1

The 'Unsettled' Eighteenth Century

Kant and his Predecessors

ROBERT SCHÜTZE

I Introduction

With the decline of the (inter)national idea of 'empire' in the early modern period,[1] the belief in a 'universal' law binding all humanity was gradually replaced by legal pluralism. The apostles of state sovereignty came to deny the very existence of supranational legal authority above the state and introduced a distinction that still structures our modern imagination: the distinction between national and international law. The former would be the sphere of subordination *within* a sovereign state; the latter became the sphere of coordination *between* sovereign states. International law is henceforth no longer the (cosmopolitan) *ius gentium* of mankind;[2] it is the *ius inter gentes* that regulates the formal interactions between sovereign states: war and peace.[3] From the perspective of modern international law, a 'civil law' between sovereigns leads to a contradiction: for if sovereignty

[1] On this point: J. N. Figgis, *Political Thought from Gerson to Grotius: 1414–1625* (Cambridge University Press, 2011) as well as R. Koebner, *Empire* (Cambridge University Press, 1966), esp. Chapter 2.

[2] In antiquity, the idea of 'international law' begins inside the history of the *ius gentium*. It is associated with 'natural law', that is: the law that is universally valid because it applies to all human beings. Roman legal theory conceptually contrasts it to the 'civil law'. The latter applies within particular civil societies, whereas the *ius gentium* applies to all societies as *ius commune* (Gaius, *The Institutes*, trans. W. M. Gordon and O. F. Robinson (Duckworth, 1988)). Unlike our modern understanding, the *ius gentium* is consequently *not* the law between civil societies (or states). The *ius gentium* is the common law of mankind that nonetheless steps into the background whenever a society has chosen 'its' domestic law. This conception of *ius gentium* identifies the latter with *private* international law; it is the law that applies to relations with foreign individuals (cf. P. Vinogradoff, *Historical Types of International Law* (Brill, 1923), 25).

[3] W. Grewe, *The Epochs of International Law* (De Gruyter, 2000), 25. See also R. Tuck, *The Rights of War and Peace* (Oxford University Press, 2001).

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

is the defining characteristic of the modern state, there could be no higher 'public' authority.

What then are the normative foundations of modern international law? How could international norms be 'laws' if there was no 'government' above the states? Could there be a 'positive' international law; or was the latter simply dissolved into natural law? These questions gained prominence in the seventeenth century,[4] and come to be heavily debated in the eighteenth century. The latter thereby represents a 'Sattelzeit': a time of semantic reformation in which many pre-modern concepts are redefined so as to receive their modern meaning.[5] Within that century, we thus find *both* older and newer conceptions of the normative foundations of international law coexisting (a coexistence that is lost in the nineteenth century).[6] This parallel existence of old and new ideas will be discussed in section II. It explores the ambivalent foundations of international law through three – contrasting – common topoi. The first reaches back to a (metaphysical) world republic that 'authorises' all positive international law; the second conception grounds international law solely in the consent of sovereign states, while a third conception defends the idea of 'civil law' between states through a federal foundation.

The most sophisticated combination of all three conceptions has emerged in the writings of Immanuel Kant. Originally disregarded as a legal philosopher, Kant's ideas on the foundations of (inter)national law have regained enormous importance in the twentieth century.[7] Section III explores his – changing – views, which in themselves reflect the unsettled nature of eighteenth-century thought. Originally endorsing the idea that world peace could only be achieved through the creation of a world

[4] H. Steiger, 'Völkerrecht' in O. Brunner et al. (eds.), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 9 vols. (Klett-Cotta, 2004), VII, 97, 110: 'Das Verhältnis von "ius naturae" und "ius gentium" bleibt begrifflich-theoretisch letzten Endes offen. Weder den Spaniern noch Grotius gelingt eine endgültige Klärung. Sie geben dem Naturrecht eindeutig den Vorrang.' For the emergence and development of early modern natural rights theories, see R. Tuck, *Natural Rights Theories* (Cambridge University Press, 1979).

[5] On the importance of the eighteenth century as a 'Sattelzeit', see R. Kosselleck, 'Einleitung' in O. Brunner et al. (eds.), *Geschichtliche Grundbegriffe: Historisches Lexikon zut politisch-sozialen Sprache in Deutschland*, 9 vols. (Klett-Cotta, 2004), I, xv.

[6] H. Steiger, 'Völkerrecht und Naturrecht zwischen Christian Wolff und Adolf Lasson' in H. Steiger (ed.), *Von der Staatengesellschaft zur Weltrepublik?* (Nomos, 2009), 143: 'Seit dem Ende des 18. Jahrhunderts verlagerte sich das Gewicht immer mehr auf die Darstellung des positiven "Europäischen Völkerrechts"; am Ende unsere Epoche werden Lehrbücher des positiven "Völkerrechts" das Bild beherrschen.'

[7] For a revival of Kantian thought, see especially J. Rawls, *A Theory of Justice* (Harvard University Press, 2005); as well as J. Habermas, *The Divided West* (Polity Press, 2006).

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

republic, Kant subsequently settled on a federation of states as the foundation of international law. The reasons behind this move will be explored in section IV, which also discusses the 'antinomies' of international right and the obstacles to the creation of a compulsory international law. Finally, section V analyses the idea of a 'permissive law' as a mediating device between the ideal and the real world of international society.

II Foundations of International Law: Three Topoi

Having lost the metaphysical certainties of the past, all early modern scholars of international law battle to establish normative foundations for the new 'law of nations'. What is the relationship between natural law and 'positive' international law? While Grotius allows for a 'natural' and 'positive' ('voluntary') international law,[8] Hobbes famously denied the existence of any 'positive' (external) international law by seeing international law as part of the (non-enforceable) natural law of the 'state of nature'.[9] By the early eighteenth century, the legal validity of 'positive' international law had indeed become a major philosophical problem. For if 'positive' international law existed, what was its relation to 'national law' and what was the 'reason' behind its (presumed) status as 'law'? Three very different answers to this quest for the normative foundations of international law are offered in the eighteenth century. These three answers reverberate throughout that century, and only in the following century would one solution come to dominate over the others.[10]

A 'Civil' Foundations: Wolff and the World Republic

A famous eighteenth-century attempt to provide a normative foundation for 'positive' international law is made in the work of Christian Wolff.[11] Wolff defines international law as 'the science of that law which nations or

[8] For the ambivalent position of Grotius in particular, see P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (Presses Universitaires de France, 1983).

[9] T. Hobbes, *Leviathan*, ed. R. Tuck (Cambridge University Press, 1996), 244: '[T]he Law of Nations, and the Law of Nature, is the same thing … [a]nd the same Law, that dictateth to men that have no Civil Government, what they ought to do, and what to avoid in regard to one another, dictateth the same to Common-wealths, that is, to the Consciences of Soveraign Princes, and Soveraign Assemblies; there being no Court of Natural Justice, but in the Conscience onely; where not Man, but God raigneth.'

[10] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2010).

[11] C. Wolff, *Jus Gentium Methodo Scientifica*, trans. J. H. Drake (Oxford University Press, 1934 [1749]).

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

peoples use in their relations with each other and of the obligations corresponding thereto'.[12] Nations are here regarded as individual persons living in a 'state of nature'; and, originally, they 'used none other than natural law; therefore the law of nations is originally nothing except the law of nature applied to nations'.[13] This natural law is seen to constitute the 'necessary law of nations' or 'internal law of nations' because it 'binds nations in conscience'.[14] This law is said to be immutable,[15] and it is complemented by a changing 'positive' international law that externally imposes obligations on the modern state.

What is the normative foundation of this positive law; and whence does its 'legal' nature come from? In the famous words of Wolff, it is this:

> Nature herself has established society among all nations and binds them to preserve society. For nature herself has established society among men and binds them to preserve it. Therefore, since this obligation, as coming from the law of nature, is necessary and immutable, it cannot be changed for the reason that nations have united into a state. Therefore society, which nature has established among individuals, still exists among nations and consequently, after states have been established in accordance with the law of nature and nations have arisen thereby, nature herself also must be said to have established society among all nations and bound them to preserve society. *If we should consider that great society, which nature herself has established among men, to be done away with by the particular societies, which men enter, when they unite into a state, states would be established contrary to the law of nature, in as much as the universal obligation of all toward all would be terminated; which assuredly is absurd.*[16]

Wolff thus presupposes the existence of a world state behind international law.[17] What is the purpose of this world state (*civitas maxima*)? The metaphysical fiction is introduced to explain changes in and impose obligations under international law. To 'concretise' and 'externalise' universal natural law,[18] a universal positive law is required; and this positive law can only be

[12] Ibid., §1.
[13] Ibid., §3.
[14] Ibid., §4.
[15] Ibid., §5.
[16] Ibid., §7 (emphasis added).
[17] In the words of N. Greenwood Onuf, '*Civitas Maxima*: Wolff, Vattel and the Fate of Republicanism' (1994) 88 *AJIL* 280, 296: 'Only by locating the *civitas maxima* at the apex of an ascending series of associations prescribed by the theory of corporations can we make sense of this proposition. The contemporary idea of an impersonal world-state connecting directly with individuals is irrelevant and, for Wolff, inconceivable … Wolff's model is the *respublica composita*.'
[18] For the complex relationship between the necessary (natural) law and the positive (voluntary) law, see Wolff, *Jus Gentium Methodo Scientifica* (above n. 11), §22: 'The voluntary

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

adopted by a world state that gives it a commanding 'will'. Only a (hypostasised) world state can adopt 'voluntary' world civil law.

