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Justice Among States

Four essays

Thesis for the degree of Philosophiae Doctor

Trondheim, December 2012

Norwegian University of Science and Technology

Faculty of Humanities

Department of Philosophy



NTNU – Trondheim
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For my dear parents

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K. K. M.

Trondheim, June 2012

Introduction

1. Subject matter and main theses

The public debates surrounding the 2003 Iraq War were not only debates about the questionable legitimacy of the war itself, but just as much about the role of international law and international institutions. While the Bush government and its supporters considered unilateral military action for the sake of international security and alleged universal values to be justified, critics of the war frequently argued that commitment to UN multilateralism and adherence to the text of the UN Charter were essential for just international conduct. Central among the former were neoconservative ideologues who, combining want of moral clarity with a self-professed acute sense for political realities, dismissed the UN as an ineffective organization of dubious legitimacy.¹ Attempts at ascribing any basic normative significance to international law and multilateral institutions were rejected as the delusional utopianism of weak states dreaming of a Kantian paradise of perpetual peace and wanting to curtail American power by subtle and indirect means.² Seeing the world organization as morally tainted by its inclusion of authoritarian and non-liberal states among its members and as incapable of acting on whatever good intentions it might have, neoconservatives instead put their trust in US power. Although fundamental interests and ideals could sometimes be effectively promoted via multilateral paths as well, they generally considered the US to be the more reliable defender of such interests and ideals. In their view, the choice between unilateralism and multilateralism was ultimately a matter of weighing

1 See Boot 2004 and Murray 2006. Even after his halfhearted distancing from the neoconservative movement, Francis Fukuyama characterizes the UN as “a huge distraction.” See Fukuyama 2006, p. 156.

2 Kagan 2003.

costs against benefits on a case-by-case basis, and US decision-makers should not hesitate to employ military force unilaterally in view of UN failure.

In this dissertation, I argue in favor of the other side in the debate about the role of international law and institutions by defending a Kantian alternative to this neoconservative vision of a hegemonic world order based on the unrivalled military power of the US. Thereby, I do not deny that fair criticism can be raised against the UN in its present state. On the contrary, I believe many of the proposals for reform of the UN that have been on the table for some time now can be supported by good reasons.³ In the following, I will nevertheless defend the thesis that co-operation within the framework of inclusive intergovernmental institutions like the UN is a necessary condition for justice among states and not just one option normatively on a par with other options. If states do not commit themselves to such co-operation, I argue, there can be no justice among states. As a point of departure, I take an idea congenial to Kant's philosophy of right: the idea that an order of public right establishing conditions for rightful exercise of freedom cannot be limited to the domestic sphere, but must extend beyond the territorial borders of states. Although I will not spend much more space discussing neoconservative thinking, I believe a strong case can be made, by exploring the normative foundations and implications of Kant's idea, against the belief that the US (or any other major power) is an exceptional nation entitled to employ its supreme power for alleged moral purposes.

According to Kant, the idea of a comprehensive legal order that extends beyond the domestic realm brings with it two additional forms or dimensions of public right, thus leaving us with a differentiation between three equally important and mutually dependent dimensions of right: the right of a state, which concerns the internal affairs of each state; the right of nations, which concerns relations between states; and cosmopolitan right, which concerns relations between states and strangers.⁴ Although I comment on the last dimension at certain points in this text, my primary focus is on the first two dimensions. The principal objectives are to defend and clarify the thesis that subjection to public authority is constitutive of justice not only in the relations between persons, but also in the relations between states. These objectives are pursued in part as an attempt to dissolve what has

3 See the 2004 report by the High Level Panel on Threats, Challenges and Chance: *A More Secure World: Our Shared Responsibility*, <http://www.un.org/secureworld/>.

4 See Kant 1996a [1797], 6:311 and 1996d [1795], 8:350.

often been considered irresolvable conceptual tensions internal to Kant's theory and in part as a critique of some of its theoretical adversaries.

One central conceptual issue concerns the coherence of establishing an international civil condition without an international public authority vested with coercive power. According to many Kant scholars, international norms could only acquire the quality of being legally binding if there were an international enforcement mechanism in place. This view is here rejected. Another important conceptual issue concerns the apparent conflict between the normative individualism at the heart of Kant's philosophy of right and the defense of state sovereignty implied in his advocacy of a league of states. Contrary to a widely held view, I argue that respect for individual freedom and respect for the equal sovereignty of states go well together. As regards theoretical adversaries, I take issue with Carl Schmitt's realist critique of the 20th century efforts at prohibiting aggressive war which implicitly is a critique of Kant's project for perpetual peace. I also take issue with a certain kind of cosmopolitan thought that stresses global protection of human rights without acknowledging the fundamental normative importance of state sovereignty. Finally, I critically discuss Jürgen Habermas' attempt at reconstructing Kant's idea in view of contemporary political challenges. This reconstruction I understand less as a competing project than as a dispute among theoretical consociates.

This is not a dissertation which primarily seeks to defend a specific interpretation of Kant's philosophy of right, but a dissertation in which Kant's philosophy of right plays an important argumentative role. Rather than adding another work to the abounding secondary literature on Kant, the primary issue is to systematically reconstruct Kant's arguments with a view to their soundness and relevance to the situation today. Accordingly, I have not tried to give a comprehensive account of Kant's philosophy of right. Since my main interest is not exegetical in nature, there are many aspects of it that I have omitted to comment on. By this, I do not imply that interpretative issues are unimportant, or that I have not tried to do justice to the relevant texts. To argue with Kant is also to interpret Kant, and I would not have given Kant such a prominent place in the argument if I did not think the interpretation on which I rely was sound. In the following, I will therefore present some preliminary thoughts on interpretative issues of relevance to major themes in the present work.

2. Kant's justification of the state

One interpretative issue which is in several respects important for my overall argument concerns Kant's justification of the state. In accordance with the standard argumentative scheme of the modern social contract tradition, Kant approaches this issue by founding the state on a contract that marks the demarcation line between a hypothetical state of nature and a civil condition. As in all former contract theories, the point of employing this argumentative scheme is to show why the state is a rational construct, or why we need the state: Taking the idea of a state of nature as a starting point, he argues that this is a problematic or defective condition precisely because it lacks a state authority, and therefore concludes that one should enter civil society, of which the state is constitutive.

In the secondary literature, one can find competing accounts of what Kant sees as the fundamental defect of the state of nature and what corresponding function he ascribes to the state. According to a common line of interpretation, the core of the problem is the imperfection of human nature. What makes the state of nature a defective condition requiring us to enter civil society is human beings' general lack of moral virtue: bias, malevolence, resentment, weakness of will, etc. Accordingly, the primary function of the state is to keep human wickedness in check by coercive means. Bringing about institutions that enforce justice is necessary in order to counteract our corrupt nature and to provide incentives for doing what is right. One example of such a reading is Sharon Byrd and Joachim Hruschka's recent commentary on Kant's *Doctrine of Right*. In their view, the need to proceed from the state of nature to civil society is based on a "presumption of badness:" "When opportunity presents itself, the human being will deviate from the moral law. ... Presuming others are evil, we can further assume that others might attack us in the state of nature." And for this reason, we need to "mutually guarantee security *through a certain act*. This act is entering the juridical state."⁵ Another example is Howard Williams *Kant's Critique of Hobbes*, where Kant is said to consider the restraints of civil society necessary because "as ... phenomenal beings we need to be reminded by a physical incentive that we should obey the law."⁶ Similarly, Onora O'Neill writes that since "human beings are not always well

5 Byrd and Hruschka 2010, pp. 192-3.

6 Williams 2003, pp. 82-3.

disposed towards one another, justice requires enforcing institutions which unavoidably curtail external freedom.”⁷

In contrast to such an anthropological grounding of the state, I have based central arguments in this dissertation on an interpretation that brackets assumptions about human nature and instead focuses on *structural* defects which make the state of nature a condition incompatible with justice, conceived as each person’s right not to be subjected to anyone’s arbitrary choice. On this interpretation, the fundamental problem is that the absence of a public authority which makes, applies, and enforces positive laws would make interacting persons systematically dependent on rather than mutually independent from each other’s arbitrariness. And due to this structural problem caused by the lack of a higher third position, the state can be seen as a necessary institutional framework for just interaction among persons, which is why one has to subject oneself “to a public lawful external coercion” unless one “wants to renounce any concepts of right.”⁸ Irrespective of whether interacting persons are moral virtuosos or wickedness incarnate, the right kind of relations between them are impossible to establish in the state of nature, because in the state of nature we unavoidably subject each other to arbitrary choice whenever there is a conflict over rights. The purpose of the state is to provide a public institutional framework that allows for resolution of rights conflicts without such subjection.

If this latter reading is sound, Kant’s justification of the state provides a non-consensual and non-instrumentalist account of legitimate political authority, where legitimate political authority is understood as: (a) the right to impose obligations on those subject to the authority and (b) the right to coerce those subject to the authority if they do not comply voluntarily with the authority’s commands.⁹ In contrast to consent theorists, Kant does not recognize any natural

7 O’Neill 2000, p. 139. I owe this reference to Varden 2008b, where several other works defending this line of interpretation are listed. See Varden 2008b, pp. 30-1, footnotes 9 and 10.

8 Kant 1996a [1797], 6:312.

9 With A. John Simmons I take the *legitimacy* of a political authority or state to be its right “to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties and to use coercion to enforce the duties.” See Simmons 2001, p. 130. Simmons distinguishes between legitimizing the state and justifying the state, where the latter amounts to “showing that some realizable type of state ... is rationally preferable to all feasible nonstate alternatives.” *Ibid.*, p. 126. Defending a Lockean consent theory of state legitimacy, he criticizes Kant for unsuccessfully trying to legitimate states by justifying them. The problem is that Kant allegedly does not sufficiently explain why we cannot discharge our duties of justice by supporting just arrangements without “binding ourselves to one of them.” *Ibid.*, p. 153. If I am

right to be unbound by political authority. The normative starting point for his theory is instead an innate right to freedom, which can only be rightfully determined and guaranteed in civil society. And since entering civil society requires the establishment of a coercive public authority, subjection to such an authority is an enforceable right and duty. Neither actual nor hypothetical consent play any role in the argument.¹⁰ In contrast to instrumentalist accounts, such as Joseph Raz's, Kant does not construe coercive public institutions simply as means of achieving morally important ends that could be clarified in a fully determinate way even if such institutions were not present. According to Raz, political authority is legitimate when it can be shown that we generally will do better in acting on reasons that apply to us independently of the authority by following its directives and prescriptions instead of scrutinizing these reasons directly.¹¹ The idea here seems to be the following: Although we can specify sufficiently what we owe to others without the help of a political authority, having a political authority is still of great value since it can make us better capable of complying with our obligations vis-à-vis others. And to the extent that we generally will do better at complying with our moral obligations by following the commands of an authority we also ought to do so. On the interpretation of Kant that I defend, however, an important part of the problem that makes political authority necessary is precisely that no fully determinate answer to the question of what we owe to others can be given prior to civil society. This is so, not only because the idea of an innate right to freedom is indeterminate with regard to what our specific obligations are, but also, and crucially, because it is not possible to overcome this indeterminacy in a way compatible with the right to freedom before public institutions are in place. For this reason, political authority is not just an effective means of establishing justice,

not mistaken, this critique rests on the assumptions that our duties of justice essentially consist in the advancement of certain goods, such as welfare and security, and that these duties can be discharged individually by moral conduct. On the account given here, however, Kant's argument is not directed at what goods can or cannot be provided, but at the form of the relationship between interacting persons in the state of nature. The problem is not that people cannot act benevolently without subjecting themselves to a public authority, but that even the most benevolent acts of any person are arbitrary from the perspective of everyone else.

10 This is of course not to say that consent never plays an important normative role. In most private transactions, it does. Yet consent is not necessary for the legitimacy of a state. It should also be noted that the two types of interpretation described above do not seem to differ when it comes to rejection of consent theory. However, those who emphasize human beings' lack of virtue do seem to come close to an instrumentalist view.

11 See Raz 1986, p. 53.

but an enabling condition for rightful or just interaction. Relying on work by Arthur Ripstein and Helga Varden,¹² I present this line of interpretation in more detail in the third section of chapter 1. In chapter 3, the idea of the state as an enabling condition for justice among persons is central in defending the thesis that respect for individual freedom requires respect for state sovereignty in the international realm.

I support this reading of Kant mainly because I believe it is the one that makes most sense in view of textual evidence. It is of course undeniable that there are frequent referrals to human corruption in both *Toward Perpetual Peace* and the *Doctrine of Right*,¹³ which are the two most relevant texts in this connection. Yet, in view of Kant's characterization of the *Doctrine of Right* as a doctrine "within the limits of reason alone"¹⁴ and his programmatic denial that it, as part of a metaphysics of morals, can be "based upon anthropology,"¹⁵ I find it unlikely that these referrals play any systematic role in his argument. They could do so consistently only if moral baseness were an *a priori* feature of human nature. Generally, however, Kant links human depravity to experience,¹⁶ which in turn

12 See, in particular, Ripstein 2004 and 2009, and Varden 2008a and 2008b. A similar reading is defended by Eberl and Niesen 2011, pp. 134-7 and Hodgson 2010b. Although they share the same basic perspective, these works also differ in their accounts of the structural defects of the state of nature. Ripstein 2009 distinguishes between three distinct defects: the problem of unilateral choice, which concerns first acquisition; the problem of assurance, which concerns rightful enforcement of rights; and the problem of indeterminacy, which concerns application of general rules to particulars. Hodgson 2010b, Varden 2008a and 2008b, and Ripstein 2004 all seem to treat the first and third of these under the same heading, leaving them with two defects: the problem of assurance and the problem of indeterminacy. Finally, Eberl and Niesen reduce all the problems to one fundamental problem: epistemic uncertainty, which they seem to identify with what Ripstein calls the problem of indeterminacy. They do not, however, explain in what specific way epistemic uncertainty or indeterminacy is the more fundamental problem, i.e., in what way the other two problems can be subsumed under it.

13 See, for instance, Kant 1996d [1795], 8:345 and 8:355; 1996a [1797], 6:307 and 6:312.

14 Kant 1996a [1797], 6:355.

15 Ibid., 6:217.

16 In this connection, the opening lines of §44 in the *Doctrine of Right* are central. Unfortunately, their meaning is distorted in Mary Gregor's translation. The German original reads: "Es ist nicht etwa die Erfahrung, durch die wir von der Maxime der Gewalttätigkeit der Menschen belehrt werden, und ihrer Bösartigkeit, sich, ehe eine äußere machthabende Gesetzgebung erscheint, einander zu befehlen, also nicht etwa ein Faktum, welches den öffentlich gesetzlichen Zwang notwendig macht." See Kant 1977 [1797], p. 430. In the English version, the connection between experience and human malevolence is precisely the opposite due to a missing comma after the fourth word: "It is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before

seems to imply that the bellicose and violent inclinations of human beings are thought of as contingent, and therefore changeable factors.

Moreover, he also emphasizes that it is “not experience” or “some fact that makes coercion through public law necessary,” that the state of nature is a defective condition “however well disposed and law-abiding men might be,” and that even if “the state of nature need not ... be a state of *injustice (iniustus)*, of dealing with one another only in terms of the degree of force each has,” it “would still be a state *devoid of justice (status iustitia vacuus)*, in which when rights are *in dispute (ius controversum)*, there would be no judge competent to render a verdict having rightful force.”¹⁷ As far as I can see, Kant here unequivocally denies that the necessity of subjecting to public lawful coercion is premised on some regrettable fact about human nature. What he appears to say, is that the transition from the state of nature to civil society is necessary even under counterfactual ideal conditions where everyone is well-disposed toward each other, because structural features of the state of nature prevent any impartial solution to rights conflicts before such a transition has taken place. Accordingly, I do not think one should emphasize anthropological pessimism when reconstructing Kant’s argument for the need to exit the state of nature. Instead, the emphasis should be on the terms of interaction in the state of nature. These terms leave persons with no other option than to act on the basis of their unilateral judgment and (if necessary) their own reservoir of force. They are therefore in conflict with each person’s innate right to freedom. Correspondingly, Kant elsewhere characterizes the state of nature as “a condition of war,” not because “actual *hostilities* are the rule between human beings who do not stand under external public laws,” but because “the relationship in and through which they are capable of rights ... is ... one in which each of them wants to be himself the judge of what is his right vis-à-vis others, without however either having any security from others with respect to this right or offering them any.”¹⁸

external legislation endowed with power appears, thus it is not some deed that makes coercion through public law necessary.” See Kant 1996a [1797], 6:312.

17 Ibid.

18 Kant 1996c [1793], 6:97.

3. Implications for the differentiation between morality and law

Reading Kant in this way is of consequence to the differentiation between morality and law, or ethics and right. If the state of nature is a condition devoid of justice no matter how virtuous people are, then legal norms cannot be understood as a subset of moral norms. If they could be so understood, it does not seem that subjection to public authority would be strictly necessary for enabling just interaction among persons. There could of course be weighty prudential reasons for doing so, but to the extent that legality forms a mere part of morality, moral reflection and perfection of humanity's moral faculties in principle seems to be enough. As reconstructed here, however, Kant's argument is precisely that justice is not something which simply is discovered by moral reflection, but something which must be established by public legislative, adjudicative and coercive institutions. Accordingly, I think it is incorrect to say that Kant's philosophy of right "is guided by the Platonic intuition that the legal order imitates the noumenal order of a 'kingdom of ends' and at the same time embodies it in the phenomenal world."¹⁹ As far as I can see, its architectonic structure is similar to the architectonic structure of Habermas' discourse theory of law and democracy, where the relation between morality and law is presented as one of complementarity rather than as one of hierarchy and subordination.

While it is true that juridical laws form a subcategory of "moral laws" in the introduction to *The Metaphysics of Morals*, it is a mistake to conclude on this basis that the concept of right is therefore derived from the basic concept of the moral law, understood as a law that determines a free will. As Ingeborg Maus has pointed out, in this work "moral" does not denote morality (*Moralität*) as opposed to legality (*Legalität*). Instead, "moral laws" is a generic term that refers to all "laws of freedom" – the subject of practical philosophy – which are contrasted to causal "laws of nature" – the subject of theoretical philosophy.²⁰ With regard to the distinction between ethics and right, the term is still undifferentiated. Moral laws are all those laws that can be universalized, irrespective of their status as ethical or juridical laws. Only in the next step, when distinguishing between internal and external freedom, is this further distinction introduced. This seems to correspond very well with Habermas' proposal that moral norms and legal norms branch out

¹⁹ Habermas 1996, p. 106.

²⁰ Maus 2002, p. 108; Kant 1996a [1797], 6:214.

coevally from a “parsimonious discourse principle” that articulates the conditions for the validity of norms in general.²¹

In both Kant and Habermas, the non-hierarchical differentiation of morality and law is, among other things, motivated by concerns related to the coercive aspect of positive law. In contrast to ethics, positive law or “right rests ... on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws.”²² This conceptual link between right and coercion causes morality and law to split up inasmuch as the latter must be restricted to the requirement of norm-compliance in external behavior, whereas the requirement of compliance for the right reasons belongs to the former. As I point out in the second section of chapter 1, there are both normative and conceptual reasons for such a split between morality and positive law.

Yet this split does not in itself explain sufficiently why moral and legal norms should not be differentiated hierarchically. In so far as positive law merely brackets what is implied in morality it might seem that legal norms are indeed a subset of moral norms, or that the concept of right is derived from “the basic concept of the moral law ... by way of limitation.”²³ Just as important as the restriction of positive law to external relations is therefore a concern with the possibility of what Peter Niesen has called “moralist abuse” in the coercive sanctioning of norm-deviant behavior.²⁴

A danger inherent in a hierarchical model that subordinates law to morality is self-empowerment by would-be enforcers of justice. If the sphere of legitimate coercion is understood simply as a subdivision of morality those sufficiently powerful might think themselves justified in applying force against perceived injustice on the basis of their own moral argument. Such justificatory strategies, aiming at a one-sided application of force in the name of justice are supposed to be closed off by the non-hierarchical differentiation of morality and law. By acknowledging the autonomy of positive law from morality, moral arguments for the use of force are bound to public legal procedures whereas moral arguments

21 Habermas 1996, p. 107.

22 Kant 1996a [1797], 6:232.

23 Habermas 1996, p. 105.

24 Niesen 2011, pp. 129-31.

aiming at extra-legal enforcement practices are ruled out.²⁵ As Niesen puts it: “Moral arguments for the use of force should ... not be interpreted as complete or self-sufficient. In order to immunize them from moralist abuse, they should be understood elliptically: not as demanding sanctions, but as demanding the establishment of a legal framework on the basis of which sanctions may be administered.”²⁶

4. Relevance for external relations between states

Reconstructing Kant’s justification of the state in the way outlined in section 2 above also provides support for many of the theses defended in this dissertation. Importantly, a parallel argument can be given in favor of the thesis that subjection to an international public authority is constitutive of justice among states, because some of the considerations that apply to interacting persons also apply to interacting states. *Qua* enabling condition for just interaction among persons, a state is what Kant calls a “moral person” having a right to freedom or independence from subjection to other states’ arbitrary choice.²⁷ At the same time, as in interpersonal relations, conflicts over rights can obviously arise in international relations as well. And as long as there is not established a higher third position via public institutions states have no other option than to act as judges in their own cases whenever such conflicts arise. In other words, in the absence of an international public authority there can be no solution to conflicts over rights consistent with each state’s right to freedom. The international state of nature is therefore structurally defective in a way similar to the interpersonal state of nature. It is a condition in which states are systematically dependent on, rather

25 On Kant’s conception of right, the idea of unilateral enforcement of justice is strictly speaking nonsensical, because unilateral enforcement implies coercion on the basis of arbitrary choice, irrespective of the enforcer’s good or bad intentions. This is part of the reason why a transition from the state of nature to the civil condition is necessary. Inasmuch as all employment of force is unilateral in the state of nature, there can be no coexistence of coercion and freedom in accordance with universal laws in this condition.

26 Niesen 2011, p. 131. This concern with self-empowerment is not only central to the analysis which on the present interpretation makes the transition from the state of nature to the civil condition necessary, but is also reflected in the institutional structures of the public authorities constitutive of justice at the respective levels. For a good account emphasizing the latter aspect, see Eberl 2008, pp. 183-262.

27 Kant 1996d [1795], 8:344; Kant 1996a [1797], 6:643.

than mutually independent from each other's arbitrariness. Hence, they too ought to enter a civil condition by subjecting to an international public authority.

I believe this point is illustrated well by §56 in Kant's *Doctrine of Right*, a paragraph which at first sight might seem like a revocation of the critique launched against the just war tradition in *Toward Perpetual Peace*. In the latter work, Kant rejects the alleged right to wage war for moral purposes defended by just war theorists as "strictly speaking, unintelligible (since it is supposed to be a right to determine what is right not by universally valid external laws limiting the freedom of each but by unilateral maxims through force)."²⁸ And a few pages earlier, Hugo Grotius, Samuel Pufendorf, and Emer de Vattel, all natural law theorists in the just war tradition, are sarcastically dubbed as "sorry comforters" who are frequently cited in order to justify military aggression, "though there is no instance of a state ever having been moved to desist from its plan by arguments armed with the testimony of such important men."²⁹ While these quotes fit nicely with the motif of opposing unilateral use of force, the picture is seemingly complicated by the opening lines of §56 in the *Doctrine of Right*:

In the state of nature among states, the *right to go to war* (to engage in hostilities) is the way in which a state is permitted to prosecute its right against another state, namely by its own *force*, when it believes it has been wronged by the other state; for this cannot be done in the state of nature by a lawsuit (the only means by which disputes are settled in a rightful condition).³⁰

Inasmuch as Kant here recognizes a right to go to war, one might think he takes a more accommodating position toward just war theory than he did in the work published two years earlier. Recently, commentators have also tried to depict Kant as a just war theorist on the basis of the quoted passage.³¹ Contrary to this, I do not think §56 represents any kind of reorientation with regard to the just war tradition on Kant's part. In line with Oliver Eberl and Peter Niesen, I believe its main purpose is to demonstrate how far-reaching and potentially unlimited just causes for war are in the international state of nature, and thus implicitly to substantiate the claim that states have a duty to enter an international civil condition.³²

28 Kant 1996d [1795], 8:356-7.

29 Ibid., 8:355.

30 Kant 1996a [1797], 6: 346.

31 See, in particular, Orend 2000, pp. 41-60. Shell 2005 seems to affirm Orend's thesis.

32 Eberl and Niesen 2001, pp. 151-55. Note that the right to go to war is a right *in the state of nature*, and not part of international public right. Hence, there is no conflict between what

Consider first that, according to the above quote, it is a sufficient justification for engaging in hostilities that a state *believes* itself to be wronged by the acts of another state. This is a consequence of being in a state of nature where everyone is judge in their own case. Consider next the relevant wrongs subsequently listed by Kant. In addition to “active violations” or “first aggression,” he also counts threats, which include both preparations for war and “the *menacing* increase in another state’s power.”³³ Accordingly, from the right to prosecute one’s rights by means of war there follows not only a right to fight defensive war, but also rights to preventive attack and to wage war for the purpose of restoring a balance of power. In sum, this leaves few practical limits on a state’s right to go to war. In the state of nature, there is a wide range of justifications available for going to war and each state is entitled to decide when there is sufficient reason for taking up arms against another state. As long as a justification referring to an alleged violation or threat can be presented, a state is permitted to use force in the defense of its own claimed rights because this is the only possible procedure in absence of an international public authority. Hence, the unspoken message seems to be what Kant says explicitly elsewhere, using the same terminology as in the case of the state of nature among persons: that states in the state of nature are in “a *condition* of war (of the right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made,” that “this condition is in itself ... wrong in the highest degree,” and that “states neighboring upon one another are under obligation to leave it.”³⁴

Despite the explicit parallels Kant draws between the interpersonal and the international state of nature, the public authority constitutive of justice among states is not a second-order state authority. In order to overcome the problems of the international state of nature, states should not form a state of states vested with legislative, judicial, and coercive power, but join a league of states vested with judicial power only. In contrast to many critics, who find Kant to be in conflict with the implications of his own argument on this point, I believe the differences between the two cases can be accounted for by reading Kant’s analysis of the state of nature as an analysis of structural defects causing systematic dependencies between interacting parties. Hence, where the critics argue that analogous

Kant says in the quoted passage from the *Doctrine of Right* and his characterization of a right to go to war as unintelligible in *Toward Perpetual Peace*.

33 Kant 1996a [1797], 6: 346.

34 *Ibid.*, 6:344.

challenges call for analogous solutions and that Kant should have opted for a state of states, I argue that Kant's justification of the state as an enabling condition for just or rightful interaction among persons speaks in favor of the league of states. For one thing, the state's role as a necessary institutional framework for just interpersonal relations generates normative constraints with regard to institution-building beyond the state. Moreover, there is only a partial parallel between the state of nature among persons and the state of nature among states. Kant's argument rests on an analogy, not a full parallel. Notably, the concerns which make a public enforcement mechanism necessary in the domestic realm are not in place in the international realm. I present this line of argument more extensively in chapter 1. Some of the same considerations are also important for the argument in chapter 4.

It should be noted that in defending Kant's league of states, I am not saying that establishing such a league will solve every possible problem in the international realm. Although Kant links the idea of extending public right beyond the territorial borders of states with the formula "universal and lasting peace,"³⁵ it is a mistake to identify this idea with the utopian vision of a peaceful and prosperous ideal world society far removed from present real-world conditions. The league does not lead us into a conflict-free "post-historical paradise."³⁶ It does, however, enable states to resolve their conflicts in a way compatible with each state's right to freedom. Thereby, it puts in place minimal conditions for just interaction among states. And this is why commitment to international law and UN multilateralism cannot be reduced to one policy-choice among others or to the indirect strategy of the weak against the strong. The UN is not simply European states' substitute for lack of military power, but the only actually existing alternative to unilateral employment of force by powerful states. Arguably, the world organization in its present state has many flaws, but that does not seem to give anyone sufficient ground for bypassing it. Rather than being a reason for states to arrogate the right to decide about the rights of other states, those flaws should motivate efforts at reforming the world organization.

