

# CATEGORICAL JURISDICTION

*A universal moral foundation of international crimes*

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Master thesis - spring 2011

*For everyone must admit that a law has to carry with it absolute necessity if it is to be morally valid - valid that is, as a basis of obligation; and everyone must grant that the commandment, 'Thou shalt not lie' could not hold merely for human beings, as if other rational beings had no obligation to abide by it. So it is with all other genuine moral laws. Consequently, the ground of obligation must here be sought, not in the nature of human beings or in facts about the way the world is, but solely a priori in concepts of pure reason.*

*-- Immanuel Kant, Preface to Groundwork of the Metaphysics of Morals*

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## Introduction

The International Criminal Court (ICC) has been set up as a means of adjudicating the most severe criminal offences known to man. In theory the jurisdiction of this court is not limited by the nationality of the individuals involved or location where a crime is committed. The primary limitation of its jurisdiction is found in the type of criminal offences it is competent to try. The crimes over which this court has jurisdiction is limited to four particular crimes.

To a large extent the selection of these crimes has been influenced by historical events in the Western part of the world. This empirical basis of its jurisdiction may hinder the acceptance of the work of the International Criminal Court on a global level. Also, the largely empirical basis of its jurisdiction makes this global court vulnerable to the criticism that this court is yet another example of a neocolonialist attempt at imposing Western values on the rest of the world.

One possible strategy to avoid this criticism would be to base the jurisdiction of the ICC on non-empirical grounds. This would require a choice of criminal offences which is not directly linked to historical events or cultural or even temporal judgements. The crimes which currently fall within the jurisdiction of the Court are crimes which are most likely considered horrendous crimes by the vast majority of individuals on this planet. The idea that most people consider these crimes to be horrendous, however, does not necessarily mean that they in fact are the most horrendous crimes conceivable.

In setting up an International Criminal Court the aim has been to construct a court which represents all cultures on this planet and which appeals to the ideals of justice of more than one generation. The very idea of a permanent International Criminal Court requires an appeal to the ideals of justice of all, regardless of the era in which one lives or one's cultural or religious background.

This thesis aims to inquire into the possibility of such an absolute foundation of justice which appeals to all and which is categorically binding upon all rational beings, regardless of cultural or temporal restrictions.

In order to investigate this possibility I will inquire into the possibility of providing the foundation of its jurisdiction through a universal moral basis which is independent of such cultural and temporal influences. More exactly in this thesis I will inquire into the following question:

**is it possible to identify crimes which require global penalisation and active prosecution by the International Criminal Court based on a categorical and universal moral norm?**

To answer this question I will inquire into a number of different aspects of the International Criminal Court and morality so as to gain a clearer understanding of the ideas behind different aspects of this question. The initial part of this investigation will concentrate on the International Criminal Court itself. In order to speak intelligibly of the possibility of formulating a list of crimes to fall under its jurisdiction the question: ‘what is the purpose of the International Criminal Court and what crimes currently fall under its jurisdiction?’ needs to be answered first.

Therefore this inquiry will commence with an inquiry into this question. In particular I will pay attention to the establishment of the International Criminal Court, and the historic events which gave rise to the establishment of this institute. Furthermore I will pay particular attention to the purpose of the International Criminal Court and the crimes which currently fall under its jurisdiction.

After having gone into the specifics of the International Criminal Court I will continue to inquire into theories on morality. In finding a suitable moral theory to function as a foundation for the formulation of a list of crimes for the International Criminal Court an understanding of the existing moral theories is paramount. In inquiring into the different existing moral theories I will answer the question: ‘is there a moral theory which could function as a universal and categorically binding moral theory for the foundation of jurisdiction?’.

This part of the inquiry will be dealt with in two parts. The first part will investigate the currently existing moral theories and will give an overview of the main types of moral theory currently recognised. The second part of this inquiry will deal in more detail with the universal applicability of each of the different types of moral theory. Through an examination of the different moral theories I will argue that the moral theories of Immanuel Kant and Alan Gewirth are the two moral theories which appear to meet the prerequisites and which therefore warrant further investigation.

I will therefore continue with a more detailed examination of the moral theories of Kant and Gewirth. Inquiring further into the particulars of these moral theories and their universal validity requires an understanding of the possibility of formulating a truly universal moral theory at all. Therefore this question will be addressed first. This part of the inquiry will be carried out by inquiring into Kant’s theory of the possibilities of inquiring into metaphysics. The find-

ings of this inquiry will provide the required framework for the further examination of the theories of Kant and Gewirth.

The inquiry into these moral theories will focus on both the contents and the categorical validity of these theories. In inquiring into these different theories I will begin by inquiring into the theory of Kant and answer the question: 'what are the key elements of the moral theory of Kant and can this moral theory be considered a universal and categorical moral theory?'

After inquiring into the theory of Kant, I will continue my examination of the theory of Gewirth. This part of the inquiry will likewise focus on answering the question: 'what are the key elements of the moral theory of Gewirth and can this moral theory be considered a universal and categorical theory?'

The examination will subsequently be concluded investigating whether either moral theory may be considered successful in its attempt to formulate a categorical and universal moral theory. Furthermore both moral theories will be examined as to their suitability to act as the foundation for the jurisdiction of the International Criminal Court. Lastly, the consequences of founding the jurisdiction on the theory which is considered the most suitable moral theory will be investigated. In this chapter I will therefore answer the question 'is it possible to identify crimes which require global penalisation and active prosecution by the International Criminal Court based on a categorical and universal moral norm?';

Finally, this inquiry will conclude by examining the results from this investigation and by summarising the main conclusion from this inquiry.

# The International Criminal Court

## HISTORY OF THE INTERNATIONAL CRIMINAL COURT

The history of the International Criminal Court can be traced back to the final days of the Second World War. The events which took place during this war had been so gruesome that the establishment of an international court was deemed necessary to try those responsible for these atrocities. The purpose of such a court, which was established in the German city of Nürnberg, was to try

*war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities.*<sup>1</sup>

The Nürnberg tribunal was the first international court of its kind and was established by the four allied powers; the United States, the United Kingdom, the Soviet Union and the provisional government of France at the London agreement.



During the time of its operation a total of 24 Nazi leaders were indicted for the war crimes committed by them and the Nazi regime in the so called major war crimes trials. Of these 24 ultimately 19 were convicted and sentenced.<sup>2</sup> After these initial trials the tribunal went on to prosecute some 200 other war criminals.

The Nürnberg tribunal created an important precedent in the prosecution of individual war criminals which would not be repeated for another fifty years, with the exception of the Eastern equivalent of the Nürnberg tribunal, the Tokyo tribunal.

The break up of former Yugoslavia around 1991 and the wars surrounding this break up would lead to the instigation of the first international criminal tribunal since the end of the Second World War. The war that took place in former Yugoslavia provided pictures that were reminiscent of events during the Second World War. As with the Nürnberg tribunal the international community reacted by establishing an international tribunal aimed at prosecuting those indi-

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<sup>1</sup> Article 1 of the London Agreement, of August 8th, 1945.

<sup>2</sup> <<http://www.history.ucsb.edu/faculty/marcuse/classes/33d/projects/nurembg/NurembergIntro.htm>>

viduals responsible for the violations of international humanitarian law during this war.<sup>3</sup> The tribunal has been in existence since 1993 and currently the ending of its activities is foreseen for 2012. Since its establishment the court has prosecuted 161 persons, the most famous of those being Serbian politician Slobodan Milošević.<sup>4</sup>



Shortly after, atrocities committed in Rwanda in 1994 led to establishment of a second tribunal aimed at trying persons responsible for genocide and violations of international humanitarian law. This tribunal, the International Criminal Tribunal for Rwanda (hereafter: ICTR) was established in 1994<sup>5</sup>.

As with the ICTY the international indignation at events which took place in Rwanda made the establishment of an international tribunal unavoidable. With the creation of the ICTR, came the realisation that the ever growing number of international conflicts after the end of the Cold War would require the establishment of a permanent International Criminal Court.

The call for the establishment of a permanent International Criminal Court was not new. Soon after the establishment of the Nürnberg tribunal and the Tokyo tribunal similar calls had been heard which had led to investigating this possibility. Political events however led to the end of these investigations.

This time, the end of the Cold War provided for a political arena with more chances of success. In 1998 the Rome Statute, establishing the International Criminal Court, was adopted by 120 states. It would still be another four years until the required number of 60 states had ratified the treaty, allowing for the actual establishment of the Court itself. On 1 July 2002 the Rome Statute establishing the International Criminal Court entered into force.

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<sup>3</sup> United Nations Security Council resolution 808, 22 February 1993.

<sup>4</sup> [http://www.icty.org/x/file/Cases/keyfigures/key\\_figures\\_101026\\_en.pdf](http://www.icty.org/x/file/Cases/keyfigures/key_figures_101026_en.pdf)

<sup>5</sup> United Nations Security Council Resolution 955, 8 November 1994.

## JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The territorial jurisdiction of the ICC is restricted to the territory of one of the ratifying states or where the accused is a national of one of the ratifying states. A third possibility of gaining jurisdiction exists when the United Nations Security Council has referred a situation to the prosecutor of the ICC.

Apart from the geographic limitations on the jurisdiction of the ICC, the Rome Statute provides for a number of other, arguably more important, limitations on the jurisdiction of the Court. In accordance with the historic backdrop which provided for the establishment of the Court and the additional character of the ICC, the crimes over which the Court has been awarded jurisdiction are limited. The ICC has been awarded jurisdiction only over those crimes which are considered worthy of the attention of such a severe instrument. In the preamble to the Rome Statute the Parties to the treaty the following considerations can be found on this subject:

*Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.*

and

*Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.<sup>6</sup>*

In accordance with the principle of the ICC as an ultimum remedium, the states participating in the Rome Statute had to come to agreement on the crimes over which the court has jurisdiction. As explained in the preamble the jurisdiction of this court was to be limited to the most serious crimes of concern to the international community as a whole.

In the end four crimes were selected. During the negotiations over the Rome Statute these four crimes became known as the four core crimes. These were the crimes over which agreement was reached relatively easy.

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<sup>6</sup> Rome Statute, 17 July 1998, preamble,

<[http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf)>

The first of these crimes, genocide, required little debate and raised little objection.<sup>7</sup> This may to a large extent be explained by the role that genocide played during the Second World War and the instigation of the Nürnberg and Tokyo tribunals.

The second type of crime over which the ICC has jurisdiction are the so called crimes against humanity. The inclusion of this crime provided for more debate.<sup>8</sup> The debate centered primarily on the wording of the article. This resulted in the current article which provides for jurisdiction of the court in cases where a number of specific acts such as murder and torture are committed as part of a widespread or systematic attack against civilian population.

War crimes form the third category of crimes over which the ICC has been awarded jurisdiction. The definition of war crimes proved to be one of the most heated issues during the preparation of the Rome Statute.<sup>9</sup> The reason this provision gave rise to such heated debate can be found in the fact that that humanitarian law consists of a fairly large number of treaties and conventions which have been recognised by most states only in parts. The majority of states have chosen not to adopt all treaties and conventions existing in humanitarian law. Ultimately, the chosen wording provides for specific acts which are considered to be war crimes under the Rome Statute.

The crime of aggression provides for the final act under the jurisdiction of the ICC. This act has not been defined further in the text of the Rome Statute. The reason for this is that the definition of this provision proved too difficult. The main problem surrounding this definition was the role of the Security Council in determining that an act of aggression had taken place. For this reason the crime of aggression has been listed in the crimes over which the court has jurisdiction, but only after a suitable definition for this crime has been formulated. This definition was finally agreed upon at the 2010 review conference of the Rome Statute. Also at this conference it was determined that the Prosecutor of the ICC has the authority to conduct investigations into acts of aggression independently of the Security Councils decision on the matter. Certain limits to this authority have been agreed upon.

In the preparation of the Rome Statute three other crimes have been considered. Firstly the crime of drug trafficking was put forth as one of the crimes over which the ICC was to have jurisdiction. Also, the crime of terrorism has been put forth as well as crimes against United Nations and associated personnel. Practical issues prevented the inclusion of these crimes in the Rome Statute. In the case of the crimes of terrorism and drug trafficking the method of investigation into these crimes was deemed more appropriate for national authorities. The

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<sup>7</sup> Arsanjani, M.A., "*The Rome Statute of the International Criminal Court*", American Journal of International Law, vol. 93, No.1 (Jan. 1999), pp 24.

<sup>8</sup> Ibid, p. 31.

<sup>9</sup> Ibid, p. 32.

problem with including crimes against UN personnel and associated personnel was that at the time of consideration of this crime the Convention on the Safety of United Nations and Associated Personnel was not yet in force.<sup>10</sup> As this convention provided the background required for the inclusion of this crime, it was not added as a separate crime over which the ICC has jurisdiction. A number of different forms of this crime, however, have been formulated and added as a particular act classified as a war crime.

During the drafting of the Rome Statute no explicit reference was made to the atrocities and the events of the Second World War or even the events which led to the instigation of the ICTY and the ICTR. Nevertheless the wording of the texts suggest that these events played an important role. In drafting the Rome Statute states built upon the experience gained by events during the Second World War and subsequent events. Without these events and the previous courts the Rome Statute would never have been drafted and the International Criminal Court would never have been established.

## C O N C L U S I O N

The final texts of the the Rome Statute award jurisdiction to the ICC over four different crimes. These four crimes are considered the core crimes of international criminal law. The basis of these crimes can be found primarily in the historic context of the establishment of the ICC and the political arena surrounding the debates at the time of the drafting of the treaty. The choices of the crimes over which the ICC has jurisdiction suggest that the Second World War and its atrocities had a profound influence in defining the jurisdiction of the court.

By awarding the jurisdiction of the court on these historic events, the question remains if the conditions in the preamble are met. In its preamble the participating nations to the Rome Statue state their desire to form an international court which is to prosecute only the worst crimes. Although it cannot be argued that the four core crimes can be considered horrendous acts, it provides no justification for its selection of these four crimes. It may even be argued that to a large extent the selection of these crimes has taken place under the influence of events in Western nations.

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<sup>10</sup> Ibid, p. 30.

## Moral theories and their applicability

In an attempt to find a less historically oriented, empirical, basis this thesis inquires into the possibility of using a universal moral theory as the foundation for its jurisdiction. The success of this attempt is strongly dependent on the existence of any such moral theory and the possibility of applying such a theory as a foundation for jurisdiction.

This chapter therefore inquires into the existence of a moral theory which may serve as a foundation for jurisdiction. More precisely, the question to be answered in this chapter is: ‘is there a moral theory which could function as a universal and categorically binding moral theory for the foundation of jurisdiction?’

To answer this question a basic understanding of existing moral theories is required. To this end I will provide an overview of the main types of ethical theory to be identified within philosophy. In providing this overview I will furthermore discuss the suitability of the different types of ethical theory for the purposes of this thesis. In doing so, I will deal specifically with the question which moral theory is suitable to serve as a foundation for criminalisation of offences for the ICC.

### ETHICAL THEORIES

Before inquiring into different ethical theories which can be identified, we must first identify what is meant by ethical theories. Within ethical theories it is possible to distinguish between meta-ethical theory, normative ethics and practical or applied ethics.<sup>11 12</sup> The main differentiation to be made within these types of ethical theories is the distinction between meta-ethics and normative ethics.

The question as to what constitutes ethics or morality is subject of meta-ethics.<sup>13</sup> This field of ethics is primarily concerned with the justification of an ethical theory. As such, meta-ethics provides a theoretical background on ethical matters from a more abstract level. Those involved in meta-ethical theory attempt to step back from moral theory and consider morality in general. Typical questions being asked within meta-ethical theory include questions such as; what is the status of moral claims? and are claims about morality objective?<sup>14</sup> Typically through

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<sup>11</sup> Kagan, S., “*Normative Ethics*”, Westview Press, Oxford, 1998, p. 2.

<sup>12</sup> LaFollette, H., “*The Blackwell Guide to Ethical Theory*”, Blackwell Publishers, Oxford, 2000, p. 1.

<sup>13</sup> Crisp, R., “*Ethics*” in Routledge Encyclopedia of Philosophy, edited by E. Craig, Routledge, London, 1998.

<sup>14</sup> LaFollette, H., “*The Blackwell Guide to Ethical Theory*”, Blackwell Publishers, Oxford, 2000, p. 1.

meta-ethical theory there is no reflection upon concrete issues which started the reflection in the first place.<sup>15</sup>

The field of meta-ethical theory may be distinguished from normative ethical theory. This field of ethics is more practical and is concerned with arriving at the standards which regulate right and wrong.<sup>16</sup> Within the field of normative ethical theory philosophers refer to the principles, concepts and ideals which underlie ethical judgements in individual cases.<sup>17</sup> An effort is made in normative ethics to find logical and consistent theory behind the reasoning of individuals on ethical matters. By doing so, it is possible to obtain a greater understanding of the reasoning behind moral judgements which enables us to make informed judgements on issues of morality. It is concerned with stating and defending the most basic moral principles.<sup>18</sup> The most important question being asked within normative ethics being: 'how ought I to live?'<sup>19</sup> or 'how should one live?'.<sup>20</sup>

Applied ethics or practical ethics is a branch of normative ethics concerned with examining specific issues from an ethical point of view. This field of ethics takes the principles and ideals of normative ethics and attempts to apply these to specific and concrete situations.<sup>21</sup> By reasoning from the principles defined in normative ethical theory it attempts to provide for a well reasoned direction in particular situations. As such, it may be considered a part of the field of normative ethics.

The purpose of the inquiry in this chapter is to identify a theory which may serve as a basis for jurisdiction of the ICC. This requires the identification of a theory which provides for standards of conduct from an ethical point of view. Therefore this chapter will focus on the different ethical theories provided for in normative ethical theory.

Within normative ethics different two types of ethical theory may be identified. The primary distinction which can be made is the distinction between teleological and deontological theories. Teleological theories are characterised by the fact that in these theories determining the rightness of an action is dependent upon the extent to which an action is directed towards a

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<sup>15</sup> Sayre-McCord, Geoff, "Metaethics", The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/metaethics/>>, §1.

<sup>16</sup> Fieser, J. "Ethics" in Internet Encyclopedia of Philosophy, <<http://www.iep.utm.edu/ethics/>>.

<sup>17</sup> Darwall, S.L., "Theories of Ethics" in A Companion to Applied Ethics, edited by R.G. Frey and C.H. Wellman, Blackwell Publishing, Oxford, UK, p. 18.

