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## The Kantian Theory of Public International Law

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source, unless "autonomy" is to maintain one's own views against reason itself, which is a possible view, but not one held by Kant.

Gould is correct that Kant is not a natural law thinker if by natural law we mean a conception embracing the authoritarianism discerned by Jerome Schneewind in some of Kant's predecessors. But I see no reason to be governed by such a historically specific definition of natural law. I have no allegiance to the expression "natural law," however, and indeed would prefer to speak simply of "morality." I chose it as the best way of making my argument in terms familiar to legal theorists, who are in the habit of discussing the relationship between morality and law by contrasting "natural" and "positive" law.

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#### THE KANTIAN THEORY OF PUBLIC INTERNATIONAL LAW

Immanuel Kant seems so often to be right, in the eyes of contemporary philosophers and legal academics, that his writings have taken on a nearly scriptural authority. To find one's views in Kant confirms their validity. To challenge Kant implies reactionary prejudice, or pointless iconoclasm. John Rawls has made so many new Kantians in the academy that every scrap and letter of the great Königsberger's work has its own scholiast, and school of eager exegetes. Finally the commentators have turned even to Kant's short late essay on *Perpetual Peace* (1795), which closely follows a tradition of proposals deriving through Kant's model Jean-Jacques Rousseau (1761) from the Abbé de Saint Pierre (1713) and William Penn (1693). The question addressed is how the different nations of the world can live together in peace.

By joining the gaggle of Kant interpreters I do not intend so much to question their consensus, as to ask (of whatever Kant says): is he right? I will briefly review Kant's proposals, considering them as actual policies, which might

be applied to contemporary relations between states. Kant proposes six preliminary articles of a perpetual peace, and three definitive articles, supplemented by a guarantee, a secret article, and two appendices, to maintain a universal community (*Gemeinschaft*) of political, international and cosmopolitan right.

#### Kant's Preliminary Articles of Perpetual Peace

Kant's six preliminary articles of perpetual peace are practical and prospective. They lay out basic rules through which existing states may bring an end to hostilities and develop the basis for creating perpetual peace. Kant intended several of his proposals (2, 3 and 4) to admit some flexibility or subjective latitude, so long as their ultimate purposes not be lost. Kant's six preliminary articles of perpetual peace propose that: (1) No conclusion of peace shall be considered valid if it was made with a secret reservation of the material for future war; (2) No independently existing state, whether large or small, may be acquired by another state by inheritance, exchange, purchase or gift; (3) Standing armies will gradually be abolished altogether; (4) No national debt shall be contracted in connection with the external affairs of state; (5) No state shall forcibly interfere in the constitution and government of another state; and (6) No state at war with another shall permit such acts of hostility as would make mutual confidence impossible during a future time of peace (All translations here and henceforth by H. B. Nisbet in *Kant, Political Writings* (Cambridge University Press 1970)).

The first preliminary article forbidding the secret reservation of material for war reflects Kant's commitment to honesty. Honest states that agree to peace would relinquish their capability for war. This preliminary article will be impractical in a multipolar world of mutually distrustful powers. Full disarmament requires universal compliance and trust. In the absence of either, prudent states will retain their capability for war, while working to create the necessary conditions for peace. Perhaps Kant's first provision will be a necessary preliminary to real peace, in the sense that complete and

permanent peace (in its strongest sense) cannot exist without disarmament. As applied to contemporary international relations, the trusting renunciation of all material for war would be unwise, and likely to provoke avoidable conflicts between states.

Kant's second preliminary article of perpetual peace, forbidding exchanges of national territory, recognizes the fundamental principals of self-determination and cultural stability. Each society has its own life and history, which would be destroyed by transfer or amalgamation. Kant recognizes the folly of a single consolidated world empire. This clause is elegant, convincing and true, but should not be read to prevent federation. Kant simply endorses the stability of existing administrative borders and the doctrine of *uti possidetis juris*. Each community or separate republic must develop its own sense of the common good and consensus about justice, standing on its own cultural history. This does not preclude a broader cosmopolitan citizenship that encompasses all humanity.

