



## Articles Kant and the Law of Nations

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## KANT AND THE LAW OF NATIONS\*

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Of the thinkers belonging to the Western tradition in political thought, Immanuel Kant (1724–1804) stands out by virtue of the attention that he devoted to politics in its international form and dimensions. The sphere of international politics, as Kant conceived of it, was primarily the sphere of the co-existence of states, and Kant attended to this sphere of politics for the reason that it was his conviction that peace was to be thought of as the supreme moral-political good. The peace that Kant regarded as the supreme moral-political good was a peace among men and states, and this he saw as requiring the establishing among men and states of a specifically juridical condition of society. That is to say, Kant saw peace among men and states as requiring the acceptance by men and states of the constraints and limitations of law as for the regulation of their mutual relations.

The law that, for Kant, served to provide for peace among men and states was the law of peace. The latter, in Kant's political thought, was a system of law that included each of what he identified as the three basic parts of public law, and together with the forms of lawful constitution that he held were to found the different parts of public law. First, there was municipal law. This was the law maintained for the government of men in the condition of the civil state. The municipal law of the state was to be founded in a form of lawful constitution that Kant called the republican civil constitution. Second, there was the law of nations. This was the form of international law that laid down the basic rights and obligations of states and rulers in the sphere of their mutual external relations. The law of

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\* The present work is based on a paper that the author delivered at the University of Tokyo, as through the kind invitation of Professor Yasuaki Onuma, on 18 January 2000. In its essentials, the paper is unchanged from its original form. However, some alterations have been made in order to clarify the sense and meaning of the argument of the paper, as well as for the sake of style, and with certain minor additions having been made to the body of the text where necessary. The paper now includes full and detailed notes and references. Charles Covell: 18 August 2015.

nations was to have as its constitutional foundation a form of organized association among states that Kant referred to as the federation of free states. Third, there was the cosmopolitan law. This was a distinct form of international law that Kant presented as providing for, among other things, a proper juridical framework for the trade and commerce of men and nations as within the international sphere. Kant was apt to write of cosmopolitan law as implying the possibility of a lawful constitution that was to unite all men and states within a universal juridical community that would come to extend itself to comprehend the whole of humanity. However, the precise form of this constitution was left unspecified, save that Kant affirmed that the cosmopolitan law was to be based in what he saw as the right of men to be treated with hospitality when entering into foreign lands.

In this paper, the discussion is confined essentially to Kant's statement and explanation of what he presented as the substantive principles of the law of nations. In this, there is the attempt made to say something about the respects in which Kant conformed with the earlier writers on the law of nations, and the respects in which he diverged from them. In particular, it is considered how Kant conformed with, and how he departed from, the established just war doctrine as this had been set out by the classic writers on the subject, such as St Augustine (354-430) and St Thomas Aquinas (1224/5-74). There is also to be considered the standing of Kant as in reference to the modern secular natural law thinkers as including Thomas Hobbes (1588-1679), as well as those who carried forward the tradition of just war theorizing such as Hugo Grotius (1583-1645), Samuel Pufendorf (1632-94) and Emmerich de Vattel (1714-67): and with the latter being the thinkers whom Kant famously condemned as sorry comforters and from whose projects in international law he explicitly differentiated his own. At the same time, the discussion of Kant on the principles of the law of nations is intended to bring out something of his anticipation of the now existing system of international law and its foundational principles. In this connection, it will be emphasized to what extent Kant thought of the law of nations as a body of law that worked to define the rights and obligations of states that were essential to their freedom and independence, and hence to what extent he thought of peace among men and states as presupposing the establishing of a state-centred system of international law. The state-centredness of the law of nations, as in Kant's account of it, is crucial in explaining the direction of his international thought, as when, towards the end of the paper, some detailed attention is given to the forms

of lawful constitution that Kant took to found the different parts of the law of peace. As for the focus of the critical expository attention of the paper, this lies with the two works where Kant stated and elaborated on what he saw as the substantive principles of the law of nations: *Perpetual Peace* (1795) and *The Metaphysical Elements of Justice*, the latter being the first part of the late treatise *The Metaphysics of Morals* (1797).<sup>1</sup>

i.

Kant wrote *Perpetual Peace* in the form of an imaginary treaty that was to provide for the establishing of perpetual peace. This treaty was divided into two sections, and with each containing certain articles of peaceful association. In the second section, Kant set down three definitive articles of perpetual peace between states, which related to the forms of lawful constitution that were to found municipal law, the law of nations and cosmopolitan law. In the first section of *Perpetual Peace*, Kant set down six preliminary articles of perpetual peace between states. It was claimed by Kant that the principles stipulated with

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1 Immanuel Kant: *Perpetual Peace: A Philosophical Sketch*, in Kant, *Political Writings*, trans. H.B. Nisbet, ed. Hans Reiss, 2nd edition, enlarged (Cambridge: Cambridge University Press, 1991), pp. 93–130; *The Metaphysical Elements of Justice*, Part 1 of *The Metaphysics of Morals*, trans. John Ladd (Indianapolis and New York: Bobbs-Merrill, 1965). For the view of the present author on Kant and the specifically jurisprudential aspects of his international thought, see: Charles Covell: *Kant, Liberalism and the Pursuit of Justice in the International Order* (Münster and Hamburg: Lit, 1994); *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (London: Macmillan; New York: St Martin's Press, 1998); *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (Basingstoke, Hampshire and New York: Palgrave Macmillan, 2009), Chapter 5, pp. 161–89. The classic statement of the principles of justice in war by Aquinas, as basing himself on Augustine, comes in the discussion of the subject in his treatise the *Summa Theologiae*, and with this to be found in Question 40 of the second sub-part of the Second Part of the work that is known as the *Secunda Secundae*. For the original Latin text of this with an English translation by Thomas R. Heath, see: *Summa Theologiae*, Blackfriars edition, Volume 35: *Consequences of Charity* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1972), pp. 80–93. Regarding Hobbes, see: *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*, edited with an Introduction by Michael Oakshott (Oxford: Basil Blackwell, 1946). For the work of Grotius' to which reference is made in the paper, see: *De Jure Belli ac Pacis Libri Tres* (1646 edition), trans. Francis W. Kelsey et al., *The Classics of International Law*, No. 3, Volume 2 (Oxford: Clarendon Press, 1925). As to Vattel, see: *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758 edition), trans. Charles G. Fenwick, *The Classics of International Law*, No. 4, Volume 3 (Washington, DC: Carnegie Institution of Washington, 1916).

the preliminary articles had the status of prohibitive laws, and it is clear that these articles comprise what Kant thought were to stand as the fundamental principles of the law of nations.