<sup>18</sup> Kagan, S., "Normative Ethics", Westview Press, Oxford, 1998, p. 2.

<sup>19</sup> Singer, P., "A Companion to Ethics", Blackwell Publishers, Oxford, 1991, p. xi

<sup>20</sup> Kagan, S., "Normative Ethics", Westview Press, Oxford, 1998, p. 1

<sup>21</sup> Ibid, p. 3.

purpose previously defined as good.<sup>22</sup> Therefore the rightness of an action is always dependent upon the measure in which it contributes to reaching the good. The central characteristic of teleological theories lies in the claim that the ultimate basis of normative ethics is to be found in terms of the significance of some central good or goods.<sup>23</sup> Within teleological theories it is possible to differentiate, yet again, this time between virtue ethical theories and consequentialist theories.

Deontological theories take a different approach. In a deontological theory of ethics an action may be considered right independent of the extent to which it aims to provide for something good.

This leaves us with three types of normative ethical theories to be investigated. The two teleological theories, virtue ethics and consequentialism on the one hand and the deontological theory of ethics on the other. The extent to which different ethical theories may be considered appropriate for the purpose at hand depends on a number of considerations. To be suitable for this purpose the different ethical theories need to meet certain criteria. These criteria will be discussed prior to providing the overview of normative ethical theories.

#### PREREQUISITES FOR SUITABILITY

This thesis aims to inquire into the possibility of formulating a list of crimes for the ICC on the basis of a universal moral theory. This means that the list of crimes is to be based on a moral theory which applies to all individuals regardless of cultural or temporal background.

Most, if not all, moral theories attempt to provide for a theory on morality which reaches beyond an individual morality. The very essence of formulating a moral theory is to inquire into a morality which allows for some sort of objectivity. To formulate a strictly subjective moral theory would obviously be nonsensical.

However, for the purpose of this thesis the sole intention of formulating a theory which is not a subjective theory is not sufficient. A number of prerequisites must be met for an ethical theory to be considered suitable. The most important restriction is that the moral theory must be considered a theory which attempts to provide for a universal theory of morality. From this follows that not all moral theories can be considered suitable as a basis for this list of crimes for criminalisation.

In order to serve as a basis for universal jurisdiction a moral theory must also provide for a theoretical basis as to why this particular theory is to be considered a universal moral theory. This theory should allow for a basis for its universality based on reason. Only if such a theo-

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<sup>22</sup> Korsgaard, C.M., "Teleological Ethics", in Routledge Encyclopedia of Philosophy, edited by C. Craig, Routledge, London, 1998.

<sup>23</sup> Kagan, S., "Normative Ethics", Westview Press, Oxford, 1998, p. 240.

retical foundation is provided is it possible to inquire into the argumentation as to its universality and is it possible to argue against or in favour of such an argumentation.

The prerequisite for any moral theory to be considered as a basis for criminalisation of offenses is therefore that such a moral theory must provide for a theoretical foundation for its alleged universality. The focus of the following will therefore be on the possibility of identifying a normative ethical theory which meets these criteria for suitability as a foundation for the jurisdiction of an ICC.

This provides for a benchmark to which the three ethical theories may be held which allows a more detailed examination of the three different types of ethical theory to be examined. I will provide an overview of their main characteristics and discuss their applicability as a foundation for jurisdiction of the ICC.

In doing so, I will start this overview with the teleological theories, virtue ethics and consequentialism. The third type of ethical theory to be examined is the deontological theory of ethics.

## VIRTUE ETHICS

Virtue of character is the predominant idea behind the ethical theory of virtue ethics. The philosophers commonly referred to as the founding fathers of virtue ethics are the Greek philosophers Plato and Aristotle.<sup>24</sup> From the works of these philosophers, and in particular the *Ethica Nicomachea* by Aristotle, the theory of virtue ethics has a long history in modern moral thought. Although since their discovery during the enlightenment both the teleological and deontological theories have attracted the most attention over the past 400 years, virtue ethics has provided great insights.

A number of aspects are particular to virtue ethics which set this type of theory apart from the other two ethical theories. Most characteristic about virtue ethics is the emphasis on virtue and on the moral of character. As stated before, the central question in normative ethics is the question: 'how ought I to live?'. Although this question also forms the central question of consequential ethicists, the emphasis for virtue ethicists is not on the action but on the character of the individual deciding upon an action. The virtue ethicist will seek to explain appropriate conduct by reference to action that exemplifies virtue.<sup>25</sup> For a virtue ethicists actions are morally good because they exemplify virtuous character traits.<sup>26</sup>

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<sup>24</sup> Hursthouse, Rosalind, "Virtue Ethics", The Stanford Encyclopedia of Philosophy (Spring 2009 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2009/entries/ethics-virtue/>>, §1.

<sup>25</sup> Shafer-Landau, R, "Ethical Theory - An anthology", Blackwell Publishing, Oxford, 2007, p. 663.

<sup>26</sup> Ibid.

The question remains what exactly constitutes a virtuous character. This question may be answered in many different fashions. In order for virtue ethics to work, it is inevitable however that this question is answered. What remains constant is that an idea must be formed on what is a virtuous character.<sup>27</sup>

A second characteristic of virtue ethics is that its primary concern is not to provide guidelines or recipes for behaviour. Its primary concern lies with defining what is virtuous or moral good. Any virtue ethical theory will therefore focus on describing what is virtue and what is morally good or admirable. From the identification of this virtue it becomes clear what one should aspire to be. It will not describe the right course of action in any event, but from the identification of what a virtuous person is, the right action may be derived.<sup>28</sup>

Any theory on virtue ethics will therefore need to define its concept of virtue, of moral good. Early Greek philosophers typically looked for this concept of virtue by inquiring into the natural position of man. Of the virtue ethical philosophers, Aristotle may be considered the most prominent, or at the very least the best known.

Ancient Greek philosophers considered *eudaimonia* as the state in which man was at his best. *Eudaimonia* is the Greek word for a state which may be translated as 'happiness'. To reach this state of happiness, Aristotle considered man must live in accordance with his purpose. This in turn meant that man had to live in accordance with his function and to excel at this function. Aristotle concludes that true excellence is reached by a life of contemplation in accord with its proper excellence - theoretical wisdom.<sup>29</sup> Or as explained by Aristotle:

*To contemplate whatever pertains to the heavens and to the stars and the moon and the sun in the heavens, as though everything else was of no worth.*<sup>30</sup>

A life in accordance with this purpose will therefore bring the aspired true virtue. Aristotle realises this life can not be attained by all and is only available to the few who realise the value of such a life. For those seeking an alternative way of life that may also bring excellence, Aristotle stresses the possibility of reaching - a lesser form of - excellence through political life.

This theory on virtue ethics is one of the possible ways of exploring into human virtue and its definition. Over the many years since its conception there have been many philosophers who have presented alternative views on ethics which may still be qualified as virtue ethicists. These views, however, all share the characteristic traits as outlined above. Virtue of character remains

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<sup>27</sup> Slote, M, "Virtue ethics" in Three Methods of Ethics: A Debate by M.W. Baron, P. Pettit and M. Slote, Blackwell Publishers, Oxford, 1997, p. 177.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid, p. 62.

<sup>30</sup> NE VI.7.1141b2-8, X.8.1179a13-16

the dominant factor in this theory. It is generally the way in which virtue is then defined which subsequently differs.

Defining the qualities which make up the virtuous character are found through an investigation of previous experiences, inquiring into the particular character traits which make up the virtuous character. Although different virtue ethical theories arrive at different conclusions, no virtue ethical theory may be found which attempts to provide for an abstract basis for its definitions and which attempts to formulate a theoretical basis for its universal applicability. For the purposes of this thesis it is therefore important to note that no virtue ethical theory has been identified where an attempt was made to provide for an absolute categorical foundation of the concept of virtue.

Such a theoretical foundation, however, is instrumental in allowing an investigation of its claim of its universality. Without the existence of any virtue ethical theory which applies for such a foundation, these types of ethical theories must be discounted as a basis for criminalisation of offenses for the ICC. This investigation will therefore continue with an inquiry into the second type of ethical theories which has previously been identified; the teleological theories.

#### CONSEQUENTIALISM

Consequentialism does not focus on the character of the acting individual but on the results of the actions of this individual. The concern with the expected outcome is the common denominator for different teleological theories.<sup>31</sup> Defining the preferred outcome is what sets the different teleological theories apart. To all teleological theories the preferred outcome is defined in terms of the good. The good is defined differently in different types of teleological theories.<sup>32</sup>

When compared to virtue ethical theories one thing both theories have in common is the fact that in both these theories an idea must have been formed about what is good. The main difference between virtue ethics and consequentialism however is that with virtue ethics this good concerns the good character. Virtue ethics formulate an idea about what virtue of character is. This is not the case in consequentialism.

In short, the prime characteristics of consequentialism may be characterised as such; ‘consequentialism takes the good to be primary and identifies right action as action that promotes value’.<sup>33</sup> From this follows that consequentialist theories are comprised of two components.

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Brink, D.O., “*Some Forms and Limits of Consequentialism.*”, in *The Oxford Handbook of Ethical Theory*, edited by David Copp, Oxford University Press, Oxford, 2006, p. 381

The first component consists of a theory of value or a theory of the good. The second component is a theory about what individual and institutional agents should do by way of responding to valuable properties.<sup>34</sup> Consequentialism can therefore be summarised as any theory with a view that whatever values an individual or institution adopts, the proper response to those values is to promote them.<sup>35</sup>

Within consequentialism a number of different approaches may be identified yet again. The primary distinction which can be made is between act consequentialism and rule consequentialism. Although both theories focus on the expected outcome, the difference between these two theories lies in the approach taken to identify the best outcome.

Within rule consequentialism the question asked is what set of rules would lead to the best possible results.<sup>36</sup> Acts are considered permissible if this act conforms to the optimal set of rules, the rules that would lead to the best possible outcome.<sup>37</sup> Rule consequentialist theories evaluate acts in terms of rules selected for their good consequences.<sup>38</sup> The conformity of the outcome of an act is thereby dependent on a set of rules and not on the direct outcome of any act. These rules are considered to be the best possible means of establishing a desired outcome.

This approach differs from act consequentialism in the sense that act consequentialism focuses directly on the act. Act consequentialism considers an act to be right if and only if that act maximises the good. This means that the total amount of good for all minus the total amount of bad for all is greater than this net amount for any incompatible act available to the agent on that occasion.<sup>39</sup>

Act consequentialism is concerned with the purpose with which an act is fulfilled. The question 'how should one live' is translated into the question, 'how should I act?'. The answer to this question is dependent on the situation, but more importantly it is defined in terms of its expected outcome.

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<sup>34</sup> Pettit, P, "*Consequentialism*," in *A Companion to Ethics*, edited by P. Singer, Basil Blackwell, Oxford, 1991, p. 230.

<sup>35</sup> Ibid, p. 231.

<sup>36</sup> Kagan, S., "*Normative Ethics*", Westview Press, Oxford, 1998, p. 223.

<sup>37</sup> Kagan, S., "*Normative Ethics*", Westview Press, Oxford, 1998, p. 224.

<sup>38</sup> Hooker, B. "*Rule-Consequentialism*," in *The Blackwell Guide to Ethical Theory*, edited by Hugh LaFollette, Blackwell Publishers, Oxford, 2000, p. 185.

<sup>39</sup> Sinnott-Armstrong, Walter, "*Consequentialism*," *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/consequentialism/>>, § 1.

A prime example of one such consequentialist theory is the utilitarian approach. Utilitarian theories base their concept of right and wrong on the usefulness of their actions. The action which is the most useful based on a pre-formulated definition of utility is considered the right action. The main problem for utilitarians then becomes the question when something is considered to be useful. Defining usefulness thus forms the largest challenge.

The most famous proponents of utilitarianism are the philosophers Jeremy Bentham and John Stuart Mill. The form of utilitarianism put forth by them is known nowadays as hedonistic utilitarianism. This type of utilitarianism defines an action as useful when it brings forth the greatest amount of happiness and avoids the greatest amount of pain.<sup>40</sup> In his book *Utilitarianism*, John Stuart Mill states the following:

*The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.<sup>41</sup>*

Important to note is that this theory is not interested in the moral character of the agent committing acts, but only in the acts themselves. An action is right independent of the intentions with which the action is committed. As stated before, in this lies the most important difference with regards to the virtue theories.<sup>42</sup>

Utilitarianism is not the only consequentialist theory. Next to utilitarianism there are many other theories that fit the criteria of consequentialism. The past few decades have seen a rise in the interest in consequentialism. Modern philosophers have rediscovered the value of consequentialist theories which has resulted in the formulation of a number of moral consequentialist theories.<sup>43</sup> These modern consequentialist theories naturally share the characteristics of consequentialist theories as defined before.

In order for this type of ethical theory to be suitable for the purposes of this thesis, it must therefore be determined whether there are any teleological theories where an universally valid purpose has been established. Where any teleological theory has attempted to identify such a universally valid purpose and where this theory has also attempted to formulate this purpose by means of an theoretical universally valid reasoning, this teleological theory may meet the prerequisites for this theory to function as a basis for this thesis.

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<sup>40</sup> The Shorter Routledge Encyclopedia of Philosophy, "Consequentialism" Routledge, Oxon, 2005.

<sup>41</sup> Mill, J.S, "Utilitarianism.", <<http://www.gutenberg.org/files/11224/11224-8.txt>>, chapter II.

<sup>42</sup> Crisp, R, "Mill on Utilitarianism.", Routledge, London, 1997, p. 97.

<sup>43</sup> Kagan, S., "Normative Ethics", Westview Press, Oxford, 1998, p. 224.

Although many different teleological theories may be identified, no such theory may be identified which meets the previously formulated prerequisites. Many different purposes have been identified in these different types of teleological theory.

Despite this wide variety of theories within this category, no theory can be said to have attempted to formulate its purposes through a systematic reasoning which holds universal validity regardless of cultural or temporal background.

From this follows that this type of theory must also be disqualified as a foundation for a list of criminal offenses which may serve as the basis for the jurisdiction of the ICC. Therefore this inquiry will continue with the last category of ethical theory, the deontological theories.

#### DEONTOLOGICAL THEORIES

The previous paragraph dealt with teleological theories. In this paragraph I stated that the prime characteristic of teleological theories is that these theories judge the rightness of actions based on the manner in which these actions contribute to achieving a state of affairs which has previously been stated as good.

This is also the point where teleological theories differ from deontological theories. The essence of a deontological theory is that the rightness of actions is independent from the state of affairs they bring about. The rejection of this characteristic of teleological theories is what primarily defines deontological theories.<sup>44</sup> Deontologists aim to avoid the emphasis on the state of affairs that choices bring about, they do not interest themselves in the outcome of choices.<sup>45</sup> The production of good is not the only morally relevant consideration. In fact, it may be permitted or even required not to maximise the good.<sup>46</sup> For deontologists, what makes a choice right is its conformity with a moral norm. In this sense, for deontologists, the 'Right has priority over the Good'.<sup>47</sup>

Deontological theories are further characterised by their emphasis on duty, which explains the term deontology from the Greek *deon*, 'duty' and *logos*, 'study of.' Constraints and obligations on actions of an individual are therefore its primary characteristics. To deontologists certain actions are considered wrong regardless of the consequences that an act may bring about. Cer-

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<sup>44</sup> Kagan, S., "*Normative Ethics*", Westview Press, Oxford, 1998, p. 240.

<sup>45</sup> Alexander, Larry, Moore, Michael, "*Deontological Ethics*", The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological/>>

<sup>46</sup> McNaughton, D & Rawlings, P, "*Deontology*" in The Oxford Handbook of Ethical Theory by D. Copp, Oxford University Press, Oxford, 2006, p. 424.

<sup>47</sup> Alexander, Larry, Moore, Michael, "*Deontological Ethics*", The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological/>>, chapter 2.

tain actions are considered intrinsically morally right or wrong.<sup>48</sup> To deontologists this intrinsic character of an action is decisive, regardless of the consequences such an action may bring about.

As with teleological theories a number of different subspecies may be identified within the field of deontological ethics. All these subspecies share the characteristic of believing in the importance of constraints and the idea that certain actions are intrinsically right or wrong. They differ however in their means of identifying the constraints. More importantly within deontological ethics deontologists differ of opinion on the requirement of any such justification. Many deontologists deny that any such justification is required.<sup>49</sup> Others do accept the requirement for such a justification. These deontologists attempt to argue for a justification of duties by means of reason. By far the most important of these deontologists is the philosopher Immanuel Kant who gave birth to a strand of deontology in which he attempted to formulate a theory of morality based on an supreme principle of morality. This supreme principle of morality, he insisted, could only be found by means of analytic reasoning.

In his *Groundwork of the Metaphysics of Morals* he elaborated upon his ethical theory. Of particular interest to the main thesis of this paper is the aspect that Kant thought that reason alone was capable of discovering correct moral principles.<sup>50</sup> To Kant, empiricism could never provide for absolute a priori morality. As it was his intention to provide just that type of moral theory, Kant attempted to build his ethical theory on reason alone.

The deontological theory of Kant pays particular attention to the possibility of formulating a theory of morality on a non-empirical abstract basis. Throughout his works, Kant has paid particular attention to the sources of knowledge. In attempting to formulate a moral theory Kant commenced this attempt by first inquiring into the epistemological possibility of formulating a theory on morality. In other words, he first inquired into the possibility of theorising on the subject of the metaphysical. This theory of morality was intended to provide for a theory on morality which was universally valid for all rational beings, regardless of cultural or temporal backgrounds.

The revolutionary theory on morality of Kant inspired many philosophers in formulating their own theory on morality. Although most have not followed suit in providing for a moral theory with the same sort of absolute validity, one such philosopher has. The moral theory of Alan Gewirth, an American professor from the twentieth century, attempts to formulate a theory on morality which provides for an absolute validity regardless of cultural or temporal influences.

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<sup>48</sup> Shafer-Landau, R. *Ethical Theory, An Anthology*, Blackwell Publishing, Oxford, 2007, p. 522.

<sup>49</sup> Craig, E., *The Shorter Routledge Encyclopedia of Philosophy*, Routledge, London, 2005.

<sup>50</sup> Shafer-Landau, R. *Ethical Theory, An Anthology*, Blackwell Publishing, Oxford, 2007, p. 521.