The third preliminary article of perpetual peace, proscribing standing armies, follows from the first, concerning material for future wars. Standing armies exist to fight, provoking apprehension in others, expensive arms races, and the danger of prophylactic aggression. Kant proposes a gradual disarmament, which might be possible in a just world of legitimate states, provided that they disarm together. Kant's further prohibition on the accumulation of public currency reserves (which he sees as equivalent to armies, since wealth can hire arms) makes little sense. Governments need wealth and reserves of wealth to serve their citizens. Converting wealth to arms takes time, and even poverty cannot prevent rearmament when states are determined to do so.

Kant's fourth article, forbidding a national debt, follows from his fear of public wealth. Such prohibitions would impoverish the state, without preventing war, and reflect an unreasoning fear of finance. Kant's subsidiary point that foreign debts may lead to war when debtor nations cannot pay, has a kernel of truth in it. His solution that states should band

together to prevent foreign borrowing seems unnecessarily harsh. Some states and populations may benefit from timely borrowing, to fund the development of their local resources and economies. Kant's view of debtors as improperly enriched would-be imperialists reveals his conception of Britain as the typical debtor nation. Regulated international borrowing, by satisfying and empowering the poorer nations, may be an important force for world peace, because it promotes greater equality among states.

The fifth preliminary article of perpetual peace comes closer to the substance of contemporary international law by banning forcible intervention in the constitution or government of another state. Kant's reasoning reveals his conception of states as moral persons, with their own political autonomy, comparable to the private autonomy of real human individuals. This analogy supposes that just as individuals may foolishly harm themselves, without legitimating someone else's intervention, so every state or people may freely harm itself, so long as it does not injure others. Accepting any intervention in a state's internal conflicts would (Kant supposes) make the autonomy of all states insecure.

Kant's attribution of moral identity and autonomy to states would be justified, if one's aim were simply to establish a peace between states, preliminary to a more definitive permanent settlement. If one's aim were justice, however, the equivalence would fail. Just as individuals deserve liberty and moral autonomy, so too do nations, but only so long as states stand in the place of the individuals that they represent. State autonomy is derivative, and depends (as Kant recognized) on the collective right to independence and self-determination of the citizens behind it. Oppressive states that disregard their citizen's welfare cannot claim to speak for them, or to enjoy vicariously their citizen's rights to independence. In such circumstances, other states may sometimes legitimately respond directly to appeals for help from subordinated populations, against oppressive regimes.

Kant's confusion between the moral autonomy of individuals and the moral autonomy of states carries over to his prohibition of certain excesses or dishonesties in war. The sixth preliminary article of perpetual peace rests on Kant's assumption that a state of nature exists between nations, which lack a court of justice to legitimate their wars of punishment (*bella punitiva*) against illegal behavior. In such circumstances, Kant suggests, wars represent a form of trial by battle, to be resolved by the judgment of God. Kant insists that such wars must follow civilized procedures, in order to avoid a descent into total destruction through escalating mutual atrocities.

This last point makes a powerful argument in favor of the laws of war, which Kant rendered almost ridiculous with his rhetorical and transparently insincere reference to the so-called judgment of God (*sogenannt Gottesgericht*). War is not a trial, but mutual destruction, to be avoided at almost any cost. Different parties to the conflict will be more or less at fault, and more or less to blame. Victory goes to the stronger (and often less justified) party, without any reference to justice. Justice plays a part in appealing for allies, or justifying measures taken to win the war. Kant's sixth article misses the decisive importance of justification (which he recognizes elsewhere). When states are at war, the more justified party may legitimately take stronger measures to win or resolve the conflict than the less justified party, whose duty lies more in submission and restitution, than vigorous pursuit of war.

Kant's preliminary articles look less to the justice than to the stabilization of the existing world order. Taken separately and individually his articles hardly apply to contemporary international relations, where international institutions and finance have completely supplanted the structures of his simpler era. Taken collectively, however, Kant's preliminary articles indicate a useful strategy for achieving perpetual peace, by first stabilizing the current administrative borders of states, then moving toward justice. Peace precedes justice in Kant's formulation, but justice justifies and perpetuates the peace, when peace between states facilitates

their mutual reform, and more definitive articles of peace.