The first preliminary article provided that peace treaties entered into with secret reservations as regarding the material for future wars were to be considered as invalid.<sup>2</sup> The place and significance of the principle stated in this article in relation to the law of nations need little explanation. For the principle that peace agreements made with secret reservations were to be excluded as invalid had been recognized prior to Kant; and, beyond this, it is to be observed that in excluding agreements with mental reservations, Kant gave recognition to the more basic and underlying principle of international law as to the effect that agreements between states were to be entered into and kept by them in good faith.<sup>3</sup> The principle of good faith is foundational within the law of nations, and it is enshrined in current international law in the rule *pacta sunt servanda*: that is, the rule that treaties are binding upon the states that are the parties to them, and that the parties are bound in good faith to the performance of their terms.<sup>4</sup>

The second preliminary article provided that no independently existing state, whatever its size, was to be acquired by another state through inheritance, exchange, purchase or gift. In the view of Kant, the disposing of the state through transactions such as inheritance, exchange, purchase or gift implied that the state was to be thought of as a possession or *patrimonium*, rather than as an association of men that was entitled to command and to dispose of itself.<sup>5</sup> The conception of the state as a possession or patrimony, and hence as the subject of the proprietary rights vested in its ruler, was fundamentally alien to the conception

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2 Kant, *Perpetual Peace*, pp. 93–4.

3 Grotius elaborated the principles of good faith in detail and at length: *De Jure Belli ac Pacis*, Book III, Chapters XIX–XXIV. As for Vattel, he denounced treaties made with mental reservations as a form of deception: *Le Droit des Gens*, Book II, Chapter XVII, Section 275.

4 The rule *pacta sunt servanda* is affirmed in Article 26 of the Vienna Convention on the Law of Treaties (1969), and the duty of states to fulfil their obligations in good faith is affirmed as the Seventh Principle laid down in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970). For the texts of the Declaration and the Vienna Convention, see: *Basic Documents in International Law*, ed. Ian Brownlie, 4th edition (Oxford: Clarendon Press, 1995), pp. 36–45, pp. 388–425.

5 Kant, *Perpetual Peace*, p. 94.

of the state that Kant argued for in *Perpetual Peace*, and that he was to elaborate at some length in *The Metaphysical Elements of Justice*. Thus Kant conceived of the state as an association of men that was sovereign unto itself, and as where its sovereignty was embodied in the collective person of its members as a citizen-body. As for the basis of the association formed among men within the state, this, for Kant, lay in the public law rather than in private law rights as relating to the conditions for the ownership of property: and with the public law comprising universal laws that were to be maintained on behalf of the citizen-body as sovereign by rulers whose office and authorized constitutional powers were founded in the principle of representation.<sup>6</sup>

The declared opposition of Kant to patrimonial principles of statehood underlines his commitment to republican constitutionalism. It underlines also his alignment with the writers on the law of nations who came before him. It is true that Grotius had famously accepted the legitimacy of states where the sovereign power was held with full proprietary right, and hence in patrimony.<sup>7</sup> However, Vattel had been clear, as Kant was after him, that the state was not to be thought of as the patrimony of its ruler: and as for the reason that the ruler of the state was a representative person, and with this being so even when the ruler happened to be an hereditary ruler.<sup>8</sup> The second preliminary article also points to the fact of Kant's anticipation of the international law of the contemporary era. For as Kant explained it, the article carried the implication that fundamental alterations to the status and position of a state within the international order as affecting its rights and independence, and fundamental alterations to the form of government that determined the system of its internal domestic political organization, were to take place only in accordance with the consent of the people who comprised its citizen-body. Here, Kant gave provisional expression to the essential meaning of what in the twentieth century was to come to gain acceptance in international law as the principle of the equal rights and self-determination of peoples. This is the principle that provides for the right of peoples to determine for themselves their own political status and their own form of self-government.<sup>9</sup>

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6 For Kant's arguments here, see: *The Metaphysical Elements of Justice*, The General Theory of Justice, Part II: Public Law, Section I: Municipal Law, sub-sections 45-49, 50-52.

7 Grotius, *De Jure Belli ac Pacis*, I.III, Sections XI-XII.

8 Vattel, *Le Droit des Gens*, I.IV.40; I.V.56-61, 68-69.

9 The principle of the equal rights and self-determination of peoples stands as the Fifth Principle

Kant characterized the principle stated in the first preliminary article of perpetual peace as a principle of law that had the standing of a strict prohibitive law. This meant that it was a law that was to have immediate effect, and to apply to all relevant cases without regard for actual circumstances. In contrast to this, the principle stated with the second preliminary article stood as a principle of law that was characterized by Kant as a law that permitted some measure of latitude in its application as determined by contingent circumstances, and which for this reason allowed for some delay in its practical implementation.

The third and fourth preliminary articles of perpetual peace were similar to the second preliminary article in that the principles that they stipulated were considered by Kant to have the status of laws that allowed for delay as to the implementation of their terms. The third preliminary article provided that the standing armies of states were to be abolished on a gradual basis.<sup>10</sup> The fourth preliminary article provided that states were not to contract national debts as in connection with the prosecution of their external policies.<sup>11</sup> It is clear that the principles laid down with the third and fourth preliminary articles have not acquired the status of rules of international law as such, and that, in this respect, the implementation of the principles contained in the articles has been put off for a very long time. Even so, the principles at issue have certainly come to be accepted as general principles of international conduct whose observance by states and governments is recognized to be conducive to the maintenance of international peace. Thus the principle that states should abolish their standing armies implies that international peace must depend on the preparedness of states to give up the means at their disposal to wage aggressive war against one another: an implication that stands confirmed as with the policies of states that are aimed at establishing mutual disarmament treaties, and aimed at establishing arms control regimes and so on. As for the fourth preliminary article, this points in the direction of what is now recognized as the principle of conditionality: that is, the principle that provides that credit is to be extended to states and governments only subject to restrictions as to the specific uses to which it may

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set out in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. The principle is also affirmed in Article 1, paragraph 2 of the Charter of the United Nations (1945). For the text of the United Nations Charter, see: Brownlie (ed.), *Basic Documents in International Law*, pp. 1-35.

<sup>10</sup> Kant, *Perpetual Peace*, pp. 94-5.