Within this world state, '[a]ll nations are understood to have come together into a state, whose separate members are separate nations, or individual states'.[19] This 'supreme state' is 'a kind of democratic government';[20] and the world state is entitled to adopt (positive) 'civil laws'.[21] These civil laws are adopted by the (fictitious) majority of the states,[22] as represented by a (fictitious) ruler of the supreme state.[23] These voluntary laws of nature are legally binding and can be externally enforced:

> In the supreme state the nations as a whole have a right to coerce the individual nations, if they should be unwilling to perform their obligation, or should show themselves negligent in it. For in a state the right belongs to the whole of coercing the individuals to perform their obligation, if they should either be unwilling to perform it or should show themselves negligent in it. Therefore since all nations are understood to have combined into a state, of which the individual nations are members, and inasmuch as they are understood to have combined in the supreme state, the individual members of this are understood to have bound themselves to the whole, because they wish to promote the common good, since moreover from the passive obligation of one party the right of the other arises; therefore the right belongs to the nations as a whole in the supreme state also of coercing the individual nations, if they are unwilling to perform their obligation or show themselves negligent in it.[24]

law of nations is, therefore equivalent to the civil law, consequently it is derived in the same manner from the necessary law of nations, as we have shown that the civil law must be derived from the natural law in the fifth chapter of the eighth part of "The Law of Nature"."

[19] Ibid., §9.

[20] Ibid., §10 and §19. The latter paragraph continues: 'The supreme state is a kind of democratic form of government. For the supreme state is made up of the nations as a whole, which as individual nations are free and equal to each other. Therefore, since no nation by nature is subject to another nation, and since it is evident of itself that nations by common consent have not bestowed the sovereignty which belongs to the whole as against the individual nations, upon one or more particular nations, nay, that it cannot even be conceived under human conditions how this may happen, that sovereignty is understood to have been reserved for nations as a whole. Therefore, since the government is democratic, if the sovereignty rests with the whole, which in the present instance is the entire human race divided up into peoples or nations, the supreme state is a kind of democratic form of government.'

[21] Ibid., §11. Within the Wolffian system of divided sovereignty, it is thus possible to envisage an international criminal law because states are entitled to 'punish' others (ibid., §272): 'The right belongs to every nation to punish another nation which has injured it.'

[22] Ibid., §20.

[23] Ibid., §21.

[24] Ibid., §13.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

But can states be forced to obey the world law? Wolff answers this question affirmatively by means of a revolutionary innovation: the idea of divided sovereignty: 'Some sovereignty over individual nations belongs to nations as a whole. For a certain sovereignty over individuals belongs to the whole in a state.'[25]

This 'public' and 'universal' part of international law is joined by two 'private' sources of (positive) international law. First: there is the 'stipulative' law founded on the express consent of the states, and which arises from international treaties;[26] and second, there is customary law based on the tacit consent of states.[27] Yet importantly: neither of these 'sources' constitute real sources of international law as law. Not only are the stipulations 'not universal but particular'; both international agreements and custom simply 'cannot be considered as the law of nations' 'just as the private law for citizens … is considered as having no value at all as civil law for a certain particular state'.[28] The 'private' law sources of international law are therefore not producing 'real' law. For what is 'law' within the law of treaties are only the binding norms that force states to obey their promises, and these rules form part of the voluntary law of nations (Figure 1).

B Consensual Foundations: Vattel and Positive Law

Superficially, Vattel stands to Wolff like an apprentice to his master; yet Vattel not only 'de-scholasticises' Wolff's work;[29] he famously derives, while taking over much of Wolff's work, a number of very different conclusions.[30]

The central plank within Vattel's philosophy of international law is the postulated sovereignty of each state: '[t]he law of nations is the law of sovereigns';[31] and a state that wishes to be part of international society must be a sovereign state.[32] From this idea stems the outright rejection of

[25] Ibid., §15.
[26] Ibid., §23.
[27] Ibid., §24.
[28] Ibid., §23.
[29] For an excellent analysis of the methodological shift between Wolff and Vattel, see E. Tourme-Jouannet, *L'Emergence doctrinale du droit international classique: Emer de Vattel et l'Ecole de droit de la nature et des gens* (Pedone, 1998), 105 et seq.
[30] E. de Vattel, *The Law of Nations*, trans: J. Chitty (Johnson & Co., 1883 [1758]).
[31] Ibid., Preface, xvi.
[32] Ibid., Book I, §4: 'To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it governs itself by its own authority and laws.'

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

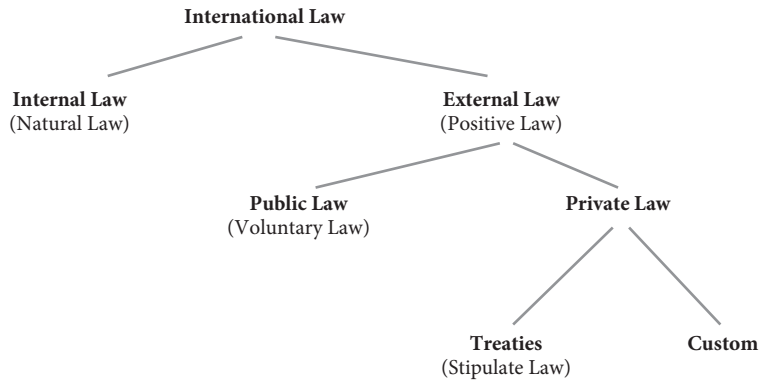

Figure 1.1 Wolff's Sources of International Law

a 'civil law' between states; and this famous rejection is announced at the very beginning in Vattel's 'Law of Nations' (1758):

> In the very outset of my work, it will be found that I differ entirely from Monsieur Wolf[f] in the manner of establishing the foundations of that species of law of nations which we call voluntary. Monsieur Wolf[f] deduces it from the idea of a great republic (*civitatis maximæ*) instituted by nature herself, and of which all nations of the world are members. According to him, the voluntary law of nations is, as it were, the civil law of that great republic. This idea does not satisfy me; nor do I think the fiction of such a republic either admissible in itself, or capable of affording sufficiently solid grounds on which to build the rules of the universal law of nations, which shall necessarily claim the obedient acquiescence of sovereign states. I acknowledge no other natural society between nations than that which nature has established between mankind in general. It is essential to every civil society (*civitati*) that each member have resigned a part of his right to the body of the society, and that there exist in it an authority capable of commanding all the members, of giving them laws, and of compelling those who should refuse to obey. Nothing of this kind can be conceived or supposed to subsist between nations. Each sovereign state claims, and actually possesses an absolute independence on all the others.[33]

Vattel here radically abandons the Wolffean foundation of positive international law: the (hypostasised) world state. While the establishment of civil society between men is seen as a necessary element to create binding law, 'civic association is very far from being equally necessary between

[33] Ibid., Preface, xiii.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

nations, as it was between individuals': 'We cannot, therefore, say that nature equally recommends it, much less that she has prescribed it.'[34] And while there exists a mutual dependence between nations, nature 'has not imposed on them any particular obligation to unite in civil society'.[35] In other words: while there is a world *society*, there is no need for a world *state*; and while there thus exists a *natural* international law, there cannot be a *civil* international law.[36]

What, then, are the sources of international law? Apart from natural-law norms, which Vattel calls (following Wolff) the 'necessary law of nations',[37] he also acknowledges a 'voluntary law of nations'.[38] But in the absence of a – fictitious – world state adopting 'voluntary' laws binding on all states, how would Vattel define the relationship between the – unchanging – natural law and the – changing – positive international law? His answer, while not always clear, is revolutionary. The source of all *positive* international law lies in the consent of all states: 'I say, that all these alterations are deducible from the natural liberty of nations[.]'[39] For Vattel, all 'positive' international law – including voluntary law – is consensual law:

> These three kinds of law of nations, the Voluntary, the Conventional, and the Customary, together constitute the Positive Law of Nations. For they all proceed from the will of Nations; the Voluntary from their *presumed consent*, the Conventional from an *express consent*, and the Customary from *tacit consent*; and as there can be no other mode of deducing any law from the will of nations, there are only these three kinds of Positive Law of Nations.

