

Legalization of International Politics: On the (Im)Possibility of a Constitutionalization of International Law from a Kantian Point of View

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Abstract

In the debate on the constitutionalization of international law, Kant's work *Toward Perpetual Peace* is the most important point of reference when talking about the intellectual origin and philosophical background of the idea of constitutionalizing international law. But while it is undeniable that Kant called for a juridification of international relations, it is far less clear which form of juridification Kant aims at. In this essay, I want to show that Kant's ultimate ideal of international law is neither a *State of States* nor the *peace federation* (which seems to be commonly accepted), but the *cosmopolitan republic*, that is, a single homogenous world State. Only such a cosmopolitan republic, backed up by enforceable laws, can be called a *constitution* in the Kantian sense. Kant's proposal of a peace federation is nothing but a first step towards this ultimate end.

Though it is not a constitution, this peace federation still constitutes a *rightful condition* insofar as it *firstly* provides the legal framework for international politics to take place in and at the same time *secondly* assumes the moral and professional ability of lawyers and politicians in charge to conduct their decisions according to the ultimate ideal of a constitutional world order. International law in the Kantian sense is – as I will demonstrate – thus nothing but a constitutional *conduct of government*.

Therefore, scholars who call for a constitutionalization of international law in the form of a multi-level legal system or conceive of present regimes, such as the UN, as a constitution are not following Kant in this respect. Under the presumption of sovereign nation States, the only thing we can hope for according to Kant is a *legalization of international politics*.

A. Setting the Stage

Despite all substantial quarrels in regard to the constitutionalization of international law, referring to Kant as an authority on this subject often seems to be something like a truism among political scientists, lawyers and political philosophers involved in this debate. Although it is disputed *which* form of regulation of the interaction among States Kant exactly advocates in his legal and political writings¹ and whether his position is consistent, it is

¹ The main source for Kant's opinion on international law is his text *Toward Perpetual Peace* (1795), but besides this, *Idea for a Universal History from a Cosmopolitan*

taken for granted *that* Kant aims or should have aimed (to be consistent) at least at some form of constitutionalization of international law. Consequently, it is not surprising that many scholars read Kant and the *Kantian Project*² of a peaceful world order, famously outlined in his treatise *Toward Perpetual Peace*, first, as a prototype for the modern international regimes of the League of Nations and later of the United Nations and, second, as a call for the necessity of a constitutionalization of international law.

But, what is this Kantian Project? To cut a long story short: in regard to international law, at least according to Kant's writings since 1795,³ practical reason admittedly prescribes the "world republic",⁴ but – since its establishment is not feasible – there only remains the negative surrogate of the *league of States* instead, by which Kant means an association of sovereign States with means and rules of procedures to settle international conflicts peacefully:

Perspective(1784) [Kant, Idea for a Universal History], *On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice* (1793) [Kant, On the Common Saying] and *The Doctrine of Right* (1797) are important *loci*. Kant's works are – if not otherwise indicated – cited according to: Immanuel Kant, *Practical Philosophy*, ed. by M. J. Gregor (1999). The pagination refers to the German *Academy Edition*.

² This notion is borrowed from J. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', in J. Habermas (ed.), *Der gesplittene Westen* (2004), 113, 114 [Habermas, Konstitutionalisierung].

³ In his legal and political writings (see *supra* note 1), Kant postulates the world republic as the ultimate ideal of practical reason. But Kant's attitude in regard to the feasibility of such a world republic seems to change between 1784 (feasibility of a world order with coercive power on the Member States) and 1795 (feasibility merely of a league of nations without such). See for more details regarding the historical development and context of Kant's peace theory R. Brandt, 'Vom Weltbürgerrecht', in O. Höffe (ed.), *Immanuel Kant: Zum ewigen Frieden* (1995), 133, 137-141 [Brandt, Weltbürgerrecht] and P. Kleingeld, 'Kant's Theory of Peace', in P. Guyer (ed.), *The Cambridge Companion to Kant and Modern Philosophy* (2006), 477, 478-480 [Kleingeld, Theory of Peace]. The existence and details of such a possible shift of Kant's opinion between 1784 and 1795 will be left aside in the present inquiry for I am primarily interested in Kant's final position, that is, his peace theory since 1795.

⁴ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357. Alternative formulations are *state of nations* (*id.*, AA VIII, 354; *id.*, *On the Common Saying*, *supra* note 1, AA VIII, 312), *universal association of states* (*id.*, *Doctrine of Right*, *supra* note 1, AA VI, 350), *cosmopolitan commonwealth* (*id.*, *On the Common Saying*, *supra* note 1, AA VIII, 311), *federation of states* (*id.*, *Idea for a Universal History*, *supra* note 1, AA VIII, 24).

“In accordance with reason there is only one way that states in relation with one another can leave the lawless condition, which involves nothing but war; it is that, like individual human beings, they give up their savage (lawless) freedom, accommodate themselves to public coercive laws, and so form an (always growing) *state of nations (civitas gentium)* that would finally encompass all the nations of the earth. But, in accordance with their idea of the right of nations, they do not at all want this, thus rejecting *in hypothesi* what is correct *in thesi*; so (if all is not to be lost) in place of the positive idea of a world republic only the *negative* surrogate of a *league* that averts war, endures, and always expands can hold back the stream of hostile inclination that shies away from right, though with constant danger of its breaking out.”⁵

Undoubtedly, this can be understood as the blueprint or at least the origin⁶ of the idea of a legal world order exemplary for modern regimes like the League of Nations or the United Nations. But beyond that, as I want to show in this article, it is wrong to claim Kant is advocating a constitutionalization of international law in its narrow sense and it is subsequently wrong to refer to such a constitutionalization as a *Kantian* project. On the contrary: according to Kant’s legal philosophy, the *constitutionalization of international law* is conceptually inconsistent. Under the presumption of sovereign nation States, the only thing we can hope for is a *legalization of international politics*.

⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357.

⁶ Kant’s peace theory has predecessors to whom he himself refers (Kant, *Idea for a Universal History*, *supra* note 1, AA VIII, 24; *id.*, *On the Common Saying*, *supra* note 1, AA VIII, 313), namely, the *Projet pour rendre la paix perpétuelle en Europe* by Abbé Charles-Irénée de Saint Pierre (1713) and the *Extrait du projet de paix perpétuelle de Monsieur l’Abbé de Saint Pierre* (1761) and the *Jugement sur la paix perpétuelle* (1782, posthumously published) both by Jean-Jacques Rousseau. See for more details G. Cavallar, *Pax Kantiana: Systematisch-historische Untersuchung des Entwurfs “Zum ewigen Frieden” (1795) von Immanuel Kant* (1992), 23-38 [Cavallar, *Pax Kantiana*]; J.-C. Merle, ‘Zur Geschichte des Friedensbegriffs vor Kant: Ein Überblick’, in Höffe, *supra* note 3, 31 and K. von Raumer, *Ewiger Friede: Friedensrufe und Friedenspläne seit der Renaissance* (1953) [Raumer, *Ewiger Friede*].

B. Three Misconceptions Concerning Kant's Political and Legal Philosophy

Before outlining what is meant by a *legalization of international politics* (in contrast to a *constitutionalization of international law*) in the Kantian sense and the possible implications of this concept on the current debate on the constitutionalization of international law, let me firstly deal with three falsities, which are common in parts of Kantian research. Not all, but many scholars endorse one or several of the following statements:

1. Because Kant conceives the legal relations among States in analogy to those of individuals in the state of nature, Kant has or (to be consistent) at least should have demanded – to overcome the state of nature – a legal world order in the form of a State of States as the final end of international law, that is, a worldwide republic consisting of nation States instead of persons.
2. Kant himself disapproves of a single, homogenous world State and thinks it is conceptually and empirically impossible.
3. Because of the infeasibility of a constitutional legal world order (regardless of it being a State of States or a single world State), the negative surrogate of a league of nations is Kant's ultimate ideal of international law.

I. The Kantian Project: A Multi-Level Legal World Order?

To scrutinize these convictions we should start with the initial paragraph of the second "Definite Article" of *Toward Perpetual Peace*:

"Nations, as states, can be appraised as individuals, who in their natural condition (that is, in their independence from external laws) already wrong one another by being near one another; and each of them, for the sake of its security, can and ought to require the others to enter with it into a constitution similar to a civil constitution, in which each can be assured of its right. This

would be a *league of nations*, which, however, [must]⁷ not be a state of nations. That would be a contradiction, in as much as every state involves the relation of a *superior* (legislating) to an *inferior* (obeying, namely the people); but a number of nations within one state would constitute only one nation, and this contradicts the presupposition (since here we have to consider the right of *nations* in relation to one another insofar as they comprise different states and are not to be fused into a single state).⁸

Here, Kant considers the relations among States in analogy with those of individuals in the state of nature. As individuals have to enter a rightful condition to overcome the state of nature, nation States as well have to enter a rightful condition (that is, a federation of States) similar to that of a civil society. Some commentators are therefore convinced that Kant *has*⁹ or (to be consistent) *should have*¹⁰ favored a legal world order in the form of a

⁷ Gregor translates: *need not*. This is a common misunderstanding of Kant's German *muss nicht*. Contrary to the contemporary German sense in Kant's text of the 18th century *muss nicht* does not mean *braucht nicht* (in English *need not*), but *darf nicht* (in English *may/must not*). Cf. the entry concerning *müssen* in J. Grimm & W. Grimm, *Deutsches Wörterbuch*, Vol. 6, (1885), 2750-2751.

⁸ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 353.

⁹ See for such an account of Kant B. S. Byrd & J. Hruschka, *Kant's Doctrine of Right: A Commentary* (2010), 188, 196-203 [Byrd & Hruschka, *Kant's Doctrine of Right*]; B. S. Byrd, 'The State as a Moral Person', in H. Robinson (ed.), *Proceedings of the Eighth International Kant Congress Memphis (Volume 1, Part 1, Sections 1-2)* (1995), 171, 178-179 and S. Axinn, 'Kant on World Government', in G. Funke & T. M. Seebohm (eds), *Proceedings of the Sixth International Kant Congress* (1989-1991), 243. Compared with these Kleingeld, *Theory of Peace*, *supra* note 3, 483-488, 496-497; earlier *id.*, 'Approaching Perpetual Peace: Kant's Defense of a League of States and his Ideal of a World Federation', 12 *European Journal of Philosophy* (2004) 3, 304, 312-314, 318-321 [Kleingeld, *Perpetual Peace*] as well as G. Geismann, 'Kants Rechtslehre vom Weltfrieden', 37 *Zeitschrift für philosophische Forschung* (1983) 3, 363, 379-384 [Geismann, *Rechtslehre vom Weltfrieden*] and only recently G. Cavallar, *Kant and the Theory and Practice of International Right* (1999), 120-125 [Cavallar, *International Right*] reach the same conclusion with the difference that they regard the peace federation as a necessary interim stage.