<sup>11</sup> *Ibid.*, p. 95.

be put.<sup>12</sup>

The fifth preliminary article of perpetual peace was one that stipulated a principle of the law of nations that Kant presented as imposing a strict prohibition as to the conditions for its application. The law set down in the article is central as to Kant's exposition of the principles of the law of nations. For it is with this article that there is brought out that Kant thought of the law of nations as a body of law that served to guarantee the rights of states, and such as were essential to their freedom and independence as states. As to its specifics, the fifth preliminary article provided that no state was to interfere forcibly in the constitution and government of other states. For Kant, the principle of non-interference as set out in the article was overriding and unconditional, as in the sense that it underlined that, *prima facie*, there could be no justification whatsoever for the interference by one state in the constitution and government of another state as by the means of force. Kant allowed that where a state had split into two parts as the result of some internal conflict, then it was not necessarily to be counted as an interference in the constitution and government of the state in question if an external power were to intervene through providing support to one or other of the parties to the conflict. However, Kant insisted that until such time as the conflict had been decided, then any such interference by external powers would constitute a violation of the right to independence of the people among whom the conflict was taking place, and so would threaten the interests of all states through the rendering of their mutual independence insecure.<sup>13</sup>

It is evident that Kant looked back to the past with the fifth preliminary article of perpetual peace. So, for example, Vattel had affirmed that states possessed the right to draw up their own constitution, and to regulate all matters relating to their own government, and to do this without interference from foreign powers.<sup>14</sup> There is also, once again, an evident

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12 Thus it may be observed that the third and fourth preliminary articles of perpetual peace set out principles of international conduct that conform with the spirit, and the meaning, of the obligations falling on states to refrain from the threat or use of force and to co-operate with one another which are laid down, respectively, as the First Principle and the Fourth Principle affirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

13 Kant, *Perpetual Peace*, p. 96.

14 Vattel, *Le Droit des Gens*, I.III.31, 37; II.IV.54-55. It is to be noted, however, that Vattel allowed for rather more scope for intervention by foreign powers than Kant was to do after him. For he accepted that a foreign power might assist an oppressed people engaged in waging a war of resistance against a tyrannical ruler, albeit subject to the condition that the people concerned had requested it to

anticipation by Kant of the current system of international law. Here, it is to be emphasized that the principle of non-interference stipulated in the fifth preliminary article was a principle that implied, and that followed from, the acceptance of the possession by states of the formal rights and attributes of sovereignty. Thus the principle of non-interference, as laid down in the article, was such that it served to guarantee the freedom and independence of states as in regard to their internal constitution and government. At the same time, the principle was such that it served to give recognition to the formal juridical equality of states, as in the respect that the freedom from external interference that the principle guaranteed to states was a freedom that was to be guaranteed to all states equally and without exception. It is concerning this aspect of it, as through its implications for the idea of state sovereignty in relation to the law of nations, that the fifth preliminary article of perpetual peace testifies to the fact of Kant as looking forward to the international law system of the contemporary period. For the principle that Kant affirmed to the effect that states were to be prohibited from forcible external interference in the constitution and government of one another answers, as to its essential meaning, to the principle, as fundamental to present international law, as to the effect that states remain subject to a duty of non-interference, or non-intervention, as in regard to the area of the exclusive jurisdiction exercised by other states. This duty of non-interference is an integral part of the general conception of state sovereignty that informs current international law, and it is a duty that follows as a consequence of the sovereignty and equality of states as this is considered to stand as the basic constitutional principle of international law as such.<sup>15</sup>

Finally, there was the sixth preliminary article of perpetual peace. This provided that states at war were not to commit such acts of hostility as would undermine the mutual confidences among states such as were essential if states at war were to return to the

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intervene. *Le Droit des Gens*, II.IV.56.

15 Article 1, paragraph 1 of the Charter of the United Nations affirms that the United Nations Organization is based in the principle of the sovereign equality of member states. The principle of the sovereign equality of states is also affirmed as the Sixth Principle stipulated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. As regarding the duty of non-intervention falling on states as to the area of the exclusive jurisdiction exercised by other states, and with this as considered as the corollary of the sovereignty and equality of states, the Declaration on Principles of International Law sets out as its Third Principle the duty of states not to intervene in matters as coming within the domestic jurisdiction of one another.

condition of peace, rather than to pursue war to the point where belligerent states were brought to total destruction. The specific acts to be prohibited, as to which Kant made reference, included the use of assassins and poison, breaches of agreements by belligerent states, and the instigation of treason in enemy states. The principle laid down in the sixth preliminary article had the standing of a strict prohibitive law, and so in consequence of this the various practices as subject to the terms of the article were, for Kant, to be outlawed with immediate effect.<sup>16</sup>

ii.

The sixth preliminary article of perpetual peace relates to the law of war. In the event, Kant expounded the law applying to the conduct of war in terms such that it was understood to occupy a central position in what he took to be the substantive law of nations. This is clear from the exposition of the principles of the law of nations that is provided in *The Metaphysical Elements of Justice*, where virtually the entire exposition of the subject is given over to the law of war and to the elaboration of its core principles. As Kant here explained the matter, the law of war, and hence the law of nations as such, was founded in the natural right of states to wage war as in defence of their rights and property. The right of states to wage war was a right that followed from what, for Kant, was the truism that states by nature stood as free and independent entities, and that the natural condition of the society formed as among free and independent states was to be thought of as a condition of war. This was so in the sense that the natural condition of the society of states was a non-judicial condition of society, where, by definition, there could exist no judicial procedures for the peaceful settlement of disputes among states as regarding their rights and property, and where the resort to war was available as the legitimate means by which states were to secure their rights against one another and to obtain redress for such injuries as were done to them. In consequence of it being a condition of war, as in the respects referred to, the natural society formed among states was to be understood as a condition of strict legal injustice.<sup>17</sup>

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<sup>16</sup> Kant, *Perpetual Peace*, pp. 96–7.

<sup>17</sup> Kant, *The Metaphysical Elements of Justice*, The General Theory of Justice, Part II: Public Law, Section II: The Law of Nations, sub-sections 53–54, 56.

While Kant regarded the right of states to wage war as a natural right that was exercised in circumstances of strict legal injustice, he nevertheless held it to be a right that was restricted by a body of law that set out the substantive lawful rights of states in the waging of war. This body of law was the law of nations, and in *The Metaphysical Elements of Justice* Kant elaborated the particular rights that it provided for as under six distinct heads.

First, Kant considered the right of states to wage war in relation to their own subjects. Here, he insisted that states were to wage war only with the consent of the representatives of their own citizen-bodies.<sup>18</sup> Second, there was the right of states to wage war with regard to other states. With this issue, Kant set down the various offences whose occurrence enabled states to claim a lawful justification for the resort to war. The principal offence justifying war was an actual injury to the state, as brought about by the first aggression of some other state or states. As well as the case of defence in the face of aggression, however, the state might also resort to war on account of some perceived threat to its own security, as where the military preparations of another state justified it in the waging of a war of prevention. In addition, the increase in the power of some state, as through its acquisition of new territory, might be construed by other states to give rise to a just cause of war, and with Kant taking this to point to the existence of the right of states to act to preserve the balance of power.<sup>19</sup>

Third, there were the rights of belligerent states during the course of a war. These were the rights that Kant saw as deriving from the idea that war was always to be prosecuted in conformity with principles of conduct that worked to preserve the possibility of belligerent states being able to abandon the condition of war, and to enter into a juridical condition of society. In Kant's explanation of them, the principles of state conduct at issue, here, served to set limits to the objects that might legitimately be pursued by states in the waging of war. So, for example, no war between independent states was to be a war aimed at the punishment of enemy states. Again, no war was to have as its aim the extermination of enemy states, or their subjugation. A war that was directed to the extermination or subjugation of an enemy state would necessarily result in the destruction of that state, and with the absorption of its population within the victorious state or their reduction to slavery.

