The Law of Nations and the Problem of Supranational Coercion in Kant

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1. World Peace as Constitutional Foundational Act

Kant lays out his systematic philosophical exposition of the law of nations in particular in the first part of his *Metaphysics of Morals (Metaphysik der Sitten)* of 1797, namely, in the section on public law in *The Science of Right* (*Rechtslehre*, or *RL*)[1]. Here Kant returns to ideas developed earlier, especially in his largely political *Project for a Perpetual Peace* (*Zum ewigen Frieden*, or *Frieden*), including the normative ideal of a temporally and spatially universal state of peace. Unusual for this era, Kant's concept of peace can be characterised as neither pursuing real political (empirical) interests nor driven by religious motives[2]. In *The Metaphysics of Morals*,he presents "eternal peace" as "the ultimate goal of all of the Law of nations" (*RL*, KW IV, p. 474), indeed as "the whole final purpose and end of the science of right" (ibid., p. 479). Kant consequently avoids building his ideal state of peace on the shaky foundations of a legally unsecured "balance of power"[3]; instead he sets out to embed institutional peace in a universal legal

[1] Kant's writings are identified by volume and page number in the edition of the collected works edited by Wilhelm Weischedel: *Immanuel Kant, Werke in sechs Bänden*, 5th ed., Darmstadt 1983 (abbreviated KW).

[2] Kant was familiar with the peace discourse of his era, including the jurists Hugo Grotius and Samuel von Pufendorf, and defended Abbé Saint-Pierre and Jean-Jacques Rousseau against the charge that the idea of eternal peace was illusory. Although agreeing that their proposals were not inherently impossible, he felt that they were overoptimistic about the imminence of peace. See *Idea for a Universal History with a Cosmopolitan Purpose* (*Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, or *Idee*, KW VI, p. 42).

For an overview of calls and plans for peace since the Renaissance, see Raumer (1953), who reproduces and discusses the most important. For the history of the concept of "peace" before Kant see also the informative overview in Merle (1995); also Höffe (1995a) and Gerhardt (1995, pp. 24–32).

[3] For example, *On the Old Saw: That May Be Right in Theory, But It Won't Work in Practice* (*Über denGemeinspruch*, or *Gemeinspruch*, KW VI, p. 172): "For a permanent universal peace by means of a so-called *European balance of power* is a pure illusion, like Swift's story of the house which the builder had constructed in such perfect harmony with all the laws of equilibrium that it collapsed as soon as a sparrow alighted on it."

order. The state of peace must, as Kant says, "therefore be established" (*Frieden*, KW VI, p. 203). This task possesses the status of a moral legal duty:

"Now, as a matter of fact, the morally practical reason utters within us its irrevocable veto: *There shall be no war*. So there ought to be no war, neither between me and you in the condition of nature, nor between us as members of states which, although internally in a condition of law, are still externally in their relation to one another in a condition of lawlessness; for this is not the way by which any one should prosecute his right." (*RL*, KW IV, p. 478)

Thus for Kant establishing a global condition of peace is a *legal* problem, rather than primarily a matter of the ethical attitude of political actors[4]. Kant believes that men and states can only arrive at a positive condition of peace through reason-based non-violent processes to regulate conflict and establish order (Kersting, 1995, pp. 87f.). Here, peace is not the direct objective of humanity's development, but merely a consequence of the juridification of all conceivable spheres of interpersonal conflict; the main thrust of the Kantian argumentation lies in this systematic aspect of his legal philosophy. He develops, to cite the pertinent title of an illuminating contribution by Geismann (1983), a "legal doctrine of world peace".

