too must use his material wealth to help those less fortunate.

The *Grounding* is, of course, a first attempt to ground a universal system of morality. Kant attempts to do this by invoking the concept of "humanity," or the ability to set ends for oneself, which requires rationality. Rationality, or the ability that allows us to know the moral law, is a human (and thus universal) trait. If human beings are to have morality, Kant argues, then they must be free. Free in the psychological (or noumenal) sense. We are not determined beings, like animals that cannot choose different courses of action.⁷⁹ Humans are influenced by their surroundings, but they are also aware that this influence does not wholly determine their actions. Human beings

⁷⁹ I disagree with MacIntyre that some animals are rational. While some animals do have the capacity to communicate with one another, it is not what we would call language, nor do these animals set out life plans to improve their abilities. Cf. MacIntyre, Alasdair. *Dependent Rational Animals*, (Peru: Carus Publishing Company, 1999/2001).

can choose to be moral or debased beings, even if they have a difficult time acting morally.⁸⁰

Kant's arguments in the *Grounding* and the *Metaphysics of Morals* posit that it is the pursuit of projects and ends that produces moral awareness. The four examples highlight this fact. One must act or do something with and around others to become aware of others' influence and one's own desire to freely pursue a project. It is the awareness of others' influence on us that gives rise to a deeper self-awareness, which in turn forces us to recognize the worth of others and their projects. This self-realization and self-love drives humans to exercise our reason to ensure our freedom; it drives us to understand morality.⁸¹ Kant's entire system then, is first built upon the rational capacity to know the moral law and to recognize one's (and thus other's) moral worth, but implicitly his system also relies on empirical, contingent factors (such as strength, wealth or intelligence) that enable human beings to fulfill all of the dictates of morality.

It is no surprise, then, that Kant's employment of the four examples in the *Grounding* is to show the nobleness in rising above inclination and that the moral law applies to us all because we have the ability to know it. He attempts to get away from conditioning morality on anything contingent. Yet, the fact that he makes his entire discussion about virtue, and ignores the question of justice, leaves us with a problem.

⁸⁰ Kant is well aware that human beings are animalistic, but we have a "predisposition to humanity" where through self-realization and interaction with other human beings we can become moral. He discusses this at length in *Religion within the Boundaries of Mere Reason*, especially 6:26-6:53. Kant, Immanuel. *Religion within the Boundaries of Mere Reason and Other Writings*, (Cambridge: Cambridge University Press, 1998). Hereafter abbreviated as "RB." Kant also has a clear and succinct discussion in his lectures on pedagogy. Cf. Kant, Immanuel. *On Education* (1803) in: Annette Churton trans.: *Kant on Education*, (Boston: D.C. Heath & Co. Publishers, 1906): 108. I will hereafter refer to as "OE."

⁸¹ This does not only take place on an individual level for Kant. As he claims in *Idea for a UH man's* "unsocial sociability" moves him to form civil societies and these civil societies are ultimately forced to form a cosmopolitan state (*UH*, 8:20).

The problem is that in each of Kant's examples, he assumes an agent's ability to act, but as we have seen, for most agents to be able to fulfill their juridical duties, the legal, juridical and enforcement institutions must be in place. This may not seem an important observation, as again obviously "ought implies can." However, it begins to assume greater importance when we reflect that there is nothing in his discussion about what to do *if one does not have the means* to fulfill a duty, and the means here are not rational but *material*. Justice requires a civil condition, and without it we are uncertain about what our duties of justice are, or if, we have any. Thus, Kant, at least in this work, ignores one of the most important questions of practical life.⁸² ⁸³ Or at least he does not come to consider material capacities more explicitly until his later political writings, where they come to the fore.

One may object here that my concern about the practical and empirical underpinnings of some Kantian duties is overstated, as he has an entire work directed at moral education. Indeed, Kant does give very explicit guidance in regards to the upbringing of children in *On Education*. He discusses issues ranging from swaddling to sex, but this work is not addressed to agents with limited material capacities.⁸⁴ All of the action guiding principles in this work are directed towards moral educators, people who possess full rational *and* material capacities for educating children. Moreover, this work

⁸² Kant also acknowledges elsewhere that one's ability plays a role in the determination of a duty. He writes "to be beneficent *where one can* is a duty;" again, he acknowledges capacity but with the intent to show moral worth (G, 4:398).

⁸³ I am not going to go too deeply into the question of when rational capacity is limited by the natural development of our mental capacities, but consider Kant's remarks about what it takes to will as well as his remarks about education in the following paragraph. The absence of these conditions may make it difficult to act on our duty, and even when we can act, there is a further question about whether our action will prove futile and whether this kind of futility excuses us from even having a duty of justice.

⁸⁴ Indeed, a child is an agent with limited capacities, but OE is not directed at children, it is a guide for adults to follow in the education of children. The child has no discretion, choice or even ability to choose her way of life, duties or projects.

is concerned with the moral education of children *in a civil society*. For Kant, one can only follow the dictates of morality through proper education, and proper education requires “discipline and culture.”⁸⁵ Culture, of course, is only found in society, but he goes even further:

It is difficult to conceive a [moral] development from a state of rudeness (hence it is so difficult to understand what the first man was like), and we see that in a development of such a condition man has invariably fallen back again into that condition, and raised himself out of it. In the earliest records of even very civilized nations we still find a distinct taint of barbarism, and yet how much culture is presupposed for mere writing to be possible! So much so that, *with regard to civilized people, the beginning of the art of writing might be called the beginning of the world.*⁸⁶

Kant was aware that writing began in civilized (i.e. ruled by law) society, and whether he is referring to the Sumerians or the Egyptians is irrelevant.⁸⁷ His educators and their pupils have sufficient degrees of protection and reciprocity via a legal system⁸⁸, even if that system is run by an autocrat. Kant is not concerned with man’s moral development in states of nature, civil wars, or any circumstances that undermine agents’ capacities to fulfill their duties.

Of course he speculates about man’s moral development in later essays, such as a *Universal History with a Cosmopolitan Purpose*, *What is Enlightenment*, *Theory and Practice* and *Perpetual Peace*. However, each of these essays postulates, implicitly or explicitly, two things: the influence of Nature and the inevitability of civil society.

⁸⁵ *OE*, pp. 1-8; 47-48; 58-59; 66-70; 83-94.

⁸⁶ *Ibid*, 12-13 (italics added).

⁸⁷ A civil condition, for Kant, is one characterized by “a system of laws...under a will uniting them [the people], [under] a constitution.” (*DR*, 6:311).

⁸⁸ Kate Moran argues that not only is Kant concerned with “public” education systems, but that ultimately Kant’s theory of education is more than “an individual question for moral perfection, [as] agents on this account have a duty to work individually and collectively to bring about the ethical community [the kingdom of ends]. These individuals will be concerned, for example, with what kinds of institutions can help realize this goal.” Education is thus tied to civic structures and institutions. Moran, Kate. “Can Kant Have an Account of Moral Education,” *Journal of Philosophy of Education Society of Great Britain* Vol. 43, no. 4, (forthcoming).

Nature, he claims, has implanted the seed of man's "unsocial sociability,"⁸⁹ which gives man through his trials and tribulations, the impetus to enter into civil society, and then into foreign relations and eventually pacific international federations.⁹⁰ While man's progress is noted in each of these essays, the driving force is not practical guidance about what to do, or how to do it; rather, Kant leaves all responsibility to Nature. Man is left not with an understanding of his duties of justice, but only with the advice that "Nature should thus be thanked for fostering social incompatibility, enviously competitive vanity, and insatiable desires for possession or even power. [For] without these desires, all man's excellent natural capacities would never be roused to develop."⁹¹ Man seemingly has no agency in fostering the conditions of his progress or enlightenment, and it seems too that he has little to go by to understand what justice requires, especially when "the highest purpose of nature –i.e. the development of all natural capacities –can be fulfilled for mankind *only in society*, and nature intends that man should accomplish this."⁹²

Unfortunately, this line of reasoning is disappointing because states of nature, such as civil wars, or any circumstances that undermine agents' capacities to fulfill positive duties of justice are all too familiar in the real world. Civil wars still occur, breakdowns in civil society still plague many states across the globe, and as Kant declares, the international system is a state of nature. We cannot be content to just let Nature watch humans' progress "be interrupted" with such conditions, and hope that we will emerge from such "interruptions" wiser and more just than before.

⁸⁹ *UH*, 8:20.

⁹⁰ *TPP*, 8:354, 8:360-368; *TP*, 8:307-313; *WE*, 8:39-40; *UH*, 8:24.

⁹¹ *UH*, 8:21. (This particular quote is from H.B. Nisbet's translation in: H.S. Reiss, ed.: *Kant Political Writings*, (Cambridge: Cambridge University Press, 1970/1991): 45. When the Reiss edition is used, I will note "Reiss edition."

⁹² *Ibid*, 45 (italics added).

We must discover a way for a person in a state of nature to understand when or if she has a duty of justice. States of nature condition one's ability to fulfill positive duties because agents in this circumstance lack a power-equalizing mechanism, such as the state. In a state of nature, man is a judge in his own cause, and because of this, dispute and conflict is highly probable. Furthermore, dispute will only be settled by strength, and strength or power is tantamount to ability. The more strength one has, in physical force, numbers, persuasion, or whatever means available, the more one is capable of fulfilling positive duties of justice. In a state of nature all persons have provisional duties of justice, but these duties only become unconditional for those who also have the material resources and power to act upon them. Even in this case, though, such duties remain provisional in another sense: their exact content remains dependent on an actor's private judgment and exercise of power. This means that everyone is still not subject to exactly the same rules and in exactly the same way. However, subordination to the same rules is regarded by Kant as a conceptually necessary feature of complete public justice. Only justice in civil society is peremptory, or what Kant calls "conclusive," as I now explain in greater detail.

*C. Might **Makes** Right?*

If we follow Kant in thinking that man's highest goal is to become a fully autonomous agent, then we must also posit that full autonomy requires full freedom. In other words, an agent must be both internally and externally free. External freedom is freedom from physical compulsion. Internal freedom is an agent rising above his inclinations and choosing to act according to the moral law. Internal freedom is made up

of both the choice to act (positively) and the choice to refrain from acting (negatively) in accordance with the moral law. What is at issue here is that if one's external freedom is limited, say by imprisonment, then the positive expression of one's internal freedom is also limited. For example, I may have a degree of internal freedom insofar as I can rise above some inclinations, say by getting up out of my cell and doing some level of exercise. Yet, because my external freedom is limited, my ability to fulfill some of my moral duties is also limited. I cannot fulfill many duties of justice, especially positive ones, if I am in solitary confinement my entire life. I can, of course have some autonomy, I have the capacity to choose (*Willkür*), but my ability to fulfill duties of justice or live, in a sense, a "complete" life is hindered. *Full* autonomy requires both external and internal freedom.

The problem, then, is that in a state of nature, some people may not be able to pursue their own projects due to the violence of others or their own lack of strength, while others may not be able to fulfill their positive duties of justice for similar reasons. However, since Kant posits that justice should be realized everywhere, we are required to take steps to make sure that all people become capable of fulfilling *all* the dictates of morality.⁹³ To do this, people must devise a way to ensure that everyone's freedom is secured. This is the enabling task of civil society. Might, for Kant, does not equal Right, but, as I argue below, it paradoxically helps to make it.

Civil society is supposed to enact equal laws for all people, equally protect all people, and equally hold all people accountable for their actions. The state is to provide the degree of protection and reciprocity necessary for people to perform not merely their

⁹³ I am of course referring to all people with "normal" rational capacities. I follow Kant here by not taking into consideration agents with mental disabilities or impairments.

negative but their positive duties as well. The state provides law, a “rightful form of association” where “everyone is able to enjoy his rights, and the formal condition under which it is possible in accordance with the idea of a will giving laws for everyone...[it is a place of] public justice.”⁹⁴ The state, therefore, allows the *possibility* for *all* to follow the dictates of morality. In a civil society, all are now equally protected and can act because their external freedom is secure. Moreover, the meaning of “justice” is defined in the same way and by the same authority, and therefore the specificity problem is also remedied. If one is wronged in a civil condition, then the necessary legal frameworks are present to adjudicate disputes and restore rights. In one sense, then, the state’s monopoly on the use of force (might) makes *Recht* possible for everyone.

Because all people must be able to fulfill duties of justice, the moral law requires people to remove the structural hindrance of the state of nature and institute a condition of civil equality. As Kant notes of a person in the state of nature:

The first thing [he] has to resolve upon is the principle that it [he] must leave the state of nature, in which each follows its [his] own judgment, unite [himself] with all others (with which it cannot avoid interacting), subject [himself] to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to [him] is determined by law and is allotted to [him] by adequate power (not [his] own but an external power); that is, [he] ought above all else enter into a civil condition.⁹⁵

Recht requires *a priori* a civil condition. Justice applies to everyone equally, and some sort of equalizing mechanism (the state) is required.⁹⁶ However, who is supposed to

⁹⁴ *DR*, 6:306.

⁹⁵ *DR*, 6:312.

⁹⁶ It is not within the scope of this essay to discuss how to legitimately enter a civil society. I will, however, briefly flag that the puzzling “permissive law” may be of some help here. Depending upon whose interpretation one goes by, i.e. Brandt, Flikschuh or Hruschka, one may be able to use coercive force to establish a civil condition. This of course becomes more problematic if one attempts to use a “domestic analogy” at the international level and use the coercive measures to establish a world state or something of that nature. Transition from the state of nature to civil society is *a priori* necessary, but the way in which it is brought about is open to much dispute. Cf. Brandt, Reinhard. “Das Erlaubnisgesetz, oder: Vernunft und Geschichte ins Kants Rechtslehre,” in: Reinhard Brandt ed.: *Rechtsphilosophie der Aufklärung*, (Berlin/New York: Walter de Gruyter Press, 1982): pp. 233-285; Flikschuh, Katrin. *Kant and Modern*

institute this society? Kant's student Vigilantius claims that in a state of nature, men "erase the possibility" of entering into a civil condition if they remain *ex leges* and might replaces right.⁹⁷ Civil society must come into being, but that "civil" probably took the form of a progression of sheer power, like the fable of King Romulus, to law-ordered society, like the tale of King Numa.⁹⁸ What is evident though, is that Romulus was the most able, and so used his power to institute Rome. Therefore, justice requires an exit from the state of nature. Justice must move beyond its provisionality, and so provisional duties must do so too.

D. Provisional to Perfect

It is important to note Kant's use of the term *vorläufig*, which implies the temporariness of a provisional duty. Recall, provisional means: *limited by some special nullifying hindrances of a temporary nature, which prevents us from developing our ability to fulfill duties of justice*. If justice requires the institutionalization of the state, then provisional duties require the institutionalization of whatever mechanisms (a state, institution, agency, procedure, etc.) necessary to turn them from provisional to "conclusive." Conclusive right in Kant is when a system of law, arbitrated by a neutral judge and backed by a legitimate coercive force exists. *Recht* loses its provisional status because individual subjective judgment and the private use of force are removed. In an *analogus* shift then, provisional duties of justice become perfect duties of justice in a civil

Political Philosophy. (Cambridge: Cambridge University Press, 2000); Hruschka, Joachim. "The Permissive Law of Practical Reason in Kant's Metaphysics of Morals," I Vol. 23, (2004): pp 45-72.

⁹⁷ Vigilantius, Johann Friedrich "Lectures on Kant's Metaphysics of Morals" (1793), in: J.B. Schneewind ed. and Peter Heath trns.: *Lectures on Ethics* (Cambridge: Cambridge University Press, 2001): 278. When using this compilation of lecture notes, I will hereafter refer to the Student's Name, followed by "LoE" and the Akademie Ausgabe pagination.

⁹⁸ Vigilantius, *LoE*, 27:514.

condition because all people are able to fulfill them. Arbitrary and subjective characteristics that allow agents in a state of nature to fulfill duties of justice are supplanted with purposive and objective standards of law and order in a civil society that protects all agents, permits them to pursue projects, and fulfill their duties of justice. “Provisional” duties become “perfect” because the state dictates who, what, when, where and how to fulfill them, and there is no room for “inclination” or subjective judgment on how to fulfill them.

Including provisional duties in Kant’s framework is novel yet supported by textual evidence both in Kant and by contemporary Kantian scholarship. First, we find two of Kant’s works, the *Doctrine of Right (DR)* and the *Conflict of the Faculties (CF)*, which provide not merely hermeneutical support, but explicit textual evidence. The *DR* repeatedly draws to attention the idea of a “provisional right.”⁹⁹ Provisional right, for Kant, is a provisionally rightful condition. In this condition—one that is compatible with some forms of natural right, but is not a “fully” rightful condition ruled by law—one can have “possessions,” but they are not conclusively property. Only a system of protected private property can render such possessions “conclusive.” Without such a system, “possession” is not much more than “holding,” and thus ownership of objects is only temporary or tentative until formal mechanisms make such ownership “conclusive.” Kant writes, “[b]ut in the former condition, that is, before the establishment of the civil condition but with a view to it, that is, *provisionally*, it is a *duty* to proceed in accordance with the principle of external acquisition.”¹⁰⁰ Kant, it seems, acknowledges a provisional duty of property acquisition! Unfortunately, he does little to explain it. Nevertheless, if

⁹⁹ *DR*, 6:255-257; 6:264-267; 6:307-308; 6:312; 6:350-351.

¹⁰⁰ *Ibid*, 6:267 (italics in original).

my interpretation and construction is correct, provisional duties are like provisional right in that both concepts require the institutionalization of legislation, judgment and enforcement to realize justice.

The second text, *CF*, also places the words “provisional” and “duty” together. It is worth quoting Kant in full here:

Consequently, it is a duty to enter into such a system of government, but it is *provisionally the duty* of the monarchs, if they rule as autocrats, to govern in a republican (not democratic) way, that is to treat the people according to principles which are commensurate with the spirit of libertarian laws...¹⁰¹

This passage is important because it shows that Kant believed that certain duties were tentative and required: i) certain structural features to be present for duties of justice to be fully conclusive; and ii) an agent’s ability to fulfill a duty. In the first instance, monarchs have a provisional duty because they are limited by international structural hindrances to the realization of *Recht*, namely, that the international system does not have all the necessary requirements for a civil society. In the second instance, only domestic rulers—not the people or outside rulers—have this duty. It is only the domestic monarch who has the ability to rule according to republican ideals.¹⁰²

As I noted in the beginning of this paper, contemporary scholarship on Kant’s idea of provisionality is very limited. Only Elisabeth Ellis writes on this topic. Ellis argues that Kant’s entire political theory is “provisional” where justice is always in a state of “becoming,” and all societies are in a continual condition of provisional right. Each

¹⁰¹ *CF*, 165 (italics added).

¹⁰² This of course is a tenuous point. One could say that foreign rulers have the capacity to force domestic sovereigns to rule according to republican principles, say by overthrowing the government or instituting a puppet regime, or that the people could revolt and force the institutionalization of a republican government. However both of these positions undermine the idea and function of the state. The state’s function is to insure *Recht* by providing positive political goods and increasing its citizens’ freedom, but for a foreign ruler to interfere or force change undercuts *Recht*. Moreover, a domestic insurrection or revolution would abolish the state itself and thus undermine *Recht* entirely, Cf. *DR* 6:320 & 6:372.

state attempts to achieve the ideal of *Recht* (a republican constitution with enlightened citizens), but because it is only a regulative ideal, a state can only approximate it, and thus it remains in a provisional condition. Progress towards the ideal of *Recht*, Ellis argues, can only happen when states' justness is judged in the public sphere by a "judging public." She writes that:

What is at stake here is nothing less than the causality of freedom. If the ideals expressed by the judging public have the power to promote concrete progress in human affairs, then freedom is not merely an internal experience but a force in the world. [...] [T]he free interplay of ideas in the public sphere leads to gradual enlightenment; that is, the principles of political reason, such as the necessity of republican rule, the evils of war, and the sanctity of human rights.¹⁰³

Though I disagree with Ellis' assertion that *all* societies are in a condition of provisional right, especially as most states satisfy the Kantian requirements of separation of powers and rights of free speech, her interpretation of Kantian provisionality compliments my discussion of provisional duties.¹⁰⁴ Provisional duties are temporary (*vorläufig*)¹⁰⁵, and they require one to act in such a manner that "does not render the ideal...impossible."¹⁰⁶ More specifically, at a minimum *Recht* requires one to abide by negative morality, but for those with the ability, it requires the establishment of a condition in which all people can begin to fulfill positive duties of justice. Nevertheless, when a civil condition is absent, and there still exists a "provisionally rightful condition," and duties of justice can only be considered provisional.

¹⁰³ Ellis, op. cit., fn 4, pp. 176-177.

¹⁰⁴ Ellis agrees with me that this point of her argument is too strong. Private correspondence with Elisabeth Ellis.

¹⁰⁵ Kant uses the term *provisorisch* in the *DR*, though in *CF* he changes his usage to *vorläufig*. Both terms are comparable, yet *vorläufig* carries with it a more temporal connotation.

¹⁰⁶ Ellis, op. cit., fn 4, p. 114.

An additional benefit of my interpretation of Kant is that it also makes sense of the areas where Kant explicitly refers to “conditional” duties.¹⁰⁷ Recall that I make the distinction that “conditional” in this sense means “requiring further enabling features” rather than “contingent upon having an inclination to act.” Provisional duties are not *contingent upon* the structural hindrances of a state of nature, civil war, or civil/social breakdown; rather they are unconditional duties an agent has *if* the agent possesses the ability to fulfill the duty while residing in a hindered condition. A duty is still a necessitation to act, and a person who has the ability to act must do so. The imperatives that dictate action here are not hypothetical, e.g. if I want justice, then I set up this institution. Imperatives here are moral, i.e. categorical; one must do what the moral law requires: institute a state in which justice can be realized.¹⁰⁸

To summarize, I have argued that in situations where one’s ability is undermined, absent, or disabled it is foolish to debate whether a duty is perfect or imperfect, for not all people may have a duty. Second, labeling some duties as “perfect” or “imperfect” is not correct, for a duty may be of a different kind. It may be provisional. Moreover, Kant’s discussion in the *Grounding* and arguments in the *Metaphysics of Morals* assume a condition where one has an ability to act morally, i.e. a civil condition where one has an ability to fulfill positive and negative duties of justice. It is not merely in keeping with Kant’s writings to include a provisional duty in his taxonomy of duties; it is a logical requirement.

¹⁰⁷ *DV*, 6:456; 6:457; 6:468.

¹⁰⁸ This is opposite the view of Kersting who posits that “the postulate of public right (*öffentliches Recht*) is under the premises of their justification theory only a hypothetical imperative of prudence.” Kersting, Wolfgang. “Kant’s Concept of the State,” in: Howard Lloyd Williams, ed., *Essays on Kant’s Political Philosophy*, (Chicago: Chicago University Press, 1992): 145.

III. Objections

The critic may object to my argument for provisional duties on two fronts. First, she may claim that material capacities should play no role in Kant's moral framework. This is a perversion of Hegel's famous "empty formalism" objection. In other words, I am admitting too much in way of empiricism. However, I believe this objection to be mistaken. As Robert Louden persuasively argues, Kant's ethics must admit of empirical and contingent facts about agents, otherwise there is no practical applicability.¹⁰⁹

Louden's argument for including, what he terms "the second part" of Kant's ethics, applies to the case of provisional duties as well. To see this more clearly, we must admit that Kant's moral system is made up of two parts: justice and ethics. Justice, as I have argued, requires legal, judicial and coercive institutions. If we follow Louden, Kant's ethical project also requires "political, cultural, religious, and educational institutions"¹¹⁰ because "by nature man is not a moral being at all,"¹¹¹ and he requires such institutions for his eventual moralization. It seems, then, at every step of the way, whether on the path of justice or ethics, material and empirical factors play a decisive role for Kant.

The critic may reply that, material considerations notwithstanding, for Kant all human beings, as rational beings, are bound by morality, and all human beings have a set of moral duties—regardless of their ability fulfill them—and must, therefore, at least attempt to fulfill them. This objection is a variant of the *fiat justitia ruat caelum* belief,

¹⁰⁹ Louden, Robert. *Kant's Impure Ethics*, (New York/Oxford: Oxford University Press, 2000).

¹¹⁰ Ibid, 20-21.

¹¹¹ Kant, Immanuel. "On Education" as cited in Robert Louden, *Kant's Impure Ethics*, (New York/Oxford: Oxford University Press, 2000): 21. I also follow Louden's conclusion that even if man has all of these things he is not guaranteed to be a moral person. Therefore we should say that these material factors are necessary but not sufficient conditions for justice and morality.

and has become, for better or worse, synonymous with Kant. Indeed, she might cite as evidence the second *Critique*:

It is always in everyone's power to satisfy the categorical command of morality; whereas it is but seldom possible, and by no means so to everyone, to satisfy the empirically conditioned precept of happiness...[for] in the latter case there is a question also of one's *capacity and physical power* to realize a desired object.¹¹²

Two items must be noted here. First, the categorical command for morality, or the categorical imperative, has several formulations, but foremost among them is the formula of the universal law. One must will her maxim as if it were a universal law; if her maxim remains consistent, then she moves on to the next one. Kant's point here is that anyone *with the ability to reason* can do this. The human faculty of reason allows us to know the moral law¹¹³ and to understand which acts accord with it. So, yes, all agents are capable of knowing morality, and insofar as we can know the moral law, all agents with the rational ability can satisfy the categorical imperative. In other words, we know how to satisfy it. Yet, what is at stake for Kant in the above passage is to argue against using a principle of obtaining happiness as a *determining ground* for moral action. His ultimate purpose is to show that happiness, or any attempted outcome which maximizes a nonmoral good, "bases morality upon incentives that undermine it rather than establish it and that totally destroy its sublimity, inasmuch as motives to virtue are put in the same class as motives to vice and inasmuch as incentives merely to teach one to become better at calculation [...]." ¹¹⁴ The critic must concede that just because I am aware of the moral law does not necessarily mean that I am obligated to fulfill every possible duty that can

¹¹²Kant, Immanuel. *Critique of Practical Reason*, T.K. Abbott trns., (Amherst: Prometheus Books, 1996): 54 (italics added). I hereafter refer to this as the "CPrR."

¹¹³ This is Kant's "fact of reason," which allows human beings to know the moral law. The fact of reason though, is not a guarantee that human beings will be moral.

¹¹⁴G, 4:442.

be derived from it. Moreover, I may know how to satisfy its imperatives, like instituting a civil society, but I might not be a Romulus to actually do so.

This moves us on to my second point: Kant claims “people are always preaching about what ought to be done, and nobody thinks about whether *it can be done*.”¹¹⁵ The context of this statement is in regards to Kant’s work on moral anthropology, but it has direct bearing here. Kant understood that human beings exist between two worlds (noumenal and phenomenal), and that they are subject to both nature and freedom. The study of morality, must take this fact into consideration. Moreover, if we again follow Loudon’s conclusions, then “can” here is not just about rational capacity. The “can” is concerned with so many more material and institutional factors, and these factors (including rational, institutional, and even physical capacities) are crucial components of Kant’s system.

Furthermore, we can now understand how the argument for provisional duties dovetails with Kant’s concept of “willing.” Kant famously makes a distinction between “willing” and “wishing.” “Willing” is special, and one cannot “will” any maxim. One must have the means (and thus the *ability*) to carry out her maxim for the agent to actually “will” anything. For example, I might try “willing” to fly. I could even go up to the roof of my house and jump off while screaming, “I will to fly; it is my maxim to fly!” Unfortunately, this does not pass Kant’s test. The only “will” I have here is the fact that I *will* find myself *sorely* disappointed. As I plummet to the earth, I realize I do not have the ability to fly – unless I am on board an airplane. “Willing” in such a manner is not, for Kant, even considered willing; it is wishing. Wishing can occur when “one’s consciousness of [his] *ability* to bring about [his desired] object by [his] action” is not

¹¹⁵ Kant, op. cit., fn 110, p. 8 (italics added).

present,¹¹⁶ or when one does not *possess* a faculty that is necessary for the idea of “choice.”¹¹⁷ Choice, therefore, directly relates to action,¹¹⁸ and one cannot will a maxim one does not have the *ability* to fulfill.

The second objection to my argument for provisional duties does not come from the idea of a provisional duty itself; rather it comes from what follows from the way I have categorized it. The objection is: ought implies can, so what? I can only attempt to meet this objection in two ways. First, by claiming that the “can” here is dependent upon something contingent; it is dependent upon physical attributes that are, ultimately, morally arbitrary. It is a matter of moral luck who is born strong and who is not. This, I believe is something most Kantians would be reluctant to endorse; however, I believe it is not at all at odds with Kant’s writings and moral system. As I argued here, it seems that Kant was aware of the fact that each cannot equally protect her rights. That is why civil society is *a priori* necessary for justice, and why he claims that:

Unless [one] wants to renounce any concepts of right, the first thing [one] has to resolve upon is the principle that [one] must leave the state of nature, in which each follows [his] own judgment, unite [oneself] with all others (with which [one] cannot avoid interacting), subject [oneself] to a public lawful external coercion, [...] that is, [one] ought above all else enter a civil condition.¹¹⁹

This is a result of an inherent tension that exists between what the moral law (in either its juridical or ethical form) demands I do, and what the natural world allows me to do. I am a “dual citizen” of both the noumenal and phenomenal worlds. Provisional duties are necessary, therefore, for Kant’s taxonomy because they recognize this tension, and they

¹¹⁶MM, 6:213. The German here is *vermögen*, meaning power, ability, capability or faculty (italics added).

¹¹⁷For Kant, “choice” consists of one having: i.) the faculty of desire; ii) consciousness of one’s ability to act; iii) actually trying to act. (MM, 6:213).

¹¹⁸Indeed B. Sharon Byrd and Joachim Hruschka claim as well that an agent’s choice, and thus the ability to freely follow, the moral law is concerned with ability. They claim that Kant’s DR is explicit in that “an object of choice is something one has the *physical* capacity to use.” Byrd, B. Sharon and Joachim Hruschka, “Kant on “Why Must I Keep My Promise?,” *Chicago-Kent Law Review* Vol. 81, (2006): 57.

¹¹⁹DR, 6:312.

exist in this sort-of purgatory. They exist at the intersection of freedom and nature, and they make a necessary allowance so freedom does not undermine its own purpose. Provisional duties relax the tension between freedom and nature because they give those without the capacity to fulfill their duties an exemption from performance, while they hold those with the capacity to fulfill them at a strict necessitation to act. Ought does imply can, but this is really at a meta-level. One can think of it like this: all agents have a duty to Δ , but in order for all agents to Δ , rules, procedures, judges and enforcement mechanisms must be put in place, call these Ω . Absent Ω , all agents cannot Δ , even though reason requires it. We can then say, $-\Omega$, all agents have a provisional duty to Δ , call it $\varphi\Delta$. However, not all agents can $\varphi\Delta$ due to a lack of ability, so these agents are exempted, temporarily; they are $-\varphi\Delta$. Those agents that can, must, and they remain bound to $\varphi\Delta$. The necessary feature to make this determination, though, is an agent's physical ability.

My second response to the “so what” objection is really rather simple: there is debate amongst Kantians about whether “ought” really does imply “can.” It is out of the scope of this paper to rehearse the debate, but we have encountered one scholar, Loudon, who adamantly believes that agent's abilities are extremely important to Kant's writings. Others too, like Jens Timmerman also believe that “can” is important for Kantian obligation, but the “can” involved is a necessary and not sufficient condition for one to actually be obligated.¹²⁰ On the other side of the debate, scholars, like Wayne Martin, argue that one may have an obligation where one has no ability, in other words, an “ought

¹²⁰ Jens Timmerman, personal correspondence.

when one cannot.”¹²¹ My point is not to embroil myself in this debate, but to at least open up a space for my argument. If ability as a ground of obligation is open to dispute, then there is at least theoretical room for provisional duties.

Conclusion

In most of Kant’s moral theory, his traditional dichotomized moral framework will suffice. However, this is not always the case, especially when one looks to harder cases. These harder cases pose questions like: What are our positive duties of justice in states of nature? Can we hold agents responsible for failing to fulfill their duties of justice when there is no system of law to guarantee safety and reciprocity? The rather unhelpful distinction between perfect and imperfect duties fails us here. I have argued that Kant’s system supports a third kind of duty, one that makes sense of these harder cases. This duty, a provisional duty, is the first step to understanding how Kant’s political theory is linked to his ethical writings. Moreover, by identifying and analyzing the concept of a provisional duty, we can now move discussions of moral responsibility forward. If agents, individuals or states, find themselves in a condition that does not meet the Kantian requirements for absolute *Recht*, we have, at least, a mechanism to identify duty bears and assign the duty to them. Ultimately, now that the concept of a provisional duty is on the table, we can begin to use Kant’s writings on provisional right to guide us in understanding what types of mechanisms will transform a provisional duty of justice into a conclusive—or perfect—duty of justice.

The challenges ahead, though, are many and not easy. If one claims that an agent provisionally has a duty, then one must also provide a measurement of ability and an

¹²¹ Martin, Wayne. “Ought but Cannot,” *Proceedings of the Aristotelian Society* Vol. 109, (2009): 102-128.

analysis of what will count as enabling or disabling in that context. For assigning a duty to an agent is dependent upon that agent meeting some sort of ability threshold.

However, providing such a metric and a threshold that is not arbitrary or useless is quite difficult and a task for another day. Nevertheless, assigning duties to agents based solely on their abilities, in relation to their enabling conditions, as a first order principle, is promising.

Chapter 2:

A Provisional Duty of Humanitarian Intervention

“I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary raison d’être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.” --- Secretary- General Kofi Annan, from “In Larger Freedom” (A/59/2005)

Humanitarian intervention (HI) is the “threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of a target state from widespread deprivations of internationally recognized human rights.”¹ HI is now widely recognized by most states as a legal duty assignable to the international community; a community whose rights and interests are, in theory, represented by the United Nations (UN). Even though there is an apparent consensus among members of the international community on the legality of HI by the UN, some, such as Kofi Annan, insist that the matter ought not to be solely couched in juridical terms: HI is not merely a matter of international law; it is also a moral duty, grounded in a principle of humanity. However, there seems to be no agreement on the moral foundations of a duty of HI, and there is no clear academic, much less institutional consensus on the nature and scope of such a duty. I believe that efforts to discern the nature and scope of a duty of HI have been considerably misguided and have thereby produced theories that are, at best, incomplete and ambiguous (leaving open such

¹ Murphy, Sean D. *Humanitarian Intervention: The United Nations in an Evolving World Order*. (University of Pennsylvania Press, 1996): 11-12.

questions as: Who should intervene? When? What is required for a successful intervention?). Thus, I attempt to move the debate along by arguing that HI is a Kantian provisional duty. As I argued in Chapter One, provisional duties exist where the conditions of domestic law, which include centralized judicial and executive authority and legitimate coercive mechanisms, are lacking.

In order to show that a duty of HI is a Kantian provisional duty, I first argue that the shift in classification of HI from a right (or a *permission*) to a legal duty is a positive step, but this step has not solved a significant problem: HI, whether characterized as a right or a duty, is still subject to the authority of the United Nations Security Council (UNSC), and the UNSC finds itself in a perpetual quagmire due to the Permanent Five (P-5) veto. Second, I argue, on Kantian grounds, that HI is a duty of justice, rather than a duty of virtue, because its content concerns the innate right to freedom and not the promotion of the ends of happiness or moral perfection. One derivative or indirect effect of an HI may be promoting the welfare of individuals, but this is not the primary focus of a duty of HI, as I will argue at length later.² Third, I suggest that the current international system lacks the structural requirements of a fully developed legal society, and is in a condition of Kantian provisional right.³ Thus, I draw on Chapter One's conclusion that a duty of justice in a state of provisional right must be classified as provisional.

I. History of the Debate

A. From a Right to a Duty

² HI can be a Kantian "moral" duty, in that one acts from humanitarian motives, but what is important is that the acts (crimes) stop. Primary concern is for action, not motive, as I will argue throughout this chapter.

³*RL*, 6:312

Historically, HI has often been argued to be a “right” of a state. Grotius, for example, argued, for a discretionary right of states to intervene “on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard of any person whatsoever.”⁴ Since Grotius, scholars have debated when a state could legitimately override the norm of nonintervention and violate another state’s sovereignty.⁵ The issue was both a legal and a moral right to intervene. Yet, the legality of a right of intervention did not really enter the debate until the early twentieth century.⁶ Since the early twentieth century, however, the debate about HI has undergone three shifts.

The first came with the establishment of the United Nations (UN). The UN’s Charter forbids the violation of state sovereignty except in extreme circumstances where a state acts in self-defense or the UN takes collective action against a transgression that poses a threat to international peace.⁷ Even in cases of self-defense, a state is expected to

⁴ Grotius, Hugo. *De Jure Belli ac Pacis* (1646) (Kessinger Publishing, 2009), Book II, ch. 20, sec. 40, vol. II.

⁵ Some early modern writers, such as Pufendorf, follow Grotius’ arguments about intervening in extreme circumstances, while other publicists, such as Vattel, narrow the requirement for intervention to undecided civil wars. Contemporary scholars such as Wheeler and Tesón argue for a redeployment of just war doctrine to establish criteria for humanitarian interventions, such as the principles of just cause, proper authority, right intention, proportionality and last resort. For a good exposition of early debates of humanitarian intervention see Simon Chesterman *Just War or Just Peace* (Oxford University Press, 2001).

⁶ Chesterman, Simon. *Just War or Just Peace*, (Oxford University Press, 2001): pp. 36-38.

⁷ Article 39 states that “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Moreover, Article 51 states “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” <http://www.un.org/aboutun/charter/chapter7.htm>

seek UN approval, if possible, before taking coercive measures. The Charter codifies the historical norm of nonintervention and upholds state sovereignty.

It is no surprise, then, that a norm of nonintervention was generally firm through the early 1980s. Before then, interventions typically were not justified on humanitarian grounds; rather, they were justified and motivated by international security and power politics. As Nicolas Wheeler explains in his impressive study of interventions during the Cold War period, each state intervening during this era (India in Pakistan, 1971; Vietnam in Cambodia, 1979; Tanzania in Uganda, 1979) attempted to justify its actions by reference to self-defense or a security threat.⁸ Humanitarian concerns may have been cited, but they were not *primary* reasons for intervention.

Then, with the end of the Cold War, states' justifications changed, and they began to once again openly employ a right of HI. The intervention that seemed to spark this shift was the 1991 intervention to save Kurds and Shiites in Iraq. A window opened when France, Belgium, the United Kingdom and the United States submitted a draft resolution (Resolution 688) to end the human rights violations of the Kurds and Shiites. The resolution passed, and "demanded an improvement in the human rights situation of a member state [Iraq] as a contribution to the promotion of international security."⁹ The US then led a coalition of forces into Iraq to create "safe havens" and "no fly zones," but there was debate over Resolution 688's legal mandate to do so. Still, since the "Western powers publically justified their action in humanitarian concerns," the international

⁸ Wheeler observes that India made use of the term "refugee aggression" to justify its actions against Pakistan, and Vietnam invoked a "two-wars justification" that argued that Vietnam was fighting against Cambodian aggression and that simultaneous internal war led by the National Salvation Front is what ousted Pol Pot. Further, Tanzania argued that Uganda's invasion of Kagera Salient justified its retaliatory attack. Cf. Wheeler, Nicolas. *Saving Strangers: Humanitarian Intervention in International Society*, (Oxford University Press, 2000) 60-71; 85-100; 117-132.

⁹ Ibid, p. 146.

community was remiss to condemn them, and “acquiescence, then, rather than tacit legitimization” ended up being the international community’s response to the intervention.¹⁰ This “acquiescence” came in the face of the revival of the language of a state’s right to intervene. As the then British Foreign Secretary, Douglas Hurd, claimed “recent international law recognizes the right to intervene in the affairs of another state in cases of extreme humanitarian need.”^{11 12}

However, after the failure to intervene in the 1994 Rwandan genocide, another change began to occur. Though debates over the legality of HI persisted, scholars, lawyers, and diplomats began to entertain the idea that HI is (or ought to be) more than merely a permissive right exercised at the discretion of willing and able states. Indeed, some scholars went so far as to suggest that HI ought to be considered a *duty*, that state actions to stop genocide, mass human rights violations, and crimes against humanity are *obligatory*, not discretionary.¹³ The major turning point, however, came in 2000 when the Canadian government supported an independent International Commission on Intervention and State Sovereignty (ICISS), the purpose of which was to “build a broader understanding of the problem of reconciling intervention for human protection purposes

¹⁰ Ibid, 154.

¹¹ Hurd, Douglas, as cited in: Jim Whitman “A Cautionary Note on Humanitarian Intervention,” The Journal of Humanitarian Assistance (1994). Found at: <http://jha.ac/1994/10/31/a-cautionary-note-on-humanitarian-intervention-2/>

¹² The closely followed 1992 intervention in Somalia (under the guidance of Resolution 794/814/837), also seemed to be strengthening this trend, until the 1993 deaths of 18 US Rangers, and the crash of 2 Blackhawk helicopters and capture of 1 pilot. Additionally, in 1992, the UN passed Resolution 770, which authorized member states to use force to deliver aid to Bosnia. After that, Resolutions 819 and 824 created safe havens within Bosnia, and Resolution 836 mandated UN soldiers to “deter attacks against the safe havens” (Wheeler, 253-254). In 1994-1995 NATO bombing helped to protect these safe areas, though they did little to save the 7,414 men that were rounded-up and killed. Even though the 1995 Dayton Accords “settled” the dispute, it was evident 4 years later that this was not the case, the Kosovo Albanians were now being systematically targeted and killed. This gave rise to the 1999 Kosovo intervention, led by NATO without UN approval.

¹³ Politicians too began to use this language as early as the 1991 Iraqi intervention. France used the language of a “duty” to intervene, but it was met with much criticism. Cf. Wheeler, op. cit., fn 8, p. 142.

and sovereignty.”¹⁴ During the consultations and round-table meetings between the ICISS and prominent international leaders, non-governmental organizations (NGOs), academics, and international lawyers, the ICISS concluded that states shoulder a dual responsibility: “externally - to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.”¹⁵ Thus, sovereignty, the basis of the international system since 1648, was redefined in terms of “responsibility,” rather than “control.”¹⁶

The shift towards sovereign “responsibility” followed an earlier 1999 *Economist* article written by then Secretary General Kofi Annan. It is worth quoting the Secretary General at length:

State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalization and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.¹⁷

This new understanding of state responsibility is one that gives primacy to citizens and victims of abuse rather than to states and the inviolability of territorial integrity and sovereignty. Gone were the days when the UN upheld state sovereignty in the face of mass atrocities, such as the “shameful episode of the 1980s, when the United Nations [...] allowed the Khmer Rouge to continue to occupy the Cambodian seat in the General Assembly for more than a decade”.¹⁸

¹⁴ International Commission on State Sovereignty. *The Responsibility to Protect: A Report of the International Commission on State Sovereignty* (IDRC Books, 2002): section 1.7. Hereafter referred to as “ICISS”.

¹⁵ Ibid, 1.35

¹⁶ Ibid, 2.14

¹⁷ Annan, Kofi. “Two Concepts of Sovereignty,” *The Economist* 352 (Sept, 1999): 49-50.

