
The Kantian Project in Modern International Legal Theory

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This essay reviews the following book: Fernando R. Tesón, *A Philosophy of International Law*, Westview Press, Boulder, CO, 1998.

Abstract

Developments over the last 50 years in the institutional nature of international law and the political situation it regulates have led to a revival of Kant's approach to international legal theory. Kant's argument requires, first, that a distinction is made between just and unjust states for the purposes of regulation by international law and, secondly, that international law must be institutionally designed to ensure the peaceful settlement of disputes. Fernando Tesón's A Philosophy of International Law — which is the subject of this review — represents the fullest defence of Kant's international legal theory yet. It is argued in this review that Tesón's work contains two problems. First, Tesón does not defend the methodological and justificatory basis of Kantian theory which is, on most accounts, the categorical imperative, and his allusion to an empirical methodology is problematic. Secondly, Tesón does not sufficiently develop the second of Kant's major theses, which concerns the maintenance of peace by international legal institutions. In fact, Tesón's argument can be best understood as an account of a Kantian approach to a moral foreign policy rather than a Kantian conception of international law.

1 Introduction

In the latter half of the twentieth century, the influence of Kant's moral, political and legal philosophy increased. This development can be attributed to the impressive and avowed Kantianism expressed by John Rawls in his seminal work on the political foundations of the state.¹ Attention should also be drawn to the Kantian theories

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¹ Rawls, *A Theory of Justice* (1972). On the relationship between Kant and Rawls, see Johnson, 'The Kantian Interpretation', 85 *Ethics* (1974) 58; Darwall, 'A Defense of the Kantian Interpretation', 86 *Ethics* (1976) 164; Rawls, 'Kantian Constructivism in Moral Theory', 77 *Journal Of Philosophy* (1980)

developed by Habermas, Alexy and Gewirth.² These examples illustrate the continuing relevance Kant's thought has for modern practical philosophy.

During this same period, public international lawyers became reacquainted with Kant's work on international law. His thesis that international law requires the development of institutions which express the general will of sovereign states to ensure world peace and to solve international conflict was inspirationally captured in the genetic documents of the United Nations.³ Despite the apparent problems with the United Nations system — such as the fact that its legal authority being firmly rooted in state consent, and the connected problem of effectiveness — it still can be understood as an important move towards Kant's vision of international legal order.

It should come as no surprise, then, that in the last 10 years or so there has been a revival in Kantian international legal theory. Among others, Rawls has made his own contribution⁴ and Tesón has contributed the work, *A Philosophy of International Law*.⁵ It is Tesón's work which is the subject of this review.

515; Hill, 'Kantian Constructivism in Ethics', 99 *Ethics* (1989) 752; and Doppelt, 'Is Rawls' Kantian Liberalism Coherent and Defensible?', 99 *Ethics* (1989) 815.

² Habermas, *The Theory of Communicative Action*, vol. 1, *Reason and the Rationalisation of Society* (1986); Habermas, *Between Facts and Norms* (1996); Alexy, *A Theory of Legal Argumentation* (1989); and *Theorie der Grundrechte* (1996); and Gewirth, *Reason and Morality* (1978). On the relationship between Habermas and Kant, see MacCarthy, *The Critical Theory of Jürgen Habermas* (1978) 325–327. For analysis of the relationship between Kant and Gewirth, see Part II of Boylan (ed.), *Gewirth: Critical Essays on Action, Rationality, and Community* (1999).

³ See, for example, the preamble to the Charter of the United Nations (1945). Simma *et al.* consider that '[t]o understand the genesis of the new peace organization, it was not necessary, as was felt in the League period, to refer back to the philosophers of past centuries, to the classical ideas of eternal peace and a European federation for the enforcement of peace'. See Simma *et al.*, *The Charter of the United Nations* (1995) 2. Despite the understandable anti-theoretical stance taken by the authors of the Charter, the preamble of the Charter clearly reflects Kant's conception of international law.

⁴ Rawls, *The Law of Peoples* (1999). For those who are familiar with Rawls' *A Theory of Justice*, his work on international law must appear somewhat perplexing. In *A Theory of Justice*, Rawls provides a powerful justification for liberal political philosophy and one might consider that his theory of international law would place liberal constraints upon the permissible conduct of states. In other words, one might think that Rawls would advocate a system of international law based upon a federation of liberal states — which is closely related to Kant's position. However, in his work on international law, Rawls proposes that non-liberal states are permissible in an international legal order. This *prima facie* contradiction can easily be understood once one understands the theoretical distance Rawls has travelled from the original universalistic conclusions he drew in *A Theory of Justice*. He has diluted his views in more recent work so that a number of comprehensive world views — some of which are not avowedly liberal — are permissible in a particular state and between particular states. On this move, see Rawls, 'Justice as Fairness: Political Not Metaphysical', 14 *Philosophy and Public Affairs* (1985) 223; Rawls, 'The Idea of an Overlapping Consensus', 7 *OJLS* (1985) 1; and Rawls, *Political Liberalism* (1993). For commentary on this move, see Hampton, 'Should Political Philosophy Be Done Without Metaphysics', 99 *Ethics* (1989) 791. For discussion on Rawls' conception of international law, see Pogge, 'An Egalitarian Law of Peoples', 23 *Philosophy and Public Affairs* (1994) 195; and Kuper, 'Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons', 28 *Political Theory* (2000) 640.

⁵ Tesón, *A Philosophy of International Law* (1999). References to this work are made in the text. See also Doyle, 'Kant, Liberal Legacies and Foreign Affairs', 12 *Philosophy and Public Affairs* (1983) 205; Sorensen, 'Kant and the Process of Democratization: Consequences for Neo-Realist Thought', 29 *Journal of Peace Research* (1992) 397; MacMillan, 'A Kantian Protest Against the Peculiar Discourse of Inter-Liberal State Peace', 24 *Millennium* (1994) 549; Mertens, 'War and International Order in Kant's Legal Thought', 8

2 Tesón's *A Philosophy of International Law*

An obvious place to start this review is to outline the general features of a Kantian⁶ philosophy of international law. However, there is considerable disagreement concerning what these general features are.⁷ Therefore, I will begin with what *Tesón* considers to be the key features of a Kantian theory of international law.

The opening line of *A Philosophy of International Law* makes Tesón's intentions clear: his book 'defends the view, first developed by Immanuel Kant, that international law and domestic justice are fundamentally connected' (p. 1). Domestic justice, for Tesón, implies respect, by a government, for human and democratic rights (p. 7). It should be noted that this is a fair but idiosyncratic view of Kant's work for two reasons. First, while Kant does think that the validity of a universal moral principle — the categorical imperative — can be demonstrated,⁸ it is not at all certain whether this principle requires respect for human rights.⁹ Secondly, Kant's adherence to democratic rights is more certain, but again, not obvious. For example, in Kant's major work on international law, *Perpetual Peace*, Kant proclaims: 'The Civil Constitution of

Ratio Juris (1995) 296; Ward, 'Kant and the Transnational Order: Towards a European Community Jurisprudence', 8 *Ratio Juris* (1995) 315; Bartelson, 'The Trial of Judgment: A Note on Kant and the Paradoxes of International Law', 39 *International Studies Quarterly* (1995) 255; Bohman and Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (1997); Laberge, 'Kant on Justice and the Law of Nations', in Mapel and Nardin (eds), *International Society: Diverse Ethical Perspectives* (1998) 83; Franceschet, 'Popular Sovereignty or Cosmopolitan Democracy? Liberalism, Kant and International Reform', 6 *European Journal of International Relations* (2000) 277; Franceschet, 'Sovereignty and Freedom: Immanuel Kant's Liberal Internationalist "Legacy"', 27 *Review of International Studies* (2001) 209; and Cavallar, 'Kantian Perspectives on Democratic Peace: Alternatives to Doyle', 27 *Review of International Studies* (2001) 229.