### Kant's Definitive Articles of Perpetual Peace

Having established the minimum preliminary foundations of a perpetual peace in his initial proposals, Kant described his three definitive articles of perpetual peace, which establish the formal relationships between nations, without which states must necessarily regard each other as enemies. Kant takes it as given that only a lawful (*gesetzlich*) state can be trusted. Only states that share a legal civil state of government (*bürgerlichgesetzlich Zustand*) can live in peace. Otherwise, their neighbors must suppress them as law-abiding citizens properly suppress those individuals who refuse allegiance to the common civil society. Kant envisioned three types of legal (*rechtlich*) regimes, depending respectively on civil right (*Staatsbürgerrecht* or *ius civitatis*), international right (*Völkerrecht* or *ius gentium*) and cosmopolitan right (*Weltbürgerrecht* or *ius cosmopolitanum*). Persons without such constitutions live in a state of nature with respect to each other, Kant believed, and so of perpetual war.

Kant's three definitive articles of perpetual peace follow from his conception of *rechtlich* or *gesetzlich* institutions, without which there would be no peace. First, all states' civil (*bürgerlich*) constitutions must be free and republican. Second, international right (*Völkerrecht*) must derive from a federation of free and republican states. Finally, cosmopolitan right (*Weltbürgerrecht*) will be limited to conditions of universal hospitality. All three of these lawful regimes depend on Kant's conception of freedom, in its older republican sense. For Kant rightful freedom (*rechtlich Freiheit*) requires submission only to those laws to which one could actually give one's consent. Rightful equality requires that all possible legal obligations apply equally to all. Kant insists these innate and inalienable rights (*angeborene, zur Menschheit notwendig gehörende und unveräußerliche Rechte*) forbid all relations of unequal power among citizens, except distinctions derived from merit alone.

Kant's powerful commitment to this natural law of reason determines his conclusion that only republican constitutions can sustain a perpetual peace. Kant's conception of the republic depends on the equal freedom (*Freiheit*) of all members of society; their equal dependence upon the civil law (*Gesetz*); and their equality (*Gleichheit*) as citizens. Republican constitutions are the only constitutions that citizens as equals could agree upon, because republics spring directly from the concept of right (*Rechtsbegriff*), and require the consent of their citizens to any public decision. Kant believed that republican citizens armed with the vote would reject war as pernicious to their own well being, while non-republics embrace war, to enrich those in charge.

These last remarks might lead (have led) some commentators on Kant to confuse the republican constitution with democracy. This would be mistaken. Kant followed Rousseau and his classical sources in believing that democracies will always be despotic, unless they separate their legislative and executive powers. Republics, Kant believed (in common with his contemporary James Madison and most other self-styled republicans of the period), will combine the separation of powers with representation or election to executive offices, so that each public officer remains a servant of the state. Kant suggested that the absence of representation will always result in despotism of one, a few, or the many, which amounts to a state of war, in which no one's rights are observed.

Kant's first definitive article confirms his commitment to justice as the basis of perpetual peace. Kant rightly concedes that there will be no peace or safety for the subjects of any state that disregards the inalienable republican civil rights to freedom, equality and law. This adds very little to his underdeveloped concept of republican government, which is restricted (in *Perpetual Peace*) to requiring representation, the separation of powers, and implied doctrines of popular sovereignty and the rule of law. Kant's contemporaries John Adams, Alexander Hamilton and James Madison provided more

nuanced descriptions of the republic, as did earlier authors such as James Harrington and the Baron de Montesquieu. Nothing Kant says contradicts their more detailed republican prescriptions for checks and balances, elected senates, and life terms for judges. Kant simply does not address the details of republican government, in an essay dedicated to the relationship between states.

The position of the republic as the basis of world peace becomes much clearer in Kant's second definitive article of perpetual peace, basing his *ius gentium* on a federation of republics or federal free states. This international constitution would correspond to the civil constitution of its several member states, by securing the rights of each state against the others. Kant emphatically rejects the possibility of an international or world state. He wants a *Völkerbund*, not a *Völkerstaat*. The difference lies in maintaining each people's separate identity in separate republics. Each republic must be an equal member of the international federation of peoples, just as every person must be equally a citizen of his or her separate component nation, within the federation.

