Kant on Rights and Coercion in International Law: Implications for Humanitarian Military Intervention
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Although Immanuel Kant did not examine the question of the permissibility of humanitarian military intervention (henceforth “HMI”) in his writings, scholars have attributed views on this topic to him, on the basis of the (alleged) implications of what he wrote about war and international law. In recent years a number of scholars have attributed to him significantly conflicting views on the permissibility of HMI. Some contend that Kant categorically prohibited all military intervention.1 Others contend that humanitarian intervention may be permissible or even required on Kantian grounds.2

The closest Kant comes to addressing the topic of HMI is in his presentation and discussion of preliminary article #5 (henceforth “PA5”) in Toward Perpetual Peace (henceforth “TPP”). He presents PA5 as follows (in quotation marks in the original text): “No state shall forcibly interfere in the constitution and government of another state.”3 Kant scholars who

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3 Immanuel Kant, Toward Perpetual Peace (1795), in: Mary J. Gregor, trans. and ed.: The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy, Cambridge: Cambridge University Press, 1996, p. 319. When citing this edition of Kant’s works I will use the abbreviation “CE.” I cite Gregor’s translation unless otherwise indicated. Another translation to which I refer is that of H.B. Nisbet, in: H. S. Reiss, ed.: Kant: Political Writings, Cambridge: Cambridge University Press, 1970/1991. When citing Nisbet’s translation I use the abbreviation “Reiss.” When citing the German text I will use two Arabic numerals separated by a colon; the first numeral refers to a volume of Kant’s Gesammelte Schriften, ed. Preussische Akademie der Wissenschaften; those following the colon refer to pages of this volume. When referring to Kant’s works Toward Perpetual Peace, The Metaphysics of Morals, or The Doctrine of Right I
content that HMI cannot be permitted on Kantian grounds point either exclusively or mainly to PA5; other scholars try to explain it away. Tesón, for example, supports his view that Kant’s philosophy should be interpreted as establishing the permissibility of HMI by arguing that there is reason to believe that PA5 is misplaced, specifically that this principle belongs among the three definitive articles of perpetual peace instead of among the preliminary articles. According to Tesón:

> If the protection against intervention is a consequence of domestic legitimacy [of government], then nonintervention holds only among liberal states, and therefore the nonintervention principle should be seen as a definitive precept that governs the liberal alliance, not as a step that must be taken before the alliance is formed.

According to Mertens, PA5 is correctly placed and this prohibition is “indeed of the strictest sort.” Kant here denies “any original jus ad bellum,” holding that “self-defense is the only legitimate ground for using force against another state.”

If PA5 is an absolute prohibition on non-defensive uses of military force, which applies to all states and protects all states (regardless of form of government), and if HMI is always non-defensive interference by one or more states in the constitution and governance of another state, then PA5 entails the absolute prohibition of HMI. Otherwise PA5 does not absolutely prohibit HMI and does not conclusively answer the question of whether HMI may be permissible under certain conditions according to the principles of Kant’s political philosophy. Here I argue that PA5 does not absolutely prohibit HMI. However, while I disagree with Mertens on that point, I also disagree with Tesón’s view that PA5 is misplaced. Further, while I contend that Kant should be interpreted as holding that the right of non-intervention (i.e., immunity to intervention) is conditional on the legitimacy of state government, I disagree with Tesón’s view that Kant

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will use, respectively, the abbreviations “TPP,” “MM,” or “DR.” In quotations of Kant, any italics are in the original text unless otherwise indicated. In general when quoting text I do not use initial or final ellipses unless doing so is necessary in order to avoid distortion of meaning.

4 Tesón, APIL, op. cit., fn. #2, p. 21.

5 Mertens, op. cit., fn. #1, pp. 225, 237.
ascribes that right only to liberal or republican states. Kant does not regard only such states as having legitimate governments.

Correctly interpreting PA5 requires understanding it in context, both in the context of TPP and in the context of Kant’s political philosophy as a whole. I start with TPP. Here Kant presents PA5 as an article of a treaty that states are to agree upon as the first step toward creating a cooperative association for peace. The fact that he presents PA5 in quotation marks has a significance overlooked by other scholars. Although PA5 refers to all states (saying that none are to interfere forcibly in any others), and although it is justifiable a priori, the fact that it is to constitute a commitment or that it is the content of a declaration to be made in words and actions, by states undertaking to establish a rightful and peaceful condition, limits the referent of the term “state” by making the prohibition conditional on conduct. Furthermore, the prohibition is conditional also in a more fundamental way which other scholars have overlooked: it is limited to states as Kant defines this term.

There are two general cases in which HMI might be permissible: (1) within a framework of positive international law constituting a rightful condition according to Kant, if the law includes requirements of governmental legitimacy that secure basic rights for the governed populations, and if permissible enforcement of such requirements by agents of the international community upon its member states constitutes HMI; and (2) partially or wholly outside such a legal framework, whether prior to its establishment, or prior to its becoming universal, or prior to its incorporating specific requirements of governmental legitimacy. It is easier to support the view that HMI might be permissible on Kantian grounds in the first general case. Therefore, I address the second. I do not take a position on the question of whether the current international legal condition most closely approximates case (1) or case (2).

I contend that the Kantian duty to establish a rightful condition (i.e., to substitute a rightful condition for the state of nature, in interactions among states as well as individuals), as well as the right to defend it may, in principle, in a narrow class of cases, justify a use of military
force reasonably termed HMI, although (Kantian) pragmatic considerations may rule it out in any given case.\(^6\) In this narrow class of cases, the right of non-intervention ascribed to states by PA5 does not oppose the intervention because there is no entity that can validly claim this right by appealing to PA5: either there is no state, or the state’s conduct renders it unable validly to claim the right. In a single article I cannot fully discuss this issue; however, in addition to defending my claims about the conditionality of PA5, I undertake here to rebut the objection that, according to Kant, HMI is never permissible because war, “the destroyer of everything good,”\(^7\) is absolutely prohibited, and HMI (outside of an international civil condition, in which it is more correctly characterized as law-enforcement) is war. I conclude by contrasting my position with that of Georg Cavallar.\(^8\)

1. Toward Perpetual Peace: Preliminary Overview

In TPP Kant offers to “the legislative authority of a state…instructions about the principles of its conduct toward other states…,” specifically “universal maxims of waging war and establishing peace.”\(^9\) He proposes six “preliminary articles” (henceforth “PAs”)\(^10\) and three

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\(^6\) See Kant’s discussion of leges latae (Kant, TPP, 8:347). For a useful discussion of the role of pragmatic considerations in Kant’s philosophy of right, see Kenneth R. Westphal, “Kant on the State, Law, and Obedience to Authority in the Alleged ‘Anti-Revolutionary’ Writings,” 17 Journal of Philosophical Research 1992, pp. 411-412.

\(^7\) Kant, The Conflict of the Faculties (1798), 7:90; Reiss, p. 187.


\(^9\) Kant, TPP, 8:368-369; CE, p. 337.

\(^10\) (1) “No treaty of peace shall be held to be such if it is made with a secret reservation of material for a future war.”
(2) “No independently existing state (whether small or large) shall be acquired by another state through inheritance, exchange, purchase or donation.”
(3) “Standing armies (miles perpetuus) shall in time be abolished altogether.”
(4) “No national debt shall be contracted with regard to the external affairs of a state.”
(5) “No state shall forcibly interfere in the constitution and government of another state.”
(6) “No state at war with another shall allow itself such acts of hostility as would have to make mutual trust impossible during a future peace; acts of this kind are employing assassins (percussores) or poisoners (venefici), breach of surrender, incitement to treason (perduellio) within the enemy state, and so forth.” (Kant, TPP, 8:343-346; CE, pp. 317-320; quotation marks in original text).
“definitive articles” (henceforth “DAs”). The PAs, which are all prohibitions, may be understood as marking out the beginning of the road to perpetual peace, and the DAs, which are all requirements, may be understood as specifying the destination. At the end of the road, all states would have republican civil constitutions, all states would securely enjoy a condition of freedom “conformably with the idea of the right of nations,” and all foreigners would have the right to visit (to be treated without hostility and not to be turned away if this would destroy them). As Kant acknowledges, this destination is an ideal which may never be attained and may not even be attainable, but it is to guide efforts to establish perpetual peace through constant reform of imperfect legal and political structures.

The PAs prohibit practices in international relations (occurring in Kant’s time) which oppose or undermine peace, as Kant explains after stating each one. None of the PAs is a clause or provision of the sort that would form part of a treaty merely putting an end to one war between or among particular states. Instead, each PA is formulated in general terms: “No treaty of peace…,” “No state…,” “[All] [s]tanding armies…,” etc. Sovereigns who are moral politicians and who sincerely want to bring about perpetual peace will endorse and follow these

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11 (1) The civil constitution in every state shall be republican. (2) The right of nations shall be based on a federalism of free states. (3) “Cosmopolitan right shall be limited to conditions of universal hospitality.” (Kant, TPP, 8:349-357). The first and second DAs are not in quotation marks in the text (CE, pp. 322-328).

12 There is also one secret article, to which states should commit themselves at least tacitly, says Kant, which states: “The maxims of philosophers about the conditions under which public peace is possible shall be consulted by states armed for war.” (Kant, TPP, 8:368; CE, p. 337). This article is necessary for perpetual peace and each state should commit itself to it, he says. However, it is secret, for two reasons. The first reason is that a state’s legislative authority (to which Kant refers as a person, the sovereign) doesn’t want to be humiliated; he would find it “prejudicial to his dignity to announce publicly that he is its author,” and therefore he would not agree to this article explicitly “in negotiations of public right.” (Ibid., 8:368; CE, p. 337). The second reason is that it goes without saying, in the sense that “no special agreement of states among themselves” is required for the purpose of allowing philosophers to speak freely: this is obligatory in any case, and all states can concur on this point even without any special agreement. (Ibid.8:369; CE, p. 337). Contrastingly, Kant offers the PAs as articles to be agreed on not tacitly but explicitly, in a “special agreement of states among themselves” reached in “negotiations of public right.” (Ibid., 8:368-369; CE, p. 337).

13 Kant, TPP, 8:356; CE, p. 327.

14 Ibid., 8:358; CE, p. 329.

15 Ibid., 8:348, footnote; CE, p. 321.

16 Kant discusses this topic in Appendix I of TPP; I discuss it briefly below, in section 6.2.b.
“laws of prohibition.” They will either at once put a stop to the abuse mentioned (in the cases of PAs 1, 5, and 6) or implement the law when circumstances permit.

The right ascribed to states by PA5 is that of immunity from forcible interference by other states: a state is to be left free to conduct its own domestic governing activities according to its own constitution. The grounds of this right are partially presented in the discussion of PA2:

For a state is not (like the land on which it resides) a belonging (*patrimonium*). It is a society of human beings that no one other than itself can command or dispose of. Like a trunk, it has its own roots; and to annex it to another state as a graft is to do away with its existence as a moral person and to make a moral person into a thing, and so to contradict the idea of the original contract, apart from which no right over a people can be thought.

An independent society has the right to live its own life, and if a state forcibly interfered in another state’s constitution and government, it “would make the autonomy of all states insecure.”

2. States as Moral Persons

According to Kant, a state’s entitlement to the rights of sovereignty derives from its status as a moral person. This status is necessary, although not always sufficient (if unjust enemy states can be moral persons yet lack the right of non-intervention, a question I discuss below). As Sharon Byrd explains, by characterizing the state as a moral person Kant means: “first, that the state is an entity whose actions are capable of imputation [i.e., they can be imputed to the state as their free cause], and second, that it is the subject of laws of freedom as opposed to laws of nature.” The idea that the state is a moral person “is similar to the more modern

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17 *Kant*, TPP, 8:347; CE, p. 320.
18 “[The ruler] is permitted only to delay [putting these laws into effect], lest implementing the law prematurely counteract its very purpose.” (*Kant*, TPP, 8:347; CE, p. 321).
19 Ibid., 8:344 (CE, p. 318).
20 Ibid., 8:346 (CE, pp. 319-320).
21 The idea that the state is a moral person, which is “still the central structural feature of contemporary international law,” was developed by both Kant and Emeric de Vattel, as Georg Cavallar explains. Both Kant and Vattel criticized defenders of “enlightened absolutism” who saw other states as possessions that could be acquired by military conquest or by inheritance, exchange, purchase or gift. (*Georg Cavallar*, Kant and the Theory and Practice of International Right, Cardiff: University of Wales Press, 1999, p. 57).
characterization of legal entities [such as corporations] as juridical persons”: like a corporation, a state is subject to laws and can be judged in accordance with them; it is in some sense different from the sum total of its component persons.23 “By enacting and enforcing its own law, the state exercises its freedom of choice and hence is a subject whose actions are capable of imputation.”24

A state has duties, both perfect and imperfect, which correspond to the duties of the individual:

[T]he state has the perfect duty to itself not to permit revolution and its own dissolution, just as the individual has the perfect duty to maintain himself and not commit suicide. The state has the imperfect duty to itself to reform the constitution, just as the individual has the imperfect duty to himself to develop his talents. The state has perfect duties to other states corresponding to the three Ulpian formulae honeste vive, neminem laede and suum cuique tribue similar to duties of law as applicable to individuals. Finally, the state has the imperfect duty to other states to render aid in times of sudden need, just as the individual has the imperfect duty to be charitable to others.25

A state in a state of nature has the duty, expressed in the formula honeste vive, to maintain its own legal personality and thus its ability to enter an international civil condition.26 The duty neminem laede requires states to follow Kant’s universal principle of right.27 The duty suum cuique tribue requires states to leave the state of nature and establish an international civil condition in order to avert war and secure rights.28

A state in the condition of nature may permissibly wage war, but must do so according to principles that always leave open the possibility of leaving this condition, as required by the duty honeste vive. This duty requires the state to respect the moral personality and autonomy of its

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23 Ibid., p. 182 note 11. According to Byrd, the state is regarded as acquiring its moral personality from the original “contract” that unites the people under a constitution; the people are regarded as governing themselves through their legislation, and the state as enacting and enforcing positive law (if it does not contradict a priori law or natural laws of freedom). As Byrd emphasizes, Kant does not mean that the state acquires “moral value greater than its components,” or that it “deserves respect” or that it is conceived “in a holistic way” (Ibid., p. 172).