⁶ When the term 'Kantian' is employed with reference to a theorist, it means that their work is directly inspired by Kant's legal and moral philosophy offered, for example, in the works: *Groundwork on the Metaphysic of Morals* (1972, first published in 1785, translated by Paton), *The Critique of Practical Reason* (1956, first published in 1788, translated by Beck), *The Metaphysics of Morals* (1998, first published in 1797, translated by Gregor, hereinafter *The Metaphysics of Morals* (see *infra* note 12)) and *Perpetual Peace* (1957, first published in 1795, translated by Beck, hereinafter *Perpetual Peace*). This label should be distinguished from 'Neo-Kantian' theories advanced by, for example, Kelsen, who develops his pure theory of law by employing a methodology inspired by Kant's philosophy of cognition set out in *The Critique of Pure Reason* (1929, first published in 1781, translated by Kemp Smith). See Kelsen, *Introduction to the Problems of Legal Theory* (1996, first published in 1934, translated by Paulson and Litschewski-Paulson).

⁷ See *infra* at 999–1000.

⁸ See *infra* note 25.

⁹ It should be noted that the categorical imperative gives primacy to duties rather than rights and, therefore, some argument is required to make the connection between the categorical imperative and human rights. In the debate on Kant's legal philosophy, there is a high degree of controversy on this point. For example, Höffe considers that the application of the categorical imperative in a legal order imposes strong procedural restrictions on the state rather than giving each individual human rights. See Höffe, *Immanuel Kant* (1994, translated by Farrier) 171. Perhaps, by employing some interpretative licence, a connection can be drawn between the categorical imperative and human rights. See Beyleveld in Boylan, *supra* note 2, and arguably see Korsgaard, 'Kant's Formula of Universal Law', 66 *Pacific Philosophical Quarterly* (1985) 24. Tesón also considers that positive human rights (e.g. the right to be given humanitarian aid) can be derived from the categorical imperative. Once again, this is highly controversial.

Every State Should Be Republican.’¹⁰ Now, Tesón considers that this corresponds to the modern conception of a constitutional democracy. He says: ‘By republican Kant means what we would call today a liberal democracy, that is, a form of political organization that provides for full respect for human rights’ (p. 3). But minimally, what Kant means by republicanism is a government whose political power is restricted by a constitutional document which prevents despotism by either a monarch or the masses. It is not clear, at least in *Perpetual Peace*, whether republicanism requires that individuals have democratic rights.¹¹ The idea of democratic representation is, however, a theme within Kant’s main work on legal philosophy, *The Metaphysics of Morals*,¹² and there is nothing within *Perpetual Peace* which specifically rejects the idea that democratic processes must be present alongside constitutional protection for individuals against governmental power.¹³ Therefore, perhaps Tesón is right to suggest that the best interpretation of the meaning of the term republicanism in Kant’s work is by way of the notion of a constitutional democracy. For Tesón, ‘[t]he Kantian thesis, then, can be summarized as follows: observance of human [and democratic] rights is a primary requirement to join the community of civilized nations under international law’ (p. 7 and *passim*).

Tesón’s opening statement makes it clear that he is attempting to engage in a defence of the Kantian conception of international law. One might expect the rest of the book to represent a reply to those critical of Kant and attacks upon those who hold a different theoretical position. This is broadly the case. The first chapter outlines the Kantian thesis. In the second and fifth chapters, Tesón deals with a Kantian approach to substantive issues such as sovereignty, use of force, self-determination and succession. The third, fourth and sixth chapters are discussions of other theoretical approaches to international law such as game theory, Rawls’ theory of international law and feminist approaches to international law. In the book there are many illuminating arguments, especially in the chapters on Rawls, feminism and secession. However, in this article, I want to argue that at two particular points Tesón’s work is problematic to the extent that his attempt to defend the Kantian thesis is undermined.

¹⁰ Kant, *Perpetual Peace*, at 11 (8: 349). When referring to Kant’s work, after the page from the text in question is given, I will also provide the volume and page number from the Prussian Akademie edition of the text. Reference to this text will take the form, for example, of ‘6: 229’, indicating the volume number and then the page number.

¹¹ See *ibid.*, at 11–15 (8: 349–354); and Archibugi, ‘Models of International Organisation in Perpetual Peace Projects’, 18 *Review of International Studies* (1992) 295, at 310–314.

¹² Kant, *The Metaphysics of Morals*. There are two editions of *The Metaphysics of Morals* published by Cambridge University Press. In these two editions, there are considerable differences in the layout of the text. The original translation was published in 1991 by Mary Gregor and a revised edition of this work by Roger Sullivan was published in 1996. The major difference between the two works can be explained by referring to Bernd Ludwig’s hypothesis that Kant’s copyist misunderstood his directions about what should be included and deleted from the text. Sullivan has adopted Ludwig’s argument in his revision of the text, and this accounts for the substantial divergences between the two texts. See Ludwig, ‘“The Right of a State” in Immanuel Kant’s Doctrine of Right’, 27 *Journal of the History of Philosophy* (1990) 402. References to the 1991 edition will be indicated by the letter ‘A’, and references to the 1996 edition will be indicated by the letter ‘B’.

¹³ See Cavallar, *supra* note 5, at 236.

The first argument concerns a methodological point: Tesón does not, in sufficient detail, engage in a discussion of Kant's method. Without doing this, it is difficult to stake a claim for the *validity* of the Kantian thesis in the face of scepticism. The second argument is substantive: Tesón grossly neglects the critical move in Kant's philosophy from international morality to international law, and hence advances a skewed and idiosyncratic view of Kantian jurisprudence.

3 Methodological Issues in *A Philosophy of International Law*

Method is here understood to mean the justification of a particular view on what should be examined in order to explain, describe, understand or criticize the social phenomenon that is international law. As Ratner and Slaughter suggest, method, within international legal thought, generally refers to (a) the process of generating an *a priori* concept of international law which is (b) applied to the concrete problems which are faced by international law.¹⁴ Therefore, to consider the validity of a particular method, we are faced with two questions: (a) how are we to gauge the validity of a particular *a priori* concept of international law, and (b) how should a particular concept of international law be related to empirical reality?¹⁵

There are two methodological problems with Tesón's work: first, and regarding (a), he does not attempt to justify the theoretical basis of his claims which are based upon the validity of Kant's supreme moral principle — the categorical imperative — and this leaves his theory open to attack from those of a more sceptical persuasion. Secondly, and regarding (b), the relationship between Tesón's conception of international law and empirical reality is ambiguous.

A Kant's Justification for the Concept of International Law

Kant considers that his method can provide stronger grounds for a conceptualization of international law than purely empirical accounts. With regard to jurisprudence in general, Kant states:¹⁶

Like the much-cited query 'what is truth?' put to the logician, the question 'what is right?' might well embarrass the *jurist* if he does not want to lapse into a tautology or, instead of giving a universal solution, refer to what the laws in some country at some time prescribe. He can indeed state what is laid down as right (*quid sit iuris*), that is, what the laws in a certain place and at a certain time say or have said. But whether what these laws prescribe is also right, and what the universal criterion is by which one could recognize right as well as wrong (*iustum et iniustum*), this would remain hidden from him unless he leaves those empirical principles behind for a while and seeks the sources of such judgments in reason alone, so as to establish the basis for any possible giving of positive laws (although positive laws can serve as excellent

¹⁴ According to Ratner and Slaughter, 'Appraising the Methods of International Law', 93 *AJIL* (1999) 291, at 292, method generally means 'the application of a conceptual apparatus or framework — a theory of international law — to the concrete problems faced in the international law'.

¹⁵ See *infra* at 1000–1004.

¹⁶ *The Metaphysics of Morals*, at A 55 = B 23 (6: 229–230).

guides to this). Like the wooden head in Phaedrus' fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain.