2. Federation of Peoples or World Republic?

In the opening paragraphs on the law of nations in the *Science of Right* (§ 53), Kant builds on his earlier theory of the autonomy of the state to draw an analogy between individuals and states: As a "moral person," in other words an independent legal subject, a state finds itself "in opposition to another state in a condition of natural freedom" (*RL*, KW IV, p. 466). In his empirical historical premise of the existence of a multitude of different nations, Kant thus adopts the fundamental idea, originally developed by Hobbes (*Leviathan*, Chapter 13) and Wolff (*Institutiones iuris naturae et gentium* IV, I, § 1088), that states, like man prior to the civil constitution, exist in a natural state. What this means is that individual states are in their own right already 'islands' of public right, but in their external relations to one another have yet to

[4] *RL*, KW IV, p. 475: "The rational idea [...] of a *peaceful* [...] international community of all of those of the earth's peoples who can enter into active relations with one another, is not a philanthropical principle of ethics, but a principle of *right*."

progress beyond the natural state: "[I]n their external relationships with one another, states, like lawless savages, exist in a condition devoid of right" (*RL*, KW IV, p. 467). This "*condition* is one of war (the right of the stronger)". "[E]ven if there is no actual war or continuous active fighting (i.e. hostilities)", fighting may break out at any moment. The mere risk means that this condition is "in the highest degree unjust in itself" (ibid.). In principle the same can be said of natural relations between states, as of those between men before the state: The "peremptory" reality of acquired rights, which in the natural state are merely "provisory", depends on the legal subjects entering into a state of public right.

"The natural state of nations as well as of individual men is a state which it is a duty to pass out of, in order to enter into a legal state. Hence, before this transition occurs, all the right of nations and all the external property of states acquirable or maintainable by war are merely *provisory*; and they can only become *peremptory* in a universal *union of states* analogous to that by which a nation becomes a state" (*RL*, KW IV, p. 474).

Not only must the original natural state of the individual be superseded by a public legal order, but if there is to be legal security the natural state of affairs between states must be overcome by means of a corresponding constitution.

"Nations, as states, like individuals, if they live in a state of nature and without laws, by their vicinity alone commit an act of lesion. One may, in order to secure its own safety, require of another to establish within it a constitution which should guarantee to all their rights." (*Frieden*, KW VI, pp. 208f.)

The relationship between empirical necessity and a priori regulation of liberty that leads to the founding of state law returns again at the level of international law. Just as the empirical unavoidability of social relations produces the moral duty to join a community of laws, a state that first and foremost ensures that the individual is protected by law from tyranny, the nations too – "confined [...] within an area of definite limits" "[t]hrough the spherical shape of the planet" (*RL*, KW IV, p. 475) – are duty-bound to "pass out of that natural condition of the states in their external relations to each other, and to enter into a condition of right" (ibid., p. 470). In *The Science of Right* Kant explicitly argues that individual states possess "the right to *compel each other* to abandon the state of war and to establish a constitution that will guarantee an enduring peace" (*RL*, KW IV, p. 466; italics added). This can only occur through

joining the higher, right-guarding state of order to which Kant alludes ("constitution") in the passage from *Project for a Perpetual Peace* quoted above. In the *Gemeinspruch* of 1793, he states unequivocally:

"And there is no possible way of counteracting this [the permanent threat of war] except a state of international right, based upon enforceable public laws to which each state must submit (by analogy with a state of civil or political right among individual men" (*Gemeinspruch*, KW VI, pp. 171f.).

So it comes as rather a surprise when Kant, in § 54 of *The Science of Right*, presents uswithout further ado with a "mutual connection by alliance" as the third component of the law of nations. This alliance "must dispense with a distinct sovereign power, such as is set up in the civil constitution; it can only take the form of a *federation*, which as such may be revoked on any occasion, and must consequently be renewed from time to time" (*RL*, KW IV, p. 467)[5]. And given that Kant's understanding of the state demands a republican civil constitution, this condition must also apply at the inter-state level. One therefore expects to hear that the internally republican states should also arrange their external relations according to republican principles. Instead of striving merely for "a voluntary gathering [...] which can be *dissolved* at any time" (*RL*, KW IV, p. 475), as a federalist *federation of peoples*, the states should seek a "*republic of free confederated peoples*" equipped with coercive laws, the "federation of peoples as world republic", upon which Kant in 1793 still hopes to build "eternal peace" (*Die Religion innerhalb der Grenzen der bloßen Vernunft*, or *Religion*, KW IV, pp. 682f.). In order to "put an end to the evil of wars" (*RL*, KW IV, p. 478) and further global legality, the establishment of such a republic of states requires a partial renunciation of national sovereignty by its member states. And what we find is that this minimal supranational statehood in relation to particular key powers that are indispensable for securing peace is utterly absent from Kant's federation of peoples as conceived in *Project for a Perpetual Peace* and *The Science of Right*: In both, Kant explicitly excludes any renunciation of national sovereignty (*RL*, KW IV, p. 467, pp. 474f.; *Frieden*, KW VI, p. 211, p. 247).

