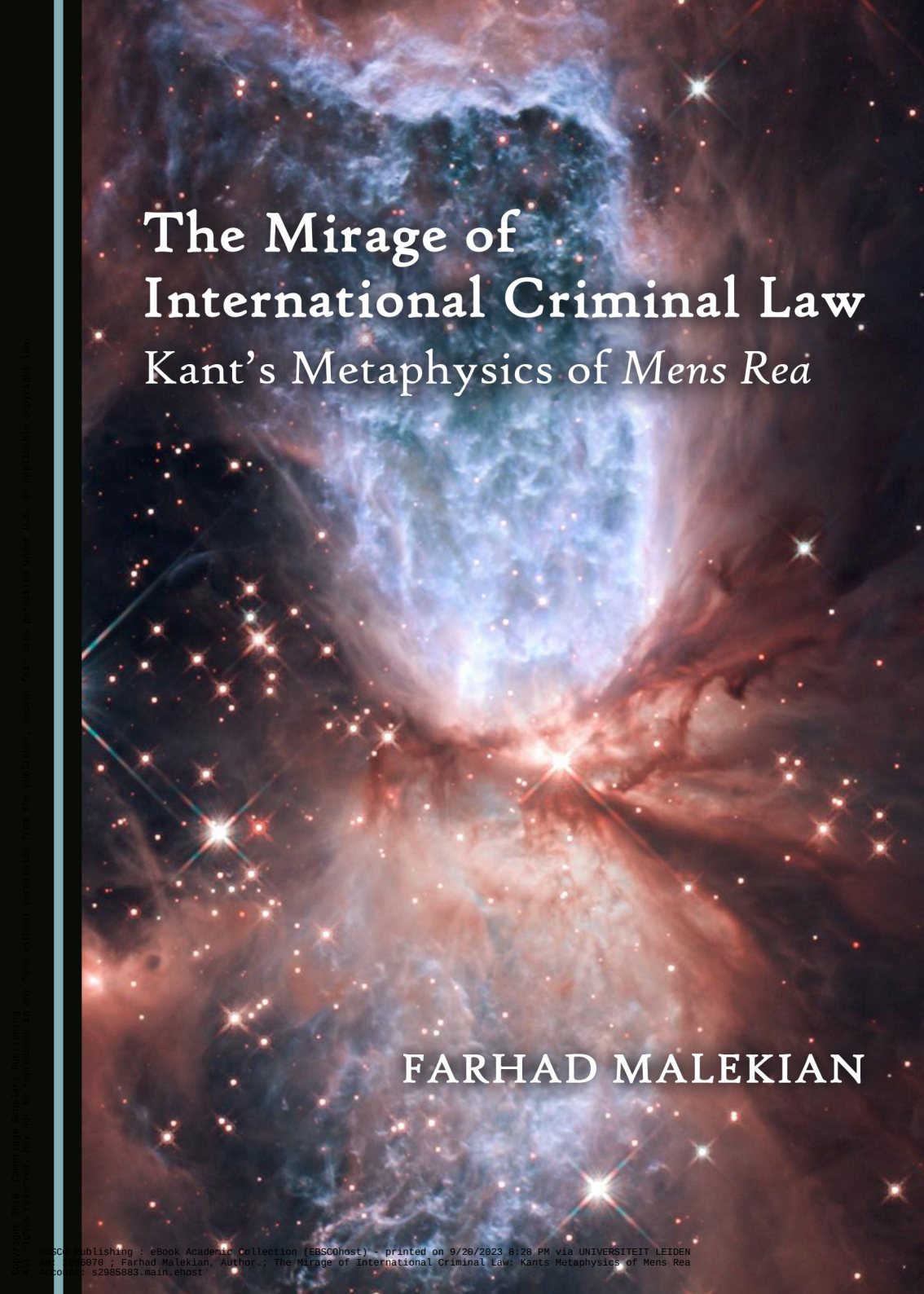

The Mirage of International Criminal Law

The Mirage of International Criminal Law:

Kant's Metaphysics of *Mens Rea*

By

Farhad Malekian

Cambridge Scholars Publishing

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This book first published 2018

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

f.malekian.in.crim.l@telia.com

ISBN (10): 1-5275-0406-9
ISBN (13): 978-1-5275-0406-6

To

My father

Mohammed Taghi Malekian

and

Mohammed Mossadegh

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INTRODUCTION

Once upon a time, Alexander the Great captured a notorious pirate and asked him, why are you plundering the high seas? The pirate replied, why are you plundering the lands? I am the king. If you are the king of the lands, I am the king of the high seas. What is the difference? The business is the same for both of us. This book elaborates the metaphysics of the monopolisation of the Security Council in conjunction with Kant's philosophy of self-love and radical evil in human nature, or the inclination to evil, or the propensity to knowingly commit unlawful behaviour. This implies the fact that *mens rea* is the mental element of the commission of the crime within the content of certain resolutions of the Security Council.

The book identifies the new methods of resolution used by the permanent members to reap economic gains from the oil pipelines. Kant's metaphysics describe the notion of international criminal law in combination with human rights law that characterizes the Security Council resolutions. This comes across as a mirage or an optical illusion − a disseminated interconnectedness in the guise of an inter-subjective icon for reliability − that tricks us into foretelling our individual or collective self-defence.

Consequently, the moral and political philosophies of Kant in conjunction with the monopolisation of international criminal law by the big political powers are the main subjects of this work. Accordingly, Kant's views are interwoven with certain recognized principles of international criminal law, which encourage states to refrain from conduct or decisions that violate the principles of peace, justice, equality, and proportionality.

Kantian philosophy is a philosophy that has had a profound impact on almost all sciences of law. Yet, it is an unfortunate fact that Kantian philosophy has not dealt with international criminal law to any degree up until today. One reason may be that the entire system of international criminal law has a double morality and is not as pure it seems to be.

The key phrases in the book are Kant's Metaphysics, international criminal law, radical evil, propensity to evil, Security Council resolutions, the principle of morality, means rea, supreme principles of morality and the concept of mirage.

Writing about the mirage of international criminal law has not been difficult. What has been the most complex part of this metaphysical study,

however, was convincing the world that most rules of law, most provisions of international human rights law, most assurances of the Charter of the United Nations, the most integral content of national legislations, and the overall majority of the provisions of the Statute of the International Criminal Court − including our own existence − are proof of strong mirages.

I am delighted to thank the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany for permitting to carry out this research in the Institute's friendly working environment. It goes without saying that Professor Hans-Jörg Albrecht and Professor Ulrich Sieber have been a key impetus for my personal growth during the writing of this book. Professor Albin Eser was also exceedingly kind whenever I asked for his time to give legal advice. Dr. Knust Nandor from the International Criminal Law Section of the MPI was available at all times with his sincere personal encouragement and critical views from the outer reaches to the depths of the academic mind. Words are not enough to thank him for his time and valuable discussions. Some words of encouragement and the occasional laugh with Sandra Reiling, one of the librarians, have also been a great help in cooling down the churning of the author's brain. Thanks to every single person.

In analogy to *the Sound of Music*, the strong and ceaseless psychological support that I have received from my Romanian-born colleague Dr. *Johanna Rinceanu* could be called *the Sound of Academics* − from its lasting music to the present piece of metaphysical scholastic melody. This also includes her extensive intercultural and intellectual wisdom.

I also sincerely thank the publishing body (CSP) for all forms of friendly facilities under the process of publication of the book.

However, responsibility for the subject matter of this work is solely mine alone.

Written in the Sovereignty of the European Union;
With full love for my family unit
Max Planck Institute for Foreign and
International Criminal Law Freiburg, Germany***;***
and others, *Alvan12 September 2017*

Farhad Malekian
Director of the Institute of
International Criminal Law
Uppsala, Sweden

CHAPTER I

THE OPTICAL DELUSION IN INTERNATIONAL CRIMINAL LAW

1. The Mirage of the Rule of the Law

It is of no significance what rules are called, which authorities implement them, and how political or philosophical arguments are laid down, but instead how they treat and respect the integrity of our national, regional, and international personality together. Ultimately, they show us the real nature of categorical justice, which may be a mirage that can never be created.

Since this work will explore the system of international criminal law in conjunction with the Security Council in the United Nations Organisation, it may be a good idea to see what is meant by the key word in the title, namely the "mirage." The word mirage is derived from the Latin word *mirare.* The Oxford Dictionary of English defines a mirage as an optional illusion caused by atmospheric conditions, especially the appearance of a sheet of water in a desert or on a hot road, caused by the refraction of light from the heated air of the sky.

For our intents and purposes, the same dictionary gives a precise definition of mirage, which aptly describes the subject matter of this book. It says that a mirage is "an unrealistic hope or wish that cannot be achieved: *the hope of sanctuary initially proved in mirage*." Scientifically, the most superior mirage is called a *fata morgana*. This is a narrow band right above the horizon. *Fata morgana* mirages deform the object(s) onto which they are reflected. This causes the object to become completely impossible to recognize. This will also serve as a metaphor for the facts of this book. A *fata morgana* can be seen on the sea, land, desert, and the sky like a flying object. All these appearances are called mirages.

The *fata morgana* of international criminal law and justice is similar to a natural *fata morgana*, with the difference that one relies on a natural phenomenon and the other relies on the content of the Security Council resolutions. The content of the resolutions ultimately modifies the

substance of the object or objects and in this way creates such serious, large, and complicated conflicts that one can easily lose sight of the reason we are facing certain problems. A clear example from the last century and the new one is the situation of the populations of Iran, Iraq, Palestine, Syria, Vietnam, Libya, and Afghanistan. The resolutions of the Security Council created such serious and controversial problems in the world that the essence of the problem changed, and these civilisations have become the instrument of the entire mirage system.

2. Reaching the Definition of Mirage

The term "mirage" in international criminal law or in the system of international human rights law may be defined as a good promise which drives you towards it, but is, in reality, an illusion. Examples are the provisions of the Declaration of Human Rights and all other international conventions promising the rights of man and the rights of nations, when achieving them is practically only a beautiful picture and a big legal promise without real effect.

In 1950, Lauterpacht, in his 475-page book *International Law and Human Rights,* recognized this problem of the Declaration: that the Declaration has no legal force and is solely based on moral standards. According to him, even this moral authority of the Declaration is misleading in the final stage of application (419-423). Still, the problem remains that Lauterpacht does not see the basic problem of the Declaration and its content, which is that it is just a mirage, even almost seventy years after adoption by the General Assembly. The gap between reality and the words of the Declaration can even be seen in other international human rights instruments. If this gap did not exist, we would not have the ISIS problem as well as underground assistance to this criminal and terrorist group by the biggest and most powerful nations in Europe or the Middle East.

A similar conclusion can be drawn about the United Nations provisions concerning "equality between nations" that have a solely psychological, hortatory effect for human beings or the population of different nations and are practically only useful for the top nations or a certain few European nations and other nations in the world. The whole structure of the United Nations is a mirage of good provisions, or the existence of international democracy in human rights norms is exclusively a democratic illusion and non-existent. How can states pay out millions of dollars or Euros for the development of terrorism and at the same time claim they are preventing terrorists under the framework of international

criminal conventions and regional conventions in Europe, including human rights law?

Even in times of armed conflict, the notion of an international humanitarian law of armed conflict is solely an illusion, and this major illusion has been witnessed in all wars, particularly since the adoption of the 1949 and 1977 international conventions and protocols applicable to armed conflict. For example, one of the serious criticisms against Germany was its violations of the law of armed conflict adopted in the provisions of the Hague conventions in the twentieth century and in the rules of customary international criminal law. Since the establishment of the United Nations Organisation and the creation of the Security Council as a central body of the Charter of the United Nations, however, it has been proven beyond any reasonable doubt that the concept of international humanitarian law of armed conflict is a hypothetical notion and a distant mirage in the face of justice.

The system of international criminal law constitutes a body of law consisting of a large number of criminal provisions, whether substantive or procedural, aiming at the prevention of international crimes. This body of law also derives greatly from conventional and customary international human rights law. Conventional human rights law refers to the provisions of international conventions and customary international human rights law to the provisions, for example, of the Universal Declaration of Human Rights law that have become a part of customary law. This is because the Declaration was adopted as a resolution and not as an international convention. The reason for this was that the drafters of the declaration did not want to have conventional provisions.

A resolution meant nothing in reality, but was a document showing the tendency of the members of the United Nations. This meant that, in practice, the powerful nations were against the adoption of an international law-making treaty which would oblige their governments to obey certain definite provisions of international human rights. However, the Declaration today constitutes an integral part of the international law of *jus cogens*, customary international law, and general principles of law that are obligatory for all states of the world. The international conventions on international criminal law and international conventions, including resolutions on human rights law, establish nothing more than an illusion because of their instability for justice. They are also an illusion because they condemn the weak and indirectly support the strong, also because of the impunity of the permanent members and the non-applicability of the principle of proportionality.

This in turn means that there is a discrepancy between facts and actual practice. This is what I call, to use one of Kant's favourite expressions, departing from the categorical imperative, from pure rules of law, from justice, and creating injustice with the cloth of threadbare justice. Kant says act on that maxim by which you can at the same time will that it should be a universal law. It implies the far distance of a mirage. The distinction between true and illusion. In other words, with the big political powers creating illusions, we never apply true justice in the permanent International Criminal Court. The ICC turns out to have been a permanent member of this mirage in the context of international criminal justice as a whole.

It is therefore rightly asserted that the international criminal court

> cannot be effective if it is subservient to the vacillating interests of nation-states. Such subservience delimits the true and illusory adjudication powers of the court. …The lack of coercive power to bring an accused before the court emasculates the legal character of an international criminal body. Merely branding an individual as an "international fugitive" is adding little to the success of either Tribunal. As the current situation indicates, international criminal law cannot depend on the acquiescence of powerful nations. Otherwise, international tribunals return to the setting of "victors' justice," which begs the question whether international criminal law is capable of equitable distribution. *Without salient enforcement, international criminal law provides only the enticing mirage of justice.*[1]

It is useful to remember that "Rawls considers his theory to be Kantian yet believes that there is a disparity in strength between the demands of justice on the national versus international levels. As is well known, Kant's moral conception is summed up in his categorical imperative." Nonetheless, "the categorical imperative is given more than one formulation and two of them are quite distinct in content although Kant seems to believe that the three are equivalent. The greatest discrepancy comes between the 'universal law' and the 'end in itself' formulations, which are so distinct as to aspire substantially distinct conclusions."[2] The end in itself certainly does not mean the concept of selectivity, but rather a pool of justice, the principle of

[1] Mary Margaret Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law *An Essay on the Nature and Immutability of Truth'*, 15 (2) *American University International Law Review* (1999), pp. 321-394, at 363-4. *Italics mine.*

[2] Steven Luper-Foy, 'Introduction: Global Distributive Justice' in Steven Luper-Foy (ed.), *Problems of International Justice* (London: Westview Press, 1988), pp.1-24, at10.

which is equality that has harmony. It follows that it has to be applied in accordance with the principles of equality. However, it is not.

The offenders of the rules of international criminal law in the Court are selective. This can be seen in the works of two British writers. One is Robert *Cryer* in his book *Prosecuting International Crimes:* Selectivity *and the International Criminal Law Regime*. The other is *Geoffrey Robertson* in his prominent book *Crimes Against Humanity: The Struggle For Global Justice,* which delivers the same message without seeing that it is the mirage of international criminal law. The sole problem with these two excellent books is that neither of them discovered the right image of international criminal law, although both unknowingly reflected the illusion or the mirage of international criminal law. This is the general problem of all such books. The reason is that they do not have the vision that the entire system of international criminal law is potentially an illusion and, in some cases, a superior mirage or *fata morgana*. As Cryer asserts, one of the reasons for this is that the enforcement of the system is selective. "The Critique enforcement relates at the more general level to arbitrariness, part of which is taking irrelevant criteria into account. This also includes discrimination, which is taking into account of irrelevant and illegitimate criteria." Cryer further describes, "This includes cases where a political body interferes with a duly authorised prosecutor applying standards applied to all other cases. The underlying value implicated is equality before the law and before courts and tribunals. This is a right accepted at the international level and is clearly an appropriate criterion against which to evaluate a criminal enforcement regime."193

Indeed, this is what Kant is against when he tries to prevent bad maxims, which applies even to the proceedings of international criminal courts. The reason is very simple: everyone should be treated as equal before the law, during implementation of the law, and after it.

3. Illusion of *Mens Rea* in Justice

It is a universally consolidated principle of criminal law that, under criminal provisions, the imputation of any harm to a person necessitates not only a basic logical connection between the conduct of the person and the incident, but also a mental connection between the person and the occurrence. This is also the focus of this book in connection with the metaphysics of Kant and in conjunction with the provisions of Chapter VII of the United Nations Charter. The intention is to grasp whether the permanent members of the Security Council have, in relation to the circumstances of certain resolutions of the Council, committed or commit

serious international crimes against international criminal justice knowingly or with knowledge.

I am not going to write here about Roman law or Canon Law as laid down by papal pronouncements unless it is necessary. I am also not going to deal here with the philosophy of Islamic law as created and presented by the holy Mohammed.[3] And neither will I discuss the theory of Marxism, one of the most powerful theories in the world of justice. Although coherence, rationality, and unity should be the sole message of most legal disciplines and theories, the reality is different, particularly when we analyse the legal validity of the body of international criminal law and the virtue of its mirage norms.

International Criminal Law is a law that exists and does not exist, depending on the strength of political wrestling campaigns, which is sometimes the most brutal form of legal conflict. This is what I will juxtapose with the philosophy of Kant or the propensity to evil in human nature within the virtues of international criminal law, in the rosiness of human rights law, and in the nature of impunity of the Permanent International Criminal Court.

The term 'propensity to evil in human nature' also implies the existence of the notion of *mens rea* or the residing mental element in the philosophy of Kant. This is because the basic element of *mens rea* is the concept of intention to commit criminal behaviour. In other words, *the actor may not be culpable unless the mind is guilty*. This is known in Latin as *se actus reus non facit reum nisi mens sit rea*. It is rightly asserted that:

> A great strength in Kant's theory being based on a priori reason is that it highlights the importance of intention, something which can be overlooked in theories based upon sentiments. Although tests on Actus Rea (such as those based on the outcome of visible moral actions) may be useful to legislators, judges and those involved in upholding societal laws, these do not challenge the heart of issues. Whilst tests on outside actions may elicit or prevent agents from performing certain actions, it is highly unlikely, if not impossible, for such regulations and legislations to change the Mens Rea, or inner intentions of an agent.[4]

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[3] Farhad Malekian, *Corpus Juris of Islamic International Criminal Justice* (Newcastle: Cambridge Scholars Publishing, 2017).

[4] Reason vs Sentiment as a Basis for Morality: 'Does Kant prove that reason rather than sentiment provides us with the basis for morality? Should we prefer Kant's view of morality to Hume's view?' Available at https://beatsviews.wordpress.com/2013/06/27/reason-vs-sentiment-as-a-basis-for-morality/ (Visited on 27 August 2017).

Throughout our examination, we will address the fact that the concept of *mens rea* concerning the big political parties is an illusion in international criminal justice, and claims of *mens rea* in connection with formulations of the Security Council resolutions are actually a taboo. Kant obviously did not mean propensity to evil in the nature of some men and non-existence of the inclination to evil in the nature of other men. He elaborated his thoughts throughout his works and concluded that a propensity to evil, an evil mentality, an evil decision, or a one-eyed-decision over the wealth of other nations is of a criminal nature and constitutes the attempt to commit core international crimes. The notion of *mens rea* clearly applies to several elements.

In the case of international criminal law, we have exceptionally original and advanced international conventions without any particular power of legal enforceability. Here, a considerable number of international criminal conventions may be mentioned, drawing on the list of core international crimes, their identification, methods of proceedings, and implementation of punishment. Some clear examples are the 1948 Convention on the Prevention and Punishment of Genocide, the 1971 Convention on Prohibition of Apartheid, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1998 Statute of the International Criminal Court constituting the main international convention ratified in the system of international criminal law.

All the above conventions represent the most significant and realistic principles of international criminal law concerning their identification and prosecution in an international criminal court, including *ad hoc* tribunals. The subject matter of all these conventions is also, in one way or another, interwoven with the element of *mens rea*. For instance, genocide as an international crime coincides with two separate mental elements. One is the element of 'general intent' known as *dolus*. The other is the element of 'intent to destroy.' The entire philosophy of Kant concerning the existence of evil in the nature of man also aims to reduce the gravity of *mens rea*. He aims to make us aware of the fact that, if this *mens rea* grows, it develops into a bad maxim and ultimately increases the volume of the commission of crimes such as genocide, crimes against humanity, war crimes, or aggression.

These issues deriving from Kant's points of view are not, unfortunately, discussed by Professor Michael Reisman in his distinguished article dealing with *Legal Responses to Genocide and Other Massive Violations of Human Rights*. The question is particularly crucial when considering that his article appears in a journal dealing with contemporary problems. In any

event, Reisman lays the concept of responsibility for all these difficult questions on individuals. His analysis is therefore very useful in his excellent book entitled *The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment*. In several sections of the book dealing with the concept of the use and abuse of force, *jus in bello*, Reisman examines the questions of aggression, but still does not directly consider, e.g., the ethical argumentation surrounding the supreme principle of morality within the body of law or the distinguishing lack of recognition of *mens rea* in the Security Council.