24 Ibid., pp. 172, 182 note 9.


26 Byrd, op. cit., fn. #22, p. 175.

27 Ibid., p. 176. “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.” (Kant, MM, 6:230; CE, p. 387).

28 Ibid., pp. 176-179.
own citizens (e.g., by not hiring them out to another state as soldiers to fight an enemy not common to both states, as prohibited by PA2),\textsuperscript{29} and to avoid using them in ways that make them unfit for citizenship; otherwise the state destroys its own moral personality, thus losing “its innate right to freedom under principles of international law and with it its innate right to equality,” i.e., rendering itself unfit “to have rights equal to those of other states within the civil condition.”\textsuperscript{30} If a state blocks the possibility of entering a rightful condition by using tactics during war such as those prohibited by PA6, which preclude future development of mutual trust and thus peace, the state sacrifices its own legal personality.\textsuperscript{31}

3. The Conditionality of PA5

According to Kant, states are entitled to the rights of sovereignty, including the right of non-interference ascribed by PA5, only if they are moral persons. If being a state entails being a moral person, then whether PA5 ascribes a right of non-interference to a (purported) state depends on whether it is indeed a state. Furthermore, whether PA5 ascribes a right of non-interference to a state apparently depends also on the state’s conduct, external (in relations with other states) and perhaps also internal (in relations between the government and the people governed), since Kant says that in some cases it can be permissible for states to use force to compel regime change in another state if its conduct makes it an “unjust enemy.”\textsuperscript{32} There is some reason to discount this element of Kant’s view, since he himself apparently argues elsewhere\textsuperscript{33} that the idea of an unjust enemy is incoherent,\textsuperscript{34} and since a contention that states can permissibly use force to compel regime change in another state may seem to contradict not only Kant’s apparent assertion (in PA5) that no state is permitted to interfere in any other state’s constitution

\textsuperscript{29} Kant, TPP, 8:344; CE, p. 318.
\textsuperscript{30} Byrd, op. cit., fn. #22, p. 176. Byrd cites Kant, DR, 6:347: “A state against which war is being waged is permitted to use any means of defense except those that would make its subjects unfit to be citizens; for it would then also make itself unfit to qualify, in accordance with the right of nations, as a person in the relation of states (as one who would enjoy the same rights as others).” (CE, p. 485).
\textsuperscript{31} Byrd, op. cit., fn. #22, p. 175; Kant, TPP, 8:346; CE, p. 320.
\textsuperscript{32} Kant, DR, 6:349; CE, p. 487.
\textsuperscript{33} Kant, TPP, 8:346-347; CE, p. 320.
\textsuperscript{34} I discuss this below, in section 7.2.
and government, but also his view that states are not permitted to use coercive force against other states in order to compel them to join a state of states.\textsuperscript{35} However, as I will argue, Kant does not contradict himself on any of these points. Whether PA5 ascribes a right of non-interference to a (purported) state depends on whether it is indeed a state, and further, whether PA5 ascribes a right of non-interference to this state depends on its conduct. In the next section I examine Kant’s conception of the state in the context of his account of the basis and limits of political obligation.

4. Kant on the State and Political Obligation

Not every powerful person or organized group of persons that purports to govern does so, and therefore not every purported state is one. Governments are authorized to legislate positive laws; however, only genuine governments are so authorized, and only to legislate laws that are genuine, i.e., that meet certain conditions. The obligation of subjects to obey a purported government’s purported laws depends not only on its power but also on whether it is indeed a government, i.e., carries out a government’s essential function of establishing a civil condition.

Kant offers a theory of how states can get established and how they can develop toward their ideal form. However, he does not provide criteria for determining whether what appears to be a state really is one, at least not explicitly and directly. Arguably he does so implicitly in TPP and DR, and more explicitly but far more briefly in other writings which I discuss below.\textsuperscript{36}

Kant defines the idea of a state in terms of the idea of laws of right.\textsuperscript{37} States may or may not exist, and when they do, they satisfy certain normative conditions; indeed, the idea of a state

\textsuperscript{35} I discuss this below, in sections 6.1. and 9.

\textsuperscript{36} If he had wanted to provide such criteria, he would have realized that it would be dangerous to do so explicitly. Indeed, his remarks about the culpability of conducting certain kinds of inquiry about states (Kant, DR, 6:339-340; CE, p. 480) may be partly intended to alert readers to the fact that he is himself compelled to say indirectly some of what he wants to say about injustice and revolution. Especially in Prussia during the decade after the French Revolution it would have been dangerous to present criteria of state (il)legitimacy.

\textsuperscript{37} “The sum of the laws which need to be promulgated generally in order to bring about a rightful condition is public right. – Public right is therefore 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, a constitution (constitutio), so that they may enjoy what is laid down as right. – This condition of the individuals within a people in relation to one another is called a civil condition (status
serves as a norm which actual states may or may not fully satisfy. A state is called a commonwealth “[b]ecause of its form, by which all are united through their common interest in being in a rightful condition.” The well-being of a state is “that condition in which its constitution conforms most fully to principles of right.” As Robert Pippin points out, Kant does not directly link the state’s function to “the welfare, happiness, or security of its citizens.” Nor does he directly link the state’s authority to “any implied or presumed act of consent.” Instead, Kant regards the state’s main function as “the protection of property rights and the regulation of disputes about property and contract,” and he ties the justification of the state’s authority to “the protection of the basic entitlements shared by all free rational beings.” In Bernd Ludwig’s words, the state is “an institution the function of which is to determine and secure what is mine and what is yours,” broadly understood, and the kind of state that would best fulfill this function is a republic.

According to Kant, since controlling any object involves preventing others from controlling it, individuals in a state of nature are liable to come into conflict, and have a duty to establish a state. Enforceable or “peremptory” rights of possession are necessary for freedom, but are possible only in a civil condition in which there is a “judge competent to render a verdict
having rightful force.”

Therefore, Kant contends, everyone has the duty to establish a civil condition: “you ought to leave the state of nature and proceed with [others] into a rightful condition, that is, a condition of distributive justice,” i.e., “the civil condition (status civilis), that of a society subject to distributive justice,” in which courts decide what is right in accordance with the laws of the state.

Furthermore, as Guyer emphasizes, “Kant argues that our duty to enter into the civil condition with others gives us the right to coerce them into entering that condition with us, since their refusal to do so would be equivalent to a threat against our property claims … and is therefore itself wrongful and indefensible.”

Prior to *The Metaphysics of Morals* (henceforth “MM”), Kant’s political essays simply assumed that the legislator in a civil society is authorized to give laws, as Mary Gregor explains; but Kant held that “a system of positive laws would presuppose a natural law establishing the authority of the legislator to bind others by his mere choice,” that is, “to enact positive laws.”

Perhaps, suggests Gregor, prior to MM Kant had not been prepared to give an account of this assumption; in any case, he finally gives one. The Doctrine of Right (henceforth “DR”) is “an account of this ‘natural law’ by virtue of which a legislator can impose such obligation, thereby making it possible for persons to acquire rights.”

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46 *Kant*, DR, 6:312; CE, p. 456. As Wood explains, Kant argues that one’s external freedom is violated (and therefore one is wronged) when one possesses an external thing phenomenally (one is in immediate bodily contact with it, e.g., holding it in one’s hand) and it is taken, against one’s will; this involves a physical violation of one’s body. Kant argues further “that people cannot carry out their free projects unless they can also be wronged through the removal of or interference with external objects that are not in the immediate physical control of the owner, but in the owner’s possession only through a pure concept of the understanding.” For this reason, according to Kant, “we must postulate that this kind of noumenal or intelligible possession is also possible.” (*Wood*, op. cit., fn #25, p. 174).

47 *Kant*, DR, 6:307; CE, pp. 451-452.


51 Gregor, ibid., pp. 51, 66.

52 Ibid., p. 51.
Kant says that “the Doctrine of Right” refers to the “sum of those laws for which an external lawgiving is possible.”

External lawgiving, as Gregor explains, “joins with a law an incentive other than the thought of duty, an incentive drawn from an agent’s natural aversions.” Although it is not conceptually possible for someone to be constrained through fear to set an end for himself, it is possible for him to be so constrained to perform an action. Such constraint is sufficient for bringing everyone’s external exercise of free choice under public laws, which is necessary if people are to be able to acquire rights to objects.

In Part I of DR Kant discusses the principles that concern how people can acquire rights by acts of choice. These principles together establish the requirement to quit the state of nature and enter civil society, which involves the authority of an external lawgiver. The state of nature lacks the conditions essential for acquiring rights by acts of choice: as Gregor explains, in a state of nature rights cannot be guaranteed, not only because there is no one with sufficient power to do so but also because the rights are not determined; therefore positive laws are necessary. People can acquire rights to objects only in accordance with public laws about acquiring and exercising possession, to which they are subject. Such laws can be known only if they are promulgated by a legislator with authority to bind others. Thus the command to quit the state of nature and enter civil society is a natural law that establishes the authority of an external lawgiver, i.e., “the authority of a legislator to enact positive laws or bind others by laws the content of which he has chosen.”

The content of the laws may derive from custom; Kant refers to this idea occasionally, but his main concern is not the content of the law but “the high-level principles on which the contingent and chosen enactments of a legislator must be based if people’s acts of choice to

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53 *Kant, DR, 6:229; CE, p. 386.*
54 *Gregor, op. cit., fn. #50, p. 64.*
55 Ibid., pp. 64, 68, 70.
56 Ibid., p. 66.
57 Ibid., p. 68.
58 Ibid., p. 66.
59 Ibid., p. 69.
acquire rights are to conform with … the universal principle of Right.” ⁶⁰ As Kant says in the introduction to DR, his aim is to establish, via reason alone, “the basis for any possible giving of positive laws.” ⁶¹ As Gregor explains, in order to “develop the system of substantive moral principles to which any giving of positive law is to conform,” one is to ask, regarding any maxim of using a certain kind of object of choice (whether what is in question is domestic rights, contractual rights, or property rights) “whether the will ‘contains a law’ for such a maxim.” ⁶² That is, one is to ask whether the maxim conforms to the formal principle of the will that applies to external laws, namely the universal principle of right. The laws comprising right cannot require an agent to adopt any maxim; instead, the legislator in a civil society is to provide a constraint (other than the idea of obligation) so that agents’ maxims, whatever they may be, will not issue in actions incompatible with a condition of external freedom. ⁶³ This is necessary, since the legislator “must enact laws prescribing what its members have to do in order to acquire definite property, contractual, and domestic rights and securing the rights they have acquired.” ⁶⁴

As Gregor emphasizes, the “a priori knowable provisions of a constitution” that constitute natural right “may not be violated by whatever statutory provisions are added on the basis of experience.” ⁶⁵ There must be such positive laws or statutory provisions if people are to be able to acquire rights; but positive laws may not infringe upon the rights that people have or can acquire according to principles of natural right. ⁶⁶ Kant holds that human beings have one “innate right,” merely by virtue of their humanity, ⁶⁷ and can acquire other rights by acts of choice. In the state of nature “one can be in ‘provisionally rightful’ possession of objects of

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⁶⁰ Ibid., p. 69.
⁶¹ *Kant*, DR, 6:230; CE, pp. 386-387.
⁶² Gregor, op. cit., fn. #50, p. 68.
⁶³ Ibid., p. 65.
⁶⁴ Ibid., p. 69.
⁶⁶ Gregor, ibid., p. 70.
⁶⁷ “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.” (*Kant*, MM, 6:237; CE, p. 393).
choice, in accordance with the ‘Idea’ of a will enacting public laws.”68 This Idea, as well as the universal principle of right, must guide the legislator in enacting laws that both prescribe what the society’s members must do in order to acquire definite rights and also secure their acquired rights.