Gewirth bases his theory on morality on the specific characteristics of human action. From the very concept of action two particular characteristics can be identified. Characteristic of this moral theory is that Gewirth attempts to formulate a moral theory which holds true for all agents, regardless of cultural backgrounds and regardless of the time they live. This theory, like the theory of Kant therefore appears to meet the requirements for the purposes of this thesis.

This leaves us with two moral theories which, at first glance, are worthy of further investigation into their exact argumentation. For these theories attempt to provide for a universal basis of morality which may serve as the basis for jurisdiction for the ICC as required for the purposes of this thesis.

## C O N C L U S I O N

In this paragraph I gave an overview of the three existing types of normative ethical theory, virtue ethics, teleological ethics and deontological ethics. From this overview it may be concluded that these types of theories each have their own specific characteristics. For this particular investigation it may also be concluded that not all ethical theories are able to provide the grounds for the formulation of an a priori moral norm that can be used as grounds for the main thesis.

As may be recalled the main thesis in this inquiry is to find a universal moral norm that can be used as the basis for formulating the jurisdiction of the ICC. In light of this thesis, virtue ethics was discounted as a viable option for providing the required universal moral basis. This was due largely to the fact that virtue ethics relies for empirical sources of knowledge for the identification of character traits which may be deemed to be virtuous. Providing for a universal moral basis to support a virtue ethicists theory has not been attempted. This is because an inherent aspect of virtue ethical theory lies in the selection of a virtuous character which is impossible to do on the basis of a priori grounds.

The second type of ethical theory to be inquired into has been the teleological theory of normative ethics. The primary characteristic of this type of theory is that it considers actions or decisions in the light of a pre-defined good. As with virtue ethics this good is defined on the basis of empirical judgments. Different types of teleological theories define the good in different manners on the basis of arguments which have no absolute, a priori meaning. By doing so these teleological theories fail to provide for a moral theory which has universal value.

The third theory which I have investigated is the deontological theory of ethics. The main characteristic of deontological ethics is the fact that a correct moral judgment is not dependent on a pre-defined good, but rather upon the idea that certain acts are considered immoral, regardless of their consequences. Within this type of ethical theory the theories of Immanuel Kant and of Alan Gewirth are of particular importance.

These two theories are the sole ethical theories which attempt to formulate a universal theory of morality. These theories of morality are to be independent of an empirical basis and must intend to formulate a theory valid for all rational beings independent of cultural or temporal background. By attempting to formulate such a theory based on an a priori basis, Kant and Gewirth appear to provide for a theory which meets the previously formulated prerequisites for a basis of jurisdiction.

For this reason the ethical theory of Kant and Gewirth will serve as the primary focus in the following chapters. To consider the suitability of these theories for the purposes of this thesis a more thorough investigation of these theories is required. Before such an inquiry can be carried out, however, first it should be established whether and if so, to what extent the possibility of formulating a universal theory of morality must be explored. The importance of the investigation of such a possibility had been recognised by Immanuel Kant who inquired extensively into this subject before formulating his moral theory. It is this investigation by Kant which will therefore be subject of the following chapter.

# Kant's theory on knowledge of metaphysics

*To seek out and establish the supreme principle of morality.*<sup>51</sup>

This is the purpose of Kant's moral inquiry as defined by himself at the outset of his book 'Groundwork for the Metaphysics of Morals'. To establish such a supreme principle with universal validity, first the question must be answered whether it is at all possible to formulate such a principle. To do so requires the ability to inquire into this subject which lies beyond the human senses, yet requires that a principle is formulated which is universally and categorically valid. Such a daunting task begs the question whether it is at all possible to speak intelligibly about morality. In essence, this requires an examination of the possibilities of acquiring knowledge.

Answering this question thus requires a detailed examination of the ways in which knowledge on this (or any other subject for that matter) is acquired. Before inquiring into the supreme principle of morality in 'Groundwork for the Metaphysics of Morals', Kant therefore set out to inquire into the possibilities of acquiring knowledge in general and of the metaphysical in particular. This examination Kant carries out in his 'Critique of Pure Reason'.

## A CRITIQUE OF PURE REASON

The purpose of this book is summarised by Desmond Hogan as follows:

*"The Critique of Pure Reason sets out to establish the sources, extent and limits of a priori knowledge, with a view to ascertaining the prospects for metaphysics as a scientific enterprise."*<sup>52</sup>

Inquiring into a priori knowledge is therefore the most important task for Kant. In conducting his inquiry, the central question is the question of how it is possible to acquire synthetic a priori knowledge. The concept of synthetic a priori knowledge is a concept first explicitly defined by Kant and forms one of the central elements in his revolutionary approach to the concept of knowledge.

In contrast to many philosophers of his age, Kant argued that not all knowledge necessarily follows from experience.<sup>53</sup> In his investigation, he emphasised the importance of reason and

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<sup>51</sup> Hill, T.E. and Zweig, A., "*Kant - Groundwork for the Metaphysics of Morals*", Oxford Philosophical Texts, Oxford University Press, Oxford, 2002, 4: 392.

<sup>52</sup> Hogan, D., "*Kant's Copernican Turn and the Rationalist Tradition*" in *The Cambridge Companion to Kant's Critique of Pure Reason*, edited by Paul Guyer, Cambridge University Press, New York, 2010.

<sup>53</sup> Kant, I., "*Critique of Pure Reason*.", translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B1

focused his attention on this aspect of knowledge. In an era where great advances had been made through the abstraction of knowledge from experiments, this was not an obvious conclusion.

In fact, Kant begins his book 'A Critique of Pure Reason' by stating that there can be no doubt that all our knowledge begins with reason.<sup>54</sup> Reason plays an instrumental role in acquiring knowledge and is therefore central to his inquiry into the possibilities of acquiring knowledge. The question Kant first sets out to answer is therefore

*“whether there exists a knowledge altogether independent of experience, and even of all sensuous impressions?”<sup>55</sup>*

This knowledge, independent of experience and even of all sensuous impressions, Kant calls *a priori* knowledge<sup>56</sup> which he defines in the following manner.

*“we will understand by a priori cognitions not those that occur independently of this or that experience, but rather those that occur absolutely independently of all experience.”<sup>57</sup>*

To Kant, a priori knowledge is therefore the opposite of empirical knowledge, or a posteriori knowledge, explained as knowledge which is gained through experience. A priori judgement can easily be distinguished from a posteriori judgement through the fact that an a priori judgement must always necessarily be a certain way.<sup>58</sup> This distinction between a priori and a posteriori knowledge is the first distinction he makes in inquiring into the possibilities of acquiring knowledge.

The second distinction made by Kant is between analytic judgements and synthetic judgements. An analytic judgement contains information which is inherent to the already present information. A famous example of such an analytic claim is the claim that 'all bachelors are

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<sup>54</sup> Kant, I., *“Critique of Pure Reason.”*, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B1

<sup>55</sup> Kant, I., *“Critique of Pure Reason.”*, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B1

<sup>56</sup> Kant, I., *“Critique of Pure Reason.”*, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B2

<sup>57</sup> Kant, I., *“Critique of Pure Reason.”*, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B2

<sup>58</sup> Kant, I., *“Critique of Pure Reason.”*, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B3.

unmarried men'. the fact that such a judgement is true must be reasoned and can not be verified by external experience.<sup>59</sup> Or in the words of Kant:

*"Analytic judgements do not really teach us anything more about the object than what the concept that we have of it already contains in itself; since they do not expand cognition beyond the concept of the subject, but only elucidate this concept."*<sup>60</sup>

A synthetic judgement on the other hand is a judgement which adds information. Through synthetic judgements a concept is linked to information which is connected to this concept, but which is not implicit in the concept itself.

When applied to the concept of the previously employed example of the bachelor, a synthetic judgement could be 'this bachelor is looking for a partner'. This sentence would have been an example of an analytic judgement if the concept of being a bachelor implied that this bachelor is looking for a partner. As this is (hopefully) not implied in the concept of the bachelor itself, this sentence has to be judged a synthetic judgement.

The ability to gain knowledge is therefore dependent on our capability of making synthetic judgements. Through these synthetic judgements we are able to link certain pieces of information and to further our knowledge. This investigation into the way knowledge is acquired provide Kant with the basic building blocks required for Kant's more detailed inquiry into the possibility of acquiring knowledge of the metaphysical.

After having identified these different categories of a priori and a posteriori judgements and after having made the distinction between analytic and synthetic arguments, Kant continues his inquiry by posing the question how synthetic a priori arguments are possible.

To Kant this question is not only central for inquiring into the possibilities of acquiring knowledge in general, but in particular to the possibilities of inquiring into the metaphysical.<sup>61</sup> If it is proven that synthetic a priori arguments are impossible it would follow that metaphysics is 'no more than illusory insights based on reason, but in reality nothing more than an the appearance of necessity based on experience.'<sup>62</sup>

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<sup>59</sup> Sullivan, R.J., *"Immanuel Kant's moral theory"*, Cambridge University Press, Cambridge, 1989, p. 15.

<sup>60</sup> Kant, I., *"Critique of Pure Reason."*, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B 764.

<sup>61</sup> Waxman, W., *"Kant's Debt to the British Empiricists"*, in *A Companion to Kant*, edited by G. Bird, Blackwell Publishing, 2006, p. 93.

<sup>62</sup> Kant, I., *"Critique of Pure Reason."*, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B20.

Therefore the future of metaphysics, including the future of any real scientific inquiry into the subject of morality, is dependent upon the explanation of this type of argumentation. Being able to explain how synthetic a priori judgements are possible in metaphysics is therefore the basis of any inquiry into morality.

## SYNTHETIC A PRIORI JUDGEMENTS

To answer this question, Kant formulates three separate questions which should lead to answering this question.<sup>63</sup> Kant begins by asking the question how synthetic a priori judgements are possible in mathematics. This examination is followed by an inquiry into how synthetic a priori judgements are possible in the natural sciences and concluded by an inquiry into the question how synthetic a priori judgements of metaphysics are possible.

The first question to be answered then is how synthetic a priori judgements are possible in mathematics. In order to do so, Kant inquires into the concepts of space and time. By inquiring into these subjects, Kant tries to show that these concepts of space and time are not concepts belonging to the world outside of ourselves which we sense, but instead that these are our own internal intuitions which we project onto the world as it were.

In essence, Kant claims that an object is not known to us because the object exists external to us and we perceive the object through the means of our sensory perception, as was traditionally held. Kant claims, knowing or cognizing an object requires an interaction between an object and ourselves. To cognize an object requires a synthetic unity of object and understanding.<sup>64</sup> This transition from a view where understanding an object was traditionally understood in terms of the object itself to a view where the understanding is initiated by our own cognitive capacity is termed by Kant as the Copernican revolution in epistemology.

After explaining how synthetic a priori judgements are possible in mathematics, Kant continues his examination by inquiring how synthetic a priori judgements are possible in the natural sciences.<sup>65</sup>

To Kant the most important aspect of this understanding lies in the ordering of objects by our intuitive ordering of perceptions. This inquiry is called the transcendental deduction of the categories and inquires particularly into the role that a priori concepts play in organising sensory perceptions.

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<sup>63</sup> Grier, Michelle, "*Kant's Critique of Metaphysics*", The Stanford Encyclopedia of Philosophy (Summer 2009 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2009/entries/kant-metaphysics/>>, § 1.

<sup>64</sup> Kant, I., "*Critique of Pure Reason*.", translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B 138.

<sup>65</sup> Grier, Michelle, "*Kant's Critique of Metaphysics*", The Stanford Encyclopedia of Philosophy (Summer 2009 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2009/entries/kant-metaphysics/>>, § 1.

This part of his philosophy is aimed at exploring the necessity of a priori concepts or categories in understanding the world around us. In it, Kant concludes that ‘the categories are necessary conditions of experience, or that we could not have experience without the categories’.<sup>66</sup>

On the one hand the a posteriori sensory information is required for the input of our experiences, on the other hand we require the use of our faculties in the form of our intuitive ordering through the categories to order this sensory information for it to become an experience.<sup>67</sup>

Through the application of these categories we are able to form judgements on objects around us. This knowledge of the world around us is an essential part in our understanding of ourselves. Through this knowledge of the world around us are we also able to be conscious of ourselves.<sup>68</sup>

Through this inquiry Kant has answered the second of his previously formulated questions. Synthetic a priori judgements of the natural sciences are possible because of the interaction between sensory a posteriori information and the importance of a priori information through the intuitive categories of the human mind. This combination forms an essential element in being able to form synthetic a priori judgements in the natural sciences.

Having thus answered the second of the formulated questions, Kant goes on to inquire into the third question. This is the question as to how synthetic a priori judgements of metaphysics are possible. This question is explored in the third part of the Critique of Pure Reason, known as the Transcendental Dialectic.

Kant bluntly answers this question by stating that synthetic a priori judgements of metaphysical objects is not possible.<sup>69</sup> Kant argues that doctrines of metaphysics have traditionally been founded on the illusions of arguing from traditional concepts of sensorial information. The human mind has the tendency to find explanations for things for which no explanation can be found. When confronted with issues of a metaphysical nature which cannot be explained, there is a natural tendency to formulate solutions on the basis of knowledge derived from known concepts. As we are only able to gain knowledge of matters known through sensorial information we have a tendency to extend this realm of knowledge to the realm of metaphysical objects over which we have no knowledge.<sup>70</sup>

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<sup>66</sup> Rohlf, Michael, "Immanuel Kant", The Stanford Encyclopedia of Philosophy (Fall 2010 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2010/entries/kant/>>, §4.

<sup>67</sup> Guyer, P. in "The Routledge Encyclopedia of Philosophy", edited by Craig. E., Routledge, London, 1998, Vol. 5, p. 185.

<sup>68</sup> Guyer, P. in "The Routledge Encyclopedia of Philosophy", edited by Craig. E., Routledge, London, 1998, Vol. 5, p. 186.

<sup>69</sup> Grier, Michelle, "Kant's Critique of Metaphysics", The Stanford Encyclopedia of Philosophy (Summer 2009 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2009/entries/kant-metaphysics/>>, § 1.

<sup>70</sup> Guyer, P. in "The Routledge Encyclopedia of Philosophy", edited by Craig. E., Routledge, London, 1998, Vol. 5, p. 189.

This method of reasoning on metaphysical objects is not able to provide true knowledge on metaphysical objects. True knowledge over the metaphysical realm cannot be gained through this method of extrapolation.

## TRANSCENDENTAL IDEALISM

This would leave Kant with the conclusion that metaphysical inquiry is impossible and that it would therefore also be impossible to inquire into morality. This, however, is not the conclusion Kant draws.

In an appendix to the ‘Transcendental Dialectic’, Kant goes on to examine the possibilities of inquiring into metaphysical subjects. In the process of this inquiry Kant reiterates that it is impossible to achieve knowledge over objects which cannot be sensed by the human senses. Nevertheless reason does allow for the understanding of the ideas of such subjects.<sup>71</sup> The generation of such ideas is done by what Kant calls the transcendental use of reason.<sup>72</sup> This transcendental use of reason differs from what Kant calls the logical use of reason, by which he means the method of reasoning through logical procedures.

The transcendental use of reason through which the human mind attempts to understand the world around him, does not necessarily provide any real insights into the world which lies beyond our sensorial possibilities. In fact, Kant argues, this transcendental use of reason is responsible for providing the mind with nothing more than ideas which do not provide knowledge about transcendent objects but only provide the illusion of doing so.<sup>73</sup>

In his understanding of these ‘ideas’ which are provided by the transcendental use of reason, Kant refers to the theory on ideas of Plato. Whereas Plato allows for the possibility of gaining knowledge through the reasoning about these ideas by means of a dialectic method, Kant refers to this type of reasoning as a ‘logic of illusion’.<sup>74</sup>

There is, however, another way in which reason allows for insight into metaphysical subjects. Kant points to the transcendental function of reason through which ideas which can be formed. These ideas may not be able to provide knowledge about metaphysical objects which

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<sup>71</sup> Rholf, M., “*The Ideas of Pure Reason*”, in *The Cambridge Companion to Kant’s Critique of Pure Reason*, edited by Paul Guyer, Cambridge University Press, New York, 2010, p. 200.

<sup>72</sup> Rholf, M., “*The Ideas of Pure Reason*”, in *The Cambridge Companion to Kant’s Critique of Pure Reason*, edited by Paul Guyer, Cambridge University Press, New York, 2010, p. 201.

<sup>73</sup> Kant, I., “*Critique of Pure Reason*”, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B 355.

<sup>74</sup> Rholf, M., “*The Ideas of Pure Reason*”, in *The Cambridge Companion to Kant’s Critique of Pure Reason*, edited by Paul Guyer, Cambridge University Press, New York, 2010, p. 202.

can not be sensed, there is another way in which these ideas may prove to be useful according to Kant.<sup>75</sup>

He argues that these ideas do provide value where they may be employed in the reasoning about ideas which may be considered as ideals or standards to which may be aspired in a restricted number of areas. In a limited number of areas the transcendental function of reason may therefore provide insight into metaphysical subjects. In particular, Kant refers to such subjects as morality, where an investigation of these a priori ideas on morality may provide insight into the standards or aspirations these ideas provide.

For the purpose of this thesis, the most important areas that Kant specifically names are the area of morals and the idea of a just constitution.<sup>76</sup> These ideas, argues Kant, are not merely subjective ideas, but must be considered to have ‘a kind of “objective validity” and must be considered to have an a priori status.’<sup>77</sup>

By reasoning on these a priori ideas, formed by the transcendental use of reason, it is possible to acquire knowledge on these ideas. These a priori ideas allow for the use of synthetic reasoning, which therefore allows for the ability to acquire knowledge over these subjects, such as morality.

It may therefore be concluded that Kant argues that reason does more than just order our sensory information through the process of logical reasoning. In this fashion reason is employed to judge on objects we are able to sense. Reason can also be employed in a second fashion. It is also able to judge on objects which we only know as ideas.<sup>78</sup> As such reason is employed in a transcendental fashion.

By extending the cognition of experience to objects known to us as ideas, reason is employed as a regulative principle. In analysing these concepts we employ reason to inquire into objects of which we have knowledge through other means than through sensory information. Kant points out that this way the principles of reason provide us with the necessary instruments to enable inquiry into metaphysical subjects.<sup>79</sup> By employing the regulative principles of reason,

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<sup>75</sup> Rholf, M., “*The Ideas of Pure Reason*”, in *The Cambridge Companion to Kant’s Critique of Pure Reason*, edited by Paul Guyer, Cambridge University Press, New York, 2010, p. 202.

