

# Metaethical Issues in Contemporary Legal Philosophy

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A Constitutivist Approach

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**Stefano Berteza and Jorge Silva Sampaio**

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## Chapter 8

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### **The sanctioner's dilemma**

The disruptive impact of a Kantian  
constitutivist approach

*Carla Bagnoli*

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# 8 The sanctioner's dilemma

## The disruptive impact of a Kantian constitutivist approach

*Carla Bagnoli*

### 8.1. Introduction

Although Kant's philosophy has undoubtedly been a source of inspiration in international law and democratic peace theory, it is generally deemed too metaphysically burdensome and morally demanding to be of practical use in the theory and practice of international relations. In this chapter, I argue that the main reservations against the political significance of the Kantian approach can be set aside by focusing on a Kantian argument in support of moral obligations. This argument grounds moral obligations on the norms of rationality, which are taken to be binding insofar as they are constitutive of rational agency.<sup>1</sup> As opposed to other varieties of constitutivism, Kant's constitutivism relies on the capacity of reason to generate new incentives for action and, most importantly, to elicit a moral feeling of 'reverence for the law-making capacity of humanity'.<sup>2</sup> The role of reverence is crucial in explaining how human agents can act on principle even when it goes against their inclination or interest.<sup>3</sup> According to this perspective, while the norms of rationality define human rational agency, they can guide human action only if they hold normative sway over subjects. Thus, a particular type of moral sensibility explains the subjective normativity, that is, the bindingness of these norms in the exercise of rational agency.

To show the promise of the Kantian constitutivist approach to international relations, I consider its relevance in the case of the 'sanctioner's dilemma'. This dilemma arises when the costs of sanctioning a state for the violation of international law seem prohibitive, for instance when a state is strategically important and its absence would significantly undermine global cooperation, or when the proposed sanctions would have humanitarian consequences. This

1 These norms allow individuals to act with others and give rise to shared, organized, and institutional forms of rational agency; they also give us the framework for reciprocal justification and accountability. For a survey, see Katsfanas 2018. For Korsgaard, constitutivism is the only possible justificatory strategy in ethics; see Korsgaard 2009, 32.

2 See Bagnoli 2022 §1.

3 Kant C2 5:75.

case is generally analyzed in terms of cost–benefit and discussed against the background of strategic rationality. My contention is that the instrumentalist view fails to fully capture the nature of the dilemma. Instead, the constitutivist argument offers a deeper understanding of the dynamics of power and authority inherent in the sanctioner's dilemma and highlights some morally perplexing aspects of sanctions. The discussion brings to the fore the potentially disruptive impact of a Kantian constructivist approach in the field of international relations.

## 8.2 A Kantian approach to international relations?

International relations are largely understood in terms of strategic interactions, modelled on a Hobbesian rather than a Kantian framework.<sup>4</sup> According to this model, states are the primary political actors in international relations, and their decision-making shapes the landscape of international affairs. States are typically motivated by self-interest, which also sustains internal cohesion and grounds domestic justice. Consequently, they cooperate if and when it is in their interest to do so. Cooperation is rationally justified to the extent that self-interested states converge on a shared end to be pursued collectively (e.g., peace and security). This model entails minimal presuppositions about the rational powers of political actors and their willingness to cooperate and, therefore, it is economical in terms of both ontology and psychology. This is widely regarded as an advantage over the Kantian model, inasmuch as the latter relies on transcendental idealism, which is associated with questionable metaphysical assumptions.<sup>5</sup> Second, it is often objected that the Kantian model is question-begging because it tacitly relies on ethical or psychological altruism, which represents the power of reason as irresistible.<sup>6</sup> Such criticisms are not entirely unfounded. But they fail to consider the significance and implications of the constitutivist strategy, as it is reformulated in contemporary metaethics. Interestingly, this shortcoming also undermines recent commendable efforts to defend the Kantian approach to international relations.

Matthew Lindauer attributes the limited influence of Kantian thought to a disconnect between moral and political philosophy within the Kantian tradition in the field of international relations. In the attempt to provide a remedy, he appeals to Christine M. Korsgaard's moral constructivism. In his view, a renewed attention to Kant's moral writings and to Korsgaard's constructivism serves two purposes. First, it shows that the main features of a Kantian

4 See also Hurrell 1990, and Schlereth 1977, 124–125. On the influence of Kant's ideas on contemporary international relations and law, see Doyle 1983a, 1983b.

5 On the vulnerability of Kant's philosophy to the queerness objection, see Mackie 1977, cf. Bagnoli 2022.

6 See Sterba 2013, cf. Bagnoli 2014. On Kant's view, psychologically, humans are capable of altruism, but this is not a value, nor is it the driving element of morality, which is justified and structured by shared norms of rationality.

ethical theory can be preserved without any cumbersome metaphysics, thereby unseating the main assumptions underlying a general skepticism regarding the Kantian approach. Second, and more importantly for present purposes, attention to Kant's practical philosophy brings to the fore considerations that challenge the appeal of realism in international relations. Kant remarks that the stability of domestic societies depends on there being a solution to the problem of anarchy on the world stage, and that the only way to satisfactorily address this problem is to develop a law-governed relationship between states.<sup>7</sup> Domestic justice depends on international order. For without the latter, states would inexorably face international war, devastation, and upheaval until the 'complete exhaustion of their inner powers'.<sup>8</sup> By reclaiming Kant's moral and political philosophy, Lindauer allows us to reconstruct a strong argument in support of the subordination of domestic to international justice, which proves useful as a contrast and a challenge to dominant varieties of realism.

The appeal to Korsgaard's constructivism is crucial in addressing the objection that the Kantian approach is incompatible with a naturalistic ontology. However, Lindauer avails himself of the theoretical resources afforded by metaethical constructivism to only a very limited extent. In fact, his defence does not rely at all on the constitutivist argument outlined above. Rather, on his reconstruction, 'the self-interested motives of human beings progressively give way to moral motivations and expanding, just political institutions'.<sup>9</sup> This appeal to the progress of moral sentiments renders the Kantian approach vulnerable to the second objection, namely that it assumes, without argument or empirical support, that we have the capacity to develop a benign nature out of our unsociable sociability. The suspicion of question-begging is a decisive ground for seeking an alternative route. The constitutivist argument is a promising alternative. In the next sections, I argue that once the constitutivist argument is established, the alleged comparative advantages of realism are not obvious, and in the end, may be only apparent.

### 8.3 The appeal to Kantian constitutivism

There are two reasons for refocusing on a Kantian constitutivist strategy. The first is that the constitutivist argument is an indispensable element in a constructivist account of the efficacy and subjective authority of practical reasoning, as argued elsewhere.<sup>10</sup> The second is that the constitutivist argument may

7 'The problem of establishing a perfect civil constitution depends on the problem of law-governed external relations among nations and cannot be solved unless the latter is', Kant, AK 8:22–23; see also the claim that perpetual peace is 'the supreme political good', Kant, AK 6:355.