Kant had no patience for disorganized (*gesetzlos*) peoples, without republican government, and did not see why he should accord any respect to disorganized states that reject the republican federation. Lawless states like lawless persons naturally express the inborn depravity of universal human nature. (*Bösartigkeit der menschlichen Natur*). Kant believed that only republican structures of government will bring out the moral capacity of human nature sufficiently to overcome this natural propensity to vice. Even after peoples acquire a lawful internal constitution (*eine rechtliche Verfassung*), Kant believed that they would continue to need a permanent overarching pacific federation (*foedus pacificum*), to preserve each state's proper freedom, as a separate lawful republic.

This idea of federalism, gradually extending to encompass all states, seemed attainable to Kant, if ever a powerful and enlightened nation could form itself into a republic, as a beacon of

justice to the world. The recent examples of France and the United States may have given some encouragement to Kant's expectation that other states would flock to form a federation around powerful republics, if given the chance. In any case, Kant firmly believed that reason mandates free federalism (*frei Föderalism*) as the ultimate shield of individual rights. Just as individuals must renounce their savage and lawless condition through public coercive laws, so states must accept an enduring and gradually expanding republican federation to prevent war.

Kant's proposal may seem somewhat unreal, in the midst of global lawlessness and war. In fact, Kant contemplated an arrangement considerably short of his ideal world republic (*Weltrepublik* or *civitas gentium*). Kant's second definitive article of perpetual peace clarifies the first by extending republican principles from individuals to peoples. Ideally the international federation should have its own enforcement mechanisms, and public coercive laws. Lacking these, Kant hoped that a weaker federation would at least limit the force of universal human inclinations to injure others, independence of law.

The third definitive article of perpetual peace concerns cosmopolitan right (*Weltbürgerrecht* or *ius cosmopoliticum*), which is to say, right growing out of the relationship between individuals (and states) as citizens of the universal state of mankind. Kant would restrict cosmopolitan right to the rule of universal hospitality. This requires non-hostility to foreign states and foreign nationals, so that no one kills, enslaves or maltreats them, without good reason. Kant believed that foreigners may legitimately be excluded from entry into independent republics (unless their lives are in danger), but expected that friendly overtures would lead to commerce, and gradually to a cosmopolitan constitution (*weltbürgerlich Verfassung*).

Kant's conception of right thus depends on three imagined codices of unwritten law concerning the *ius civitatis*, *ius gentium*, and *ius cosmopoliticum* respectively. Natural law implies fundamental human rights, which only a republican civil constitution can secure or

maintain. Protecting republican states against outsiders (and each other) requires an international federation of republican peoples, to govern their mutual relations. Finally, this republican federation will fail to develop or survive without an attitude of universal hospitality.

These three categories of natural law or right (*Recht*) do not represent three levels of duty, as one might expect, but rather, two related systems of obligation, overlaid (or undergirded) by a separate and dominant requirement, applicable to both. The *ius civitatis* (concerning the right of citizens) and the *ius gentium* (concerning the right of peoples) contain within them the universe of public obligations. The *ius cosmopoliticum* embodies the one simple rule that leads (in the end) to developing the rest. Not doing harm to others by simply avoiding hostility will lead to community, Kant believed, as people naturally seek the mutual benefits of commerce and association. People will wish to interact, and doing so without hostility will produce the benefits of natural right, within and between all peoples.

Kant's Definitive Articles of Perpetual Peace constitute the essence of his proposal, unrestricted (unlike the preliminary articles) to specific circumstances of time and place. The threefold project of (1) republican constitutions, (2) republican federation and (3) general (arms-length) non-hostility between states (and individuals) provides a convincing model for developing peace and justice from a common foundation of republican politics. A *weltbürgerlich* attitude on the part of persons and states will lead to better mutual understanding, interdependence, and peace; whether such an attitude will ever actually develop remains to be seen. Kant's republicanism is convincing and morally sound (though politically underdeveloped), but the non-republican institutions of existing states, and their less than *weltbürgerlich* attitude, make it seem a bit utopian, so long as existing regimes maintain their less-than-republican political views and institutions.

### The Guarantee of Perpetual Peace

Kant would have responded to this criticism by reiterating his argument that peace and justice both depend, and will in the end both arise and prevail, from the inborn structures and desires of ordinary human nature. This optimistic doctrine supplies what Kant identified as the ultimate guarantee (*Garantie*) of perpetual peace. Kant supposed that inherent structures of nature would bring humans into concord, even against their will, so that the moral ends which people *ought* in any case to pursue, as prescribed by reason, will also naturally result from their self-seeking greed and ambition. Kant suggested that all three types of public right *ius civitatis*, *ius gentium*, and *ius cosmopolitanum* will follow eventually from nature, with or without any deliberate human commitment to justice.