Even the entire theory of aggression and its lack of definition because of military and political battles has been based on the element of *mens rea*. This is also obvious in Chapter VII of the Charter of the United Nations and its provisions. In fact, Chapter VII shows its crippled function as to the concept of *mens rea*, the existence of *mens rea* in the provisions of Chapter VII, and also practical implementation of the definition of the elements of *mens rea*.

This chapter is restricted to the metaphysics of international criminal law. With this, we mean what is laid down as its basis and which philosophy is in its nature. As to the question of philosophy, I do not necessarily mean the prevention of crimes and the prosecution of international criminals in an international criminal court. I do, however, mean the way in which we can understand its substance, intentions, aims, and modalities within the framework of a theoretical approach to justice, whether or not this legal body of law exists and, if it does, in that case, to what level and degree. This is what I will put on the scales of the mirage of justice and, in certain highly serious cases of genocide such as in Rwanda, Sierra Leone, and Srebrenica, on the scales of *fata morgana*. For instance, concerning the International Criminal Tribunal for the former Yugoslavia the

> gesture was to promise an international tribunal to prosecute the guilty. The *mirage* that some hoped to create is that even if not acting then to confront the killers and violators of international humanitarian law, nonetheless such would ultimately have to face justice. This promise of justice in the future to excuse no action then though was perhaps also lacking sincerity/commitment; however, then who would really care once the conflict ended and in particular if BiH disappeared?[5]

[5] Muhamed Sacirbey, 'International Criminal Tribunal Born as Bastard?' The World Post, https://www.huffingtonpost.com/ambassador-muhamed-sacirbey/international-criminal-tribunals_b_3344169.html (visited on 4 November, 2017).

The significant fact is that *mens rea* exists behind all these theories, which literally means knowing the full intention of the inclination to commit evil conduct or serious international crimes. For instance, "the knowledge-based standard of genocidal intent is established when the perpetrator's knowledge of the consequences of the overall conduct reaches the level of practical certainty."[6]

I will focus here on the reality of the system of international criminal law and the mirage that mars its real discipline. With the term "mirage of international criminal law," I will prove that the forum of international criminal law does not exist in reality and that it is an illusion between reality and what we call conventional international criminal law. All these aspects are discussed in conjunction with the Kantian philosophy of the propensity to evil in human nature or as regards good interpretation of the law or bad deduction from a legal discipline.[7] We will face the contradictions between the means, practice, and the end.

4. Knowing Iniquity on Kant's *Mens Rea*

Mens rea means what an accused was feeling before the actual commission of the crime and what the accused intended when the criminal act was committed. *Mens rea* guides the system of criminal justice to distinguish between a person who did not mean to commit a crime and a person who deliberately decided to commit a crime. Whilst *mens rea* refers to a guilty mind, criminal justice is a process of differentiating between intentional and unintentional purpose.

In other words, *mens rea* is the criminal identification of controllable and uncontrollable conduct. There are different degrees of punishment for both concepts. Still, the definition of *mens rea* varies, depending upon the gravity of negligence. Therefore, if negligence is not serious, it may not fall under the concept of *mens rea*, but if it has seriously harmed the victim, the concept of *mens rea* may be raised in the context of criminal liability.

Obviously, a criminal decision, criminal behaviour, criminal conduct, or a hidden criminal attack carried out in self-defence comes within the

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[6] Hans Vest, 'A Structure-Based Concept of Genocidal Intent', *Journal of International Criminal Justice* (2007), pp.781-797, at 793.

[7] See *also* Felix Grayeff, *Kant's Theoretical Philosophy* (Barnes & Noble, 1970); Moltke S. Gram (ed), *Kant: Disputed Questions* (Quadrangle, 1967); Alic Halford Smith, *Kantian Studies* (Greenwood Press, 1974); Otfried Hoffe, *Immanuel Kant* (State University of New York Press, 1994); C. W., Hendeled (ed.), *The Philosophy of Kant and Our Modern World* (Liberal Arts, 1957).

ambit of criminal law or international criminal law. Yet, unintentional criminal conduct or behaviour may be treated under the concept of *mistake of fact* or *mistake of law*.

The concept of a mistake of fact refers to a situation when we are engaged in a lawful conduct, the object of which is actually unlawful such as selling boxes of food that contain drugs. The possibility of *mens rea* will not be obvious. The reason is for this is that we simply did not have the intent to commit a criminal act because the payments were very low and for the value of food.

Concerning the mistake of law, however, the accused cannot go free and assert that he knew he was selling drugs, but thought that selling drugs was not prohibited. Nevertheless, it is a recognised principle that *ignorance of the law is no excuse*. The extrapolation is that any statement by the permanent members of the Security Council claiming that they did not know, that they were not informed, or that they were cheated by another state or by one of the other permanent members certainly cannot be considered an excuse for escaping criminal liability.

A clear example of this is found in the statements of former British Prime Minister Tony Blair regarding questions of serious criminal acts committed in Iraq. Here, according to Kantian philosophy, Blair is subject to strict liability, since he should have known about the criminal intentions of relevant resolutions of the Council, due to his political position and the position of the United Kingdom as a permanent member of the Security Council.

In our systems of criminal justice and proceedings, knowingly means to be aware of what we are doing. It is the opposite of unknowingly, unintentionally, undeliberately, unconsciously, unwillingly, and mistakenly. This is what Kant's metaphysics teaches us concerning the existence of certain facts within our intentions, in our personalities; in other words, the propensity to evil in human nature has to be controlled in order to create a good maxim.[8] Rosen correctly presumes that:

> These readings of Kant are close enough to the truth to be initially plausible, yet far enough off the mark to be seriously misleading. In one sense it is perfectly correct to hold that Kant believes justice or law should be indifferent to inner states; but in another sense nothing could be farther

[8] Consult also Martin Gottfried, *Kant's Metaphysics and Theory of Science* (Manchester University Press, 1974); Herbert James Paton, *Kant's Metaphysic of Experience* (Humanities Press, 1961); Martin Heidegger, *Kant and the Problem of Metaphysics* (Indiana University Press, 1962); Douglas P. Dryer, *Kant's Solution for Verification in Metaphysics* (Allen and Unwin, 1966).

> from the truth. Kant regards justice as purely external in the limited sense that the sole purpose of judicial laws is to regulate external conduct. However, this does not mean that justice has no interest in inner states. As is evident from the long history of the legal concept of *mens rea* [a guilty mind], as well as from recurring debates in the legal community about the role of intentions and motives in the criminal law, jurists have traditionally supposed that mental states are of concern to the law. Kant shares this assumption and in at least three respects regards inner states as vital to justice and jurisprudence.[9]

The intention of Kant is to prevent the commission of wrongs, immoralities, iniquities, and crimes. However, he insists that we should commit to good action with good thought − not for the purpose of good itself, but for the purpose of good reason. This is the only appropriate way to mitigate the various concepts of *mens rea* in the nature of man. He means categorical evil inclinations must submit themselves to the supreme principle of morality. This is in order to create good universal law and promote the supreme principle of morality with good maxims against bad maxims.

One should take into consideration that the concept of *mens rea* arises whenever there is an intention to commit a crime, a bad action, unlawful conduct, or immoral behaviour according to the law. It therefore refers to the knowledge that its implementation or omission causes a crime to be committed. Ultimately, *mens rea* is often a necessary corollary element for the recognition of crimes. According to the *Kayishema* case in the International Criminal Tribunal for Rwanda, *mens rea* means knowingly.

This is what Kant also writes about – to knowingly borrow money from our neighbour with the promise that we are going to pay tomorrow; when the storekeeper knowingly cheats his customers and pays less change, while we are completely aware of the fact that we are not going to pay; knowingly formulating provisions in the Security Council resolutions that are going to be used for criminal purposes, for the destruction of countries, for the killing of children, men, and women; knowingly shedding blood for economic income; and knowingly creating the Abu Ghraib prison to horrify all inhabitants of the world in order to demonstrate that the policy of the Security Council is correct, thus confusing them with different matters in order to mislead the facts.

This is what Shadi Mokhtari intensively probes in the book *After Abu Ghraib*, which is explained in the subtitle *Exploring Human Rights in America and the Middle East*. She correctly asserts that "Abu Ghraib temporarily froze the mounting prescriptions for torture as 'necessary evil'

[9] Allen D. Rosen., *Kant's Theory of Justice* (Ithaca, London: Cornel University Press, 1996), p.85.

by pushing the issue out of the realm of the abstract, theoretical, and hypothetical into the realm of the stark, explicit, and real." There were at least 1800 images depicting Abu Ghraib torture. Although the international public has not seen all these hidden and evil *mens rea* offences, the pictures were so immoral that one could not look at them and well assert that those who were tortured had an evil mentality. Shadi's analysis should further on continue with Tassing description of torture in the context of colonial slavery in Congo and Peru:

> The system of torture they (the colonisers) devised … mirrored the horror of the savagery they so feared, condemned – and fictionalised … The mimesis between the savagery attributed to the Indians by the colonists and the savagery perpetuated by the colonists in the name of … civilisation. This reciprocating yet distorted mimesis has been … the colonial mirror that reflects back onto the colonists the barbarity of their own social relations, but as imputed to the savage … And what is put into discourse through the artful story telling … is the same as what they practiced on the bodies of Indians.[10]

What is, really, the definition of *mens rea* in international criminal law? The definition implies the intent of a criminal act. In other words, when Kant says the propensity to evil is in the nature of man, he legally means *mens rea* in the stage of the mind and not at the level of action. For example, the relevant resolutions of the Security Council after 11 September 2001 all have a high level of inclination towards the *mens rea* concept: bearing the mental element, committing unlawful actions for personal or entities' advantages, exhibiting self-love, displaying self-interest, and having full evil intentions. Are these not crimes? Is this not *mens rea*? Is this not aiding, abetting, supporting, assisting, and serving criminal intent? It is indeed rightly stated that "if one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would to negative the rule that *mens rea* is a matter of intent only and does depend on desire or motive."[11]

The International Criminal Tribunal for Rwanda, in the *Kayishema* case correctly asserts that:

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[10] Michael Taussing, 'Culture of Terror –Space of Death: Roger Casement's Putumayo Report and Explanation of Torutre', in *Interpretive Social Science: A Second Look*, Paul Rabinow & William Sullivan, eds. PP. 241, 276-278, 245, 262 (1987). Quoted in Mark Osiel, The end of Reciprocity (2009), p.255.

[11] National Coal Board v Gamble (1959), 1 QB 11. Cited in Barad, 75.

> The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused. This requirement further complements the exclusion from crimes against humanity of isolated acts carried out for purely personal reasons.[12]

5. Publicists Missing Kant's Theory of *Mens Rea*

It is indeed one of the despondent facts that Badar, a good scholar of international criminal justice, like many other writers on criminal law and international criminal law failed to spot the theory of Kant in his book published by Hurt on *The Concept of Mens Rea in International Criminal Law*. He neglected the metaphysics of the supreme principle of morality and the propensity to good and evil in human nature. In such an accomplished, heavy volume, including an investigation of the legal systems of a considerable number of countries, he should have addressed the fact that the whole theory of *mens rea* or 'intention,' '*culpa*,' or '*dolus*' overlaps with the concept of Immanuel Kant's philosophy. Even the blind peer reviews of the publisher Hurt did not identify this significant fact as missing.

Therefore, the question then arises as to who is going to convey Kant's message? Who will understand that Kantian philosophy refers to hidden *mens rea* in the nature of man to a great degree? The same implicit approach to Kant's approval of *mens rea* is revealed in the eager insistence that:

> For Kant, it is evident that intention is important as his theory is deontological; he believes one ought to do good because doing so is the morally correct way to act. Some may raise the objection that maxims are not always observable or reliably inferable and therefore the outcomes of universality tests to onlookers may be incorrect. An example of this could be that a would-be-murderer could intend to shoot an innocent child, which would be a guilty act (or '*Actus Rea'*), but misfires and kills the vicious dog which was about to attack the child. The outcome of the action of the

[12] *Kayishema* (*ICTR-95-1-T*), *Judgement*, 21 May 1999, paras. 155-154.

> would-be-murderer is a positive one, and it could appear to be a morally good action, however the would-be-murderers intention (or '*Mens Rea*') would be a morally repulsive one. Such issues however do not raise problems for Kant; *in the application of his universality test, the importance lies in the agents underlying principles or 'intentions'*. [13]

Even Cherif Bassiouni, the well-known international criminal lawyer, with his wealth of books and articles has not interpreted this valuable philosophy of Kant as governing the notion of *mens rea*, knowingly or intention in the nature of man. Similar shortcomings can be found in the works of William Schabas, who is also well established in the system of international criminal law theory with his accumulated works concerning the abolition of capital punishment and international criminal courts.

The works of Mark Osiel have also encountered similar problems in not tackling the philosophy of Immanuel Kant regarding the propensity to evil in human nature and within the provisions of the Security Council. Osiel, with his potentially valuable books on torture and atrocities, should have realised that the German philosopher Immanuel Kant was referring to the prevention of atrocities in international criminal law several hundred years before him. Definitely, atrocities indicate the highest stage of *mens rea* in the nature of man or the uppermost level of immorality in the action and propagation of supreme bad maxims. Let us call it international *actus reus*.

Even Michael Scharf, professor of international criminal law in the USA with a prolonged cooperation with the CIA, such as the establishment of the show tribunal for Saddam Hussein, did not acknowledge this fact in his serious commitment to international criminal law and justice. Many comparative criminal lawyers from Germany have also unfortunately failed to understand the concept of *mens rea* in the theory of Kant.

Kant did not refer to genocide and, beyond that, he also did not refer to crimes against humanity. Above and beyond such atrocities, he also did not specify the core crimes in international criminal law, but formulated them with a clear philosophy of metaphysics of ethics that a bad maxim creates a bad maxim and ultimately generates extreme immorality and large-scale criminality such as genocide.

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[13] Reason *vs* Sentiment as a Basis for Morality: 'Does Kant prove that reason rather than sentiment provides us with the basis for morality? Should we prefer Kant's view of morality to Hume's view?' Available at https://beatsviews.wordpress.com/2013/06/27/reason-vs-sentiment-as-a-basis-for-morality/ (Visited on 27 August 2017). *Italic* added.

Kant has raised and addressed many questions for the international lawyers of contemporary time. He simply says that the propensity to evil in human nature, the propensity to gain money from the miserable situations of victims, and the propensity to occupy high international positions for having the highest international seat create a bad maxim and, in the end, the aim of justice is lost. Even if the idea is good, it has still not been done for the reason of good, but for the reason of personal advantage. That is why, in its practical aspects, the system of international criminal law is indeed suffering from many problems of proper implementation and justice. It is also why the entire permanent International Criminal Court is occupied by those who do not even have the primary necessary understanding or knowledge of the principles of the German philosopher. They are working for criminal justice, not in the pursuit of justice, but because of their duties. This is why Kant criticises and prohibits the performance of duty for the sake of duty being recognised as a good maxim. He says we do not even have a contractual duty in this regard; we should carry out such good actions with good reason.[14] He says:

> One oughtn't to venture anything that risks being wrong — that is a moral principle that needs no proof. Hence, the consciousness that an action that I intend to perform is right is an unconditional duty. Whether an action is over-all right or wrong is judged by the understanding, not by conscience. And it's not absolutely necessary to know, concerning all possible actions, whether they are right or wrong. But concerning the action that I am planning to perform I must not only judge and form an opinion that it is not wrong but be certain of this; and this requirement is a postulate of conscience, to which is opposed probabilism, i.e. the principle that the mere opinion that an action may well be right is a good enough reason for performing it. So conscience could also be defined as follows: *Conscience is the moral faculty of judgment.*[15]

[14] Consult *also* Francis, X. J. Coleman, *The Harmony of Reason: A Study in Kant's Aesthetics*. (University of Pittsburgh Press, 1974); Norman Kemp Smith, *Commentary to Kant's 'Critique of Pure Reason"* (Humanities Press, 1962); A. C. Ewing, *A Short Commentary on Kant's "Critique of Pure Reason"* (Methuen, 1978); N. A. *Sense,* Nikam, *Understanding and Reason* (Asia Publishing House, 1966); Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press, 1989); P. F. Strawson, *The Bounds of Sense: An Essay on Kant's " Critique of Pure Reason"* (Methuen, 1966).

[15] Immanuel Kant, *Religion within the Limits of Bare Reason* (1793). Launched by Jonathan Bennett, available at http://www.earlymoderntexts.com/pdfs/kant1793 part4.pdf (Accessed 25 August 2017).

6. Moral Faculty of Judgment

An unknown, but good American legal philosopher correctly writes that "there can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist."[16]

Kant shares the opinion of Hart as regards the position of motives and intentions in criminal law. Consequently, he expresses that the mental or inner states of man are a concern of criminal law from three perspectives. The philosophy of Kant concerning *mens rea* can also apply to the inner states of the permanent members of the Security Council, e.g., how they think and act, how they interpret the law, how they use their position, and how they obliterate a nation. First, he explains that,

> even though judicial laws do not *require* any special motives, they nonetheless provide a motive for compliance; fear of coercion or punishment. All that is strictly necessary for the performance of a juridical duty is the external action itself, but in order to ensure external compliance the law supplies an 'incentive or motive to include compliance by threatening to punish compliance. Kant's view is therefore like T.H. Green's belief that while 'in enforcing its commands by threats, the law is presenting a motive, and thus … affecting action on its inner side, it does this solely for the sake of the external act.'[17]

Kant's second assumption of mental states in criminal law concerns the end of an action. He means an end is merely a state of affairs that an agent intends to bring about through its conduct. This can be a single individual act, joint conduct of a group of individuals, or the decisive behaviour of such a legal body as the Security Council of the United Nations. Rosen interprets Kant's metaphysics in the following terms:

> Judicial laws are concerned with inner states insofar as some such states, notably intentions, are constitutive of human actions. Kant recognizes as much when he asserts that every action contain an 'end', for an end is simply a state of affairs an agent intends to bring about through his actions. Because intentions are part of the fabric of human action, they must be taken into consideration by jurisprudence. For criminal law, especially, they are of great interest. Very often for instance in cases of murder,

[16] *Joel Prentiss Bishop Criminal Law* (9th ed. 1930), p.287.
[17] Allen D. Rosen., Kant's *Theory of Justice* (Ithaca, London: Cornel University Press, 1996), pp.85-6.

> burglary, robbery, fraud, larceny, and criminal conspiracy, intentions figure conspicuously in the definitions of criminal offenses. Kant is aware of this. In the *Rechtslehre*, he characterizes a crime as an 'international transgression of the law. Committing a murder, Kant insists, involves more than killing a human being, it requires in addition the intention to do so under particular circumstances.[18]

Kant derives his opinion concerning *mens rea* from law and ethics. Both intend to prevent individuals from harbouring bad motives and to guide them to moral faculty of judgment, which means the mental faculty of cognition by reference to reasoning or intuition as to whether an act is right or wrong, whether an act is good or bad, or whether a decision in the Security Council is just or unjust.[19] Kant believes that a judgment is a particular type of cognition, which constitutes the mental representation of a decision or an object. The law and ethics also aim to prevent the permanent members of the Security Council from bad motives, too. In fact, the law and ethics are complements of one another. Therefore, Kant shares Hart's opinion concerning the role of motives and intentions as proof of guilt. The third mental state or inner state in Kant's philosophy of *mens rea* is explained in the following way:

> inner states are relevant to jurisprudence because they affect ascriptions of legal responsibility. Kant argues that imputations of responsibility must take into consideration 'the state of mind of the subject, namely, whether he committed the deed with emotion or in cool deliberation.' Nor formula is provided by Kant for determining how to factor different kinds of mental states into assessments of legal responsibility, but the direction of his thinking is clear from his examples. In the case of a starving man who seals food to survive, Kant holds that the 'degree of his responsibility is diminished by the fact that it would have required a great deal of self-restraint for him not to do it."[20]

In other words, Kant stipulates that "punishments and legal responsibility should be pointed out with due attention to motives, intentions, and other mental states. We should therefore not accept the suggestion that Kant regards justice and law as purely external in the sense that intentions,

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[18] Allen D. Rosen., Kant's *Theory of Justice* (Ithaca, London: Cornel University Press, 1996), pp.85-6.

[19] Consult also Johan Zammito, *The Genesis of Kant's Critique of Judgment* (University of Chicago Press, 1992); John Watson, *The Philosophy of Kant Explained* (Garland, 1976); R. P. Wolf (ed.), *Kant* (Doubleday, 1967); Bella K. Milmed, *Kant and Current Philosophical Issues* (New York University Press, 1961).

[20] Rosen *note* 18, p.86.

motives, and other inner states are of no consequence for jurisprudence, such as view is far from Kant's."[21]

Let me sum up the matter of the '*moral faculty of judgment*' in this way: we or over the majority of states cannot be cognisant of the permanent members' hidden purposes in respect of any provision of certain resolutions of the Security Council.[22] As a result, we may not interfere with that purpose by limiting the authority of the Council concerning the determination of the existence of any threat to the peace, breach of the peace, or act of aggression. However, without knowing the fact that the whole theories of certain provisions of the Security Council are solely a mirage, this mirage creates a bad illusion. Edgar Allan Poe correctly puts forth, "those who dream by day are cognizant of many things which escape those who dream only by night."