8 Kant, AK 8:22–23.

9 Lindauer 2018, 15–16.

10 Bagnoli 2021, 2022, §2.

have a far-reaching and disruptive impact in international relations. I cannot develop a comprehensive argument here, but I hope to show its potential.<sup>11</sup>

As opposed to the argument from the progress of moral sentiments, the constitutivist argument holds that norm compliance depends on the autonomy of practical reason rather than on any empirical considerations. To be autonomous, that is, self-governing, and self-authenticating,<sup>12</sup> reason must be governed by constitutive norms that explain its normativity from inside. Kant's distinctive conception of 'practical reason' requires humans to be able to act morally in the absence of incentives extraneous to morality. The authority of moral obligation does not rest on the psychological premise that rational agents are naturally altruistic or cooperative by default. The moral feeling of respect for the law-making capacity of humanity is the subjective condition of authority, representing morality as an incentive. This moral feeling is the mark of our capacity to act on moral principle.

Second, and consequently, the possibility of a basic agreement on what counts as a reason descends from the claim that rational agency is constituted by the exercise of rational norms. Thus, rational norms are not efficacious on the condition that they serve preestablished moral concerns fixed by nature, or the interests of individual subjects on particular occasions but rather because they are constitutive of their agency. If this is correct, then rational agents can be motivated to act cooperatively, to the extent that cooperation is prescribed by rational norms, even when compliance with such norms seems counter to self-interest. Ultimately, however, genuine self-interest must align with the prescriptions of the constitutive rational norms. That is because such norms set the framework for cooperative interactions as solutions to the individual problem of sustaining a struggle with others to have everybody's rights respected and enforced. This justification differs from the ones represented by altruism and egoism.

In the domain of individual rational agency, the purported merit of this argument is that it explains the normativity of moral obligations by showing that they are requirements of rationality that hold first-personal authority rather than via appeal to external sanctions and rewards.<sup>13</sup> Its intended result is to show that moral obligations are compelling rational requirements only to the extent that they rely on the moral incentive of respect.<sup>14</sup> The extension of this argument to international relations brings to the fore considerations that

11 This extension builds on the 'constitutional model', which draws an analogy between the constitution of the self and that of a polis (Korsgaard 2009, 134). However, I contend that the constitutivist argument fundamentally differs in both kind and scope from Korsgaard's method (1996), see Bagnoli 2022, §2, see O'Neill 2018.

12 O'Neill 1992, cf. Bagnoli 2022, §1.

13 On the advantages of the constructivist conception of normativity vis à vis accounts based on sanctions, see Bagnoli 2011; on Kant's argument regarding moral incentives, see Bagnoli 2021.

14 See, e.g., Bagnoli 2014.

have previously not been taken into account. The keystone is that reason has the power of producing new motives for action through a ranking of incentives.<sup>15</sup> Like the variety of constructivism rehearsed by Lindauer, its ontological commitments are minimal.<sup>16</sup> In contrast to Lindauer's argument, however, the constitutivist argument we are considering here does not invoke the progress of moral sentiments: in fact, the argument undercuts the very dichotomy between altruism/self-interest that drives the debate between realism and idealism in international relations. Thus, the constitutivist argument makes room for a Kantian approach that emphasizes the compelling role of international norms, interdependence, and cooperation among states.<sup>17</sup> The resulting view is morally constrained but pragmatic, and thus represents a viable alternative to both realist and social constructivist views of international relations.<sup>18</sup>

#### 8.4 Further objections: agency, power, and authority

While constitutivism seems a promising step forward in the debate on the plausibility of the Kantian approach to international relations, it is itself a controversial theory. David Enoch has recently argued that the constitutivist argument fails to explain the normativity of reason because it presupposes an interest in being an agent, but it is not inconceivable to be content with being a 'shmagent'. The 'shmagency objection' has large currency in the domain of individual agency and retains some force against the more ambitious versions of Kantian constitutivism, despite a plethora of replies.<sup>19</sup> Interestingly, however, when transferred to the domain of international relations, the shmagency objection is moot: constituting themselves as self-governing agents is the primary interest of any state or putative political actor.<sup>20</sup> The problem is not whether political actors *want* to be self-governing agents; the question is how to contain this motivation so as to allow for a peaceful coexistence and cooperation with all others political actors. Therefore, the constitutivist argument may be especially rewarding when brought to the international arena.

However, the constitutivist argument is vulnerable to a further objection, which concerns not the presumptive normative powers of reasoning in

15 On self-constitution, see Korsgaard 2009, 188–206; for an alternative construal, see Bagnoli 2021. For a non-constructivist account of this claim, see Nagel 2005.

16 See Bagnoli 2022.

17 These features are generally associated with 'idealism' in international relations; see Wilson 2011.

18 On social constructivism, see Onuf 1989, Wendt 1992.

19 Enoch 2006; on the ensuing debate, see Bagnoli 2022, §2. This problem is directly related to the possibility of bad action in a constitutivist account; see Fitzpatrick 2013 and Prezas 2022.

20 The key feature in this case is the artificiality of agency. Modern and contemporary states seek stability over time. However, there might be kinds of states that aim at their own dissolution, e.g., when their constitutive purpose is achieved.

governing and constituting agency but rather the conditions in which practical reasoning is engaged. It is arguable that in non-ideal conditions, where power relations do not match relations of rational authority, the greatest normative influence on political actors' decisions comes from outside reason itself. If so, then considerations rooted in power relations count as genuine reasons, rather than being disruptions of reasoning to be dismissed. The sanctioner's dilemma is a case in point.

This is a common case in international relations and arises when the costs of sanctioning a state for a serious violation of international norms (e.g., for violating human rights) are too high. This case is generally analyzed in terms of strategic rationality. In fact, it can be considered the paradigmatic case in which the 'moral reasons' for sanctioning a state for transgressing an international standard (e.g., violating human rights) are outweighed by 'strategic' or 'prudential' reasons (the sanctioner's self-interest).

The task of the following sections is to show the theoretical and practical advantages of adopting a Kantian constitutivist analysis of the sanctioner's dilemma, which encompasses the moral dimension of the predicament and illuminates the broader issue of international law enforcement. Before embarking on this analysis, it is necessary to conduct a preliminary discussion of sanctions.