¹⁰ See for such an account of Kant O. Höffe, 'Völkerbund oder Weltrepublik?', in Höffe, *supra* note 3, 109, 114-115, 119-122 [Höffe, *Völkerbund oder Weltrepublik*]; M. Lutz-Bachmann, 'Kants Friedensidee und das rechtsphilosophische Konzept einer Weltrepublik', in M. Lutz-Bachmann & J. Bohman (eds), *Frieden durch Recht: Kants Friedensidee und das Problem einer neuen Weltordnung* (1996), 25, 38-39 [Lutz-

State of States as the final end of international law. This would be a worldwide federative republic consisting of basically sovereign nation States instead of persons and with limited coercive power concerning the international relations. What these authors have in mind is (with differences in detail) a multi-level legal order, for which the nation States would have to give up their sovereignty to a certain extent and transfer it to the world republic.¹¹ From my point of view, such an account of Kant is unjustified because the underlying understanding of Kant's reasoning is wrong. Instead, Kant presents in the cited passage a profound four-step argument *against* a multi-level legal order in the form of a State of States:

- a. Kant in general defines an *analogy* “not as an imperfect similarity of two objects”, but as a structural equivalence, that is, “a perfect similarity of two ratios of totally dissimilar things”.¹² So what are the ratios on which the analogy bears? In all his writings there are only two passages where Kant literally speaks of an analogy of States and individuals:

“No state is for a moment secure from others in either its independence or its property. [...] Now, the only possible remedy for this is a right of nations, based on public laws accompanied by power to which each state would have to submit (by analogy with civil right, or the right of a state, among individuals) [...]”¹³

Bachmann, *Frieden durch Recht*]; T. Carson, ‘Perpetual Peace: What Kant Should Have Said’, 14 *Social Theory and Practice* (1988) 2, 173, esp. 182-184 [Carson, *Perpetual Peace*]; V. M. Hackel, *Kants Friedensschrift und das Völkerrecht* (2000), 74-76 [Hackel, *Kants Friedensschrift*]; likewise P. Koller, ‘Frieden und Gerechtigkeit in einer geteilten Welt’, in R. Merkel & R. Wittmann (eds), *‘Zum ewigen Frieden’: Grundlagen, Aktualität und Aussichten einer Idee von Immanuel Kant* (1996), 213, 220-221 [Koller, *Frieden und Gerechtigkeit*] and Cavallar, *Pax Kantiana*, *supra* note 6, 211-212.

¹¹ See Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 115-119 as an example of such an account. Cf. further in English *id.*, ‘Global Peace through Democratization and a League of Nations? Kantian Scepticism against Kant’, in B. Puri & H. Sievers (eds), *Terror, Peace, and Universalism: Essays on the Philosophy of Immanuel Kant* (2007), 46.

¹² Kant, *Prolegomena to Any Future Metaphysics* (1783), AA IV, 357 [Kant, *Prolegomena*] (translation by the author).

¹³ Kant, *On the Common Saying*, *supra* note 1, AA VIII, 312.

“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.”¹⁴

Here, Kant’s talk of an analogy is linked to the necessity of a rightful condition with enforceable laws in order to guarantee right and peace. The analogy bears on the duty to establish a rightful condition, that is, the transition from a state of externally lawless freedom into a state of externally lawful freedom backed up by enforceable laws. The ratio between individuals in a lawless state of nature and a lawful rightful condition is compared to the ratio of States in a lawless state of nature and a lawful rightful condition: that States should give up their natural freedom for the sake of mutually secured lawful freedom is analogous to the duty of individuals giving up their externally lawless freedom.

- b. For Kant now, any rightful condition in its narrow sense must be a state under enforceable laws:

“So, unless it [sc. the human being] wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter a civil condition.”¹⁵

This applies not only to individuals, but to States as well, when Kant states that

¹⁴ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 350.

¹⁵ *Id.*, AA VI, 312.

“[i]n accordance with reason there is only one way that states in relation with one another can leave the lawless condition, which involves nothing but war; it is that, like individual human beings, they give up their savage (lawless) freedom, accommodate themselves to public coercive laws¹⁶.”

- c. But in such a worldwide rightful condition under coercive laws, the legal coercive power on States would be equivalent to the legal coercive power on the individuals constituting these States. To understand this equation we have to bear in mind that for Kant *sovereignty* belongs to the legislative authority, which is nothing but the *united lawgiving will* of the people:

“Now, a unilateral will cannot serve as a coercive law for everyone [...], since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.”¹⁷

“The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. [...] Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.”¹⁸

¹⁶ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357. Cf. as well *id.*, AA VIII, 354; *id.*, *Doctrine of Right*, *supra* note 1, AA VI, 460 and *id.*, *On the Common Saying*, *supra* note 1, AA VIII, 310-311: “Just as omnilateral violence and the need arising from it must finally bring a people to decide to subject itself to the coercion that reason itself prescribes to them as means, namely to public law, and to enter into a *civil constitution*, so too must the need arising from the constant wars by which states in turn try to encroach upon or subjugate one another at last bring them, even against their will, to enter into a *cosmopolitan constitution* [...].”

¹⁷ Kant, *Doctrine of Right*, AA VI, 256.

¹⁸ *Id.*, AA VI, 313-314. See also *id.*, AA VI, 257, 315-316, 338-339, 372 and at the international level *id.*, *Idea for a Universal History*, *supra* note 1, AA VIII, 24. Cf. regarding the concept of *sovereignty* as well P. Unruh, *Die Herrschaft der Vernunft: Zur Staatsphilosophie Immanuel Kants* (1993), 158-183 [Unruh, Herrschaft der

So, if there is an international rightful condition with enforceable laws, there must be a world-sovereign to wield the legal coercive power (that is, the power to pass coercive laws). Such a world-sovereign presupposes the unification of the lawgiving will of all the people around the world. Therefore, an international rightful condition in its narrow sense would render nation States redundant, for in such a State the different peoples would already form a single people and would be united under a supreme world-sovereign with coercive power.¹⁹

Some of the authors mentioned above argue against this argument, for it would violate the analogy initially brought forward by Kant: as individuals establishing a rightful condition do not have to give up their inner freedom, States likewise – when they enter a rightful condition – would not have to give up their inner freedom, that is, their sovereignty concerning inner affairs. What follows from Kant’s analogy is only a limited renunciation of sovereignty as long as it concerns *international* affairs.²⁰

But this objection is based on a wrong understanding of *analogy* in the Kantian sense: as we have seen, Kant defines an analogy “not as an imperfect similarity of two objects”, but as a structural equivalence, that is, “a perfect similarity of two ratios of totally dissimilar things”.²¹ What is perfectly similar in the issue under consideration is – as we have further seen – *the transition* from a state of externally lawless freedom to a state of externally lawful freedom *as such*. This is nothing else but the similarity of the duty to establish a rightful condition. But this does not imply that the respective outcome (that is, the legal structure of the rightful condition in each case) must be alike as well. To the contrary, all

Vernunft] and W. Kersting, *Wohlgeordnete Freiheit: Immanuel Kants Rechts- und Staatsphilosophie* (1984), 258-274 each with further references. Thereby the sovereign holds the unified State authority irrespectively of a functional separation of powers.

¹⁹ Cf. also W. Kersting, ‘Weltfriedensordnung und globale Verteilungsgerechtigkeit: Kants Konzeption eines vollständigen Rechtsfriedens und die gegenwärtige politische Philosophie der internationalen Beziehungen’, in Merkel & Wittmann, *supra* note 10, 172, 179-181 [Kersting, Weltfriedensordnung und globale Verteilungsgerechtigkeit].

²⁰ See with slightly different argumentations in detail Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 116-117, 121-122, following him Hackel, *Kants Friedensschrift*, *supra* note 10, 74-76; Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 39 and Carson, *Perpetual Peace*, *supra* note 10, 183-184.

²¹ Kant, *Prolegomena*, *supra* note 12, AA IV, 357 (translation by the author).

formulations that compare States and individuals in the rightful condition indicate that Kant conceives the resemblance of those legal structures as imperfect.²² Since Kant defines *analogy* as a perfect similarity of two *ratios* of totally *dissimilar* things, the equation of the inner freedom of individuals with the sovereignty of nation States is unjustified.

- d. So if there is a duty for States to enter a rightful condition (a.), it must be a world State under enforceable laws (b.). And if such a world State unites the lawgiving will of all people around the world to *one* sovereign (c.), the establishment of a world State would deprive the nation States of their sovereignty for the new supreme world-sovereign, that is, the State of nations, would now be the *sole* united lawgiving will of all. This would consequently lead to the dissolution of nation States and hence would be against the presupposition of a law of nations as a “right of *nations* in relation to one another insofar as they comprise different states and are not to be fused into a single state”.²³

It is clear that the persuasive power of this argument depends on the acceptance of Kant’s account of *sovereignty*. Not surprisingly, this account of an indivisible sovereignty has been widely criticized as not justifiable and as a presumption that unnecessarily limits the possible scope of a Kantian theory of international law.²⁴ Habermas, in particular, proposes a multi-level legal world order as a Kantian project,²⁵ because Kant could have accepted a

²² In Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 356 Kant explicitly says that in the state of nature, according to international law, the same rule does *not* apply to states as to individuals according to the law of nature. In *id.*, 354 Kant only speaks of “a constitution *similar* to a civil constitution” (emphasis added).

²³ *Id.*, AA VIII, 353.

²⁴ Habermas, *Konstitutionalisierung*, *supra* note 2, 126 speaks of an unnecessary conceptual bottleneck and W. Kersting, ‘Einleitung: Probleme der politischen Philosophie der internationalen Beziehungen: Die Beiträge im Kontext’, in C. Chwaszcza & W. Kersting (eds), *Politische Philosophie der internationalen Beziehungen* (1998), 9, 27 and Kersting, *Weltfriedensordnung und globale Verteilungsgerichtigkeit*, *supra* note 19, 184-185 speaks of a Kantian dogma. See for such an account as well Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 122; Koller, *Frieden und Gerechtigkeit*, *supra* note 10, 216-217, 220-221 and T. W. Pogge, ‘Kant’s Theory of Justice’, in J. Nida-Rümelin & W. Vossenkuhl (eds): *Ethische und politische Freiheit* (1998), 78, 103-107 [Pogge, Kant’s Theory of Justice].