¹⁸ Ambassador to Netherlands, S/PV.4011, 10 June, 1999 12-13 (cited in Wheeler, op. cit., fn 8, p. 297).

B. The Responsibility to Protect & The Outcome Document

Issued in December 2001, The ICISS report, *The Responsibility to Protect* (R2P), marks a definitive turning point in the intervention debate: it claims that HI can no longer be considered solely in terms of a right to intervene; rather, it should be recognized as a duty. R2P does this, first, by positing the duality of sovereignty: “externally [...] to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.”¹⁹ From this assumption, R2P attempts to achieve the goals of “alter[ing] the consensus about the use of deadly force to help victims,” and attempts to determine that the responsibility to intervene is “located in the UN Security Council.”²⁰ R2P endeavors to accomplish these ends by changing the language of the debate and providing a set of foundational principles.

If the language of the debate is altered, certain moral and political problems may be sidestepped.²¹ One of these problems includes the use of the term “humanitarian” to describe military action, which relief and aid workers feel is not “humanitarian” in any way. Another problem is that some believe that labeling interventions in such a manner “prejudice[s] the very question in issue – that is, whether the intervention is in fact defensible.”²² Finally, labeling armed interventions as “humanitarian” can easily be construed as attempts to mask moral and political imperialism.²³ Thus, the ICISS invokes a new term – one they hope is less corrupted – the “responsibility to protect.”

¹⁹ ICISS, op. cit., fn 14, 1.35.

²⁰ Weiss, Thomas. *Humanitarian Intervention: Ideas in Action* (Polity Press, 2007): 100.

²¹ ICISS, op. cit., fn 14 1.39-1.141.

²² Ibid, 1.40

²³ Weiss notes that after the 2003 invasion of Iraq this view has been significantly bolstered (Weiss, op. cit., fn 20, p. 124). Nardin also criticizes Tesón’s account of the 2003 Iraq war as “humanitarian imperialism.” Cf. Fernando R. Tesón “Ending Tyranny in Iraq” and Terry Nardin “Humanitarian Imperialism: Response to “Ending Tyranny in Iraq” *Ethics and International Affairs* Vol. 19, No. 2 (2005): 1-26.

ICISS also attempts to provide foundational principles in order to guide intervention in the twenty-first century and beyond. These principles, while helpful, are not exactly new. The ICISS claims that the responsibility to protect lies first and foremost with each state, but if a state is unwilling or unable to protect its citizens, the responsibility falls to the international community.²⁴ The international community, in turn, must look to the UN Security Council to determine what action (if any) is necessary to maintain peace and security and restore human rights. ICISS claims that R2P is composed of three elements: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.²⁵ Most important for any discussion of HI is the second – reacting to a mass atrocity. While no international legal document has ever before conditioned sovereignty in this way, the procedure of looking to the Security Council for guidance or approval is not new.²⁶ Furthermore, R2P’s criteria for intervention are well established in the just war tradition. R2P borrows the just war principles of right authority, just cause, right intention, last resort, proportional means and reasonable prospect of success, to limit and to guide the actions that states may take.²⁷

Even though many of R2P’s core principles and “elements” are not new in academic and legal debates, most states have not been willing to endorse such principles for the purposes of intervention. But in 2005, during the World Summit meetings, the

²⁴ ICISS, op. cit., fn 14, xi,

²⁵ Ibid, xi.

²⁶ The International Law Association drafted a set of criteria in the early 1970s for judging the legality of unilateral HI. Numbers 3 and 9, of the 12 point document, require a state to *meet* with the Security Council to inform it and seek guidance (and implicitly approval) for an intervention. Third Interim Report of the Subcommittee on the International Protection of Human Rights by General International Law, ILA Report of the Fifty-Sixth Conference 217 (New Delhi, 1974). Quoted in Wheeler op. cit., fn 8, p.43, and noted in Weiss, op. cit., fn 20, p. 107.

²⁷ ICISS, op. cit., fn 14, 4.16.

UN adopted the recommendations of the ICISS report (if not in letter, at least in spirit).

The Summit's "Outcome Document" expressly declared:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. *In this context, we are prepared to take collective actions, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.*²⁸

It appears, then, that the world community recognizes, at some basic level, a duty to protect all citizens of the world from gross crimes against humanity.

II. Limits of R2P and the Outcome Document

A. Practical Limits of a Legal Duty to Intervene

Intervention is a question rather of policy than of law. It is above and beyond the domain of law, and when wisely and equitably handled by those who have the power to give effect to it, may be the highest policy of justice and humanity.²⁹ --William Harcourt, 1863

Unfortunately, the acceptance of only some of the ICISS' recommendations and the delay in implementing any of the UN's mandates has led to waning support for R2P.

Weiss notes that the lack of public support for a more open policy on intervention and

²⁸ A/60/150, otherwise known as the "Outcome Document," paragraphs 138-139 (italics added). Hereafter "Outcome Document." Since then, the UN has reaffirmed its commitment to these principles. See, for example, UN Resolution 1674 (April 2006): the international community bears a "responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity." Since the passing of Resolution 1674, the Security Council has had four more open debates that have resulted in a reaffirmation of the responsibility to protect (italics in original).

²⁹ Harcourt, William Vernon. *Letters by Historicus on Some Questions of International Law*: Reprinted from 'The Times' with Considerable Additions (London: Macmillan, 1863): 14. Cited in Chesterman, op. cit., fn 3, p. 39.

R2P is due to the Bush and Blair Administrations' attempts to justify their invasion of Iraq in 2003 on humanitarian grounds.³⁰ Moreover, the "Outcome Document's" mandate to establish a set of criteria for determining when an intervention is warranted has "stalled." Weiss attributes this to the "poisonous atmosphere" in the General Assembly since the Iraq invasion, but the causal arrow is not that clear.³¹ As Alex Bellamy argues, establishing criteria for the use of force was contentious from the outset and not primarily due to the 2003 Iraq invasion; in fact, three of the P-5 members on the Security Council opposed institutionalizing criteria, for reasons that ranged from limiting states' freedom of action to the probability of abuse of such criteria.³²

On the practical side of the equation, then, we have three problems. First is the failure of the R2P and the "Outcome Document" to identify an appropriate agent: the "international community" is not (and cannot be) an "agent" proper, for it lacks a *will* and *capacity* to act. More precisely, as the international community lacks the necessary criteria for moral agency, we cannot properly speak of it in terms of responsibility, much less duty. Of course, both documents seem to solve this problem by suggesting that the UN might be something of an agent *in loco*. However, the problem of inaction remains unsolved: the relevant organ of the UN—the body capable of ordering action—is the Security Council; but the Security Council is hindered by an institutional strait jacket, namely the P-5 veto.

I am not alone in identifying this problem: both the World Federalist Movement and the Institute for Global Policy also noted their concerns about "what should happen if

³⁰ Weiss, op. cit., fn 20, pp.124-129.

³¹ Ibid, 125.

³² The members are the United States, China and Russia. Bellamy, Alex. "Whither the Responsibility to Protect? HI and the 2005 World Summit" *Ethics and International Affairs*, Vol. 20, No. 2 (2006): p. 165

the Security Council failed to act.”³³ It is no surprise then that scholars continue to debate about who should intervene, as the UN has not undergone substantial reform, and no specified unit, organization, or institution other than the “international community” is charged with a duty to intervene.³⁴ R2P’s success in changing the terms of the debate from a right to a duty is ultimately undermined because assigning the duty of HI to a vague “international community” amounts to nothing more than a semantic sleight of hand. In reality, all “legitimate” hopes rest on a dysfunctional Security Council.

Moreover, Bellamy points out that disagreement still exists over whether the Security Council even has a duty to intervene. Paraphrasing John R. Bolton, the U.S. Representative to the UN, Bellamy writes: “he argued that the Security Council was not *legally* obliged to protect endangered civilians, whereas host states were. Bolton also argued that the Security Council must have the freedom to decide upon the most appropriate course of action on a case-by-case basis and that the language of obligation [in the “Outcome Document”] should be toned down accordingly.”³⁵ This position clearly compounds the problem: if the “language of obligation” is placed on the chopping block and the Security Council’s agency is called into question, then the debate is likely to regress back into the terms of a state’s discretionary right to intervene.

In addition to the problem of inaction by UN, there is a second, and related, problem of the role of regional organizations. Some scholars insist that, when the

³³ World Federalist Movement-Institute for Global Policy, *Civil Society Perspectives on the Responsibility to Protect: Final Report* (New York: World Federalist Movement, April 2003) cited in Bellamy op. cit., fn 32.

³⁴ There is of course another legal debate over whether the Security Council has implicit powers under the Charter to authorize humanitarian interventions. The SC has always justified the use of force, for humanitarian purposes or otherwise, under Chapter VII. Nevertheless, assuming a legal case can be made for the SC’s powers to authorize an HI, my point remains that the SC as it currently stands is dysfunctional.

³⁵ Bellamy, op. cit., fn 32, p.164 (*italics in original*).

Security Council is unwilling or unable to act, others should take its place.³⁶ However, it is not clear whether this “should” is a moral or a legal prescription. For example, Bellamy points out there may be instances where regional organizations carry out interventions on their own mandates because they “need not defer to the UN Security Council in humanitarian emergencies.”³⁷ Here Bellamy calls attention to the African Union’s (AU) Constitutive Act, which grants its members a right of (collective) HI and thus “strongly implies that the AU, not the UN Security Council, may assume primary responsibility in the face of humanitarian emergencies.”³⁸ Among other problems, this position is inconsistent with R2P’s claims that the Security Council’s approval is required (as a legal matter). The tension between regional organizations and the UN is yet another instance of “dueling sovereignty” and “dueling responsibility” that muddies the water even further. If we are to take seriously the problems of dueling sovereignty and dueling responsibility, we could extrapolate from the AU example and envision the possibility that all twelve of the regional organizations currently in existence might find themselves in similar situations of conflicting responsibility.³⁹ It is possible, indeed highly probable, that conflict could result in an intervention deemed illegal by UN standards but legal by the terms of the regional treaty or constitution.

³⁶ See, for example, Fernando Tesón *Humanitarian Intervention* (Transnational Publishers Inc., 1988); James Pattison. “Whose Responsibility to Protect? The Duties of Humanitarian Intervention,” *Journal of Military Ethics*, Vol. 7 No. 4 (2008): 262-283; James Pattison, “Legitimacy and Humanitarian Intervention: Who Should Intervene” *The International Journal of Human Rights*, Vol. 12, No. 3 (2008): 395-413.; Gareth Evans. *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings, 2008); Nicholas Wheeler *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, 2000).

³⁷ Bellamy, op. cit., fn 32, p. 157.

³⁸ Ibid, 158.

³⁹ The identified regional agencies are the: European Union (EU), African Union (AU), North Atlantic Treaty Organization (NATO), Organization for Security and Cooperation in Europe (OSCE), League of Arab States (LAS), Organization of American States (OAS), Commonwealth of Independent States (CIS), Association of Southeast Asian Nations (ASEAN), ASEAN Regional Forum (ARF), South Asian Association for Regional Cooperation (SAARC), Shanghai Cooperation Organization (SCO), Economic Community of West African States (ECOWAS).

Finally, R2P and the “Outcome Document” are nothing more than international legal prestidigitation. If institutionalized procedures to act in humanitarian crises were to be embodied in international law, then the problems of agency and scope would disappear. However, as Gareth Evans, the father of R2P, notes in his recent book:

The immediate objective must be to get to the point where, when the next conscience-shocking case of large-scale killing, or ethnic cleansing, or other war crimes, or crimes against humanity comes along –as is all too unhappily likely—the immediate reflex response of the whole international community will not be to ask *whether* action is necessary but rather *what* action is required, by whom, when and where.⁴⁰

Evans gives the game away here, for if R2P were such a success, it is hard to understand why, three years after its adoption by the UN, the debate persists. Further examination reveals that the UN’s adoption of R2P through the “Outcome Document” and Resolution 1674 is nothing more than legal lip service. On the one hand, the UN claims responsibility to “protect [states’] populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁴¹ On the other hand, between the caveats of “as necessary and appropriate” and “on a case-by-case basis,” the UN does nothing more than “pledge support” for reform of its constituent bodies; there are absolutely no immediate, tangible, or clear plans to fulfill a duty of HI.

It seems, then, that a duty of HI, as outlined in R2P and the “Outcome Document” is, at best, only vaguely defined. In the event of the Security Council’s failure to act, the responsibilities of states and regional organizations remain ambiguous, as there may be conflicting requirements between states and regional organizations. These contradictory requirements may also give rise to incompatible claims as to who violates international law if a state or regional organization undertakes an intervention.

⁴⁰ Evans, op. cit., fn 36, p. 53 (italics in original).

⁴¹ Outcome Document, op. cit., fn 28, paragraph 138-139.

While the practical problems remain, I posit that the main difficulty with R2P and the “Outcome Document” is conceptual. Whether we want to call armed intervention “humanitarian” or a “responsibility to protect” does not answer the fundamental questions raised by terming it a *duty*. If intervening in another state (without its consent) to save human life is indeed a duty, then we must understand what type of duty it is. Such a clarification is necessary in order to determine who possesses the duty, what is required to fulfill it, and whether coercion is justifiable.

In the next section, I engage the Kantian theoretical debate over a duty of HI, and I argue that two prominent Kantians are mistaken in their categorizations of the duty of HI. In putting the cart before the horse, so to speak, these misguided categorizations have only perpetuated the aforementioned practical problems.

B. Theoretical Limits of a Duty to Intervene

Here, indeed, we are referring to *laesio dolosa*^{*}; in this case there is an injury to humanity in our own person; it would be affronted, and the respect owed to it would be lost sight of, if we were willing to let the rights of our humanity be toyed with. We must therefore possess a desire for justice, in order to demand satisfaction from the other for injury deliberately inflicted.⁴²

Kantian scholars who attempt to categorize a duty of HI as either *perfect* or *imperfect* wrestle with the same problems we witnessed on the practical front, namely agency and scope. Indeed, the Kantian debate over whether HI is a perfect or imperfect duty seems to revolve around these very issues. I believe the locus of the debate is misplaced and, thus, it is largely misguided. That the debate misses the point is ultimately the result of two things: one, a misapplication of Kant’s taxonomy of duties; and two, a misunderstanding of (or, perhaps, a taking for granted of) Kant’s distinction

^{*} Injurious offence, italics in original.

⁴² Vigilantus. *LoE*, 27:688.

between justice and virtue. Kok-Chor Tan and Carla Bagnoli are the prime movers in this debate and, thus, are the primary foci of my inquiry.

Before we begin, briefly recall from Chapter One that an imperfect duty is what Kant would call a “wide” duty of beneficence. If HI is an imperfect duty, then agents (in this case, states or international or regional organizations) must take the “ends” of other recipients (states or peoples) as their main motive for acting. Imperfect duties provide agents with a degree of latitude in choosing how to act, insofar as agents may decide not only when, where, and how they will fulfill their duties, but also to whom these duties apply. If, however, HI is classified as a perfect duty, then an agent’s choice is rather limited. A perfect duty implies more precision with respect to recipient, scope, and the ability to be discharged.

B.1. HI as an Imperfect Duty ~ Tan

Kok-Chor Tan argues that HI, *as it stands now*, is an imperfect duty. He claims that this duty is imperfect because “no one has been assigned the duty, and it is not specified what anyone is to do.”⁴³ Tan claims that because the current international system has no institutionalized mechanism for assigning a duty of HI to any particular state (or group of states), compulsory performance of the duty is impossible. Moreover, even if there existed an institution capable of assigning a duty to intervene, the scope of the duty would remain unclear in the absence of well-defined institutional rules and procedures. That is to say, agents (interveners) would be uncertain as to whether their duty would require them merely to stop violence or also engage in reconstruction and

⁴³ Tan, Kok-Chor. “The Duty to Protect” in *Nomos XLVII: Humanitarian Intervention*, Eds. Terry Nardin & Melissa Williams, (New York University Press, 2006): p.104.

reconciliation. Yet Tan believes that these problems are solved if we simply identify an appropriate agent and delineate for that agent the scope of its duty. In other words, the solution is to turn an imperfect duty of HI into a perfect one. His solutions are set forth in two arguments: one identifies agents and the other institutionalizes rules and procedures.

His first argument consists of two parts. Part one claims that states that “stand in a special relationship to a people needing protecting by virtue of their shared historical ties” ought to be the specific agent to intervene.⁴⁴ Here Tan alludes to the responsibility of former colonial powers or states that have some sort of “shared culture...common history...[or] other common ties that are unrelated to past injustices,” that put them into a closer relationship.⁴⁵ Part two asserts that if a state has “special capabilities,” it ought to intervene.⁴⁶ These capabilities may involve military capacity, economic ties, or special units trained for peacekeeping missions. The capability requirement designates the “best candidate, compared to others, for doing the protecting.”⁴⁷

Tan’s second argument posits that a better solution to the agency problem is by institutionalizing the duty to protect.⁴⁸ Institutionalizing this duty, he supposes, will allow “all states *in a position to do something* to coordinate their efforts so as to effectively discharge the protection of the duty.”⁴⁹ By placing an organization, such as the UN, in the position of assignor, the agency and scope conditions can be satisfied. The imperfect duty therefore becomes a perfect duty.

⁴⁴ Ibid, 97.

⁴⁵ Ibid, 97.

⁴⁶ Ibid, 100.

⁴⁷ Ibid, 100.

⁴⁸ Note here that his discussion of “institutionalization” is rather vague.

⁴⁹ Ibid, 103.emphasis added

Moreover, it is also important to note that Tan acknowledges, at least implicitly, that coercive force is necessary to fulfill a duty of HI. While Tan persists in the use of a “Kantian” framework to justify the moral imperative to intervene, that imperative, it seems, must also justify coercion.⁵⁰ If we are to take Tan’s conclusions seriously, then we must examine his employment of the Kantian moral framework into his argument and determine whether, after his use, his argument remains coherent. I believe it does not.

The first step Tan makes away from Kant’s system is his reversal of the priority of agent over claimant. He notes:

It might not be quite accurate to say that a duty to intervene is an imperfect one, for in this case, it is clear to whom the duty is owed –it is owed to the people whose basic rights are being seriously violated by their own state. Still, I think that treating a duty as imperfect on the grounds that no agent has been specified, as Walzer and O’Neill do, is not inconsistent with the spirit of the Kantian distinction.⁵¹

Tan is either, therefore working in a Kantian or perhaps neo-Kantian tradition.

Let us say that he is working in a Kantian framework, as he is trying to maintain “the spirit” of Kant’s taxonomy of duties. We then must understand how far he can stretch this framework before it becomes inconsistent with its original “spirit,” and renders his discussion confused.

On the one hand, Tan’s classification of HI as an imperfect duty is reminiscent of Nardin’s understanding: a duty is imperfect because it “grants the recipient a substantive benefit that is indeterminate in form or quantity. [And it] is imperfect because what needs

⁵⁰ Tan notes “it is not that the active violation of rights on the part of a state causes it to forfeit its sovereignty, which in turn renders permissible an intervention by outsiders. Rather it is the need to protect human rights, which compels outsiders to intervene...” (Tan, op. cit., fn 43, pp. 91-92). Further, I take Tan to be working from a Kantian framework, as he claims that the “distinction between perfect and imperfect duties is central to Kant’s ethics,” and then proceeds to define such duties via Kant’s *Groundwork* (Tan, op. cit., fn 43, p. 95).

⁵¹Ibid, 95.

to be done cannot be precisely specified.”⁵² On the other hand, where Nardin correctly follows Kant in stating that imperfect duties do not specify content, Tan fails to appreciate Kant’s prioritization of agent over claimant. This is important for two reasons. One, for Kant, *all* agents have imperfect duties, such as benevolence or charity, and all imperfect duties are duties of virtue. Kant’s reason for leaving claimants of imperfect duties unidentified is precisely to allow *agents* to exercise their practical judgment and thereby further moral perfection.⁵³ The priority here is on an agent’s ability to have leeway to when and where to fulfill that duty. The prioritization is not on the claimant. Reversing agent and claimant undermines Kant’s and Kantian ethics, as both require moral perfection via an agent’s exercise of her practical reason. Two, on Kant’s (and Kantian) understanding, imperfect duties of virtue take the “ends” of others and not their “rights” as primary. Where one has a legitimate right, either acquired or innate, then there is an identifiable claimant, and the duty is one of justice, not virtue.

This can be seen more readily when one presses Tan’s use of O’Neill as further support for his agent/claimant reversal. First, Tan’s use of O’Neill’s argument is suspect because her argument directed elsewhere. She is arguing that providing food to the poor must be considered a matter of justice, not ethics. Furthermore, her use of scare-quotes around the word “right” seems to indicate that *if* a right to provide food is truly a “right” it is a weak one at that.⁵⁴ I tend to follow O’Neill’s later discussion on this topic where

⁵² Nardin, Terry. “Introduction” in *Nomos XLVII: Humanitarian Intervention*, Eds. Terry Nardin & Melissa Williams, (New York University Press, 2006): 15.

⁵³ *TL*, 6:386-6:394. Moral perfection is also considered an imperfect duty because human beings are faced with a wide array of situations, life experiences, education practices, etc. All of these differences require us to use our practical judgment in different ways.

⁵⁴ “[U]nless the obligation to provide food to each claimant is actually allocated to specified agents and agencies, this ‘right’ will provide meager pickings. The hungry know that they have a problem. What would change their prospects would be to know that it was others’ problem too, and that specified others have an obligation to provide them with food. Unless obligations to feed the hungry are a matter of

she claims that “the point of difference is that they [universal economic, social and cultural rights] must be institutionalized: if they are not there is no right.”⁵⁵ If Tan is insinuating that all human rights are “manifesto rights,” which I assume him to be doing due to his use of O’Neill, then a violation of them will “provide meager pickings” for redress. This conclusion points not so much to a duty of HI’s status as imperfect or perfect, but to a fundamental problem of international justice. As O’Neill rightly understands, “if it is not in principle clear where claims should be lodged, appeals to supposed universal rights to goods and services, including welfare, are mainly rhetoric.”⁵⁶ These appeals are rhetoric because justice requires certain institutional features for its instantiation.

Tan’s claims, therefore, to inverse the agent/claimant distinction to support his reading of a duty of HI makes little sense. It makes little sense because the original distinction gives meaning to the division of justice and virtue, once that is changed so drastically, Tan is no longer working within the “Kantian spirit.”

Second, Tan’s claim that once an imperfect duty of HI is institutionalized it “becomes” a perfect duty of HI makes little sense on Kantian grounds. Kant does not believe that imperfect duties can “become” perfect duties; *they are different in kind*. Again, imperfect duties of virtue take the *end* of humanity (i.e., happiness) as the content of the duty. Perfect duties, are for the most part, concerned with the *right* of humanity. Perfect duties may take one of two forms: either they pertain to *internal freedom* (and are

allocated justice rather than indeterminate beneficence, a so-called ‘right to food’, and the other ‘rights’ of the poor, will only be ‘manifesto’ rights.” O’Neill, Onora, cited in Tan, op. cit., fn 43, endnote 20.

⁵⁵ O’Neill, Onora. *Towards Justice and Virtue* (Cambridge University Press, 1996): 132.

⁵⁶Ibid, 132.

thus duties of respect),⁵⁷ or they pertain to *external freedom* (and are thus duties of right). As I noted before, imperfect duties provide an agent with latitude (*Speilraum*) in how she decides to fulfill them; they are “wide” in scope. Perfect duties, however, are considered “narrow” because they also prescribe acts or omissions. Imperfect duties to others, namely benevolence, deal with “satisfaction in the happiness (well-being) of others,” and the maxim from which the agent acts is concerned with beneficence (“making [the] happiness [of others] one’s [own] end”).⁵⁸ Because an agent must take another’s end as her own and will a maxim in accordance with the moral law, an imperfect duty cannot be coerced. The moral worth of the duty derives its importance from the end and the maxim, not the action, and so coercion can play no part. If an agent fails to perform her imperfect duty, then she cannot be held culpable for it; rather her character can only be said to have a moral defect.⁵⁹

Perfect duties, for the most part, concern right (*Recht*).⁶⁰ At bottom, all “rights” are derived from or acquired because of the “only...innate right...belonging to every man by virtue of his humanity.”⁶¹ It is freedom to be a moral being, to pursue one’s own ends, while not hindering the freedom of other persons to pursue their ends too. One must do or forbear from doing *some act*, regardless of end or motive. Moreover, because perfect duties involve right, agents can and may justifiably be coerced to perform or to forbear

⁵⁷ As I noted in Chapter One, all duties of respect are purely negative. One must forbear from acting, and no duties of respect – in Kant’s writings – are positive.

⁵⁸ *TL*, 6:452.

⁵⁹ One may object that a failure in any duty is a “wrong;” however, this is not the case for Kant. “Wrong” belongs strictly to the category of *Recht*. To wrong, for Kant, is to violate a right; to fail in a duty of virtue, one cannot be held “culpable” but morally deficient. *MM* 6:384 & 6:390.

⁶⁰ My discussion in the following paragraph demarcates all areas of perfect duty, but in most circumstances “perfect” is said to be in accordance with *Recht*. There are “narrow” duties of virtue, like those of respect Cf. *TL* 6:462-468. Kant explicitly claims “a duty of free respect toward others is, strictly speaking, only a negative one (of not exalting oneself above others) and is thus analogous to the duty of right not to encroach upon what belongs to anyone. Hence, although it is a mere duty of virtue, it is regarded as *narrow* in comparison with a duty of love.” *TL*, 6:449.

⁶¹ *RL*, 6:237.

from the act in question. Thus an imperfect duty cannot become a perfect duty, their contents and objects are wholly separate.

Third, Tan's arguments for turning an imperfect duty of HI into a perfect duty of HI fail to address the issue of coercion.⁶² In so doing, he leaves a deeper question unanswered: Why does making a duty determinate with respect to agent and scope also make it coercible? Under a Kantian framework, the identification of an agent and a clearly defined scope do not generate a right to coerce. Tan's initial use of Kantian categories could provide him with the resources to address the question of coercion, but in order to do so, he would have to categorize the duty as one of justice. The closest Tan comes to acknowledging that HI is a duty of justice is in his claim that "some duties are just too important to be left imperfect."⁶³ This assertion does little to explain why perfect duties are "more important" than imperfect duties. Neither does it help to explain why justice is more important than virtue. Perfect or imperfect, a duty is a duty; fulfillment is not discretionary, it is obligatory. One kind of duty does not carry more "weight" than the other,⁶⁴ one is not "more important" than the other and, as I have shown, they are different in kind. Nevertheless, both are still *duties*.

B.2. HI as a Perfect Duty ~ Bagnoli

⁶² Tan argues that massive human rights violations, which would be the main determinant to a state forfeiting its sovereignty and thus rendering an intervention permissible, trigger a "need to protect human rights, which compels outsiders to intervene." (Tan, op. cit., fn 43, p. 93). Further on Tan asserts that "I am claiming only that the neutral state cannot appeal to the principle of sovereignty to maintain its neutrality" (Ibid, 93).

⁶³ Ibid, 104.

⁶⁴ Again, in a puzzling passage Tan claims "that a duty is imperfect points only to the need for coordinating efforts and the need to cooperate. It does not mean that the duty need not be taken seriously by anyone" (Ibid, 111). This is rather disturbing because any duty, under a Kantian framework, requires an agent to act. If Tan follows Kant "in spirit," then he should at least be aware that an imperfect duty is still a necessitation to act. Agents still have to take their imperfect duties seriously, and they must still fulfill them; it is only how and when that is discretionary. Agents cannot ignore their duties.

Carla Bagnoli represents the other side of the Kantian debate over HI. She argues that HI is not an imperfect duty at all; its content categorizes it as a perfect duty of justice. She claims that because part of the categorical imperative (CI) is to respect the humanity within oneself and others (the humanity formula, hereafter CI₂), to violate it is to wrong someone. Humanity, for Bagnoli, is the “capacity to decide what is valuable and what is not...[it] is the very capacity for rationally setting ends of one’s own.”⁶⁵ CI₂, she explains, demands that we recognize the humanity, and thus the dignity, of others. Once we recognize “somebody is a person [that recognition] makes a claim on us: it demands that we respect such a person as an autonomous source of value.”⁶⁶

To respect others’ humanity, she contends, gives rise to a duty to intervene in instances of mass human rights violations because human rights violations are nothing more than treating humanity as a mere means (a violation of CI₂). Moreover, she maintains that under a Kantian framework, to interfere with a person’s setting of ends without adequate justification is a violation of *Recht*, and the violator of *Recht* is subject to coercion. Bagnoli also counters the objection that, under present circumstances, the duty of HI is “unassignable” and is thus relegated to an imperfect status. Respect for humanity is a duty of justice or right; as such, it “applies to all rational agents.”⁶⁷ Yet, she also claims that assigning a duty of HI (to states) is a political problem rather than a “problem of allocation,” because every person has the duty.⁶⁸

Bagnoli maintains further that even though everyone has a perfect duty of HI, fulfilling it requires answering the question of “proper authority.” She argues that we

⁶⁵ Ibid, 119.

⁶⁶ Bagnoli, Carla. “Humanitarian Intervention as a Perfect Duty” in *Nomos XLVII: Humanitarian Intervention*, Eds. Terry Nardin & Melissa Williams, (New York University Press, 2006): 120.

⁶⁷ Ibid, 124.

⁶⁸ Ibid, 125.

must separate the normative force of the duty from questions of fulfilling or discharging it, as some individual duties “ought to be discharged collectively.”⁶⁹ Morality demands that all rational beings have this duty; law merely deals with the specifics of assigning proper authority and delegation/allocation.⁷⁰ Thus, for Bagnoli, the duty of HI is perfect and institutionalizing it is merely a “political” task.

While I agree with many of Bagnoli’s conclusions, ultimately, I believe her argument to be flawed on three accounts, all of which are ultimately interrelated. First, Bagnoli, while noting that “a lawful state is one in which this conception of right is instantiated through appropriate institutions, and informs personal relationships,” does not seem to notice that her categorization of HI as a perfect duty requires such an institution *before* the duty can be categorized as “perfect.” If Bagnoli is trying to remain true to Kant’s texts, which I believe she is, her argument overlooks the fact that a civil society must be present for perfect duties of justice to even exist.

Bagnoli correctly claims that perfect duties of justice have, as one of their hallmark features, the ability to use external coercion to ensure compliance. In Kant’s *Lectures on Ethics*, Vigilantius notes: “*Obligatio perfecta*, [is] an obligation where the agent can be necessitated to an act of duty by the choice of another.” However, for this to be “rightful” coercion, that “lawful state,” or something that satisfies the institutional requirements of it, must be present. But, Bagnoli does not claim this. Rather, she states “Kant defends the permission to coerce as a *juridical permission*, according to which one person may force another person to act rightly, that is we may obstruct wrong actions.”⁷¹

⁶⁹ Ibid, 133.

⁷⁰ Ibid, 133.

⁷¹ Ibid, 129 (italics in original). Claiming that the right to coerce is a permission is full of problems. First, it is not a permission, as a “permission” carries with it the connotation that one is allowed to do something

She seems to be stating, as the reader is left to infer, that any “rational agent”⁷² can coerce a state to stop its rights violations.

However, this is problematic for three reasons. One, for Kant, rightful coercion can only take place in a civil society. The “universal principle of right” claims that “any action is right if it can coexist with everyone’s freedom in accordance with a universal law,”⁷³ and “everyone’s freedom” can really only be guaranteed when “a will putting everyone under obligation, [...] a collective general (common) and powerful will can provide this assurance.”⁷⁴ Thus “the whole of individuals in a rightful condition, in relation to its own members is called a state (*civitas*).”⁷⁵ Absent such a condition, “coercion” is not rightful. Coercion outside of a civil condition is not “coercion” in the Kantian sense; it is rather, “violence.”⁷⁶ States in the international system are not in a *civitas*, they are in a *status naturalis*. Therefore, Bagnoli’s claim that any rational agent can “rightly” coerce the target state to stop violating its citizens’ rights is not quite right.

Two, Bagnoli’s claims about the legitimacy of using coercion against target states actually misses the point of about the correlative nature of coercion and perfect juridical duties. In other words, by focusing on the legitimacy of overriding the territorial integrity and sovereignty of the target state and not on coercing the duty bearer, Bagnoli misappropriates the object of coercion (i.e., the duty bearer). For Kant, *agents* with perfect duties can be coerced to fulfill them. Now, if Bagnoli wants to argue that states

one is otherwise not allowed to do. The reciprocal right to coerce is rather the negating of a wrong. Coercion in the face of a wrong is a “hindrance to a hindrance” of freedom and is therefore “right” by the law of contradiction. There is a question of permitting the coercion of others when they have not already wronged, but that is not what Bagnoli is discussing here.

⁷² “A duty [of HI] applies to all rational agents.” Thus I take her to mean the ability to coerce also applies to all rational agents.

⁷³ *RL*, 6:230.

⁷⁴ *RL*, 6:256.

⁷⁵ *RL*, 6:311.

⁷⁶ *RL*, 6:312.

have a perfect duty to their citizens to uphold their citizens' rights, then yes, coercion may apply to them (depending upon many factors and Kantian interpretation), but that is not what she is arguing. She is stating instead that states that violate their citizens rights are subject to intervention; they have forfeited their right of nonintervention. However, another problem arises because she claims that "all rational agents...[meaning] everybody, that is, the entire international community, is bound by the obligation to protect the victims of human rights abuse," and so if we take it that all of those agents have a perfect duty, then by Kant's account *those agents* can be coerced to fulfill their obligation.

This gives rise to problem three: Bagnoli's discussion of "proper authority." If the reader is puzzled as to Bagnoli's insistence that "everybody" bears a perfect duty of intervention, she is not alone. "All rational agents" implies not only states (if she agrees with Kant's insistence that states are "moral persons") but people and international organizations (assuming the "moral personhood" of corporations) as well. While she may not want to state this, she in fact does, for all of those entities are "rational agents" that have the possibility of bearing a duty of HI. Which is why it is odd that she then claims that even though "everybody" bears a perfect duty of HI, they do not have the "proper authority" to fulfill it. She says that "although the violation of human rights calls for action, it is not obvious that any particular state has the authority to respond, especially in cases where the state in which the violation occurs is not aggressive and does not pose any immediate threat."⁷⁷ While it is not immediately apparent, at least to me, why aggression or perceived threats should bear any moral weight on one's perfect duty of intervention, it makes even less sense to claim that an agent that has a duty does

⁷⁷ Bagnoli, op. cit., fn 66, p. 131.

not have the “authority” to execute it. Indeed, there might be “easier” ways to execute duties, say by institutionalizing them, but that does not mean that an agent only gains “authority” once the institution is established. In fact, this seems to be quite backwards. Institutions gain authority because the agents that have it individually bestow their authority upon the institution, and not visa versa. A state’s “moral standing” is said to derive from that of its citizens, and international institutions’ authority from that of its member states.

All of these problems stem, not from categorizing HI as a perfect duty as such, but from the fact that HI is a duty of justice in a state of nature. This gives rise to the second problem with Bagnoli’s argument: a duty of HI cannot apply to “everybody.” Absent a civil society, one that acts as a power-equalizing mechanism, “everybody” cannot fulfill a duty of HI. The debate over institutionalization comes back into the picture: a duty of justice requires legal, juridical and coercive institutions to assign, adjudicate and enforce duties, while protecting all agents’ external freedom so that they can fulfill such duties. Without these protections, many agents cannot fulfill their duties, and then, it would seem that Bagnoli is prescribing an “ought” where one “cannot.” Thus, despite Bagnoli’s claims that a duty of HI does not face a problem of allocation, it in fact does. The duty falls to those agents that are capable of fulfilling it, but deciding which agents are capable requires a metric for such allocation. Moreover, the insistence on institutionalization is not, in this instance a “political problem,” it is a logical requirement for Kantian justice.

Ultimately, I believe all these problems to be the result of how Bagnoli grounds a duty of HI: respect for humanity. Her first move is to say that “human rights are ways to

express our humanity,”⁷⁸ and that humanity “consists in the capacity to decide what is valuable and what is not.” Further she claims “a person is a special *locus* of value, in that it is also the origin of value.”⁷⁹ She couples all of this with CI₂, to support her argument for a perfect duty of HI. To understand how this reading of Kant is problematic, we must parse a few things out.

First, the concept of “respect” does not immediately ground a positive duty to intervene in humanitarian crises. Bonnie Honig’s impressive essay on Kant’s concept of “respect” will help to illuminate this point. Honig identifies three types of respect in Kant’s works: reverence-respect, teleological respect, and liberal respect. Reverence-respect “is respect for the moral law as it is manifested in the actions and self-legislation of others.”⁸⁰ With reverence-respect, “the object of respect is not really persons but the law of laws [the moral law]”.⁸¹ Reverence-respect is not “owed” to people; it is a moral feeling that is immediately elicited from us when we witness an example of the moral law via someone else’s actions.⁸² Since it is not owed to persons as such, only some people awaken this feeling in us, but again, our “respect” is directed at the moral law. This type of respect, then, cannot be the ground for a duty of HI because Bagnoli claims that “persons,” not the moral law, “are the locus of value.”

Honig’s second classification, teleological respect, is respect for “humanity in our persons.”⁸³ Teleological respect has “two facets: one negative and forbids certain actions, the other is positive and involves an attitude toward others.”⁸⁴ This kind of

⁷⁸ Ibid, 119.

⁷⁹ Ibid, 119.

⁸⁰ Honig, Bonnie. *Political Theory and the Displacement of Politics* (Cornell University Press, 1993): p. 27.

⁸¹ Ibid, 27.

⁸² Ibid, 27.

⁸³ Ibid, 29.

⁸⁴ Ibid, 29.

respect can be withdrawn when a person's "actions subvert or abase his humanity."⁸⁵

Again, it seems that this kind of Kantian respect also cannot ground a juridical duty of HI because this kind of respect requires i) forbearing from actions (negative) or ii) a moral feeling or attitude that can be revoked. Bagnoli's attention is on actions, not feelings, and those actions are positive (coming to aid).

The third classification is the best hope: liberal respect. "Liberal respect is the acknowledgment we give to the distance between individuals. It involves taking others into account when willing maxims and acknowledging their existence as a constraint on our choice of which maxims to will."⁸⁶ Persons, as such, deserve this respect, and this respect cannot be withdrawn either. Honig notes: "[i]t requires that men relate to each other from a distance, as equals, and as bearers of rights."⁸⁷ The account of liberal respect is drawn from CI₂'s insistence that a rational agent never be treated as a mere means. Kant's civil condition is one where "juridical enforcement of liberal respect for persons (respect for rights) disallows actions that interfere with the ability of others to will maxims and act in their own right as free, equal, and rational beings."⁸⁸ Moreover, "[p]ositive law ensures that relationships between person in civil society are conducted in accordance with juridical duties whether or not the citizens will morally that it be so."⁸⁹

Liberal respect is the best option for interpreting Bagnoli's arguments for a duty of HI being grounded on respect. However, this reading of respect puts us back into the vicious circle of *Recht*. Honig notes that the state, that is civil society, is required not only for liberal respect, but for "all three strands of respect" to "reinforce the 'veneer of

⁸⁵ Ibid, 29.

⁸⁶ Ibid, 32.

⁸⁷ Ibid, 32.

⁸⁸ Ibid, 35

⁸⁹ Ibid, 35.

morality”’.⁹⁰ Liberal respect may be concerned with people’s rights, but its object is one that does not lend itself well to Bagnoli’s arguments. First, liberal respect is like “negative liberty” in that it forces agents to *forbear* from doing harm. This in turn does little to help ground a positive duty of HI. Second, civil society is liberal respect’s domain. The international society, as I have noted before, does not have the requisite features to maintain liberal respect.

Ultimately, something more than “respect” is required to ground a duty of HI. This something ought not to be contingent on civil society, solely negative, directed exclusively at the moral law, and can be withdrawn. In my estimation, only the innate right to freedom can ground a positive duty of HI. While Bagnoli’s arguments face problems, she does, nevertheless, come the closest to the correct categorization of a duty of HI. She correctly understands that it is a duty of justice, but her arguments fail to take into account the problems associated with such a conclusion. She does not give any practical advice for what states can expect in the meantime, and she does not adequately address the issues of coercion and the logical necessity of a civil society. In the next section, I will argue that HI is a duty of justice because it is grounded in one’s innate right to freedom. Then, I will argue that as a duty of justice in a state of nature, a duty of HI is a provisional duty of justice.

III. Justice Not Virtue

In this section, I argue that the most important classification concerns the Kantian first-order distinction between justice and virtue. The imperfect/perfect distinction discussed above is primarily helpful as a second-order classification to understand what is

⁹⁰Ibid, 35.

required of an agent; to be more specific, I agree with Bagnoli that HI is a duty of justice, not a duty of virtue. However, to argue this in fuller detail I must do several things. First, I need briefly to remind the reader of the purpose of virtue in Kant's moral theory. Second, I must describe the typical actions that warrant an intervention, namely genocide and gross crimes against humanity. Third, I will argue that these actions, violate an agent's external freedom (and thus the fundamental Kantian right of innate freedom), and are subject to coercion, specifically in the form of intervention.

First, as I argued in Chapter One, Kant distinguishes between justice (*Recht*) and virtue (*Tugend*) in terms of a number of criteria, such as the type of law-giving, the incentive for action, whether the end is obligatory, and the issue of permissible coercion, and internal vs. external freedom. If an agent's action is primarily concerned with his internal freedom, then that act is classified as virtuous. When one is internally free, and thus virtuous, one chooses to make one's maxim of action conform to the moral law: acting in accordance with duty, from duty, for duty's sake. A virtuous action can concern oneself or others. When one's action is directed towards other people, one's motive must be duty; the end, however, must be the happiness of the person (or persons) to whom the action is directed. As Kant argues, "virtue signifies a moral strength of the will" and, as such, the will must be "constrain[ed] through [its] own lawgiving."⁹¹ In other words, no external (or heteronomous) motive, force, or "incentive" can be present if an action is to be judged as virtuous. Nothing external, not even inculcation or habit, can affect an agent's choice to act virtuously (for such an act cannot be deemed a *free* and conscious volition of the will).^{92,93}

⁹¹ *TL*, 6:405.

⁹² *TL*, 6:407.

It is no surprise that many scholars attempt to categorize a duty of HI as a duty of virtue because helping others in need appears to be a matter of benevolence. Under the Kantian framework, the duty to be beneficent is justified on the premise that “since our self-love cannot be separated from our need to be loved (*helped in the case of need*) by others as well, we therefore make ourselves an end for others; and the only way this maxim can be binding is through its qualification as a universal law, hence through our will to make others our ends as well.”⁹⁴ Kant is quite explicit that where others are in need, one “ought to sacrifice a part of [his] welfare to others without hope of return ... [and that] it is impossible to assign determinate limits to the extent of this sacrifice [because] how far it should extend depends, in large part, on what each person’s true needs are in view of his sensibilities, and it must be left to each to decide this for himself.”⁹⁵ Unsurprisingly then, scholars such as Tan, Walzer and O’Neill, argue that a duty to aid or protect is imperfect because of these very features.⁹⁶

An agent’s motives are also a primary concern when it comes to virtue. To be virtuous, one must act for duty’s sake, so in the case of HI, one’s motives must be humanitarian. Humanitarian motives were strongly emphasized during the debate over a right of intervention; however, with the shift from a right to a duty, scholars (like Tesón and Wheeler) no longer argue that a potential intervener’s motives are of primary importance because placing too much weight on them detracts from the suffering of the victims. However, if we use Kant’s moral framework, motives are not important because

⁹³TL, 6:407.