The legitimacy of a state is to be assessed by reference to the idea of the original contract. “Properly speaking, the original contract [i.e., “the act by which a people forms itself into a state”] is only the idea of this act, in terms of which alone we can think of the legitimacy69 of a state.”70 There are better and worse constitutions, each of which is a kind of social contract which may or may not “well be reconciled with the idea of the original contract.”71 A despotically governed state is characterized by “the high-handed management of the state by laws the regent has himself given, inasmuch as he handles the public will as his private will.”72 The “spirit of the original contract (anima pacti originarii) involves an obligation on the part of the constituting authority to make the kind of government suited to the idea of the original contract.”73 That authority is under obligation to change the kind of government “so that it harmonizes in its effect with the only constitution that accords with right, that of a pure republic;” thus it must bring about replacement of “the old (empirical) statutory forms, which served merely to bring about the submission of the people,” by “the original (rational) form.”74 Such reform “will finally lead to what is literally a state,” which is “the final end of all public right.”75 Only in this condition can each “be assigned conclusively what is his.”76

All forms of state are based on the idea of a constitution which is compatible with the natural rights of man, so that those who obey the law should also act as a unified body of legislators. And if we accordingly think of the commonwealth in terms of concepts of pure reason, it may be called a platonic ideal (respublica noumenon)…. A civil society organized in conformity with it and governed by laws of freedom is an example

68 Ibid., p. 69.
69 Kant uses the word “Rechtmässigkeit.”
70 Kant, DR, 6:315; CE, p. 459.
72 Kant, TPP, 8:352; CE, p. 324.
73 Kant, DR, 6:340; CE, p. 480.
74 Ibid., 6:340; CE, p. 480.
75 Ibid., 6:341; CE, pp. 480-481.
76 Ibid., 6:341; CE, p. 481.
representing it in the world of experience (*respublica phaenomenon*) and it can only be achieved by a laborious process, after innumerable wars and conflicts. But its constitution, once it has been attained as a whole, is the best qualified of all to keep out war, the destroyer of everything good.77

In the other forms of state, at least if they are not governed in a republican way,78 there is “no absolutely rightful condition of civil society,” but “only provisional right within it.”79 Therefore the constituting authority must “change the kind of government,” and “even if this cannot be done all at once,” it must do so “gradually and continually.”80

The above account of the legislator’s authority to give laws suggests that the authority of any actual legislator must depend on whether this legislator (whether an individual or a group of some kind, and whether male or female; I will use the pronoun ‘he,’ following Kant) does or does not carry out the essential function of government. However, it does not explicitly address the question of the criteria of a legislator, a government, a constitution, or a state, nor the question of the implications for political obligation when not all of the criteria are met in any given case. Much of what Kant says on the topic of political obligation appears in the passages of text in which he argues against the right of revolution; however, there are other relevant passages of text, one of which (in the *Anthropologie in pragmatischer Hinsicht*) was published a year after *The Metaphysics of Morals*. As Jan Joerden81 makes clear, in these passages Kant distinguishes not only between civil society and despotism, but also between despotism and barbarism; the last, in contrast to the previous two, lacks law. While there is some ground, Joerden thinks, for regarding barbarism as a kind of state constitution, as distinct from a situation of war of all against all, there is also ground (stronger, I think) for holding that, according to Kant’s philosophy of right, where law is absent there is no political obligation and no state.

77 Here I quote from *Ludwig*, op. cit., fn. #44, p. 413; he quotes *Kant*, The Conflict of the Faculties, 7:90.
78 *Kant*, TPP, 8:352; CE, p. 324.
79 *Kant*, DR, 6:341; CE, p. 481.
80 Ibid., 6:340; CE, p. 480.
In TPP Kant distinguishes only two forms of government, despotic and republican (as distinct from forms of sovereignty, of which there are three: autocracy, aristocracy, or democracy). The “form of government (forma regiminis)” concerns “the way a state, on the basis of its civil constitution (the act of the general will by which a multitude becomes a people), makes use of its plenary power; and with regard to this, the form of a state is either republican or despotic.”82 In DR Kant speaks of “a pure republic” as having “the only constitution that accords with right”83 and speaks of the autocratic form of state (as distinct from the aristocratic or democratic forms of state) as “the most dangerous for a people, in view of how conducive it is to despotism.”84 Kant understands both forms of government, republican and despotic, as combining law and power, but only the republican form of government as combining law and power with freedom.

This becomes clear in Kant’s Anthropologie. Here Kant says:

Freedom and law (by which the former is limited) are the two hinges around which the civil legislature turns – but such that the law has effect and is not mere advertisement: So a medium is to be added, namely, power, which when connected with those lends these principles effect. – Now one can think of four combinations of the latter with the two former:
A. Law and freedom without power (anarchy)
B. Law and power without freedom (despotism)
C. Power without freedom and law (barbarism)
D. Power with freedom and law (republic).85

82 Kant, TPP, 8:352; CE, p. 324.
83 Kant, DR, 6:340; CE, p. 480.
84 Ibid., 6:339; CE, p. 479.
85 Kant, Anthropologie, 7:330-331, quoted from Joerden, op. cit., fn. #81, p. 139. Compare Robert B. Louden’s translation: "Freedom and law (by which freedom is limited) are the two pivots around which civil legislation turns. – But in order for law to be effective and not an empty recommendation, a middle term must be added; namely force, which, when connected with freedom, secures success for these principles. – Now one can conceive of four combinations of force with freedom and law:
A. Law and freedom without force (anarchy).
B. Law and force without freedom (despotism).
C. Force without freedom and law (barbarism).
D. Force with freedom and law (republic).”
As Joerden interprets this passage, anarchy is not a state constitution: it is “defined without (state) power and therefore, strictly speaking, does not represent a state constitution but rather the situation of a non-state.”86 Whether barbarism is a state constitution is less clear; it depends on how one construes “state,” “power,” and “law.”

As Kant defines a state (civitas), it is “a union of a multitude of human beings under laws of right.”87 Therefore, suggests Joerden, one can replace “the expression ‘law and power’ in Kant’s system of concepts (in either the Anthropologie or Reflexion 1501) with the concept ‘state’;” according to “this suggestion of substitutes” there result four possible combinations of the concepts of state, freedom, right and power, two of which are: “State without freedom … (‘despotism’)” and “Power without right … (‘barbarism’).”88 According to this conceptual scheme, barbarism is not a state at all; a state without freedom is despotic; and only a republican state has freedom. “The republic (‘Rechtsstaat’/rule of law state) arises out of freedom and law (= ‘Recht’/Right) as well as law and power (= ‘Staat’/state).”89

Joerden points out that according to Kant, barbarism is a situation “in which neither positive law nor natural law is effective;” it is characterized by mere power.90 Barbarism differs from despotism insofar as despotism has, but barbarism lacks, law. An actual state can make a gradual transition from despotism to barbarism, which is a “degenerate state structure.”91 Once a

86 Joerden, op. cit., fn. #81, pp. 140-141.
87 Kant, DR, 6:313; CE, p. 456.
88 Joerden, op. cit., fn. #81, p. 149.
89 Ibid., p. 149.
90 Ibid., p. 141. However, according to Joerden “[t]he parameter of power (‘Gewalt’) should be interpreted as ‘state power’ and should not be confused with mere violence ‘Gewalttätigkeit’.” (Ibid., p. 140, italics in original). This puzzling suggestion becomes slightly less so in view of Joerden’s clarification that by state power he means “the possibility of the head (‘Oberhaupt’) – a term used by Kant in other places – to implement his laws or will.” (Ibid., p. 140). I say “slightly” because in the passage of MM to which Joerden refers, where Kant uses the term ‘Oberhaupt,’ Gregor translates it as “a superior over all (which, from the viewpoint of laws of freedom, can be none other than the united people itself).” (Kant, DR, 6:315; CE, p. 459). Perhaps the phrase “laws or will” is to be understood so that where power is used to implement not laws but merely someone’s will, there the situation is one of barbarism. In his (unpublished) Reflexionen zur Anthropologie Kant speaks of a ‘barbaric regime,’ which he characterizes as lacking not only freedom but also law (while despotism, in contrast, lacks freedom but has law). (Joerden, ibid., p. 144).
91 Joerden, ibid., pp. 143, 151.
state of barbarism is reached, there is no longer any law. Joerden provides an illustrative example:

A constitutive element of the concept of law seems to be that it is at least possible to follow the law in question. … A state where ‘laws’ are enacted which cannot be followed and which add repressive measures – in particular, criminal reprisals – can only be labelled a state without law. … A state which persecutes or even exterminates members of the society, for example on the basis of race criteria, does not seek to guide the conduct of these people but solely aims at the exclusion or even the extermination of such persons. Thus, it does not even allow these people the possibility of adapting their conduct in order to fit in to the state. Such state conduct is simple execution of state power ‘without law’ (and of course even more so ‘without freedom’). … A state which imposes reprisals on its citizens which cannot be avoided by conduct conforming to law treats its citizens solely as means and in no way as ends.92

5. Kant’s Denial of a Right of Revolution

If there were no limit to political obligation, according to Kant, then HMI could not be permissible; for it would not be permissible to use coercive force against a government which has posed no threat to other states and is legitimate in relation to its own people, i.e., which they are obligated to obey. In a situation of barbarism, however, there is no law and no government. The people have no obligation to refrain from using force against their lawless oppressors in order to overthrow them.93 Indeed, they have duties to overthrow them: duties to themselves and to others, including the duty to establish a rightful condition. Outsiders, too, have the duty to establish a rightful condition, and they have no duty (corresponding to a state’s right of non-intervention) not to intervene in the situation of barbarism when aiming to fulfill their own duty, since in that situation there is no law and no government, thus no state; therefore they have a right to do so, in the sense of a liberty (i.e., the lack of a duty corresponding to a state’s right of non-intervention), although their duties toward the people subject to barbaric oppression (among others) set permissibility constraints on the feasible courses of action available. Further, given

92 Ibid., p. 142, italics in original.
93 Sharon Anderson-Gold argues that genocide puts the targeted part of the population into a state of nature with the government, thereby releasing them from their obligations, and that these people are in effect international orphans or internal refugees that can be rescued. (Sharon Anderson-Gold, “Crimes Against Humanity: A Kantian Perspective on International Law,” in: Sidney Axinn/Jane Kneller, eds.: Autonomy and Community: Kantian Social Philosophy Today, Albany: State University of New York Press, 1998).
that a state has the imperfect duty to other states to render aid in times of sudden need,\textsuperscript{94} arguably this duty\textsuperscript{95} extends to helping a people whose government has degenerated into barbarism, especially if it is committing or abetting genocide.\textsuperscript{96}

Many scholars seem to attribute to Kant the view that political obligation has no limits; for before, or without, discussing Kant’s views about the basis of governmental authority or the nature of the state, they assert, e.g., that according to Kant’s “Hobbesian absolute prohibition against revolution,” no person has the right to attempt to overthrow a head of state, “regardless how tyrannical” he may be;\textsuperscript{97} or else that Kant holds that “sovereignty is absolute;”\textsuperscript{98} or that “all governments should be taken to be legitimate.”\textsuperscript{99} Some scholars correctly point out that, although Kant argues that “it is always wrong to disobey even unjust laws, or the commands of an unjust ruler acting contrary to law,” and also that it is “always wrong to overthrow the existing ruler, however unjustly that ruler may behave,” still the requirement to obey the ruler’s laws or commands holds only “as long as these laws and commands do not require you to do something that is in itself morally wrong.”\textsuperscript{100} But it is important to make fully clear that political obligation is limited, according to Kant, and that this is evident even from his arguments against a right to revolution.

Consider Howard Williams’ summary of these arguments. It is wrong to disregard, disrespect, or destroy legal order; therefore, “revolution or rebellion under a lawful constitution is

\textsuperscript{94} Byrd, op. cit., fn. # 22, pp. 171, 180.
\textsuperscript{95} Thomas E. Hill, Jr. argues “that Kantian ethical theory provides a strong presumption in favor of humanitarian interventions in certain special conditions though it also opposes such interventions when those conditions are absent.” \textit{Thomas E. Hill, Jr., “Sovereignty and Humanitarian Intervention,”} unpublished paper cited with author’s permission.
\textsuperscript{96} Insofar as such a case is not correctly described as a civil war or a state’s merely “struggling with its internal illness,” Kant’s discussion of PA5 does not conflict with this interpretation of that imperfect duty. \textit{(Kant, TPP, 8:346; CE, pp. 319-320).}
\textsuperscript{98} \textit{Pippin, op. cit., fn. #41, p. 416.}
\textsuperscript{100} \textit{Wood, op. cit., fn. # 25, p.176.}
at all times wrong.”101 We must “obey the sovereign authority even when we think it acts mistakenly or illegitimately, otherwise it is not a sovereign authority,” and in order to have rule of law we require a sovereign authority.102 Moreover, in attempting to improve a legal order, it is wrong to destroy the old one instead of reforming it legally. Wherever “the rule of law (however tenuously) is to be found,” improvement cannot be ruled out; “it should be possible for reform to take place under any legal constitution.”103 “A complete and drastic break with the existing political system, if it has an effective legal system, is out of the question.”104

If we take Howard Williams’ interpretation of Kant’s position on revolution as correct, as I think it is, then Kant’s arguments assume that there is a legal order, though it may be gravely deficient, and also assume that not only the subjects but also the ruler(s) have, or believe they have, respect for law and rights.105 Acknowledging that a government, whatever its constitution or form of sovereignty, can be “despotic and violent” if it lacks a representative system,106 Kant considers the question of how to improve a legal order. He does not address power-wielders who disrespect and destroy law and cannot be seen as trying to secure the people’s rights; nor does he address the subjects of such power-wielders.107 Kant apparently does not have such people in mind at all; apparently he thinks people incapable of such crime.108 In any case, he does not

102 Ibid., p. 186.
103 Ibid., p. 180.
104 Ibid., p. 186.
105 As Kenneth Westphal points out, Kant’s argument against revolution in “On the common saying: That may be correct in theory, but it is of no use in practice” (1793), at 8:299, is fallacious and would be valid only if restricted to legitimate governments; thus it can ground only a prohibition against active resistance to legitimate law. (Westphal, op. cit., fn. #6, p. 388). As Thomas E. Hill, Jr. points out, Kant’s argument against inter-state interventions seems to be that it always disrespects the will of the people in the target state; but this argument cannot plausibly ground an absolute prohibition on interventions, for “in states with rulers that grossly oppress many of their subjects, the presumption that the ruler has the united will of the people behind him is either false or without normative force.” (Hill, op. cit., fn. # 95, pp. 23-24).
106 Kant, TPP, 8:353; CE, p. 325.
107 “A nonrecalcitrant subject must be able to assume that his ruler does not want to do him any wrong.” (Kant, TPP, 8:304; CE, p. 302).
108 “[Such a criminal’s] maxim is therefore opposed to the law not by way of default only (negative) but by rejecting it (contrarie) or, as we put it, his maxim is diametrically opposed to the law, as contradictory to it (hostile to it, so to speak). As far as we can see, it is impossible for a human being to commit a crime of
address the question of what may permissibly be done to resist such criminals, whether by the people subject to them or by other states. Thus his doctrine of the wrongness of revolution is premised on an assumption that is not necessarily true: that the power-wielders are not law-defying, law-destroying criminals, but instead rule the people by law in a bona fide state.