²⁵ Habermas, *Konstitutionalisierung*, *supra* note 2, 125-127, 132-135 and already *id.*, ‘Kants Idee des ewigen Friedens: Aus dem historischen Abstand von zweihundert Jahren’, in Lutz-Bachmann & Bohman, *supra* note 10, 7, 18-24 with special emphasis on the UNO.

concept of divided sovereignty.²⁶ According to Habermas, Kant could have even seen such a concept using the example of the United States, where independent States partially give up their sovereignty for the sake of a federal State. And Habermas points out that this does not impair the unity of the alleged popular sovereignty, for, while in a federal system of States with separation of powers all public power is legitimated by the people, this still constitutes a procedurally divided sovereignty horizontally and vertically.²⁷

In fact, Kant was aware of the founding of the United States and even mentioned it in his *Doctrine of Right*.²⁸ And he was well aware of the separation of powers²⁹ and even pointed out that this separation does not impair the unity of the (in modern terms) sovereignty of the people.³⁰ I therefore think that the critique of Kant's account of sovereignty by Habermas and others misses the point that Kant wants to make with his account of sovereignty. Let's take a look at the passage where Kant compares his peace federation with the United States:

“By a *congress* is here understood only a voluntary coalition of different states which can be *dissolved* at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved.”³¹

With respect to federalist or unitary polities, Kant does not care about how States are internally organized and whether administration is split up on different levels. Instead, what is crucial about a constitution (referring to the passage above) is that it cannot be *dissolved* (note the emphasis by Kant). If there is a constitution, that is, if there is a State, then this implies permanentness in the sense that secession is morally prohibited.³² Member States might disagree with and protest against decisions and measures taken

²⁶ Likewise Kersting, *Weltfriedensordnung und globale Verteilungsgerechtigkeit*, *supra* note 19, 185-186.

²⁷ Habermas, *Konstitutionalisierung*, *supra* note 2, 126-127.

²⁸ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 351.

²⁹ *Id.*, AA VI, 313, 316.

³⁰ *Id.*, AA VI, 338.

³¹ *Id.*, AA VI, 351.

³² The cited passage is one instance for this. Other instances are Kant's qualification of secession as an inner disease of the state (Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 346) and his objection against revolution (*id.*, *Doctrine of Right*, *supra* note 1, AA VI, 318-323 and *id.*, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 382).

at the federal level, but they are not free to leave the federation if the federation does not comply. In the case of the United States, Kant would take it for granted that the federation as such is *legally prior* to the Member States, because the latter are *not* States in the proper sense but merely organizational subdivisions,³³ which in disputes are obliged to pay deference to the federation in case the federal court decides so.

And this again is the crucial aspect about sovereignty, when it comes to multi-level legal systems, which Kant might not have made explicit, but which is implied in his account of sovereignty. Kant would raise the old³⁴ question: *Quis iudicabit?*³⁵ Scholars like Habermas and Höffe talk about multi-level international legal systems in which the nation States basically stay sovereign, but transfer certain competences to the international level. The so formed supranational organization, then, would be able to enforce right within these competences (if necessary by military power) against the Member States.³⁶ Still, Kant would be able to ask who decides whether this supranational organization acts within its competences or *ultra vires*. According to Kant, talking about sovereignty is talking about the ultimate responsibility. And ultimate responsibility must be undivided.³⁷ If we have a world organization in the sense proposed by Habermas and Höffe, then ultimate responsibility must be on the supranational level, at least in the form of a world judiciary. I admit that the world organization could (and most probably would) discipline itself by a world judiciary not to act *ultra vires*.³⁸ But it is still theoretically possible that it would enlarge or exceed its authority allowed by the world judiciary. In this case the nation States neither could appeal nor in the worst case leave the world organization. And

³³ Similar S. Kyora, 'Kants Argumente für einen schwachen Völkerbund heute', in V. Bialas & H.-J. Hässler (eds), *200 Jahre Kants Entwurf "Zum ewigen Frieden": Idee einer globalen Friedensordnung* (1996), 96, 98-99 [Kyora, Kants Argumente].

³⁴ Hobbes did so before, cf. T. Hobbes, *Leviathan* (1651), ch. 18, para. 4.

³⁵ Kant refers to this question whilst dealing with the right of revolution, see Kant, *Doctrine of Right*, *supra* note 1, AA VI, 320 and *id.*, *On the Common Saying*, *supra* note 1, AA VIII, 303.

³⁶ See for instance O. Höffe, 'Eine Weltrepublik als Minimalstaat: Zur Theorie internationaler politischer Gerechtigkeit', in Merkel & Wittmann, *supra* note 10, 154, 165-167 and Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 115-119 as well as Habermas, *Konstitutionalisierung*, *supra* note 2, 133-135.

³⁷ See also for such an account of Kant Pogge, *Kant's Theory of Justice*, *supra* note 24, 88.

³⁸ Comparable to the function of the German Federal Constitutional Court or the US Supreme Court for example.

so, when it really comes down to it, the ultimate responsibility and thereby the sovereignty at the supranational level is indivisible. This argument is not meant to disqualify proposals like those brought forward by Habermas or Höffe as political theories, but is rather a serious attempt to defend Kant's account of indivisible sovereignty.

Be that as it may, at least we have seen that it is (from an internal Kantian point of view) blatantly wrong *both* to criticize Kant for not being particular about the analogy and therefore being inconsistent *and* to claim that he should have advocated – to be consistent – a State of nations in the form of a State of States. In the end a State of nations in the form of a State of States is – at least for Kant – a conceptual impossibility since Kant conceives the sovereignty of a State always as the lawgiving united will of its constituting individuals. Therefore, a State of nations comprises the lawgiving will of all the people around the world and thereby renders subordinated nation States redundant. In *On the Common Saying* and his *Preliminary Work to the Doctrine of Right*, Kant consequently called such a State of nations a *cosmopolitan republic*.³⁹ This explains why the federation of sovereign nation States “*must not* be a state of nations”,⁴⁰ for such a world State is conceptually contradictory to the presupposition of international law understood as the law between *sovereign* States or – to put in Kant's words – “since here we have to consider the right of *nations* in relation to one another insofar as they comprise different states and are not to be fused into a single state”.⁴¹

II. League of States or Cosmopolitan Republic? In Defense of the World State

Still most Kantian scholars, although they often point out that a constitutional legal world order (regardless of it being a State of States or a

³⁹ Cf. Kant, *On the Common Saying*, *supra* note 1, AA VIII, 312 and *id.*, *Preliminary Work to the Doctrine of Right*, AA XXIII, 352. – Again, this does *not* imply that the administration or even legislation cannot be split up on different levels within the cosmopolitan republic, as long as the latter remains *legally prior* and can overrule measures taken at the subordinated levels. See above previous page and cf. in this sense as well *id.*, *Doctrine of Right*, *supra* note 1, AA VI, 319-320.

⁴⁰ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 353 (emphasis added). In regard to the possible misreading of “must not”, see *supra* note 7.

⁴¹ *Id.*, AA VIII, 354. See also *id.*, AA VIII, 367: “The idea of the right of nations presupposes the *separation* of many neighbouring states independent of one another [...]”

single world State) is demanded by practical reason, understand Kant in the end to argue against a world State in the narrow sense, that is, a cosmopolitan republic. Therefore, these authors regard the negative surrogate of a peace federation as Kant's ultimate ideal of international law.⁴² The reason which is brought forward for this opinion is twofold. Firstly, according to some authors a cosmopolitan republic is for Kant *conceptually* impossible: under the presumption of existing nation States the establishment of a cosmopolitan republic is impossible because nation States are not allowed to give up their sovereignty.⁴³ Secondly, it is alleged that a cosmopolitan republic is (also) *empirically* impossible: one may mainly refer to a passage of *Toward Perpetual Peace* here, where Kant argues against a *universal monarchy*, and which is often considered as evidence of Kant's rejection of a world State in the form of a cosmopolitan republic referring to the arguments of the ungovernability of a world State and the danger of a soulless despotism.⁴⁴

⁴² For such an account of Kant, see for instance: P. Niesen & O. Eberl, *Kommentar: Immanuel Kant: Zum ewigen Frieden* (2011), 235-236, 240-242 [Niesen & Eberl, Kommentar]; P. Capps & J. Rivers, 'Kant's Concept of International Law', 16 *Legal Theory* (2010) 4, 229, 230, 243-245 [Capps & Rivers, Concept of International Law]; Habermas, *Konstitutionalisierung*, *supra* note 2, 125-127, 142; Hackel, *Kants Friedensschrift*, *supra* note 10, 81; J. Rawls, *The Law of Peoples* (1999), 36; Pogge, Kant's Theory of Justice, *supra* note 24, 103-104; Kersting, *Weltfriedensordnung und globale Verteilungsgerechtigkeit*, *supra* note 19, 182; Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 37-39; V. Gerhardt, *Immanuel Kants Entwurf "Zum ewigen Frieden": Eine Theorie der Politik* (1995), 93-95 [Gerhardt, Eine Theorie der Politik]; Brandt, *Weltbürgerrecht*, *supra* note 3, 139-142; Carson, *Perpetual Peace*, *supra* note 10, 176-179 and J. Ebbinghaus, 'Kants Lehre vom ewigen Frieden und die Kriegsschuldfrage', in J. Ebbinghaus, *Gesammelte Schriften*, Vol. I (1986), 1.

⁴³ See with differences in detail: Niesen & Eberl, *Kommentar*, *supra* note 42, 137-138; A. Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (2009), 225-230; Habermas, *Konstitutionalisierung*, *supra* note 2, 125-126; Hackel, *Kants Friedensschrift*, *supra* note 10, 69-70, 76-79; Pogge, *Kant's Theory of Justice*, *supra* note 24, 99-104; Kersting, *Weltfriedensordnung und globale Verteilungsgerechtigkeit*, *supra* note 19, 184; Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 40-42; R. Brandt, 'Historisch-kritische Beobachtungen zu Kants Friedensschrift', in Merkel & Wittmann, *supra* note 10, 31, 52 [Brandt, Beobachtungen]; Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 121; Gerhardt, *Eine Theorie der Politik*, *supra* note 42, 95-97; Carson, *Perpetual Peace*, *supra* note 10, 177; F. H. Hinsley, *Power and the Pursuit of Peace* (1963), 62-67 and Raumer, *Ewiger Friede*, *supra* note 6, 167.