[34] Ibid., Preface, xiv. Vattel continues (ibid.): 'We cannot, therefore, say, that nature equally recommends it, much less that she has prescribed it. Individuals are so constituted, and are capable of doing so little by themselves, that they can scarcely subsist without the aid and the laws of civil society. But, as soon as a considerable number of them have united under this same government, they become able to supply most of their wants; and the assistance of other political societies is not so necessary to them as that of individuals is to an individual … States conduct themselves in a different manner from individuals. It is not usually the caprice or blind impetuosity of a single person that forms the resolutions and determines the measures of the public: they are carried on with more deliberation and circumspection; and, on difficult or important occasions, arrangements are made and regulations established by means of treaties.'

[35] Ibid., Preface, xiii.

[36] For an excellent discussion of the relation between Vattel and Wolff here, see P. Haggenmacher, 'Le Modèle de Vattel et la discipline du droit international' in P. Haggenmacher (ed.), *Vattel's International Law from a XXIst Century Perspective* (Nijhoff, 2012), 3 esp. 38–46.

[37] Vattel, *The Law of Nations* (above n. 30), Preliminaries, §7.

[38] Ibid., Preliminaries, §21.

[39] Ibid., Preface, xiv.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

> We shall be careful to distinguish them from the Natural or Necessary law of nations, without, however, treating of them separately. But after having, under each individual head of our subject, established what the Necessary law prescribes, we shall immediately add how and why the decisions of that law must be modified by the Voluntary law; or (which amounts to the same thing in other terms) we shall explain how, in consequence of the liberty of nations, and pursuant to the rules of their natural society, the external law which they are to observe towards each other differs in certain instances from the maxims of the internal law, *which nevertheless remains always obligatory in point of conscience*.[40]

All international law, including voluntary law,[41] is here effectively 'privatised'.[42] Not only do the sources of positive international law become (almost) equal in status, Vattel (almost) completely abandons the idea of an 'external' compulsory international law beyond the consent of each state.[43] The voluntary law is no longer a 'civil' law that allows states to be 'punished'.[44] It is that law of general state practice that (academic) commentators consider 'as the best available evidence of consent that might

[40] Ibid., Preliminaries, §27 (emphasis added).

[41] The concept of voluntary law is however extremely complex and multilayered. Koskenniemi describes it as Vattel's 'most central, yet most puzzling notion' in M. Koskenniemi, 'International Community: From Dante to Vattel' in P. Haggenmacher (ed.), *Vattel's International Law from a XXIst Century Perspective* (Nijhoff, 2012), 51, 73. For analysis of the concept, see also E. Reibstein, 'Die Dialektik der souveränen Gleichheit bei Vattel' (1958) 19 *ZaöRV* 607.

[42] In this sense also: Steiger, 'Völkerrecht und Naturrecht' (above n. 6), 148: 'Durch den Wegfall jeder Art von Staatengemeinschaft wird zudem das naturrechtliche Völkerrecht individualistisch.'

[43] In the words of F. S. Ruddy, *International Law in the Enlightenment* (Oceana Publications, 1975), 313: '[T]he voluntary Law of Nations reflected state practice, especially in reference to commerce and commercial treaties; precedence, self-defence and intervention; the prerogatives of territorial sovereignty; the rights of necessity and of innocent use; and in the importance, generally, of treaties to international relations.'

[44] Vattel, *The Law of Nations* (above n. 30), Book II, §7: 'It is strange to hear the learned and judicious Grotius assert that a sovereign may justly take up arms to chastise nations which are guilty of enormous transgressions of the law of nature, *which treat their parents with inhumanity like the Sogdians, which eat human flesh as the ancient Gauls, &c.* What led him into this error, was, his attributing to every independent man, and of course to every sovereign, an odd kind of right to punish faults which involve an enormous violation of the laws of nature, though they do not affect either his rights or his safety. But we have shown (Book I. § 169) that men derive the right of punishment solely from their right to provide for their own safety; and consequently they cannot claim it except against those by whom they have been injured. Could it escape Grotius, that, notwithstanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts? Mohammed and his successors have desolated and subdued Asia, to avenge the indignity done to the unity of the Godhead; all whom they termed associators or idolaters fell victims to their devout fury.'

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

reasonably be presumed'.[45] The distinction between a necessary international law and a voluntary international law is thus gradually reduced to 'an endorsement of current practice camouflaged by the supposedly self-enforcing sanction of conscience'.[46] In this respect Vattel is much closer to Hobbes than to Wolff.

C *Federal Foundations: Rousseau and the European Government*

A third recurring theme within eighteenth-century discussions on international law and peace concerns (international) federalism. This third strand acknowledges, like Vattel, the sovereign equality of states that disallows – in the state of nature – a 'civil' law above the state; yet, unlike Vattel, it urges states to 'found' such a civil law through a federal compact between them.

The most elaborate project propagating a federation of states within the eighteenth century is here offered by Saint Pierre;[47] yet his work would only become famous in its Rousseauian 'restatement'.[48] And while Rousseau's 'A Lasting Peace' treats its predecessor with 'utmost freedom',[49] its central *problématique* remains the same: how to combine internal welfare within a state with the external warfare between states? If one admits 'that the Powers of Europe stand to each other strictly in a state of war, and that all the separate treaties between them are in the nature rather of a temporary truce than a real peace', how can a 'public Law of Europe' be guaranteed?[50]

The answer Rousseau gives is this:

> If there is any way of reconciling these dangerous contradictions, it is to be found only in such a form of federal Government as shall unite nations by bonds similar to those which already unite their individual members, and place the one no less than the other under the authority of the Law. Even apart from this, such a form of Government seems to carry the day over all others; because it combines the advantages of the small and the large

[45] N. Greenwood Onuf, '*Civitas Maxima*: Wolff, Vattel and the Fate of Republicanism' (above n. 17), 300. And see now: Article 38(1)(d) Statute of the International Court of Justice.

[46] T. J. Hochtstrasser, *Natural Law Theories in the Enlightenment* (Cambridge University Press, 2000), 181.

[47] C.-I. Castel de Saint-Pierre, *Projet pour rendre la paix pérpetuelle en Europe* (Utrecht, 1713).

[48] J.-J. Rousseau, *A Lasting Peace Through the Federation of Europe*, trans. C. E. Vaughan (Constable and Co., 1917).

[49] This was the opinion of C. E. Vaughan (ibid., 7): 'Rousseau has treated his original with the utmost freedom.'

[50] Ibid., 47.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

> State, because it is powerful enough to hold its neighbours in awe, because it upholds the supremacy of the Law, because it is the only force capable of holding the subject, the ruler, the foreigner equally in check.[51]

But how can this federal government be established? Contrasting it to the 'free and voluntary association' that already existed among the states of Europe, 'an authentic federation' is characterised as 'a genuine Body politic' that:

> must have a Legislative Body, with powers to pass laws and ordinances binding upon its members; it must have a coercive force capable of compelling every State to obey its common resolves whether in the ways of command or prohibition; finally, it must be strong and firm enough to make it impossible for any member to withdraw at his own pleasure the moment he conceives his private interest to clash with that of the whole body.[52]

The natural bond between the states of Europe consequently had to be transformed into a 'Constitution of the Federation of Europe'; and the latter would contain five articles:

> By the first, the contracting sovereigns shall enter into a perpetual and irrevocable alliance, and shall appoint plenipotentiaries to hold, in a specified place, a permanent Diet or Congress, at which all questions at issue between the contracting parties shall be settled and terminated by way of arbitration or judicial pronouncement. By the second shall be specified the number of the sovereigns whose plenipotentiaries shall have a vote in the Diet; those who shall be invited to accede to the Treaty; the order, date and method by which the presidency shall pass, at equal intervals, from one to another; finally the quota of their respective contributions and the method of raising them for the defrayal of the common expenses.
>
> By the third, the Federation shall guarantee to each of its members the possession and government of all the dominions which he holds at the moment of the Treaty, as well as the manner of succession to them, elective or hereditary, as established by the fundamental laws of each Province … By the fourth shall be specified the conditions under which any Confederate who may break this Treaty shall be put to the ban of Europe and proscribed as a public enemy … Finally, by the fifth Article, the plenipotentiaries of the Federation of Europe shall receive standing powers to frame – provisionally by a bare majority, definitively (after an interval of five years) by a majority of three-quarters – those measures which, on the instruction of their Courts, they shall consider expedient with a view to the greatest possible advantage of the Commonwealth of Europe and of its members, all and single.[53]

[51] Ibid., 38–9.
[52] Ibid., 59–60.
[53] Ibid., 61–4.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

This constitutional scheme allows for 'civil' laws for the European federation that are adopted by a qualified majority of 'plenipotentiaries' on behalf of their states. These laws could be enforced by executive and judicial means; and the advantages of such a federal government are clear and numerous – both for each nation as well as the whole of Europe.[54]

Yet such a federal scheme has never been adopted. Why? For Rousseau, the reason is not that it is not good but rather that 'it was too good to be adopted'.[55] In light of the 'excessive self-love' of kings,[56] '[n]o Federation could ever be established except by revolution'.[57] This conclusion leaves Rousseau with the pessimism that undermines the very desirability of the federal project. For if the only way to establish a federal Europe is revolution, the question arises 'whether the League of Europe is a thing more to be desired or feared', because '[i]t would perhaps do more harm in a moment than it would guard against for ages'.[58]

We shall see that the same idea would also cross the mind of the most important legal philosopher of the eighteenth century: Immanuel Kant.

