Impact of Kantian Philosophy on Law and the Practical Application of Perpetual Peace through Responsibility to Protect

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Abstract

The paper is a small attempt to reflect on the impact of Kantian philosophy on Hans Kelsen and how International law has tried to accomplish the Sisyphus task of applying the principles espoused in 'Towards Perpetual Peace' through the novel concept of 'Responsibility to Protect'. Section I of the paper will discuss the application of Kant's 'Copernican Revolution' in law by focusing on the work of Hans Kelsen, who himself being a neo Kantian, was responsible for enunciating an 'anti – ideological' approach to law. Kelsen was instrumental in importing Kant's Copernican revolution in the legal sphere. Section II of the paper will reflect on a comparative analysis of Perpetual Peace model and the Charter of United Nations 1945. Section III of the paper makes an argument that the Six Preliminary Articles of Kant's Perpetual Peace Model were responsible for shaping the legal structure of the international order from 1945-1990 through the Charter of The United Nations 1945, however, it is the combined reading of the Three Definitive Articles and Responsibility to Protect (hereinafter referred as R2P) which marks the true application of Perpetual Peace Model in the sphere of international law in the 21st century.

Keywords: Kant, Kelsen, UN, Fail States, International Law.

Section I: The Influence of Kant on the Work of Kelsen

> It is a world where God, Father, State are interchangeable, unapproachable, all powerful forces: implacable, invincible, capricious, devouring and destructive, whether obeyed or resisted. – Harold Bloom's observations on Kafka's universe.[2]

According to Paul Guyer the drama in the life of Kant was intellectual.[3] Kant's 'Critical Philosophy' can be interpreted as the harmonization of the prevailing religious and philosophical tendencies of his time. Being trained

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2 Harold Bloom, *Bloom's Bio Critiques: Franz Kafka* (Langhorne: Chelsea House Publishers 2005) 7.

3 Paul Guyer, *Kant* (New York, Routledge 2014) 17.

in the tradition of Pietism, Kant was also the child of Enlightenment. His work is to be seen as reconciliation between the fanatic tendencies of Christian Religion and the increasing autonomy of sciences, Catholicism and Protestant, Rationalists and empiricists. Kant dealt with some of the most intriguing problems of his times i.e. the relationship between subject and predicate, metaphysics, space and time, morality and religion etc. However, it was Rousseau's General Will that had a profound effect on the work of Kant. This became apparent in his writings particularly in, 'Critique of Practical Reason', where Kant talked about the 'self-legislating' tendencies of man. Kant's Copernican revolution can also be termed as Anthropological Revolution. Kant made human the centrepiece of philosophy where objects conform to knowledge. Christine M. Korsgaard in an introduction to 'Groundwork of the Metaphysics of Morals' describes the Copernican Revolution in the most succinct manner possible , '…….Kant's own revolution also turned the world inside, but in a very different way, for it places humanity back in the centre. Kant argued that the rational order which the metaphysician looks for in the world is neither something that we discover through experience, nor something that our reason assures us must be there. Instead, it is something which we human beings impose upon the world – in part through the way we construct our knowledge, but also, in a different way, through our actions'.[4] According to Howard Caygill, Kant explained his critical philosophy on the lines of Copernicus' primary hypothesis. Previously metaphysics assumed that our knowledge must conform to objects but now objects must conform to knowledge.[5] Recently, Chris Thornhill has given a brilliant exegetical analysis of Kantian anthropological revolution on legal and political philosophy.[6] According to him, prior to Kant's work 'universal and metaphysical' debates had been the pertinent part of Reformation and early Enlightenment era.[7] Kant argued that human legislation is the centre of this materialistic world and it is the human will alone that is responsible for the institutionalization of positive norms in the human society.[8] Human reason can deduce valid law and this valid law can be applied into positive forms. Thornhill further writes, '…. Kant's philosophy stands as a response to the collapse of metaphysical law and the problems of positivization arising from the Reformation. The salient implication of his philosophy is that law, as deduced by human reason, can be at one and the same time positive and universal and metaphysical ……

4 Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor and Jens Timmermann ed, 2nd edn, Cambridge University Press 2012) x.

5 Howard Caygill, *A Kant Dictionary* (Oxford, Blackwell Publishing 2009) 136.

6 Chris Thornhill, *German Political Philosophy: The Metaphysics of Law* (New York, Routledge 2007).

7 ibid 98.

8 Thornhill (n 6).

Indeed, at the centre of Kantian thought is an endeavour to transpose the will of the rationally free God onto human will as the source of valid positive law ….'.[9] In a nutshell, Kant was responsible for humanizing metaphysics. The individualistic approach of Kant can be seen as an extension of Locke's liberalism. Kant, like Locke was an ardent supporter of private property.[10] In fact, Locke defense of private property through his labour theory, paved the way for liberalism and laissez faire. A combined reading of the views of Locke and Kant leads one to the realm of anthropocentric revolution. Locke and Kant are credited for being the pioneers of a 'modern man'.