<sup>76</sup> Rholf, M., “*The Ideas of Pure Reason*”, in *The Cambridge Companion to Kant’s Critique of Pure Reason*, edited by Paul Guyer, Cambridge University Press, New York, 2010, p. 203.

<sup>77</sup> Allison, H.E., “*Transcendental Idealism, An Interpretation and Defense*”, Yale University Press, London, 2004, p. 438.

<sup>78</sup> Kant, I., “*Critique of Pure Reason*”, translated and edited by P. Guyer and A. Wood, Cambridge University Press, Cambridge, 1998, B 699.

<sup>79</sup> Guyer, P. in “*The Routledge Encyclopedia of Philosophy*”, edited by Craig. E., Routledge, London, 1998, Vol. 5, p. 189.

Kant argues, it becomes possible to inquire into a limited number of metaphysical subjects of which the possibility exists to form ideas through the transcendental use of reason.

## C O N C L U S I O N

Having thus finished his examination into the ways in which a priori judgements are possible on the topics of mathematics and of natural sciences Kant concludes his examination into the possibility of making synthetic a priori judgements on the topic of metaphysics. This examination leads Kant to conclude that synthetic a priori judgements of metaphysics are only possible in a limited number of areas.

In particular areas, such as morality, the faculties of reason can be employed to inquire into metaphysics by means of the transcendental reasoning on a limited number of metaphysical ideas. The conclusion of the Critique of Pure Reason must therefore be that it is impossible to gain absolute certain knowledge on the realm of the metaphysical but that human reason can be employed to inquire into the subject of morality through this transcendental use of reason by which ideas on subjects such as morality may be formed.

Reason must therefore act as an ‘independent source of principles of conduct, immune from the blandishments of sensual inclinations in both its determinations of value and its decisions to act and indeed that human autonomy is the highest value and the limiting condition of all other values.’<sup>80</sup>

His quest for knowledge on the metaphysical and most importantly on the subject of morality is continued in another of his critiques, the Critique of Practical Reason. The subject of morality Kant later elaborated in his ‘Groundwork of the Metaphysics of Morals’ and the ‘Metaphysics of Morals’. As this subject of morality is the main focus for the topic of this thesis, this will also be the subject of the remainder of this discussion on the theories of Kant.

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<sup>80</sup> Guyer, P. in “*The Routledge Encyclopedia of Philosophy*”, edited by Craig. E., Routledge, London, 1998, Vol. 5, p. 189.

## The moral theory of Immanuel Kant

Kant continued this inquiry into morality by deriving ‘a moral law from the very concept of rationality itself’<sup>81</sup> which he worked out in his book ‘Grundlegung zur Metaphysik der Sitten’, or as it is known in English; ‘Grounding for the Metaphysics of Morals’.

The aim of this book is put by Kant himself as:

*‘The present treatise is, however, nothing more than the investigation and establishment of the supreme principle of morality, and this alone constitutes a study complete in itself and one which ought to be kept apart from every other moral investigation.’*

The first two chapters of this book are dedicated to the inquiry into this supreme principle of morality by employing reason. He does this by inquiring into the common ideas that exist on morality. He attempts to establish the principles that would be accepted by most as the principles upon which moral judgements are based.<sup>82</sup>

The third and final chapter of this book is subsequently dedicated to inquiring into the universal and categorical validity of the principle of morality which was established in the first two chapters. This is required because he had previously concluded that inquiring into morality was only possible through a reasoning based on transcendental ideas of reason. This type of reasoning requires justification as to its universal validity. As there can be no guarantees that the principle worked out in the first two chapters by means of reason is truly universal, this final chapter inquires into this aspect in particular.

In discussing the moral theory of Kant I will maintain this division. Therefore I will follow Kant’s line of inquiry and commence by examining his inquiry into the supreme principle of morality through reason, which as stated before, begins by an examination of what principles underlie moral judgements.

### THE SUPREME PRINCIPLE OF MORALITY

Kant begins his inquiry into the supreme principle of morality by one of his best known statements:

*‘It is impossible to think of anything at all in the world, or indeed even beyond it, that could be considered good without limitation except a **good will**.’*<sup>83</sup>

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<sup>81</sup> Guyer, P. in “*The Routledge Encyclopedia of Philosophy*”, edited by Craig. E., Routledge, London, 1998, Vol. 5, p. 189.

<sup>82</sup> Johnson, Robert, “*Kant’s Moral Philosophy*”, The Stanford Encyclopedia of Philosophy (Summer 2010 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2010/entries/kant-moral/>>, § 1.

<sup>83</sup> Kant, I, “*Groundwork of the Metaphysics of Morals*”, in ‘Practical Philosophy’ by I. Kant, translated and edited by M.J. Gregor, Cambridge University Press, Cambridge, 1996, 4: 393

After presenting this bold statement, Kant argues why only a good will itself can be called good without qualification. He does so by inquiring into various other possible candidates. He argues that although there are many other character traits such as courage or determination that may be called good, none of these can exclusively be applied for the purpose of doing good. All character traits, as well as the gifts of fortune such as power, wealth or even health can be applied to perform functions of evil as well as good.<sup>84</sup> As candidates for good without qualification all other possibilities must therefore be rejected.

This is only different, Kant argues, with a good will. Only a good will itself can not be employed for evil. Even when an act is performed from the best intentions and this act causes harm, this would still not negate the underlying intentions. In such a situation the unfortunate and regrettable harm is not caused by the will but by the resources employed.<sup>85</sup>

In the eyes of Kant no other concept can therefore be called good without qualification. Even the concept of happiness is unable to meet the required criteria according to Kant. To achieve happiness in an immoral way would never lead to the desired result as one would always feel guilty for achieving this state by those immoral means.<sup>86</sup>

It is important to stress that the goodness of a good will is not dependent on the ends at which it aims.<sup>87</sup> This point is explicitly made by Kant in the formulation of his second proposition:

*The moral worth of an action done out of duty has its moral worth, not in the objective to be reached by that action, but in the maxim in accordance with the action is decided upon.*<sup>88</sup>

To hold any other position would revert this philosophy to a utilitarian philosophy, whereby an action is considered good if it aims to reach an objective which has previously been defined as good. The revolutionary aspect of Kant's philosophy is that the good will is judged independent of the object of its will. Also the measure to which this object is achieved is unimportant in judging the goodness of this will. Nevertheless, Kant does have an eye for the importance of the outcome of the good will. Only a successful realisation of the good will can result in the complete good.<sup>89</sup>

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<sup>84</sup> Kant, I, "Groundwork of the Metaphysics of Morals", in 'Practical Philosophy' by I. Kant, translated and edited by M.J. Gregor, Cambridge University Press, Cambridge, 1996, 4: 394

<sup>85</sup> Hill, T.E. and Zweig, A., "Kant - Groundwork for the Metaphysics of Morals", Oxford Philosophical Texts, Oxford University Press, Oxford, 2002, p. 27.

<sup>86</sup> Hill, T.E. and Zweig, A., "Kant - Groundwork for the Metaphysics of Morals", Oxford Philosophical Texts, Oxford University Press, Oxford, 2002, p. 27.

<sup>87</sup> Paton, H.J., "The Categorical Imperative", Hutchinson's University Library, London, 1953, p. 43.

<sup>88</sup> Kant, I, "Grounding for the Metaphysics of Morals", translated by A. Zweig, Oxford University Press, Oxford, 2002, 399.

<sup>89</sup> Paton, H.J., "The Categorical Imperative", Hutchinson's University Library, London, 1953, p. 43.

## D U T Y

A good will is therefore at the basis of Kant's moral theory. Kant argues further that only a will which acts for the sake of duty is a good will. An act in accordance with duty can't be qualified as an act derived from a good will. The motor of a good will is therefore provided by the concept of duty. Only when acted for the sake of duty a will may be considered a good will.

This is only the case with the human will. This problem does not exist to the holy will. The reason for this is that our will is imperfect, unlike a divine or holy will. With a wholly good will there is no requirement for any adaptation of such a good will. This would for instance be the case with God. The will of God, by definition, must be qualified as a good will. God being the omnipotent and all-knowing being that his (or her) name implies would necessarily bring forth a will that must be qualified as a good will. Despite the best intentions of man, however, man is unable to meet these criteria. The will of man is by definition one that requires constant help in finding the path to righteousness.<sup>90</sup>

Kant's inquiry into the concept which provides this help is provided by his inquiry into the concept of duty.<sup>91</sup> Duty is the central theme to the theory of Kant and by far the best known concept. It is of course not without reason that the theory of Kant and later moral theories in this tradition have been named deontological theories, from the Greek *deon*, duty.

Duty in the vision of Kant is a way for imperfect humans to attain that which comes natural to a divine good will.<sup>92</sup> To act morally right is not merely to act 'in accord with duty' but to act from duty.<sup>93</sup> Kant uses the method of isolation to sustain this argument which at first may seem rather awkward and almost non-human. Through a process of elimination Kant shows that only acts for the sake of duty can be classified as deriving from a good will. If an act is done for other reasons than duty, for instance self-preservation, there is no truly good will which lies at the basis for this action. Other motivations or desires are then responsible for the instigation of such an act.<sup>94</sup>

Not only is this concept of duty the best known, it is also the concept which leads to the greatest amount of misunderstanding of Kant's theory on morality. Often this concept is explained in terms of a philosophy where to act right is equated with acting in accordance with

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<sup>90</sup> Paton, H.J., "*The Categorical Imperative*", Hutchinson's University Library, London, 1953, p. 46.

<sup>91</sup> Kant, I., "*Grounding for the Metaphysics of Morals*", translated by A. Zweig, Oxford University Press, Oxford, 2002, 397.

<sup>92</sup> Paton, H.J., "*The Categorical Imperative*", Hutchinson's University Library, London, 1953, p. 48.

<sup>93</sup> Hill, T.E. and Zweig, A., "*Kant - Groundwork for the Metaphysics of Morals*", Oxford Philosophical Texts, Oxford University Press, Oxford, 2002, p. III.

<sup>94</sup> Paton, H.J., "*The Categorical Imperative*", Hutchinson's University Library, London, 1953, p. 48.

an external obligation. To act in accordance with one's desires would therefore be contrary to acting in a morally right way. This is however not the interpretation Kant intended.<sup>95</sup>

The point Kant was making is somewhat different. Kant only intended to argue that it is impossible to say of an act that it is done out of good will. If an act is performed in accordance with duty, but not for the sake of duty, it may be performed with an ulterior motive. This ulterior motive is then the driving force behind the action and not the good will itself. Therefore only the act performed for the sake of duty can be said to be an act of good will.

Duty which takes such a predominant position in the theory of Kant is then the following topic elaborated upon by Kant. In an attempt to elucidate the concept of duty, Kant formulates his third proposition which explains what duty is. He formulates this proposition as:

*Duty is the necessity of an act done out of respect for the law.*<sup>96</sup>

This formulation forms the final part of the first chapter of the Groundworks. This first chapter is entitled 'Moving from common-sense knowledge to philosophical knowledge about morality'. He has thus far argued through an inquiry using the principles of reason that a good will is the only thing that can be considered truly good and good in itself. Therefore an action can only be truly good when it is done out of a good will. This, however means, according to Kant, that it can't be done because the results of an action will be good, but the action itself must be motivated by the good will itself. This in turn requires that an action is performed for the sake of duty, for any other motivation could never be because of the underlying good will. Another motivation could never be a result from the good will as these other motivations will form the basis for this action.

This leads Kant to conclude that only an action performed for the sake of duty can be considered an action performed out of good will. This begs the question when an action is performed for the sake of duty. This requires that an action is performed not because of an inclination from either one's self or any other person's inclination. It requires something that could be an 'object of respect', 'something that does not serve my inclination but overpowers it or at least excludes it entirely from my decision-making'. This, Kant concludes, can be 'nothing but the law itself'.<sup>97</sup>

This leads Kant to ask the question what kind of law it could be, 'the idea of which must determine the will, even without considering the expected result, if that will is to be called good

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<sup>95</sup> Paton, H.J., *The Categorical Imperative*, Hutchinson's University Library, London, 1953, p. 48.

<sup>96</sup> Kant, I, *Grounding for the Metaphysics of Morals*, translated by A. Zweig, Oxford University Press, Oxford, 2002, 400.

<sup>97</sup> Kant, I, *Grounding for the Metaphysics of Morals*, translated by A. Zweig, Oxford University Press, Oxford, 2002, 400.

absolutely and without qualification'.<sup>98</sup> The answer to this question is the infamous maxim phrased by Kant as:

*I ought never to act in such a way that I could not also will that my maxim should become a universal law.*<sup>99</sup>

Thus Kant has taken the first steps in his inquiry into the metaphysics of morals. This part of the inquiry has ended with the first formulation of what is later to be phrased as the famous Categorical Imperative. Before this phrase is actually employed by Kant, a further inquiry into this subject is required.

The continuation of this inquiry is carried out in the second part of the Groundwork. This chapter is entitled 'Transition from Popular Moral Philosophy to a Metaphysics of Morals'. The first step Kant takes in order to move beyond popular philosophy to metaphysics is to articulate the necessity of laws in nature.

#### L A W S

*'Everything in nature works in accordance with laws.'*<sup>100</sup>

This statement forms the beginning of Kant's transition from popular philosophy to metaphysics. From this basic statement about the necessity of laws in nature, Kant goes on to argue that only rational beings have a will. A will, Kant reminds us, is nothing more than practical reason as it enables us to derive actions from laws. The will therefore grants us the power to act in accordance with the idea of laws, in accordance with principles.<sup>101</sup> This quality is what defines us as rational beings.

For us human beings this will, this practical reason, is a law of duty. To us this moral law appears as a command. The reason for this can be found in the fact that our will, our practical reason, is unable to guide us in the right direction without the help of this moral command.<sup>102</sup>

We humans require this moral command because we do not have full control over our inclinations. As we stray away from the direction we know is right, because of our desires, because of our inclinations, we require our practical reason to set us back on the right track. We require

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<sup>98</sup> Kant, I, "Grounding for the Metaphysics of Morals", translated by A. Zweig, Oxford University Press, Oxford, 2002, 402.

<sup>99</sup> Kant, I, "Grounding for the Metaphysics of Morals", translated by A. Zweig, Oxford University Press, Oxford, 2002, 402.

<sup>100</sup> Kant, I, "Grounding for the Metaphysics of Morals", translated by A. Zweig, Oxford University Press, Oxford, 2002, 412.

<sup>101</sup> Kant, I, "Grounding for the Metaphysics of Morals", translated by A. Zweig, Oxford University Press, Oxford, 2002, 412.

<sup>102</sup> Paton, H.J., "The Categorical Imperative", Hutchinson's University Library, London, 1953, p. 70.

this practical reason, this will, to lead us in that direction.<sup>103</sup> The direction our practical reason, our will, sets us upon is the direction in which the moral law guides us, which to us deficient humans is a moral command, a moral imperative.<sup>104</sup>

For a holy will the moral law would not appear as a moral command. A truly divine, holy, will would already want to direct itself into the direction of the good. The moral law, which it may recognise, would not be conceived of as a moral command because it does nothing more than point in the direction the divine will already wants to go. Unlike our human, deficient, will that is strayed in many directions away from the truly good.

For Kant, moral behaviour is therefore an action where the will has led the individual to act in accordance with his or her duty. The duty to perform in such a fashion is recognised by the will through imperatives. Kant explains an imperative as:

*“The idea of an objective principle, in so far as it constrains a will, is called a commandment (of reason), and the formulation of this commandment is called an Imperative.”<sup>105</sup>*

Kant distinguishes between three different imperatives. In the first place he distinguishes between hypothetical and categorical imperatives. A hypothetical imperative is one ‘where the objective principle of practical reason is conditioned by an end’.<sup>106</sup> The hypothetical imperative is dependent upon the desires of the individual. If a certain action is willed, then the hypothetical imperative will direct towards the action which is required to achieve that end.

Within the hypothetical imperative a further distinction can be made, according to Kant. He distinguishes between the problematic hypothetical imperative and the assertoric hypothetical imperative. This distinction is dependent upon whether or not the result or goal is necessarily willed. If the result is merely what one might will the imperative is a problematic hypothetical imperative.<sup>107</sup> If the result is necessarily willed by all, the imperative is an assertoric hypothetical imperative.<sup>108</sup> An important principle given by Kant of one such aim, is the aim of perfect happiness which is a purpose for all which can be ‘presupposed a priori and with certainty to be present in everyone because it belongs to the essence of human beings.’<sup>109</sup>

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<sup>103</sup> Paton, H.J., “The Categorical Imperative”, Hutchinson’s University Library, London, 1953, p. 70.

<sup>104</sup> Ibid.

<sup>105</sup> Kant, I, “Grounding for the Metaphysics of Morals”, translated by A. Zweig, Oxford University Press, Oxford, 2002, 413.

<sup>106</sup> Paton, H.J., “The Categorical Imperative”, Hutchinson’s University Library, London, 1953, p. 115.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Kant, I, “Grounding for the Metaphysics of Morals”, translated by A. Zweig, Oxford University Press, Oxford, 2002, 415.

The third type of imperative, which was already distinguished, is the categorical imperative. A categorical imperative, according to Kant, is one that 'represents an action that is itself objectively necessary, without regard to any further end'.<sup>110</sup> This categorical imperative is an imperative which finds its basis in a priori knowledge.

These imperatives relate back to the question initially posed by Kant in his 'A Critique of Pure Reason'. Here Kant attempted to save the possibility of metaphysical inquiry by inquiring into the possibility of a priori synthetic judgement. The outcome of this inquiry is relevant for the current subject as Kant qualifies the categorical imperatives as a priori synthetic judgments.<sup>111</sup> These, according to Kant, are judgements which are entirely based on a priori knowledge and which do not relate to any sensory experience. To ensure the universal validity of the categorical imperative it must necessarily be investigated a priori.<sup>112</sup> This investigation, Kant carries out in the third part of the Groundworks and will be discussed further on.

This is different with the hypothetical imperatives which rely on empirical information for their formulation and design. Both hypothetical imperatives derive the formulation of their ends from experience gained in the world outside.

