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Political Independence, Territorial Integrity and Private Law Analogies

ARTHUR RIPSTEIN
University of Toronto
Email: arthur.ripstein@toronto.ca

Abstract

Kant deploys analogies from private law in describing relations between states. I explore the relation between these analogies and the broader Kantian idea of the distinctively public nature of a rightful condition, in order to explain why states, understood as public things, stand in horizontal, private legal relations without themselves being private. I use this analysis to explore the international law analogues of the three titles of private right, explaining how territory differs from property, treaty from contract and the specific form of status relations between nations. I conclude with a brief discussion of the ongoing relevance of these horizontal relations.

Keywords: Kant, property, territory, contract, treaty, ius cogens

The steady, if uncertain, march of globalization has led many people to conclude that the idea of the territorial state has outlived its usefulness. Kant is an important voice on all sides of these debates. He defends not only individual rights and cosmopolitanism, but also the territorial state. My aim in this article is to look more carefully at his development of these ideas, situating them in his public conception of the state, and his concomitant conception of each state's right to political independence and territorial integrity. Once the public nature of a rightful condition is understood in the right way, political independence and territorial integrity are different formulations of a single idea, which is inseparable from the idea that the state is charged with upholding individual rights. Taken together, they give shape to a distinctive understanding of the global legal order.

I will frame the issue from two directions: first in terms of the private law analogies Kant deploys in describing relations between states outside of

global legal institutions, for example, in *Perpetual Peace*, where he remarks that 'apart from some kind of rightful condition, ... the only kind of right there can be is private right' (*MM*, 8: 383);[1] and second, in terms of the distinctively public nature of a rightful condition. Kant sees the state as the solution to a set of moral problems that necessarily arise in the absence of legal and political institutions, 'no matter how good and right-loving human beings might be' (*MM*, 6: 312). In this his account contrasts with both the patrimonial conception of the state that figures prominently in the writings of Grotius, Pufendorf and Vattel, as well as the universal/instrumental conception of the state that figures in Thomistic and scholastic just war theory and, in a different form, in utilitarian conceptions of the state. I briefly outline Kant's reasons for conceiving of the state in this way, by looking to the distinctive problem of right to which the state is a solution. Taken together, they explain why states, understood as public things, stand in horizontal, private legal relations without themselves being private. I articulate the international law analogues of the three titles of private right, explaining how territory differs from property, treaty from contract and the specific form of status relations between nations. I conclude with a brief discussion of the ongoing relevance of these horizontal relations, even when international law becomes more nearly public.

I will follow Kant in using the word 'state' and the word 'nation' interchangeably, not because there are no differences between them, but rather because the people of a state must be presumed to have inherited it, whether or not they have in fact (*MM*, 6: 311). A state's right to political independence and territorial integrity does not depend on an antecedent relation between those people and the land on which they reside; they are presumed to have inherited it because how the state came into being, or how they came to be its members, has no bearing on the state's relations with any other state.

1. Private Law Analogies in International Law

In his 1927 book *Private Law Sources and Analogies of International Law*, the great international lawyer Hersch Lauterpacht wrote that 'if the main distinction between private and public law is that the first regulates the relations of legal entities in a state of co-ordination, and the second the relations of those in a state of subordination to one another, then, formally, international public law belongs to the genus private law' (Lauterpacht 1927: 82). Lauterpacht's claim is obvious but puzzling. It is obvious because it accurately reports the way international law treats nations as the bearers of rights as against each other. Treaties are modelled on contracts, and the obligation to perform under them is subsumed

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under the more general contractual principle *pacta sunt servanda*. In discussions of war, national defence is modelled on individual self-defence. It is no less puzzling: people and nations differ in so many ways.

Early modern writers in international law borrowed from the inherited Roman law of their time and represented nations as individuals. They found the parallels so obvious that they were equally comfortable using relations between nations to illustrate those between private persons. They saw not only relations between states as private, but states themselves as private domains. Grotius, not to be outdone, went further and characterized sovereignty not just as mastery of the state's territory and resources, but also of its citizens, characterizing slavery as the basic form of political relationship (Grotius 1625: 106).

More recent writers have suggested that these inherited categories lead to confusion rather than clarity. Writing close to a century ago, Roscoe Pound complained that the analogy between states and persons is outdated, and to employ it 'is to put morals in terms of law, not law in terms of morals' (Pound 1923: 80). Pound concedes that such analogies figure in legal practice, but doubts their normative significance. However useful the analogies may have been in the age in which relations between patrimonial states were ultimately private arrangements between their rulers, Pound suggests that the external relations of modern states should not be modelled on this outdated and repugnant picture.

More recent critics have suggested that states and persons are so different that no insight is to be gained by comparing them. Much of this criticism has been directed at Michael Walzer's use of what he calls the 'domestic analogy' between individuals and states (Walzer 1977). Walzer's strategy is to identify the distinctive good that is produced by a nation, understood as 'a people governed in accordance with its own traditions' (Walzer 1980: 210), and to argue that its entitlement to territorial integrity and political independence protects that good.[2] Walzer's critics have questioned whether all states provide this good (Beitz 2009), whether only states do (Rodin 2014) and whether it is important enough to outweigh the harms that many states do to their members (Luban 1980). Walzer and his critics are alike in seeking to assess a relational norm governing the ways in which states interact with each other in terms of a non-relational, monadic feature of states.

Kant's approach is fundamentally different; he understands political independence and territorial integrity relationally, building on an

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analogy between private law relations and juridical relations between nations. I will not fully endorse Lauterpacht's claim that international law is (or ever was) a species of private law. Nor will I contend that the private law analogies exhaust an international legal order; I am interested in how they can be any part of it, how nations can stand in 'horizontal', private relations at all.

The Kantian approach I will develop contrasts with other understandings of the private legal relations between states. Hobbes, for example, uses relations between nations to illustrate what relations between individuals would be in a state of nature, that is in the absence of legal institutions. The Hobbesian conclusion is that nations have no rights against each other, only a liberty to do what seems useful to them. Grotius, Pufendorf and Vattel see nations as having rights and duties, but those rights are thought to be grounded in their express or implied, that is, customary, agreement. For Kant, nations must already stand in juridical relations if they are to enter into voluntary arrangements, whether express or implied, and their power to enter into any such arrangements is limited by their public nature.

A Kantian account of private law and its international analogue begins with relations as they can be conceived in a 'state of nature', but it does not end with them. Private legal relations can, in principle, constitute a condition of anarchy in which peaceful coexistence is contingently possible. But rights are not secure in such a condition. Individual human beings, and, by analogy, states, must enter a public legal condition in which their rights are secure, and properly public international law includes institutions and rules that go beyond private law and its analogues. As in the case of individuals, the state of nature between nations is defective because it lacks a common standpoint through which competing claims can be assessed and uses of force brought under law. Modern international legal institutions – including both customary international law and formal institutions such as the UN – have made some progress towards providing such a standpoint, and thereby creating a legal order in which both individuals and nations are able to enjoy their rights. In creating that structure, however, the international legal order does not give rise to any new *private* rights as between nations.[3] Instead, they serve to enable collective security and to protect individuals and the natural environment from the structural effects of a system in which states are sovereign within their borders.