Kant's concept of human will is in direct contrast to the divine will. Kant's concept of autonomous will necessitates that a divine will is not required to legislate laws. It is the sole domain of human will. This is a part of human metaphysics. Kant's implication of metaphysics is influenced by Protestant Ethics which provided autonomous sphere to humans and God.[11] It is a revival of the lost cause of the Scholastics and the Classical traditions. The essence of religious law lies in the conversion to human law.[12] Kant's concept of natural law in turn is radical too. Kant distinction between homo noumenon and homo phenomenon, makes it clear that it is the noumenon world which is purely guided by reason. It is in this domain where man acts as a rational and self-legislating agent.[13] Kant's natural law is in fact, concretized in the idea of autonomy and it is realized where human beings disconnect their actions from the sensory world of interest and stimulus and ensure that their actions form an intelligible realm. Kant's authentic natural law is a law against nature, not of nature.[14] This is possible because of his anthropocentric approach being manifested through human metaphysics.[15]

The 'anthropological' revolution of Kant has been imported into the realm of law through the work of Hans Kelsen. Kelsen was the most influential legal theorist of the 20th century and was a Neo Kantian. In spite of being a Positivist, Kelsen was a humanist and just like Kant was concerned with the status of individuals in their relation with law. Kelsen's work is unique in various ways. His work is a byproduct of the tumulus political conditions of his times. His approach towards law can be termed as 'anti

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9 ibid

10 Kant, *The Metaphysics of Morals* (Lara Denis ed, Cambridge University Press 2017) 55.

11 Thornhill (n 6) 103.

12 ibid 102.

13 ibid 101

14 ibid 105.

15 ibid 103.

ideological'. Kelsen legal philosophy is hugely influenced by the philosophical underpinnings of German society and has a unique take on the nature of public and private law. The political uncertainties of his times, allowed him to construct a 'transcendental' view of law, a view that was criticized by his peers and contemporaries. Kelsen's work is hugely influenced by Kant's epistemological approach. Kelsen's seminal work 'Pure Theory of Law'[16] bears testament to Kantian tradition in law. Kelsen's 'Peace through Law'[17] is loosely based on Kantian cosmopolitan views. His work is a combination of Kantian philosophy, Hebrew philosophy, an anti-dote to Schmitt's political concept of law and a cosmopolitan world where international law acts as a superior law. According to Wayne Morrison, Kelsen defended the humanist conception of man against the reductionist and scientific imagination of Positivism of 20th century.[18] This was also a reaction against the Weberian structure of state. If law is to be understood in its 'Pure' form then its 'expressive' dressings must be stripped and law must be accepted in as a 'hierarchical apparatus of coercion'.[19] It is at this point that Kelsen introduces the concept of 'Norm'. A norm according to Kelsen is a human act. In order to make individuals the main concern of law, Kelsen distinguishes between society and nature and asserts that society is the subject matter of humanity. It is the human ability to live by norms that transcends society over nature and law emerges as a normative structure of human relations.[20] Legality provides the mechanism by which human society creates web of social structuring.[21] Kelsen's stand was diametrically opposed to that of Carl Schmitt who had endorsed the Nazi ideology and believed that it was the charismatic leader that was the source of all law and authority. In his analysis it was the political that came before legal. The will of the leader triumphed everything including the law. Schmitt famously stated, 'The sovereign is: He who decides on the state of exception'.[22] Schmitt's analysis shows that all legal orders are based on 'Decision' and not on 'Norm'. Decision is based on personality and not on rule of law. In the state of exception law retreats and the state stays.[23] Schmitt's concept of sovereign was very much influenced by Hobbes' understanding of

16 Hans Kelsen, *Pure Theory of Law* (New Jersey, The Lawbook Exchange Limited 2009).

17 ibid

18 Wayne Morrison, *Jurisprudence: from the Greeks to post modernism* (New Delhi, Lawman (India) Private Limited 1997) 324.

19 ibid

20 ibid 326.

21 Morrison (n 18) 327.

22 David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford University Press 2003) 42.

23 ibid 44.

Sovereign in 'Leviathan'.[24] Schmitt not only endorsed Nazi ideology but played an instrumental role in ousting Kelsen from the Law faculty at Cologne as Kelsen was his ideological opponent.[25] David Dyzenhaus gives a detailed account of Schmitt's relation with Nazi party and ideology in the following words: '…. Nevertheless, it seems clear that once Hitler had come to power, Schmitt and the other conservatives had no philosophical resources to do anything other than welcome him. Schmitt had of course his craven personal motives in his prolific celebration of Nazism, in that he wanted to install once more as the official legal adviser to the government'.[26] Further the erudite author states that Schmitt praised Hitler's political murders of 1933 NAD this praise was based on the fact that Hitler had done everything that Schmitt had ever desired from a leader.[27] Schmitt wanted an authoritarian government in Germany, a government that would be free from the constraints of parliamentarianism.[28] It was this anti ideological approach which Kelsen vehemently opposed especially in his work 'Pure Theory of Law' where law was presented as a set of hierarchical normative structure, Law was prior to State and Sovereign. The validity behind law was law itself and the 'decision' of the sovereign was subservient to it. Kelsen's Grundnorm is the supreme validating norm. Kelsen's theory of norm is based on Kant's 'Transcendental Logic', a claim which becomes apparent in Part V of 'Pure Theory of Law'.[29] Kelsen's idea of an objective and coercive regime of international law did not go down well with the Nazi regime. The Nazis seizure of power in Germany meant taking over German Law including international law. Legal Scholars who did not support the Nazi cause were removed from their posts.[30] These were replaced by an array of scholars who were more than willing to distort international treaties and conventions to suit the German national interests.[31] In the words of Mary Ellen O' Connell, '… The old debate over the ordering of state will and international law was once again in play with Schmitt and other Nazi theorists arguing that German law and policies were naturally superior to world law. If international law coincided with German interests, then Germany should follow it, but if German interests or German internal law diverged, it need not. Nazi scholars argued that it was inconceivable for

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24 ibid

25 Mary Ellen O' Connell, *The Power and Purpose of International Law* (Oxford University Press 2008) 58.

26 Dyzenhaus (n 22) 83.

27 ibid

28 ibid 53.