7. Divorcing from Criminal Justice

The system of international criminal law, the system of international criminal justice, and the system of international human rights law in the world and their relevant courts are suffering from the impunity of big criminals, or the Godfathers.[23] What Kant did was simply to prevent a bad maxim. What term is more reasonable than 'moral faculty of judgment?'[24] This also means 'passing judgment in the legal sense' on oneself. For instance, when the system of the ICC was established, it became the biggest competition between various individuals in the world to put their feet and, if necessary, their knees into the Court. This was not in pursuit of justice, but to secure a place in the festive boat of justice, regardless of the fact that sailing the boat of justice cannot function properly in the right sea if there is a lack of the categorical imperative and if it is steered with the propensity to self-interest, self-position, and ultimately self-love from the beginning. Do we really respect these ethical principles and standards? Kant explains this in connection with spiritual understanding. He says that:

> We have seen that it is a uniquely special duty to unite oneself with an ethical commonwealth; that if everyone performed his own private duty,

[21] *Id*., p.87.
[22] Consult also note 19, Watson, *The Philosophy of Kant Explained*; Zammito, *The Genesis of Kant's Critique of Judgment.*
[23] Matthew Parish, **'**International criminal law – justice or mirage?' (2013), http://www.transconflict.com/2013/05/international-criminal-law-justice-or-mirage-025/ (visited on 2 November 2017).
[24] *Id*.

> that would lead to everyone's happening to agree in a common good, with no need for any special organisation; but that there's no hope of such an agreement unless special arrangements are made for them to come together with a single goal, and a commonwealth under moral laws is established as a united and therefore stronger power to hold off the attacks of the bad principle.[25]

Kant's theory of a bad maxim indicates the state of *mens rea*. Let us put it this way: Kant generously divides the metaphysics of morality into several categories. These are *i*) the propensity to evil in human nature; *ii*) the inclination towards bad morality; *iii*) imperative morality; *iv*) universal law; *v*) humanity; *vi*) the autonomy of understanding; *vii*) the categorical imperative; and *viii)* the supreme principle of morality. As we can see, he leaves us with several choices. Due to their gravity, he starts with bad moral choice and ends with good universal moral choice, which seems necessary for the universalisation of the supreme principle of morality. In his book on *The Morality of Freedom*, Joseph Raz deals with these extreme values of the principle of morality.

In other words, the categories in the above list are in the order of the highest stage of *mens rea* towards full control of *means rea* in the nature of man with the element of supreme principle of morality. Thus, Kant encourages the fact that morality in a good maxim should be given priority over any type of soft, harsh, or bad maxim in which morality is a question of personal advantage and not for the sake of good. Inclinations in the intent of *mens rea* should not prevent us from a good maxim that has a genuine moral worth or prevents the implementation of actual *mens rea*.

We should not forget that the notion of *mens rea* comes into existence when we knowingly attempt to execute a certain plan such as: borrowing money from someone with the promise that we are going to repay it, but we are not going to; knowing that our old neighbour has problems with his eyesight and cannot see the apples we are picking in his garden from a long distance; or the shopkeeper example given above.

The concept of *mens rea* constitutes one of the most significant elements of criminal responsibility. It implies the guilty mind of an offender or a propensity to evil action. It is also called the mental requisite for criminality. The system of international criminal law and the provisions of Chapter VII of the Charter of the United Nations both have a strong tendency to prohibit bad maxims or *mens rea* in order to commit any action against security, peace, and justice. They actually refer to mental requisites for criminality in the international legal personality of a member state once it

[25] Rosen note 18, p.87.

attempts to commit certain acts. Chapter VII of the Charter clearly labels the terms "action with respect to threats to the peace, breaches of the peace, and acts of aggression."

In international criminal law, the law intends to prevent criminal acts. In Kant's philosophy, the supreme principle of morality is the natural wisdom of man not to follow a bad maxim and to follow a good maxim as an independent duty and as a legal or dependant duty. Consequently, a wrongful purpose or criminal intent is considered a crime when it is combined with a physical element.

Kant also believes that a propensity to evil in human nature is one of the mental elements necessary to further a bad maxim. The state of propensity to evil is therefore considered a controllable *mens rea* that has not come to pass. But, when a shopkeeper intentionally cheats his customers, the mental element of a bad maxim is translated into actual implementation. This is the same in the case of bad resolutions of the Security Council, which directly or indirectly permit the consolidation of a bad maxim. Thus, *actus reus* or all other actual inclinations serve to commit an action for self-interest/self-love, the evility of which is obvious, namely the evidence of propensity to evil behaviour, evil action, or in extreme cases radical terror.

> If the basic norm of a legal system is good and derives its reasons from the implementation of love for justice, the entire machinery of the same system has to create love for justice. We cannot have a legal system, the constitution of which is based on respecting human rights principles but the legislators of which create norms, which is against the basic idea of the constitution. The legal validity of the basic norm therefore has to be seen within other norms. I am referring here to the norms of law that are not only integrated into national legal systems but also the international legal system. If the Constitution of the United Nations demands justice for all, such justice should also be formulated into all international treaties. This means that we cannot create treaties in contradiction to the core intention of the UN Charter. Love for justice has to be seen within all legal systems. The basis of this philosophy is that the provisions of the Charter shelter all members of the United Nations, and therefore their constitutions and actions have to follow the structure of the organisation. We are all obliged to respect the good norm or the good intention of any law, and the contrary cannot be a fact but a political reality. Any interpretation of the Charter based on radical evil will surely end in radical terror.[26]

[26] Farhad Malekian, *Judgments of Love in Criminal Justice* (Germany: Springer: 2017), p.26.

The objective of the principle of *mens rea* or the propensity to evil conduct was, in fact, one of the significant topics of discussions in the *ad hoc* committee for the establishment of International Criminal Court. According to the Committee, the principle constitutes one of the general principles in the corpus of criminal law. The term '*mens rea'* was therefore chosen from among a considerable number of terms such as 'intention,' '*culpa, dolus* or intentionally,' 'recklessly, or *dolus eventualis,'* 'general intention,' and 'knowingly.' It resulted in the acceptance of the principle of the mental element in the Rome Statute. Regarding the mental element, Article 30 of the Statute, with an explanation for both 'intent' and 'knowledge,' provides that:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where:
> (a) In relation to conduct, that person means to engage in the conduct;
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

8. The Existence of Non-Existence

The whole system of international criminal law is inspired from the provisions of national legal systems. In fact, the core principles of international criminal law are borrowed from national criminal law and its proceedings. For this reason, one may say at the outset that the system of international criminal law is one big national criminal law system. This description is not sufficient, however, and may mislead the reader. This is because governments, police departments, and national criminal courts control national criminal law by one means or another.

In the system of international criminal law, such opportunity does not exist; there is no particular government to control the provisions of the law. In other words, under national criminal jurisdiction, we have a superior power according to which the entire structure of the law is controlled, debated, modified, adopted, and ultimately implemented. As a general rule, the propensity to evil as asserted by Kant, although existent, is controllable by the government in force. Here, I do not wish to discuss

the position of those national criminal law systems or courts which are corrupted.

Thus, in the system of international criminal law, there is a reality which sounds very good, is highly recognized, and adorns itself with provisions of an exceedingly significant character. There also exists a Court, which is highly advanced and internationally recognized. When it comes down to reality, however (hunting the actual big criminals and implementing authentic criminal justice), the entire system of international criminal law becomes a mirage, meaning that whatever you observe is an illusion and does not exist where it should exist. This means that brutality, barbarity, and atrocities increase. This is why Kant tries to prevent the distribution of a bad universal maxim.

The initial difference is that national criminal law systems are effectively under the control of police departments, as any violation of the criminal law system has to be recorded and taken into consideration very seriously. Due to this national phenomenon, most crimes are reported, and a group of criminal investigators examines them. This marks the degree of their effectiveness within national law and the criminal law system. The system of international criminal law does not have a police organisation that is watchful and controlling the commission of international crimes. In fact, a large number of crimes in the international legal and political sphere are not reported and, if they are, they are reported very rarely and unthinkably poorly.

The enforceable authority for international criminal law is i) the individual state, ii) collective measures, and iii) in most cases, the Security Council of the United Nations. The system of international criminal law does not have a police authority; it is solely a question of who has more power. In fact, the system of international criminal law suffers seriously from an illusion. This is what I call the mirage of international criminal law. According to one author

> International Criminal Law - establishes the accountability of international wrongful acts. Can International Criminal Law be considered as an existing autonomous discipline part of international human rights law? Or is it just *a mirage* and therefore an image of national legislations? The following paragraphs will try to elucidate *the existence or the non-existence of International Criminal Law*… International Criminal Law exists, albeit in an imperfect manner.[27]

[27] Pilar Villanueva Sainz Pardo,'Is International Criminal Law a living discipline?,' 3:4 *The International Journal of Human Rights* (1999), pp.92-100,at 92 and 99. Available at http://www.tandfonline.com/doi/pdf/10.1080/1364298990 8406846 (visited 2 October, 2017). *Italics added.*

One may see the crimes, one may see the attacks, one may see the widespread commission of genocide or even apartheid, and all other atrocities against man, but when one attempts to address these matters, they cannot be properly addressed. This means the existence of non-existence in the mirage of the norms of international criminal law and human rights law. Everything is controlled by big political powers. The rules and provisions of international criminal human rights law become a mirage, and one cannot achieve their intentions as long as the big actors in international criminal law do not act.

The excellent legal merits of international criminal law can only be implemented at the desk of the Security Council, and since it has almost never been reached, these merits do not seem to exist. In other words, the system of international criminal justice witnesses a mirage of bloodshed, a mirage of corruption, a mirage of brutalities, and a mirage of victims that are not accessible by the world's population, but are solely under the control of the governments of big military powers. The question is, if the system of international criminal law is effective, why are core international crimes such as genocide, crimes against humanity, and war crimes continuously committed in the international arena?

The different treatments of the victims of domestic or international violence clarifies more seriously this mirage of rights of victims.

> However, it seems doubtful whether the concept of "International criminal practice " exists in reality. "International criminal proceedings" are widely fragmented as a result of the unprecedented development of international or internationalized criminal tribunals which follow very different approaches as far as criminal procedural law is concerned. For example, if one takes a closer look at the issue of the participation of victims in criminal proceedings, one may already observe at least three different types of procedures (i) the practice of the ICTY, the ICTR, and the SCSL is closely based on the common law model which traditionally does not provide at all for the participation of victims in the proceedings; (ii) the Khmer Rouge Tribunal follows the civil law model which allows victims to participate in the proceedings as full parties; and, finally (iii), somewhere between those two approaches are the ICC and the Lebanon Tribunal which allow for the participation of victims in proceedings but with a somewhat undefined status. *'International criminal practice' has become as diverse as national criminal practice and is thus at the moment, and has certainly for a long time been a 'mirage' in international law.* It is obvious that with the adoption of very precise (and different from those of the ad hoc Tribunals) Statute and very precise Rules, states wanted to move away from the Rules adopted by ad hoc tribunals. The reference to those Rules as constituting 'customary international criminal procedural law' is

> not only misplaced but also in complete contradiction with what Article 21 dictates to the ICC judges.[28]

Yet, the most difficult notion of this mirage is the powerful notion of human rights law and its motives, concepts, and protection. The fact is that, when the most significant principles of international human rights law are needed for the protection of groups or nations, the entire notion of human rights becomes a mirage − one we can never touch. In other words, the system of international human rights law becomes just a notion, a habit of speech, and a mere illusion. This means an optical human rights illusion caused by international human rights conventional promises.

> The rule of law becomes a mirage when legal black holes are entrenched. International lawyers specializing in human rights and international humanitarian law have been struggling to confront some perceived holes with regard to the international legal regime governing detention. Detention can be legitimate under certain situations, but it has to be judicially controlled. When the power to detain is exercised in an arbitrary manner, measures to counter legitimate concerns become themselves illegitimate. Respect for human rights law adds to the legitimacy of the measures taken to address complex dilemmas.
>
> Some suggest that the judicial review of the detention is simply a mirage that will never become reality, particularly in the context of armed conflict. As this article shows, judicial review of detention is an integral part of human rights law that is applicable in time of peace and in time of conflict. States have to find a way to reconcile their legal obligations and lawfully use the authority given to them under international law. Actual or perceived conflict of rules cannot be interpreted to place individuals outside the scope of the protection of the law and undermine their basic human dignity. *At the end, it is these black holes that are the mirage*![29]

This much is especially evident through the establishment of international criminal courts. It means the mirage is the refraction of serious human rights provisions, but, in actual reality, such powerfully promising provisions have no power of enforceability or are solely beautiful mathematical rules of international criminal law. A natural mirage is the

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[28] Carsten Stahn, *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2009), P.429. *Italics added.*

[29] Charles Riziki Majinge, 'Peaceful Settlement of Disputes among States and the Rules of Regional Judicial Institutions in Africa' in Charles Riziki Majinge (ed.), *Rule of Law Through Human Rights and International Criminal Justice: Essays in Honour of Adama Dieng* (Cambridge: Cambridge Scholars publishing,), pp.523-52, at 522. *Italics added.*

consequence of heated air of the light from the sky. And the mirage of human rights law is what Kant expresses as existence not being predicate. I use his words, as he most probably means the existence of non-existence and the non-existence of existence.

9. Kant's Dimension of Predicate Existence

Kant uses the term "existence is not a predicate" in relation to the idea of God existing by necessity. He means that existence is an essential substance of God. He further explains that existence cannot be an imperative part of *anything* that was inherently *accidental.* Consequently, he reaches the conclusion that existence cannot be indispensable for its existence. Core crimes against human beings exist in all parts of the world, and the existence of a considerable number of international human rights conventions or international criminal conventions do not affect the commission of crimes or the non-existence of crimes.

This also means that territories in which international crimes are committed should change from time to time, but the powerful provisions of international criminal law are solely a mirage of provisions. In other words, self-love is the real picture of most provisions of human rights law. But where the provisions of human rights are necessary, they are just a bare illusion. Kant believes that the predicate existence of an object does not extend to the perception of that object. According to him, the judgement that something exists is at all times fake rather than *critical.*

Yet, the difference between national criminal law and international criminal law is the existence of national criminal courts. Although we do not reject the fact that international criminal law also has a permanent international criminal court and a considerable number of *ad hoc* international criminal courts, the courts do not have the power of a national criminal court. This is because the latter exists and its doors are open at all times in order to prosecute suspected criminals. Almost all national crimes and almost all suspected criminals come under the jurisdiction of the court.

However, the position is different regarding international criminal courts. First, the ICC has a limited jurisdiction and cannot bring all suspected criminals under its jurisdiction. It is simply a question of who knows whom and who has strong military power. For example, up until today, the ICC has been incapable of bringing powerful criminals under its jurisdiction.

The Court's decisions have therefore been very limited, and it has mostly had jurisdiction over suspected African persons. Corruption exists

in the practice of the law, in the rules of the law, in the proceedings of the law, and in its final judgement. *All this constitutes a very bad universal maxim.* Second, there is a long process involved in the prosecution of international criminals. This is because we cannot bring international criminals directly under the jurisdiction of the ICC.

Chains of command have to be created, adopted, and performed, and, in the end, they may ultimately be rejected. This may not only occur by means of the court itself, but also by the direct and indirect intervention of the Security Council. It means that most suspected persons may escape prosecution and punishment. In other words, the propensity to evil in the nature of the court has indirectly been entered. The problem becomes even larger when it comes to the question of priorities and the very concept of complementarity of the court.

Accordingly, if you are not a strong military state or one of the allies of the big political parties, you will almost always be found guilty. In other words, a state will be forced to accept a plea deal offered by the Security Council and its resolutions. This has occurred in cases involving Iraq, Libya, Afghanistan, Yemen, and many African states. If a state is not strong, and if it is poor in its military position and particularly its economy and politics, its words will not be heard properly. A state may have a very strong economic income because of its national resources, but it may still be politically or economically weak. The same state may not want to follow the underground political relations of strong states, and that always puts said state in danger.

10. Kant Awakening the Complex Form of *Fata Morgana*

I should not be misunderstood in my task when writing about the concept of a mirage in international criminal law. Practically, I am not here aiming at the United States' political relations and ignoring the strong power of Russia and its underground political exchanges with other states. The words of the strong political powers in the Security Council are always the same and carry the same priority, even though they are fabricated and tamper with evidence. This implies the fact that they manipulate every piece of evidence and even witnesses.

As Kant says, it is impossible to prevent the propensity to evil in human nature when it has already been awakened because of man's greed

for wealth and love of power.[30] Here, he is absolutely referring to *mens rea,* or criminal intent constituting the essential *mental element* of *criminal* responsibility, with *actus reus* being the essential objective element. I am here aiming at the physical element of crime such as the inhuman attacks under the two Gulf Wars in Iraq. Kant also means that the words of the superpowers are always strong and will be treated as such by most nations, particularly their allies, as the final stage of interpretation and application of the law.

This is a bad maxim or a maxim that should be called a strong *mens rea* or a powerful feeling of knowing the future intent of military attacks because of the broad inclination to sponsor the evil behaviour of the permanent members. Do we not in the provisions of Chapter VII of the Security Council find the mental element of the crime when it comes to the wording of certain resolutions that aim at the destruction of, e.g., Iraq, Afghanistan, or Syria, due to the hidden truth of September 11? Or do the machinery of criminal law, the understanding of the reality of its nature, and the discovery of the truth of the subject of the resolutions require several decades to pass before a particular *mens rea* becomes evidently proven?

Another serious problem is that the permanent members of the Security Council have certain criteria for recognition of good friendship. One of the core principles of this good friendship is to react to international matters as they do and to contribute to good, productive relations in order to consolidate their interests. Yet, a Security Council decision and its resolution may not only be based on the political, military, and economic capability of a given state; it may also depend on race and religion. Generally, the permanent members of the Security Council, particularly the strongest one, also take into consideration religious beliefs, which is obviously against the spirit of the United Nations Statute governing the protection of human rights law.

All this indicates that the system of international criminal law is an illusion denoting the existence and non-existence of a mirage, which cannot be as effective in the international legal order and as peacekeeping as it is thought to be. As we will see, this mirage can sometimes be considered a *fata morgana* constituting an unusual and complex form of a superior mirage – one that is unbelievable, but people believe has occurred, so it is there. As I will prove, the events of 11 September 2001 are one of these superior mirages and can be termed the superior *fata morgana* of the system of international criminal law that has been the

[30] But see *also* Hans Saner, *Kant's Political Thought* (University of Chicago Press, 1973).

reason for destroying most of the Arabic region and committing atrocities against its population. The American writer Mark Osiel describes what atrocities really are in the renowned book *Mass Atrocity, Collective Memory, and the Law*. The book gives a good picture of international criminal law, the illusion existing in the legal system of the world, and the serious illness of international politics.

11. Inclination in *Mens Rea*

The entire system of international criminal law is based on the concept of commission of certain crimes. For the recognition of an act as an international crime, it must be committed against the provisions of certain international criminal conventions, the violation of which is considered an *internationally criminally wrongful conduct*. There are, however, different criteria for the recognition of an international crime, depending on the source of our reference and interpretation. An international crime is an action or inaction violating certain prescribed, significant behaviour in the arena of international criminal sources.

These sources may be conventional or customary law or a general principle of law, which are recognized as a source of international criminal law by most nations of the world. Examples of conventional sources are conventions on genocide, torture, or apartheid. Instances of customary sources and recognition of certain acts as international crimes are piracy, slavery, and brigandage. Examples of a general principle of law as a source of international criminal law are the destruction of historical buildings, which constitutes the integral identity of a nation, and killings of infants, the elderly, and pregnant women.

The commission of these acts are prohibited and recognized as completely unjust. Their commission is against international morality as a whole. All of them denote the existence of a bad maxim and, yet, many of these crimes may overlap with one another's characteristics. Bader gives a good picture of the concept of *mens rea* in his book *Mens Rea*. He analyses the way in which *mens rea* takes shape. Although he fails to identify the existence of *mens rea* as the consequence of a bad maxim in the mirage of international criminal law or the Security Council's actions, he is sure that something is seriously wrong with the system of international criminal law and justice.

Most international crimes are defined in terms of behaviour, action, or conduct performed wilfully by the perpetrator. This means the commission of certain acts under the principle of *mens rea*. The concept of *mens rea* can be understood from the content of all international criminal law

treaties. An example is Article 8 (1) (a) of the Rome Statute governing the concept of an international criminal court. The article is an integral part of the ICC Statute today. It deals with grave breaches of international criminal law. It lists *inter alia* wilful killing, torture, or inhumane treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; wilfully depriving a prisoner of war or other protected person of the rights to a fair and timely trial. Article 8 (1) (b) goes even further and lists many other international crimes that, according to the theory of Kant, are an extreme demonstration of knowing propensity to evil in human nature, including the mental element or a violation of the supreme principle of morality. Here, as before, I am referring to *mens rea* or the intentional inclination to commit evil behaviour, as Kant expresses in his shopkeeper example or in the example of borrowing money from the neighbour and having already decided not to repay it. The extreme violations are, for example:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
(xii) Declaring that no quarter will be given;
(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
(xvi) Pillaging a town or place, even when taken by assault;
(xvii) Employing poison or poisoned weapons;
(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

Then the question arises whether there is no inclination to evil and men rea when the members of the Security Council or the sole power of the legislation of the world to maintain peace engages in trades in weapons and acts of aggression? Chapter VII of the United Nations Charter sets out the United Nations Security Council's powers to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to receive from the United Nations members military and non-military assistance to "restore international peace and security". *Why, then, there is to many wars? Almost everyone would consent that to kill each other is evil - - disobediently evil, regardless of any auxiliary arguments for or against it.*

If we believed the contrary of what we have told in the above paragraph; if we also ostensibly believed that the Charter is an excellent equal law-making treaty and not unequal one; if we trusted that military actions established, beyond a shadow of a doubt, that they are peaceful and preventive of conflicts as nothing else could be; If, we are fretful to put our case of military evil inclination in a way that nobody realise its nature; If we still believed that any prevention of military operation regardless of the legal classification of the situation would certainly be resulted by a disquieting boost in the number of aggressive military actions; we are still decisive to express and repeat it again with undiminished assurance, that the most imperative of all duties which congregate us in the United Nations Organisation, or could congregate any regional or international legal body that had a sagacity for the supreme principle of morality or the supreme human values - is the definite abolition of all military operations occurred under the secret and invisible conventional powers of the Security Council.