⁴⁴ See with differences in detail: Niesen & Eberl, *Kommentar*, *supra* note 42, 139-140; Capps & Rivers, *Concept of International Law*, *supra* note 42, 244; Byrd & Hruschka, *Kant's Doctrine of Right*, *supra* note 9, 197-198; Habermas, *Konstitutionalisierung*, *supra* note 2, 127; Hackel, *Kants Friedensschrift*, *supra* note 10, 79-81; O. Höffe, 'Für

“The idea of the right of nations presupposes the *separation* of many neighboring states independent of one another; and though such a condition is of itself a condition of war (unless a federative union of them prevents the outbreak of hostilities), this is nevertheless better, in accordance with the idea of reason, than the fusion of them by one power overgrowing the rest and passing into a universal monarchy, since as the range of government expands laws progressively lose their vigor, and a soulless despotism, after it has destroyed the seed of good, finally deteriorates into anarchy. Yet the craving of every state (or of its head) is to attain a lasting condition of peace in this way, by ruling the whole world where possible. But *nature wills* it otherwise. It makes use of two means to prevent peoples from intermingling and to separate them: differences of *language* and of *religion* which do bring with them the propensity to mutual hatred and pretexts for war but yet, with increasing culture and the gradual approach of human beings to greater agreement in principles, leads to understanding in a peace that is produced and secured, not as in such a despotism (in the graveyard of freedom), by means of a weakening of all forces, but by means of their equilibrium in liveliest competition.”⁴⁵

Both alleged “Kantian” arguments against the cosmopolitan republic are doubtful from a Kantian point of view. Starting with the former, a conceptual impossibility of a cosmopolitan republic would – with regard to the moral duty to establish it – be strange: if there is a moral duty prescribed by practical reason to establish a world republic (which – as we have seen – is nothing else than the cosmopolitan republic), it would even be

und Wider eine Weltrepublik’, in Chwaszcza & Kersting, *supra* note 24, 204, 210 and Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 125-127; Brandt, *Weltbürgerrecht*, *supra* note 3, 139-141 and *id.*, *Beobachtungen*, *supra* note 43, 52; Kersting, *Weltfriedensordnung und globale Verteilungsgerechtigkeit*, *supra* note 19, 182; A. W. Wood, ‘Kants Entwurf für einen ewigen Frieden’, in Merkel & Wittmann, *supra* note 10, 67-74; Koller, *Frieden und Gerechtigkeit*, *supra* note 10, 221-222; J. Nida-Rümelin, ‘Ewiger Friede zwischen Moralismus und Hobbesianismus’, in Merkel & Wittmann, *supra* note 10, 239, 247-248; G. Patzig, ‘Kants Schrift “Zum ewigen Frieden”’, in Merkel & Wittmann, *supra* note 10, 12, 20-21; Cavallar, *Pax Kantiana*, *supra* note 6, 179-183, 205 and Carson, *Perpetual Peace*, *supra* note 10, 177.

⁴⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 367.

contradictory for Kant, since *ought implies can*, to negate its feasibility on conceptual grounds. Anything that is morally prescribed as duty is as such conceptually feasible, although we might not want it to be realized or theoretically do not understand how it could ever be realized.⁴⁶

“Morals is of itself practical in the objective sense, as the sum of laws commanding unconditionally, in accordance with which we *ought* to act, and it is patently absurd, having granted this concept of duty its authority, to want to say that one nevertheless *cannot* do it. For in that case this concept would of itself drop out of morals (*ultra posse nemo obligatur*); hence there can be no conflict of politics, as doctrine of right put into practice, with morals, as theoretical doctrine of right (hence no conflict of practice with theory) [...].”⁴⁷

Therefore, Kant says that, although perpetual peace seems theoretically infeasible, the idea of perpetual peace “[is] for practical purposes [...] dogmatic and well founded as to its reality”.⁴⁸ And since Kant conceives of the perpetual peace as only to be realized within a cosmopolitan republic,⁴⁹ the cosmopolitan republic as such must be on conceptual grounds feasible.

⁴⁶ Similar Cavallar, *Pax Kantiana*, *supra* note 9, 123-125.

⁴⁷ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 370.

⁴⁸ *Id.*, AA VIII, 362. Cf. also Geismann, *Rechtslehre vom Weltfrieden*, *supra* note 9, 387. See in general for the concept of *practical reality* of an object Kant, *Critique of Practical Reasons* (1788), AA V, 45-46 and concerning this B. Ludwig, ‘Die “consequente Denkungsart der speculativen Kritik”: Kants radikale Umgestaltung seiner Freiheitslehre im Jahre 1786 und die Folgen für die Kritische Philosophie als Ganze’, 58 *Deutsche Zeitschrift für Philosophie* (2010) 4, 595, 616. Cf. also Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 368 where he states that the natural guaranty confirms the feasibility of what practical reason demands: “In this way nature guarantees perpetual peace through the mechanism of human inclinations itself, with an assurance that is admittedly not adequate for *predicting* its future (theoretically) but that is still enough for practical purposes and makes it a duty to work toward this (not merely chimerical) end.” Cf. likewise Brandt, *Beobachtungen*, *supra* note 43, 44.

⁴⁹ See above section B. and as well Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357 and *id.*, *Doctrine of Right*, *supra* note 1, AA VI 350. See also Hackel, *Kants Friedensschrift*, *supra* note 10, 76-79 with further references.

“But, it will be said, states will never submit to coercive laws of this kind; and a proposal for a universal state of nations to whose power all individual states should voluntarily accommodate themselves so as to obey its laws [...] still does not hold in practice; [...] For my own part, I nevertheless put my trust in theory, which proceeds from the principle of right, as to what relations among human beings and states *ought to be*, and which commends to earthly gods the maxim always so to behave in their conflicts that such a universal state of nations will thereby be ushered in, and so to assume that it is possible (*in praxi*) and that it *can be*.”⁵⁰

Ergo, it must be *conceptually* possible for States to give up their sovereignty in order to establish the cosmopolitan republic. This is furthermore confirmed by the passage cited above in which Kant deals with the founding of the United States. This passage proves that Kant in principle affirms the possibility of States giving up their sovereignty to merging into a federal State.

Critics might now reply that this is contradictory to my own view (above, where I say that statehood implies permanentness in the sense that secession is morally prohibited) as well to the passage above (where Kant disapproves of a universal monarchy). But those objections miss that there are two questions at play here: The first is about whether States *can* give up their sovereignty. The second is about whether they *must by force* give up their sovereignty (analogous to the way in which private persons must give up their lawless freedom – and indeed can be forced to do so – by submitting to public lawgiving).

Kleingeld has shown that “Kant’s opposition to a universal monarchy, however, is not inspired by a general opposition against states giving up their sovereignty. States are allowed to join a federation when this happens voluntarily and with the preservation of the lawful freedom of their citizens. In fact, Kant believes that reason requires them to do so [...]”.⁵¹ The passage about universal monarchy cannot be read as arguing against the

⁵⁰ Kant, *On the Common Saying*, *supra* note 1, AA VIII, 312-313.

⁵¹ Kleingeld, *Theory of Peace*, *supra* note 3, 487 and at length *id.*, *Perpetual Peace*, *supra* note 9. See also Kyora, *Kants Argumente*, *supra* note 33, 100; Cavallar, *Pax Kantiana*, *supra* note 6, 211 and W. Beutin, ‘Kants Schrift “Zum ewigen Frieden” (1795) und die zeitgenössische Debatte’, in W. Beutin (ed.), *Hommage à Kant: Kants Schrift “Zum ewigen Frieden”* (1996), 97, 105.

cosmopolitan republic as such.⁵² Such a reading leans on the hidden premise that the merging of different States under an ascending nation which thereby becomes a universal monarchy is equivalent to the dissolution of nation States during the voluntary establishment of a cosmopolitan republic.

Instead, Kant's objection here is not conceptual, but procedural, that is, it is directed against a paternalistic and forcible *ad hoc* realization of a world State through annexation by an overwhelming State.⁵³ In contrast to individuals in the State of nature (in which individuals lack political autonomy by definition),⁵⁴ nation States – though being in a state of nature among themselves – are already entities with political autonomy and as such cannot be forced into a legal world order,

“[...] since, as states, they already have a rightful constitution internally and hence have outgrown the constraint of others to bring them under a more extended law-governed constitution in accordance with their concepts of right [...]”.⁵⁵

A State is already the expression of the united lawgiving will of its constituting individuals (that is basically what the entire original contract is about)⁵⁶ and a forced surrender of it towards a world State would negate the autonomy of the latter as co-legislating people.⁵⁷ So Kant's argumentation

⁵² Cf. Kleingeld, *Theory of Peace*, *supra* note 9, 313. Besides this, Kant conceives of the morally prescribed world State as a cosmopolitan *republic*. But, a republic is exactly the opposite of despotism (see Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 352). Therefore, it would be already conceptually strange to equate the cosmopolitan republic with the despotic universal monarchy.

⁵³ See also *Religion within the Limits of Reason Alone* (1793), AA VI, 34 with fn. ** and 123, fn. *. See also for a similar interpretation Cavallar, *Pax Kantiana*, *supra* note 9, 119-125.

⁵⁴ See *Doctrine of Right*, AA VI, 312. Cf. Kleingeld, *Theory of Peace*, *supra* note 3, 485-486: “Forcing individuals into a state, by contrast, does not violate their political autonomy because, on the Kantian account, they do not have political autonomy as long as they remain in the state of nature.” Cf. likewise Geismann, *Rechtslehre vom Weltfrieden*, *supra* note 9, 380.

⁵⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 355-356.

⁵⁶ See Kant, *Doctrine of Right*, *supra* note 1, AA VI, 340-341.