29 Kelsen (n 16) 193.

30 Connell (n 25) 58.

31 ibid

Germany to subordinate its law or policy to the rules of a universal system'.[32] Kelsen's Pure Theory of Law was different in many ways. Its approach was anti ideological which served as an antidote to Schmitt's analysis of Nazi regime.

The connection between Kelsen and Kant is described by Hakan Gustafsson. According to him, Kelsen's basic norm is a 'presupposition' and has three basic features: *firstly* (i) Grundnorm is an epistemological device serving a well-defined cognitive purpose; *secondly*, (ii) Grundnorm is internal to the system and also immanent to it; and *thirdly*, it is presupposed.[33]

The author asserts that the title of Kelsen's seminal work, 'Pure Theory of Law' is an ode to Kant's 'Critique of Pure Reason'.[34] Kelsen's work is based on the famous Is/ought distinction and tried to lay a 'pure' system for law just like Kant tried to create a 'pure' system for philosophy.[35] According to Kelsen, Ought can work as an 'a priori' category. Kelsen wanted to give a metaphysical basis to law rather than a scientific base and this was a direct opposition to Schmitian political stand on law.[36] According to Kant, Transcendental question is less concerned with the objects themselves than with 'How' we perceive and recognize them. Kelsen formulates Kant's transcendental method in law and investigates as to what kind of knowledge is gained from a system of legal norms and how its cognition is possible.[37] The transcendental logic category is responsible for providing a set of formal and constitutive conditions for being able to recognize object that do not exist independently.[38] Richard Tur states, 'The Pure Theory of Law is not a book of knowledge but a book about knowledge. As a prolegomenon to all future jurisprudence which aspires to be scientific it must necessarily relate to forms of knowledge and not provide knowledge itself. The a priori element of law is its form, not its content'.[39] Basic norm is a transcendental logical

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32 ibid

33 Hakan Gustafsson, 'Fiction of Law' (October 2007) 4 NoFo 86 <www.helsinki.fi/nofo/NoFo4 Gustafsson.pdf> accessed 01 February 2018.

34 ibid 87.

35 ibid

36 Gustaffson (n 33) 83.

37 ibid 87.

38 ibid

39 Richard Tur, 'The Kelsenian Enterprise' in R. Tur and W Twining (eds), *Essays on Kelsen* (Oxford, Clarendon Press 1986) 160; quoted in Hakan Gustafsson, 'Fiction of Law' (October 2007) 4 NoFo 86 <www.helsinki.fi/nofo/NoFo4 Gustafsson.pdf> accessed 01 February 2018.

presupposition, a pure 'ought' norm which is an epistemological device for making legal cognition possible.[40]

Kelsen's anthropological approach took its definite shape because he was influenced by the Neo Kantians, a philosophical school that emerged at the end of nineteenth century. The Marburg School of Marburg University led by Hermann Cohen was the centre point of this school. According to Neo Kantian school, human being is only truly human if it is autonomous.[41] Neo Kantians, cantered their work on 'legal humanism', Legal humanism is the doctrine of human being.[42] Law according to Cohen is the medium through which humans is able to recognize its capacities and limitation. Cohen's concept of 'pure will' or 'purely self-legislating will' can be compared to Rousseau and Kant's 'Anthropological revolution'. According to Cohen, it is in the form of a legal subject i.e. a bearer of valid rights, freedoms and obligations that a human becomes most human. According to Positivists, the legal subject is a 'social' form of freedom that law constructs for itself, therefore, Neo Kantians therefore give a fuller account of legal subject by saying that legal subjectivity is a condition produced by subject itself in which subject autonomously deduces the human pre conditions of the law autonomy of legal subject thus allows the world to evolve.[43]

Section II: Kantian Morality and Perpetual Peace Model

Kant's political thoughts were a byproduct of the turbulent times of the European continent. If one can say that Kant spearheaded 'The age of Enlightenment' through his thought provoking work, 'An Answer to The Question: What is Enlightenment?',[44] then it is also true that Kant and contemporaries reacted differently to the American and French Revolution. If the era of Enlightenment was pregnant with the concept of human 'Reason' then it can be said that the subsequent political events brought forward a very different 'outcome' of the faculty of 'Reason'. If Kant and his contemporaries cherished the American Revolution, then French Revolution turned out to be a bone of contention as it evoked mixed responses from the European intellectuals. The Jacobean take on the Revolution and the succeeding, 'Reign of Terror', disillusioned the

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40 Gustaffson (n 33) 83.

41 Thornhill (n 6) 239.

42 ibid 240.

43 Thornhill (n 6) 241.

44 Kant, 'An answer to the question: 'What is Enlightenment?'' in *Kant Political Writings* (H. S. Reiss ed, Cambridge University Press 2015).