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18 Ibid., *The General Theory of Justice*, II.II.55.

19 Ibid., *The General Theory of Justice*, II.II.56.

Such a war was not to be reconciled with what Kant, as in this connection, identified to be the general principle of the law of nations. This was the principle as to the effect that states were to resort to war, as through the application of the use of force, in order to defend their rights and property, but not in order to make material acquisitions for themselves that would undermine other states as in consequence of the increase in their relative power. The discussion of the rights of belligerent states also included consideration of the practices that were to be prohibited in wartime, and with Kant condemning the use of assassins and poison and the other practices of the sort as excluded by the terms of the sixth preliminary article of perpetual peace. In addition, Kant maintained that belligerent states were not permitted to seize by force the private property of the subjects of vanquished enemy states.<sup>20</sup>

The fourth set of rights relating to war that Kant discussed were the rights of states on the conclusion of a war. In regard to this matter, Kant listed certain conditions that it was not permissible for a victorious state to include in a treaty of peace as concluded with a defeated enemy. Thus it was not permitted for a victorious state to demand compensation from a defeated enemy state in order to meet the costs of war, or to demand that it should forfeit its freedom and independence as through its being reduced to the status of a colony.<sup>21</sup> Fifth, there were the rights of states at peace. These included the right of states to neutrality, and the right of states to form alliances for the purpose of mutual defence against internal and external aggression.<sup>22</sup> Sixth, there were the rights of states in relation to an unjust enemy state. Kant cited, as the case of such an enemy, the state that acted in violation of the terms of treaty obligations. This state was unjust, Kant argued, for the reason that its publicly expressed will demonstrated that it acted in accordance with a principle of conduct which, if adopted by all states on a universal basis, would preclude the possibility of establishing international peace, and so prolong for all time the natural condition of war obtaining among states as by nature. All states were at liberty to unite against a state guilty of this injustice, and, where necessary, to impose on it a form of lawful constitutional order that would incline it to act for peace.<sup>23</sup>

Kant's statement of the principles of the law of war is further evidence of his looking

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20 Ibid., *The General Theory of Justice*, II.II.57.

21 Ibid., *The General Theory of Justice*, II.II.58.

22 Ibid., *The General Theory of Justice*, II.II.59.

23 Ibid., *The General Theory of Justice*, II.II.60.

forward to subsequent developments in international law. Thus it was that he affirmed such fundamental principles of current international law as those excluding wars of aggression, and wars aimed at conquest and the enslavement and colonization of peoples. At the same time, Kant on the law of war serves to underline his links with the previous writers on the law of nations. This is true as to Kant in his relation to the line of pre-modern just war theorists as represented by Augustine and Aquinas; and it is true also of Kant in his relation to Grotius and Vattel, as prominent among the modern secular natural law writers who contributed to the development of just war doctrine.

In the tradition of just war theorizing, there had been three essential conditions stipulated for justice in war. First, there was the condition of lawful authority. Thus it was that justice in war required that war should be waged by states only on the lawful authority of their sovereign rulers. Both Augustine and Aquinas underlined the condition of lawful authority, and it was made central by Grotius and Vattel in discussion of the category of war that they referred to as public war. The second condition for justice in war, as identified by these various writers, was the condition that war was to be waged by states only where there existed some just cause for war. The requirement of just cause, as to the waging of war, was recognized by Augustine and Aquinas, and later by Grotius and Vattel who, in explanation of the matter, saw the presence of a just cause for war as the basis and precondition for the exercise by states and rulers of the various rights of war. The third condition for justice in war was the condition of right intention. With this condition, it was provided that justice in war required that war should be waged by states only to the end of restoring a condition of peace that would, as such, constitute a just and lawful political order. The restoration of peace, as the proper lawful object of war, was upheld by Augustine and Aquinas; and the same was the case with Grotius and Vattel, who were to discuss this in terms of the establishing of peace as being the end that was implied in the undertaking of war by states. The condition of right intention, as thus understood, is notable in just war doctrine, as in the respect that it confirmed the necessity that states should observe such rules and principles in the conduct of warfare as would allow for the return to peace: and hence confirmed also the necessity that there should be laws adopted and followed by states that would serve to limit

and mitigate the harsher effects and consequences of war.<sup>24</sup>

Kant remained faithful to the just war tradition, as in his exposition of the law of nations as it applied to war, as through the recognition that he gave to lawful authority, just cause and the considerations bound up with the condition of right intention as the basic and necessary conditions for justice in war. So Kant maintained that the right of war was a sovereign right of states, and hence that war was to be waged by states only with the lawful authority of the ruler: albeit that he emphasized that the exercise by states of the right of war was to be conditional on the consent of the citizens as through their representatives. Kant also insisted that justice in war required that war was to be waged only where there existed some just cause for it, as witness here his picking out of defence against first aggression as the principal justification for war. There was also the affirmation by Kant of the idea of right intention, as where this was thought of as the condition that war was to be waged in order to establish a peace based in law and justice. Thus it was in accordance with the terms of this condition that Kant excluded such practices in wartime as the use of assassins and poisons and breaches of agreements, in addition to his excluding, as unlawful, such wars as were directed towards the extermination or the subjugation of enemy states.

For all that Kant was faithful to the terms of the theorizing as adopted in the established just war tradition, there still remain significant divergences on his part from certain of the key formulations that belong to it. This is true in regard to particular points of substantive doctrine, as is the case, most importantly, with the question of war and punishment. For Augustine and Aquinas, as well as for Grotius and Vattel, the three principal just causes for war had been identified as self-defence, the recovery of property and the punishment of states guilty of wrong-doing.<sup>25</sup> The identification by the just war thinkers of the punishment

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24 For Aquinas, and here following on from Augustine, as to the statement of lawful authority, just cause and right intention as conditions for the justice of war, see: *Summa Theologiae*, Secunda Secundae, Question 40, article 1. The three conditions for justice in war were given recognition to by Grotius, in *De Jure Belli ac Pacis*, as with his discussion of the distinction between public war and private war (I.II.1-V), the just causes of war (II.I), and the rules and principles to be observed by belligerent states in order to moderate the harsh effects and consequences of war (III.XI-XVI). As regarding Vattel, there is discussion in *Le Droit des Gens* of the right to make war (III.I.3-4), the just causes of war (III.III), and the law relating to what it was permissible to do to the person of the enemy in a just war (III.VIII).