12. Lawful and Unlawful *Mens Rea*

Kant offers a different account of morality and shows us why we constantly have a duty beyond duties to respect the dignity of persons and not to violate the principle of humanity. This occurs with the full intention of achieving the supreme principle of morality. Thus, the term “supreme principle of morality” constitutes one of the first principles of justice and

one of the principles by which we can judge our own entities, judgments, decisions, and actions. It means the skeleton of our duties are constructed accordingly and are so important that one should not use the natural and legal characterisation of people even for good ends. This further means that the freedom of the people should not be violated, should not be destroyed, and should not be humiliated by the tools of war, the tools of politics, the tools of trade, and the tactics of economic self-love. All these considerations imply the commission of criminal behaviour in our crippled criminal law. It is crippled because it can make the stealing of a few carrots or lettuce a crime that is punishable according to certain sanctions, but the million-dollar trade in weapons to kill each other is lawful. Clear examples are the Swedish, English, German, Danish, Norwegian, Finish, and French legal systems. We should also not lose sight of the fact that the United Nations Organisation and the Universal Declaration of Human Rights came into force when we still had true human zoos in Europe and Africa.[31]

Obviously, Kant means that we cannot have lawful *mens rea* and unlawful *mens rea*. We also cannot have human beings as an essential object of human civilisation, human rights law, and the basic reason for the promotion of the United Nations body, but at the same time as the item of our actual zoos. Similarly, we cannot require the necessity of a mental element for most crimes under national and international criminal law, but forgive and forget the mental element, the subjective element, and *mens rea* in the case of the permanent members of the United Nations Organisation.

In other words, the subjective element in criminal law gives rise to the concept of crime; the subjective element in Kant's metaphysics or knowing propensity to evil conduct, evil decisions, and self-interest, including violation of the rights and interests of others, indicates criminal conduct or *mens rea*. The notion of *mens rea* can even be raised in the case of the subjectivity of recklessness. In *Sansregret v the Queen,* a case before the Supreme Court of Canada, it was stated that:

> In accordance with well established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of subjective. It is found in the attitude of one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is

[31] Gabriella, Deep Racism: the Forgotten History of Human Zoos, available at *http://gabriellagiudici.it/deep-racism-the-forgotten-history-of-human-zoos/* (visited on September 23 2017).

> in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.[32]

Kantian metaphysics concerning a different account of morality not only applies to individual wills, but also to states' wills, organisational wills, and the wills of the permanent members of the Security Council.[33] This theory of Kant should also be discussed alongside the theory of utilitarianism, which promotes self-interest and can ultimately cause war and the commission of international crimes. On the contrary, Kant's theory struggles for the implementation of appropriate principles of justice.

The significant role of justice is dealt with in the excellent and astonishing subject matter of three heavy volumes written by Professor Nasser Katouzian, the father of law in the Persian history of positivism, under the title *Step Toward Justice*. In the first volume, he indicates that, in law, there are two high values. One is the value of discipline and the other is the value of fair division of justice. These two values accomplish one another's intentions. In a country which does not have discipline − neither justice nor a territorial jurisdiction that fulfils the principles of justice − its discipline has no practical value. For instance, the discipline existing in prison also constitutes the highest level of discipline. Discipline without justice and security without justice have no substantial value either. The factor that gives a significant value to discipline and security and is the essence of these two subjects is the integrity of justice. (255) The question therefore is: has the integrity of international political, human, and legal justice been maintained with the mirage provisions of the system of human rights law and the United Nations law?[34]

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[32] Sansregret v The Queen (1985) 45 CR (3d) 193, 203-04 (Security Council).

[33] But see note 7 Gottfried *Kant's Metaphysics and Theory of Science*; Paton, *Kant's Metaphysic of Experience*; Heidegger, *Kant and the Problem of Metaphysics*; Dryer, *Kant's Solution for Verification in Metaphysics*.

[34] Lukman Harees, 'The Mirage of Dignity on the Highways of Human 'Progress': - the Bystanders Perspective (2012). "Many respondents said they had become frustrated with their ICC experience. One of the victims' lawyers put it this way: "The do see it largely, as far as I can tell, as an example that yet again the rich and the powerful have triumphed, and yet again the process of justice is a bit of a mirage because they are being forgotten, and the most powerful man in the country from the richest family in the country has succeeded." 'The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court' *Human Rights Center, University of California, Berkeley, School of Law*, 2015), available at https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf (Visited on 1 November 2017), p.54.

CHAPTER II

THE MIRAGE OF INTUITIONISM IN INTERNATIONAL CRIMINAL LAW

1. Introduction

One of the basic principles of Kant's theory is intuitionism, which includes synderesis and natural law theory.[1] Synderesis is a *special mental process* and *innate awareness of morality*. The inherent principle in the moral insight of every person guides the agent towards good conduct and prevents him from evil conduct. The natural law theory means that humans have an intuitive awareness or knowledge of morality.[2]

This intuitionism tells us to let the conscience determine the right or wrong of each act. It means active intuitionism is based on moral understanding, moral conscience, and moral knowledge. They all indicate the innate awareness in human beings. We have to evaluate the consequence of each activity we undertake. Yet, acting upon the notion of intuitionism may prevent us from not vigilantly considering the

[1] It is interesting to know that "fundamentally, the *Rechtsstaat* means a state based on reason, the roots of which also lie in Kant, who saw law as the synthesis of morality and nature; the *Rechtsstaat* was a practical manifestation of these abstract ideas into practical choice and realization of moral freedom.120 Concretely, today this means that the state in its execution of power is to act rationally, neutrally, and equally, meaning at least that actions must apply generally to all and not single out particular people; that state actions and legal measures must have a legal basis and discernible content and provide fair notice; and that these actions must also be proportional to the ends they seek. This last idea is known as the Proportionality Principle and calls for a close nexus between means employed to accomplish ends sought." Edward J. Eberle, 'The German Idea of Freedom', 10 *Oregon Review of International Law* (2008), pp.1-76, at 47-8.

[2] But consult *also* Richard E. Aquila, *Matter in Mind: A Study of Kant's Transcendental Deduction*. (Indiana University Press, 1989); Justus Hartnack, *Kant's Theory of Knowledge* (Harcourt, Brace and World, 1967). See *also* Paul Guyer, *Kant and the Experience of Freedom* (Cambridge University Press, 1993); Graham Bird, *Kant's Theory of Knowledge* (Humanities Press, 1962).

appropriate measure of conscience and the consent of other parties for whom or against whom the act is taken. Hence, acting on intuitionism may cause inconsistency.

We thus have to look at particular rules that can be a standard for intuitionism in order to be consistent. These are moral rules that should be carried out in good faith, regardless of outcome, e.g., whether it is good for us or not. We should search for the categorical imperative, which is a moral force that is universal and implies absolute command – universal moral truth. Basically, morality is valuable in its own right. It implies *good will*. Solely absolute intrinsic good will makes a decision morally valuable. Other intrinsic values/goods can otherwise be corrupted unless they are connected with good will.[3]

This is why Kant refers to the hypothetical imperative (if you want this, do that). In contrast to the hypothetical imperative, Kant also refers to the categorical imperative. As said elsewhere, this necessitates performing a moral duty for its own sake or duty for the sake of duty (do your assignments under all conditions and circumstances). In its own terms, this implies universalising action or creating a maxim that is equally applicable to everyone. If an action cannot be universalised, it is immoral.

If the Security Council resolutions are solely against certain members of the United Nations and do not apply to the dangerous acts of the permanent members or others, then they are immoral maxims. This also means that each state is rational and each state's international legal personality or dignity should be treated with respect. The Security Council should treat states as ends and not as means.

Furthermore, the basic concept of international conventions of human rights law that concern human beings are contained in the territory of United Nations members. This theory applies even to the human-legal personality of a state and its inhabitants, which are not official members of the organisation. Still, all these considerations should be based on the principle of the autonomy of cultivating universal moral laws. Universal moral law can also be individual moral law that is practised solely by a single person.

Universal moral law does not necessarily need collective application; the core principle is that it presents good will, even though not all others respect it. A single universal good maxim should not be influenced by a

[3] Consult Patricia A. E. Hutchings, *Kant on Absolute Value* (Wayne State University Press, 1972); Hardy E. Jones, *Kant's Principle of Personality* (University of Wisconsin Press, 1971). See *also* Patricia Kitcher, *Kant's Transcendental Psychology* (Oxford University Press, 1990); Salim. Kemal, *Kant's Aesthetic Theory: An Introduction* (St. Martin's Press, 1992).

collective universal bad maxim. In fact, the principle of autonomy is against the principle of heteronomy. No authority controls the first one, while the second has to follow actions motivated by the authority of others, e.g., rules or codes provided by parents, the state, aristocracy, nobility, religion, and, in our case, by the permanent members of the Security Council.

It should be emphasised here that Kant understands that there may be serious conflicts in conjunction with the categorical imperative, whether in individual, group, state, or Security Council decisions. This is why he encourages us to always take a decision in accordance with reason.[4]

2. Autonomous Beings

Kant partly rejects utilitarianism and strongly believes that all individuals have a certain dignity, which has to be respected by all individuals and entities, including states − not because we are individuals and should be respected on this account, but because we are all "rational beings." This simply means that we are capable of reason.[5] We are also self-ruling, self-directed, and autonomous beings. Here, he means that we are fully capable of acting and orienting our decisions freely. In other words, the human capacity for reason and freedom is not its sole capacity, but human beings also have the capacity for suffering, self-satisfaction, self-love, troubles or pleasure, and self-independence.[6] Kant therefore believes that the individual is sacred, and it follows that the individual should not be the tool of the Security Council. Even state members of the United Nations do not have any right to act against the inherent dignity of man, which is the essence of the existence of humanity.[7]

As a whole, Kant does not entirely reject utilitarianism. We naturally seek to avoid pain and that we like pleasure. Kant's metaphysics does not

[4] Examine the good discussions in Francis, X. J. Coleman, *The Harmony of Reason: A Study in Kant's Aesthetics*. (University of Pittsburgh Press, 1974); Norman Kemp Smith, *Commentary to Kant's 'Critique of Pure Reason"* (Humanities Press, 1962); A. C. Ewing, *A Short Commentary on Kant's "Critique of Pure Reason"* (Methuen, 1978); N. A. *Sense,* Nikam, *Understanding and Reason* (Asia Publishing House, 1966); Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press, 1989); P. F. Strawson, *The Bounds of Sense: An Essay on Kant's " Critique of Pure Reason"* (Methuen, 1966).
[5] *Id.*
[6] *Id.*
[7] *Id.*

deny this. What he really denies, however, is Bentham's claim that pain and pleasure are our personality masters and decide on all other matters. Kant believes that such an idea is not correct, because our rational capacity makes us distinctive and special, not pleasure and pain. Here, he bases his ideas on self-treatment and self-rationality and chooses human beings over animal existence. For him, freedom does not mean we can do whatever we want, whatever we think, and that there is no limit to our scope of activities. Kant goes against this freedom and rejects such a concept entirely. He attributes other aspects of freedom to individuals. His demands are positive, convincing and persuasive.

If mankind seeks animal-like pleasure and the satisfaction of his own desires while avoiding pain, we are violating the scope of the rights to freedom of others, since we want to achieve our own satisfaction at whatever price, even at the cost of the destruction of the freedoms and rights of other individuals. When we ignore others and pursue our own desires, we are fully acting (freely) without taking any responsibility for the rights of the others. This is what Kant is against and this is also where, as we will discuss throughout this book, Kant's view goes against the content of certain resolutions of the Security Council.

In other words, we become the slaves to our freedoms. To act upon natural necessity and upon certain personal design and intent means freedom without accepting responsibility and by violating the sovereign freedom of others. Kant considers the concept of freedom to be the opposite of necessity. This is what we are insisting on when we say that the Security Council resolutions emanate from certain inter-state intentions of certain permanent members who violate the rights of other nations based on awful and unequal provisions of the Statute of the United Nations concerning the power of Security Council.

In reality, the provisions of Chapter VII of the Charter have become the way in which we design our inter-personal interests and violate the rights of other states and their populations. These violations of freedoms of other nations mean some states do not act freely, but upon the individual reasoning of the permanent members. For a state to act freely or to be fully independent means for it to act autonomously. It also means acting according to a law that provides equal norms, equal wishes, equal interests, and equal love for justice.

Because of the provisions of the Security Council or Chapter VII of the Charter, the member states of the United Nations do not act freely, and they are in one way or another obliged in their decisions and actions to consider and reconsider the reaction of the permanent members. Since the permanent members act for their own sake and interests, the entire

philosophy of peace, justice, and cooperation in the Charter becomes a superior *fata morgana* that is impossible to achieve because of the non-existence of a real Lady Justice. The concept of "autonomous" is itself more of a mirage than a reality.

> The German philosopher Kant developed a hybrid view of law, morality, and love. It is therefore sometimes very difficult to separate his views from legal moralism or legal positivism. The former is the philosophy of law, which maintains that laws may be employed to prohibit or permit certain behaviour that seems right or wrong based on majority judgement. This arises from the moral attitude of the given society. The latter view or 'legalism' is the extension of and the respect for the former when we adopt or formulate the will of society into a legislation or constitution. This legislation is enforceable. One may assert that Kant was a moral realist or value realist in stark contrast to a representative of Neo-Darwinian materialism.[8]

Furthermore:

> Kant tried to avoid any damage to moral autonomy; a position which followed inevitably from value realism. Accordingly, there are things that constitute moral facts and do not cause illusion. That is the nature of moral judgment. This is a judgment, which is capable of distinguishing between true or false regarding such facts. Actually, Kant agrees to a divine command view of moral obligations. He therefore tries to connect the good ordered by divine law and the good for the autonomy of moral obligations. Since divine laws are not in themselves enforceable, he places them within the moral agent itself rather than in God's theory. Thus, according to this philosophy, good has to be a part of the principle of morality. In other words, morality has to be good; this is also the nature of morality under the command of God. The good is itself the rejection of bad intentions and the presentation of love for humanity. This notion of good in morality also has to be seen in our international conventions, in our interpretations, and it must be a part of the rule of law as well. Morality is a positive action in opposition to evil or immoral action. In addition, good morality does not apply solely to practical motive but also to the substance of our wills.[9]

For Kant, to act in accordance with our physical strength, military power, and political intrigues is no longer within the territory of freedom, but within the territory of force and serious propensity to evil in human nature or an organisation, implying the existence of clear *mens rea* transforming

[8] Farhad Malekian, *Judgments of Love in Criminal Justice* (Germany: Springer: 2017), p.22.
[9] *Id.*, pp.22-3.

into practical reality. A parallel can be drawn to the Nazi organisations, which were acting freely, but violating the entire structure of freedoms of other individuals, groups, and minorities. Consequently, Kant strongly objects to the basic principles of utilitarianism in which morality appears to be kicked around like a ball in football match. Put differently, the existence of soft *mens rea* can change into hard *mens rea*, in other words practical action or actual criminal conduct. For these reasons, Kant informs us about bad inclinations in human nature and their developments into such maxims, which are not good and can be against the supreme principle of morality.[10]

3. Heteronomy in International Criminal Law

In order to prove his concept of metaphysics, Kant uses the term "heteronomy." The term means doing or taking decisions that are not based on rational or legitimised reason.[11] Kant means that if one acts upon an inclination or according to desires, one has not chosen oneself. This means freedom is autonomy. It is a particularly stringent idea that Kant insists upon. It is not easy to achieve and one has to understand its ethical, moral, and public connotations. Why is autonomy the opposite of acting heteronomously or with due consideration for the dictates of nature?

For example, Kant believes that laws − laws of cause and effect − govern nature. For Kant, to act freely is not to choose the best means towards a given end. Rather, it is to choose the end itself for its own sake. This means to act for the sake of justice and not for the sake of own individual desires.[12] With this, I mean that Kant would guide the Security Council towards the good result of acts in the interest of international democratic rules, democratic benefits, and the control of self-interest. In other words, the human capacity is vast and insightful and can control those self-interests that Bentham, regrettably, supports.

Kant's aim is to guide us out of the international criminal law mirage or atrocities committed in the implementation of a bad maxim. He does not want to create wars, killings, and torture as committed very seriously in the Abu Ghraib prison in Iraq or in the Guantanamo Bay detention

[10] Consult Gray Cox, J., *The Will at the Crossroads: A Reconstruction of Kant's Moral Philosophy* (University Press of America, 1984); A. R. C. Duncan, *Practical Reason and Morality* (Nelson, 1957).
[11] Consult *note* 4.
[12] See also Edward J. Eberle, 'The German Idea of Freedom,' 10 *Oregon Review of International Law* (2008), pp.1-76.

camp.[13] Darius Rejali describes these bad maxims in his book entitled *Torture and Democracy*. This is a treatise touching upon the most central questions of morality; according to the author, torturing the essence of our existence goes against the basic foundations of human morality.[14]

Kant believes that human beings should not act as animals, but should think their decisions through to the end. In other words, self-pleasure should not control our principles of humanity as a reason to violate the rights of others. In light of the same philosophy, I will reflect on the Security Council's function, with particular deliberation given to the core intentions of the United Nations Charter as clearly stated in its Preamble. It pledges the following:

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom.

All these provisions should be read wisely and with particular consideration that, for Kant, freedom is an autonomous idea, namely not to violate the rights of others, even when the moral aspects of our own design are not given priority. It is also based upon the significant principle of freedom for all, but also based on the good of all states/nations that the Preamble of the Charter clearly states the following objectives:

- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples.

[13] See also Mona Rishimawi., 'A Reality or a Mirage: Judicial Review of Detention,' in Charles Riziki Majinge (ed.), *Rule of Law Through Human Rights and International Criminal Justice: Essays in Honour of Adama Dieng* (Newcastle: Cambridge Scholars publishing, 2015), pp.507-522.
[14] See note 10.

The principles in the above guide us to act on behalf of what is beyond us, i.e., to have an inclination of pleasure for all and not harbour an innate will within ourselves alone. According to Kant, the Security Council should pursue pleasure that ultimately brings justice for all and does not culminate in the entire destruction of Iraq, Libya, Afghanistan, or Yemen. Our acts should be conducted towards the realisation of such ends as well as united strength and promotion of good will for all peoples. This means respecting human dignity, individual dignity, group integrity, and state integrity. All these terms, individually and collectively, mean regarding the acts not just as a means to an end, but also as an end in themselves.

This is the reason why it is essentially wrong to use people, to use individuals, to use a nation, and to misguide the international legal and political community with questionable resolutions ending in the destruction of nations. For the sake of international populations and their happiness, Kant therefore lays down the theory of the supreme principle of morality. This is one of the reasons why Kant goes against utilitarianism: the happiness of the majority is the happiness of all.

For Kant leading good is attaining both, i.e. complete virtue and happiness at the same time. However, not only is there no necessary link between the two concepts, in contrary, it is the case that doing what is good or right is in disagreement to doing what would make us happy. This means Kant very narrowly correlates the principle of morality, the principle of reason and the principle of freedom.

Yet, one of the necessary conditions of morality is that the praiseworthy conducts are entirely performed freely. The conduct can be free if the individual was motivated by his own intention or his own reason and not bodily desires. Examples are hunger, lust threat or any other coercive measure imposed by force, then his actions are not free and cannot be recognised morally praiseworthy. In other words, actions or conducts must consistent with moral law.

Kant argues that reason says us that act solely with that maxim that you want at the same time that act can become a *universal law*, but do not aim with the act to achieve to your happiness alone. This is for Kant categorical imperative. This means that our actions can be assessed against the principle of categorical imperative in order to evaluate if their natures are consistent with the demands of morality.

Obviously, Kant understands that this happiness may also be used by others in general and be restricted when the whole idea affects the inner feelings of man and is ultimately monopolized by the permanent members. Kant clearly purports: “We must not expect that a good constitution

because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men."

Kant's words are completed by those of Chief Justice Johan Marshall in *Marbury v Madison*. He tells us: *"*The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." This is what the Security Council has to respect with good faith in order to avoid radical terrorist interpretations. The purposes of the provisions of Chapter VII of the Charter are and should be the maintenance of peace and justice.