⁵⁷ Kleingeld, *Theory of Peace*, *supra* note 3, 485 speaks of “co-legislating citizens”. Cf. as well *id.*, *Perpetual Peace*, *supra* note 9, 310-311 and approving Habermas, *Konstitutionalisierung*, *supra* note 2, 128, fn. 33 and A. R. Bernstein, ‘Kant, Rawls, and Cosmopolitanism: Toward Perpetual Peace and The Law of Peoples’, 17

against a universal monarchy and the corresponding *natural guaranty*⁵⁸ only restate the fact that nation States cannot be *forced* into a legal world order. As well, this leads to the *empirical* reason why the forced establishment of a universal monarchy will not be of long duration, namely, because the inner (cultural) tensions will make governability of a universal monarchy impossible and lead to its collapse. Still this is no objection against the cosmopolitan republic as such for “increasing culture and the gradual approach of human beings to greater agreement in principles, leads to understanding”,⁵⁹ which will make a voluntary affiliation *empirically* possible in future. For Kant, the voluntary establishment of such a legal world order in the form of a cosmopolitan republic is a moral duty and as such possible in principle. The difference in comparison with the morally prohibited secession is that secession always implies the implementation of the particular will of some against others dissenting, while the merging of two States into one implies the consent of the united lawgiving of all people concerned.⁶⁰

But why does Kant regard the voluntary establishment of a cosmopolitan republic infeasible if it is in principle possible? We have already heard Kant’s simple and striking answer: *they don’t want it!* And this is the *presupposition* of international law mentioned above: there is neither a duty to preserve national sovereignty nor any other conceptual infeasibility of a cosmopolitan republic that prevents nation States to merge into a world State. It is just their insistence on national sovereignty which

Jahrbuch für Recht und Ethik (2009), 3, 9. Cf. also Cavallar, *Pax Kantiana*, *supra* note 9, 119-121, but rather arguing with the autonomy of the State as a moral person.

⁵⁸ The point of the natural guaranty is that differences of language and of religion *presently* prevent the nations from being *merged* into one *forcefully* (Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 367). However, in Kant’s work there is no textual evidence to support the view that the *voluntary* establishment of a world State contradicts the natural guaranty. Therefore, nature is not against the cosmopolitan republic as such, but only against the paternalistic and forcible imposition of a world government. Reading Kant contrariwise again leans on the hidden – and from my point of view *wrong* – premise that *cosmopolitan republic* and *universal monarchy* are synonymous concepts for Kant.

⁵⁹ *Id.*, 367.

⁶⁰ There is a parallel regarding the right of revolution. In early sources, Kant considers the legitimacy of a revolution if it is the expression of the whole united lawgiving will of the people. But, for Kant, since there will be always some who are against a revolution, a revolution will always be the expression of a particular will and will therefore never be legitimate. See for example Kant’s lecture on natural law *Feyerabend* dated in 1784 (AA XXVII, 1392).

they presuppose in their understanding of international law. According to Kant, what are the reasons for this unwillingness? My guess is that these reasons are on the one hand most probably the same as those which hinder the establishment of a universal monarchy, namely, the national differences in language, culture, religion, etc. On the other hand, Kant assumes that nation States inherently have the ambition to become a universal monarchy by subduing foreign countries forcefully.⁶¹ But whether that guess is right or not or whether these reasons are valid today does not matter in principle. As long as we (“we” as the united will of the lawgiving people and thereby the nation State) are talking about international law as the law among multiple sovereign nations, we already presume the existence of sovereign nation States and show thereby “our” unwillingness to give up this sovereignty. That it is, what Kant means, when he says that States “[...] do not at all want this [sc. the cosmopolitan republic], thus rejecting *in hypothesi* what is correct *in thesi* [...]”.⁶² This sentence does not fall back behind critical philosophy nor is it a concession to pragmatic arguments in questions of morals,⁶³ but it is the consequence of the autonomy of the co-legislating people partaking in the united lawgiving will.

So all in all, Kant’s ultimate ideal, that is, the ideal of a legal world order prescribed by practical reason, is *not* the State of States and *not* the peace federation, *but* the cosmopolitan republic. And beyond that, this cosmopolitan republic is not unfeasible as such, but only as long as we cling to the idea of international law between sovereign nation States.

⁶¹ Cf. the references *supra* note 53.

⁶² Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357. Cf. Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 127-128 and Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 43-44 considering a similar interpretation of this passage.

⁶³ Such an account has made some Kantian scholars judge Kant’s position as inconsistent because of Kant’s opposition to pragmatic arguments in moral questions, e.g. K. E. Dodson, ‘Kant’s Perpetual Peace: Universal Civil Society or League of States?’, 15 *Southwest Philosophical Studies* (1993) 1, 1, 7; O. Höffe, *Kategorische Rechtsprinzipien: Ein Kontrapunkt der Moderne* (1990), 274 and W. Röd, ‘Die Rolle transzendentaler Prinzipien in Moral und Politik’, in Merkel & Wittmann, *supra* note 10, 125, 137-138.

C. Kant's Peace Federation: A Constitutional Legal World Order?

I. The Cosmopolitan Republic as a Task

If this had been Kant's last word, he would have left us in a desperate state: because of our notorious unwillingness to form a cosmopolitan republic according to our moral duty, we have to face the alternative in form of a constantly threatening state of war, never achieving the perpetual peace. Fortunately, we are not doomed though: Kant admits that international law is necessary since nation States do not want to unite into a cosmopolitan republic. But contrary to the theories of international law by his predecessors it does not follow that this international law is a law of war but a law of peace.⁶⁴ Therefore, Kant proposes a peace federation as a negative surrogate for the cosmopolitan republic: if there must be an international law, then it is according to Kant an international law of peace.

Somebody might reply to that: there is the moral duty to establish a world republic and there is likewise the conceptual possibility to do so. If nation States don't comply: *so what!?* Why all this fuss about a peace federation as the negative surrogate of the world republic? To answer this question, we have to explain what generates the necessity for States to adopt the peace federation as a negative surrogate of the principally feasible cosmopolitan republic. The best answer give Kant's closing remarks of *Toward Perpetual Peace*:

“If it is a duty to realize the condition of public right, even if only in approximation by unending progress, and if there is also a well-founded hope of this, then the *perpetual peace* that follows upon what have till now been falsely called peace treaties (strictly speaking, truces) **is no empty idea but a task** that, gradually solved, comes steadily closer to its goal (since

⁶⁴ Kant calls Grotius, Pufendorf, Vattel and others “only sorry comforters” because States rely on their theories of international law only to justify acts of war (Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 355). Cf. similarly Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 111-112 and Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 37.

the times during which equal progress takes place will, we hope, become always shorter).⁶⁵

Kant understands the moral duty to “realize the condition of public right” on an international level – that is, as we have seen, the duty to establish a cosmopolitan republic – in terms of a *task* that is supposed to be gradually solved. This formulation bears *in nuce* what Kant has elaborated in detail for the national constitution in *The Contest of the Faculties*:

“The idea of a constitution that is consistent with the natural rights of human beings, the idea, namely, that those who obey the law should also, united, be legislators thereof, underlies all forms of state. And the polity, which, conceived in accordance with this idea and through concepts of pure reason, is a platonic *ideal (respublica noumenon)*, is no mere figment of the imagination, but rather the eternal norm for all civil constitutions, and disposes with all war. A civil society that is organized in accordance with this idea is its representation in accordance with the laws of freedom by means of an example in experience (*respublica phaenomenon*) and can only be attained with great difficulty through numerous feuds and wars. But its constitution, when it has once been achieved in large part, qualifies it as the best possible one to hold off war, the destroyer of all that is good. It is hence a duty to enter into such a constitution. In the meantime, however, since such a constitution will not soon come into being, it is the duty of the monarchs, even though they may rule in an *autocratic* way, to nonetheless govern in a *republican* way (not a democratic way). That is to say that the people ought to be treated according to principles in line with the spirit of the laws of freedom (as a people with mature reason would dictate to itself), even if, by the letter, the people is not asked for its consent.”⁶⁶

⁶⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 386 (italic emphasis in the original, bold emphasis added).

⁶⁶ Kant, *The Contest of the Faculties* (1798), AA VII, 91 (cited according to: Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, ed. by P. Kleingeld (2006)). See also *Reflexion 8077*, AA XIX, 610.

Against this background we have to conceive the morally prescribed cosmopolitan constitution as an *ideal* (*respublica cosmopoliticon noumenon*), which nation States are obliged to strive for, although it is not yet or will even never be realized (*respublica cosmopoliticon phaenomenon*). Elsewhere Kant says: “we must act as if it is something real, though perhaps it is not; we must work toward establishing perpetual peace and the kind of constitution that seems to us most conducive to it [...]”⁶⁷ The peace federation, which Kant proposes, is nothing but a step on the way towards this ideal and is as such for nation States mandatory to obtain.⁶⁸ For Kant, the proposed peace federation is better than the *status quo* of international law in 1795⁶⁹ because it is closer to the morally prescribed ideal. In this respect the peace federation can be understood as a mandatory negative surrogate of the cosmopolitan republic.

In his *Doctrine of Right* Kant gives quite a precise description of how this peace federation would look like:

“Such an *association* of several *states* to preserve peace can be called a *permanent congress of states*, which each neighboring state is at liberty to join. [...] By a *congress* is here understood only a voluntary coalition of different states which can be *dissolved* at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved. - Only by such a congress can the idea of a public right of nations be realized, one to be established for deciding

⁶⁷ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 354.

⁶⁸ See for similar accounts of Kant’s peace federation as a first step towards a regulative ideal Kleingeld, *Theory of Peace*, *supra* note 3, 483-485, Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 43-44, Cavallar, *International Right*, *supra* note 9, 124 and *id.*, *Pax Kantiana*, *supra* note 6, 211; Geismann, *Rechtslehre vom Weltfrieden*, *supra* note 9, 379-384 and H. L. Williams, *Kant’s Political Philosophy* (1983), 256-257.

⁶⁹ Cf. Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 356: “But if this state says, ‘There shall be no war between myself and other states, although I recognize no supreme legislative power which secures my right to me and to which I secure its right,’ it is not understandable on what I want to base my confidence in my right, unless it is the surrogate of the civil social union, namely the free federalism that reason must connect necessarily with the concept of the right of nations if this is to retain any meaning at all.” Accordingly, Kant refers in *Toward Perpetual Peace*, *supra* note 1, AA VIII, 355 to Grotius, Pufendorf, Vattel and other theoreticians of international law and characterises them as “only sorry comforters”.

their disputes in a civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war.”⁷⁰

It is obvious that this concept of a loose federation, which everyone can join or leave voluntarily, which does not interfere in internal affairs and is for the only purpose of negotiating international matters peacefully, suits the willingness of States, which cling to their national sovereignty. Of course, we have to embellish this concept of a permanent congress of States with further aspects such as a founder’s charter, conditions of membership and rules of procedure. And if we do so we come quite close to modern organizations like the League of Nations or the United Nations.⁷¹ Still we have to ask us: does this association of States honor Kant’s promise of transferring the international relations into a rightful condition? How far is this peace federation really a *surrogate* of the cosmopolitan republic, that is, of a constitutional legal world order? *Vulgo*: can this be called a constitutionalization of international law? The answer is both: yes and no.