25 For Aquinas, Grotius and Vattel on punishment of wrong-doing and the other principal just causes of war, see respectively: *Summa Theologiae*, Secunda Secundae, Question 40, article 1; *De Jure Belli*

of wrong-doing as a just cause for war was informed by, and associated with, a quite specific view of war. The view of war at issue, here, was that of war as a means for the maintenance, regulation and enforcement of an objectively subsisting normative order among states, as where this order was assumed to stand as the basis for the determination of the justice of the claims of right as set forward by the belligerent states concerned. This view of war is to be found present with Augustine and Aquinas. It is present also with Grotius and Vattel, as is underlined by their affirming of the doctrine, as integral to traditional just war theorizing, that in respect of the essential nature of its cause no war was to be thought of as being just on both sides.<sup>26</sup>

In the matter of the lawful justification for the waging of war by states, Kant was clear that self-defence and the recovery of property stood as just causes for war. Nevertheless, he expressly denied that a war between independent states could be a war of punishment. For Kant, punishment presupposed a relationship obtaining as between a superior and an inferior. However, no such relationship obtained among independent states, with the consequence that no state could be thought of as waging a war whose object and justification lay with the punishment of some other state. The relationship between superior and inferior as required for the right of punishment, Kant argued, was something that could exist only within the juridical form of society to be found in the civil state, as where a people were subject to a supreme political authority as exercising the various rights of sovereignty of which punishment was one. As for states at war, these, Kant emphasized, were to be regarded as co-existing in the natural condition of their mutual society, and hence in a non-juridical condition of society where, by definition, there was present no lawful basis for the right of punishment.

Given that Kant saw states at war as standing to one another in a non-juridical condition of society, it was not open to him to adopt the view of war as adhered to by Grotius and Vattel and the earlier just war theorists. For Kant conceived of the international state of nature, as a state of war, in terms such that he was unable to think of war as a

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*ac Pacis*, II.I; *Le Droit des Gens*, III.III.

26 It is to be noted that while Grotius and Vattel held that no war could be just on both sides with regard to its cause, they emphasized that a war might be considered just on both sides as with regard to its legal effects and consequences for the parties to it. Grotius, *De Jure Belli ac Pacis*, II.XXIII. XIII; Vattel, *Le Droit des Gens*, III.III.39-40.

legitimate means for the sustaining of an objective normative order holding among states, and to which reference might be made for the authoritative determination of the justice of the different claims of right as these were advanced by states at war. In consequence of this, Kant was also prevented from following Grotius and Vattel in their conviction as to the impossibility of the considering of war as capable of being just on both sides. As Kant explained it, the international state of nature, as a state of war, was a non-judicial condition of society, as where the rights of states were to be determined and secured not through binding principles of law and justice, but only through the right of the strongest. Thus it was that Kant insisted that the international state of nature was a non-judicial condition of society, as for the reason that there could be established within it no judicial procedures that were competent to provide for a conclusive determination of the justice of the claims of right as set forth by belligerent states. From this it followed that, as within the natural condition of the society holding among states, there could be no final and fully objective determination of the justice of the cause of a war as such. As Kant put the matter in explaining the sixth preliminary article of perpetual peace, war was about the assertion of rights by force in a state of nature where there was no court competent to judge with lawful authority. If, therefore, a proper and reliable determination of the justice of the claims of states at war were to be looked for, then this would have to be a determination as based in, and proceeding from, the actual outcome of the war.<sup>27</sup>

Kant looked back to Hobbes in the view that he took of war as the natural condition of the society obtaining among states. For Hobbes had held that independent states, or commonwealths, were to be thought of as standing to one another in a state of nature, and with the state of nature being, as in his celebrated characterization of it, the condition of the war of all against all, as where there were established no authoritative institutions of government, no effective rule of law, and no determinate principles of justice and propriety.<sup>28</sup> Even so, Hobbes was still prepared to allow that there were certain laws that obtained in the

27 For Kant on punishment as a right of sovereignty as belonging to and exercised by the ruler within the civil state, see: *The Metaphysical Elements of Justice*, The General Theory of Justice, II.I: General Remarks on the Juridical Consequences arising from the Nature of the Civil Union, Section E. For Kant's arguments regarding punishment in regard to war and to the situation of states in the sphere of their mutual external relations, see: *Perpetual Peace*, p. 96; *The Metaphysical Elements of Justice*, The General Theory of Justice, II.II.57, p. 120; II.II.58, pp. 121-2.

28 Hobbes, *Leviathan*, Part I, Chapter XIII.

state of nature. These were the laws of nature, which laws Hobbes saw as setting out the essential principles of peaceful association among men: and, in this aspect, as imposing such fundamental duties as the duty to endeavour peace, the duty to set limits to the rights of war on a reciprocal basis, the duty to fulfil the terms of agreements entered into, and the duty to have disputes submitted to the judgment of independent arbitrators.<sup>29</sup> For Hobbes, the laws of nature, as laws stating the principles of peace, were laws that he explained as having primary application to individual men, and hence as relating to the conditions for association among men as within the civil state. However, Hobbes also saw the laws of nature as applying to states and their rulers, and hence as serving to establish the normative framework for peace as among states and rulers. Indeed, Hobbes identified the law of nations as the laws of nature in their application to sovereign rulers, and, to the extent that he did so, then he placed himself squarely with Grotius, Pufendorf and Vattel, as leading modern secular natural law writers, in their respective expositions of the law of nations.<sup>30</sup>

Kant stands in opposition to Hobbes for the reason that he thought of the gulf between the natural condition of the society of states, as a condition of continual war, and the juridical condition of the society of states, as a condition of peace based in laws, as being an absolute gulf, and not one that was to be overcome through appeal to laws which were understood to have their foundation in nature. Thus it was the view of Kant that if there was to be a normative order comprising laws making for peace among states, then this would have to be an order which it fell to states to bring into being – or, as he put it in *Perpetual Peace*, to institute on a formal basis – through some explicit act of their own. That is to say, for Kant, the normative order that was to embody the conditions for a peace among states based in law was an order whose foundations were to be explained not in reference to the concept of laws given in nature, but in terms of the will and agreement of the states to which this order had application.<sup>31</sup>

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29 Ibid., I.XIV-XV.

30 For Hobbes on the law of nations as consisting in the laws of nature as applying to sovereign rulers, see: *Leviathan*, II.XXX, pp. 231–2. For a discussion by the present author of Hobbes as in relation to the question of the law of nations, see: Charles Covell, *Hobbes, Realism and the Tradition of International Law* (Basingstoke, Hampshire and New York: Palgrave Macmillan, 2004), especially Chapter 2.