I will develop the analogy in three steps, focusing first, on the formal nature of an analogy, second, on the structure of private law, and third,

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on the moral nature and status of states. When Kant characterizes a nation 'as a moral person, considered as living in relation to another state in the condition of natural freedom' (*MM*, 6: 344), his claim is not that a nation is like a natural person. 'Moral person' is a technical term in eighteenth-century philosophy, referring to any artificial organization to which moral concepts apply, and so to which acts can be imputed.[4] Nations live in relation to each other 'in the condition of natural freedom' because rightful relations between nations are like rightful relations between persons in such a condition in that the characteristic wrongs that violate them are analogous. That is why they are subject to the requirement that they interact in conformity with the idea of 'an antagonism in accordance with outer freedom by which each can preserve what belongs to it, but not a way of acquiring' (*MM*, 6: 347). I will develop Kantian interpretations of the international law analogues of what Kant identifies as the three titles of private right: property, contract and what Kant calls 'status', that is, relations in which one party is in control of some aspect of the affairs of another. Each form of relation is different in the international case – a state's territory is neither its body nor its property, a treaty is not a private contract and a state that exercises power over another's territory is precluded from engaging in its own constitutive activity, that is, acting on behalf of its own inhabitants. These differences, in turn, reflect the ways in which the different forms of interaction apply to states rather than individuals. I will conclude by drawing out the implications of these private law conceptions for a properly public conception of relations between states.

2. The Concept of Analogy

The commonplace of recent philosophy that any two things are alike in some respects and unlike in others (Goodman 1972) raises a challenge to any attempt to draw material analogies between states and persons. The Kantian alternative is to focus on formal ones.[5] In the *Critique of Pure Reason*, Kant explains that analogies are between relations, rather than objects (A179/B222). See also *CPJ*, 5: 464; *P*, 5: 357. The form of a mathematical analogy is A:B : C:D, because it compares relations to each other and, abstracting from the quantity of the numbers in each relation, looks instead only to the relations within each pair (Bottici 2003). In his *Prolegomena to Any Future Metaphysics*, Kant illustrates with his own use of the principle of action and reaction in physics to elucidate the juridical relation between human actions (*P*, 4: 357). In offering that analogy, he does not suppose that human beings are point-masses, or that laws of right have the same type of necessity as laws of physics. Instead, the point is that the form of relation is the same.

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The same point applies to the case of states: the key to interpreting the analogy is to focus on the relations between them, rather than the relata understood apart from them. If nations stand in private legal relations, it is not because they are like individual human beings.[6] Clarifying those points of analogy therefore requires careful attention to both the structure of private law and to the important differences between nations and individuals. Those differences shape their application in important ways (Lauterpacht 1927: 54).[7]

3. Private Legal Relations

Kant's conception of the morality governing political life is resolutely individualist in its premises, but develops these premises through a sequence of ideas. The *Doctrine of Right* begins with a traditional first-order normative question about law and legal institutions: how can positive (that is, chosen) law be morally binding? Kant is not merely making the familiar empirical observation that positive law varies from place to place. Instead, the question arises because positive law is presumptively in tension with the fundamental moral idea, that each person is *sui iuris*, his or her own master. The task of the *Doctrine of Right* is to answer the question that many children ask, 'why do you get to make the rules?' The answer articulates the forms of moral relation that are consistent with the organizing principle that each person is *sui iuris*. The relevant idea that you are your own master is not a positive idea of self-mastery, but rather as a relational and contrastive one: the entire content of the idea that you are your own master is exhausted by the thought that no *other* person is your master, that you are entitled to be independent of another person's determining choice. Your status as *sui iuris* thus contrasts with the status of *alieni iuris*, a slave or serf or dependent child who is subject to the authority of another. As *sui iuris*, you can stand on your rights, making a claim in your own right for wrongs that are personal to you.[8] The contrast between being *sui iuris* and *alieni iuris* does not suppose that you are somehow internally your own master, factually independent of your circumstances, or that every decision you make is correct just because you make it. Each person's independence is only from the choice of others – each is neither their superior nor their subordinate.

This is the basic form of moral relations between persons. It is basic because your status as *sui iuris* is not delegated by some higher authority that has granted you the power to decide, say, whether to enforce your contractual rights, under a general rule based on the hypothesis that worthwhile commercial activity will be facilitated if creditors decide whether to collect. Nor can your standing to decide be traced to its direct

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or indirect contribution to well-being, either your own or that of your debtor. It is more basic than that; you have a right against another person. This thought is especially clear with respect to rights against bodily interference: nobody else gets to tell you what to do with your body because it is not theirs, it is yours. You have a right to your own body because nobody else is in charge of you. Rather than saying that others have to avoid interfering with your body or may only do so with your permission because this it will contribute to your well-being, the Kantian says instead that you are entitled to be independent of any other person's determining choice. The basic form of your right is thus a right against a certain kind of domination. The secondary form of that right is the right to make a claim in your own right – the entitlement to stand (or not) on your own right.

Your status as *sui iuris* is formal because it is fundamentally and non-derivatively relational. Although only a certain type of being can stand in such a relation – only a being capable of setting and pursuing ends could either subordinate another to its ends or be subordinated by another – this boundary condition on its application does not show that your status as *sui iuris* is in the service of enabling you to set and pursue your ends. Indeed, because being *sui iuris* is a reciprocal relation between persons, the standing of others as *sui iuris* will sometimes compromise your ability to pursue and achieve your own ends. Their standing precludes you from having the rightful power to compel them to assist you or, what comes to the same thing, it entails that those others are not under any obligation to assist you with your pursuits by organizing their pursuits around yours. Absent a special relationship, created through some affirmative act on your part, either of contract or some form of fiduciary obligation, your primary duty to others is one of non-interference, rather than assistance.

By locating the fundamental question of right in terms of something like standing or authority, interpersonal morality – the subject matter of private right – focuses not on the ends for which a person acts, but rather on the means he or she uses. Although the doctrine of right as a whole has the final end of perpetual peace (*MM*, 6: 355), no ends at all govern private right. Instead, as Kant explains in introducing the contrast between right and virtue, both right and its enforcement focus on what can coexist with 'ends as such' (*MM*, 6: 396). It does not matter what you were trying to achieve when you made a contract with me, or whether you will succeed; having made the agreement, we are now both bound to perform, because our contract subjects the question of the performance of each to the

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choice of the other. Nor does it matter why you decided to have or not have some surgical procedure performed on you; to say that it is up to you leaves it to you alone to determine the grounds on which you will decide. Again, as an owner of property, you determine the ends for which it will be used, which is just to say that you have it available to you as a means, because no other person is entitled to determine the purposes for which you use it. The only restrictions on your use come from the rights of others to use what is theirs. Just as others must not interfere with your person without your authorization, and you must not interfere with theirs, so, too, others may not compel you to accommodate their particular purposes. That is just what it is for you and others to be independent of each other: one person's purposes are not subordinated to those of any other.

The requirements of right are, as Kant observes, entirely external. The universal principle of right

> does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; instead, it says only that freedom is limited to those conditions in conformity with the idea of it and that it may be actively limited by others. (*MM*, 6: 321)

Right protects external freedom, and limits it only to the conditions of everyone enjoying their freedom together, the coexistence 'of everyone's freedom in accordance with the universal law' (*MM*, 6: 230).

Kant also argues that right is equivalent to the authorization to use coercion, that is, the only authorization for the use of force is the upholding of a system of individual freedom, where freedom is once again understood relationally and contrastively. A system of reciprocal limits on independence is, at the same time, a system of reciprocal limits on the enforcement of that independence.[9] The authorization to prevent or reverse a wrong is nothing over and above the right that is protected or upheld.

4. The Public Nature of a Rightful Condition

Kant's argument from external freedom and its enforcement to the moral necessity of a rightful condition follows a sequence of steps. From reciprocal independence and the right of each person to be presumed to have done no wrong, he proceeds through private legal relations, including property, contract and relations of agency and status, showing how entering into these relations is provisionally consistent with the freedom of everyone. That consistency is only provisional, however, because the

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moral norms governing private rights are only enforceable through public institutions, capable of making, applying and enforcing law on behalf of everyone.