German thinkers. In the words of Hans Reiss, 'Revolutionary sentiment in Germany was a tender plant capable of blossoming forth only under the stimulus of force'.[45] Unfortunately, this force was lacking as the bourgeoisie of Germany was not as emancipated as the bourgeoisie of England and France.[46] This had happened because Germany did not yet exist as a nation, and the pace of industrial revolution was slow.

Kant's biggest contribution to the realm of political philosophy was his essay 'Perpetual Peace'. While writing this Kant assumed the method of a contractualist. According to Daniel Archibugi, 'Perpetual Peace Model' is an ancestor of a widely debated hypothesis of contemporary international relations i.e. 'democracies do not fight each other.'[47] According to Don E. Scheid peace among states is a fundamental idea of global justice.[48] Throughout the history of international law, hundreds of peace projects have been developed and they have yearned for a unified Europe or global peace. The Perpetual Peace model has based itself on the notion of universalisation of Stoics and *jus gentian* idea of Romans. Pierre Dubois, Dante Alighieri, George Von Podiebrad, Emeric Cruce, Maximilien de Bethuna Sully, William Penn, Saint Pierre, Anacharsis Cloots can be considered as Kant's predecessors as far as Perpetual Model is considered.[49]

Following are some of the common recurring themes in almost all the above mentioned Perpetual Peace projects:

(a) Establishment of a secular order in opposition of a unified religious order i.e. rule of a king and not of a pope.

(b) Establishment of a confederation.

(c) Settlement of a dispute through peaceful means. Pierre Dubois was one of the earliest theorists to propose the establishment of an International Court of Arbitration.[50]

(d) Relationship between commerce and war. Emeric Cruce in his work, 'The New Cyneas or Discourse of the Occasions and Means to Establish a General Peace, and the liberty of Commerce Throughout

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45 Kant, *Political Writings* (H. S. Reiss ed, 2nd edn, Cambridge University Press 2015) 7.

46 ibid

47 Daniel Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace' (1995) (4) European Journal of International Relations 1.

48 Don E. Scheid, 'Perpetual Peace' in Deen Chaterjee (ed), *Encyclopaedia of Global Justice* (New York, Springer Publication 2011) 827.

49 ibid

50 ibid

> the Whole World', emphatically asserted that international commerce encouraged interdependence and reduced the happening of war. In his estimate, commerce discouraged war. He favoured international free trade and proposed a universal currency and standard weights and measure.[51]

Before dwelling on Kant's Perpetual Peace Project, it is noteworthy to mention that before Kant's Project, Saint Pierre's project came closest in the creation of a hypothetical contractarian peace model.[52] The Project Pour Rendre La paix Perpetuelle En Europe (Project for Bringing About Perpetual Peace in Europe) by Abbe Saint Pierre is an important exponent of Perpetual Peace Projects. His peace project was written in the background of Treaty of Utrecht (1712-1713). His Perpetual Peace Model is composed of five articles. The First Article asks for a 'Perpetual Alliance' which exists to make peace unalterable. The Second Article provides that each sovereignty shall contribute financially to the common expense of the Peace Project. The Third Article asks for renunciation of war as a method of settlement of dispute. Fourth Article proposes a common military force. Fifth Article stipulates that these articles may not be altered except by unanimous vote of all the members of the alliance.

The roots of Kantian peace project are to be found in his 'Critical Philosophy', contractualism and cosmopolitan philosophy. Kant's legal Philosophy is primarily transcendental contractualism. His contractarian philosophy is value laden. It is embellished with a unique understanding of morality, rights and liberty. The contractual thoughts of Kant are inherently connected to his idea of 'a priori' morality and practical necessity. Kant's contractual theory is the application of 'categorical imperative' axiom at a global level. According to Wolfgang Kersting:

> ….. The voluntarism of the Hobbesian, Lockean and Rousseauean contract in the theory of legitimation lies beneath the metaphysical level of unconditional practical necessity of Kant's philosophy of right and politics. Kant emphasizes a contract that is conceived as a practically necessary principle of reason and thus stripped of all connotations of voluntarism in order to illustrate the form of the rational state… Every empirical legislation is bound by the contract of rational right…. The norm of the contract is obviously the counterpart to the categorical imperative in political ethics, as it were the categorical imperative in political actions. Just as categorical imperative as a moral principle allows for the evaluation of the lawfulness of maxims, so does the original

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51 ibid 834.

52 ibid 835.

> contract as the principle of public justice serve to measure the justice of positive laws.[53]

Kantian Philosophy itself created an autonomous branch of epistemology which was based on 'a priori' methods and his ideas tried to harmonize the conflicting schools of Rationalists and Empiricists. Kant tried to create a balance between the two by elaborating on the idea of categorical imperative. The categorical imperative is the highest form of morality because according to Kant's epistemology, it is dictated by reason. It is a pure concept, a meta principle, something that is not subject to a higher validation. This idea of categorical imperative is applicable at three levels:

(A) Individual.
(B) Municipal.
(C) Universal.

At stage (A), the categorical imperative dictates morality like mathematical axioms. Reason is the underlying notion. Others should be respected because they have value in themselves. According to Thomas Donaldson, what is important is the characteristics of an agent's actions and not his consequences. In this way the theory is different from Utilitarianism and Consequentalism.[54] At a municipal level, it would lead to adoption of a responsible and responsive government and finally at a universal level it would lead to formation of federation of democratic republics.