31 For Kant on peace as a condition to be instituted, see: *Perpetual Peace*, p. 98.

## iii.

The insistence of Kant that peace based in law was a condition of society that had to be formally instituted serves to underline his break with Hobbes, and with the secular natural law thinkers such as Grotius and Vattel who stood within the just war tradition. For Grotius and Vattel, it had been assumed that war should be made subject to the constraints and limitations of law, and that the legal regulation of war was itself a precondition for war being concluded and a return made to the condition of peace. In the event, however, neither Grotius nor Vattel had been able to move from the position that there should be a law providing for justice in war, and towards the position that the full realization of a normative order based in law, as in its international application, required the establishing of a rule of law where war would cease to be resorted to by states and rulers as the legitimate means for the maintenance, regulation and enforcement of justice and as to their rights.

This was the decisive move that Kant made in his explanation of the juridical foundations of peace. For he assumed that if the relations between states were to be based in the rule of law, and peace secured through this, then it was not sufficient merely that states should observe that part of the law of nations which defined their rights and duties in the waging of war. The conviction of Kant as to this matter explains why it was that he came to argue that the extension of the rule of law to the international sphere required, and necessitated, nothing less than the permanent renunciation by states of war as the means for settling disputes about their rights, and the adoption by states of a juridical framework based in a rule of law that would provide for the determination of their rights under conditions of universal peace. It is because Kant associated the ideal of a peace based in law with the permanent renunciation of war by states that he understood a true peace based in law to be a perpetual peace. In the same way, it is because Kant conceived of perpetual peace as requiring that states should submit themselves to a juridical framework in the sphere of their mutual external relations, and so abandon the natural condition of their society, that he insisted that international peace was a condition of society that it was necessary that states should formally institute.

The juridical framework that Kant envisaged as necessary for the establishing of a perpetual peace was one that presupposed that states, and the individuals who comprised

them, should base their mutual relations in specific forms of lawful constitution. The forms of lawful constitution that Kant saw as essential for peace were the constitutions that he considered were to found the municipal law, the law of nations and the cosmopolitan law as the three parts of the public law. These constitutional orders Kant discussed in the three definitive articles of perpetual peace that were set down and explained in the second section of *Perpetual Peace*, and later in Part 2 of *The Metaphysical Elements of Justice*.

The forms of lawful constitution that Kant was concerned with were thought of by him as providing for the instituting of peace. In this respect, the concern of Kant with constitutions, as the basis for peace, points, once again, to his anticipation of the future development of international law. For the formal institutionalization of relations among men and states in the international sphere was to come to be central to the later development of international law, and especially so during the twentieth century. Indeed, the legal-political principles that are embodied in the forms of lawful constitution that Kant affirmed as being necessary for peace are principles that, to a large extent, have been incorporated into international law, or that stand as principles that relate to areas in international politics which are considered to be proper to be made subject to regulation through international law. The international law of the contemporary era remains a system of law that is based in the institution of the state. This is a feature of present international law that serves to render it consistent with the terms of what Kant argued for as being the law of peace. For the law of peace was a state-centred conception of law, and, through the municipal, international and cosmopolitan forms of public law pertaining to it and through the constitutional structures that were to found these different parts of the public law, the law of peace was such that it worked to secure and legitimate the institution of the state and to guarantee and preserve the rights of states that were essential to their sovereignty and hence to their freedom and independence. The state-centredness of the law of peace, as Kant expounded it, is something that is everywhere apparent in his specification of the forms of lawful constitution that he prescribed as making to establish a permanent international peace on a definitive basis.

The form of lawful constitution that Kant held was to found the municipal law maintained in the state was the republican form of civil constitution. The republican constitution was the subject of the first definitive article of perpetual peace. The form of

government that, in Kant's explanation of the matter in *Perpetual Peace*, was required under the terms of the republican constitution was that of constitutional government as subject to the constraints and limitations as set through the rule of law. Thus the republican constitution provided for the formal separation of the legislative and executive powers of the state, and so thereby provided for the subordination of the executive power of rulership to the laws that were established as through the legislative power. For Kant, the legislative power in the state was sovereign, and with this meaning, as he understood it, that the sovereign power of legislation in the state was embodied in the people or citizen-body as a whole. Accordingly, the ruler of the state, as exercising the executive powers of government, was bound by the laws enacted by the citizen-body as sovereign, and hence was, in this sense, to be thought of as the representative of the sovereign will of the citizens in their collective aspect.

In Kant's view, then, the principle of representation was the very essence of republican constitutionalism. For the representative status of the ruler was here intrinsic to rulership, as where this was exercised through offices that were based in and constituted through public law. However, there was nothing about the ideal of representative government, as bound up with republican constitutionalism, that implied that the republican form of civil constitution demanded the adoption of the democratic form of government. On the contrary, Kant was clear that republican constitutionalism and democracy in government were fundamentally opposed as one to another: and with this being so for the reason that democracy promised that the citizen-body bearing the sovereign legislative power might hold and exercise executive power in the state. As a result, it was inevitable that the democratic form of government would collapse the separation of powers and that, in doing this, it would free the executive powers of rulership from subjection to law and thereby work to undermine the foundations of limited constitutional government.

The chief merit of the republican constitution, as in Kant's account of it, was not anything to do with the democratization of the institutions of state government, but rather the securing under the terms of the state constitution of the rights of individual citizens according to law. Specifically, the terms of the republican constitution were such that law and government in the state were to be based in the consent of the citizen-body; as so also were the rights and freedoms of citizens to be secured to them through a system of public

municipal law which applied to all citizens, as on an equal basis, and which thereby established the only conditions for the legitimate application of coercive force by the state against its citizens. The additional, and very particular merit, that Kant claimed for the republican constitution was that it stood as the constitution for peace. This was so, for Kant, as in the sense that the state that adopted the republican constitution would be likely to refrain from resorting to war. As Kant put it, the republican constitution was such that, under it, the citizen-body was able to determine whether or not the state was to opt for war, and, in his assessment of the matter, it was not likely that the citizen-body would willingly opt for this while knowing of their own liability to suffer the direct effects and consequences of war.