### **8.5 Sanctions as a normative practice**

Sanctions may take various forms and apply to a state when and if it violates international norms of conduct.<sup>21</sup> Typically, sanctions are either economic (e.g., trade restrictions, asset freezes, or financial penalties) or diplomatic (e.g., the expulsion of diplomats or suspension of diplomatic relations), or they impose other forms of political isolation and exclusion from specific political roles, activities, networks, or organizations.<sup>22</sup> In some cases, sanctions are intended to restrict access to benefits earned by full participation in cooperative schemes.<sup>23</sup> For instance, in the case of the United Nations (UN), the

21 I define sanctions as normative responses applied in cases of a violation of a shared norm within a coalition. The Global Human Rights Sanctions Regimes, also known as 'Magnitsky sanctions', are designed to target perpetrators of severe human rights violations committed abroad. The United States was the first country to establish such a legal framework with the Global Magnitsky Human Rights Accountability Act in 2016. This framework has since been adopted by 35 countries worldwide, including the EU through decision (CFSP) 2020/1999 and regulation (EU) 2020/1998, and the UK through the Global Human Rights Sanctions Regulations in 2020. These acts encompass various restrictive measures targeting both natural and legal persons. It is arguable that the Magnitsky sanctions framework can contribute to the formation of customary international law on third-party countermeasures, see Jia 2023.

22 Hathaway and Shapiro (2011) introduce 'outcasting' as a novel form of international sanction. Like ostracism, this is an ancient practice of boundary negotiation, which often weaponizes moral attitudes, such as blame and shame; see Bagnoli 2021b.

23 I emphasize the centrality of the cooperative scheme, which I take to be implicit in, if not a constitutive rationale of, the sanction regime.

sanctions regime is meant for the promotion of international peace and security, but it is arguable that the cooperative scheme is more generally intended for the sake of the stability the UN, whose existence depends on peace and security.<sup>24</sup>

The pressure that sanctions exert depends on the specific roles, activities, networks, or organizations that are targeted. In some cases, the effects are largely reputational, calling attention to the unreliability of the target states in cooperative interactions. More generally, however, the expulsion or suspension of membership rights from an international organization has substantial consequences, far beyond a reputational cost: it changes the normative status of a member, its normative powers, and its authority within the coalition (see, e.g., Russia's expulsion from the Council of Europe).

Sanctions are largely understood to be non-violent, and as such, to be a tool of foreign policy to induce compliance.<sup>25</sup> They can be applied unilaterally or multilaterally.<sup>26</sup> The latter carry greater weight and have more impact than the former. By involving multiple countries or international bodies, multilateral sanctions signal a unified stance against the target and can exert more significant economic, political, and diplomatic pressure. Furthermore, multilateral sanctions are often perceived not only as more effective but also as more legitimate insofar as they reflect a consensus among a broader coalition of nations. This is the case when sanctions are decided or authorized by the Security Council under the Charter of the UN. The coordination required to sustain multilateral sanctions can be a challenging task, given that states differ in their interests, priorities, and policies. Consequently, a workable convergence may result from local compromises rather than being the expression of a 'rational agreement', that is, an agreement on shared reasons. In Section 8.8, I cast some doubts on the non-violent nature of sanctions, even when they are preferable to military interventions.<sup>27</sup>

24 See Ruys 2017, cf. Van Rooij and Daniel 2021.

25 Opinions vary regarding the classification of sanctions as 'diplomatic' interventions, depending on the specific types of sanctions involved. This categorization may extend to military sanctions, as argued by Charron (2011) and noted by Shapiro and Hathaway (2017) and Subedi (2021). I find it valuable to differentiate sanctions from military intervention, although both aim to address violations of norms enforced by international agreements. It is important to note that the mere threat of military intervention can act as a deterrent.

26 The distinction lies between sanctions imposed or authorized by the UN (which are multilateral by definition) and autonomous sanctions. Autonomous sanctions can be unilateral or multilateral when imposed by states belonging to the same region (e.g., the EU) or by states that share a similar worldview (e.g., Western states).

27 The argument concerns further normative characterizations of sanctions in relation to the purpose of the sanctioner and allows for the distinction between reactive and proactive sanctions, protective and aggressive sanctions, and other forms of sanctions. This normative taxonomy may be useful, even though the actual effects of sanctions may differ from those anticipated or designed by the sanctioner, and for strategic or non-strategic reasons that could not have been anticipated.



## 8.6 Justification, legitimacy, and effectiveness

In the context of international relations, the application of sanctions poses several philosophical issues, beginning with their *justification*. Questions arise about the *legitimacy* of using coercive measures to influence the behaviour of other states and the tension between state sovereignty and international intervention.<sup>28</sup> The imposition of sanctions on sovereign states potentially infringes upon the rights and autonomy of targeted populations. The fundamental postulate of liberal international theory holds that states have the right to be free from foreign intervention, and hence from external sanctions. In relation to the principle of state sovereignty, the primary concern is that transnational legal regimes may disrupt the existing international legal order. It seems to follow that sanctions may apply with *legitimacy* only when a state intentionally violates an agreement, which violation was known to be enforced by the imposition of sanctions. By consenting to the agreement, a state thereby commits to accepting sanctions in the event of any future violation, unless exceptional circumstances or cases of necessity arise. Arguably, then, when political actors fail their international obligations, for instance by violating a shared norm or by disregarding a shared timeline, sanctions appropriately apply.<sup>29</sup>

A second philosophical issue arises in consideration of constraints on the ways in which sanctions are applied. There are procedural requirements of warning (i.e., the state should be warned before being subjected to sanctions), proportionality (in relation to the violation performed, or the general purpose pursued), and compliance with non-derogable norms (e.g., prohibition of force, and torture). These constraints are legal, but they may rest on moral and political grounds. Although sanctions are morally permissible as a means of addressing perceived wrongdoings by states, they are subordinate to independent grounds of moral permissibility. Their moral permissibility depends on their consistency with principles of justice, fairness, and respect for human dignity. For instance, when striving for safety, there may be valuable information that can be obtained through coercion, but ethical considerations limit the methods by which truth can be acquired, and such limitations prevent truth from being extracted through force or violence. This is a specific instance of the kind of moral dilemmas that arise when the only means to achieve a

28 I define the wrongness of such coercive relations in Bagnoli 2023. I am not suggesting that all coercive measures are wrongful; in this case, the point of sanctions is to coercively enforce legitimate norms.

29 This claim may indicate a line of response to those who are skeptical regarding the normativity of international law in the absence of a central authority with the power to enforce its dictates. Insofar as the latter condition lacks, international law is merely a system of norms without true legal force. The possibility of sanctions agreed within an international coalition—but unilaterally or multilaterally administered, rather than collectively by a unified body—may be taken to show that international law can indeed be enforced, with legitimate authority, as Hathaway and Shapiro (2011) have argued. My worry regarding this interpretation is that it renders the normativity of law dependent on its efficacious enforcement.

seemingly positive outcome are morally reprehensible. Analogously, the use of sanctions that cause economic hardship or limit access to essential goods and services may affect vulnerable or marginalized groups within the targeted country in ways that legitimately raise humanitarian concerns. These moral considerations suggest that there should be moral constraints on the application of sanctions, independently of whether they are appropriate responses to violations. This argument gives priority to morality over politics in international relations.