III Kant and the 'Unsettled' Foundations of International Law

What is Kant's philosophical position towards the nature and foundation of international law? In the early post-critical period, Kant lays out three themes that are characteristic to his legal writings. First, he expressly links the establishment of a perfect 'national' constitution 'to the problem of a law-governed external relationship with other states'; indeed: the former is 'subordinate' to the latter 'and cannot be solved unless the latter is also solved'.[59] Second, as the solution for the lawful condition between states, he suggests 'a federation of peoples';[60] and, third, since that federation is not embedded in natural law, it must be positively 'founded'.[61]

[54] Ibid., 88–90.
[55] Ibid., 111.
[56] Ibid., 94–5.
[57] Ibid., 112.
[58] Ibid. In the famous footnote in Book III, Chapter 15 of his 'Social Contract', Rousseau had promised a deeper analysis of foreign relations and the political philosophy of 'confederation' in a later work – yet he never did. For a summary of his international law writings, see however: S. Hoffmann and D. P. Fidler, *Rousseau on International Relations* (Clarendon Press, 1991).
[59] I. Kant, *Political Writings*, ed. H. Reiss (Cambridge University Press, 1991), 47.
[60] Kant here clearly follows Saint-Pierre and Rousseau, see G. Cavalar, *Pax Kantiana: Sytematisch-historische Untersuchung des Entwurfs 'Zum Ewigen Frieden' (1795) von Immanuel Kant* (Böhlau, 1992), 33.
[61] Like Hobbes, and unlike Wolff, the natural state is thus one of war, and peace therefore needs to be 'positively' founded. However, it is in my view, wrong to argue that Kant's

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

But what sort of federation he has in mind changes with the course of time. There are different and contradictory answers that the Königsberg philosopher gives. One answer applies, by analogy, the solution found for civil society to international society and thus argues in favour of a 'cosmopolitan constitution' establishing a federation above the individual states (A). But later on, this positive idea is replaced with a 'negative' substitute: an international federation of free states without the power to coerce (B). Both of these solutions are, while indebted to its immediate predecessors, original; yet they also show that Kant was himself a child of the 'unsettled' eighteenth century.

A The 'Cosmopolitan Constitution' and the World Republic

For Kant, international peace can only be established in a 'federation of peoples'. In his 'Idea of a Universal History with a Cosmopolitan Purpose' (1784), this is a federation 'in which every state, even the smallest, could expect to derive security and rights not from its own power or its own legal judgment, but solely from this great federation'.[62] The latter is 'a united power', whose united will adopts world laws.[63] Expressly referring to the plans by Abbé St Pierre and Rousseau, this *institutional* solution is justified by the suffering states can inflict on each other. It is this suffering that 'must force the states to make *exactly* the same decision (however difficult it may be for them) as that which man was forced to make, equally unwilling, in his savage state – the decision to renounce his brutish freedom and seek calm and security within a law-governed constitution'.[64] This solution is 'like a civil commonwealth' with a 'civil constitution', because 'nature aimed at a perfect civil union of mankind'.[65]

international law philosophy is 'an extremely Hobbesian account of the international state of nature' (Tuck, *The Rights of War and Peace* (above n. 3), 215). This seriously underestimates the intellectual debts to Wolff, Vattel and Rousseau, while it also downplays the originality of Kant's own solution in founding the normativity of international law. For the relationship between Kant and Rousseau in the context of international law, see in particular: O. Asbach, 'Internationaler Naturzustand und Ewiger Friede: Die Begründung einer rechtlichen Ordnung zwischen Staaten bei Rousseau und Kant' in D. Hüning and B. Tuschling (eds.), *Recht, Staat und Völkerrecht bei Immanuel Kant* (Duncker & Humblot, 1998), 203.

[62] I. Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' in *Political Writings*, ed. H. Reiss (Cambridge University Press, 1991), 41, at 47.

[63] Ibid.

[64] Ibid., 48 (emphasis added).

[65] Ibid., 48–51.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

Kant's answer to creating 'international' (better: cosmopolitan) law and peace thus lies in projecting the 'civic' solution into the international arena of states. States must exit the (international) state of nature and positively found a 'cosmopolitan system' in which a 'united power' legislates, executes and adjudicates over the individual 'citizens'.

This institutional solution is subsequently taken up and (minimally) developed in 'Theory and Practice' (1793):

> On the one hand, universal violence and the distress it produces must eventually make a people decide to submit to coercion which reason itself prescribes (i.e. the coercion of public law), and to enter into a *civil* constitution. And on the other hand, the distress produced by the constant wars in which the states try to subjugate or engulf each other must finally lead them, even against their will, to enter into a *cosmopolitan* constitution. Or if such a state of universal peace is in turn even more dangerous to freedom, for it may lead to the most fearful despotism (as has indeed occurred more than once with states which have grown to large), distress must force men to form a state which is not a *cosmopolitan* commonwealth under a single ruler, but a lawful federation under a commonly accepted international right.[66]

The passage contains a number of key confirmations. First, Kant advocates the adoption of a 'civil constitution' that is a 'cosmopolitan constitution'. Second, this cosmopolitan constitution will involve 'the coercion of public law'. Third, because the establishment of a world state is potentially dangerous for freedom if it is a state under a single ruler (universal monarchy), Kant prefers a 'federation', that is: a republican commonwealth. The latter is not the 'loose' federation of his late work, but 'a state of international right, based upon enforceable public laws to which each state must submit (by analogy) with a state of civil or political right among individual men'.[67] And to reinforce his plea for public laws, Kant not only ridicules the idea of the invisible hand in discourses on the international balance of powers,[68] he also holds – against Rousseau – that the theory of the federal world state is (still) possible in practice: 'For my own part, I put my trust in the theory of what the relationships between men and states *ought to be* according to the principle of right. It recommends to us earthly gods that maxim that we should proceed in our disputes in such a way that a universal federal

[66] I. Kant, 'On the Common Saying: "This May Be True in Theory, but It Does Not Apply in Practice"' in *Political Writings*, ed. H. Reiss (Cambridge University Press, 1991), 61, 90.

[67] Ibid., 92.

[68] Ibid: 'For a permanent universal peace by means of a so-called *European balance of power* is a pure illusion, like Swift's story of the house which the builder had constructed in such perfect harmony with all the laws of equilibrium that it collapsed as soon as a sparrow alighted on it.'

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

state may be inaugurated, so that we should therefore assume that it *is possible* (*in praxi*)'.[69]

In conclusion: a first solution combines the idea of the world state – presumed by Wolff to be naturally existing – with the Rousseauian idea that such a state needs to be positively founded; and this founded cosmopolitan state would have to be a 'federation' – presumably along the lines that Rousseau had drafted, that is: a federation that acknowledges the continued political existence of individual states as moral persons; yet one that can enforce its laws through the right to be prosecuted through a 'punitive' war.

B The Abandonment of the World Republic?

Only two years after 'Theory and Practice', Kant published his longest essay on the foundations of international law: 'Perpetual Peace: A Philosophical Sketch' (1795).[70] Written in the style of a peace *treaty* between states, the very form of the essay already signals a fundamental shift in his conception of the normative foundation of international law. No longer is international law founded on a cosmopolitan constitution, international law needs to be founded on the voluntary agreement between free states.

Kant's peace treaty has four components: the preliminary articles, the definite articles, the supplements and the appendices. The preliminary articles are designed to establish the preconditions for peace.[71] They are

[69] Ibid.

[70] I. Kant, 'Perpetual Peace: A Philosophical Sketch' in *Political Writings*, ed. H. Reiss (Cambridge University Press, 1991), 93. The essay is generally seen to be Kant's personal response to the Peace Treaty of Basel (1795), concluded by Prussia and revolutionary France. In the Treaty, Prussia ceded territory west of the Rhine so as to be permitted to swallow a part of Poland (to be shared with Austria and Russia). For an analysis of the third 'Polish Partition', see V. Kattan, 'To Consent or Revolt? European Public Law, the Three Partitions of Poland (1772, 1793, and 1795) and the Birth of National Self-Determination' (2015) 17 *Journal of the History of International Law* 247.