In order to secure their own ambition, with mutual protection against each other's avarice and self-interest, people will form states (Kant supposed) with civil laws to bind them. To strengthen their own state's interests against the rest, even wicked citizens and states must seek republican confederations. Kant embraced the republican conclusion, already well articulated by James Harrington, John Adams, and many others, that even a nation of devils would gradually establish the checks and balances of republican government, to control each other's self-interest by the oversight of the rest, so that ambition would counteract ambition, and public interest rule, despite the avarice and bad intentions still eagerly raging in each private devil's own secret heart.

This mechanism of nature (*Mechanism der Natur*), by which selfish inclinations are naturally opposed to one another, compels submission to coercive laws, which in turn preserves peace (as Kant believed), both within and between states. Good morals follow good laws, and dissipate without them. Thus nature irresistibly determines that right will (eventually) gain the upper hand. (*Die Natur will unwiderstehlich, das Recht zuletzt die Obergewalt erhalte*). Virtue and good will do not matter so much, according to Kant's conception of nature, because right follows from

selfish conflict, through an equilibrium of power among vigorous rivals, within and between states. Thus nature wisely separates the nations, and Kant would keep them separate, to maintain justice, in perpetual peace.

As separation prevents despotism, Kant believed, so to commerce assures unity and peace among nations, by offering an economic incentive against war. These two forces supply nature's guarantee of lasting peace. Using rivalry, self-interest (to support *Staatsbürgerrecht* and *Völkerrecht*) and avarice (to support *Welbürgerrecht*), nature maintains peace by the universal mechanism of natural human inclination. This is not to say, however, that justice and peace now actually exist (or ever have done). Rather, Kant hopes to establish that nature supplies the materials for perpetual peace, to be gradually channeled and implemented, by those who have the wit to do so.

This constitutes Kant's secret article of perpetual peace. Philosophers have studied and explained the mechanisms of peace in government and international relations. Kant suggests that governments should make use of this wisdom (without attribution). He does not want philosopher kings, or king philosophers but only that kings should secretly implement the philosophers' insights, in pursuit of perpetual peace. Power corrupts, and corruption misleads the public councils. But philosophers have no power, which frees them to think, and better understand the state.

Kant's secret article supplies some of the deficiencies of his earlier guarantee, by acknowledging the extent to which nature requires guidance in realizing its ends. The whole history of the world reveals a procession of violence and injustice so seldom interrupted, as to undermine the plausibility of natural providence or nature's benevolence to man. Nature supplies the materials for human felicity without creating the political structures to support them. The science of politics determines the best system of political checks and balances to harness nature in pursuit of republican government, and social justice for all. Creating just constitutions requires active philosophy and

human intervention. The greatest weakness of Kant's essay on perpetual peace is his lack of specificity about the structures needed to secure and preserve a lawful republican state.

### The Identity of International Law, Morals, and Politics

Kant's sanguine reliance on nature's guarantee of perpetual peace reflects his greater interest in moral rather than in political questions. Both appendices to his essay on perpetual peace explain all politics (international and international), as applied branches of right or justice, for which morals supply the theoretical foundation. This means that morals and true politics never conflict. Politics, properly understood, realize the absolutely binding moral laws by which all actions *ought* to be governed, so that anyone who wishes to know her or his own civic duty may do so, simply by consulting the inborn reason that all of us possess. Kant knew that practical political maxims must consider the actual structure of human nature, including its weaknesses. Good Kantian politicians and statesmen will continuously examine their political institutions, to ensure their conformity with natural law or right (*Naturrecht*).

Kantian politicians will not, of course, destroy the existing bonds of any political or cosmopolitan community before they have something better to put in their place, but they will always continue to maintain a course towards eventual reforms to realize political justice (*die nach Rechtsgesetzen beste Verfassung*). Kant hoped that politicians would rule as much as possible in a republican (*republikanisch*) manner, while adjusting the constitution gradually to be itself more republican, and just. Kant concluded that any natural law respecting constitution (*rechtliche*), even if it is not very lawful (*rechtmässig*) itself, will be better than no constitution at all. Revolutions and invasions should not occur, unless they will make things better.