Here — and corresponding to Slaughter and Ratner's stipulation of the meaning of method in international law — Kant identifies that justifiable *a priori* judgments must inform a concept of law, and by corollary, a concept of international law, which can then be employed to criticize or validate our familiar, everyday, conceptions of such social phenomena. In this passage, Kant is outlining an argument common in modern legal and international legal philosophy and it is important to make this argument clear before explaining Kant's view. The various proponents of this argument, such as Koskenniemi and Carty, contend that descriptions of international law generally are constructed through an alliance of familiar social practices coupled to our linguistic assumptions (i.e. the social phenomena that are usually given the label 'international law'). However, such descriptions are based upon *a priori* presuppositions which vary from individual to individual, place to place and time to time. Finnis, who also develops this line of argument with regard to descriptions of law in general, considers that such divergences are caused by differences of opinion concerning what features of empirical reality are to be given importance within a particular description.¹⁷

Specifically, Koskenniemi argues that 'the facts which constitute the international social world do not appear "automatically" but are the result of choosing, finding a relevant conceptual matrix'.¹⁸ Carty makes a similar point. He states: 'One cannot simply study the practice of states as evidence of law because it is logically inconceivable to examine any evidence without *a priori* criteria of relevance and significance.'¹⁹ Furthermore, for Slaughter this insight forms a cornerstone of her approach to international law. She argues that 'the 17th and 18th century fathers of classical international law internalized deep assumptions about the incidence of war and peace and the nature of States', and therefore 'international lawyers must be more explicit about their underlying political science'.²⁰

While this point is fairly uncontroversial, what is not at all obvious is what social phenomena should be considered relevant or significant in a particular description of international law. For example, Koskenniemi and Kennedy would certainly question whether it is possible, at all, to make this judgment in a non-arbitrary fashion.²¹ Carty would be agnostic, or perhaps favour a pragmatic, discursive approach.²² Slaughter

¹⁷ Finnis, *Natural Law and Natural Rights* (1980) 9. He says: 'It is obvious, then, that the differences in description [by different legal theorists] derive from differences of opinion, among the descriptive theorists, about what is *important* and *significant* in the field of data and experience with which they are all equally and thoroughly familiar.'

¹⁸ Koskenniemi, *From Apology to Utopia* (1989) 188–189.

¹⁹ Carty, *The Decay of International Law* (1986) 95–96.

²⁰ Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503, at 537. See also Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Columbia Law Review* (1992) 1907. Here Slaughter seems to adopt a position on Kant which is heavily coloured by Doyle. See Doyle, *supra* note 5.

²¹ See Koskenniemi, *supra* note 18, at 458 and *passim*. See also Kennedy, *International Legal Structures* (1987).

²² See Carty, *supra* note 19, at chapter 9.

thinks that an inductive empirical method can be employed to justify particular approaches.²³

Arguably,²⁴ Kant considers that the moral requirements of the categorical imperative provide the non-arbitrary, apodictic judgment of importance which can be employed to shape his concept of international law. The validity of this viewpoint comes not from any analogue to empirical reality, but rather from the *a priori* justification he provides for this principle.²⁵ The categorical imperative is formulated in a number of ways. However, with regard to law, Kant appears to prefer the formulation called the Universal Principle of Right: 'Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.'²⁶ A concept of law or international law must be premised upon the categorical imperative if it is to be considered justified.²⁷ True to his Kantianism, Tesón asserts the general link between morality and international legal reasoning and considers it unproblematic. But, once again, a degree of argument is required to make

²³ See *infra* 1002.

²⁴ This statement is arguable because some theorists do not consider that the moral constraints of the categorical imperative are incorporated into Kant's concept of law. The two most prominent advocates of this position are Waldron and Maus. Waldron argues that the categorical imperative drops out of the move from moral reasoning to legal reasoning. This is because a legal order creates a general or 'omnilateral' judgment which solves the problem of moral conflict which occurs in a state of nature in which each individual makes a unilateral judgment of what the categorical imperative requires. See Waldron, 'Kant's Legal Positivism', 109 *Harvard Law Review* (1996) 1535. Maus considers that authoritarian views of Kantian legal theory which are developed from natural law and positivistic accounts of his work should be recast in a positivistic fashion which emphasizes democratic constraints on law-making. See Maus, 'The Differentiation Between Law and Morality as a Limitation of Law', in McCormick and Wroblewski (eds), *Law, Morality, and Discursive Rationality* (1989) 141. Now, there are three points which can be made here without getting embroiled fully in this debate. First, both Waldron and Maus are working from older translations of some of Kant's writing which do lend themselves to a more positivistic reading. See *supra* note 6; and Flikschuh, 'On Kant's Rechtslehre', 5 *European Journal of Philosophy* (1997) 50. On this point, see the difference in the translation of 'Idea for a Universal History with a Cosmopolitan Intent' (8: 15) employed by Waldron (at 1564) and Humphrey's translation of the same passage in Kant, *Perpetual Peace and Other Essays* (1983) 34 (8: 23). Secondly, there is plenty of support for the view that the moral constraints of the categorical imperative are incorporated into legal rules. See, for example, Ludwig, *Kant's Rechtslehre* (1988); Mulholland, *Kant's System of Rights* (1991); Kersting, *Wohlgeordnete Freiheit* (1993); and Toddington and Olsen, 'Idealism for Pragmatists', 85 *Archiv für Rechts und Sozialphilosophie* (1999) 510. Thirdly, the moral interpretation of Kant's legal theory is certainly as plausible as other accounts. Therefore, I will argue — as Tesón does — from the *assumption* of the validity of the moral approach, but without making any specific comment on the validity of this approach.

²⁵ The strongest justification which is offered by Kant is the transcendental deduction in Part III of *The Groundwork of the Metaphysics of Morals* (see *supra* note 6). The transcendental deduction is a method whereby Kant attempts to derive the categorical imperative logically from rational reflection by an individual on his or her *capacity to conceive* that they have practical reason. I am making no comment about whether this argument, or any of the other arguments Kant provides for the categorical imperative, are correct. See, however, Allison, *Kant's Theory of Freedom* (1993) at chapters 11–13; and Beyleveld in Boylan, *supra* note 2.

²⁶ *The Metaphysics of Morals*, at A 56 = B 24 (6: 230).

²⁷ See *supra* note 24.

this link and a plausible account of the link between morality and legality is outlined by Franceschet. He argues that Kant envisages an ‘original contract’ which supports a legislator who wills only that which every individual would consent to in accordance with the requirements of the categorical imperative. Each actual legislator, be they at national or international level, will not reach this ideal, but must attempt to do so.²⁸ But, of course, this is premised upon the validity of the categorical imperative and, if Tesón is engaging in a defence of the Kantian view of international law, he must, at least initially, focus his defence on the justifications for Kant’s supreme moral principle. For without a defence of this stage of Kant’s argument, it appears difficult to ascertain from his work why, exactly, the categorical imperative should be considered the non-arbitrary viewpoint upon which to premise a concept of international law. Without this argument, it is very difficult to see how Tesón could hope to alter the opinions of sceptics such as Koskeniemi or Kennedy. Tesón could argue that his audience — which is presumably made up of international lawyers — would not be impressed by detailed forays into the complexities of Kantian practical philosophy, but it seems that Tesón has got little choice if he wants his theory to be a *defence* of the Kantian project in international law.²⁹

B *Empiricism as a Justification for the Concept of International Law*

The second problem with Tesón’s method concerns how he applies the Kantian theory of international law to empirical reality. We have already seen that empirical reality is something that cannot be neutrally apprehended, and that *a priori* judgments of significance are presupposed by accounts of it. What is of concern here is the relationship which Tesón perceives exists between the Kantian theory of international law and such ‘reality’. In order to establish why Tesón’s position is of some concern, it is useful to outline Slaughter’s approach to the relationship between concepts of international law and ‘empirical reality’. This is because, at times, the approaches adopted by Tesón and Slaughter appear to be similar, and share a common problem.

As has already been highlighted, Slaughter argues that we must be fully aware of the *a priori* assumptions that underpin our conceptions of international law. She considers that realism and liberalism — two popular theories of international

²⁸ See Franceschet, ‘Sovereignty and Freedom’, *supra* note 5, at 221–222; and Laberge, *supra* note 5, at 83–89. However, this is, to some extent, controversial. See *supra* note 24. The textual evidence of Kant’s assertion of a necessary link between the categorical imperative and the international legal order can be found in *Perpetual Peace* and *The Metaphysics of Morals*. For instance, Kant contends that the constitution of a state ‘is established, firstly, by principles of freedom of the members of a society (as men); secondly, by principles of dependence of all upon a single common legislation (as subjects); and, thirdly, by the law of their equality (as citizens)’. See *Perpetual Peace*, at 11 (8: 349–350). Kant similarly states that law should be generated ‘in accordance with the principle . . . [of] the free choice of each to accord with the freedom of all’. See *The Metaphysics of Morals*, at A 84 = B 51 (6: 263). Tesón considers two other formulations of the categorical imperative which are the Formula of the End in Itself and the Formula of Universal Law. See Kant, *Groundwork on the Metaphysics of Morals*, *supra* note 6, at 83 (4: 420) and 90 (4: 427). For correspondence between these versions of the categorical imperative and Kant’s theory of international law, see *The Metaphysics of Morals*, at A 151 = B 115 (6: 345) and *Perpetual Peace*, at 16 (8: 344).