Kant frames the argument using conceptions of property that have figured centrally in Western legal traditions over the past two millennia, but its core is intelligible in abstraction from the particulars of those conceptions. Kant argues first, that if (as is contingently the case) there are usable things that free beings are capable of subjecting to their choice, that is, using as means to achieve their own purposes, it must be possible to rightfully use those things. Because each human being is *sui iuris*, the entitlement to use things must be formal: the use of things and not require the approval of every other person, contingent on that other person's appraisal of the purpose for which the thing is used, or the comparative assessment of alternative uses to which it might be put. Instead, the use of things is only consistent with everyone's freedom if everyone can have things fully subject to their own choice. This, in turn, requires that people be able to make things their own, on their own initiative, that is without consulting everyone else, yet putting all others under new obligations to forbear from using the things that has been acquired. Acquiring an object makes it wrong for others to interfere with it. The puzzle is to understand how such a change could ever be consistent with each person's right to independence, rather than being a case of one person unilaterally binding another in a way that the other cannot bind the first. Kant's solution is to bring particular acts of acquisition under a general and public power-conferring rule, which must be seen to have issued from the omnilateral will, that is, from the people considered as a collective body. Absent omnilateral authorization, one person's taking physical possession of the object does not change the rights of others, only the particulars governed by the possessor's innate right of humanity.

Although Kant illustrates this point with the traditional example of acquiring land that is unowned and unoccupied, it applies just the same to any institutional procedure through which people apply for homesteads, mining licences and so on, or through which an organization assigns them to particular people. Many contemporary writers follow Grotius and Hume in locating the origin of property in an agreement, convention or practice. Any such arrangement by the members of a group could only bind non-participants if the parties to the arrangement were already entitled to determine how usable things could be used in a way that binds everyone – the very question of public right (*MM*, 6: 251). Registering your land claim at the homestead office only binds others

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if the homestead office is a properly constituted public authority. A procedure provided by a private organization would still be unilateral in the relevant sense and unable to bind everyone.[10] Only authoritative public lawmaking institutions can constitute an omnilateral standpoint and so make acquisition binding on everyone.

Second, Kant argues that acquired rights are merely provisional in a state of nature because, although they are presumptively enforceable, in the absence of authoritative public institutions, each person's standing as *sui iuris* entail that no person needs to defer to another's enforcement of an acquired right, but may instead resist with right all attempts at enforcement (*MM*, 6: 256). As a general matter, remedial enforcement of private claims can only be legitimate if it is conditioned by an appropriate procedure to establish the wrong. Any such procedure must be structured by the defendant's right to be beyond reproach, but it also must have general jurisdiction, that is, it must be part of a system in which all disputes about private rights can be adjudicated in a way consistent with the freedom of everyone. Once again, this requires authoritative public institutions overseeing enforcement of private rights. That is, your status as *sui iuris* – your entitlement to bring a claim in your own right for a wrong personal to you – requires institutions consistent with everyone's independence. Otherwise your action of enforcement is merely unilateral, and so inconsistent with every other person's right to be beyond reproach.

Third, Kant develops a distinctive version of the traditional natural law argument that juridical concepts are indeterminate in their application, and so require authoritative determination and specification, as well as authoritative application to particulars in cases of dispute. The Kantian approach does not turn on assumptions about the likelihood of empirical disagreement, and focuses exclusively on the juridical structure of the situation. The argument is clearest in the case of property. The basic form of acquiring property is taking possession, but the concept of property must be formal, and so must allow a person to acquire things larger than can be subject to that person's current factual control. That in turn entails that even the simplest case of acquisition requires a procedure. Even such natural-seeming procedures as picking up a stick or grabbing an apple with your mouth only create a continuing property right if they are instances of a more general system of acquisition. Similar difficulties pervade other relations, including contract, where the idea that the parties must agree needs to be given an external procedural marker, and the terms of the agreement need to be justiciable by a court.

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The point is not that disagreement is inevitable, or even likely, but rather that concepts of right need to be subject to a common articulation, and the application of that common articulation to particulars must be subject to authoritative adjudication, providing closure.

All three arguments turn on the general idea that public institutions are required to create a system in which everyone can enjoy their rights. The state can only solve the three problems that arise in its absence if it is a distinctively public thing, capable of acting on behalf of everyone, and occupying a distinctive standpoint. No private body could solve any of the problems. No private person or organization could authorize one person to put a third under obligation, require that one person refrain from defending holdings against another who contested them or institute binding determinations of abstract concepts of right. Only a public authority can constitute such a standpoint.

Kant emphasizes that the analysis incorporates what he calls 'the state as idea', that is, the state understood as public institutions empowered by and restricted by distinctive juridical norms. Private right abstracts from all ends; by contrast, public right requires the state to have one mandatory end, that it, the provision of a rightful condition to its inhabitants.

Kant's focus on the ideal case highlights the way in which the creation and legitimacy of a legal order can only be understood in terms of the case in which public legal institutions are genuinely public, and genuinely act on behalf of everyone, enabling the citizens to rule themselves through their institutions. Actual states fall far short of the ideal, but it is analytically basic, because actual cases encountered in experience must be understood as defective versions of it. There is a nice question about just how defective institutions can be, consistent with solving the problems of the state of nature. Kant's answer sets a very low bar for satisfying what he calls 'the postulate of public right', that is, for solving the problem of a state of nature, and sets out as a regulative ideal what he calls 'the idea of the original contract'. The contract does not rest on some historical event, but only 'the idea of this act, in terms of which alone we can think of the legitimacy of a state' (*MM*, 6: 315). The idea of the original contract is the regulative principle for a rightful condition. All existing legal orders are defective in relation to it; some, those Kant characterizes as 'despotic', are gravely defective.

Any legal order that satisfies the postulate of public right will have powers that no private person could have, including the right to determine

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legitimate uses of force, the right to impose binding and enforceable resolutions on private disputes and the right to confer powers on both private persons and public officials. A public authority has the further power to see to its own continued existence, and to take up the means necessary to do so, always consistent with the rights of the human being subject to its power and authority.

Contemporary debates about rights are usually more focused on human rights than individual property rights, and more concerned about the proper limits of state power than the role of the state in providing systematic protection of individuals from each other. Kant's articulation of the problems of private right in a state of nature may seem out of date in relation to these more recent ideas. But the Kantian conception of public law has enduring importance for two reasons. First, the Kantian account does not represent the state as exclusively in the service of ideas of private right, and does not imagine (as some Lockean arguments do) that morality is somehow complete in the absence of legal institutions. A legal order provides closure with respect to how things stand both horizontally, as between private individuals (private right) and vertically, between itself and those over whom it exercises power and jurisdiction (public right). It can only do so consistent with every person's status as an independent human being by adopting an exclusively public standpoint, both empowering officials to do things that no private person is entitled to do, and restricting the means that those officials can use in carrying out their mandates. Second, no account of how things stand between persons or nations can do without some analogue of concepts of private right. Questions about who has standing to determine how which things are used, and who has standing to resolve disputes and enforce claims are not unique to capitalist economies, but arise whenever human beings or nations interact. Attempts to explain relations between states without these ideas borrow heavily from juridical ideas of private right, and understanding how those ideas properly operate provides a way of showing that those debts cannot be repaid.

5. Private Legal Relations between Nations

So far, I have introduced an account of private legal relationships, in terms of each person's right to independence of each of the others, and an account of public law as charged with the distinctively public purpose of providing a rightful condition to those living under its jurisdiction. These two levels of analysis provide the materials from which the private law analogies can be analysed.