From this Kant concludes that the human will, unlike the holy or divine will, is subject to inclinations. These inclinations direct the human will to actions which are not in accordance with good. Only those actions which are carried out under the direction of a duty to act the right way are good. In such instances the will is directed by the categorical imperative, a 'command' which directs the will to act in a good way or the way which is right for no other purpose than being right. A prerequisite for such a categorical imperative is that it must 'contain the principle[s] of all duty 'if there is to be such a thing at all'.<sup>113</sup>

There is no ulterior motive in directing the will towards this action, other than acting right and it must be valid for all reasonable beings, and therefore also for all human wills. This categorical imperative provides the basis for any inquiry into a pure a priori moral theory as it is the only imperative which is formed by means of an a priori synthetic judgement. This is also the reason why Kant continues his quest for the supreme principle of morality by inquiring further into the categorical imperative.

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<sup>110</sup> Kant, I, "*Grounding for the Metaphysics of Morals*", translated by A. Zweig, Oxford University Press, Oxford, 2002, 414.

<sup>111</sup> Ibid, p. 420.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid, p. 424.

## THE CATEGORICAL IMPERATIVE

Because of its universal validity, independent of the formulation of any other goal towards action must be directed, it is possible to know what the categorical imperative contains.<sup>114</sup> This is possible because a categorical imperative ‘contains, besides the law, only the necessity that the maxim conform to this law. while the law, as we have seen, contains no condition limiting it.’<sup>115</sup>

The categorical imperative is the imperative which directs the will towards the action which is right, independent of its consequences. This is the action which independently of all consequences is categorically right, of itself. This makes that there can only be one categorical imperative. However, there are several ways of formulating this imperative and Kant formulates it in a number of different ways. Kant has presented a number of different formulations of the categorical imperative. He emphasised however that these different formulations are mere formulations of one and the same law.

## THE UNIVERSAL LAW

The first, and probably the best known formulation of the categorical imperative is:

*“Act only on that maxim by which you can at the same time will that it should become a universal law”.*<sup>116</sup>

This is the first formulation of the categorical imperative. It is articulated to provide a compass for moral reasoning in particular situations. By posing this question it intends to allow only actions which could hypothetically be seen as a universal law. For it is only this kind of behaviour which could qualify as intrinsically good.<sup>117</sup>

This compass may be said to consist of four different phases.<sup>118</sup> When considering a certain action and you wish to inquire into the moral agreement of such an action with the categorical imperative the first phase consists of formulating a general maxim which can be abstracted from the proposed behaviour. Second, imagine all rational agents acting according to the maxim you have just abstracted. Then, thirdly, consider whether it is conceivable for all rational agents to conform to the maxim you just formulated. If this is answered in the affirmative, you move on to the fourth phase which consists of asking yourself if you yourself could or

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<sup>114</sup> Kant, I, “*Grounding for the Metaphysics of Morals*”, translated by A. Zweig, Oxford University Press, Oxford, 2002, 421.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Mertens, T., Introduction to the Dutch translation of “*Groundwork of the Metaphysics of Morals*”, Boom publishers, Amsterdam, 2008, p. 22.

<sup>118</sup> Johnson, Robert, “*Kant’s Moral Philosophy*”, The Stanford Encyclopedia of Philosophy (Summer 2010 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2010/entries/kant-moral/>>, § 5.

would act in accordance with this maxim in such a world. If the answer to this question is also affirmative, then your action is morally permissible.<sup>119</sup>

A negative answer to the third or the fourth question indicates a duty to refrain from acting in such a fashion. A negative answer to the third question of whether it is conceivable for all rational agents to conform to your maxim provides for a different type of duty from a negative answer to the fourth question whether you yourself could or would act in accordance with such a maxim.

A negative answer to the third question indicates that there exists a perfect duty to refrain from acting in accordance with your maxim, whilst a negative answer to the fourth question provides for an imperfect duty to refrain from acting in such a way. Perfect duties are duties which one must always adhere to and acted upon. These are of such a nature that no exception can be made. These duties are of a more strict nature than the imperfect duties. Imperfect duties are duties which do allow for exceptions. Although exceptions are conceivable, these duties may not be abandoned entirely, but only may be limited in situations where these duties collide with other duties. Aside from these perfect and imperfect duties, Kant also distinguishes between duties towards yourself and duties towards others.

#### THE END IN ITSELF

The second distinct formulation of Kant's categorical imperative is one which places a more direct emphasis on the, more emotional, argument of persons belonging to a particular class of beings. Kant formulates this formulation of the categorical imperative as:

*“Act in such a way that you treat humanity, whether in your own person or in any other person, always at the same time as an end, never merely as a means”.*<sup>120</sup>

This formulation of the categorical imperative obliges us to respect other persons and never to treat other persons as mere tools in effecting your own desires. According to Paton four separate arguments can be found in the Groundwork for this formulation of the categorical imperative.<sup>121</sup> The first argument is taken from the essence of the categorical imperative itself. Through the categorical imperative we aim to direct actions towards ends which are given by mere reason itself. These ends must be valid for every rational being and must be objective ends. These objective ends must be found in rational beings. From this follows that both the effects that the will seeks, but also that will itself must be considered as ends in themselves. This means that the rational beings, and for practical reasons, men must be ends in themselves.

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<sup>119</sup> Johnson, Robert, "Kant's Moral Philosophy", The Stanford Encyclopedia of Philosophy (Summer 2010 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2010/entries/kant-moral/>>, § 5.

<sup>120</sup> Kant, I, "Grounding for the Metaphysics of Morals", translated by A. Zweig, Oxford University Press, Oxford, 2002, 429.

<sup>121</sup> Paton, H.J., "The Categorical Imperative", Hutchinson's University Library, London, 1953, p. 175.

This implies that all rational beings must be considered an end in itself, from which follows the second formulation of the categorical imperative.<sup>122</sup>

The second argument is based on the idea that each man regards his own existence as an end in itself. As this is an objective and necessary point of view, we must conclude that every man regards himself as an end in itself on the same valid rational reason, I must also regard every man as an end in itself.<sup>123</sup>

The third follows from the character of a good will. A rational will seeks to produce certain ends in its actions. An absolutely good will can not derive its end from an effect to be brought about, but must be self-sufficient in itself. As this can therefore only be an abstract end which must therefore already be existent, it can only be in a negative sense. This end must be never to be treated merely as a means or to treat any other rational will as a means.<sup>124 125</sup>

The fourth argument is derived from the first formulation of the categorical imperative. This formulation tells me to act only in such a way as to be able to want my actions to become a universal law. This means that in my actions I have to take the will of all other rational beings into consideration. 'I ought to act only in such a way that as rational beings they can act on the same law as I'.<sup>126</sup> This formulation would therefore never allow me to use another rational will as a mere means to an end or to allow myself be used as a mere means to an end.

The argumentation behind this formulation of the categorical imperative is wholly dependent upon the concept of rational beings. Because of the fact that others must be considered rational beings, we are never to treat them as mere means to an end. This formulation, which places great emphasis on the rational being, can be differentiated from the third formulation which may qualified as the formulation of autonomy.

## THE KINGDOM OF ENDS

There is some uncertainty as to what Kant considered to be the third formulation of his categorical imperative.<sup>127</sup> Two apparently different formulations appear to function as the third formulation. The first possibility is the Principle of Autonomy. This formulation bears a striking resemblance to the first formulation and is formulated as:

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<sup>122</sup> Paton, H.J., "*The Categorical Imperative*", Hutchinson's University Library, London, 1953, p. 176.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid, p. 177.

<sup>125</sup> Kant, I, "*Grounding for the Metaphysics of Morals*", translated by A. Zweig, Oxford University Press, Oxford, 2002, 438.

<sup>126</sup> Paton, H.J., "*The Categorical Imperative*", Hutchinson's University Library, London, 1953, p. 177.

<sup>127</sup> Guyer, P., "*Kant's Groundwork of the Metaphysics of Morals*", Rowman & Littlefield Publishers, Oxford, 1998, p. 235.

*“Act only on a maxim through which the will could regard itself at the same time as enacting universal law”.*<sup>128</sup>

Although this formulation bears strong resemblance to the formulation of the first categorical imperative, there is an important difference between the two. This formulation of the categorical imperative focuses on the lawmaker, as opposed to the mere follower of laws as is the case with the first formulation.<sup>129</sup> Kant stresses the importance of the rational being as both a law-maker and a follower of the laws which he himself makes. In this aspect lies the autonomy of every rational being. Or in the words of Kant:

*“The dignity of humanity consists precisely in this power of giving universal law, though only on condition of also being subject to this same lawgiving.”*<sup>130</sup>

The alternative third formulation of the categorical imperative is the formulation of the kingdom of ends, which according to Paton must be considered an natural extension of the autonomy formula.<sup>131</sup> It builds upon the autonomy formula in that this formulation aims to provide for a formulation of the categorical imperative which is in line with the ideas of Kant on the establishment of a moral community. Whereas the previous formulations are primarily focused on the individual and aims to provide a compass for the individual, this formulation aims to examine the possibility of humans collectively acting morally and the outcomes this would provide.<sup>132</sup> This formulation of the categorical imperative reads:

*“Act on a maxim which at the same time embodies in itself its own universal validity for every rational being”.*<sup>133</sup>

This formulation fits within Kant’s desire to not only inquire into the individualistic requirements for moral action, but also to inquire into the possibilities where this moral acting would ultimately lead humanity. In the discussion of this formulation Kant elaborates on a number of points that are important in the correct understanding of this formulation. The points made by Kant in the discussion of this formulation of the categorical imperative seem to reach beyond the discussion of this formulation only.

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<sup>128</sup> Kant, I, *“Grounding for the Metaphysics of Morals”*, translated by A. Zweig, Oxford University Press, Oxford, 2002, 434.

<sup>129</sup> Paton, H.J., *“The Categorical Imperative”*, Hutchinson’s University Library, London, 1953, p. 180.

<sup>130</sup> Kant, I, *“Grounding for the Metaphysics of Morals”*, translated by A. Zweig, Oxford University Press, Oxford, 2002, 440.

<sup>131</sup> Paton, H.J., *“The Categorical Imperative”*, Hutchinson’s University Library, London, 1953, p. 184.

<sup>132</sup> Sullivan, R.J., *“Immanuel Kant’s moral theory”*, Cambridge University Press, Cambridge, 1989, p. 213.

<sup>133</sup> Kant, I, *“Grounding for the Metaphysics of Morals”*, translated by A. Zweig, Oxford University Press, Oxford, 2002, 438.

The first point of interest in this discussion is the emphasis Kant places on the unique dignity of rational beings in their position as maker of their own laws.<sup>134</sup> Their ability to self legislate is what differentiates rational beings from other beings, according to Kant. This unique position of rational beings is what enables this formulation of the categorical imperative. As each individual is able to conceive himself as a maker of laws to one's self, this same conception must be applied to other rational agents.<sup>135</sup>

To arrive at a kingdom of ends, this conception of reciprocity is a vital component. In order to retain the maximum amount of autonomy myself, I must grant other rational beings their autonomy also.<sup>136</sup> This implies that perfect reciprocity is an essential part in the creation of the kingdom of ends as envisaged by Kant.

After having presented the different formulations of the categorical imperative, Kant reaches the position where he has shown through an analytical process the importance of the categorical imperative. In the end Kant formulated different versions of the categorical imperative, which are all different formulations of one and the same categorical imperative. The final formulation of this categorical imperative is able to formulate an imperative which intends to produce a 'possible kingdom of ends with a kingdom of nature.'<sup>137</sup>

Central to these formulations of the imperative is the idea that every rational being itself is the legislator of the laws to which he or she must adhere. In the words of Kant himself:

*Now from this it unquestionably follows that every rational being, as an end in itself, must be able to regard himself as also the maker of universal law in respect of any law whatever to which he may be subject; for it is precisely the fitness of his maxims to make universal law that marks him out as an end in himself.*<sup>138</sup>

The dignity of a rational being lies in exactly this possibility to self-legislate.

*The dignity of humanity consists precisely in this power of giving universal law, though only on condition of also being subject to this same lawgiving*<sup>139</sup>

Because a rational being is able to provide for the laws which he or she must follow this rational being is to be considered an end in himself. This dignity which a rational being possesses

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<sup>134</sup> Guyer, P., "Kant's *Groundwork of the Metaphysics of Morals*", Rowman & Littlefield Publishers, Oxford, 1998, p. 235.

<sup>135</sup> Ibid.

<sup>136</sup> Korsgaard, C.M., "*Creating the Kingdom of Ends*", Cambridge University Press, Cambridge, 1996, p. 193.

<sup>137</sup> Kant, I, "*Grounding for the Metaphysics of Morals*", translated by A. Zweig, Oxford University Press, Oxford, 2002, 4:436.

<sup>138</sup> Ibid, 4:438.

<sup>139</sup> Ibid, 4:440.

also demands that he treats all other rational beings as beings worthy of the same amount of dignity. In this lies the possibility of being able to provide for the kingdom of ends.

If all rational beings were able to follow the maxims of the categorical imperative, the kingdom of ends would be like a kingdom of nature, where in a kingdom of nature all of nature acts in accordance with natural laws. If the categorical imperative were followed in the same fashion as the laws of nature, this would lead to a society where a kingdom of ends would actually come into existence.<sup>140</sup>

These different formulations lead to the following summary of the supreme principle of morality as summarised by Paul Guyer:

*(T)he ultimate source of value is human freedom as an end in itself, manifested in interpersonal contexts in the possibility of freely given consent to the actions of others; conformity to the requirement of universal law is the way to ensure that this value is preserved and fostered; and the ideal outcome of the observation of such a law would be a kingdom of ends as a system of freedom, in which all agents freely pursue their freely chosen ends to the extent compatible with a like freedom for all.<sup>141</sup>*

This principle of morality leads to the formulation of a number of different duties which have later been elaborated upon in the 'Metaphysics of Morals'. Kant distinguishes between perfect duties and imperfect duties. Furthermore Kant distinguishes between duties to others and duties to oneself.

These duties which are derived from the different formulations of the Categorical Imperative, impress upon all agents the duty to act in such a way as to preserve their own freedom and to ensure the respect of the freedom of others.<sup>142</sup> These duties rest upon all rational agents for they have a will which is led by the Categorical Imperative.

Freedom is therefore the ultimate compass in deriving the rightness of actions. In accordance with these duties Kant is able to provide more practical directions on the rightness of actions. In The Metaphysics of Morals, Kant states:

*Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.<sup>143</sup>*

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<sup>140</sup> Kant, I, "Grounding for the Metaphysics of Morals", translated by A. Zweig, Oxford University Press, Oxford, 2002, 4:438.

<sup>141</sup> Guyer, P. in "The Routledge Encyclopedia of Philosophy", edited by Craig. E., Routledge, London, 1998, Vol. 5, p. 190.

<sup>142</sup> Ibid, p. 191.

<sup>143</sup> Kant, I., "The Metaphysics of Morals", translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 6: 230.

This provision for an action being right also provides for guidance as to when intervention into a persons freedom is authorised. According to Kant, intervention into one's freedom is authorised if the use of freedom intervenes with another persons' freedom. In the words of Kant:

*Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.<sup>144</sup>*

What becomes apparent from this part of the works of Kant is that autonomy and reciprocity are the primary ingredients in the ultimate realisation of society. Through a process of reasoning, Kant has formulated this theory on morality and the primary principles on morality.

Autonomy is the core element of the philosophy of Kant. The ability of rational beings to function as lawmakers of their own will is a unique quality that sets rational beings apart from other beings. This unique ability is the decisive element in the unique status of rational beings. Also, this unique possibility warrants the respect for the autonomy of others and demands moral behaviour towards others. Central to this concept of autonomy is the element of free choice and the ability to choose to act in a certain manner.

Kant describes autonomy of the will as the property the will has of being a law to itself. The central position of this autonomy of the will makes that Kant calls this the 'sole principle of ethics'.<sup>145</sup> As the previous analysis has shown that this principle of ethics must be categorical imperative. Also this analysis has shown that this categorical imperative is to 'command nothing neither more nor less than precisely this autonomy of the will'.<sup>146</sup>

Finally through a derivation of the different duties which follow from this categorical imperative Kant has been able to define the right action. This in turn has lead to the definition of a so called 'wrong' action which allows for the intervention by the authorities. In effect formulating the principles of justice.

This theory and its principles have been formulated using the methodology of reason. What remains therefore is to inquire into the true universal validity of this theoretical knowledge. This is the aim of the third and final chapter of the Groundworks.

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<sup>144</sup> Kant, I., "*The Metaphysics of Morals*", translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 6: 231.

<sup>145</sup> Kant, I., "*Grounding for the Metaphysics of Morals*", translated by A. Zweig, Oxford University Press, Oxford, 2002, 4:440.

<sup>146</sup> Ibid, 4:440.

## UNIVERSAL AND CATEGORICAL VALIDITY

Kant goes through great pains to inquire into the possibility of formulating a universal moral theory. In doing so, Kant has formulated an extensive theory on the origins of knowledge and the possibilities of inquiring into metaphysics. This inquiry leads Kant to conclude that inquiring into morality is possible on the basis of synthetic a priori reasoning through the ideas which can be formed about morality on the basis of the transcendental use of reason.

His inquiry into the supreme principle of morality is carried out through the use of this methodology. Providing for the supreme principle of morality with universal and categorical validity demands the highest degree of certainty in its reasoning. After all, such a supreme moral principle requires an unambiguous justification by means of an analytical approach. Through the initial inquiry into the concepts of morality in the first two chapters of the *Groundworks* Kant has been able to formulate the supreme principle of morality. What remains, however, is to provide an analytic justification of this principle, to show that morality is more than a mere 'phantom of the brain'. This is the main purpose of the third chapter of 'A Groundwork to a Metaphysics of Morals'.

To provide this justification, Kant employs the concept of freedom of the will. This concept becomes a key aspect of Kant's reasoning in the evidence of the necessity and reality of the moral law.

In his attempt to provide for this universal basis, two stages can be identified. In the first stage of his argument, Kant argues that every rational agent must be assumed to have a free will. In the second stage Kant argues that every agent with free will is subject to the moral law.<sup>147 148</sup>

Within each of these stages separate steps can be identified which Kant employs to build his argument. In the following I will outline these arguments and I will elaborate on each of these steps where deemed necessary.