²⁹ This point is made by another reviewer of Tesón’s work. See Garcia, ‘Review of Tesón’s Philosophy of International Law’, 93 *AJIL* (1999) 746, at 749.

relations which she seeks to apply to international law — are each premised upon three assumptions. The realist, for Slaughter, assumes: (a) that states are the primary actors in the international system and that states are rational and functionally identical; (b) that the ‘preferences’ of states are fixed; and (c) that the international system is anarchical.³⁰ The liberal, similarly, assumes: (a) that the primary actors in the international system are individuals and groups acting in domestic and transnational civil society; (b) the state interacts with these actors in a complex relationship of representation and regulation; and (c) what states do in international affairs is the aggregate of pressure put on the state by primary actors.³¹ Now, each of these sets of assumptions are employed by theorists to create an ‘intellectual construct that . . . [can be used] to describe the empirical world they study’.³² But how can we choose between these competing positions? Well, Slaughter is concerned with the ‘empirical validation of these models’, whereby the ‘hypothesis . . . may describe an important dimension of the current system’.³³ Slaughter has ‘designed a . . . hypothetical model of international law based upon a set of assumptions about the composition and behaviour of specific states. Its ultimate value must await empirical confirmation of specific hypotheses distilled from this model.’³⁴ So, as Slaughter seeks to defend liberalism, she must show that liberalism *describes* empirical reality better than realism.

Presumably, according to this methodology, realist and liberal models are verified, or tested for validity, against empirical reality. So, if the model ‘fits’, it is accepted; if it does not, we modify or reject it. If Slaughter is right, realism must be modified or, more plausibly, rejected, because it has ceased to ‘fit’ empirical reality. Liberalism becomes the model we should consider valid, because it does ‘fit’.

This form of empiricism — which is common within the social sciences — is based upon the positing of a hypothetical model which is tested against empirical reality. This method operates as follows. Initially, a hypothetical model is advanced which is employed *deductively* in order to explain and predict empirical reality. Then, if the model does explain and predict, it is accepted. If it fails to do this, it is rejected or modified. Hence, the validity of the hypothetical model is ascertained by the employment of empirical facts inductively.³⁵ Therefore, if Slaughter is right, liberalism should be adhered to because induction from empirical facts does not require the abandonment of liberalism. The adoption of this approach is quite clear in Slaughter’s work. For instance, she states:³⁶

Neither law nor politics may be a science, but international relations theorists have a comparative advantage in formulating generalizable hypotheses about State behaviour and in conceptualizing the basic architecture of the international system . . . This approach would

³⁰ See Slaughter, *supra* note 20, at 507.

³¹ *Ibid.*, at 507–508.

³² *Ibid.* (emphasis added).

³³ *Ibid.*, at 505.

³⁴ *Ibid.*

³⁵ Hollis, *Models of Man* (1977) 47 and *passim*.

³⁶ Slaughter, *supra* note 20, at 504.

look first to the congruence between the image or model of the international system that implicitly or explicitly informs international law and the models used by international relations theorists. As political scientists, these scholars are concerned with the empirical validation of these models.

It should be noted, here, that Slaughter adopts a method whereby liberalism is validated via empirical method. Tesón, at some points of his book appears to accept this position. For instance, he says in a critique of positivist approaches to international law that '[t]he Kantian thesis is a promising way of approaching international law and relations because it provides tools to *explain* what positivism leaves unexplained' (p. 95, emphasis added). Tesón similarly suggests that game theory is inductively problematic because it cannot explain why states comply with international law when compliance is not in the state's best interests (pp. 90–91). Accordingly, a conception of international law based upon the moral obligations placed on states to respect human rights is less problematic in this sense. Therefore, for Tesón, it would appear that the reason one should accept the Kantian model is because of its capacity to explain empirical reality via the deductive and inductive stages of the empirical method.³⁷

At other points of his work, Tesón appears to be working at a normative level. This means that the Kantian thesis provides justifiable reasons as to why international legal institutions and rules should take a certain form. For instance, he argues (p. 95):

One way to explain the point of democratic institutions as defended in this book (respect for human rights plus true representative government) is to see them as attempts to place limits on the government's pursuit of its own interests at the expense of the people's interest . . . By forbidding the government to violate human rights, we place limits on the ways in which the government might want to pursue its interests.

Tesón, then, can be understood as adopting two different methods of justification for the Kantian thesis. First, Tesón considers that the Kantian thesis is justified because it can explain empirical reality better than other theories. Secondly, Tesón considers that the Kantian thesis is justified because it provides a normative justification to limit the activities of states.

The validity of the Kantian thesis in a normative sense is established by the reasons which are provided for favouring a conception of international law based upon the moral requirements of the categorical imperative over other, competing, conceptions. Therefore, the question of validity is determined by the validity of the categorical imperative and this leads back to the argument made above. Turning to the empirical justification which is offered by these theorists, the employment of conventional accounts of international law as justificatory devices is viewed cynically by a number of important theorists.³⁸ This level of scepticism might be justified considering the eloquent criticisms made by Karl Popper and Martin Hollis of empirical method in the

³⁷ Doyle, *supra* note 5, adopts a similar empirical approach to justify his Kantianism. However, I examine Slaughter's work because, while Doyle may be closer to the empiricism which Tesón alludes to, Slaughter is more forthright about the methodological underpinnings of the empirical method.

³⁸ See *supra* at 998–999.

social sciences in general.³⁹ To start with, we need to be more precise about what might be meant by ‘empirical reality’. As both Slaughter and Tesón appear to take ‘empirical reality’ as an unambiguous given, it is necessary to speculate.

We receive information about a stock of facts which make up the empirical world from a whole number of reports which may be first, second or third (or more) hand. Such reports may come from newspapers, academic articles and so on. These reports, however, are ultimately dependent upon a massive number of social facts — that is events which have occurred, and which have been processed and reported. The totality of these social facts can be understood to represent empirical reality and it makes sense to suggest that it is against this totality that liberalism, realism or any other hypothetical model is to be verified or rejected via induction. However, as Popper argues regarding empirical method generally, this totality of social facts cannot be unambiguously used as the arbiter of our theoretical controversies. For all theories have built into them certain assumptions about what, within this totality of social facts, is to be considered relevant for the theoretical modelling of social phenomena, including liberal and realist conceptions of international law.

Models of international law have built into them two judgments. First, there is a judgment of *relevance*. This judgment requires the theorist to determine, from the totality of social facts that constitute empirical reality, which are relevant to the study of international law. For instance, the liberal considers that the activities of bureaucracies within the state are of relevance to the study of international law. The realist does not. Secondly, there is a judgment of *importance*. The realist considers the outward emanations of ‘state will’ to be of central or focal importance. The liberal considers the internal process whereby the ‘state will’ is articulated to be focal.⁴⁰ As Katz states, a hungry animal will divide his environment into edible and inedible things and we might add that within the class of edible things the animal might consider some things more nutritious than others. By analogy, the liberal and the realist are two animals who eat radically different things.⁴¹ Popper’s analogy of an ‘induction machine’ which can formulate models which can be tested for validity against empirical reality is equally instructive. As ‘the architects of the machine’, Popper argues, we ‘must decide *a priori* what constitutes the world; what things are to be taken as similar or equal and what kind of “laws” we wish the machine to be able to “discover” in its world’.⁴² Therefore, it appears illogical to consider realism or liberalism as being better or worse at explaining empirical reality, because each is based upon a different judgment of relevance and significance about the total number of facts that make up empirical reality. They are simply different interpretations of this total

³⁹ See Popper, *Conjectures and Refutations* (2000, first published in 1963), introduction and chapter 1; and Hollis, *supra* note 35, chapter 3.