II. Kantian “as if”-Constitutionalism, or: How the Peace Federation Constitutes a Rightful Condition

Insofar as the answer is *no*, we already know the reasons:

1. According to Kant a constitution in its narrow sense expresses nothing but the united lawgiving will of the people.⁷² Such a constitution comprises the regulation of external and internal affairs and can on a global level only exist in the form of a cosmopolitan republic which expresses as the sole sovereign the lawgiving will of the people all around the world. Hence, it is incompatible with the presupposition of international law between sovereign nation States.

⁷⁰ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 350-351.

⁷¹ It would be arduous to make a detailed comparison between Kant’s peace federation and the United Nations, since such have been made elsewhere, see for instance Hackel, *Kants Friedensschrift*, *supra* note 10, 181-204 and O. Höffe, ‘Ausblick: Die Vereinten Nationen im Lichte Kants’, in Höffe, *supra* note 3, 175-194 with further references.

⁷² See above section B. I. c. and Kant, *Doctrine of Right*, *supra* note 1, AA VI, 311: “Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under a will uniting them, a constitution (*constitutio*), so that they may enjoy what is laid down as right.”

2. Since States don't want to give up their sovereignty and are already equipped with a constitution regulating the internal affairs, that is, the relations among their citizens, they cannot be forced into such a cosmopolitan republic. Therefore, Kant's proposed permanent State congress can firstly only address the question of regulating the external affairs among nation States:

“The reason, why this cosmopolitan federation needs not to deal with legislation and legal administration of the links of this cosmopolitan society, i.e. why a cosmopolitan republic needs not to be established, is that only the external freedom is the sole object, what they [sc. the states] can validly claim, i.e. only the formal condition of all rights, whereas in a civil condition the matter of choice [,] property and everything that goes with it have to be dealt with.”⁷³

3. And for the same reason it is secondly just a voluntary association without binding and enforceable laws:

“This league does not look to acquiring any power of a state but only to preserving and securing the *freedom* of a state itself and of other states in league with it, but without there being any need for them to subject themselves to public laws and coercion under them (as people in a state of nature must do).”⁷⁴

Therefore this association of States lacks constituting aspects of a constitution which are implied in Kant's account of public law, although he does not make them explicit, such as: mandatory membership,⁷⁵ unlimited competences,⁷⁶ binding and enforceable laws,⁷⁷ indissolubility⁷⁸.

Nonetheless, Kant claims that the peace federation constitutes a rightful condition:

⁷³ Kant, *Preliminary Work to the Doctrine of Right*, *supra* note 39, AA XXIII, 352-353 (translation by the author).

⁷⁴ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 356.

⁷⁵ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 312.

⁷⁶ *Id.*, AA VI, 372.

⁷⁷ *Id.*, AA VI, 312.

⁷⁸ *Id.*, AA VI, 351.

“The condition under which a right of nations as such is possible is that a *rightful condition* already exists. For without this there is no public right, and any right that one may think of outside it (in a state of nature) is instead merely private right. Now we have seen above that a federative condition of states having as its only purpose the avoidance of war is the sole *rightful condition* compatible with the *freedom* of states.”⁷⁹

This poses the following questions, why Kant – although elsewhere he identifies a rightful condition especially with the existence of enforceable laws⁸⁰ – calls this federative association a *rightful condition* and subsequently in how far this can justly be called a constitutionalization of international *law*. To answer these questions, we have to recall that according to Kant the permanent State congress is the negative surrogate in respect of the ultimate *ideal* of a cosmopolitan republic. An ideal in Kantian terms is primarily a fiction with an *action-guiding function*.⁸¹ With regard to national constitutions Kant has said, as we have already seen, that the ideal of a *respublica noumenon* compels the rulers to govern the people in terms of this ideal, although it is far from being realized *in concreto*.⁸² For Kant, the same applies in international law:

“A moral politician will make it his principle that, once defects that could not have been prevented are found within the constitution of a state **or in the relations of states**, it is a duty, especially for heads of state, to be concerned about how they can be improved as soon as possible and brought into conformity with natural right, which stands before us as a model

⁷⁹ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 385.

⁸⁰ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 312.

⁸¹ According to Kant, it is characteristic for an ideal to work exactly this way, cf. Kant, *Critique of Pure Reason* (1781, 1787), ed. by P. Guyer & A. W. Wood (1998), AA III, B 372-B 374; *Lecture Moral Mrongovius II*, AA XXIX, 604-605 and already Immanuel Kant, *Vorlesung zur Moralphilosophie*, 10-11, edited by W. Stark (2004).

⁸² See above section C. I. Cf. as well W. Kersting, ‘Die bürgerliche Verfassung in jedem Staate soll republikanisch sein’, in Höffe, *supra* note 3, 99-104; Unruh, *Herrschaft der Vernunft*, *supra* note 18, 62-65 and B. Ludwig, ‘Politik als “ausübende Rechtslehre”’: Zum Politikverständnis Immanuel Kants’, in H. J. Lietzmann & P. Nitschke (eds), *Klassische Politik: Politikverständnisse von der Antike bis ins 19. Jahrhundert* (2000), 175, 188-199.

in the idea of reason [...]. [B]ut it can be required of the one in power that he at least take to heart the maxim that such an alteration is necessary, in order to keep constantly approaching the end (of the best constitution in accordance with laws of right). A state can already *govern* itself in a republican way even though, by its present constitution, it possesses a despotic *ruling power* [...].”⁸³

A careful reader immediately recognizes that Kant is here talking about *political* maxims of heads of State. Every statesman is supposed to bear in mind the morally prescribed ideal (that is, the *respublica noumenon*, when it comes to the question of improving the national constitution, respectively the cosmopolitan republic, when it comes to the question of international relations) and direct his political maxims accordingly. Now, for Kant, the peace federation provides nothing else than the platform for politicians with such a legal mindset:

“Such an *association* of several *states* to preserve peace can be called a *permanent congress of states*, which each neighboring state is at liberty to join. Something of this kind took place [...] in the first half of the present century, in the assembly of the States General at the Hague. The ministers of most of the courts of Europe and even of the smallest republics lodged with it their complaints about attacks being made on one of them by another. **In this way they thought of the whole of Europe as a single confederated state which they accepted as arbiter, so to speak, in their public disputes.**”⁸⁴

Kant takes the assembly of the States-General in The Hague as example for his proposal of a peace federation. The remarkable claim of this passage is that according to Kant at the Hague assembly the whole of Europe *considered* itself as a united federative State. Europe in fact consisted of several sovereign States (contrary to the United States to which

⁸³ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 372 (italic emphasis in the original, bold emphasis added).

⁸⁴ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 350 (italic emphasis in the original, bold emphasis added).

Kant referred at that time as a counter-example)⁸⁵ but acted in the mindset *as if it was united*. After praising the Hague assembly, Kant complains in the following clause that “the right of nations [later] survived only in books; it disappeared from cabinets or else, after force had already been used, was relegated in the form of a deduction to the obscurity of archives”. To Kant, the right of nations belongs to “cabinets” as the practical guideline for politicians and statesmen. It doesn’t matter if it is written down in books or recorded in treatises or a formal constitution. The peace federation as such is of course laid down in treatises,⁸⁶ which set up the permanent State congress, record rules of procedure, etc. And all this is obviously necessary to settle international conflicts in a “civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war”.⁸⁷ But this is just the formal framework. The core of the peace federation is the legal mindset of the lawyers, politicians and statesmen in charge. They have to make decisions according to the normative guideline, that is, how a cosmopolitan republic (which guarantees the perpetual peace) would look like.

By now we can give an answer to the question in how far the Kantian peace federation can affirmatively be called a surrogate of a cosmopolitan republic, that is, of a constitutional legal world order. *For one thing*, the peace federation sets up a legal framework for international politics and guarantees peace and justice through proceedings: The founding treatises of the peace federation lay down rules of procedure, which allow international conflicts to be treated in an equal and peaceful manner. And because the Member States have voluntarily joined the peace federation by contract, they legally committed themselves to this way of resolving conflicts prior to waging war. *For another thing*, the peace federation aims at a legal ideality: Though it admittedly lacks core aspects of a true constitution in the Kantian sense,⁸⁸ the peace federation is still programmatically oriented towards the constitutional world order of the cosmopolitan republic, for the cosmopolitan republic alone can guarantee peace permanently. Since the cosmopolitan republic is a practical ideal and as such a moral duty to strive

⁸⁵ *Id.*, AA VI, 351: “By a *congress* is here understood only a voluntary coalition of different states which can be *dissolved* at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved.”

⁸⁶ Kant says that any state of peace “[...] cannot be instituted or assured without a pact of nations among themselves [...]”. (Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 356).

⁸⁷ Kant, *Doctrine of Right*, *supra* note 1, AA VIII, 351.

⁸⁸ As we have seen in the beginning of this subsection.

for, lawyers, politicians and statesmen in charge have to direct their maxims accordingly.

This normative sentence befits a political philosopher; a practitioner, however, would consider it to be a naive, at best a desirable idea. Kant had already anticipated this critique and had addressed the alleged problem in the appendix of *Toward Perpetual Peace* on the disagreement of politics with morals.⁸⁹ Kant's answer to our critical practitioner is firstly that for attaining the perpetual peace mere political prudence is insufficient, instead moral politics are required therefore. And secondly, Kant claims that moral (and thereby in Kantian terms lawful) politics and governance are theoretically and practically possible no matter what the constitutional framework is.⁹⁰

I see two possible objections to that. The first is that people in charge will in fact act otherwise (that is, by pursuing their contingent personal interests). To this, Kant would still have replied that the best rule is the rule of law:

“[T]he best constitution is that in which power belongs not to human beings but to the laws.’ For what can be more metaphysically sublimated than this very idea [...] [I]f it is attempted and carried out by gradual reform in accordance with firm principles, it can lead to continual approximation to the highest political good, perpetual peace.”⁹¹

Of course, “rule of law” in the Kantian sense means rule of the moral law,⁹² which is prescribed by practical reason. But the crucial point is that the rule of law (no matter what is understood by that notion in detail) is not self-executing, but gains effectiveness only by the people in charge who stick to it.⁹³ And consequently there is no society which does not rely on the integrity of its people in charge: be it lawyers and judges that they stick to

⁸⁹ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 370-381.