⁹⁴TL, 6:393 (italics added).

⁹⁵TL, 6:393.

⁹⁶ Tan and O’Neill also use this framework to argue not for the identification of a recipient but for an agent.

the duty of HI is a duty of justice (and Kantian duties of justice are always concerned rectification and redress, either to victims, society or right itself).

Second, I argue that actions that warrant humanitarian intervention. Following the Rome Statutes and the Outcome Document, I propose that a duty to intervene exists when a state⁹⁷ commits genocide and/or gross crimes against humanity against its own people. The Rome Statutes establish the International Criminal Court (ICC), specify which crimes are prosecutable, and designate the ICC's jurisdiction. For justificatory purposes, I use the Rome Statutes because the ICC complements the UN by working within the UN Charter and provides an international judicial body for crimes committed by states. More importantly, the ICC came into being under the auspices of the UN, where a majority of states supported the institution of the ICC and the corresponding definitions of the crimes under its jurisdiction. War crimes and crimes of aggression are not of concern at present because these involve external, not internal, action and persecution. Thus, genocide is defined as:

Acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such [by] killing members of the group; causing serious bodily or mental harm to the members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.⁹⁸

Moreover, crimes against humanity are:

Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of the fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the

⁹⁷ A duty to intervene can also exist if non-state actors or groups within the state, over which the government has little if no control, commit these crimes. The government in these situations also fails in its duties of justice towards its people.

⁹⁸ Rome Statute, Part II Article 6. <http://untreaty.un.org/cod/icc/statute/rome.htm>

Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁹⁹

Third, I argue that each of these crimes *primarily* involves fundamental violations of innate right to external freedom. External freedom, according to Ripstein, is “a matter of being able to set and pursue your own ends” without being “subject to the choice of another person.”¹⁰⁰ This type of freedom, it should be added, is of a physical nature. It is freedom from the physical compulsion of another. As Ripstein argues, “by depriving you of the means you use in pursuit of those [freely chosen] ends, or making you pursue ends you do not share, or using your means to pursue those [forced] ends” results in one being unfree.¹⁰¹

Moreover, the right to one’s person is a right of external freedom because one must have one’s person to set or pursue ends. To see this clearly we can look to Ripstein’s discussion of Kant’s concept of “willing.” Ripstein claims:

In order to set an end for myself, that is, to take it up as an end that I pursue, I must have the power to achieve it. There are two ways in which I can have such powers: first, I have my own personal powers, which I have innately, that is my right to them does not depend upon any act that I, or anyone else, has performed. ... Second, I might have powers that are external to me; that is, I might have means at my disposal.¹⁰²

One’s person is, therefore, a primary means one has to pursue projects. One is entitled to one’s person because it is part of one’s capacity to set and pursue ends.¹⁰³ Viewed this way, if my person is violated in some way, then I am “deprived of means I could have

⁹⁹ Rome Statue, Part II, Article 7 <http://untreaty.un.org/cod/icc/statute/rome.htm>

¹⁰⁰ Ripstein, Arthur. “Authority and Coercion,” *Philosophy and Public Affairs*, Vol. 32 no. 1 (2004):8.

¹⁰¹ Ibid, 8.

¹⁰² Ibid, 11.

¹⁰³ Kant’s understanding of property in one’s person is different than, say, Locke’s. Ripstein has a very clear explication of the rights to security in one’s person “prior to rights in property” for Kant. The gist of Ripstein’s discussion is that there are two arguments at work in Kant: a right to humanity in our own person and acquired rights. Individuals have an innate right of humanity, which forbids certain acts like slavery, suicide, etc. Individuals can also acquire further rights through the state, rights to “external” things. However, the Ripstein’s discussion is problematic because of things like forced conscription and some acts of consent. Cf. Ripstein, op. cit., fn 100, footnote 18 pages 13-14.

used in pursuit of ends that I have not set for myself,” and “I am *wronged* because I am deprived of my ability to be the one who determines how the thing will be used.”¹⁰⁴ The right to one’s person necessarily entails one’s innate right to freedom. This is so because a person’s body is, at the very least, the primary means by which one exercises external freedom. Interfering with one’s person without her consent is, therefore, a violation of external freedom, and is wrong because one’s person is directly connected to freedom.

The role of justice in Kant’s framework is to limit reciprocally agents’ external freedom while they pursue their own projects so that no one unilaterally dominates (makes unfree) another. This is why he claims that “any action is *right* (*Recht*) if it can coexist with everyone’s freedom in accordance with a universal law.”¹⁰⁵ To ensure that agents do comply with the dictates of right, coercion plays a fundamental role.

Kant claims that “right is connected with an authorization to use coercion,”¹⁰⁶ where coercion is the means to furthering agents’ freedom by “*hindering a hindrance to freedom*.”¹⁰⁷ In other words, B’s hindrance of A’s external freedom at time T_1 is incompatible with the freedom of all and is unjust (*Unrecht*). However, for Kant, any subsequent action at time T_2 that hinders B’s hindrance of A at T_1 is just (*Recht*). Moreover, “for the limits [on freedom] to be reciprocal, they must bind all in the same way; that is to say, they must be in ‘accordance with a universal law’.”¹⁰⁸ This is Kant’s distinction between a unilateral, a bilateral and an omnilateral will.¹⁰⁹ Only those actions

¹⁰⁴ Ibid, 12 (italics added).

¹⁰⁵ *RL*, 6:230 (italics in original).

¹⁰⁶ *RL*, 6:231.

¹⁰⁷ *RL*, 6:231 (italics in original).

¹⁰⁸ Ripstein, op. cit., fn 100, p.11.

¹⁰⁹ *RL*, 6:256, 6:259, 6:260.

that conform to an omnilateral (and thus universal and general) will can be considered just.

If we refer back to the Rome Statutes' definitions of genocide and crimes against humanity, it is immediately apparent that each of these crimes affects a person's physical ability to set and pursue his or her own ends. Killing, *physical* destruction, *forcible* transfer of population, imprisonment or other *severe deprivation of physical liberty* in violation of the fundamental rules of international law, rape (*nonconsensual* or *forced* sex), sexual *slavery*, *enforced* prostitution, *forced* pregnancy, and *forced* sterilization—all of these acts involves the violation of one's right to control their person. Each crime involves illegitimate coercion, i.e. unilateral or bilateral coercion, and the subsequent interference with one's capacity to act.

I can think of no better examples of being used as a mere means to another's end, or of being deprived of my means (my person), than crimes against humanity. Such crimes are the ultimate expressions of Kantian injustice: violating a person's external freedom by depriving her of her powers and means or using her powers and means without her consent. This is why scholars such as Carla Bagnoli argue that HI is a perfect duty: HI deals with the mass violations of human rights, and perfect duties concern violations of the innate right to freedom. The content of the duty is squarely within the realm of justice, not virtue, and intervention to stop or redress such a violation is perfectly legitimate because intervention is a "hindrance" at time T_2 . Questions of well-being and welfare arise only *after* an agent's external freedom is secure.

One might object here that acts that warrant intervention are concerned with both external and internal freedom, and that these acts actually accord primacy to welfare

rather than freedom. While it is true that genocide and crimes against humanity do affect both a person's freedom and welfare, *under a Kantian framework* these acts are "wrong" because they violate a person's external freedom, thereby hindering or removing her capacity to act. As Sharon Byrd notes:

External freedom is freedom from someone else's necessitating choice. If you are necessitated to do something, it can be either with irresistible or resistible force (brute force or threats of force). If your movement is necessitated by irresistible physical force, one cannot say you acted, but for Kant "action" (*Handlung*) is broad in meaning, and when he means a voluntary action he speaks of a free action. Accordingly any physical impact on your person would be necessitation with irresistible force (not a free action) and thus a violation of your right to external freedom.¹¹⁰

If one were to embrace a different moral theory, say consequentialism, then one could argue that a person's welfare could be seen as the priority. However, under Kant's moral theory, acts that violate a person's external freedom fall under the category of *Recht* and therefore are issues of justice.

One might also object that acts that deprive a person of his means or powers are acts that occur frequently within states, and that my argument simply shows that most states are subject to intervention. I think this objection is mistaken. First, civil society is supposed to act as a way of universalizing protection and rights for all citizens. When a state is systematically violating the rights of its citizens there is no way for those citizens to seek redress. The "normal" channels for justice are absent. The state may either be collapsed and anarchic (as in the case of Rwanda), failed (as perhaps in the case of Cambodia), or considered an "unjust enemy" towards other states because of its treatment of a portion of its population (as in the case of Darfur).¹¹¹ When a state's mechanisms for

¹¹⁰ Byrd, Sharon. Private Correspondence

¹¹¹ I examine the case of the "unjust enemy" in more detail in the next chapter. However, for present purposes, I follow Bernstein's interpretation of Kant's unjust enemy but extend it to portions of populations within states because humanitarian intervention is primarily about states committing crimes against their own people and thus becoming unjust enemies to their populations. Kant claims that in a state of nature an

justice are present, then the citizens may use the law and courts to seek redress for rights violations. Most states, therefore, do not fall into the category that warrants intervention, but there are several that do.¹¹²

I conclude, then, that HI is a duty of justice; however, categorization is only the first step. Proper categorization helps us to understand better the nature of the duty, but it also helps to illuminate its short-comings. Duties of justice that do not fit neatly under the Kantian rubric of a civil society raise further issues, and the international system is just one of these instances. In the next section I argue that HI is a provisional duty of justice.

IV. A Provisional Duty to Intervene

Recall from Chapter One that Kant makes an a priori argument that runs as follows: to be free and to pursue their projects, people must secure property. However, in a state of nature there is no guaranteed way to secure property beyond what one can physically possess: there is no neutral judge to adjudicate disputes and no publicly agreed upon laws that are backed by a coercive force to protect individuals. In a state of nature, each person is judge in his own cause and “might makes right.” Hence, property and

“enemy whose publicly expressed will (whether by word or deed) reveals a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible and, instead, a state of nature would be perpetuated.” (RL, 6:349; Bernstein, 90). Bernstein claims that “to speak of an unjust enemy *in a state of nature* is to refer not only to the fact that the circumstances do not allow the settlement of the conflict by a lawsuit, but also to the fact that a *state* has violated another state’s rights, as well as the fact that the rights-violator’s maxim, if made a universal rule, would perpetuate the state of nature.” Bernstein, Alyssa R. “Kant on Rights and Coercion in International Law: Implications for Humanitarian Military Intervention” *Annual Review for Law and Ethics*, 16 (2008): 91 footnote 200.

¹¹² The “State Fragility Index” compiled from the Polity IV data concludes that out of 162 countries, 8 states are considered “extreme,” 18 are “high,” and 21 are “serious.” These terms note the level of fragility and the likelihood of state breakdown. The Polity IV data measure the institutional strengths of countries in terms of governance. This index measures effectiveness and legitimacy by using indicators: security, governance, economic, and social dimensions of state performance.
<http://www.systemicpeace.org/polity/polity4.htm>

Recht can only be deemed “provisional.” Yet, the moral law requires us to maintain our freedom and to obtain property. The only way to do both of these is to join a civil society—that is, a society ruled by law, arbitrated by a neutral judge, and backed by a force that is sufficiently coercive to enforce laws and punish offenders.¹¹³ Kant also realized that certain features, like the separation of powers, must be present in the type of regime that would uphold these rules.¹¹⁴

Absent civil society, *Recht* is provisional, and agents do not have *perfect* duties of justice because there is no civil society. Rather, they have *provisional* duties of justice, and as I argued in Chapter One, provisional duties are duties of justice that some agents have outside civil society and in some instances of uncertainty (conditions of ambiguous right). Provisional duties of justice correlate with provisional rights. Provisional duties are those duties that permit exceptions on the basis of ability; agents who can fulfill a provisional duty of justice must, whilst those that do not have the physical capacity are exempted from the duty. As provisional duties make an exception on the basis of ability, this in turn means that most, if not all, negative duties stand as strict necessitations to act, as all agents have the capacity to forbear from action. Positive duties, however, are not open to all in a state of nature. This does not mean that duties of justice are not binding, nor does it give license to agents to behave immorally.¹¹⁵

From this line of reasoning, it follows that humanitarian intervention is a provisional duty of justice. As I have shown, HI is neither an imperfect duty of virtue nor

¹¹³ *RL*, 6:312.

¹¹⁴ Kant claims that all states that have a “moral personality” are republics. Only republics can seek peace, be legitimate, be consented to, and all must have a separation of powers. *RL*: 6340-6:342; *PP*, 99-102.

¹¹⁵ I am hesitant to use the word “unjust” here, as full “justice” requires civil society. Without such a society, one is in a “condition devoid of justice” *RL* 6:312.

a perfect duty of justice. However, I will argue below that as it stands now, HI is a provisional duty, and as a provisional duty, it can become a perfect duty of justice.

We can trace this conclusion to Kant's logic in the *Doctrine of Right*. First, he claims that individuals join a civil society in order to protect their freedom (and thus their persons) and enjoy their rights. Once in civil society, these individuals become "citizens," and each is granted certain rights (lawful freedom, civil equality, civil independence).¹¹⁶ These acquired rights listed above, stem from one's rights that existed provisionally in the state of nature, and they now transfer over to the civil society and become "conclusive," or peremptory, through the protection of law. Rights in the state of nature are still a matter of justice, and this is why they remain a matter of justice inside the civil society.

Second, the juridical state is, as previously noted, a priori necessary for the protection of rights and freedom. A juridical state, for Kant, is "the relation of human beings to one another which contains the conditions solely under which each can in fact enjoy his rights,"¹¹⁷ where enjoyment means "free from external coercion."¹¹⁸ In a state of nature agents cannot fully enjoy their rights without the constant threat of violence, and so agents enter a condition (civil society) to protect those rights. If someone violates a right in a civil condition, then that person is subject to the dictates of law.

Third, if we adhere to Kant's framework, then, rules of justice at the individual (domestic) level ought to analogously hold for the state (international) level as well. In other words, if we have a command to leave the state of nature as an individual to protect

¹¹⁶ *RL*, 6:312-6:314

¹¹⁷ *RL*, 6:306 as cited and translated by Byrd, Sharon and Joachim Hruschka. "From the State of Nature to the Juridical State of States." *Law and Philosophy*, Vol. 27 (2008): 606.

¹¹⁸ *Ibid*, 606.

and enjoy our rights, and the international system is a state of nature, then we must also leave it to do the same. He writes “a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition[...].”¹¹⁹ Sharon Byrd and Joachim Hruschka also come to this conclusion when they note that “[s]tates, and not merely individual persons, are required to enter a juridical state among states. And as for individuals, here “required” means that all states may use force to coerce all other states to make this move.”¹²⁰ I cannot here enter into the discussion of coercion of states into a “state of states,” but what I can do is to show that the duty to join civil society is the same in both instances. Moreover, the foundation of this duty is also the same: to protect freedom and rights.

Now, if we were to take the crimes that warrant intervention (rape, torture, enslavement, killing) and place them in the context of a functioning domestic civil society (the rule of law, authoritative courts and penal systems), and change the perpetrators to private parties, the result is that the state would step in and coerce the criminals to stop. The criminals would face prosecution and, if found guilty, imprisonment or other appropriate punishments. The state has a duty to intervene in these crimes, make them stop and punish the transgressors. Practically, then there are two duties: people have a duty to obey the laws of the state, and the state has a duty to uphold the rights and freedoms of its people. Unfortunately, while this situation ought to be no different, theoretically, for the international system, there is in fact a difference. While states do have a duty of justice to refrain from committing these acts, there is no

¹¹⁹ *RL*, 6:350 (emphasis in original)

¹²⁰ Byrd, Sharon and Joachim Hruschka. *op. cit.*, fn 117, p. 624.

functioning “state of states” to fulfill a duty of intervention.¹²¹ However, this does not mean that a duty does not exist.

As we have seen, Kant constructs parallels in his *Doctrine of Right*. The individual and international states of nature and the reasons for entering into juridical states are the same. Moreover, if one has a right to freedom in the domestic setting, then so too does the individual in the international setting. If one ought to institute a state for the purposes of justice, domestically, to protect those rights, then that ought to parallel at the international level as well.¹²² Since agents institute the state to protect rights, the state assumes a duty to intervene to stop crimes. The state is made the most capable agent (through law and the legitimate monopoly on coercive force). However, if we were to remove ourselves from a juridical condition, the right to freedom and the duty to “hinder a hindrance to freedom” do not, therefore, change. The parallel stays the same, and so the duty falls, in exactly the same manner, to capable agents.

We can now delineate that a duty of HI is a provisional duty of justice. First, the international realm is a state of nature, and all duties of justice in a state of nature are “provisional.” Second, HI is parallel to a duty of justice, assumed by the state, to intervene in crimes (like rape, torture, and murder) in the domestic realm. HI would be a perfect duty of justice because its content concerns the innate right to freedom (and thus by extension one’s person), but no formal system of law exists internationally. Third, the same moral impetus works on the domestic and international levels: exit at all costs to

¹²¹ Interestingly, Kant claims one can have no duties of justice to himself. Duties of justice are all “external,” but he does not elaborate or even venture into the discussion of duties of a government towards its citizens. If a state is, as he says, a “moral person,” then duties of justice towards the citizens of the state would be like having duties of justice to oneself, as the citizens are components of the state.

¹²² I cannot here enter into this argument in full, but I will spend considerable time on the “state of states” argument in Chapters Four and Five.

secure and protect one's rights because otherwise all rights are provisional. Thus we come to the conclusion that HI is a provisional duty of justice because it takes place in a state of nature, is concerned with one's innate right to freedom, and correlates to provisional right.

Now, one might object here that Kant clearly prohibits intervention, for he explicitly claims in Article 5 of *Perpetual Peace* that “no state shall forcibly interfere with the constitution and government of another state,”¹²³ and so the domestic analogy cannot hold. I address this issue at length later; for now, I offer two brief rejoinders. First, humanitarian intervention does not necessarily imply interfering or changing the constitution or government of another state. It can amount to a violation of territorial integrity (and some will argue sovereignty) but there is no direct link between intervention and the creation of a new state. Second, considering Kant's cosmopolitan juridical and ethical writings, I agree with Otfried Höffe that “[i]n view of systematic genocide, unknown to Kant in his day, it is likely that he would approve of humanitarian intervention, albeit only subject to...strict criteria.”¹²⁴

If we take my argument from Chapter One, that a form of *Recht* exists in every condition (private, public, cosmopolitan), and that agents also have rights and duties in each of these conditions, then duties of justice that exist in preceding conditions will also exist in the following ones. Furthermore, if the crimes that warrant intervention are considered duties of justice at the domestic level, then, by the domestic analogy, they ought to be considered duties of justice at the international level as well. However, since conditions at the international level do not satisfy the requirements for full or complete

¹²³ *TPP*, in Reiss p. 96

¹²⁴ Höffe, Otfried. “Forward” in *Terror, Peace and Universalism: Essays on the Philosophy of Immanuel Kant*. (Oxford University Press, 2007): ix-x.

justice (law, judge, coercive force), a duty of justice can only be considered provisional, not perfect. It follows, then, that HI is a provisional duty of justice. I will spend a great deal of time in Chapter Five outlining what a provisional duty of intervention implies for the conduct of states in various situations.

The critic might object here that the international system is not necessarily an absolute state of nature, as there are courts and law and there exists some semblance of civil society. This is the objection Gregory Kavka makes to Hobbes: the choice Hobbes offers between the state of nature, on the one hand, and submission to an absolute sovereign, on the other, are not the only alternatives.¹²⁵ In other words, the prospect of lasting, meaningful cooperation—a middle ground, so to speak, between the state of nature and absolute sovereignty—is a viable option. It may surprise some that I agree with Kavka about a wider range of alternatives, but this is because I believe that the Kantian framework can provide a middle ground.¹²⁶

Such a middle ground is the condition of private right. Private right, as I argued in Chapter One, is still a Kantian condition of right. Private right follows from the

¹²⁵ Kavka, Gregory S. “Hobbes’s War of All against All” in *Critical Essays on Hobbes, Locke, and Rousseau*. Ed. Christopher W. Morris (Rowman & Littlefield Publishers, Inc., 1999).

¹²⁶ Some, like Noel Malcomb, argue that Hobbes does offer such a middle ground in his theory, and that actors can make pacts or agreements in a state of nature, “if one of them shows his good will by performing his side of the bargain first,” or there is “a Power to make him performe [his contract]” because there is a “moral term” that is universal and helps to mediate between the state of nature and civil society (438). Malcomb attempts to support his argument for the “moral term” by invoking Hobbes’ laws of nature, where these laws oblige actors to perform (or abstain from) certain acts and intentions (e.g. drinking to excess or not being cruel). I applaud Malcomb’s attempts here, however, I disagree with him. Ultimately, Hobbes’ framework denies free-will and endorses what Malcomb calls “pre-moral psychological terms”, that is, terms that assign “good” and “bad” to objects subjectively (436). I cannot go into much detail here, but if one first denies an agent’s capacity to be determined by objects of sense and desire, and then one claims that the “pre-moral” (I take him to mean temporally “pre”) terms of good and bad are subjective, I cannot see how a universal “moral” term can result. Furthermore, even if Hobbes’ laws of nature obligate certain acts, they do so as addendums to the Right of Nature (self-preservation), which, ultimately turns “moral” rules into “rules of prudence” and collapses the distinction between the moral and prudential. Thus, the argument that one can contract in a state of nature still faces the problem of the first person to contract; in other words, the first move is irrational. Even if one attempts a contract, that contract is still, in a sense, irrational because long-term cooperation, according to Hobbes, is likely to be impossible, so such contracts are perceived to be sucker’s bets. Malcomb, Noel. *Aspects of Hobbes* (Clarendon Press, 2002).

natural law and contains within it a “rightful presumption.”¹²⁷ Thus there are duties of justice and rights and ways in which agents can attempt to resolve conflict, but the threat of breakdown and injustice always looms large because there is no “absolutely rightful condition” (as there would be in a civil society).¹²⁸ The existence of the treaty and customary law, and institutions like the ICC, ICJ, and UN, does not transform the international society from a state of nature to a civil society, it merely moves from a state of nature to a condition of private right and thus slightly forward towards public right.¹²⁹ Hence, my account of a provisional duty of HI does much to clarify not only the debates about HI, but move policy and institutional prescriptions along as well.

A provisional duty of HI applies to all states that have the capacity to intervene; those that do not have the capacity are exempted from it. Categorizing a duty of HI this way does two important things: it relieves us from looking to the motives of the intervener and it requires us to assess capacity. Motives become irrelevant, while physical capacity and action become important. This conclusion follows and adds further support to the current arguments in the HI debate, but for different reasons. It follows arguments, made by Wheeler and others, against including an agent’s motives in the moral calculus.¹³⁰ I whole-heartedly agree with Wheeler’s assessment, but I justify it in terms of the juridical rights of others in Kant’s system of justice.

¹²⁷ *RL*, 6:257.

¹²⁸ *RL*, 6:341.

¹²⁹ The international courts do not have full jurisdiction, as the court functions on treaty, states have to i) agree to jurisdiction and ii) agree to be tried by it. ICC: <http://www.icccpi.int/Menus/ICC/About+the+Court/> ICJ: <http://www.icj-cij.org/court/index.php?p1=1&p2=6>

¹³⁰ Wheeler, amongst others, objects that to take the intervening state as the “referent object for analysis” places too much emphasis on the agent and not enough on the recipient (the victim).¹³⁰ Wheeler, *op. cit.*, fn 8, p. 38.

Second, my conclusion follows the current progression of the HI debate by positing that physical capacities are a necessary factor in identifying those states that have a duty of HI. Two scholars who argue for the importance of capacities are Kok-Chor Tan and James Pattison. While I have noted at several points my disagreements with Tan, he is on to something. He posits that only those agents capable of intervening ought to be assigned a duty (because ought implies can). His conclusion is consistent with my arguments about a provisional duty, but the way he reaches it, I believe, is incorrect. He does not discern that a duty to intervene is a duty of justice, and that it cannot become a perfect duty (of justice) simply because the agent and scope problems have been resolved. Capacity is important because of the nature of Kantian justice: for Kant, justice entails requires an outward conformity with *Recht*, and so we must have the ability to do or forbear from doing whatever *Recht* requires.

An imperfect duty cannot turn into a perfect duty because the two are categorically different. Yet, as I argued in Chapter One, a provisional duty of justice can become a perfect duty. Provisional duties are necessitations to act and are, therefore, always unconditional for the agents who have them. However, they are provisional because the requirements for full, or conclusive justice are generally lacking in some circumstances. Provisional duties are of a temporary or transient nature and require institutionalization of something – namely civil society – to transcend their provisional status. Thus, while Tan’s arguments are inconsistent with Kant’s (and a Kantian) framework, the idea of a duty turning into another kind upon institutionalization is something that can be explained using different categories that are more consistent with Kant’s thought. Tan’s argument is not up to this, as he misses the fundamental problem

that humanitarian intervention is a duty of justice, more specifically a duty of justice in a state of nature. Even though Tan comes to some correct conclusions, he does so without understanding that some of his prescriptions are logically and materially required because of the kind of duty HI is.

Some may object that my treatment of Tan's arguments is unfair and mere semantics. However, I think this is misplaced. Tan claims that:

At any rate, what is of significance for my discussion is not whether the duty to intervene is imperfect in the technical Kantian sense but, rather, the substantive moral claim, following Walzer, that in the absence of a clear specification of which country is to intervene, it is not clear if any can be morally bound to do so.¹³¹

Granted, Tan does not seem to be too bothered by his (mis)treatment of the framework from which he draws his discussion. However, if his real concern is understanding whether states have a duty in the absence of "clear specification," then comprehending Kant's taxonomy of duties is of crucial importance because it provides logical and material answers. States have a provisional duty to intervene, and that means that capable states – any state that is capable – has a duty to do so. Agents are specified by virtue of their capacities. We do not need to look for historical "special ties" and we do not need to limit ourselves to "the most capable" agent.¹³²

Another line of support for a focus on agents' capacities comes from an unlikely source, a consequentialist. James Pattison argues for what he calls the "general duty approach," which is that all states have a general duty to alleviate suffering, but that in particular cases the "most effective" state should be assigned a duty of HI.¹³³ Pattison claims "effectiveness" should be evaluated according to five criteria: (1) sufficient

¹³¹ Tan, *op. cit.*, fn 43, p. 96.

¹³² *Ibid.*, 96.

¹³³ Pattison, *op. cit.*, fn 36, p. 264.

military resources; (2) sufficient non-military resources; (3) a suitable strategy for using both (1) and (2); (4) rapid response and deployment capability; (5) perception of legitimacy by the people subject to intervention.¹³⁴ He also acknowledges that circumstances play a vital role in the calculation of “expected-effectiveness,” noting specifically that probabilities of success can be affected by interstate relationships, and that if greater right’s violations are occurring, then there is “more scope for an intervener to achieve extremely beneficial consequences.”¹³⁵ Pattison’s measurement for sufficient military resources includes:

(1) a high number of armed, motivated, and trained – and, ideally, experienced – military personnel; (2) military equipment such as helicopters, armoured-personnel carriers, and communications equipment; (3) strategic lift capacity (in both air and sea forms) to be able to move personnel and equipment to wherever the humanitarian crisis is in the world, (4) logistical support to sustain this force abroad (without its resorting to looting, etc.)¹³⁶

Pattison argues from a consequentialist ground to justify his list of five criteria to identify a possible intervener, and then based on these principles assigns a duty of HI to a particular agent. His is an account based on the expected utility of beneficent actions of the identified agent. While I have argued at length elsewhere against Pattison’s consequentialist rationale, I do support his list of criteria as a starting point to identify agents with a provisional duty of HI.¹³⁷ I would also add to this list non-military resources and ample support from relevant practitioners and academics, as they also play a crucial role in the likelihood of success. Understanding a country’s overall history, politics, conflicts, ethnography, and making efforts to take these factors into

¹³⁴ Ibid, 266-267.

¹³⁵ Pattison, op. cit., fn 36, (2008a) p. 267 and 2008b, p. 401.

¹³⁶ Pattison, op. cit., fn 36, p. 266; citing O’Hanlon, M. *Expanding Global Military Capacity for Humanitarian Intervention* (Brookings Institution Press, 2003).

¹³⁷ Roff, H.M. “Response to Pattison: Whose Responsibility to Protect” *Journal of Military Ethics* Vol. 8, No. 1 (2009): 79-85.

consideration in a sympathetic and non-paternalistic way will help to facilitate a lasting peace, while reducing fears of “humanitarian imperialism.” This last non-military requirement will also help to reify the fifth requirement of perceived legitimacy (for the target state’s population and for the international community).

Ultimately, many of the problems associated with terming HI a duty stem from the interaction between the nature of a duty (a necessitation to act) and the requirements for a duty of justice. If an agent has a duty of justice, many of the questions about agent, recipient and scope are already answered by the juridical system; however, if one has a duty of justice and this system is lacking, then we may know what has to happen and when, but we may be uncertain as to who should do it and how to make them do it. As I argued in this section, agents with the ability to intervene have a provisional duty to do so. However, to transfigure a provisional duty of HI into a perfect one requires further institutionalization.

V. Objections

Some may object that describing a duty to intervene as “provisional” makes no practical difference in international affairs and little, if only semantic, difference theoretically. I believe both of these objections to be misguided.

A. Practice

Practically speaking, some may object that labeling a duty of humanitarian provisional does little to answer the question of when unauthorized unilateral intervention is permissible. On the legal side, I respond that provisional duties are merely temporary

(*vorläufig*) and require, by their very nature, the creation of permanent institutional structures that will turn them into perfect duties. While some may counter that the current international system, headed by the UN, and regulated by custom and treaty, has the requisite institutions to act on duties of HI, this is not so. The international system, as it stands now, lacks the requisite institutional features to move from a provisional duty of HI to a perfect one. To understand why, I follow Kant's suggestions in the *Metaphysics of Morals* and in his political essays, and argue that what is required for adequate institutionalization must be similar to the requirements for public right. These requirements include the rule of law, a neutral judge, a legitimate coercive mechanism *and* the separation of powers. Kant stresses that only "republics" accord with *Recht*, and republics are distinguished by "that political principle whereby executive power (the government) is separated from the legislative power."¹³⁸ In other words, even if we assume that the international system has a functioning system of law, the international system's courts do not have jurisdiction over all states, and the UN, while consisting of a separate General Assembly and Security Council, does not have a federated system. It acts more like a unitary system where the executive, in this case the Security Council, reigns supreme and the General Assembly has little if no power.

Practically, then, we must refocus the debate about institutionalization. If we follow Tan and claim that a duty to intervene must be "institutionalized," and we also fall into the many scholar's prescriptions of identifying the UN Security Council as the requisite authority and institution, then we run the danger of repeating this vicious circle. In the spirit of Kant and also the authors of the *Federalist Papers*, real institutionalization requires understanding the necessity of a federated separation of powers and finding a

¹³⁸*TPP*, 8:352.

better system of international checks and balances. While the ICISS report gained new ground in identifying and helping codify a duty of HI, it did little to move the debate beyond the stock answer look to the Security Council. I will spend considerable effort laying out an argument for the institutionalization of a duty of HI in the following chapters; but for now, I want to point to the conceptual requirement of institutionalization that accompanies a provisional duty. Such “institutionalization,” by my account, is something quite different than vesting all power (and hope) in the Security Council.

Second, by claiming that a duty of HI is provisional, I also argue that we can identify who, and who does not, have a duty to intervene. To do this, I have argued, we must look to the *material abilities* of each agent. This, of course, requires a codified set of criteria to identify possible interveners, and I believe Pattison has made helpful progress on this front.

B. Theory

Understanding the terminology and correct classification of a duty of HI is of great theoretical importance. As Hobbes so eloquently recognizes, “the manner how Speech serveth to the remembrance of the consequences of causes and effects, consisteth in the imposing of *Names* and the *Connexion* with them.”¹³⁹ The importance of recognizing this duty, and properly naming it, is that this recognition facilitates understanding and provides guidance for future action. This process begins once we understand that a duty of HI is a duty of justice, not virtue.

Duties of justice permit coercion, and this includes coercion to establish the conditions for justice. The perfect/imperfect distinction is unhelpful when it comes to

¹³⁹ Hobbes, Thomas. *Leviathan* (Cambridge University Press, 1992): Chapter 4, paragraph 13.

identifying the requisite features of justice (law, judge, executive, coercive force), and it does not tell us how to *institute* those features. The imperfect/perfect distinction only *describes* certain characteristics of a duty. A duty's first-order classification is, therefore, paramount to understanding what agents can be expected or compelled to do.

I will elaborate further on the claim that certain duties of justice, in this instance HI, are best undertaken publicly in the next chapter. However, for now, I want to focus on the fact that understanding the requirements of justice leads us to this conclusion. Therefore, I agree with Ripstein when he argues that duties of rescue ought to be undertaken by the state because rescue "is a need-based task that sustains the conditions of equal freedom," and the duty to rescue is "a nonrelational duty owed to society at large, rather than to some particular individual."¹⁴⁰ If a domestic state ought to undertake this charge, then why can we not also conclude that the international community also provide for some mechanism or institution as well? A Kantian framework of justice would instantiate duties of rescue at the domestic level, and to remain consistent, this framework should also therefore instantiate them at the international level. The structures are the same. However, without the identification of this duty as one of justice, such conclusions would be missed.

All previous attempts to justify a moral duty of HI, in one way or another, revolve around the problems associated with the absence of the requirements of justice. Yet Tan's agency condition, the innate right to freedom, the unimportance of motives, and the requirement to institutionalize a duty of HI are all dealt with under Kant's concept of public *Recht*.

¹⁴⁰ Ripstein, Arthur. "Three Duties to Rescue," *Law and Philosophy*, Vol. 19, no. 6 (2007): 775.

Conclusion

In the chapter, I argued that HI is a “provisional” duty. From the acceptance of R2P, to part of its adoption in the “Outcome Document” and the passing of Resolution 1674, we can conclude that the international community recognizes a duty to protect the victims. However, this duty, as it is currently understood by the international community, is (and will be) ignored or thwarted because of the current structure of the international system. Acceptance of a duty to protect means very little when all that is done is to reiterate the importance of the Security Council’s authorization before intervention takes place.

Within Kantian theory, I argued that any attempt to classify a duty of HI as imperfect or perfect is mistaken. Instead, this duty is best understood as a provisional duty of justice, not virtue. Because the international system lacks the structural requirements of a fully developed system of law this duty of justice can only be provisional. Finally, I countered objections that such a classification means very little practically or theoretically. Practically, the idea of a provisional duty of HI forces us to think about what kind of institutionalization will transform the temporary provisional duty to a conclusive perfect duty. Classifying a duty of HI as provisional also requires us to identify a set of criteria for identifying potential interveners. Theoretically, my argument for a provisional duty of HI resolves the debate over classifying a duty of intervention, clarifies the grounds of justice and virtue, and thus makes sense of all the previous calls to “institutionalize” a duty of intervention.

In the next chapter I will explore the permission to coerce agents into a civil society by way of the “permissive law” and how this applies to the international system.

Moreover, I will address at more length the worry that Kant's moral theory cannot justify a policy of HI because of his explicit decree that "states shall not forcibly interfere with the constitution of another state."

Chapter 3:

Kant's Permissive Law: A Principle for the Perplexed

*"So force must be permitted, in order thereby to institute a right to preserve life. Here, too, therefore, the underlying maxim is that to institute a right, might precedes right, in accordance with a permissive law."¹
– Vigilantius, Kant's Lectures on Ethics*

The conclusion of Chapter One was that the concept of Right requires a priori that anything provisional (rights, duties, or possession of external objects of choice) become “conclusive,” that is, guaranteed through a system of public law. As I argued in Chapter Two, a duty of humanitarian intervention (HI) is a provisional duty of justice. I then argued that a provisional duty of HI must become conclusive or peremptory. To do this, a duty of HI must be institutionalized. Such an institution must publicly and, on Kant’s understanding, “generally” systematize and regulate the practice of HI, as this is the only feasible way the duty can transcend its provisional status.² This institution or organization, which I term an “International Humanitarian Intervention Institution” (IHII), is the requisite agent: not only would it identify target countries and mandate military objectives, but it would ultimately render individual state judgment, and the corresponding condition of private right *on this matter*, moot. In the next chapter I will argue that such an institution can be created via Kant’s permissive law, and that coercion

¹ Vigilantius, *LoE*, 27:516

² As I will discuss later, “generally” differs from Kant’s understanding of “universal.” Furthermore, “feasible” here means, for all intents and purposes, practically viable. A provisional duty of HI could become perfect under two other conditions: the establishment of a federation of states ruled by international law, or the creation of a cosmopolitan state. Of course, if the latter happened, then the problem of state sovereignty would, of necessity, be eliminated from any attempt to justify humanitarian intervention, for it is rather nonsensical to speak of a state violating its own sovereignty. These last two options clearly seem less “feasible” than forming an International Humanitarian Intervention Institution.

of states to join such an institution is permissible. However, before we can apply Kant's *lex permissiva*, we must determine its function, scope, and content.

Although Kant's use of the term *lex permissiva* may appear simple, the concept is actually difficult and problematic. Indeed, it has puzzled scholars, although it by no means has received ample attention yet.³ Most of these scholars focus exclusively on two

³ Mary Gregor noted that permissive laws have "to do with something that is permissible in the state of nature but forbidden by positive law," and that such laws are "found within ethics as well." Gregor, Mary. *Laws of Freedom* (Oxford Basil Blackwell Publishing, 1963): 57 note 26. Gregor rightly states that the permissive law applies to acts that "are not always morally indifferent" and that the "permissive law states the conditions under which a general prohibition does not apply" (Gregor, 57-58). Unfortunately, Gregor does little to explain what actions are not morally indifferent and why there is a need for such a law in Kant's system. Furthermore, though she notes that permissive laws are found in ethics, her statement that permissive laws "give us a legal title to perform actions" does not seem to square with the notion of a permissive law. If permissive laws give us a "legal title," then that title assigns to us a right – something that by Kant's understanding – gives us the ability to coerce another person. However, the realm of virtue does not permit such coercion, and so it appears that a permissive law is something more than just a law that provides a legal title. Her discussion of Kant's permissive law in the realm of ethics is short, and she seems to be defining the permissive law differently here. She states that "If some good end is to be achieved by the free play of inclinations, then it may be permissible to relax the restrictions that virtue generally imposes on them, even if there is some danger that the inclination, gathering strength from this exercise, might tempt one to vice" (Gregor, 142). However, this reasoning is tantamount to consequentialism and cannot truly be Kant's reasoning. A permissive law that permits, otherwise prohibited, acts based on the good ends "achieved" does not sound very much like Kant, and this explanation of a permissive law, as noted above, does not readily apply itself to her earlier explanation.

Brian Tierney also grapples with Kant's *lex permissiva*, and while he describes many of the problems we previously encountered in the *RL*, he does not offer a solution to them. Tierney, a medievalist, is mainly concerned with understanding the role of permissive natural law through the writings of medieval and early modern political theorists, such as Gratian. His treatment of Kant's *lex permissiva* does take into account many of Kant's texts on the subject, especially the *Lectures on Ethics*, and the *Vorarbeiten zur Tugendlehre*. Like Gregor, Tierney reaches a conclusion that Kant's permissive law "must apply to acts that were not merely indifferent" (Tierney 2001a, 309). Furthermore, Tierney claims that Kant "went on to say that there could in fact be exceptional circumstances where a permissive law arising out of natural Right could authorize an act that would otherwise be forbidden" (Ibid, 309). Yet, Tierney's ultimate focus on Kant's permissive law comes back to the *RL* and its employment in the argument for the acquisition of property. Tierney concludes that, historical context aside, Kant's use of *lex permissiva* "lead[s] on to paradoxes and problems" (Tierney 2001b, 398). On Tierney's reading, these paradoxes and problems concern the justification of unauthorized unilateral acquisition of property. He claims that "if the act [initial acquisition] was unrightful in itself because it constrained the freedom of others, but was justified by the invocation of a permissive law, then a deeper problem arises. As Kant's argument develops, it seems that natural law is in conflict with itself" (Tierney 2001a, 311).³

Yet, Tierney's judgment on Kant's permissive law is rather vague. He seems to endorse the idea that the permissive law is an exemption, but that such an exemption renders Kant's entire *RL* incoherent. Strangely, then, he falls into the same pattern as Flikschuh and Hruschka: he takes the *RL* as the primary focus of his argument. In so doing, he holds the postulate as *the* permissive law – and not *a* permissive law. The use of the postulate as a permissive law is only one instance of Kant's employment of this principle, and so the question of what the permissive law actually is, still remains. Ultimately, as he is trying to fit Kant's *lex permissiva* into historical context, the most he says in regards to identifying what exactly it entails is that historical arguments were "not quite adequate for Kant's purpose" (Tierney 2001b,

texts to explain *lex permissiva*—*Perpetual Peace* and the *Metaphysics of Morals* (more specifically, the *Rechtslehre*)—even though Kant discusses *lex permissiva* in at least three additional texts. What is more, two of these additional texts are concerned neither with politics nor justice (like *Perpetual Peace* and the *Rechtslehre*) but virtue. The

398). However, if we are charitable to Kant and do not conclude that his writings are inconsistent and “insoluble,” then, on Tierney’s account, we are still left wondering what the permissive law is and what it does. Cf. Tierney, Brian. “Kant on Property: The Problem of the Permissive Law,” *Journal of the History of Ideas*, Vol. 62, no. 2 (2001a): 301-312; “Permissive Natural Law and Property: Gratian to Kant,” *Journal of the History of Ideas*, Vol. 62, no. 3 (2001b): 381-399. “Natural Law and Natural Rights: Old Problems and Recent Approaches” *Review of Politics* (2002); “Historical Roots of Modern Rights: Before Locke and After” *Ave Maria Law Review* Vol. 3 no. 1 (2005): 23-43.

Aaron Szymkowiak also writes on *lex permissiva*, but he ultimately uses Hruschka’s distinction between allowed and merely allowed actions as a foil for his own arguments. In other words, Szymkowiak’s argument for Kant’s *lex permissiva* is that it is merely a function of Achenwall’s hexagonal logic. Achenwall’s deontic hexagon is a form of logic that has three possible areas for action: indifferent, permissible, and commanded. So it is hexagonal because it has six possibilities: indifferent (or not); permissible (or not); commanded (or not). Achenwall, Szymkowiak argues, was concerned with rejecting the previous belief that acts could only take two forms: permissible or commanded. Achenwall wanted to show that some actions are also morally indifferent. Szymkowiak then argues that Kant invokes this deontic hexagon in his use of *lex permissiva*. This is not substantively different than Hruschka’s conclusion about the allowed and merely allowed distinctions, which I will discuss beginning on page 14.