⁴⁰ I have argued this point in a more comprehensive fashion in ‘Incommensurability, Purposivity and International Law’, 11 *EJIL* (2000) 637, at 639–653. This argument is also well made by Korhonen, ‘Liberalism and International Law: A Centre Projecting a Periphery’, 65 *Nordic Journal of International Law* (1996) 481.

⁴¹ Katz, *Animals and Men* (1937) at chapter 6.

⁴² Popper, *supra* note 39, at 48.

number of facts, rather than being better or worse descriptions and, therefore, empirical reality cannot be employed as a neutral arbiter of our theoretical controversies.

If this is right, there are serious difficulties with Slaughter's method. Similarly, it would appear that Tesón is unwise to advance an empirical methodology to justify the Kantian thesis. So how should one go about justifying the Kantian thesis? Well, from the viewpoint of rationalist epistemology (which the Kantian accepts) the thesis has to be tested for validity *a priori* according to criteria such as logical coherence and whether its premises are question-begging. But it is this kind of inquiry which is exactly what is required to ascertain the validity of Tesón's normative justification for Kantian liberalism and, as has been argued, Tesón does not engage with this debate.

Both Tesón and Slaughter realise that *a priori* premises underpin conceptions of international law but do not attempt to justify them. To return to Kant's analogy of the wooden head in Phaedrus' fable, Tesón and Slaughter are politically correct in that they realize that it is brains that count, and appearances are superficial. However, they need to establish, categorically, criteria which will allow them to ascertain what it is about a brain which makes it intelligent.

4 Moral and Legal Reason in Kantian International Legal Thought

The methodological issues which have been discussed above need to be included in any *defence* of Kant's philosophy of international law, but the absence of these considerations are not fatal to Tesón's work. Rather, I have suggested that more careful consideration of the justificatory basis of Kantian theory is required so that it can be effectively defended against those of a more critical disposition. It is at this juncture that I want to turn to a second, and more serious, problem with Tesón's book. I argue that Tesón trivializes and leaves highly underdeveloped a key — if not *the* central — move in Kant's philosophy of law and international law. This is the move from unilateral moral reason to legal or omnilateral reason. If this argument follows, it is questionable whether Tesón, in the vast majority of his book, is referring to Kant's conception of international law at all. This argument is made by reference to Tesón's argument in favour of intervention by states to secure humanitarian objectives.⁴³

⁴³ The same argument can be made in response to his argument found in chapter 5 of his book on the topic of secession. One of the anomalies of Kant's legal theory is that he rejects the idea of revolution against an unjust government, and this would presumably include a prohibition on secession as well. Tesón considers this anomaly when he states: 'Kant's thesis of rational allegiance to the law is not easily reconciled with his strong opposition to a right to revolution. The propositions that citizens may revolt (as a last resort) against arbitrary power when the sovereign has broken the agency contract follows from any liberal political theory. Perhaps Kant was trying to make a purely formal point, namely, that for citizens to have a *legal right* to revolution is self-contradictory' (p. 6). On this point, see also Franceschet, 'Sovereignty and Freedom', *supra* note 5, at 219–220.

A Tesón's Justification for the Use of Force

Tesón considers that conventional legal principles which defend the concept of state sovereignty (such as non-intervention and autonomy) are morally and conceptually wrong (p. 40). Instead, Tesón considers that a 'morally loaded' conception of sovereignty is normatively justified by the Kantian thesis. He claims that a 'government's freedom consists in wielding (internally or externally) the coercive power of the state' but that a 'government's freedom cannot be a good thing for the same reasons an individual's freedom is a good thing' and hence 'action has to be justified, like all exercise of political power with the tools of political morality' (p. 42). Tesón then argues that Kant's moral and political philosophy provides the constraints on a particular government's freedom and that this requires that states adhere to the protection of human and democratic rights. Two corollaries flow from this argument: (a) that citizens may revolt and overthrow an unjust government and a persecuted minority may secede; and (b) that governments which respect human and democratic rights may engage in self-defence and may intervene in the internal affairs of states whose governments deny their citizens these rights.

Intervention, for Tesón, is justified when there is a conjunction of two conditions (p. 59):

Two conditions apply to the potential intervenor: its cause has to be just and its government has to be legitimate. We saw that the only legitimate aim of the intervenor is the protection of human rights . . . A government's war to defend the rights of its citizens, when they are being violated by a foreign aggressor, is called self-defence. A government's war to defend the citizens of the target state from human rights violations by their own government is called humanitarian intervention.

This argument depends upon a clear distinction being drawn between legitimate and illegitimate governments where only legitimate governments have a duty to intervene.⁴⁴ The condition for legitimacy to be attached to a government is respect for human and democratic rights. Another condition which Tesón does not acknowledge, but presumably must also apply, is that this duty is only held by those governments in states which command sufficient power (military or otherwise). 'Ought' implies 'can'.

Tesón develops his ideas on the conditions by which legitimacy can be attributed to a state or government when he distinguishes between the horizontal and vertical social contract. The horizontal social contract concerns the obligations each individual within a society has towards others. The vertical social contract concerns the establishment of political institutions which maintain the horizontal social contract. A legitimate government will ensure that democratic and human rights are fully fulfilled in both social contracts (p. 57). If a government is a dictatorship, the vertical social contract has broken down, and the *government* is classed as illegitimate. Similarly, if the horizontal social contract breaks down, for example in a civil war or in the break-up of a state, then the government has become ineffective in maintaining

⁴⁴ Tesón states that illegitimate governments — for example, dictatorships — may not 'validly perform acts of intervention' (p. 57).

the obligations each citizen has to each other. When this occurs, the *state* is illegitimate.

One can find correspondence between the views of Tesón and Kant on this issue. Kant argues: ‘There are no limits to the rights of a state against an *unjust enemy* (no limits with respect to quantity or degree, though there are limits with respect to quality); that is to say, an injured state may not use *any* means *whatever* but may use those means that are allowable to any degree that it is able to, in order to maintain what belongs to it.’⁴⁵ Therefore, Kant would advocate a division between just and unjust states and a right to self-defence. However, Kant then states: ‘But what is an *unjust enemy* in terms of the concepts of the right of nations, in which — as is the case in the state of nature generally — each state is judge in its own case?’⁴⁶ Therefore, Kant is saying that the determination by a state as to whether other states are just, or otherwise, is a *unilateral judgment*.⁴⁷

Tesón expands upon this argument. He argues that self-defence and intervention are in fact manifestations of a normatively justified foreign policy. Each state has a threefold duty: ‘(1) to defend its own just institutions; (2) to respect the rights of all persons at home and abroad; and (3) to promote the preservation and expansion of human rights and democracy globally’ (p. 55). Point (1) corresponds to a right to self-defence, if the individuals who operate within state institutions consider such institutions to be just; points (2) and (3) give a *prima facie* duty to intervene if a just state’s government considers that human and democratic rights are being infringed abroad. Tesón’s argument, at this point, deviates from Kant’s position. This is seen best by way of an example. I shall use the familiar *Nicaragua* case.⁴⁸

The *Nicaragua* case concerned military action by the United States against Nicaragua. In order to stop the United States engaging in this activity, Nicaragua initially petitioned the ICJ for provisional measures. At the merits phase of the adjudication, Nicaragua asked for reparations. The ICJ found in favour of Nicaragua at both phases. What is of specific interest here are the arguments employed by Nicaragua and the US to defend their actions. The nature of the United States’ action in Nicaragua was set out in a report made by the President to Congress on 10 April 1985. Initially, the report stated:⁴⁹

United States policy towards Nicaragua since the Sandanistas’ ascent to power has consistently sought to achieve changes in Nicaraguan Government policy and behavior. We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government.

There were four changes which the United States sought to achieve. First, they sought ‘a termination of all forms of Nicaraguan support for insurgencies or subversion in

⁴⁵ *The Metaphysics of Morals*, at A 155 = B 118 (6: 349).

⁴⁶ *Ibid.*

⁴⁷ Kant’s comments about a ‘state of nature’ are considered in detail at *infra* at 1008–1010.