⁹⁰ See on this passage in detail Niesen & Eberl, *Kommentar*, *supra* note 42, 284-292; Gerhardt, *Eine Theorie der Politik*, *supra* note 42, 146-185 and M. Castillo, ‘Moral und Politik, Mißhelligkeit und Einhelligkeit’, in Höffe, *supra* note 3, 195.

⁹¹ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 355.

⁹² The moral law is comprised of duties of law and duties of virtue, which Kant has elaborated in both parts of the *Metaphysics of Morals*. See also the division in Kant, *Doctrine of Right*, *supra* note 1, AA VI, 239-240.

⁹³ Kant already had this insight in 1781, cf. Kant, *Critique of Pure Reason*, *supra* note 81, AA III, B 372-B 374.

the rules laid down in legal codes and do not take illegal means to pursue their ends, be it officials and civil servants that they hold their office responsibly for the public good and don't let themselves be corrupted. So for constitutional principles gaining effectiveness, every society has to rely upon the personal integrity of the people in charge, no matter what the constitutional framework is.

The second objection insists on the necessity of a constitution with enforceable laws without which there would be no way to control and sanction unlawful acts. This certainly hits the mark insofar as we accept the presupposition that law is analytically equivalent to *enforceable* law and otherwise no law at all. Kant understood law in this very sense as enforceable law.⁹⁴ He can nonetheless speak in regards to the peace federation of a *rightful condition*:

“[...] for, as a public right, it contains in its very concept the publication of a general will determining for each what is its own, and this *status iuridicus* must proceed from some kind of pact, which need not (like that from which a state arises) be based on coercive laws but may, if necessary, be a condition of *continuing free* association, like that of the federalism of various states discussed above.”⁹⁵

This passage bears *in nuce* the explanation of what renders the legal status of the peace federation. Firstly, Kant refers to the *form of publicity*. Any legal claim must be capable of publicity, “since without it there would be no justice (which can be thought only as *publicly known*) and so too no right, which is conferred only by justice”.⁹⁶ Secondly, publicity can only

⁹⁴ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 232: “[O]ne can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone. [...] Right and authorization to use coercion therefore mean one and the same thing.” With this background (and bearing in mind the results of our inquiry so far) a constitutionalization of international *law* is already conceptually impossible for Kant as long as international law means the law among sovereign States. Only a cosmopolitan republic would be a rightful condition *backed up by enforceable laws*, see above section B. To discuss the question if law conceptually requires enforceability for contemporary legal theory would exceed the scope of this essay. At least under that presumption international law would be conceptually impossible at present.

⁹⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 383.

⁹⁶ *Id.*, AA VIII, 381. Cf. Brandt, *Beobachtungen*, *supra* note 43, 62-64.

gain effectiveness if States oblige themselves *by treaty* to settle international matters peacefully within a peace federation. Thereby the peace federation *legally* drags politics into the light⁹⁷ of public scrutiny according to the principle of public right: “All maxims which *need* publicity (in order not to fail in their end) harmonize with right and politics combined.”⁹⁸

So although there is strictly speaking no international law for Kant (because of the missing enforceability), there are international politics within a legal framework according to the principle of public right, which can be publicly scrutinized.⁹⁹ Kant now hopes that States under this observation restrain themselves from political acts that are unlawful according to the principle of public right cited above. For him, this hope is well founded, because States – although “each *state* puts its majesty [...] just in its not being subject to any external lawful coercion at all”¹⁰⁰ – have a need of legally justifying their decisions and actions.¹⁰¹ This – so Kant – proves “that there is to be found in the human being a still greater, though at present dormant, moral predisposition to eventually become master of the evil principle within him [...]”¹⁰²

So, if we want to speak of a constitutionalism in the Kantian sense, it cannot be a *constitutionalization of international law*. For law in the Kantian sense requires enforceability, which is on the global level – at least for Kant – only guaranteed within a cosmopolitan republic. Under the presumption of sovereign nation States the only we can hope for is a

⁹⁷ I borrow this metaphor from Kant himself: “[B]ut with morals in the second meaning ([sc. morals] as doctrine of right), before which it would have to bend its knee, it finds it advisable not to get involved in any pact at all, preferring to deny it any reality and to construe all duties as benevolence only; but this ruse of a furtive politics would still be easily thwarted by philosophy, publicizing those maxims it uses [...]”(Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 386).

⁹⁸ *Id.*

⁹⁹ Cf. with similar considerations Gerhardt, *Eine Theorie der Politik*, *supra* note 42, 97-102, 198-204 and J. Bohman, ‘Die Öffentlichkeit des Weltbürgers: Über Kants “negatives Surrogat”’, in Lutz-Bachmann & Bohmann, *supra* note 10, 87, 87-98.

¹⁰⁰ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 354.

¹⁰¹ Cf. *id.*, 355: “[I]t is surprising that the word *right* could still not be altogether banished as pedantic from the politics of war and that no state has yet been bold enough to declare itself publicly in favor of this view; for Hugo Grotius, Pufendorf, Vattel, and the like (only sorry comforters) – although their code, couched philosophically or diplomatically, has not the slightest *lawful* force and cannot even have such force (since states as such are not subject to a common external constraint) – are always duly cited in *justification* of an offensive war [...]”

¹⁰² *Id.* Cf. as well Brandt, *Beobachtungen*, *supra* note 43, 55-56.

legalization of international politics. I think this term conceives best, what on an international level Kant's political philosophy aims at: It is still nothing but politics of sovereign, independent States, but it deserves to be called a legalization, since – as we have seen in this chapter – it takes place within the legal framework of the peace federation and is at the same time programmatically oriented towards the constitutional world order of the cosmopolitan republic.

D. Legalizing Politics: A Conduct of Government¹⁰³

Up to now, this essay has been primarily interested in a) clarifying Kant's position regarding international law and b) answering the question in how far his political philosophy can be appropriately described in terms of constitutionalism. Now I want to address the question if our results so far can be of any *practical* impact in the contemporary debate on the constitutionalization of international law. Of course, we first have to define what constitutionalization of international law means. However, an exact definition would probably not only require at least an essay of its own, but would also be impossible, because of the many different approaches to the issue.¹⁰⁴ So, since this essay is primarily philosophical, I have to ask for lenience. I will pick out two definitions of constitutionalism of international law which seem suitable to me to present my understanding of a Kantian approach of *legalization of international politics as a conduct of government*.

Koopmans' definition can be read as a representative for a domestic approach. For him, constitutionalism entails that powers

¹⁰³ This phrase is inspired by the title of M. Koskeniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 9 [Koskeniemi, Constitutionalism]. For, as I want to show, a legalized conduct of government in the first place requires the people in charge to adopt a constitutional mindset. Although I disagree with Koskeniemi on several points, I think he still has summed up several core aspects of Kant's philosophy in this issue into a nutshell with this phrase.

¹⁰⁴ For the legal debate see for example J. Klabbers, 'Constitutionalism Lite', 1 *International Organizations Law Review* (2004) 1, 31 and for an approach in political theory cf. Habermas, *Konstitutionalisierung*, *supra* note 2. See also the collection of essays by R. S. J. MacDonald & D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005).

“[...] are not exercised arbitrarily, reflecting the mere will of the political leaders of the day, but in accordance with the law, which creates or recognizes permanent institutions and organizes the powers to be exercised by them”.¹⁰⁵

Such a domestic understanding of constitutionalization tries to transfer core aspects of constitutions of nation States to an international level by resorting to a vocabulary of institutional hierarchies. Therefore, constitutionalism can be understood as an architectural project that tries to identify institutional and hierarchical structures in international law (e.g. the UN Charter) which resemble domestic constitutions.¹⁰⁶

Contrary to that, Koskenniemi stresses (incidentally by referring to Kant) that:

“[...] constitutionalism is not necessarily tied to any definite institutional project, European or otherwise. Irrespective of the functional needs or interests that laws may seek to advance, a Kantian view would focus on the practice of professional judgment in applying them. Less than an architectural project, constitutionalism would then be a programme of moral and political regeneration. That is what I mean by the description of constitutionalism as a ‘mindset’”.¹⁰⁷

Such an approach refrains from the necessity of establishing an articulated constitution which states a complete hierarchical legal system and thereby spells out every legal problem solution. Instead, the *nucleus* for a constitutionalization of international law is the lawyer and his legal judgment that constitutionalizes scattered legal materials by interpreting them in a mindset that puts these materials within a constitutional framework.

From a Kantian point of view, the first approach is over-determined, whilst the second one is under-determined. The overdeterminacy of the

¹⁰⁵ T. Koopmans, *Courts and Political Institutions: A Comparative View* (2003), 245.

¹⁰⁶ Cf. for example B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009); J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009) and several essays in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009).

¹⁰⁷ Koskenniemi, *Constitutionalism*, *supra* note 103, 18.

former approach lies in its *need of essential core aspects* (known from domestic constitutions) such as mandatory membership of the nation States, permanentness of the international body and especially an articulated constitutional hierarchy of norms as well as binding and enforceable laws, etc. Therefore, whether there is a constitutionalization of international law depends on the question of whether there presently exists an international legal regime, which *in concreto* has this material function of a domestic constitution. As we have seen, Kant even rejects the possibility of such a constitution of international law for several reasons.¹⁰⁸ For him, the peace federation, that is, a legal framework according to the principle of public right, is sufficient to speak of a rightful condition in international law.

The underdeterminacy of the latter approach lies in its *lack of a fundamental ideal*, which could moderate or respectively guide (in absence of a quasi-domestic constitution) a “constitutionalized” reading of scattered legal materials. Although Koskenniemi’s – from a Kantian perspective – right in refraining from the necessity of establishing an articulated constitutional system and calling for a constitutional mindset to speak of a constitutionalization of international law, he goes too far by saying:

“Even in the absence of a formal constitution, a practice does exist of ‘constitutionalizing’ international relations by constant adjudication between rules and rule-systems, deciding on institutional powers of international bodies, and formulating legal ‘principles’ out of scattered materials. [...But even] if law offers a solution to every problem, we cannot know what that solution is. After all, *rules do not spell out the conditions of their own application*. The result, therefore, could seem insufficient to those hoping to undo delegalization, fragmentation, or empire [sc. in international law] through firm hierarchies or definite policy suggestions.”¹⁰⁹

Koskenniemi speaks of “a familiar hubris [...]: the assumption that a right (‘lawful,’ ‘valid,’ ‘optimal,’ ‘effective’) solution already exists somewhere, and the lawyer’s task is just to find it and apply it”.¹¹⁰ Such an account does not share Kant’s conviction that every lawyer as a moral being

¹⁰⁸ See above section C. II.