35 Kant 1996a [1797], 6:355.

36 Kagan 2003, p. 3. With Oliver Eberl and Andreas Fischer-Lescano, I believe Robert Kagan's simplistic differentiation between Kantian idealists from Venus and Hobbesian realists from Mars first and foremost displays that he makes use of "a binary coding which does not have much to do with the conditions on the planet Earth." See Eberl and Fischer-Lescano 2005, p. 1 note 5 [translated from German by K.K.M.].

5. Outline of articles

The main part of the text consists of four chapters originally written as separate articles.³⁷ In the first article, “In Defense of Kant’s League of States,” I address the issue of what kind of institutional arrangement Kant does or should prefer for enabling just relations between states. As mentioned, his proposal that rightful or just international relations can be achieved within the framework of a league of states is often criticized for being at odds with his overall theory. In view of the analogy he draws between an interpersonal and an international state of nature, it is often claimed that he should instead have opted for the idea of a state of states. I call this the *standard criticism*. Agreeing with the standard criticism that a league of states cannot establish the institutional framework for international justice, others also suggest an alternative *stage model interpretation*. According to this interpretation, Kant’s true ideal is in fact a state of states, whereas the league is introduced as a temporary and second best solution. In contrast to both the standard criticism and the stage model interpretation, I argue that fundamental normative concerns count in favor of a league rather than a state of states. I also argue that Kant’s defense of such a league is consistent with his position on the institutional preconditions for just interaction in the domestic case because of crucial relevant differences between the state of nature among individuals and the external relations between states.

In the second article, “Carl Schmitt and the Prohibition against Aggressive War,” I discuss Carl Schmitt’s critique of the efforts at criminalizing aggressive war from the First World War onwards. For Schmitt, an effective bracketing [*Hegung*] of war is the most we should hope and strive for in international relations. Ideas such as Kant’s project for perpetual peace are hopelessly utopian and deeply problematic because prohibiting aggressive war leads to a “discriminatory concept of war” that can intensify antagonisms between political adversaries and thereby prepare the ground for especially brutal and inhumane wars. It is not unusual to understand this critique as a general critique of the Just War-tradition for introducing moral notions into international politics. In contrast to such readings, I argue that the real target of Schmitt’s critique is liberal individualism. In his view,

37 A version of the first article is published in *Law and Philosophy* 30 (2011), pp. 291-317. I have been invited to publish the third article as a contribution to an anthology on Kant and cosmopolitanism edited by Gary Banham, Garrett Wallace Brown, and Áron Telegdi-Csetri. The fourth article has been accepted for publication in *Ratio Juris*.

liberal ideology is the driving force behind the interwar efforts at criminalizing war, and the abstract universalism of liberalism combined with the inescapability of what Schmitt calls “the political” is what causes intensification and brutalization of international conflict. I further argue that Schmitt’s analysis rests on a radical form of anthropological pessimism that is difficult to defend in any other way than as a subjective profession of faith, that the realism of his defense of a non-discriminatory concept of war can be questioned, and that he seems to overstate the deep existential significance of the political. Although intertwined with a keen analysis of a deceptive and interventionist form of imperialism highly relevant to present political trends, the critique aimed at the criminalization of aggressive war (and thus implicitly at Kant’s project for perpetual peace) does not seem sound.

Part of the problem with Schmitt’s position is that he overemphasizes the political to the detriment of individual freedom. In the third article, “A Cosmopolitan Defense of State Sovereignty,” I criticize a position that I have called *anti-statist cosmopolitanism* and that falls into the opposite trap of overemphasizing individual freedom to the detriment of the political. Proponents of this influential strand of contemporary political thought include Brian Barry, Charles Beitz, Allen Buchanan, Simon Caney, Darrel Moellendorf, and Fernando Tesón. They advocate international legal reforms in a decisively individualistic direction, arguing that state sovereignty should not be considered a basic principle of international law, but instead be ascribed derivative significance, dependent on its instrumental value for protecting human rights. Implied in this view is rejection of non-intervention and self-determination as fundamental international norms and, more generally, support for a non-egalitarian international system that discriminates between states on the basis of their internal features. In contrast to the anti-statist cosmopolitans, I argue that there is a stronger connection between individual freedom and state sovereignty. Explicating justice among persons in terms of what Kant calls an innate right to freedom, I show that state sovereignty is not only compatible with, but essential to the recognition of individuals as units of ultimate concern and that respect for the rights of persons therefore requires respect for sovereignty in the international realm. On this view, sovereignty is an international analogue to individual freedom in the domestic realm. Such an analogy is often criticized by anti-statist cosmopolitans, either for overlooking important differences between states and individuals or for putting undue emphasis on communal integrity. I also argue that the present defense of this so-called *domestic analogy* is not susceptible to these critiques.

In the fourth and final article, "Habermas and Kant on International Law," I present a critical assessment of Jürgen Habermas' reformulation of Kant's project for perpetual peace. Here, special attention is paid to how well Habermas' proposal for a multi-level institutional model fares in comparison with Kant's league of states. Like Kant, Habermas rejects the idea of a state of states vested with coercive power. At the same time, he is dissatisfied with Kant's idea of a voluntary league of states which is only vested with judicial power. In what seems like an attempt at finding the middle ground between these two alternatives, he proposes a model that involves cooperation between the UN, conceived as a supranational executive agency, and democratically reformed regimes, such as the EU, operating at a mid-level between the nation states and the world-organization. Contra Habermas, I argue (a) that his critique of the league fails in important respects and (b) that his own proposal faces at least two problems related to the attempt at going beyond such a league. With regard to (a), I argue that Habermas does not succeed in showing that a voluntary league of sovereign states is at odds with the project of establishing a system of binding international law or with the primacy of individuals as units of normative concern. With regard to (b), the first problem is that Habermas' alternative model implies a problematic asymmetry between powerful and less powerful states. The second problem is that his proposal entails creating a global police force that has an obligation to intervene against egregious human rights violations world-wide, and that this seems incompatible with the idea that every person has an innate right to freedom. In short, I argue that there are important normative constraints relevant for institutional design in the international domain that Habermas does not take sufficiently into account. Yet this does not mean that Kant's league cannot be supplemented with more comprehensive forms of institutional cooperation between states. On the basis of my assessment of the multi-level model, I therefore propose a hybrid model combining elements from Kant and Habermas.

Chapter 1

In Defense of Kant's League of States

1. Introduction

The starting point for this article is a contested issue among Kant researchers: What kind of institutional arrangement does or should Kant prefer for the achievement of a just international legal order? While there is broad agreement that the idea of a global unitary state which merges all states into one state should be rejected, the disagreement concerns which of two models is the more adequate: a) A league of states vested with judicial, but no coercive power which states are free to join and leave at will, or b) a state of states which leaves the primary state units as separate entities, but which permanently establishes coercive power over its members. In this article, I defend the league of states against two competing positions which I call the *standard criticism* and the *stage model interpretation*. According to proponents of both these positions, such a league is a too weak institutional arrangement for achieving a just international legal order. In their view, the only institutional model consistent with Kant's own theory is a state of states.

Despite this agreement between the standard criticism and the stage model interpretation concerning the necessity of establishing a state of states, they disagree on how Kant's idea of a league of states should be understood. Proponents of the standard criticism understand the introduction of this idea as a rejection of a state of states, and argue that there is a problematic mismatch with regard to what obligations Kant says hold for individuals and what obligations he says hold for states. The problem arises because Kant draws a parallel between the original state of nature between individuals and external relations between states, and at the same time rejects that overcoming the international state of nature calls for a solution parallel to the solution to the interpersonal state of nature. With regard to

the latter, Kant claims that persons that cannot avoid interacting with other persons have an enforceable right and duty to subject themselves to a public authority enacting and enforcing positive laws, i.e., a state. By contrast, state communities can neither be compelled to do so, nor should they do so by establishing a state of states. Instead, they should voluntarily form a league of states. This move is seen as inconsistent with Kant's overall theory. As Otfried Höffe puts it: "According to the international state of nature argument, the establishment of a state-like union is already needed between existing states," and "the thesis about the federalism of free states ... is clearly incompatible with the analogy it rests on."¹

Although proponents of the stage model interpretation agree that a voluntary league cannot establish the necessary institutional framework for international justice, they claim that the standard criticism is based on a misunderstanding regarding the role of the league. According to Pauline Kleingeld, "the standard view of Kant's position is mistaken" and does not recognize that he "combines the defence of a voluntary league with an argument for the ideal of a world federation with coercive powers."² On this reading, the league of states is not the final institutional scheme for establishing rightful international relations, but merely a first step to be superseded by a state of states when the time is ripe.³ While Kleingeld emphasizes that the transition from the league of states to the state of states cannot be forced upon states, an alternative version of the stage model interpretation is defended by Sharon Byrd and Joachim Hruschka in a recent article in *Law and Philosophy*. In their view, Kant does not only defend the league of states as an intermediary stage in the process leading towards the state of states, but also holds the view that "all states may use force to coerce all other states to make this move."⁴

In the following, I contest both versions of the stage model interpretation, as well as the underlying assumption that they share with the standard criticism of Kant – namely that overcoming the international state of nature requires a state of states. In contrast to adherents of the stage model interpretation, I argue that the league is Kant's final conception. In contrast to adherents of both the stage model interpretation and the standard criticism, I argue that systematic normative

1 Höffe 2006, p. 193. For similar claims, see Lutz-Bachmann 1997 and Carson 1988.

2 Kleingeld 2004, p. 304.

3 This view is also defended by Byrd 1995, Cavallar 1999, and McCarthy 2002.

4 Byrd and Hruschka 2008, p. 624.

considerations suggest that the league is the rational ideal whereas the state of states is in conflict with right or justice.⁵

In my view, the asymmetries between the domestic and the international case can be explained with reference to the fact that peace is an end internal to the doctrine of right, and that its realization therefore must not oppose the principle of equal freedom which is at the centre of Kant's theory. Peace among nations is a condition of right, not a goal external to it. Being such a condition, any conceptualization of and attempt at achieving lasting peace must cohere with what is right. In order to see why this implies a rejection of the state of states, it is necessary to examine more closely Kant's justification for his non-voluntarist view of domestic political obligations, which is the view that a state's authority to impose duties on its subjects rests on an enforceable right and duty to enter civil society, and not on the actual or hypothetical consent of its subjects.⁶ In this connection, a crucial point is that irresolvable structural problems⁷ in the state of nature make a public authority vested with coercive powers a necessary precondition of rightful relations between persons. But insofar as a public institutional framework is a necessary precondition of rightful relations it is possible to show that states cannot, as can individuals, be forced to subject themselves to a public authority and that the public institutional framework constitutive of the international civil condition should not establish a global monopoly of violence. In addition, focusing on Kant's justification for non-voluntarism in the domestic case helps us see why this conclusion is consistent with the proposal for a league of states. By considering to what degree the problems with regard to interpersonal relations apply also to the external relations between states it can be shown that the international state of nature is similar to the former only in some respects and therefore does not necessarily call for a state of states.

In order to explain why Kant regards a coercive public authority as constitutive of rightful relations between persons and therefore adheres to a non-voluntarist conception of domestic political obligations, I first give a brief presentation of his conception of right in section 2. Thereafter, in section 3, I show what structural problems make the state of nature a condition incompatible with right. In section 4, I introduce Kant's idea of a league of states, and discuss what

5 In this article I use the terms "right," "justice," and "rightful relations" interchangeably.

6 On Kant's non-voluntarism, see Varden 2008b.

7 These are the problems of assurance and indeterminacy treated in section 3 below.

critics find problematic about this idea. Here, I also argue that the stage model interpretation is unconvincing on a textual basis. In this connection, I consider in particular the arguments put forward by Byrd and Hruschka. In section 5, I first argue that states cannot be rightfully forced to leave the state of nature, which is also why a state of states with coercive powers is a problematic goal. Then, I explain why there is a need for a league, but not a state of states, arguing that there is only a partial parallel to the interpersonal state of nature in the external relations between states.

2. Kant's conception of right

Kant's conception of right can be described in terms of the familiar idea of coercively protected spheres of freedom within which everyone is equally free to choose as they please. This idea is expressed in his definition of right as "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom,"⁸ and is grounded in each person's innate right to freedom, the right to "independence from being constrained by another's choice ... insofar as it can coexist with the freedom of every other in accordance with a universal law."⁹

While this emphasis on equal freedom places Kant within the tradition of liberal political thought, there is also an affinity with the so-called republican tradition, in particular with this tradition's notion of "freedom as non-domination" which Phillip Pettit describes as "the condition under which you live in the presence of other people but at the mercy of none."¹⁰ In contrast to Isaiah Berlin's "negative" concept of liberty, the innate right to freedom does not track interferences with regard to goal attainment.¹¹ Whereas Berlin considers any act by other human beings that frustrates a person's wishes as an obstruction of that person's freedom, Kant says that right does not concern the "relation of one's

8 Kant 1996a [1797], 6:230. All references to Kant in this article are according to the Prussian Academy pagination. I have made use of the following of his works: *The Metaphysics of Morals*, PA 6:203-493; *Idea for a Universal History with a Cosmopolitan Intent*, PA 8:15-31; *On the common saying: 'That may be correct in theory, but it is of no use in practice'*, PA 8:273-313; *Toward perpetual peace – A philosophical project*, PA 8:341-386.

9 Kant 1996a [1797], 6:237.

10 Pettit 1997, p. 80.

11 Cf. Berlin 2006, p. 169.

choice to the mere wish ... of the other.”¹² In his view, to be independent is to be able to set ends of one’s own without the interference of other people,¹³ but not necessarily to be unaffected by the choices other people make. Since the actions of other people lead to changes in the world they may indeed frustrate the pursuit of whatever end we choose, but as long as they do not interfere with our capacity to pursue ends they do not restrict our innate right to freedom. It is perfectly possible to be hindered by others in achieving what one strives for without thereby having one’s freedom of choice restrained. And, since the crucial issue is whether other persons interfere with our capacity to pursue ends rather than whether one is hindered in achieving one’s ends, Kant need not, as does Berlin, draw a sharp conceptual line between freedom and justice.¹⁴ Freedom is to have the final word with regard to the use of one’s own powers. It does not entail the use of other people’s powers. Restrictions that prevent some person from arrogating or damaging some other person’s capacity to make free choices are therefore strictly speaking not restrictions on freedom. More appropriately, they should be seen as conditions that enable the equal freedom of everyone, that is, restrictions that secure each person’s independence from subjection to the arbitrary choices of others.

The indifference with regard to the relation between one person’s choice and another person’s wishes reflects a general aspect of Kant’s conception of right: the emphasis on the form of the relationship between interacting persons rather than on substantive standards such as basic human needs, purposes, interests and the like. The rightfulness of an action does not depend on it being favorable to the promotion of basic values or fundamental human interests. The only requirement is that it accords with universal laws – that is, rules which, first, restrict every person equally and, second, do not merely represent the choice of one particular person or group.

There is a structural similarity between Kant’s theory of right and his ethics. In both cases he stresses formality and universality. At the same time there is an

12 Kant 1996a [1797], 6:230.

13 Arthur Ripstein defends the idea of equal freedom against critics who argue that liberty is not a self-limiting concept by stressing this point, in Ripstein 2009, pp. 31-9.

14 Referring to Hobbes’ view of the free man as the man who is not hindered in doing what he has a will to, Berlin sees any restriction as external to freedom. Although he recognizes that the legitimate area of free action must be limited, it is characteristic that political liberty is conceived as conceptually distinct from justice: “Everything is what it is: liberty is liberty, not equality or fairness or justice.” Berlin 2006, p. 172.

essential difference between the two insofar as the sphere of right is restricted to “what is external in actions.”¹⁵ From the perspective of right, our inner dispositions for acting in a particular way are not of interest. Virtuous action requires the right kind of motivation, whereas justice is agnostic on this question. In both cases we are obliged vis-à-vis universal laws of freedom. But as far as right is concerned, it cannot be demanded that we make the fulfillment of moral laws the incentive of our action.

This restriction of right to the external sphere is related to the conceptual link between right and coercion. Even if coercion is an impediment to or hindrance of external freedom, right is still analytically connected to an authorization to coerce. Whoever hinders rightful use of freedom does wrong by laying arbitrary constraints on the innate right of some other person, and coercion that prevents such constraints is legitimate, “as a *hindering of a hindrance to freedom*.”¹⁶ It is therefore no surprise that the requirement of a moral motive must be abandoned in the sphere of right. Since questions of right are essentially questions of legitimate coercion, there cannot, as a matter of principle, be any rightful regulation of morality. For one thing, if coercion is allowed to reach beyond the external sphere to the internal motivations of people, we seem to have no substantial barrier against paternalistic, not to say authoritarian or totalitarian, intrusions by governments with regard to how one should lead one’s personal life, how one should think, what one should desire, etc.¹⁷ Moreover, such efforts would also be self-defeating for the simple reason that virtuous action is beyond the reach of possible coercion. Virtuous or moral action implies that what is done is done because one recognizes that it is the right thing to do, so whatever a person does because he or she is externally compelled to do so is not a virtuous action.

The boundaries of each person’s sphere of freedom demarcate what powers or means belong to whom. They designate what empirical objects other people are obliged to refrain from using without our consent. Among the objects which we can coercively exclude other people from using, our body is the only thing to which we have an innate right, and any use of some person’s body not consented to by this person or any intentional injury caused by one person on another is wrong. Beyond this entitlement to be in control of the powers of one’s own body, it must also be possible to be in rightful control over objects separate from us.

15 Kant 1996a [1797], 6:232.

16 Ibid., 6:231.

17 Cf. Maus 2002, p. 109.

Kant recognizes three kinds of external objects which can be mine or yours: corporeal things (property right), other persons' deeds (contract right), and another's status in relation to me or you (domestic right).¹⁸ Being separate from us, external objects are not innately ours. Entitlements to such objects must nonetheless be possible to acquire. A general prohibition against the use of things separate from us would be an arbitrary, and thus illegitimate, restriction of external freedom. The treatment of "any object of my choice as something which could objectively be mine or yours" is therefore what Kant calls a "postulate" or "permissive law (*lex permissiva*) of practical reason."¹⁹ This implies that we are permitted to put others under contingent obligations, obligations which they would not have had if we had not in fact made some specific thing our own, which further means that a new set of possible wrongs is generated. Since entitlements to external objects extend our sphere of external freedom beyond our own body, it is possible for a person to do wrong without physically interfering with another person, for instance by using what rightfully belongs to the other without permission, or by failing to perform a certain deed to which the other has a contractual right.

On Kant's account, then, a rightful condition is a condition of equal independence where each of us is required to refrain from non-consensually using the persons or possessions of others, as well as to fulfill contractual agreements. However, the state of nature cannot possibly be such a condition. Absent a public authority that enacts, enforces and arbitrates in accordance with positive law, there is in Kant's view no way consistent with the principle of right in which each person's entitlements could be properly guaranteed or delimited. In the state of nature some persons will unavoidably be exposed to arbitrary and non-reciprocal restrictions due to what is sometimes referred to as problems of assurance and indeterminacy.²⁰ And this leads Kant to the conclusion that to choose to remain in the state of nature is to do "wrong in the highest degree,"²¹ as well as to its corollary: that entering civil society is an enforceable right and duty.

18 Kant 1996a [1797], 6:247.

19 Ibid., 6:247. Cf. also Ludwig 2002, pp. 175-6.

20 Ripstein 2004; Varden 2008a and 2008b.

21 Kant 1996a [1797], 6:307.

3. The assurance and indeterminacy problems

The assurance problem is a problem regarding rightful possession. If a person is in rightful possession of something external, others are obliged not to make use of it as long as they have not been given permission to do so by the possessor. The core of the assurance problem concerns under what conditions people are so obliged. According to Kant, we are not obliged to leave objects belonging to others untouched unless they provide us assurance that they will behave equally with regard to objects belonging to us.²² The question then becomes: How can we rightfully provide such assurance?

Considering that right is only concerned with external use of choice, a rightful obligation is necessarily an external obligation. For this reason, the solution to the assurance problem entails creating a power strong enough to secure compliance from everyone. This claim does not rest on the assumption that human beings are made of such “warped wood” that they cannot be expected to respect the boundaries between mine and yours virtuously. The problem is not that we are “phenomenal beings” that “need to be reminded by a physical incentive that we should obey the law,”²³ but that reliance on mere trust in other people for the purpose of providing rightful assurance is to make oneself dependent on their arbitrary choice.²⁴ Even in an ideal world, where everyone keeps their part of any agreement, reliance on someone’s promise that she will not infringe on your acquired rights makes it her choice whether something external is yours or hers. And since an anarchical condition where no one is subjected to external constraints fails to guarantee each person independence from the choice of other people such a condition is deficient from the perspective of right.

But if virtuous promising does not suffice to provide a rightful guarantee, neither does creating a power that simply serves as an irresistible external constraint. Apart from the capacity to restrain all others without itself being restrained, the power providing assurance must also be a power that restrains everyone equally. This implies that no private agent can serve the role as enforcer of justice. As private, such an enforcer is what Kant calls a “unilateral will,”²⁵ and such a will cannot possibly establish a system of reciprocal restrictions. For one

22 Ibid., 6:255-6.

23 Williams 2003, p. 83.

24 On this, see Varden 2008b, pp. 8-9.

25 Kant 1996a [1797], 6:256.

thing, its acts of enforcement would be arbitrary from the perspective of everyone else, since they represent the choice of the private enforcer. Moreover, a private enforcer can at most obligate everyone but itself, which means that the assurance problem remains unsolved with regard to the relation between the enforcer and other agents.²⁶ But if a private enforcer fails to obligate everyone equally, then justice is impossible outside civil society, because in the state of nature any use of force is private use of force.

The problem of indeterminacy concerns how the distinction between mine and yours can be rendered accurate in a way compatible with the innate right to freedom. In part, this is a problem of specifying what the abstract principles of private right prescribe generally, and, in part, it is a problem of applying these principles to particular cases.²⁷ In relations of private right there may be disagreement concerning the determinate content of each person's rights. General principles of right are indeterminate with regard to what belongs to whom, what counts as the fulfillment of a contracted service, or whether a certain act is exploitative or not, and thus under certain circumstances leave room for a plurality of equally reasonable, yet incompatible interpretations. Although there may be easy cases, there are also circumstances which give room for reasonable disagreement concerning where the boundary between mine and yours is to be drawn. The challenge is to resolve such conflicts of interpretation in a rightful way.²⁸

26 The latter point is emphasized by Varden 2008a, p. 8 and 2008b, pp. 10-11.

27 At this point, Ripstein 2009, pp. 145-76 distinguishes between the problems of unilateral choice and indeterminacy, and thus ends up with three structural problems which make the state of nature a non-rightful condition. While this is more adequate in certain respects, I stay with the bipartite distinction between the problems of assurance and indeterminacy, partly due to considerations of space, and partly because it is sufficient for my main argument to single out these problems.

28 It is sometimes claimed that the problem of indeterminacy arises only with regard to acquired rights, and not with regard to the right to one's own body. This view is defended by Varden 2008a, p. 8 on the ground that the innate right to freedom necessarily entails a right to our own bodies, since there is an analytical connection between our person and our body in terms of right. Similarly, Paul Guyer seems to assume that the problem of indeterminacy can only come up with regard to property and contract right because our bodies have determinate boundaries. See Guyer 2002, p. 62. However, none of this implies that what is covered by innate right is completely determinate in every possible case. As Ripstein points out, it is not a purely factual question whether startling a person standing at the edge of a cliff by shouting out loud is to wrong this person, or whether a certain use of force should be judged as an act of aggression or as preventive self-defense. See Ripstein 2009, pp. 176-9. I also believe there is room for reasonable disagreement with regard to the authorizations which Kant says are

As is the case with the problem of assurance, so Kant's view on this second, but logically prior, issue is that there is no way in which we could actually solve problems related to indeterminacy in the state of nature. The reason is that there is no authority that could rightfully decide what interpretation is to prevail.²⁹ Again, the heart of the problem is that in the state of nature any judgment about the appropriate distinction between what is mine and what is yours is a private judgment. Whoever decides where the line is to be drawn inevitably subjects everyone else to one-sided restrictions, and thus acts contrary to everyone else's right to be restricted by universal laws only. There is, of course, the possibility of coming to bi- or multilateral agreements on the issues. While this is preferable to the unilateral imposition of one person or group's will, it would still not accord with what is right. We would still be subject to the choices other people make whether to consent or not, and would therefore not have the independence implied in the innate right to freedom. But if there is no solution to the problem of indeterminacy in the state of nature, then we have a second reason why justice is not possible outside civil society.

The only way to overcome the problems of assurance and indeterminacy is, in Kant's view, to establish a public authority that organizes legislative, executive and adjudicative bodies, i.e. a state. As a *public* authority, a state is an authority that represents the will of all united. It is a "collective general (common) and powerful will,"³⁰ what Rousseau calls a *volonté générale*, that has no partial interest vis-à-vis its subjects. It is only such a will that can, by means of legislation and adjudication, determine the boundaries of mine and yours in a rightful way, and, through its coercive powers, ensure that everyone is made subject to reciprocal restrictions. And since a public authority representing everyone subject to its restrictions equally is a precondition for rightful interaction, there follows the enforceable duty to "subject ... to a public lawful external coercion, ... that is, ... to enter a civil condition."³¹ To refuse to do so is to "renounce any concepts of right"³²

implied in the innate right to freedom. For instance, it is not unlikely that the right to communicate one's thoughts may come into conflict with the right to be beyond reproach, at least if the latter is taken to entail a prohibition against libel. Cf. Kant 1996a [1797], 6:238. Hence, there may be cases involving neither property nor contract right where there is a potential indeterminacy problem.

29 Kant 1996a [1797], 6:312.

30 Ibid., 6:256.

31 Ibid., 6:312.

32 Ibid.

and to choose to “remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.”³³ Refusing to leave the state of nature is in other words tantamount to denying others the possible enjoyment of freedom in accordance with universal laws. Coercing a person to enter civil society must therefore be permitted as a hindering of a hindrance to freedom.

It is important to note that according to the interpretation presented here, Kant’s non-voluntarist conclusion with regard to political obligations does not depend on the assumption of a morally corrupt or problematic human nature. The claim is that in the state of nature even good-natured persons cannot but subject others to their arbitrary choice due to the problems of assurance and indeterminacy. Even under the presupposition that human beings happen to agree on what is each person’s fair share and also are well-disposed toward each other in such a way that no one is inclined to violate other persons’ spheres of external freedom, it would still be wrong in the highest degree to deny entrance to civil society, because in so doing one fails to provide the only framework within which rightful independence is possible. For this reason, a public coercive framework is in Kant’s view more than a mere remedy for the “inconveniences” of the state of nature, as in Locke.³⁴ It is rather a condition for the possibility of rightful interaction among persons, that is, an enabling condition for freedom in accordance with universal laws.

4. From the right of a state to the right of nations: The puzzling rejection of the state of states

The ideal form of the state authority that in Kant’s view is constitutive of civil society, the republic, has two essential institutional features: first, separation and hierarchical organization of legislative (sovereign), executive (ruler), and judicial (judge) powers, and, second, ascription of legislative power “to the united will of the people,”³⁵ that is, popular sovereignty. This institutional structure Kant calls “*the state in idea*, as it ought to be in accordance with pure principles of right,” and “serves as a norm (*norma*) for every actual union into a commonwealth.”³⁶ Yet

33 Ibid., 6:308.

34 Locke 1986 [1690], p. 13.

35 Kant 1996a [1797], 6:313.

36 Ibid.

even if conceived in ideal terms, a republican constitution constitutes only part of the conditions that as a sum are to enable the free choice of every person to be united with the free choice of everyone else in accordance with universal laws. According to Kant, the establishment of “a perfect civil constitution” is dependent on a solution to “the problem of law-governed *external relations among nations*.”³⁷ Similarly to the state of nature among persons, the external relations between states are characterized as a non-rightful condition which can only be overcome by entering a civil condition of which an international public authority is constitutive.³⁸

Although he draws repeated parallels between the original state of nature among individuals and interstate relations,³⁹ Kant’s view regarding the institutional presuppositions for just interaction in the international sphere differs in important respects from his view regarding the institutional presuppositions for just interaction in the domestic sphere. In contrast to what he says with regard to the domestic case, Kant does not say that the international public authority should be a state authority. Nor does he say that states have an enforceable right and duty to leave the state of nature. Rather than a global state authority, he proposes a treaty-based “*pacific league*” that “seeks to end *all wars forever*,” but without requiring member states to “subject themselves to public laws and coercion under them (as people in a state of nature must do).”⁴⁰ The league is not to have legislative or executive powers, as it is not founded in order “to meddle in one another’s internal dissensions but to protect against attacks from without.”⁴¹ Furthermore, entrance and exit must be voluntary. The league is “a *permanent congress of states*,” which neighboring states are “at liberty to join,” and which can “be *dissolved* at any time.”⁴² In other words, the institutionalization of an international civil condition differs from the civil order among persons in two ways. First, the public authority is no sovereign power, only an international organization with arbitration capacities. Second, no state may be legitimately forced to join this organization, which means that there is no parallel to Kant’s non-voluntarist view of domestic political obligations at the international level.