As Guyer points out, Kant argues that there cannot be a constitutional right to rebellion, because any constitution that allowed such a right would be a self-destructive document; but while this argument may be acceptable, there is reason to reject Kant’s argument denying that it can be morally right for a people to rebel under some circumstances (even if they cannot do it “as a people, in accordance with their positive laws”). Kant presents this argument in “Theory and Practice:”

> even if it is granted that by such an uprising no wrong is done to a ruler (perhaps one who had violated a joyeuse entrée, an actual basic contract with the people), nevertheless the people did wrong in the highest degree by seeking their rights in this way; for this way of doing it (adopted as a maxim) would make every rightful constitution insecure and introduce a condition of complete lawlessness (status naturalis), in which all rights cease, at least to have effect.

It would introduce a condition of lawlessness because there must be a point in time after the destruction of the previous constitution and before the organization of a new commonwealth.

> Even if an actual contract of the people with the ruler has been violated, the people cannot react at once as a commonwealth but only as a mob. For the previously existing constitution has been torn up by the people, while their organization into a new commonwealth has not yet taken place. It is here that the condition of anarchy arises with all the horrors that are at least possible by means of it.

Kant is arguing, as Guyer’s says, that “the overthrow of an existing state, even if in the hope of greater justice and not merely greater happiness, can never be an immediate transition to a better-

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109 Guyer, op. cit., fn. #49, pp.284-287. Thomas E. Hill, Jr contends that Kant’s arguments do not establish an absolute moral prohibition against engaging in revolution and notes “some prima facie reasons to expect that Kant’s fundamental moral principles, reasonably construed, would allow revolution in some extreme circumstances.” (Hill, op. cit., fn. #97, p. 294).

110 Here, by closing the parentheses, I follow the punctuation in Guyer, ibid., p. 288.

111 Kant, TPP, 8:301; CE, p. 300.

112 Kant, TPP, 8:302, note; CE, p. 300.
constituted state, but is always a reversion” to a condition of anarchy, from which a better state might not arise. However, as Guyer points out, new regimes are sometimes accepted very quickly. Moreover, although it may be reasonable to suppose that “in a state of anarchy it is entirely accidental whether justice obtains or not,” and thus reasonable to estimate the probability of injustice as “always more or less 50 percent,” contrastingly, “in a truly malicious regime, intentionally aimed at doing injustice to some or many of its citizens – such as Nazi Germany or the Stalinist Soviet Union – the probability of such injustice is much higher, let’s say 99 or 100 percent;” therefore the subjects of such a regime arguably “have a moral right or even a moral duty to overthrow it even at the risk of anarchy,” even though people are, according to Kant, always imputable for all the consequences of their actions, whether foreseen or not, when they depart from the law. In such a case there might be no law from which to depart.

Guyer summarizes Kant’s view about our duties in relation to the state as follows: “if there is no state, then our first duty in the actual circumstances of human life is to institute one; but if there is a state, then our responsibility, even in the face of its injustice, is to maintain it rather than to return to the state of nature.” In actual conditions it may be difficult to judge whether a state still exists or the rule of law has entirely degenerated; as Joerden emphasizes, the transition between despotism and barbarism can occur gradually. Yet there is an important difference between the two and there are clear cases of both. The distinction between them separates a kind of state government, on the one hand, from a situation of domination in which there is, strictly speaking, no law and no state. Although Kant does not discuss how to judge when despotism has made the transition to barbarism, nor what it may be permissible for people in such circumstances to do, his arguments entail that political obligation is limited; we are

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114 Ibid., p. 288.
115 This is a topic which probably would have been dangerous to discuss, especially if the censors were to see it as indirectly inciting revolution by encouraging subjects to judge for themselves regarding when they are no longer under political obligation.
left with the tasks of judging these matters ourselves, both with regard to domestic political
relations and with regard to international political relations.

6. PA5 is Conditional on State Conduct

Above I have claimed that whether PA5 ascribes a right of non-interference to a
(purported) state depends on whether it satisfies the criteria of a state. This is a necessary but not
sufficient condition for entitlement to the right of non-interference, or so I will now argue. PA5
ascribes this right to a state conditionally on its conduct toward other states. How should states
conduct themselves toward each other? Understanding Kant’s views on this question requires
first making sense of what he says about the ideal international order.

6.1. The Ideal International Order

Although states must leave the state of nature among states in order to secure their rights
and avert war, they may not coerce each other to do so.\(^\text{116}\) As Pauline Kleingeld explains, while
Kant holds that states have a duty to promote the establishment of a federation of states with
coercive powers over the member states, he thinks that reaching this ultimate ideal requires first
establishing a non-coercive, voluntarily cooperative league of states, without any highest
legislative or executive authority, such as the pacific league he advocates in DA2.\(^\text{117}\) Kant argues
that reason demands the establishment of a federation or state of states: “As concerns the
relations among states, according to reason there can be no other way for them to emerge from
the lawless condition, which contains only war, than for them to relinquish, just as do individual
human beings, their wild (lawless) freedom, and to accustom themselves to public, binding laws,
and to thereby form a (continually expanding) state of peoples \((\text{civitas gentium})\), which would

\(^\text{116}\) Byrd so interprets Kant in 1995. \((\text{Byrd}, \text{op. cit., fn. #22, 176-179})\). However, Byrd apparently changes
her mind about this between 1995 and 2006: \(\text{Sharon Byrd/Joachim Hruschka}, \text{“From the State of Nature to the}
\text{Carlsberg Academy, Copenhagen, Denmark, August 2006, cited with author’s permission.}\)

\text{convincingly for her own interpretation against other scholars’ interpretations, including one which she}
\text{calls “the standard view.”}
ultimately comprise all of the peoples on earth.”\footnote{Kant, TPP, 8:357, quoted in Kleingeld, ibid., p. 484.} Indeed, Kant “endorsed the idea of a federative ‘state of states’ throughout the 1780s and 1790s.”\footnote{Kleingeld, ibid., p. 488.} However, starting in the 1790s he argued that the only way states can leave the state of nature and progress toward the ideal is by starting with a voluntary league of states.

The reason why states must start by forming a voluntary league concerns the imperfection of the analogy between (a) the state of nature among individuals, and (b) the state of nature among states, as Kleingeld explains: “When individuals leave the state of nature to submit to the laws of a common state, the state they form may not be perfect, but it will be better, normatively speaking, than the state of nature that they left behind because before its creation there was no rule of law at all;” however, this is not true in the case of states leaving the state of nature.\footnote{Ibid., p. 485.} Since individuals do not have political autonomy in the state of nature, such autonomy cannot be violated by forcing individuals into a state. By contrast, states already have an internal legal constitution; therefore, as Kant says, “they have outgrown the coercion of others to subject them to a broader legal constitution according to their [viz. others’] conceptions of right.”\footnote{Kant, TPP, 8:355-356, quoted in Kleingeld, ibid., p. 485. Here Kleingeld also quotes the Vorarbeiten for TPP (23:168), in which Kant says that within states “public right has already been established.”} To force an unwilling state into a federation “would violate the autonomy of the individuals composing the state, collectively as co-legislating citizens.”\footnote{Kleingeld, ibid., p. 485.}

Insofar as the unwilling state is a just republic, a despotic state of states could destroy the citizens’ rights and freedoms; but even the members of “currently despotic states may not want to join a federation of states if this has to happen on a conception of right that differs from their own.”\footnote{Ibid., p. 486.} Furthermore, “an otherwise justly ordered state of states [that] coerced despotic states into its organization against their will” and undertook to improve the external freedom of the individuals in these states by reorganizing their political structures, would fail to treat the peoples

118 Kant, TPP, 8:357, quoted in Kleingeld, ibid., p. 484.
119 Kleingeld, ibid., p. 488.
120 Ibid., p. 485.
121 Kant, TPP, 8:355-356, quoted in Kleingeld, ibid., p. 485. Here Kleingeld also quotes the Vorarbeiten for TPP (23:168), in which Kant says that within states “public right has already been established.”
122 Kleingeld, ibid., p. 485.
123 Ibid., p. 486.
involved as capable of political autonomy: it would treat them paternalistically. While these peoples may want to be rid of their oppressors, they may not want foreign states doing the ridding, and furthermore they may not want to join a particular state of states.\textsuperscript{124} Kleingeld concludes, plausibly, that Kant had good reason “to advocate not the coercive formation of a state of states but a league instead and to hope that the federation will subsequently become established voluntarily.”\textsuperscript{125}

\textbf{6.2. The Definitive Articles, the Doctrine of Right, and PA5}

A state of nature is, Kant says, “a condition of war, that is, it involves the constant threat of an outbreak of hostilities even if this does not always occur;” therefore a condition of peace must be established, “for suspension of hostilities is not yet assurance of peace, and unless such assurance is afforded one neighbor by another (as can happen only in a \textit{lawful} condition), the former, who has called upon the latter for it, can treat him as an enemy.”\textsuperscript{126} This holds of nations as well as of individual human beings: “a human being (or a nation) in a mere state of nature denies me this assurance and already wrongs me just by being near me in this condition.”\textsuperscript{127} A condition of peace must be established at three levels, i.e., there are “three possible forms of rightful condition.”\textsuperscript{128} Each is addressed by one of the three DAs.

\textbf{6.2.a. The Definitive Articles}

In discussing DA1 Kant argues that individual human beings should enter “a condition of being under civil laws,” ideally under a republican constitution, not only because its origin is “the pure source of the concept of right” and it is “the sole constitution that issues from the idea of the original contract,” but also because “the republican constitution does offer the prospect of the result wished for, namely perpetual peace.”\textsuperscript{129} This is because in a republic the consent of the

\textsuperscript{124} Ibid., p. 487.
\textsuperscript{125} Ibid., p. 487.
\textsuperscript{126} \textit{Kant}, TPP, 8:349; CE, p. 322.
\textsuperscript{127} Ibid., 8:349, footnote; CE, p. 322.
\textsuperscript{128} \textit{Kant}, DR, 6:311; CE, p. 455.
\textsuperscript{129} \textit{Kant}, TPP, 8:349, footnote; 8:349-350; CE, pp. 322-323.
citizens is required for war, and therefore war is less likely to be undertaken. However, the duty to leave the state of nature is fulfilled by the establishment of any system of laws creating a civil condition in which the people may be “secure against violence from one another”\textsuperscript{130} and in which everyone “is bound to refrain from encroaching on what another possesses.”\textsuperscript{131}

In DA2 Kant argues that states should enter “a constitution similar to a civil constitution, in which each can be assured of its right.”\textsuperscript{132} Any constitution of states in relation to one another that is “in accord with the right of nations” is a rightful constitution.\textsuperscript{133} States should establish at least a pacific league, which would avert war and “secure a condition of freedom of states conformably with the idea of the right of nations,” and would gradually extend further and further by alliances with more states.\textsuperscript{134}

According to Kant, “all men who can mutually affect one another must belong to some civil constitution;” and since “individuals and states, standing in the relation of externally affecting one another, are to be regarded as citizens of a universal state of mankind (\textit{ius cosmopoliticum}),” they should belong to a civil constitution that is “in accord with the right of citizens of the world.”\textsuperscript{135} This right, i.e., cosmopolitan right, “shall be limited to conditions of universal hospitality,” argues Kant in DA3.\textsuperscript{136} What this means is that while foreigners do not have the right to be a guest, they do have the right to visit, i.e., “to present oneself for society” and to seek commerce.\textsuperscript{137}