¹⁰⁹ Koskenniemi, *Constitutionalism*, *supra* note 103, 21.

¹¹⁰ *Id.*

is obliged to strive for the ideal of a constitutionalized world order (i.e. the cosmopolitan republic) and is thereby equipped with a programmatic guideline for legal policies and hierarchies. In the first place this “ideal guideline” gives us the standards for legal decision-making and for interpreting scattered legal materials within a consistent legal framework: the right decisions, policies and structures are those with the most freedom-enhancing capability according to universal laws.¹¹¹ Therefore according to Kant we always *a priori* know, not only what standards an ideal legal solution has to meet,¹¹² but also what the ideal structures and conditions for legal decision-making are.¹¹³ By focusing too much on the formal aspects of Kant’s legal philosophy¹¹⁴ and on the process of judging and adjudicating¹¹⁵

¹¹¹ Cf. Kant, *Critique of Pure Reason*, *supra* note 81, AA III, B 373-B 374: “A constitution providing for the *greatest human freedom* according to laws that permit *the freedom of each to exist together with that of others* (not one providing for the greatest happiness, since that would follow of itself) is at least a necessary idea, which one must make the ground not merely of the primary plan of a state’s constitution but of all the laws too, and we must initially abstract from the present obstacles, which may perhaps arise not so much from what is unavoidable in human nature as rather from neglect of the true ideas in the giving of laws. [...] The more legislation and government agree with this idea, the less frequent punishment will become, and hence it is quite rational to assert (as Plato does) that in perfect institutional arrangements nothing of the sort would be necessary at all. Even though this may never come to pass, the idea of this maximum is nevertheless wholly correct when it is set forth as an archetype, in order to bring the legislative constitution of human beings ever nearer to a possible greatest perfection.”

¹¹² We know that the solution must conform to the idea of the original contract (cf. Kant, *On the Common Saying*, *supra* note 1, AA VIII, 297), although what that means in an existing case involving concrete particulars cannot be known *a priori*. Besides, exempted from these standards are of course legal *adiaphora*, for example the legal decision between left-hand traffic and right-hand traffic.

¹¹³ To elaborate all material implications of Kant’s legal philosophy regarding legal structures and policies would be beyond the scope of this essay. But already a glance at the *Doctrine of Right and Toward Perpetual Peace* shows that for Kant, for instance, (on the national level) republicanism, separation of powers, acknowledgement of the innate right of humanity and (on the international level) the ban of interference into national affairs and of acquisition of independent states as well as the prohibition of standing armies are material core features of just legal structures and policies.

¹¹⁴ Koskenniemi, *Constitutionalism*, *supra* note 103, 23-29, especially in his account of Kant’s concepts of “freedom” and “autonomy”.

¹¹⁵ Cf. *id.*, 9-12.

Koskenniemi misses that Kant's concept of right has beyond its criterial function¹¹⁶ material implications regarding just legal structures and policies.

The nub of the Kantian approach is that it refrains from the necessity of an actually existing constitution in its material sense, while still clinging to the ideal of such a constitution as a guideline for legal and political conduct.¹¹⁷ A practical lawyer might now question the applicability of such an abstract concept to the concrete problems of conflicting legal regimes within international law. A few remarks on how this concept can be applied practically must suffice, however. I want to take the constitutional principle of democracy as an example of how a Kantian approach in the debate on the constitutionalization of international law would look like.¹¹⁸

Democracy is – at least from a western point of view – undoubtedly one of the most important legal principles of domestic constitutions. A most basic definition of democracy would have at least to contain that democracy is a form of government in which all adult citizens have an equal say in the decisions that affect their lives. Ideally, this includes some form of participation in the proposal, development and passage of legislation into law as well as the acceptance of majority decisions. Already in reference to such a basic definition, it is clear that democracy in this sense is presently only realized within the constitutions of nation States and not on an international level. In the contemporary debate this fact gives rise to complaints about a democratic deficit in international law. The responses to that are manifold: some either question the binding force of legal decisions of international bodies or call for domestic (and thereby democratic) ratification of any international decision making,¹¹⁹ some demand something like a “world democracy” with democratic bodies on an

¹¹⁶ According to Kant, the concept of right serves to judge legal structures in regard to “whether what these [sc. positive] laws prescribed is also right, and what the universal criterion is by which one could recognize right as well as wrong (*iustum et iniustum*)[...]“ (Kant, *Doctrine of Right*, *supra* note 1, AA VI, 229).

¹¹⁷ Similar T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012), 304-310, although Kleinlein controverts that Kant's legal philosophy ultimately aims at the world state in the form of the cosmopolitan republic.

¹¹⁸ Here, I do *not* understand democracy in the sense in which Kant uses this notion (cf. Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 352 and *id.*, *Doctrine of Right*, *supra* note 1, AA VI, 338-339), but in a contemporary sense.

¹¹⁹ See for example with further references J. L. Goldsmith & E. A. Posner, *The Limits of International Law* (2005).

international level,¹²⁰ whereas others discard this plan, because there is no “world nation” and therefore no worldwide consensus among the peoples to accept democratic decision making.¹²¹ A Kantian approach (in the sense described above) would tackle this issue in two ways:

1. Democracy (as far as it comes to *existing democratic structures*) basically requires legal processes and institutions, which guarantee some sort of equal representation in and legitimation of the legal decisions of/by the people concerned. This again presupposes a certain degree of cultural/political resemblance in order to agree on a common form of democracy as well as an international consensus on the most uncomfortable feature of democracy, namely the acceptance of opposed majority decisions. Since both these presuppositions are not met on an international level (maybe this is different on the European level), implementing democratic structures in existing or new international bodies is a vain fiction which ignores in the final analysis the lack of a more or less homogenous world society. Or to put in more Kantian words: as long as nation States don't want give up their sovereignty as far as the implementation of democratic structures on an international level is concerned, there will always be a (constitutional) democratic deficit in international law.
2. Nonetheless we are still obliged to strive for *democracy as a constitutional ideal*. This means first that on a long term perspective politicians and lawyers in charge are obliged to implement democratic structures as soon as the necessary preconditions mentioned above are guaranteed. Maybe the partial democratization of the European Union might be taken as an example for such a process.
But second – and this is most important – although present international bodies are not democratically structured (and will not be in close future), they still can be democratically administrated. This is what I want to call a Kantian redefinition of *democracy as a conduct of government*. For this, all political or legal decisions of international bodies, respectively of their people in charge, would have to pass a hypothetical democratic

¹²⁰ See for example O. Höffe, *Demokratie im Zeitalter der Globalisierung* (1999); D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995) or the essays in D. Archibugi & D. Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (1995).

¹²¹ E.g. A. L. Paulus, ‘The International Legal System as a Constitution’, in Dunoff & Trachtman, *supra* note 106, 69, 95 [Paulus, International Legal System].

validation: a decision is democratic if and only if it takes into account equally the interests and preferences of all stakeholders concerned. Of course, if all politicians and lawyers would have to be able to act in this way, they would have to be omniscient angels. And an imaginable way to cope with this “epistemological overload” is the further development of Kant’s philosophy towards Habermas’ communicative paradigm and deliberative democracy.¹²² But still, this hypothetical democratic validation is a proper and legitimate guideline for international decision making. Even if some decisions were made in this way, international law would be to a certain extent more democratic. It sounds paradox that despite a lack of democratic structures (esp. core features like representation), there still can be democratic decision making. But this paradox is (from a Kantian point of view) based on a misunderstanding of equating democracy as a constitutional structure with democracy as a constitutional ideal. From the point of view of domestic constitutions, the latter admittedly looks paternalistic and totally undemocratic. Nonetheless it is the best we can hope for under the presumption of sovereign nation States if we strive for a constitutionalization and thereby democratization of international law.

Though all this is not more than a sketchy outlook, this Kantian concept can be elaborated and transferred to other known constitutional principles, such as rule of law, federalism, separation of powers, protection of human and civil rights, etc.¹²³ In the end, a constitutionalism of international law in the Kantian sense would admittedly aim at the implementation of constitutional structures in principle – but only if the necessary preconditions are guaranteed. Since the latter is presently not the case, it would refrain from the call for material constitutional structures for the sake of a constitutional conduct of government. A Kantian approach therefore demands a moral regeneration of the people in charge, or to put in less Kantian words “a professional and perhaps spiritual regeneration”,¹²⁴ towards a legalized conduct of government. Beyond that, international politics and decision making require legal structures only as a formal framework that sets down the existence, assignment, rules of membership

¹²² Cf. A. von Bogdandy & S. Dellavalle, ‘Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms’, 10 *German Law Journal* (2009) 1, 5, 14-29.

¹²³ See for core aspects of domestic constitutions Paulus, *International Legal System*, *supra* note 121, 97-107.

¹²⁴ Koskeniemi, *Constitutionalism*, *supra* note 103, 9.

and procedure, etc. of international bodies and guarantees a public countercheck of the legal conduct of international politics.

E. Legalization of International Politics

Closing our inquiry, we can say that Kant's *Toward Perpetual Peace* (as well as the relevant passages of his *Doctrine of Right*) proposes the cosmopolitan republic as the *legal end* of international law, that is, a world State with comprehensive competences and binding and enforceable laws. Only to that extent, it is correct to claim Kant is advocating a constitutionalization of international law. Therefore, scholars who call for a *constitutionalization* of international law in the form of a multi-level legal system or conceive of present regimes, such as the UN, as a *constitution* are not following Kant in this respect.

If we want to speak of a constitutionalization of international relations in a Kantian sense under the presumption of sovereign nation States, the only thing we can hope for is a *legalization of international politics*. This implies a waiver of constitutional structures and hierarchies beyond those necessary for a legal framework for international politics to take place in. This assumes the moral and professional ability of lawyers and politicians in charge to conduct their decisions according to the ultimate ideal of a constitutional world order. And this requires the existence of an informed world public to countercheck politics.

A rightful condition in this sense bears only little resemblance with domestic constitutions. But exactly because we are far away from implementing domestic constitutional structures in international law, this Kantian conception of a rightful condition is the best we can hope for in international relations.