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A successful development of the analogies would need to show how legal orders stand in irreducible relations to each other, organized around rights of non-subordination, but focussed not on their entitlement to pursue their private purposes, but instead with their status as distinctively public legal orders. Precisely because legal orders are mandate-created and driven, they have no private purposes, and so a system in which one legal order was independent of another would not be a system 'consistent with ends as such' (*MM*, 6: 396), in which each was restricted in its entitlement to pursue its private purposes by the entitlement of others to do the same. Instead, any analogy must operate at the level of the relation, not at the level of the things that are related to each other. Understood in this way, a system of rightful private relations between nations would have to be one that was consistent with 'public legal order as such', that is, one in which each legal order was entitled to be the legal order that it was, consistent with the equivalent entitlement of other legal orders. Just as private relations of right can hold only between beings capable of setting and pursuing purposes (because they prohibit the subordination of one person's choice to another's) international relations of right can only hold between systems of public law, and their organizing norm would have to prohibit the subordination of one system of public law to another. This thought is captured in the principle *par in parem non habet imperium*, that states are legal equals. As a comparative claim, the principle is palpably false; as a relational normative claim – that none is the superior and so none the subordinate of another – it is both true and important.

The distinctive purpose of each state thus gives rise to its claim to independence of others. A system of public law's claim to rule is grounded in the provision of closure with respect to actual and potential disputes between private persons. Its provision of closure, in turn, is itself subject to its own principle of closure.[11] Scott Shapiro explains this structure with the idea of self-certification: a legal system is self-certifying if nothing outside of it is relevant to its entitlement to provide closure (Shapiro 2011: 221). It brings human interaction under law by providing a unique standpoint from which disputes can be resolved, remedies determined and enforcement authorized. Shapiro offers the example of a condominium corporation that can make its own by-laws, but only subject to powers conferred on it by the jurisdiction in which it is located. Within a federal system it may be that it is subject to limits of the federation as a whole, but once again, that just shows that the federation rather than the member state or province is self-certifying.

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This idea of self-certification does not lead to the conclusion that all legal systems are equally good, that all methods of providing closure are equally good or that all ways of resolving a particular dispute are equally good. Nor does it lead to the conclusion that a legal system must be able to do whatever it wants; constitutional limitations on its lawmaking powers, including those contained in a bill of rights or basic law are entirely constituent with it. Self-certification demands only that the provision of closure by the legal system is independent of the say-so of any *other* national legal system: no legal order wrongs any other legal order by bringing uses of force under law within its own territory – each has a mandate to provide a rightful condition for the human beings subject to it, but not for those outside it – but one legal order wrongs another by subordinating the other legal order to its own, because to do so is to substitute force for law. Each legal order's entitlement to be self-certifying is thus its entitlement to bring human conduct under law. It does so through its own procedures. If another nation can use force to interfere in those procedures or to pre-empt their operation, that other nation replaces law with mere force. The Kantian argument that individual human beings must replace force with right by entering a civil condition thus leads to the conclusion that each civil condition must not disrupt another existing legal order through force.

This idea of self-certification does not support a patrimonial conception of sovereignty on which a state's lawmaking power is not subject to any internal norm; its self-certifying status is its external independence of any other legal order. Indeed, its own internal norm limits its rightful focus to providing a rightful condition for its inhabitants, and so it cannot compel its citizens to interfere with another nation's independence (*MM*, 6: 345), because no other state's independence, as such, interferes with that provision.

Nor does each state's claim to independence support the thought that a state is entitled to refuse to recognize the rights of any other state. Instead, each state is *sui iuris* only if they all are; each lacks jurisdiction over any other legal order.

The relational understanding of self-certification leads directly to each nation's right to political independence and territorial integrity. Nations are politically independent of each other because one national legal order's lawmaking powers are not an instance of another nation's lawmaking powers. If they were so subject, then they would have to either be subordinated to the particular private purposes of the members (or

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leadership) of the other legal order, or to the other legal order's public purpose of providing a rightful condition for its inhabitants. The specific private purposes of the members of the superior state cannot bind the subordinate state or any of its members; one nation's public purpose of providing a rightful condition to its own inhabitants does not give it any rights to assistance from any other legal order charged with providing a rightful condition to its own citizens. Conversely, no nation wrongs another by providing a rightful condition to its own inhabitants, provided that in so doing it does not interfere with the other nation's political independence or territorial integrity. Each nation has a positive duty to those inhabiting its territory to provide them with a legal order in which those inhabitants can enjoy their rights, but only a negative duty to avoid interfering with another nation's provision of a legal order. It does no wrong by failing to provide a favourable context for other nations, just as one person's non-wrongful acts are not rendered wrongful by the fact that they make it more difficult for another to achieve his or her purposes.

Each nation's status as public legal order thus gives it a negative claim against other nations, over and above the claims its individual members have against outsiders. The legal order has authority over those subject to it because it has provisionally solved the problem of right for them; another legal order that seeks to impose itself forcibly interferes with the provision of a rightful condition.

A focus on moral relations between states shows the difficulties of a recent argument made by John Simmons, according to which a Kantian account cannot explain why the functions of a state are not fully fungible. Simmons offers the hypothetical example of a bloodless annexation in which all private property claims remain intact, and stipulates that the invader's government does at least as good a job in functional terms. By making the invasion bloodless and property-preserving, Simmons's example seeks to circumvent the idea that the provision of a rightful condition has been interfered with, on the assumption that a transfer of power that violates no private rights is functionally indistinguishable from no change at all. From this he contends that the Kantian approach lacks the resources to condemn the invasion (Simmons 2016).

But even a bloodless private-right-preserving invasion substitutes force for right, and so violates the principle of freedom under law, because it makes the change through non-legal means. The problem is not merely that positive law does not permit those means; they are unlawful as such, because the change in the legal system to which the invaded country's

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inhabitants are now subject does not come about through that country's own procedures. If the invaded state's officials resign or flee out of fear, or abandon their offices because they have been offered emoluments by the invaders, force has been substituted for right: the invasion is effective only because the rule of law has been subverted, because those officials have stopped doing their jobs. Not only are they replaced; their official positions are replaced, even if the new rulers put different people in functionally indistinguishable roles. The bloodless invasion thereby wrongs the invaded country and its citizens by subjecting them to what must be, from their perspective, arbitrary force.

Those who are in a rightful condition are entitled to remain in that rightful condition, which means that the citizens, considered as a collective body, have a right that outsiders not subvert their legal order. That is a sense in which Kant conceives a state as 'a society of human beings that no one other than itself can command or dispose of' (*PP*, 8: 344). Just as a monarch cannot give a state away or sell it, so outsiders cannot take it for themselves, either through force or guile. The invasion violates their right to be members of the legal order they are in, even if it does not affect their welfare or violate any of their private rights. Its entitlement to remain in a rightful condition cannot be a question for any outside agency, because that would subordinate the rights of its inhabitants to outsiders. This is a right that it has because it is public; a private corporation that offered dispute resolution and enforcement services would have no comparable claim against outsiders.

Understood in this way, the starting point for all of the private law analogies is a familiar conception of what it is for legal persons to stand in distinctively legal forms of relation: the idea that states are entitled to be independent of each other, and so that they can stand on their rights, make claims in their own name and have special standing to protest wrongs that are personal to them. This idea entails that one party cannot unilaterally negate another's legal status. Lauterpacht makes this point in his discussion of the Kellogg-Briand pact of 1928, which outlawed war as an instrument of national policy. He notes that a system of international law is internally, that is to say, legally, defective if one state can unilaterally deprive another of the law's protections (Lauterpacht 1944). Lauterpacht is discussing the law of war, but his point applies much more generally, and indeed, he goes on to deploy it in characterizing the role of recognition in international law. The word 'recognition' might seem to suggest an affirmative and voluntary act by the recognizing nation, but, as Lauterpacht argues, that cannot be the right way to think

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about it. Instead, recognition must be a part of the peremptory law of nations, rather than of the voluntary law of nations. If one nation breaks off diplomatic relations with another, the former does not thereby suspend the rights of the other.