4. Morality Equating Freedom

It is wrong to use some nations for the sake of other nations' self-interests. This is the real reason why Kant says it is important to respect the dignity of all human beings and leave the sovereignty of their rights untouched. Even in cases in which the resolutions of the Security Council maximize the concept of justice, we still have not let all people or members of the General Assembly express their views. For this essential reason, the General Assembly resolutions governing the international crime of apartheid were against resolutions of the Security Council; both aim to maximize justice from their own angles. When justice is in the hands of the Security Council, however, it is still wrong, because it acts for purely reliant or conditional reasons stated in the provisions of Chapter VII of the United Nations Charter. As a whole, every single provision of the Charter points out that, in the final stage, the entire United Nations is under the authority of the permanent members. This is because justice is in possession of the Security Council for instrumental reasons. It will utilize the entire international human community for its own calculated reasons rather than respecting it as an end in itself. Therefore, in this regard, Kant views freedom as autonomy interwoven with the idea of morality.

The question, however, is what brings an action to the concept of moral worth. This question arises from Kant's powerful, challenging idea of freedom and notion of morality. It may be answered by saying that the action does not consist in the consequences that follow from it. This is because we recognize the moral worth of an action when we look at its motive and quality of will.

For instance, the apartheid cases in the General Assembly and the Security Council, document that two of the permanent members and their allies had no interest in ending the apartheid system, and therefore the result and motive quality was wrong, since it ended in the same circuitous result. This is the same in the case of Palestine, despite whatever positive

decision is taken in the General Assembly; the Security Council still has not established the rights of the Palestinians in the occupied territories.[15]

In other words, the positive aspects of the General Assembly resolutions are barred by the Security Council decisions. According to Kant, slowly and gradually brings the relevant Palestinian territories under complete occupation or possession of the occupying power is a not morally worthy result. The decisions of the Security Council on the occupation were taken for a wrongful intention. Consequently, the moral worth of the Security Council resolutions depends on its motives and the result. An action should be carried out for the right purpose and the right reason and not to the advantage of some and ignorance of the rights of others.[16] This is what I discuss in my article *Judging International Criminal Justice in the Occupied Territories*. The original title of the article was, in fact, *Crucifying International Criminal Justice in the Occupied Territories.* Imminently before publication, I was officially informed in an e-mail that the entire article would be rejected if the term 'crucifying' would not be replaced with the term 'judging'.

As Kant asserts, "a good will isn't good because of what it affects or accomplishes**,** it is good in itself**.** Even if by utmost effort the good will accomplishes nothing it would still shine like a jewel for its own sake as something which has its full value in itself**.**" This means doing right thing for the right reason.

It also implies the fact that, in order for any action to be morally good under the Security Council resolutions, it is not sufficient that it obey the rules of moral law and the provisions of Chapter VII of the Charter. Such action also has to be taken for the sake of the basic principles of the Charter, including what is listed in the Preamble and the consensus achieved in the General Assembly. The entire idea is for the intention to confer the moral worth of an action. Thus, when the Security Council resolutions call for the destruction of Iraq, with the sole intention of bringing oil under its own control, they cannot be morally worthy or, in other words, the end confirms the means.

For Kant, all of these motives have to do with our inclinations. The inclination here implies our plans, desires, and impulses. In fact, actions solely been carried out for the sake of the core intentions of the Charter,

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[15] Pietro Stefanini, 'Palestine and the Mirage of International Criminal Justice – Can the ICC improve the Security of the Palestinians,' available at http://platform.almanhal.com/Files/2/90090 (Visited on 1 November 2017).

[16] Consult Norman Kemp Smith, *Commentary to Kant's 'Critique of Pure Reason"* (Humanities Press, 1962). Francis, X. J. Coleman, *The Harmony of Reason: A Study in Kant's Aesthetics*. (University of Pittsburgh Press, 1974).

for the sake of moral law, for the sake of the duty of the United Nations, and for the sake of the proper implementation of the principle of human rights law have a moral worth only if our intention creates a good maxim.

5. Motives Endangering Morality

The fact is that many resolutions of the Security Council have caused thousands and thousands of people to be killed and, similarly, millions and millions of people have become refugees. The reality, however, is that we ignore these events and do not pay particular attention to them, because we are used to believing that the Security Council is doing good and the right things. In addition, we never answer the following simple questions:

Are the permanent members in the territories of Iraq or the contrary? Has the Iraqi military power destroyed the homes and installations of the United States/the United Kingdom or the contrary? Have the estimated number of 550,000 children died in the United States and the United Kingdom or Iraq because of the Security Council sanctions during the first Gulf War? Does the Iraqi government have the intention to occupy the territories of the permanent members or the contrary? Has ISIS really been created by the Iraqi government or the contrary? Were the Abu Ghraib events perpetrated against the United States Army or the contrary? Have the provisions of international criminal law been seriously violated by the government of the permanent members or by the government of Iraq? Were the questionable events of September 11 against the Muslim World or the contrary? Was the intention to occupy Iraq, Libya, Afghanistan, and Iran or was it to occupy Israel, the United Kingdom, and the United States?

More or less similar questions may also be drafted about Cambodia, Egypt, Palestine, Syria, Yemen, Vietnam, and many other countries. Certainly, a large number of people have been killed and became homeless, because it is obviously impossible to provide a precise statistic of the killings based on the Security Council resolutions. A rapid glance at the books by Richard Falk, particularly the four volumes in *The Vietnam War and International Law,* implies the miserable facts of bad maxims in the practice of the permanent members of the United Nations. His books say precisely what Kant says, and he tries to prevent the universalisation of these horrible maxims.

According to Kant, only one type of motive is consistent with the notion of morality. This is what he calls the motive of duty. One may describe this duty as performing or acting for the right thing for the right reason. Certainly, the right thing here does not mean violation or commission of crimes or adopting certain resolutions for the sake of secret

superpower interests. Kant believes that there are different types of motives when a decision is taken. This is the same in the case of the Security Council resolutions, the content of which implies the nature of the motive. Kant sums up different types of motives in the category of inclination, which exists in the content of various resolutions of the Security Council or even the General Assembly.

In all these theories, as I have stated earlier on several occasions, I am referring to the aspect of Kantian philosophy concerning categories of inclination, which are part of the substance of man. I would like to apply the same philosophy of Kant here. We often observe various positive or negative intentions in the content of the resolutions of the Security Council and the General Assembly. In fact, for reasons of the category of inclination in the nature of man, we have created the voting process in the General Assembly and in the Security Council of the United Nations in order to reach, to some extent, equality among nations. Similar conclusions can be drawn about the voting processes we pass under election systems and also in governments.

But, we will yet see that the voting of the majority cannot be always correct. Kant also makes us aware of the nature of motive and the supreme principle of morality as an end to the principle of humanity. Thus, it is not important to talk about the principle of humanity to the tune of propaganda, but it is highly significant that such humanity arise from a clear inclination towards the sake of man and without particular personal advantage.

In other words, we should not use the principles of humanity and the declarations of human rights law for the sake of our own interests and ends. This not only includes the elements of human rights law entrenched in the Charter of the United Nations, but also the Universal Declaration of Human Rights formulated by the United Nations, the American Declaration of the Rights and Duties of Man, the Déclaration des Droits de l'homme et du Citoyen, the European Declaration of Human Rights, the Latin American Declaration of Human Rights, and the Islamic Declaration of Human Rights. This is what George Schwarzenberger addresses in his books on international law in order to minimize the monopolisation of the rules of law and morality in the Security Council.

6. Supreme Principle of Morality

By "supreme principle of morality," Kant means that one should not (or the Security Council should not) employ the plea of humanity as a tool for its own intents and purposes. Kant's theory is that, each time that we use this motive for satisfaction of a desire or a preference, it means that we are

pursuing an interest. This implies that we are acting out of inclination. In other words, in so far as we act morally, our actions have moral worth. Thus, he lays down the criteria of moral worthiness. According to him, an act should be morally worthy and should not be carried out for personal interests. As we will see, such acts, motives, or intentions should not end in killings or the murder of individuals.

We will also see that Kant even prohibits or condemns suicide – to him, suicide is the murder of human integrity, and the integrity of human beings has superior value for humanity and should not be violated by any means. It further implies the fact that, when certain members of the Security Council take certain actions for the sake of their own interests, adopt resolutions (originally basing their motivation on lies), and destroy a country, this cannot be a good motive for the end. This means the actions are not morally worthy.

But, the question is what motive and maxim imply good action and what can be evaluated as morally worthy. For Kant, that which confirms moral worth is precisely our capacity to rise above self-interest, prudence, and inclination and to act out of duty. Kant's philosophy puts a heavy emphasis on the concept of duty, and the concept of pure duty appears to be one of the core principles of human justice. This also means a pure motivation comes from duty and gives an action its moral worth. One may, however, have several duties when engaging in certain matters.

One may have the motivation to do the right thing in and of itself out of duty, and hence, while there is more than one motivation within the overall concept of duty, this does not mean that action is devoid of moral worth just because there is another motive. Thus, as long as our actions are in pursuit of our duties towards the entire concept of humanity and do not violate the substance of being, they are appropriate. This is because the motive that involves the duty is what gives it moral worth.

Kant emphatically says that for an action to have moral worth, it must be carried out for the good of the duty, not out of inclination. Yet, one may find a connection between Kant's stringent notion of morality and the demanding understanding of freedom. This leads us to the second distinction, i.e., the link between morality and freedom. In *Groundwork III*, Kant believes that moral ought(s) are rational willingness, i.e., that an agent, insofar as s/he is only rational, does not even experience morality, since human beings are finite creatures and always understand morality as an indispensable merit or categorical imperative. Nevertheless, Kant argues that, as long as we fully satisfy the demands of morality, it is justifiable for an agent to be guided by her/his inclinations. Still, Kant

believes that moral demands also are the way in which we achieve happiness.

In other words, morality can be a source of happiness. Comparatively, if the Security Council members have strong moral demands, they will also serve happiness and not dissatisfaction. In most crucial cases, however, the interpretations of the Council's resolutions have proven that the Council has violated these two significant principles, namely morality and happiness. When the first principle disappears in the actual decisions of the Council, the second also disappears automatically. A critical analysis of the content of the resolutions of the Security Council and the actual reaction of the permanent members to the interpretation of these resolutions indicates that both concepts, i.e., morality and happiness, have long disappeared. Instead, the interests of the permanent members have been the most imperative motive and political duty of the members.

7. Connections between Reason and Morality

Kant strongly believes that all moral commands of his ethics are practical and that his view is rationally powerful and can always find substantive logical recognition.[17] According to him, respect for the supreme principle of morality also creates happiness. For him, happiness is even an indirect duty. One may say, however, that Kant does not satisfy himself with these explanations. For him, there are certain relationships between freedom, morality, motive, and humanity. He describes the entire idea in two different ways: autonomously and heteronomously.

Kant says, I am only free when my will concerning certain matters, decisions, actions, and intentions is determined autonomously. This can be understood from the law that I give myself. If we are capable of freedom autonomously, we must be capable of not acting according to the law that is imposed on us, but according to a law that we give ourselves. But, the question arises as to where such a law − the law that we give ourselves − could come from?

Kant bases his argument on the law of reason. According to him "the law of reason to seek unity is necessary, since without it we would have no

[17] P. F. Strawson, *The Bounds of Sense: An Essay on Kant's "Critique of Pure Reason"* (Methuen, 1966); N. A. *Sense,* Nikam, *Understanding and Reason* (Asia Publishing House, 1966); Norman Kemp Smith, *Commentary to Kant's 'Critique of Pure Reason"* (Humanities Press, 1962); Francis, X. J. Coleman, *The Harmony of Reason: A Study in Kant's Aesthetics*. (University of Pittsburgh Press, 1974); A. C. Ewing, *A Short Commentary on Kant's "Critique of Pure Reason"* (Methuen, 1978).

reason, and without that, no coherent use of the understanding, and, lacking that, no sufficient mark of empirical truth…" Reason determines my will; then the will becomes the power to choose, independent of the dictates of nature or inclination or circumstance. Therefore, an understanding of the theory of Kant's demanding notions of morality and freedom is especially connected with the notion of reason.

Kant's opinion therefore relays a great message to the policy of the politics of the Security Council, pushing the body of thought within the framework of reason. Reason for him constitutes the master key to the right decision, and it is higher than morality. This is why he insists upon the supreme principle of morality. Here, the principle constitutes the given reason. Kant envisages a multi-ethnic concept of independence of the will as the only method of securing and achieving peace and justice. Obviously, he respects the rule of law, not the law that is monopolized and not the law based on equal footings, but the law based on reason, and he fully respects humanity. This is why he insists on our freedom being determined autonomously.

As we will see, however, the autonomous concept is very profound and demanding. Kant supports his theory both nationally and internationally. His intention is to reduce human suffering resulting from self-love, self-interest, and self-morality. Consequently, he treats law and politics with a view to a maxim of good. According to him, the Security Council is obviously responsible for and answerable to the highest concept of the duty to pursue good for all nations and not use the international desk of morality in the Council for private purposes.

Yet, some may believe that Kant describes his theories from the approach of teleological reasoning and not in the light of the contemporary position of the Security Council. Although teleology relates to the study of ultimate causes in nature or of actions in connection with their ends, this reasoning is very weak and blind. He does not refer to theology as the ultimate means of ethics for their ends or utility. According to Kant, it is the means to realize the nature of law and politics with good judgment on which the principle of humanity is based – not on personal advantage or personal motives, but on the supreme principle of morality, which is free of all wills.[18] Certainly, it is difficult to understand Kant's republicanism as a precondition for the federation of states when the question of reason is

[18] Consult also Johan Zammito, *The Genesis of Kant's Critique of Judgment* (University of Chicago Press, 1992); John Watson, *The Philosophy of Kant Explained* (Garland, 1976); R. P. Wolf (ed.), *Kant* (Doubleday, 1967); Bella K. Milmed, *Kant and Current Philosophical Issues* (New York University Press, 1961).

involved. This is because the entire body of the Council serves political moralists rather than moral politicians. It means the will is not free.

8. Ground Reason Effecting Will and Duty

The question is how reason can determine the will. Kant purports that there are two different commands of reason. Kant believes that this command of reason constitutes an imperative. An imperative is simply a must or ought to. The most common type of imperative is a hypothetical imperative, while the other is categorical imperative. This means that hypothetical imperatives use instrumental reason: if you want X, then do Y.

Kant addresses all this: "If the action would be good only as a means to something else**,** the imperative is hypothetical; if the action is thought of as good in itself and therefore as necessary*,...* for a will which of itself accords with reason, then the imperative is categorical." This means that there is a serious and potential difference between a categorical and a hypothetical imperative. It is what we are also attributing to the content of resolutions of the Security Council.

For example, many of the resolutions of the Security Council in conjunction with the destruction of Arabic regions were taken with the full intention of other hidden intentions. This is the same for many other countries. The concept of a categorical imperative commands categorically, which just means without reference to or dependence on any further purpose. Kant himself clarifies this by saying "act only in accordance with that maxim through which you can at the same time will that it become a universal law."

The *Stanford Encyclopedia of Philosophy* on Kant's moral philosophy deals with the above statement of his in connection with the opinion of two other philosophers, namely O'Neill and Rawls (1980, 1989). It says the following:

> among others, take this formulation in effect to summarize a decision procedure for moral reasoning, and we will follow their basic outline: First, formulate a maxim that enshrines your reason for acting as you propose. Second, recast that maxim as a universal law of nature governing all rational agents, and so as holding that all must, by natural law, act as you yourself propose to act in these circumstances. Third, consider whether your maxim is even conceivable in a world governed by this law of nature. If it is, then, fourth, ask yourself whether you would, or could, rationally will to act on your maxim in such a world. If you could, then your action is morally permissible.

Here, the question is whether the performance of certain acts is permissible for us or whether the Security Council was subject to certain conditions. In other words, we have to find out whether our maxim is morally permissible. Accordingly, for a maxim to be morally permissible, it should also satisfy the requirements of the law of nature. Furthermore, one has to be careful not fail in one's maxim. Our actions may develop a maxim that is not advisable. Our decisions may encourage tactics that are hazardous to international peace, equality, and justice. A bad maxim is also evident when we go beyond the substance of our duty and change its nature. For instance, intrigues between several members for the occupation of oil resources and keeping the price of oil down by killing Arab nations and indirectly helping ISIS constitutes a very abhorrent maxim. In other words, a "perfect" duty is created by acting correctly, but for evil interests.

When the Security Council permanent members have accepted certain duties for the maintenance of justice, peace, and security, but their actions are contrary to what they have promised, they are encouraging a bad maxim. While promising to do so, they did not intend to fulfil those duties in the Security Council, since they were aware that they were going to violate the system of the Charter against one another. In fact, the Security Council was created to give the strong military powers huge income, broad power of decision, powerful authority to take military decisions, and unforeseen voting rights, i.e., the veto.

The permanent members were clearly aware of the fact that they were not going to adhere to their promises, legal duties, and political responsibilities. Logically, being reasonable necessitates not disagreeing with one's own promises. Once we have made a promise, particularly in the Security Council, we have to keep it. However, there is no self-contradiction in the maxim "I will make lying promises when it achieves something I want." According to Kant, under the provisions of the Security Council, it is irrational to perform an action, once made into a universal law of nature, when the maxim in that particular action contradicts itself. Therefore, Kant is in the favour of the doctrine of rights.

In fact, according to one view:

> Kant lays the foundation for the Doctrine of Right in his General Division of Legal Duties. There Kant uses the then popular three Ulpian formulae, '*honeste vive*' (live honestly), '*eminem laede'* (harm no one), '*suum quique tribue*' (give each his own), to undertake his own tripartite division of legal duties. Kant realizes that he can use the Ulpian formulae for his own division only if the formulae are given meanings which Ulpian perhaps did not clearly see himself. Still, Kant claims, these meanings can be

> developed from, or interpreted into, the formulae. The meanings Kant gives them are 'be a juridical person', 'do no one wrong', and 'enter a state in which everyone's own can be secured against everyone else'. To these three formulae, Kant attaches the three *leges*: '*lex iusti*', '*lex iuridica'*, and '*lex iustitiae*' and speaks of the three legal duties: 'internal legal duties', 'external legal duties', and 'those duties which contain the derivation of the external legal duties from the principle of the internal legal duties through subsumption'.[19]

Kant distinguishes four classes of duties in his *Groundwork*. These are perfect duties toward ourselves, which is practically personal. The second class is the perfect duties towards others. The third one is imperfect duties toward ourselves. The fourth concerns imperfect duties towards others. All these duties show the connection between reason and morality. The high practical application of these duties demonstrates its direction. These classifications of duties can also be analysed in conjunction with the Security Council's functions and with a different approach to the interpretation of the provisions of Chapter VII of the Charter.

9. The Concept of the Categorical Imperative

In order to understand the concept of the categorical imperative and the Kantian idea in connection to the question of the Security Council's resolutions and its evil inclinations and relation to Kant's opinion, one has to explore what the nature of the categorical imperative is. For this reason, Kant provides us with two different characterisations of the concept of the categorical imperative. One relies on the formula of universal law and the other on the formula of humanity as an end in itself.

Murder and suicide are at odds with the categorical imperative. The reason is that, when we kill someone, we are taking a life for an ulterior purpose, either because our interests lie in other countries or they are a hindrance to the achievement of our desires. Regardless of any clarification of our motive, we have some interests and some purposes that fuel the particular reason we are killing and using them as a means. This is because murder violates the categorical imperative. Kant goes even further, in this way not only condemning the consequences of the Security Council resolutions and the killing of thousands of innocent individuals, but also condemning self-killing or suicide.

For Kant, morally speaking, suicide is on a par with intentional murder. Thus, the mental element of the crime or *mens rea* can be seen as one of

[19] B. Sharon Byrd and Joachim Hruschka, *Kant and Law* (Ashgate, 2005), p.xv.

the basic requisites of criminal law against the background of all given positions. However, we should make clear here that to refer to intent, mental element, or *mens rea* in cases of great breaches of international criminal law, such as genocide, would be to deprive the definition of its constituent elements.[20]

When we kill thousands of individuals for our own personal interests or advantage, we are taking their lives as a means for personal ends. In fact, we are violating the rules of moral law when we take a life − our life or someone else's. We use that person, we use a rational being, we use humanity as a means, and in this we fail to respect humanity. In the end, the capacity for reason − that humanity that commands respect of other human beings' lives − may disappear. This is because humanity is the high ground of dignity and that is the cause of reason. It means that humanity feeds the capacity for reason that resides undifferentiated in all of us.

Fuller, the perceptive American author of moral law, addressed the concept of the categorical imperative and the value of morality with the following words in his 1964 book *The Morality of Law*:

> What the Golden Rule seeks to convey is not that society is composed of a network of explicit bargains, but that a pervasive bond of reciprocity holds it together. Traces of this conception are to be found in every morality of duty, form those heavily tinctured by an appeal to self-interest to those that rest on the lofty demands of the Categorical Imperative. Whenever an appeal to duty seeks to justify itself, it does do always in terms of something like the principle of reciprocity. So in urging a reluctant voter to the polls it is almost certain that at some point we shall ask him, 'How would you like it if everyone acted as you purpose to do?'(20).

In the above paragraph, Fuller wants to secure the integrity of a person as does Kant. He also wants to create a balance between the essence of man and the reason for the existence of the law. Hence, the concept of integrity is the chief question of law and morality. Fuller sees a strong relationship between morality, law, and integrity. While he admits that Hart is a good analyst, he rejects Hart's theory of the separation of law from morality.