37 Kant 1983 [1784], 8:24.

38 Kant 1996a [1797], 6:344; 1996c [1795], 8: 354.

39 Kant 1996d [1795], 8:354; cf. also 1983 [1784], 8:24 and 1996a [1797], 6:344-5.

40 Kant 1996d [1795], 8:356.

41 Kant 1996a [1797], 6:345.

42 Ibid., 6:350-1; cf. also *ibid.*, 6:345.

It is the rejection of a state of states with coercive power that motivates the standard criticism. In the critics' view, Kant, in drawing an analogy between the interpersonal state of nature and external state relations, also ought to favor an institutional structure at the international level analogous to the institutional structure at the domestic level. What seems primarily to trouble these critics is that the league of states cannot solve an assurance problem assumed to exist in the international realm. Since the league does not possess coercive powers it cannot ensure compliance from its members, and thus leaves it for each state to decide whether or not to comply with the league's judgements. According to the standard criticism, this means that states will continue to subject one another to arbitrary choice rather than universal restrictions authorized by the international public authority. Consequently, interaction at the international level will in important respects remain in a state of nature: "[S]ince a federation lacks the instruments requisite for securing that which is to be agreed on, namely, world peace, there can be peace only with reservations and qualifications ... Without the 'sword of justice,' a federation remains a (modified) state of nature."⁴³

Few, if any, of these critics think of the state of states in terms of a global unitary state that reduces existing states to parts which it may fuse together or split up at will. What is usually held up as an alternative to both the global unitary state and the league of states is the idea of complementary statehood, where the second order state authority is vested with a restricted set of powers and leaves the primary state units intact. Just as individual persons do not give up, but affirm, their freedom by entering the civil condition, so the freedom of every state should be affirmed by its subjection to an international public authority with narrow competencies: "[T]he correctly formed analogy demands that the 'republic of states' ... not be organized in opposition to its members' rights of liberty and equality. ... [T]he 'republic of states' would have a mandate for action only in those spheres individual states could not regulate on their own."⁴⁴

But even if the international public authority should not be established at the expense of the first order state communities' right to territorial integrity and self-determination, Kant's analogy is still said to require some kind of state authority with coercive powers. Otherwise, there seems to be something wrong with the foundations of the entire theory. If one can deny that a second order state

43 Höffe 2006, p. 200; see also p. 195. The lack of coercive power is also emphasized as the league's main deficiency by Byrd 1995, Byrd and Hruschka 2008, Pogge 1988, and Wood 1995.

44 Lutz-Bachmann 1997, p. 71.

unit is constitutive of an international civil condition, then one should also deny that first order state units are constitutive of rightful relations among individuals: “*Either* the imperative of individuals to renounce their freedom in leaving the state of nature already involves a contradiction ... *Or* ... international statehood ... is a condition that makes possible the state of international lawfulness.”⁴⁵

The distinction between a global unitary state and a limited state of states is also the backdrop of the stage model interpretation. According to this line of interpretation, the league of states should not be seen as an alternative to the state of states altogether, but merely as the first stage in a process that is ultimately to result in a state of states. On this reading, Kant’s arguments against a global unitary state, that it dissolves rather than solves the problem of guaranteeing the right of nations,⁴⁶ and that it will lead to a “soulless despotism” which “finally deteriorates into anarchy,”⁴⁷ are misunderstood if they are taken to be arguments against any form of global statehood. The real motive behind the introduction of the league of states, it is said, is not to reject global statehood as such, but to accommodate to the political realities of his times. Since the obstinate unwillingness of political leaders to comply with a priori principles of right makes it unrealistic to expect the realization of the superior alternative in the near future, Kant suggests that a league of states may be a first step that prepares for the eventual establishment of a coercive state of states. Although the league is seen as insufficient for the purpose of establishing the sought for international civil condition, it may serve as a temporary surrogate to be superseded by a state of states when time is ripe: “The core of Kant’s argument ... is that the full realization of perpetual peace does require a federal state of states ..., but that this goal should be pursued mediately, via the voluntary establishment of a league, and not via premature attempts to institutionalize a state of states immediately.”⁴⁸

As for the second difference between the domestic and the international cases, the voluntary membership in the league, it has not only been argued that Kant should have opted for the opposite view, namely that subjection to the international authority must be compelling;⁴⁹ there are, as mentioned, alternative interpretations in the secondary literature on this point as well. Recently, Sharon

45 Höffe 2006, p. 197.

46 Kant 1996d [1795], 8:354.

47 Ibid., 8:367.

48 Kleingeld 2004, p. 318. See also Byrd and Hruschka 2008, pp. 637-8, and Cavallar 1999, pp. 113-31.

49 See, for instance, Carson 1988.

Byrd and Joachim Hruschka have ascribed the view that any capable state can force any other state to enter an international civil condition to Kant.⁵⁰ According to Byrd and Hruschka, Kant takes a more mature stance in the *Doctrine of Right* than in *Toward Perpetual Peace*, where states are said to “have outgrown the constraint of others to bring them under a more extended law-governed constitution in accordance with their concepts of right.”⁵¹ They see evidence for such a change of mind in the discussion of “the original right that free states in a state of nature have to go to war with one another (in order, perhaps, to establish a condition more closely approaching a rightful condition),”⁵² as well as in the discussions of the right to go to war, right during a war, and right after a war in the later work. In addition, they find support for the same conclusion by pointing to a parallel between states and individuals similar to the one we have seen in connection with arguments in favor of the state of states. Against the background of Kant’s characterization of states as moral persons, they claim that states can acquire analogues to property, contract, and status rights, and conclude that the enforceable right and duty to leave the state of nature applies also to state actors.

I think there are good reasons to question both versions of the stage model interpretation in favor of the more traditional reading, where Kant is seen as rejecting any model of global statehood and, consequently, non-voluntarism at the international level. In the next section, I set out the principled normative considerations that support this view. Yet before I turn to this issue some textual considerations are in order.

Proponents of the stage model interpretation may find some support in the often cited passage from *Toward Perpetual Peace*, where Kant seemingly makes an unequivocal judgment in favor of the state of states, and the league of states is characterized as a “*negative surrogate*” brought forward so that everything “is not to be lost.”⁵³ Nevertheless, I find it hard to square this reading with the main tendencies and arguments in this work as well as in the *Doctrine of Right*. Even if the proponents of the stage model interpretation take Kant’s concern for a political world consisting of a plurality of states into consideration, there is the further

50 Byrd and Hruschka 2008, esp. pp. 624-6.

51 Kant 1996d [1795], 8:355-6.

52 Kant 1996a [1797], 6:344.

53 Kant 1996d [1795], 8:357. It is possible, however, to exaggerate just how unambiguous the passage is. For an account that challenges the prevailing assessment that Kant here makes a clear statement in favor of the world state as the only institutional framework sufficient for establishing an international civil condition, see Maus 2004, pp. 84-9.

complication that Kant seems to reject global statehood in any form, and not just in the form of a unitary state. For instance, at the end of the chapter on the right of nations in the *Doctrine of Right*, Kant contrasts the idea of a congress of states, i.e. the league, with a federation like the US, which “is based on a constitution and can therefore not be dissolved.”⁵⁴ The fact that he immediately afterwards says that “[o]nly by such a congress can the idea of a public right of nations be realized,”⁵⁵ suggests that he also rejects more modest proposals for global statehood. Moreover, directly before the passage where he is often assumed to reduce the league to a second rate surrogate, Kant says that reason must necessarily connect “the concept of the right of nations” with “free federalism.”⁵⁶ Later in the same text he also says that “a federative condition [*föderativer Zustand*]” is “the sole *rightful* condition compatible with the *freedom* of states.”⁵⁷ Against this background, it seems implausible that he thinks of the league of states as a temporary surrogate for a future state of states.

Even if Byrd and Hruschka point to some interesting differences between *Toward Perpetual Peace* and the *Doctrine of Right*, it is also hard to find support for their non-voluntarist interpretation with regard to the right of nations in the passages they refer to from the latter work. Consider first the “original right” to go to war which Kant ascribes to “free states in a state of nature.” What Byrd and Hruschka do not mention is the context of the quote. In the relevant paragraph (§55), Kant discusses the question whether a state has a right to use its subjects for war against other states, a question which he answers only conditionally in the positive, since citizens cannot be treated as mere means and therefore must consent to “each particular declaration of war” if they are “to serve in a way full of danger to them.”⁵⁸ In other words, the argument does not revolve around the question whether a state can force other states to enter an international civil condition. The question is only raised hypothetically as an introduction to a discussion about another topic, and therefore does not seem to have any direct impact on the issue dealt with by Byrd and Hruschka. Nor is there much support for their interpretation in the proceeding paragraphs (§§56-58) on the right to go to war, right during a war, and right after a war. Rather than indicate that Kant

54 Kant 1996a [1797], 6:351.

55 Ibid.

56 Kant 1996d [1795], 8:356.

57 Ibid., 8:385.

58 Kant 1996a [1797], 6:346.

“accepts the right states have to coerce other states to move to a juridical state of nation states,”⁵⁹ the discussion in these paragraphs seems to affirm much of what is contained in the preliminary articles of *Toward Perpetual Peace* which address questions pertaining to acceptable and non-acceptable conduct of states in a pre-civil condition, but not the issue of whether states can be forced to leave this condition. As far as the parallel between the domestic and the international cases is concerned, it suffices to say at this point that its soundness depends on the assumption that all the structural problems identified in the state of nature between persons also apply to the state of nature between states. This assumption ought to be doubted. I return to this issue in the following section, after first explaining why states cannot be rightfully forced to subject themselves to an international public authority.

5. Why the league of states is and why the state of states is not an ideal precondition for perpetual peace

Beyond the textual considerations discussed at the end of the previous section, there are also principled normative considerations which make non-voluntarism an inadequate ideal of international political obligations. The main reason is that such an ideal of international political obligations would entitle every capable state to force other states to become members of a league of states or a state of states. Such an entitlement is problematic, first, because it allows the stronger state to set the terms of cooperation unilaterally. This would be an obvious injustice, since it contradicts the requirement that every restriction is to be a universal restriction.⁶⁰ Second, non-voluntarism in the international sphere implies a right to wage war in order to enforce exit from the state of nature. This is not to say that war is the only coercive means available to states in their relations to other states. Yet in the international sphere an analogue to the enforceable right and duty of individuals to enter civil society would in the final resort imply a right to go to war against states that refuse to leave the state of nature voluntarily. It is therefore tantamount to a right to put existing state sanctioned legal orders at risk, one’s own as well as those

59 Byrd and Hruschka 2008, p. 625.

60 Kleingeld seems to have a similar point in mind when arguing that forcing a state to join a state of states violates the political autonomy of the state that is forced to join. See Kleingeld 2004, p. 309. See also Kant 1996d [1795], 8:356-7.

of the other states. But there can be no right to do this. First and foremost we have a duty to establish a state, since it constitutes a necessary institutional framework for rightful interaction among persons. Jeopardizing this framework by going to war is therefore incompatible with right. Coercing an unwilling state to leave the international state of nature is not a hindering of a hindrance to freedom, but employment of unilateral force opposed to our primary duty to leave the state of nature among persons. I believe this is the main reason why Kant says that states have “outgrown the constraint of others to bring them under a more extended law-governed constitution.”⁶¹ The original subjection to any international public authority must be based on consent, since the opposite “is analogous not to founding a state but to a revolution which fails and leads to a state of nature.”⁶²

In view of these considerations, one can also see why conceiving individuals as the basic normative units does not imply a non-statist conception of international law or that statist conceptions of international law are based on illiberal or authoritarian theories of the state.⁶³ Rather than reflecting illiberal authoritarianism, prohibiting aggressive wars and interventions in the internal affairs of a state confirms the state’s role as a necessary precondition for each person’s independence vis-à-vis other persons.

I take it that concerns similar to those which lead to the rejection of an enforceable right and duty to enter an international civil condition also motivate Kant’s opposition to a permanent union of states. This is at least indicated by the claim that the possibility of dissolving or renouncing the league of states “is a right *in subsidium* of another original right, to avoid getting involved in a state of actual war among the other members.”⁶⁴ When some member states fight among themselves, any other state must be allowed to withdraw from the league at will in order to remain neutral. If there were no such right, every member of the league could be commanded by the international political authority to become entangled in conflicts between or within other states. But this would imply that the international public authority had a right to put the lives of its member states’ citizens at risk. Again: there can be no such right. The founding idea of the state is to guarantee the rightful use of freedom among interacting persons. In order to provide this guarantee, the state can demand that its citizens act in a way that is

61 Kant 1996d [1795], 8:355.

62 Maus 2004, p. 91.

63 For the opposite view, see Tesón 1997, pp. 1-2.

64 Kant 1996a [1797], 6:344.

consistent with the perpetual existence of the state. But citizens are not obliged to risk their lives in wars against other states as long as their own state is not directly threatened. If they are forced to fight to assist other states, they are used for purposes that are not their own. They are thereby used as mere means, which violates their innate right to freedom.⁶⁵ Besides, a state's duty to establish rightful relations between itself and other states does not imply any obligation to assist other states whenever they are in conflict with external enemies or are afflicted by internal violence. To do wrong is to hinder external use of freedom in accordance with universal laws, and whoever abstains from taking part in an ongoing conflict does no wrong.

In light of similar considerations, Helga Varden has argued that the public authority constitutive of rightful international relations "cannot ever establish a perpetual monopoly on coercion."⁶⁶ While this seems like a sound conclusion, we still need to explain why consent can do a job in the international sphere which Kant says it cannot do in the domestic sphere. Given Kant's non-voluntarist conclusion with regard to domestic political obligations, it is not yet clear why a league of states is sufficient for the establishment of an international civil condition. Why is the "sword of justice" dispensable in the international realm? In order to give a satisfactory answer to this question we have to consider in what respect the international state of nature is a non-rightful condition of war.

At this point, it can be useful to recall that for Kant the term "state of nature" does not refer to a previously existing condition in historical time that could only be overcome by means of a contract establishing the state. Rather than describing a previous state of affairs, it is a theoretical fiction that shows why certain structural problems make rightful interaction among persons impossible absent a public authority.⁶⁷ As such, it is a term that serves the normative-practical

65 Cf. *Ibid.*, 6:345-6.

66 Varden 2008a, p. 21. Puzzlingly, she also says that this authority should have a "tripartite republican constitution." See *ibid.*, p. 23. I do not see how this claim can be squared with the rejection of a supranational monopoly of coercion. An international public authority without coercive powers is an authority which lacks one of the powers constitutive of a republican constitution, namely the executive power, and could therefore at most have a bipartite constitution.

67 Correspondingly, the contract that founds the public authority should not be conceived of as an actual agreement explicitly or tacitly consented to by state citizens: "it is by no means necessary that this contract ... be presupposed as a *fact* (as a fact it is indeed not possible). ... Instead, it is a *mere idea* of reason, which, however, has its undoubted practical reality." See Kant 1996b [1793], 8:297.

purpose of displaying that it is pragmatically inconsistent for agents possessing practical reason to renounce obligations toward any such authority. Similarly, the characterization of external relations between states as a state of nature is a proposition about the ideal preconditions for justice in the international sphere: in this sphere too there are irresolvable structural problems which make rightful interaction impossible unless there is established a second order public authority. The crucial question is therefore in what respect the structural problems in the latter case are similar to and in what respect they are different from those in the former case.

We saw in the previous section that the proponents of the state of states assume that there is an assurance problem in the international sphere which a league of states cannot solve. Given this assumption, the conclusion that a second order public authority with coercive powers is constitutive of an international civil condition is convincing. Insofar as the major concern is to provide rightful assurance, and no particular state can serve as an external guarantor, since each state, considered in opposition to other states, in such a case would represent a particular will whose relation to the others is also in need of regulation, a state of states appears necessary in order for states to interact rightfully. However, the premise that there is an assurance problem to be solved in the external relations between states is false.

In his recent book *Force and Freedom*, Arthur Ripstein observes that there is in fact no reference to such a problem in Kant's discussion of conflicts between states.⁶⁸ What we find is a partial analogue to the problem of indeterminacy, but there is no analogue to the claim that we are not obliged to leave what belongs to others untouched unless we are provided assurance that they will behave accordingly with regard to what is ours. According to Ripstein, this deviation from the domestic case reflects two features of states which distinguish them from persons: first, states do not have external objects of choice, and second, states have a fundamentally public nature.

Unlike Byrd and Hruschka, who conceive of a state's territory as the property of the state, Ripstein argues that territory, in Kant's view, "is just the spatial manifestation of the state."⁶⁹ That is to say that territory constitutes the state's person in its external relation to other states and therefore should be

68 Ripstein 2009, pp. 227-8.

69 Ibid., p. 228.

conceived of as analogous to a person's body rather than as analogous to her possessions. If this is correct, it explains why Kant does not speak of an assurance problem in the international state of nature. As argued in section 3, there is an irresolvable assurance problem in the state of nature between individual persons because these persons have enforceable rights to external objects of choice which no one is in a position to rightfully enforce. This problem does not arise with regard to the rights persons have to their own bodies. Other persons are always obliged to not violate our bodily integrity. Resisting violations against it with force is therefore not contrary to right. In fending off aggressors one does not impose unilateral force on others, but merely hinders a hindrance to freedom. Similarly, if territory is what a state is, perceived externally, then there is no assurance problem in the international sphere, because there are no external objects of choice with regard to which assurance must be provided.⁷⁰ Any wrong done by one state against another state is comparable to the wrong one person does against the body of another person, and can rightfully be resisted with force by the aggrieved party. Acknowledging defensive wars as legitimate, Kant speaks of "the *right to go to war*" in the state of nature as "the way in which a state is permitted to prosecute its right against another state ... when it believes it has been wronged by the other state."⁷¹

Against this, one can object that states are artificial entities that have no natural borders comparable to a person's body. For one thing, it is not always clear just where the borders between neighboring states are, whereas it is generally easy to tell whether something is part of a specific person's body. Also, territory can be divided and disposed of more easily than can body parts. The latter difference seems to be the main reason why Byrd and Hruschka speak of territory as property.⁷²

While the artificiality of a state's borders certainly makes the relation of state and territory different from the relation of person and body, I do not think it suffices for arguing that the former relation is structurally the same as the relation

70 By the same token, Byrd and Hruschka's inference from non-voluntarism in the domestic case to non-voluntarism in the international case is undermined. It is the normative requirement that it must be possible to have rightful possession which justifies the use of coercive means for the purpose of establishing a civil condition among individuals. Cf. Kant 1996a [1797], 6:256. But if states do not have external objects of choice a crucial premise is missing, and a mere parallel from the one case to the other will not do.

71 Kant 1996a [1797], 6:346.

72 Byrd and Hruschka 2008, pp. 625-6.

of person and property. As a category of right, property is most appropriately described as means with which a person has an exclusive right to pursue whatever end he or she chooses. Property therefore stands in a means-end relation to the choices of persons. For reasons which have to do with the second difference between a state and a person, the public nature of the state, we cannot think of territory in the same way. Being a public authority, a state does not have ends of its own. Its sole function is to provide a coercive institutional framework which enables citizens to interact in a rightful way. Therefore it is not appropriate to speak of territory as some means with which a state can pursue private purposes. Territorial borders should rather be understood as the demarcation of the sphere of validity of the public order constituted by the state. In this perspective, borders are the limits of a state's "inner" lawgiving. Externally, from the perspective of other states, these limits make up the person of the state, which is to say that territory counts as embodiment and not as property.

Beyond this, there is also a separate reason why the public nature of the state supports the view that there is no assurance problem in the international sphere. In virtue of being a public rightful condition, a state can only act for public ends, such as continually approximating an ideal republican constitution and sustaining the already established public order. In our context, the crucial implication of this notion of a state is that it is conceptually impossible for any genuine state to wage aggressive wars. The only rightful or just cause for which a state can fight wars is to preserve itself as a public order. As argued above, not only do aggressive wars violate the rights of the state under attack. To wage war is to put the necessary institutional framework for rightful interaction at risk, and is therefore at odds with our primary duty to leave the state of nature, unless required for the state's survival. Consequently, just states can only fight defensive wars, since fighting non-defensive wars is irreconcilable with their status as public authorities.

In view of these reflections regarding states' lack of external objects of choice as well as their essentially public nature one can see why a "sword of justice" is not needed for establishing an international civil condition. Both aspects imply that there is no assurance problem in the international sphere, and so rightful interaction among states is possible without a strong physical power securing compliance from everyone. This means that an important premise for the stage model reading of Kant's position on international right is undermined. If it is possible for states to interact rightfully without subjecting themselves to a public

coercive authority, then there seems to be no reason why a league of states should be seen as a temporary surrogate for a more satisfactory institutional framework to be implemented at a later point in time. The league, however, is still needed in order to overcome an indeterminacy problem in the external relations between states. This problem arises with regard to at least two different kinds of issues: rightful use of defensive force,⁷³ and rightful determination of national borders.⁷⁴

Even if every state has a right to fight defensive wars, it is not necessarily clear what acts amount to aggression in every particular case. Discussing a state's right to execute its own right against other states, Kant does not only recognize "active violations," or "first aggression," as legitimate grounds for defensive use of force. A state may also be threatened by another state, either by the other state's preparations for war, or by its "*menacing* increase in ... *power* (by its acquisition of territory)."⁷⁵ This makes it possible for states to reasonably disagree on whether certain uses of force are aggressive or defensive. What one state considers an act of first aggression, the other state may consider a preemptive action covered by its right to self-defense. In the state of nature there is no rightful way to settle such conflicting rights claims. As long as there is "no judge competent to render a verdict having rightful force,"⁷⁶ each state is within its right to follow its own judgment. Yet thereby they employ force on the basis of their own arbitrary choice, which is contrary to right.

The same problem applies to disputes about borders. Whenever there is disagreement in the state of nature concerning where the lines between different states' jurisdictions are to be drawn, any judgment made on the issue is the particular judgment of one state. This again means that states in the state of nature are unavoidably subjected to arbitrary choice rather than universal law. Irrespective of whether a particular state's judgment is forced through or the parties in the dispute come to an agreement, the relation between the states is not one of rightful independence.

Even if a state of states is not required, the existence of an indeterminacy problem in the international sphere still makes an international public authority with judicial powers necessary in order to overcome the international state of nature. The league of states is such an authority, and can therefore be seen as an

73 This is emphasized by Ripstein 2009, p. 227.

74 This is emphasized by Varden 2008a, pp. 18-9.

75 Kant 1996a [1797], 6:346.

76 Ibid., 6:312.

ideal precondition for rightful relations between states. Of course, being a voluntary congress which can be dissolved at any time, the league cannot provide a guarantee that existing states will accept its decisions. Individual states may be dissatisfied with specific decisions and thus choose to act on their own unilateral judgment. Yet this circumstance does not challenge the view that a voluntary league provides the institutional framework constitutive of an international civil condition. In refusing to comply with the verdict of the public authority, a state does wrong, but it does not do so unavoidably. In the state of nature the irresolvable problem is that each state, however just and right-loving it might be, has no choice but to either act on its own unilateral judgment or else yield to that of another state. As an arbiter, the league provides the means by which conflicting claims made by states vis-à-vis each other can be resolved in a rightful way. In this way it establishes the minimal conditions required for states to decide “disputes in a civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war.”⁷⁷

6. Summary

In this article, I have defended Kant’s league of states as a rational ideal constitutive of international justice against proponents of the standard criticism and the stage model interpretation. Against the latter position, I have considered textual evidence which indicates that the league is not merely the first stage of a process leading towards an international civil condition which has to find its final form in a state of states. More importantly, I have challenged the common premise of both competing positions, namely that a league of states is insufficient for establishing rightful relations between states. In contrast to this view, I have argued that normative concerns related to the rationale for establishing states lead Kant to conclusions with regard to international justice that differ from the conclusions he draws in the domestic sphere. In addition, I have argued that there is no contradiction involved here. By focusing on structural problems under ideal conditions, it can be explained why the institutional preconditions for rightful interaction are different in the domestic and the international sphere. The only international parallel to the state of nature between individuals is an

⁷⁷ Ibid., 6:351.

indeterminacy problem which can be overcome by establishing an international public authority with judicial authority, i.e., a league of states. In other words, if my arguments are sound, there are good reasons to think that the ideal institutional structure for approaching perpetual peace which Kant has in mind is indicated by the three definitive articles of *Toward Perpetual Peace*: an order of independent republican states⁷⁸ whose disputes are dealt with in a common intergovernmental organization, and whose citizens have a right to make attempts at contact across borders without thereby being treated as enemies. There are also good reasons to endorse this structure as a rational ideal as well as to reject the claim that it is at odds with Kant's overall theory.⁷⁹

78 By this I do not imply that an internal republican constitution is a criterion for membership in the league, only that the republican constitution is the ideal toward which states should strive as far as their internal order is concerned.

79 *Acknowledgements*: In addition to an anonymous referee, I would like to thank Kristian Skagen Ekeli, Ståle Finke, Øystein Lundestad, Reidar Maliks, Helga Varden and Audun Øfsti for valuable comments to earlier drafts of this article. Also, thanks to the participants at an internal seminar at the Department of Philosophy, NTNU, for comments on a very early draft, and to the participants at a colloquium at ARENA, UiO, for comments on a next to final draft.

Chapter 2

Carl Schmitt and the Prohibition against Aggressive War

1. Introduction

Central to Carl Schmitt's writings on international law is his critique of the 20th century efforts at making aggressive war an international crime. There are two aspects to this critique. First, there is a critique of a subtle and indirect form of imperialism associated with the Treaty of Versailles, the League of Nations, and the rising power of the US.¹ Second, there is a critique of the political efforts at criminalizing aggressive war from the end of the First World War onwards *as such*, irrespective of what particular interests these efforts served in the concrete historical context. In the following, I take issue with Schmitt's critique, focusing on the latter aspect in particular.

Schmitt does not criticize these efforts at criminalizing aggressive war because he considers war to be something attractive. The problem is rather that prohibiting aggressive war can lead to a dangerous intensification of political conflicts, since the resulting 'discriminatory concept of war' will sharpen the antagonisms that always exist between political communities. Discriminating between aggressive and defensive war makes war a crime on one side and enforcement of justice on the other. Thereby, recognition of the enemy as a worthy opponent who is on a par with oneself is ruled out, which in turn puts traditional restraints on warfare at risk and prepares the ground for especially brutal and inhumane wars.

1 This aspect is what Leftist critics of the contemporary US hegemony in world politics sometimes find attractive in Schmitt. See, for instance, Douzinas 2007 and Mouffe 2005.

This line of criticism is sometimes understood as a general critique of Just War theory and its introduction of moral notions into international politics. Allegedly, it is discrimination of political enemies in accordance with the moral distinction between good and evil that causes escalation of violence in international conflicts. In contrast to such readings, I argue that Schmitt has a more specific target in mind: the pacifistic attitude implicit in liberal individualism. It is liberal ideology that is the driving force behind the interwar efforts at criminalizing war, and it is the abstract universalism of liberalism combined with the inescapability of what Schmitt calls “the political” that causes intensification and brutalization of international conflict. Seeking the end of war in the name of humanity leads to a particularly intense asymmetrical relation between oneself and one’s enemy, because the enemy of this project is turned into the enemy of humanity, an inhuman monster that must be annihilated by any available means. And this is what sets in motion a dynamic of violence that potentially leads to the terror of total war.