[5] The idea of "federalism" in an international order appears relatively late in Kant's writings. To my knowledge, he first discusses "a federation under jointly agreed international law" in print in 1793 (*Gemeinspruch*, KW VI, p. 170). See also *Frieden*, KW VI, p. 208: "The public right ought to be founded upon a federation of free states."

The methodological analogy that shapes his argumentation – transposing to the sphere of international relations the model by which the natural condition is overcome to found the state – demands a final normative step to attain a "republicanism in all states, together and separately" (*RL*, KW IV, p. 478). To be legally consistent he would have to demand the world republic, for real legal liberty and security for the individual depend not only upon the internal constitution of a state, but also on the legal security of its external relations to all other states. Kant himself clearly lays out what this implies:

"*The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved.* What is the use of working for a law-governed civil constitution among individual men, i.e. of planning a commonwealth? The same unsociability which forced men to do so gives rise in turn to a situation whereby each commonwealth, in its external relations (i.e. as a state in relation to other states), is in a position of unrestricted freedom. Each must accordingly expect from any other precisely the same evils which formerly oppressed individual men and forced them into a law-governed state" (*Idee*, KW VI, pp. 41f.).

Because rivalry between states means that the rights of citizens within a state always remain provisional, a federation of peoples free of authority and devoid of coercion would ultimately endanger every interest of the people. Note at this point the rationally unresolvable ambivalence between the reason-led demand underlined in the opening paragraphs on the law of nations – that states, too, should progress beyond the natural state of private right – and a future form of organisation lacking any state structures. Certainly, Kant's federation of peoples has not moved beyond the natural state of states (Kersting, 2004, p. 161).

The relevance of the problem inherent to this ambivalence is palpable even today, more than two centuries after the publication of *The Science of Right*: Either states enter into free associations without fundamentally renouncing their freedom of action, establishing an international treaty organisation without any traits of statehood "which can be *dissolved* at any time" (*RL*, KW IV, p. 475), corresponding to the federation of peoples. Or they consent to broader reciprocal obligations, accepting a narrowly defined loss of sovereignty and constituting a community of laws and states equipped in particular spheres with supranational powers of coercion, corresponding to an

extremely restrictively constituted "universal international state" (*Gemeinspruch*, KW VI, 172; Höffe, 1995b, p. 125). Kant does not consider the possibility of the latter as an element of the law of nations in *The Science of Right*, because his theory of the state presupposes indivisible sovereignty (Pinzani, 1999, p. 253; Kersting, 2004, pp. 160–62). On the other hand, one must ask why should nation states not retain their internal autonomy even if they at the same time submit to a sovereign legal power in relation to particular significant questions of conflict between nations? In Kant's moral philosophy sovereignty and submission (autonomy and partial renunciation of liberties) are by no means per se mutually exclusive (Ludwig, 1988, p. 176). Why should the limited renunciation of individual sovereignty that accompanies the foundation of territorial states and the establishment of state institutions not be expanded with a limited renunciation of state sovereignty in favour of an international legal order with powers of coercion? Ultimately, for Kant it is practical reason itself that obliges politics to strive tirelessly for the "ideal of a juridical union of men under public laws generally" (*RL*, KW IV, pp. 478f.) in the sphere of relations between states too.

Otherwise, Kant is unmistakeably clear that in the subsidiary order of such a world republic the individual states must continue to exist as *primary states* equipped with far-reaching sovereignty[6]. Whereas republican nation-states would retain sole responsibility for all domestic and most foreign policy matters, the only responsibility of the society of nations would be to maintain legal external relationships between its member-states by protecting their legal independence (in other words, territorial integrity) against violent attack, if necessary by military means. A "universal monarchy" in the sense of a "homogenous world state" (Höffe, 1995b, pp. 124f.) in which individual states survive, if at all, only as dependent provinces – as actually proposed by the Thuringian political economist Johann Heinrich Gottlieb von Justi in 1761 – is for several reasons beyond the pale for Kant (see *Frieden*, KW VI, p. 225; *Religion*, KW IV, p. 682, note). What arguments does Kant advance for preserving the autonomy of the state, and how do these arguments relate to the a priori validity of his *Science of Right*?