This leads us to a separate but related issue concerning the effectiveness of norms and the efficacy of sanctions as modes of social, legal, and moral enforcement in foreign policy. The effectiveness of a norm is determined by the extent to which it is complied with. It can be argued that different types of sanctions may be expected to be effective to varying degrees in achieving their intended goals, namely, improving norm compliance. The question is whether, and to what extent, political actors represent themselves as bound by norms and agreements, for reasons independent of the shmagency objection regarding their nature as agents, and relative to the scope of the agreement or the external conditions of its enforcement. Precisely because political actors are supremely interested in and care about their status as self-constituting agents, on some occasions, they may decide that it is prudent to withdraw from or occasionally to violate an agreement.

### **8.7 The relational features of sanctions' efficacy**

The efficacy of sanctions in improving norm compliance is circumstantial and depends on various relational factors, including (i) the capacity and power of the targeted state to bear the specific costs imposed by sanctions and to withstand or mitigate the effects of isolation; (ii) the power of the targeted state in the international community, which is often also perceived as a power of retaliation; (iii) the willingness of the states in the coalition to cooperate in imposing sanctions, which may reflect their respective standing in the community and/or different perceptions or assessments of the risk involved; (iv) the evaluation of the effectiveness of other complementary diplomatic strategies—such as positive incentives, third-party mediation, nudging, and coercive pressure—to address the relevant international disputes and to promote adherence to international law and norms; (v) the assessment of the legitimacy of the norms being enforced, which may depend only partially on well-grounded reasons regarding the compliance of actual policy-making with international law norms and procedures; (vi) the willingness and capacity of the state to impose the costs of sanctions (or let the costs fall) on some subset of its population; and (vii) the availability of other, alternative partners.

## 8.8 The aims and rationales of sanctions

The acknowledged aim of sanctions is twofold: (1) to impose costs on offending states for their behaviour, and (2) to pressure them into conforming to international standards of conduct shared by the coalition in which they belong. Presumably, conformity is functional to cooperative interactions, which are the core drivers of the international community, if not its constitutive aim. However, different rationales may exist behind the application of sanctions.

First, sanctions may be imposed as a *punishment* for violation, which reacts to the breach of an agreement or custom. In such cases, sanctions are backward-looking and address the transgressor; their meaning is punitive and retaliatory. Punishment meaningfully applies to partners in cooperative interactions and typically carries a symbolic significance, beyond its tangible effects.<sup>30</sup> That is, in addition to the material costs, sanctions *express and signal disapproval* of the government of the target state, with domestic political effects (Grauvogel, Licht, & von Soest 2017). This is also a *communicative* act, which translates into a reputational cost that alters cooperative schemes. In most cases, the sanctions have *normative effects* equivalent to losing privileges and entitlements associated with membership of an institution or a position of power (e.g., the case of Russia's exclusion from the EU Council). The delegitimising effects of the normative change that sanctions impose are broad and may extend beyond the loss in status. Being subjected to sanctions may determine dramatic changes in the economy of credibility, inflicting a drastic loss of bargaining power within the coalition. Internally, this may translate into a corresponding fear of being excluded from cooperative interactions as an unreliable partner. Punishment highlights the breach of trust that has occurred, while also reminding participants in the relevant cooperative interactions of their mutual dependence and reliance.<sup>31</sup>

Relatedly, sanctions aim at a broader audience beyond the targeted violator when they operate as *deterrents*. They can be adopted as a means to

30 Empirical research shows that cases in which punishment is applied even though it is costly for the punisher and yields no material gains are common. This phenomenon is known as 'altruistic punishment' and is considered a key mechanism in cooperative interactions, where it targets defection. Fehr and Gächter (2002) argue for a strict correlation: cooperation flourishes if altruistic punishment is possible and breaks down if it is ruled out. This research considers negative emotions towards defectors as the proximate mechanism behind altruistic punishment. It may be useful to compare this research programme on negative emotions in altruistic punishment with the philosophical discussion concerning the category of 'reactive attitudes' defined by Strawson (1962). On the punitive and offensive functions of reactive attitudes as elements of larger mechanisms of boundaries negotiation, see Bagnoli 2021b.

31 It is often the case that international sanctions are intended to exert pressure on the targeted government by signalling support for the opposition. Based on qualitative evidence, Grauvogel, Licht, and von Soest (2017) argue that sanctions work as international certifications of approval for the opposition internal to targeted regimes and encourage collective action against them.

discourage further future deviations from all other partners in the coalition by singling out the violator as a negative exemplar and underscoring the costs imposed by the sanctions. In this way, sanctions may be adopted as a *proactive* practice to encourage compliance with established norms and to reinforce the sense of international community. On this construal, they are instrumental to the deterrence of non-compliance, to the prevention of conflict, to improving diplomatic relations, and to the consolidation of a sense of global community. The effectiveness of sanctions under this rationale is less obvious and more difficult to prove retrospectively, given the complexity of the factors involved. Nonetheless, the forward-looking or proactive intended effect of sanctions remains a crucial rationale in their justification. In general, sanctions are identified as a means of enforcing the norms that underpin the international coalition.

### **8.9 The sanctioner's dilemma: four scenarios**

In a typical scenario, the international coalition faces a hard choice regarding whether to impose sanctions against another state for a serious breach, such as the violation of human rights. This presents a moral dilemma, because it involves morally grounded considerations. To provide a clearer illustration, a more specific example may be helpful. In one scenario, the offending state is strategically important in terms of its standing and credibility in the coalition, its natural resources, economic influence, or geopolitical position. The prospect of imposing sanctions or isolating the offending state could have negative repercussions for the individual sanctioner (A), or more generally for global cooperation, trade, or security arrangements (B). Importantly, these dilemmas arise because political agents do not have the same normative powers, and this is because they do not have equal standing in the coalition.

In another scenario, the sanctions that would be most effective against the offending state would have heavy humanitarian consequences for its population, potentially leading to famine (C), or exacerbating domestic tensions that may also have repercussions beyond the borders of the offending state (D). In the former case, the coalition faces a dilemma whereby it must weigh the moral imperative to address human rights abuses against the potential costs and risks of taking a punitive action that undermines the coalition itself and may trigger retaliatory effects. In the latter case, the conflict arises because the alternative options fall under the same humanitarian moral principle, but their implementation is mutually exclusive. The morally perplexing feature of both these cases is that the effectiveness and the normative significance of the sanctions are compromised by the high profile of the offending state.