While Szymkowiak’s definition of a permissive law is hard to find, he seems to imply that a permissive law lies somewhere in the realm of license (*licitum*) and that such laws exist when an act is not specified and a command is uncertain. I do not engage Szymkowiak any further, for two reasons. First, there is debate over whether Kant merely maps on Achenwall’s arguments to his own, or develops his arguments for *lex permissiva* from a tradition, of which Achenwall was part. It is evident that Kant used the hexagonal logic, but that the content of the logical operators stayed the same as Achenwall’s and did not change is not immediately clear. Cf. Tierney, Brian. “Natural Law and Property from Gratian to Kant” p. 395; Kaufmann, Mattias. “Was erlaubt das Erlaubnisgesetz – und wozu braucht es Kant?” *Annual Review of Law and Ethics*, Vol. 13 (2005): 195-220. Second, if such deontic logic was incorporated by Kant, and his treatment of it was fully in accordance with Achenwall (contra Tierney’s point), it is odd that Hruschka (1986), on whom Szymkowiak relies, would not have also invoked this in his very own treatment of the permissive law. Hruschka’s work on Achenwall informs his reading of Kant, especially since Hruschka argues that Kant’s use of *licitum* is Achenwall’s, yet Hruschka does not identify deontic hexagonal logic as the only key to Kant’s permissive law (2004). The logic is important, but it is not the entire package. Ultimately Szymkowiak’s argument does little to answer any substantive questions, and his treatment focuses solely on property acquisition and its relation to Right. Thus, even if we took Szymkowiak’s reading as correct, it still does not explain why a permissive law is necessary in Kant’s moral system and how it ends up in the *Tugendlehre*. Cf. Aaron Szymkowiak, “Kant’s Permissive Law: Critical Rights, Sceptical Politics,” *British Journal of the History of Philosophy* 17, no. 3 (2009): 567-600.

Brandt also wrestles with Kant’s permissive law, and his reading is incorporated by Katrin Flikschuh, and so I do not treat it specifically here. Cf. Reinhard Brandt, “Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kant’s Rechtslehre,” in *Rechtsphilosophie der Aufklärung*, ed. Reinhard Brandt, 233-285 (Berlin, 1982). Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000). Joachim Hruschka, “The Permissive Law of Practical Reason in Kant’s *Metaphysics of Morals*,” *Law and Philosophy* Vol. 23 (2004): pp. 45-72.

failure of almost all scholars to discuss *lex permissiva*'s role in the realm of virtue is too important to overlook.

Lex permissiva, or the permissive law, is an essential concept in both Kant's political and moral theory. In politics, it fundamentally justifies the entire *Rechtslehre* (*RL*). This is so because the *RL* is aimed at the rightful relation of agents' external actions in relation to one another.⁴

Kant's justification of property is grounded on the "postulate with regard to Right," which he calls a permissive law. If we work backwards, then, from his full theory of Right to its very bedrock, we see that Kant's first move is to invoke *lex permissiva*. While all great philosophers need postulates to get their theories off the ground, it is not immediately clear that Kant's use of the postulate as *lex permissiva* does not render his theory incoherent. We will see why this is so more clearly throughout the remainder of the chapter, but for now let us say that invoking a postulate that appears to make an exception against a universal rule, and that type of exception may lead to conflicting duties. For example, an agent may be commanded "do not interfere with the freedom of another," while at the same time being commanded to "coerce everyone into a civil condition." We must, therefore, understand Kant's *lex permissiva*, for the coherence of his doctrine of Right is at stake.

Yet the doctrine of Right is not the only issue, as Kant also invokes *lex permissiva* in the realm of virtue. Unfortunately, his writings on *lex permissiva* in relation to virtue

⁴ Such actions can concern three different objects of choice: external actions of a person in relation to an object; external actions of one person in relation to "another's choice to perform a specific deed;" external action of a person in relation to "another's status." Each of these is considered an "external object of choice." These are always three way relationships; in other words, relationships between agents that concern a particular object. It is not, like Locke, a two-way relationship solely between agent and object. *RL*, 6:260-262.

are very few. Indeed, he merely notes them in passing in his *Lectures on Ethics* and in the *Tugendlehre*. However, if we are to be charitable to him, we must enquire why he also employs them there. It can be of no small importance if *lex permissiva* applies in the realms of both politics and virtue. Yet, because his remarks (in the *Tugendlehre*) are brief, we are still left with little explanation of the role and function of Kant's permissive law. This is very odd for such a systematic and analytic writer.

This chapter attempts to provide a more complete account of Kant's *lex permissiva*. Up until now, almost all scholars have attempted to understand its employment only in the realm of politics; however, I believe this to be a disservice to Kant's account of the permissive law.⁵ It is crucial to understand the concept of *lex permissiva* on its own, and then to look to its different applications in both politics and virtue. It is only by assembling all of the fragments from Kant's texts and reconstructing all of his arguments that we can finally understand what *lex permissiva* is, why it is necessary, and whether invoking a postulate that functions as a permissive law renders his political theory incoherent.

My argument proceeds in two sections. In section I, I survey the current debate over *lex permissiva*, focusing mainly on Katrin Flikschuh and Joachim Hruschka's conflicting interpretations, as their work is the most substantial in this area. Flikschuh interprets permissive law as a provisional solution to the antinomy of Right. In contrast, Hruschka argues that it is a "power conferring norm" that provides a moral faculty (or power) to agents to establish necessary legal institutions. Such diverging opinions suggest that this debate is deeply important, not only to Kant scholarship, but also to those

⁵ One might object that Gregor does note its employment in ethics; however, as I argue in note 3, she does not actually provide an argument for its role in ethics; she merely states that it permits something for "good ends."

scholars who attempt to use Kant's moral and political framework to solve real world problems. With an increasing interest in Kant's political works, current scholars are employing his principles and solutions to problems ranging from the justification of punishment to the necessity (logical and moral) of international organizations. It is therefore necessary to comprehend Kant's theories fully before such application; otherwise any supposedly Kantian exercise in applied philosophy may be far wide of the mark.

In section II, I offer my interpretation of *lex permissiva*, which clarifies much of the present debate. As I will argue, I believe Kant's *lex permissiva* to be an exclusive disjunctive principle that one consults when one finds oneself in a supreme moral emergency. I follow the typical definition of exclusive disjunction, namely it is a logical operation for two logical values, such as propositions or principles, which notes "either but not both" propositions or principles may hold at one point in time.⁶ A supreme moral emergency is one where following the dictates of morality or Right, as if one were in the ideal world, would ultimately undermine the entire purposes of morality or Right.⁷

I. Current Trends: Flikschuh & Hruschka

A. Flikschuh's Permissive Law

To understand Kant's notion of a permissive law, it is first necessary to understand the problem it is designed to solve. Flikschuh thinks that problem is Kant's

⁶ Lacey, A.R. *Dictionary of Philosophy*, (Barnes & Noble Books, 1996): 63.

⁷ Some may suggest that Kant's permissive law may be essential to his *nonideal* political and ethical theory, and this is why he spends so little time on it, as he was concerned primarily with working out a theory under the assumption of strict compliance to principles. However, as I will argue later, the nonideal world can present situations whereby compliance with such principles would undermine reason, and thus morality, itself.

antinomy of Right. “An antinomy is a conflict of reason in which two opposed philosophical positions derive conflicting conclusions from mutually accepted premises.”⁸ The antinomy of Right, as Kant explains, arises when “reason is forced into a critique of itself in the concept of something external which is mine or yours,”⁹ in other words, when one begins to explain the possibility of rightful possession of property. The antinomy of Right, then, is a conflict between the freedom of the individual and the freedom of all arising from the unilateral acquisition of private property, where both suppositions share the premise of the Universal Principle of Right.¹⁰ The antinomy is as follows:

The *thesis* says: *It is possible* to have something external as mine even though I am not in possession of it.

The *antithesis* says: *It is not possible* to have something external as mine unless I am in possession of it.

Solution: Both propositions are true, the first if I understand, by the word possession, empirical possession (*possessio phaenomenon*), the second if what I understand by it purely intelligible possession (*possession noumenon*).¹¹

Empirical possession is dependent upon one having, e.g physically holding an object. For example, if I hold a book in my hand, I am the “possessor” of the book. However, as soon as Jane “wrests” the book from my hand, she becomes the “possessor.”¹² Intelligible possession, on the other hand, “denotes a non-physical connection between [one’s] innate right to freedom and external objects of [one’s]

⁸ Flikschuh, op. cit., fn 3, 123-124.

⁹ *RL*, 6:254

¹⁰ Again, Gregor’s and Flikschuh’s interpretation of the universal principle of right states that “any act is right if it can coexist with everyone’s freedom in accordance with a universal law.” *RL*, 6:230. I, however, prefer to keep the principle in the original “*Allgemeines Prinzip des Rechts*,” (APR) as *allgemein* has several meaning, such as “general,” “common,” “universal,” and “public.” As I point out in footnotes 54-56.

¹¹ *RL*, 6:255 (italics in original).

¹² In this example, the “wresting” would violate my bodily integrity, but not the “right” to possession.

choice.”¹³ Thus, even if I do not physically possess the book, if Jane comes into my office and, unbeknownst to me, takes the book, reads it, and then returns it to the shelf, she has wronged me.

The antinomy, as Kant writes it, is concerned with the use of the word “possession.” He is concerned with the possibility of intelligible possession; that is, something over and above mere holding. Intelligible possession is necessary for the full and guaranteed exercise of a person’s freedom. If it were not, possession would amount to the physical possession of the object, and that, in turn, would be dependent upon the morally arbitrary fact of a person’s strength. The strong would be granted freedom because of their power while the weak would be subjugated to the former’s choices. Intelligible possession in principle, then, guarantees universal freedom for all.

However, there is an antecedent problem that Kant must deal with before he can resolve the antinomy over “possession.” This is the way in which such “possession” comes into being. The problem is roughly this: the unilateral acquisition of an object in a state of nature puts that object beyond anyone else’s possible use of it. In other words, by taking physical control of an object, one hinders the possible exercise of freedom of everyone else, because taking that object out of the domain of possible use, *without the consent of all*, takes everyone else’s capacity to choose that particular object. To see this more clearly, we should note some differences between Kantian “negative” and “positive” freedom. On the one hand, freedom has a negative aspect: freedom “from being constrained by another’s choice.”¹⁴ “On the other hand, freedom has a “positive” aspect too, that is, a practical capacity of the will exercised through one’s power of

¹³ Flikschuh, op. cit., fn 3, p. 122.

¹⁴ *RL*, 6:237

choice (to use the rather awkward sort of language employed by Kant).¹⁵ Both aspects must be present for someone to be fully free. If Loki stakes off a water hole on an island, one of two sources of fresh water, and then attempts to protect the water hole as his because he was the first to find it, he has removed my capacity of choice. I now have no choice but to walk, however far, to the next water hole. Thus the unauthorized unilateral acquisition of an external object in a state of nature can be in direct tension with the freedom of everyone else.

However, the problem becomes even more difficult when an additional variable is added to the equation: the necessity of possessing objects of one's choice. As I argued in Chapter One, external objects (private property) are necessary to one's freedom. For an agent to be fully free, she must make plans and pursue projects, and these can range from mere survival to perfecting her character. In any project an agent pursues, she must possess some type of external object (say, an apple to eat or books to read). Whether such possession is mere "holding" or "intelligible," on Kant's account any unilateral acquisition of such an object violates the freedom of everyone else. We are left, then, with a conundrum. If I want to be free, I must take external objects into my possession, but if I take external objects into my possession, I violate the freedom of everyone else (via the Universal Principle of Right).

Kant's solution to the antinomy is most puzzling: just divide the types of possession into empirical and intelligible. But why? This does not solve the antecedent problem of unilateral acquisition violating the freedom of all others. Moreover, such

¹⁵ Flikschuh follows Kersting's interpretation of Kant here, where Kersting cites Kant as claiming that freedom has a "positive capacity." Flikschuh, *op. cit.*, fn 3, p. 126, and footnotes 33 and 34 on the same page. Kant's explanation of positive freedom is at *RL*, 6:213-214, where he states "the positive concept of freedom is that of the ability of pure reason to be of itself practical."

acquisition has three consequences (two of which we have seen already). First, the agent (as individual) exercises her freedom. Second, the agent (as part of a community) hinders the freedom of others by taking an object out of the domain of possible use. Third, and most perplexing, Kant asserts that, by claiming an external object as one's own, an agent imposes an obligation on others to recognize and refrain from using that object! Now, we not only have the problem of possible intelligible possession (the antinomy), the antecedent problem of unilateral acquisition violating freedom, but also an obligation imposed on others by the (wrongful) act of unauthorized unilateral acquisition. Kant's ultimate solution to all of these problems is to institute the state, whereby all provisional property acquired in a state of nature becomes "conclusive." The state makes possible intelligible possession, and further property laws regulate acquisition, inheritance and all other bundled property rights and laws.

Yet that explanation seems to rush through fundamental problems in Kant's account of property (and Right). Furthermore, we have yet to see where the permissive law fits into all of this. Enter Katrin Flikschuh. Flikschuh's account is that the idea of a permissive law is a provisional solution to the antinomy of Right and that the permissive law also provides the basis for political obligation.¹⁶ On her reading, the permissive law provisionally authorizes "what is strictly speaking a violation of the universal principle of

¹⁶ Flikschuh focuses mainly on Kant's use of the "permissive law" in § 6 and 7 in the *Rechtslehre* (RL), though she does discuss Kant's long footnote in *Perpetual Peace* on permissive laws, and has one reference to the *Tugendlehre*. Her primary concern is to understand the permissive law's use in politics, namely, the acquisition of property and how this acquisition is tied to political obligation, reflective judgment, and ultimately Kant's cosmopolitanism.

Right.”¹⁷ The permissive law allows for an agent unilaterally to acquire an external object without the authorization of all others (i.e. the antecedent problem).¹⁸

As Flikschuh correctly interprets Kant, the empirical/intelligible and physical/non-physical relationships of possession in the antinomy of Right point to a fundamental problem with the concept of freedom. Moreover, she also notes that “Kant’s abrupt statement of the antinomy of Right is exceedingly obscure and has given rise to much puzzlement. “Why exactly,” she asks, “is there a conflict between these two conceptions of external possession, and what precisely is the solution supposed to amount to?”¹⁹ She methodically works through the antinomy and finds that one can accept neither the thesis nor the antithesis, and that scholars who attempt to do either are incorrect.²⁰ To accept thesis or antithesis violates a tenet of Right, and so one cannot reasonably take a side. This is so because Kant’s purpose is to find a solution to both, for choosing the thesis over the antithesis (or vice versa) fails to account for noumenal or phenomenal possession.

Flikschuh then examines Kant’s use of “the postulate of practical reason with regard to Right” or, as she states, *the lex permissiva*, as a solution to the antinomy. The postulate asserts that “it is possible to have any external object of my choice as mine,”

¹⁷ Flikschuh, op. cit., fn 3, p. 140. Furthermore, recall that the general principle of right (APR) states that “any action is right if it can coexist with everyone’s freedom in accordance with a general law.” *RL*, 6:230.

¹⁸ Flikschuh follows Bernd Ludwig’s revised edition of the *Rechtslehre*, where he philologically rearranges § 2 of Section I, Chapter I to § 6 of Section I, Chapter I. Ludwig follows Buchda and Tenbruck’s work on reorganizing some sections of the *Rechtslehre* due to the belief that “illicitly included preliminary notes and provisional drafts” occur in the published text. The purpose of reconstructing these specific paragraphs is to gain clarity in understanding the “postulate of practical reason with regard to right” (114). Cf. Buchda, Gerd. “Das Privatrecht Immanuel Kants”; Friedrich Tenbruck, “Über eine notwendige Textkorrektur in Kants ‘Metaphysik der Sitten’;” Bernd Ludwig, “Der Platz des rechtlichen Postulats der praktischen Vernunft innerhalb der Paragraphen 1-6 der Kantischen Rechtslehre” as cited in Flikschuh, Katrin, *Kant and Modern Moral Philosophy*. Flikschuh notes that “Buchda and Tenbruk established independently of each other the illicit inclusion of some of Kant’s preliminary notes in sections 4-8 of § 6, Section I” (Ibid, footnote pg. 114). This same ordering also appears in the Gregor translation.

¹⁹ Ibid, 25.

and that once in my possession, all others have an obligation to refrain from using the object.²¹ In other words, the solution to the antinomy permits acts of unilateral acquisition counts such acts as legitimate. The postulate as *lex permissiva*, therefore, allows a violation of the Universal Principle of Right to establish conditions for Right (as it relates to the exercise of freedom). The postulate provides a solution, albeit a controversial one, to the antecedent problem of initial acquisition and the final problem of obligation, thereby solving the antinomy indirectly. It is an indirect solution because Kant provides the postulate as the justification for empirical/phenomenal possession to be possible. Kant's direct "solution" to the antinomy is merely to restate the noumenal/phenomenal distinction in relation to property, but he must employ the postulate to ground the antithesis.

Flikschuh follows Brandt's interpretation of permissive laws as "laws that provisionally authorise actions the commission of which are, strictly speaking, prohibited."²² As she understands it, "Kant regards the commission of an act of injustice as a necessary condition of the possible establishment of the relations of justice between persons."²³ She claims that Brandt's analysis (and thus her own) "hinges on his reading of the postulate as a type of practical judgment peculiar to the concept of political agency."²⁴ While she does not elaborate on Brandt's concept of political agency, she must, at least, take it into her own account, for she also claims that "permissive laws are tentative attempts at practical political judgment, the urgency and necessity of which

²¹ *RL* 6:246; *RL* 6:247.

²² Flikschuh, *op. cit.*, fn 3, p. 117.

²³ *Ibid*, 136.

²⁴ *Ibid*, 136.

subjects recognize and acknowledge, but the determinate form of which they are not as yet able to discern.”²⁵

On Flikschuh’s account, Kant employs the concept of a permissive law in his argument for property acquisition because of our epistemic and practical limitations with regard to understanding Right. In a state of nature, we cannot really “know” the principles of mine and thine because positive law has not come into existence. All we can know is that we are free beings, and as free beings we want and need to acquire property, but our acquisition is threatened by all others because the only guarantee we have is our limited physical strength. Furthermore, we understand that as free beings we want to be left alone, and we ought to leave others alone, but we cannot take a step in either direction without violating either our freedom or someone else’s. We are, in other words, stuck between a rock and a hard place, to make a decision as to what Right and freedom require. The *lex permissiva*, therefore, offers a practical solution: it authorizes an otherwise impermissible act (unauthorized unilateral acquisition and the corresponding obligation to others to refrain from use) to establish the conditions of Right.²⁶

Furthermore, Flikschuh contends that because “reason wills that the postulate hold as a principle of pure practical reason [...] then those whom the *lex permissiva* authorises to take into possession external objects of their choice must be acting within the constraints of reason. This means that their actions are subject to the demands of

²⁵ Ibid, 139. There is little discussion of what “political agency” means. Moreover, I take her to be saying that the judgment to acquire property and impose an obligation on others to refrain from it is a tentative political judgment. That is, a judgment that is political in nature before the institution of a civil society.

²⁶ One might object to Kant’s arguments that they require something like the Lockean proviso or a principle of distributive justice to ensure that simple taking does not result in subsequent unfair or unjust distributions of property. While this may be true, Kant does not address the subject. The most he has to say about redistributions of property occur once agents enter the civil condition and they may be taxed to support the poor. Cf. *RL*, 6:326-327.

their possible justification to others.”²⁷ In other words, once I understand that I am free, I thereby understand that other agents are also free. Furthermore, once I understand that the acquisition of an external object of my choice limits the choice of others, I am under an *obligation* of justice towards them because of *my* choice.²⁸ She further notes, “the *lex permissiva* makes possible what one might call a recognitional shift in agents’ perception of their situation, leading them from their unilateral claims to freedom to an acknowledgement of their duties of justice towards one another.”²⁹ For Flikschuh then, the *lex permissiva* is a “provisional solution to the antinomy of right” as a “dark preliminary judgment.”³⁰

B. Hruschka’s Permissive Law

In contrast with Flikschuh, Joachim Hruschka argues that Kant’s permissive law is not designed to resolve an antinomy of Right but to provide the necessary means (or authorizations) to establish necessary legal institutions. In Hruschka’s terms, the *lex permissiva* is a “power conferring norm”³¹ because it grants us an authorization to establish “the legal institutions we need to be able to own and acquire property, to enter into contracts and acquire contractual claims, and to establish family relationships and acquire claim rights based on them.”³² Hruschka differs from Flikschuh mainly in two ways: i) he argues that the permissive law cannot be thought of as an exception to a prohibitory rule; and ii) he believes that it can be applied to more instances in the realm

²⁷ Flikschuh, op. cit., fn 3, p.141.

²⁸ Ibid, 141-142.

²⁹ Ibid, 143.

³⁰ Ibid, 139.

³¹ Hruschka, op. cit., fn 3, p. 59.

³² Ibid, 66.

of Right than merely the antinomy. This is important to note, as it broadens the possible applicability of *lex permissiva*, and suggests that further attention should be paid to this abstruse concept, in view of the fact that two of the most prominent Kantian scholars in this area come to extremely divergent views about it.

In order to understand how the permissive law operates as a “power conferring norm” and how it establishes such institutions, we must first understand how Hruschka construes the meaning of “permissive.” He claims that for Kant, the concept of permissive can be either “allowed” (*erlaubt*) or “merely allowed” (*bloß erlaubt*)³³ Scholars up until this point have missed this subtle distinction. According to Kant, Hruschka argues, allowed actions are “*not contrary* to what the actor must do,” and so allowed “means the same as ‘not prohibited.’”³⁴ However, if we were merely to distinguish between prohibition and allowance, it is unclear whether an allowed action is one that might also be morally required. Obviously, obligatory actions are, by their very nature, allowed. In contrast *merely* allowed actions are something different. Merely allowed actions are ‘neither required nor prohibited.’”³⁵

Hruschka then goes on to make a further distinction: some merely allowed actions are morally indifferent (*adiaphora*) while others require a permissive law, but are not themselves required.³⁶ He states that the latter kind of merely allowed acts “may need to be based on a rule,” but that Kant does little to justify or explain such an assertion.³⁷ Unfortunately, Hruschka does not correct this problem. He too offers little in the way of

³³ Ibid, 48-49.

³⁴ Ibid, 49. (*italics in original*)

³⁵ Ibid, 49

³⁶ Ibid, 53-54.

³⁷ Ibid, 54.

explanation of why a permissive law is required, but he does provide an explanation of what such a law is.

Hruschka's explanation of the permissive law is that it is a "power conferring norm," and to support his claim he draws on two of Kant's contemporaries, Achenwall and Thomasius, as well as an early eighteenth century philosophical dictionary by Walch. Hruschka's starting point is that the concept of a permissive law was not new with Kant, and that Kant had ample previous philosophical debate on this subject from which to draw. Hruschka then speculates that Kant would likely have been familiar with the "common" definitions, such as Walch's.³⁸ From such an understanding of Walch's definition of *permissio*, Hruschka then suggests that Kant employs Achenwall's argument for a permissive law. Achenwall's permissive law, Hruschka states, "grants its beneficiary a moral faculty (*facultas moralis*)."³⁹ From here, Hruschka infers that Kant's understanding of a permissive law follows Achenwall's because Kant uses the word "*Befugnis*," which is typically translated as "authorization" but sometimes also as "*facultas moralis*."⁴⁰ From this Hruschka draws two conclusions: (1) Kant's permissive law of practical reason relates only to merely allowed actions that one has license to do (such as establishing legal institutions like parental power and property rights); (2) that the permissive law "grants the beneficiary a moral faculty."⁴¹

³⁸ Hruschka notes Walch's article on "*Zulassung*" (license), [which] the Latin translation of '*Zulassung*' is '*permissio*,' which Kant translates as '*Erlaubnis*.'" Walch states that " 'license' (*permissio*) can mean the 'introduction of a right through a law' like 'when, e.g. parental power, citizens' property, etc. are licensed by the law.'" Johann Georg Walch as cited in Hruschka, op. cit., fn p. 55 and note 26 (italics in original).

³⁹ Gottfried Achenwall as cited in Hruschka op. cit., fn p. 56 and notes 1 and 30 (italics in original).

⁴⁰ Ibid, 58. (italics in original).

⁴¹ Ibid, 58. (italics in original) For Kant, "*facultas moralis*" is an authorization. This authorization is freedom in the negative sense, as Kant claims "that action is permitted (*licitum*) which is not contrary obligation; and this freedom, which is not limited by any opposing imperative, is called an authorization (*facultas moralis*)."*RL*, 6:222.

This moral faculty permits something that otherwise would be morally, legally, or politically impossible. Hruschka cites an example of such impossibility: the act of buying condominiums in the United States during the 1960's. Since condominiums did not exist, buying one was not possible. However, once the law allows for such a thing as condominiums (and assuming there were condominiums built and available) people are granted a power (or a faculty) to exercise or not. "The law, we might say today, confers a legal power on its beneficiary," and so "[w]e therefore can call the permissive law a 'power conferring norm'."⁴²

Hruschka's argument is drawn mainly from the *Metaphysics of Morals*, specifically the *Doctrine of Right (RL)*. As we have seen, Kant's use of permissive law in §2 of the *RL* is aimed at justifying the possibility of acquiring property. Yet, Hruschka rightly notes that although previous attempts have "incorrectly limited [their] application [of the permissive law] to property rights,"⁴³ Kant's use of the idea is broader than this. He argues that Kant's use is, rather, to establish the legal institutions necessary for Right.

He is also careful to note that he believes Kant's arguments in *TPP* are different from his arguments in the *RL*. Hruschka states that the long exegetical footnote in *TPP* defines permissive laws "as laws that provide exceptions to an 'assumed prohibition'";⁴⁴ in other words, *TPP* formulates permissive laws as exceptions, tantamount to

⁴² Hruschka, op. cit., fn 3, p. 59. One might object to Hruschka's example of condominium buying as not appropriate to the discussion of power conferring norms, as his example seems to suggest a permission right to buy and sell (bundled with claim rights against certain kinds of interference). Hruschka seems to be saying that the permissive law as power conferring norm is rather a "power" in the proper legal sense; that is, a right to create new rights and obligations. I believe that Hruschka intends this latter sense, but his example of condominiums is inapposite. Creating a legal institution – especially an entire legal or civil condition – is creating something that introduces new rights and obligations, and not, granting the permission to do X or Y. We must first have the institution before we can have a permission to act within it. I thank David Mapel for this point.

⁴³ Hruschka, op. cit., fn 3, p. 47.

⁴⁴ Ibid, 51.

justifications.⁴⁵ Yet Hruschka argues that in the *RL* Kant defines them as power conferring norms, and that *TPP* does not employ the distinction between “allowed” and “merely allowed.” This is important because Hruschka believes that Kant changed his usage when it came to permissive laws. The later text was his final word, and so we should follow the *RL*, as it is the final and most complete treatment of permissive laws.⁴⁶

Yet, why would Kant change his construal of *lex permissiva* between *TPP* and the *RL*? More importantly, if *lex permissiva* is, as Hruschka claims, a power conferring norm that authorizes individuals to set up the necessary legal institutions for Right, why would the *lex permissiva* make an appearance in Kant’s *Doctrine of Virtue*? Certainly Kant is entitled to make changes to his own theory, but it is an odd shift for a philosopher so very concerned with consistency to have two separate meanings of the same concept solely for politics and then have it also show up in the realm of virtue – which is not concerned with legal institutions *per se*. Moreover, as *TPP* was published only two years before the *RL*, but we have textual evidence in the Collins lecture notes that he was playing with this concept eleven years before *TPP*.⁴⁷ Thus, while Hruschka’s work on the allowed versus merely allowed distinction sheds much light on the type of act to which a permissive law applies, his classification of permissive laws as power conferring norms to set up legal institutions (and not exceptions) does not seem to provide the full picture. Too many crucial questions are left unanswered.

⁴⁵ Ibid, 51.

⁴⁶ Ibid, 52.

⁴⁷ According to Werner Stark, the Collins notes may be an earlier text, perhaps as early as the mid 1774-1775. Stark, Werner. *Vorlesung zur Moralphilosophie* (de Gruyter, 2004), esp. pp 403-404. I thank Robert Louden for pointing this out.

II. Permissive Laws: Disjunctive Rules and Conflicting *Rationes Obligandi*

I now want to present my own interpretation of Kant's understanding of *lex permissiva*. I will argue that he regarded it as a principle that authorizes an agent to choose whether to engage in or forbear from a prohibited act (e.g. it grants an exception to a general law) for the ultimate purpose of sustaining reason and its ends. This permission is necessary when an agent finds himself in what I call a "supreme moral emergency" (SME). A SME is a situation in which, if he agent follows certain moral precepts as if he were in an ideal world, the results of his actions in the actual world would undermine the entire purpose of morality (the universal achievement of good willing through the exercise of practical reason, freedom and autonomy). Following such precepts would engender a fundamental conflict of reason with itself. A permissive law only comes into play when nature and reason are opposed to one another in this way.

I support my argument by taking into account all of the texts in which Kant explicitly addresses the issue of *lex permissiva*. Moreover, in my comprehensive account, I am careful to incorporate the distinctions Kant draws between noumenal and phenomenal, ideal and nonideal worlds, general and universal laws, and conflicting duties versus conflicting grounds of obligation. It is only after these nuanced distinctions are made clear that we can begin to understand Kant's permissive law and its possible application to the problem of instituting an IHII.

My interpretation of Kant's concept of the permissive law that is similar in some respects yet distinct from, the previous interpretations. I argue that he applies this concept to conflicts in ethics and politics with regard to freedom. What is fundamental to each instance of Kant's use of permissive law is that it provides an opportunity for agents

to choose among different obligating reasons for action. Thus, there is not *the* permissive law, as some suggest, but in fact a *class* of permissive *laws*.

A. Preliminary Distinctions

To understand where Kant's concept of permissive law fits into his overall theory, we must make some preliminary distinctions. Kant divides his system into two realms: the noumenal and the phenomenal. The noumenal world is where man is considered an intelligible being, "i.e., as a being who must be declared independent of all influence from sensibility."⁴⁸ An intelligible being is one whose reason for acting in accordance with his obligation is independent of determination by inclination: "the causality of his actions exists through mere reason."⁴⁹ Only man *qua* intelligible being is free; his actions are not determined by anything other than his own will and he is considered a first cause. The noumenal world is, therefore, the free world.

However, man is also considered part of the phenomenal world. Here man is regarded as a sensible being, i.e., man is "conscious of himself, his existence and actions, both through his outer senses and by means of his inner sense."⁵⁰ Phenomenal man is also affected by these senses, driven by them, so to speak, and, as such, is determined by them. Since phenomenal man is controlled by his feelings, inclinations and senses, his actions "are to be regarded as effects of preceding causes," and as he is not the author of these acts; responsibility for such acts cannot be "imputed to him."⁵¹ The phenomenal (or natural) world is not free but instead universally naturally determined.

⁴⁸ Vigilantius, *LoE*, 27:505.

⁴⁹ Vigilantius, *LoE*, 27:505.

⁵⁰ Vigilantius, *LoE*, 27:504.

⁵¹ Vigilantius, *LoE*, 27:502.

Man is at once a noumenal and phenomenal being, or a being who is both free and simultaneously hindered (although actually not determined) by inclination. Kant's moral theory is formulated as a set of imperatives because of man's duality. If man were solely a noumenal being, then he would be completely rational, a holy being as it were, and would always act morally. As such, he would have no need for imperatives. However, as man is not a completely or consistently rational being—as he is influenced by his surroundings, his physical desires, and his senses—[i.e., by his/her embodiment] he is capable of acting contrary to reason and morality. Reason must issue the dictates of morality in the form of imperatives.

Additionally, we need to make a distinction between ideal and nonideal worlds. While the noumenal/phenomenal and ideal/nonideal distinctions do not map on to each other one-to-one, they do track rather closely. An ideal world is where all rational beings comply with the dictates of reason and morality. One might call this Kant's "Kingdom of Ends." All agents comply with such dictates for the right reasons, that is, they comply because they understand what duty requires, and they take duty to be their motivating reason for acting. The nonideal world, on the other hand, is one where agents, for the most part, do not comply with the dictates of reason or morality for *the right reasons*. Moreover, noncompliance can be the result of many causes. For example, noncompliance can be the effect of rational miscalculation: I thought I was doing the right thing, but see after the fact that I did not have full information, and I made the wrong decision. Or noncompliance can be the result of the situation in which one finds herself. For example, in a state of nature I might try to gain power of you, as I have no guarantees that you will not harm me if I do not. In this situation, complying with the

dictates of reason as if I were in a Kingdom of Ends would more than likely harm me rather than help me. The point is that human beings as imperfect, finite, embodied beings, always although not necessarily exclusively inhabit the nonideal world.

We should also note that the nonideal world can be more or less so. In most parts of the world we witness widespread noncompliance with the dictates of reason or morality. In some parts of the world, we do not. Noncompliance is not, generally, so widespread that we are in a “war of all against all.” This may be due to the fact that we are either well-intentioned angels, or a “a race of devils,” or somewhere in between, but more likely (either by design or by luck), we have managed to institute systems that will ensure compliance to a sufficient degree that we can, for the most part, follow reason’s dictates without much confusion or fear. This, of course, is the civil condition. The civil condition provides laws and protections in the nonideal world, and so the civil condition can ensure general compliance through enforcement. Indubitably there will always be some degree of noncompliance because the world is, after all, nonideal. However, through reform and education, mankind can continue to progress in hopes of approaching the ideal more closely.

A third distinction is between the two forms of law in Kant’s system: universal and general. Universal laws are “valid under all circumstances, so that an exception is therefore impossible.”⁵² General laws, on the other hand, “hold good in the great majority of cases,” but not all cases, and so exceptions are possible.⁵³ Universal laws (*universales*) for Kant are those laws that provide underlying principles for general

⁵² Vigilantius, *LoE*, 27:514

⁵³ “*Die Verbots/gesetze sind aber theils universals, die allgemein gelten, wobei also eine Ausnahme unmöglich ist; heir ist also ein Erlaubnißgesetz gar nicht denkbar: theils generales, d.i. wo das Verbot in den mehresten Fällen (im Allgemeinen) gilt. Heir lassen sich Ausnahmen denken [...].*” *LoE*, 27:514.

(*generales* or *allegemeinen*) laws. In other words, general laws are real world instantiations or applications of universal laws. A universal law holds true without exception because it is a “supreme principle [...] and hence strictly universal.”⁵⁴ General laws are the “real legislation” of universal ones.⁵⁵

Kant, of course, has a “universalizability” test for general “real (nonideal) world” laws. This test, however, is different from the classification of laws. Kant famously notes in “Theory and Practice” that a legislator ought “to frame his laws in such a way that they could have been produced by a united general will of a whole nation, and [these laws ought] to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will.”⁵⁶ This test is for a legislator to check whether his laws are legitimate. Moreover, it is important to note Kant’s use of the word “*allgemein*” when formulating his principles of Right. He claims “all right consists solely in the restriction of the freedom of others, with the qualification that their freedom can co-exist with my freedom *within the terms of a general law*; and public right in a commonwealth is simply a state of affairs regulated by a real legislation which conforms to *this principle* and is backed up by power.”⁵⁷ Thus in *actual* constitutions, there can be general laws

⁵⁴ Beilefeldt, Heiner. “Autonomy and Republicanism,” *Political Theory*, Vol. 25, no. 4 (1997): 544. Beilefeldt’s discussion of the confusion arising from Gregor’s translation of “*allgemein*” as “universal” in the *Rechtslehre* is well worth noting. Beilefeldt makes an impressive case that “*allgemeine Gesetze* must be applied to an empirical society of humans whose ‘actions, as facts, can have (direct or indirect) influence on each other, as Kant points out (544).

⁵⁵ Kant, in “Theory and Practice,” states “all rights consist solely in the restriction of the freedom of others, with the qualification that their freedom can coexist with my freedom within the terms of a general (*allegemeinen*) law; and public right in a commonwealth is simply a state of affairs regulated by real (*wirklichen*) legislation which conforms to this principle.” Reiss translates “*allegemeinen*” as “general”, whereas Humphrey as “universal.” *TPP*, 8:292

⁵⁶ *TPP*, Reiss translation, p. 79

⁵⁷ *Ibid*, pp.75-76 (italics added.) I am not here denying the universal principle of right, but I want to draw a distinction between Right *as such*, and real world instantiations of Right. This quote comes from Kant’s essay “Theory and Practice” where I believe him to be drawing that distinction. Metaphysically, right is universal. However, laws that come about in the real world are general.

formed by a thought experiment considering universalizability, but in practice, these laws remain effectively general.

An example might be helpful here. Let us take Kant's discussion of marriage. Marriage, Kant believes, is the only form of association where human beings reconcile the use of another person as a means (sexually) and with that person's freedom. This is so because one person gives full right over himself to the other in marriage and vice versa. Kant claims that "[m]atrimonium signifies a contract between two persons, in which they mutually accord equal rights to one another."⁵⁸ This full and complete giving and receiving can, for Kant, only be between two people. Monogamy is thus necessary to matrimonial morality because one can only give oneself fully to one other person and thereby remain free. Reason wills this hold as a universal; however, if one finds oneself in the unique position of being the last man on earth, then this cannot hold as a universal law, for there is also an "end of nature," namely, procreation.⁵⁹ In this case, Kant would claim that an exception must be made to the monogamy principle, thus allowing a man to take on many "wives" for the end of procreation.⁶⁰ As Kant might say, nature wills that the species survive, so monogamy, it turns out, is only general, not a universal law.

Yet in the case of the Last Man, how are we to know which law to follow, the natural law or the law of reason? This situation, it seems, involves a conflict of duties. The Last Man has a duty to his wife to remain monogamous, both for the sake of her freedom and his. However, the Last Man also has a duty to ensure that the species does not die out. Yet, Kant's system cannot admit of conflicts of duties. A conflict of duties in a rationalist system would mean the downfall of such a system, for one is obligated

⁵⁸ Collins, *LoE*, 27: 388; *RL*, 6:277-280.

⁵⁹ *RL*, 6:277

⁶⁰ *VMdS*, 23:385

and not obligated at the same time.⁶¹ This is why Kant declares “[a] collision of duties and obligations is inconceivable (*obligationes non colliduntur*).”⁶² The conflict is not one between duties; rather it is between the grounds of obligation (*rationes obligandi*).⁶³

Kant claims:

However, a subject may have, in a rule he prescribes to himself, two grounds of obligation (*rationes obligandi*), one or the other of which is not sufficient to put him under obligation (*rationes obligandi non obligantes*), so that one of them is not a duty. – When two such grounds conflict with each other, practical philosophy says, not that the stronger obligation takes precedence (*fortior obligatio vincit*), but that the *stronger ground of obligation* prevails (*fortior obligandi ratio vincit*).⁶⁴

Kant further explains “duty always contains a *ratio obligans*, or sufficient reason obligating to a dutiful act,” but that an agent can have several *ratio obligandi*, that is “any other reason, insufficient [for a duty].”⁶⁵ While one may only have one duty, it does not mean that one does not feel a pull in the direction of the other *ratio obligandi*. One can still be upset, torn, or otherwise, but an agent has only one duty.

However, in the above example the Last Man does not have a *ratio obligans*; he does not have an obligation.⁶⁶ He has conflicting grounds (*ratio obligandi*). The permissive law presents itself here because of the circumstances: the ideal world and the nonideal world conflict in such a way that following the dictates of reason may undermine the very existence of reason. The permissive law does not tip the scales in

⁶¹ For an excellent discussion of this Cf. Alan Donagan “Consistency in Rationalist Systems.” *Journal of Philosophy*, Vol. 81, no. 6 (1984):291-309. One may object that Kant is not a rationalist in the strict sense of the word (like Leibniz or Wolff); however, I would say that Kant is enough of a rationalist to not allow a conflict of duties into his system.

⁶² *RL*, 6:224

⁶³ *RL*, 6:224; Collins, *LoE*, 27:280; Vigilantius, *LoE*, 27:493; 27:501; 27:508; 27:537.

⁶⁴ *RL*, 6:224

⁶⁵ Vigilantius, *LoE*, 27:508

⁶⁶ One may object here and say that the Last Man has a strict obligation to his wife, as he made a promise to her. The permissive law here is granting, if he so chooses, a temporary exemption to his self-incurred obligation. Once there are more men, the prohibition regains force. The Last Man has strong reasons to stay faithful to his wife (his promise of fidelity) but he also has equally strong reasons to perpetuate the species. Reason cannot dictate for him to violate his promise or to keep it and risk annihilating humanity, as there would be a conflict of duties as a result. Thus he has to choose.

favor of one *ratio obligandi* over the other; rather the permissive law opens up a space—e.g., it authorizes the Last Man to choose for himself whether he will take on more “wives” or not. Reason cannot obligate the man to forbear from performing act X, nor can Nature obligate him to do X. He has strong reasons for each, but ultimately he must decide for himself.

On my reading of Kant, reason requires a disjunction between the moral law, on the one hand, and the permissive law on the other. As Hruschka rightly points out, Kant, following Achenwall, divides his system into permissible acts (those that can be but do not have to be obligatory) and merely permissible acts (those that can only be indifferent and not obligatory). The permissive law governs the realm of some merely permissible actions, whereas the moral law governs the obligatory.⁶⁷ The moral law commands, and the permissive law allows.

Moreover, there is an important side note. Hruschka correctly classifies merely allowed acts as those acts that are neither prescribed nor prohibited; acts that require a permissive law are a further subclass of merely allowed acts. Yet, the definition of merely allowed applies to “indifferent actions,” although, as Kant notes, “no special law would be required for” an indifferent act.⁶⁸ (Morally indifferent acts are indifferent in relation to a moral law. For example, whether I decide to take my dog for a walk this morning or to stay home and drink coffee is neither commanded nor prohibited by the moral law. The act is, therefore, neither good nor bad, but morally indifferent.) We have, then, a paradox: it seems we must grant that acts which require a permissive law are both indifferent (as the definition of merely allowed implies) and not indifferent (as the

⁶⁷ Where there is strict moral indifference, there is no need for a law, and so no need of “governance,” thus the moral and permissive laws are exclusively disjunctive.

⁶⁸ *RL*, 6:223.

Rechtslehre notes.) We can make sense of this seeming paradox on my reading because acts that require a permissive law are “indifferent” only in form. In other words, all morally indifferent actions are merely allowed insofar as they are neither in violation of nor are they required by the moral law, though not all merely allowed actions are morally indifferent in content.⁶⁹ Acts that require a permissive law are morally indifferent in that they are neither required nor prohibited (reason cannot make them obligatory because if it did, it would undermine its ends and come into conflict with itself), but *materially*, they are morally important.