Consequently, I violate that dignity in my own person if I commit suicide. In turn, by attacking other nations under the guise of human rights law and murdering their peoples in the thousands, we are violating the dignity of universal humanity and the humanity located in the virtue of man. From a moral point of view, if I take somebody else's life, it is the same wrongdoing (and the reasons are the same poor ones) as if I had taken my own life. Taking life creates a bad maxim and seriously harms

[20] Badar, *Mens Rea*, pp. 273-4.

the philosophy of the human being. These considerations are all based on the principle of universal character and the ground of moral law.

The reason that we have to respect the dignity of other people does not have anything in particular to do with them and, consequently, Kantian respect is unlike love for humanity and has nothing to do with man's personal position. It is unlike sympathy and it is unlike solidarity or a fellow feeling for altruism. We must not put aside that humanity is universal and, at the same level and degree, rational capacity is also universal − this is why violating it by committing suicide is then same as violating the life of any other individual who inhabits any other part of the globe.

Concerning the formula of universal law, as presented in the preceding paragraphs, Kant says, "act only on that maxim whereby you can at the same time will that it should become a universal law." With the term "maxim," Kant means the rules that explain what you are doing. These are good deeds, good actions, and keeping promises. Obviously, when we do not keep promises, like those given at the time of ratification of the Charter, in certain relationships, in the context of a resolution of the Security Council, or when we twist the real purpose of the resolution, that can no longer be considered the categorical imperative.

10. False Maxim Against the Categorical Imperative

A false promise is at odds with the categorical concept. It is evident that, in the categorical imperative, the intention is correct and not fabricated. For instance, when the Security Council promises that it is going to remove chemical weapons in Iraq's possession, it means that weapons of mass distraction exist under Iraqi jurisdiction. The Security Council gives us a picture that is not true. It is a picture that creates a mirage. It also, in its own terms, seriously violates international criminal law and causes fear internationally in the international legal system.[21]

The picture is what I call a supreme illusion of murder, atrocities, and torture in a country. My book *Monopolization of International Criminal Law in the United Nations* deals with all these problems of the Security Council body and the core principles of justice, peace, humanity, equality, human rights law, and settlement of international disputes by peaceful methods. The monopolization of international criminal law creates a mirage of facts, realities, and illusions.

[21] Mary Margaret Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law *An Essay on the Nature and Immutability of Truth'*, 15 (2) *American University International Law Review* (1999), pp. 321-394, at 349-50.

A false promise by the Security Council means that the Council sufficiently investigated the matter and was sure that its statements in the content of the relevant resolutions are not only correct, but also without any doubt. However, in reality, they are not. This is what Kant means with his categorical imperative. He means the concept of certainty. In other words, the false promise is at odds with the categorical imperative; we intend to universalize the idea, we intend to say that we can also reach certain self-love interests by cheating others and by giving false information. In addition, we can even formulate this false information, the substance of which we are already aware of, into the most important documents of the United Nations. This means universalising certain evil acts or wrongful information with the sole purpose of an evil motive. This is a maxim that in turn creates evil maxims, and that ends in the destruction of the entire civilisation of a country.

To universalize a maxim that is false, evil, or creates disorder is not only harmful for the entire body of jurisprudence of international law, but it is also dangerous if the representatives of all man make use of the same false maxim. In fact, a false maxim not only encourages war, but also develops antagonism and terror between individuals, groups, or states. The false information of 11 September 2001 not only introduced wrong information against Muslims, but also incited terrorists. It is rightly asserted that "9/11 is the biggest science in human history. But, why? Why they do this? They did it to create the perception in the public mind that the Western democratises are under attack from Islamic Terrorists. So that the public and troops would support the government in inventing, countries which they wish to establish basis in such as Iran and Afghanistan."[22]

False information or a maxim by the permanent members of the Security Council would be a contradiction, and the maxim which has been universalized would ultimately undermine itself. In other words, the real picture of 11 September 2001 did not exist. It was just a serious, superior mirage or *fata morgana* that created international panic. Consequently, Kant says, the false promise is wrong. Such a promise has a tendency to promote terror and the clear propensity to evil. This means we are aiming at the mental element. Or let us say a 'false promise' constitutes the primary intention to commit crime knowingly.

If each state member of the international community, or the General Assembly, or the Security Council lied, then no state could rely on any

[22] https://www.youtube.com/watch?v=LPKq2K2dh6k (visited on 4 September 2017). Consult *also* Farhad Malekian, *Corpus Juris of Islamic International Criminal Justice* (Newcastle: Cambridge Scholars Publishing, 2017).

other state's word. Isn't this exactly the reason that you should universalize, to test your maxim is to give in to your particular needs and desires over everybody else's? It is a way of satisfying the demands of this categorical imperative.

11. Formula of Humanity in the Categorical Imperative

Another version of the categorical imperative is the formula of humanity as an end in itself. This is an approach that is more intuitively accessible than the formula of universal law. Kant describes the categorical imperative by saying that we cannot base it on any particular purposes, interests, or ends, because then it would only be relative to the person whose ends they were: "but suppose, however, there were something whose experience in itself an absolute value … an end in itself…then in it." He goes further and clarifies as follows:

> But suppose there were something whose existence in itself had absolute value, something which as an end in itself could support determinate laws. That would be a basis—indeed the only basis—for a possible categorical imperative, i.e. of a practical law. There is such a thing! It is a human being! I maintain that man—and in general every rational being—exists as an end in himself and not merely as a means to be used by this or that will at its discretion. Whenever he acts in ways directed towards himself or towards other rational beings, a person serves as a means to whatever end his action aims at; but he must always be regarded as also an end.

What is that which has an end in itself? Kant answers "I say that man, and in general every national being, exists as an end in itself, not merely as a means for arbitrary use by this or that will." Here, Kant seems to give a clear picture of the Security Council resolutions by saying that, in general, every national being or thing exists as an end in itself. Not every national being should exist for the purpose of itself, however, but as a substantial reason for its own end. In other words, the substance of things should, in the final stage of presentation, present itself, and we should not alter its substance.

The theory of this alteration creates a false maxim. If all things are used as they are supposed to be used, we would not have false maxims and the categorical imperative would not be false either. It is always the arbitrary use of subjects or objects that makes a bad habit become universal. Naturally, if the provisions of the Security Council are employed for self-interest, self-tactics, and self-love, the bad maxim not only becomes universal and a habit between the political authorities of the

world, but it also becomes a dangerous maxim to which people do not react. A clear example is the dreadful Iraqi political, social, cultural, and international position to which the people of the world have become accustomed.

The evil resolutions of the Council have not only destroyed the entire position of the country internationally, but they have also become a reason that we do not act as before to the destruction of other countries, for instance Syria and Yemen. However, we easily react to the terrorist attacks in Europe and other parts of the world. If these terrorists attacks are continuous and repeated the whole time, we become accustomed to the attacks and we have developed a bad maxim.

Kant distinguishes between persons on the one hand and things on the other. Rational beings are persons; they do not just have relative value for us, but, if anything has an absolute value, they do − an intrinsic value is that rational beings have dignity. This dignity is violated by the Security Council resolutions. If this dignity did not exist, there would no longer be a bad maxim or at least we would not distinguish between a good and bad maxim.

According to Kant, it is good maxims that are worthy of reverence and respect. This line of reasoning leads Kant to the second formulation of the categorical imperative: "Act in such as why that you always treat humanity, whether in your own person or in the person of any other, never simply as means, but always, at the same time, as an end." Treat humanity in your own person or in the person of another; never treat it as a means, but always, at the same time, as an end. This is what we mean by the formula of humanity as an end.

The idea that human beings as national beings are an end in themselves is highly significant when one considers that the substance of human beings is the solid reason for being an end in itself. Whenever the Security Council makes a false promise, it is using the international community as a means for its own purposes, and it fails to respect individual dignity, group dignity, nations' dignity, and the international community's dignity as a whole. This means a clear monopolisation of power on the part of the Security Council, the United Nations authority, and the substance of justice. Thus, the concept of proper and powerful justice becomes a mirage, and this mirage creates a bad illusion.

It also mirrors the way in which we create a mirage − not a naturally occurring optical phenomenon − in which resolutions of the Security Council and their provisions are bent to produce a displaced image of rules of law in the atmosphere of international criminal law, international criminal justice, and the international human community as a whole. This

also means that the mirage of international criminal law and the Security Council resolutions do not have a particular surface, but a damaged screen of rules of law that are unfortunately real and present a wrongful interpretation of the entire subject and object of the law.[23]

[23] For a concept of appropriate national interpretation of the principle of legality consult Johanna Rinceanu, 'The principle of legality (*Nullum crimen sine lege*) in Romania' in U. Sieber, S. Forster, & K. Jarvers (Eds.), *National Criminal Law in a Comparative Legal Context, vol.2* (1): Max-Planck-Institute für Ausländisches und Internationals Strafrecht, (2011) pp.89-101; in particular study Johanna Rinceanu, 'Criminal Liability of Legal Persons in Romania' in *Riccardo Borsari, Responsabilita` da reato deli enti* (Padova: Padova University Press, 2016), pp. 407–418; see *also* Johanna, Rinceanu**,** 'Concept and Systematization of the Criminal Offense in Romania' in U. Sieber, S. Forster, & K. Jarvers (Eds.), *National Criminal Law in a Comparative Legal Context*, Vol. 3(1): Max-Planck-Institute Max-Planck-Institute für Ausländisches und Internationals Strafrecht (2011), pp. 73–85.

CHAPTER III

THE MIRAGE OF SECURITY COUNCIL RESOLUTIONS

1. Evilness of Unequal Treaties

The establishment of the United Nations was a giant step forward in the development of international criminal law, which was in its infancy in 1945. However, there was one big problem with the establishment of the organisation. The entire concept of the organisation and its Charter are based on an unequal treaty. This can be seen in the provisions of Chapter VII of the Charter governing certain privileges of the permanent members. Since the establishment of the Charter of the United Nations, the Security Council of the Organisation has adopted certain international law-making resolutions that have not only not promoted peace, but also quite the opposite.

As a general rule, the UN organisation is based on law-making treaties constituting the first source of international criminal law. This is based on Article 38 of the Statute of the International Court of Justice in The Hague. Thus, according to the provisions of the relevant article, the treaty constitutes the first source of international law, which means it has legal validity and has to be respected.[1]

Yet, the basic theory of all international treaties should be the same. We should not ratify an international treaty or an international convention that

[1] Article 38 of the Charter is essentially very significant. It reads that "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, [.e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

does not respect the first primary principles for the formulation of international treaties. An international convention, as Kant asserts, should not have a propensity to evil. All international conventions are the result of intensive international negotiations and, regardless of any political strength during negotiations and formulations of international treaties, certain principles have to be maintained.

These principles are the equality of arms, equality of provisions, fairness, proportionality, and justice. It means that no propensity to evil should be formulated into the treaty document. In other words, when there are unequal provisions within the provisions of the treaty, the concept of good faith − which is the fundamental principle in the law of treaties, in the philosophy of justice, and in the theory of judgments and any other decision − is completely violated. This also implies the existence of a mental element of the crime or an intention to commit an international crime whenever considered necessary.

Here, I am not aiming at all the resolutions of the Security Council, but at those resolutions demanding the development of equality, peace, and justice in favour of all nations. Clear examples are the resolutions of the Security Council concerning the apartheid regime and the voting of certain permanent members of the organisation against the General Assembly resolutions for the abolition of apartheid.

Similarly, the situation of Iraq and the obvious propensity to evil in the contents of the resolutions of the Security Council bear witness to these miserable facts of international law, international criminal law, and international criminal justice. If we do not see the mental element of the concept of *mens rea*, if we did not understand the intention of crime and *mens rea*, and if we do not realise that the formulation of the resolution overlaps with *mens rea* and a guilty mind, we should at least realise that the consequences of the relevant resolutions imply the commission of serious crimes under the guise of prevention.

The situation resembles the violation of the concept of moral and political standards as asserted by Kant. In other words, although the main reasons for the creation of an international union were to encourage the peaceful settlement of international disputes in the international arena, the propensity to self-love or self-interest has been the main symphony of the Security Council. This includes all permanent members. Here, we neither speak selectively, nor do we intend to find one single permanent member guilty.

2. The Den of Iniquity in the United Nations

The term 'iniquity' originally comes from Latin. Its root is *aequus*, which means equal, right, and just. However, when it is used as iniquity, it refers to immoral or grossly unfair behaviour. It means the quality of being unfair or *evil*. It implies a system plagued by corruption and injustice. A clear traditional reference to the term is in the context of slavery or unjustified taxation.

In Scotland, the term 'iniquity' also has a negative definition, but it refers to an unfair action in the administration of justice. It therefore means a judicial error or an error of the court or judge. For instance, the idiom *iniquum est alios ihhibere mercaturam* ('it is unfair to permit some to carry on trade and to prohibit others') can be seen to refer to the decisions of the Security Council or their self-interested actions. In the system of international criminal law, it should refer to an evil political power to the exclusive right of permanent members reserved by military strength as per Chapter VII of the Charter of the United Nations.

For example, the Security Council members allow themselves to possess unlawful nuclear weapons and prevent others from possessing them. In other words, they recognise themselves as much more eligible and capable of having such weapons. Similar conclusions can be drawn about the resolutions of the Security Council and the destruction of other civilisations in the name of preventing injustice.

Kant would not be able to be convinced of the fact that the cultivation of a bad maxim or inequalities in the structure of the Security Council creates a good maxim. In other words, *iniquum est aliquem reis sui esse judicem* is obviously correct, which means that it is improper for a person to be a judge in his own case.

Kant tries to make us aware of the fact that iniquity or an evil maxim, e.g., in the house of the Security Council, is hazardous to the supreme principle of morality. When considering his subject matter against the content of certain resolutions of the Security Council, one realises that the Council has become a notorious den of iniquity, which practically means a place where immoral things are decided and carried out with full evil intention. Examples are the resolutions of the Security Council that have directly or indirectly permitted violations of the territorial integrities of a number of states with different excuses.

Thus, when Kant refers to prevention of a bad maxim and propagation of a good maxim, and, ultimately, a maxim based on the supreme principle of morality, he means that the den of iniquity in the United Nations has to

be prevented, has to be modified, and has to be replaced with the den of *iustitia*, morality, and the universal law of morality.[2]

This implies the fact that Kant's notion of the categorical imperative is the only way to achieve the appropriate moral law, is the sole way to prevent the suffering of unjustified acts against humanity, and is also the way in which we may establish the concept of moral and ultimate legal justice − by extinguishing to a certain extent all types of greed in human nature and in the nature of individual entities, organisations, and states. He says that "act only on that maxim by which you can at the same time will that it should become a universal law." This means that we not only create a personal maxim, but also a universal one, which is based on reason, as well as a rational one, which does no harm and creates purity in common morality.

Of course, a maxim may engender a personal maxim, but this should not prevent us from preventing self-interests, self-love, and of course evil interests. In order to achieve a universal maxim, we are therefore bound to use the categorical imperative, which is based on ethical choice and which can be followed by anyone, including the Security Council. The permanent members must evaluate their choice and see whether it is the categorical imperative, based on ethical reasoning, and, if it is copied by other states, whether it does not harm international morality, international legality, and the international community rules as a whole.

Unlike Mill, the English philosopher, Kant favoured a very high moral choice in expressing his moral, political, or legal theories. Kant was against any immoral conduct that increased injustice in the den of iniquity. He was therefore against lying, theft, cheating, suicide, and murder, for example. He certainly prohibited all these acts, not only in the personal realm, but also all collective and joint actions, which, for our purpose, also includes the United Nations Security Council. This vehement philosophy of Kant in international criminal law, in human rights law, and – for us − within the resolutions of the Security Council means exactly this, even in cases in which our lying, stealing, cheating, and murder would bring about more contentment than the alternative.

Kant therefore puts two serious questions to our sense of morality or to the permanent members of the Security Council. He simply asks that, whenever we take decisions at home or around the negotiation table of the Charter, two basic moral philosophies must have core functions before taking any decision:

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[2] See *also* Gray Cox, J., *The Will at the Crossroads: A Reconstruction of Kant's Moral Philosophy* (University Press of America, 1984); A. R. C. Duncan, *Practical Reason and Morality* (Nelson, 1957).

i) Is it reasonable that everyone act as I intend to act? If the answer is no, then it is obvious that we should avoid performing such an action.[3]

ii) Does my personal or self-made action respect the natural integrity of human beings rather than simply utilising them for my own ends? Naturally, if our answer is no again, then we are definitely obliged not to implement it. Kant's conclusion, under consideration of self-interests, self-love, and self-tactics with the sole intention of evil terror, can also be addressed to the Security Council members. All this introspection means that Kant would have the intention of prohibiting immoral acts in the den of iniquity of the Security Council.

3. Conditional Value of the Security Council

Kant in his work uses the phrase "man is bad."[4] Kant clearly explains this phrase and says that, with "man is bad," we can only mean that he is mindful the notion of moral law and its function, but he has yet to adopt it as his maxim when necessary, with occasional deviation. "He is by nature bad is equivalent to saying: This holds of him considered as a species; not as if such a quality could be inferred from the specific conception of man (that of man in general) (for then it would be necessary); but by what is known of him through experience he cannot be otherwise judged, or it may be presupposed as subjectively necessary in every man, even the best."

What does Kant mean with the above-mentioned phrase: is man to be judged through his experience? Here, Kant emphasizes not only experience in the nature of man, but also experience in the nature of the history of man. This is because the history of man is combined with all types of conduct attributed to man, and this attribution is not free from his criminal or bad nature. One may conclude that all wars are conducted upon man's actions with respect to threats to the peace, breaches of peace, and acts of aggression. This is what Kant makes us aware of; by implication, the articles in Chapter VII of the UN are originally a bad maxim. According to him, they have not developed a good maxim, and the intention from the outset had the propensity to use the power of the Security Council and also monopolize the entire organisation. This is what Kant says:

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[3] Similar questions should the permanent members of the United Nations ask themselves. http://pacem.no/2016/konflikt-mellan-rattigheter/ (visited on 5 September 2017).

[4] See also Jonathan Bennett, *Kant's Dialectic* (Cambridge University Press, 1974); Jonathan Bennett, *Kant's Analytic* (Cambridge University Press, 1966).

> Things that are preferred have only conditional value, for if the preferences (and the needs arising from them) didn't exist, their object would be worthless. That wouldn't count against the 'objects' in question if the desires on which they depend did themselves have unconditional value, but they don't ! If the preferences themselves, as the sources of needs, did have absolute value, one would want to have them; but that is so far from the case that every rational being must wish he were altogether free of them. So the value of any objects to be obtained through our actions is always conditional.

Kant's words clearly show that the value of any object is conditional. This "conditionality" also includes the function of the Security Council as regards peace, the prevention of aggression, and the establishment of justice. In other words, when the Security Council uses the provisions of Chapter VII of the Charter as means for its evil economic interests, it violates the categorical imperative. But, it would not violate the notion of the categorical imperative if it dealt with all states of the international community using the same measure, in a way that that is consistent with respect for their dignity as fully recognized international legal persons.

The intention here is to clarify that the international legal personality of each member state represents the integrity of its population, and it is this personality that prevents the antagonism of nations against each other. The Security Council is therefore responsible for treating this (legal) personality properly and for not using the integrity of one nation against another. Here, the word integrity not only means respect, but also to prevent murder, destruction, and military power as a means of the threat of force. It also implies the fact that, in reality, bad nature has to be prevented by the merits of the supreme principle of morality.[5]

4. Resolutions of the Security Council and Bare Reason

The core issues governing the metaphysics of the Security Council resolutions arise from the words and phrases of Chapter VII of the organisation. The structure of the relevant Chapter empowers the Security Council with actions with respect to threats to the peace, breaches of the peace, and acts of aggression. These possibilities are stated in Articles 39 to 51 of the Chapter.

Article 39 of the Charter plays an important role in the recognition of internationally wrongful conduct. With the term "internationally wrongful conduct," we here mean acts of immorality, illegality, criminality, and,

[5] See *note* 2 Gray *The Will at the Crossroads: A Reconstruction of Kant's Moral Philosophy;* Duncan, *Practical Reason and Morality*.

obviously, acts based on self-interest, self-love, and having a propensity to evil conduct as a whole. According to Kant, however, the philosophy of human nature tends to be corrupt from the very start of our moral standards. This is what is understood from Kant's philosophy in *Religion within the Bounds of Bare Reason*. He demonstrates the corruption of human goodness and the way in which a human being argues for logical interpretation of different matters. According to him, although our predisposition is good, he argues that all human beings show that they have an original inclination towards the opposite direction.

According to Kant, if such an inclination or propensity to evil exists, then its status must be more than just that of an unintentional or voluntary feature of human experience. Therefore, he concludes that this propensity must be inevitable. The relevance of this philosophy to Chapter VII of the Charter and its Article 39 is that evil often arises as a perversion of an originally good predisposition. In other words, Article 39 has a tendency to elicit good action and, since this action cannot be performed without the actual engagement of man's will and his decisions, such decisions may reveal the original inclination in the adoption of the provisions of the article.