[71] What do they state? The first article clarifies that a temporary peace to prepare for war is not valid ('No conclusion of peace shall be considered valid as such if it was made with a secret reservation of the material for a future war.'). The second article states that a state cannot acquire another one ('No independently existing state, whether it be large or small, may be acquired by another state by inheritance, exchange, purchase of gift.'), because states are moral persons. The third article stipulates that standing armies are to be gradually abolished, while the fourth article criticises the credit system for financing wars ('No national debt shall be contracted in connection with the external affairs of the state.'). The fifth article prohibits violent interferences into the internal affairs of other states ('No state shall forcibly interfere in the constitution and government of another state.'), and the sixth preliminary article finally outlaws 'dishonourable stratagems' (poisoning and treason) that would undermine the trust of the enemy that a future peace might be possible.

'prohibitive laws'; yet, not all of them are said to be prohibitive in a strict sense.[72] By contrast, the 'definitive articles' positively 'institute' peace and end 'the state of nature, which is rather a state of war'.[73] In discussing these three articles, Kant returns to his first central theme: all law is connected; and here he distinguishes three constitutional levels:

> [T]he postulate on which all the following articles are based is that all men who can at all influence one another must adhere to some kind of civil constitution. But any legal constitution, as far as the persons who live under it are concerned, will conform to one of the three following types:
>
> (1) [A] constitution based on the *civil right* of individuals within a nation (*ius civitatis*).
> (2) [A] constitution based on the *international right* of states in their relationships with one another (*ius gentium*).
> (3) [A] constitution based on *cosmopolitan right*, in so far as individuals and states, co-existing in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*).[74]

All public (positive) law is thus based on three 'constitutions';[75] and the constitutional categories are 'not arbitrary, but necessary': each of them on its own must be realised in order to create peace.[76] The three 'complementary

[72] This is, for example, the case for the second preliminary article. This is a prohibition to treat states as 'objects' capable of possession; and yet, in light of existing state practice, this prohibition is not directly effective. Kant explains: 'prohibitive' laws in a wider sense 'are not exceptions to the rule of justice', but 'allow for some *subjective* latitude according to the circumstances in which they are applied'. Put differently: they 'need not necessarily be executed at once, so long as their ultimate purpose (e.g. the *restoration* of freedom to certain states in accordance with the second article) is not lost sight of'. Delay in applying this prohibition is permitted 'as a means of avoiding a premature implementation which might frustrate the whole purpose of the article' (ibid., 97). Kant here introduces the idea of the 'permissive law', which will be discussed below.

[73] Ibid., 98.

[74] Ibid., 98, *footnote.

[75] On the concept of 'constitution' here, see O. Eberl and P. Niesen, *Immanuel Kant: Zum Ewigen Frieden* (Surkamp, 2011), 208–9: 'Wenn Kant sich am Ende des 18. Jahrhunderts in Friedensschrift und Rechtlehre für den Ausdruck "Verfassung" entscheidet, um den Rechtszustand nicht nur diesseits, sondern auch jenseits der Staaten zu bezeichnen, greift er ein in jüngster Zeit mehrdeutig gewordenes Konzept auf. Im hergebrachten und unspezifischen Sinne bezeichnet "Verfassung" einfach den Gesamtzustand des Gemeinwesens; im neuen, mit der Amerikanischen und der Französischen Revolution eingeführten terminologischen Sinn ist eine Verfassung dagegen ein positives Gesetz, dass die Rechtsbindung aller machthabenden Institutionen festlegt. Während das alte Verständnis ein empirisches ist, ist das neue ein normatives … Sein Verfassungsbegriff für die globale Ordnung ist rechtlich-normativ, aber nicht demokratisch.'

[76] Kant, 'Perpetual Peace' (above n. 70), 99: This classification, with respect to the idea of a perpetual peace, is not arbitrary, but necessary.' See also I. Kant, 'Metaphysical First Principles

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

constitutions' are indeed mutually interlocking; and each of the three definitive articles consequently deals with one constitution:

> Definite Article 1: 'The Civil Constitution of Every State shall be Republican.'
>
> Definite Article 2: 'The Right of Nations shall be based on a Federation of Free States.'
>
> Definite Article 3: 'Cosmopolitan right shall be limited to Conditions of Universal Hospitality.'

Unlike the preliminary articles (which are prohibitive laws), the definitive articles represent prescriptive laws. The first article thereby demands a link between the national and the international constitutions. For the requirement that state constitutions are 'republican' means, inter alia,[77] that the consent of the citizens is required to declare war; and this is seen to guarantee that states will only go to war when absolutely necessary.[78] The second article explains the need for an international constitution as follows:

> Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured. This would mean establishing a *federation of peoples*. But a federation of this sort would not be the same thing as an international state. For the idea of an international state is contradictory … But peace can neither be inaugurated nor secured without a general agreement between the nations; thus a particular kind of league, which we might call a *pacific federation (foedus pacificum)*, is required … This federation does not aim to acquire any power like that of a state, but merely to preserve and secure the *freedom* of each state in itself, along with that of the other confederated states, although this does not mean that they need to submit to public laws and to a coercive power which enforces them, as do men in a state of nature.[79]

---

of the Doctrine of Right' in *Kant, The Metaphysics of Morals*, ed. M. Gregor (Cambridge University Press, 1996), §43: 'So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undetermined and must finally collapse.' It is therefore misleading to state that 'Kant argues that a peaceful global order can be created only by a cosmopolitan law [*Weltbürgerrecht*] that enshrines the rights of world citizens and replaces classical law among nations [*Völkerrecht*]' (J. Bohmann and M. Lutz-Bachmann, 'Introduction' in J. Bohmann and M. Lutz-Bachmann (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (MIT Press, 1997), 1, 2–3).

[77] On the very complex concept of 'republicanism', see Cavalar, *Pax Kantiana* (above n. 60), 142–56.

[78] On the famous empirical claim that democracies go less to war (with other democracies), see M. Doyle, 'Kant, Liberal Legacies and Foreign Affairs (Part I)' (1983) 12 *Philosophy and Public Affairs* 205–35 and Part II, 323–53.

[79] Kant, 'Perpetual Peace' (above n. 70), 102 and 104.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

The passage seems to significantly depart from Kant's past position in three ways. First, he now denounces the very idea of an 'international state' as a contradiction in terms. *Inter*-national law conceptually means a law *between* nations; and if there were an international state, there would simply be no need for the second definitive article. This leads to a second point. The federation of states cannot have a civil constitution that allows for laws that can be enforced by a superior authority;[80] and there therefore cannot be any 'punitive war'.[81] Finally, the constitution must be based on the voluntary accession of states.[82]

The third definitive article finally deals with the cosmopolitan constitution. Substantially, it cannot – by subtraction – deal with relations within one state (Article 1), nor with relations between states (Article 2). Cosmopolitan law deals with the relationship between states and non-states. It is defined as 'the right of a stranger not to be treated with hostility when he arrives on someone else's territory'.[83] This right to hospitality is not the '*right of a guest* to be entertained' (asylum), but only the right to present oneself so as to enter into contact.[84] Importantly, this third article contains a prescriptive and a prohibitive element.[85] For while the prescriptive 'shall' positively indicates that there be a cosmopolitan right whose normative foundation appears to lie in the idea of a *civitas maxima*,[86]

[80] This is further spelled out in the 'Doctrine of Right' (above n. 76), §54: 'This alliance must, however, involve no sovereign authority (as in a civil constitution), but only an *association* (federation); it must be an alliance that can be renounced at any time and so must be renewed from time to time.'

[81] Kant, 'Perpetual Peace' (above n. 70), 96: 'A war of punishment (*bellum punitivum*) between states is inconceivable, since there can be no relationship of superior to inferior among them.'

[82] States should gradually crystallise around a federal 'focal point' – but no forceful or permanent adhesion is allowed (ibid., 104): 'For if by good fortune one powerful and enlightened nation can form a republic (which is by its nature inclined to seek perpetual peace), this will provide a focal point for federal association among the states. These will join up with the first one, thus securing the freedom of each state in accordance with the idea of international right, and the whole will gradually spread further and further by a series of alliances of this kind.'

[83] Ibid., 105.

[84] This right of physical *contact* is often identified with a right of economic *contract.* For an extensive discussion of Kant and international trade, see P. Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge University Press, 2012), Chapter 5.

[85] This excellent point is made by Eberl and Niesen, *Immanuel Kant: Zum Ewigen Frieden* (above n. 75), 248.