The first stage of Kant's argument rests on the idea that every rational agent must be assumed to have a free will. In 'A Critique of Pure Reason', he had already elaborated on his concept of the will, which in his view the will must be seen as practical reason. This stage of his argument rests on the idea that any rational agent must have a free will and therefore be autonomous. This part of the argument is not necessarily related to any morality, but is only intended to argue that to be rational must imply that one is autonomous.<sup>149</sup>

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<sup>147</sup> Copp, D., "The 'Possibility' of a Categorical Imperative: Kant's *Groundwork*, Part III", *Philosophical Perspectives*, Vol. 6, Ethics (1992), pp. 261-284.

<sup>148</sup> Kant, I., "The *Metaphysics of Morals*", translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 4: 447.

<sup>149</sup> Hill, T.E., "Kant's Argument for the Rationality of Moral Conduct", in *Kant's Groundwork of the Metaphysics of Morals - Critical essays*, edited by P. Guyer, Bowman & Littlefield Publishers Inc, Oxford, 1998, p. 254.

According to Beyleveld, the following steps can be identified in arguing his point:<sup>150</sup>

1. *“The will is a kind of causality of living beings insofar as they are rational.”*<sup>151</sup>
2. *“In the negative sense, a will that is free works independently of determination by alien causes (laws of nature)”*.

The reason that a rational agent has a free will follows from the very idea of being a rational agent. To be a rational agent implies the ability to make decisions ‘independently of alien causes’<sup>152</sup> and to act on these decisions, independently of external factors.<sup>153</sup> This requires the agent firstly to form his own mind on the course to be taken by the agent and secondly the capability of that agent to act on that decision.

For an agent not to be able to perform either one of those two requirements would mean that the agent could not be a truly rational agent.<sup>154</sup> Therefore a rational agent must be an agent with some kind of freedom to make his own decisions and to act upon these decisions. Any agent that would not meet these criteria could not be considered a truly rational agent.<sup>155</sup> This freedom is what Kant refers to as a negative freedom. From this point Kant continues by employing the following steps.

3. *“A will that is free in the negative sense is also free in the positive sense that it is not lawless but a causality conforming to immutable laws of a special non-natural kind”*.<sup>156</sup> Or in the words of Kant himself: *“so freedom, although it is not a property of the will in accordance with natural laws, is not for that reason lawless but must instead be a causality in accordance with immutable laws but of a special kind; for otherwise a free will would be an absurdity”*.<sup>157</sup>

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<sup>150</sup> Beyleveld, D., “*Gewirth and Kant on Justifying the Supreme Principle of Morality*” in *Gewirth- critical essays on action, rationality and community*, edited by M. Boylan, Bowman & Littlefield Publishers, Oxford, 1999, p. 101.

<sup>151</sup> Kant, I., “*Grounding for the Metaphysics of Morals*”, translated by A. Zweig, Oxford University Press, Oxford, 2002, 4:446.

<sup>152</sup> Ibid.

<sup>153</sup> Copp, D., “*The “Possibility” of a Categorical Imperative: Kant’s Groundwork, Part III*”, *Philosophical Perspectives*, Vol. 6, Ethics (1992), p 266.

<sup>154</sup> Copp, D., “*The “Possibility” of a Categorical Imperative: Kant’s Groundwork, Part III*”, *Philosophical Perspectives*, Vol. 6, Ethics (1992), pp. 266.

<sup>155</sup> Copp, D., “*The “Possibility” of a Categorical Imperative: Kant’s Groundwork, Part III*”, *Philosophical Perspectives*, Vol. 6, Ethics (1992), pp. 266.

<sup>156</sup> Beyleveld, D., “*Gewirth and Kant on Justifying the Supreme Principle of Morality*” in *Gewirth- critical essays on action, rationality and community*, edited by M. Boylan, Bowman & Littlefield Publishers, Oxford, 1999, p. 101.

<sup>157</sup> Kant, I., “*The Metaphysics of Morals*”, translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 4: 446.

4. *“Freedom of the will can be no other than autonomy, that is, the will’s property of being a law to itself”*.<sup>158</sup>

From this position Kant goes on to argue for the second stage of his argument. In this stage Kant argues that every agent with a free will is bound by moral law. Kant substantiates his argument by claiming that:

5. *“The proposition, the will is in all its actions a law to itself, indicates only the principle to act on no other maxim than that which can also have as object itself as a universal law”*.<sup>159</sup>

and

6. *“This is precisely the formula of the categorical imperative and is the principle of morality; hence a free-will and a will under moral laws are one and the same”*.<sup>160</sup>

Although the rational agent is free to make up its own mind and it possesses what Kant calls negative freedom, this is not to say that there aren’t any rules or principles which direct the mind of the rational agent. From this negative freedom Kant argues that positive freedom of a rational agent may also be derived. As with everything else in nature, Kant claims, this process is also directed by laws and principles.<sup>161</sup>

*Since the concept of causality brings with it that of laws in accordance with which, by something that we call a cause, something else, namely an effect, must be posited, so freedom, although it is not a property of the will in accordance with natural laws, is not for that reason lawless but must instead be a causality in accordance with immutable laws but of a special kind; for otherwise a free-will would be an absurdity.*

Therefore the will, being nothing more than practical reason, must conform to some sort of alternative law. The content of this law is analysed by Kant from the previously formulated concept of freedom. This law cannot be a fixed law like a law of ‘natural necessity’ for this would diminish the amount of freedom that a rational agent could possess. Therefore this law itself must be dependent on reasoning.<sup>162</sup>

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<sup>158</sup> Kant, I., “The Metaphysics of Morals”, translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 4: 447.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid, 4: 446.

<sup>162</sup> Copp, D., “The “Possibility” of a Categorical Imperative: Kant’s Groundwork, Part III”, *Philosophical Perspectives*, Vol. 6, Ethics (1992), pp. 268.

This law, according to Kant, must be a law of the will itself, it must be a special kind of law.<sup>163</sup> To Kant this law which guides the freedom of the will can be nothing other than autonomy, the will's property of being a law to itself.<sup>164</sup> Kant then goes on to argue:

*“But the proposition, the will is in all its actions a law to itself, indicates only the principle, to act on no other maxim than that which can also have as object itself as a universal law. This, however is precisely the formula of the categorical imperative and is the principle of morality; hence a free will and a will under moral laws are one and the same”.*<sup>165</sup>

These alternative laws guiding the will, Kant concludes, must be the very essence of autonomy. Autonomy in turn is nothing but the ability of being a law to itself; the ability of the will to provide for its own laws which it should follow. The content of this law in turn, can be nothing else but the law to act on no other maxim than that which you could will to become a universal law, which is the categorical imperative.

Kant argues that this argumentation provides for analytic proof that any rational agent must indeed be free and ‘entirely self-determining’.<sup>166</sup> The next step that is required is to prove that morality holds for all rational beings. Furthermore it must be proved ‘as a property of all rational beings’<sup>167</sup>, not through empirical means. It can therefore not be proven on the basis of ‘previous experiences of human nature’.<sup>168</sup> Beyleveld describes this step in the argumentation of Kant as follows:

7. *“Free-will cannot be demonstrated (from a theoretical point of view) as a property of a being with a will”*<sup>169</sup>

However, it is impossible to know whether we as humans, allegedly rational beings, truly meet these requirements. We can never know whether our decisions and our will is truly made up out of our own accord or whether we act fully determined.

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<sup>163</sup> Copp, D., “The ‘Possibility’ of a Categorical Imperative: Kant’s *Groundwork*, Part III”, *Philosophical Perspectives*, Vol. 6, Ethics (1992), pp. 268.

<sup>164</sup> Kant, I., “*The Metaphysics of Morals*”, translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 4: 447.

<sup>165</sup> Ibid.

<sup>166</sup> Korsgaard, C.M., “Creating the Kingdom of Ends”, Cambridge University Press, Cambridge, 1996, p. 163.

<sup>167</sup> Kant, I., “*The Metaphysics of Morals*”, translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 4: 447.

<sup>168</sup> Ibid.

<sup>169</sup> Beyleveld, D., “*Gewirth and Kant on Justifying the Supreme Principle of Morality*” in *Gewirth- critical essays on action, rationality and community*, edited by M. Boylan, Bowman & Littlefield Publishers, Oxford, 1999, p. 101.

Providing proof of this freedom for us humans is impossible. But more importantly, according to Kant, this proof does not need to be provided. Kant claims that this proof is not important. He claims that

*‘every being that cannot act otherwise than under the idea of freedom is just because of that really free in a practical respect, that is, all laws that are inseparably bound up with freedom hold for him just as if his will had been validly pronounced free also in itself and in theoretical philosophy’.*<sup>170</sup>

According to Copp this must be explained in the following terms. To act means to regard oneself as free. An agent must consider himself to be rational. Which in turn implies that the agent must consider himself to be free in the way as explained above.<sup>171</sup> The point is not, according to Korsgaard, that an agent must believe that he is free, but that he chooses as though he were.<sup>172</sup> As an agent you simply have no alternative than to ignore the possibility that life is fully determined. It is impossible not to act because of the possibility that one’s actions are fully determined. And as there is no alternative but to act, you must act in such a way as though your actions are not determined.

This assumption of being free is all that is required from a practical point of view, according to Kant. In determining one’s will and in deciding upon a course of action it is sufficient that you do so under the idea of freedom. This step is described by Beyleveld as:

8. *“Free-will must be presupposed as a property of all beings with a will, because every being with a will must presuppose that its will is free as the only idea’ under which he can act”.*<sup>173</sup>

Since it logically follows from the very concept of a rational being that it has a free will, and it follows from the very concept of the free will that said free will must in all its actions be ‘a law to itself’, it further follows that every rational being with a free will must be autonomous. As Kant has argued that free will must be presupposed in rational beings and an autonomous will is bound by the categorical imperative, it necessarily follows that:

9. *“Every being with a will must consider that it is bound by the categorical imperative as the only idea under which it can act”.*<sup>174</sup>

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<sup>170</sup> Kant, I., *“The Metaphysics of Morals”*, translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 4: 448.

<sup>171</sup> Copp, D., *“The “Possibility” of a Categorical Imperative: Kant’s Groundwork, Part III”*, *Philosophical Perspectives*, Vol. 6, Ethics (1992), pp. 267.

<sup>172</sup> Korsgaard, C.M., *“Creating the Kingdom of Ends”*, Cambridge University Press, Cambridge, 1996, p. 162.

<sup>173</sup> Beyleveld, D., *“Gewirth and Kant on Justifying the Supreme Principle of Morality”* in *Gewirth- critical essays on action, rationality and community*, edited by M. Boylan, Bowman & Littlefield Publishers, Oxford, 1999, p. 101.

<sup>174</sup> Ibid.

These two stages provide Kant with his arguments for his position that every rational agent must necessarily conform to the categorical imperative. He has done so by firstly arguing for the freedom of the will of the rational agent and secondly by arguing that every agent with free will is subject to the moral law.

## EVALUATION OF PROOF

By means of the argumentation provided above, Kant intended to prove the universal validity of the categorical imperative by providing for the evidence that the categorical imperative is a 'natural necessity'.

This quest for the supreme principle of morality can be traced back to Kant's inquiry into the very possibilities of gaining knowledge of the world around us. This possibility had been examined in detail in his first critique, the Critique of Pure Reason. This inquiry led him to conclude that synthetic a priori judgements form the basis for gaining knowledge with absolute and a priori validity. In the field of morality this reasoning is based on the ideas of morality which have been identified through the transcendent use of reason.

Left with this basis as possible grounds for acquiring insight into the universal validity of moral judgements, it is this methodology that Kant employs in arguing for the universal validity of the categorical imperative. After initially inquiring into the nature of the supreme principle itself, Kant concludes this inquiry by providing an analytic basis for the the categorical and logical validity of his arguments. Kant arrives at the conclusion that through this argumentation he has proven this categorical and logical validity.

Nevertheless the careful examination of his arguments since the publication of the 'Groundwork' must lead to the conclusion that Kant has been unable to successfully prove his argument. The following will examine the most important points of criticism directed at this argumentation.

This criticism directed at the argumentation supplied by Kant in support of his position that it is possible to prove the universal validity of the categorical imperative is aimed at a number of different steps in the argumentation offered by Kant. The most important steps to be criticised have been steps 3 and 8 of Kant's argumentation.

The third step of Kant's argumentation provides for his inference from the concept of negative freedom to the concept of positive freedom of the free will. Where Kant initially argued that a will is free when it works independently of determination by alien causes, Kant goes on to argue that there must nevertheless be a set of laws and principles guiding the way in which the will is formed.

Kant however fails to provide for arguments why this is the case. Kant firstly argues that the will is a kind of causality and that, as such, it must be determined by some sort of law. That

there must be some other set of laws or principles is argued by Kant on the basis of the fact that everything in nature is guided by laws or principles. No further argument for the existence of these laws or principles is offered, however.<sup>175 176 177</sup>

The question therefore is what type of laws govern the workings of the will. That a will cannot be formed by the same principles of causation guiding natural laws is obvious as this would lead to a fully determined will.<sup>178</sup> Kant argues that the will must therefore be governed by some sort of other law.<sup>179</sup> The laws that Kant identifies as the laws governing this will are the commands or imperatives of the will. These imperatives must therefore act as the moral laws guiding the will.

A number of problems can be identified in this argumentation. In the first place it may be questioned why the will must be determined by some sort of law. The only argument that Kant offers for this is that everything in nature works according to laws.<sup>180</sup> This argument of Kant is subject to the same type of metaphysical illusion as criticised by Kant himself in his 'Critique of Pure Reason' as it appears to abstract proof by means of earlier empirical findings which is subsequently projected to an element of which no empirical knowledge can be obtained. Neither does Kant provide any other real arguments for this position.

Even if this part of the argumentation is accepted, a further problem remains in the argument by Kant that the only type of law which can be responsible for the forming of the will can be the self-imposed moral law, being the categorical imperative. Kant offers no true argumentation as to why this type of law can be the only candidate for the laws guiding the will.<sup>181</sup>

Kant argues that freedom of the will implies autonomy and in turn that autonomy means self-legislation. The step Kant subsequently takes is that this self-legislation must be exercised

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<sup>175</sup> Hill, T.E. and Zweig, A., "*Kant Groundwork for the Metaphysics of Morals*", Oxford University Press, Oxford, 2002, p. 133.

<sup>176</sup> Copp, D., "*The "Possibility" of a Categorical Imperative: Kant's Groundwork, Part III*", *Philosophical Perspectives*, Vol. 6, Ethics (1992), pp. 273.

<sup>177</sup> Allison, H.E., "*Morality and Freedom - Kant's Reciprocity Thesis*", in *Kant's Groundwork of the Metaphysics of Morals - Critical essays*, edited by P. Guyer, Bowman & Littlefield Publishers Inc, Oxford, 1998, p. 277.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> *ibid.*

<sup>181</sup> *Ibid.*, p. 278.

through the categorical imperative. Kant fails to offer any reasoning as to why this self-legislation can only take place through the categorical imperative.<sup>182</sup>

Overall it must be concluded that Kant has not been able to provide for unequivocal proof of the validity of the categorical imperative as the supreme principle of morality.<sup>183 184 185</sup> This conclusion is further strengthened by the language used by Kant himself. From his texts in the *Groundwork* it appears that Kant himself never considered the provided logical reasoning as anything more than a mere deduction of the “supreme principle of morality”.<sup>186</sup>

This deduction is unable to offer the standard of certainty that is required to accept the universal validity required for the supreme principle of morality with universal and categorical validity. From his initial inquiry into the concepts of knowledge and the ability to gain knowledge and allow for truthful judgements it follows that the deduction provided for by Kant offers insufficient certainty to speak of a universal and categorical theory of morality. When judged from this perspective, the moral theory of Kant must be discounted as a possible foundation for universal jurisdiction of the ICC. Whether this theory of morality may still provide value if judged from another perspective, will be considered after inquiring into the possibilities of applying the moral theory of Gewirth as a foundation for the jurisdiction of the ICC.

## C O N C L U S I O N

In his attempt to provide for the proof that his deductive reasoning is more than a mere phantom of the brain, Kant has provided for an elaborate and extensive argumentation. This argumentation, however, is unable to offer the standard of proof to accept his theory of morality as a universal and categorical theory of morality. For this, his reasoning shows too many points where valid criticism can be voiced. The moral theory of Kant must therefore be discounted as a valid universal and categorical foundation for the jurisdiction of the International Criminal Court. Before considering the ramifications of this conclusion I will continue my inquiry into the moral theory of Gewirth, after which a further evaluation of the possible application of either theory will be considered.

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<sup>182</sup> Allison, H.E., “*Morality and Freedom - Kant’s Reciprocity Thesis*”, in *Kant’s Groundwork of the Metaphysics of Morals - Critical essays*, edited by P. Guyer, Rowman & Littlefield Publishers Inc, Oxford, 1998, p. 278.

<sup>183</sup> Henrich, D., “*The Deduction of the Moral Law*”, in “*Kant’s Groundwork of the Metaphysics of Morals*”, edited by P. Guyer, Rowman & Littlefield Publishers Inc, Oxford, 1998, p. 322.

<sup>184</sup> Hill, T.E., “*Kant’s Argument for the Rationality of Moral Conduct*”, in *Kant’s Groundwork of the Metaphysics of Morals - Critical essays*, edited by P. Guyer, Rowman & Littlefield Publishers Inc, Oxford, 1998, p. 268.

<sup>185</sup> Hill, T.E. and Zweig, A., “*Kant - Groundwork for the Metaphysics of Morals*”, Oxford University Press, Oxford, 2002, p. 144.

<sup>186</sup> Henrich, D., “*The Deduction of the Moral Law*”, in “*Kant’s Groundwork of the Metaphysics of Morals*”, edited by P. Guyer, Rowman & Littlefield Publishers Inc, Oxford, 1998, p. 334.