[6] The pertinent terms of "primary states" for the individual states and "subsidiary order" for the world republic are from Höffe (1995b, p. 116).

1) At a first level of argumentation, a coming together of all nations is excluded by the analogy between individuals and states, which Kant applies in a questionably definitive sense. As already mentioned, both *Project for a Perpetual Peace* (*Frieden*, KW VI, p. 197) and *The Science of Right* (*RL*, KW IV, p. 466) refer to the legal incorporation of the state as a "moral person". According to the introduction to *Metaphysics of Morals* this means that "a Person is subject to no laws other than those he gives himself (either alone or at least with others at the same time)" (*RL*, KW IV, pp. 329f.). Self-determination is, in an admittedly weak analogy, also a characteristic of the state as "a society of men, over whom the state alone has a right to command and dispose" (*Frieden*, KW VI, p. 197). It follows directly from this analogy, and its requirement to respect the state's right to self-determination in the same way as the autonomy of a *natural* person, that the *legal person* of the state may neither become the heteronomous object of an act of legal acquisition (*Frieden*, KW VI, p. 197), nor relinquish its self-determination through the founding of a superordinate body. In *Project for a Perpetual Peace* Kant also speaks of a contradiction within the idea of "several nations united into one state" (ibid., p. 209). The merging of individual states into a single unitary state would, he argues, contradict the inherent meaning of the law of nations: the peaceful coexistence of *different* republics[7]. Instead, nations as subjects of international law must be assured of their general freedom of action and autonomy within an international community of laws to the same measure as the individual's birthright to outer freedom is protected in a republic.

To what extent do the two main strands of this argumentation produce a fundamental moral objection against merging nations "which ought not to be incorporated into one and the same state" (*Frieden*, KW VI, p. 209)? The purely linguistic assertion that the term "the law of nations" presupposes different states, and therefore precludes the joining of all nations into one, may be analytically undeniable but is a logically unconvincing circular argument. For, one could object, what rational legitimacy would

[7] The relevant passage is: "This would be a *federation of nations*, without the people however forming one and the same state, the idea of a state supposing the relation of a sovereign to the people, of a *superior* to his *inferior*. Now several nations, united into one state, would no longer form but one; which contradicts the supposition, the question here being of the reciprocal rights of nations, inasmuch as they compose a multitude of different states, which ought not to be incorporated into one and the same state" (*Frieden*, KW VI, p. 209).

be left to a federal law of nations if its moral purpose of global peace and order could be achieved more effectively by replacing it with a 'world law'? The second aspect of the Kantian argumentation, resting on the analogy between states and individuals, is similarly problematic: The thesis that states as legal subjects should be treated as moral persons, in the same way as natural rational beings, and therefore enjoy an unconditional right to exist, creates an almost impossible burden of proof. Kant pays inadequate heed to the limits of the analogy of states and individuals (also Pinzani, 1999, p. 254). The legal sovereignty of the state has in principle little in common with the moral autonomy of its citizens. States are not natural persons, but artificial, empirical-historical formations, which according to Kant possess a moral personhood that obliges individuals to join them. In the scope of the arguments laid out thus far, Kant's objections to a single global state ultimately turn out to be empirical reference to the historical diversity of nations and the measure of public reason already realised within them. Finally, "since having already a legal constitution, as states" (*Frieden*, KW VI, p. 211), their moral worth is not to be relinquished lightly.