Lauterpacht's point is that, once the idea of political independence is grasped relationally, the nineteenth-century idea that the law of nations is entirely voluntary cannot even be conceived. Any voluntary arrangement presupposes some background of a peremptory law of nations. Nations can modify their relations *inter se* only against the background of a set of norms laying out their antecedent relations. The status of each nation as *sui iuris* does not depend on an optional affirmative act by any other nation or nations. Separate legal orders are juridical equals, not because of some agreement that they have made (what standing could they have to enter into an agreement, or to decline to do so, and how could they have the capacity to bind themselves in relation to each other?) nor because of a positive act by any superior international legal order to which both are subordinated. As in the individual case, any capacity to enter into voluntary arrangements presupposes their prior right to independence, and with it the distinction is between the ways in which one nation may affect another only with the other's permission, and those for which permission is not required. The suggestion that all international law is a set of voluntary arrangements on the part of sovereign states which can repudiate it at will is therefore incoherent.

Nations stand in reciprocal relations of independence because each is its own legal order and not the other's legal order. Each nation is entitled to exercise its public powers within its boundaries, but none has extraterritorial application. The first, and most basic, is the tripartite power to make, apply and enforce laws. No nation enjoys this power in relation to another: it lacks lawmaking power, and so the power to enforce its laws, as well as the concomitant power to apply them. Nor do nations enjoy any analogue of what Kant calls the 'police power' over each other, and so they do not enjoy the power to impose taxes, redistribute assets or facilitate interaction. Nor do states have standing to punish other states, or even to impose binding resolution of disputes on them.

As in the individual case, only a certain kind of entity can stand in the relevant relations. In the individual case, only beings capable of setting and pursuing purposes can stand in (and so can potentially violate) the relevant relations, because only a being that can set purposes can interfere with the entitlement of another being to set purposes, and only such a

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being can be interfered with. In the international case, only a system of public law could potentially impose its legal norms on another legal order, and only another order could have outside norms imposed on its system in this way, and so be wronged by their imposition. Just as in the individual case everyone else's status as *sui iuris* may or may not contribute to your success in achieving your purposes in particular cases, so, too, the standing of separate nations as *sui iuris* may or may not contribute to their success in their immanent purpose of providing a rightful condition to those living on their territory. Once again, the status is purely relational.

Kant represents nations as in a state of nature; he also characterizes it as a barbaric, warlike condition. In this barbaric condition, no rights are secure. That does not, however, entail that rights cannot be understood. In the closing section of *Anthropology from a Practical Point of View*, Kant distinguishes between two ways of conceiving the state of nature: first, as a system of anarchy, which would be the state of nature as an idea of reason, that is in its pure case; and second, as a state of barbarism, which would be its defective (and indeed actual) version. A state of anarchy is a condition of freedom with neither force nor law; that is, the independent coexistence of separate nations, a way in which – however accidentally – all in fact enjoy their freedom in relation to each other, because none is subject to the choice of another (*Anth*, 7: 330). A state of barbarism, by contrast, is a condition of force with neither freedom nor law, that is, a situation in which one is subject to another, or some subject to others. In the absence of a public rightful condition at the international level, nations are in a state of nature. The moral principles governing the international state of nature – the private law of nations – are articulated in the 'Preliminary Articles' of *Toward Perpetual Peace*. Those articles describe the conditions of the transition from the actual barbarism of the international state of nature to an anarchic version of it. They are preliminary because at most they can secure a fragile and temporary peace.

Kant argues that states must exit the state of nature, which is inevitably a condition of war or imminent war, and so 'wrong in the highest degree' (*MM*, 6: 307). In its place they should set up, he suggests, 'a league of nations in accordance with the idea of an original social contract' (*MM*, 6: 344), that is, set up institutions, corresponding to the 'Definitive Articles' of *Towards Perpetual Peace*, so as to expand the reach of the principle of freedom under law. Just as leaving the individual state of nature first brings human interaction under that principle, so, too,

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leaving the international state of nature would have the effect of bringing more human interaction under that principle, because it would lead interactions between nations to no longer be a matter of each doing 'what seems right and good to it' (*MM*, 6: 312), but instead bring those interactions under a shared standpoint of general norms and shared fora for interpreting and applying them.

Although Kant does not expressly discuss whether such a system introduces further duties of nations 'among themselves than can be conceived' in a state of nature (*MM*, 6: 306), the analogy with private legal relations suggests that it does not. Their right to independence – their sovereignty – limits what they may do to each other; it does not rule out further duties of international law,[12] even though these duties require a public legal authority. To the extent that such an authority exists, it exists not through the voluntary agreement of states, but rather through the development of what has come to be called 'customary international law', that is, the articulation of both norms and fora of dispute resolution that are recognized by most nations, sufficient to bind the others. The lawmaking power of such customary law is restricted; it cannot confer powers on nations that are inconsistent with other nations' right to independence. That is, the right of each nation to political independence and territorial integrity generates norms that must be peremptory for public international law. That is just Lauterpacht's point about the system in which customary international law, as reported by Grotius, purported to confer a right to go to war and seek satisfaction. Such a system, even if established through the same kind of customary procedures as established by such bodies as the United Nations, is, as Lauterpacht puts it, legally defective.

6. How a Public Thing Stands in Private Relations

Kant identifies three titles of private right. Property governs the ways in which separate persons interact independently, contract the ways in which they interact interdependently and consensually, and fiduciary-type relations in which they interact interdependently and non-consensually. In the right of nations, these forms of interaction are reconfigured as territory (which is not property), treaty (which is not contract) and public trusteeship (which is not a private fiduciary relation). In each of the three cases, these differences between the individual private law case and its international law analogue do not show that the analogies do not fit, but rather illustrates the ways in which they do. The three titles of private right correspond to the three forms of interaction consistent with reciprocal independence. Their international law analogues differ in their matter but not in their form.

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Property and Territory

Writers in the regular war tradition such as Grotius, Pufendorf and Vattel treated a nation's territory as its property. Other writers sometimes reject this account in favour of a different private analogy, according to which each nation's territory is its body. If the basic private law analogy is understood relationally, neither specification can be entirely right. A nation's claim to its territory is an instance of its claim as a system of public law; its territory is just *where* it is effective as such a system, not a means available to it for purposes that it is free to determine. In the individual case, you need to avoid subordinating another person's body or property to your purposes because they are not yours; in the international case, each state must avoid subordinating another state's institutions and territory to its public law because it has no jurisdiction over it.

A nation does not have its territory as a belonging that it can use for whatever purpose it sees fit. Instead, it has it against other nations because its territory is the place where it exercises its jurisdiction as a legal order. That jurisdiction does not depend on its mode of acquisition in the way that a property claim does. The founding of a state is not an act by the state – otherwise it would need to exist before it came into being – and so cannot depend on any analogue of the procedure through which an individual property owner acquires property. That is why a state does not need an external authorization to acquire its territory in the way in which individual property claims require public authorization.[13] If no other state already had jurisdiction on the territory, creating a legal order does not deprive any individual or state of a right to do something it was antecedently entitled to do.