Acts that require a permissive law are morally important because they cannot be obligatory for the sake of reason and its ends. The content of the act is not indifferent to reason, but the result is that the act must be classified as such because it cannot be required or prohibited. Another example may be helpful here. Hruschka and Brandt claim that a permissive law allows for the coercion of individuals into a civil society. That is, coercion is legitimate to set up the juridical institutions necessary for *Recht*. Yet, unilateral coercion, if we were to follow solely the APR, is always illegitimate because it hinders the freedom of others. However, the end of reason is the universal condition of good willing in humanity. This end requires, as a first step, exiting the state of nature and instituting a civil society. Nature, too, has an end: the preservation of the person and species. In a state of nature, persons are allowed to defend themselves. In this situation, men, if left solely to the UPR, “would despoil themselves of all rights and abolish the very existence of laws,” and would “erase the possibility of passing over into a condition

⁶⁹ Indeed, this is where I think Hruschka’s distinction between “allowed” and “merely allowed” may come into play. All morally indifferent actions are allowed, that is morally permitted (*erlaubt*), but only some of these permitted actions (*bloß erlaubt*) require a law. These “merely permitted” actions permitted, but in my reading, not morally indifferent. They are permitted but morally important, and so have need of a law authorizing their allowance.

of legal order.”⁷⁰ Men thus have a duty to exit the state of nature. The rub is that without a permission to use means that are otherwise prohibited, men could not fulfill their duty. Thus, the permissive law grants an authorization to use such means (coercion) to fulfill the duty (exit the state of nature).⁷¹

Again, this situation arises only when the ideal and nonideal worlds dictate mutually exclusive actions simultaneously: X and not-X. The moral law (universally and ideally) states “not-X,” while the natural law (and a tenet of reason itself) dictates “X.” The moral law is of no guidance here; rather, what the agent requires is an authorization (to X or not-X) to do as he chooses. The prohibition (not-X) exists, but only in the ideal world or when the conditions in the real world reach a certain threshold as when the legal, juridical and coercive institutions of a state are in place. The ideal is, for Kant, in a different time frame: the future. By contrast, the permission (X) exists in the nonideal “present,” the prohibition in the ideal “future.” Thus the moral law and the permissive law cannot be at work at one and the same time; they are disjunctive.

Furthermore, the permissive law comes into play only when an agent finds himself in a supreme moral emergency (SME). A SME is a situation such that if an agent were to follow certain moral precepts as though he were in an ideal world, the results of his actions would undermine the entire purpose of morality in the nonideal world. In the Last Man example, the condition in which the man finds himself is indeed extraordinary, though this need not always be the case.⁷² To be sure, the Last Man has a good reason to remain monogamous, for he would be violating a promise to his wife and possibly treating her as a mere means were he to take more “wives.” However, by not

⁷⁰ Vigilantius, *LoE*, 27: 514.

⁷¹ One may see here that *in some cases*, provisional duties are commensurate with the permissive law.

⁷² Cf. *TL* 6:426.

taking more “wives”—by not propagating the world with more finite rational beings—reason itself would be extinguished (as far as we know). Thus, the permissive law allows the Last Man to make an exception to the general rule of monogamy, for the sake of reason itself.

The necessity of a permissive law of practical reason is ultimately the result of Kant’s distinction between the noumenal and phenomenal. This duality raises many problems for Kant: for instance, sometimes reason can dictate courses of action that would frustrate the ultimate purposes of reason itself, namely the universal condition of good willing, because the nonideal world where humans actually live faces them with unforeseeable situations that precludes them from following the dictates of morality. If we are to take Kant seriously on the duality of the nature of human beings, and assuming that human beings live in a nonideal world, then we must accept a permissive law of practical reason.

My argument for the permissive law as a disjunctive principle that authorizes agents to decide for themselves is supported by ample textual evidence. Indeed, it is supported by every work where Kant mentions *lex permissiva*.⁷³ While few scholars refer to texts other than *TPP* and *RL*, many of the arguments of other scholars fail to take a comprehensive approach to Kant’s writings on *lex permissiva*.⁷⁴ I believe it is

⁷³ Kant discusses *lex permissiva* in six texts: *Lectures on Ethics*, *Vorarbeiten zu die Metaphysik der Sitten* (*VdMdS*), *Towards Perpetual Peace*, the “Introduction” to the *Metaphysics of Morals*, the *Doctrine of Right*, and the *Doctrine of Virtue*. Moreover, in English translations of Kant’s *Lectures on Ethics*, three of the four students (Collins, Mrongovius and Vigilantius) remark on permissive laws. It is also important to note that the student lecture notes are not all available in English. Of the twenty-three known student lecture notes, five are published in English and nine are lost. Explicit reference in *LoE* to *leges permissivae*, *lex permissiva* and permissive laws (*Erlaubnisgesetz*) at: 27:274; 29:620; 27:512; 27:514; 27:515; 27:524; 27:562.

⁷⁴ Flikschuh mentions the *Doctrine of Virtue* (*TL*) but only in passing (Flikschuh, op. cit., fn 3, p. 137). Her point in mentioning the *TL* is to bracket it off from her main argument for the permissive law to be a provisional solution to the antinomy of right, and oddly, she does not cite the explicit references to *lex*

indispensible to look at each instance where Kant discusses this concept so that we can get a complete picture of how he understands and employs it.

A.1.) *Lectures on Ethics*

Kant's first text (*LoE*) begins with Collins's⁷⁵ note that there are laws that can be prescriptive, prohibitive, or permissive, "whereby actions are allowed."⁷⁶ We do not see Kant broach this topic again until Mrongovius notes that "*leges [...] permissivae*" are "prescriptive laws that forbid or allow."⁷⁷ Little is explained by these passages, and it is not until Vigilantius' notes of 1793-1794 that the fullest exposition of permissive laws comes to the fore. Vigilantius again reiterates the previous points, namely that there can be three types of laws, and that permissive laws allow something to an agent. However, the most illuminating explanation we gain here is through Kant's example of *Recht* in a state of nature. Vigilantius' notes state:

For example, might must not replace right is a prohibitive [law], which is subject to an exception when all men are *put into a condition* where, by equal resistance to one another, they would *despoil themselves of all rights and abolish the very existence of the laws*; e.g. in *statu naturali*, where each takes himself to be defending the legitimacy of his own actions. Here, between them, *they erase the possibility* of passing over into a condition of legal order, and only the power of the stronger is then left, and thus might replaces right.⁷⁸

Further:

For if it be the case, that without might no right can be instituted, then might must precede right, whereas rule by right has to be the basis of power. If we take men in *statu naturali*, they are *ex leges*, under no legal order, and have no laws, only external power to keep them upright. [...] Should a prohibitive law be now issued, whereby it was not permitted to employ force, so that men might come into enjoyment of a *status civilis*, this would continue to uphold the state of

permissiva in the *TL* (6:426 and 6:453). Tierney and Szymkowiak also do not look to the entire *LoE*.

Tierney and Szymkowiak restrict their discussion to Vigilantius, (although Szymkowiak bizarrely includes a section from Collins that has nothing to do with *lex permissiva*.)

⁷⁵ The Collins notes date from 1784, though as I observed in note 47, there is debate that they are ten years earlier.

⁷⁶ Collins, *LoE*, 27:274.

⁷⁷ Mrongovius dates from 1785. Mrongovius, *LoE*, 29:620.

⁷⁸ Vigilantius, *LoE*, 27:514. (italics added)

lawlessness, and a condition, therefore, in which there would be no law, or no acknowledgement thereof. But *this is a state of affairs in conflict with the universal imperatives of morality*, and we thus have to assume that nature allows us, in this fashion, to bring man's free choice into the agreement with general freedom, by means of a universal law; and so here there is a natural law in effect, to permit the force employed.⁷⁹

In these passages, we see that a permissive law must be present to ensure the eventual manifestation of universal freedom and morality. As I argued in Chapter One, universal moralization requires agents to enter into a rightful (civil) condition. If agents remain in a state of nature, then they erase the possibility of such progress. The state of nature is in direct opposition to the universal dictates of morality because agents in this condition have no guarantees or protections; an agent's main concern is survival, and so morality cannot take hold. The state of nature presents agents with a supreme moral emergency, for if the state of nature persists, any possibility of universal morality will vanish.

A.2.) *Vorarbeiten zu der Metaphysik der Sitten*

In the VdMS, Kant takes another tack, but again with the same end in mind. He states: "*Lex permissiva* is the law which allows something according to natural law, which is prohibited by civil law, e.g. to be one's own judge when insulted or having multiple women (polygamy with women) if there is only one man available or robbery in the danger of starvation [...]."⁸⁰ While this passage is only a fragment, we see again the situation of a supreme moral emergency. Reason cannot obligate a person to extinguish the very existence of reason. In the case of the Last Man, humanity would die out; in the

⁷⁹ Vigilantius, *LoE*, 27:515. (italics added)

⁸⁰ *VdMS*, 23:385. ("Lex permissiva ist das Gesetz wodurch etwas nach Naturgesetzen erlaubt ist was nach civilgesetzen verboten ist z. B. sein eigener Richter in Beleidigungen zu seyn oder Vielweiberey wenn nur ein Mann da ist oder Raub wenn Gefahr zu verhungern eintritt [...].") There is a bit in the original text as well that attempts to discuss the securing of private property, but it is an incomplete sentence. It is important to note though that Kant did at least bring the property discussion back in here, albeit the notes do so in a fragmentary and incomplete way.

case of a starving man, if he does not steal, he will perish, and so on.⁸¹

I might also venture to say here that “civil” vs. “natural” is a special case of “ideal” vs. “nonideal.” The civil condition is not ipso facto an ideal condition, but it satisfies (for the most part) the necessary conditions to avoid a SME. The civil condition has, by definition, legal, judicial, and legitimate coercive institutions in place to guarantee the rights of individuals. As we have seen, the natural condition fails in this respect, so individuals are responsible for their own protection. Thus certain acts are permitted (such as coercion) are permitted in the state of nature, for otherwise individuals and more generally humanity would be robbed of the means to survive.

A.3.) *Tugendlehre*

The meaning of *lex permissiva* is perhaps best indicated by Kant’s use of the concept in the *Tugendlehre* (TL). Though he only mentions it twice, these two instances do much to explain this puzzling concept. One mention is when he considers the duty of beneficence and questions whether one can ever exempt oneself from fulfilling such a duty. It is worth quoting Kant in full here:

For everyone who finds himself in need wishes to be helped by others. But if he lets his maxim of being unwilling to assist others in turn when they are in need become public, that is, makes this a *universal permissive law*, then everyone would likewise deny him assistance when he himself is in need, or at least would be *authorized* to deny it. Hence the maxim of self-interest would conflict with itself if it were made a universal law, that is, it is contrary to duty.⁸²

⁸¹ One might object here that the starving man is only one individual, and so this situation cannot really be a supreme moral emergency. I think this is a fair objection. As this is only a fragmentary note, and it appears to be a casuistical question, it is difficult to discern Kant’s entire meaning here. Though I do think it important to note that numbers are not the main determinant of a supreme moral emergency. A SME is a situation that threatens the very possibility of reason and morality taking hold in the world. The state of nature is a very different situation, one that cannot be explained by “numbers.” Now, if one is in a civil condition, where sufficient steps have been taken to ensure general compliance and safety, then a SME cannot result.

⁸² TL, 6:453.

We must note that in this passage Kant specifically addresses the concept of a “universal” permissive law. It is no surprise then, when he denies that such a law could exist. Once we recall that only general laws can permit exceptions, it is easy to see that the very concept of a “universal permissive law” is self-contradictory.

The most useful passage, though, is a short quip in one of his casuistical questions, where he toys with the question of whether a sterile couple is allowed to pursue sexual activities. While this example may seem extremely dated and puritanical by today’s standards, the way Kant formulates his answer is helpful for our present purposes. He asks: “is there, in this case, a permissive law of morally practical reason, which *in the collision of determining grounds* makes permitted *something that is in itself not permitted* (indulgently, as it were), in order to *prevent a still greater violation*?”⁸³ In this brief mention, Kant has again tied the permissive law to a fundamental tension between nature and freedom, where the permission involved seeks to maintain the ultimate purpose of the law of reason (universal moralization) in a nonideal world. While it is arguable whether this case is one of a supreme moral emergency,⁸⁴ Kant’s characterization of a permissive law in this context provides much insight. [I think it wouldn’t be too difficult to convert it into an SME if the couple were, e.g., Adam & Eve. That would also make a nice counterweight to the Last Man example.] It is “morally practical reason” that is employed to “prevent a still greater violation” of morality.

Practical reason requires the separation of the permissive law and the moral law because

⁸³ *TL*, 6:426 (italics added). Nature’s end is procreation, while reason’s end is moralization. If a wife (or husband) is sterile or incapable for some reason of bearing children, nature’s end is automatically frustrated. Reason, however, holds that sex is actually a good. Kant is a bit unclear on this point, but in his discussion of marriage (*RL*, 6:277-279), and his discussion of defiling oneself by lust (*TL*, 6:424-426), I infer that there must be some good to the “mutual enjoyment” in the act of sex that is separate from mere procreation. This, I believe, is why Kant toys with the casuistical question above.

⁸⁴ It is by definition a SME, however, as I have made clear before in my distinction between formal and material definitions, this situation may not be an SME materially.

reason cannot obligate one act over another—it would undermine its purposes and come into conflict with itself. Furthermore, he adds the crucial explanation of a collision of *ratio obligandi*. The couple has sufficient obligating reasons to X and not-X, but if reason is not to become “a pedantry regarding the fulfillment of duty,”⁸⁵ there must be a space in which an agent is authorized (by a law) to choose for herself which course to take. Unfortunately, Kant offers no further advice to this couple.

I now turn to the two most oft-cited and examined texts on *lex permissiva*: *Toward Perpetual Peace* and the *Rechtslehre*. We can now employ my interpretation of *lex permissiva* as a disjunctive principle to see if it helps to make sense of these two texts.

A.4.) *Toward Perpetual Peace*

Kant’s discussion of a *lex permissiva* in *Toward Perpetual Peace* (TPP) occurs in two footnotes.⁸⁶ The first footnote is the longer of the two and states: “It has previously been doubted, not unjustifiably, whether in addition to commands (*leges praeceptivae*) and prohibitions (*leges prohibitivae*) pure reason could provide permissive laws (*leges permissivae*).”⁸⁷ Kant goes on to claim that indeed, there do seem to be permissive laws “that reason in its systematically analytic use sets out.”⁸⁸ The explanation, though, is not readily apparent, as the way Kant goes about responding is rather cryptic. He juxtaposes two cases to explain the possibility of a *lex permissiva*: the object of the law vs. the object of the permission and natural law vs. civil (statutory) law.

First on the topic of objects of law and permission, he states:

⁸⁵ *TL*, 6:426.

⁸⁶ *TPP*, 8:348 & 8:374. The second footnote at 374 does not really add anything further to the understanding of *lex permissiva*. The only thing it underscores is the importance of time.

⁸⁷ *TPP*, 8:348.

⁸⁸ *Ibid*, 8:348.

For in general, laws contain a foundation of objective practical necessity, while permission only provides a foundation for certain acts that depend on practical contingencies. Thus a permissive law would necessitate an action that one cannot be compelled to perform, which, if the object of the law has the same sense in both cases, would entail a contradiction. But the permissive law here under consideration only prohibits certain modes of acquiring a right in the future (e.g., through inheritance), while the exception from this prohibition, i.e. the permission, applies to a present state of possession.⁸⁹

Here, Kant separates “the object of the law,” namely possession, into two temporal categories: present and future. The present time period here does not “meet” the requirements of Right *in toto*, but it does satisfy a minimum condition.⁹⁰ Possession in the present may stand (i.e., is permitted) because “at the time (of the putative acquisition) [it was] accepted as lawful by public opinion in all nations.”⁹¹ However, due to the fact that the present condition in the international system possesses merely a modicum of Right—and Right, in its a priori universal form requires full, public realization—a prohibition exists. The paradox is that prohibition and permission do and do not exist simultaneously. They do exist simultaneously in that Right lays down a prohibition: “No independent nation...may be acquired by another nation by inheritance, exchange, purchase or gift,”⁹² while at the same time permits putative possession of territory. To see how Kant thinks of this, we must revisit the division between nonideal and ideal worlds. Kant cannot allow a state of nature to persist because domestic states, however

⁸⁹ Ibid, 8:348.

⁹⁰ This minimum condition is that of being “honest.” (TPP, 8:348) Here I believe Kant means the principle of *honeste vive*, or live honorably. For Kant, *honeste vive* implies the maxim “Act so that you are worthy of honor in your own eyes” (LE, 29:632). The relation of *honeste vive* in this example to the assertion that the act of taking possession was “honest” is important because Kant is referring to possession of external objects (namely state’s territory) in a state of nature. In a state of nature, as I have previously argued, there is no full instantiation of Right, only private right, where each is judge in his own case. If I take a piece of land, with the “correct” intention, I am my own judge, and so I can say that my possession is honest, especially when this intention “rests ultimately on our own judgement [sic] of the action” (Vigilantius, LoE, 27:527).

⁹¹ TPP, 8:347.

⁹² Preliminary Article No. 2 in TPP at 8:344.

they were acquired or instituted, are better than the state of nature.⁹³ This is because civil societies are necessary to eventual universal moralization. On the other hand, for international right to become instantiated, states cannot “acquire” other states, for such an act would constitute a violation of another state’s (and its people’s) right to freedom. Prohibition and permission do not (cannot) exist simultaneously, for this would imply a contradiction (i.e., an obligation to X and not-X). Thus Kant claims that the prohibition cannot be held *until a time in the future*, when Right is capable of full instantiation at the international level. In other words, when the conditions for Right line up with the dictates of the ideal, then the prohibition carries without the permission. Yet, *presently* there must exist a permission, for the nonideal world has not attained the requisite features (international civil society with appropriate legal, juridical, and coercive institutions). Thus, for the sake of sustaining reason in the future, reason must permit something that it would otherwise prohibit.

The second case that Kant uses to explain a *lex permissiva* is the use of it in civil (statutory) law. Here, Kant claims:

My desire here has been simply to draw the attention of proponents of natural right to the concept of a *lex permissiva*, a concept that reason in its systematic analytic use sets out and that is often used in civil (statutory) law, though with this difference, namely, *that the prohibitive part of law stands on its own, while the permissive part is not (as it should be) included in the law as a limiting condition, but is regarded instead as among the exceptions to it...*[F]or permissions arise only circumstantially, not according to a principle, that is, they arise only in considering specific situations. Otherwise the conditions would have to be stated in the *formulation of the prohibitive laws* and would in that way have to become laws of permission.⁹⁴

⁹³ *TPP*, 8:374. Vigilantius also notes Kant’s imperative to leave the state of nature in *LoE* 27:589-591, where it appears that Kant sides with Hobbes assertion of “*exeundum esse ex statu naturali*” (we must escape from the state of nature).

⁹⁴ *TPP*, 8:348. The italics in the last sentence occurs in Humphrey’s translation; however, it does not occur in the original text. I add italics to the middle portion, which seems to be the crux of what Kant is discussing.

A *lex permissiva*, it seems, has a function similar to, but distinct from, permissive statutory laws. Permissive statutory laws incorporate the exceptions into the prohibitive law. Yet, Kant's permissive law is separate from the prohibition. We can gain a clearer understanding of this reading by consulting again the *Lectures on Ethics* (*LE*).

Vigilantius's notes have Kant explicitly stating "if there are *leges permissivae*, they have to be accompanied with a prohibition."⁹⁵ Prohibitory laws, though, as we have seen, can be of two sorts: universal and general. Universal prohibitory laws are "valid under all circumstances," general prohibitory laws "hold good in the great majority of cases," and so "exceptions are conceivable."⁹⁶

Returning to *TPP*, we can see that the primary text, which the explanatory footnote accompanies, makes a further distinction between strict laws ("*leges strictae*") and laws with latitude ("*leges latae*").⁹⁷ Whether Kant is thinking that *leges strictae* are analogous to universal laws and *leges latae* to permissive laws is beyond the philological capacity of this chapter. However, there does seem to be something that either hints at this, or at least makes a further distinction, that permissive laws are laws with latitude. Either way, the permission *accompanies* the prohibition and is legitimate based on the circumstance of a state of nature. The permission in *TPP* allows states to perpetuate a condition of injustice for the eventual sake of justice, for reason dictates that even though there is a state of nature amongst states, this is better than an all out state of nature

⁹⁵ Vigilantius, *LoE*: 27:514.

⁹⁶ Vigilantius, *LoE*, 27:514.

⁹⁷ The text reads: "Although the laws set out above are objectively, i.e., from the perspective of those in power, merely prohibitive laws (*leges prohibitivae*), some of them are of that strict kind—that is, of that class of laws that holds regardless of circumstances (*leges strictae*)—that demands immediate implementation (viz., Nos. 1,5, and 6). However, others (viz., Nos. 2,3,4), while not exceptions to the rule of law, do permit, depending upon circumstances, some subjective leeway in their implementation (*leges latae*) as long as one does not lose sight of their end. [...] Delay is permitted only to prevent such premature implementation as might injure the intention of the article" (*TPP*, 8:347).

amongst individuals. A similar example is used in the *LoE* where Kant claims that in a state of nature men have permission to use coercion to establish a legal order.⁹⁸

An important distinction must be made: where Kant uses the term “exception,” it is not the kind of casuistry that accompanies statutory laws. This explains why he juxtaposes civil statutory law to his version of *lex permissiva*. For example, in most states, there are laws prohibiting killing, *except* in cases of self-defense and, in some instances, capital punishment, or Trolley Problem-type cases, e.g. rationing healthcare. These are exceptions built into the rule, where one must look to each case of killing to determine whether it satisfies the conditions that allow a permission.⁹⁹ This type of exception, one that is built into the rule, would for Kant, render the prohibition a permission.¹⁰⁰ However, Kant’s use of “exception” is different. I take him to mean, *an area of a general law that does not apply in a special limiting condition (like a state of nature)*. This type of exception explains what Kant means by the use of “accompany,” and the statement “the prohibitive part of the law stands on its own, while the permissive part is not [...] included in the [civil] law as a limiting condition.”¹⁰¹ First, the use of “accompany” tells us that an object must be separate from another object, for one cannot accompany the other if it is part and parcel of it.¹⁰² Second, Kant explicitly claims that the permission in civil law is not included as a limiting condition. A limiting condition

⁹⁸ Vigilantius, *LoE*, 27:514-515

⁹⁹ The case would have to satisfy the legally relevant facts that allow a permission. For a very insightful discussion of legally relevant facts, the relevance of facts, mistake of law and mistake of fact, see Sharon B. and Joachim Hruschka, "The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in His Doctrine of Right," *University of Toronto Law Journal* 56 (2006): pp. 217-282, especially footnote 44.

¹⁰⁰ *TPP*, 8:348.

¹⁰¹ *TPP*, 8:348

¹⁰² To “accompany” something assumes a separation from the thing it is accompanying. To “accompany” is “to go somewhere with” or “be present or occur at the same time as” or “provide or serve as a compliment to,” according to the *Oxford English Dictionary*. All definitions assume a distinction between two objects.

(*einschränkende Bedingung*) here is distinct from an exception (*Ausnahmen*). A limiting condition ought to be thought of when formulating a prohibitive general law, but this condition, and the law that applies in it, is distinct from the prohibitive law itself. Making this distinction allows agents to know what conditions trigger the permission *for everyone*. An exception, however, implies “freedom from a general duty or service *to which most others* are subjected.”¹⁰³ Exceptions, or exemptions, *only exist for the person who possesses the relevant facts*; permissions, on the contrary, apply *generally*. Thus an “exception,” as permissive law, in *TPP* is a different kind of exception. Kant may be guilty of ambiguity, but his attempt to discern limiting conditions from typical exceptions is helpful. Contra Hruschka it appears that the permissive law in this situation is not a “justification.” For the permissive law is a general law standing on its own and authorizing all agents to act as they see fit.

This reading also makes sense of Kant’s description in Collins’ and Mrongovius’ lecture notes that *leges permissivae* are laws that allow. They do not “contravene the law” because the act is “negatively good,” that is, “not [in] conflict with the law of duty.”¹⁰⁴ The permitted action occurs at a temporally different time, in a supreme moral emergency, and reason cannot obligate X or not-X because it will undermine its ends or come into conflict with itself.

A.5). *The Rechtslehre*

The second text used by Kant scholars is the *Metaphysics of Morals*. More specifically, scholars tend to focus on the “Introduction” to the *Metaphysics* and the

¹⁰³ Cf. *Black’s Law Dictionary* (West Publishing Company, 1983). (Italics added.)

¹⁰⁴ Vigilantius, *LoE*; 27: 512.

Rechtslehre (RL). Scholars, such as Hruschka, look to the brief discussion of permissive laws in the “Introduction” to explain the later use in the sections of the *RL*. I briefly examine these two passages.

First, in the “Introduction,” Kant states:

An action that is neither commanded nor prohibited is merely *permitted*, since there is no law limiting one’s freedom (one’s authorization) with regard to it and so too no duty. Such an action is called morally indifferent (*indifferens, adiaphoron, res merea facultatis*). The question can be raised whether there are such actions and, if there are, whether there must be permissive laws (*lex permissiva*), in addition to laws that command and prohibit (*lex praeceptiva, lex mandati* and *lex prohibitive, lex vetiti*), in order to account for someone’s being free to do or not to do something as he pleases. *If so, the authorization would not always have to do with an indifferent action (adiaphoron)*; for, considering the action in terms of moral laws, no special law would be required for it.¹⁰⁵

We can immediately see from this passage that Kant’s explanation of permissive laws points to the fact that permissive laws do not “always” have to accompany morally indifferent actions. This, of course, supports my view that a permissive law is necessary for merely allowed morally important acts. As I discussed earlier, a merely allowed act is formally “indifferent,” but materially this is not the case.

The first clause of the last sentence suggests that permissive laws relate actions that are *not* morally indifferent actions. The second clause, as I understand it, reads “for considering the action [a morally indifferent action] in terms of moral laws, no special law [like a permissive law] would be required for it.” This, of course makes sense, as materially morally indifferent actions would not need a law. Thus the question becomes: Which actions require a permissive law? As I have suggested throughout this chapter, the actions that require a permissive law are those acts that, if one were to follow a precept of reason as if one were in an ideal world, would result in the undermining of

¹⁰⁵ *RL*, 6:223. The italics on “permitted” in the first line occurs in Gregor’s translation; however, it is not noted in the original text. I reproduce it here, though I think the translator could have left it out and the reading would not be affected. Hruschka would argue that if there is emphasis, it ought to be placed on “merely” (*bloß*) rather than “permitted” (*erlaubt*). I added italics to the first portion of the last sentence.

reason (and its essential purposes). These acts become permitted, because reason cannot dictate one way or the other; however, they are not morally indifferent. Indeed, they are seminally morally important.

The second widely cited use of the *lex permissiva* occurs in the *RL*'s section titled "Postulate of Practical Reason with Regard to Rights."^b There, Kant begins his argument for the acquisition of property rights. The argument is rather complex, but the gist is whether "any external object of my choice" can be "mine."¹⁰⁶ He wants to know if rightful possession is a possibility. External objects of choice are all those things external to me. On Kant's understanding, then, external objects can take three different forms: a thing, another's choice, or another's status.¹⁰⁷ What this ultimately means is that I can have possession of an object or thing, like the chair I am sitting on; I can have possession of another's choice, like a promise from Jane to help me move next Saturday; or I can have possession of another's status, like the right (and duty) to take care of my children. All of these are "objects" outside of me, so they are external. Kant is concerned with the rightful possession of these objects,¹⁰⁸ and that, for him, requires proving that such possession is first possible.

He begins his argument by stating "an object of my *choice* is something I have the physical capacity to use as I please."¹⁰⁹ To use an object "as I please" means that no one else has possession of it; otherwise, I would have to go to that person and request to use

^b This refers to the text in the Gregor translation, and as I will explain below in the section on Flikschuh, the text has been reorganized for the sake of clarity and a belief that the original publication was corrupted.

¹⁰⁶ *RL*, 6:246

¹⁰⁷ *RL*, 6:247

¹⁰⁸ Rightful possession is different than mere possession, or "holding." Rightful possession means that anyone's use of something that belongs to me, whether I am in physical possession of it or not, wrongs me. Wrong does not have to be a physical harm. For a very good discussion of this Cf. Arthur Ripstein "Authority and Coercion," *Philosophy and Public Affairs*, Vol. 32 no. 1 (2004): 1-35.

¹⁰⁹ *RL*, 6:246 (italics in original).

it.¹¹⁰ However, Kant wants to understand how we can reconcile possession of an object with the freedom of everyone. Recall that the *Allgemeines Prinzip des Rechts* (APR) states “any action is right if it can coexist with everyone’s freedom in accordance with a general law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with general law.”¹¹¹ The possession of property therefore poses a moral dilemma: one must have objects of choice available to use as one pleases, but in so doing one puts possible objects of use by others out of their domain of use. This is where Kant starts: freedom is paramount, objects of choice are necessary for freedom, but possession of such objects hinders the freedom of others. Moreover, this is where Flikschuh treats the “antinomy of Right.”

Then the “Postulate of Practical Reason with Regard to Rights” rears its head.

Here Kant states:

This postulate can be called a permissive law (*lex permissiva*) of practical reason, which gives us an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not have otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession. Reason wills this hold as a principle, and it does this as *practical* reason, which extends itself a priori by this postulate of reason.¹¹²

Later in §16 Kant states, “provisional acquisition, however, needs and gains the favor of a law (*lex permissiva*) for determining the limits of possible rightful possession.”¹¹³ The last explicit reference to *lex permissiva* follows in §22, where he states that a “natural permissive law” provides a “favor” for the acquisition of a right to a person (really a

¹¹⁰ Flikschuh’s impressive exposition of Kant’s idea of property right is worth noting here. Kant does not, believe, like Locke, that one can acquire rights *against* or *to* an object. One can only acquire rights against or to persons. What this means is that Kant’s understanding of property is a three-way relationship between rights holder, duty bearer, and object. For example, I have a right R to object O, and Jane has a duty D to refrain from using O. On the Lockean understanding, it is a two-way relationship between possessor and object (in our example R and O), but as Flikschuh rightly interprets Kant to be saying, only persons and not objects can have rights to or against something.

¹¹¹ *RL*, 6:230.

¹¹² *RL*, 6: 246 (italics in original).

¹¹³ *RL*, 6:267.

person's status).¹¹⁴ In each of these passages, Kant is discussing acquisition of external objects or property. The latter two passages seem to refer back to Kant's "Postulate of Practical Reason with Regard to Right" as a *lex permissiva*. I forgo much exegetical interpretation on these last three instances of *lex permissiva* because Flikschuh's argument and interpretation seem correct to me. However, I believe that we must look at whether the postulate and the *lex permissiva* are the same thing, as some seem to suggest, or whether the postulate is just that, a postulate, and, as such, merely an *instance of* a permissive law.

My reading is the latter. Kant explicitly states, "the postulate can be called *a* permissive law." The postulate is one instance of a permissive law, in that the situation in which agents find themselves is a supreme moral emergency (SME). Possession of objects must be possible because I must use objects in the pursuit of my projects. Some projects may also require that I not merely have the use of these objects, but sole possession of them. Reason requires this. However, the APR states that if I exercise my freedom and take an object, then I am effectively taking something that another agent (Jane) may also use. I restrict Jane's freedom because I have limited her capacity to choose; I have limited her freedom.

The even stickier wicket is the second and third clauses of the first sentence: "which gives us an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not have otherwise have [...]." I am interested neither in the coherence of Kant's argument for property nor whether first occupancy and *res nullis* justify initial acquisition. What does concern me here is the use of the postulate as a permissive law. These second and third clauses

¹¹⁴ *RL*, 6:276.

provide us further insight into *lex permissiva*, and they also seem to tidy up some lingering questions about how I can obligate others without their free choice.

First, I agree with Hruschka here, that a permissive law does provide an authorization to do something. That is, it provides for a faculty, and that faculty gives us an authorization (or an allowance) to choose to do (or not do) something. Yet, I would like to expand his point and say that this faculty is due to reason, that is *practical reason*, and not “mere concepts of right as such.”

For Kant, an a priori deduction of “mere concepts of right as such” (like the *Rechtslehre*) takes as its starting assumptions about the moral worth of human beings, their innate right to freedom and three noncontingent facts about the nonideal empirical world (time, space, and the spherical shape of the earth’s surface). This deduction is therefore concerned, a priori, with determining what is “Right,” and what is necessary for Right. It is concerned with the ideal world, and it does not take into consideration contingent facts. Thus, if we were to try to derive a permissive law from this framework, we could never do so *because* a permissive law is necessary due to the tension between the ideal and nonideal worlds. If one is not allowed to factor into the equation contingent facts about the nonideal world, one could never see the need for or deduce a principle designed to mitigate the effects of such a world. One needs to move beyond the ideal in order to understand the necessity of a permissive law.

Thus we must move beyond “mere concepts of right as such” to the realm of practical reason. Practical reason is exercised in “the practical sphere [where] it responds to inclinations by generating principles of action or maxims, taking the objects of empirical desire into account in setting ends, selecting policies of action for their

achievement, and forming an idea of our happiness in relation to which actions can be judged regarding the agent's self-interest."¹¹⁵ This is why Kant claims "Reason wills that this [postulate] hold as a principle, and it does this as *practical* reason." Reason takes account of both the noumenal and phenomenal realms, whereas the *principles* of Right are concerned with the ideal.

Yet, even if we grant that it is practical reason requiring a permissive law, one that allows agents to choose to act in a certain way, it is still not clear why any of those actions would impose an obligation on others. In the case of the postulate, Flikschuh argues that it is reflective judgment that places an obligation on us, and I think this is correct, in a sense. If a permissive law is thought of as a principle that authorizes an agent in a nonideal world to choose which action to take when reason threatens to undermine its own existence, then one sees that by consulting the permissive law an agent is required to use his practical reason and judge whether to act or forbear from action. The permissive law encourages practical reason's exercise and thus reflective judgment. This, we could say, has the result that reason imposes an obligation on us, and it does this as practical reason. However, I think this reading is a bit of a stretch. If Flikschuh is purporting to make a "Kantian" (as opposed to Kant's) argument, then this stretch is not a problem; if, however, she is attributing this argument to Kant, that is another matter.

The obligation, at least in the instance of the postulate, is incurred by the fact of possession of an object, and is not incurred by the reflective judgment of others. I stated earlier that Kant's argument for original acquisition of property is not the main focus of this chapter. However, the issue of obligation is a "thorn" for Kant *in this matter*, that is,

¹¹⁵ Wood, Allen W. *Kant's Ethical Thought*, (Cambridge University Press, 1999): 56.

the matter of rights to external objects of choice. The necessity of a permissive law does not entail that such a law always imposes an obligation on others (as the cases in ethics make manifest). To understand Kant's position let us return to the *LoE*:

Between *having the right* to do this or that, and *having a right* to something, Professor Kant distinguishes as follows. A subject may be granted license to do a thing, and yet it may contain merely the possibility (namely, where the right appears by reason of the object, as opposed to any actual object of right); but in that case the subject still does not *possess the right to do* anything. [It is merely provisional right] This is equivalent to the term *jus illi competit*, i.e. he has permission to act, i.e. he does no wrong in engaging the action, e.g., to take possession of a thing that belongs to nobody. But a subject *has a right* as soon as he has something in regard to whose use he can do or omit as he wills. Here an object is present, and not merely the right to act thus, in and for itself. To have a right therefore already presupposes an acquisition, and thus the possession of a thing, or a promise on another's part, over which promise or thing I am able to dispose and of which I can make use.¹¹⁶

The obligation incurred is not due to the postulate as a permissive law. The obligation is (provisionally) incurred because of the result of taking an object into one's physical possession. Thus Hruschka is correct on this point: it is "Kant's assumption of the universal united will...in anticipation of the move to a civil social order (*bürgerliche Gesellschaft*) or state "that imposes an obligation to recognize the property rights of others."¹¹⁷ To this I would add that the obligation is *provisional*, in that I have strong reasons, all things considered, to recognize others' property rights, though "I am...not under [an] obligation to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine."¹¹⁸ The obligation does not become "perfect" until I am in a civil society; however, the obligation is initially and provisionally imposed once a person takes possession of a specific object of her choice.

¹¹⁶ Vigilantius, *LoE*, 27:524.

¹¹⁷ Hruschka, op. cit., fn 3, p. 70.

¹¹⁸ *RL*, 6:256.

I agree with Flikschuh in a sense because reflective judgment is part and parcel of practical reason. We come to know the moral law by the “fact of reason,” which is our own self-awareness that also gives rise to respectful awareness of others. We then act morally when we conform our maxims to the moral law, and doing so requires that we take others into consideration via reflective judgment. However, this is not how we come to have an obligation to recognize and refrain from other’s property.

B. A Synthesis of Sorts

Kant’s *lex permissiva* does not apply only to his arguments for property. Indeed, Hruschka is correct to point this out. Kant’s use of it spans, and is necessary for, his entire moral theory. This is why it is necessary to look at Kant’s works comprehensively, and also why each author I have discussed is correct in some way. While I agree with many of their points, and disagree with others, it is only by synthesizing this body of commentary, as well as looking at all of Kant’s work, that we can come to see the entire picture.

Flikschuh is right to acknowledge that the postulate, as an instance of a permissive law, is a solution to the antinomy of right. Possession of external objects of choice is necessary for the exercise of reason and freedom, but such initial acquisition threatens the APR. The postulate as a permissive law authorizes such acquisition, and only the institution of civil society can fully reconcile the freedom of each with the freedom of all. Moreover, Kant’s typical explanation of solving an antinomy by dividing the problem into noumenal vs. phenomenal distinctions does little to solve the antinomy

of Right because the antinomy is the result of this very division. Reason and freedom, are faced with the possibility of “practical annihilation”; they are in an SME.

Hruschka, likewise, presents us with many correct readings of Kant. A permissive law is necessary to institute civil society, to first acquire property, and to delay premature constitutional reform. Permissive laws obtain in these situations and grant agents with authorizations to choose whether to establish such institutions or reform them. However, permissive laws do not apply only in the realm of Right. As we have also seen, permissive laws apply in ethics too.

Moreover, Hruschka’s original insight into the merely allowed/allowed distinction, and further subdivision of merely allowed actions into morally indifferent actions and morally indifferent actions that require a permissive law, is very important to the present reading.¹¹⁹ Categorizing all permitted actions as morally indifferent fails to take account of the necessity of permissive laws. Hruschka’s interpretation lays this foundation, but he does not go far enough. He limits his application of *lex permissiva* to the establishment of legal institutions, and this, as we have seen is not the whole story. Permissive laws exist in ethics too, thus their power must be more than “introduce or license certain rights.”¹²⁰

I disagree, therefore, with Hruschka’s claim that Kant employs two different concepts of permissive law (one in *TPP* and one in the *RL*). As I have argued, the concept of *lex permissiva* is the same in each instance Kant uses it. However, in each

¹¹⁹ It is important to note that Hruschka does not think that permissive laws are “morally indifferent” but a class of merely allowed actions. I however contend that they are “indifferent” in a sense, that is, they are neither required nor prohibited by the moral law. However, they are not “indifferent” in that they have no moral import. Quite the contrary, acts that require a permissive law are morally important actions, but due to the issue of consistency, they cannot be required nor prohibited.

¹²⁰ Hruschka, op. cit., fn 3, p. 56.

text, he does describe the features of the permission differently, and each permission has a different object in its view. Does this mean that Kant is guilty of not being crystal clear? Certainly. Does he fail to provide us with one fully explicated account of *lex permissiva*? Absolutely. However, as my argument suggests, each of his uses points to the same fundamental problem and the same solution. Therefore, I do not see my interpretation of Kant's permissive law as "trying to force a square peg into a round hole."¹²¹

No theorist has, until now, addressed Kant's entire picture of the permissive law and given a resounding answer the question of its purpose. As interest in Kant's political philosophy grows, scholars are more and more encountering his use of *lex permissiva*. Indeed, this is seen by the recent attention given to it. However, these arguments are still myopic in that they do not attempt to locate the *lex permissiva* in Kant's overall moral system. These scholars remain, at present, tied to the arguments in *TPP* and the *RL*.¹²²

Conclusion:

The next chapter will do two things: apply the argument for *lex permissiva* to the case of a provisional duty of humanitarian intervention and address the major objection to my argument for *lex permissiva*. The major objection is that it opens up a realm of permissiveness that is too broad for Kant's theory to support and that the case of a duty of humanitarian intervention highlights this excessive broadness perfectly.

¹²¹ Ibid, 47.

¹²² Again, there are others that look at the *TL* and *LoE*, but those scholars either present no explanation, or their arguments are flawed for one reason or another as I argued in note 3.

Chapter 4

Permitting Coercion: Applying Kant's Permissive Law to the Case of Humanitarian Intervention

They rounded up all the villagers. They separated men from women. To the women they said, "You may go to the border," and they put us men in two big rooms. They said, "Now NATO can save you," and they started to shoot. And when they finished shooting they covered us with straw and corn and set it on fire. We were one hundred and twelve people. I survived with one other man.¹

When we arrived, I looked at the school across the street, and there were children, I don't know how many, forty, sixty, eighty children stacked up outside who had all been chopped up with machetes. Some of their mothers had heard them screaming and had come running, and the militia had killed them, too. We got out of the vehicle and entered the church. There we found 150 people, dead mostly, though some were still groaning, who had been attacked the night before. The Polish priests told us it had been incredibly well organized. The Rwandan army had cleared out the area, the gendarmerie had rounded up all the Tutsi, and the militia had hacked them all to death.²

Both of these heart-wrenching and head-shaking events occurred at the hands of states. The states, in these cases Serbia and Rwanda, selected a portion of the population to systematically murder. The crime was carried out with impeccable organization and coordination. Too often, crimes against humanity are not perpetrated by non-state actors (though this is certainly possible), but by states—governments—against the people they are supposed to protect. When Major Beardsley went back to that same Rwandan village later that day, he did not see survivors; the militia had cleared all roadblocks and killed

¹ Krashnishi, Mehmet. Quoted in *Kosovo: Contending Voices on Balkan Interventions* (ed.) William J. Buckley. (Wm. B. Eerdmans Publishing Company, 2000): 60.

² Beardsley, Brent. Quoted in Samantha Powers, *The Problem From Hell* (HarperCollins Publisher, 2002): 349.

the remaining people.³ Moreover, Mr. Krashishi's experience in Kosovo during this time was not the exception but the rule. In situations like these, situations where the possibilities of law, order, and protection have vanished, we must ask whether morality itself is in danger of vanishing. Indeed, in such extreme circumstances, we ought to ask ourselves: Should we follow the precepts of justice, or are we faced with a situation so "unusual," so "horrificing," that different actions – perhaps traditionally impermissible actions – are required?⁴

Winston Churchill once said:

The letter of the law must not in supreme emergency obstruct those who are charged with its protection and enforcement. It would not be right or rational that the aggressive Power should gain one set of advantages by tearing up all the laws, and another set by sheltering behind the innate respect for law of its opponents. Humanity, rather than legality, must be our guide.⁵

It is this exact sentiment that underlies a Kantian supreme moral emergency (SME). Instead of norms or the rule of law requiring disobedience, as in the Churchill example, it is now juridical precepts that must sometimes be disobeyed, not for just any reason, but for the sake of morality itself. Human beings, imperfectly rational animals that we are, are sometimes faced with conditions (some of our own making, some not) that threaten our very existence and humanity.