[86] G. Cavallar, *Kant and the Theory and Practice of International Right* (University of Wales Press, 1999), 59; and see also K. Flikschuh, *Kant and Modern Political Philosophy* (Cambridge University Press, 2000), Chapter 5.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

that right is limited to universal hospitality; and by means of this restriction, Kant indirectly prohibits all forms of imperialism and colonialism between states and non-state 'peoples'.[87]

IV The 'Antinomies' of International Right

There is a central antinomy at the heart of Kant's conception of international law, which he describes in 'Perpetual Peace' as follows:

> There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an international state (civitas gentium), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (so that they reject in *hypothesis* what is true in *thesi*), the positive idea of a world republic cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war.[88]

And in the 'Doctrine of Right', we read:

> Since a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely *provisional*. Only in a universal *association of states* (analogous to that by which a people becomes a state) can rights come to hold *conclusively* and a true *condition of peace* come about. But such a state made up of nations were to extend too far over vast regions, governing it and so too protecting each of its members would finally have to become impossible, while several such corporations would again bring a state of war. So *perpetual peace*, the ultimate goal of the whole right of nations, is indeed an unachievable idea. Still, the political principles directed toward perpetual peace, of entering into such alliances of states, which serve for continual approximation to it, are not unachievable … Such an *association* of several *states* to preserve peace can be called a permanent congress of states, which each neighbouring state is at liberty to join.[89]

[87] Cavallar, *Pax Kantiana* (above n. 60), 227. On Kant and colonialism, see K. Flikschuh and L. Ypi (eds.), *Kant and Colonialism: Historical and Critical Perspectives* (Oxford University Press, 2014).

[88] Kant, 'Perpetual Peace' (above n. 70), 105.

[89] Kant, 'Doctrine of Right' (above n. 76), §61.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

What arguments did Kant employ to explain this antinomy between reason and reality, between theory and practice? Two aspects must here be distinguished. First, Kant employs a series of empirical arguments to explain why nature obstructs the creation of an international state (A); and, second, there exist a number of 'conceptual' or normative reasons why Kant thinks there cannot be an 'international state' (B).

A Empirical Obstacles to a Universal Civic State

For Kant, the *idea* of international law springs from the *empirical* existence of a plurality of states. For there simply would be no need for such a concept if all human beings had, from the beginnings of history, united into *one* general will under *one* constitution creating *one* state.[90] But this has not happened. There thus exists a multitude of peoples having constituted a multitude of states; and it is this *empirical* fact that gives rise to the law of nations, or better: the law *between* states.

But does nature not wish there to be only one state in the end? While 'Theory and Practice' postulated that nature unconditionally wants an international state governed by a civil constitution, the Kantian position has changed after 1795. Kant henceforth identifies the idea of an international state with a 'universal monarchy', whose 'soulless despotism' would 'finally lapse into anarchy' in light of the fact that 'laws progressively lose their impact as the government increases in range'.[91] Geography is here presented as an argument against the creation of (effective) law. But more importantly: nature itself has 'wisely separate[d] the nations' and uses 'two means to separate the nations and prevent them from intermingling – *linguistic* and *religious* differences'.[92] And since the social preconditions for a universal state are not fulfilled, 'unlike that universal despotism which

[90] If the physically possible (!) interaction between all human beings on earth is the reason for the assumption of an original community, why is the physically actual (!) interaction limited to states? The – perhaps – best explanation of this paradox comes from B. Ludwig, *Kants Rechtlehre* (Felix Meiner, Verlag, 2005), 131–2: 'Der *empirische* (mithin zufällige) Sachverhalt, daß der Erwerbende nicht zugleich mit *allen* Erdbewohnern "in ein Praktisches Verhältnis kommt", sondern zunächst nur mit denen, die sich mit ihm aktuel auf *dieselben* äußeren Sachen beziehen, führt dazu, daß, obgleich die *Idee* des allgemeinen Willens selbstverständlich alle praktischen Vernunftwesen einzubeziehen hat, der unmittelbar bewirkte Zustand der vereinigen Willkür nur einen Teil derselben umfaßt. Das – erst im öffentlichen Recht Thema werdende – Phänomen [!] des *Einzel*staates hat folglich seinen systematischen Ursprung in den empirischen Bedingungen der Erwerbung äußerer Sachen, speziell des Bodens.'

[91] Kant, 'Perpetual Peace' (above n. 70), 113.

[92] Ibid., 113–14.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

saps all man's energies and ends in the graveyard of freedom, [perpetual] peace is created and guaranteed by an equilibrium of forces and a most vigorous rivalry'.[93] This rivalry is kept in check by nature, because 'nature also unites nations' under the concept of cosmopolitan right 'by means of their mutual self-interest' through 'the spirit of commerce'.[94]

In essence: the diversity within mankind demands only a degree of unity, and that unity-in-diversity is best preserved in a federation of states. Nature herself would see to this – mixed – result.[95]

B Normative Obstacles against an International State

Why did Kant nevertheless not normatively advocate the idea of a (universal) state? In 'Perpetual Peace', Kant gives two reasons. Analytically, he considers the very idea of an 'international state' as contradictory: 'a number of nations forming one state would constitute a single nation'; '[a]nd this contradicts our initial assumption, as we are here considering the right of nations in relation to one another in so far as they are a group of separate states'.[96] The force behind this argument has often been misjudged.[97] For Kant's 'pure' theory of law, considers the idea of a people or 'nation' in exclusively legal terms. A state and its nation always coincide because a state 'constitutes' the nation (and not the other way around).[98] Because the

[93] Ibid., 114.

[94] Ibid.

[95] This is the essence of the 'First Supplement: On the Guarantee of a Perpetual Peace', where Kant famously writes (ibid., 108): 'Perpetual peace is *guaranteed* by no less an authority than the great artist Nature herself (*natura daedala rerum*).'

[96] Ibid., 102.

[97] For an extensive discussion of this point, Kleingeld, *Kant and Cosmopolitanism* (above n. 84), 59 et seq.

[98] According to this (Hobbesian) view, a multitude constitutes itself as a 'people' or 'nation' through the very act of creating a civil body, that is: a state. The notion of 'Staatsvolk' is here a pleonasm because 'Staat' and 'Volk' always coincide. This contrasts with the 'organic' (or in Kant's terminology: anthropological) view that considers the 'people' as an ethnic or cultural entity that pre-exists the state. The latter view can of course consider an international state of multiple national peoples, like the UK. J. Habermas therefore misreads the passage when he states (*The Divided West* (above n. 7), 127–8): 'In this context, Kant appears to treat "states" not only as associations of free and equal citizens in conformity with the individualism of modern constitutional law, but also in ethical-political terms, that is, as national communities. These collectivities consist of "peoples" or "nations" … that are differentiated from one another by language, relation, and mode of life … On this reading, the "contradiction" resides in the fact that the price the citizens of a world republic have to pay for the legal guarantee of peace and civil liberties would be the loss of the substantive ethical freedom they enjoy as members of a national community organized as an independent nation-state. In fact, this supported contradiction, over which generations of Kant interpreters have

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

latter is defined as a multitude of persons subject to a (sovereign) legislature, it analytically follows that there cannot be an 'inter-national' state but only a cosmopolitan state.

But why does Kant not allow for such a *cosmopolitan* state – a state in which all humanity is united into one nation? Why does he reject 'the positive idea of a *world republic*' in favour of 'the negative substitute in the shape of an enduring and gradually expanding *federation*'? Kant admits that states are under an obligation to leave the state of nature, which is 'a non-rightful condition' that is 'in itself still wrong in the highest degree';[99] yet he accepts that the obligation on states to leave the state of nature is not the same as that imposed on individuals:

> [W]hile natural right allows us to say of men living in a lawless condition that they ought to abandon it, the right of nations does not allow us to say the same of states. For as states, they already have a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right.[100]

And again:

> [The] difference between the state of nature of individual men and of families (in relation to one another) and that of nations is that in the right of nations we have to take into consideration not only the relation of one state towards another as a whole, but also the relations of individual persons of one state towards the individuals of another, as well as toward another state as a whole. But this difference from the rights of individuals in a state of nature makes it necessary to consider only such features as can be readily inferred from the concept of a state of nature.[101]

Unlike the extreme normative pluralism that exists when each private person judges right and wrong in the state of nature, once civil societies have been formed, normative progress through 'unification' has been made. In order to protect the degree of 'public' order already reached, Kant thus

racked their brains, dissolves once we examine the premise underlying the argument. Kant takes the French republic as his model and is forced into an unnecessary conceptual bind by the dogma of the indivisibility of state sovereignty … Had Kant read th[e] conception of "divided" sovereignty from the US model, he would have realised that the "peoples" of independent states who restrict their sovereignty for the sake of a federal government need not scarify their distinct cultural identities.' Habermas is here, in my view, wrong about the 'cultural' conception of Kant's concept of 'people' but he is right in suggesting that Kant cannot perceive a people as being subject to two legislatures.

[99] Kant, 'Doctrine of Right' (above n. 76), §54.

[100] Kant, 'Perpetual Peace' (above n. 70), 104.