Nor is the manner in which a state came about relevant to its territorial claim as against other states. As Kant remarks in the context of revolution, 'it is futile to inquire into the historical documentation of the mechanism of government', not merely for lack of a historical record (*MM*, 6: 340), but more fundamentally because the question of 'whether a state began with an actual contract of submission (*pactum subjectionis civilis*) is a fact, or whether power came first and law arrived only afterwards, or even whether they should have followed in this order' (*MM*, 6: 318), has no moral implications. The pointlessness follows from the fact that the state's right to rule is not the result of it having come about through appropriate procedures.

There can be no procedure required for a state to come into being, because the existence of a state is the precondition of binding procedures.

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But the same point applies to territory acquired through other non-rightful transactions. The second preliminary article of *Towards Perpetual Peace* stipulates that 'no independently existing state (whether small or large) shall be acquired by another state through inheritance, exchange, purchase or donation' (*PP*, 8: 345). Kant makes this point about entire states, but it also applies to parts of states; he is sharply critical of supposed purchases of sovereignty by Europeans colonists in Africa and the Americas (*MM*, 6: 266), and would certainly have condemned the widespread practices of purchasing land and claiming sovereignty by Europeans in nineteenth-century Africa.[14] Kant characterizes the way in which a prohibition applies going forward but not retroactively as a 'permissive law', by which he means that such acquisition is wrongful in the future, but retroactively gives rise to a legitimate claim. On this understanding, then, although there was no rightful basis for France to sell Louisiana, or Russia to sell Alaska, or for the United States to purchase either territory, once jurisdiction has been successfully exercised over them, they become parts of the country that incorporated them. The quality of the transaction that gives rise to a state having jurisdiction in an area is highly relevant in prospect, potentially relevant shortly after, but must eventually become irrelevant. For all of the same reasons, a nation can defend its territory from wrongful conquest, and continue that defence during ongoing hostilities, but after a peace is concluded cannot exercise any right of corrective justice to reclaim it. The only right that it needs to stand on is its right to be *sui iuris*, not subject to the jurisdiction of another legal order.

The analogy between territory and property therefore collapses. A private person's claim to property depends on how that property was acquired. There is no backward-looking procedure that counts as the rightful way of acquiring territory, only a forward-looking prohibition on wrongful acquisitions. The combined effect is to make past wrongful acquisitions binding. The closest thing to a property model would be a system in which the current holder of territory has a superior claim to it than anyone else. That model describes territorial integrity as property only by leaving no distinctive work for the concept of property to do.

In Kant's time, acquisition through war (and other non-rightful transactions such as purchase and bequest) was frequent. Since the end of the First World War, a series of international documents and institutions have progressively outlawed acquisition through war, beginning with the League of Nations charter, through the Kellogg-Briand pact of 1928 and the United Nations charter. These legal documents have not succeeded

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in preventing wars – most notably, the Second World War took place despite the adoption of the Kellogg-Briand Pact – and not all of the effects of those wars have been rolled back, but they have nonetheless marked a formal transition from an international order structured exclusively by private relations between nations to a more public order. It is more public, without being fully public, because although it has mechanisms in place capable of providing closure with respect to disputes – it is within their mandate to do so – it is not within their mandate to impose that closure; enforcement depends on the participation of other states. In another sense, as noted above, that transition just gives effect to what is required by private interactions between nations; no 'further duties and rights' between nations are created by the prohibition on war as an instrument of national policy. Instead, the prohibition has the effect of retroactively making any actual past acquisition binding. The only way to prohibit the principle that might makes right with respect to territory is to concede that might made right in the past; there is no way to outlaw future acquisitions through might without treating past ones as binding on others.

These difficulties of the property model do not lead to the conclusion that a state's territory is its body, something with which it is born and which it cannot alienate. Even if each state is 'born' with some territory, since it must already be legally effective somewhere in order to act, and so must have territory before any act of acquisition, once it exists its boundaries may change. Not only may alluvial or volcanic islands spring up, or unoccupied regions be acquired through accession (*MM*, 6: 353), but also through its own official acts, including wrongful ones, what was once the territory of one state may have become the territory of another. That is, territory could belong to another nation, in a way that a person's body normally does not and morally could not. Although a right to territory can be thought in a state of nature, it can only be fully secured under public international legal institutions; without such institutions any enforcement is entirely unilateral (*MM*, 6: 350).[15] But a focus on how territorial change came about in fact does not engage the question of territorial entitlement. The other difficulty with the body analogy is shared with the property model: characteristic private wrongs against bodies subordinate one person's power of choice to another's particular choices. Wrongs against territory are different: they subordinate one nation's legal order to that of another.

On this understanding, political independence and territorial integrity are different aspects of a single form of relation. A nation's territory is just where it is entitled to be politically independent. The right to political

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independence carries with it the right to exclude other legal orders, which is not equivalent to a right to exclude individual human beings.[16]

Contracts and Treaties

Each nation's entitlement as against others to its own territory is the organizing norm of international law, against the background of which voluntary arrangements can be made. Bringing private legal relations under public law requires *ius cogens* norms limiting the ability of nations to arrange their affairs through treaty,[17] but in another way those norms create no new juridical relations. Although they are often described as prohibiting treaties that are contrary to good morals or violate the ethics of the international community (Verdross 1937),[18] they are fundamentally the organizing structure of private legal relations between states. The restrictions apply to the basic form of interaction between nations that are *sui iuris*, and they are already contained in the idea of nations as independent legal orders. The rules about juridical capacity to enter into treaties are so contained; so too is the rule that two states cannot make a treaty voiding the rights of a third, as it is just the international analogue of contract law's principle of privity. The most prominent *ius cogens* norms go to the minimal conditions of a rightful condition, such as the prohibition of slavery and genocide and the continued operation of public institutions; others go to the minimal conditions of political independence and territorial integrity, such as the prohibition of aggression.[19] States lack the legal power to exempt themselves from these core public functions not only because membership in the international order is mandatory, so that their binding force is just what it is for nations to have left the state of nature. They also go directly to the application of the postulate of public right to each state. Any undertaking to violate those prohibitions would be an undertaking to abandon a rightful condition and descend into barbarism. A treaty authorizing slavery or genocide would do more than subordinate one legal order to another. Instead, it would be the international equivalent of an individual human being selling him- or herself into slavery. Just as you could not be bound by a contract that annihilated your legal personality, since you would not legally be capable of bearing duties, and so could not be bound, so, too, a nation could not enter into a binding agreement inconsistent with the postulate of public right because to do so would be to annihilate its legal personality and so to be incapable of compliance.[20] The Kantian argument against slave contracts is purely formal, and some have doubted whether a conceptual argument could lead to such a robust conclusion.[21] The same query might be raised here. The answer must be the same in both cases: the starting point of the analysis is the right to

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independence, which is already a robust moral norm. In both the individual and international cases, it entails that no person or nation can make a binding arrangement to exempt itself from standing in rightful relations. Just as right must be consistent with 'ends as such' in the individual case, thereby ruling out slavery, so, too, it must be consistent with public law as such in the international case, ruling out treaties through which a nation agrees to no longer provide a rightful condition for its inhabitants.

The other class of norms that are sometimes said to be *ius cogens* are the basic human rights norms, including more than the prohibitions on slavery, genocide and stripping of citizenship that are already included in the postulate of public right. These further norms are aspects of the idea of the original contract, and so regulative for states but not constitutive of them. A state cannot contract out of them by treaty because it could not give another state the rightful power to prohibit it from acting in conformity with its own regulative principle.[22] Although states often fail to bring themselves into conformity with the idea of the original contract, they cannot make arrangements that prohibit them from doing so.