⁴⁸ The *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* had two phases: (a) *Request for Provisional Measures*, ICJ Reports (1984) and (b) *Merits*, ICJ Reports (1986). I will hereafter refer to this case by the phase of adjudication.

⁴⁹ *Merits*, at 46.

neighbouring countries'.⁵⁰ Specifically, the United States were concerned by the flow of armaments which came into Nicaraguan ports and were supplied to El Salvadorian insurgents. Secondly, the United States sought an 'implementation of Sandanista commitment to the Organization of American States to political pluralism, human rights, free elections, non-alignment, and a mixed economy'.⁵¹ Thirdly, the United States sought 'a reduction of Nicaragua's expanded military/security apparatus to restore military balance in the region'. Fourthly, the United States sought a 'severance of Nicaragua's military and security ties to the Soviet Bloc and Cuba'.⁵²

The third and fourth changes which were sought by the United States attempted to achieve predominantly political goals, and presumably do not have a legal justification. However, there might have been a legal justification for the first and second reasons given for the actions of the United States against the claim brought by Nicaragua.

With regard to the United States' first claim, collective self-defence would be a *prima facie* defence against Nicaraguan claims.⁵³ In support of this contention, the United States' agent read out the following submission: 'contrary to the repeated denials of Nicaraguan officials, that country is thoroughly involved in supporting the Salvadorian insurgency'.⁵⁴ The Foreign Minister of Nicaragua rejected such assertions:⁵⁵

I am aware of the allegations made by the Government of the United States that my Government is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador. Such allegations are false, and constitute nothing more than a pretext for the US to continue its unlawful military and paramilitary activities against Nicaragua intended to overthrow my Government . . . It is interesting that only the Government of the United States makes these allegations, and not the Government of El Salvador, which is the supposed victim of the alleged arms trafficking. Full diplomatic relations exist between Nicaragua and El Salvador. Yet, El Salvador has never — not once — lodged a protest with my Government accusing it of complicity in or responsibility for any traffic in arms or other military supplies to rebel groups in that country.

The United States Government considered that the conditions for exercising its right of collective self-defence were fulfilled. Similarly, Nicaragua considered that the conditions by which it could exercise a right to self-determination, non-intervention and ultimately a right to self-defence were equally fulfilled. These are competing claims. If both governments consider they are legitimate in the manner described by Tesón, then his interpretation of the Kantian thesis will justify both states employing force against the other.

With regard to the second justification for the action by the United States, state officials thought that intervention to restore human rights and democracy was justified. There may be some evidence, albeit tenuous, to support the right to

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, at 47.

⁵² *Ibid.*

⁵³ See, for example, Jennings and Watts, *Oppenheim's International Law* (9th ed., 1996) 444.

⁵⁴ *Request for Provisional Measures*, at 26.

⁵⁵ *Ibid.*, at 28. Judge Schwebel's dissenting judgment suggests that the Nicaraguan Government's assertion of El Salvadorian acquiescence on this matter is debatable.

democracy,⁵⁶ but from the point of view of Tesón's thesis, the position of the United States is clearly justifiable.⁵⁷ Nicaragua made similar claims in support of their position. They pleaded that the ICJ must provide provisional measures on the grounds of the right to self-determination, the right to non-interference and that 'the lives and property of Nicaraguan citizens, the sovereignty of the State and the health and progress of the economy are all immediately at stake'.⁵⁸ As Roth asserts: 'the [Sandanista Government] interpreted democracy and human rights to require . . . a major redistribution of wealth and power in the society in advance of the fixing of permanent institutions.'⁵⁹ These submissions indicate, as far as the Nicaraguan Government is concerned, that it was acting legitimately and that military action by the United States infringed the human rights of the Nicaraguan people. According to Tesón's thesis, Nicaragua has a right to self-defence. The point, once again, is that both states have a justification to use force in support of democracy and human rights.⁶⁰

B *Unilateralism and the 'General Will'*

Tesón's division between just and unjust states is supported in Kant's work. For Kant, a state can decide unilaterally whether another state is just or unjust with reference to the categorical imperative. Specifically, Kant states that an unjust enemy 'is an 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'.⁶¹ From this, and if certain assumptions are made concerning the relationship between the categorical imperative and human and democratic rights, we can see a congruence between the positions taken by Tesón and Kant. Of central importance, however, is the distinction Kant makes between a state of nature in the relations between states on the one hand and civil society or international legal order on the other. In the state of nature, each state is a 'judge in its own case' and, therefore, unilaterally decides what it considers to be right. This, for Kant, is characteristic of a non-legal situation.⁶² It does not matter

⁵⁶ See Roth, *Governmental Illegitimacy in International Law* (1999) 298.

⁵⁷ *Ibid.*, at 294–295.

⁵⁸ *Request for Provisional Measures*, at 17. Also, one should note that the Sandanistas, when in political opposition, were supported by the OAS, because of the heinous human rights abuses committed by the Samosa regime. See Roth, *supra* note 56, at 294.

⁵⁹ *Ibid.*, at 301–302.

⁶⁰ Tesón wrote in response to the ICJ's decision that 'this might not be a situation that would justify the use of force by the United States for human rights purposes', but criticized the ICJ for resting upon 'overblown and antiquated' principles such as sovereignty and non-intervention and for not being more open to arguments which would allow humanitarian intervention. On the merits of permitting intervention by the United States against perceived human rights abuse in Central America, I will offer no opinion other than to state that, if the ICJ are applying 'overblown and antiquated' principles such as state sovereignty, Tesón is perhaps applying an 'overblown and antiquated' view of the virtue of the foreign policy of the United States in Central America. See Tesón, 'Le Peuple, C'est Moi! The World Court and Human Rights', 81 *AJIL* (1987) 173, at 183.

⁶¹ *The Metaphysics of Morals*, at A 155 = B 119 (6: 349).

⁶² *Ibid.*

whether this unilateral judgment is a genuine attempt to correspond policy with the moral requirements of the categorical imperative, for it is the *unilateral nature* of the judgment which is problematic. The reasons given by both the United States and Nicaraguan Governments in support of their actions can be read in line with the moral requirements of the categorical imperative (if we accept Tesón's reading of these requirements). If both states are justified in employing force, invariably it will be the more powerful state which overbears the policies of the weaker state and this results in the unilateral judgments of the stronger state holding sway. Therefore, by focusing on the moral legitimacy of foreign policy and unilateral action by states, Tesón is considering how states (strictly) ought to act in the state of nature.⁶³

As Kant put it, '[i]t is *redundant* . . . to speak of an unjust enemy in a state of nature; for a state of nature is itself a condition of injustice'.⁶⁴ The state of nature is unjust because '[i]n the state of nature among states, the *right to go to war* (engage in hostilities) is the way in which a state is permitted to prosecute its right against another state, namely by its own *force*, when it believes it has been wronged by another state; for this cannot be done in the state of nature by a lawsuit (the only means by which disputes are settled in a rightful condition)'.⁶⁵ Kant makes a similar point in *Perpetual Peace*: 'The concept of a law of nations as a right to make war does not really mean anything, because it is then a law of deciding what is right by unilateral maxims through force and not by universally valid public laws which restrict the freedom of each one.'⁶⁶ So how is the transformation from the state of nature to international legal order to be effectuated? Kant explains:⁶⁷

(1) states, considered in external relation to one another, are (like lawless savages) by nature in a non-rightful condition. (2) This non-rightful condition is a *condition* of war (of the right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made (hostilities). Although no state is wronged by another in this condition . . . this condition is in itself still wrong in the highest degree, and states neighboring upon one another are under an obligation to leave it. (3) A league of nations in accordance with the idea of an original social contract is necessary . . . (4) This alliance must, however, involve no sovereign authority (as in a civil constitution), but only an *association* (federation).

The move from (1) to (4) is considered by Kant to be a move from a unilateral to an omnilateral or general will.⁶⁸ His argument, I consider, can be understood as follows: (1) that the state of nature is immoral, because of the conflict caused by unilateral judgments and acts on the part of states,⁶⁹ hence (2) states should give up the capacity

⁶³ I use the term 'strict oughts' to be precise about the obligation states are under. According to Gewirth, not all oughts are correlative to duties but 'strict oughts' are. See Gewirth, *supra* note 2, at 63–68.