As I argued in the previous chapter, Kantian supreme moral emergencies (SMEs) are situations where reason is in conflict with itself. Such conflicts arise when an agent in the non-ideal world follows certain moral precepts as if he were in an ideal world, thereby undermining the end of morality (the universal achievement of good willing through the exercise of practical reason, freedom, and autonomy). In a SME, I argued, a permissive law of practical reason is present; the permissive law allows an agent to

³ Powers, op. cit., fn 2, p. 350.

⁴ Walzer, Michael. *Just and Unjust Wars*, 3rd Ed. (Basic Books, 2000): 253.

⁵ Churchill, Winston. Quoted in Walzer, Ibid, 245.

undertake an otherwise impermissible act for the sake of reason itself. In other words, the permissive law grants permission to use certain means, usually off limits, in fulfilling one's duty.

SMEs might arise in a variety of circumstances (Kant's last man example as noted in the previous chapter, or, perhaps more tangibly for our present experiences, the threat of global destruction and the annihilation of millions of people due to nuclear war). Our present concern is whether the international system currently presents us with an SME. In particular, the fact that there are so many cases requiring humanitarian intervention (HI) highlights exactly how the current (non)juridical condition of the international system threatens the ability for justice to take hold in the world.

In what follows, I will argue the affirmative. The international system requires an institution capable of protecting the rights of individuals everywhere. Humanitarian intervention highlights, more clearly than any other international phenomenon, the need to establish such an institution. This international supreme moral emergency (hereafter iSME) is analogous to the domestic supreme moral emergency (hereafter dSME) witnessed between individuals in a state of nature. In a state of nature between individuals, people must, for the sake of justice and morality, form a civil society to protect their basic rights. Functionally, the situation in the international system is no different. Conceptually, the only difference between the arguments for state formation at the individual level and the state level concern Kant's "presumption of badness."

My argument is presented in two sections. In the first section, I examine the presumption of badness and the other conditions that trigger the dSME. Furthermore, I argue against Byrd and Hruschka's use of Kant's presumption to justify coercion of states

into a state of states. In the second section, I argue that the same conditions that trigger a dSME also give rise to an iSME. The only difference concerns the use of empirical evidence to make a conjecture about the intentions and future behavior of states. Finally, I reject the argument that the international system has juridically progressed to a degree that making such coercion is illegitimate.

Up to this point, I have attempted to remain true to Kant's texts by providing substantial exegetical support for my argument for a provisional duty of HI and what I take to be Kant's understanding of *lex permissiva*. At this point, though, I must diverge slightly from interpretation of Kant's texts and provide Kantian prescriptions for the problem of HI. Obviously, Kant did not address the evils of genocide and gross crimes against humanity, and his stalwart faith in the domestic state ultimately weakens parts of his theory's applicability to current international affairs.

I. The Logic of Justice

*"Well, I've now come to what we likened to the greatest wave. But I say what I have to say, even if the wave is a wave of laughter that will simply drown me in ridicule and contempt.... Until philosophers rule as kings or those who are now called kings and leading men genuinely and adequately philosophize, that is, until political power and philosophy entirely coincide...cities will have no rest from evils...nor, I think, will the human race."*⁶

While philosophers, political practitioners, and lawyers debate about juridical progress in the international system, the case of HI exposes the very weakness of that system. For all the discussions, reaffirmations, and considerations of the "Responsibility

⁶ Plato, *Republic*, (Trns.) G.M.A. Grube revised by C.D.C. Reeve (Hackett Publishing Company, 1992): 473d.

to Protect,”⁷ the United Nations, as representative of the international society of states, has ultimately done nothing.⁸ Pomp and circumstance certainly accompanies these discussions, but the reality is that progress—that is the institutionalization of protective measures for all peoples everywhere—is still a “pious wish.” Yet, this sad fact should not dissuade us from the pursuit of justice. As Socrates tells us, if we truly desire to know what justice requires, we must steel ourselves for the waves of laughter that might erupt when the extreme conditions necessary for its realization are addressed.

As I argued in Chapter Three, Kant believes that the state of nature between individuals triggers a dSME. This is why his permissive law of practical reason allows agents to force all others into a civil condition. Yet, there appears to be a puzzle about why coercion is permitted between individuals in a state of nature, but it is not permitted between states in a state of nature.⁹ On the one hand, a vast majority of Kant scholars object to the use of coercion in international politics, claiming that Kant could not condone such measures. On the other hand, two prominent Kant scholars passionately claim that Kant’s theory requires the coercion of states into a state of states. How can such vast disagreement over an issue that is fundamental to Kant’s entire theory of politics exist? The simple answer is that Kant put too much faith in the domestic state. As I will argue throughout this chapter, the international system is in a state of nature analogous to the one witnessed between individuals. Moreover, following Kant’s remarks in the beginning of the *Rechtslehre*, we can see that if his assumptions in the beginning stages of his theory of justice hold, then they must hold analogously in the

⁷ Humanitarian military intervention is a component of R2P. Recall that R2P calls on domestic states and the international community to prevent gross crimes against humanity, react when they occur, and rebuild after they have occurred. The current focus on R2P, therefore, includes HI.

⁸ Cf. A/RES/63/308.

⁹ See Vigilantius, *LoE* 27:514. Vs. *TPP* 8:355.

latter stages of his argument. The result is that the international system finds itself in an SME.

We must start at the beginning: determine what in a domestic state of nature triggers a SME. Recall that Kant is adamant that individuals must exit the state of nature and found a civil society, clearly expressed in his *Exeundum* Principle. This is so because a legal condition is *a priori* necessary to guarantee the rights and freedom of people everywhere. The civil condition is the only condition that removes private judgment and enforcement from individuals; the civil condition supplants “might makes right” and protects every person universally. We can call this the principle of the Universal Requirements of Justice. However, the civil condition is not just about justice; it is also a necessary stepping-stone for morality to take hold in the world. Without the protection of laws, culture and education cannot take root, as people are not in relative safety to pursue these enterprises. Without culture and education, morality is a distant hope.¹⁰ According to Kant, men must become moral beings. We can call this the Principle of Teleology of Reason. Yet, there is an assumption that Kant makes about the nature of men that simultaneously gives rise to and threatens all of these principles: the Presumption of Badness. The Presumption states that men are naturally evil, and that one ought to presume that men are evil unless they give “equal assurance” that they will refrain from doing wrong.¹¹ Such assurance, for Kant, is entering civil society.

The presumption plays a central role for Kant’s formulation of the other principles. If men were i) not naturally evil and ii) all equal with regard to their power and strength, then the other principles would be of no use. Men would obey the moral

¹⁰ *OE, RB.*

¹¹ *RL, 6:307.*

law and respect each other's rights naturally; they would be perfect angels. If, however, men are i) evil and ii) unequal in regards to their power and strength, then the other principles are *a priori* necessary. Men must exit a condition that continually threatens their rights and provides no assurance that each can protect himself. Moreover, "given the depravity of human nature" men must work at becoming moral beings.¹²

Unfortunately, Kant believes that the majority of men will not exit the state of nature of their own free will. Thus he claims that "it is not necessary to wait for actual hostility [from others]; one is authorized to use coercion against someone who already, by his nature [that is, evil], threatens him with coercion."¹³ Therefore, in order that men do not "erase the possibility of passing over into a legal condition," (a condition which provides assurance and protection of rights) reason prescribes a permissive law that authorizes agents to coerce all others into civil society.¹⁴ The permissive law allows agents to use impermissible means to achieve the ends of reason.

I believe a dSME arises when the presumption of badness cannot be overridden, and thus the additional three principles cannot be met. Only when one can override or rebut the presumption, via the protection of civil society, can the other three principles be met. The table below summarizes these factors, with their contents and textual support.

¹² *TPP*, 8:355.

¹³ *RL*, 6:307.

¹⁴ *Vigilantius LoE*, 27:514.

Table 1: Factors for a Domestic Supreme Emergency

	Presumption of Badness	<i>Exeundum</i> Principle	Principle of Universal Requirements of Justice	Principle of Teleology of Reason
Content	Men are by nature evil, will naturally act out of self interest and so despoil themselves of right	Men are under an obligation to leave the state of nature, and to remain in it by choice is “wrong in the highest degree”	Justice must be universal in form: might cannot make right. Without universal justice, all rights are provisional	Men must become moral beings, and to do so, they must be under civil laws, that can facilitate education
Text & Citation	<i>LoE</i> , 27:514-515, 27:421, 27:1340, 27:1354, <i>RL</i> , 6:307, <i>R</i> , 6:32-35	<i>LoE</i> , 27:589-90, <i>RL</i> , 6:307, 6:312, 6:344, <i>R</i> 6:97	<i>LoE</i> , 27:514-515, <i>RL</i> 6:230, 6:266, 6:311-312, 6: 341, 6:350	<i>LoE</i> , 27:522, <i>RL</i> 6:352. <i>R</i> , 6:94, 6:97, <i>OE</i> , 7, 13,16,18

Of course, this is not to say that this is the only way in which an SME can be triggered, far from it. SMEs can occur for different reasons, as my arguments in the previous chapter show. In the case of the dSME, though, the inability to satisfy these principles appears to threaten Kant’s moral and political theory with incoherence.

A. The Presumption of Badness

The presumption of badness plays a foundational role for Kant’s political theory. It justifies the coercive move between individuals to found a civil society, and it gives substantive character to Kant’s theory of a state of nature. The presumption also provides a reason for the necessity of man’s moral progress. Given all of these facts, it is important to understand whether the presumption applies throughout Kant’s political theory, or if it only plays a role in the beginning stages of it. If it is the former, then there may be justification for the coercion of states into an international civil condition, and a

further elaboration on Kant's theory of international and cosmopolitan justice. If it is the latter, then there is not only a possible resolution to the dispute between Kant scholars on the issue of coercion in international affairs, but a deeper understanding of how the modern state mitigates the need for violence and thwarts the possibility of an SME arising between states.

It is no secret that Kant takes a state of nature between individuals to be analogous to that of a state of nature between states.¹⁵ This is so because the hallmark of a state of nature is that it lacks the requisite features of a civil society (public legislative, judicial, and executive authorities). Regardless of the agents (individuals or states) who find themselves in a state of nature, it is deemed a state of nature because it is “opposed to ... not a...social [society] but rather the civil [society].”¹⁶ If the states of nature between men and states are analogous, then the juridical imperative to leave a state of nature must also be the same in both. That is, if individuals must leave the state of nature, so too must states. This interpretation is supported, not only by logical consistency, but also by Kant's remarks at the beginning of the *Rechtslehre* where he explicitly claims that the later sections of his work (those of international and cosmopolitan right) can be “easily inferred from the earlier” sections.¹⁷ It is no surprise, then, that Byrd and Hruschka take this line of argument in their work on Kant's state of nation-states (*Völkerstaat*).

¹⁵ *RL*: 6:344; 6:346; 6:350.

¹⁶ *RL*, 6:306.

¹⁷ *RL*, 6:209.

Byrd and Hurschka argue that Kant's argument for the *Exeundum* Principle is based on the "presumption of badness" (hereafter "presumption").¹⁸ The imperative to exit the state of nature, moreover, is coupled with a right to coerce all others into a civil condition. This right to coerce is generated by the presumption because it "provides the basis for Kant's claim that we have a right (in the state of nature) to exercise preemptive and preventive defense."¹⁹ This preemptive and preventive defense includes the authorization to coerce others into a civil condition. As Kant explains in the *Religion*, all men are presumed to be evil and that, given the chance, men will choose to disobey the moral law and attempt to satisfy their appetites instead. Kant believes that man is "evil from his very nature," and so without guarantees like the rule of law, there is no need to wait for actual harm to occur before one can rightly coerce others.²⁰ The presumption is, therefore, about possible (and highly probable) future actions.²¹

Given the fact that Kant claims that a state of nature between individuals is analogous to that of a state of nature between states, and given his remarks about the "inference" of arguments in the *Rechtslehre*, one might easily be led to the conclusion that the presumption of badness also applies to states in the international state of nature,

¹⁸ Byrd and Hruschka define a presumption as a normative proposition, "which require[s] that certain facts or circumstances generally be assumed as given. Byrd, B. Sharon & Joachim Hruschka. "From the State of Nature to the Juridical State of States". *Law and Philosophy*, Vol. 27 (2008) p. 616. Presumptions on the whole can take many forms. The use of presumptions in law, and also in philosophy can span: presumptions of law, presumptions of fact, rebuttable presumptions, irrebuttable presumptions, or conclusive presumptions. Ullman-Margalit argues that in everyday experience, presumptions are assumptions made in advance to help aid in practical deliberation and decision-making. Hers is a particular philosophy of action orientation. Cf. Ullman-Margalit, Edna. "On Presumption," *Journal of Philosophy*, Vol. 80, no. 3 (1983): 143-163. In this paper though, I follow Byrd and Hruschka's understanding of presumption and conjecture, which is located in Kant's period.

¹⁹ Byrd and Hruschka, op. cit., fn 18, p. 619.

²⁰ Ibid, p. 620. Man is both capable of good and evil. However, for Kant, man's nature is presumed evil because the first act man did was one of defiance. The "fall" of man, the choice to put self-interest above the commands of God, proved man's nature. Nevertheless, this same act also proves man's capacity for good, as man can also choose to obey God's commands. It is the very faculty of choice that gives man his humanity and the possibility to degrade it.

²¹ Ibid, p. 621.

and so states are authorized to coerce other states into a *Völkerstaat* (despite Kant's remarks in *Perpetual Peace* about the impermissibility of coercing states into a world state).²² This is Byrd and Hruschka's argument. They believe that the presumption can be applied to states, and that Kant's remarks in *Perpetual Peace* are not his final answer to the question of instantiating a universal conception of justice. Byrd and Hruschka instead believe that Kant's last word is his *Rechtslehre*, written two years after the essay on peace.

Here is the rub: almost all Kant scholars vehemently object to permitting coercion to establish a *Völkerstaat*, and Byrd and Hruschka vehemently hold that Kant's theory of justice requires such coercion to establish a *Völkerstaat*. Much of the disagreement results from the use (and perhaps abuse) of the presumption of badness and Kant's assumptions about the domestic state and the direction of threat to *Recht* amongst states. By clarifying all of these issues, we can determine if the international system is in an iSME.

While Kant's arguments about individuals in a state of nature surely contain an *a priori* presumption of badness, I disagree that this presumption can work in Kant's argument about states in an international state of nature. The presumption cannot be applied by rote to the international system. While states can achieve a certain "moral personhood," and can thus be regarded as moral agents, they do not have the same "nature" as human beings.²³ A state, as a moral agent, can have intentions, and

²² *TPP*, 8:355-356.

²³ Interestingly, in her article "The State as a Moral Agent", Byrd notes the role of corporate moral agency in Kant's conception of the state as a moral person, but refuses to recognize that a corporation as a moral agent is distinct from the individuals that comprise it (Private Correspondence). Cf. Byrd, B. Sharon. "The State as a Moral Person," *Proceedings of the Eighth International Kant Congress*, H. Robinson (ed.), (Marquette University Press: 1995), Vol. I.1: pp. 171-189.

responsibility can be imputed to it for its actions. However, to claim that such a state is *by its nature* evil obscures the distinction between human beings as moral agents and moral agents *simpliciter*. In other words, states and human beings are types of moral agents, and not all moral agents necessarily have evil natures (as Kant believes angels are moral agents too). A human being may, by his nature, be evil, but that fact does not mean that *all* moral agents are evil. The presumption, as it works in Kant's theory, only applies to human beings, and cannot be automatically applied to states.

One might object that states are merely entities constituted by human beings, and so it is human acts and decisions that must ultimately determine the general moral character of state conduct. Indeed, Kant himself seems to admit to this position. In *Perpetual Peace* he notes that “the depravity of human nature...is revealed and can be glimpsed in the free relations among nations (though deeply concealed by governmental restraints in law governed civil-society).²⁴” Moreover in *Theory and Practice*, he claims, “human nature never seems less lovable than in relations among entire peoples.”²⁵ This taken in conjunction with his assertion that “as nations, peoples can be regarded as single individuals” appears to cement the view that nations are nothing more than the sum of their parts.²⁶ If nations (i.e. states) can be regarded as collectives of individual human beings, and these single individual nations are regarded as moral persons, then, *modus ponens* states should be regarded as evil. Unfortunately, this conclusion is not so easily reached. In the *Rechtslehre*, the Vigilantius lecture notes of 1793, *The Conflict of the Faculties*, and “On the Proverb: That May be True in Theory but is of no Practical Use” he notes that states, courts, legislatures, executive branches, humanity and ideal beings

²⁴ *TPP*, 8:355.

²⁵ *TP*, 8:312.

²⁶ *TPP*, 8:354.

such as God or angels are all moral persons.²⁷ In these passages, Kant appears to be claiming that if one has the status of a moral person, then this is tantamount to having the capacity for intention and action. In other words, if one is a moral person, then one can be held responsible for one's acts; that is, responsibility can be attributed because acts are imputable to the agent. Moral personhood here entails the capacity for responsibility.

One could attempt to make a case that Kant is a radical individualist, and so any type of moral status granted to states is merely by way of the individuals (with their human natures) that compose them. This argument would then entail that the presumption of badness holds for states as well, and so coercing states into a state of nation-states is legitimate. States find themselves in an iSME because the presumption cannot be rebutted due to the condition of a state of nature, and since the presumption cannot be rebutted, we are left with an imperative to leave the state of nature for the sake of universal justice and moral progress.

While this conclusion would be helpful for establishing that the international system is currently in an iSME, the argument is unpersuasive. All of Kant's other assertions about the moral personhood of states, courts, executives, etc., his definition of a person ("a subject whose actions can be imputed to him"), and his explicit claim that "moral personality is therefore nothing other than the freedom of a rational being under moral laws" and is therefore separate from "psychological personality" which is "merely the ability to be conscious of one's identity in different conditions of one's existence," leads us to believe that a state cannot be merely reducible to the people within it.²⁸ For Kant, the kind of moral agency that courts, executives, etc., exercise is more like the

²⁷ *RL*: 6:227; 6:274; 6:297, 6:316; 6:343; 6:347; 6:348. In *CF*, p. 133. In *TPP*, 8:344. In *TP*, 8:291. In the *Vigilantius LoE*, 27:510; 27:573.

²⁸ *RL*, 6:223.

modern notion of corporate moral agency. Just as corporations are held legally and morally responsible for certain misdeeds, but not the individual shareholders, states too are held responsible (in interstate disputes). Government officials may be held responsible in their official capacities, but they are not held responsible as private citizens. This is analogous to that of a board of directors being held responsible for a corporate policy, and not the Chief Executive Officer being held privately responsible. Leaders can only be held responsible for their failure in their public roles.²⁹

Despite Kant's musings about the ability to observe human nature more fully in the relations amongst states, his account of the person and moral personality is so minimal that states and juridical institutions are capable of moral responsibility. That means that Kant's political theory endorses what we now call corporate moral agency. This is so because he holds that governments and their juridical powers are capable of acting freely; that is, they have autonomy.³⁰ These entities are capable of intention and action, and due to this fact they also have rights accorded to them.³¹

I do not wish to enter here into the debate about the best account of responsibility and whether one should hold a corporate (collective) or individualist account. There are good reasons on both sides of this debate to accept or reject the other.³² What concerns

²⁹ Cf. French, Peter. "The Corporation as a Moral Person" *American Philosophical Quarterly*, Vol. 16 no. 3 (1979): 207-215.

³⁰ Kant explicitly notes that "a state (*civitas*) has its autonomy, that is, by which it forms and preserves itself in accordance with laws of freedom" (RL, 6:318).

³¹ RL, 6:343. The rights of states are the rights to go to war, their rights in war and their rights after war.

³² For the view that states can have corporate moral responsibility, Cf. Erskine, Toni. "Making Sense of 'Responsibility' in International Relations: Key Questions and Concepts" in Toni Erskine (Ed.) *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations, Global Issues Series*. (Palgrave Macmillan, 2003): 1-18; Erskine, Toni. "Assigning Responsibility to Institutional Moral Agents: The Case of States and 'Quasi-States' in in Toni Erskine (Ed.) *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations, Global Issues Series*. (Palgrave Macmillan, 2003): 19-40; Harbor, Frances V. "Collective Moral Agency and the Political Process" in in Toni Erskine (Ed.) *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations, Global Issues Series*. (Palgrave Macmillan, 2003): 69-83; Arnold, Denis G. "Corporate Moral

me here is what Kant's political theory can sustain. While Kant does not endeavor to provide a full and complete explanation of how states and their juridical institutions can have intentions, make choices, have ends and act to bring them about, he does at least assert that they do.³³ Such an admission, then, means that he is not a radical individualist.³⁴

If states are corporate moral agents and not reducible to the individuals that compose them, then they are artificial corporate moral agents. They are capable of forming an intention, having an end, and acting to fulfill that end, but do not have an inherent nature.³⁵ Moreover, states are entities that live on long past the lives of their constituent members; they “have an identity over time” and they have “continuity.”³⁶ If states have no inherent nature, then we cannot presume them evil. For example, if we look at the moral character of Japan in 1941, it is significantly different from the character of Japan today. Thus if we are to judge the character of a state, or more

Agency” *Midwest Studies in Philosophy*, Vol. 30 (2006): 279-291. For an informative account of the paradoxical nature of responsibility and states, see: Runciman, David. “Moral Responsibility and the Problem of Representing the State” in Toni Erskine (Ed.) *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations, Global Issues Series*. (Palgrave Macmillan, 2003): 41-50. Eckert, Amy. “Peoples and Persons: Moral Standing, Power and the Equality of States” *International Studies Quarterly*, Vol. 50 (2006): 841-859. For individualist accounts of moral responsibility see: Miller, Seumas. “Collective Moral Responsibility: An Individualist Account” *Midwest Studies in Philosophy*, Vol. 30 (2006): 176-193. Miller, Seumas. *The Moral Foundations of Social Institutions: A Philosophical Study* (Cambridge University Press, 2010). For arguments about Kant's state as a moral person, see: Byrd, Sharon B., op. cit., fn 23, pp. 171-189.

³³ RL: 6:227; 6:274; 6:297; 6:316; 6:343; 6:347; 6:348.

³⁴ Dubbink, Wim. “Conceptualizing Corporate Moral Responsibility: A Neo-Kantian Approach,” Annual Meeting of the Society of Business Ethics, Honolulu HI, August 2005, as cited in Denis G. Arnold “Corporate Moral Agency” *Midwest Studies in Philosophy*, Vol. 30 (2006): footnote 9.

³⁵ One might still object that a robot is an artificial moral agent and can be programmed to be evil, thereby being inherently evil. However this objection misses the mark. If an agent has to be “programmed” it is not autonomous. It is acting within the constraints of how the system runs and cannot be said to be acting freely.

³⁶ Erskine writes, “a collectivity is more than the sum of the identities of its constitutive parts and, therefore, does not rely on a determinate membership; a decision-making structure; an identity over time; an a conception of itself as a unit.” (Erskine, op. cit., fn 32, p. 24). The last requirement for Erskine, that of identifying itself as a unit is not a requirement of Kant's, as I previously noted that psychological personality is not necessary or the same as moral personality.

precisely, a government, we must look at how it acts over time. We must not make an *a priori* presumption, but must make an *a posteriori* conjecture.

One might still object that if people are generally evil, and people hold government office, then we can still attribute the presumption of evil to them (and thus to states). To this I say that leaders are, for the most part, still subject to the law.³⁷ More to the point though, even if domestic legal mechanisms are weak, and leaders can act outside of domestic legal structures when they are undertaking foreign policy, *leaders find themselves within a civil society*. Leaders are physically and metaphysically situated within a juridical state, and this satisfies the condition necessary to render the presumption of badness moot. Though leaders may be able to act with more impunity in international affairs, the processes of culture, civilization and moral education are supposed to have an effect on them. Thus even if we are to admit that human beings are at the helm, for Kant, once man is in society he “cannot regard [human nature] as so immersed in evil that after many unsuccessful attempts, morally practical reason will finally triumph and show it [human nature] to be loveable.”³⁸

Of course, we must admit that though human beings are the actors, as leaders, legislators, and judges, their actions are undertaken for the state. They are not, *prima facie*, acting for personal reasons. They are acting as officials of the state, and it is, for better or for worse, states that are the agents at work in international affairs. As corporate agents, states undertake actions and are thus the responsible parties. They have responsibilities toward their own citizens, other states, and, as I will argue, to foreign citizens as well. Indeed, the very idea that states can bind themselves to agreements

³⁷ Of course there is a wide spectrum of the moral accountability of leaders.

³⁸ *TP*, 8:313.

presupposes that states, and not the agents of states signing treaties, maintain those agreements.³⁹

Since the presumption cannot hold for states, as artificial agents, I contend that something else is required to form judgments about the possibility of an iSME: empirical evidence. If State A is to hold a belief about State B's intentions or character, State A must come to hold this belief based on observed events. As Kant states, "a state is permitted to prosecute its right against another state...when it *believes* it has been wronged by the other state."⁴⁰ This wronging can take several forms: threats, active violations, or a "publically expressed will (whether by word or deed) [that] reveals a maxim by which, if made a universal rule, [would render] any condition of peace among nations impossible."⁴¹ In each of these cases, states do not have to wait to be *attacked*, but they do have to wait for states to "undertake" to do *something* that would thereby threaten them.⁴²

One might object here that Kant specifically states: "This is a wrong to the lesser power merely by the condition of the superior power, before any deed [*Tat*] on its part."⁴³ I submit that the focus should be on the type of "wrong". The condition of a state of nature is "wrong in the highest degree" (i.e., it is a non-rightful condition where violence is the only way to secure one's rights), and so while this condition "wrongs" all who are

³⁹ As Peter French argues, corporations are capable of moral agency. They require an "internal decision structure," that is a power hierarchy and decision making model, whereby individuals within it act in accordance with a corporate policy. Moreover, the question of intentionality is explained by the presence of the corporate policy. He explains "corporations have reasons because they have interests in doing those things that are likely to result in realization of their established corporate goals regardless of the transient self-interest of directors, managers, etc. If there is a difference between corporate goals and desires and those of human beings it is probably that corporate ones are relatively stable and not very wide ranging" (French, op. cit., fn 29, p. 214).

⁴⁰ *RL*, 6:346 (italics added).

⁴¹ *RL*, 6:346 & 6:349.

⁴² Kant states that states can be threatened by "another states being the first to undertake preparations...or the menacing increase in another state's power (by acquisition of territory). *RL*, 6:346.

⁴³ *RL*, 6:346.

in it, that “wrong” cannot be imputed to one state in particular. In other words, the condition is wrong because of all states’ refusal to exit the state of nature (i.e., act in accordance with the *Exeundum* Principle).

Moreover, as the rest of the text in this section shows, Kant suggests that State A has reason to fear State B because of its *actions* (either by State B’s increasing its territory or creating more power or a higher status). To undertake a preemptive or preventive attack, another state must feel or perceive itself to be threatened by another state. Threats can only be made when someone actually *does* something.⁴⁴ The state of nature amongst states aggravates the insecurity of each, but to be justified in attacking one state there must be some reason to attack, even if that reason is merely self-preservation rather than self-defense.

It appears, then, that what is at work in Kant’s writings on state behavior is not a presumption of badness applied to states, but what Byrd and Hruschka identify instead as a “conjecture.” They claim:

Conjectures are preliminary judgments about facts or circumstances. They are individual judgments and not generally valid propositions. They are descriptive and have no normative character. If I am in a room with no windows, I may conjecture about whether it is raining outside. My conjecture might be based on a weather report I heard in the morning or noise I hear on the roof that sounds like rain. This conjecture is purely factual—that it is in fact raining—and has no normative content. It is valid only for me, because others might conjecture differently about the weather at the moment. And it is only preliminary; as soon as I get to a window I may change my mind.⁴⁵

While Byrd and Hruschka argue that conjectures cannot apply to Kant’s arguments about Right, this is incorrect. The presumption, they note, carries the normative force needed to justify coercion of a state into the *Völkerstaat*. However, this conclusion seems to run

⁴⁴ *RL*, 6:343. The very act of making a threat is more than sufficient, but my claim is that even actions that are directed towards securing oneself, i.e. self preservation, are sufficient for another state to judge itself in danger. One need not explicitly threaten.

⁴⁵ Byrd, Sharon B. and Joachim Hruschka. “From the State of Nature to the Juridical State of States.” *Law and Philosophy*, Vol. 27 (2008): 615-616.

against everything Kant says about nonintervention, free federations of states, and the absence of sovereign or coercive powers in international leagues. In other words, Byrd and Hruschka's position seems to beg the question when it comes to the role of coercion. At one stage in their interpretation the right to coerce appears always present, for the mere condition of a state of nature combined with the presumption authorizes an agent to coerce. However, if this were the case, then it is odd why Kant explicitly notes that the *Völkerbund* is not, and indeed cannot be, coercive.⁴⁶ How, then, can the structure of Kant's argument justify coercion at the individual level and cosmopolitan levels, but not at the interstate level? How does the *Völkerstaat* acquire coercive power if the *Völkerbund* forbids it?

The simple reason is that coercion into the *Völkerbund* and *Völkerstaat* is impermissible *if we follow Kant's assumptions and logic*. Indeed, the majority of Kant scholars are correct in this matter. However, if we do not take Kant's assumptions as correct, then we are left with a different task: determining whether coercion is permissible in the international system (i.e., whether the international system is more alike to the individual state of nature than previously thought). The issue, then, is the assumptions Kant makes about the civil condition and international behavior. These assumptions are that civil society protects individuals sufficiently and secures their basic rights and that the largest threat to states' and people's rights is external.⁴⁷ If domestic

⁴⁶ *RL*, 6:344; 6:350-351; 6:353; *TPP*, 8:346; 8:354; 8:357.

⁴⁷ The textual evidence is roughly as follows: In *TPP* and the *RL* the threat to states within the international system is to come from the outside (other states) and individuals within states are protected *enough* because domestic states have "a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right." (*TPP*, Reiss, p. 104). Such internal juridical arrangements of states give them the status of "moral persons;" agents who have rights against others (*RL*, 6:343). Kant states that the rights of nations include the right to go to war, the right in war, and the right after war. Much of this turns on the idea that states have a certain degree of external freedom and therefore have a right against intervention by other states. This moral personhood

states do protect rights—sufficiently and generally—then there is no need to coerce countries into a transnational state, and the presumption of badness is moot.⁴⁸

Attempting to coerce states risks undermining the protections present at the domestic level. If, however, domestic states fail to protect and secure basic human rights, the probability for internal conflict will be higher, and thus external war may not be the largest threat to rights.

If Kant's assumptions do not hold, then we ought to look back to his prior discussions of domestic state formation to guide the requirements for transnational justice because it is in this portion of his theory that we gain the most clarity on issues of justice in a state of nature. Kant does not provide us with detailed prescriptions for international and cosmopolitan right, but as Byrd and Hruschka note, Kant's arguments in the first section of the *Rechtslehre* (on private right) ought to apply in each subsequent section (public right, international right, cosmopolitan right). Moreover, while the presumption of badness may not hold for states, we may be able to use an analogue of it to determine whether states are acting "evilily." If states are acting in such a manner, we can make a conjecture about their future behavior. This conjecture, taken in conjunction with the structural features of a state of nature, would thereby show that we are in an iSME.

carries with it, in particular, the right of noninterference, and many scholars maintain that Kant holds a strict nonintervention principle. These scholars cite the 5th Preliminary Article in *TPP* that "no state shall forcibly interfere with the constitution and government of another" (*TPP*, 8:346). Furthermore, they often cite Kant's insistence that only a "free federation of states," a federation without a constitution and sovereign rights, is permitted at the international level. *TPP*, 8:354-57; *RL*, 6:344; 6:351. Georg Cavallar makes this distinction, against someone like Fernando Tesón.

⁴⁸ The presumption is moot in the sense of rendering a matter irrelevant or of no practical significance. The presumption is not completely abolished, but on Kant's reasoning, once the civil condition is in place the need to preemptively coerce others is no longer required. The presumption only authorizes coercion when the rule of law is absent, and when, or if, a state fails the presumption could once again authorize such coercion.

B. The State of the World in 1795 or in 2010?

Since states are artificial moral agents and the presumption of badness cannot be automatically applied to them, we must look at empirical evidence to make a conjecture about whether Kant's assumptions hold today. If the majority of states do uphold the rights of their peoples and provide adequate protection of those rights, and threats to states' and peoples' rights come from the outside, then we can conclude that Kant's arguments about international coercion still hold and we are not in an iSME. We cannot, then coerce states into a juridical condition. If, however, the majority of states do not uphold sufficiently the rights of their peoples and provide adequate protection of those rights, and the threats to states' and peoples' rights is internal as well as external, then we ought to conclude that Kant's arguments about the impermissibility of coercion in international relations do not hold, and we should return to his arguments about individuals in a state of nature.

While it is true that Kant did not provide lengthy arguments about state failure, collapse or internal threats, he did reply to Hobbes about the relation of a government to its people. This is the most direct insight we have on Kant's arguments about the threat posed by a government to its people, and he claims that a sovereign domestic state "has no wish to do [its citizens] injustice."⁴⁹ Kant argues that "if [a citizen] assumes that the ruler's attitude is one of good will, any injustice which [the citizen] believes he has suffered can only have resulted through error, or through ignorance of certain possible consequences of the laws which the supreme authority has made."⁵⁰ On this account, the ruler (or sovereign) cannot possibly wish to do harm to its citizens. Kant's famous

⁴⁹ *TP*, Reiss, p.84.

⁵⁰ *TP*, Reiss, p. 84.

remedy for any perceived injustice is to allow for “freedom of the pen” so that the citizens might inform the ruler of the injustices suffered by the people (so that he may correct them).⁵¹

Unfortunately, after the horrors witnessed in the twentieth century, this response is at best naive and at worst dangerous. Kant’s first assumption, that the majority of governments uphold and secure sufficiently the rights of their people, appears empirically false. The present-day reality is that well over half of the world’s governments systematically and intentionally violate the rights of their peoples.⁵² To place full faith in the power of the pen to redress wrongs is nothing but blind hope. The pen is an insufficient safeguard against government propaganda dispersed over radio and press to incite violence against groups of people. Moreover, freedom of the pen cannot stop non-state actors from perpetrating crimes against the populace when the state is too weak to enforce its “laws.” Top-down reform cannot happen because either “the top” desires to annihilate a portion of its people or there is no “top” to address.

That the majority of the world’s states do not protect sufficiently the rights of their people is no secret. In 2009, *Foreign Policy* published its fifth “Failed State Index.”⁵³ The index uses 12 indicators of state cohesion and performance, along with a compilation of 30,000 publically available sources to rank 177 out of 194 countries. The Index finds that 131 states are currently either “critical,” “in danger,” or “borderline” failing. In other words, almost two-thirds of the world’s states are in trouble.⁵⁴ For our

⁵¹ Cf. *TP*, *RL*.

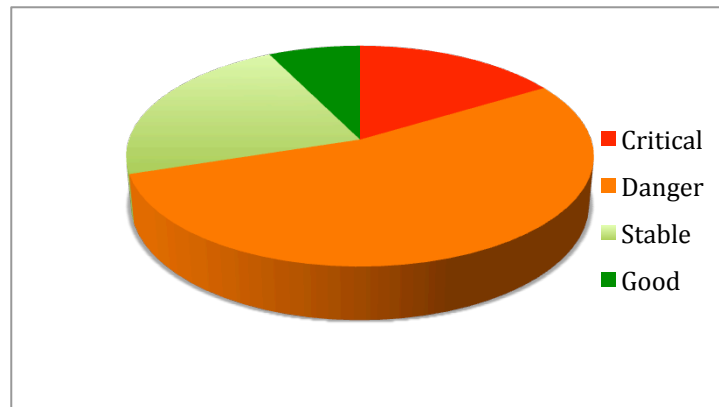
⁵² I am concerned here about basic human rights and not political rights. Such basic right include rights not to be tortured, killed, ‘disappeared’ and other fundamental rights pertaining to external freedom.

⁵³ http://www.foreignpolicy.com/articles/2009/06/22/the_2009_failed_states_index

⁵⁴ The term “failure” in the Failed State Index has several attributes. “One of the most common is the loss of physical control of its territory or a monopoly on the legitimate use of force. Other attributes of state failure include the erosion of legitimate authority to make collective decisions, an inability to provide

purposes though, I have separated the economic factors from the Index to get a better picture of the number of states failing, or on the brink of failing, as measured by human rights problems. After reorganization, 28 states are in “critical” shape, while an additional 95 are in “danger.” The figure below summarizes the findings.

Figure 1: Human Rights Risk of Failure

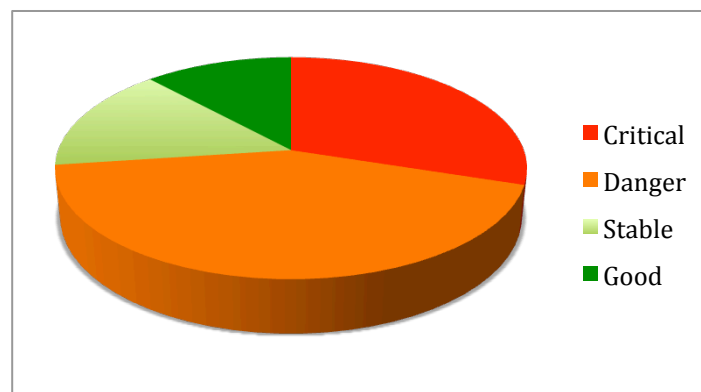


reasonable public services, and the inability to interact with other states as a full member of the international community. The 12 indicators cover a wide range of elements of the risk of state failure, such as extensive corruption and criminal behavior, inability to collect taxes or otherwise draw on citizen support, large-scale involuntary dislocation of the population, sharp economic decline, group-based inequality, institutionalized persecution or discrimination, severe demographic pressures, brain drain, and environmental decay. States can fail at varying rates through explosion, implosion, erosion, or invasion over different time periods.” As to the definitions of “critical”, “in danger” or “borderline”, these correspond to the “rank order of the states based on the total scores of the 12 indicators. For each indicator, the ratings are placed on a scale of 0 to 10, with 0 being the lowest intensity (most stable) and 10 being the highest intensity (least stable). The total score is the sum of the 12 indicators and is on a scale of 0-120. In the article, the 60 countries in the index are divided into two parts for easy reference: Critical (red), and In Danger (orange). On the index's global map, additional countries that scored higher than 60 are colored yellow. Countries with scores between 30 and 59.9 are considered Stable (light green). Countries that have scores lower than 30 are categorized as Most Stable (dark green).”

http://www.foreignpolicy.com/articles/2009/06/22/2009_failed_states_index_faqs_methodology

When one separates out all indicators but state legitimacy and stability, the trend continues to grow: 52 states are in the “critical” position and 76 are in “danger.”⁵⁵

Figure 2.: State Stability and Legitimacy



Well over half of the world’s states are in a crisis or near crisis with regard to protecting human rights, instability and illegitimacy. Although these data are imperfect, and many of the indicators interact or influence one another, such methodological objections do not detract from the conclusion: Kant’s assumption that the world’s states are satisfactorily protecting rights is not true; only a minority of states adequately do so.

The international system, as Kant notes, is a state of nature, though he believes that even its fragile juridical condition is better than nothing at all. These findings suggest that the majority of states are not that far removed from an individual state of

⁵⁵ I have included an index at the end of the dissertation of with the variables used to reorder the failed state index. All variables, methodology and state scores can be found at:
http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=229&Itemid=366

nature, in that the law is either absent, defunct, or used to persecute minorities.⁵⁶

According to Kant, the domestic state is the first bastion of protection for individuals' rights; if it collapses, or fails to fulfill its purpose, then *individuals* find themselves back in what amounts to a state of nature. However, this state of nature is not the somewhat peaceful society of states, but a state of war, where the enemies can take the shape of governments, nongovernmental organizations or fellow citizens. When a domestic state fails to protect the basic rights of its citizens, it can no longer be considered a "civil society"; its people are left in a juridical vacuum.

This juridical vacuum exists because the state system (in Kant's theory and in international relations) has been set up to engage only with other states, on the assumption that individuals have adequately removed themselves from a state of nature. However, as we have seen, this assumption is incorrect. Many individuals, like refugees, internally displaced persons, stateless persons, and targets of genocide, ethnic cleansing and crimes against humanity, have no protection from a home country and have no place to seek redress or protection.⁵⁷ Moreover, the post-Westphalian system that privileges territorial integrity and state sovereignty precludes other states from "interfering" in domestic matters.

⁵⁶ For further empirical evidence of this, see Bueno de Mequita et al, "The Hobbes Index" at: <http://freedom.indiemaps.com/>.

⁵⁷ As of 2008, there were roughly 42 million forcibly displaced persons (15.2 million refugees, 827,000 asylum seekers, 26 million internally displaced persons). UNHCR identified 6.6 million stateless people, though it suspects that there were closer to roughly 12 million. Unfortunately, this picture is not even close to complete. The data provided by UNHCR is "limited to populations that UNHCR has a mandate," so the number does not include the additional 4.7 million refugees under UNRWA (Global Trends, 3). The IDPS listed by the UNHCR only takes account of those persons who "benefited directly or indirectly from UNHCR's protection and assistance activities" (Global Trends, 4). Thus, all people who are not in a UNHCR camp or program are unaccounted for in these estimates. Cf.: UNHCR's 2008 report, "Global Trends" at <http://www.unhcr.org/4a375c426.html>.

How does Kant fare with his second assumption that the greatest threat to justice and rights comes from external war? As will be seen, this too is false. Today, data suggest that the greatest threat of war comes from intrastate war and not interstate war. Fearon and Laitin find that between 1945 and 1999 there were roughly five times as many intrastate as interstate conflicts, with three times as many states involved in intrastate conflicts, and almost five times as many deaths as a result of those internal conflicts.⁵⁸ While this study ends in 1999, the current data available continue to support their findings: out of the 23 conflicts since 2000, 19 of these were intrastate wars.⁵⁹ The current trend in international conflict is an easy one to predict: threats come mainly from the inside. Kant's belief, or rather hope, that a state's ruler cannot possibly intend harm is false.

Of course there were internal conflicts during Kant's time, the French Revolution being the most prominent; but from his writings, the reader is left to assume that the greatest threat is external strife, war *between* states.⁶⁰ As he notes, war is "the destroyer of everything good," and it threatens to undermine the moral progress of mankind.⁶¹ That

⁵⁸ Fearon and Laitin find 25 interstate wars during this period, while there are 127 civil wars. 25 states were involved in interstate conflict, while 73 states were involved in intrastate conflict. The number dead is staggering: 3.33 million deaths as a result of interstate conflict, while 16.2 were killed in civil wars. Their study does not incorporate the number of refugees or internally displaced persons as a result of these wars, but with the sheer volume, I am sure the numbers are equally overwhelming. Cf. Fearon, James D. and David D. Laitin. "Ethnicity, Insurgency, and Civil War" *American Political Science Review*, vol. 97, no. 1 (2003): 75-90.