It may happen that political actors decide to apply sanctions despite their negative effects, in cases such as A and B. Empirical social psychology mentions the phenomenon of 'altruistic punishment', which names cases in which the sanctioner applies sanctions even though the effects of the application would be negative for the sanctioner. Fehr and Gächter (2002) argue that

cooperation flourishes if 'altruistic' punishment is possible and breaks down if it is ruled out. However, this hypothesis does not have any predictive power in international relations, where altruistic punishment is not the norm. Some varieties of the dilemma can be mitigated by constraints that restrict the scope of sanctions (e.g., by recognizing the priority of the protection of humanitarian interests in the context of sanctions regimes). For instance, Resolution No. 2664 (2022) of The United Nations Security Council introduces a humanitarian carve-out to almost all asset-freezing sanctions, exempting humanitarian operations from the scope of application of UN resolutions, which represents a crucial development in the UN's effort to protect human rights.<sup>32</sup> However, the implementation of targeted sanctions is problematic because the activities of targeted individuals or groups and legitimate humanitarian actors often overlap from a financial standpoint. The effectiveness and legitimacy of the carve-out largely depend on the specifics of its implementation.

### **8.10 The standard approach**

The standard description of this case borrows the language of cost–benefit analysis: it is a dilemma that arises when the potential costs of sanctioning the offending country are deemed too high in comparison with its expected benefits. All varieties of the sanctioner's dilemma seem to underscore the complex trade-offs and tensions involved in international relations, where states must navigate between moral principles and pragmatic considerations. The pervasiveness of such dilemmas by itself discourages the adoption of rigorist policy and suggests that coalition leaders should engage in a careful cost–benefit analysis, and perhaps search for reasonable compromises.<sup>33</sup>

It is possible, if the analysis is sufficiently careful, that dilemmas can be explained away. The resolution should be the option that causes less global disruption in the former case and less domestic damage in the latter case. The moral characterization of such disruption requires the adoption of a normative theory. For instance, utilitarian theory would recommend a choice that maximizes utility or at least minimizes the disutility, based on the assessment of outcomes. The realist approach may easily appropriate the utilitarian calculation or the cost–benefit analysis to assess the potential costs and benefits in terms of geopolitical dynamics, strategic alliances, and national security interests. This combination often presents itself as the only viable course of action. However, there are difficulties regarding this methodology that should discourage anyone from taking it as a solution.

32 The issue of the adverse effects of sanctions was addressed at meeting number 8962 of the Security Council, 7 February 2022; see Seatzu and Vargiu 2023.

33 As I explain later, this is a difficulty also for some varieties of constitutivism; see, e.g., Korsgaard 2009, and cf. Fitzpatrick 2013.

### 8.11 Two reasons for rejecting the cost–benefit analysis

There are two major problems with the cost–benefit analogy. First, it is difficult to measure the impact of sanctions and thus to determine exactly its costs and benefits. The problem is partly generated by substantial disagreements regarding the kind of measurement, but also regarding the very objects of measuring.<sup>34</sup> For instance, scholars tend to interpret the absence of observable change in target behavior as a lack of efficacy, but there are kinds of normative changes that cannot be tracked from the outside and that thus require a different kind of qualitative exploration. Some of these normative changes emerge slowly in time and would require a dynamic analysis. Thus, the prevalent use of static data from existing sanctions databases reduces the ability of researchers to study various time-specific factors affecting the probability of success in the application of sanctions. These methodological habits greatly undermine our understanding of the phenomena of enforcement and compliance.

Second, cost–benefit analysis underappreciates the moral significance of the sanctioner’s predicament and explains away its dilemmatic appearance. This is particularly important in cases A and B, which originate in power asymmetries. The objection is twofold. On the one hand, a method that fails to capture the moral significance of choice is phenomenologically inapt: it fails an important descriptive goal of any plausible scientific explanation. On the other hand, the objection is normative: a method that eludes the moral dimension of rational choice obscures the normative effects of sanctions. It suggests that sanctions should be considered morally legitimate only if the costs are not expected to be too high. In Section 8.5, I noted that the effectiveness of sanctions is contextual and heavily dependent on the profiles of the states that form the coalition, the profile of the targeted state, and other circumstantial factors. If the moral legitimacy of sanctions is understood to be a function of their efficacy or effectiveness, then the very existence of this dilemma proves that the application of sanctions is illegitimate in such cases. But is there any reason to take the sanctioner’s moral perplexity seriously? The cost–benefit analysis misdescribes the very nature of the sanctioner’s dilemma.

### 8.12 Sanction under coercive threat

The moral predicament of the sanctioner’s choice in A and B can be elucidated by noticing that its structure is analogous to dilemmas under conditional threats. In such dilemmas, an agent is asked to condone something

34 See Peksen 2019, for further details. As noted by Peksen (2019), studying sanctions in isolation from other instruments offers only a partial understanding of their specific role in shaping the foreign policy landscape. Aaken and Simsek (2021) emphasize the concept of rewarding as an under-theorized mechanism for encouraging compliance, providing an alternative to sanctions. However, measuring and assessing the impact of rewards faces similar difficulties to those encountered when evaluating sanctions.

immoral under threat of a worse scenario that his refusal to submit to the coercer will produce. These scenarios are triggered by complex dynamics in which the coercive power of conditional threat opposes legitimate authority. The cost–benefit approach fails to consider that the agent is making his decision under a conditional threat of coercion, which undermines the normative status and whose normative significance does not easily translate in terms of performative outcomes. Coercion is impactful but the nature and complexity of its impact is such that it eludes the reductive language of costs and benefits unless the coercive challenge to the sanctioner's normative standing results in an outward performance.

The focus on performance coheres with the instrumentalist bent of the cost–benefit analysis but leads to the following paradoxical result. If the retaliatory conduct of the targeted offending state is expected to be sufficiently strong to outbalance the positive effects of the application of sanctions, then, on the instrumentalist account, the coalition has compelling instrumental *and* moral reasons not to impose sanctions on the offender. This is to say that the coalition is both instrumentally and morally obligated to comply with the conditional threats of the offending state. The utilitarian calculation thus fails to recognize that the proposed solution to the dilemma is a submissive action under a conditional threat of coercion, by which the coalition renounces its normative and agential authority, as it acts on reasons that are imposed by the offending state. The unacknowledged normative element of this scenario is that when the coalition is overpowered via conditional coercive threats, its decisions no longer fully represent or express the free exercise of its normative agency. On this construal, the dilemma does not originate in a trade-off between costs and benefits, but it presents a threat to the coalition's agential, ethical and political authority.

The constitutivist strategy enables us to acknowledge that if a state bypasses or blatantly violates the constitutional procedures in the pursuit of its own (non genuine) interest, it coerces all others into acquiescence. It is that state that rules, and not the coalition, and it rules by violence. This characterization of the sanctioner's moral predicament in deliberating under coercive threat is more perceptive and perspicuous than the instrumentalist. In fact, combined with the instrumentalist approach to practical reasoning, the cost–benefit analysis leads to a dangerous conflation of brute power with the normative authority of the parties involved. The moral significance of rational choice under conditional threat cannot be fully understood in terms of strategic and instrumental principles. Arguably, the constitutivist account of the sanctioner's dilemma also fits better with the moral phenomenology of deliberating over sanctions under coercive threat, but its advantages are not restricted to the phenomenology of hard choice. The main lesson is that to fully understand and capture the impact of international sanctions, we must refocus on the moral significance of the sanctioner's choice.