Ius cogens norms restrict the ability to make agreements; permissible agreements contrast with private contracts (this is not an exhaustive list):

(a) A peace treaty is different from any other agreements, because its bindingness does not depend on the fact that it was entered into voluntarily.[23] Its particulars may be negotiated, but its basic form is mandatory, because participation in it is interdependent but nonconsensual. A peace treaty ends a war, and resolves residual claims, not on their merits, but on the basis of the outcome of the war. That is what is barbaric about war: it is the context in which might makes right. But a peace treaty is binding nonetheless, because if a peace treaty needed to be in accordance with the merits or was subject to the condition that it not be coerced, peace would need to precede itself, and so finally be impossible. Put differently, a peace treaty is the entry into a rightful condition between states, and so cannot be analysed as a private act between them at all, because the bindingness of private arrangements presupposes a condition of peace. This is just another route to the conclusion that the territory of any rightful condition is rightful as such, independently of whether it was brought about in the right way because there is no such thing as the right way to bring it about. The juridical form of a peace treaty is not contract (*pacto*) but status (*lege*) because its basic terms must, as a matter of right, be required by law, in particular the continued existence of both belligerents.

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(b) Secession and division: in circumstances in which the residues of war or colonialism create units in which divisions make it difficult for institutions to properly represent everyone, it is within the power of a legal order to modify its borders (*PP*, 8: 347). Any such power of modification, however, is not an expression of a limit on its entitlement, as against other nations, to political independence and territorial integrity. It is instead an exercise of that entitlement. None of this shows that territory is a form of property; negotiations are always preferable to conflict, but they are binding for the same reason that the results of conflict must ultimately end up being binding. In the transition from a state of nature to a more fully law-governed condition between nations, such changes are the best way to come to terms with the past, but not because they are discretionary exchanges or because they restore proprietary claims.[24]
Like all exercises of political power, any such adjustments are subject to an internal standard set by the idea of the original contract. A state can only engage in them rightfully in the service of improving the rightful condition of its inhabitants, that is, to bring itself into greater conformity with the idea of a situation in which the citizens better rule themselves through their laws and institutions. Rather than being organized under the patrimonial conception of territory as property, or the just war tradition's assumption that the state has a universal jurisdiction, any power that is exercised must be exercised on behalf of the inhabitants of the territory over which it is exercised, consistent with the independence of other legal orders. The same point applies to two or more states forming a federation, or, as happened in Europe in the 1990s, additional states joining an already existing federation. In so doing they do not give up on their independence, but they accept limitations on some of the ways in which they exercise it. Through such a process, the two states might become one, or, remain federated in such a way that, as Kant puts it, 'can be renounced at any time'.

(c) Economic treaties: a nation can enter into arrangements with others to improve its rightful condition through trade, investment or borrowing, because managing the economy is one of its core public powers. In cases in which the arrangement is purely private – massive borrowing transparently in the service of privately enriching corrupt rulers – the resulting debts can be repudiated as odious precisely because the power to enter into arrangements is public rather than private (Dimitriu 2015). In a private transaction, a corrupt officer of a company can still bind the company; the international case differs because no other nation's legal order can impose an obligation on another country to authorize private corruption.

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Trusteeship

Kant introduces the concept of status relation though cases in which one person is in control of some aspect of another's affairs, and the other is not in a position, either factually or juridically, to oversee that control. In such cases – including parents and children, agents and those for whom they act, bailors and bailees, and trustees and their beneficiaries – the non-consensual nature of the interaction can only be rightful if the person in control acts for the actual or imputed purposes of the one whose affairs are being controlled. Governments stand in a form of this relation to the inhabitants of the territories over whom they exercise political power. That is why public officials must not act for their own private purposes. A different version of this juridical structure can arise if one nation comes into possession of another territory on a short-term basis, for example, as the result of victory in fighting a defensive war (or of prevailing in an aggressive one). The victor does not become the owner of the vanquished nation's territory, able to use it for its own purposes. Not only is it precluded from using the territory for the private purposes of its rulers or their political allies; it is also precluded for using it for its own public purposes. Instead it must exercise power on behalf of the inhabitants, just as the government of that territory is required to do.[25] In the individual human case, such dependence need not be pathological or even unfortunate. But in the international case it is always problematic.

7. Conclusion: Bringing Horizontal Relations under Law

Recent developments in international law have given global institutions a new prominence, leading a number of commentators to suggest that the idea of a world of sovereign states standing in horizontal relations to each other is outmoded and that, instead, states should be understood as having those powers delegated to them by the international legal order. Hans Kelsen had already made such a suggestion before the Second World War, writing

> If establishing a norm-issuing power whose system is continuously effective for a certain area represents, in terms of positive law, the emergence of a lawmaking authority, it is because international law invests the authority with this property, which means that international law empowers the authority to make law. (Kelsen 1992)[26]

Kelsen's argument paralleled an argument that he had earlier deployed to argue that people have private rights – including even each person's innate right of humanity – only because a legal system has adopted

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capitalist organization of economic activity (Kelsen 1992: 44). In both cases, the meaning of the word 'because' is somewhat mysterious. The claim is not causal/explanatory, since in neither case does it support the counterfactual that would make it so: if international law had been different, then states would be free to invade each other or contract into servitude, or, in the domestic case, human beings would not have the innate right of humanity in their own person,[27] or indeed, that legality is possible without legal persons standing in horizontal relations, such that a legal person is one who can assert a claim in its own right for wrong personal to it.[28] Kelsen's claim does better if it is understood merely as a formal claim, that is, that basic relational norms must be given effect in a coordinate system of public law, both in the interpersonal and in the international case. That is, rather than debunking the idea that individual human beings have rights, or that nations are entitled to be independent of each other, Kelsen's argument is more fruitfully understood as articulating the fundamental principle that all forms of interaction – between individual human beings, between the individual and the state of which that human being is a member, between states and between individual human beings and states of which they are not members – must all be brought under the principle of freedom under law.

What is needed, then, is a way of understanding the sense in which political independence and territorial integrity are insecure outside of a public international rightful condition, and so private rights are also insecure. In the interpersonal case, exiting the state of nature and entering a rightful condition replaces force with right by providing a public standpoint within which there must always be a way of answering every question about how things stand between private persons. Institutions for making and applying law are empowered to formulate and apply general rules, including rules about who gets to decide about what question, and further procedural rules about how things stand vertically between the legal order and those who are subject to its authority. That provision of closure must itself be closed with respect to outside claimants to authority, including other nations that claim authority either with respect to private claims or with respect to how things stand between the legal order and private claimants. Others can say what they think, but they cannot be entitled to use force, because any force that they use would be merely unilateral, and so replacing law with unauthorized force. A plurality of such systems therefore introduces a new form of horizontal relation between nations, with respect to which the same questions of independence recur. Therefore, just as individual human beings must leave the state of nature, so, too, must nations exit the state of nature in which they find

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themselves, which is a 'non-rightful condition'. As in the interpersonal case, entry into a public rightful condition introduces 'no further or other duties of human beings among themselves than can be conceived' in a state of nature. An international legal order replaces the natural law of a state of nature concept of 'an antagonism in accordance with outer freedom by which each can preserve what belongs to it, but not a way of acquiring' (*MM*, 6: 347), with the 'rational idea of a peaceful, even if not friendly, thoroughgoing community of all nations on the earth' (*MM*, 6: 352), making it possible for disputes to be decided 'in a civil way, as if by a lawsuit, rather than in a barbaric way' (*MM*, 6: 351). Kant acknowledges the possibility that 'the complete realization of this objective always remains a pious wish' (*MM*, 6: 354), but its incomplete realization must govern nations that remain in horizontal relations to each other.[29]

Notes

1 Parenthetical references to Kant's writings give the volume and page number(s) of the Royal Prussian Academy edition (*Kants gesammelte Schriften*), which are included in the margins of the translations. English translations are from the Cambridge Edition of the Works of Immanuel Kant. I use the following abbreviations: *CPR = Critique of Pure Reason; CPJ = Critique of the Power of Judgment; P = Prolegomena to Any Future Metaphysics; MM = The Metaphysics of Morals* (in Kant 1996: 363–602); TP = 'On the Common Saying: That may be Correct in Theory, But it is of No Use in Practice' (in Kant 1996a: 277–309); *TPP = Toward Perpetual Peace* (in Kant 1996: 315–51); NF = 'Naturrecht Feyerabend' (in Kant 2016).