2) At an empirically more solid second level of argument, Kant cites, alongside the experiential historical fact of different nation-states, detailed pragmatic empirical objections to the single global state whose significance, especially in the light of experiences with totalitarian regimes in the past century, should not be underestimated: First of all, Kant believes a single global state organised on liberal principles would be ungovernable and unable to fulfil its essential protective function: "For the laws always lose in energy what the government gains in extent" (*Frieden*, KW VI, p. 225). "But with the too great extension of such a union of states over vast regions, any government of it, and consequently the protection of its members, must at last become impossible" (*RL*, KW IV, p. 474). It must therefore be feared that a world state can only be ruled by "despotism" (or to put it in modern terms, a totalitarian dictatorship) where peace exists only "upon the grave of liberty" or "degenerates into anarchy" (*Frieden*, KW VI, pp. 225f.; also *Gemeinspruch*, KW VI, p. 169; *Religion*, KW IV, p. 682, note). Finally, the cultural differentness of the nations documented in "the difference of *language* and of *religions*" contradicts their "mixing" in a universal monarchy (*Frieden*, KW VI, pp. 225f., italics added). Even if these pragmatic arguments lack the weight of fundamental moral objections (Höffe, 1995b, p. 126), they do rest on

empirical facts that change only slowly (if at all), with which the law of nations as theory "applied to practice (application to cases known to experience)" theory must thus reckon (*RL*, KW IV, p. 309). For example, in the Kantian argumentation the earth would *always* be too large to enable the establishment of a single state that is properly governable under liberal principles (Pinzani, 1999, p. 252).

3. Conclusion: On the Contemporary Relevance of Kant's ideas

With respect to the present-day significance of Kant's position, the question is: What is international law worth in the absence of an international community equipped with powers of coercion? Can his "ultimate goal" of peaceful global conflict resolution ever be achieved without public international or even supranational powers in a federal, "*free and permanent* association" (*Frieden*, KW VI, p. 247, italics added) of fully sovereign states? With respect to recent and ongoing violations of the principles of international law, the answer to the question must be no, because the coercive legal instruments required to secure a global state of peace are quite simply lacking. States cannot and must not force one another to join a merely treaty-bound federation of peoples (*RL*, KW IV, p. 474)[8]. In the event of conflict between states, the Kantian federation of peoples provides neither shared coercive laws (*Frieden*, KW VI, p. 211) nor an internationally authorised and impartial court capable of enforcing the legal rights of its members; in case of doubt, the states would remain "their own judges" (ibid.). Moreover, there would be no executive powerful enough to enforce international decisions. Consequently, as Otfried Höffe puts it, this would be "a legal solution without security [...], in other words a provisional affair that [...] can only be a transitional stage" (Höffe, 1995b, p. 121)[9]. On the basis of Kant's own concept of the federation of peoples, at best "only a truce" (*Frieden*, KW VI, p. 196) could be achieved between states that have not progressed beyond a natural state where essentially, "when there is a controversy concerning rights *(ius controversum)* no competent judge can be found to render a

[8] This fundamental right of coercion remains denied to the individual states, even though Kant explicitly states they are entitled to "compel each other to abandon the state of war" (*RL*, KW IV, p. 466). There appears to be a contradiction here. One state may "compel" another to leave the natural state, but accession to the federation of peoples must always be voluntary.

[9] See also Kersting (2004), p. 161: "As a fragile and transitory treaty organisation devoid of statehood, the federation of peoples represents a completely unsuitable form for realising global peace and order."

decision having the force of law" (*RL*, KW IV, p. 430). Therefore, the fragile association of a federation of peoples devoid of all statehood cannot fulfil the lofty ideal of permanent global peace and order. For dealing with "the problem of a law-governed external relationship with other states"(*Idee*, KW VI, p. 41) and establishing "a constitution that will guarantee an enduring peace" (*RL*, KW IV, p. 466), such a model must be rejected as inadequate and half-hearted[10].