There is great significance attaching to the argument of Kant that the adoption by states of the constitutional form of government, as the basis for their internal domestic political organization, would incline states to maintain peace among themselves and so, as a result of this, incline them to submit to the constraints and limitations of law as it had application in the international sphere. For this argument underlines what Kant saw, and insisted on, as being the essential inter-connectedness of domestic state law and politics and international law and politics. Even so, it remains here vital to understand that the progress of states towards the ideal of the constitutional form of government, in Kant's own sense of it, was something that was to depend on the development of the internal domestic political organization as taking place within states, and as in accordance with their own will and agency. It was not something that was to be brought about through the will and agency of the international community, as, say, through the mechanisms of international legal regulation or those of international coercive power. This was so because Kant's claims for the republican constitution, as the constitution for peace, were claims that he set out in the context of the claims that he made regarding the basic substantive principles of the law of nations as such; and, as it has been explained, the law of nations, for Kant, provided that states were to remain free from all forcible external interference with their constitution and government. Thus was Kant's prescription of the republican form of civil constitution, as a definitive condition for the establishing of perpetual peace, qualified by his insistence that international law proper was to work to entrench the institution of the state as a free and

independent, and hence sovereign, entity.<sup>32</sup>

The second of the forms of lawful constitution that Kant prescribed in *Perpetual Peace*, as necessary for permanent peace among men and states, was the constitution that he held was to found the law of nations. This constitution was to be embodied in a federation of free states, and it was the subject-matter of the second definitive article of perpetual peace. The federation of free states, as a form of constitutional relationship among states, was explained by Kant such that, as within the framework of the law of peace, it was understood to work to preserve the institution of the state in its character as a sovereign entity, and thereby to guarantee the freedom and independence from external control and higher authority that were essential to the sovereignty of the state as an institution.

Thus it was that Kant insisted that the federation of free state was not to stand as a world state or an international state, and hence that the establishing of the federation was not to require the subordination of states to international governmental institutions bearing powers analogous to the constitutional powers such as belonged to the institution of state government. For as Kant characterized it, the federation was to provide the constitutional foundation for a body of law that, by virtue of being international law, possessed application to states considered as entities which were free and independent, and which were therefore not to be brought together to form some unitary political authority or institutional structure. Again, states were free and independent in that they were based in a lawful form of internal constitution. For this reason, states were to be thought of as being properly exempt from subjection to the external coercive rights and powers that were embodied within the civil constitution, and as being there necessary for the maintenance of the municipal law as

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32 Kant, *Perpetual Peace*, pp. 99–102. The arguments that Kant set out for the republican constitution, as in relation to issues to do with the subject of international peace, connect his thought to what is now referred to as the democratic peace theory: and with this being so as in the respect that Kant envisaged the constitutional form of government within states as serving to promote and to secure peace between states in the international sphere. However, it is to be emphasized, here, that Kant distinguished clearly between the principles of republican constitutionalism, as such, and the principles of democratic government. In addition, it has to be observed that there is nothing to link Kant to the doctrine of liberal humanitarian interventionism with which democratic peace theory is sometimes associated. For what is often pointed to as being a seminal contribution to the core agenda and development of democratic peace theory, see: Michael W. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', *Philosophy and Public Affairs*, 12 (Summer 1983), pp. 205–35; 12 (Fall 1983), pp. 323–53.

obtaining within states. The exempting of states from subjection to external coercive rights and powers was crucial to their freedom and independence, and it was precisely the securing of the freedom and independence of states, as understood in terms of this exemption, that Kant took to stand as the end and purpose of the federation of free states.

In the explanation of the idea of the federation of free states as set out in *Perpetual Peace*, Kant pointed to how the essential and defining feature of the federation, as a lawful constitutional structure, was to be taken as lying not in any international governmental institutions, but in the treaty agreement among states through which the federation was brought into being. The treaty establishing the federation was to be a peace treaty, except that it was to be a treaty not to end some particular war but, rather, a treaty that was to put an end to war as such and on a permanent basis. Hence it was a treaty that was to involve an undertaking by the states that were the parties to it to abide by the terms of the law which applied to them, and which stood as the condition for the initiating and preservation of lasting peace. The emphasis that Kant placed on the treaty establishing the federation of free states, as the constitutional foundation for the law of nations, underlines how he saw the law of nations as law that was based in, and that derived its normative force from, the will and agreement of states. Likewise, Kant's specification of the terms of the treaty relating to the federation, as a treaty committing the parties to the permanent renunciation of war, underlines how Kant moved beyond the standpoint specific to traditional just war theorizing. This was so in the respect that Kant saw the treaty as creating a constitutional relationship among states where war was no longer to be available, or to be resorted to, as a proper means for the enforcing of law and for the securing of the lawful rights of states.

If Kant insisted that the federation of free states was not an international state or an institution for international government, and if he was clear that the essence of the federation lay in the treaty agreement establishing it, there remains nothing about his account of the federation to indicate that he would have excluded institutional arrangements for the structuring of inter-state relations as such. To be sure, Kant would certainly have had little difficulty with accepting institutional arrangements for facilitating the peaceful settlement of disputes among states as in accordance with law. No doubt this is why Kant's projected federation of free states has sometimes been linked (erroneously, in fact) with such later international organizations as the League of Nations and the United Nations Organization.

However, this in no way qualifies what is the fundamental position that Kant argued for through his appeal to the ideal of a federation of free states: that is, the position that peace among states would have to depend not on the presence of international organizations exercising governmental or quasi-governmental powers, but rather on the acceptance by states and governments of the rule of law on a voluntary basis, and on their acceptance of a legal regime committed to the maintenance of the institution of the state and the maintenance of the freedom and independence as essential to them and to their sovereignty.<sup>33</sup>

The third form of lawful constitution that Kant called for in *Perpetual Peace* was the cosmopolitan constitution, which constitution stood as the subject-matter of the third definitive article of perpetual peace. The cosmopolitan constitution was an ideal form of constitutional order that Kant conceived of as providing for the juridical union of men and nations as in accordance with the terms of the cosmopolitan law. As Kant explained it, the cosmopolitan law was the law that applied in the regulation of trade and commerce among men and nations in the international sphere. However, the cosmopolitan law was much more than the law of international trade and commerce. For Kant characterized it such that the cosmopolitan law was understood to comprise a system of law that was to provide for the universal recognition of the equal legal status and legal personality of all men and all nations. It was in these terms that Kant made reference to the concept of cosmopolitan law to condemn such abuses in the international politics of his own times as colonialism and slavery.

It is clear that, for Kant, the cosmopolitan law was to facilitate trade and commerce among men and nations, and that the interdependence among men and nations as resulting from the spread of international trade and commerce was to be thought of as working to promote the cause of international peace. It is clear also that Kant envisaged the cosmopolitan law as working to promote peace as through the form of juridical

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33 Kant, *Perpetual Peace*, pp. 102–5. Further to Kant on the federation of free states as the constitutional foundation for the law of nations, see: *The Metaphysical Elements of Justice*, The General Theory of Justice, II.II.61. For an excellent discussion of Kant and the place occupied by the idea of the federation of free states within his international thought generally, and as where there is underlined the opposition of Kant to projects for establishing a world state or a system of international government, see: F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge: Cambridge University Press, 1963), Chapter 4.

egalitarianism that it was to bring to the condition of international society: that is, through its providing for the universal recognition of the legal status and legal personality of men and nations. In both respects, the cosmopolitan law was something presented by Kant as establishing juridical ties and inter-connections among men and nations in the international sphere such as would serve to reduce, and indeed to put an end to, the incidence of war at the level of the relations among states and their governments.