> We plan for the possession of the wealth of other nations by the force of armed conflicts and resolutions, by creating different fanatical groups, and by means of our secret intelligence agencies. Such plans inject political illness into the Security Council of the United Nations through our political manoeuvring. How can we insist that our justice is good and that other nations of the world who are the target of our own political decisions—motivated as they are by love of wealth, love of power, and love of superiority—should respect it?[6]

Article 39 provides that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Yet, the provisions of Article 40 of the Charter also imply this inclination towards evil behaviour and allude to the prevention of evil conduct and banning the self-interests of states.

It reads that "in order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties

[6] Farhad Malekian, *Judgments of Love in Criminal Justice* (Germany: Springer: 2017), p.31.

concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures." We shall see what the term "failure" means in the following.

Article 40 of the Charter clearly means that there must be a failure to comply with the provisions of the United Nations Charter. It says that the Security Council shall duly take account of failure to comply with such provisional measures. The question that arises here is whether the failure to comply with the provisions of the Charter occurred intentionally or unintentionally? Does the concept of intention or non-intention play any role in the overall content of the violations of the Charter or the violation of the supreme principle of morality, including creation of superior *fata morgana?* And, put according to Kantian philosophy, in the entire context, has this intention been committed with a propensity to evil in human nature as the main actor in the Security Council decision, the main decision-maker of governments, and the original player in the commission of conspiracy, crimes, and atrocities? The content of Article 40 actually denotes the existence of evil not only in the nature of actual decision-makers, but also within the entire framework of the United Nations Charter. This statement remains powerful for the implementation of evil actions as long as the structure of the Security Council knowingly rests on *mens rea* and the den of iniquity in the Security Council.

5. Kantian Objections to the Security Council's Morals

With the argumentation surrounding Kant's philosophy and its relevance to the decisions of the Security Council, we do not mean to suggest that the permanent members of the Security Council have a bad or good nature. One cannot say that Kant is against the present permanent members of the Security Council. This is not true. This argument would arise even if the five permanent members of the Council consisted of Iran, Saudi Arabia, Egypt, Turkey, and Israel. Consequently, the argument is not about the political, moral and, cultural personality of the present permanent members. Instead, the discussion is around the substance of the United Nations Charter and whether it is based on good legal reasoning like the philosophical Kantian structure.

When we refer to a bad nature in the above paragraph, we do not really mean a man is bad or good. We also do not mean that man's bad nature is always awakened. But, we obviously mean that man lives and dies with good and bad intentions, and all these intentions depend on the strength of

man to draw on or not draw on his nature, his bad habits, and his personal, individual, or collective egoistic interests. Consequently, the simple question that arises is whether the drafters of the United Nations and even the Security Council did not know about the nature of man. In addition, we are positively sure that the bad nature of man, which Kant has drafted into his philosophical approach and morality of the law, does not solely address those who are not the permanent members.

Surely, Kant did not mean to reduce the nature of man to the stage of slavery, but he knew barbarity was an integral part of man's nature or innate structure. He did not mean his view applies to the rest of the world (and not the five permanent members). The question that therefore arises is whether or not the Security Council members' innate nature separates them from their brutality or whether the representatives of the permanent members do or do not have the propensity to evil. According to Kant, the propensity to evil exists in the nature of all men, and this evil nature cannot be isolated from one member to another. In particular, the unequal provisions of the Statute of the Charter denote the propensity to evil, propensity to power, propensity to self-love, and propensity to evil victory. For this reason that Kant says the following:

> now this propensity itself must be considered as morally bad, and consequently not as a natural property, but as something that can be imputed to the man, and consequently must consist in maxims of the elective will which are opposed to the law. However, on account of freedom these must be looked upon as in themselves contingent, which is inconsistent with the universality of this evilness (immorality), unless the ultimate subjective ground of all maxims is, by whatever means, interwoven with humanity, and, as it were, rooted in it.

He goes further and says, "We call this a natural propensity to evil; and as the man must, nevertheless, always incur the blame of it, it may be called even a radical badness in human nature." For these reasons, the notion of Kant and the provisions of Article 41 of the Security Council do not coincide with each other, and it may be said that they violate each other's purposes. The coherence between the law and between Kant's moral ethics is violated very effectively.[7]

[7] On Kant's ethic see Keith Ward, *The Development of Kant's View of Ethics* (Humanities Press, 1972); H. J. Vleeschauwer, *The Development of Kantian Thought* (Nelson, 1962).

6. Chapter VII of the Charter against Kant's Metaphysics

The provisions of Articles 41 and 42 of the Charter of the United Nations are against the entire philosophy of Kant, or the entire metaphysics of Kant is against those provisions of the Charter. Article 41 even translates into action with the permission of the five permanent members, since their permission is not interwoven with the propensity to evil. These members are those who do not have in their nature any propensity to evil action. The article provides that "the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Yet, with the provisions of Article 42, the provisions of Article 41 are strengthening the cause of justice and the prevention of evil and brutality in the nature of other members of the United Nations. The article reads that "should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Kant's fundamental essence of metaphysics attempts to inform us about individual and collective evil and to prevent individual or legal evil. The intention is therefore to take all matters regarding the evil nature of man seriously and not to ignore one reason or another. The provisions and policy of Article 43 are, however, clear in their practical policy. This is because the permanent members never commit crimes and do not have the inclination to evil in the structure of their governments and politics. They are absolved of all guilt and are therefore permitted to resort to the use force and even aggression against the other members. In addition to this, the permission to use force has to rise from their decisions. Article 43 of Chapter VII of the Charter indicates this unfortunate fact. It reads as follows:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and

facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

The provisions in the above should also be read in conjunction with the provisions of Article 44 of the Charter. The article develops the permanent members' legal power for the purpose of employment of armed force. It reads that "when the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces." This in turn means that these provisions are not only essentially free of any tendency towards evil conduct, but they even aim at the prevention of evil conduct.

However, the historical development of the views of the Security Council exhibits the contrary.[8] This can be seen in the content of a large number of Security Council resolutions. Reading the list of some of the resolutions of the Security Council indicates that all violators of international criminal law and justice are all other states and not the permanent members. Here, Kant would object to the division of power, to the concept of morality, and to the maxim developed by the Security Council resolutions and their actual reality.

[8] Article 45 mentions the Military Staff Committee and reads that "In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee." And Article 46 completes the relationship between the permanent members and the military Staff Committee by saying that "Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee."

7. Morality in Comic Maxims

The concept of morality is not restricted in Kant's view. It is very large in scope. He also does not encourage personal morality, as every individual understands its notion. Rather, Kant refers to the concept of morality in the face of the categorical imperative, as the manifestation of universal law. Kant's theory is an example of a deontological moral theory. Kant believes that actions are morally accurate in the context of their motives. This virtue must derive mostly from the outcome of duty rather than from inclination.

In other words, the term 'categorical imperative' implies the significant function of one's duty and refers to the command of morality to act correctly. For instance, it is imperative not to lie in order to prevent a bad maxim, and it is imperative not to cheat if we do not want this to become a social habit. Thus, the principle of the categorical imperative compels us to shift away from the propensity to evil actions and knowingly commit certain acts. According to Kant's theory, the tacit permission for *mens rea* within the Security Council provisions is one of the shortcomings of the Charter and therefore encouragement of immorality.

Furthermore, it is impossible to prove that a Security Council resolution is against one of the five permanent members. This is because all five permanent members of the Council are free from any condemnation − including impunity − and this can be seen in the content of the resolutions. In other words, evil conduct, evil thoughts, or the propensity to evil exists solely in the nature of the representatives of other states and not in the innate nature of the permanent members. This is because other states do not respect and follow the peaceful resolutions of the United Nations.[9]

Iraq does not submit its oil resources into the hands of the permanent members. It was Afghanistan that did not obey the Soviet Union's peaceful resolutions and went against them. The people of Afghanistan occupied Russian territories. It was also them who occupied the territorial jurisdiction of the United States of America. In addition, Afghans destroyed the United States' entire civilisation. *With all these exaggerations, Kant and I, are pointing out the comic maxims.*

Similarly, it was the Afghan people who, after occupation of the United States' territories, murdered American civilians and raped their women. Also, the Iraqi population created the Abu-New York prison and exercised the most heinous torture against American soldiers. It was also

[9] Mary Margaret Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law *An Essay on the Nature and Immutability of Truth'*, 15 (2) *American University International Law Review* (1999), pp. 321-394, at 358.

the Iraqi people who fed Daesh and created it in different states of the United States. Also, this people cooperated with the United Kingdom's military air force to attack to the entire international legal personality of the US. I hope my use of irony or inversion of argument here will not be lost on the reader.

This is what Kant is alluding to. All the above statements give false information and give a false impression. They are false because we react and realize that the statements cannot be correct. The poor nations, the unarmed nations, and politically very weak nations could not have sufficient power to occupy militarily strong nations in the world or create the picture of September 11.

This is why Kant seeks in his theory a centre of good and bad and a centre in which the categorical imperative works and issues commands properly. Kant tries to appeal to the centre of humanity, to the distribution of the right maxim and the prevention of a bad maxim. For him, we are looking or searching for the good maxim. Rather, for him a good maxim is one that does not harm and does not have the aim of self-satisfaction. For him, a good maxim is a maxim that creates this highest standard of humanity.

And again, for him, the definition of "highest standard of humanity" follows the supreme principle of morality. If every single individual in our universe exercises the same maxim, it will create a good maxim. The virtue of a good maxim is a good maxim. A bad maxim cultivates a bad maxim. Accusing other nations for the sake of self-interest, moral self-satisfaction, and self-love constitutes a bad maxim.

8. Kant Rejecting the Bad Maxim

What Kant does is indeed simple. His entire purpose is to prevent the radical evil/the mental requisites for criminality that we see good in ourselves and, when executed with others having a bad nature, *mens rea*. Consequently, the philosophy of Kant that human beings, as a species, possess an innate propensity to evil does not mean that human beings are substantially made evil, but an evil maxim creates the concept of radical evil and has to be prevented. His view here, despite what is understood by other respected philosophers, is probably a natural extension of his established theories on moral law, moral culpability, and human freedom.

Kant's arguments on human beings are all driven by the anthropological analysis of the human being. He looks to the nature and substance of the existence of man. He takes into consideration the different capacities human beings possess within their natures. They include their capacity affected by

inclinations, their capacity for reason, and their different capacities over the course of the conduct of their actual lives.

According to these substantial capacities and inclinations, we are encouraged to understand the politological facts of the Charter of the United Nations. Kant in his *Groundwork* takes this charter-politological or anthropological approach by distinguishing between empirical concepts. The difference between the former and the latter is that an anthropological analysis concerns human beings' empirical observations, their conduct, and their behaviour. It does not concern repeat behaviour, but instead looks at the consequences of such observations and attempts to give them a more basic rationale, including an explanation.

The function of anthropology is to view historical and present development in the nature of human beings. With the concept of anthropology, however, Kant slowly directs us into empirical observations. I am applying this deduction to the Security Council structure, too. When I say there is a clear connection between the historical and present position of the Security Council, and according to an empirical glance at the statistics of the resolutions of the same body, it implies the existence of the propensity to evil in the provisions of the Security Council. The source of this evil does not come from the international conduct of permanent members with other members of the United Nations alone, but derives from a combination of many of these relationships, the core cause of which is our composite nature as human beings.

This implies our nature as human beings possessing both concepts of inclinations. They are animal inclinations and the capacity to understand moral law through reason. Evidence proves, however, that there is a natural inclination in human beings towards moral corruption. This can be understood from empirical facts suggesting the existence of some sort of natural inclination towards evil in human nature. In its own terms, this affects the content of certain resolutions of the Security Council and discriminates between one member and another. It can also be seen from empirical facts that give rise to the concept of radical evil in the nature of resolutions affected by the words of representatives of the permanent members who have received orders from their respective governments.

The conclusion seems to be that the entire accusation regarding the resolutions of the Council could be considered true, for example regarding Muslims or African nations, but that such accusations against the permanent members of the Council are solely wrong and do not exist in actual reality. This is because a permanent member is free from the responsibility for crimes, based on the legal sanctity of each permanent member. It is what we call the mirage of international criminal law. In

other words, we can observe great breaches of international criminal law, we can see countries after countries destroyed by the complicities of certain permanent members, we can observe great human suffering and the demolition of entire cities, but we cannot prove it because of the mirage of justice. Thus, the pillars of a false maxim for the sake of our own interests lead to a different interpretation of the institution of justice.

The reason for this is that the mechanism of the system of international criminal law aims at the prevention of international crimes, and this function of the system is fuelled by the system of Security Council resolutions. Here, the Security Council members are those members whose words are ultimately imposed by military strength. The fact is that, in reality, we ignore the big, powerful crimes, and this in itself universally creates a bad maxim, one which is wrong according to the provisions of Kant's theory. In the end, universalizing a bad maxim brings about wars, antagonism, and grave violations of the system of international criminal law, in particular crimes against humanity. Although crimes against humanity are defined in the statute of the permanent International Criminal Court, they are indeed the most frequently committed international crimes within the civilisation of humankind.

These crimes reveal clear gaps between the rules of law in international criminal law and the great illusion, which is impossible to prevent. Consequently, the rules of law, the rules of international criminal law, the rules of human rights law, and the rules of international humanitarian law of armed conflict become the negative part of the picture of justice. It is a superior mirage or, as stated elsewhere, the superior *fata morgana* between the crimes and their appearance in the skies of justice, especially the appearance of a sheet of blood in the desert of law, on a hotbed of wartime conflict caused by the refraction of rules of international criminal law from a sky with hot weapons of the armed.

9. Security Council Preventing Proper Choices

Based on the words of Kant's first critique, the natural world is entirely based on the laws of cause and effect. However, in his second critique, Kant realizes that this cannot be entirely true. Kant strongly believes that there exists within each of us an essence that commands us to conform our wills to pure moral law. This means to perform our duty, even when the bad desires exist within us. For him, to make moral law effective and pure, we must possess a *capacity for free choice*. In other words, moral law cannot function properly if our free choices are conditional. In fact, free choice guarantees the independence of moral law.

Kant's entire idea is to save the independence of choice and ensure that free choice does not disappear. The question is therefore whether free choice exists in the case of the adopted resolutions of the Security Council. The core issues are also whether the contents of certain resolutions of the Council are decided beforehand and whether they are seriously influenced by political interests. This is a key consideration because Kant emphasizes that we must possess a capacity for free choice. How are the conditions of free choice possible when the main decisions are under the power of the Security Council or a body solely working for the interests of the permanent members. Obviously, when there is a veto right for a member and solely for the five permanent members, the theory of the supreme principle of morality is being ignored.

> It may then be high time for the United Nations to examine the problem, not from the view of law or morality but also from the perspective of what is actually erroneous in the policy of all the treaties that are supposed to prevent national, regional, or international criminal violations. It should also examine what is wrong with the policies of the Security Council and the General Assembly of the United Nations and with the extensive overlapping norms of international human rights law, international humanitarian law of armed conflict, and statutes of international criminal justice. One could certainly believe that the transformative policy of the norms of law and morality into international conventions or organisations must not be accurate. Otherwise, why has the average number of violations increased? Why have the elements of peace brought us solely elements of injustice? In addition, why has the contemporary human historical evolutionary context resulted in us being armed more heavily than ever before?[10]

The system of international criminal law treaties cannot function properly when the consent of a state is restricted or has already been decided in advance by the provisions of Chapter VII of the Charter. For the formulation and ratification of international treaties, consent appears to be the most significant aspect of the law of treaties. How can consent be free and based on a good maxim when it has already been made? How can the capacity for free choice be guaranteed when the absolute political and legal capacity of all five permanent members is so decisive?

A very interesting situation arises from the conditions of Article 47. The history of Article 47 and its relevant provisions have proven that the

[10] Farhad Malekian, *Judgments of Love in Criminal Justice* (Germany: Springer: 2017), pp.32-33.

basic theory of the article has been negatively used in the interest of power. In other words, the provisions of the article have been employed in the interests of big political parties and have created many atrocities and much brutal conduct. One can strongly assert that Kantian philosophy can clearly be seen in the content of Article 47 and 48 denoting the existence of inequality between the individual members of one territory against another territory.[11] Article 48 together with Article 49 makes the situation more determinative:

> *Article 48*
>
> 1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
> 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.
>
> *Article 49*
>
> The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

A similar philosophy of power politics, or who is the master of rules of law and who is going to decide on the law of use of armed force, can be seen in the content of Articles 51 and 52. Both articles go against the theory of Kant; this is a theory in which justice should not be carried for

[11] Article 47 reads: 1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament. 2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work. 3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently. 4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

the sake of justice alone, but justice should be done for the supreme principle of morality into which the dignity of all human beings is integrated.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The general preventive end or purpose of the provisions of Chapter VII is clear. They intend to implement the metaphysics or the theory of Kant concerning the prevention of evil, yet not solely in the innate nature of man, but also in national, regional, and international relations and in the content of their written decisions. To some degree, they state that the nature of criminal actions is meant to be − through the inclination to evil and consequently self-interest, the desire of men, or individual and collective interests.

There is knowledge in the innate nature of representatives of the member states of the Security Council or the General Assembly who are aware of their actions and their individual state interests.[12] This also means the knowledge that a certain inclination to individual state interests leads to a certain result. Nevertheless, this propensity cannot be unintentional; it is obviously intentional. We face individual state choice, and it is this choice that goes against the philosophy of Kant.

[12] For example, for the content of resolutions which destroyed the entire international legal personality of Iraq, see Resolution 660 (1990) of 2 August 1990, 661 (1990) of 6 August 1990, 662 (1990) of 9 August 1990, 664 (1990) of 18 August 1990, 665 (1990) of 25 August 1990, 666 (1990) of 13 September 1990, 667 (1990) of 16 September 1990, 669 (1990) of 24 September 1990, 670 (1990) of 25 September 1990, 674 (1990) of 29 October 1990, 677 (1990) of 28 November 1990, 678 (1990) of 29 November 1990, and 686 (1991) of 2 March 1991.

CHAPTER IV

RADICAL EVIL CONSTITUTING A ONE-EYED JUSTICE

1. Self-Love

Our purpose in this chapter is to emphasize that radical evil at the most fundamental level of human nature turns into self-interest, based on our having an innate propensity with regard to the adoption of certain maxims or intentions – namely those that give priority to motives of self-love or self-interest when they come into conflict with moral maxims. All these self-interests create radical terror between nations. The continuous devastation of one country after another is the result of a monopolized system of the United Nations in which the functions of most member states have become equally superfluous and their existence is solely symbolic rather than requisite. The illusion is that we think it is reality, but it never appears.

This chapter elaborates the metaphysics of the new method of interpretation of the term "use of force" and the radical propensity to evil deeds, which has an innate root in human nature. This means cultivating terrorism and creating counter-terrorism in order to gain gigantic rewards from the oil pipelines. Thousands and thousands of Arabs are killed and hundreds and hundreds of Europeans are terrorized in their homelands, based solely on the interests of certain members of the UN. I am very surprised why Katja Samuel in her comprehensive book *The OIC, the UN, and Counter-Terrorism Law-Making: Conflicting or Cooperative Legal Orders?* does not seriously take into examination the concept of state terrorism or terrorism occurring under the power of the Security Council's members? She should have mentioned the notion of state terrorism based on her deep study into Western and non-Western political diplomacy.

Bantekas and Nash have also examined core international crimes in the book *International Criminal Law*, but have also not dealt with terrorist state crimes or crimes committed by state entities in the Security Council.

In this book, we do not suggest demolishing cities, beheading innocent victims, victimising victims, executing the guilty, promoting terrorists, poetising violence, making children refugees, or demobilising counter-terrorism activities. I will not follow the opinion of Kant concerning the death penalty as the final alternative of justice. His opinion is contrary to that of the intelligent Italian lawyer Beccaria, as a "sophistic" has proven to be without any practical value today, when the abolition of the death penalty already constitutes a part of the international law of *jus cogens* norms.[1] However, we will insist on finding the facts and underlying theories concerning the concept of radical forces of terror originally arising from an innate propensity in human nature, one which has created thousands of homeless refugee children all over the world.[2]

We will try to depict the position of the real distributors of weapons of mass destruction, i.e., states or organizations, which unfortunately interpret their own actions as resorting to the principle of self-defence (Art. 51) under the Charter of the United Nations.[3] This is a theory that Kant prohibits in his work *Religion,* as he prohibits resorting to supposed morality for the purpose of immorality. In his work in the *Groundwork of the Metaphysics of Morals,* he even makes us aware that the metaphysics of morals has a highly significant, indispensable function for the understanding of our actions. He says that this is because "morals themselves remain subject to all sorts of corruption as long as we are without that clue and supreme norm by which to appraise them correctly."[4] However, he does not encourage immoral law. Based on this fact, he goes further and explains as follows:

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[1] On *jus cogens*, see Farhad Malekian, 'The Laws Governing Crimes against Women Constituting *Obligatio Erga Omnes*' in David Wingeate Pike, Crimes against Women (New York: Nova Science Publishers, 2011), pp. 3-22; Farhad Malekian & Kerstin Nordlöf, Prohibition of Sexual Exploitation of Children Constituting *Obligation Erga Omnes* (Cambridge Scholars Publishing, 2012).