In opposition to liberalism, Schmitt takes an affirmative stance in favor of the political, a stance that is also reflected in his speculations on an international *Großraum*-order which began in the late 1930s. Underlying this affirmation of the political is a radical form of anthropological pessimism according to which efforts at abolishing war are hopelessly utopian and apolitical undertakings. Such pessimism, I suggest, seems to be difficult to defend in any other way than as a subjective profession of faith. Consequently, one can call into question the relevance of Schmitt’s critique for people not sharing his religious-political faith. In addition, I suggest that 20th century experience not only raises questions concerning the realism of Schmitt’s defense of a non-discriminatory concept of war, but also indicate that he overstates the deep existential significance of the political. Although his diagnosis of a deceptive form of imperialism has some relevance in relation to contemporary political trends, the critique aimed at the criminalization of aggressive war does not seem sound.

Schmitt’s argument relies to a large extent on a historical narrative where efforts at making aggressive war an international crime are understood as part of a process that dissolves the classical European state-system and thereby as a threat to the civilizing achievements of this system. In section 2, I therefore present Schmitt’s analysis of this system, emphasizing the way in which he finds it a successful restraint on international violence. In section 3, I pinpoint the real target of his critique as the liberal individualism and universalism underlying the

interwar efforts at criminalizing aggressive war. Subsequently, in section 4, I explain how the liberal opposition to granting states a right to go to aggressive war in combination with the alleged inescapability of the political in Schmitt's view leads to a dangerous intensification of enmity. In section 5, I briefly account for Schmitt's affirmation of the political in terms of his preference for an international order of large regions (*Großräume*) or hemispheres dominated by a central power. Here, I also point out what role anthropological pessimism plays in Schmitt's affirmation of the political. In section 6, I conclude by making some critical remarks regarding the soundness of Schmitt's analysis.

2. Jus publicum Europaeum

An important backdrop for Schmitt's critique of the attempt at criminalizing aggressive war is his analysis of the state-system that arose out of the European religious civil wars in the 16th and 17th centuries. This system, which he names *jus publicum Europaeum*, supposedly led to a progressive "limiting and bracketing [*Hegung*] of European wars."² It was a working order representing a common orientation among European sovereigns that succeeded in tempering violent conflicts between religious factions and that "signified the strongest possible rationalization and humanization of war."³ In Schmitt's view, it is this civilizing effect of the traditional European state-system that is put at risk by the interwar efforts at prohibiting aggressive war.

Schmitt presents the *jus publicum Europaeum* as the first *global nomos* of the Earth. Its global character was due to what – for the Europeans – represented discoveries that took place from the end of the 15th century. These discoveries for the first time made possible an international order that encompassed the world as a whole. When Schmitt speaks of this order as a *nomos*, he does so in opposition to "normativistic" approaches to jurisprudence – that is, theories of law that reduce legal orders to systems of material and procedural rules. Rather than a set of general rules, a *nomos* is a "concrete order," a substantive political and social unity for which legal rules are secondary means.⁴ Importantly, such an order is connected to a concrete distribution of land. Seeing "land-appropriation" as "the

2 Schmitt 2003b [1950], p. 140.

3 Ibid., p. 142.

4 Schmitt 1993 [1934], pp. 10-20.

primary legal title that underlies all subsequent law,”⁵ Schmitt conceives of *nomoi* as “spatial orders” involving crucial spatial distinctions and divisions.

Accordingly, the *jus publicum Europaeum* was not primarily a treaty system based on voluntary agreed treaties and the principle *pact sunt servanda*, but an order based on “strong traditional ties” of a “religious, social, and economic character.”⁶ In the words of William Hooker, it was “a shared framework of understanding” within which politics took place.⁷ The most important spatial distinctions of this global *nomos* were (a) the distinction between land and sea and (b) the distinction between European and non-European soil. From this, a tripartite spatial division arose. First, there was European ground divided into territories of sovereign states. Second, there was non-European ground open for acquisition by European powers – i.e., potential colonies. Third, there was the sea, which could not be occupied by anyone and therefore remained an open space “for trade, fishing, and the free pursuit of maritime wars.”⁸

In view of these divisions, one can distinguish between two senses in which the European state-system signified a bracketing⁹ of war: a spatial sense and a metaphorical sense. Spatially, the bracketing of war refers to a demarcation line made by Europeans between European soil and the rest of the world, and the special status thereby given to European soil. As the centre or core of the *jus publicum Europaeum*, Europe was “the theatre of war ..., the enclosed space in which ... states could test their strength against one another under the watchful eyes of all European sovereigns.”¹⁰ Here, there was an anarchical order of equally sovereign states – a purely interstate order conceived as a balance of power, the stability of which depended partly on the equilibrium of continental land powers and, crucially, on the role of England as a balancing sea power.¹¹

5 Schmitt 2003b [1950], p. 46

6 Ibid., p. 148.

7 Hooker 2009, p. 24.

8 Schmitt 2003b [1950], p. 172; see also p. 148.

9 “Bracketing” is Gary Ulmen’s translation of the German word *Hegung*, which literally means “enclosure” or “an area that is fenced in.” The translation seems somewhat misleading, but it has become standard terminology in the English-speaking secondary literature, and I therefore adopt it in this article.

10 Ibid., p. 142.

11 Being the dominant maritime power, England played an essential role for the balance of power on the European continent. Based on its naval superiority, England could keep continental wars and alliance politics at some distance and rather exercise its influence so as to maintain the balance among the land powers and thereby its own security. For Schmitt’s emphasis on

Metaphorically, the bracketing of war refers to the state-system's tempering effect on war *within Europe*.¹² On the European continent, territorial borders defined the distinction between inner jurisdiction and external self-assertion. Internal to these borders, sovereignty signified the highest authority within a centralized political and juridical order. Externally, in relation to other states, an important implication of being recognized as sovereign was the possession of *jus ad bellum*, i.e., the right to wage war. *Qua* sovereign, no state could be subjected to any superior authority empowered to resolve disputes between it and other states, and since each state was just as sovereign as any other, each state was conceded the same right to wage war as a last resort in the prosecution of its own claimed rights vis-à-vis other states.¹³

Due to this right to wage war on the part of sovereign states, the European state-system recognized no normative distinction between aggressive and defensive war. The act of going to war was not in itself regarded as a crime, and the state defending itself against an attack was not seen as fighting a more just war than the attacker. There were of course acts recognized as war crimes in the sense of offenses against *jus in bello* – rules applying to parties engaged in war. Acts of war should be preceded by declarations of war, the parties of war were supposed to distinguish between combatants and non-combatants, prisoners of war should be treated humanely and released at the end of hostilities, and those displaying a flag of truce should not be attacked, etc. However, no sovereign state could commit a crime of going to aggressive war, because the right to decide whether to go to war or not belonged to the sovereign. Accordingly, regular wars – that is, wars between sovereigns respecting the formal rules of war – had to be accounted equally just on both sides.¹⁴ As Schmitt sees it, this conception of war as a relation between sovereigns that recognized each other as equals was crucial for overcoming the brutal wars between religious factions plaguing Europe in the 16th and 17th centuries.

the significance of English sea power for the balance of power, see Schmitt 2003a [1955], pp. 352-3; and Schmitt 2003b [1950], pp. 140, 145, 172-5, and 183.

12 With regard to the account following here and in the next two sections, I owe much to Høibraaten 2010, esp. parts III and V.

13 Schmitt 2003b [1950], p. 147. In his *Doctrine of Right* Kant similarly speaks of war as a permissible way for states to prosecute their rights against other states absent an international public institutional framework that enable them to settle disputes by a lawsuit. See Kant 1996a [1797], 6:346.

14 Cf. Vattel 2008 [1758], p. 591; referred to by Schmitt 2003b [1950], p. 166.

In contrast to medieval wars, the wars between Christian princes after the Reformation were not wars between parties subject to a common spiritual authority, but wars between parties that claimed to represent the one and only true faith while at the same time being divided on creedal grounds. Whereas medieval wars among Christians took place within the framework of a concrete order, the *respublica Christiana*, no such common ground existed for the belligerents in the religious wars after the schism of the 16th century. This resulted in wars according to the logic of civil war, which in Schmitt's view is a particularly barbaric form of war since it is war within a political unity to which each of the warring factions lay an exclusive claim.

Before the schism, European wars were wars among parties that recognized the church as a common authority and as the institutional embodiment of an overarching Christian order. They were "bracketed" wars "distinguished from wars against non-Christian princes and peoples," and "did not negate the unity of the *respublica Christiana*," even when justified in accordance with Just War doctrine.¹⁵ After the schism, however, Christianity was a contested concept to which each faction laid claim at the expense of their opponent. In this context, claims about waging war for a just cause could only be the self-righteous claim of a particular side – it was to make oneself judge over one's enemy. As in civil war, it was a case of adversaries sitting in judgment over each other without ceasing to remain enemies. And since each side – in claiming to represent the only true Christian religion – laid a claim to the whole in a way that left no legitimate space for the adversary, the adversary was placed in a "position of absolute and unconditioned injustice."¹⁶ According to Schmitt, this necessarily led to a hardening and deepening of hostilities to the point where the enemy was not seen as someone that had to be fought and driven back, but as someone that had to be annihilated. The enemy was outlawed in the name of the law, and thus the means and methods of law were turned into means and methods of extinction.¹⁷

Against this backdrop of religious civil war, the European state-system is portrayed as an effective limiting and bracketing of war, "the highest form of order within the scope of human power."¹⁸ Rather than a conflict between parties that self-righteously condemned each other as unjust on creedal grounds, war now

15 Schmitt 2003b [1950], pp. 58 and 120.

16 Schmitt 2002 [1950], pp. 56-7.

17 Ibid., pp. 57-8; see also p. 71.

18 Schmitt 2003b [1950], p. 187.

became a conflict between *justi hostes*, or just enemies. Such a war could be characterized as a “war in due form,”¹⁹ comparable to a duel among gentlemen, where the question of justice no longer referred to the cause for which one fought, but to the formal status of the fighting parties. The “duel”-war was not a war where the one party was right and the other party was wrong, but a war between parties that were in their own right, provided they adhered to the procedural rules constituting *jus in bello*. Thereby, there was in Schmitt’s view established a “realm of relative reason,” where enemies were no longer fought by “methods of annihilation.”²⁰ By setting the question of just cause to the side, the *jus publicum Europaeum* could acknowledge the justice of both sides in a regular war. In contrast to the unjust criminal, the just enemy was someone with whom one could conclude a peace treaty. This in turn prevented the worst excesses and prepared the ground for an effective legal regulation of war. War became a “regulated contest of forces,” a contest that provided “the only protection against a circle of increasing reprisals, i.e., against nihilistic hatreds and reactions whose meaningless goal lies in mutual destruction.”²¹

In other words, Schmitt links the civilizing effects of the European state system to its morally neutral or non-discriminatory concept of war. Because the equal justice of political adversaries was recognized, hostilities were tempered, and this enabled less brutal warfare circumscribed by formal rules of conduct. However, with the 20th century turn toward a discriminatory concept of war condemning aggressive war as a moral crime against humanity, this bracketing of war was threatened. Such condemnation transforms war from a contest between just enemies into an asymmetrical relation where justice belongs exclusively to one side. This in turn potentially implies a regression to the nihilistic logic of civil war.

3. The target of Schmitt’s critique

As regards the practical efforts at criminalizing aggressive war, Schmitt emphasizes the 1919 Treaty of Versailles and the subsequent founding of the

19 Schmitt borrows this expression from Emer de Vattel. See Vattel 2008 [1758], p. 500.

20 Schmitt 2003b [1950], p. 142.

21 Ibid., p. 187.

League of Nations, the 1924 Geneva Protocol, and the 1928 Kellogg Pact.²² In the Treaty of Versailles, the indictment of William II (art. 227) and the so-called war guilt article (art. 231) were of particular importance. They both “must be considered to be a symptom of, if not a precedent for a conceptual change” toward a discriminatory concept of war.²³ The founding Article 10 of the League of Nations declares that member states “undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members,”²⁴ and is succeeded by prescriptions for peaceful resolution of international conflicts. Further, the Geneva Protocol explicitly states that a war of aggression constitutes an international crime, whereas The Kellogg Pact condemns war as an instrument of national policy.

In Schmitt’s view, none of this was sufficient for establishing a legally binding prohibition against aggressive war. As things turned out, William II was never put to trial, and the major European powers did not push the issue. Since the war guilt article was placed under the heading “Reparations” rather than “Penalties,” Schmitt suggests that “one cannot say that the transformation of aggressive war into an international crime in the criminal sense was intended.”²⁵ In the Covenant of the League of Nations, one finds prescriptions for the prevention of war, but no formulations that explicitly criminalize aggressive war. And while the Geneva Protocol was accepted and signed by several states, it did not come into effect, as Czechoslovakia was the only state to ratify it. Finally, the Kellogg Pact not only lacked clear determinations of what constituted war as an instrument of national policy, but also lacked stipulations about penal action against aggressors as well as an organization to pursue wrongdoers. Accordingly, it could not be understood as forming the legal basis for a new international crime.

Yet, even if these diplomatic efforts did not succeed in criminalizing aggressive war, Schmitt still considers them to reflect an important trend that points in the direction of such a criminalization. This trend, which was also reflected in legal scholarship,²⁶ took place along with a highly problematic dissolution of the traditional European state system. Partly due to lack of consciousness of traditional spatial distinctions, notably that between European

22 Schmitt 2003b [1950], pp. 259-73; Schmitt 2011b [1945], pp. 136-64.

23 Schmitt 2003b [1950], p. 260.

24 The Covenant text can be found at: <http://www.unhcr.org/refworld/publisher/LON,,,3dd8b9854,0.html>

25 Schmitt 2003b [1950], p. 267.

26 Schmitt 2011c [1937].

state territory and colonial possession, and partly due to the rising power of the US, the concrete European order of states had been declining into an abstract “global universalism lacking any spatial sense” since the end of the 19th century.²⁷ As a consequence, mutual recognition among states could no longer refer to a “homogeneity among the recognizing and recognized,” because all that was left was “a collection of states randomly joined together by factual relations – a disorganized mass of more than 50 heterogeneous states, lacking any spatial or spiritual consciousness of what they once had in common.”²⁸

Most of what Schmitt finds wrong about the new constellation is reflected in the League of Nations, a recurring object of critique throughout his writings. Aspiring to be a “universal” or all-inclusive organization comprising states from all over the world, the League for one thing lacked a basic degree of homogeneity requisite for an effective bracketing of war. Second, it was a vehicle for the indirect imperialism of the US. Not only was the Monroe Doctrine given priority over the League Charter, but the US, despite its official non-membership, was still effectively present in the League via the numerous member states from the Western Hemisphere whose “sovereignty” was qualified by their US-dependency.²⁹ Third, the League served as an instrument for the continued subjugation of Germany in giving the Treaty of Versailles a veneer of legitimacy, thus securing France and Britain’s war booty. Finally, and in this context most importantly, the League symbolized the interwar efforts at criminalizing aggressive war.³⁰

In view of the international disorder of the 20th century in general, and the interwar period in particular, Schmitt does not see any prospect for effective ways of preventing, or of upholding an eventual prohibition against, aggressive war. Instead, and despite the efforts at making aggressive war an international crime, new possibilities for justifying war are generated. It now becomes possible to wage defensive war against war – that is, a war to end all future wars. Referring to the situation in interwar Europe, Schmitt specifically points to strong anti-war

27 Schmitt 2003b [1950], p. 235.

28 Ibid., p. 234.

29 Ibid., pp. 251-5; see also Schmitt 1994 [1932].

30 As for the connection between this aspect and the third aspect, Schmitt points out how the formulation of Article 10 neither excludes territorial change, nor war between states. Its primary function is to exclude territorial change “à la prussienne” – that is, by conquest. Territorial changes by other, less German, means such as economic and financial coercion or starving are not rejected. Nor is war, as long as it is not pursued for the purpose of imposing border changes on an adversary. See Schmitt 2005 [1926], pp. 93-8.

sentiments seeking the abolition of war as a likely rationale for waging a final war against aggressors, and, at the same time, warns against the catastrophic consequences of such a war: “[T]he absolute last war of humanity ... is necessarily unusually intense and inhuman because ... it ... degrades the enemy into moral and other categories and is forced to make of him a monster that must not only be defeated but also utterly destroyed.”³¹ In line with this, the League of Nations is elsewhere described as nothing but “a means to the preparation of a war that is in the fullest sense ‘total:’ namely, a war backed by trans-state and trans-national claims to justice.”³²

According to some commentators, this warning against the inhumane potential contained in humanitarian efforts at criminalizing aggressive war is grounded in a general critique of Just War theory on Schmitt’s part. On these readings, Schmitt endorses a non-discriminatory concept of war, indifferent vis-à-vis the distinction between just and unjust war, because the alternative, introducing discriminatory moral notions into international conflicts, tends to feed self-righteousness and thus to promote the escalation of violence. As Chris Brown puts it, “the basic logic of the Just War” on Schmitt’s view implies “that the unjust must be defeated whatever the cost.”³³ Similarly, Gabriella Slomp writes that “the condemnation of the idea of just war is a recurring theme” in his writings because “a commitment to just war results in the demonization of the enemy.”³⁴

Although this takes important aspects of Schmitt’s analysis into consideration, I do not think it is entirely adequate as an account of his opposition to a discriminatory concept of war. It is true that he emphasizes the separation of the question of *justa causa* from the question of *justus hostis* when accounting for the civilizing force of the *jus publicum Europaeum*. It is also true that he takes a critical stance toward the re-emergence of Just War terminology in 20th century international law. In *The Concept of the Political* he affirmatively writes: “That justice does not belong to the concept of war has been generally recognized since Grotius.”³⁵ And in the above quote, the inhumanity of war against war seems to be explained as a consequence of the degradation of political enemies by means of moral (and other) categories.

31 Schmitt 1996 [1932], p. 36.

32 Schmitt 2011c [1937], p. 32.

33 Brown 2007, p. 59.

34 Slomp 2009, p. 95. For similar claims, see Balakrishnan 2000, p. 109; Benoist 2007, pp. 16-18; and Burchard 2006, pp. 27-33.

35 Schmitt 1996 [1932], p. 49.

While this suggests that judging political adversaries in moral terms as evil is what ultimately lifts all restraints on international violence, at least two things are missed if one reads Schmitt's critique simply as a general critique of Just War theory. First, the historical contrast to European bracketed wars he refers to is not primarily medieval just war, but religious civil war. Second, he draws an important distinction between medieval Just War doctrine and the attempts of his own contemporaries to apply ideas from this tradition to a completely different context and for completely different purposes: "the modern distinction between just and unjust war lacks any inherent relation to medieval scholastic doctrine ... If today some formulas of the doctrine of just war ... are utilized in modern and global formulas, this does not signify a return to, but rather a fundamental transformation of concepts of enemy, war, concrete order, and justice presupposed in medieval doctrine."³⁶

To be sure, Schmitt does not consider medieval Just War doctrine to be unproblematic. At the same time, he generally takes a more sympathetic stance to it than to its 20th century counterpart. Despite carrying with it a potential for total war,³⁷ the medieval doctrine was still embedded in a concrete order kept together by common faith and recognition of the church as a common spiritual authority (*potestas spiritualis*). For this reason, just wars were not necessarily self-righteous crusades justifying all sorts of atrocities, but could also be bracketed wars, at least among Christians.³⁸ Even justified "punitive" wars were compatible with recognition of the opponent as a just enemy.³⁹ By contrast, modern just war doctrine seeks to outlaw aggressive war and to turn the aggressor into a criminal. Thereby, equality and mutual recognition among just enemies is excluded. In fact, the aggressor is no longer someone against whom one fights a real war, because, as a criminal, he becomes no more than an object of violent measures: "the action taken against him ... is merely the execution of justice and, ultimately ... only a measure taken against a parasite or trouble-maker."⁴⁰

In view of this differentiation, one should avoid reading Schmitt simply as a critic of Just War theory. The more specific target of his critique, I contend, is rather the abstract universalism of liberalism. The ultimate source of modern wars

36 Schmitt 2003b [1950], pp. 122-3; See also *ibid.*, pp. 56, 122-5, and 321.

37 *Ibid.*, p. 141.

38 *Ibid.*, p. 58.

39 *Ibid.*, p. 124.

40 *Ibid.*

of annihilation is not merely the introduction of moral distinctions between just and unjust war into international conflicts, but also, and just as much “the pseudo-religion of absolute humanity”⁴¹ which seeks to abolish war, although without being able to escape the logic of what Schmitt calls “the political”.

4. Political versus liberal universalism

True to his own statement “all political concepts ... have a polemical meaning,”⁴² Schmitt coins the concept of the political with a specific opponent in view, namely liberal individualism. Characteristic of liberal thinking, he claims, is its lack of positive political ideas. First and foremost, liberalism is a critique of politics that seeks the limitation of state power for the sake of individual freedom and private property. In the domestic domain, this individualistic impulse leads to diverse methods for taming and controlling the power of state and government such as the division of powers and constitutionally entrenched civil rights, but no constructive ideas about the public organization of communities.⁴³ In the international domain, it provides the liberal with a rationale for criminalizing aggressive war. A right to go to war in the sense of the *jus publicum Europaeum* implies that a political community can demand of its citizens that they fight its enemies and, if necessary, sacrifice their own life. Yet, “from the viewpoint of the private individual,” this is “lack of freedom and repression,” and “*eo ipso* something evil.”⁴⁴

In opposition to the liberal “system of demilitarized and depoliticalized concepts”⁴⁵ Schmitt defines the political in terms of the distinction between friend and enemy. This distinction corresponds to, but is also independent of other distinctions, such as the moral distinction between good and evil, the economic distinction between profitable and unprofitable, or the aesthetic distinction between beautiful and ugly. Positively, the distinction between friend and enemy “denotes the utmost degree of intensity of a union or separation, of an association or dissociation.”⁴⁶ “The political enemy,” Schmitt writes, “is ... the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way,

41 Schmitt 2009 [1950], p. 108.

42 Schmitt 1996 [1932], p. 30.

43 Ibid., pp. 70-1; see also Schmitt 2008 [1928], pp. 235-9.

44 Schmitt 1996 [1932], p. 71

45 Ibid.

46 Ibid., p. 26.

existentially something different and alien, so that in the extreme case conflicts with him are possible."⁴⁷ The enemy need not be someone we think of as immoral or repugnant, although, as Schmitt also points out, he is easily treated as such. Nor does moral corruption or aesthetic unattractiveness necessarily make someone an enemy. What is in all cases decisive is rather the intensity of the disassociation, which in the final resort can lead to violent conflict with, and thus possibly the physical killing, of the enemy.

When Schmitt further specifies the political enemy as the *public* enemy he also has the polemic against liberalism in view. In liberalism, the enemy tends to be transformed into an economic competitor, a debating adversary, or someone one hates on a personal basis. Contrary to this, Schmitt emphasizes that enmity is a relation between politically constituted groups, and that an "enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity."⁴⁸ This means that the possibility of violent conflict inherent in enmity refers to the possibility of war, although not in the sense that political antagonisms normally take the form of war or that war is something desirable. Political action is not the same as military action. Nor is war the aim or purpose of politics. The crucial thing is rather the existence of war "as an ever present possibility" that "determines in a characteristic way human action and thinking and thereby creates a specifically political behavior."⁴⁹

To say that war is an ever present possibility determining human action and thinking is to say that the political is inescapable. The division into friend-enemy groupings is essential to the human condition, and any attempt at escaping the logic of the political is futile. From this, it does not follow that specific groups forever have to remain enemies, or that the political constitutes a domain of its own, apart from other domains of human life. Despite the independence of the friend-enemy distinction vis-à-vis other distinctions, such distinctions, be they moral, economic, aesthetic, or religious ones, can nevertheless be transformed into political distinctions. The political "does not describe its own substance, but only the intensity of an association or dissociation of human beings whose motives can be religious, national ..., economic, or of another kind and can effect at different times different coalitions and separations."⁵⁰ Rather than some substantial content

47 Ibid., p. 27.

48 Ibid., p. 28.

49 Ibid., p. 34.

50 Ibid., p. 38.

that forever divides groups into friends and enemies, the political refers to the degree of intensity of an intergroup relation capable of turning a non-political antithesis into a political antithesis.⁵¹ Such a transformation takes place at the point when a group starts orienting itself and acts with a view toward the possibility of war. At this point a former non-political entity becomes a political entity.

The political entity has the final say with regard to the friend-enemy distinction. It is decisive or authoritative when it comes to decisions concerning the possibility of violent conflict with another political entity. Only the political entity can demand of its members a readiness to die and to kill for the sake the entity itself. This capacity to instigate a readiness to die and kill, Schmitt claims, cannot be normatively circumscribed: "War ... has no normative meaning, but an existential meaning only ... [N]o rational purpose, no norm no matter how true, no program no matter how exemplary, no social ideal no matter how beautiful, no legitimacy nor legality ... could justify men in killing each other."⁵² The only possible justification for war is the presence of "a real enemy" that poses "an existential threat to one's own way of life."⁵³ And the decision as to who is the real enemy belongs entirely to the political entity. In the most extreme cases of political conflict the perspective of participants has an absolute primacy over the perspective of detached observers. Precisely what constitutes the utmost degree of intensity between collectives, so that violent conflict between them is possible, "can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party. Only the actual participants can correctly recognize, understand, and judge the concrete situation and settle the extreme case of conflict."⁵⁴

It is analytically implied in the concept of the political that "the political world is a pluriverse, not a universe."⁵⁵ Only if the political world consists of a multiplicity of political entities can the distinction between friend and enemy be drawn. In a universal state embracing all of humanity, there is no place for such a distinction. This is not to say that the political pluriverse has to consist of a

51 Hans Morgenthau similarly characterizes the political as "a certain coloring, a determined nuance in contrast to anything substantial," in Morgenthau 1929, p. 70 (as translated in Koskenniemi 2001, p. 441).

52 Schmitt 1996 [1932], p. 49.

53 Ibid.

54 Ibid., p. 27.

55 Ibid., p. 53.

plurality of sovereign states. The sovereign territorial state is in Schmitt's view not a universal organizational form for political entities. It is rather a particular and contingent form bound to a specific geographical area and a specific historical period, namely Europe from the 16th to the 20th century. It was preceded by other political forms, and it is likely that it will be replaced by new ones in the future.⁵⁶ That the political world is a pluriverse therefore primarily means that the existence of a political entity – of whatever form – presupposes the existence of another political entity, whereas the idea of a universal political unit is self-contradictory because it excludes the possibility of enmity.

A further implication of the concept of the political related to this is that "humanity," the core concept of liberalism, is not a political concept. "Humanity" is a concept that covers everyone born human, referring to their equality *qua* human beings. Being a concept entailing no specific differentiations, it cannot give rise to any concrete political distinction, since even enemies remain human beings.⁵⁷ Rather than a political concept, "humanity" is the principle of bourgeois freedom, and "freedom," Schmitt writes, citing the Italian nationalist Giuseppe Mazzini, "constitutes nothing."⁵⁸

At the same time, Schmitt does not reject the importance or value of "humanity" as a moral concept. On the contrary, he considers it to be an elevated concept, comparable to the concept of God; a concept whose dignity resides in it being enthroned above political divisions. It is a concept that unites everyone, irrespective of their particular political, religious or other allegiances, and can therefore temper and moderate discords and conflicts between groups.⁵⁹ Yet this tempering capacity of the concept presupposes that it is not distorted by being caught up in political struggles.

That "humanity" is an apolitical concept does not mean that it cannot be put to political use. Given its lack of an identifiable enemy "humanity as such cannot wage war," but wars can very well be "waged in the name of humanity."⁶⁰ Far from being wars for the sake of humanity, the latter kind of wars would be wars where one political grouping usurps the concept of humanity in its fight against its enemy. It is precisely this kind of usurpation that Schmitt sees as particularly dangerous.