[101] Kant, 'Doctrine of Right' (above n. 76), §53.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

considers that there exists a difference between the state of nature between individuals and the state of nature between states:

> The refusal by one State to enter into a civil condition with a particular State in its neighbourhood is not the same as refusing a civil condition between States as such. When, within the state of nature, a random number of persons decide to form a state, they create something ontologically different, namely an internally rightful constituted group of persons – which, as such, simply did not exist beforehand. By contrast, whenever a random number of previously distinct States join a Union of States that is itself similar to a State, nothing ontologically new has been created when compared to what had existed before. For there still exists a plurality of dis-united States – with the only difference that one State has changed its size and internal structure.[102]

In order to protect the 'internal' peace – and normative unification – that has already been achieved within a state, Kant not only prohibits any revolution from within, he also prohibits any other state from interfering into the internal affairs from without.[103] But more than that: while states are under an obligation, like individuals, to leave their state of nature, the means to achieve that end are different. While individuals are entitled to use force to positively 'found' a civil constitution, states are not allowed to establish the international constitution by means of war. (For a war against war is still war – and can never be a 'just war';[104] and even within the state of nature, wars of extermination or subjugation – that is: wars that forcefully merge one state with another – are prohibited.) Kant's legal philosophy here accepts states as distinct normative phenomena, and consequently rejects the violent creation of a world state.[105] Integration between states must thus be integration through law, not integration through war.

[102] J. Ebbinghaus, 'Kants Lehre vom Ewigen Frieden und die Kriegsschuldfrage' in *Gesammelte Aufsätze, Vorträge und Reden* (Olms, 1968), 24, 35 (my translation).

[103] The fifth 'preliminary article' states: 'No state shall forcibly interfere in the constitution and government of another state.'

[104] Kant's 'Doctrine of Right' distinguishes between three 'rights' with regard to war: the right to go to war (§56), the right during war (§57) and the right after war (§58). But importantly: these rights are rights within the state of nature and Kant emphatically denies a (conclusive) 'just war' as a contradiction in terms. It is thus wrong to claim that there is a Kantian theory of just war, and it is also unthinkable for Kant to justify a humanitarian intervention, contra: F. Téson, *A Philosophy of International Law* (Westview Press, 1998), 56: 'The Kantian thesis includes a theory of just war; it is the war waged in defense of human rights.'

[105] W. Kersting, *Kant über Recht* (mentis, 2004), 151: '[E]s kann kein Erlaubnisgesetz der Vernunft zur Gewaltnahme zum Zwecke der Errichtung eines Weltstaates geben, und daher kann sich die Befriedung durch Einzelstaatlichkeit nicht als Befriedung durch

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

What means of leaving the state of nature is suggested? The *exeundum* obligation expresses itself in the idea of a 'social contract' that creates a league of nations. Its single aim is the protection of peace under the territorial status quo.[106] The creation of a 'league' thus means no transfer of sovereign authority (as in a civil constitution); and the league cannot interfere in the states' internal affairs. The social contract between states is thus reduced to 'limit' states' external sovereignty. Kant identifies his idea of a league with a congress of states: 'Only by such a congress can the idea of a public right of nations be realized, one to be established for deciding their disputes *in a civil way, as if by a lawsuit*, rather than in a barbaric way (the way of savages), namely by war.'[107]

What does this 'as if' formula here mean? Negatively, it may mean that the (fictitious) Congress not only lacks legislative and executive powers but also lacks judicial powers.[108] Yet behind the 'as if' formula may equally stand a positive idea that finds a parallel in Kant's treatment of 'republicanism' under constitutional law. For Kant there famously accepts that, regardless of the constitutional arrangements within states,[109] the idea of republicanism can operate even outside a 'republic'. Wherever an (enlightened) monarch governs 'as if' s/he directly represented the people, republicanism is at play; and, in a similar vein, the 'as if' formula with regard to a 'civil law' above the state may thus refer to the idea that even in the absence of a single 'constitutional' moment that establishes a 'world state', the federation of states can act 'in a civil way'. The 'as if' formulation here refers not to a world *government* but to a form of world *governance* that needs to be

Weltstaatlichkeit vervollständigen. Es gibt im Kantischen Vernunftrecht Raum für Staatsgründungsgewalt, aber nicht für Weltstaatsgründungsgewalt.'

[106] Kant, 'Perpetual Peace' (above n. 70), 97. With reference to the second preliminary article Kant writes (ibid.): 'For in the case of the second article, the prohibition only relates to the *mode of acquisition*, which is to be forbidden hereforth, but not to the present *state of political possessions*. For although the present state is not backed up by the requisite legal authority, it was considered lawful in the public opinion of every state at the time of the putative acquisition.'

[107] Kant, 'Doctrine of Right' (above n. 76), §61.

[108] For the opposite view, A. Ripstein, *Force and Freedom* (Harvard University Press, 2009), 229–30: 'Because each nation has neither private purposes nor external objects of choice, the analogue of a rightful condition among states has a court but neither legislature nor executive. Such a court can resolve disputes about boundaries peacefully, but its resolution of disputes is only "as if before a court", because states can resolve their disputes peacefully by accepting the decision of a court as binding.' This interpretation reduces the 'as if' by pointing to the lack of an executive force enforcing a judgment.

[109] With Aristotle, Kant distinguishes between three 'forms of sovereignty' (autocracy/monarchy, aristocracy and democracy); while there exist two forms of government: republican and despotic.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

permanently striven for. In this ideational sense, Kant unconditionally supports the idea (!) of the world state as a regulatory ideal;[110] but doubts that this ideal can ever be realised.[111]

V Excursus: Permissive Law(s) and International Right

The idea of a third class of 'permissive laws' to complement 'prohibitive' and 'prescriptive' laws has a distinctive pre-Kantian lineage. Kant here reacts and acts within an eighteenth-century context;[112] yet his understanding of the concept undergoes a remarkable evolution.[113] We first encounter the idea of a 'permissive law' in 'Perpetual Peace'. In a lengthy footnote that is meant to explain the difference between prohibitive laws in a strict and a wide sense, Kant takes the second preliminary article as his example and states:

> It has hitherto been doubted, not without justification, whether there can be permissive laws (*leges permissivae*) in addition to perceptive laws (*leges praeceptivae*) and prohibitive laws (*leges prohibitivae*). For all laws embody an element of objective practical necessity as a reason for certain actions, whereas a permission depends only upon practical contingencies … [I]n the permissive law contained in the second [preliminary] article above, the initial prohibition applies only to the mode of acquiring a right in the future (e.g. by inheritance), whereas the exception from this prohibition (i.e. the permissive part of the law) applies to the state of political possessions in the present. For in accordance with this permissive law of natural

[110] Kant, 'Perpetual Peace' (above n. 70), 105.

[111] Can the idea of the international state ever be realised? According to Cavallar, *Pax Kantiana* (above n. 60), 209 this is possible if states voluntarily consent to subjecting themselves to compulsory laws; and importantly (ibid., 211): 'Kant kritisiert schließlich nie die freiwillige Stiftung einer kosmopolitischen Republik. Staaten könnten zusätzliche Schritte unternehmen, um über eine Föderation hinauszugehen, die bloß versucht, Kriege zu verhindern.' Yet for Kant, the idea that states as states would be willing agents favouring a process that would undermine their moral existence is unlikely, cf. Kant, 'Perpetual Peace' (above n. 70), 105: 'But since this [the world state based on voluntary association] is not the will of the nations, according to their present conception of international right (so that they reject *in hypothesi* what is true *in thesi*), the positive idea of a *world republic* cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding *federation* likely to prevent law.'

[112] On the 'scholastic' tradition of the idea of 'permissive laws', see B. Tierney, 'Permissive Natural Law and Property: Gratian to Kant' (2001) 62 *Journal of the History of Ideas*, 381; as well as M. Kaufmann, 'Was Erlaubt das Erlaubnisgesetz – und wozu braucht es Kant?' (2005) 13 *Jahrbuch für Recht und Ethik* 195.

[113] For a brilliant discussion of the idea of 'permissive law', see R. Brandt, 'Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre' in R. Brandt (ed.), *Rechtsphilosophie der Aufklärung* (de Gruyter, 1982), 233.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

> right, this present state can be allowed to remain even although the state of nature has been abandoned for that of civil society.[114]

This definition points to a link between 'law' and (moral) 'necessity', which seems to be broken for permissive laws. For certain types of actions, the moral law thus stands at the crossroads: what it prohibits in the future, it may nonetheless allow in the present. Later on, in another lengthy footnote, in the First Appendix to 'Perpetual Peace',[115] we find an explanation of this first definition:

> These are permissive laws of reason, which allow a state of public right to continue even if it is affected by injustice, until all is ripe for a complete revolution or has been prepared for it by peaceful means. For any legal constitution, even if it is only in small measure *lawful,* is better than none at all, and the fate of a premature reform would be anarchy. Thus political prudence, with things as they are at present, will make it a duty to carry out reforms appropriate to the idea of public right. But where revolutions are brought about by nature alone, it will not use them as a good excuse for even greater oppression, but will treat them as a call of nature to create a lawful constitution based on the principles of freedom, for a thorough reform of this kind is the only one which will last.

This second definition reinforces the first one: once we enter civil or international society and the latter (unjustly) 'legalises' a tainted status quo, this is still better than not moving towards some normative uniformisation. Kant thus unconditionally prefers national or international constitutions – even those that only are 'in small measure lawful' – to none at all.