[2] Farhad Malekian & Kerstin Nordlöf, Confessing the International Rights of Children (2012); Malekian & Nordlöf, The Sovereignty of Children in Law (Cambridge Scholar Publishing, 2012); Malekian, 'Consolidating the International Criminal Law of Children' (2015) 26 (3) Criminal Law Forum 569-593; Farhad Malekian, 'The International Criminal Law of Children on War Crimes', Vol. 13, No. 25 *Prawa Dziecka i Ich Ochrona, Horyzonty Wychowania* (2014), pp. 31-69.

[3] This book legitimates individual or collective self-defence under certain conditions.

[4] Immanuel Kant, *Groundwork of the Metaphysics of Morals,* ed. and transl. Mary Gregor (Cambridge University Press, 1997), 4:390.

> For, in the case of what is to be morally good it is not enough that it conform with the moral law but it must also be done for the sake of the law; without this, that conformity is only very contingent and precarious, since a ground that is not moral will indeed now and then produce actions in conformity with the law, but it will also often produce actions contrary to the law.[5]

Rightfulness in morality is a very essential principle of Kant's doctrine. Consequently, I may highlight through this work that the phrase "guilt should be proven beyond any reasonable doubt" may also be accompanied by a novel principle in criminal law, which indicates that any underlying reason should also be proven beyond any reasonable doubt.[6] When we sell our weaponry, it constitutes a radical evil; we cannot ban the use of weapons easily, and when we obliterate a country over the course of decades for our radically evil intentions, we cannot expect that it will flourish with the social traditions of our interests.[7]

This is a prominent feature of international criminal law and why the entire legal discipline is greatly suffering from unjust interpretation of the law. The *corpus juris* of international criminal law cannot function properly when its basic acquisition is greatly violated by the provisions of the very same legal discipline. This is what I have called the mirage of international criminal law throughout the book. It means an illusion based on other rules than those we see, a visible picture of invisible rules, which have a propensity to evil in the innate nature of the perpetrators.

2. Transparency in Kant's Philosophy

The pool of justice, the pool of humanity, the pool of truth, and the pool of love can never be pure if their substance is not based on the norm of

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[5] *Id.*, 3-4.

[6] Consult Baum L. M., 'Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court,' 19 *Wisconsin International Law Journal 197* (2001); Davis Michael C., Wolfgang Dietrich, Bettina Schoolman and Dieter Sepp, *International Intervention in the Post-Cold War World: Moral Responsibility and Power Politics* (New York: M.E. Sharpe, Inc., 2003); Detmold M.J., *The Unity of Law and Morality: A Refutation of Legal Positivism* (Canada: Law Book Co. of Australasia, 1984); Fuller Lon Luvios, *The Morality of Law* (Virginia: Yale Law University, 2nd ed., 1969); MacIntyre Alasdair, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1982).

[7] Richard J Bernstein, *Radical Evil: A Philosophical Interrogation* (New York: Blackwell Publisher, 2002), at 2.

transparency. According to Socrates, nobody ever willingly does wrong. Aristotle asserts that human beings possess such a thing as moral weakness. They well distinguish what is wrong; nonetheless, they lack the capacity to choose right. Still, in cases of moral weakness, the lack of strength in one's own benefit without any transgression constitutes a kind of ignorance. This means an intentional or unintentional ignorance of method and an ignorance of what is most important and valuable for all human beings.

Indeed, it is of no significance if our ignorance arises out of a definite lack of knowledge or solely from the one-eyed justice of our own hedonism or self-satisfaction. The consequences of our personal attitudes and priorities will remain, either with knowledge or with ignorance. This fundamentally emerges from free choice. The strength of our moral weakness is a form of preference that disagrees with the implementation of good knowledge or good conduct.[8]

Normally, our ignorance is not transformed through a lack of knowledge, but in combination with the context of the existential seriousness of weaknesses involving the self-chosen mode of existence and a moral stance that forces the moral actor to decide on lower priorities. The consequence is that the ethically weak person/authority undeniably believes that some matters have more functional value for him/it in practice than any other actual knowledge and the distribution of truth and humanity. Thus, the authorities do not worry if their decisions are morally false and cohere with ignorance. In other words, it does not matter if the misconduct is the product of pure ignorance or a moral weakness. They become accustomed to living with their failure and ignorance.

3. Non-Subjective Position of Morality

Kant's philosophy suggests that the United Nations Organisation is not only responsible for preventing radically evil interests under the authority of the permanent members of the Security Council against the majority views by means of effective modification of the Charter, but it is also responsible for obliging all representatives to have a certificate of participation in a course of moral philosophy. Kant thinks that, as long as we do not understand the real meaning of happiness, we also do not understand the real meaning of evil either. According to him, happiness, justice, and evil have certain links with each other, and the function of the United Nations Security Council is to serve this universal happiness and not violate its boundaries. Therefore, it is not that Kant thinks happiness is

[8] Max Maxwell, 'A Socratic Perspective on the Nature of Human Evil', available at http://www.socraticmethod.net/socratic_essay_nature_of_human_evil.htm (accessed on 27 May 2017).

insignificant and has no value, but he thinks it is not a pursuit of moral value and not a pursuit of pure reason. Therefore, he says that man should promote his happiness not from inclination, but from duty, which is a necessary requirement for man's will. In this way, his conduct would first acquire true moral worth. Kant clarifies as follows:

> unfortunately, the notion of happiness is so indefinite that although every man wishes to attain it, yet he never can say definitely and consistently what it is that he really wishes and wills. The reason of this is that all the elements which belong to the notion of happiness are altogether empirical, i.e., they must be borrowed from experience, and nevertheless the idea of happiness requires an absolute whole, a maximum of welfare in my present and all future circumstances. Now it is impossible that the most clear-sighted and at the same time most powerful being (supposed finite) should frame to himself a definite conception of what he really wills in this. Does he will riches, how much anxiety, envy, and snares might he not thereby draw upon his shoulders? Does he will knowledge and discernment, perhaps it might prove to be only an eye so much the sharper to show him so much the more fearfully the evils that are now concealed from him, and that cannot be avoided, or to impose more wants on his desires, which already give him concern enough. Would he have long life? who guarantees to him that it would not be a long misery? would he at least have health? how often has uneasiness of the body restrained from excesses into which perfect health would have allowed one to fall? and so on. In short, he is unable, on any principle, to determine with certainty what would make him truly happy; because to do so he would need to be omniscient. We cannot therefore act on any definite principles to secure happiness, but only on empirical counsels, e.g. of regimen, frugality, courtesy, reserve, etc., which experience teaches do, on the average, most promote well-being. Hence it follows that the imperatives of prudence do not, strictly speaking, command at all, that is, they cannot present actions objectively as practically necessary; that they are rather to be regarded as counsels (consilia) than precepts of reason, that the problem to determine certainly and universally what action would promote the happiness of a rational being is completely insoluble, and consequently no imperative respecting it is possible which should, in the strict sense, command to do what makes happy; because happiness is not an ideal of reason but of imagination, resting solely on empirical grounds, and it is vain to expect that these should define an action by which one could attain the totality of a series of consequences which is really endless.[9]

[9] Fundamental Principles of the Metaphysic of Morals, by Immanuel Kant, 1724-1804. Available at https://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/chapter2.html (visited 6 September 2017).

Peter Rickman, the British philosopher, comments that Kant's suggestions certainly need some clarification. According to him, Kant's arguments relating to morality are not purely subjective. If the basis of morality were to solely arise from our feelings, this would not only differ from person to person, but such feelings could also differ within a person, depending on his experience and physical health.[10] Consequently, he believes that Kant took into account feelings in human beings such as "sympathy, affection and the like morally valuable, and, indeed, said they were needed to counterbalance selfish feelings that pulled against the call of duty."[11] Therefore, what is commonly misunderstood is certainly the epistemological perspective. This is the part of philosophy examining the nature of knowledge from different points of view, including and not excluding its foundations, scope, and substantial validity.

According to the same view in the above, the belief that the concept of morality in Kantian philosophy is simply about motives and not actions is a relatively simple misunderstanding of the substance of Kant's metaphysics. In other words, "doing the right thing for the wrong reason, i.e. for a non-moral reason, makes it a non-moral action." This sentence of Rickman's describes precisely what the thesis of this book is, i.e., the propensity to evil in the Security Council resolutions. Rickman further believes that "You can claim no moral credit for helping someone merely in the hope of gaining a favour in return. However, the right motive may be a necessary, but it is not a sufficient condition of morality. To Kant our motives must imply the utmost endeavour to actually *achieve* what we consider is right – which demands action, or restraint from action."

Rickman also maintains that "Kant said that it was difficult, if not impossible, to gauge our own motives – it is only too easy to think that we are acting from (moral) duty, when in fact we're prompted by vanity or ambition." In other word, "Kant's sensible suggestion … was that we are more likely acting from duty when we dislike what we are doing. This does not however mean that we need to dislike or be indifferent to what we are doing in order to be moral."[12]

This theory is the same concerning the perspective of the Security Council's duties and its moral or immoral conduct. I am not saying here that the combination of Security Council permanent members is wrong. *The degree of our criticism against the basic structure of the five*

[10] *Id.*
[11] *Peter Rickman, Having Trouble With Kant? https://philosophynow.org/issues/86/Having_Trouble_With_Kant (* visited *6* June 2017*).*
[12] *Id.*

permanent members is the same, even if it were to consist of Iran, Turkey, Israel, Sudan, and Palestine. It would also be the same if permanent members of the Security Council were Romania, Bulgaria, Serbia, Greece, and Italy. Another permanent membership of the Security Council could be Brazil, Morocco, Afghanistan, Japan, and Australia.

The question is therefore not about particular permanent members of the Security Council, but instead the very question of respect for the supreme principle of morality, violation of the basic principles of law-making treaties, and, in particular, the principle of equality of arms. Obviously, the situation would not be any better if we had five other permanent members. What is wrong is indeed the existence of a Security Council based on one-eyed justice. Still, I do not reject the fact that not all democratic decisions can be correct decisions. However, I insist that a democratic decision should be based upon a clear, wise reason. A brilliant reason is always brilliant, even though it can be dormant for one reason or another by languishing in the depths of an evil rejection.

4. Accurate Treatment of Human Morality

What is meant with the above section is that a duty may also affect our decisions, and decisions may become hazardous. There does not exist, in fact, even a single decision of the Security Council that is free from this concept of duty. Even though we suppose that

> we come next to the vexing problem of telling the truth to the axe murderer. The axe man knocks at our front door and, with a mad gleam in his eye, asks if his intended victim is inside. Should we answer truthfully that he is, or should we lie
>
> Could we perhaps rephrase the principle concerned into 'truth telling is usually right' or 'truth telling is right unless there are compelling reasons against it'? Kant would claim – and is he not right? – that these formulations do not sound like moral principles. Furthermore, as Kant argues forcefully, these formulations would undermine the credibility of all communication. No one would know when there was a good reason for lying and so when they were being lied to.

Philosophers of law, philosophers of moral ethics, and philosophers of natural/positive law are surely aware of the fact that the virtue of love for justice, love for humanity, love for peace, and love for the eradication of radical evil has to be the model of humanity − if injustice is not going to be the decision-maker of international relations. I will demonstrate here that the pure, sheer love for justice is the only principle that may prevent

injustice, and injustice is the only toxin to stimulate the propensity to radical innate evil in human nature and in the nature of the United Nations Charter. As Kant purports, we must treat our human mentality and freedom accurately.[13]

> A man reduced to despair by a series of misfortunes feels wearied of life, but is still so far in possession of his reason that he can ask himself whether it would not be contrary to his duty to himself to take his own life. Now he inquires whether the maxim of his action could become a universal law of nature. His maxim is: "From self-love I adopt it as a principle to shorten my life when its longer duration is likely to bring more evil than satisfaction." It is asked then simply whether this principle founded on self-love can become a universal law of nature. Now we see at once that a system of nature of which it should be a law to destroy life by means of the very feeling whose special nature it is to impel to the improvement of life would contradict itself and, therefore, could not exist as a system of nature; hence that maxim cannot possibly exist as a universal law of nature and, consequently, would be wholly inconsistent with the supreme principle of all duty.[14]

With all this, Kant seems to draw a line between being a good person, acting in the most reasonable way as much as possible, or being a good Security Council, a legal body in the service of justice. He also encourages the notion that doing correct acts is indispensible for being considered good. It means that Kant obviously pushes us towards doing good and being a good person. This also includes a legal body such as the Security Council, which constitutes a forum consisting of actual individuals. It also implies the fact that being a good and a reasonable person in itself directs every single man towards pure happiness. Let us put it in this way: a good legal body treats every single member well, and its intentions are not self-love. It is good in all conditions and, accordingly, reasonableness constitutes the content of all its resolutions.

> Without being an enemy of virtue, a cool observer, one that does not mistake the wish for good, however lively, for its reality, may sometimes doubt whether true virtue is actually found anywhere in the world, and this

[13] Henry Allison, *Kant's Theory of Freedom* (Cambridge University Press, 1990), 2-3, 11-12; Sharon Anderson-Gold, *Unnecessary Evil: History and Moral Progress in the Philosophy of Immanuel Kant* (SUNY Press, 2001), 15-17.

[14] *Fundamental Principles of the Metaphysic of Morals, by Immanuel Kant, 1724-1804. Available at https://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/chapter2.html* (visited *6* June 2017*).*

> especially as years increase and the judgement is partly made wiser by experience and partly, also, more acute in observation. This being so, nothing can secure us from falling away altogether from our ideas of duty, or maintain in the soul a well-grounded respect for its law, but the clear conviction that although there should never have been actions which really sprang from such pure sources, yet whether this or that takes place is not at all the question; but that reason of itself, independent on all experience, ordains what ought to take place, that accordingly actions of which perhaps the world has hitherto never given an example, the feasibility even of which might be very much doubted by one who founds everything on experience, are nevertheless inflexibly commanded by reason; that, e.g., even though there might never yet have been a sincere friend, yet not a whit the less is pure sincerity in friendship required of every man, because, prior to all experience, this duty is involved as duty in the idea of a reason determining the will by a priori principles.[15]

Yet, love for justice is not an easy task; the greatest difficulty of our propensity to radical evil is that man, even in his sexual relations, does not properly understand the strength of love for justice. Man is often wrong. True love for any subject needs full understanding of the substance of the subject and scarification. Otherwise, the soul is damaged. This even includes justice and peace. We should one day realize that justice, the prevention of terrorism, and the creation of happiness are beyond any rules of law. They depend on the art of love, and this cannot be practiced easily, neither in family relations, nor in the unity of United Nations. They depend on discipline, concentration, patience, and the supreme concern to spread love.[16]

5. Religion within the Bounds of Bare Reason

The entirety of this book revolves around the principal theory of Immanuel Kant, the German philosopher, whose many ideas of legality, morality, justice, and love coincide with the very strong philosophy of radical evil in human nature. The well-known work of Kant*, Religion within the Bounds of Bare Reason,* clarifies that the existence of evil is based on free choice.[17]

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[15] *Fundamental Principles of the Metaphysic of Morals, by Immanuel Kant, 1724-1804. Available at https://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/chapter2.html (*visited 15 September 2017*).*

[16] Erich Fromm, *The Art of Loving* (Harper & Row, 1956), at 107-111.

[17] Immanuel Kant, '*Religion within the Limits of Bare Reason*', available at http://www.earlymoderntexts.com/assets/pdfs/kant1793part1. pdf. see *also* Michael Despland, *Kant on History and Religion* (McGill-Queen's University Press, 1973). See *also* Lewis White Beck, *Kant Studies Today* (Open Court, 1969).

Kant demonstrates a theory about a basic propensity to evil as an explanation for weakness of will. I will put forth in this book that this fundamental propensity to evil, in combination with intentional ignorance of knowledge by human choice, has also entered into the structure of the United Nations.

The system of international criminal law as it is today did not exist in Kant's time. However, it is believed that the system existed from another perspective under other titles. One may list the notion of the "law of war," the "law of peace and war," and "bad and good" or even "right and wrong." Kant's theory is certainly attributable to the system of international criminal law and justice, too. The entire system of international criminal law refers to what constitutes evil or, to use Kant's favourite term, the propensity to evil in human nature.

In other words, the entire literature of the system of international criminal law is evaluating, in one way or another, the concept of *mens rea*: its elements, identification, application, and prevention. It may be true that a man cannot wish to avoid evil in his nature, but man can surely wish to avoid acting on it. This is what the system of international criminal law says and what the metaphysics of Kant requires from its proponents. In other words, man is capable of controlling radical evil or evil interest and self-love. Nonetheless, I understand that this also depends on the requirements of the principle of morality and many other factors.

As I have noted in my work *Judgments of Love in Criminal Justice* "almost all norms of law present conditions, provisions, or principles that are crucial for their purpose, but this does not necessarily mean that the norm does not enjoy or have any requirements of the principle of morality. What the requirements of the principle of morality are simply such matters as good faith, good action, good interpretation, good result, and good achievement. I am, however, aware that these aims should also be a part of a legal norm. In other words, it is almost impossible to separate these requirements from the body of legal or moral norms, or even to separate legal, moral, and love norms from one another's discipline in the body of criminal law. This is not only the case for good law, but it should also be true for the body of bad law. One cannot properly present the content of norms of legality without the putative norms of morality."[18]

In his essay *Religion within the Bounds of Bare Reason*, Kant analyses the concept of radical evil by taking different philosophical approaches. Kant not only explains the metaphysical nature of radical evil, but also explains "the origin of moral evil." For this reason, he asserts "So if we are trying to determine and if possible explain the general subjective basis for

[18] At 36.

our adopting something bad into our maxim, we should inquire not into the temporal origin of such an action, but only into its reason-origin." Throughout Kant's philosophy, the element of reason constitutes a very valuable and constructive principle. One can find it in all his works. The theory is very simple: all acts have a reason. This may be bad or good, depending on the conditions of certain interpretation. Therefore, Kant gives priority to the reason of origin.

According to one author, one may sum up the value of the practical reality of the concept of an idea of reason. He says that

> A practical reality is grounded in the self-determining freedom of human action. An idea of reason is intelligible as an articulated unity of its parts. Freedom of the will, the integration of free choice and practical reason, is the focal point that units the various aspects of the practical idea of the reason into a network of conceptual interdependencies. Practical reason is the determining ground that can conform free choice to its own nature as a spontaneous causality of concepts. This meshing of freedom and necessity imparts normative force- and thus practical reality – to the entire idea of reason.[19]

Similarly, one may find a comparable description in Kant's work *Critique of Practical Reason*. Kant follows the same line of thought regarding the question of evilness, reason, self-love, and the concept of monopolisation of law, which, according to him, is the most essential reason for the cultivation of radical evil.[20] In fact, radical evil within Kantian philosophy, in other words, means the radical monopolisation of ideology, which we have to avoid. He states that "the concept of good and evil must not be determined before the moral law ... but only ... after it and by means of it."[21] This means that we cannot properly understand the concept of evil nature as long as we have not undertaken the scientific study of the origin and cause of our actions or the nature of human will. By this, he means the "conflict of maxims with the practical laws cognized by himself." However, what constitutes a maxim is also another question in itself.

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[19] Ernest J. Weinrib, 'Law as a Kantian Idea of Reason', 87 *Columbia Law Review* (1987), pp.472-508, at 507. Reprinted *also* in B. Sharon Byrd and Joachim Hruschka, *Kant and Law* (Ashgate, 2005), p.38.

[20] See, in general, Pablo Muchnik, *Kant's Theory of Evil: An Essay on the Dangers of Self-love and the Aperiodicity of History* (Lexington Books, 2010).

[21] Immanuel Kant, note 7.

6. Substance of a Maxim

Kant distinguishes sharply between *maxims* and practical laws and, on some occasions, he characterizes *maxims* as subjective laws. Although *maxims* have to be an objective rule first, he differentiates subjective from objective *maxims*. Accordingly, there must be a basic principle that creates conflicts with laws. Kant describes this idea of different *maxims* in several ways. He asserts that, when we call a man bad, this is not because his conduct is contrary to the principles of law, but because his actions imply that he has bad *maxims* in him. The recognition of these particular maxims is not easy for Kant. Therefore, to call a man bad, one also needs to have some notion about what the definition of bad is in order to understand the underlying evilness *maxims* − and to differentiate morally evil *maxims* from other *maxims*.

Thus, Kant seems to categorize different types of maxims, which are located in the substance of human beings. Maxims are thus different substances or feelings that are integral to man for different reasons. I will demonstrate later that Kantian theories about maxims are sometimes very hard to accept. One could get the idea that he is referring to similar ideas as those of Lombroso, the Italian criminologist who analysed the supposedly pre-established criminal nature of man. Kantian philosophy concerning maxims therefore has to be exercised cautiously and is, at the same time, very useful.

Radical evil or, let me say in this conjunction with the propensity to radical terror, is the situation when we give priority to our own wills and interests. We do not necessarily think we are obviously correct; we simply choose to give in to the temptation to favour our self-interest in our choice of maxims on certain occasions. This is not because of the existence of bad or evil maxims in our nature, but because we give precedence to certain matters and less attention to others. We choose between good and good and between bad and bad. In fact, our wisdom is the slave of our wills, and our wills are the one-eyed justice of the *radical propensity to evil* that makes evil deeds inevitable. This may be a matter of self-love and self-interest or, if we consider international organisations like the United Nations, it is the consequence of our strong military mobility or political power.[22]

[22] This matter of self-interest or state interests has remained one of the most serious issues in international law. Pablo Muchnik, note 13.