Astonishingly, Kant comes to a very similar conclusion in the final section of the Second Definitive Article of *Project for a Perpetual Peace*, where he describes the federal organisational form of the federation of peoples as only the second-best solution, a "*negative* supplement" compared to the "positive idea" of a "*society of nations*" or "*universal republic*" (*Frieden*, KW VI, p. 213). As such, Kant is admitting that securing peace through a federation of peoples relying solely on the moral promises of governments represents an inferior substitute that cannot bring about full legal security because "the torrent of those unjust and inhuman passions [...] always threaten

[10] Jürgen Habermas also points to the "inconsistency" created by Kant's adherence to an indivisible national sovereignty and the demand for the natural condition of states to be overcome by constitutional means (1996, pp. 9f.). Without the moment of the "moral [self-]obligation" of the member-states, Kant's federation of peoples cannot "consolidate" into a "permanent" and "ongoing" entity but must remain "trapped in volatile constellations of interests" and would "collapse – like later the Geneva-based League of Nations". "Kant cannot be thinking of a legal obligation, as his federation of peoples is not conceived as an organisation with the shared organs that would grant it a statelike quality and insofar a compelling authority" (ibid., p. 10). But unlike in Kant's concept: "the international community must at least be able to press its members to act lawfully under threat of sanctions. Only then will the unstable system of self-asserting sovereign states based on reciprocal threat transform into a federation with shared institutions to undertake state functions, namely, legally regulating relations between its members and ensuring observance of the rules. The external relation of international relationships regulated by treaty [...] will then be modified through an internal relation between members of an organisation based on statute or constitution" (ibid., pp. 18f.).

Interestingly, Habermas identifies a similarity between the discrepancy in the United Nations Charter – an overemphasis on national sovereignty and a deficit of suprastate institutionalisation – and Kant's discussions of international law. To the extent that Article 2 (7) of United Nations Charter explicitly prohibits interference in the internal affairs of states, but Chapter VII (Articles 39–51) empowers the Security Council to conduct military action if it identifies a "threat to the peace, breach of the peace, or act of aggression" (Article 39), it is taking account of "a transitional situation" (Habermas 1996, p. 19). Only with armed forces of its own and the imposition of an international monopoly on the use of force could the United Nations free itself from its dependence on the voluntary cooperation of its members and ensure the enforceability of its decisions (ibid.).

to break down this fence" (ibid.). But because the empirical factual circumstances are such that the nations, following "the ideas which they have of public right, absolutely prevent the realization of this plan", they will "reject in practice" a world republic that is "true in theory" (ibid.). The relevant passage in *Project for a Perpetual Peace* is:

"At the tribunal of reason, there is but one means of extricating states from the turbulent situation, in which they are constantly menaced with war; namely, to renounce, like individuals, the anarchic liberty of savages, in order to submit themselves to coercive laws, and thus form a society of nations *(civitas gentium)* which would insensibly embrace all the nations of the earth." (*Frieden*, KW VI, p. 212)[11]

Now it is doubtless reasonable, "if all is not to be lost" (ibid., p. 213), to regard the federation of peoples as an essential intermediate stage for purposes of reform. Until there is a globally shared moral consciousness, nary a state will be openly willing to renounce the aspects of sovereignty required for a world republic. However, Kant does not reject the minimalist union of states on principle. In fact, the opposite is the case. It is positive legal, historic/political and sometimes pragmatic empirical reasons that make it appear (as yet) unrealisable. Taken to its legal and logical conclusion, the idea of the law of nations must lead to a "federation of peoples as world republic" (*Religion*, KW IV, p. 683)[12].

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[11] Correspondingly, Kant writes in § 44 of *The Science of Right*: "The necessity of public lawful coercion does not rest on a fact, but on an a priori idea of reason, for, even if we imagine them to be ever so good natured and righteous before a public lawful state of society is established, individuals, *nations, and states* can never be certain that they are secure against violence from one another" (*RL*, KW IV, p. 430; italics added).

[12] Many critical opinions on the interpretations presented here could be cited. Alongside contributions by Brandt (1995), Geismann (1983, esp. pp. 380–384) and Cheneval (1997), I would point at this juncture to what I regard as the rather broad-brushed contribution by Gerhardt (1995, pp. 93–104), which without doubt goes too far in levelling the undeniable ambivalences. Numerous passages where Kant speaks of law and coercion in dealings between states are too close to the *Project for a Perpetual Peace* and *The Science of Right* in the chronology of the writings to suggest any fundamental shift in the assessment of the chances of a "universal state of nations" (Gerhard, 1995, p. 104). The interpretation presented here builds on the ideas of Höffe (1995b), Habermas (1996), Kersting (2004, pp. 149–163) and Pinzani (1999).

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