⁶⁴ *The Metaphysics of Morals*, at A 156 = B 119 (6: 350).

⁶⁵ *Ibid.*, at A 152 = B 116 (6: 346).

⁶⁶ *Perpetual Peace*, at 19 (8: 356).

⁶⁷ *The Metaphysics of Morals*, at A 151 = B 114 (6: 344).

⁶⁸ These terms are applied to the move from the state of nature to civil society within a state, but can equally be applied to the relations between states, as Kant is centrally concerned with the similarities between the move from a state of nature to legal order with regard to the relations between states.

⁶⁹ The argument to demonstrate the immorality of the state of nature is not very clearly made in *Perpetual Peace*. However, Franceschet's argument *supra* at 1000 is of help. On the basis of this argument, it

to judge and act unilaterally and (3) states should establish a league of nations based upon a constitution (i.e. an original contract) which (4) has to be institutionally designed in the manner of a federation. Now, if we read Tesón's view on intervention into Kant's thesis, he appears to be saying that states, when acting unilaterally, should attempt to act morally. However, by giving a duty to states to intervene as a matter of foreign policy, Tesón appears to side-step Kant's idea that the essence of international law is not concerned with states unilaterally deciding what is right. Kant, on Tesón's reading, is being appropriated to justify the unilateral interpretations, by powerful states, of what objective morality requires when applied to a highly complex world. Clearly, Kant does not argue this, and he argues for a distinction between unilateral moral reason and legal reason. It is the capacity of states to judge and act unilaterally which is the problem which international law has to solve.

To be fair, Tesón does make a small concession to this move in Kant's work (see pp. 25–26), but merely states that various aspects of the UN Charter should be amended to only allow the inclusion of legitimate states⁷⁰ and that permanent courts should be established to correspond to Kant's three definitive articles of perpetual peace.⁷¹ He does state that '[t]hese and other reforms will have to be worked out in detail' (p. 25), but it is clearly the working out of these reforms which is of central importance to the Kantian project in international legal theory.

C *Reconsidering Humanitarian Intervention*

According to conventional understandings of international law, intervention can be defined as actions by state A to affect the policies of state B without the authorization of the Security Council and without the consent of state B. Humanitarian intervention is where state A acts to ensure the protection of human rights *within* state B.

Unilateral intervention by states to secure humanitarian objectives is clearly supported by Tesón's view of Kant's work. However, it has been shown that this conclusion is not one which emerges easily from a textual analysis of Kant's work. Unilateral judgments and actions by states are exactly the problem which Kant considers that international law addresses. From this, it might be supposed that humanitarian intervention by states — in so far as it is unilateral — is illegal and hence Tesón's justification for humanitarian intervention deviates considerably from Kant's position. However, this assertion is overly simplistic, and more care must be taken before any conclusion can be reached concerning the legality of unilateral humanitarian intervention according to the Kantian thesis.

Kant's conception of international legal order is rather ambiguously captured in the

could be coherently argued that the state of nature is immoral because decision-making amounts to the judgments of the weaker states being overborne by the judgments of stronger states. This is, therefore, suboptimal decision-making against the measure of the hypothetical 'original contract'.

⁷⁰ E.g. Tesón argues that Articles 4 and 6 of the UN Charter should be modified, and ambiguities in Article 4 should be interpreted in favour of human rights (pp. 25–26). See Laberge, *supra* note 5, at 95.

⁷¹ Tesón also advocates that illegitimate governments should not be recognized, should not be permitted to consent to treaties and its officials should not have diplomatic status (pp. 25–26).

idea of the 'general will'. What does Kant mean by this? It is clear that in an international legal order judgments of what can be referred to as the 'general will' replace unilateral judgments in the state of nature. Therefore, a way to elaborate on the concept of the 'general will' is to ascertain why unilateralism in the state of nature is problematic.

For Kant, 'deciding what is right by unilateral maxims through force . . .'⁷² is the problem in the state of nature. It is a situation of inter-state conflict where the judgments of the most powerful states tend to hold sway. Kant clearly envisages it as a function of the 'general will' to obviate the problems associated with the state of nature, and argues that the different judgments of states have to be weighed against each other by international legal institutions in order to reach a just decision rather than a decision determined by the action or threat of action by more powerful states.⁷³ However, beyond this, he is of little help. Speculatively, Kant's idea of a 'general will' can be divided into two components. The 'general will' requires the establishment of, first, basic principles which can be employed to guide the conduct of states and, secondly, institutional mechanisms which make and enforce legal judgments in line with such principles. Now, if this speculative interpretation of the 'general will' is correct, it is similar, at least *prima facie*, to the way the United Nations system is supposed to operate. Principles are enshrined in the Charter, and decisions are made and enforced by the ICJ and the Security Council. While it may be unwise to adhere to this similarity with too much conviction, it is adequate for the purposes of argument.

Within this narrow definition, the United Nations system is clearly *capable* of making decisions concerning the legality or illegality of intervention to achieve humanitarian objectives, and can, at least *in theory*, base such decisions on legal principles enshrined in the Charter and elsewhere. Obviously, if action by a state to achieve humanitarian objectives is authorized by the Security Council, then it is not strictly humanitarian intervention according to the definition given above. Similarly, if the Security Council prohibits such intervention, then for a state to engage in such action is illegal.⁷⁴ But, of course, this argument assumes that the United Nations system is capable of determining the legality of competing claims and hence be a genuine expression of the 'general will'. For within the United Nations system, there are clear circumstances where *no judgment* is made. The consensual basis of the ICJ and the veto rights of the permanent members of the Security Council are two examples where legal judgments are not made. In this kind of circumstance, how are states to act?

This question can be answered by considering how the United Nations system, which can only be considered functionally consistent with Kant's 'general will' in certain circumstances, should be understood. In some circumstances, disputes will be resolved with reference to legal principles by decision-making institutions such as the ICJ. When international law is incapable of effectively determining the 'general will',

⁷² *Perpetual Peace*, at 19 (8: 356).

⁷³ *Ibid.*, at 16 (8: 354).

⁷⁴ However, for a clear example of such a reading, see Verdross and Simma, *Universelles Völkerrecht* (1984).

states are left to dialogue, diplomacy and ultimately force to resolve their disputes. This is a situation where disputes between states are sometimes regulated by international law, and are sometimes resolved by states employing forcible or non-forcible countermeasures. But, when a state employs countermeasures to enforce what they think is the legal position, it is ‘deciding what is right by unilateral maxims through force’, and this is the characteristic of the state of nature in international relations.⁷⁵ So, from the Kantian perspective, inter-state relations under the United Nations system appears to be to some extent a legal order and to some extent a state of nature. It is, for want of a better term, a semi-legal system.⁷⁶ Therefore, with regard to humanitarian intervention, there are three scenarios: (a) if a judgment is made by the Security Council that state A is authorized to use force against state B to stop or prevent a humanitarian disaster then for state A to act in this way is legal; (b) if the Security Council makes a judgment which prohibits state A using force against state B to stop or prevent a humanitarian disaster, then for state A to intervene is clearly illegal; and (c) the Security Council makes no decision. With regard to (c), how should the state act in the absence of a legal decision? Well, this amounts to considering how a state should act in a state of nature. In the state of nature, states are bound to follow the moral requirements of the categorical imperative, and each state unilaterally determines what this requires. If state A considers that it is morally justified in intervening in state B, then it may do so, but the problem is, as Kant points out, there is no external constraint to determine the legality of the judgment made by the state.

This argument indicates that, when the United Nations system is incapable of making a decision in a particular dispute, states can make a unilateral moral judgment to engage in humanitarian intervention. However, it must be recalled that, for Kant, ‘this condition is in itself still wrong in the highest degree, and states neighboring upon one another are under an obligation to leave it’.⁷⁷ Therefore, because states under the United Nations system may unilaterally consider that they have a moral duty to engage in humanitarian intervention, this does not mean that it is legally justified. Rather, an argument along these lines merely demonstrates the inadequacies of the United Nations system from the viewpoint of Kant’s international legal theory.