It is important to notice that Kant does not say that the numerical order of the DAs (1-3) is a chronological sequence, i.e., that first all states must become republics, then all states must

\textsuperscript{130} \textit{Kant}, DR, 6:312; CE, p. 456.
\textsuperscript{131} Ibid., 6:307; CE, p.452.
\textsuperscript{132} \textit{Kant}, TPP, 8:354; CE, p. 326. Kant seems to use “constitution” synonymously with “legal order.” The term “legal order” can be used less awkwardly to describe a pacific league.
\textsuperscript{133} Ibid., 8:349, footnote; CE, p. 322.
\textsuperscript{134} Ibid., 8:356-357; CE, pp. 327-328.
\textsuperscript{135} Ibid., 8:349; CE, p. 322
\textsuperscript{136} Ibid., 8:357; CE, p. 328.
\textsuperscript{137} Ibid., 8:357-358; CE, pp. 328-329. “The other can turn him away, if this can be done without destroying him, but as long as he behaves peaceably where he is, he cannot be treated with hostility.”\textsuperscript{137} (Ibid., 8:358; CE, p. 329).
join into a league, and then they should establish a cosmopolitan law.\textsuperscript{138} He does say that all three levels of right are necessary for achievement of perpetual peace.\textsuperscript{139} However, he makes clear that a league can get established before all states become republics. He does not prohibit non-republican states from joining it, nor does he argue against their joining, but instead in favor of all states doing so. He suggests that membership in a league can accelerate development of republican institutions in non-republican member states.\textsuperscript{140} And while he argues that the idea of a pacific league can become actual if a republic provides a focal point of federative union for other states, he does not argue that this is the only way; he merely offers it as a plausible example of one way, in order to support his claim that a pacific league is not impossible.\textsuperscript{141}

6.2.b. Leaving the State of Nature

Kant conjectures that human inclinations can lead states toward peace. Sooner or later, he says, the spirit of commerce “takes hold of every nation.”\textsuperscript{142} The power of money, which “may well be the most reliable of all the powers (means) subordinate to that of a state,” compels states “to promote honorable peace and, whenever war threatens to break out anywhere in the world, to prevent it by mediation, just as if they were in a permanent league for this purpose.”\textsuperscript{143} Yet a permanent pacific league for the purposes of averting war and securing states’ freedom according


\textsuperscript{139} Kant says: “if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse.” (DR, 6:311; CE, p. 455). Similarly: “if only one of these [individuals or states] were in a relation of physically affecting another and were yet in a state of nature, the condition of war would be bound up with this.” (TPP, 8:349, footnote; CE, p. 322).

\textsuperscript{140} Kant, TPP, 8:356, 8:366, 8:373; CE, pp. 327, 335, 340.

\textsuperscript{141} Ibid., 8:356; CE, p. 327.

\textsuperscript{142} Ibid., 8:368; CE, p. 336.

\textsuperscript{143} Ibid., 8:368; CE, p. 337.
to the right of nations would be crucially different, as the moral politician sees but the political
moralist does not.\footnote{Kant says that the political moralist considers the end of perpetual peace to be a mere technical problem, but the moral politician sees that it is a moral problem that requires a different procedure from the one that would be chosen by the political moralist. \textit{(Kant, TPP, 8:377; CE, p. 344). In fact, perpetual peace can be attained only by political wisdom and justice, not by pacts with secret reservations, etc. \cite{Ibid., 8:377-378; CE, pp. 344-345}. “[P]olitical maxims…must issue from the pure concept of duty of right…” \cite{Ibid., 8:379}. “True politics can therefore not take a step without having already paid homage to morals….” \cite{Ibid., 8:380}.}

Duty requires\footnote{Kant says: “the ultimate goal of the whole right of nations” is perpetual peace, and that continual approximation to it by entering suitable alliances of states “is a task based on duty and therefore on the right of human beings and of states.” \textit{(Kant, DR, 6:350; CE, p. 487).}} states to leave the state of nature and enter coalitions like a pacific
league that would “not look to acquiring any power of a state but only to preserving and securing
the freedom of a state itself and of other states in league with it.”\footnote{\textit{Kant}, TPP, 8:356; CE, p. 327.}

Such an association of several states to preserve peace can be called a \textit{permanent congress of states}, which each neighboring state is at liberty to join. Something of this kind took place (at least as regards the formalities of the right of nations for the sake of keeping the peace) in the first half of the present century, in the assembly of the States General at the Hague. The ministers of most of the courts of Europe and even of the smallest republics lodged with it their complaints about attacks being made on one of them by another. In this way they thought of the whole of Europe as a single confederated state which they accepted as arbiter, so to speak, in their public disputes.\footnote{\textit{Kant}, DR, 6:350; CE, pp. 487-488.}

By such a congress to preserve peace, and only thus, “can the idea of a public right of nations be
realized, one to be established for deciding their disputes in a civil way, as if by a lawsuit, rather
than in a barbaric way (the way of savages), namely by war.”\footnote{Ibid., 6:351; CE, p. 488.}

What constitutes states’ having left the state of nature? Kant says that a true condition of
peace could come about, and rights could come to hold conclusively, only “in a universal
association of states (analogous to that by which a people becomes a state).”\footnote{Ibid., 6:350; CE, p. 487.} However, such an association cannot be achieved in current reality, due to contingent circumstances and facts about human nature:

if such a state made up of nations were to extend too far over vast regions, governing it
and so too protecting each of its members would finally have to become impossible,
while several such corporations would again bring on a state of war. So **perpetual peace**, the ultimate goal of the whole right of nations, is indeed an unachievable idea.\(^{150}\)

Yet we can follow “the political principles directed toward perpetual peace,” and we have the duty to do so. We have the duty to continue to try to establish the conditions in which rights can hold conclusively, even though they will always hold less than conclusively in some respects or to some degree.\(^{151}\) As conditions change, new possibilities may emerge and permit approaching perpetual peace more closely than previously seemed possible.

Kant clearly holds (and evidently with good reason) that establishing a congress of states is making important moral progress beyond the state of nature among states, even though it is not enough to make rights hold conclusively. Similarly, he clearly holds (though more controversially)\(^{152}\) that establishing a state is making important moral progress beyond the state of nature among individuals, even if the state is despotic. Although a republican constitution “is the final end of all public right, the only condition in which each can be assigned conclusively what is his,”\(^{153}\) and although only a republic is “literally a state,”\(^{154}\) nevertheless the crucial distinction is between private and public right,\(^{155}\) for where there is only private right there is no rightful condition\(^{156}\) at all but only a state of nature.\(^{157}\)

\(^{150}\) Ibid., 6:350; CE, p. 487.

\(^{151}\) Before states leave the state of nature, says Kant, “any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely **provisional**;” although there may not be constant fighting, there can be no “true **condition of peace**” and rights cannot hold conclusively. (Ibid., 6:350). However, rights do not become conclusive as soon as states leave the state of nature, if a universal association of states is necessary for this. Kant sometimes seems to say that any civil condition is sufficient, and that any constitution establishes a civil condition (ibid., 6:255-257; CE, pp. 408-410; 6:264; CE, p. 416; 6:312; CE, p. 456; 6:350; CE, pp. 487-488); at other times he seems to say that right at all three levels is necessary for security of rights (ibid., 6:311; CE, p. 455; 6:340-341; CE, pp. 480-481), and that a universal association of states is necessary for rights to be conclusive (TPP, 8:357; CE, p. 328).


\(^{153}\) Kant, DR, 6:341; CE, p. 481. Note: here Kant should be understood as saying that a republic is a necessary, not a sufficient condition; also necessary is the universal association of states, as he says a little later on, at 6:350.

\(^{154}\) Ibid., 6:341; CE, p. 480.

\(^{155}\) Public right is “a system of laws for a people … so that they may enjoy what is laid down as right.” (Kant, DR, 6:311; CE, p. 455).

\(^{156}\) “A rightful condition is that relation of human beings among one another that contains the conditions under which alone 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.” (Ibid., 6:305-306, CE, p. 450).
If some agent in a state of nature (whether an individual or a state) acquires something external, e.g., “by taking control of it or by contract in accordance with its concepts of right,” this acquisition is provisional and remains so “as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect.” But wherever there is public justice in a state of any kind, i.e., in a rightful or civil condition (status civilis), and only in such a condition, a person can be “assured of what is his against violence.” Every state establishes a rightful condition, even though not every state has the form it ought to have in accordance with pure principles of right, namely, a republican constitution. Wherever there is public right, people can enjoy their rights not only provisionally but also with assurance to some degree approaching conclusiveness (which would require living in a republic within a universal state of republican states). Therefore what is most important is for individuals and states to leave the state of nature by entering some kind of rightful condition, after which continual, gradual reform toward a republican government and a universal association of states is possible.

6.2.c. The PAs as Necessary Preliminary Steps

Any states intending to leave the international state of nature must endorse and follow the PAs. States will follow the PAs if they acknowledge other states as autonomous societies of

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157 In a state of nature there can be society “but no civil society (which secures what is mine or yours by public laws).” (Ibid., 6:242; CE, p. 397). There can be only provisionally rightful possession, which is “[p]ossession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will.” (Ibid., 6:257; CE, p. 410). Although there can be provisionally rightful possession and “private right” in a state of nature, there can be no distributive justice. (Ibid., 6:242; CE, p. 397; 6:306; CE, pp. 450-451). Distributive justice concerns “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);” whether a country has a court “is the most important question that can be asked about any arrangements having to do with rights.” (Ibid., 6:306; CE, pp. 450-451). In the state of nature there is “no judge competent to render a verdict having rightful force.” (Ibid., 6:312; CE, p. 456). Nevertheless, there are duties of right with regard to external objects: “if external objects were not even provisionally mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature;” indeed, “the civil condition itself would be impossible” if “no acquisition were cognized as rightful even in a provisional way” in the state of nature. (Ibid., 6:312; CE, p. 456).

158 Ibid., 6:312; CE, p. 456.

159 Ibid., 6:308; CE, p. 452.

human beings and recognize that all states as well as individual human beings are not things but moral persons. However, in requiring this the PAs do not demand inner acts or motives but simply rule out certain sorts of external conduct.

Since all of the PAs prohibit going to war or engaging in practices that are likely to lead to war, they may be understood as implications of the veto on war pronounced by morally practical reason. However, they are also informed by empirical facts about state conduct in Kant’s own era. In this respect they partially have the character of positive law.

Another respect in which the PAs partially have the character of positive law is that, if some states explicitly commit to them in a “special agreement among” themselves reached in “negotiations of public right,” then these states are obligated to abide by the PAs also in virtue of this agreement, whereas the other states are not. And only the parties to such an agreement give each other mutual “assurance of peace.”

Kant says that neighbors can offer each other an assurance of peace “only in a lawful condition.” It is clear (from the footnote) that he is referring to both individuals and states. However, it is not entirely clear what constitutes a lawful condition among states. For Kant also argues that a universal association of states is impossible. If only a universal association of states would be a lawful condition, then states can offer each other no assurance of peace and therefore, it seems, can treat each other as enemies. Yet it seems clear that Kant does not think this. Evidently he holds that a pacific league would be a lawful condition, despite the lack of enforcement of international law among the member states.

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161 Kant, TPP, 8:344; CE, p. 318.
162 Note that this holds for PA1, which is stated as banning secret mental reservations, if it is understood as banning the later raising of an old claim as a cause for war after the peace treaty has been concluded.
163 Kant, DR, 6:354; CE, p. 491.
164 For example, the making of treaties, the acquisition of other states by inheritance or purchase, the hiring out of troops, the maintenance of standing armies, the development of a treasury for carrying on war.
165 Kant, TPP, 8:368; CE, p. 337.
166 Ibid., 8:349; CE, p. 322.
167 Ibid., 8:349; CE, p. 322.
168 Ibid., 8:349, footnote; CE, p. 322.
169 Ibid., 8:349; CE, p. 322.
If this is correct, and enforcement of international law is not necessary for creating a lawful condition among the members of a pacific league, then perhaps a court or an arbitration procedure would be sufficient; Kant’s remarks about the States General suggest that he thought it would or could be sufficient.\textsuperscript{170} And his remarks about the PAs suggest that explicit agreement on them is necessary for generating sufficient trust, peace, and security for establishing either a defensive alliance, a pacific league, or a congress. In forming any such association, states must make explicit commitments to each other, at least promising (directly or indirectly) not to invade, threaten, or provoke each other. Thus the PAs, or very similar articles, are necessary elements of any agreement establishing a defensive alliance, a pacific league, or a congress.

If a defensive alliance endures and expands, it can lead to further cooperation. An alliance for mutual defense may not be a necessary precursor to a pacific league or congress; however, unless the member states are willing to defend each other and their shared association from attack, it may not last long. Most likely it must start small; in any case it will not start as an all-encompassing association of states.

In TPP Kant speaks of a condition of public right that can secure perpetual peace, as contrasted with peace treaties that are strictly speaking mere truces, thus falsely called peace treaties.\textsuperscript{171} He explains that “a right of nations as such,” i.e., not private right but public right, is not possible until “a \textit{rightful condition} already exists.”\textsuperscript{172} A right of nations “contains in its very concept the publication of a general will determining for each what is its own, and this \textit{status iuridicus} must proceed from some kind of pact, which need not (like that from which the state arises) be based on coercive laws but may, if necessary, be a condition of \textit{continuing free association}….”\textsuperscript{173} Evidently any such pact must include the PAs or very similar articles.