But what is the normative function of permissive laws? An extensive answer is given in the 'Metaphysics of Morals' where Kant associates permissive laws with the 'Postulate of Practical Reason with Regard to Rights'.[116] A permissive law is here characterised as a presumption of legality, which Kant ingeniously uses to explain the rational obligation of each individual to exit the state of nature. And the best way to illustrate this philosophical move is to refer to his complex philosophy of (property) rights. Suffice to say here that Kant's fundamental idea behind (almost) all

[114] Kant, 'Perpetual Peace' (above n. 70), 97.

[115] Ibid., 118.

[116] Kant, 'Doctrine of Right' (above n. 76), §6: 'This postulate can be called a permissive law (*lex permissive*) of practical reason, which gives us an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession. Reason wills that this holds as a principle, and it does this as practical reason, which extends itself *a priori* by this postulate of reason.'

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

of his 'private' or 'natural' law philosophy is to explain how 'acquisitions' of external objects are possible.[117] His solution is that they must be possible because they are extensions of external liberty; and if they are to be possible permanently, there needs to be a 'public' or 'civil' law.[118] An individual that (unilaterally) claims property rights is thus justified in defending this right against everyone else, by means of a permissive law, because the claim to property is an invitation to enter into civil society.

But considering that he accepts that all (property) rights only become conclusive in 'a universal association of states (analogous to that by which a people becomes a state)',[119] why is there no permissive law to force states into entering into an international state? A partial answer to this question was already given above: once individuals have created a plurality of (sovereign) states, the existence of these states – as islands of public law – will itself be protected under a permissive law even if their creation is tainted by illegality. And because international law is defined as a relation *between* states, that is: a relation between moral *persons* and not physical objects, it is clear that 'the idea of the right of nations involves only the concept of an antagonism in accordance with principles of outer freedom by which each can preserve what belongs to it, but not a way of acquiring'.[120] And since states cannot 'acquire' property, the normative obligation on states to enter into a cosmopolitan state is here much lower.[121] The task of international law is thus exclusively to guarantee the coexistence of states in which property

[117] Brandt, 'Das Erlbaubnisgesetz' (above n. 113), 233: 'Die Lehre vom Privatrecht ist eine Theorie des erwerbbaren äußeren Mein und Dein[.]' Kant allows for the idea of 'innate' rights, that is: rights that are original and need not be aquired; yet for him these innate rights do not comprise property.

[118] Unlike Locke, property is not a 'natural right' that can be acquired by a person simply working the land. Such an idea of a 'unilateral' acquisition disregards that rights always impose obligations on others, and that in order to justify these obligations, these others must consent to the obligation imposed on them. For Kant, then, if an individual insists on the idea of 'rightful' property – as opposed to mere possession – it implicitly 'wills' civil society, for the idea of (non-provisional) property cannot be thought without the idea of public law. In claiming property rights, an individual thus insists on founding civil society; and because this idea of public law is a postulate of practical reason, the unilateral acquisition of property is provisionally justified – as long as it is followed by the creation of public law later on.

[119] Kant, 'Doctrine of Right' (above n. 76), §61.

[120] Ibid., §57.

[121] For the same conclusion, Ripstein, *Force and Freedom* (above n. 108), 228: '[A]s Kant understands states, they do not have external objects of choice. The state does not acquire its territory; its territory is just the spatial manifestation of the state. That is why Kant joins other eighteenth-century writers in supposing that the state's territory is more like its body than like its property.'

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

has become 'internally' conclusive, and the way to externally protect this solution is through a voluntary league of nations.

What normatively stabilises this voluntary league? The best answer here returns to the normative connection between internal (constitutional) law and external (international law):

> [A] state which claims immunity from international juridical coercion on the grounds of its juridical sovereignty domestically is for that reason juridically obliged to enter into rightful relations with other states: its very claim to sovereignty domestically obliges it internationally. The juridically sovereign state is a self-enforcer of its international obligations: given its juridical immunity it cannot be compelled by a higher authority but must compel itself. However, though not coercible, the obligation is not for that reason voluntarily incurred or even voluntarily discharged.[122]

A state that does not recognise the (external) sovereignty of other states thus undermines its own claim to (internal) sovereignty. This ingenious solution stands at the heart of Kant's international law: it is a solution that dialectically synthesises the central idea of all classic international law: the sovereign equality of all states.

VI Conclusion

The normative foundations of international law remain debated and unsettled throughout the eighteenth century. Leaving aside the role of natural law, three possible foundations of *positive* international law here compete with each other. The first postulates the existence of a (united) general will within a fictitious world state. The latter can adopt 'voluntary' laws that will be binding on each of the states; and, in accepting binding international laws adopted by an authority above the states, this view must ultimately accept the idea of divided or shared sovereignty.[123] A second view rejects the metaphysical foundations of positive international law altogether and reconstructs the normative nature of international law around the sovereign equality of all states. All positive international law ultimately derives its 'normativity' from the consent of the states; and, while a lingering connection with natural-law theories is retained, this view ultimately leads to the complete 'positivisation' and 'privatisation' of international law.[124]

[122] K. Flikschuh, 'Kant's Sovereignty Dilemma: A Contemporary Analysis' (2010) 18 *Journal of Political Philosophy* 469 at 488.

[123] On this point, see section II(A) above.

[124] According to E. Tourme-Jouannet, *L'Emergence doctrinale du droit international classique* (above n. 29), 423 (my translation): 'Vattel is not one of the fathers of positivism or interstate voluntarism but simply the grand "engineer" of classic international law.'

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

A third view sits in the middle between these two positions. For while it rejects the 'natural' existence of a government above the states, it can envisage a positive (voluntary) law that can be enforced against a state's own will; yet this binding international law must be 'founded' through a federal compact.

All of these three views resurface in the work of Kant – this eighteenth-century prince of legal philosophy. Kant believes, with Wolff, in the *idea* of the world state as the ultimate normative fountain of all law, and this legal 'monism' strikingly contrasts with the legal dualism that would become a hallmark of modern international law;[125] yet, in light of the empirical and normative plurality of states, Kant comes to replace the (unrealisable) ideal of a world republic with the (realisable) idea of a voluntary federation of states. This federation is not 'naturally' given – but must be 'founded'; and without this federation there exists no 'public' international law. However, because states are 'sovereign', any federal union is confined to the 'negative' task of maintaining peace between states and it cannot 'positively' interfere into the 'internal' sphere that belongs to 'state' law. The free federation of states will thus not have a 'government', but the collectivity of the states is tasked to govern 'as if' subject to a civil constitution.

In retrospect, then, the eighteenth century is a battleground of – fascinating – old and new ideas. It is the century in which the 'old' international law dies and the modern international law is born.[126] That new – positive – international law will reach maturity in the next century; and, in many respects, the 'long' nineteenth century is, sadly, still with us – even if the owl of Minerva spread its wings in between two devastating World Wars. The second half of the twentieth century has however

[125] On this development, see only: Koskenniemi, *The Gentle Civilizer of Nations* (above n. 10), and J. von Bernstorff, Chapter 2 in this volume.

[126] The modern phrase 'Westphalian state order', so often found in international relations and (American) legal scholarship, is thus deeply misleading. No one has better said it than Haggenmacher, 'Le Modèle de Vattel et la discipline du droit international' (above n. 36), 48: 'Il ne s'agit nullement de nier l'immense importance politique de la paix de Westphalie qui (avec celle des Pyrénées) marque une césure dans l'histoire européenne en faisant échec aux visées hégémonique de la maison d'Autriche et en instaurant une manière de stabilité confessionnelle. Au demeurant l'objet du congés de paix n'était pas de créer de toutes pièces un nouvel ordre juridique internationale; tout au plus rééquilibrait-on la constitution du Saint-Empire, de manière à affaiblir la position de l'empereur … S'il est vrai qu'avec eux s'ouvrit une nouvelle époque du système des Etats européens qui vit éclore les droit international comme discipline juridique propre, ce n'est pas pour autant à ces traités qu'on le doit. A vrai dire, ceux-ci forment bien le point de départ de ce qu'on appellera au temps de Vattel, à la suite de l'abbé de Mably, "le droit public de l'Europe fondé sue les traits"; mais ceci est toute autre chose que le prétendu "Westphalian Order"… Allant plus loin, il est même permis de se demander si l'on n'a pas indument projeté le modèle de Vattel un siècle en arrière.'

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press

seen a remarkable revival of 'cosmopolitan' ideas, and especially, a return to the international law philosophy of Immanuel Kant. The rise of Kantian ideas and themes can thus today be found in discussions on the United Nations, as well as the European Union.[127]

[127] J. Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2013); as well as R. Schütze, *From International to Federal Market: The Changing Structure of European Law* (Oxford University Press, 2017), Epilogue.

https://doi.org/10.1017/9781316417027.002 Published online by Cambridge University Press