56 Schmitt 2003c [1941].

57 Schmitt 1996 [1932], p. 54.

58 Schmitt 2008 [1928], p. 235.

59 Schmitt 1999 [1930], pp. 204-5.

60 Schmitt 1996 [1932], p. 54.

Once “humanity” is used for political purposes the concept loses its capacity to restrain political antagonisms, because it is transformed into what Reinhart Koselleck has termed an “asymmetric counterconcept” – that is, a classification that articulates the identity of a person or group vis-à-vis other persons and groups in a way implying lack of mutual recognition.⁶¹ To identify one’s own group with humanity is to make a qualitative differentiation between particulars by means of a universal concept. This can only come at the price of denying the quality of being human to the enemy. If the constitutive trait of one’s own group is to represent humanity, then the existentially other, the alien, can only be the inhuman. And this ultimately turns a tempering and moderating moral concept into a vehicle for excessive and barbaric violence: “To confiscate the word humanity ... probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.”⁶²

It is less the vocabulary of just and unjust war than the liberal-humanitarian urge to escape the alleged inescapable logic of the political that unleashes the terror of total war in the 20th century. Given the political as a basic aspect of the human condition, any attempt at abolishing the political becomes, as Leo Strauss points out, entangled in a contradiction.⁶³ Such efforts can only succeed by becoming political – that is, by grouping men into friends and enemies and driving pacifists into a war against non-pacifists. Insofar as such a war against war is waged in the name of humanity, however, liberal pacifists leave no legitimate space for their political enemy, the proponent of classical interstate “war in due form.” As in the case of religious civil war, the enemy is placed in a “position of absolute and unconditioned injustice”⁶⁴ and thus reduced to a mere object of violent measures – an inhuman monster that has to be exterminated.

Precisely the attempt to eliminate the political in the name of humanity, then, is what lifts all restraints on international violence. In contrast to enmity based on economic, religious, national, etc. antitheses, which presupposes the common humanity of friends and enemies, the identification of one’s own cause with humanity turns the political adversary into an enemy of humanity. Far from referring to the equality of every person, the political abuse of the concept of

61 Koselleck 2004, pp. 155-91.

62 Schmitt 1996 [1932], p. 54

63 Strauss 1996 [1932], pp. 94-5.

64 Schmitt 2002 [1950], pp. 56-7.

humanity has a particularly intense divisive power that bears with it an awful potential for slaughter. Used asymmetrically, not only does the concept correlate with its antithesis, “inhumanity,” but also for all practical purposes it realizes the distinction between superhuman (*Übermensch*) and subhuman (*Untermensch*). And for the subhuman, only extermination and annihilation waits.⁶⁵

5. Großraum and the anthropological grounding of the political

On the face of things, Schmitt’s invocation of the political is an objective and descriptive account of an apparent blind spot in liberalism. The distinction between friend and enemy is said to be “inherent reality,” something that “cannot be denied” and that “remains actual” as “an ever present possibility for every people existing in the political sphere.”⁶⁶ Yet, as Strauss correctly remarks, the appeal to the political is more than the recognition of political enmity as a persistent historical fact. Schmitt does not merely pinpoint an essential aspect of the human condition overlooked by liberalism, but normatively affirms a political world divided into plural and antagonistically related political entities.⁶⁷ The political, to which belong enmity and the possibility of war, is not only real, but should also be vindicated. It should be vindicated as a modest and rational alternative to “any world- and humanity-encompassing universalism” that can only lead to a dangerous intensification of enmity.⁶⁸ For Schmitt, international order cannot have its meaning in the elimination of war. Ideas such as Kant’s project for perpetual peace are hopelessly utopian, and in the final resort undermine the possibility of international order. In international relations, an effective bracketing of war is the most we can hope and strive for, and this therefore represents “the highest form of order within the scope of human power.”⁶⁹

This affirmation of the political is not, however, a plea for a return to the traditional European state system. Being intertwined with the sovereign territorial state as the dominant organizational form for political entities, the *jus publicum Europaeum* is bound to a particular time and place in the same way as the former.

65 Schmitt 2009 [1950], p. 111.

66 Schmitt 1996 [1932], p. 28.

67 Strauss 1996 [1932], pp. 96-7.

68 Schmitt 1999 [1930], p. 205.

69 Schmitt 2003b [1950], p. 187.

Even if Schmitt speaks of “peoples unified into states” as the preferable alternative to liberal universalism at least as late as 1930,⁷⁰ in 1938 he rejects that his criticism of the turn toward a discriminatory concept of war is “directed ... against the idea of fundamentally new orders.”⁷¹ And one year later, in 1939, he presents the idea of a *Großraum* principle that is to replace “state territory” as the relevant spatial concept for theoretically dealing with questions about international order.⁷²

According to the *Großraum* principle, which is modeled on the 1823 Monroe Doctrine, a limited number of large regions (*Großräume*) or hemispheres, each dominated by a hegemonic power or *Reich*, could be the constitutive elements of a new *nomos* and bracketing of war. Rather than territorially defined political entities, the *Großräume* are exclusive spheres of influence where the political ideas of the hegemonic power “radiate,” and thus transcend the borders of the states within the respective *Großraum*.⁷³ These spheres of influence are regions of states that share a common cultural and ideological orientation, and that live under the authority of a leading power whose exceptional status relies on its capacity to protect against interventions by so-called spatially alien (*raumfremde*) powers. Although a *Großraum* system does not exclude interaction or legal relations between and across the different regions,⁷⁴ each region represents a separate space constituted by political entities sharing a unifying political idea that *qua* political is polemically directed against the politically unifying ideas of other regions. On this model, the traditional principle of non-intervention is transferred from the state level to the level of regions. Non-intervention no longer refers to the right of sovereign states to organize their internal affairs without interference from other states, but to the right of hegemonic powers to keep spatially alien powers out of their own backyard.

A pluriverse of *Großräume* is not the only possible constellation for a future global order envisaged by Schmitt. Speculating on possible models for a new *nomos* of the Earth in the mid-50s he saw at least two other alternatives. One was a

70 Schmitt 1999 [1930], p. 205.

71 Schmitt 2011c [1937], p. 74.

72 Schmitt 2011a [1939].

73 Ibid., p. 101.

74 On this point, Schmitt makes a fourfold division between (a) relations between *Großräume* as wholes, (b) relations between the hegemonic powers of the *Großräume*, (c) relations between states within a *Großraum*, and (d) relations between states belonging to different *Großräume*. Ibid., p. 110.

unified world ruled and administered by one great power – whichever would emerge as the victorious party from the cold war. Another was a hegemonic balance structure similar to that of the *jus publicum Euroaeum*, yet with the US, rather than England, in the role as a balancing power.⁷⁵ Although it remained an open question for Schmitt what kind of order would eventually replace the traditional European state system, he evidently saw a balance between internally homogeneous *Großräume* as the most favorable alternative,⁷⁶ whereas any unification of humanity under a single sovereign would be a “frightful” and “dubious progress.”⁷⁷

Underlying the affirmation of the political is an “anthropological profession of faith:” that man is “by nature evil.”⁷⁸ This presupposition, which in Schmitt’s view is shared by all genuine political theories, should not, however, “be taken ... in any specifically moral or ethical sense,” but “in a rather summary fashion” as “the answer to the question whether man is a dangerous being or not, a risky or a harmless creature.”⁷⁹ That man is by nature evil does not imply that intentional wickedness is an essential trait of human nature, but that mankind is a species with a problematic and dangerous nature – that human beings represent a threat to other human beings, and, accordingly, are vulnerable beings in need of protection and care.

At first sight, this might seem trivial. Does anyone consider human beings to be unproblematic or harmless? What is controversial about Schmitt’s anthropological pessimism is not the assumption of dangerousness as such, but the denial of the possibility of historical progress. In his view, evil does not only “appear as corruption, weakness, cowardice, stupidity, or ... brutality, sensuality, vitality, irrationality,” but is also the opposite of goodness, which “may appear ... as reasonableness, perfectibility, the capacity of being manipulated, of being taught, peaceful, and so forth.”⁸⁰ In other words, that man is by nature evil means that mankind is incapable of being taught or of being peaceful. Exceptional men can be educated so as to become part of a community’s cultural and political elite, but the species as a whole does not learn, and cannot manage to organize internally and externally peaceable societies. In human relations at all places and at all times

75 Schmitt 2003a [1955], pp. 354-5.

76 Ibid., p. 355.

77 Ibid.; and Schmitt 1987 [1978], p. 80.

78 Schmitt 1996 [1932], p. 58.

79 Ibid., pp. 58 and 61.

80 Schmitt 1996 [1932], p. 58.

there is an ineradicable element of violence that threatens to disrupt whatever established order there is.

This non-trivial form of anthropological pessimism forms the basis for a stark opposition between liberal universalism and political order. For Schmitt, the formula of political order is “*protego ergo oblige*.”⁸¹ Whoever provides some degree of security and protection against internal and external enemies is to be obeyed. In every political community there is a necessary element of personal rule or domination that cannot be dissolved into a neutral rule of law guaranteeing the maximal individual freedom compatible with equal freedom for all. This goes even for democratic communities, which on Schmitt’s analysis are closer to dictatorship than to liberalism.⁸² A sovereign power that keeps subversive forces internal to a state in check and that protects against external aggressors is always required. Only if one presupposes that the human race is capable of learning does it make sense to limit political power for the sake of individual freedom – domestically in order to throw off the yoke of personal rule in favor of the rule of law and internationally in order to limit the state’s power over life and death. From the perspective of the anthropological pessimist, however, *bourgeois* freedom, the guiding principle of liberalism, is not only externally related to political order, but in the final resort detrimental to any order or *nomos* in the domestic as well as in the international domain.⁸³

6. Concluding critical discussion

The problematic part of Schmitt’s affirmation of the political is not the implied advocacy of an international order consisting of plural political entities. There is

81 Schmitt 1996 [1932], p. 52.

82 Schmitt 1985 [1923], pp. 13-17 and 25-30. Two crucial conceptual moves open up for the possible combination of democracy and dictatorship: i) the definition of democratic equality as substantial equality or homogeneity, and ii) the definition of democracy as “identity of ruler and ruled” (and not, as in Rousseau and Kant, identity of author and subject of law). See Schmitt 2008 [1928], pp. 263-4.

83 Throughout this article, I have explained how the criminalization of war – the imposition of international restraints on state sovereignty in the name of humanity – allegedly implies a return to the nihilistic logic of the religious civil wars. Similarly, Schmitt explains the malaise of the Weimar Republic, a state whose unity was threatened by heterogeneous social forces, at least in part as a consequence of the hollowing out of state power by liberal *Rechtsstaat* principles such as basic rights and division of powers.

nothing wrong with pluralism as such. The problematic part is rather the implied non-discriminatory concept of war and the corresponding authoritarian conception of domestic politics.

Inasmuch as the crucial elements of Schmitt's conception of political order – peace, security, protection, obedience – are antithetically contrasted with freedom, it can justifiably be characterized as a “one-sided” and “repressive” conception.⁸⁴ Theorists of the Enlightenment tradition, from Rousseau and Kant to Habermas, would consider the antithesis on which it is based as false. In their view, individual freedom and political order are co-constitutive rather than externally related. Political order is not a substance conceptually prior to or ranked higher than individual freedom. Nor is individual freedom identified with a pre-political set of natural rights that must be imposed on political orders from the outside. Instead, the freedom of each, their right to reciprocally regulated spheres of free choice, is enabled by and realized within political orders, whereas the substance of political order is precisely the realization of freedom via democratic self-legislation. On the one hand, we can become free from dependence on the arbitrariness of other individuals only by subjecting ourselves to the coercive power of the state. On the other hand, the only way to avoid domination by the state's executive power is to subject the latter to the sovereign legislative will of the people. Certainly, on this conception the idea of equal freedom for all limits the legitimate use of political power. Legal norms and institutional arrangements that entitle some person or persons to subject others to their own arbitrary choice or that create systematic relations of dependency between persons are ruled out. Yet such limits are not meaningfully conceived as external restraints imposed on political communities, since, as implications of the idea of equal freedom, they are internal to the constitutive idea of political order.⁸⁵

In Kant, this idea of a freedom-enabling democratic order motivates the “philosophical project” “Toward perpetual peace”⁸⁶ aiming at the replacement of the European order of states established by the peace of Westphalia in 1648 with an international civil order of “universal and lasting peace.”⁸⁷ An alleged right to go to war is not only at odds with the equal sovereignty of states, but also represents a threat to the civil and political freedom of each state's citizens. Accordingly, an

84 Brunkhorst 2004, p. 516.

85 See, for instance, Kant 1996a [1797]; and Habermas 1996, esp. chapters 3 and 4.

86 Kant 1996c [1795], 8:341.

87 Kant 1996a [1797], 6:355.

international legal order that prohibits war is a precondition for law-governed interaction where “the freedom of choice of one can coexist with everyone’s freedom in accordance with a universal law.”⁸⁸ Working toward a stable and peaceful international legal order is therefore in Kant’s view a duty. Specifically, this means working toward the establishment of an international public authority, a league of states, empowered to adjudicate conflicts between states. Peace based on a balance of power, he mocks as “a mere fantasy” comparable to a certain “*Swift’s house* that the builder had constructed in such perfect accord with all the laws of equilibrium that it collapsed as soon as a sparrow alighted upon it.”⁸⁹

For Schmitt, however, such a project reflects anthropological optimism, and must therefore be rejected as apolitical. The fact that Kant repeatedly make rather harsh judgments on a corrupt human nature, for instance by characterizing men as being made of “such warped wood” that “nothing straight can be fashioned” from them⁹⁰ and emphasizing their malevolence and desire to dominate others,⁹¹ does not count for much in this connection. Implied in the view that there is an obligation to work toward perpetual peace is a belief in possible progress: that deep political conflicts eventually can be tempered and resolved peacefully in processes where neutral third parties act as judges. And this is to deny that the political is unavoidable.

Yet it is in no way clear what warrants Schmitt’s anthropological grounding of the political. At no point does he provide us with any compelling reason for thinking that human nature is so radically evil that progress is impossible. Nor does it seem likely that any such reason can be provided. Unless one adheres to a circular view of history, no appeal to the violent past of humanity can suffice in this context. As argued by some interpreters, what instead seems to form the basis of Schmitt’s anthropological pessimism is a profession of religious faith: that every human being by birth is a creature tainted by original sin.⁹² To profess anthropological pessimism, on this reading, is to recognize and affirm man’s subservience to God. It is to acknowledge that mankind cannot make it on its own, and therefore is in need of divine guidance. By contrast, anthropological optimism reflects disobedience toward God. Inherent in the Enlightenment belief in possible

88 Ibid., 6:230.

89 Kant 1996b [1793], 8:312.

90 Kant 1983 [1784], 8:23.

91 Kant 1996a [1797], 6:307 and 6:312.

92 See, for instance, Meier 1998.

progress is the idea of a common life based on the authority of human reason alone. This is to deny that enmity is essential to the order of human things, which in turn is to deny the Christian dogmas of original and inherited sin. In this perspective, Schmitt's paraphrase of Proudhon, "whoever invokes humanity wants to cheat,"⁹³ need not only be read as a critique of a deceptive form of imperialism, but can also be understood as referring to a deceptive "battle *against God* ... in the name of mankind."⁹⁴

But if it is correct that anthropological pessimism, the fundamental premise of Schmitt's affirmation of the political, ultimately rests on religious faith, it is not so easy to engage with it at the level of philosophical argument. How can one argue against revelation? And why should anyone not sharing Schmitt's version of Christian faith find his critique of the efforts at criminalizing aggressive war an important contribution to a debate on international law and politics? For those who do not do so, I believe at least two considerations that speak against an affirmation of the political can be put forward.

First, one could question whether it makes much moral sense to defend a sovereign right to go to war after the experience with total war in the 20th century. Arguably, one lesson to be learnt from this experience is that reserving such a right to states is not a particularly good way of preventing excessive violence in war.⁹⁵ Considering the destructive potential of modern weapons technology, Schmitt's defense of the right to go to war has something surreal about it. To the extent that the faith in the dangerousness of man in the final resort rules out impartial mediation of political conflicts by third parties, one has to ask: Can we really afford the luxury of such an extravagant faith?

Second, one could ask whether historical experience does not give us reason to question the harsh and unrelenting quality ascribed to political antagonisms by Schmitt. Even if it can be argued that there was no legally established prohibition against aggressive war before World War II, non-aggression has nevertheless been a peremptory norm of international law at least since the war crimes tribunals in Nuremberg and Tokyo. Saving "succeeding generations from the scourge of war" and providing "effective collective measures for the prevention and removal of threats to the peace" is also the most important purpose of the UN.⁹⁶ In addition,

93 Schmitt 1996 [1932], p. 54.

94 Meier 1998, p. 23.

95 Cf. Habermas 1998, p. 194.

96 UN Charter, Preamble and art. 1.

basic human rights have become binding norms of international law via the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1966 Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights, and in numerous other ways. Since the end of the Cold War we further have had wars and military interventions publicly justified either as response to the international crime of aggression or as humanitarian defense of civilians. And, according to official political rhetoric, even the wars of aggression waged by western powers since 9/11 are not simply wars against enemies of western-style secular society, but wars in defense of universal human values.⁹⁷

On the one hand, this can be seen as confirming the relevance of Schmitt's critique of liberalism understood as a critique of the tendency to appropriate universalist moral language for political purposes. Like any other normative concept, so the concept of humanity can be abused, and today the language of universal human rights is not only the language of political opposition and critics of power throughout the world, but also the language of hegemonic powers that seek an exceptional status in the international system. Such exceptionalism further seems to be a danger inherent in a certain strand of contemporary cosmopolitan thought which seeks to replace state sovereignty with universal human rights as the moral basis for international law. Recognizing individuals rather than states as the ultimate subjects of international law, proponents of this form of cosmopolitanism ascribe no fundamental normative significance to territorial borders and defend military interventions for the moral purpose of promoting just institutions or of protecting human rights.⁹⁸ Accordingly, they support a development toward a non-egalitarian international order where powerful states can intervene in other states on the basis of their own arbitrary moral judgment. In opposition to such views, Schmitt's affirmation of the political would be attractive if it did not come along with authoritarian anti-individualism and a non-discriminatory concept of war.⁹⁹

97 See, for instance, Blair 2007.

98 See, for instance, Caney 2005, Moellendorf 2002, and Tesón 1997. For a good critical discussion of Tesón, see Eberl 2008, pp. 124-46.

99 With Jean Cohen 2006, I believe the main problem with the cosmopolitan position is not so much the talk about universal human rights as overemphasis on such rights in combination with neglect of the fundamental normative importance of state sovereignty. We can therefore say that it is a position no less one-sided than Schmitt's position: Where Schmitt emphasizes the political at the expense of individual freedom the cosmopolitans emphasize individual freedom at the expense of the political.

On the other hand, that Schmitt's diagnosis of an indirect form of imperialism can be seen as relevant in view of current political trends does not mean that he provides a sound critique of the criminalization of aggressive war or of Kant's project for perpetual peace. None of the wars in which western powers have been involved the last 20 years were symmetrical contests of force between just enemies. Nor were they uncontroversial. Yet, whatever stance one takes regarding the legitimacy of these wars, it is questionable whether any of them were particularly inhumane compared to wars wrapped up in non-humanitarian rhetoric. No doubt, the experience of war must have been terrible for those directly involved. There is no such thing as humane warfare. Still, criticizing the two Iraq Wars, the bombing of Serbia, the war in Afghanistan, or the intervention in the Libyan civil war for being total wars of annihilation seems to be far off target. What should be criticized is the combination of discriminatory practices and pursuance of *limited* political goals, such as retaining geopolitical hegemony or controlling vital natural resources. Rather than brutal extermination driven by universalistic rhetoric, the current configuration appears to be one of hegemonic control legitimized as defense of alleged universal values. While this certainly is distressing, it also indicates that Schmitt generally overstates existential otherness as a constitutive feature of political antagonisms, and, consequently, that a central premise of his critique of liberal universalism and a discriminatory concept of war can be put into question.

On the interpretation presented in this article, the idea of a radical difference separating political adversaries and excluding possible mediation of political conflicts by neutral third parties is crucial for Schmitt's positioning in favor of the political. Only if political enmity is as sharp and deep-seated as he claims does the thesis of total war as a result of prohibiting aggressive war appear warranted. By contrast, if total war is merely assumed to be a persistent *logical* possibility in view of the openness of the future, there is no reason to worry more about wars in the name of humanity than there is reason to worry about wars in any other name, be it moral ideals, religion, glory, national interests, etc. War is in any case a grim condition that ought to be avoided. If it breaks out, combatting parties most likely already have or eventually will develop discriminatory attitudes toward each other nonetheless.¹⁰⁰ In other words, unless the element of radical otherness is presupposed, it does not seem to make much of a difference

100 Schmitt in no way denies this. See Schmitt 1996 [1932], p. 27.

whether war is fought in the name of universalistic or particularistic causes. If this element is missing, there is no apparent reason why there is anything wrong in making aggressive war an international crime.¹⁰¹ Given the high stakes, the criminalization of aggressive war arguably has been a progressive step in the evolution of international law. Although it does not by itself prevent war or escalation of violence in war, it potentially provides political leaders that risk being put to trial with incentives for seeking peaceful solutions to international conflicts. For this reason alone, it should be affirmed. In addition, the prohibition against aggressive war accords better with mutual recognition among states than does a sovereign right to go to war. If all states have a right to pursue their claimed rights unilaterally by means of war, the sovereignty of each state depends on arbitrary decisions made by other states. As a result, the only sovereign is the strongest state or coalition of states. Therefore, contrary to what Schmitt thinks, limiting sovereignty by renouncing the traditional *jus ad bellum* is an affirmation of the equal sovereignty of states.¹⁰²

101 Conversely, if Schmitt is right about the political, there also seems to be something to say in favor of his analysis of a dangerous potential for slaughter entailed in the political appropriation of universalist moral ideas. Inasmuch as political enmity does not allow for third party mediation and only the actual participants in a conflict can decide whether the possibility of war shall remain possible or become reality, criminalizing aggressive war indeed seems like a problematic project. The question, of course, is why we should think he is right. Michael Jeismann has suggested that radical otherness, which Schmitt presents as the defining feature of the political, first and foremost has a strong affinity to the modern idea of the nation. See Jeismann 1992, pp. 383-4. If Jeismann is right in this, the political, in the sense of an especially intense relation of association and dissociation is less a universal feature of the human condition than a phenomenon related to the development of a distinct national consciousness in the epoch after the French Revolution. I am indebted to Helge Høibraaten for the reference to Jeismann.

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Chapter 3

A Cosmopolitan Defense of State Sovereignty

1. Introduction

Cosmopolitan normative commitments are often considered incompatible with recognition of state sovereignty as a basic principle of international law. Although cosmopolitans do not necessarily reject the normative importance of sovereignty completely, proponents of an influential strand of contemporary cosmopolitanism that I call *anti-statist cosmopolitanism* tend to ascribe to it a mere derivative significance, dependent on its instrumental value for protecting human rights. In this article, I take issue with this kind of cosmopolitanism, arguing that there is a stronger connection between individual freedom and state sovereignty. Taking a conception of justice informed by Kant's philosophy of right as a point of departure, I claim that state sovereignty is not only compatible with, but essential to the recognition of individuals as units of ultimate concern. Justice among persons, understood as each person's right to be independent from subjection to other people's arbitrary choices, presupposes that their interaction is regulated by coercive public institutions (i.e., state authorities). Accordingly, respect for the rights of persons requires respect for sovereignty, which entails norms such as the duty of non-interference in the internal affairs of a state and the right to self-determination of peoples.

An important step in the argument is to challenge the specific way in which anti-statist cosmopolitans typically frame or conceptualize discourse about justice. Borrowing terminology from Iris Marion Young, I argue that most anti-statist cosmopolitan positions tacitly presuppose a problematic *distributive conception of*

justice,¹ which, briefly put, is a conception where justice is understood as the fair allocation of certain pre-politically defined outputs (e.g., rights). My suspicion is that the ascription of a mere derivative significance to sovereignty is a consequence of adherence to such a conception. I therefore argue that justice is better conceptualized with a direct focus on interpersonal relations, and that Kant's idea of an innate right to freedom is a promising alternative in this regard. Conceptualizing justice with a primary view on interpersonal relations rather than outputs not only brings us closer to what justice is really about, but also makes it easier to see why there is an internal connection between individual freedom and state sovereignty.

On the view that I defend, sovereignty is an international counterpart to freedom in the domestic realm. This view is sometimes dubbed *the domestic analogy*, since it implies that states have a right to territorial integrity much in the same way that individuals have a right to bodily integrity. Such an analogy is often criticized, either for overlooking important differences between states and individuals or for putting undue emphasis on communal integrity. The present defense of the analogy is not susceptible to this kind of criticism. I do not presuppose that states have moral faculties similar to those of human agents. Nor do I ascribe any independent moral value to community. States are instead understood as necessary institutional frameworks or arenas for realizing individual freedom, and being such arenas they have a right to be protected by the principle of non-intervention. That being said, I share the cosmopolitan commitment to the idea that all persons are equal units of normative concern generating obligations on every other person. I therefore call this a cosmopolitan defense of state sovereignty.

I proceed as follows. In Section 2, I present the basic position of anti-statist cosmopolitans. In Section 3, I criticize the distributive conception of justice implicit in this position. In section 4, I present an alternative relational conception, taking Kant's innate right to freedom as a starting point. In Section 5, I explain why this conception also implies that there is an internal connection between individual freedom and state sovereignty. Finally, in Section 6, I argue that the line of reasoning pursued in the two former sections provides a defense of the domestic

1 Young criticizes a dominant distributive *paradigm* in contemporary political discourse on justice. Young 1990, pp. 15-38. See also Forst 2011.

analogy that circumvents the criticism typically raised against such an analogy by anti-statist cosmopolitans.

2. Anti-statist cosmopolitanism

By cosmopolitan normative commitments, I understand commitments entailed in the core idea of moral cosmopolitanism – the idea that each person is to be recognized as an equal unit of concern generating obligations on every other person. Thomas Pogge has spelled out this idea by identifying three features uniting diverging strands of cosmopolitanism: *individualism*: the ultimate units of concern are individual human beings or persons rather than human groups of various sorts; *universality*: the status of ultimate unit of concern attaches to every living human being equally; *generality*: this special status has global force, which is to say that persons are ultimate units of concern for everyone.²

Moral cosmopolitanism is commonly distinguished from *institutional or legal* cosmopolitanism,³ which refers to positions advocating institutional schemes that bring states under the authority of some kind of supranational agency. Such advocacy is not implied in moral cosmopolitanism, but is not ruled out by it either. Commitment to moral cosmopolitanism can lead to support for cosmopolitan institutional schemes, but there is no necessary relation between the two.⁴

In view of this openness with regard to institutional issues, there need not be any conflict between moral cosmopolitanism and an international legal order of sovereign states. The latter, sometimes dubbed a “statist” order, is an order where

2 Pogge 2002, p. 169. See Barry 1999, pp. 35-6 for a similar account.

3 To my knowledge, the distinction is due to Beitz 1994, who distinguishes between institutional and moral cosmopolitanism. Pogge 2002 speaks of legal rather than institutional cosmopolitanism in order to draw a further distinction between interactional and institutional *moral* cosmopolitanism. According to this distinction, interactional moral cosmopolitanism formulates ethical principles that apply directly to the conduct of persons and groups, whereas institutional moral cosmopolitanism formulates principles of justice that apply directly to institutional schemes. See Pogge 2002, p. 170.