⁵⁹ The other conflicts consist of 2 extrastate wars and 2 interstate wars. Both of which involve the interstate wars of Afghanistan in 2001 and Iraq in 2003. The extrastate wars are now these ongoing insurgent conflicts in these countries. Cf. Correlates of War Project: <http://www.correlatesofwar.org/>. The data on the battle deaths of these conflicts are not available yet.

⁶⁰ Kant's views of the French Revolution are puzzling. In the *MM* and in other several essays, Kant rejects the permissibility of revolution because it destroys a condition of public right. Yet he appreciates with a "disinterested sympathy" bordering "closely on enthusiasm" the overthrow of the *ancien régime* (*An Old Question*, 7:85). The French Revolution provided Kant with an opportunity to test his hypothesis that the human race is morally progressing (*An Old Question*, 7:88-89). The possibility of founding a republican constitution reified his prior theoretical prescriptions for this type of government.

⁶¹ *An Old Question*, 7:91.

is, it seems, why Kant is so adamant about the necessity of a republican constitution. Republican constitutions are “the best among all others to banish war,”⁶² but the “problem of establishing a perfect civil constitution depends upon the problem of law-governed *external relations* among nations.”⁶³ Internal composition and civil strife do not threaten humanity’s moral progress, and it seems that Kant does not address these factors.

Yet, the simple fact remains that civil war, not external or interstate war is the greatest threat. Ignoring the implications that the majority of the world’s conflicts are internal and continuing to espouse a doctrine of nonintervention, despite the staggering numbers of deaths from these conflicts, threatens to undermine not only Kant’s writings on the importance of humanity, but his theory’s applicability to present day affairs. While many of Kant’s ideas are timeless (e.g., humanity as the highest value that guides and limits our actions or the need for laws to regulate behavior and protect our rights), others are now antique. The political landscape changes, as Kant thought it would, but such change does not necessarily follow his prediction of peaceful republican constitutions emerging all over the globe. To be sure, external threats still persist, but internal war is equally, or more, threatening to the moral progress of humanity.⁶⁴ Internal war threatens not only the lives of the people but also the structure of the domestic and (future) international juridical system, threatening citizens with degeneration to a state of

⁶² Ibid, 7:91.

⁶³ *UH*, 8:24 (*italics added*).

⁶⁴ A rough estimate of the major wars fought between 1648 and 1804, roughly from the emergence of the Westphalian system to Kant’s death, shows that external threats of war were higher than internal threats. There are roughly 27 major wars during this period, spanning wars of succession, colonization, and conquest. There were also roughly 17 revolts during this period, and 4 revolutions. While the total number of battle deaths is not available, there are rough estimates, and these put deaths from external conflicts above those of internal revolts or revolutions. Cf. Black, Jeremy. *The Origins of War in Early Modern Europe* (John Donald Publishers, 1987), and Bercé, Yves-Marie. *Revolt and Revolution in Early Modern Europe* (St. Martin’s Press, 1987).

nature. Therefore, if we are to apply Kant's writings today, we must take account of these empirical facts; we must not only relax some of Kant's strict maxims on nonintervention and coercion between states but revisit his arguments laid out in his theory of private right.

II. An International SME

It is my contention that the international system is in a SME analogous to the one witnessed in the individual state of nature. Because Kant's assumptions about the protection of basic rights by the domestic state are incorrect, the system he has built upon them cannot fully maintain itself. In other words, we should not agree with Kant that what is morally required is "only a voluntary coalition of different states which can be dissolved at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved." This is because Kant's argument is based on an empirical falsehood.⁶⁵ Kant's argument that a congress of states cannot have coercive powers and any act against a state would constitute an act of aggression (thus triggering legitimate reciprocal coercion, i.e., war) does not hold. Rather, the current international situation places us in a condition where the use of coercion to establish an institution to maintain basic human rights is permissible via Kant's permissive law.

If we return to Kant's arguments about private right, the presumption and three principles, and apply them to the international state of nature, then the picture is drastically different. First, while the *a priori* presumption of badness cannot hold for states (as it stands), we can justify an *a posteriori* conjecture of government self-

⁶⁵ *RL*, 6:351.

interest.⁶⁶ This conjecture is justified by empirical evidence that the majority of the world's governments do not uphold the basic human rights of their peoples and that such wrongdoing is the cause of most war related deaths. The conjecture posits that governments will for the most part not act justly toward other states or, when domestic juridical institutions are weak or absent, toward their own citizens. This conjecture, taken with the other three principles reveals an iSME.

Reason requires that justice be universal in form, and that humanity continually progress toward moral perfection. As I have previously argued, moral perfection is only gained via culture found in civil society.⁶⁷ Alas, many states are threatened with instability, failure, and collapse, and this failure and collapse threatens man's moral progress because it undercuts the means for moral progress. The problem is only compounded when one looks to international society for help. As the case of humanitarian intervention highlights, states are reluctant to undertake military campaigns for the sake of another state's people. The international "legal" system is a system of private right, and so each agent (state) is able to be judge in its own cause. International society as currently structured is not—indeed cannot be—sufficient for the type of moral progress Kant requires. Moral progress requires the gradual expansion from the individual and his community, to the state, to interstate relations and finally to a universal and cosmopolitan relation of peoples. This progress can be seen as a series of concentric circles, where the center is the individual and his community. Without the center, nothing further can be done. Thus, if domestic civil society fails to provide the conditions

⁶⁶ Self-Interest, which is very much related to man's evil, is what Kant poetically calls "the god of this world." *RB*, 6:161.

⁶⁷ Cf. *OE*, *RB*.

necessary for progress, such as securing basic rights, then we cannot rely on a larger society of states to do so.⁶⁸

An iSME is present in the current international system. The prevalence of genocide and/or gross crimes against humanity that warrant intervention shows the juridical failings of this system. Indeed, international society recognizes these acts as the gravest and most atrocious crimes that can be committed against persons, and of course it has attempted to secure the rights of peoples by instituting treaties and transnational courts. However, the treaties and courts have no teeth to them; coercive mechanisms (that can either force states to halt their crimes against their people or force other states to intervene in a target state) are lacking. Right entails the authorization to use coercion, and the current state of affairs in the international system prove that if there is to be Right, and not merely the power of the strongest, then formal juridical institutions with power must be present. That international society must found such institutions is a dictate of reason for the sake of not only rights protection, but moral progress as well.

One might object here that my focus on states is too narrow. Indeed, history proves that the agents who commit these crimes are people, not states, and so my focus should be on regulating the affairs of individuals on the world stage. I ought to be focused on a project like strengthening the International Criminal Court, as it is the main juridical institution in place to hold individuals accountable for these horrific crimes. While it is certainly true that governments are not the only actors, I wish to point out two facts. First, the judicial institution in place to try states (the International Court of Justice

⁶⁸ I cannot here examine the question of state building. However, suffice it to say that state building is very important to the Kantian enterprise, and is indeed its first step. The problem, however, is that most states violate the rights of their peoples, and what is required to end such violations is external coercion by capable agents, i.e. more powerful states.

(ICJ)) has historically tried few states for the crime of genocide. However, the ICJ only adjudicates disputes *between* states; thus prosecution in the ICJ presumes that a state is committing genocide against the people of another state. Unfortunately, the reality is that most states commit crimes of genocide *against their own people*, which makes prosecution in the ICJ impossible. The cases of genocide that were prosecuted in the ICJ were committed during or prior to the breakdown of the Former Republic of Yugoslavia, and all of these cases are problematic due to jurisdiction and treaty issues.⁶⁹ Second, the way around the prosecution and jurisdiction problem is to create an institution that can intervene in a state when these crimes are being committed, and then ensure that individuals and states are held accountable for the crimes they commit. What is required in this iSME is exactly what is required in a dSME: an institution that can legislate and enforce public (international) laws. This institution would supplement the already existing laws and transnational courts. However to make such changes, the actors on this stage must be states, not individuals.

While the international system may not appear to be in an iSME, it in fact is. The threat of civil breakdown and violence is all too near, and because the system lacks what Michael Walzer calls “the rivets of authority,” individual (and state) rights can only attain a provisional status.⁷⁰ States must exit the state of nature and establish an IHII to secure the basic rights of peoples everywhere. Justice cannot exist merely for the morally lucky; states are, therefore, authorized under a permissive law of practical reason to coerce other

⁶⁹ Cf. <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>.

⁷⁰ Walzer, op. cit., fn 4, p. 58. Recall also that Kant states:

“Since a state of nature among nations, like a state of nature among individual human beings is a condition that one ought to leave in order to enter into a lawful condition, before this happens any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely provisional. Only a universal association of states (analogous to that by which a people becomes a state) can rights come to hold conclusively and a true condition of peace come about.” *RL*, 6:350

states into joining an IHII. This is not to say that the IHII is the only solution. States could be coerced into something much broader, like a global state; however, as I will explain in greater detail in the next chapter, such coercion into a world state may prove inefficacious. For Kant, this “sure-to-fail” maxim would, therefore, be unjust. The maxim would not always be wrong, say if the conditions in the system improved, but presently such coercion would be bound to fail and create more strife. Thus, coercing states into a “surrogate” that can protect the rights of people everywhere is a necessary step. Much like individuals in a state of nature may coerce others into a domestic civil condition, states too can coerce other states into an analogous institution. As Kant notes, states have a right “to constrain each other to leave this condition of war and so form a constitution that will establish a lasting peace,” and if states have this right, they must also have a right to establish an institution that will enforce the international laws currently in place and monitor the behavior of states toward their peoples.⁷¹ Sovereignty is not sacrosanct—it is a privilege that is dependent upon the state fulfilling its obligations towards its people.⁷²

III. Objections

Some might object that my characterization of the international system as witnessing a SME is exaggerated. The critic might argue that international system is actually further along the juridical path than in Kant’s time, and that such progress puts us closer to, not further from, a condition of international public Right. This forward

⁷¹ *RL*, 6: 343

⁷² I am not here referring to popular sovereignty, but the Westphalian conception of sovereignty as control. Popular sovereignty is more sacrosanct, though in cases of gross human rights violations, genocide, etc., there was no popular sovereignty in the first place. If popular sovereignty existed, then these crimes most likely would not have been perpetrated on such a grand scale.

movement, therefore, makes a supreme moral emergency a distant possibility and not an immediate concern. Indeed, she might concede that idea that the international system is still a *statu naturali*, but this Hobbesian picture is losing accuracy because the society of states is governed by international law, adjudicated by international courts and tribunals, and executed, in a sense, by and the United Nations.

At first blush, these observations all hold true, although I attempt to show that all of these “juridical” mechanisms are not properly juridical in a Kantian sense. More importantly, states actually seem to subvert the “progress” they claim to have made, as they have perpetually refused to give up a certain degree of sovereignty and establish a transnational institution with universally coercive capabilities. Thus while the current international system is a society “compatible with rights,” it is still not a rightful society, and attempts at forming and implementing international institutions have done little to regulate state behavior and protect basic human rights.⁷³ The international system might be “governed” by international “law” (treaty and customary), and it may have transnational courts to adjudicate disputes between states or persons, but it does not “secure against violence” the rights of “human beings, peoples, and states.”⁷⁴ To answer the objection satisfactorily, then I must do two things: illustrate Kant’s necessary conditions to secure and protect rights, and examine whether international society’s attempts at laying down “laws” and creating transnational courts, satisfies the conditions of public international Right.

⁷³ *RL*, 6:306. Kant states “For in a state of nature, too, there can be societies compatible with rights (e.g. conjugal, paternal, domestic societies in general, as well as many others); but no law [...]”

⁷⁴ I do not want to engage fully the question of “what is law,” but I do want to engage what Kant would take as necessary for public Right. *RL*: 6:312.

Kant's notion of public Right is "the sum of the laws which need to be *promulgated generally* in order to bring about a rightful condition." In other words, it is a "system of laws for a people, that is a multitude of human beings, or for a multitude of peoples, which because they affect one another, need a rightful condition *under a will uniting them*."⁷⁵ What this ultimately means is that established and promulgated laws must be general in form (i.e., applicable to all people) and they must be backed by a "public lawful external" coercive mechanism (i.e., enforcement of the laws must not depend upon any one individual's strength). The question: "What makes Right", then, is not so simply answered as, "those rules set up by a legislator (or legislature)." For Kant, Right requires the legislative authority, but that authority must be "public" in the sense that "the people" authorize it to make laws (either through appointed or elected officials or direct voting).

However, the legislative authority is not the only requirement for public Right, there must be also an executive authority and a judicial authority. Kant claims that:

These [authorities] are like the three propositions in a practical syllogism: the major premise, which contains the law of that will; the minor premise, which contains the command to behave in accordance with the law, that is the principle of subsumption under the law; and the conclusion, which contains the verdict (sentence), what is laid down as right in the case at hand.

Right, for Kant, cannot really be public law without the other two authorities present.

Thus, international law, constituted by agreements (treaties) and generally observed rules (norms or *jus cogens*) does not satisfy the Kantian conditions of public Right.⁷⁶

⁷⁵ *RL*. 6:311 (italics added).

⁷⁶ Customary international law requires that there "must be widespread and uniform practice of states, and state must in engage in the practice out of a sense of legal obligation, [and] this second requirement, often referred to as *opinio juris*, is the central concept of customary international law" (Goldsmith & Posner, 23). Treaty law, either bilateral or multilateral is a "easier case" for international law scholars because the rules of the treaty are made public and the parties to the treaty explicitly know the terms of agreement. However, this is not to say that states commit or comply with treaties more often than not. There is a large literature

Even though transnational courts are present in the international system, they lack the Kantian requirement to settle “irreversible” decisions.⁷⁷ Kant maintains that the office of the judiciary must be able to “apply the law, and to render to each what is his with the help of the executive authority,” by pronouncing final judgments that cannot be appealed.⁷⁸ Yet, the transnational courts in place do not fulfill this requirement for two reasons: noncompulsory jurisdiction and the lack of an enforcement mechanism (i.e., “the help of the executive”).

The first issue, noncompulsory jurisdiction, is no surprise.⁷⁹ The ICJ is the principal judicial organ of the United Nations (UN), where states, and only states, can bring suit against other states. While all members of the UN are parties to the Court’s

on the reasons for state commitment and compliance that falls into roughly two schools of thought: rational choice (interests) and versus liberal-ideational (norms) as reason for compliance. The first school of thought, represented by those like Eric Posner and Jack Goldsmith, argue that states commit or comply with treaties out of their own self-interest (coincidence of interests) or fear of retaliation (coercion). The second school of thought, represented by those like Harold Koh and Andrew Moravcsik, argue that states commit and comply with treaties because of the power of the ideas, where “states internalize norms and act in accordance with them because they understand them to be correct or appropriate” (Hathaway, 481.) Oona Hathaway attempts to argue for a middle ground between the two sides, in her “integrated theory” that places emphasis on domestic regime type, domestic actors, self-interest and structural consequences. Without explicitly arguing or acknowledging it, Hathaway is describing (or arguing for) a theory of international law based on strategic interaction taking place on the domestic and international levels. The interaction on the domestic level is between the government and different political actors, and the interaction on the international level is between states. The hallmark of a strategic interaction is that an agent conditions his choice on the expected reaction of another agent. Hathaway’s invocation of the idea of “collateral consequences” that “arise when domestic and transnational actors premise their actions toward a state on the state’s decision to accept or reject international legal rules” is, therefore, a strategic interaction (Hathaway, 502). Cf. Hathaway, Oona. “Between Power and Principles: An Integrated Theory of International Law” *University of Chicago Law Review* Vol. 72 (2005): 469-536. For arguments on the interest based model see: Goldsmith, Jack and Eric Posner. *The Limits of International Law* (Oxford University Press, 2005). Posner, Eric. *The Perils of Global Legalism* (University of Chicago Press, 2009). Krasner, Stephen. “Structural Causes and Regime Consequences: Regimes as Intervening Variables” in Stephen D. Krasner, ed., *International Regimes* 1,2 (Cornell University Press, 1983). For arguments on the liberal-ideational side see: Koh, Harold. “Why Do Nations Obey International Law?” *Yale Law Journal*, Vol. 106 (1997): 2599. Moravcsik, Andrew. “Taking Preferences Seriously: A Liberal theory of International Politics” *International Organization*, Vol. 51 (1997): 513.

⁷⁷ *RL*, 6:316.

⁷⁸ *RL*, 6:317.

⁷⁹ I do not here deal with any of the regional courts, such as the Inter-American Court on Human Rights, the European Court of Human Rights, the European Court of Justice or specific treaty adjudication bodies such as GATT and the WTO. Regional or topical courts do not satisfy the universal or transnational requirement necessary for Kant, and so they are not necessary for my argument.

statute (by function of signing the Charter), jurisdiction is not compulsory.⁸⁰ Simply stated, only states that expressly recognize the jurisdiction of the ICJ can: 1) bring suits or be sued; 2) have judgments enforced against them (typically by the UN Security Council). One of the oft-cited cases involving jurisdictional problems is with the *Avena* case (*Mexico v. the United States of America*), where the United States did not inform the Mexican consulate that the accused (Ernesto Medellín Rojas, et. al.) was arrested, tried, and convicted. The Mexican Consulate has a right under the Vienna Convention (signed by both Mexico and the US) to review the case, visit and correspond with the accused and appoint representation. In 2003, Mexico brought suit against the US in the ICJ, but the US continued to deny the jurisdiction of the Court even in the face of a judgment against the US. The end result was that the US ignored the judgment by the ICJ, and in 2008 executed Medellín. As of 2009, Mexico again brought the issue before the ICJ for interpretation. Ultimately, the ICJ, while acknowledging that the US “failed to discharge its obligation” to Mexico (upholding the 2004 judgment), dismissed the further claims by Mexico that the US violated the 2004 judgment on the grounds of lack of jurisdiction.⁸¹

⁸⁰ The ICJ’s jurisdiction is limited to three areas: all parties to a dispute make a special agreement to bring their dispute to the ICJ; states include a “jurisdiction clause” in a treaty, where one party to the treaty can bring suit against the other(s); where states have explicitly recognized the jurisdiction of the ICJ and can then bring claims against only those other states who have also expressly declared they also recognize the ICJ (otherwise known as reciprocal declaration jurisdiction). International Court of Justice: <http://www.icj-cij.org/court/index.php?p1=1&p2=6> .

⁸¹ The US response to Mexico was a loophole. Mexico requested interpretation by the ICJ under Article 60, which states that if there is a dispute between parties over the meaning and scope of the judgment then whatever the Court decides is “final and without appeal”. The US replied that it agreed with the judgment, and was aware of its obligation to comply with the judgment, though the US differed on its view of how the obligation was to be discharged. The Court, therefore, claimed it lacked jurisdiction under Article 60 to interpret the judgment of 2004 because the US agreed that it had an obligation; though, of course, the US patently failed to uphold the judgment of 2004 by executing Mr. Medellín. The take-home message in this case is that a party to a case can easily flout the judgment of the Court by first claiming that domestic rule of law does not allow implementation; second by withdrawing from any treaty that subjects a state to adjudication; and third by using loop-holes in the ICJ’s constitutive articles. Thus, an already tenuous and fragile area of jurisdiction is weakened even further. Cf. <http://www.icj-cij.org/docket/files/139/14939.pdf?PHPSESSID=81340a17293631037a58c57156015db8>

The second transnational court, the ICC, created by the Rome Statutes, is separate from the UN, and it prosecutes crimes (listed under the Rome Statutes) committed by individuals. States and individual agents (persons or organizations) can call attention to situations of possible Rome Statutes violations, though the procedures and evidentiary proof appears to be different in each case.⁸² In the event that a state or the UN refers a *situation* to the ICJ, the ICJ *is to proceed with investigation* unless there is no reasonable basis under the Rome Statutes. If an individual or a nongovernmental organization (NGO) receives a *communication*, the ICJ *is not to initiate an investigation* unless there is a reasonable basis under the Rome Statutes. It appears that individuals and NGOs carry a heavier burden of proof when submitting communications to the Office of the Prosecutor. Again, the Court's jurisdiction is noncompulsory.⁸³ As of 2009, 110 countries (out of 196) are party to the ICC and accept its jurisdiction.

While it appears that a good majority of countries acknowledge the ICC, unfortunately three of the largest and most powerful do not: the United States, China, and the Russian Federation. It also happens that these three countries make up the majority of the Permanent-Five members on the United Nations Security Council (UNSC). The obvious result is that if a person is to be charged with violating the Rome Statutes, *irrespective of the State's jurisdictional acceptance or the place of the crime*, then the charge can only come via a recommendation of the UNSC. However, with three of the Permanent-Five currently refusing to acknowledge jurisdiction, it is possible, indeed

⁸² International Criminal Court: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referrals+and+communications/> .

⁸³ The three areas of jurisdiction include: "the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court; the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; [or] the United Nations Security Council has referred the situation to the Prosecutor; irrespective of nationality of the accused or the location of the crime." International Criminal Court: Jurisdiction and Admissibility <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm> .

probable, that if such a suit were brought against a national of one of these countries, the UN would not, or could not, submit a referral.

More subversive still is the practice of the Bilateral Immunity Agreement (BIA). A BIA is an agreement that the United States (US) makes with another country where: the US and the other country agree not to surrender nationals of either country to the ICC; where the other country agrees not to surrender US nationals to the ICC; where the country will continue to receive US foreign aid as long as the country upholds the BIA with the US; or cases that are “unconfirmed” where the agreement has not been disclosed by the US State Department and thus the outlines of the agreement are unknown.⁸⁴ The US now has BIAs with 98 signatories to the ICC, most of which are repeated human rights violators.⁸⁵ This tactic, it is claimed, “is an attempt to undermine the ICC’s universalistic role.”⁸⁶

Aside from the two largest transnational courts, some, like Eyal Bevenisti, argue that domestic courts endeavor to form an “international judicial alliance” where “[domestic] judges can force governments of strong as well as weak countries to adhere to a set of international values or constitutional norms that otherwise would not receive universal consent.”⁸⁷ However, scholars such as Posner and Goldstein argue that such a notion is “certainly odd and has no known adherents” in practice.⁸⁸ What is of interest to us is whether the current structures of ICC, the ICJ, or even a hypothetical international

⁸⁴ http://www.amicc.org/usinfo/administration_policy_BIAs.html#countries.

⁸⁵ There are a total of 102 countries and “nonstate parties” listed as having a BIA with the US. I count only those countries that are listed as having a confirmed agreement in place. Moreover, some of the countries referred to above include the notoriously poor human rights record-holders of: Angola, Afghanistan, the Democratic Republic of Congo, the Republic of Congo, Cambodia, Burundi, Bosnia and Herzegovina, Sierra Leone, Rwanda, Liberia, East-Timor (Timor-Leste) Pakistan and Yemen.

⁸⁶ Posner, Eric. *The Perils of Global Legalism* (University of Chicago Press, 2009): 89.

⁸⁷ Ibid, p. 120. Posner cites Bevenisti, Eyal. “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts” 102 Amer. J. Int’l Law 241 (2008).

⁸⁸ Ibid, 121.

judicial alliance can satisfy (or come close to satisfying) Kant's requirement for public Right. The answer is that they do not.

These institutions, real or hypothetical, are the exact opposite of what Kant requires for a judicial system. For Kant, "the moral person that administers justice is a court (*forum*) and its administration of justice is a judgment (*iudicium*)."⁸⁹ Judgments, in Kant's terminology are publically "laid down as right,"⁹⁰ that is, Kant's court holds jurisdiction over all parties in society, and this jurisdiction is coupled with the capacity to coerce parties to fulfill its judgment. Moreover, the authority of the Kantian judiciary is to be held with the people who appoint "administrators" such as judges to "apply the law, and to render to each what is his with the help of the executive authority."⁹¹ International society, with all questions of international law aside, lacks the requisite features of a "people" establishing a court with universal jurisdiction and an executive to administer or enforce judgments.

While individual states are those "moral persons" that make up the society of states, this society is not properly called "a people." The society of states is merely a collection of agents each pursuing its own purposes, where sometimes those purposes have a "coincidence of interest" and sometimes not.⁹² For Kant, a public condition of Right can only be established through a "will putting everyone under obligation, hence only a

⁸⁹ *RL*, 6:297.

⁹⁰ *RL*, 6:297.

⁹¹ *RL*, 6:317.

⁹² The terminology of "coincidence of interest" is Posner's. He claims that states solve coordination problems not because they are pursuing a joint purpose (or what Nardin would call a purposive association), but because there is a coincidence of individual interests, not a commitment to something like a scheme of rules, coming together, and so states form organizations to help them better pursue their individual interests (or what Nardin would call a practical association). Cf. Nardin, Terry. *Law, Morality, and Relations of States* (Princeton University Press, 1983).

collective general (common) and powerful will,” in other words, an omnilateral will.⁹³ It does not appear that the international society of states fits this description.

One might object that since the majority of states have signed the UN Charter, and the UN established the ICJ, there is, therefore, consensus by the society of states to place authority in this judicial body. Unfortunately, as we saw before, this is not the case. Many states refuse to recognize the jurisdiction of the ICJ (when brought to suit), and thus, they do not recognize its authority to pronounce supreme and “irreversible” judgments. One might also counter that the ICC also came into existence by the voluntary act of a majority of states, and so this body, at least, has the authority and jurisdiction required under a Kantian framework. Yet again, this too is wishful thinking. There is no mandatory jurisdiction for states, and even more problematic, states (such as the US) have figured out a way, through BIAs, to side-step jurisdiction in states that have recognized the jurisdiction and authority of the ICC. Ultimately, despite the diplomatic maneuvering, issuing of statements, signing of treaties or the meetings of heads of state fail to recognize or admit the existence of the elephant in the room: a refusal to limit state sovereignty and give coercive power to a transnational institution. Thus, I agree with Posner that the proliferation of ineffective transnational judicial bodies “is a sign of the weakness of the international system, not its strength.”⁹⁴ States continue to create judicial bodies, but “then find they cannot control them,” and “rather than submitting to their jurisdiction, they set up even more courts or more arbitration panels –ones they think the *can* control.”⁹⁵

⁹³ *RL*: 6:256; 6:259-260.

⁹⁴ Posner, *op. cit.*, fn 86, p. 174.

⁹⁵ *Ibid*, 174 (*italics in original*).

Finally, the oft-cited lack of coercive power is the largest and most problematic factor for international Right. The lack of a centralized, public, and authoritative coercive mechanism means that any attempt at founding an international juridical condition is doomed to fail on Kantian grounds. As “Right and the authorization to use coercion therefore mean one and the same thing,” and authorization must come from a “collective general (common) and powerful will,” international society fails to be a genuine condition of public Right.

A critic might object that public and centralized enforcement is not necessary for international law to be “really law”⁹⁶, as “international law is enforceable in the same way that domestic law is enforceable,” namely by some sort of “legally imposed sanction.”⁹⁷ The sanction “remove[s] one or more of [a state’s] entitlements,” and that entitlement is a “legally recognized right.”⁹⁸ While this argument from private enforcement might appeal to many international lawyers, it is unpersuasive to a Kantian because private enforcement of public laws is not sufficient for the rule of law. From this standpoint, any coercion will work to establish international law as law, as it is still enforced, though privately.

According to Kant’s criteria, public Right, that is public law, must be enforced by an authoritative and *external* mechanism. Individual enforcement by states is an internal mechanism and such enforcement is dependent on a state’s strength (much like the individual’s strength in a state of nature); Right, in this situation, always amounts to might. Moreover, the argument that state practice has evolved to a point where states

⁹⁶ The German word “Recht” would also fall under this usage of “law.” For the question here is not merely about a law (*Gesetz*) but the rule of law (*Recht*).

⁹⁷ D’Amato, Anthony. “Is International Law Really ‘Law’” *Northwestern University Law Review*, Vol. 79 (1985):1303-1304.

⁹⁸ *Ibid*, 1304.

now have entitlements obscures the distinction between society and civil society. For Kant, agents in society can be guided by a set of primary rules (natural right), but these are not legal in character.⁹⁹ What makes these rules legal is their public determination, which are both externally enforced and arbitrated by a neutral judge. The international system cannot be called a condition of public right because agents privately enforce their private judgments with regard to their rights.

All of this is not to say that the international system is not “rule governed”; indeed it is. There exist rules for the seas, rules governing trade, war, diplomacy, and a variety of other activities. There also exist international institutions, where states come together to decide on existing rules and implement new ones. Though, in most instances, when states actually make agreements (either multi or bilaterally), states often would have either complied with those rules anyway because it is already in states’ self-interest, or states have no intention of complying with the rules and sign a treaty for some other reason and then defect.¹⁰⁰ There is no external way to make states comply with the rules, and so the state of international affairs fails to be a condition of Right and law, as Kant understands it.

Indeed, I am most concerned here with arguing that the international system is currently witnessing an iSME. This is not to say, however, that many individuals in many parts of the world are not often threatened with violence and complete lawlessness. In these situations, it makes sense to say that those societies lack a condition of public domestic Right, and that they find themselves in a dSME. Their situation is, in a sense,

⁹⁹ *RL*, 6:237. Kant states that Right can be divided into two: “natural right, which rests only on *a priori* principles, and positive (statutory) right, which proceeds from the will of the legislator.”

¹⁰⁰ Cf. Goldsmith, Jack and Eric Posner. *The Limits of International Law* (Oxford University Press, 2005). Posner, Eric. *The Perils of Global Legalism* (University of Chicago Press, 2009), especially Part 2 Chapter 3.

morally compounded. On the one hand these individuals must create a functioning domestic civil society, while on the other hand they too must work towards an international civil society. Moreover, in these situations, humanitarian intervention may prove urgent. If individuals cannot rise up to found their own functioning domestic civil society and the government that is formally in place is violating their rights, then the only redress is to look to outside help. However, if such help is to be reliable and protect individual rights generally and sufficiently, more is required than unenforceable agreements and impotent juridical institutions. For, as it stands now, international justice is nothing more than a mere appearance. Especially given the fact that when the rubber hits the road, the international system still permits a state to “prosecute its rights against another state, namely by its own *force*, when it believes it has been wronged by the other state.”¹⁰¹

Conclusion:

In this chapter, I have argued that the international system is in a SME analogous to the one witnessed in the state of nature between individuals. The conditions that trigger this iSME, though, are not purely *a priori*; the presumption is based on empirical data, and so is an *a posteriori* conjecture. This conjecture is, therefore, subject to change if states change their behavior. The international state of nature appears more like what Alexander Wendt believes it to be: “what states make of it.”¹⁰² Because states are artificial moral agents, they have no nature to justify a presumption of evil. We must look, therefore, to states’ self-interest to make judgments about their character. It is

¹⁰¹ *RL*, 6:346 (italics in original).

¹⁰² Wendt, Alexander. “Anarchy is What States Make of It.” *International Organization*, Vol. 46, no.2 (1992): 391-425.

completely possible that a state's self-interest, properly formulated, could be benevolent. This benevolence would occur much like Kant thought: when a state's interests coincide with its people's. Unfortunately, the current state system does not seem to mirror this republican ideal. Too often states' interests are separate from their peoples. Due to this opposition, the current evidence points to a conjecture that, for the most part, states' self-interests tend to be malevolent towards their peoples. This fact, together with the other conditions found in a dSME, triggers an iSME. Since states find themselves in an iSME. Therefore, they are authorized under a permissive law of practical reason to use coercion to force other states into an institution that will secure their and their people's rights. They are "permitted to constrain everyone else...to enter along with [them] into a civil constitution."¹⁰³

While many will not agree with this argument, or perhaps become overwhelmed with waves of laughter, this is ultimately what justice requires. As Kant reminds us:

The Platonic Republic has become proverbial as an example—and a striking one—of imaginary perfection, such as can exist only in the brain of the idle thinker [...] But we should do better to follow up this thought, and, where this admirable thinker leaves us without assistance, employ new efforts to place it in clearer light, rather than carelessly fling it aside as useless, under the very miserable and pernicious pretext of impracticability.¹⁰⁴

In this case justice cannot be anything more than provisional, unless an institution, that monitors state behavior and protects the lives of people everywhere comes into existence. Structuring this institution, an International Humanitarian Intervention Institution, is the task for the next chapter.

¹⁰³ *RL*, 6:257.

¹⁰⁴ *CPR*, 3:247.

Chapter 5:

Provisional to Perfect: Institutionalizing a Duty of Humanitarian Intervention

It is true of course, that we have no judicial precedent for the Charter. But international law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law. International law is not capable of development by the normal processes of legislation, for there is no continuing international legislative authority. Innovations and revisions in international law are brought about by the action of governments such as those I have cited, designed to meet a change in circumstances. It grows, as did the common law, through decisions reached from time to time in adapting settled principles to new situations. The fact is that when the law evolves by the case method, as did the common law and as international law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. – Robert H. Jackson¹

Chief Prosecutor for the Nuremberg trials, Robert Jackson, uttered these words to legitimize the Tribunal's, and his, authority to prosecute the military and political leaders of the Nazi regime. Jackson's strategy was to work within existing international law, claiming that the Nazi regime was a criminal organization that planned to break the laws of war and the law prohibiting aggression. Where his arguments pushed the limits of international law was in his inclusion of "crimes against humanity" in the charges. Prosecuting the Nazi regime for crimes committed against people in its own sovereign territory changed the face of international legal history. Such changes, advanced "at the expense of those who wrongly guessed the law," continue still. However, it is not only that international law evolves at the expense of those who guess wrongly and thus break

¹ Jackson, Robert H., Chief U.S. Prosecutor to the Nuremberg Trials, Opening Statement to the Tribunal, 11.21.1945. <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/jackson.html>

it; it also evolves at the expense of victims such as the Jews in the Holocaust, the Tutsi in Rwanda or the Albanians in Kosovo.

From the Nuremberg trials, the famous “never again” slogan arose. Nations claimed they could no longer stand idly by while mass numbers of people were brutally slaughtered. Indeed, nations signed international agreements denouncing crimes against humanity, genocide and gross violations of human rights. Some might say this attitude towards rights violations became the norm. Yet, it seems that much of the progress was made from 1945-1948.² While many states continue to preach from the pulpit of human rights, little is done to move international law forward to secure those rights.³

Throughout this dissertation, I have argued that a duty of humanitarian intervention (HI) must be institutionalized. Institutionalization is required because it is a duty of justice in a state of nature, which renders it provisional, and provisional duties must become peremptory. To do this, we must formulate the requirements, not only of an International Humanitarian Intervention Institution (IHII), but also of the reforms in the current structure of international legal organizations. I must note at the outset that the IHII will not solve all problems of international justice, and there will still be difficulties governing the practice of HI. This is due to the fact that the IHII and the reformed international bodies will still function in a state of nature, that is, a condition of private right. Though my suggestions will not render the international system a state of public right, these reforms can ameliorate the effects of private right *for the matter of HI* by mirroring, as best as possible, the juridical requirements of public right.

² This is the period when the Nuremberg trials took place, the United Nations was created, the UN Declaration on Human Rights and the Genocide Convention were formulated and signed.

³ Indeed, the formation of the International Criminal Court is a great step, but as I will address in this chapter, there are significant problems that must be addressed if it is to become an institution that has the capacity to secure rights.

My argument for the IHII is presented in two sections. In the first section, I argue that an IHII should be established to promulgate public rules to govern the practice of HI, thereby solving the ubiquitous problem of indeterminacy. The institution should have the ability to monitor human rights violations (in all countries) that have the potential to trigger a humanitarian crisis, and it should provide a centralized information network to the United Nations (UN) and society of states. However, the IHII must be an autonomous institution from the UN. The IHII ought to mirror the position of National Human Rights Institutions (NHRI) at the international level. Once in place, the UN should execute the IHII's rules, and when individuals or states do not comply, a strengthened International Criminal Court or International Court of Justice should adjudicate controversies about noncompliant individuals or states. Moreover, I suggest that to execute effectively the rules of the IHII, the UN ought to have a rapid reaction volunteer military force. In the second section, I explain how such reforms can satisfy Kant's requirements of protective, commutative and distributive justice, thereby rendering a provisional duty of HI preemptory.

I. Governing the Practice of Humanitarian Intervention

*Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have "leave to live by no man's leave, underneath the law."*⁴

In Chapter Two, I outlined the current international political trend of moving away from discussions of humanitarian military intervention and toward discussions of the

⁴ Jackson, Robert H., Chief U.S. Prosecutor to the Nuremberg Trials, Opening Statement to the Tribunal, 11.21.1945. <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/jackson.html>

“Responsibility to Protect” (R2P). While R2P is a broader concept than military intervention, the most contentious issue within R2P’s scope is the use of force. It is for this reason that much of the debate about military intervention persists and any steps taken towards implementing R2P amount to little more than legal prestidigitation. In other words, most states no longer question “whether international actors should intervene in one way or another, but how.”⁵ The “how” is the sticky wicket.

Since the UN’s adoption of R2P (and its subsequent lack of institutionalization), states have inconsistently, and perhaps arbitrarily, applied the concept. Such haphazard application worries some that R2P will become little more than a “Trojan Horse,” used to justify any state’s foreign policy, while others suppose that attempts at broad application will ultimately yield further coherence on the concept and thus limit misapplication.⁶ Despite this difference in beliefs, any attempt to generate public rules governing the practice of R2P, and military intervention in particular, has received little support.

This is not to say that supporters of R2P do not attempt institutionalization. In his most recent report on R2P, Secretary General Ban Ki-moon advocates for: sharing information between UN sub-agencies; viewing information gathered by UN bodies through an “R2P lens”; and helping the UN to generate further “capacities” for timely and effective responses in R2P situations.⁷ Ban’s report is directed mostly at what he calls the “first pillar” of R2P, namely the prevention stage. Much of Ban’s suggested changes are

⁵ Bellamy, Alex. “The Responsibility to Protect: Five Years On” *Ethics and International Affairs*, Vol. 24, no. 2 (2010): 155.

⁶ Alex Bellamy argues that the application of R2P to cases that fall outside of its scope (namely the 2008 unilateral military intervention in Georgia and the 2008 cyclone disaster in Myanmar) help to more clearly demarcate the lines of the principle. Unfortunately, while some may argue that Russia’s or the France’s attempts to invoke R2P are not justified, states still attempt to legitimize their action within its terms. That the actions were not seen as legitimate under this principle does not mean that states will not attempt to use it. Cf. Bellamy, op. cit., fn 5, p. 152.

⁷ A/64/864

bureaucratic and not necessarily politically contentious.⁸ The only change that may seem disputatious is Ban's demand to have timely policy options delivered to him via his Special Advisers (the Special Adviser to the Secretary General for the Prevention of Genocide, Francis Deng, and the Special Adviser to the Secretary General for the conceptual, political and institutional development of R2P, Edward Luck) and Under-Secretaries-General. Ban states:

In such cases, I will ask the Special Advisors [Deng and Luck] to convene an urgent meeting of key Under-Secretaries-General to identify a range of multilateral policy options, whether the United Nations or by Chapter VII regional arrangements, for preventing such mass crimes and for protecting populations. Such an emergency meeting will be prepared through a working level process convened by the Special Advisers, and the results, including the pros and cons of each option, will be reported promptly to me, or should I choose, to the Policy Committee.⁹

Ban understands that “early warning does not always produce early action”; however, “early action is highly unlikely without early warning.”¹⁰

These small steps are encouraging. Yet, these are *small* steps, and by no means indicative of the UN's attitude on the matter. One of the main problems is that the General Assembly (GA) is playing a stalling game. On the one hand, the GA continues to push back scheduled debates on implementation of R2P. On the other hand, the GA simultaneously claims that any further implementation of R2P can only occur after such debates. An important issue to be discussed is Ban's desire to create a joint office of the Special Advisers on Genocide and R2P. Yet, such a merger could only take place after the GA has had a chance to read the Secretary General's reports on R2P and come to

⁸ Ban Ki-moon claims that institutionalizing the responsibility to protect requires 3 pillars: prevention, domestic capacity building, and reaction when states are either unable or unwilling to protect their domestic populations. Cf: A/63/677. These “three pillars” correspond to the ICISS' report that R2P work to prevent, react and rebuild.

⁹ A/64/864, p. 7.

¹⁰ Ibid, 8.

consensus.¹¹ Unfortunately it seems to be that the only actors in the UN who desire change are Ban, Deng and Luck, as the organization continues to drag its feet or blatantly stonewall any progress.¹²

While political will is, of course, the solution to almost any international political problem, many of the difficulties associated with R2P, and HI more specifically, are due to the duty's current lack of institutionalization. In other words, states recognize they must do something to protect basic human rights of all peoples, but how, when, where and whether they can be coerced to do so is still unclear. Three problems stand out as indicating that international agents are often acting according to their own conceptions of what is right, i.e. exercising private right. First, there is the UN Security Council's refusal (or inability) to come to agreement about military intervention (as in the case of Darfur). Second, there is the attempt of various states to justify their actions under the auspices of an undefined and noninstitutionalized principle of R2P (as in the case of Georgia). Finally, there is the abject failure of the UN and states to uphold the R2P principle at all (as in the case of Somalia). This tendency to act on private right is underscored even further if one views R2P as "a political commitment to prevent and halt genocide and mass atrocities accompanied by a policy agenda in need of

¹¹ A/63/677, A/64/864, <http://www.responsibilitytoprotect.org/index.php/edward-luck-special-adviser-with-a-focus-on-the-responsibility-to-protect> . In a private discussion with the UN Special Rapporteur on the Freedom of Religion, he admitted that unofficially, all UN Special Rapporteurs have been given directives to begin viewing their work through an R2P "lens." Moreover, his opinion was that any sort of institutionalization that could happen would, and must, go through a process of what he called "soft institutionalization" whereby the norm would become part of UN language and precedent.

¹² For example, after member states deliberated on the post of Special Adviser for R2P, they refused to fund the post, citing that it was not necessary. Dr. Luck continues in this post without funding from the UN. Cf: <http://www.responsibilitytoprotect.org/index.php/edward-luck-special-adviser-with-a-focus-on-the-responsibility-to-protect> . On August 9, 2010 the GA held an "interactive dialogue" on the Secretary General's recent report on early warning assessment. While this may seem like progress, only 42 member states attended (out of 192), and amongst those 42 there were still detractors. Moreover the "interactive dialogue" merely "reaffirmed" its commitment to R2P and nothing else. Cf: <http://responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2914-general-assembly-debate-on-early-warning-assessment-and-the-responsibility-to-protect-> .

implementation.”¹³ Without implementation, states will continue to abuse (either purposefully or not) the concept and the problems of indeterminacy, and compliance, will never be overcome.

Institutionalizing a duty of HI requires a two-pronged approach: establishing an IHII and reforming several international organizations, namely the UN, the International Criminal Court (ICC) and the International Court of Justice (ICJ). In next section, I will suggest the principles for establishing an IHII, and in the following section, I will discuss the areas for reform.

A) An International Humanitarian Intervention Institution

Institutionalizing a duty to protect is, ultimately, a question of strengthening international law. As a duty of HI is a provisional juridical duty, it requires bolstering the *juridical*. Unfortunately, the normal avenue for creating international law, i.e. the time honored process of voluntarily creating bi- or multi-lateral treaties, is interfering with the institutionalization of R2P.¹⁴ Member states within the UN refuse, not only to make necessary reforms to the organization but even to debate such reforms. If we are to extricate ourselves from this quagmire, we must be more inventive with remaking the rules of international law formation. I suggest that what is required is not necessarily a breaking of international law, but a coercive maneuver within the existing avenues of

¹³ Bellamy op. cit., fn 5, p. 158.