In this perspective, the moral reasons why coercion by conditional threat is wrong in interpersonal relations extend *mutatis mutandis* to international



relations. This statement concurs with Lindauer's general argument in favor of the Kantian approach and adds pressure to the realist approach to international relations but does not rely on altruism.<sup>35</sup> The Kantian approach to the sanctioner's dilemma shows identifies a variety of coercion that does not simply block or bypass the agent's deliberative powers but rather exploits them.

### 8.13 Moral concerns and instrumental considerations

It may seem that the sanctioner's dilemma exposes a tension internal to practical rationality itself: the import of non-strategic moral concerns, such as the duty to defend human rights, is pitted against the import of strategic and pragmatic considerations, which are routinely set aside. In the first variety of the predicament, strategic considerations are intuitively and pragmatically compelling. In the second variety of the dilemma, the sanctioner is in a bind because moral concerns are non-negotiable;<sup>36</sup> thus, the dilemma is not solvable through rational means. Cost-benefit analyses may seem to be the only remedy, because they treat such dilemmas as spurious and resolvable by calculation—at least in principle. In Section 8.8, I have presented two reasons to think that this may not be a decisive advantage. In this section, I shall explain how the Kantian approach compares on this issue.

A current argument in the constructivist literature is that the principle of instrumental rationality does not stand by itself.<sup>37</sup> Its normativity—that is, its normative and subjective authority on rational agency—depends on the non-instrumental principle of rationality, which is warranted by the fundamental norm of the categorical imperative. The categorical imperative is fundamental in the distinctive sense that it articulates the stance of rational agency. The principle of instrumental reason is also a constitutive principle of agency, but its normative authority depends on the more basic authority of the non-instrumental principle of rationality.<sup>38</sup> The categorical imperative commits itself to its realization in practical action and thus includes prescriptions about the means to achieve the end. Therefore, the principle of instrumental reason cannot be separated from the categorical imperative. It is best understood as an aspect of the categorical imperative that warrants its efficacy. Ultimately, there is only one principle of practical reason: the categorical imperative. If this argument is correct, then the constitutivist variety of Kantian constructivism sidesteps the shortcomings of the deontologist and rigorist interpretations of Kant's ethics.

35 See also Rudall 2020.

36 Correspondingly, juridical obligations to protect fundamental rights and human dignity are 'absolute': non-negotiable, inalienable, and irrevocable.

37 I take Kantian constructivism to rely on the constitutivist argument; see Bagnoli 2022. On the dependence of the principle of instrumental rationality on the principle of non-instrumental rationality see O'Neill 1989, 73–74; and Korsgaard 2009, xii, chapter 3; Bagnoli 2022, 29ff.

38 For a crisp formulation of this principle, see Korsgaard 2009, 67–68, 92.



Applying this approach to the moral dilemma faced by the sanctioner brings into sharp relief that the pragmatic considerations, which clash with the moral considerations, should be justified by the same principles of rational agency. These considerations do not track independent and separate sources of reasons. By appealing to the constitutive norm of rational agency, the decision-maker can reconcile both horns of the dilemma and formulate a proper maxim of action. This action will be ultimately justified by the categorical imperative, which makes sense of both strategic and non-instrumental grounds.

### 8.14 Too quick?

The solution presented in the previous section may seem hasty, seriously downplaying the sanctioner's predicament, albeit for reasons different from those discussed in regard to the cost–benefit analysis in Section 8.11.<sup>39</sup> The appeal to compelling constitutive norms of rationality makes the appeal to sanctions unnecessary. If moral obligations are rational requirements, and ultimately justified by norms that exert normative authority over humans as agents, why do they need to be implemented by sanctions at all? This question is relevant for two reasons. First, it calls into play the distinction between rational agents as such, and human rational agents, who are 'animals endowed with reason'. Kantian constitutivism is frequently defended in the abstract, thereby obscuring the complications presented by human embodiment and finitude, social embeddedness, and interdependence, all of which are constitutive aspects of the human condition. Second, it calls for a clarification regarding the role of enforcement. Kant argues that duties of right are enforceable by an omnilateral will but their normativity is not derived from their enforceability by sanctions. The discussion of these two points provides an opportunity to highlight further aspects of its relevance for—and its potentially disruptive impact on—international relations.

Regarding the first point, I have argued that Kant's theory of practical reasoning should be interpreted as a variety of embodied and embedded constitutivism.<sup>40</sup> This interpretation highlights its distinctive merits as a theory of meta-normativity, which acknowledges norms of rationality as constitutive

39 See note 6 for some alleged difficulties of the constitutivist model. Some of these difficulties may stem from an ambiguity that requires resolution: is this model individualist, extended to the political dimension? Or is it a political model extended to the individual? The differences between accepting and inflicting sanctions can be seen as morally significant within a constitutivist account, given the various ways of exercising rational agency. Acquiescing under coercive threat may hold symbolic significance and emotional resonance beyond observable material consequences, making them difficult to calculate, especially over time. However, a significant division among Kantian constitutivists concerns whether it is possible to be a rational agent without being autonomous: some argue that it is possible, whereas others argue that it is not. The former view is associated with Kant, and the latter with Korsgaard (2003, 2009).

40 Bagnoli 2022, cf. Rodriguez-Blanco 2011, and Bagnoli forthcoming.

aspects of human agency. They represent the bare structure of rational agency, which is practised in context by embodied, interdependent, and mutually vulnerable agents. This exercise involves practical reasoning and typically begins by considering the ‘circumstances of justice’ in which human agents operate. These circumstances should include the fact that agents are finite, interdependent, and mutually vulnerable rational beings with equal moral standing who must deal with scarce resources. According to this perspective, justice is not a tool for remedying the inevitable power struggles that arise in the face of scarcity. More importantly, the point of the concept of justice is to regulate the relationships between rational agents who have equal normative standing and authority.