4 Precisely what counts as a cosmopolitan institutional scheme differs somewhat from author to author. According to Pogge 2002, p. 169, legal cosmopolitanism implies the idea of a universal republic. Caney 2005, p. 5, writes that “institutional/legal cosmopolitanism ... maintains that there should be global political institutions.” Beitz 1994, p. 124, identifies “the distinctive common feature” of institutional cosmopolitanism as “some ideal of world political organization in which states and state-like units have significantly diminished authority in comparison with the *status quo* and supranational institutions have more.”

all states *qua* sovereigns have legal standing and are recognized as equals. This means that they are formally subject to the same general rights and duties, most importantly the right to self-determination and the correlative duty of non-intervention. In a statist order, sovereignty implies that a collective actor has legal personality, and thereby can be a subject of international legal processes and a party entering into international treaties. It also implies the entitlement to organize legislative, executive, and adjudicative institutions as it sees fit within a specific territory as well as the obligation to respect the territorial integrity of other sovereigns. Ideas congenial to a statist order are clearly present in the UN Charter, where paragraph 2(4) says that “members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state” and paragraph 2(7) says that nothing in the Charter “shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”

Despite the compatibility of moral cosmopolitanism and a statist international legal order in principle, the latter is today challenged by what I have termed anti-statist cosmopolitanism. Advocates of this strand of cosmopolitanism – which include philosophers like Brian Barry, Charles Beitz, Allen Buchanan, Simon Caney, Darrel Moellendorf, and Fernando Tesón – support global legal reforms in a decisively individualistic direction. The idea is that we should move away from an order based on the sovereign equality of states toward an order where respect for basic human rights serves as the exclusive criterion for judging the legitimacy of political and legal institutions. This view is based on the idea that political borders have no fundamental normative significance or the idea that there should be congruence between domestic principles of justice and international or global principles of justice.⁵ Whatever principles of justice apply internally to states should also apply in the international realm. And since anti-statist cosmopolitans usually conceptualize justice in terms of human rights, so “the core of justice, protection of human rights, should be a primary goal of the international legal system,”⁶ much in the same way as protection of human rights is the standard by which we ought to assess domestic political orders. State sovereignty is thereby reduced to an instrumental value whose importance is dependent on its effectiveness in promoting and protecting basic human rights.⁷ Individuals, not

5 Beitz 1994, p. 125; Caney 2005, p. 265; and Tesón 2003, p. 103.

6 Buchanan 2004, p. 81.

7 See, for instance, Beitz 1999, pp. 69 and 83, and Tesón 1997, p. 40.

states, should be recognized as the ultimate subjects of international law, whereas the international standing of states should depend on the legitimacy of their domestic orders.

An important implication of this view is a rejection of non-intervention as a basic international norm. Given the normative primacy of individuals, protecting or promoting basic human rights is considered a just cause for intervention – including military intervention. Some, but not all, proponents of this view even argue that such interventions are not only *permissible*, but a *duty* on the part of states capable of helping those whose basic rights are violated.⁸ This is not to say that human rights violations taking place on the territory of a state provide sufficient justification for military interventions. All interventions are subject to standard *jus ad bellum* constraints: the use of military force must have a reasonable prospect of success; be a means of last resort; stand in proportion to the injustice it is meant to rectify; etc. While this limits the scope of cases where interventions are justified, the norm of non-intervention is not, however, recognized as a basic norm governing international relations. As Charles Beitz puts it, “there is a right against intervention, but ... it does not apply with equal force to all states.”⁹ Sovereignty is a derivative of the more basic concern with justice to persons, and “only just states deserve to be fully protected by the shield of sovereignty.”¹⁰

By the same token, the validity of claims to self-determination, as raised by former colonies in the 20th century, depend on whether or not liberation would be favorable with regard to reducing injustice in the relevant territory. People living under foreign rule can invoke no fundamental right to govern themselves against colonial powers. Self-determination, like non-intervention, is not a basic principle. It is just “a means to the end of social justice.”¹¹ Only if there is reason to believe that decolonization will lead to a less unjust society is there a right to self-determination.

8 That there is a duty to intervene militarily and thus to risk violent death is rejected by Buchanan 2004, p. 470. For the opposite view, see Caney 2005, p. 235, Moellendorf 2002, p. 123, and Tesón 2003, p. 103.

9 Beitz 1999, p. 191.

10 Tesón 1997, p. 40. In a similar vein, Beitz 1999, p. 69, writes: “Intervention, colonialism, imperialism, and dependence are not morally objectionable because they offend a right of autonomy, but rather because they are unjust ... This is not to say that there are never cases in which a right of state autonomy ought to be respected, but rather that such a right, when it exists, is a derivative of more basic principles of justice.”

11 Beitz 1999, p. 104.

It seems reasonable to say that anti-statist cosmopolitanism belongs to what Gerry Simpson has called a tradition of “liberal anti-pluralism” characterized by “lack of tolerance for non-liberal regimes.”¹² Transforming sovereignty into a function of a state’s human rights record implies discrimination between states on the basis of their internal features. In addition to what I have already mentioned, such discrimination is reflected in proposals that would pull the international system in a less egalitarian direction were they to come into effect. These include proposals that representation in the UN should be restricted to democratic states that respect human rights,¹³ or that there should be established a coalition of democratic states that under certain circumstances can trump the UN Security Council with regard to authorization of preventive use of force.¹⁴ They also include proposals that regime change, or advancing justice in the basic structure of states, should be acknowledged as a just cause for military intervention.¹⁵

Recently, Jean Cohen has criticized this anti-statist trend among contemporary cosmopolitans for being “normatively flawed and politically dangerous.”¹⁶ In her view, it is a form of cosmopolitanism that risks becoming an imperial ideology of powerful states in need of an excuse for going to war and, more generally, seeking an exceptional status for themselves. The crucial mistake of the anti-statist cosmopolitans, she further claims, is that they seek cosmopolitan reforms without acknowledging the fundamental significance of the sovereign state.¹⁷ I agree with her on both points. The anti-statist cosmopolitan project seems to bring with it the risk of undermining one of the most important innovations of 20th century international law: the prohibition against aggressive war. And contrary to the advocates of this project, I think a sound defense of human rights should not come at the price of degrading sovereignty to a function of a state’s human rights record. It is a mistake to construe the relation between individual freedom and state sovereignty in such a way that whoever ascribes fundamental normative significance to the one is compelled to ascribe a derivative or secondary significance to the other. We should avoid understanding the two as hierarchically related concepts. In the following, I will therefore suggest a way in

12 Simpson 2001, p. 539.

13 Tesón 1997, p. 25.

14 Buchanan and Keohane 2005, pp. 274-8.

15 Moellendorf 2002, pp. 104, 118, and 159-60; Tesón 2005.

16 Cohen 2006, p. 486.

17 *Ibid.*, p. 497.

which individual freedom and state sovereignty can be understood as co-original aspects of one and the same normative package, so to speak.

3. A critique of distributive conceptions of justice

How can the normative tenets of moral cosmopolitanism outlined in section 2 be reconciled with the recognition of self-determination and non-intervention as fundamental principles of international law? An important first step is to call into question what can be termed a distributive conception of justice implicit in the anti-statist cosmopolitan view. I do so partly because I assume that it is precisely because they understand justice in distributive terms that anti-statist cosmopolitans cannot attribute more than an instrumental value to sovereignty. I also do so because I believe such conceptions are misleading and tend to produce erroneous reasoning about justice.¹⁸

What I term a distributive conception of justice is not specific to the anti-statist cosmopolitan view. It is a way of thinking of justice that is dominant in contemporary political philosophy, and it therefore comes in different forms. Generally, one can say that what characterizes distributive conceptions is that justice is defined in terms of fair allocation of certain outputs. In the words of Iris Marion Young, a distributive conception is a conception that “defines social justice as the morally proper distribution of social benefits and burdens.”¹⁹ Precisely what are regarded as morally relevant outputs or “benefits and burdens” vary somewhat, but typical examples are civil and political rights, duties, material resources, and opportunities.

As far as anti-statist cosmopolitans are concerned, the output to be distributed is basic human rights grounded in certain fundamental human interests. In other words the term “justice” refers to the realization of a set of

18 Implicit in this criticism is also a critique of what I see as a failure to differentiate properly between morality and law, or, in Kant’s terminology, ethics and right. In giving purely moral justifications for the use of force in response to rights violations, the anti-statist cosmopolitans in effect makes legal norms a subset of moral norms. In line with Jürgen Habermas and Ingeborg Maus (and Kant), I think one would do well to think of the relation between morality and law as complementary rather than as hierarchical. An important consequence of making such a differentiation is that moral arguments that are not put forward within a positive legal framework cannot justify rights-protecting coercive sanctions. See Habermas 1996, pp. 82-131; Habermas 1998, pp. 165-202; Maus 1994, pp. 308-336; and Maus 1998.

19 Young 1990, p. 16.

rights, usually including the right to life, the right to security of the person, the right to freedom of belief, the right to freedom of expression, the right to freedom of association, the right to freedom of movement, the right to protection against enslavement, the right to due process and equality before the law, the right to means of subsistence, etc. These rights are justified as protections of interests of fundamental importance to individual human beings. Such fundamental interests can refer either to personal autonomy or to well-being and human flourishing. On this latter point there seems to be some disagreement among the anti-statist cosmopolitans that I have referred to.²⁰ Yet whatever differences there are regarding the justificatory ground of rights, a common idea is that human rights are protections of whatever fundamental interests one takes as a starting point. Whoever is seriously committed to justice should seek to establish conditions that secure the non-violation of these rights.

This way of conceptualizing justice has an impact on what role one ascribes to legal and political institutions, not least the institutions that make up a state. Insofar as one thinks of justice in terms of allocating morally desirable outputs, institutions can only serve as more or less useful means with which we approximate these allocations. By that, I do not suggest that those who adhere to a distributive framework consider legal and political institutions to be of no or little significance.²¹ The point is rather that conceptualizing justice in terms of pre-politically defined outputs seems to imply that institutions and justice are externally related as means to an end. The reason for having institutions exercising the powers of making, applying, and implementing laws is to make it more likely that the right results are realized, and the legitimacy of such institutions depends on their effectiveness in this regard – that is, their effectiveness in generating the morally desirable outputs.

Such a view on institutions is easily traceable in the writings of anti-statist cosmopolitans. It seems to be implied in the claim that state sovereignty is an instrumental value dependent on its effectiveness in promoting and protecting human rights. It is unambiguously expressed by Brian Barry: “the value of any political structure ... is entirely derivative from whatever it contributes to the

20 For instance, Beitz and Tesón emphasize autonomy, whereas Buchanan and Caney emphasize well-being.

21 Such a suggestion would be particularly unfair to Buchanan, who emphasizes the need for more institutional focus in theories of international justice. Buchanan 2004, pp. 18 and 22-7.

advancement of human rights, human well-being, and the like.”²² In a similar vein, Allan Buchanan emphasizes the “teleological” nature of moral reasoning about institutions. Even if it need not be guided by the goal of maximizing welfare or happiness, and even if all efforts at achieving morally worthy goals should be subject to deontological constraints, such reasoning is nevertheless fundamentally goal-guided, in the sense that assessments of institutions takes the form of evaluating the institutions’ effectiveness in achieving the end they were made to achieve.²³

The distributive framework for thinking about justice implicit in the anti-statist cosmopolitan view provides us with a problematic ‘image’ of justice. It should therefore be questioned. Importantly, by conceptualizing justice within such a framework one tends to lose sight of the fact that justice is a concept that only applies to *interpersonal relations*. Whatever the demands and entitlements of justice are, they can never apply to persons living isolated from other persons. I believe few people would deny this. Yet the relational nature of justice is played down to the extent that justice is conceptualized in terms of distribution of outputs. If justice is understood primarily as a question regarding proper allocation of goods or rights, persons are first and foremost seen as recipients of justice. What a person has a right to is in the first place specified independently of his or her relation to other persons. Only in a second step, after clarifying what output each person can rightfully lay claim to, do other people come into the picture as those against whom claims of justice can be made. In my view, this is to distort the phenomenon at hand. It is a misrepresentation that tends to cause erroneous reasoning about justice.

One kind of distortion caused by conceptualizing justice in distributive terms is the blurring of important distinctions in a way that severs the link between demands for justice and actual injustice. A primary focus on outputs does not seem to allow one to distinguish adequately between cases where people suffer as a consequence of natural events and cases where people suffer as a consequence of what other people do to them. Nor does it seem to allow one to distinguish adequately between cases of rights violations due to the exploitative acts or practices of other people and cases of rights violations due to our own acts and practices. This is not to say that these distinctions cannot be recognized and

22 Barry 1999, p. 37.

23 Buchanan 2004, pp. 74-6.

assessed differently by someone adhering to a distributive point of view. Yet inasmuch as justice is identified with a specific output it seems to follow that all the cases raise justice-based demands on the “supply-side”, so to speak. Since what matters is the realization of a certain pattern of distribution, it is in each case required that we remedy the bad situation of those who suffer in order to fulfill our duties of justice. This is to confuse acts of solidarity with what we owe to others as a matter of justice.²⁴ Such confusion is reflected in the view that we have a duty to militarily assist people who are denied basic human rights by their government, a view defended by many anti-statist cosmopolitans.²⁵ It is also reflected in Allen Buchanan’s claim that we have a “Natural Duty of Justice” to ensure that all persons have access to institutions protecting their basic rights even if we are not interacting directly or indirectly (via institutional schemes) with these persons.²⁶

Another, and in this context more important, distortion caused by adherence to a distributive conception of justice, at least in the specific form of anti-statist cosmopolitanism, is insufficient attention to the issue of who can legitimately decide how abstract principles of justice should be specified, applied, and implemented in particular cases. With Raymond Geuss, one could describe distributive conceptions as approaches that “complete the work of ethics first, attaining an ideal theory of how we should act, and then in a second step ... apply that ideal theory to the action of political agents.”²⁷ Characteristic is a primary focus on what are appropriate principles of justice. What matters is that justice is done. The questions ‘who is to determine what are justified claims?’ and ‘who is entitled to ensure that justice is done?’ are either not addressed or else thought to rely on the extent to which the relevant agent meets objective criteria of justice.²⁸ This is particularly unsatisfactory insofar as the demand for justice is linked to the use of coercive means, as in the case of military intervention. For the anti-statist cosmopolitan it becomes hard to identify any normatively significant difference between coercion by domestic political authorities and coercion by foreign

24 Cf. Forst 2011, p. 2.

25 For references see footnote 8 above. I have yet to see any good account for why there is in fact such a duty. My suspicion is that anti-statist cosmopolitans are here jumping to conclusions as a result of their adherence to an outcome-oriented conception of human rights.

26 Buchanan 2004, pp. 85-7. See also Caney 2005, pp. 111-16.

27 Geuss 2008, p. 8.

28 The latter part of this disjunction is supposed to cover the view defended by Buchanan 2004, pp. 233-49.

governments.²⁹ Yet this is to ignore domestic context as the most important arena for specifying and concretizing what should count as each person's legitimate rights.³⁰ It implies a form of expert rule where political processes and decision-making involving the rights holders themselves is replaced by normative reflection carried out by the moral philosopher.

4. An alternative Kantian conception of justice

In view of the considerations brought forward above, it is worthwhile to consider whether there are better ways of conceptualizing justice. To my mind, a promising alternative is to think of justice in terms of what Kant calls an innate "right to freedom," defined as a right to independence from being subject to constraints arbitrarily imposed by other people.³¹ It is promising not only because it seems to steer clear of the problems connected to distributive conceptions of justice, but also, and particularly important in this context, because it better enables us to see the internal connection between individual freedom and state sovereignty.

The idea of a right to freedom is an idea that squares well with the basic features of moral cosmopolitanism, and it should therefore have some appeal to anti-statist cosmopolitans. It is individualistic in the sense that it acknowledges individual human beings as ultimate units of concern. It is universalistic in the sense that the status of ultimate unit of concern attaches to every human being equally. And it is general in the sense that all persons are ultimate units of concern for everyone.

The right to freedom is further linked to a concept of right which Kant says can be located "directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone."³² This formulation expresses the familiar idea of reciprocal and coercively protected spheres of freedom within which everyone is free to choose as they please. Inasmuch as the anti-statist cosmopolitans are political liberals committed to the ideal of freedom and equality, this should also appeal to them.

29 Beitz 1999, pp. 80 and 87.

30 Cf. Cohen 2006, p. 488.

31 Kant 1996a [1797], 6:237.

32 Ibid., 6:232.

At the same time, conceptualizing justice in terms of Kant's right to freedom differs remarkably from distributive conceptions that articulate justice in terms of human rights protecting fundamental human interests. First of all, the idea of equal freedom, as Kant understands it, does not track what are claimed to be fundamental human interests that persons have independently of their relation to other people. Although the capacity for rational agency forms the ultimate ground for claims of justice,³³ the right to freedom is not a protection of some underlying interest attributable to persons considered individually. Its focus is exclusively on interpersonal relations, or what Kant calls "the *form* in the relation of choice" on the part of interacting persons.³⁴ Rather than an output that can be specified without reference to one's relations to other people, freedom as independence is a claim of each person against all other persons that they do not subject him or her to their arbitrary choice. As such, freedom "is not a good to be promoted," but "a constraint on the conduct of others."³⁵ The normative baseline is that everyone should have the right to make choices of their own provided their exercise of this right does not encroach on anyone else's right to make free choices. Every claim of justice must somehow be founded in this right to equal freedom, which is an unconditional constraint on any effort at promoting other desirable ends.

Second, due to its direct focus on interpersonal relations the idea of a right to freedom is not a distributive idea. It does not refer to the equal distribution of a pre-politically defined set of rights or of an equal range of equivalent opportunities. Nor does it refer to freedom as one good among others that have to be promoted, possibly in competition with other goods. The idea is strictly relational, in the sense that it concerns the standing of persons vis-à-vis other persons. This standing should be one of mutual independence. Everyone should be free to decide for themselves what ends to pursue, and no one should be in position to impose their arbitrarily chosen ends on others. Justified restrictions on the right to pursue ends of one's own choice must be reciprocal and non-contingent. They must restrict everyone equally, and they must not merely represent the particular view of one person or group concerning what should count as binding prescriptions for interaction. Enabling relations of mutual independence is the rationale for establishing legal and political institutions, and the idea of such relations is the standard by which these institutions are assessed.

33 See, for instance, Hodgson 2010a.

34 Kant 1996a [1797], 6:230.

35 Ripstein 2009, p. 15.

On this basis there is no straightforward way of justifying a duty to aid other people whose fundamental interests are at stake. Inasmuch as questions of justice are not primarily questions about what ends to pursue, but questions about *who gets to decide* what ends to pursue, it is neither sufficient nor necessary that someone is badly off in order to generate duties of justice in other people. Accordingly, in Kant's right to freedom there seems to be no support for a duty to intervene militarily in order to help victims of tyrannical state coercion³⁶ or for a "Natural Duty of Justice" to help bring about just institutions for all persons.

As regards the internal connection between individual freedom and state sovereignty that I am aiming at in this article, it is crucial that the right to freedom is not only a principle for assessing the legitimacy of legal norms and institutions, but also an idea that requires a state authority. Freedom, understood as a system of reciprocal and non-arbitrary constraints, is not possible to uphold in the absence of a public authority that organizes legislative, executive, and judicial public institutions. On this conception, we can only interact in a fully rightful way in a civil condition, of which the state is constitutive. If one accepts that justice should be thought of in terms of a right to freedom, one should therefore reject the view that legal and political institutions are mere tools for promoting desirable outputs. Such institutions should rather be seen as constitutive of justice. For the same reason, we should avoid thinking of state sovereignty as an instrumental value. If the state is a necessary condition for mutual independence, then recognizing the equal sovereignty of states is part and parcel of respecting each person's right to freedom.

5. The complementarity of state sovereignty and individual freedom

The core of the problem that makes the state a necessary condition for interaction on just terms is that the right kind of independence is not possible in a hypothetical state of nature. In his recent book *Force and Freedom – Kant's Legal and Political Philosophy*, Arthur Ripstein has analyzed this problem in terms of certain structural defects that arise absent the right kind of institutions. In the

³⁶ Elsewhere, I have argued that precisely the right to freedom excludes the possibility that there can be a duty of justice to risk one's own life in coming to the rescue of people living in other states. See Mikalsen 2013.

following, I will focus on two of these: the problems of assurance and indeterminacy.³⁷ Although the problems are different, they refer to defects that are parallel in their structure. In both cases the point is that interaction and coordination of action plans in a state of nature must be based exclusively on the private judgments of interacting parties, which means that we unavoidably subject each other to arbitrary choice as long as there is not established a public institutional framework governing our interaction.³⁸

The assurance problem is a problem regarding property rights. In contrast to the right to freedom, which is an innate right to our own person, rights to property are acquired. Any legitimate legal system must permit such acquisition, because a general prohibition against it would be an arbitrary restriction of freedom.³⁹ Further, acquired rights must be enforceable. It must be possible to coercively prevent others from using whatever we have acquired a right to. Yet in a state of nature there is no one who can enforce these rights in a rightful way. Absent public authorities any coercive act is necessarily performed by a private agent, and such an agent cannot possibly serve as an enforcer of justice. A private enforcer is what Kant calls a “unilateral will,” and cannot possibly establish a system of reciprocal and non-arbitrary constraints. Rightful assurance is therefore not possible outside civil society.

The indeterminacy problem concerns the demarcation of each person’s sphere of external freedom from every other person’s sphere of external freedom when there is disagreement about rights. Since general rules and principles are indeterminate, there can be a plurality of equally reasonable, yet incompatible interpretations of what they imply in particular cases. While some cases are easy, many cases leave room for reasonable disagreement concerning the proper limits between my freedom and yours. As in the case of the assurance problem, the problem here is that there is no rightful way in which we could resolve such disagreement in a state of nature. Again, the problem is that any judgment about how to draw the distinction would be a private judgment. Hence, whoever decides

37 Ripstein also analyses a third defect: the problem of unilateral choice. See Ripstein 2009, pp. 148-59. Due to considerations of space I do not discuss this defect here.

38 In addition to Ripstein’s book, I have benefited greatly from the accounts found in Hodgson 2010b, Ripstein 2004, and Varden 2008a when working out the argument that follows. The next three paragraphs are highly condensed versions of what I take to be central points in these works.

39 Kant 1996a [1797], 6:247 and 6:250. See also Ludwig 2002, pp. 175-6.

where the line shall be drawn subjects others to one-sided restrictions, and this is incompatible with each person's right to freedom.

These defects of the state of nature are problems even under ideal conditions where people relate to each other in good faith. They do not depend on assumptions about moral baseness on the part of interacting persons. Since we are moral beings, we can always act according to what we recognize as being the right thing to do. Yet even if we assume human agents to be so fair-minded and well-disposed toward each other that they are not inclined to violate anyone's right to freedom, the *form* of the relationship between interacting parties would still be wrong as long as all coordination of action relied exclusively on their arbitrary choices. Not human malevolence, but structural features of the state of nature alone explain why one cannot exercise the right to free choice in a way fully compatible with everyone else's right to exercise their right to free choice. This, I take it, is the point when Kant writes that even if "the state of nature need not, just because it is natural, be a state of *injustice* ... it would still be a state *devoid of justice (status iustitia vacuus)*, in which when rights are *in dispute (ius controversum)*, there would be no judge competent to render a verdict having rightful force."⁴⁰

The only way to overcome the systematic dependencies that would exist in a hypothetical state of nature is in Kant's view to establish a state – that is, a public authority organizing legislative, executive, and adjudicative bodies. Inasmuch as one agrees that any justified restriction on freedom must be for the sake of freedom itself, I think one should agree with him on this point as well. Absent public institutional bodies that coercively regulate interaction on a territory shared by several persons, there is no agent who can adjudicate or enforce rights in a way compatible with each person's right to freedom. In a situation where such institutional bodies did not exist every conflict over rights would have to be resolved on the basis of arbitrary choices made by the conflicting parties. Rather than mutual independence there would be systematic dependence between persons. For this reason, creating a public authority that represents the will of all citizens united seems to be the only way there is to create a system of reciprocal and non-arbitrary constraints.

Yet if the state can reasonably be seen as a necessary condition for relations of mutual independence, it seems mistaken to contrast human rights with state

40 Kant 1996a [1797], 6:312.

sovereignty, or to reduce sovereignty to an instrumental value. Negatively put, this is so because the idea of mutual independence is not fully specifiable without reference to the legal and political institutions that make up the state. Rather than a pre-politically defined ideal, the right to freedom is a constraint on what can be recognized as a legitimate legal and political order. It is an abstract normative criterion that rules out laws and institutional arrangements that entitle some person or persons to subject others to their own choice or that create systematic relations of dependency between persons. What this concretely entails, however, is an open question. In what specific form the abstract right to freedom should be transformed into positive rights and how such rights should be interpreted in particular cases can only be determined within the institutional framework of a state. In other words, prior to political processes and procedures leading up to legally binding decisions issued by public and authoritative institutions there is no given or fixed moral output in relation to which sovereignty could be understood as an instrumental value.

Put more positively, state sovereignty is a necessary complement to each person's right to freedom, because it secures the autonomy of the political processes and procedures necessary for giving the abstract idea of mutual independence concrete content and binding force. To recognize the principle of non-intervention as a basic principle of international law is simply to approve of the state's role as an institutional framework enabling rightful exercise of individual freedom. By contrast, a right to military intervention for the protection of human rights is the same as a right to jeopardize the freedom-enabling institutional framework of the state. It is a right to wage war, which in turn is to put the state sanctioned public order at risk. And this conflicts with each person's right to freedom. If states are not protected from interventions in their internal affairs their function as public authorities is effectively undermined. Each of their decisions could then be contested and opposed by foreign powers, and individuals would thereby be deprived of a final authority that could determine the rightful boundaries of their freedom. For this reason, I believe Michael Walzer is completely right when he writes that "the recognition of sovereignty is the only way we have of establishing an arena within which freedom can be fought for and (sometimes) won."⁴¹

41 Walzer 1977, p. 89.

It should also be noted that understanding states as freedom-enabling institutional frameworks is far from understanding them as guarantees that the equal freedom of citizens will in fact be realized. According to Kant, the ideal constitution for the state authority constitutive of civil society is the republican constitution that binds executive power to the legislative will of the people. Yet there is nothing in his argument or in the argument that I have put forward that makes a perfect republican constitution a criterion for recognizing the sovereignty of a state. *Qua* enabling frameworks states are structures where freedom can (but need not) take on concrete shape. Understood relationally, freedom is not a gift or something that can be imposed on a people from the outside, but a common practice, something which co-citizens must continuously strive for themselves. Such common practice needs an arena where reciprocal ascription of rights can take place. States are such arenas. And these arenas, even when they are less than perfect, should be protected by the principle of non-intervention.⁴² Whoever is concerned with individual freedom should therefore be equally concerned with state sovereignty.

6. A novel defense of the domestic analogy

If the preceding argument is sound, it provides a defense of the so-called domestic analogy that circumvents criticisms commonly aimed at such an analogy by anti-statist cosmopolitans. On the basis of this analogy, sovereignty can be understood as an international counterpart to individual freedom in the domestic realm. In much the same way as individuals have a right to bodily integrity, states have a right to territorial integrity. In both cases, integrity is an external condition for autonomous conduct, although the right to integrity is not conditional on such conduct. The right to integrity is an essential aspect of the right to freedom, and it includes the right to make one's own mistakes, on the part of individuals as well as states. As in the case of individuals, there are things we cannot do to states, even if it is for their own alleged good. In other words, there is no direct relation between

⁴² This is not to say that everything that goes under the name of a state is good enough. As I point out in the next section, we should draw a line between defective public orders, which can be oppressive yet still constitute necessary conditions for internal reform toward republican self-legislation, and genocidal regimes, which should not be protected by the principle of non-intervention.

the internal features of a state and its international standing.⁴³ A state can be unjust domestically, but still be recognized as sovereign internationally. Accordingly, the domestic analogy implies equality of all states. In contrast to the asymmetrical view defended by anti-statist cosmopolitans, defending the analogy means defending non-intervention and self-determination as basic principles of international law covering both just and unjust states.

This parallel between interpersonal and international relations is frequently criticized by anti-statist cosmopolitans for being ill-founded. In their view, advocates of a statist international order have so far not succeeded in coming up with convincing arguments for recognizing non-intervention and self-determination as basic principles of international law. Such arguments are considered either (a) to overlook important differences between individuals and states or (b) to put an undue emphasis on the value of communal autonomy to the detriment of the rights of individuals.