¹⁴ Since R2P is such a broad concept, involving the prevention, capacity building and reaction, multiple policy approaches are required. Capacity building can be undertaken by existing UN programs. What is required for R2P to be truly institutionalized is implementation of a monitoring system (the early warning capacity for which that Ban Ki-moon is currently vying), and public rules governing the practice of HI. An IHII would govern the monitoring and early warning as well as reaction portions of R2P.

international law to establish an IHIL.¹⁵ As I argued in the previous chapter, the international system is not a system of public Right, and this fact, along with states' empirical histories of violating their citizens rights, places the current international system in a supreme moral emergency (SME). Such an SME permits agents, via Kant's permissive law, to use means that are otherwise impermissible to establish a condition of public Right.

Recalling the conclusion of Chapter Four, we know that any agent *capable* of coercing all others into a rightful condition is permitted to do so. Conceptually, this coercion could take any form: military intervention, "coercive diplomacy", monetary threats, revoking of aid packages, etc. Practically speaking, however, using such means to create an IHIL, and then coercing all agents to join it, would at best be ineffective, and at worst would provoke such harsh backlash that it could provoke total war.¹⁶ Few states would abide being strong-armed, as they would see this as a move to dominate global society. It appears, that in principle Kant's theory justifies a coercive course of action, but in practice considerations of prudence dictate. This result puts us back in the dilemma: coerce states or do nothing.

If we are to find a way around the horns of this dilemma, then it is through the current non-juridical status of international society and its accepted rules for regulating

¹⁵ I am using the word "law" here to signify current international rules. as I have noted in Chapter Four, the rules fall short of the Kantian requirements for "law", but they are still social rules that, for the most part, constrain states. Thus, I am not suggesting that one must break "law" to make law, like Allen Buchanan. I think one can stretch some of the existing rules or practices to enhance what is already there. Cf: Buchanan, Allen. "Reforming the International Law of Humanitarian Intervention" in J.L. Holzgrefe and Robert O. Keohane (eds.) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge, 2003): 130-174.

¹⁶ The efficacy of this move is still important to a Kantian. In the Second Appendix to *TPP*, Kant claims, that "all maxims that require publicity (in order not to fail of their end) agree with both politics and morality." Notice the "in order not to fail" clause. Earlier Kant in the Appendix Kant also claims that if one did publicize his maxim, and that undermined his purpose, it would be "wrong." Efficacy and Right therefore are linked. Cf. *TPP*, 8:384, 8:386.

behavior in this condition. Recall that the international system is not a fully rightful society. It is a society “compatible with rights.”¹⁷ States have and do make agreements among themselves, and the UN, a creation of such agreements, attempts to codify rules governing the use of force (in the UN Charter). I contend that we work through these commonly accepted rules,¹⁸ but not by a process of “soft institutionalization.”¹⁹

In her article “A Global State of Emergency or the Further Institutionalization of International Law: A Pluralist Approach,” Jean Cohen argues that the UN Security Council (SC) is illegitimately legislating for the international community. She claims that traditional means for law making in the international system, i.e. bi-or multi-lateral treaties, are being circumvented. Instead of seeking state consent, the SC issues resolutions that require member states to change their domestic legal systems to conform to whatever the SC deems appropriate for the “peace and security” of the international system. To wit, the SC is legislating for the world without member states’ express consent. Cohen cites Resolutions 1373, 1540, 1730, and 1566 (resolutions governing the fight against terrorism and the acquisition of weapons of mass destruction) as the main means by which the SC is operating. She argues that:

the Security Council arrogates to itself the competence to identify not particular, but general, permanent yet amorphous threats to the existing order, and responds by legislating for the

¹⁷ *RL*, 6:306. Indeed, Kant is quite explicit that *Recht* exists in society, though it is not public (*öffentlich*), and so states of nature are not “opposed to a social but to a civil condition” (*RL*, 6:242).

¹⁸ As the ICISS report notes: “The UN, whatever arguments may persist about the meaning and scope of various Charter provisions, is unquestionably the principal institution for building, consolidating and using the authority of the international community. It was set up to be the linchpin of order and stability, the framework within which members of the international system negotiated agreements on the rules of behavior and the legal norms of proper conduct in order to preserve the society of states. Thus simultaneously, the UN was to be the forum for mediating power relationships; for accomplishing political change that is held to be just and desirable by the international community; for promulgating new norms; and for conferring the stamp of collective legitimacy. (ICISS, p. 48).

¹⁹ Cf. footnote 11.

international community as a whole, thereby informally amending the Charter, usurping constituent authority, and radically changing the way international law is made and its function.²⁰

Cohen believes that by extending its scope of action and authority, the SC is illicitly amending the Charter, which can only be legitimately accomplished by a two-thirds vote in the GA and a unanimous vote by all five permanent members (P-5) in the SC.²¹ She argues that the SC is extending its powers beyond the scope originally defined in the Charter.²² The problem seems to be similar to one witnessed in the United States: the extension of the executive's powers under the auspices of "war powers."

While Cohen is quick to note that she believes such legislation is illegitimate and harmful to the protection of state sovereignty and international law, I do not think we should be as dismissive of this process. First, the SC claims it is working within its enumerated Chapter VII powers.²³ The argument runs something like this: when the Charter was created, member states did not foresee such global threats as are currently witnessed, and so the SC's exercise of its powers has expanded to meet such threats. Through an evolving order, the SC has extended its reach, but only to fulfill its mandate. Another line of argument for the SC's arrogation of legislative powers is roughly as follows: while the SC is stretching the boundaries of its powers, this is necessary to get member states to institutionalize in their domestic constitutions adequate mechanisms for

²⁰ Cohen, Jean. "A Global State of Emergency or the Further Institutionalization of International Law: A Pluralist Approach," *Constellations*, Vol. 15, no. 4 (2008): 461. Cohen's solution is to reform the UN Charter system to be more equal amongst its members. Moreover, she argues for what she calls "dualistic sovereignty" where states would alienate only particular rights to the UN, retaining all others. Unfortunately, I do not see how this notion of dualistic sovereignty is different than what is already enumerated in the Charter. The problem is not dueling sovereignties; the problem is that states, while signing onto the Charter and in principle alienating certain rights (such as the right to the use of force) have not in fact alienated such rights. They are still judges in their own causes.

²¹ Cf. Chapter XVII, Article 108. <http://www.un.org/en/documents/charter/chapter18.shtml>

²² Cohen, op. cit., fn 20, pp. 460-464.

²³ S/RES/1373 especially cites precedence in former SC resolutions, GA declarations and its Chapter VII powers. S/RES/1540 does not draw as heavily on precedent, but does attempt to legitimize its prescriptions by calling attention to previous meetings, treaties and agreements on arms control and demilitarization.

the protection of their governments and peoples.²⁴ Without the SC issuing resolutions under Chapter VII, its decisions would not be binding and states would be free to ignore them. Exercising power in this way is the only way to ensure universal compliance. The SC has merely found a way to make secure, as best as it can, rights of states and peoples; it has become an international Romulus, so that the international system can later be ruled by a Numa.²⁵

It is via this avenue of Chapter VII powers that I suggest the SC forms a subsidiary, yet not dependent, organ for the institutionalization of a duty of HI. It is important that this organization be authorized by, but autonomous from, the UN. One very fruitful avenue to pursue is to mirror an IHII on the model of domestic organizations known as National Human Rights Institutions (NHRI). NHRI were developed to occupy a “unique position...between government...and civil society.”²⁶ These institutions act as “middle grounds” between governments, peoples, and NGOs, while remaining separate from them all.²⁷

While NHRI receive funding from their domestic governments, they act as watchdogs, holding their governments accountable for human rights abuses. As Anne Smith notes about the independence and functions of NHRI:

²⁴ In S/RES/1735, the SC states: “*Stressing that terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States, and international and regional organizations to impede, impair, isolate, and incapacitate the terrorist threat*” (italics added).

²⁵ In the *Vigilantius LoE*, Kant states that all political constitutions were originated by coercion, and only later supplanted by law. He uses the examples of King Romulus to symbolize coercion, and Numa to symbolize the rule of law. While the analogy is not perfect, it still works. The SC is using its power to coerce other states into an agreement that they would otherwise have not have made to for the sake of protecting rights. Cf. *Vigilantius, LoE*, 27:514.

²⁶ Smith, Anne. “The Unique Position of National Human Rights Institutions: A Mixed Blessing?” *Human Rights Quarterly*, Vol. 26, No. 4, (2006): 904-946.

²⁷ There are also other non-human rights institutions that have existed with similar structures; these are typically referred to as “shadow states.”

The institution must be independent of government control, including financial control. It should have an appointment process providing political independence and a body composed of persons broadly representative of those bodies involved in the protection and promotion of human rights. It should have adequate funding to fulfill its functions effectively and be given as broad a mandate as possible in order for it to be able to promote and protect human rights. Other features include adequate powers, including the right to initiate investigations without referral from a higher authority or receipt of an individual complaint, the power to access information, prisons, and other places of detention, and the power to compel witnesses to testify. [...] [A]n institution should be able 'to perform its functions without interference or obstruction from any branch of government or public or private entity.'²⁸

Interestingly, NHRI are often created by domestic states to ensure the states' compliance with international human rights norms. This might seem somewhat paradoxical, as I am recommending the establishment of an international organization to monitor not only domestic governments but the UN as well. International organizations require monitoring of their compliance with international human rights norms too.

The IHII's functions are broad: it must promulgate public rules for the practice of HI; it must have the ability to monitor domestic governments to ensure compliance with those rules; and it must be able to act as an ombudsperson for the UN.²⁹ Most important for our purposes is that the IHII ought to take a legislative role, as public rules and procedures governing the practice of HI are ultimately required. Such rules ought to be formulated not by the GA, but by those "men who possess most wisdom to discern, and most virtue to pursue, the common good of the society;" in other words, by individuals who are experts and who can play advisory roles, such as Francis Deng and Edward Luck.³⁰ Because this body will ultimately promulgate rules for the practice of HI, which is a global practice, the institution ought to attempt to be representative of global society. Those involved in the promulgation of rules should "make no law which will not have its

²⁸ Smith, op. cit., fn 26, p. 913. The 1993 Paris Principles and the Office of the United Nations High Commissioner for Human Rights (OHCHR) Handbook mandate these guidelines.

²⁹ Hoffmann, Florian and Frédéric Mégret. "Fostering Human Rights Accountability: An Ombudsperson for the United Nations?" *Global Governance*, Vol. 11 (2005): 43-63.

³⁰ Madison, James. "Federalist Paper 57" in *Hamilton, Madison and Jay: The Federalist Papers*, (Ed.) Clinton Rossiter (Signet Classic, 2003): 348-353.

full operation on themselves and their friends, as well as on the great mass of the society.”³¹ Thus, the formation of rules should come out of a consensus reached by a community of global experts, and all states are equally subject to these laws.³²

Such rules could, of course, be lifted from the ICISS’ report “The Responsibility to Protect,” or one could use the Rome Statutes (as I have suggested) as a starting point.³³ How such rules are operationalized is open to debate. The crucial point is that an organization be established with the authority to promulgate such rules.

One might object here that the GA is exactly this kind of body, and so the formulation of rules governing the practice of HI ought to be done there. Much like legislative bodies throughout the world, the delegates to the GA come together to discuss issues, make recommendations and the like. Moreover, the GA is a smaller body than most legislatures, and so coming to consensus might be easier too. Unfortunately, there is one special difference between states’ legislatures and the GA: power. The GA is only empowered to “discuss” issues. It cannot issue any binding law on member states, but merely make recommendations. Moreover, it is more frequent that when the GA does make a recommendation or a resolution, these suggestions are the product of backdoor and nontransparent dealings. The world’s “legislative” body issues nonbinding

³¹ Madison, *op. cit.*, fn 30. Kant also has the same requirements; if a legislator attempts to pass a law that an entire people could not agree to, then this law is considered unjust. (*TP*, 8:299).

³² This is, in fact, exactly what the ICISS report attempted to do. The Commission sought to include experts from every region of the earth, and to provide rules and advice for “what is politically achievable in the world as we know it today.” (ICISS, viii).

³³ The 2005 World Summit Outcome Document adopts a broader just cause threshold than the ICISS report. The Outcome Document follows the Rome Statutes in requiring that states act to prevent and stop genocide, war crimes, ethnic cleansing and crimes against humanity (A/60/150, paragraph 138). However, the Outcome Document does not provide any suggestions for rules governing R2P, where the ICISS’ report does.

recommendations that don't even arise from a formal vote.³⁴ The GA is ultimately a powerless and nontransparent body in the UN.

If the UN is going to establish an institution to fulfill the international community's duty to protect, it must endow that institution with the authority to promulgate public binding rules. The SC's ability to pass resolutions that require a change in domestic legal regimes is an effective way to accomplish this. The SC is the only UN body that can "make law" for its member states. By passing a resolution that requires states to support such an institution, the international community is, in a sense, forced to be free. As the only international body with the authority and power to make such universal decisions, the SC is the most capable agent to do so. Yet capability here ultimately rests not merely on military prowess but authority.

B) The ICC and The ICJ

*Until it is possible to remove from the interested states the prerogative of resolving questions of law and transfer this permanently and universally to an impartial authority, all further steps along the road to world peace are to be excluded.*³⁵

As I argued in Chapter Four, the International Criminal Court (ICC) and the International Court of Justice (ICJ) lack universal jurisdiction and the ability to render legally binding decisions enforced by a public coercive mechanism. Hans Kelsen's suggestion, that international courts have mandatory jurisdiction, is not a new claim.

³⁴ The GA has a two-tier voting system. On matters pertaining to budget and the admission of new members, it requires a two-thirds majority vote. All other issues need only a simple majority. As Fasulo maintains, "if, as often happens, the leadership can establish a consensus on a given matter, a formal vote may not even be required." Fasulo, Linda. *An Insider's Guide to the UN* (Yale University Press, 2009): 63-64.

³⁵ Kelsen, Hans. *Peace Through Law* (1944), as cited in Daniele Archibugi "The Reform of the UN and Cosmopolitan Democracy: A Critical Review" *Journal of Peace Research*, Vol. 30, no. 3 (1993): 309.

Kelsen asked for this in 1944, and others since have followed suit.³⁶ As I have already addressed at length the reasons why the jurisdiction of these courts is insufficient, I will limit myself here to suggesting reforms to the ICC. The ICJ is a court constituted to settle contentious cases between states, and it is rare that a state commits gross crimes against humanity or genocide against citizens of another state. Thus, reforms to the ICJ are not as practically, legally or morally pressing.³⁷ Contrarily, states established the ICC specifically to prosecute these very crimes (genocide and crimes against humanity). I will then discuss some of the ways in which the ICC could be strengthened, according to Kantian principles, to give it the necessary “teeth.”

Besides the problem that the ICC ought to have compulsory and universal jurisdiction, one of the continued thorns in the side of the Court is the principle of complementarity (PoC). The PoC set out in Article 17 of the Rome Statute provides the principles according to which a case is admissible to the ICC. The PoC favors local prosecution; only when such prosecution has not occurred because a state is unwilling or unable to prosecute, or because prosecution proceedings are being used to “shield” a perpetrator, may the ICC prosecute.³⁸ The ICC is supposed to be a “court of last resort.”³⁹

³⁶ For an extensive bibliography of this literature, see Daniele Archibugi “The Reform of the UN and Cosmopolitan Democracy: A Critical Review” *Journal of Peace Research*, Vol. 30, no. 3 (1993): 309-311. For literature on the ICC, see: *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, ed. Steven C. Roach (Oxford University Press, 2009).

³⁷ If one were to require reforms, then universal and compulsory jurisdiction would be first amongst them. The way in which the Court could dovetail with the function of an IHII, would be the similar to that of the ICC, as a post-conflict judicial body to hold states accountable, via referrals from member states or the Security Council.

³⁸ Article 17 States: Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct

The PoC in theory is unproblematic. However, in practice, it is the source of much dispute. The three problems are: misapplication of the PoC; “interests of justice” arguments; and “shielding” proceedings. The first problem is the easiest to resolve. Darryl Robinson, drafter of the text that became Article 17, recently argues that most international law scholars completely ignore almost half of the text of the Article.⁴⁰ He explains that Article 17 is really a two-step test of inadmissibility of a case to the Court. The first step of the test is to assess if national proceedings are being prepared or ongoing, and then a second step is to assess the quality of those proceedings. Robinson notes that international lawyers and scholars ignore much of what the Article says, and they collapse all distinctions into what he calls the “slogan version,” where the Article is made to look as if “unable and unwilling” (one of the second-step tests) is the hallmark condition for ICC jurisdiction. Robinson’s plea is for international lawyers and scholars to pay closer attention to the wording of Article 17. By doing so, they will see that the role of the ICC is complementary to domestic legal institutions. In other words, sovereignty is not at risk because the ICC is a court of last resort: when there is effective

which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

<http://www.preventgenocide.org/law/icc/statute/part-a.htm#2>

³⁹ Branch, Adam. “Uganda’s Civil War and the Politics of Intervention” *Ethics and International Affairs*, Vol. 21, no. 2 (2007): 187.

⁴⁰ Robinson, Darryl. “The Mysterious Mysteriousness of Complementarity” *Criminal Law Forum*, Vol. 21 (2010): 67-102.

prosecution at the domestic level, the ICC has no need to intervene.

The second problem is more difficult. This problem concerns the “interests of justice,” which can be illustrated by the case of Uganda. Without going into much historical detail, the problem is roughly this: Uganda referred a case to the ICC to try members of the Lords Resistance Army (LRA), and after the ICC issued arrest warrants for the prosecution of several leaders of the LRA, Uganda began peace talks and attempted to sign peace treaties with the rebels.⁴¹ One of the stumbling blocks to peace has been the ICC’s refusal to dismiss the arrest warrants. Yet one of the stumbling blocks to justice has been Uganda’s refusal to support the ICC after Uganda requested the Court’s help. The question is whether the ICC should continue to prosecute members of the LRA despite local calls for amnesty. The underlying tension is not necessarily between peace and justice but between differing conceptions of justice. Some believe that the ICC should continue with prosecution, while others think that continuing prosecution is “a form of international law legalism; in other words, the pursuit of formalistic universal justice comes at the expense of meaningful local mechanisms of justice.”⁴² Yet, when the prosecutor has discretion to determine whether a case ought to be pursued “in the interests of justice,” it is not immediately clear whose conception of justice he ought to follow.⁴³ Robinson states that the drafters of the Rome Statue did not

⁴¹ Treaties were not signed because several of the leaders did not show to the signing ceremonies due to fear that they would be arrested and sent to the ICC for prosecution. For a very informative piece on the problems associated with the Ugandan situation, see: Greenawalt, Alexander K., “Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court” *Virginia Journal of International Law*, Vol. 50, no 1 (2009): 108-162.

⁴² Hayden, Patrick. “Political Evil, Cosmopolitan Realism, and the Normative Ambivalence of the International Criminal Court” in *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, ed. Steven C. Roach (Oxford University Press, 2009): 171. Hayden cites Branch (2007) as belonging to the former group and Allen (2005) and the Refugee Law Project (2005) as belonging to the latter.

⁴³ Rome Statue, Article 52(2)(c): “If, upon investigation, the Prosecutor concludes that there is not a

want to deal with the problem of dueling conceptions of justice and would rather leave it up to diplomats.⁴⁴ Unfortunately, diplomats are not addressing the case in Uganda, and the “creative ambiguity” left in the statute is only creating further problems.

The Kantian solution is to enforce the Rome Statute universally. Although it may be hard to accept, Uganda is a case of strict universalizability. Uganda referred the case to the ICC, and the ICC investigated and found that the LRA leaders committed war crimes and crimes against humanity. The ICC then issued arrest warrants for its leaders. Some might argue that Uganda’s referral was merely a political ploy, but whatever its motivations, as a sovereign member state it was within its rights to do so.⁴⁵ Uganda believed that utilizing the ICC was the best course of action, so it must then abide by its agreement and support the ICC. If the maxim of referring cases and then dropping them for reasons of political expediency were universalized, the ICC would be robbed of legitimacy and efficacy.

The final problem that ought to be addressed in reforming the ICC concerns “shielding” of perpetrators. Shielding goes far beyond a domestic government setting up sham prosecutions (thereby satisfying the first-step test of admissibility in Article 17). Shielding can also take the form of a state not complying with the ICC’s demands,⁴⁶ as well as the form of other member states failing to observe their obligations under the

sufficient basis for a prosecution because [...] prosecution is not in the interests of justice, taking into account all the circumstances, including gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”

⁴⁴ Robinson, Darryl, cited in Greenawalt, op. cit., fn 41, p. 134.

⁴⁵ For discussion on how Uganda used the ICC as a political tool, see: Branch, op. cit., fn 39. Member states may refer a situation to the ICC under Rome Statute Articles 13 and 14.

⁴⁶ The case with Sudan is slightly different. While Sudan is not a member state of the ICC, the UN Security Council recommended the case to the ICC in 2005 and due to this, Sudan is legally obliged to comply with ICC investigations, proceedings, etc. S/Res/1593. The prosecutor formally opened an investigation into the situation in Darfur in June 2005.

Rome Statutes.⁴⁷ The current case against Sudan's President Omar Hassan al-Bashir is representative of all of these problems. When a state as recalcitrant as Sudan flouts the rights of its people and its treaty obligations, it is an affront to the pursuit of justice. Unfortunately, the ICC can do nothing in response. The chief prosecutor can issue arrest warrants, or he can remind states of their R2P obligations, or even write op-ed columns in newspapers, but the fact remains that nothing can be done.⁴⁸ The Court lacks power to enforce its proceedings. The Court requires states to do the enforcing, because it is, after all:

[A] system of justice [that] exists within the system of states and is subject to all that this interstate system entails. The ICC depends on elements of this interstate system for its success, and to secure the cooperation of the states within this system, contains elements that reinforce the authority and sovereignty of the state [...] This is balanced against, and sometimes contradictory to, the universality to which the ICC aspires.⁴⁹

To remedy the problems of shielding (broadly construed) is to remedy the problems of rendering final and binding judgments capable of enforcement. The ICC must have the means available to execute arrest warrants and to hold states accountable for their noncompliance. In the next section, I argue that the first step to ensuring this kind of compliance is the establishment of a UN Rapid Reaction Force.

⁴⁷ In July 2010 President al-Bashir travelled from Sudan to Chad. Chad is a signatory state to the Rome Statutes, and so is obliged to arrest al-Bashir. Unfortunately, Chad has taken no action to do so. <http://www.bbc.co.uk/news/world-africa-10718399>

⁴⁸ Moreno-Ocampo, Luis "Now End This Darfur Denial" *The Guardian*. 07.15.2010. <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur>

⁴⁹ Eckert, Amy. "The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide" in *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, ed. Steven C. Roach (Oxford University Press, 2009): p. 219.

C) United Nations Rapid Reaction Force

Arguments for a volunteer UN Rapid Reaction Force (RRF) are not new.⁵⁰ Scholars continue to refine their arguments for such a standing army, debating the numbers required, the placement of such a force in the UN organization, who should provide financial, military and logistical resources, and how to limit abuses of and by an RRF by providing concurrent institutions of accountability. Many of the participants in the debate over HI agree on one thing: in the past, undertaking humanitarian interventions has been increasingly difficult because states do not want to put their soldiers in harm's way to save the lives of distant strangers. An RRF is required as a solution to the problem of member states' lack of "political will" to intervene. Such a force should be small and capable of rapid deployment anywhere in the world and sustainable for a short period of time.⁵¹ Moreover, proponents of an RRF claim that by making this force voluntary, and not subject to any one state, the RRF will be truly cosmopolitan, an army for the protection of *human* rights.⁵²

⁵⁰ Caney, Simon. *Justice Beyond Borders* (Oxford University Press, 2005); Conetta, C. and Knight C. Vital *Force: A Proposal for the Overhaul of the UN Peace Operations System and for the Creation of a UN Legion* (Commonwealth Institute, 1995); Held, David. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, 1995); Held, David. "Democracy and Globalization" in D. Archibugi, D. Held and M. Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Polity Press, 1998): 11-17; Kaysen Carl and George Rathjens. *Peace Operations by the United Nations: The Case for a Volunteer UN Military Force* (American Academy of Arts and Sciences, 1996); Kinloch-Pichat, Stephen. *A UN "Legion": Between Utopia and Reality* (Frank Cass, 2004); Langille, H.P. "Preventing Genocide: Time for a UN 911", *Globe and Mail*, (October 19, 2004); Pattison, James. "Humanitarian Intervention and a Cosmopolitan UN Force", *Journal of International Political Theory* Vol. 4, no. 1 (2008): 126-145; Pattison, James. *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford University Press, 2010); Smith, M. "Humanitarian Intervention: An Overview of the Ethical Issues", *Ethics and International Affairs*, Vol. 12 (1998): 63-79; Urquhart, Brian. "For a UN Volunteer Military Force", *New York Review of Books* (June 10, 1993); Woodhouse, T. and Ramsbotham, O. "Cosmopolitan Peacekeeping and the Globalisation of Security" *International Peacekeeping*, Vol. 12, no. 2 (2005): 139-156.

⁵¹ The arguments differ on whether it should be one year, several months, etc. The RRF, though, is supposed to be seen as a temporary force and not a permanent peacekeeping force.

⁵² Kinloch-Pichat op. cit., fn 50.

I do not want to repeat much of what has been said before, and discussing if there ought to be 200,000 or 600,000 troops is not of theoretical importance. What is important is understanding why a cosmopolitan RRF is required, not only to help a provisional duty of HI to become peremptory, but by the concept of *Recht* as such.

Recall that Kant claims that:

A rightful condition is that relation of human beings among one another that contains the conditions under which everyone is able to *enjoy* his rights, and the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone is called public justice.⁵³

In other words, only in a condition where individuals' rights to external objects of choice (persons, promises, and objects) are secure can public Right exist. Such "enjoyment," or security, requires an authoritative coercive force capable of ensuring each his own.⁵⁴

This force, which Kant calls "power" (*Macht*), must be capable of "constraining everyone else with whom he comes into conflict."⁵⁵ Only when this force is present, and working according to universal standards, can each person's rights be secured. By universal standards, I mean laws that a people could decree for itself.⁵⁶ If a people could not agree to a law, through a test of hypothetical universalization, then that law fails to protect each person.

Coercion is "limitation of freedom by the will [*Willkür*] of another,"⁵⁷ but public, lawful, and "irresistible"⁵⁸ coercion is necessary *a priori* for the protection of rights. The coercive power must be irresistible, not just in terms of its overwhelming force, but its legitimacy. In terms of a domestic constitution, individuals create such a force to protect

⁵³ *RL*, 6:306 (italics in original).

⁵⁴ *RL*, 6:256.

⁵⁵ *RL*, 6: 256.

⁵⁶ *TP*, 8:305.

⁵⁷ *TP*, 8:290.

⁵⁸ *UH*, 8:22.

equally each person's rights under the law; what is required internationally should be no different.

An international force, capable of systematic enforcement of public rules and judgments, is necessary to provide all human beings with the capacity to "enjoy" their rights. An RRF is therefore not just a standing army; it is the necessary coercive mechanism capable of protecting each person in his freedom, equality, and independence.⁵⁹ As Hobbes so wisely stated, "covenants without the sword, are but words and of no strength to secure a man at all."⁶⁰ Public "rules" or agreements on the "Responsibility to Protect" are, likewise, hollow words without an institutionalized military force capable of enforcing such rules.⁶¹

An RRF ought to be under the direction of the UN. In the case of an emerging humanitarian crisis, the IHII should make a recommendation to the SC for the deployment of the force. In the event that the SC is caught in a quagmire due to the P-5 veto, the decision should be referred to the GA for a vote. The ICISS report on R2P suggests such a procedure in case of a SC stalemate, and I see no reason why such a procedure should not be used to direct the RRF as well.⁶² Since the SC's main function is to provide for the peace and security of the world's states, it ought to be the principal

⁵⁹ Kant notes that individuals in a civil condition is based, a priori on three principles: "the freedom of every member of society as a human being;" "the equality of each member with every other as a subject;" and "the independence of every member of the commonwealth as a citizen." (*TP*, 8:290) He also states this again in the *RL* at 6:314.

⁶⁰ Hobbes, Thomas. *Leviathan* (Cambridge University Press, 1992): Chapter XVII.

⁶¹ There is a question of whether such a force would also be authorized to carry out arrest warrants that the ICC issues. This is may be politically tricky, as there are not many institutional mechanisms in place to ensure the supremacy of international law, but I see no moral reason why not. If a country has signed onto the Rome Statue and has not furnished the accused to the Court, then the PoC should apply here as well. If a state hasn't signed the Rome Statue, jurisdiction (for prosecution and police action) can be proven when the Security Council recommends the case to the Court. This is of course assuming that the Court undergoes no significant changes in universal jurisdiction.

⁶² ICISS, p. 48, p. 53.

organ to issue directives.⁶³ To guard against the same problems witnessed now with regard to HI, the GA should be an alternate avenue for checking the veto power in the SC.⁶⁴

II. Providing a “Surrogate” or making a Provisional Duty of HI Perfect

Of course, a duty of HI cannot become fully peremptory until something like a state of states (*Völkerstaat*) is established, but such a duty can be institutionalized and become enforceable. It can approximate, in what amounts to a Kantian state of nature, a peremptory duty of HI. We can do this by employing similar reasoning to Kant: set up a surrogate institution to secure rights in the interim.⁶⁵ The IHII, coupled with a reformed ICC and implemented cosmopolitan RRF, is a surrogate to the state of states. Instead of requiring a sharp and drastic move, we can instead approximate the requirements of public Right.

The requirements of public Right, Kant explains,

can be divided into *protective justice* (*iustitia tutatrix*), *justice in men’s acquiring from one another* (*iustitia commutativa*), and *distributive justice* (*iustitia distributiva*). – In these the law says, *first* merely what conduct is intrinsically *right* in terms of its form (*lex iusti*); *second*, what [objects] are capable of being covered externally by law, in terms of their matter, that is, what way of being in possession is *rightful* (*lex iuridica*); *third*, what is the decision of a court in a particular case in accordance with the given law under which it falls, that is, what is *laid down as right* (*lex iustitiae*).⁶⁶

⁶³ One could perhaps object that referring a situation to the GA will always result in forbearance of the use of force because the GA is made up of both Kantian republics and non-republics. There are a plethora of types of states in the GA: western liberal democracies, transitional democracies, despotisms, autocracies, and a score of states who fear intervention in their territories. Thus any vote would result in a lack of intervention. While this all these facts and conjectures are certainly true, the response to this objection is that the SC would, of course, necessarily know as well. This gives the SC reason to guard its power and come to agreement on the use of force without having to delegate any of its power to the GA.

⁶⁴ This may also help to guard against one of the P-5 abusing its citizens without fear of intervention.

⁶⁵ *TPP*, 8:356.

⁶⁶ *RL*, 6:306.

These three forms of justice are “formally” necessary. They must exist “as institutions” in the real world.⁶⁷ These institutions are “public law giving, the free public market, and the public judiciary.”⁶⁸ Any system of public Right, must have these three (separated) authorities, and anything short of these requirements means that the condition one finds oneself in is non-juridical and a condition of private right.

As I noted in Chapter One, a condition of private right is right in a state of nature, where only natural law rules. Natural law for Kant is roughly “law determined by reason which concerns the interrelation of persons in so far as one person’s exercise of freedom can have an influence on the possible exercise of freedom of some or all others.”⁶⁹ Natural law is considered private here not because it governs the contemporary notion of private law (torts, contracts, family law) but because it is judged privately according to one’s own conscience. The most oft noted problem with this condition is that individuals will judge when their rights have been violated differently, and irresolvable disputes will ensue (i.e. a state of war). However, we need not even go to this extreme. Other problems, such as the inconsistency in application of laws, the indeterminacy of laws, and the lack of a way to generate compliance with laws also plague this situation, as we have seen in the previously mentioned cases of Georgia, Darfur and Somalia. Therefore one must, “unless [one] wants to renounce any concepts of right, [...] resolve upon the principle that [one] must leave the state of nature [...] unite [oneself] with all others (with

⁶⁷ Byrd, B. Sharon & Joachim Hruschka. *Kant’s Doctrine of Right: A Commentary* (Cambridge University Press, 2010): 33.

⁶⁸ Ibid, p. 33

⁶⁹ Mulholland, Leslie Arthur. “The Difference Between Private and Public Law,” *Annual Review of Law and Ethics* Vol. 1 (1993): p. 131.

[which one] cannot help interacting),” and “subject [oneself] to a public lawful external coercion”.⁷⁰ One is commanded, therefore, to create the institutions of public justice.

A) *Iustitia Tutatrix*

Iustitia tutatrix is “protective” because it promulgates laws publically, and therefore takes private judgment about rights out of the hands of private persons. The protective form of justice corresponds to the legislative authority in a community. For Kant, public law contains “the *a priori* principles of reason about what law should be, but it also gives them effect in the world of experience because it is enacted and enforced.”⁷¹

The establishment of an IHII, as an institution that can authoritatively lay down public rules for the practice of HI, can fulfill the requirement of *iustitia tutatrix*. Promulgating public rules that settle issues of when, where, and how interventions occur removes states’ private judgment over these questions. Moreover, the creation of a volunteer RRF settles the question of “who” ought to intervene.

B) *Iustitia Commutativa*

The commutative form of justice governs transactions between individuals in the marketplace. As Kant argues, people cannot have external rights to things, but only rights against people, and so the marketplace is an extremely important concept in our dealings with others.⁷² Each time I decide to buy an apple or to make or accept a promise, my right to an external object of my choice is affected. My right is affected

⁷⁰ *RL*, 6:312

⁷¹ Byrd & Hruschka, op. cit., fn 67, p. 36.

⁷² *RL*, 6:284. For a very good discussion about Kant’s theory of property, and how it is fundamentally different than Locke’s theory (where one can have a right to things) see: Flikschuh, Katrin. *Kant and Modern Political Philosophy* (Cambridge University Press, 2000): 117-121.

because it is dependent upon the recognition and actions of others. Therefore, the role of commutative justice is to regulate property and contract law in the real world between acting individuals.⁷³ The kind of authority corresponding to commutative justice is, therefore, the executive.⁷⁴

Regulating the exchange of external objects of choice may not appear to be the role of the executive, but Kant's argument depends on his understanding of the role of subsumption in a practical syllogism. As Byrd and Hruschka explain, the major premise in the syllogism would be the law; the minor premise would be a particular case involving a dispute about the law. The conclusion would be a judgment that a neutral and public judge renders on the particular case (i.e., in determining whether the case applies under the major premise.) The executive authority comes to the fore when the laws laid down by the legislature or the judgments rendered by the judiciary must be executed. In other words, the executive is in charge of setting up the requisite institutions for law. For example, if the legislative authority claims that landowners must sign a registry, then one of the executive's functions is to create that registry. Thus in the marketplace, the executive must make the necessary arrangements to govern the buying and selling of external objects of choice.

In terms of fulfilling its duty to protect, the executive in this case would be the UN Security Council. Its role would be to use its authority to issue binding resolutions on member states and force them to support the creation of an IHII. The SC would create the institution required to fulfill the international community's duty to protect.

⁷³ Byrd & Hruschka op. cit., fn 267, pp. 37-38.

⁷⁴ The reason why the executive authority corresponds to commutative justice is fully explained in Byrd, B. Sharon and Hruschka op. cit., fn 67, Chapter 7, section 3.

C. Iustitia Distributiva

Finally, the role of distributive justice is to “award to each what is his in accordance with the law.”⁷⁵ In other words, when rights are in dispute, the role of a neutral judge is necessary to determine whether the object of choice belongs to Party A or Party B in accordance with the public laws. Thus, the corresponding institution to distributive justice is the judiciary.

Strengthening the ICC to render public and final judgments, capable of enforcement via a RRF, would satisfy Kant’s requirements for distributive justice. The ICC would have not only the crimes listed in the Rome Statutes to “subsume” under its judgment, but would also have any other public rules laid out by the IHIL under its jurisdiction. Moreover, with the formation of a RRF, that force would be subject to the same international humanitarian law that governs all state’s armed forces. Placing cosmopolitan soldiers under the jurisdiction of a cosmopolitan court would provide accountability for any crimes undertaken during an operation. Currently, there is no means for such accountability within the UN, and this continues to place strain on the organization.⁷⁶

⁷⁵ *RL*, 6:313

⁷⁶ Hoffman and Mégret argue that the United Nations requires an ombudsperson to oversee accusations made against UN troops. Such accusations for rape, murder, or any other crimes are presently addressed by the member state whose troops are “on loan” to the UN. Unfortunately, Hoffmann and Mégret’s solution would not do much to change existing practices, as ombudsmen “are not full-blown judicial bodies, their remedial powers are usually recommendatory rather than binding, and their ability to effect compliance rests primarily on the publicity of their reports rather than on formal prosecutorial competences” (Hoffman and Mégret, *op. cit.*, fn 29, p. 54).

D. *Universality and Reciprocity*

As Byrd and Hruschka argue, Kant employs three different “models” in his explanation of the transition to international and cosmopolitan law.⁷⁷ As I explained in Chapter Four, Byrd and Hruschka argue that Kant ultimately requires the second model, a state of nation states (*Völkerstaat*). However, due to the lengthy process of gradual reform, Kant writes in *Perpetual Peace* that a league of nations (*Völkerbund*) should be the penultimate target. States have “a duty to strive toward the constitutional perfection of one single state of nations in an effort to approximate perpetual peace,” but “we cannot completely attain our goal,” even though “we can come as close as possible to attaining perpetual peace.”⁷⁸

My suggestions for the establishment of an IHII, along with my suggested reforms to the ICC and the creation of a voluntary UN RRF would place the international system further along the path towards international public Right. Such reforms go beyond a mere *Völkerbund*, which is only concerned with “maintaining and securing freedom for a state and simultaneously for the other states in the league.”⁷⁹ The *Völkerbund* cannot acquire any power over its members, and each state must consent to join the league.⁸⁰ The IHII, by contrast, would be set up via the powers delegated to the SC by UN member states. This institution would have authority to promulgate public universal rules to which member states must abide. Moreover, the IHII would have authority to monitor states’ treatment of their citizens. If leaders, militias, or any other individuals within a state commit gross crimes against humanity, the IHII has power to

⁷⁷ Byrd, Sharon B. and Joachim Hruschka. “From the State of Nature to the Juridical State of States.” *Law and Philosophy*, Vol. 27 (2008); Byrd and Hruschka op. cit., fn 67, Chpt. 9.

⁷⁸ Byrd and Hruschka, op. cit., fn 67, p. 203.

⁷⁹ *TPP*, 8:356.

⁸⁰ *TPP*, 8:356.

call for an intervention to stop such abuses and to make recommendations to the ICC for prosecution. A *Völkerbund* only has power to secure the rights and freedoms of states; an IHII is concerned with securing the rights and freedoms of individuals within states.

As Kant informs us, the transition from provisional to conclusive right⁸¹ requires that every person:

[P]rovides me with assurance that he will behave in the same principle [...] This assurance does not require a special act to establish a right, but is already contained in the concept of an obligation corresponding to an external right, since the *universality*, and with it the *reciprocity*, of obligation arises from a universal rule.⁸²

An IHII, promulgating universal rules that ensure reciprocity, satisfies such a condition. Since the IHII is concerned with universally protecting the basic rights of human beings, regardless of where they happen to be born, the rules it promulgates cannot “infringe upon natural right, (i.e. that right which can be derived from a priori principles for a civil condition).”⁸³ Further, a UN RRF provides the requisite “accompanied power” to give force to the public laws and the settled judgments.⁸⁴

It is only when the legislative, judicial, executive and enforcement authorities are present that one’s rights can be fully secured. We must theorize about how to establish such authorities in the international system, especially as states are very reluctant to curtail their powers, even for the protection of human life. Kant understands the dangers of such reluctance, so we must continue to remember his postulate of public right: “When you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive

⁸¹ Kant, recall, calls acquisition provisional in a condition of provisional right. “Conclusive” acquisition is where external objects of my choice are secured through public laws, arbitrated by a neutral judge, and backed by a public and authoritative coercive force. Conclusive, therefore, corresponds to a rightful condition, where duties of right are peremptory (and therefore perfect). (Cf. *RL*, 6:256-257).

⁸² *RL*, 6:256 (italics added).

⁸³ *RL*, 6:256.

⁸⁴ *RL*, 6:256.

justice.”⁸⁵ I have attempted to show in this chapter, how we can approximate a condition of distributive justice without creating a world state.

Conclusion:

I began this chapter with a quote from the chief prosecutor at the Nuremberg trials, a quote in which Robert Jackson asked for the further advancement and improvement of international law. I also attempt to argue for the extension and evolution of international law by founding an institution to protect basic human rights. I have argued for the creation of an IHII, an institution designed to promulgate public and universal laws for the practice of HI. Such an institution will answer the questions of who ought to intervene, when, where, and for how long. This institution ought to be created via the SC’s power of issuing binding resolutions on all member states. The SC has such power in its purview, and while it may not be Rousseau’s wise legislator, it can still be “the prince,” who is “merely the mechanic who sets it [the Republic] up and operates it.”⁸⁶ Yet, to ensure the requirements of justice, an external authoritative coercive force, a RRF, must accompany this institution. Kant famously said that “there is connected with right by the principle of contradiction an authorization to coerce someone who infringes it.” It is only by resisting, with force, a “hindrance to freedom” that can one be free, and it is only when such resistance is universal, guaranteeing the rights of all, that there can be universal freedom. A cosmopolitan military, designed to protect human rights, would be such a force.

⁸⁵ *RL*, 6:307.

⁸⁶ Rousseau, Jean Jacques. *The Social Contract*, (Trns.) Maurice Cranston, (Penguin Books, 1968): 84.

Finally, we must reform transnational judicial institutions in accordance with Kantian principles of justice. These courts ought to have universal jurisdiction, should work from one universal conception of justice, and should be able to ensure that any domestic process of adjudication is undertaken in accordance with this conception. Its decisions, moreover, should not be dependent on any one state for enforcement. Transnational judicial decisions should be enforced via a transnational coercive force.

Ultimately, I am sure that much of what I have said here will be construed as a mere “pious wish.” Indeed, as Kant observed in 1795:

Reason can provide related nations with no other means for emerging from the state of lawlessness, which consists solely of war, than that they give up their savage (lawless) freedom, just as individual persons do, and, by accommodating themselves to the constraints of common law, establish a *nation of peoples (civitas gentium)* that (continually growing) will finally include all the peoples of the earth. But they do not will to do this because it does not conform to their idea of the right of nations, and consequently they discard in *hypothesis* what is true in *thesis*.⁸⁷

The logic of justice requires that states move beyond their lawless freedom and submit to public coercive laws. Not merely for the regulation of their affairs, but for the protection of individuals within their borders. This is true in thesis, and we must continue to work towards its realization.

⁸⁷ *TPP*, 8:357

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