\textsuperscript{170} \textit{Kant}, DR, 6:350; CE, p. 488.
\textsuperscript{171} \textit{Kant}, TPP, 8:386; CE, p. 351.
\textsuperscript{172} Ibid., 8:385; CE, p. 350.
\textsuperscript{173} Ibid., 8:383; CE, p. 349.
Moral politicians\textsuperscript{174} and enlightened heads of state will acknowledge that there is reason to join such a pact and follow the PAs, at least as long as other heads of state do likewise, since doing so is necessary in order to establish the preconditions for international peace, which is necessary for security of rights. By endorsing the PAs in an actual treaty, the signatory states would be agreeing to abide by them as long as the other signatories did likewise. In so doing, a state (i.e. head of state or state’s representative) might be motivated either by enlightened self-interest, or else by a belief that pure practical reason or political morality requires doing so, or both.\textsuperscript{175} Moreover, s/he might believe that reason, prudential and/or moral, requires all states to do so. Indeed, practical reason does require all states to follow these rules. However, only those states that demonstrate to other states, by deeds as well as words, their intentions to abide by these rules, are thereby, additionally, obligated to each other to do so; thus they acquire the entitlements corresponding to the others’ obligations to do so, and thus they give each other assurance that they will do so.

According to Geismann,

a ‘peace covenant’ of sovereign States, voluntarily agreed on and subject to notice at any time, open to every State, without common law-giving and common judge and thus without the right and power of coercion … is ‘the only juridical condition [rechtlicher Zustand] compatible with their freedom.’ It … is the first step in the direction of a world republic and itself already the establishment of peace among states, if only provisionally. …. Given their function, the common rules agreed on thus far are already (positive) public Right…. But … they are only provisional Right, since, although valid, they are not secured by any public judge possessed with power. …. And yet the situation has, in terms of Right, fundamentally changed since the States can now do wrong in a way in which it would not have been possible before. The violation of a valid public contract ‘reveals a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible.’ ‘In terms of the concepts of the Right of Nations’, the violating state becomes an ‘unjust enemy.’\textsuperscript{176}

Non-signatory state governments that actively oppose and undermine international peace among states and thus hinder and reverse progress toward an international civil condition apparently

\textsuperscript{174} Ibid., 8:372; CE, p. 340.
\textsuperscript{176} Ibid., pp. 295-296.
forfeit the state’s *natural rights* of external sovereignty and non-intervention. Can these rights be claimed by non-signatory state governments that do not actively oppose international peace but severely persecute all or some of their subjects, yet without committing genocide? The more severe the persecution, the closer the state comes to a condition of barbarism, and the stronger the reason for other states to see that state’s government (and its collaborators) as lacking respect for (morally justified) law, whether domestic or international. Arguably such a government is not likely to refrain from engaging in a war that would further its own interests (understood amorally), nor is it likely to decide to join a pacific league, nor is it likely to impose moral constraints on its own conduct in war, i.e., on the commands it issues to its soldiers. Arguably the harsher and less law-respecting the government’s policies domestically, the more likely it is to be harsh and disrespectful of law in its foreign policies and conduct of war. And the less voice and power the (oppressed) people have domestically, the less able they will be to put a brake on the abuses of power by the regime that dominates them. Severely oppressive states can be (although they will not necessarily be) a significant threat to a pacific league’s member states. And even when not internationally aggressive, severely oppressive states obstruct the pacific

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177 In the words of former U.S. Secretary of State Marshall: “Governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people and are likely to seek their objectives by coercion and force in the international field.” This quote comes from *Anderson-Gold, Cosmopolitanism and Human Rights*, Cardiff: University of Wales Press, 2001, p. 46; she quotes *Patrick Flood, The Effectiveness of UN Human Rights Institutions*, Westport: Praeger, 1998, p. 32.

178 The following objection to this claim has been raised by Hilary Bok in personal correspondence. “Is it true that the less a government respects law internally, the less likely it is to respect law in external affairs? Unclear. Possibly it would be less likely to respect law *as such* (as opposed to refraining from violating it for prudential reasons.) But isn’t it the likelihood of actual violations, as opposed to the motive for refraining from them, that counts, if one is concerned about whether some state actually threatens one’s security (which this passage suggests is key)? I think this is important, since a lot of the justification for war turns on its being okay in cases where some state threatens the establishment of a pacific league. It is not clear that a state that respected international law but was internally unjust would pose such a threat. Possibly it might in the long run, if one thought e.g. that such states generally fail eventually, and that the results of their failure would be threatening. [But a distant threat is] not the sort that ought to justify war ... for Kant.” These are important points; therefore I hope the reader attends to the remaining sentences of this paragraph of the main text (clarified, thanks to the objection).

179 Recall that Kant says that in a republic the citizens can make it difficult for their government to undertake war. (*Kant, TPP, 8:350; CE, pp. 323-324*).
league’s goal of securing rights and establishing peace worldwide.\footnote{One must acknowledge that, as history has recently demonstrated, it is possible for a government that is largely respectful of domestic law to be disrespectful of international law and justice. Although it is possible for a government that is severely oppressive domestically to respect international law for the most part, if it is a signatory of the international pacts on human rights, it most likely fails to fulfill obligations owed to the other signatory states. According to Christine Chwaszcza, “from the perspective of International Law a government that signed [the International Pacts on Human Rights], but violates human rights does not commit a crime against its citizens, but does not fulfill an obligation it owes to the other signatory states.” Christine Chwaszcza, “Secession, humanitarian intervention, and the normative significance of political boundaries,” in: Deen K. Chatterjee and Don E. Scheid, eds.: Ethics and Foreign Intervention, Cambridge University Press, 2003, p. 188, note 27.} However, if they are (despotic) states, not territories in conditions of barbarism, then from Kant’s point of view, intervention may be justifiable only if the state meets his criteria of an unjust enemy.

7. Kant’s Views on War and Their Implications for HMI

As I have shown, the prohibition expressed by PA5 is limited to states as Kant defines this term, and although PA5 refers to all states, the referent of the term “state” is limited, since the prohibition is conditional on conduct. Kant puts PA5 in quotation marks because he presents it as not only a prohibitive law that is justifiable a priori as part of the right of nations, but also an article of a treaty to be endorsed in word and deed by states undertaking to establish a rightful condition among themselves. Since the PAs are limited and conditional in application, PA5 does not categorically prohibit HMI (contra Mertens). Nevertheless, if Kant categorically prohibits non-defensive war, and if HMI is non-defensive war in all instances, then Kant categorically prohibits HMI.

If enforcement of international law can be HMI in some instances, and if law-enforcement is not and does not necessarily become war, then Kant’s position does not categorically prohibit HMI when it is such law-enforcement, even if it categorically prohibits non-defensive war. As I will now argue, Kant does not categorically prohibit non-defensive war, if \textit{defensive} war is understood as limited to war in reaction to aggression or serious threat to a state’s own territory or its own people’s lives. States are not prohibited from taking part in non-defensive war against other states, classifiable as unjust enemies, which pose them only indirect threats, or which attack or threaten a pacific league or congress of which they are a member, or
which obstruct the establishment of such a league or congress; nor are they prohibited from using coercive force against barbaric pseudo-states which obstruct the establishment of a rightful condition domestically and therefore internationally.

7.1. Disagreements about Kant on War

Kant’s position on war is disputed. How we should construe it depends on whether we must interpret TPP and DR as mutually or internally contradictory, or neither. A number of scholars have noticed apparent contradictions in Kant’s writings about war and international law, and have offered differing explanations for them. Here I address some of these scholars’ views and I interpret TPP and DR as neither mutually nor internally contradictory.

Byrd and Hruschka together argue that Kant changes his mind about a number of important questions between writing TPP and writing DR. According to them, Kant changes his mind about (1) whether states have a right to wage war (he later argues that they do), (2) whether states are permitted to use coercion in order to establish a state of nations (he later argues that they are), and (3) whether states are permitted to wage a war of preventive defense (he later argues that they are). Their overall explanation for “Kant’s change of heart” between 1795 and 1797 is that he continued developing his concept of a juridical state, with the consequence that DR, in which “Kant develops a system of law based on his definition of a juridical state,” is Kant’s “more mature and reasoned peace project.” However, although Byrd and Hruschka correctly note that in DR Kant develops a system of law (or the principles of right that should structure legal systems), and that comparatively little systematic argument is found in TPP, they do not succeed in showing that Kant had a change of heart between 1795 and 1797. Pauline Kleingeld argues convincingly against point (2), the view that Kant changes his mind between 1795 and 1797 about whether states are permitted to use coercion in order to establish a state of

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182 Ibid., p. 3.
nations. In this section I argue against point (1), the view that Kant changes his mind about whether states have a right to wage war.

Howard Williams correctly emphasizes the importance of the fact that the two works, TPP and DR, have different functions or roles in Kant’s system. As Williams describes this difference,

[the objectives of DR are] almost wholly scholarly and didactic whilst [Perpetual Peace] might legitimately be seen as a piece of applied ethics. [The latter] is conceived as the intervention of a philosopher in the events of the day and as an attempt to influence them. Rechtslehre is in comparison a strictly academic work which of course has implications for current politics but those implications are not developed. [Perpetual Peace] goes a good deal further than the Metaphysics of Morals in spelling out the implications of Kant’s critical position for politics.

Williams asserts, it seems correctly, that “the account that Kant gives of permissible war under the auspices of international law in the Metaphysics of Morals is logically prior to the critique of war as an instrument of international politics given in Perpetual Peace.” However, he does not adequately support his suggestion that “the account of war provided in Perpetual Peace should be regarded as Kant’s most fully worked out treatment of the question of just war” or as the work presenting “the most mature of Kant’s thoughts about the issue of war.” Nor does he show that, “if Kant’s thinking is (legitimately) seen in a developmental perspective,” the Doctrine of Right “can defensibly be seen as an initial attempt at attaining the point of view expressed in Perpetual Peace.” To me it seems that Kant’s thoughts about the question of the unjust enemy are more mature in DR than in TPP. Overall, both works express and defend the same point of view on war and justice, although in different ways; DR provides a theoretical framework and context for TPP, as I hope to show in this section.

183 I summarize her argument above, in section 6.1.
185 Ibid., section 1.
186 Ibid., section 2.
187 Ibid., section 5.
Williams acknowledges that “there is a legitimate *prima facie* case for regarding both *Perpetual Peace* and *Metaphysics of Morals* as authoritative accounts by Kant of his views on war and justice and so requiring us to discover within them one golden unifying thread.”

However, he doubts this can be done: “the divergence between the two texts is arguably so marked that we have somehow to account for two different and authoritative views on war in Kant rather than one coherent view.” He suggests that, in virtue of the conflicts between the two texts as well as within each work, “the paradoxical conclusion we may have to draw is that Kant is both a limited advocate of just war theory and yet one of its sharpest critics.” I contend that we do not have to draw that conclusion.

It is clear that Kant hates and opposes war. But although he argues that war must be eliminated, he acknowledges that this can be achieved, if at all, only gradually and despite setbacks. Even if perpetual peace were achieved, it would still be permissible to use coercive force for the purpose of maintaining it via enforcement of international law. And on the possibly endless road to achieving perpetual peace, it can be permissible for states to use coercive force internationally for the purpose of removing obstacles to its achievement, as well as in self-defense. The principles of Kant’s political philosophy would permit (i.e., would not prohibit),

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188 Ibid., section 2.
189 Ibid., section 4.
190 He declares that “the entire final end of the doctrine of right within the limits of mere reason” is “establishing universal and lasting peace.” (*Kant*, DR, 6:355; CE, p. 491). He asserts that “morally practical reason pronounces in us its irresistible veto: there is to be no war, neither war between you and me in the state of nature nor war between us as states.” (Ibid., 6:354; CE, p. 491). He speaks acridly of wars by which states try to “aggrandize themselves...at the expense of others” by encroaching upon or subjugating another (T&P, 8:310-311; CE, pp. 307-308); in similar tones he speaks of heads of state who regard their own splendor as consisting in their ability, without putting themselves in danger, “to command many thousands to sacrifice themselves for a matter that is of no concern to them,” and who regard the majesty of their state as consisting in its “not being subject to any external lawful coercion at all.” (Ibid., 8:354; CE, p. 326). Such wars are not defensive but offensive, and such heads of state do not resort to them as the only expedient for forcibly asserting one’s right in a state of nature; instead they forcibly impose “unilateral maxims.” (Ibid., 8:357; CE, p. 328). When Kant says “war is, after all, only the regrettable expedient for asserting one’s right by force in a state of nature” (ibid., 8:346; CE, p. 320), he is not defining war, nor is he stating that whenever states engage in war they are asserting what they believe to be their rights. Instead he is simply saying that states in a state of nature that want to assert their rights forcibly when they are challenged have no means to do so other than war, since “there is no court that could judge with rightful force.” (Ibid., 8:346; CE, p. 320).
and could in some cases require, two kinds of war which could constitute HMI: (1) war to
overthrow lawless oppressors obstructing the establishment of a rightful condition and peace, and
(2) war against an “unjust enemy” (properly understood).