(a) The first line of criticism is often aimed at an argument in favor of territorial integrity and non-intervention that can be traced back to classical political theorists such as Christian Wolff, Samuel Pufendorf, and Emer de Vattel. The basic idea of this argument is quite simple: starting from the assumption that interstate and interpersonal relations are relevantly similar, one concludes that states should interact according to norms analogous to the norms governing interpersonal interaction. Like persons, states are morally equal actors, and just as persons generally are held to have a right to pursue ends of their own independently of what ends others think they should pursue, so states have a right to arrange their own affairs as they see fit without interference by foreign powers. Accordingly, states should be recognized as equal sovereigns possessing a right to self-determination and a duty of non-intervention in the internal affairs of other states.⁴⁴

Anti-statist cosmopolitans generally reject this argument on the ground that it neglects relevant differences that count against recognizing states as autonomous agents worthy of respect comparable to the respect we owe persons. In contrast to persons, states are collective actors that cannot form beliefs or make choices of their own, at least not in any straightforward sense. States are not human beings writ large. As Beitz puts it, "states qua states do not think or will or

43 Cf. Walzer 1977, p. 89 and Walzer 1980, pp. 212 and 214.

44 I here bracket the question whether this is a fair way of reading Wolff, Pufendorf, and Vattel. For the sake of argument I take the interpretation presented by Beitz and Caney at face value.

act in pursuit of ends; only people ... do these things.”⁴⁵ It therefore does not appear to be any compelling reason to invest states with rights analogous to the rights persons have to pursue ends of their own choice (as long as they do so in a way compatible with the rights of others to do the same). Since states lack relevant moral properties justifying territorial integrity on an analogy with integrity of the person the argument seems to fail.

(b) The second line of criticism usually addresses Michael Walzer’s communitarian defense of the domestic analogy. This is a defense that does not ascribe moral agency directly to states. The idea is not that states are moral agents comparable to persons and therefore also have rights analogous to persons. The idea is rather that states are political representations of underlying social entities that have a right to autonomy – that is, a right to stake out their own paths toward freedom without interference by foreign powers.⁴⁶ On this view, then, foreign intervention is less an offense against the state than an offense against the community represented by the state.

Although Walzer frequently speaks of communal autonomy as if it is a right possessed by political communities as such, he ultimately grounds it in the right of individuals to live in self-determining communities. In the final resort, the rights of communities rest on the tacit consent implicit in ongoing cooperative practices among community members. Thus, the deepest moral foundation of community is, as he puts it, “a contract, Burkean in character, among ‘the living, the dead, and those who are yet to be born,’” whereas “the idea of communal integrity derives its moral and political force from the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves.”⁴⁷ And to such historic communities foreigners owe respect, which Walzer juxtaposes with “a morally necessary presumption: that there exists a certain ‘fit’ between the community and its government and that the state is ‘legitimate.’”⁴⁸ Even if governments sometimes can turn against their citizenry, foreigners do not have enough historical knowledge or direct experience to form adequate judgments about a government’s actual legitimacy. Generally, they are not in position to judge whether a government uses the coercive apparatus of the state merely in its own self-interest,

45 Beitz 1999, p. 76; see also Caney 2005, p. 236.

46 Walzer 1977, pp. 88-9.

47 Walzer 1980, p. 211.

48 *Ibid.*, p. 212.

or whether it governs in a way that fits with a community's traditional way of life. In combination with the right to live in a self-determining community, this lack of contextual understanding requires that we act as if governments or other states are legitimate – except in certain special circumstances.⁴⁹ Failure to do so would be to disregard the rights of other states' citizens. For this reason, Walzer concludes, "states can be presumptively legitimate in international society and actually illegitimate at home."⁵⁰

Anti-statist criticism of this communitarian defense of the domestic analogy typically puts into question the connection between respect for communal integrity and the presumption of fit between community and government. For one thing, there seems to be no obvious reason for assuming that we do not know enough in order to make sound judgments regarding such a fit. On the contrary, there are usually an abundance of relevant sources of information, such as social scientists, emigrants, experienced travelers, diplomats, scholarly works, etc. that makes what Walzer calls a morally necessary presumption implausible.⁵¹ Moreover, it is rarely the case that there is a clear match between state and community. For the most part, if not always, there will be a plurality of communities within one and the same state territory. And even if it makes sense to speak of a state representing one and only one community it does not necessarily follow that we can expect internal unanimity regarding the interpretation and importance of different traditional values. In view of such pluralism, it is not clear that non-intervention is the best way of respecting communal integrity. Abstaining from interfering in an intra-state conflict could instead be interpreted as partisanship in favor of the dominant party.⁵² In other words, Walzer's argument does not explain why non-intervention is a principle that should protect states, and therefore fails as a defense of the domestic analogy.

I do not want to challenge the anti-statist cosmopolitan criticism of these two defenses of the domestic analogy. Instead, I claim that the present defense of the analogy is not susceptible to these lines of criticism. In no way have I assumed that states have moral faculties similar to those of human agents. Nor have I

49 Specifically, Walzer mentions secession or national liberation, counter-interventions against foreign powers that have intervened in support of one side in a civil war, and cases of enslavement or massacre as situations where the principle of non-intervention can be suspended. See Walzer 1977, pp. 89-108.

50 Walzer 1980, p. 214.

51 Luban 1980, p. 395; Caney 2005, p. 237.

52 Beitz 1999, p. 195; Buchanan 2004, pp. 178-9.

assumed that communal integrity has any independent moral value or that we are morally required to presume any fit between government and community. On the account given here, states are understood as necessary arenas for realizing individual freedom in a rightful way, and *qua* such arenas they ought to be protected by the principle of non-intervention. Sovereignty in the international realm is a necessary complement to such an understanding of the state, whereas any right to wage wars in the name of justice would endanger the state as a freedom-enabling institutional framework, which is therefore in conflict with each person's right to freedom. Just as persons have a right to independence vis-à-vis other persons so states have a right to independence vis-à-vis other states, because only if states have such a right can they perform their role as public authorities properly. And against this defense of the domestic analogy none of the considerations brought up above can count as relevant counterarguments.

I have also argued that having a just inner constitution is not a precondition for being recognized as a sovereign state in the international realm, which is to say that issuing unjust or oppressive laws does not provide other states with a just cause for intervention. A worry that probably will cause anti-statist cosmopolitans to resist this standpoint is that a general prohibition against intervention in a state's internal affairs apparently can serve as protection for governments that commit grave violations of human rights, such as genocide or ethnic cleansing. Sometimes the coercive apparatus of a state is turned systematically against individuals and intra-state groups on a large scale. Are we really obliged to stand by and watch as atrocities are going on? I think not, but unlike anti-statist cosmopolitans I also do not think that permitting interventions in such extreme cases should prevent us from acknowledging non-intervention as a basic principle of international law.

In order to see how defending the principle of non-intervention can be consistent with permitting intervention in certain extreme cases it can be useful to point out the obvious: that organizing a state is not the same as organizing a monopoly of force on a territory. Although the latter is an essential aspect of the former, a state must also establish an institutional order where conflicts over rights can be resolved through legal procedures and binding decisions made by public officials acting on mandate. Such an order can certainly be defective. It can be unfair, oppressive, too invasive in private matters, etc. Yet the legitimacy of a state is not dependent on its satisfying some ideal standard of justice. It is sufficient that it establishes conditions that make it possible for persons to interact on

rightful terms. Regimes that commit genocide or ethnic cleansing do not satisfy this requirement. They are not simply defective public orders, but organizations that unilaterally employ force against other people. Permitting foreign intervention against them is fully compatible with defending the equal sovereignty of states as well as the principle of non-intervention. In such cases, military intervention is not to undermine a state sanctioned public order that potentially can make the freedom of each consistent with the freedom of all, but to prevent mass murder and arbitrary expulsion of people from a territory.

Nor is it particularly useful to think of intervention as enforcement of individual human rights. More adequately, it is conceived as an emergency-measure that can be justified in extreme cases so as to bring an exceptional situation to an end and to establish a normal situation where individual rights can be ascribed and enforced. And in all normal cases non-intervention is the basic principle we should adhere to. The concern with genocidal regimes should not mislead us into relativizing sovereignty, turning it into an instrumental value in the service of morally desirable outcomes. Justifying general rules on the basis of concerns related to exceptional cases is a bad habit. Just as in the domestic domain, so in the international: Hard cases make bad law.

Still, it is not necessarily an easy matter to determine exactly where one should draw the line between a defective public order and an illegitimate regime against which intervention is permissible. Unlike Walzer, I do not think we can presuppose a clear-cut chasm between brutal and oppressive regimes on the one hand and regimes guilty of systematic massacre on the other hand.⁵³ While there can be cases that leave little room for doubt, other cases are less obvious, and any general criterion regarding where to draw the line will open up the possibility of reasonable disagreement in particular cases. If nothing else, the cases of Kosovo 1999 and Libya 2011 seem to make it clear that moral stakes can be fundamentally unclear.

Given such indeterminacy, Walzer's defense of a unilateral right to intervene for alleged moral purposes should also be rejected, because such a right reintroduces the kind of asymmetry and hierarchy between states that I have criticized in this article. If it is up to particular states to decide in accordance with their own arbitrary moral judgment whether the criteria justifying humanitarian intervention are met, the permission to intervene in exceptional cases seems to

53 See Walzer 2002.

translate too easily into an exceptional status for powerful states. For this reason, legitimate interventions must be anchored in an international public body authorized to specify and apply general criteria for when the basic principle of non-intervention can be overruled.⁵⁴ Authorization by such a body for any use of force other than self-defense is the only way intervention as an emergency-measure can be reconciled with the equal sovereignty of states. Only if the permission to intervene goes along with a commitment to an inclusive international organization representing all states is there a chance that it does not become a means of self-empowerment on the part of powerful states.⁵⁵

54 See also Cohen 2006, pp. 498-9; and Habermas 2006, pp. 103-4 and 184-5.

55 *Acknowledgements*: I would like to thank Kristian Skagen Ekeli, Ståle R. S. Finke, Øystein Lundestad, and Audun Øfsti for valuable comments and suggestions. Thanks also go to the participants of the conference “Cosmopolitanism and Philosophy in a Cosmopolitan Sense” at New Europe College and to the participants of a seminar at the Department of Philosophy, NTNU, for stimulating responses and discussions after presentations of abridged versions of the article.

Chapter 4

Habermas and Kant on International Law

1. Introduction

In view of the problems of interstate and intrastate violence and the challenge posed by processes of globalization to the democratic nation-state, the issue of establishing and promoting a normatively desirable system of international law has been on the agenda for some time. This issue has gone hand in hand with proposals for institutional design. With regard to the latter, the alternatives in the contemporary debate range from minimal intergovernmental models to proposals advocating a world republic. Proponents of intergovernmental models are often inspired by Kant's proposal for a league of states, which is an organization vested with judicial power to adjudicate conflicts between states and which states can join and leave freely. John Rawls is a notable example of such a proponent.¹ Among the proponents of a world republic one can distinguish between those who advocate a state of states and those who advocate a cosmopolitan democracy. A state of states is a second order state authority that permanently establishes coercive power over primary state units, which nevertheless are left intact as separate entities.² Proponents of cosmopolitan democracy also recognize states as important institutional entities, but advocate a more closely integrated global legal order that entails establishment of new institutions on both the global and the regional levels. Such institutions include supranational parliaments and international courts where not only states, but also individuals, are represented and have legal standing.³

1 Rawls 1999.

2 This model is defended in Byrd and Hruschka 2008.

3 Cf., for instance, Held 1997.

In what seems like an attempt at finding a middle ground between a league of states and a world republic, Jürgen Habermas has recently proposed a multi-level model that involves cooperation between different kinds of collective actors. In addition to traditional state actors, he imagines a reformed and strengthened UN that is to serve as a supranational executive authority responsible for securing peace and protecting basic human rights. Importantly, such a reformed world organization should organize a global police force that has an obligation to intervene against egregious human rights violations that governments either cause or fail to prevent. At a mid-level between the nation states and the world organization, Habermas envisages democratically reformed regimes, such as the EU, that are to deal with transnational challenges, in particular within issue areas such as economy, ecology, and energy.

The main purpose of this article is to critically consider Habermas' multi-level model, which is an attempt to reformulate Kant's project "Toward Perpetual Peace."⁴ Special attention is paid to how well this model fares in comparison to Kant's league of states. Although Habermas, like Kant, rejects a world republic, he is also skeptical of Kant's league. In his view, a voluntary league is not sufficient in order to establish a system of binding international law. He also claims that an intergovernmental organization recognizing the inviolable sovereignty of states is at odds with the recognition of individuals as the ultimate units of normative concern. Moreover, he claims that an intergovernmental league is inadequate for dealing with pressing challenges that have arisen due to the increase and intensification of processes of globalization since Kant's time.

While I agree that there are good reasons for rejecting a world republic, I argue (a) that Habermas' critique of Kant's league of states fails in important respects and (b) that his own proposal faces problems related to his attempt at going beyond such a league. With regard to (a), I argue that Habermas does not succeed in arguing that a voluntary league of sovereign states is at odds with the project of establishing a system of binding international law or with the primacy of individuals as units of normative concern. I also argue that Kant has sound reasons for proposing a less ambitious institutional framework in the international domain. With regard to (b), I argue that Habermas' model seems to imply a problematic asymmetry between powerful and less powerful states. Furthermore, I argue that

4 Kant 1996d [1795], 8:341. All references to Kant in this article are according to the Prussian Academy pagination. I have made use of the following of his works: *The Metaphysics of Morals*, PA 6:203-493; and *Toward perpetual peace – A philosophical project*, PA 8:341-386.

it is questionable whether a global police force that has an obligation to intervene against grave and widespread human rights violations can be squared with the idea that every person has an innate right to freedom – that is, a right to independence from being constrained by other people’s choices.⁵

The aim of engaging with Habermas’ model in relation to Kant’s league of states is to contribute to the ongoing debate in political and legal theory on the normative foundation of international legal institutions. On the one hand, I want to show that there are important normative constraints relevant for institutional design in the international domain that neither proponents of a world republic nor Habermas take sufficiently into account. In particular, Habermas’ focus on establishing a supranational executive authority (for example, organizing a global police force) is problematic. On the other hand, my defense of Kant’s league does not mean that it cannot be further developed or supplemented with more comprehensive forms of institutionalized cooperation between states. Such cooperation seems important not least in view of globalization processes that are often seen as undermining the action capacities of states. In this regard, Habermas’ multi-level model is an interesting proposal that can complement Kant’s league.

The article proceeds as follows. In section 2, I present Kant’s league of states, as well as Habermas’ objections to this model. In section 3, I set out Habermas’ multi-level model and his reasons for rejecting a world republic. In section 4, I argue that Habermas’ objections to Kant’s league fail in important respects, and that his multi-level model faces problems that a league of states avoids. On the basis of the preceding discussion, I suggest a way in which elements from Kant’s and Habermas’ proposals can be combined in a hybrid model.

2. Kant’s model: a league of states

Kant and Habermas are in agreement with regard to the characterization and evaluation of the European order of sovereign states circumscribed by classical international law often associated with the period between 1648 and 1914. They both understand this order as a latent state of war – an interstate anarchy characterized both by the absence of any superior authority that can resolve disputes between states and by the right to wage war in the name of national

5 Kant 1996a [1797], 6:237.

interests. They also agree that this order is normatively unacceptable and should be reformed by establishing authoritative public institutions beyond the domestic domain. Only by establishing such institutions is it possible to resolve questions regarding what shall count as binding rules and how binding rules are to be applied in particular cases in a just way.

Despite this agreement, they disagree about the institutional design of an international legal order. They both reject a world republic, but Habermas finds a league of states of the kind proposed by Kant to be “beset with conceptual difficulties and ... no longer consonant with our historical experiences.”⁶ In the following, I give an outline of Kant’s views on international law before I set out Habermas’ critique of Kant’s league in more detail.

2.1 Kant’s league of states

Kant characterizes the anarchical order of sovereign states of his own times as “a *condition of war*” that is “wrong in the highest degree.”⁷ As regards the right to wage war recognized by classical international law, he judges it “unintelligible,” since it is nothing but the right of the stronger party to arbitrarily determine what is right.⁸ This renunciation of an international system based on the balance of power does not imply that the idea of taming interstate violence by means of law should be abandoned. The “veto” of practical reason – that “there is to be no war”⁹ – rather demands the replacement of international anarchy with an international civil condition. What is required is an international order of public law more consistent with principles of right or justice – that is, principles calling for the harmonization of particular wills according to universal laws of freedom that restrict interacting parties in a reciprocal and non-arbitrary way. In Kant’s view, this entails the establishment of a public authority empowered to make collectively binding decisions with regard to international disputes, since establishing such an authority is the only way in which one can avoid the subjection of state actors to the arbitrary choices of other state actors.

Although Kant repeatedly compares external state relations to the interpersonal state of nature, he draws different conclusions with regard to how

6 Habermas 1998, p. 166.

7 Kant 1996a [1797], 6:344.

8 Kant 1996d [1795], 8:356-7.

9 Kant 1996a [1797], 6:354.

the state of war between persons and the state of war between states should be overcome. The problem in the *state of nature between persons* is that all interaction is necessarily based on interacting persons' moral or immoral private judgments, which means that they unavoidably subject each other to their arbitrary choices. Such a condition is incompatible with each person's innate right to freedom – the right to “independence from being constrained by another's choice.”¹⁰ In Kant's view, the only way to overcome this problem is to enter civil society, which requires the establishment of a state authority organizing a public coercive institutional framework for interaction. The ideal form of such a state authority is the republican constitution that has two essential institutional features. The first is separation and hierarchical organization of legislative (sovereign), executive (ruler), and judicial (judge) powers. The second is ascription of legislative power “to the united will of the people.”¹¹

By contrast, overcoming *the state of nature between states* is not said to imply the establishment of a world republic. Instead of a full parallel between the interpersonal and international spheres, Kant introduces a complementary institutional structure in the form of a league of states. While establishing such a league is a necessary precondition for just international relations, membership in the league is still voluntary – both with regard to entrance and exit. It is an organization that “each neighboring state is at liberty to join” and which “can be dissolved at any time.”¹² Of the three powers characteristic of a state, the league Kant has in mind is only vested with an analogue to the judicial power. Its function is to establish a dispute-settling mechanism that enables states to decide “disputes in a civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war.”¹³ Further, since such a league is established for the sole purpose of solving conflicts between states, only state actors are represented and have legal standing in the league.

2.2 Habermas' critique of Kant's league of states

Habermas sets out three objections to this model. The first I call *the objection from voluntariness*. It addresses an alleged contradiction inherent in the idea of

10 Kant 1996a [1797], 6:237.

11 Ibid., 6:313.

12 Ibid., 6:350-1.

13 Ibid., 6:351.

promoting the rule of law internationally in the form of a voluntary league. In Habermas' view, there is a conflict between acknowledging each state's sovereign right to leave the league at will and the aim of establishing a lasting and peaceful international legal order where states are obliged to abide by the verdicts of the public authority: "Kant cannot have *legal* obligation in mind here ... he must rely exclusively on each government's own *moral* self-obligation."¹⁴ Habermas emphasizes that this objection is not empirical, but conceptual, in nature. As long as the arrangement regulating interaction between states is voluntary, it is dependent on the good will of its members, and cannot, in his opinion, count as a *legal* arrangement. Referring to Kant's idea of a republican constitution, Habermas writes: "If the union of peoples is to be a legal, rather than a moral, arrangement, then it may not lack any of those characteristics of a 'good political constitution' that Kant enumerates."¹⁵

The second objection I term *the objection from sovereignty*. It addresses Kant's defense of state sovereignty and the principle of non-intervention. In view of the danger that states can turn their monopoly of violence against their own citizens, Habermas objects that a league of independent states whose sovereignty is inviolable is at odds with the basic normative premises of Kant's theory, which gives priority to each person's right to freedom in accordance with universal laws: "[I]f Kant holds that this guarantee of freedom ... is the essential purpose of perpetual peace ... then he must not allow the autonomy of citizens to be preempted even by the sovereignty of their states."¹⁶

The two former objections address internal tensions in Kant's idea of a league of states. The third objection – *the objection from globalization* – more generally questions the adequacy of state-centered approaches to political theory in view of our historical situation. Against the background of the widely held view that processes of globalization place the traditional nation state under pressure, Habermas regards state-centered approaches as counterproductive. He does so, first, because a political practice which clings to the framework of independent state actors whose external affairs are regulated exclusively on an intergovernmental basis will probably fail to cope adequately with challenges that have an essentially transnational character. This includes challenges related to poverty, infectious diseases, environmental degradation, proliferation of weapons

14 Habermas 1998, p. 169.

15 Ibid., p. 170.

16 Ibid., pp. 180-1.

of mass destruction, organized crime, and transnational terrorism.¹⁷ Second, and perhaps more importantly, he is concerned with the internal democratic order of states whose capacity to regulate interaction within their own borders is challenged by the increase and intensification of these kinds of cross-border exchanges.

I will consider these objections more closely in section 4.

3. Habermas' Multi-level Model versus a World Republic

As mentioned, Habermas' critique of a league of states does not imply that he advocates a world republic. Still, commentators at times misrepresent him as such an advocate.¹⁸ In view of Habermas' critique of Kant's league, it is to some extent understandable that such misunderstandings can arise. But since the publication of *The Postnational Constellation* (2001, orig. 1998), there can be no doubt that Habermas is not proponent of a world republic. Here, he rejects this model unequivocally. In later works, he has also proposed a multi-level model that is meant to serve as an example illustrating "a *conceptual* alternative to a world republic."¹⁹ In the following, I present this model, and explain how it differs from a world republic and Kant's league of states. Then, I set out Habermas' objections to a world republic.

Habermas' multi-level model is an arrangement that assigns different tasks to different institutional levels. On the supranational level, Habermas imagines a reformed and strengthened UN that is to serve, among other things, as an executive authority responsible for securing peace and protecting human rights. He supports reorganizing the Security Council and limiting the veto power of its permanent members in order to make the UN a more representative and effective organization. He also supports Held's idea of dividing the General Assembly into two chambers – one in which states are represented and another in which world citizens are represented – but claims that the legislative function of such a "world parliament" must be restricted to "the interpretation and elaboration of the Charter."²⁰ In addition, Habermas defends the establishment of permanent

17 Cf. the 2004 report *A More Secure World: Our Shared Responsibility*.

18 See Mertens 1996, p. 338 and Zolo 1999, p. 437.

19 Habermas 2006, p. 136.

20 Habermas 2008b, p. 449.

international courts where not only states, but also individuals, have legal standing. Beyond settling conflicts between states and conflicts between private actors and a state, the function of such courts is to prosecute individuals for criminal acts performed in the service of a state. Worthy of note, is Habermas' suggestion that reforms, in addition to the strengthening of core institutions (i.e., the Security Council and the General Assembly), should aim at detaching these institutions from specialized UN organizations, such as FAO, IAEA, UNESCO, WHO, the World Bank, etc.²¹ This way, the world organization would become an institution whose tasks are considerably narrowed down compared to the contemporary UN.

The main difference between a world organization reformed along these lines and a world republic is that the former lacks sovereign powers to define the reach of its own responsibilities. It is an organization for which "the enforcement of established law takes precedence over the constructive task of legislation and policy-making,"²² and can therefore be characterized as a supranational agent acting on delegated powers.

Compared to Kant's league of state, a reformed world organization has more extensive powers. It is supposed to serve as a supranational executive authority providing the international community with effective means to "enforce its rules and decisions,"²³ although Habermas emphasizes that the states are to remain in control of the means of coercion. His model also extends the scope of responsibilities. Kant's league is established for the sole purpose of dealing with conflicts between states, whereas the world organization is also supposed to protect basic human rights globally. Finally, the division of the General Assembly into two chambers would make the UN an organization that is not only *for*, but also *of* the two types of actors recognized as legal subjects by international law, namely states and individuals.

The feature distinguishing Habermas' proposal most from both a league of states and a world republic is an institutional mid-level in between the supranational and the national levels. At this level, so-called "global players," such as the US, China, India, Russia, and politically integrated "regional regimes" on the model of the EU, are envisaged as the central actors. Operating within a transnational negotiation system, such actors are supposed to work out binding

21 Habermas 2008a, p. 322.

22 Habermas 2006, p. 174; also see p. 134.

23 Ibid., p. 132.

compromises on important cross-border issues – particularly economic, ecological, and energy issues – that increasingly overstrain the capacities of nation states. These regional regimes are the main loci for democratic rule beyond traditional state communities, from whose perspective regional integration serve the purpose of creating political arenas where democratic processes can regain some of their autonomy vis-à-vis globalised economic forces. Within the transnational negotiation system, they serve the purpose of reducing the negotiating parties to a “manageable number” and of making these parties relatively equal in terms of negotiation power, so that fair compromises are conceivable.²⁴ In addition, the delegation of cross-border issues to interregional negotiations is supposed to lighten the workload of the world organization, thus enabling it to deal more efficiently with global peace and human rights enforcement.

Habermas seems to have two main reasons for rejecting a world republic, and these explain why he thinks there is a need for his multi-level system instead of a world republic.

(1) The first can be called *the argument from civil solidarity*. Habermas raises doubts concerning the possibility that a world republic could become democratic in any meaningful sense. In this connection, the decisive obstacle is said to be the lack of a thick global collective identity that can ground a sufficiently strong civic solidarity. Given its non-exclusiveness, a world republic would lack “a basis of legitimacy on structural grounds:”

Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. ... Even if such a community is grounded in the universalist principles of a democratic constitutional state, it still forms a collective identity, in the sense that it interprets and realizes these principles in light of its own history and in the context of its own particular form of life. This ethical-political self-understanding of citizens of a particular democratic life is missing in the inclusive community of world citizens.²⁵

Referring to this passage, Robert Fine and Will Smith suggest that Habermas is presenting an empirical argument in the guise of a conceptual argument. They object that even if knowledge about “actual democratic practices” gives us good reasons to doubt the feasibility of a global democratic state, it does not mean that

24 Habermas 2008a, pp. 324-5.

25 Habermas 2001, p. 107.

such a state is “conceptually impossible.”²⁶ This judgment does not seem to do justice to Habermas’ actual claim, which concerns pragmatic presuppositions for democratic practice, and refers to a conflict between the idea of a world republic and the ethos of democratic citizenship – that is, the performative aspect of being a citizen (as opposed to “bourgeois”) concerned with the common good. When Habermas writes that it is the “concept” of self-determination that calls for the embedding of political practice in a particular community, he is not claiming that a democratic world republic is a contradiction in terms. At issue, rather, is the need for a common “we”-perspective that can motivate special obligations towards fellow citizens who nevertheless remain strangers and political adversaries. This becomes clear if one considers the discussion of civic versus cosmopolitan solidarity in the paragraphs that follow the above quote.

The crucial issue is that an active “civic solidarity” in Habermas’ view must be rooted in a collective identity. Such civic solidarity is distinct from what he calls a negative, or reactive, “cosmopolitan solidarity” that unites humanity through common responses of indignation and outrage when confronted with grave violations of human rights and acts of aggression, as well as of sympathy for those who suffer due to natural and humanitarian disasters. On the basis of the latter, an all-inclusive world-organization could be empowered to pursue goals like human rights-protection and international peace and security. For the pursuit of political goals and projects beyond this, the social bonds among world citizens are too weak (Habermas specifically has redistribution policies in mind). Globally, a thicker context of common value orientations that enable citizens to see themselves as *one* community engaged in the joint practice of self-legislation is absent. Accordingly, the “institutionalization of procedures for creating, generalizing, and coordinating global interests cannot take place within the organizational structure of a world state.”²⁷ In other words, the claim is not that the concept “cosmopolitan democracy” is self-contradictory in a formal-analytical sense. The claim is that a global democratic state should be able to, but in fact cannot, link up with the self-understanding and motivations of world citizens. It would therefore fail to be a realization of the idea of a society of self-determining free and equal persons.