## The moral theory of Alan Gewirth

Like Kant, Gewirth attempts to formulate a supreme principle of morality within his own theory of morality. According to Gewirth the justification of any principle of morality is of 'first importance for the guidance of human life.'<sup>187</sup>

In attempting to formulate this principle of morality Gewirth, like Kant, recognises the difficulties connected to the possibility of acquiring knowledge of a subject like morality. He follows Hume in his line of thought in stating that an inquiry into morality is only possible from a point of view where from which moral spectators judge from a general rather than a self-interested point of view. He recognises however, again with Hume, that it appears impossible to provide an objective point of view as experience has shown that in such an attempt invariably other opinions on these matters are apparent.<sup>188</sup>

### ACTION AND REASON

Nevertheless, Gewirth argues that it is possible to inquire into the subject of morality. This possibility exists where a supreme moral principle can be rationally justified.<sup>189</sup> Gewirth further argues that such a justification can be

*obtained through an analysis of certain considerations about reason and action, as these considerations are reflected in their respective concepts.*<sup>190</sup>

This means that from the very concept of agents performing actions it follows that

*any agent, simply by virtue of being an agent, must admit, on pain of self-contradiction, that he ought to act in certain determinate ways.*<sup>191</sup>

Action is to Gewirth what empirical data is to the natural scientist. It provides him with

*'an objective basis or subject matter against which, respectively, moral judgments or rules and empirical statements or laws can be checked for their truth or correctness.'*<sup>192</sup>

Actions are to Gewirth the benchmark of his findings, as it were. Not in the sense that individual actions are to be employed as such a benchmark, rather the particular characteristics of

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<sup>187</sup> Gewirth, A., "Reason and Morality", The University of Chicago Press, Chicago, 1978, p. ix.

<sup>188</sup> Ibid, p. 6.

<sup>189</sup> Ibid, p. 7.

<sup>190</sup> Ibid, p. 21.

<sup>191</sup> Ibid, p. 26.

<sup>192</sup> Ibid, p. 26.

action provide for this benchmark. Because of the specific nature of action it allows for the deduction of certain features about morality.

These features or characteristics which may be deduced from the concept of morality are the features of voluntariness or freedom and purposiveness or intentionality. From the very fact that an agent acts, follows, according to Gewirth, that an agent chooses to act a certain way, in the sense that he has is free to perform an act a certain way. Furthermore from the fact that an agent acts, follows that the agent has some end or purpose which constitutes his reason for acting.<sup>193</sup> Needless to say these features apply only to unforced acts. Acts which are forced are therefore not considered acts in the strictest sense of the word.<sup>194</sup>

These particular features of action and indeed in constructing the remainder of his moral theory, Gewirth employs what he calls a dialectical method.<sup>195</sup> His methodology is therefore not based on an a priori inquiry into the metaphysical aspects of morality. This, possibility had already been discounted by Kant in his examination of this possibility in 'A Critique of Pure Reason'. Rather, Gewirth employs the dialectical method to inquire into the particulars of the concept of action.

## PRINCIPLE OF GENERIC CONSISTENCY

Through this methodology Gewirth constructs his moral theory based on the specific features of action and reason. The main steps taken by Gewirth in presenting his theory are presented by Deryck Beyleveld in his book 'The Dialectical Necessity of Morality' in three stages with a total of 13 steps. They consist of the following stages and steps.<sup>196</sup>

### Stage I

As a rational agent I commit myself to certain acts because I consider want the consequences I expect to follow from such an act. Therefore it can be stated that a prospective purposive agent claims (by definition)

1. I do (or intend to do) X voluntarily for some purpose E.

From this follows that there are certain consequences which the agent considers desirable. By virtue of making this claim, the prospective purposive agent rationally must consider that (claim in logical sequence)

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<sup>193</sup> Ibid, p. 27.

<sup>194</sup> Ibid, p. 32.

<sup>195</sup> Ibid, p. 43.

<sup>196</sup> Beyleveld, D., "The Dialectical Necessity of Morality - An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency", The University of Chicago Press, London, 1991, p. 14.

2. E is good;

This is, however, nothing more than stating that E has some positive value to that agent and that the agent is motivated to pursue this purpose. Reaching certain purposes requires that I have particular capacities and resources. The most important of these are freedom and well-being which allow me to act on these purposes.

3. My freedom and well-being are generically necessary conditions of my agency;

Freedom and well-being are of such importance that it can be said that these always required, this allows for the statement:

4. My freedom and well-being are necessary goods.

## **Stage II**

5. I (even if no one else) have a claim right (but not necessarily a moral one) to my freedom and well-being.

## **Stage III**

By virtue of having to accept (5) on the basis of (1) the prospective purposive agent must accept

9. Other prospective purposive agents have (moral) claim right to their freedom and well-being.

If this is the case, then every prospective purposive agent rationally must claim, by virtue of claiming to be a prospective purposive agent,

13. Every prospective purposive agent has a (moral) claim right to its freedom and well-being,

which is a statement of the Principle of the Generic Consistency.

In short these stages and steps can be summarised as:

*The first is that every actual or prospective agent logically must accept that he or she has rights to freedom and well-being. The second is that the agent logically must also accept that all other actual or prospective agents have the same rights he claims for himself, so that in this way the existence of*

*universal and equal moral rights, and hence of human rights, must be accepted within the whole context of action or practice.*<sup>197</sup>

These two theses are universally valid, according to Gewirth. Gewirth holds that not accepting these two theses is to contradict oneself. Furthermore, from these two theses, Gewirth formulates the Principle of Generic Consistency which he formulates as:

*Act in accord with the generic rights of your recipients as well as of yourself.*<sup>198</sup>

This then forms the principle on which the secular principle of human rights is founded in the theory of Gewirth. This principle requires of every agent ‘that he act in accord with the generic rights of his recipients as well as of himself.’<sup>199</sup> In essence the Principle of Generic Rights prescribes what Gewirth calls an Equality of Generic Rights, which in turn leads to the formulation of a number of direct applications of this principle. In the first place a principle of Equal Freedom can be formulated with regard to freedom.<sup>200</sup> With regard to well-being the principle of Common Good can be identified.

These direct applications eventually lead to the prescription of a way of behaviour where one is not to act in such a way as to cause an ‘an unequal distribution of freedom or well-being between oneself and other persons who are affected by one’s action’.<sup>201</sup>

## UNIVERSAL CHARACTER OF THEORY OF GEWIRTH

One of the prime characteristics of the moral theory of Gewirth is its methodology of reasoning. Gewirth reaches his conclusions by applying a dialectically necessary method. This dialectically necessary method of reasoning implies that this moral theory is derived by employing dialectical arguments derived from its central conception, the concept of action.

Gewirth argues that a universal justification of his theory is ‘obtained through an analysis of certain considerations about reason and action’.<sup>202</sup> By reasoning through a dialectically necessary method, Gewirth argues, and by applying reason to the very concept of action it is possible to provide for the supreme principle of morality.

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<sup>197</sup> Gewirth, A., “Human Rights and Conceptions of the Self”, *Philosophia*, Vol. 18, numbers 2 and 3, p. 136.

<sup>198</sup> Gewirth, A., “Epistemology”, *Social Philosophy & Policy*, 1984, Vol 1. p. 17.

<sup>199</sup> Gewirth, A., “Reason and Morality”, The University of Chicago Press, Chicago, 1978, p. 206.

<sup>200</sup> Gewirth, A., “Reason and Morality”, The University of Chicago Press, Chicago, 1978, p. 206.

<sup>201</sup> Gewirth, A., “Reason and Morality”, The University of Chicago Press, Chicago, 1978, p. 206.

<sup>202</sup> Gewirth, A., “Reason and Morality”, The University of Chicago Press, Chicago, 1978, p. 21.

Since the initial presentation of this theory, as with any other theory in philosophy, it has attracted a number of criticisms from different sides. In an attempt to analyse this criticism the most important points of criticism have been collected by Beyleveld in his book 'The Dialectical necessity of Morality'. In all, Beyleveld has collected, analysed and attempted to refute some 66 points of criticism. In his discussion of the different criticisms against the theory of Gewirth, Beyleveld has organized these points into a number of categories, dependent on the stages of the argument which they are directed against. The sheer number of objections to this theory shows the measure in which this theory has been discussed and criticised.

It is not my intention to review the objections collected by Beyleveld or to review the defense of Beyleveld in response to each of these points. In stead I will discuss some of the main points of criticism directed at this theory and review the objections which in my opinion may be considered the most fundamental points of criticism.

In doing so I will begin my discussion of the points of criticism with the second stage of Gewirth's theory, as the main points of criticism are directed at the second and third stage of his theory.

The first objection is raised against the second stage argument made by Gewirth that from the fact that I want/need/demand x, it follows that I have a claim right to X. The basis for this criticism can be found in the transition from step 4 to step 5 of the theory of Gewirth. Whereas in step 4, Gewirth argues that freedom and well-being are necessary goods, he continues his argumentation by arguing in step 5 that an agent must consider that he or she has a claim right to these necessary goods.

The acceptance of certain necessary goods as goods to which the agent has a right presents a crucial step in his theory. If the agent does not regard his entitlement to these necessary goods as a right, this would mean that the agent does not have to consider the requirement to certain necessary goods as a right of other agents either. This would in turn mean that the Principle of Generic Consistency does not necessarily follow. For this reason it is an important part of the theory of Gewirth that the agent must consider himself to have a right to certain necessary goods.

This connection to considering certain goods as necessary and considering that one has a right to these goods can be criticised. It is also this point which is criticised by Kai Nielsen. As pointed out by Nielsen there is no reason for a necessary connection between the agent's consideration of certain goods as necessary and an entitlement or a right to these necessary goods. There is no reason why the agent may not just consider these necessary goods as vital in his or

her success and survival, but not consider himself to be entitled to these goods in the normative terms that is required for the success of Gewirth's moral theory.<sup>203</sup>

Beyleveld points to his argument of attitudinal consistency to argue that there is a requirement for such a normative consideration. Beyleveld argues that to be opposed to interference with freedom and well-being logically means that one has a right to freedom and well-being. According to Beyleveld logic dictates the support of this position. He uses a rather complex theoretical argumentation based on logic to prove his point.

At its core, Beyleveld argues that to hold the position where others may not interfere with one's freedom and well-being yet not hold a right to freedom and well-being or where an agent does not speak in terms of rights or where an agent is agnostic on the question of rights means that an agent not necessarily has a proactive negative attitude towards interference with his freedom and well-being.<sup>204</sup>

In essence, Beyleveld therefore argues that Nielsen's argument is invalid and claims that it is logically impossible for an agent to consider freedom and well-being necessary, yet not consider himself to have a right to these necessary goods.

Beyleveld has provided for a complex argumentation as to why it is logically impossible to consider certain goods such as freedom and well-being as necessary, yet not hold that one has a right to these necessary goods. The argument as to why this is the case is founded in the logical argument that from the logical conclusion that to not consider that one has a right to freedom and well-being means that one must not have a negative attitude towards interference with one's freedom and well-being. This entails that from a negative attitude towards interference with my freedom and well-being follows that one must consider that one has a right to freedom and well-being.

A second objection which can be raised against the third stage of the moral theory of Gewirth is directed at the argument that to acknowledge one's rights necessarily implies the acceptance of the rights of others to certain necessary goods of others. Moving from merely accepting one's own right to freedom and well-being to the acceptance of the moral rights of other prospective purposive agents is a step Gewirth takes in the ninth step formulated in his theory.

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<sup>203</sup> Nielsen, K., "Against Ethical Realism" in Gewirth's Ethical Rationalism, edited by Edward Regis Jr, The University of Chicago Press, Chicago, 1984.

<sup>204</sup> Beyleveld, D., "The Dialectical Necessity of Morality - An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency", University of Chicago Press, London, 1991, p. 97.

The criticism directed at this part of Gewirth's theory is formulated by McMahan in the following manner.<sup>205</sup> The objections raised by McMahan are that Gewirth has not successfully argued why the step can be taken from accepting one's own right to freedom and well-being to accepting that all other agents must accept his right to freedom and well-being and which forces him to respect the right to freedom and well-being of other agents. This part of the argument as developed by Gewirth has been elaborated upon by McMahan as entailing the following steps:

1. As an agent I judge my freedom and well-being (the generic conditions of my agency) to be necessarily good;
2. Since my freedom and well-being are necessarily good, I ought to have what is required to maintain them;
3. The maintenance of my freedom and well-being often requires that others behave in certain ways;
4. Thus others ought to behave in these ways;
5. But my situation is not relevantly different from that of other agents;
6. Thus I ought to behave in the ways that are required to maintain the freedom and well-being of other agents.<sup>206</sup>

Through careful analysis of the argument presented by Gewirth, McMahan concludes that the fourth step is the crucial step in the argumentation of Gewirth, but furthermore concludes that the reasoning involved in the fourth step must be considered invalid.

From the third step in the argumentation it is only follows that the agent he or she must desire other agents to respect his or her freedom and well-being. Likewise from this argument only follows that all other agents must also consider it desirable that this agent (and other agents) respect their necessary requirements for freedom and well-being. It does not follow from this argument that all others feel a requirement to respect this agents requirements for freedom and well-being.

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<sup>205</sup> McMahan, C., "Gewirth's *Justification of Morality*" in *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 50, no. 2, p. 267.

<sup>206</sup> McMahan, C., "Gewirth's *Justification of Morality*" in *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 50, no. 2, p. 270.

As it cannot be concluded from the argument that the maintenance of my freedom and well-being often requires that others behave in certain ways, that others in fact ought to behave in this way, McMahan argues that this must be considered an invalid argument.<sup>207</sup>

This argument made by McMahan is based on a particular explanation of the word 'ought', in a prescriptive sense. Gewirth attempts to counter this argument by stressing that his argumentation relies on a prudential explanation of the term 'ought'. This explanation does not provide the argumentation with a moral or legal right, but only indicate the agents' entitlement in a non-legal or moral fashion.<sup>208</sup>

Nevertheless McMahan argues that Gewirth is unable to provide for a valid line of argumentation by employing a prudential explanation of the 'ought' judgement, either. This explanation of the term 'ought' still requires that it must be possible to infer from my consideration for freedom and well-being as necessary requirements that other agents must likewise consider themselves bound to the respect for my rights to freedom and well-being.<sup>209</sup> This aspect of the theory of Gewirth appears remains unsolved.

## C O N C L U S I O N

The theory of Gewirth depends on a number of steps which can be criticised in a serious manner. The first point which can be criticised is the dependency of Gewirth on the acceptance of the argument that agents must consider a right to freedom and well-being. A mere acceptance of the importance of these conditions, without considering a right to freedom and well-being is insufficient. However, no valid arguments can be presented from which it follows that necessitates such a demand. The argument of attitudinal consistency provides a logical and formal reasoning which attempts to provide this proof. However, this proof appears overly formalistic and fails to convince.

A second point of criticism is aimed at the requirement of the agent to consider from the rights of other agents a necessary judgement for the agents' own behaviour. As Gewirth's theory is also unable to deflate this criticism, even by considering the argument as a prudential right, this argument must also be seen as a strong point of criticism against the theory of Gewirth.

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<sup>207</sup> McMahan, C., "*Gewirth's Justification of Morality*" in *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 50, no. 2, p. 270.

<sup>208</sup> McMahan, C., "*Gewirth's Justification of Morality*" in *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 50, no. 2, p. 272.

<sup>209</sup> McMahan, C., "*Gewirth's Justification of Morality*" in *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 50, no. 2, p. 277.

It must therefore be concluded that Gewirth's theory of morality is likewise unable to offer a universal and categorically valid theory of morality. The theory of Gewirth depends on a number of arguments which are open to criticism.

## Conclusion

Having concluded this inquiry of the theories of both Kant and Gewirth and having examined the suitability of each of the different theories, the point has come to answer the primary thesis and to answer the question which has been formulated at the outset of this thesis. This question has been formulated as:

**is it possible to identify crimes which require global penalisation and active prosecution by the International Criminal Court based on a categorical, universal moral norm?**

In answering this thesis it must be concluded that it has proven impossible to identify a moral theory with a universal and categorical moral theory which may serve as the basis for the jurisdiction of the International Criminal Court in the strictest sense.

From a comparison of the different existing types of moral theory this inquiry identified the two deontological theories of Immanuel Kant and Alan Gewirth which appeared to provide the best possible theories which could function as the required foundation.

A more detailed inquiry into these theories provided the required framework that could serve as the benchmark against which a prospective moral theory could be held. This framework was provided for by Kant in his inquiry into the possibilities of acquiring knowledge.

In inquiring into the two moral theories in more detail it proved impossible to identify a moral theory which was able to meet the requirements provided for in the framework. An absolutely universal and categorical moral theory could therefore not be identified. Neither the theory of Kant nor the theory of Gewirth provided for the absolute proof of its universality.

The theory of Kant provides for the most detailed investigations into the possibility of such a theory by also providing for a detailed examination of the origins and possibilities of gaining knowledge. This inquiry leads Kant to conclude that an inquiry into metaphysics is only possible by employing the methodology of reason that is gained through the inquiry of non-metaphysical examination. Gaining knowledge of truly metaphysical issues remains impossible as we are unable to gain insight into the metaphysical through our inherently limited sensorial means.

The remaining method of inquiring into the subject of morality leaves Kant with an argumentation based on the concept of good will. In providing a universal justification of this method of reasoning Kant offers a justification which allows for a number of points of criticism which cannot be refuted definitively. From this follows that the justification of universality of this

theory and thereby also the theory of morality itself leaves to many questions unanswered and must be discounted as a universal and categorical theory of morality.

The theory of Gewirth offers a theory of morality based on a dialectical investigation into the nature of action and reason. Unlike the theory of Kant, the theory of Gewirth is not part of a larger investigation into the nature of knowledge and the possibilities of acquiring knowledge on metaphysics.

His dialectical investigation into the nature of action and reason leads Gewirth to the formulation of his principle of generic consistency, which he argues is the supreme principle of morality. As with the theory of Kant a number of points of criticism can be raised against the argumentation provided by Kant in the formulation of his supreme principle of morality. These points of criticism can not be refuted undisputedly.

As Gewirth is unable to successfully counter the various points of criticism and because his theory of morality does not provide for a categorical and universal theory of morality, this theory of morality must also be discounted as providing for the universal and categorical theory of morality sought after at the outset of this thesis.

## Postscript: applicability within restrictions

Although this conclusion provides for a definitive answer to the primary thesis, the fact that neither moral theory is able to provide for a categorical and universal moral norm begs the question whether either theory is able to provide for a valuable foundation of the international criminal jurisdiction of the ICC within the recognised limitations. More precisely the question may be posed whether either of these two theories is suitable as a foundation for the jurisdiction of the ICC, within the inherent limitations to its claim of universality. Inquiring into the suitability of either of these two theories within these limitations is the subject of the following chapter.

It must be recognised that both theories are fundamentally different in approach and reasoning. To compare these two wholly different theories is therefore a difficult task. In their approach and their reasoning both theories provide for valuable insights and inherent qualities. In choosing between these two theories a choice is made on the basis of the considered suitability of the different theories for the purpose at hand. As such no choice is made as to the qualities of the different theories.