7.2. The Unjust Enemy State

Kant discusses the idea of the unjust enemy state both in TP and in DR. In TP he argues
that a war cannot be a rightful use of force, since only “the outcome of the war (as in a so-called
judgment of God) decides on whose side the right is.”192 Kant means, I think, that the outcome of
the war does not decide on whose side the right was; it simply puts an end to the conflict and
determines rights to be recognized from then on. “The way in which states [which are not subject
to a common external constraint] pursue their right can never be legal proceedings before an
external court but can only be war; but right cannot be decided by war and its favorable outcome,
victory.”193 Therefore “neither of the two parties can be declared an unjust enemy,”194 neither
prior to the outcome of the war nor retrospectively, due to the absence of any court that could
judge with rightful force. For these reasons, “[t]he concept of the right of nations as that of the
right to go to war is, strictly speaking, unintelligible (since it is supposed to be a right to
determine what is right not by universally valid external laws limiting the freedom of each but by
unilateral maxims through force).”195

192 Kant, TPP, 8:347; CE, p. 320.
193 Ibid., 8:355; CE, p. 327.
194 Ibid., 8:346; CE, p. 320.
195 Ibid., 8:356-357; CE, p. 328. Kant says in DR that states, considered as moral persons living in relation
to each other in the condition of natural freedom, have rights, which consist “partly of their right to go to
war, partly of their right in war, and partly of their right to constrain each other to leave this condition of
war and so form a constitution that will establish lasting peace, that is, its right after war.” (Kant, DR,
6:343; CE, p. 482; italics in original). Here he is not contradicting TPP where he says that “[t]he concept of
the right of nations as that of the right to go to war is, strictly speaking, unintelligible.” (TPP, 8:357; CE, p.
328). For at 6:343 he is not limiting the right of nations to the right to go to war, and he is not speaking
“strictly:” here, at the beginning of Section II of Part II of DR, he is simply setting out the topics he will
discuss under the rubric of “the right of nations,” including not only the topic of the right to go to war but
also the topics of rights in war and after war. In the subsequent subsections of DR he shows that the right
of nations, properly understood, is not simply the right to go to war and, furthermore, does not include the
(purported) right to go to war as previously understood by European heads of state: it does not include any
right of aggression or forcible imposition of unilateral maxims, but at most (given the constraints of the
right of nations) it may include a right to go to war in order to approach a rightful condition. Kant affirms
In DR Kant may appear to contradict his statement in TPP\textsuperscript{196} that neither of two states warring with each other in a state of nature can be declared an unjust enemy. For here he defines the idea of an unjust enemy in a state of nature as “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.”\textsuperscript{197} However, I think Kant is simply saying that, although there is no court with the authority to declare either party an unjust enemy and enforce the rights of the injured party, there is an applicable criterion that uses the concepts of the right of nations, properly understood. This criterion can be used in the state of nature, given that “the idea of the right of nations involves only the concept of an antagonism in accordance with principles of outer freedom by which each can preserve what belongs to it.”\textsuperscript{198} At 6:349, Kant is evidently saying that if a state conducts itself, when initiating, conducting, or concluding a war, in such a way that its maxim clearly conflicts with the right of nations, then it is an unjust enemy. Such conduct would include violation of the PAs.

Suppose that a state in the state of nature conducts itself in accordance with the law of nations; then not only would it not be an unjust enemy, it would not be an enemy to any state:

> “the original right that free states in a state of nature have to go to war with one another (in order, perhaps, to establish a condition more closely approaching a rightful condition).” (DR, 6:344; CE, p. 483). He explains that in the state of nature among states it is permissible for a state to use its own force to attack another state, “when it believes it has been wronged by the other state,” since it cannot prosecute its right against the other state by a lawsuit (DR, 6:346; CE, p. 484). Note that in this case the idea is not that the outcome of the war will determine who was in the right.

\textsuperscript{196} Kant, TPP, 8:346; CE, p.320.

\textsuperscript{197} Kant, DR, 6:349; CE, p. 487. According to Cavallar, there are inconsistencies in Kant’s account of the permissibility of war, particularly in his account of the unjust enemy. Cavallar points out that in TPP Kant says that in the state of nature among states, each state is entitled to judge for itself whether its rights have been violated, since “no court of justice is available to judge with legal authority” and no state can claim legal authority over the others; and that therefore “neither party can be declared an unjust enemy, for this would already presuppose a judge’s decision.” (Cavallar, op. cit., fn. # 21, p. 103. Cavallar cites Kant, VIII, 346, 34; Reiss, 96, and VIII, 346, 35-7; Reiss, 96.) Contrastingly, in MM Kant says that the “rights of a state against an unjust enemy are unlimited in quantity or degree, although they do have limits in relation to quality,” and he calls the state of nature a state of injustice. (Cavallar, ibid., 103. Cavallar cites Kant, VI, 349-50). Thus it appears to Cavallar that in TPP Kant denies that the concept of the unjust enemy state is applicable to the state of nature among states, while in MM he applies it to that condition. (Cavallar, ibid., 103-4.) Cavallar concludes that Kant was either confused or changed his mind. But if I am right, Cavallar is mistaken and there is no significant inconsistency between TPP and MM.

\textsuperscript{198} Kant, DR, 6:347; CE, p. 485.
“A just enemy would be one that I would be doing wrong by resisting; but then he would also not be my enemy.”199 I take Kant to mean here that a state exercising coercive force upon another state is not necessarily the second state’s enemy; this must be judged by reference to states’ rights, as determined by the law of nations. It is possible for a state to be subjected to coercive force yet not be wronged. Therefore the idea of an enemy state is not the idea of a state using coercive force upon another state, but instead the idea of a state that violates another state’s rights.200

States may defend themselves against unjust enemies: “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.”201 Here arise several questions, including: (1) What are the allowable means? (2) How may states be injured by unjust enemies?

It is clear, in view of what Kant says in DR, subsections 56-59, that unjust enemies may injure other states in a number of ways, including aggression, various sorts of threat, and obstruction of the establishment of an international civil condition. And in view of what he says in subsection 60, it is evident that unjust enemies can injure some states indirectly while injuring others directly. Violation of public contracts is an expression of a will whose maxim would, if

199 Ibid., 6:350; CE, p. 487.
200 Every enemy is unjust, so it is pleonastic or redundant to speak of an unjust enemy, and to speak of an unjust enemy in the state of nature is even more so. “It is pleonastic … to speak of an unjust enemy in a state of nature; for a state of nature is itself a condition of injustice” (Kant, DR, 6:350; CE, p. 487). Kant acknowledges that the state of nature “need not, just because it is natural, be a state of injustice (iniustus), of dealing with one another only in terms of the degree of force each has,” but he emphasizes that it would still be “a state devoid of justice (status iustitia vacuus), in which when rights are in dispute (ius controversum), there would be no judge competent to render a verdict having rightful force” (DR, 6:312; CE, p. 456). When a state violates another state’s rights in the state of nature, thus becoming its enemy, the condition they share is not only devoid of justice but also unjust. 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 to the fact that the rights-violator’s maxim, if made a universal rule, would perpetuate the state of nature. My interpretation differs from that of Shell, op. cit., fn. #138, pp. 83-84, as well as from that of Cavallar, op. cit., fn. #21, fn. #138, and fn. #197.
201 Kant, DR, 6:349; CE, p. 487.
made a universal rule, perpetuate the state of nature and make peace among nations impossible; and since “this can be assumed to be a matter of concern to all nations whose freedom is threatened by it, they are called upon to unite against such misconduct in order to deprive the state of its power to do it.”

If a nation’s freedom is threatened, it is injured. Therefore, it would seem to follow from what Kant says in subsection 60 that all nations injured by the conduct of an unjust enemy, whether directly or indirectly through its obstruction of a rightful and peaceful international condition, may use allowable means to protect their rights and their freedom and deprive the enemy state of its power to threaten them.

What means are allowable? Kant says little on this topic, but he does specify what appear to be the two limits of the permissible and the impermissible. It is impermissible to divide up the unjust state’s territory, thus eliminating the state, “since that would be an injustice against its people, which cannot lose its original right to unite itself into a commonwealth.” However, it is permissible to make the people “adopt a new constitution that by its nature will be unfavorable to the inclination of war.” Evidently what is permissible is what is necessary in order to ensure that the state will cease to threaten other states’ freedom and rights.

Kant says that the right to peace includes the right to an alliance for common defense “but not a league for attacking others and adding to their own territory.” If injured states compel the unjust enemy state’s people to adopt a new constitution as a means of eliminating the threat to other states’ freedom and rights, the injured states are not using force in order to gain more territory. Nor are they themselves becoming enemies to that unjust state, if they are acting in accord with the right of nations, on behalf of all states and peoples, with the aim of securing their freedom and rights.

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202 Ibid., 6:349; CE, p. 487.
203 Ibid., 6:349; CE, p. 487.
204 Ibid., 6:349; CE, p. 487.
205 Ibid., 6:349; CE, p. 486.
Kant argues that a state at war must conduct the war “in accordance with principles that always leave open the possibility of leaving the state of nature among states (in external relation to one another) and entering a rightful condition.” Therefore a state must not use any means that would either make its subjects unfit to be citizens (thus depriving the state of its status as juridical person and by the same token depriving it of rights), or undermine the possibility of mutual trust between the states after the war. Such activities would block movement toward a civil condition; thus they would be forms of injustice. States engaging in such activities wrong other states insofar as they obstruct establishment of the rule of law, due to not wanting to leave the state of nature. Kant’s conception of the rights and duties of states entails that rulers who understand the lawlessness of current relations among states, but do not want a rightful international condition and obstruct its establishment, commit injustice: they wrong both other states and their own subjects or citizens.

7.3. Implications for HMI

According to Kant, states trying to bring about a lasting peace by establishing a rightful international condition are entitled to defend their peaceful alliance (since its purpose is not domination but securing the rights of nations, of states, and of individuals). It is permissible for them to do so; whether they will be able is of course a different question. They are entitled to defend themselves and each other against attack (as in a standard defensive alliance), to penalize

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206 “Right during a war would, then, have to be the waging of war in accordance with principles that always leave open the possibility of leaving the state of nature among states (in external relation to one another) and entering a rightful condition.” (Ibid., 6:347; CE, p. 485).

207 “A state against which war is being waged is permitted to use any means of defense except those that would make its subjects unfit to be citizens; for it would then also make itself unfit to qualify, in accordance with the right of nations, as a person in the relation of states (as one who would enjoy the same rights as others). Means of defense that are not permitted include…in a word, using such underhanded means as would destroy the trust requisite to establishing a lasting peace in the future.” (Ibid., 6:347; CE, p. 485).

208 Here I have in mind Leslie Mulholland’s distinction between general justice and particular justice, and his claim that according to Kant there can be only general but not particular justice in the state of nature: “The former [general justice] is possible for states pursuing a condition under which there can be the rule of law. The latter [particular justice] is possible only through the peremptory determination of rights under the rule of law.” (Mulholland, op. cit., fn. # 138, p. 367).
states that undermine or threaten the peace, and if necessary to forcibly change the constitution of
an “unjust enemy” state.

Intervention in an “unjust enemy” state (as distinct from self-defense in reaction to
aggression) is permissible, in view of its being a state and having a functioning legal system, only
if: it has committed certain offenses,\(^{209}\) and the intervention is carried out on behalf of a pacific
league that has followed an appropriate procedure of deliberation and decisionmaking;\(^{210}\) and the
intervention uses permissible means for permissible ends, which may include overthrowing a
severely oppressive government and should, in such a case, also include enabling the people to
replace it with a less oppressive and less aggressive government of their own choosing (not
necessarily republican). Intervention in the territory of a barbaric power-wielder (as distinct from
intervention in a civil war)\(^{211}\) is justifiable, in view of its not being a state, only if: the
intervention is carried out on behalf of a pacific league that has followed an appropriate
procedure of deliberation and decisionmaking, and the intervention uses permissible means for
permissible ends, which may not include seizing the people’s territory or resources but may
include rescuing them from genocide and should include enabling them to establish a government
of their own choosing. Whether any such intervention may reasonably be called “humanitarian
military intervention” is a further question.

Even if HMI is not absolutely prohibited in principle, still there may be few if any actual
cases in which it is permissible. Moreover, even heads of state who were moral politicians as
distinct from political moralists would face difficulties in assessing large-scale, complex political
situations and judging which policies would be permissible. For these reasons among others, it is

\(^{209}\) “For Kant, [an unjust] enemy would have to violate the right of nations \textit{dramatically and repeatedly}
(Vattel’s historical example is Louis XIV).” \textit{(Cavallar, op. cit., fn. # 138, p. 121, and op. cit., fn. #21, pp.
105-107)}.

\(^{210}\) According to Cavallar, “only the \textit{majority} of states is authorized to coerce the unjust enemy.” \textit{(Cavallar,
op. cit., fn. # 138, p. 121)}.

\(^{211}\) \textit{Kant}, TPP, 8:346; CE, pp. 319-320.
important to establish formal decisionmaking procedures with built-in safeguards, checks and balances. Kant would surely have made such an argument had he addressed the topic of HMI.