⁷⁵ *Perpetual Peace*, at 19 (8: 356).

⁷⁶ I employ the prefix ‘semi’ because it better expresses my view that the current UN system is, to some extent, a legal order. It is not a quasi-legal system if this term means that international law is not really ‘law’ but is rather analogous to ‘law’ as Austin would suggest. See Austin, *Province of Jurisprudence Determined* (1995, first published 1832) 20.

⁷⁷ *The Metaphysics of Morals*, at A 151 = B 114 (6: 344).

5 The Kantian Project in Modern International Legal Theory

The argument above proposes that a central component of Kant's international legal philosophy is the distinction between legal and moral forms of reasoning and hence there is a moral, but not a legal, justification for humanitarian intervention.

Kant's philosophy of international law rests upon a method which is founded upon the *a priori* moral requirements of the categorical imperative and social contractarianism. Tesón's work — and especially his work on humanitarian intervention — appears to be in direct opposition to Kant's view. Tesón appears to equate legality with morality. However, Tesón admits that his theory is not meant to be faithful to a textual interpretation of Kant. He states:⁷⁸

One can distinguish two ways of approaching the work of a philosopher. One is to clarify what the philosopher is saying . . . The other is to reconstruct the philosopher's views, so as to provide a coherent and rationally defensible interpretation of that view . . . Without denying the value of exegesis, I am decidedly a proponent of reconstruction.

Now, the case has been clearly made that there is a textual disparity between Kant's actual writings and Tesón's reconstruction. However, Tesón's views on humanitarian intervention, and his neglect of the social contractarian aspect of Kant's international legal theory, makes his position antithetical to that held by Kant and not a reconstruction of Kant's view.

Kant, in distinction to Tesón's understanding of his work, is best read as advancing an institutional theory of international law which is necessarily founded upon, but which is conceptually distinct from, morality. But, once the key move from a pre-legal state of nature to international legal order has been achieved, the problem of institutional legitimacy arises. This problem arises because of the tension between the two aspects of Kant's international legal philosophy which have been outlined above. On the one hand, the social contractarian aspect of Kant's work emphasizes the need for the resolution of conflict between states, while, on the other, the moral aspect requires that such resolutions are legitimate. To emphasize the contractarian aspect over the moral aspect takes Kant close to a Hobbesian position. This reading indicates that, so long as conflicts are solved, international law is responding to the problem of the state of nature.⁷⁹ But then the legitimacy of a legal judgment which solves a particular conflict can be questioned. We cannot presume that merely because a legal judgment settles the conflict it is legitimate. The question of legitimacy — that is, why international legal judgments normatively pre-empt the unilateral judgments of states — arises. While this is a problem which faces all legal systems, Koskenniemi finds this particularly problematic for international law. For example, he wonders why the conflicting interpretations of legal documents by states are normatively

⁷⁸ Tesón, 'Kantian International Liberalism', in Mapel and Nardin (eds), *International Society: Diverse Ethical Perspectives* (1998) 103.

⁷⁹ For a detailed analysis of the relationship between Hobbesian and Kantian social contractarianism, see Tuck, *The Rights of War and Peace* (1999) 207–225.

overridden by international tribunals.⁸⁰ Koskenniemi asks why states should comply with legal judgments rather than their own unilateral judgments.

These twin concerns can be met by an institutional theory of international law whereby conflicts between states are resolved by *legitimate* decision-making which normatively overrides their unilateral judgments. To develop this theory is a key element of the Kantian project in international law. An initial and obvious starting point in this project is to ascertain how it is possible to reason logically from an abstract moral imperative, to basic constitutional principles, to rules which can be applied in particular cases.⁸¹ Kant clearly realized that the move from morality to legal rules constituted a problem that had to be faced for two reasons. First, the question of how moral principles could be incorporated into international law was of overwhelming importance for Kant, even if one is sceptical about whether he successfully achieved this aim.⁸² Secondly, and intriguingly, Kant briefly considered how the overtly formal categorical imperative, the substantive moral principles which can be derived from it, and legal rules are related. He argued:⁸³

A conflict of duties (*collisio officiorum s. obligationum*) would be a relation between them in which one would cancel the other (wholly or in part). But since duty and obligation are concepts that express the objective practical *necessity* of certain actions and two rules opposed to each other cannot be necessary at the same time, if it is a duty to act in accordance with one rule, to act in accordance with the opposite rule is not a duty but even contrary to duty; so a *collision of duties* and obligations is inconceivable (*obligationes non colliduntur*). 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 incit*).

Therefore, when there is a conflict between two legal rules — in the sense that they require two different and contradictory patterns of conduct — Kant tells us to examine the moral obligations which justify particular rules. Each moral obligation has a normative force which provides a justification for a particular rule. By weighing and balancing the relative normative force of the competing moral principles, it can be ascertained which rules should be applied and followed. This argument advanced by Kant is fairly embryonic, and certainly not sufficient to placate a sceptic, but it is, I suggest, hitting a key issue which has now been identified by a number of international lawyers. The weighting of relative principles is central to the international legal theory of Lauterpacht and Higgins.⁸⁴ Similarly, this idea also forms the core of the Dworkinian-inspired support for ‘relative normativity’ in international law

⁸⁰ Koskenniemi, ‘The Politics of International Law’, 1 *EJIL* (1990) 4, at 22–23.

⁸¹ See Koskenniemi, *supra* note 18. See also Schieder, ‘Pragmatism as a Path Towards a Discursive and Open Theory of International Law’, 11 *EJIL* (2000) 663, at 688.

⁸² See *supra* note 24.

⁸³ *The Metaphysics of Morals*, at A 50 = B 16 (6: 224).

⁸⁴ See Lauterpacht, *The Development of International Law by the World Court* (1958) 399 and *passim*; and Higgins, *Problems and Process: International Law and How We Use It* (1994) at chapter 1.

developed by Tasioulas.⁸⁵ However, the grounds upon which such competing principles can be normatively weighed remains relatively under-developed by these theorists and the problem of incommensurability of such principles still looms large.⁸⁶

According to Kant, the categorical imperative is the moral principle which allocates weight to each competing principle, and it is clear from the argument made in the previous section that weighting has to be decided by international legal institutions and not unilaterally. One might be sceptical about the capacity of the rather formalistic categorical imperative to provide authoritative grounds to determine that one particular obligation has a greater normative weight than another. Scepticism would certainly be allayed if Tesón could ascertain the logical link between the categorical imperative and specific human and democratic rights, and the relative weighting of each specific right. But fundamentally, such scepticism does not logically mean that such a task is impossible or that international lawyers should not strive to achieve it.

6 Conclusion

Two criticisms have been made against Tesón's book. First, it needs to consider the validity of the categorical imperative as a moral principle. Without this, the validity of his approach to international law, which is based upon this principle, lacks foundations. Secondly, Tesón appears to side-step or trivialize the central core of Kant's legal philosophy which concerns the move from the state of nature to international legal order. Without this, Tesón appears at times to be an apologist for the unilateral activities of states and this is something that Kant would firmly reject. It is also intuitively plausible that legal mechanisms must be developed to resolve conflicts between states, where, invariably, both states consider they are justified in their course of action. For Tesón to side-step this move in Kant is problematic, and it is submitted that, while Tesón's work is a worthwhile analysis of Kant's ideas about the moral standing of states in a state of nature, it does not represent a developed account of Kant's conception of international law.

The Kantian project, therefore, has to move towards a theory of institutions rooted in legitimate constitutional principles and procedures which will permit the effective application of the categorical imperative in the relations between states. This does not necessarily lead to a conception of international law which is dogmatically based upon certain absolute and inviolable substantive constitutional principles. Rather, it leads to a conception of international law based upon institutions which are effectively designed to pre-empt and resolve conflicts between states in a morally justified way.

⁸⁵ See Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *OJLS* (1996) 123 and *passim*. It should be noted that Alexy's *Theorie der Grundrechte* (1996) impressively expands upon Kant's basic insight. See also Jansen, 'The Validity of Public Morality', *Archiv für Rechts und Sozialphilosophie* (1998) 1.

⁸⁶ Incommensurability in this sense means that there is no rational way of weighing competing moral claims.