The idea of Categorical Imperative can be summed up in the words of David Bell:

> An imperative is a command, instruction or Rule governing how one should act. An imperative is 'categorical' when it is exception less, that is, when it is binding, on all rational agents, in all circumstances, at all time. Kant believed that what he called 'the supreme principle of morality was just a categorical imperative, and he provided a number of different formulations of it. The most important are:
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> (1) Act only that maxim through which you can at the same time will that it should become a universal law.
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> (2) So act to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means.

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53 J. B. Schneewind, 'Autonomy, Obligation and Virtue: An Overview of Kant's Moral Philosophy' in Paul Guyer (ed), *The Cambridge Companion to Kant* (New York, Cambridge University Press 2009) 318.

54 Thomas Donaldson, 'Kant's Global Rationalism' in Terry Nardin and David R. Mapel (eds), *Traditions of International Ethics* (Cambridge, Cambridge Publications 2002) 137.

(3) So act as if you were always through your maxims a law making member of a kingdom of ends.[55]

Categorical imperative is thus a meta narrative. In Kantian terms Autonomy of Human beings was an essential part of morality that was ultimately guided by reason. Kant's ideas are 'neither dependent on nor open to interference by temporal, local, social or cultural contingencies'.[56] Kantian philosophy of Right is based on Kantian principle of Justice which in turn is a derivative of categorical imperative. This application of a priori principle at an international level took the form of Perpetual peace models, a hypothetical model where states have entered into a contract at an international level to live in a world which is primarily built on states that have adopted a liberal form of government. Kant's idea is based on the premise that liberal democracies are more powerful and law abiding than the others. If these liberal democracies were to prevail, then it would create an everlasting peace. In order to come up with the model of Perpetual Peace, Kant avoided the positivist approach of Vattel and Wolff. Instead he focused on the notion of Cosmopolitanism and Universalism.[57] Kant wrote a number of essays on the topic of war and peace. His most famous work is 'Zum ewigen Frieden; Ein Philosophicer Entwurf' (Towards Perpetual Peace: A Philosophical Outline). It is speculated that Kant wrote that article in the Background of Peace of Basel.[58] His essay includes six preliminary articles that formulate the six negative conditions of peace.[59]

(1) No conclusion of peace shall be considered valid as such if it was made with a secret reservation of the material for a future war.

(2) No independently existing state, whether it be large or small, may be acquired by another state by inheritance, barter, purchase or gift.

(3) Standing armies will gradually be abolished together.

(4) No national debt shall be contracted in connection with the external affairs of the state.

(5) No state shall forcibly interfere in the constitution and government of another state.

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55 David Bell, 'Kant' in Nicholas Bunin and Jochen Rauber (eds), *The Blackwell Companion to Philosophy* (Oxford, Blackwell Publications 2001).

56 Jochen Rauber, 'The United Nations- A Kantian Dream Come True: Philosophical Perspectives on The Constitutional Legitimacy of the World Constitutions' (2009) 5 (1) Hanse Law Review 51.

57 Archibugi (n 47).

58 Scheid (n 48) 836.

59 Rauber (n 56) 53-54.

(6) No state at war with another shall permit such acts of hostility as would make mutual confidence important.

In addition to the six negative conditions of peace, Kant mentioned three positive conditions for peace:

(1) Civil constitutions of every state shall be republican.

(2) The right of nation shall be based on a federation of free states.

(3) Cosmopolitan right shall be limited to the condition of hospitality.

This section makes an argument that the six preliminary articles were instrumental in the creation of the two leading international organizations i.e. the 'ill fated' Covenant of League of Nations and the Charter of the United Nations. An important point of discussion here is that Kant never wanted to abrogate State's sovereignty and only talked about a loose federation of states where states would come to form enter Perpetual Peace through a voluntary treaty. Secondly, during Kant's time there was no sense of an 'international organization' with a distinct legal personality having its own binding set of objective rules over member states i.e. sovereign states. The question of the legal personality of the international legal personality came to be settled in the Reparations case.[60] The acceptance of the notion that international organizations having a legal personality is the handiwork of international law. Kant himself was skeptical about the binding nature of international law. Pauline Kleingeld has called this the problem of 'institutionalization.'[61] The institutionalization could only be done through binding international treaties.

Article I of the preliminary article denounces a treaty which is made with a 'secret reservation' of material for a future war. In modern times, the Vienna Convention of Law of Treaty 1969 denounces a 'reservation' which would destroy the very essence of a treaty. This article gives primacy to the establishment of peace and the same notion is present in the preamble of the Covenant of the League of Nations and Charter of United Nations. In fact, maintenance of peace is spread over a number of articles in the entire 111 Articles scheme of the UN Charter.[62] Article II of the preliminary article states that no state having an independent existence

60 (1949) I.C.J. 174.