2 Walzer draws on an earlier argument by Mill (1984). The parallel is striking between Mill's argument in *On Liberty* about individuality and well-being and his view that a people must liberate itself.

3 Kant remarks that a public rightful condition 'contains no further or other duties of human beings among themselves than can be conceived' in the state of nature (*MM*, 6: 306).

4 See the discussion in Meckstroth (n.d.).

5 In the *Doctrine of Virtue* Kant represents the ability of a person's conscience to sit in judgement on that person through the analogy of a separation of powers of a unified state (*MM*, 6: 439). Conversely, in the *Doctrine of Right* Kant's emphasis on the state's duty to bring itself more fully into conformity to 'the idea of the original contract' can be represented as a duty of virtue because, as Bernd Ludwig (1993) has pointed out, it is a duty to adopt an end which no outside legal person is entitled to enforce. The late Sharon Byrd suggested that the similarities between nations and persons as duty bearers underwrite external relations between states (Byrd 1995), but that cannot be right; these similarities show analogous internal relations within a state and within a person; they do not provide the basis for external relations, because, as Kant explains in the Transcendental Aesthetic of the *Critique of Pure Reason*, and reiterates in his claim that the Universal Principle of Right is a 'postulate incapable of further proof', relational properties cannot be reduced to or grounded in monadic ones. Beyond these textual matters, the idea that all of a state's internal duties are duties of virtue rather than right makes the idea of *ius cogens* norms of international law concerning human rights impossible. Such norms are

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not externally enforceable, but they can be externally justiciable, and are norms of right not virtue.

6 See the discussion of the disanalogies between individuals and states in Flikschuh (2010). As Flikschuh puts it, 'On a systemic approach one need not take the view that the concept of Right, having been applied in relation to individuals domestically, must now be re-applied in exactly the same way in relation to states internationally' (2010: 487).

7 See also Lauterpacht's remark that 'Of course, in order to fully understand this formal analogy, it is necessary to discard the misleading notion that whereas private law is above the subjects of law, international law is a law between them, and that therefore every analogy is inadequate' (Lauterpacht 1927: 82).

8 This conception of the moral importance of independent legal personality runs deep in legal thought. As Judge Cardozo puts it in *Palsgraf v. Long Island Railroad Co*., 248 N.Y. 339, 162 N.E. 99 (1928), a 'plaintiff sues in her own right for a wrong personal to her'. Even H. L. A. Hart, who rejected the Kantian idea of a system of equal freedom, views the right to assert a claim in your own name as fundamental to just law, writing, 'The crudest case of such unjust refusal of redress would be a system in which no one could obtain damages for physical harm wantonly inflicted. It is worth observing that this injustice would still remain even if the criminal law prohibited such assaults under penalty' (Hart 2012: 164). As Lauterpacht remarks in the context of international law, 'It would appear that, apart from physical or similar incapacity, the right to bring a claim is of the essence of juridical personality' (Lauterpacht 1982: 178).

9 Kant makes this point using a vocabulary reminiscent of Newtonian physics: 'resistance that counteracts the hindering of an effect promotes this effect and is consistent with it' (*MM*, 6: 321).

10 'For a unilateral will (and a bilateral but still particular will is also unilateral) cannot put everyone under an obligation that is in itself contingent' (*MM*, 6: 263).

11 As Jeremy Waldron (1993) puts Kant's point, closure requires that there be only one closure-imposing agency.

12 In the often quoted formulation of Judge Anzilotti, a state is sovereign if it 'has over it no other authority than that of international law' (*Austro-German Customs Union Case*, PCIJ, Ser. A/B No. 41, 1931, p. 57).

13 Contrary to a suggestion by Miller (2016: 862), and Huber (2017).

14 See the discussion in Press (2017).

15 I am grateful to Anna Stilz for pointing out my earlier misconception about this.

16 As pointed out in Waldron (2017).

17 Vienna Convention on Treaties Art. 54, 63.

18 Verdross writes that the 'criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community' (Verdross 1966: 58). See also the discussion in the *Yearbook of the International Law Commission*, 2 (1953): 154–6. A more recent articulation of Verdross's approach can be found in Orakhelashvili (2006). I do not mean to deny that there can be purely public *ius cogens* norms; my claim is only that some of the primary *ius cogens* norms are private.

19 In his classic discussion, Verdross also includes the protection of citizens while they are abroad.

20 In TP Kant makes this point by saying that a person 'cannot, by means of any rightful deed (whether his own or another's), cease to be in rightful possession of himself' (8: 293).

21 For example, by Cohen (1995: 212).

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22 *Ius cogens* norms are now widely held to apply outside of the treaty context, but have their origin in it and figure in it via private law analogies.
23 In his lectures of 1784, Kant rejects Achenwall's claim that a peace treaty is binding because voluntary on the part of the parties, writing that '[t]he concurrence of the vanquished is at its basis only a formality'. The passage in Achenwall's textbook about which Kant is lecturing is Achenwall (1763: para. 72).
24 See the discussion in Niesen (2014).
25 I discuss this issue in detail in Ripstein (2014).
26 For the international case, see Kelsen (1959: 408ff.).
27 Kelsen's student Josef Kunz, to whom he dedicates *The Principles of International Law*, refers to 'the so-called innate rights of the individuals' (Kunz 1924: 130).
28 See the discussion of relation between legal capacity and the possibility of bringing a claim for a wrong personal to the entity with capacity in *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174, 11 April 1949. The International Court of Justice concludes from the fact that the UN is 'a subject of international law and capable of possessing international rights and duties ... that it has capacity to maintain its rights by bringing international claims' (para. 17). Scholars have disputed the manner in which it arrived at the premise that the UN is a subject of international law (Portmann 2010: 99–110). The consequence drawn from it – that if it has legal personality, it can assert a claim in its own right for a wrong personal to it – is beyond dispute. As Lauterpacht remarks of the case, 'It would appear that, apart from physical or similar incapacity, the right to bring a claim is of the essence of juridical personality' (Lauterpacht 1982: 178).
29 Ancestors of this article were presented at the Conference 'Property and Territory' at Universität Bayreuth in May 2017, at the Private Law Workshop at Tel Aviv University in May 2018 and at the conference 'A Kantian International Order – Principle and Institutions' at Goethe Universität Frankfurt in July 2018. Something closer to the current version was presented at the Conference 'Kant and Law' at Cardiff University in October 2018. I am grateful to members of those audiences and to Jutta Brunnée, Hanoch Dagan, Avihay Dorfman, David Dyzenhaus, Chris Essert, Rainer Forst, Aravind Ganesh, Micha Gläser, Javier Habib, Jakob Huber, Larissa Katz, Karen Knop, Joanna Langille, Sylvie Loriaux, Macarena Marey, Christopher Meckstroth, Sofie Møller, Marie Newhouse, Peter Niesen, Cara Nine, Jennifer Page, Japa Pallikkathayil, Alice Pinheiro Walla, Rudolf Schüssler, Stephen Smith, Annie Stilz, Emmanuel Voyiakis, Ernest Weinrib, Jacob Weinrib, Howard Williams, Lea Ypi and an anonymous referee for comments and suggestions.

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