This brings us to the second point. In respectful relationships between agents of equal normative standing, each agent can unilaterally act in a way that binds everyone else. However, the bond is genuine only when the authorization is public. With some simplification, we can affirm that the categorical imperative gives the form of such public authorization.<sup>41</sup> Such a structure allows agents engaged in such reasoning to respect each other as having equal normative standing. This is a moral obligation, but it is also a rational requirement. The constitutivist argument demonstrates that these obligations are *direct*—they apply to all rational agents simply by virtue of their rational capacity and address each of them for the same reason. They are authoritative prior to and independently of any intermediary institution, although their enforcement can be institutionalized. This claim represents a challenge to many positions held in international relations. Typically, sanctions are understood to address governments. In contrast, the constitutivist argument reminds us that

41 In this case, it is appropriate to understand the form as a ‘procedure’ (Rawls 1980, Bagnoli 2022). Ripstein refers to ‘omnilateral’ authorization (Ripstein 2009, 157). I prefer the term ‘public’ authorization over ‘omnilateral’ because it implies a richer condition that the law aims to establish: the creation of a commonwealth of shared ends (Bagnoli 2021). ‘Omnilateral’ authorization suggests a more modest equitable and enforceable agreement, possibly based on self-interest—for example, where all count as one and no more than one. Cooperative interactions can be strategically justified as a form of coordination with individual payoffs distributed over time and can be the focus of an agreement based on everyone’s interest, rather than solely driven by concern for collective interest or coalition stability. Ripstein remarks that the categorical imperative plays a role analogous to L.H.A. Hart’s norm of recognition (Ripstein 2009, 157). Although there may be some overlap between legal positivism and certain forms of constitutivism, Hart’s conception of law primarily emphasizes the social and institutional dimensions of legal systems, rather than grounding legal authority in constitutive moral or rational principles. Unlike the rule of recognition, however, the norm constitutive of rationality is not itself socially constructed and cannot be evaded or avoided by humans, insofar as they are rational. This is the specific sense in which the normativity of rational agency is inescapable, although its norms can be violated. This is a contestable claim (Enoch 2006; Bagnoli 2022). See also the debate on the constitutive role of the concept of rule as ‘practice’, which attributes functional statuses, as identified by Rawls (1955). An analogous issue concerns the source of normativity of law, which I cannot discuss in this chapter, but see Plunkett and Schapiro 2017.

the actual target of sanctions are their citizens—human beings—who posit constraints that one cannot trespass while preserving one's moral legitimacy.

### 8.15 Enforcement by mutual constraints

A widespread approach in international relations relates the need for sanctions to the possibility and unfortunate pervasiveness of violations.<sup>42</sup> Kant provides a perspective on the moral and political significance of sanctions that differs radically from the dominant understanding, presenting an argument that is entirely a priori. Insofar as obligations towards humanity are moral and thus (based on the constitutive argument) rational requirements, then their normative authority does not reside in sanctions but rather in their constitutive relations to agency. This does not imply that they can function without enforcement. On the contrary, enforceability is their defining feature as juridical obligations. However, according to Kant's view, enforceability of obligations to humanity is distinct from the application of sanctions. Enforcement is a constitutive element of the concept of right, although its modes may vary, especially in consideration of the international context.<sup>43</sup>

The dialectic of private attitudes towards public rules refers to the dynamic of power and authority. Individual rational agents have the agential normative power to press claims (unilaterally), but such claims gain normative authority only through public authorization (i.e., by bringing them under a law). Mutual constraints are not reducible to sanctions because their significance does not reduce to a corrective or backward-looking remedial function that applies in the aftermath of moral transgression. Rather, sanctions belong to the conceptual elucidation of the meaning of right, understood as a system of mutual constraints that protect freedom. This argument points to a broader justification of international law in terms of cooperative interactions under universal law, which protects the freedom of each and all by mutual constraints. For agents thus constituted, violating mutual constraints imposed by right is possible but self-defeating: violation defeats the constitutive purpose of interdependent and mutually vulnerable agents. The result also depends on the self in question, but in the case of traditional states, the result of violation is disaggregating.

Because of its underlying a priori argument, the Kantian account of enforcement thus sketched sharply departs from tradition and from current practice in international relations. It concerns the very concept of right, rather than any empirical considerations. In contrast to the Hobbesian view, the argument is

42 Arguably, this is an approach that extends an argument that is current in criminal law to international law.

43 Kant, *Perpetual Peace: A Philosophical Sketch* (1795): 'Second Definitive Article for Perpetual Peace' or 'Second Definitive Article: The Federation of Free States'. This passage seems also to refer to an empirical argument, but it should be interpreted in light of Kant's pragmatic anthropology.

not strategic. Rather, it shows right to be essential to the constitution of interdependent, embodied, and socially embedded rational agents. The Kantian argument, which is based on the protection of individual freedom, provides us with strong grounds for condemning violations of human rights, including those caused by the application of sanctions. More importantly, it does not rely on sanctions to demonstrate that international law is normative and authoritative. Rather, it encourages us to search ways to enforce international law without appealing to external sanctions.

### 8.16 Sanctions as a political exercise of power

The preceding section may be subject to criticism from various perspectives within the broader debate. It stands in contrast to the prevailing norms of international relations, as the imposition of sanctions represents a shared approach to influencing the course of global events and is regarded as a non-violent diplomatic instrument, in contrast to military intervention. Applying sanctions is often thought to be the primary means of enforcing international law. This tendency reflects a traditional critique of international law, which has been described as ineffective and therefore not ‘real law’. One prominent response has it that international laws are enforced through the implementation of economic measures and the practice of outcasting, which exclude violators from the cooperative benefits derived from participation in a coalition. Such sanctions modify the equilibrium of cooperative interactions. In certain instances, these sanctions may also indirectly affect the party imposing them. In such cases, Hathaway and Shapiro posit the necessity for the provision of incentives to sanctioners to encourage the application of sanctions. Do sanctioners need additional reasons to apply sanctions when required? Make sanctions mandatory, Hathaway and Shapiro advise.<sup>44</sup>

The literature on the effects of sanctions indicates that the moral predicament of the sanctioners may not be rooted in the worry to run a risk that undermines their own interest. A serious worry is the stability of the coalition, and more deeply, the humanitarian effects of the application of sanctions. On the one hand, sanctions can indirectly affect the political landscape by mobilizing collective action against governments in favour of human rights enforcement,<sup>45</sup> although they do not fully explain nor warrant compliance.<sup>46</sup> On the other hand, sanctions may have a detrimental impact and cause severe humanitarian predicaments.<sup>47</sup> In the latter case, making sanctions with multi-lateral requirements aggravates, rather than helps, the situation.<sup>48</sup>

44 Hathaway and Shapiro 2011, 320ff, cf. 311.

45 Grauvogel, Licht, and von Soest 2017.

46 Van Aaken and Simsek 2021.

47 Peksen 2019; Kwaku Afesorgbor and Renuka Mahadevan 2016; Choi and Luo 2013.

48 For a critical review of the literature of the effectiveness of sanctions, see Peksen 2019.

This empirical evidence calls for a reconsideration of the political meaning of sanctions, including the various forms of exclusion and outcasting. First, their status as a diplomatic means can be called into question. Although sanctions apply without the use of military force, they are themselves modes of exercising power and can be considered violent, given their effects. This is true both of economic sanctions and of practices of outcasting, both of which aim at excluding the target countries from cooperative benefits earned through participation in a given coalition. The threat of exclusion may have domestic humanitarian consequences as heavy as direct economic sanctions. In the face of a documented negative impact on the population, this categorization is highly questionable.