61 Pauline Kleingeld, *Kant and Cosmopolitanism* (Cambridge, Cambridge University Press 2013) 86.

62 Vienna Convention of Law of Treaties 1969, art 19.

whether it be great or small, shall be acquired by another through inheritance, exchange, purchase or donation. The use of the terms 'independent existence', 'great or small' is important as it signifies the modern notion of 'sovereign equality' as codified and institutionalized in the first Principle of the Charter of the United Nations.[63] The phrase 'acquired by another through inheritance, exchange, purchase or donation' is reminiscent of the non-violable nature of the 'territorial integrity' of the States which is reflected both in the Covenant of The League of Nations and Charter of the United Nations.[64] The third preliminary article is by far the most utopian article as it envisions the abolition of standing armies. This has not been possible as the UN Charter itself espoused to create the office of Military Staff Committee[65] and the 'inherent' right of states to defend themselves when an 'armed attack occurs', makes the use of army all the most necessary[66]. It is to be noted that the word 'peace' has now been changed to 'peacekeeping', 'peacemaking' and 'peace building'. In order to accommodate these new terms United Nation Organization requires Peacekeeping troops itself. The 'Blue Helmets' have carried out various peacekeeping operations all around the world. The fourth preliminary article states that no national debt shall be contracted in connection with the external affairs of the state. Martha Finnmore in her seminal work on Intervention[67] has dedicated an entire chapter on it. According to her, non-payment of debts was the most common ground for intervention and annexation. In today's international law every State's territorial integrity is inviolable and there are adequate modes of peaceful settlement of disputes within the UN Charter which allow the parties to take their case before an adequate judicial forum.[68] Article 5 of the preliminary articles is to be read with Article 2 of the Preliminary Article. Article 5 prohibits the violent interference with the constitution and administration of another. This article corresponds directly to the Principle of non-use of threat or use of force against the 'territorial integrity', 'political independence' of a state.[69] This is the back bone of the Charter of the United Nations and the most positive assertion of the Doctrine of Sovereign Equality. This Principle has solidified the notion of non-intervention and Westphalian Sovereignty. It can also be compared to the

63 Charter of the United Nations 1945, art 2(1).

64 Covenant of League of Nations 1919, art 10; Charter of the United Nations 1945, art 2(4).

65 Charter of the United Nations 1945, art 43.

66 ibid, art 41.

67 Martha Finnmore, *The Purpose of Intervention: Changing beliefs about the use of force* (New York, Cornell University Press 2003) 24-51.

68 Charter of the United Nations 1945, arts 33-38.

69 ibid, art 2(4).

modern notion of Political Self Determination[70]. The sixth preliminary which prohibits modes of hostility that would make mutual confidence impossible. These include employment of assassins, poisoners and breaches of capitulations. These principles can be considered as precursors to the Laws of War and The Four Geneva Conventions[71].

Section III: Perpetual Peace Model and Responsibility to Protect

The third part of this paper discusses the point that the Three Definitive Articles of Perpetual Peace Model are more relevant in the present era, because the first six preliminary articles were instrumental in the drafting of the UN Charter and usually covered the time period from 1945-1990. This particular time frame includes the questions of interstate disputes. With the disintegration of USSR and the onset of globalization, the inherent vices of State began to show. If interstate conflicts declined then the issue of Civil War raised its head. This encouraged the practices of genocide, ethnic cleansing and crime against humanity. The UN Charter had the legal recourse of 'humanitarian intervention', to solve this issue. Article 2(4) had created a strict Westphalian model of sovereign states, where non-intervention in the internal matter of the states was the theory and intervention an exception. Legally, humanitarian intervention was possible through the expansive interpretation of powers of Security Council,[72] and any unilateral intervention done outside the realm of Charter of The United Nations was illegal. Humanitarian intervention was a well-intended measure, but its militaristic overtone made international legal community skeptical about its application. This raised some novel and unexplored issues in international law whose answer could be found in philosophy. The novel areas included the notion of 'fail/weak state', 'exit strategy for the international actors once the situation of civil war has subsided', 'a balance between state sovereignty, human rights, humanitarian law and rehabilitation process', 'deficiencies in the legal structure of the states where instances of genocide were common', 'political and legal strategies for the inclusion of these fail/weak states'. To give tentative answers to these novel issues, the concept of Responsibility to Protect (hereinafter referred as R2P) was brought into being by International Commission for Intervention State and Sovereignty (hereinafter referred as ICISS). The legality of R2P, its application through various General Assembly and Security Council Resolution are not dealt in

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70 General Assembly Resolution 2625, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with Charter of the United Nations 1970.

71 Geneva Conventions 1949.

72 Charter of the United Nations 1945, art 39.

this paper. The third section of the paper tends to forge a relationship between the third dimension of R2P i.e. Responsibility to Rebuild, Fail/Weak State and Definitive Articles of Perpetual Peace model. Responsibility to Rebuild should be read with the Definitive Articles and an argument can be made that the philosophical argument made in the Perpetual Peace Model can be fulfilled through the process of 'State Building'.

Being a novel area in International law, Fail/Weak states have started to attract the attention of scholars. Following are some of the definitions related to the term:

(1) Failed States are States which cannot and will not safeguard minimal civil conditions i.e. peace, order, security.[73]

(2) Failed States can be defined in terms of their demise of the practical operation of governmental functions for an internationally recognized state.[74]

(3) Rotberg notes that states succeed or fail according to the effective delivery of crucial political goods and strong states may be distinguished from weak states and weak states from failed or collapsed states.[75] Rotberg analysis shows that state failure is a continued process which includes weak states, failed states and collapsed states. A failed state is one that meets a specific set of conditions and excludes states that meets a specific set of conditions and excludes states that meet some of the criteria which can then be classifies as weak or failing states. A collapsed state is the most extreme form where there is complete absence of authority.[76]

The concept of a failed state refers to a state that is seen as incubators for global 'bads' because they lack adequate capacity to resolve issues such as

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73 Robert Jackson, 'Surrogate Sovereignty? Great Power Responsibility and Failed States' (November 1998) International Institute of International Relations Working Paper 25, 1.