In considering each of these different theories I will argue that Immanuel Kant offers the best theory for the application as a foundation for the jurisdiction of the ICC, within the given limitations. This position is motivated by a number of arguments which I will outline below.

The first consideration to this position is inspired by the starting points of the different theories. The theory of Kant begins with an inquiry based on what Kant qualifies the only good thing in the world without limitations; the good will. From this basic premise Kant goes on to argue for concepts important in the foundations of his theory, such as the autonomy. Alternatively, Gewirth takes the voluntary action of the agent as his initial point of departure. From this concept of voluntary action and reason Gewirth goes on to identify the basic human requirements of freedom and well-being.

Although both theories arrive at the concepts of individual freedom and autonomy, the method of deriving the importance of these concepts is inspired by more generic, non-individualist terms in the theory of Kant. By taking the generic concept of good will as his initial point of departure, Kant is able to depart from a position which lays less emphasis on individuality than Gewirth. As this part of the inquiry is dedicated to identifying the moral theory most suitable to act as a foundation for the jurisdiction of the ICC, the ability of any such moral theory to provide for an objective point of departure is considered of great value to its credibility and its ability to appeal to universality.

This ability to appeal to universality is also an important consideration in the approach taken by each of the different theories. The theory of Gewirth stresses the importance of the claims of individuals. The individuals' claim to the right to freedom and well-being and the derived

reciprocity of this individual claim to rights is at the heart of the theory of Gewirth. Although this could be considered a natural consequence from the initial point of departure it indicates a strong emphasis on an individualist position to morality in which claims to rights take an important position.

It would be hard to argue that Kant, as one of the founding fathers of enlightenment, provides for a moral theory which stresses the importance of society and a morality based on selflessness, completely contrary to the morality of Gewirth. Nevertheless, Kant does offer a theory of morality which emphasises the importance of individual duty. From the importance of autonomy, Kant goes on to identify the categorical imperative. This imperative which directs the will towards the moral goal obligates the individual to perform in a way which is consistent with a moral purpose. Amongst the different formulation of this final purpose, Kant identifies the formulation which ultimately leads mankind to a humane society, the so called Kingdom of Ends. It may be argued that Gewirth likewise formulates his Principle on Generic Consistency specifying obligations to respect the claim of other individuals regarding freedom and well-being. However, this obligation is founded upon the claim of individual rights, whereas Kant takes the concept of duty itself to be a central aspect of his theory.

A third and final reason for considering the theory of Kant more suitable for the purpose at hand is the extent in which the theory of Kant aims to provide a universal and abstract formulation of a moral theory within the wider context of its inquiry into the possibilities of gaining knowledge and judgements. Although the validity of a moral reason is not dependent on the wider framework in which a moral theory is set, Kant has provided a wider foundation to a number of concepts which are key to his moral theory.

By conducting his moral inquiry within this wider framework, Kant has provided for a moral theory which clearly identifies the shortcomings inherent to any such metaphysical inquiry. This can also be identified as one of the primary causes for the more universal approach to morality as outlined before.

These considerations lead to the conclusion that of the two moral theories, the moral theory of Immanuel Kant is the more suitable of the two theories to act as a possible foundation for the jurisdiction of the ICC. Again, within the inherent limitations on its possible universality as concluded before. The following chapter will examine the consequences for the jurisdiction of the ICC when founded on the principles and norms provided for in the moral theory of Kant.

## KANT AS A BASIS FOR INTERNATIONAL CRIMINAL JURISDICTION

Having concluded that the moral theory of Immanuel Kant is the most suitable theory to serve as the foundation for the jurisdiction of the International Criminal Court this inquiry will con-

tinue to investigate in what way the theory of Kant can form the basis for international criminal jurisdiction.

Inquiring into this possibility begs the question to what extent morality and law have any relation at all. Although intuitively many would agree that there appears to be more than a coincidental relationship between the two, this relationship is highly contentious within legal philosophy.

With the increased attention to the concept of natural law, a law with a higher standing than any worldly law, the legal philosopher Austin questioned the possibilities of maintaining order through the strengthening of worldly laws. This possibility was required to avoid the degradation of worldly laws by the appeal of citizens to avoid compliance with worldly laws on the basis of natural laws. As natural laws are not codified, chaos would ensue if this appeal would be tolerated.

Austin therefore stressed the importance of adherence to worldly laws by introducing the concept of legal positivism. This theory provided for the possibility of differentiating between natural and worldly laws. His formulation of this concept reads:

*The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.*<sup>210</sup>

This theory on legal positivism has later on been revisited and expanded upon by the legal philosopher H.L.A. Hart. His theory on legal positivism has probably become the most recognised theory on legal positivism. This theory maintains the strict differentiation between natural law and worldly law, between morality and law. In the application of the law the only relevant factor could be positive law, the law as it is codified.

This differentiation has raised the criticism of a number of different legal philosophers. Amongst these critics is the philosopher Dworkin who argues that such a strict differentiation between morality and law cannot be justified by legal reality. Dworkin points to the practice of jurisprudence to argue that in every legal system there are cases where the law dictates a certain outcome, which is clearly at odds with morality. In these instances, Dworkin argues, judges tend to go outside the law to decide the case in accordance with morality. These cases, which Dworkin classifies as 'hard cases', show that a pure and formal distinction between law and morality is untenable.<sup>211</sup>

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<sup>210</sup> Austin, J., "Lectures on jurisprudence: or, The philosophy of positive law - vol. 1", Lecture V, p. 157, John Murray, London, 1869, as found on Google Books: <<http://books.google.com/books?id=ggwAAAAAYAAJ&pg=PR3#v=onepage&q&f=false>>.

<sup>211</sup> Huisman, N., "Moraliteit en recht", bachelor thesis University of Utrecht, 2009.

Although the precise relationship between law and morality is difficult to define it becomes obvious from the discussions between Hart and Dworkin that a strict and total separation between law and morality is unrealistic. To inquire further into this relationship is beyond the scope of this thesis. Therefore, for the purposes of this thesis it will be accepted that there is indeed a relationship between the two, even if the precise content is unknown.

The subsequent step to be taken in this inquiry is therefore to investigate in what way the moral theory of Kant can be employed as a foundation for ICC jurisdiction. For this to be determined the jurisdiction of the International Criminal Court needs to be ascertained on the basis of the supreme moral principle laid down by Kant and the concept of duty and the concept of justice as derived from the supreme moral principle by Kant.

It may be remembered that the supreme principle of morality, identified by Kant as the Categorical Imperative has been defined as:

*“Act only on that maxim by which you can at the same time will that it should become a universal law”.*<sup>212</sup>

From this categorical imperative Kant identified the following concept of the right action:

*Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.*<sup>213</sup>

Which in turn led to the following definition of the rightful intervention by the state in the freedom of the individual:

*Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.*<sup>214</sup>

From the previous it has become apparent that the concepts of freedom and autonomy lie at the heart of the theory of Immanuel Kant. The ability of the rational being to self-legislate is what determines the particular aspects of dignity of the rational agent. The duty based concept of moral rights is therefore exclusively aimed at the rational agent.

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<sup>212</sup> Kant, I, “*Grounding for the Metaphysics of Morals*”, translated by A. Zweig, Oxford University Press, Oxford, 2002, 421.

<sup>213</sup> Kant, I., “*The Metaphysics of Morals*”, translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 6: 230.

<sup>214</sup> Kant, I., “*The Metaphysics of Morals*”, translated by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, 6: 231.

The theory of Kant awards no particular duties to non-rational beings, in the sense that only beings who are in possession of a will and who are able to determine their own courses of action by following the Categorical Imperative are awarded special treatment in the sense that a rational agent is to allow such a rational agent his or her own freedom of choice.

This means that according to the moral theory of Kant rational agents have no particular duties towards animals, as they are not in possession of such dignity. On the other hand this theory does not restrict the duties of the rational agent to only human beings. To Kant it is arbitrary who is the possessor of the ability to self-legislate. The sole consideration of interest is the ability of the agent to self-legislate. Any agent in possession of this ability, human or not, is to be treated in such a way as to allow for his, her or its freedom of choice.

The conclusion that rational beings only have duties towards other rational beings appears to be a far-reaching conclusion. It would appear that this justifies the conclusion that rational agents have no duties towards animals, little children, comatose patients or persons with Alzheimer who can't, not yet or no longer be considered rational agents.

Although it must be conceded that Kant emphasised the importance of the rational agent in the concept of duty, Kant was not of the opinion that animals or non-humans were left to the discretion of the individual. In his Lectures on Ethics, Kant argues on our duties towards animals that there exists a duty towards animals because of the particular nature of certain animals which must be considered analogues to the behaviour of humans.

*So if a man has his dog shot, because it can no longer earn a living for him, he is by no means in breach of any duty to the dog, since the latter is incapable of judgement, but he thereby damages the kindly an human qualities in himself, which he ought to exercise in virtue of his duties to mankind.<sup>215</sup>*

In so far duties toward non-persons is not warranted by means of their potentiality of reaching the state of rationality such as is the case with babies, or even regaining the state of rationality such as is the case with comatose patients, Kant argues that such a duty exists also to certain animals and humans, deriving from a duty towards ourselves and mankind to exercise the human quality in ourselves.

Nevertheless, despite these derived duties towards animals and non rational humans, respect for autonomy and freedom of the rational agents must be considered the cornerstone of Kant's moral theory with respect to the duties towards others. These concepts of respect and autonomy have particular meaning in Kant's conception of the state. Kant sought to provide for a more practical basis to his theoretical framework in a number of different works.

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<sup>215</sup> Kant, I., "Lectures on Ethics", edited by P. Heath, Cambridge University Press, Cambridge, 1997, 27: 459.

In his essay ‘On the common saying: That may be correct in theory, but it is of no use in practice’, Kant argues in more detail on the relation of theory to practice in the right of a state. This level of detail is aimed at providing direction on the limitations of the right of the state to interfere with the lives of the individual. The relationship between the state and the individual is to be guided by the following three principles, according to Kant:

*that the rightful condition is based a priori on the following principles:*

- i. The freedom of every member of the society as a human being;*
- ii. His equality with every other as a subject;*
- iii. The independence of every member of a commonwealth as a citizen.<sup>216</sup>*

The principle of freedom in the theory of Kant is such that Kant believes each individual has the right to find his or her own method of living life. This principle is elaborated upon by Kant in the following manner:

*No one can coerce me to be happy in his way (as he thinks of the welfare of other human beings); instead, each may seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others to strive for a like end which can coexist with the freedom of everyone in accordance with a possible universal law.<sup>217</sup>*

From this elaboration the basic principles of individual freedom and autonomy clearly ring through. These continue to offer the required guidance in the direction of living, also when it applies to the limitations of the right of the state to intervene in the personal life of its subjects.

These same ideas can also be found in the second principle of equality formulated by Kant which he elaborates upon in the following manner:

*Each member of a commonwealth has coercive rights against every other, the only exception being the head of state (since he is not a member of the commonwealth but its creator or preserver), who alone is authorised to coerce with himself being subject to a coercive law.<sup>218</sup>*

Also from this elaboration it is obvious that Kant believes all members of a society to be equal and not to allow for individual differentiation upon whichever grounds. The sole exception allowed by Kant is that of the sovereign ruler, who is awarded specific rights. The exception of

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<sup>216</sup> Kant, I., “On the common saying: That may be correct in theory, but it is of no use in practice”, in “Practical philosophy”, translated and edited by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, p. 291, 8: 290.

<sup>217</sup> Ibid, p. 291, 8: 290.

<sup>218</sup> Ibid, p. 292, 8: 291.

the sovereign may (partially) be explained by the strong censorship of Frederick the Great that may have demanded certain discrepancies in this part of the theory of Kant.

The third principle of independence is a key concept of the political philosophy of Kant. This principle of freedom is based on the concept of the direct democracy where the possibility to restrict one individual's freedom is to be found in the collective determination of wills within a society.<sup>219</sup> These principles of Kant make it obvious that Kant is a firm believer in a society based on a social contract theory where society is formed by a hypothetical contract between the individual members and its collective representation in the form of a state.

An integral part of this theory is the idea that the state has the right to intervene in the individual freedom of its members for the greater good, as defined by means of legislation of the collective with the right to vote. In identifying those with the right to vote, Kant awards this right to those who may be considered as 'being one's own master'.<sup>220</sup> For Kant this excludes women and children, but emphasises that the landowner with large amounts of property is no greater than that of the individual craftsman.

Why Kant did not award the right to vote to all those who he has previously awarded a particular dignity from their ability to self-legislate is unclear and appears to be an incoherent point of view in his philosophy.

In addition to his elaboration on the practical consequences of his philosophy on the constitution of the state, Kant has written an essay on the possibility of perpetual peace. In this essay, named 'Perpetual Peace' Kant sets out his ideas on reaching this possibility. He believes such a situation requires the existence of what he calls a 'civil constitution'. This civil constitution is:

- (1) *one in accord with the right of citizens of a state, of individuals within a people (ius civitatis),*
- (2) *one in accord with the right of nations, of states in a relation to one another (ius gentium),*
- (3) *one in accord with the right of citizens of the world, insofar as individuals and states, standing in the relation of externally affecting one another, are to be regarded as citizens of a universal state of mankind (ius cosmopoliticum).*

It is particularly the third requirement for the constitution of perpetual peace which appears to be applicable to the possibility of founding jurisdiction of the International Criminal Court on the moral theory of Kant. Kant appears to advocate the existence of a legal framework from an international point of view which is applicable to all mankind, regardless of one's nationality and regardless of the location. This *ius cosmopoliticum* is justified by Kant on the basis of the

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<sup>219</sup> Williams, H., "Liberty, Equality and Independence", in "A Companion to Kant", edited by Graham Bird, Blackwell Publishing, Oxford, 2006, p. 372.

<sup>220</sup> Kant, I., "On the common saying: That may be correct in theory, but it is of no use in practice", in "Practical philosophy", translated and edited by Mary J. Gregor, Cambridge University Press, Cambridge, 1996, p. 295, 8: 295.

ever increasing globalisation which was already apparent at the time of Kant's writing. He justifies this proposition by saying:

*Since the (narrower or wider) community of the nations of the earth has now gone so far that a violation of right on one place of the earth is felt in all, the idea of a cosmopolitan right is no fantastic and exaggerated way of representing right; it is, instead, a supplement to the unwritten code of the right of a state and the right of nations necessary for the sake of any public rights of human beings and so for perpetual peace; only under this condition can we flatter ourselves that we are constantly approaching perpetual peace.<sup>221</sup>*

This cosmopolitan right may in part be construed as the legislation of the International Criminal Court, as this legislation is intended to award certain guarantees to all beings on the planet. It is obvious that these rights are to award the guarantees which may be derived from the moral theory of Kant, thereby emphasizing the importance of one's individual freedom and autonomy as laid down in the concept of duty as explained above.

This concept leads to a form of legislation whereby the emphasis is on securing these principles of freedom and autonomy. Although there are no moral grounds to delineate its reach to only the worst types of offences, this delineation appears to be in line with the concept of complementarity as elaborated upon by Kant and which currently exists in the international legal order which emphasises the importance of the national state. Therefore this legislation should be chosen in such a manner as to direct its legislation only at the most severe offences directed at personal autonomy and freedom. The selection of these offences may be aided by the second formulation of the Categorical Imperative. Jurisdiction could be awarded to the International Criminal court where an intrinsic part of the crime is that another rational being is treated as a mere means to an end and where the personal dignity of that person from his or her ability to self-legislate is disregarded.

Prime example of such crimes would be the crime of genocide, human trafficking, and slavery. Only because of the complimentary nature of the International Criminal Court is it possible to distinguish between crimes of such a horrendous nature that they should fall within the jurisdiction of the International Criminal Court.

The sheer scale required to speak of an act of genocide allows for the unlimited jurisdiction of the International Criminal Court for this offence. The offences of human trafficking and slavery, although they may be qualified of some of the most reprehensible acts possible based on the supreme principle of morality as identified earlier, may require a further limitation based on the principle of complementarity. With regards to these crimes jurisdiction may be awarded

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<sup>221</sup> Kant, I., "Toward Perpetual Peace", in 'Practical Philosophy' by Kant, I., translated and edited by Mary J. Gregor, Cambridge University Press, 1996, 8: 360.

to the International Criminal Court where these crimes are committed by organisations on a transnational basis.

Other examples of crimes which fall within the previously identified criteria include crimes which are part of the criminal legislation of many countries. These examples include crimes such as murder and rape.

The individual murder or rape, grotesque as it may be, ought to fall within the jurisdiction of the national state. Only in situations where these crimes are committed on a large scale or where they are carried out on a systemic basis a means to arrive at a certain end, can awarding justification of these offences to the International Criminal Court be justified on the basis of the principle of complementarity. The systemic execution of these offences may in these situations be classified as crimes against humanity, crimes currently already within the jurisdiction of the International Criminal Court.

A further candidate, coincidentally already within the jurisdiction of the International Criminal Court is the act of aggression whereby the workings of a state are employed in the execution of an act of aggression. The inclusion of this act is justified due to the inherently instrumental nature of this crime.

The category of crimes which currently also falls under the jurisdiction of the International Criminal Court but which has not been identified as a particular category in this investigation is the category of war crimes. To the extent these crimes fall within previously recognised categories they are naturally to fall under the jurisdiction of the International Criminal Court. The inclusion of war crimes outside of those already recognised may be justified by means of a practical consideration. This consideration finds its basis in the principle of complementarity of the International Criminal Court. Often crimes which are carried out in the act of war may not be prosecuted by virtue of their execution in the furtherance of the policy of a state. Therefore the awarding of jurisdiction of these types of offences to the International Criminal Court safeguards the actual prosecution of these offences. From a moral standpoint based on the supreme principle of morality as identified by Kant, there appears no particular reason to include this category of crimes as a separate category.

This leaves us with the following list of crimes of which awarding jurisdiction to the International Criminal Court may be justified on the basis of the supreme principle of morality as identified by Immanuel Kant;

- a) genocide
- b) human trafficking and slavery where perpetrated by organisations on a transnational basis;
- c) crimes against humanity;
- d) acts of aggression.

Furthermore it may be argued that, judged on the basis of this supreme principle of morality, there appears no justification for the inclusion of the crimes of international drug trafficking or terrorism. Crimes which, according to the preparatory work of the Rome Statute, had previously been considered.

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