8. Cavallar on Totalitarian States and Unjust Enemies

“The distinction between totalitarian and despotic regimes is crucial, and missing in many accounts,” including Mulholland’s, argues Cavallar.212

Hitler’s Third Reich and Prussia under Frederick II cannot simply both be labelled as unjust, oppressive and non-republican, as if no crucial differences in terms of the quality of government, or Regierungsort, had existed. Kant argued that many elements of Frederick’s rule accorded with ‘the spirit of a representative system’ and, historically speaking, he was not that far away from the truth. Prussia advanced greatly under Frederick, not only as a military power but also as a political community approaching republicanism by a series of reforms. Similarly, Franco’s Spain and post-Stalinist Russia adhered to a form of rule of law that undermined their status as a totalitarian state.213

Cavallar argues that states that brutally violate their subjects’ basic human rights lose their entitlement to the rights of sovereignty, both internal (domestic) and external (international). Claiming that a totalitarian state lacks moral personality, thus lacks rights to freedom and equality under principles of international law, Cavallar suggests that it “corresponds to what Kant calls an ‘unjust enemy’.”214 “Other states [do not] have duties towards this regime, only towards its people, who keep their territory and their right to ‘unite into a commonwealth.’”215 Cavallar argues that since Kant distinguished between popular sovereignty and state sovereignty, saying that “the supreme legislative power has its legitimate origin only in the united will of the people,”216 we may perhaps conclude that “intervention is permissible as long as the united will of the people is respected, even if state sovereignty is formally infringed.”217 Thus Cavallar

212 Cavallar, op. cit., fn. #21, p. 92.
213 Ibid., p. 92.
214 Ibid., pp., 91-92. Regarding a state’s moral personality, Cavallar cites Byrd, op. cit., fn. #22.
215 Cavallar, ibid., p. 92. Cavallar cites Kant, VIII, 352.
216 Cavallar, ibid., p. 89; Cavallar cites Kant, VI, 313.
217 Cavallar, ibid., p. 89. Cavallar cites Kant, VI, 313 and VIII, 344. To me, these passages of Kant’s texts seem insufficient to support that conclusion.
argues that, despite Kant’s apparent categorical rejection of all military intervention, his legal philosophy “may allow for a qualified right of intervention.”

According to Cavallar, the lawless conditions in a failed state may, e.g., due to generating refugee flows, pose a threat to neighboring states sufficiently great to justify their intervening, for reasons similar to those Kant thought would justify reacting militarily to a neighboring state’s becoming a potentia tremenda (i.e., its suddenly becoming much more powerful than it was previously). By contrast, a totalitarian state poses a threat to all other states and individuals simply insofar as it disrespects the rights of persons. A totalitarian state is in a state of nature both internationally (in relation to other states) and domestically (in relation to the individuals to whom it denies the status of personality), and it poses a threat to all other states and individuals, insofar as it disrespects the rights of persons both internationally and domestically and constitutes an obstacle to the achievement of a peaceful juridical condition among all states. Therefore, according to Cavallar, arguably the totalitarian state or unjust enemy lacks the right of non-intervention and gives other states sufficient reason to unite against it and even to use coercive force against it, if this is necessary in order to deprive it of its power to conduct itself in such a lawless fashion.

I disagree with Cavallar’s generally estimable interpretation of Kant’s philosophy of right, insofar as it neglects Kant’s category of barbarism. A second shortfall is that it makes apparently self-contradictory claims about totalitarian states. Having said that a totalitarian state lacks moral personality, and that therefore other states do not have duties toward this regime but only toward its people; and having said that a totalitarian state “corresponds to what Kant calls an ‘unjust enemy’;” Cavallar later says that an unjust enemy “cannot lose its quality as a

218 Cavallar, ibid., p. 88.
219 Ibid., pp. 91-93.
220 Ibid., pp. 91-92; Kant, DR, 6:349; CE, p. 487.
221 See above, section 4.
222 Cavallar, op. cit., fn. #21, p. 92.
223 Ibid., p. 91.
moral, or juridical person." And as regards his claim that a totalitarian state poses a threat to other states, or can be assumed likely to do so, because it disrespects the rights of persons domestically, he apparently contradicts it in later writing: “Kant’s unjust enemy is a state that makes ‘a peaceful condition among nations impossible’ (6:349) – domestic matters are irrelevant here.”

It is not clear whether or precisely to what extent Cavallar’s Kantian defense of HMI (or denial that it is absolutely prohibited) conflicts with Kant’s expressed views. Cavallar says that “the Kantian letter and spirit of international right support an unconditional veto against military intervention,” but that “in spite of Kant’s explicit rejection of a right of intervention, some passages, or perhaps the ‘spirit’ of Kant’s legal philosophy, may allow for a qualified right of intervention.” Thus it seems that Cavallar thinks that within Kant’s philosophy of international right there is an unresolved tension or internal contradiction, and that PA5 conflicts with the idea that states have a qualified right of intervention. I see no such internal contradiction in Kant.

Cavallar does not, it seems to me, offer a sufficiently strong and full rebuttal to those Kant scholars who argue that states with non-republican and undemocratic regimes should not be regarded as having the right of non-intervention. After referring approvingly to an argument supporting the conclusion that “intervention is permissible as long as the united will of the people

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224 Ibid., p. 110.
225 Cavallar, op. cit., fn. #138, p. 121.
226 Cavallar, op. cit., fn. #21, p. 88.
227 I have in mind primarily Fernando Tesón, whose book, APIL (op. cit., fn. #2) was published only one year before Cavallar’s book (op. cit., fn. #21). Cavallar cites Harry Van der Linden and Friedrich Kambartel: “In his article on intervention, Van der Linden argues that Kant’s ‘unqualified prohibition of intervention’ should be abandoned in favour of a theory of political intervention, where republican states forcibly interfere in non-republican, oppressive states ‘in order to bring about political improvements in that nation.’ His main argument against the traditional interpretation of Kant is that non-republican, undemocratic regimes cannot be viewed as moral persons with autonomy, as the government does not accord with the united will of its people. A similar line of reasoning can be found in Kambartel’s recent essay on non-intervention.” (Cavallar, op. cit., fn. #21, p. 90, citing Van der Linden, op. cit., fn. #2, and Friedrich Kambartel, “Kants Entwurf und das Prinzip der Nichteinmischung in die inneren Staatsangelegenheiten: Grundsätzliche zur Politik der Vereinten Nationen,” in: Matthias Lutz-Bachmann/James Bohman, eds.: Frieden durch Recht: Kants Friedensidee und das Problem einer neuen Weltordnung, Frankfurt am Main: Suhrkamp, 1996).
is respected, even if state sovereignty is formally infringed,”228 Cavallar warns that “[r]ecent use of this argument, however, shows its susceptibility to political abuse.”229 He reminds us of “Kant’s cynical remark that we can always find ‘plausible’ arguments for the use of violence ‘on the grounds that it is in the best interests of the world,’230 and argues against teleological and consequentialist justification of military intervention, citing Kant’s insistence that the end of perpetual peace must always be pursued in harmony with “the formal principle of the maxims governing external action.”231 However, in reply to those who argue that non-republican and undemocratic states cannot be regarded as moral and juridical persons with the right of non-intervention, Cavallar says:

There is a tension in Kant’s writings between the moral and juridical, and the positivistic, legal aspect of states’ existence. Sometimes Kant seems to argue that any existing state should be regarded as a moral person. Sometimes it is plausible to see exclusively republican states as moral persons.232

I disagree: I do not think it is plausible to interpret Kant as holding that every (purported) state should be regarded as a moral person on merely positivistic legal grounds, and I do not think it is plausible to interpret Kant as holding that only republican states are moral persons.

9. Conclusion

Contra Tesón,233 there is no evidence that Kant intended to include PA5 among the DAs; the logical structure of TPP indicates otherwise; and Kant’s philosophy of right shows that there are good reasons not to restrict the right of non-intervention to republics (and no good reasons to

229 Cavallar, op. cit., fn. #21, p. 89.
230 Ibid., p. 87; Cavallar cites Kant, VI, 353; Reiss, 173.
231 Cavallar, ibid., p. 87; Cavallar cites Kant, VIII, 377; Reiss, 122.
232 Cavallar, ibid., p. 90.
233 Tesón asserts: “[T]he nonintervention principle is dependent upon compliance with the First Definitive Article. Internal legitimacy is what gives states the shield of sovereignty against foreign intervention. ... If the only just political arrangement is the republican constitution, state sovereignty reacquires its shielding power only in states that have adopted and implemented such a constitution. Sovereignty is to be respected only when it is justly exercised.” (APIL, op. cit., fn. #2, p. 21). Here, as elsewhere, Tesón uses “just” and “legitimate” interchangeably; this is problematic. For a discussion of an important distinction between justice and legitimacy, see Alyssa R. Bernstein, “A Human Right to Democracy? Legitimacy and Intervention,” in: David Reidy/Rex Martin, eds.: Rawls's Law of Peoples: A Realistic Utopia?, Malden, MA: Blackwell, 2006.
restrict that right to them). Contra Mertens, PA5 does not absolutely prohibit HMI: PA5 is limited to states as Kant defines this term, and since the immunity from intervention is conditional on conduct, the referent of the term “state” in PA5 is limited. Contra Cavallar and others, Kant does not contradict himself on the topics of war and the unjust enemy state. The right of non-intervention ascribed to states by PA5 does not oppose intervention when there is no entity that can validly claim this right. Such is the case when there is no state but instead a condition of barbarism, or when the state’s conduct makes it, in Kant’s terminology, an “unjust enemy” of other states.

Neither Kant’s conception of state sovereignty nor his opposition to war provides reason for holding that his philosophy of right must prohibit HMI as impermissible; nor is such reason provided by his position that it is impermissible for states to coerce other states into a pacific league. It is one thing to initiate coercion with that purpose; it is another thing to employ coercion against an unjust enemy state in reaction to its attacks or threats. Furthermore, changing the regime of an unjust enemy state is not the same as coercing it to join a league. Moreover, since situations of barbarism are lawless, in such cases no state is coerced.

Kant argues against using violence, whether to establish justice in one’s own country via revolution or to bring culture to “uncivilized” or “crude” peoples. Regarding the latter he says that, while “sufficient specious reasons to justify the use of force are available,” all of them claiming “that it is to the world’s advantage,” nevertheless “all these supposedly good intentions cannot wash away the stain of injustice in the means used for them.” This important passage is somewhat difficult to interpret. It becomes less so if we keep clearly in mind the distinctive

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234 Mertens asserts: the “prohibition on military intervention” in PA5 is a prohibition “of the strictest sort”; it is a “categorical prohibition of military intervention.” (Mertens, op. cit., fn. #1, pp. 224, 225, 237).
235 Although a state’s government can be coerced to sign a treaty or make a declaration, and can then (justifiably or not) be penalized for violating it, neither the people of a state nor its governmental representatives can be coerced to adopt a maxim or to develop the will to work toward a universal association of states satisfying the DAs.
236 Kant, DR, 6:353; CE, p. 490.
meaning Kant assigns to “barbarism,” namely lawless domination; this is very different from merely uncivilized in the sense of crude or primitive. Kant strongly criticizes the “horrifying” injustice shown by “civilized, especially commercial states in our part of the world,” in “visiting foreign lands and peoples (which with them is tantamount to conquering them).”238 It appears that in the above passage239 Kant is simply arguing against states using coercive force against each other impossibly, i.e., for reasons of interest or advantage of any kind as distinct from reasons of right. As we have seen, he holds that it is permissible to use force in certain ways, and even in certain cases to intervene forcibly in the constitution and governance of another state, for reasons of right.240

238 Kant, TPP, 8:358; CE, p. 329.
239 Ibid., 6:353; CE, p. 490.
240 I am grateful to Sharon Byrd and Joachim Hruschka for inviting me to take part in the conference where I presented the paper from which this article has developed, at Jena’s Friedrich-Schiller-Universität in July, 2007, and for funding my participation. The Ohio University Philosophy Department’s Spetnagel Travel Fund and Ohio University’s Institute for Applied and Professional Ethics provided additional financial support. I benefited from useful and enjoyable discussions with many of the conference participants, in particular (alphabetically listed): Manfred Baum, Sharon Byrd, Thomas Christiano, Joachim Hruschka, Matthias Kaufmann, Brian Orend, Alessandro Pinzani, Arthur Ripstein, Jan Schuhr, Fernando Tesón, Kevin Thompson, and Hannes Unberath. Georg Geismann gave me voluminous and incisive comments on an early post-conference draft, and Allen Wood and Jeppe von Platz promptly and helpfully critiqued more than one draft. For valuable written comments I thank (alphabetically listed): Sharon Anderson-Gold, Hilary Bok, Thomas E. Hill, Jr., and Faviola Rivera-Castro. For criticisms of an early pre-conference draft I thank the members of the Ohio University Philosophy Department’s paper-discussion group; for written feedback I thank Nathaniel Goldberg, James Petrik, and especially Mark LeBar. A generous fellowship from DePauw University, the 2007-2008 Nancy Schaenen Visiting Scholar position at the Janet Prindle Institute for Ethics, enabled me to focus intensively on completing this article. For very helpful discussions and supportive friendship, as well as editing suggestions, I thank my husband Todd Shannon Bastin and my friend Ilona Chessid.