74 Hans – Joachim Spanger, *Failed State or Failed Concept? Objections and Suggestions* (Peace Research Institute, Frankfurt 2000); quoted in Donald W. Potter, 'State Responsibility, Sovereignty, and Failed States' (refereed paper presented to the Austarlasian Political Studies Association Conference, University of Adelaide, 29 September – 1 October 2004) 3.

75 Robert I Rotberg, 'Failed States, Collapsed States, Weak States: Causes and Indicators' in Robert I. Rotberg (ed), *State Failure and State Weakness in a Time of Terror* (Washington D.C.: Brookings Institution 2003); quoted in Donald W. Potter, 'State Responsibility, Sovereignty, and Failed States' (refereed paper presented to the Austarlasian Political Studies Association Conference, University of Adelaide, 29 September – 1 October 2004) 4.

76 ibid

terrorism, trafficking and disease.[77] State building has been referred to interventionist strategies to restore and re build the institutions and apparatus of the state. It is something that external authorities can engage in.[78] According to David Chandler state building is a consequence of the humanitarian intervention of the 1990s and at a same time a theoretical approach to state sovereignty.[79] State building has mellowed the overtly militaristic stance of humanitarian intervention and is now it is no longer viewed upon as an external coercion but as an internal matter of administrative assistance for good governance or institutional capacity building. This is true, if we reflect upon the idea of Responsibility to Rebuild tool from the theoretical framework of Kantian peace model.

The decade of 1990s was seen as the 'golden period' of humanitarian intervention. It looked as if the states were losing their legal capacity. Many viewed this as a positive development.[80] Post modernists drew on the work of Foucalt to argue that Clausewitz's dictum should be inverted to reveal the illegitimacy of the liberal democratic state and understand 'politics as the continuation of war by other means'.[81]

Some were of the view that the state oriented perspective of the international community encourages post-cold war conflicts like Bosnian conflicts.[82] The concept of 'state building' gained momentum in the 1990s with the advent of good governance agenda.[83] Stephen Mallaby has argued that State Building is a subset of Development.[84] Good governance stays within the agenda of development[85] and the tools of development include tax reforms, civil service reform, infrastructure development,

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77 Liana Sun Wyler, 'Weak and Failing States: Evolving Security Threats and U. S. Policy' (CRS Report for Congress RL34235, Washington D.C. 2008, Congressional Research Service, Library of Congress).

79 David Chandler, *Empire in Denial: The Politics of State Building* (London, Pluto Press 2006) 26.

80 ibid 30.

81 David Held, 'Democracy and the New International Order' in Daniel Archibugi (ed), *Cosmopolitan Democracy: An agenda for a New World Order* (Cambridge, Polity Press 1995); A Linklater, *The Transformation of Political Community* (Cambridge Polity Press 1998).

82 Michel Foucalt, *Society Must be Defended: Lectures at the College de France* translated (D. Macey tr, Penguin Publication 2003).

83 D. Campbell, *National Deconstruction: Violence, Identity and Justice in Bosnia* (Minneapolis, University of Minnesota Press 1998).

84 Zoe Scott, *Literature Review on State Building* (Governance and Social Development Resource Centre, University of Birmingham, International Development Department 2007) 4.

85 ibid

86 ibid

87 ibid 5.

democraticisation, conflict management etc.[86] The notion of state building in the decade of 1990s was seen with an abundant skepticism. According to one observation, the notion of state building was less self-consciously altruistic and was more focused on fulfilling the ulterior motives of the external actors rather than focusing on the restructuring of the weak state.[87] State building has also been labelled as 'neo imperialism' and 'neo patrimonalism'[88]. The interventionist tendencies suffered from certain basic defects:

(a) They were overtly external and coercive in nature.

(b) Usually governance issues were ignored.

(c) Policies were forced on reluctant countries.

(d) They were aimed primarily at advancing the economic or political interests at donor.[89]

It was also said that international aid provision bypassed state institutions and established parallel bureaucracy.[90] However, with the advent of Responsibility to Protect (hereinafter referred as R2P) the situation has changed drastically. R2P with its Responsibility to Prevent, React, Rebuild tools added new terms like Preventive Diplomacy and Rebuilding Process. Responsibility to React and Prevent tool box are nothing more than the integration of Chapter VI and VII of UN Charter. The novel aspect of R2P however, lies in Responsibility to Rebuild. Responsibility to Rebuild answers the question as to what amounts to an honourable exit. This tool lays out the blue print for the integration of a Fail / Weak State in the liberal democratic legal order by making a State more responsive and responsible. Responsibility to Rebuild is arguably the first effort to institutionalize the issue of 'Local Ownership'. The issue of local ownership is what separates the new conflict management strategy of R2P from humanitarian intervention. For the first time, the international legal community has offered a tool in the realm of conflict management. It is the tool of Responsibility to Rebuild. It is the third dimension of R2P. Responsibility to Rebuild has four interrelated dimensions:

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88 ibid

89 ibid

90 Chnadler (n 79) 29.

(a) Achieving security.
(b) Good governance.
(c) Justice and Reconciliation.
(d) Economic and Social Development.[91]

The Responsibility to Rebuild Toolbox consists of Political, Economic, Constitutional and Security Measures which includes rehabilitative tools such as maximization of local ownership, economic development, rebuilding criminal justice, refugee returns, peacekeeping, disarmament and Security sector reform.[92]

There are three more issues attached to the notion of Fail/Weak States:

(a) Achieving Security
(b) Achieving Good Governance.
(c) Achieving Justice and Reconciliation.