It has been argued that the appeal of Kant to cosmopolitan law indicates that he was a revolutionist with respect to international politics, as in the sense of being a theorist who looked forward to the overthrowing of the international order, as an order based in states, and the establishing in its place of a universal cosmopolitan society. As against this revolutionist interpretation, there are Kant's own arguments about the cosmopolitan law. For these, in fact, do nothing to suggest any doubts on his part regarding the necessity of the maintenance of states as the institutional foundation of both internal domestic and international political organization. Thus it was that Kant saw the cosmopolitan law as being grounded in, and as deriving from, the right of universal hospitality: that is, the right of men not to be treated with hostility by the inhabitants of the foreign lands into which they entered. However, the cosmopolitan right to hospitality was the right of a guest; it was not, as Kant insisted, the right of resort or settlement. In consequence, the right that belonged to men under cosmopolitan law was not a right that Kant thought of as working to undermine state institutions with regard to their territorial and jurisdictional competences, or with regard to the exclusiveness of the juridical relationships obtaining among them and their respective citizen-bodies. Beyond this, there is the consideration that the cosmopolitan law and its related form of lawful constitution comprised only one part of the system of law that Kant presented as making for peace among men and states. As such, the cosmopolitan law supplemented, but without negating, the municipal law of states, and with the latter presupposing the existence of states and pointing to the adoption by states of the republican constitution as the condition for both peace and justice. At the same time, the cosmopolitan law supplemented, but again without negating, the law of nations as the law that underwrote the institution of the state, and that served to define and validate the rights and duties which were essential to the freedom and independence of states as in their character as sovereign

entities.<sup>34</sup>

There is little question that the principles that are embodied in the forms of lawful constitution that Kant commended, as the foundations for the three parts of public law, are principles that receive recognition in current international law. Thus in proposing the adoption by states of the republican form of civil constitution as the precondition for peace, Kant recognized that factors pertaining to the internal domestic political organization of states were crucial to the establishing of an effective rule of law to regulate the relations among states in the international sphere. The form of state constitution that Kant endorsed was one that served to guarantee the fundamental rights of men as citizens. To the extent that Kant saw international peace based in law as depending on the acceptance by states of the republican constitutional form of government, as this secured the rights of men as citizens, then it is plain that he looked forward to the present era in international law as where the principles of human rights have come to be acknowledged as setting benchmark standards for the internal domestic political order of states which relate directly to the prospects for international peace. In calling for the federation of free states as the constitutional basis for the law of nations, Kant underlined that the law of nations required the instituting of some specific international organization of states whose concern was to lie with the maintaining of that body of law. Here, too, Kant looked forward to the present era in international law, as where it has come to be accepted that international peace and order must depend not only on the existence of law as such, but also on the existence of international institutions that are charged with its actual maintenance. Finally, there is the cosmopolitan law as the precondition for international peace. With this matter, Kant once again looked forward to the present era in international law, and as an era that has come to be distinguished by the forming of regimes for trade and commerce among men and nations, the affirming of decolonization and the equality and self-determination of peoples, and the commitment to the recognition of the universal application of the fundamental rights of men

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34 Kant, *Perpetual Peace*, pp. 105–8. As concerning Kant on cosmopolitan law, see also: *The Metaphysical Elements of Justice*, The General Theory of Justice, Part II: Public Law, Section III: World Law, sub-section 62. For the revolutionist interpretation of Kant and his international thought, as weighted towards its cosmopolitan component, see: Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (1977), 2nd edition (London: Macmillan, 1995), Chapter 2, pp. 23–6.

and nations.<sup>35</sup>

With all of this said, it is to be observed, in conclusion, that within the framework of the law of peace, as Kant set this out, the principles embodied in the forms of lawful constitution that he projected as being necessary for a lasting peace among men and states, as on a definitive basis, stood as restricted by, and subject to, the principles that he saw as comprising the essential substance of the law of nations. These, of course, were principles that he expounded such that they were to be taken as serving to entrench the institution of the state as a free and independent, and hence sovereign, entity. Thus for Kant and as from his own distinctive standpoint in international thought, the principles of republican constitutionalism remained qualified by the terms of the law of nations as this provided for the right of states to be free from forcible external interference with matters to do with their constitution and government. Then again, the principles of international federalism remained qualified by the consideration that no international federation of states was to act to the detriment of states as to the freedom and independence integral to their sovereignty. Moving beyond this, the principles of the cosmopolitan law, as this concerned freedom of trade and commerce and as it promoted juridical egalitarianism among men and nations, remained everywhere qualified as by the rights of states. In the now on-going situation in the development of international law, the rights of states are such that they may well be thought of as standing in a competitive relation to the defining ends of constitutional government and the rights of men as citizens. So, too, may the rights of states be thought of as competitive with the defining ends of international institutions and their promotion, and with the defining ends as to do with the commercial interdependence of men and nations, and with the equal and universal recognition of the lawful rights and personality of men and

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35 As to the current international law on human rights, there is the Universal Declaration of Human Rights (1948). In regard to the current law relating to international organizations, as in connection with Kant and the federation of free states, there is, of course, the United Nations Charter; but there is also, and arguably more relevant as to its institutional implications, the duty laid on states to settle disputes by peaceful means that is stipulated as the Second Principle given in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. With the Declaration, the Third Principle, stipulating the duty on states to co-operate with one another, and the Fourth Principle, as stipulating the principle of equal rights and self-determination of peoples, conform, as to their substance and application, with the sense and meaning belonging to the idea of the cosmopolitan law in the form that Kant presented it. For the text of the Universal Declaration of Human Rights, see: Brownlie (ed.), *Basic Documents in International Law*, pp. 255–61.

nations. In the sense that this is so, then these considerations must serve to underline the relevance of Kant to the understanding of the contemporary predicaments in international law and international relations. And so also is it underlined, and as in accordance with Kant's own view of the matter, how and why it is that the state continues to present itself as an institution that is both central and yet problematic as in respect of the international political order.<sup>36</sup>

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36 Looking back to January 2000 when this paper was delivered in its original form, it is now all the more evident that Kant provides a corrective to the sort of arguments that became fashionable in the 1990s following the end of the Cold War, and as to the effect that the centrality of the state would be diminished in consequence of the then identified newly emerging factors as within the international political order. For an indication of this line of direction with the relevant theorizing going on at that time, see for example: Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996). In retrospect, it is also fully evident to what extent the course of events in world politics since January 2000 has served to confirm the necessity, and the inescapability, of the state and state institutions in the current and prospective condition of politics and society in both the domestic and international spheres. For the views of the present author on some of the different aspects of this question, see: Charles Covell and Shahzadi Covell, 'Administrative Law and Civil Society in the People's Republic of China', *Journal of International Public Policy*, 30 (September 2012), pp. 1–51.