(2) A second line of argument pursued by Habermas can be called *the asymmetry argument*. This argument primarily aims at undermining the claim that

26 Fine and Smith 2003, p. 486 note 22.

27 Habermas 2001, p. 109.

a world republic is conceptually necessary for establishing binding international law. It is developed against the background of an interpretation of Kant which differs from the one presented above, where Kant is seen as rejecting a world republic in favor of a league of states. In his later writings, Habermas takes Kant to mean that a world republic is in the end the only satisfactory solution to the problem of interstate violence, whereas the idea of a league is introduced as a “negative surrogate” due to the fear that a world republic might develop into a “soulless despotism.”²⁸ Allegedly, Kant is led to this conclusion by his own analogy between the interpersonal state of nature and anarchic international relations. In view of the solution to the problem of overcoming the former condition, which is to establish a state, the establishment of a world republic is apparently the only way of overcoming the latter.²⁹

Against this kind of reasoning Habermas objects that one should not overlook important differences between the interpersonal and the international levels when it comes to developing desirable legal institutions. This objection has two aspects. The first is that one must consider that states have established legal orders internally and therefore enjoy a normative status that must be taken into account when envisioning an institutional model for international law. One cannot simply superimpose the scheme known from domestic legal orders on the relationship between states. Nor can the rights of individuals be the sole reference point for an international legal order. In view of their role as guarantors of legally secured freedom among persons, state actors should be taken into account. Therefore, Habermas suggests that we understand the establishment of a just system of international law as *complementary* rather than as *analogous* to the establishment of just domestic legal systems.³⁰

28 Habermas 2006, pp. 128-9. Habermas links this fear of “soulless despotism” to the risk of an unwanted social and cultural homogenization in the world republic. With Ingeborg Maus, I think it is more apt to say that Kant is concerned with the diminishing possibility of holding executive and judicial authorities accountable to democratically enacted law in large states. See Maus 2006, p. 472.

29 Habermas is here influenced by McCarthy 2002, who is for his own part influenced by Byrd 1995. I criticize McCarthy and Byrd’s interpretation in more detail in Mikalsen 2011, and I do not think Habermas’ subsequent counterargument succeeds if one understands it as a critique of Kant. This does not make the argument irrelevant, but it should rather be directed at those who consider a world republic to be an implication of Kant’s characterization of international relations as a state of nature. See, for instance, Höffe 2006, p. 193 and Lutz-Bachmann 1997.

30 Habermas 2006, pp. 129-30 and Habermas 2008b, pp. 448-9.

The second reason why one should think of international rule of law as complementary, and not similar, to domestic rule of law, is that promoting the rule of law in the two domains involves challenges that in certain respects are inverse and therefore call for different solutions. In this connection, Habermas draws a distinction between the concept of a “state” and the concept of a “constitution.” “State” is defined as “a complex of hierarchically organized capacities available for the exercise of political power or the implementation of political programs.” “Constitution” is defined as “a horizontal association of citizens ... laying down the fundamental rights that free and equal founders mutually grant each other.”³¹ In view of these definitions, he points to the asymmetric relationship between state and constitution at the domestic and international levels. Domestically, the hierarchical state component comes first, so to speak. Here, promoting the rule of law implies “the reversal of the initial situation in which law serves as an instrument of power” into a situation where governmental power is subjected to democratically enacted law in “the fully established constitutional state.”³² Internationally, one must think differently, because there is no parallel to an authoritarian state power which is to be legally tamed by means of the democratization of legislative power in this sphere:

What is missing in classical international law is not an analogue of a constitution that founds an association of free and equal consociates under law, but rather a supranational power above competing states that would equip the international community with the executive and sanctioning powers required to implement and enforce its rules and decisions.³³

Seen in isolation this quote, with its reference to the lack of “executive and sanctioning powers,” might seem to imply that what is needed for establishing an international legal order is, after all, a world republic.³⁴ But the point of stressing the priority of the horizontal relations between states is actually the opposite. First, Habermas tries to show that a legal constitution can be separated from a hierarchical state structure not only conceptually, but as a matter of fact as well. Although normatively deficient in many respects, not least due to its anarchical

31 Habermas 2006, p. 131.

32 Ibid., p. 132.

33 Ibid.

34 And, as I argue in the next section, Habermas’ emphasis on the need for supranational sanctioning powers may also threaten the coherence of his proposal for a non-state institutional scheme for a legally integrated world society.

structure, the European order of states which emerged in the repercussions of the religious civil wars of the 17th century was not a lawless condition, but a rudimentary legal order that regulated international relations by certain rules of conduct. For this reason, Habermas speaks of the classical European order of states as a “proto-constitution” that “creates a legal community among parties with formally equal rights.”³⁵

Second, and more crucially, emphasizing the asymmetry between the domestic and the international cases is meant to show that the challenge of binding state power by law externally is essentially different from the challenge of binding state power by law internally, and subsequently that the former calls for a different solution than the latter. Again, the point is that one must take states into account when conceptualizing an institutional order for the international rule of law: “Where it is not a matter of *constraining* authoritarian state power but of *creating* political decision-making capabilities, those subjects who already control the legitimate means of violence and can *make them available* to a politically constituted international community are indispensable.”³⁶

4. Kant versus Habermas

The considerations put forward in the previous section support the view that a world republic is not the right answer to the question of how a system of international law should be institutionalized. On the other hand, Habermas’ critique of a league of states is less convincing. With regard to his three objections presented in section 2.2, I think only the third can create a need for institutional structures that go beyond the league, whereas there are cogent responses to the two former objections. Furthermore, Habermas’ own proposal faces problems related to his attempt at going beyond Kant’s model. While this seems to pull in the direction of the less ambitious league, it does not necessarily mean that we should reject all the aspects of his multi-level model. In what follows, I first assess Habermas’ critique of the league of states. Then I discuss two problems related to the supranational aspect of his model. On the basis of the preceding discussions, I suggest a way in which elements from both Kant and Habermas’ proposals can be combined.

35 Ibid., p. 133.

36 Habermas 2008b, p. 449.

4.1 An assessment of Habermas' critique of a league of states

Although something can be said in favor of certain aspects of Habermas' critique of Kant's league of states, it also fails in important respects.

(1) *The objection from voluntariness*: Habermas does not sufficiently explain why an international legal order has to resemble the internal legal order of states. By pursuing this line of criticism, he seems to come close to the proponents of a world republic. But Habermas is, after all, no proponent of such a model. Already in his 1995 article "Kant's Idea of Perpetual Peace," Habermas expresses some reservations with regard to Held's proposal for UN reform along the lines of a state constitution.³⁷ In later writings, the rejection of a world republic is more explicit. Here, he claims that transformations of international law must proceed through "voluntary restrictions on sovereignty."³⁸ He also argues that a reformed UN empowered to make authoritative decisions regarding issues of collective security and human rights protection can leave the control of the means of violence to its member states: "The individual states retain their monopoly on force, although as members of the United Nations they formally cede the right to decide on when military force should be used to the Security Council (except in the case of justified self-defense)."³⁹ But if this is true, why cannot Kant's voluntary league count as a legal arrangement? There is a clear similarity between the two schemes when it comes to the voluntary cooperation of member states. If this aspect is consistent with one of them being a legal order, there is no obvious reason why it is not consistent in the other case. Conversely, if Habermas' criticism of the league's voluntariness is sound, it also seems detrimental to his own position.⁴⁰

Moreover, there are at least two good reasons why membership in a league of states must be voluntary. First of all, states cannot, as can individuals, have an enforceable duty to *enter* a civil condition, even if they do wrong in the highest degree by remaining in the state of nature.⁴¹ If states had such a duty, then every

37 Habermas 1998, p. 188.

38 Habermas 2006, p. 133.

39 Habermas 2008a, p. 320.

40 For a criticism of Habermas which parallels Habermas' criticism of Kant, see Scheuerman 2008b, pp. 141-3.

41 Considerations of space do not allow me to explain in any detail why this is the case with regard to individuals. Suffice it to say here that Kant considers remaining in the state of nature as incompatible with each person's right to freedom, and, consequently, that forcing those unwilling to leave this state can be justified as a hindrance of a hindrance to freedom. For good analyses of this point, see Ripstein 2009 and Varden 2008a.

state that had the capacity would, in the final resort, have a right to wage war against states that refused to do so voluntarily. But such a right is in conflict with the purpose of forming the league of states, namely that of enabling just and peaceful interstate relations. Furthermore, it is at odds with the primary duty of individuals to enter civil society, since to wage war is to put the entire public order at risk.⁴²

Secondly, the right to *leave* at will is equally well-founded and coherent with the purpose of founding a league of states. The basic idea underlying this right is that states must be allowed to remain neutral when other people are fighting each other. Designating the avoidance of war as the fundamental aim of the league, Kant recognizes a right on the part of states to step back in order to not become entangled in violent conflicts between or within other states. Therefore, he writes that the league “can be renounced at any time and so must be renewed from time to time.”⁴³ This claim squares well with the general restriction of the sphere of right to the external relations between interacting parties.⁴⁴ Wrongdoing consists in hindering anyone’s free choice in accordance with universal laws, but there is no wrongdoing involved if a state that is not already party in an ongoing conflict refuses to become such a party.⁴⁵

(2) *The objection from sovereignty*: The main problem with this objection, is that it is based on a conception of cosmopolitan right fundamentally different from Kant’s. Kant presents cosmopolitan right as a third dimension of public right complementing two other dimensions: the right of a state and the right of nations. As such, it does not compete with the other two dimensions. The three dimensions of right address different kinds of relations – all of which have to be legally regulated in order to enable an enduring peace in accordance with universal laws of freedom. *The right of a state* is concerned with the horizontal relations between fellow citizens and the vertical relations between each state and its citizens. With regard to these relations, the republican constitution is the normative ideal which should be continually approximated. *The right of nations* is concerned with external relations between states, and seeks the avoidance of war by means of a league of states. *Cosmopolitan right* is concerned with relations between states and strangers, be they citizens of another state or members of non-state peoples.

42 Maus 2004, p. 91.

43 Kant 1996a [1797], 6:344.

44 Cf. *Ibid.*, 6:230.

45 Cf. Varden 2008a, p. 21.

Interaction in this dimension should be constrained by the “conditions of universal *hospitality*”⁴⁶ – that is, the right of foreigners to visit the land of other peoples without being treated with hostility, and the right on the part of those being visited to turn visitors away as long as it is not tantamount to their destruction.

By contrast, Habermas understands cosmopolitan right as superior law that takes priority in cases of conflict with the right of a state (i.e., domestic law) and that includes every person in a legal community of free and equal world citizens. Accordingly, cosmopolitan right is said to imply a global hierarchy of law where the rights and duties ascribed to persons *qua* world citizens trump the rights and duties ascribed to persons *qua* state citizens: “The point of cosmopolitan law is ... that it bypasses the collective subjects of international law and directly establishes the legal status of the individual subjects by granting them unmediated membership in the association of free and equal citizens.”⁴⁷ And since the relation between cosmopolitan norms and state-sanctioned norms are conceived in such a hierarchical fashion it appears inconsistent to insist on the inviolability of state sovereignty, especially in view of the possible abuse of states’ coercive powers internally.

From Kant’s perspective, however, there is no obvious conflict or tension between the sovereign rights of a state and cosmopolitan right. Being an aspect of public right concerned with the rights and duties relevant for interaction between states and strangers, cosmopolitan right is a transnational kind of right that presupposes the independency of the former kind of actors. Only if one conceives of cosmopolitan right as establishing a global hierarchy of legal norms does there seem to arise a possible conflict between insisting on inviolable state sovereignty and granting legal standing to every person irrespective of particular state citizenship, but even then it is not obvious that Kant’s league of states is a contradictory construction. As Habermas points out elsewhere, a transformation of existing states into constitutional democracies combined with a universal right to citizenship is an imaginable model, however distant such a condition may seem today.⁴⁸ But in granting this, his critique of Kant’s defense of state sovereignty becomes all the more puzzling.

The defense of state sovereignty is also consistent with each person’s innate right to freedom. In Kant’s view, the internal hierarchical organization of the

46 Kant 1996d [1795], 8:357.

47 Habermas 1998, p. 181.

48 Habermas 2001, p. 118.

republic, where the executive authority is subjected to the legislative will of the people, is the primary guarantee for this right. To insist on the principle of non-intervention and the territorial integrity of states is in this perspective merely to confirm the state's role as such a guarantee. First and foremost, the defense of state sovereignty implies that the internal political processes of states ought to be protected from interference by foreign powers.

Such protection is not limited to the democratic processes of republican states. Despite unfair and repressive practices, the sovereignty of non-republican or despotic states is also to be acknowledged. By establishing a public order that perhaps only minimally accords with right or justice, the factual constitution of even an absolutist regime is a presupposition for autonomous learning-processes aimed at a condition where those subjected to coercive laws can understand themselves as authors of the same laws.⁴⁹ For this reason, Kant writes that "some [legal] constitution or other, even if it is only to a small degree in conformity with right, is better than none at all."⁵⁰ Although the only just state is the republican state,⁵¹ one is still obliged to respect the integrity of non-republican states insofar as the actual legal order is a necessary precondition for internal reform towards a republican constitution.

At the same time, this may not be a sufficient response to Habermas' main worry with regard to the norm of non-intervention – the worry that a prohibition against interference in a state's internal affairs can serve as a protective shield behind which massive violations of human rights, such as genocide or ethnic cleansing, can take place. When state authorities either cause or fail to prevent the systematic murder of people on grounds of nationality, ethnicity, race, or religion, the rationale for the principle of non-intervention presented above does not seem adequate. In such cases, we are not dealing with imperfect public orders, but with unilateral employment of organized force by one group against another. Here, an appeal to the possible evolution towards a republican constitution by means of internal processes of self-enlightenment does not suffice for grounding an obligation on the part of foreign powers not to interfere, simply because a minimally functioning public order is not in place. Having said that, Habermas'

49 Cf. Maus 1998, pp. 105-6.

50 Kant 1996d [1795], 8:373. I have replaced "rightful" with "legal" as a translation of the German "rechtliche" in the quote, since the former term appears too close to terms like "just" or "right," which is clearly misleading in this context.

51 Kant 1996d [1795], 8:349-50.

attempt at recasting military intervention as law enforcement on the model of police action against criminals⁵² is still problematic. Equally problematic is his corollary claim that “the international community” has a “legal obligation to protect human rights worldwide.”⁵³ I will discuss these issues more closely in the next subsection.

(3) *The objection from globalization*: This is, as mentioned, the weightiest objection against a league of states. It should, however, be noted that the increase of border-crossing transactions of various sorts points beyond the league of states first and foremost to the extent that the interdependencies and shared risks of the contemporary world community have an impact on the internal political order of states. I do not question that many urgent challenges are today transnational in nature, or that independent states by their own have limited capacities to protect the lives and well-being of their citizens. What should still be kept in mind is that Kant’s theory of right – with its inclusion of cosmopolitan right – actually takes the phenomenon of private actors moving from one jurisdiction to another into account as a special kind of interaction that requires legal regulation. It is in other words designed for dealing with transnational flows.⁵⁴ Moreover, one should not overlook that Kant’s theory is primarily concerned with a priori conditions for rightful interaction, and not with questions pertaining to what are the most effective means for solving this or that problem. The idea of a league of states outlines an institutional framework without which states cannot possibly resolve conflicts of judgment in a rightful or just way. Insofar as this model signifies what we cannot possibly do without if there is to be such a thing as justice among nations, it is not clear in what sense it is challenged by the phenomena referred to by the term “globalization.” A wider range of shared risks seems to lead beyond the league with regard to the scope of issues that require international regulation, but such an extension of issues that states must address collectively does not necessarily require more than an intergovernmental mode of cooperation.

But if the scope of shared risks and challenges does not by itself put Kant’s league in question, what is more crucial is the way in which increased interdependencies appear to restrict the capacity of state authorities to regulate and intervene in the society delimited by their own territories. If the claim that globalization leads to such a loss of control on the part of national politics is sound,

52 Habermas 2008a, pp. 338-9.

53 Ibid., p. 339.

54 Cf. Maus 2006, p. 468.

it gains normative significance in view of the conceptual link between legitimate law and the modern idea of popular sovereignty found in both Kant⁵⁵ and Habermas.⁵⁶ According to this idea, legitimate law ultimately derives from the common will of the subjects of law. So far, democracy in this modern sense of identity of those who make and those who are bound by positively enacted law has been most closely approximated in the organizational body of territorially bound nation states.

The adequacy of tying democratic self-legislation exclusively to the nation state presupposes that the comprehensive jurisdiction over a certain territory formally enjoyed by national political authorities is complemented by the actual capacity of such authorities to make efficient interventions in the society demarcated by the borders of this territory. Unless there is some degree of correspondence between formal authority and *de facto* capacity to regulate and intervene, those who in fact make the relevant decisions for a society will be beyond democratic control. Therefore, insofar as the “material” autonomy of formally sovereign states is put under pressure because of an increased density of transactions across borders, political integration above and beyond traditional nation states may be a sensible strategy for enabling democratic rule of law under present conditions. To be sure, a complex web of transnational organizations has already emerged, but these are problematic in view of central democratic principles.⁵⁷

4.2 Two problems with the supranational aspect of Habermas’ multi-level model

One of the ways in which Habermas goes beyond Kant is in proposing that the UN should serve as a supranational agency providing “the international community with executive and sanctioning powers.”⁵⁸ On this view, promoting a normatively desirable system of international law implies a “transformation of military force into a global police force” that is to enforce the prohibition against aggressive war and protect the basic rights of world citizens.⁵⁹ There are at least two problems with this aspect of Habermas’ multi-level model. I call them *the problem of asymmetry between states* and *the problem of the right to command world citizens*.

55 Kant 1996a [1797], 6:313-14.

56 Habermas 1996.

57 For two analyses among many others, see Brunkhorst 2005 and Zürn 2004.

58 Habermas 2006, p. 132.

59 Habermas 2008a, pp. 338-9.

The problem of asymmetry between states is related to the institutional gap between the power to make binding decisions at the supranational level and the actual control with the coercive means in Habermas' model. In view of the fact that states have unequal resources of power, such an institutional gap implies a problematic asymmetry between powerful and less powerful states.

This problem has also been addressed by William Scheuerman, although in a somewhat unsatisfactory way. According to Scheuerman, there is a discrepancy between Habermas' concern for more effective and non-arbitrary implementation of Security Council resolutions and his rejection of a world republic with coercive power. With regard to the dependency of even a reformed and strengthened UN on the power resources of its member states, Scheuerman writes: "Generality and consistency in law presuppose some capacity to enforce legal norms without undue dependence on those against whom they may need to be enforced. If individual nation-states ... remain "final arbiters" on a global stage plagued by deep military inequalities ... it seems improbable that such dependence could be easily reduced or made fair and calculable."⁶⁰

While this points to a true problem in Habermas' multi-level model, I do not think Scheuerman really succeeds in showing why there is in fact a problem here. Central to his critique is the claim that Habermas, in making the UN rely on member states' coercive powers for the implementation of its decisions, plays down the degree to which great powers tend to hold on to their advantages of power. In Scheuerman's view, it is not realistic to assume that the UN can do without centralized power resources if its decisions are to be implemented in a consistent and non-arbitrary way, because the power interest of states is a too persistent structuring element in international relations.

Contrary to Scheuerman, I do not think that pointing to such an obstinate power-oriented self-conception on the part of state actors counts for much in this context. Against such claims, Habermas can, and does, respond that even if we today experience glaring discrepancies between ideals and realities we do not need to assume that it always has to be this way. On Habermas' view, state actors are capable of moral learning through collective coping with common problems within an increasingly complex web of international, transnational and supranational institutions. Accordingly, cooperative adaptation to growing interdependencies can transform the normative self-understanding of states and

60 Scheuerman 2008b, p. 142.

gradually make them internalize norms and legal regulations that are at first only accepted nominally.⁶¹ Unless one is committed to the view that state actors are essentially narrow minded egoistic agents involved in a strategic game for power, it is therefore not enough to appeal to present political realities in order to undermine the idea of a multi-level world order as a conceptually coherent *project* – that is, as a vision which can be gradually approached and realized in the future.

But if an argument that relies on the assumption of states being egoists exclusively pursuing goals perceived as being in their own self-interest fails, it should also be added that such an argument is superfluous. This is so because Habermas' proposal is inconsistent with the rule of law idea that all are equal before the law on structural grounds alone. Insofar as the project of promoting a desirable system of international law is linked to the establishment of a global police force that is empowered to non-arbitrarily enforce and implement the norms of the international community, there seems to be no way in which this could succeed unless such a police force is made institutionally independent of state actors. In relying on the coercive power of states for the purpose of law enforcement the states are allowed to decide whether authoritative decisions made by the world organization are to be coercively implemented. In practice, this means that enforcement always depends on the benevolence of great powers or strong alliances of states, which further means that enforcement is only possible vis-à-vis less powerful states, whereas great powers that wage aggressive war or violate human rights can always get away with it. There is, in other words, no need to invoke power interests or partiality in order to see why this scheme cannot work, because selectivity and arbitrariness is unavoidable in view of its inherent asymmetric structure: punishment for the weak and impunity for the strong.

Although there is a real problem in Habermas' construction, it does not necessarily pull in the direction of global "state-like organizations" or "core elements of global *government*," as Scheuerman claims.⁶² Alternatively, it can be seen as raising the question of whether the real challenge of overcoming the international state of nature is to establish a supranational executive authority. The conceptual and normative quandary arising in connection with the idea of an executive that depends on the voluntary cooperation of those who potentially have to be forced to comply can be avoided simply by dropping this ambition. Instead, a

61 Habermas 2008b, pp. 452-3.

62 Scheuerman 2008a, p. 487 and Scheuerman 2008b, p. 142.

supranational public authority, such as the UN, would serve the function of a judicial power that can judge in an impartial way whenever states raise opposing claims, or when private parties have complaints against their own government. To the extent that states internalize the legal norms of a world community consisting of equally sovereign states and world citizens, one could rely on their voluntary adoption of whatever verdict such a supranational authority reaches. Conceived in this way, the role of the supranational authority is similar to Kant's league of states, although there is still a difference insofar as the power of the latter is restricted to disputes that are international in the strict sense of being a dispute *between* two or more states.

The problem of the right to command world citizens is related to Habermas' hierarchical understanding of cosmopolitan right. Recall that on Habermas' view, the central idea of cosmopolitan right is to establish a global hierarchy of law where world citizens are ascribed legal rights and duties that trump the rights and duties ascribed to them in their role as state citizens. An important consequence of such a right is that any person can be held responsible and convicted for crimes committed in the service of a state. Another implication is that individuals have legal standing and can bring a case against their own state before international courts. The aspect of this understanding of cosmopolitan right which is particularly problematic is Habermas' further claim that the international community is legally obliged to intervene, if necessary with military means, in cases of egregious human rights violation.⁶³ The problem is that it does not appear that anyone can be so obliged.

Even if there may be cases where overriding the principle of non-intervention is permissible, it is questionable whether any person can be rightfully obliged to risk his or her life for the sake of saving the lives of people living in other states. One can argue that this is an implication of the rationale for establishing public coercive institutions (i.e., states). In line with Kant, I see this rationale as enabling persons to pursue ends of their own choice in a way compatible with every other person's equal right to do the same. In this perspective, a state does have the right to impose obligations on its citizens for the purpose of perpetuating its existence as a public order. It does not, however, have the right to make use of citizens for purposes beyond this, such as requiring them to fight wars within or against other states as long as their own state is not directly threatened. Otherwise,

63 Habermas 2008a, p. 339.

the state would be entitled to use its citizens as mere means, which is a violation of their innate right to freedom. As Kant puts it, “citizens ... must always be regarded as co-legislating members of a state (not merely as means, but also as ends in themselves), and must therefore give their free assent ... not only to waging war in general but also to each particular declaration of war. Only under this limiting condition can a state direct them to serve in a way full of danger to them.”⁶⁴ If one accepts this claim with regard to the rights of state authorities, it also seems to hold with respect to any supranational authority. So even if only a supranational public authority can make authoritative decisions concerning the permissibility of military humanitarian interventions, it cannot have the right to command citizens of sovereign states to be part of such interventions.

But if no one can be rightfully commanded to execute the decisions of a supranational authority, it seems to follow that the international community cannot be legally obliged to act collectively as a global police force on behalf of those whose rights are violated in cases of genocide and ethnic cleansing. That does not mean that one should in no case feel morally compelled to intervene. Yet insofar as the right to decide whether to execute the rulings of a global supranational authority in the final resort always lies with the citizens of a particular state, whatever they are doing when intervening in order to stop ongoing atrocities it is not a fulfillment of a legal obligation triggered by egregious human rights violations. Provided the intervening states are willing to take the necessary risks, it can at best be described as an act of solidarity with those who suffer from the abuse of collectively organized use of force. For this reason, it is also misleading to conceptualize military humanitarian intervention as enforcement of the legal rights of world citizens by a global police force.⁶⁵ It should rather be seen as an emergency measure that can be permitted, but never imposed, when there is a breakdown of a state-sanctioned public order somewhere in the world.

4.3 A hybrid model

The critique presented in the preceding subsections seems to support a system of international law such as Kant’s league of states. If the critique is sound, it implies that Habermas’ focus on the establishment of supranational executive powers is

64 Kant 1996a [1797], 6:345-6.

65 For a similar view premised on somewhat different considerations, see Maus 1998, p. 112.

problematic and that a supranational authority vested with judicial power is most important with regard to the institutionalization of a just international legal order. However, it does not follow from the preceding discussion that a league of states cannot be further developed or that it is superior to Habermas' multi-level model in every respect. Insofar as Kant's model merely outlines necessary institutional preconditions for just resolution of international conflicts, it is compatible with more comprehensive forms of institutionalized cooperation between states. In view of our historical situation, such cooperation also seems to be essential for states to cope adequately with present challenges. For this reason, I believe a cogent case can be made for a hybrid model combining elements from both Kant and Habermas.

The most important lesson to draw from Kant is that the public authority necessary for just interaction between states should not establish coercive power over its member states. Its primary function should be to adjudicate international conflicts. Such an intergovernmental organization can be supplemented with a permanent system of international courts that also recognizes individuals as having legal standing. The latter is important for at least two reasons. First, it provides tribunals that can prosecute individuals for international crimes, such as crimes against humanity, crimes against peace, or war crimes. Second, it provides tribunals that can adjudicate conflicts between states and private parties, for instance with regard to human rights issues or issues of international trade.

In addition to the establishment of such a supranational adjudication system, there can be good reasons for welcoming the kind of regional political integration that is today taking place not only in Europe, but in many other parts of the world as well. To the extent that the world has changed in ways that make coping with actual problems no longer possible on a purely intergovernmental basis, the emergence of regional political and legal bodies could be crucial for facilitating an intermediary transnational institutional structure complementing the world organization in the way Habermas envisages. Such bodies may help state actors regain and preserve some of their action capacities, and thus enable democratic control with those who have decisive decision-making power with regard to what rules govern interaction within societies. They can enable fairer terms of negotiation on political issues that are transnational in character. Finally, if the many challenges related to increased transnational interdependency can be worked out on this mid-level between regional bodies, the world organization can specialize and deal more adequately with peace and human rights issues.

5. Summary

In this article, I have presented and criticized Habermas' reformulation of Kant's project "Toward Perpetual Peace." I have argued that Habermas' critique of a league of states fails in important respects and that his own multi-level model faces problems related to his attempt at going beyond Kant's model. While Habermas, like Kant, proposes an institutional model that is complementary rather than analogous to the internal legal orders of states, it is in a sense still too similar to a world republic. First, his defense of a transformation of the UN into a supranational executive authority relying on the coercive powers of member states seems to imply a problematic asymmetry between powerful and less powerful states. Second, we can turn at least one of Habermas' critiques of the league against his own proposal. Insofar as it is intertwined with the recasting of military humanitarian intervention into global police operations, his hierarchical understanding of cosmopolitan right is in conflict with the idea of an international legal order ultimately founded on an innate right to freedom "belonging to every man in virtue of his humanity."⁶⁶

It does not follow from this criticism that all aspects of Habermas' multi-level model should be rejected. The most important implication is that we should be concerned about establishing institutions with judicial, and not executive, powers in the international domain. This is compatible with a hybrid model that integrates elements from both Kant and Habermas and that may be preferable in view of our historical situation.⁶⁷

⁶⁶ Kant 1996a [1797], 6:237.

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