In addition to the six negative conditions of peace, Kant mentioned three positive conditions for peace:

(4) Civil constitutions of every state shall be republican.
(5) The right of nation shall be based on a federation of free states.
(6) Cosmopolitan right shall be limited to the condition of hospitality.

It is these three Definitive Article that one can forge a link between Responsibility to Rebuild, Fail / Weak State, State Building and Perpetual Peace building. Similarly, Responsibility to Prevent toolbox aims at the strategic solution to the problem of conflict management. The Responsibility to prevent toolbox is composed of two main components. One is the structural prevention measure and the other is direct operational measure. The structural prevention measure is long term and root cause oriented. The direct operational measures are more responsive to short term crises. The two tools have four components.

(1) Political/Diplomatic Strategies: The basic idea behind this approach is good governance. Both individual states and international community states have a stake in it. Every state wants to develop just institutions of legislature, executive and judiciary. The problem lies in the quantum of responsibility that is to be shared between state and international community. A workable solution is provided by Gareth Evans, 'It is important to recognize just how much of the

[91] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington D.C. Brookings Institute 2008) 151.
[92] ibid 150.

responsibility must fall on the shoulders of the states themselves. It is true that a great many simply do not have the physical or financial capacity by themselves to deliver material wellbeing to their people but what every state does have, at the very least, is the capacity to desire political and civil rights- giving everyone a direct say in how they are governed and the ability to talk and act freely'.[93] This means that civil and political liberty is the minimum criteria for a civilized state. A government must be tolerant and pluralistic in its approach. It must accept a strong civil society organization as a measure of the quality of existing governance and a means of ensuring its improvement in the future. This tool encourages states to join and participate actively in international organizations and regimes which are designed to minimize threats to security promote confidence and trust, and create institutional frameworks for dialogue and cooperation. After the end of cold war new promising tools have been developed like Fact Finding Commissions, Conciliation and Non official Track Dialogue. The new age diplomacy is pre emptory in nature. South Africa's involvement in Burundi and UN's involvement in Ethiopia and Eritrea in 2007 are its leading example.

(2) Economic and Social Strategies: It is now generally acknowledged that development, peace, security and human rights are interred related and mutually supporting. A major effort must be made to bridge the gap of income and opportunity. These are not only humanitarian aspiration but they are a part of national security as well. There should be acceptance of trade regimes that will permit greater access to external markets for developing economics and better terms of trade for the encouragement of regional and larger economic integration strategies. More generally, there is a case for supporting community peace building programmes of the kind run by a great many civil society organization both national and international, working with local actors at the grass root level to dispel the fear, mistrust and prejudice at the heart of conflicts. Gareth Evans gives the example of 'Seeds of Peace', an initiative established in 1993 to bring together Arab and Israeli teenagers in a neutral setting to share their experiences and learn how to cooperate.[94]

(3) Constitution and Legal Strategies: This approach calls for the investigation of human rights abuses, promotion of rule of law and creation of a court system that is adequately resourced and a procedural system that is fair and just. In recent times the creation of

93 Evans (n 91) 88.
94 ibid 92.

International Criminal Court has created a notion of deterrence at an international level.

(4) Security Sector Strategies: According to Gareth Evans, the biggest reform is managing a transformation from military to civilian controlled government.[95] This requires a complete detour to accountability, transparency and transparent financing. The author focuses on the role of confidence building measures. It involves tools such as reciprocal information exchanges and military to military programmes. The basic idea is to reduce high levels of mistrust between two states and achieve transparency in security policy.

This paper reflects upon the essential link between philosophy and law. In spite of being popularly known for its coercive nature, law, is pregnant with certain values and meta ethics. The dominant theories in law are utilitarianism and Analytical Positivism but the Kantian morality has found its way into legal corridors through the works of Hans Kelsen, John Rawls and Jurgen Habermas. The impact of Kant's anthropological revolution in law is rarely discussed. It will not be an exaggeration to say that Kant's concept of transcendentalism allowed Kelsen to represent Law as an anti-ideological device through his theory of grundnorm. Kantian theory rescued law from being 'politicized' in the 20th century. In the 21st century, the onus was on International Law to effectuate Kant's 'Perpetual Peace' model. In order to create a connection between the concept of Responsibility to Protect and Kantian Peace Model, the paper has divided the 'Perpetual Peace model' into two parts depending on two different timeframes. The Preliminary Articles were, in the estimate of this paper, instrumental in creating a peaceful world between 1945-1990, a time where avoidance of an 'inter-state' dispute was the main concern of the Charter of The United Nations. The Definitive Articles on the other hand are relevant in the 21st century where the problem of Fail/Weak States, Genocide, Ethnic Cleansing, Civil war is rampant. If Democratic Peace Model does not justify the true vision of Kant then Responsibility to Rebuild definitely comes within the non-coercive nature of Kant's Peace model. The attempted nexus between Kantian Political ideas, International Law and Conflict management is a step closer not only to a 'peaceful world' but to a 'peace driven world'.

95 ibid 91.

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