Kant observed that international society does not possess and should never obtain the despotic right to formulate coercive laws for mechanical

application by lawyers. Nations must rely instead on the application of reason to universal principles of freedom, to justify their public actions and political constitutions to others. This follows the normal international practice of public argument by reference to public right (*öffentlich Recht*). Even when states and lawyers argue insincerely, their insincere references to public right and justice confirm these concepts' irreducible value, as sources of international obligation, applying Kant's fundamental principle of right, which is always to act in such a way that you could wish your maxim to be the universal law.

Kant's conceptions of political, international and cosmopolitan right are the moral constructs of reason, and universally binding. He considered that genuinely republican (*echt-republikanisch*) government will best secure the obedience and prosperity of the people, so long as politicians introduce it gradually, seizing favorable circumstances, without recourse to hasty, or violent innovation. Kant expected that peace would follow justice, when the general will (*allgemeine Wille*) discovers the concept of right (*Rechtsbegriff*), among or between peoples, on the basis of freedom and equality. "*Fiat iustitia, pereat mundus*" -- for Kant justice came first, and everything else would follow.

Kant's formula for perpetual peace required first that the state should have an internal constitution organized in accordance with pure principles of right. (*eine nach reinen Rechtsprinzipien eingerichtete innere Verfassung des Staats*) and second that it should unite with other states to form some sort of federal union (*allgemein Staat*). Morality, law and politics go together. Without justice, there will be no peace. Kant was confident that human reason will gradually apply moral principles to secure justice, helping right to increase, since all right comes from justice (*Gerechtigkeit*).

This identity between international law, morals and politics demands a more detailed description of republican institutions, at both the national and the federal level, than Kant is ever willing to provide. To claim (as Kant does) that republican institutions will find and implement



justice, requires some description of what republican institutions will look like. *Perpetual Peace* avoids the specifics. Kant's specificity lies instead in his moral formula or calculus, to act in such a way that you could wish your maxim to be the universal law. This leaves the politics too vague to reach any definite understandings, or to resolve any disagreements about justice, which may arise between citizens or states.

### The Transcendental Concept of Public Right

Kant concluded his essay on perpetual peace by supplying a new more detailed formula with which to calculate the content of public justice or right, which forms (as he understands it) the only lasting basis of peace. Kant's conception of public right depends on publicity as the final measure of law and justice. Kant's rule holds that all maxims of action that cannot be made public are wrong, while all maxims that require publicity in order to succeed must be right, in morals as well as politics.

This formal attribute of publicness (*Publizität*) epitomizes in a single phrase all Kant's philosophy of right, both ethical and juridical. Kant argues that every claim of right must have this public quality. Concerning the *Staatsrecht* or *ius civitatis* (for example), Kant denies the right of rebellion against unjust tyrants, because such a principle could never be openly accepted, as part of a civil constitution. Similarly, in the case of *Völkerrecht* or *ius gentium*, Kant denies that states can ever legitimately renounce their commitments within the pacific federation, because no state would willingly have joined the federation in the first place, knowing that others could withdraw. Kant explained that *Weltbürgerrecht* or the *ius cosmopolitanum* follows the same principles, by close analogy with international law. Kant did not imagine that everything public is necessarily just, but rather that nothing political can ever be just, that cannot be publicized, or acted on openly.

Publicity discovers morality or rightness best (including international right), only when a lawful (*rechtlich*) state already exists. Kant's

conception of public right (*öffentliches Recht*) requires this lawful state or republic. Because Kant believed that only a federative association of states can lawfully support freedom, he concluded that politics and morality will never agree, until the federative union (*Verein*) is in place.

Kant's transcendental concept of public right, requiring publicity, captures a central element of republican justice, which recognizes the importance of public debate. Republics test ideas by deliberation, and confirm them by votes. Governments that act without submitting their policies to public examination will make mistakes about justice, by misunderstanding the common good. Public deliberation clarifies moral error by bringing all citizens' experience and observations into play. This true and convincing argument for popular sovereignty becomes nonsense, however, when Kant twists it to protect despotism. To publicize one's planned revolution against non-republican tyrants would be suicide. This does not mean that revolutions should never happen. Secret plans against oppression will be justified, when republican deliberation would be subject to retaliation and violence.