Second, the application of sanctions can be used offensively, not just defensively, with the sole intention of responding to an ascertained violation. In fact, sanctions are often employed as a violent instrument of domination. One method of monitoring this is by paying attention to the temporal scope of their application. The temporality of sanctions affects both their effectiveness and their legitimacy. Their effectiveness is largely dependent on their timing: the application of sanctions on a multilateral basis over an extended period of time increases their effectiveness. However, the legitimacy of sanctions is also strictly related to their temporality and does not co-vary with their effectiveness. For instance, sanctions may be justified as an immediate defensive reaction against a terrorist attack. However, prolonging sanctions disproportionately becomes a powerful mode of aggression. It is therefore clear that the temporal extension of sanctions should be regarded as a criterion for assessing them as a proportionate response to a violation.<sup>49</sup>

In addition to the issue of proportionality, other considerations suggest that the temporality of the application of sanctions is a matter of significant legal and political sensitivity. A state imposing sanctions may be willing to do so more promptly if it is individually advantageous for it to do so. It may be reluctant to abide by a collective decision to apply multilateral sanctions depending on a calculation of risks that an application would produce a negative impact on its economy or politics. Consequently, sanctions can be readily transformed from a means of enforcement into a means of exerting political power by force. It is therefore evident that the aforementioned sanctions are not, in fact, non-violent modes of exerting political authority. Sanctions can be harsh methods of exerting power over the target country and of altering the dynamics within the coalition, which may not be perceived as legitimate.

49 The criterion can be finessed further. Grauvogel and von Soest (2020) argue that sanctions' termination can be disaggregated by means of the target's compliance and the sanctioner's capitulation, with the determinants of both outcomes significantly diverging. This study shows that poor economic health and high political volatility in the target country make it significantly more likely to comply, whereas political alignment between the sanctioner and target, as well as leadership changes in the sanctioner's country, lead to a higher probability of the sanctioner's capitulation.

### 8.17 The empowering approach

When transposed to the international domain, the Kantian constitutivist argument acknowledges the deeper role of the constitutive norms of rationality.<sup>50</sup> These norms play a crucial role in the justification of a conception of justice, rather than merely in its implementation. This is evidenced by the key role of their constitution of institutions and practices. This claim also challenges a general assumption underlying contemporary theories of rational choice regarding the incentivizing effects of rewards and penalties. The primary advantage of this approach is that it preserves the independence of the dimension of normative legitimacy from the dimension of effectiveness. This is achieved by making enforcement internal and constitutive to a broader moral and political project, namely the protection of individual freedom. Nevertheless, this particular feature may give rise to concerns regarding its implementation.

In conclusion, I present a few practical considerations. The Kantian argument is characterized by a forward-looking orientation and a focus on future deliberation. From the standpoint of a policymaker, the effectiveness of this approach is primarily evident in the context of envisioning new political relations. In contrast, from the perspective of a sanctioner, the efficacy of this approach is more evident in the context of determining whether and how to respond to a violation. The use of sanctions is justified when the impairment of international relations is beyond remedy. The fundamental Kantian recommendation is that the sanctioner should conceptualize themselves as a policymaker dedicated to a shared cooperative plan of safeguarding and advancing freedom. From this perspective, the focus is on fostering renewed diplomatic engagement and strengthening social and political networks, rather than on isolating the defector. The objective of these activities is to foster awareness of interdependence and shared responsibility towards one another and towards those who suffer the consequences of human decisions. Within such a large cooperative scheme, violations not only carry unbearable reputational costs but are also destabilizing and ultimately self-defeating.

### 8.18 Conclusion: beyond mutual constraints

The constitutivist argument is key to Kant's account of the kind of enforcement distinctive of obligations to humanity, which are moral and yet enforceable. Kant's argument for their enforceability is entirely *a priori* and does

50 The constitutivist argument can be integrated with the so-called 'institutionalist' view; see, e.g., Rawls 1993: 262, 1980: 305–306 and 322–330; Beitz 1999; Wenar 2001; Nagel 2005: 119–122. A practice, in Rawls's sense is 'any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure'; see Rawls 1955/1999, 20. Insofar as its structure is provided by the norms of rationality, the institutionalist view may appropriate the Kantian constitutivist argument. On the definition of the 'institutionalist' in contrast to 'culturalist' views, see Sangiovanni 2008.

not rest on the fear of defection, nor on the urge of punishing an infraction. Obligations to respect human rights are moral insofar as they are grounded on the value of humanity and are thus absolute. As duties of right, they *are* enforceable, but they are not authoritative *because* they are enforceable. Their normative (juridical and moral) authority rests on practical reason. They are compelling on grounds prior to and independent of their external enforcement. The latter conclusion follows from Kant's constitutivist argument. I have argued that renouncing it would diminish the significance and feasibility of a Kantian approach to international relations.

These considerations should counter concerns regarding Kant's claim that the enforceability of juridical duties is the distinguishing feature of a legal system, which appears to be overly restrictive and insufficient in explaining the normativity of duties owed to humanity. Paradoxically, the emphasis on the enforceability of moral obligations is often seen to discount the possibility that moral principles can guide human agency in the absence of legal enforcement, thereby exposing a lack of genuine authority. Critics object that Kant's account of the system of equal freedom in terms of reciprocal constraints is insufficient to address positive obligations to promote justice, equality, and the common good.<sup>51</sup> In response to this concern, constitutivism should acknowledge the dimension of embodiment and embeddedness that characterizes the human condition. This is the key to recognizing that the notion of duty of right does not only help to negotiate boundaries but rather evidences the mutual interdependence of political actors and identifies fair modes of shared interactions that expand individual agency and are mutually enhancing.<sup>52</sup>

51 For all of these critiques and a thorough explanation and sustained defence of Kant's system of rights, see Ripstein 2009.

52 See Bagnoli 2022, 2023. In conversation, Zylberman objected that the distinction between duties of right and duties of virtue is lost. However, duties of right are also (in my view, indubitably), moral duties, although they admit of external enforcement. The possibility of external enforcement does not entail that they are not also moral; it entails only that they can be fulfilled by mere external compliance, in which case the right action does not have moral worth. To explain the double nature of the duties of right, juridical and ethical, we should look at their grounding and thus at the relation between the Categorical Imperative and the Principle of Right. This relation is underappreciated by taking the line pursued by Ripstein (2009) whose driving idea is that the domain of right is modelled on a spatial understanding of embodiment. It seems to me that it is limiting and reductive to take embodiment and finitude solely in terms of spatial incompatibility. There are other features that Kant seems to acknowledge as specifications of embodiment, although not reducible to it, such as interdependence, for instance. Interdependence—with its root in animality and its expansion through humanity—seems to me the key to uncovering specific vulnerabilities and, thus identify specific wrongs. At the same time, interdependence can be transformed by reasoning into a strength, that is, the capacity for rational shared agency. The constitutivist argument vindicates the relation between the principle of right and the categorical imperative, understood as the constitutive norm of reason; the embodied variety of constitutivism is best suited to highlighting the faceted significance of interdependence; see Bagnoli forthcoming.



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