### The Kantian Theory of Public International Law

Reviewing Kant's arguments in *Perpetual Peace* reveals the extent to which his conception of right depended on natural law. Kant's two maxims of universality and publicity provide the natural law basis for all legitimate government policy. The only legitimate governments (Kant believed) would be those that implemented republican institutions, as part of a republican federation, to realize the moral rules that Kant's moral maxims endorsed. Some preliminary articles would be necessary to make the world ready for republican government, but even without them Kant expected that justice would eventually prevail.

The central element of Kant's essay on perpetual peace (his list of definitive articles) is also his best and most convincing argument. Kant believed that *ius civitatis* should rest on

whatever political institutions (including the rule of law) will best realize objective morality and justice. This is true. He argues for a *ius gentium* that will protect and coordinate these republics in one large federation. This seems sensible. Kant suggests that the *ius cosmopolitanum* should encourage mutual non-hostility between states. So it should. What Kant lacks is any workable description of what will count as republican forms of government, when applied to the actual constitutions of states.

In this Kant resembles John Locke, useful for the principles, but not for forms of government. When Kant does offer specifics, they are weak and unconvincing (as in his preliminary articles), or pernicious (as in his strictures on revolution, forbidding secrecy against tyrants). Kant's argument for republican government is just and convincing, but he never gives sufficient details about what a republic will look like. This leaves would-be Kantians strangely at sea, committed to principles of liberty and justice, without clear techniques for making them real. To find the *rechtliche Verfassung*, republican internationalists most look to other sources, which is why they so seldom agree on what their master would want. The Kantian Theory of international law is a republican theory of natural law, left deliberately vague, to encourage the gradual development of republican institutions, in a world of illegitimate despots, and lawless tyrannical states.

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## A CRITIQUE OF "KANTIAN INTERNATIONAL LAW"

### The Conception of "International Law" and "States"

Harry Gould approaches "Kantian International Law" from a hypothetical viewpoint, which prompts two criticisms concerning: (1) Gould's lack of a lucid definition of "international law; and (2) his lack of a lucid definition of "the state."

The Kantian-theory of international law, sometimes referred to as "Neo-Kantian legal theory," in some ways resembles the legal theories developed by the late Hans Kelsen (1881-1973). In his work, *The Pure Theory of Law*, Kelsen generally suggests that public international law should be regarded as similar to the norms of municipal state law and should be observed as norms of the same single universal legal system. (Hans Kelsen, *Introduction to the Problems of Legal Theory*, 107-25, (Bonnie Litschewski & Stanley L. Paulson trans., Clarendon Press)(1992); Hans Kelsen, *Reine Rechtslehre-mit einem Anhang: Das Problem der Gerechtigkeit*, 328-45 (2nd ed. 1976)). The English translation of Professor Kelsen's theory on the unity of international law and state law put his view very clearly:

The only given is a cognitive unity of all law; that is, one can conceive of international law together with the state legal systems as unified system of norms in exactly the same way as one is accustomed to regarding the state legal system as unity. This view, shared even by proponents of the dualistic doctrine, reflects the epistemological requirement that all law be considered in one system, that it be considered from one and the same standpoint as an integral whole in itself. Because legal cognition aims to comprehend as law - to comprehend within the category of the valid legal norm - material characterized as international law, as well as material presenting itself as state law, legal cognition sets the very same task for itself that natural science sets for itself: to represent its object as a unity. The negative criterion of this unity is noncontradiction, a logical principle that also applies to cognition in the realm of norms. (*Introduction to the Problems of Legal Theory*, supra, at 111, 111(f), 112.)

However, Kelsen's influential legal theory is contrary to other current theories on the relationship of public international law, municipal law (Hans Kelsen, *Auseinandersetzungen zur Reinen Rechtslehre – Kritische Bemerkungen zu Georges Scelle und Michel Virally – Im Auftrag des Hans Kelsen – Institutes aus dem Nachlaß herausgegeben von Kurt Ringhofer und Robert Walter*, 1-61, 111 et seq. (New York: Springer Verlag 1987)), and