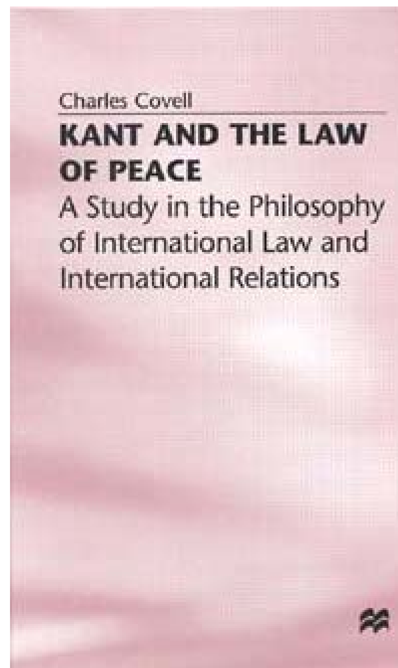

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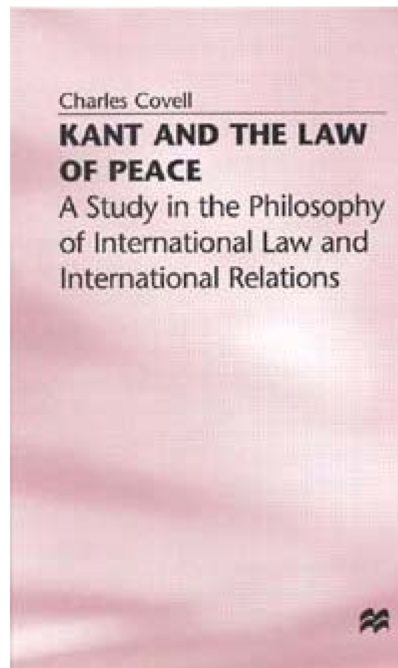

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Kant and the Law of Peace

A Study in the Philosophy of International Law and International Relations

Charles Covell
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Japan

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The origins of this book go back to 1991, when I began lecturing on Kant's international thought at what was then the College of International Relations, and what is now the College of International Studies, of the University of Tsukuba in Japan. In April 1992, the College commenced a five-year research project with the official title of the Special Research Project on the New International System. I joined the project in April 1995, and this book stands as my contribution to the realization of its academic aims. Participation in the Special Research Project on the New International System has conferred on me many benefits and privileges. For these, I am pleased to have here the opportunity to record my formal thanks to the Ministry of Education of Japan, which sponsored the project, and to Professor Hideo Sato, who has been the Director of the project during the period of my membership of it.

The first results of my study of Kant's international thought came in the form of a monograph published in Germany in 1994: *Kant, Liberalism and the Pursuit of Justice in the International Order*. The issues I addressed in this work led me to consider some of the issues I address in the present book. I am therefore pleased to express my thanks to Professor Harald Kleinschmidt, my colleague here at Tsukuba, for inviting me to write the monograph.

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CHARLES COVELL
Tsukuba, Japan
January 1977

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Introduction

The present volume provides a general account of the international thought of the German philosopher Immanuel Kant (1724-1804). More specifically, it provides an account of Kant's views regarding the question of peace among men and states, and regarding the question of the law whose establishing he considered was necessary in order to lay the foundations for peace among men and states on a lasting basis. Kant's views on peace have their clearest expression in his famous essay *Perpetual Peace* (1795; 2nd edition, 1796).1 It is with the argument of *Perpetual Peace,* and with the statement and explanation of the law of peace given in the essay, that this volume is primarily concerned.

Kant ranks as one of the greatest philosophers in the modern tradition in Western philosophy that began in the seventeenth century with the work of the French rationalist philosopher René Descartes (1596-1650). Kant's greatness as a philosopher rests, first and foremost, on the explanatory power of the examination of the foundations of human reason and understanding in their theoretical employment that he conducted in the work that stands as his masterpiece: the *Critique of Pure Reason* (1781; 2nd edition, 1787).2 The arguments set out in this work were such as to lead Kant to the analysis of the principles of human practical reason which forms the basis of his ethics. The substance of Kant's ethics is to be found set out in two works: the *Fundamental Principles of the Metaphysic of Morals* (1785)3 and the *Critique of Practical Reason* (1788).4 In 1790, Kant published *The Critique of Judgement,*5 a work in which he explored, among other matters, the idea of nature as a purposive order. In 1797, there followed a third major work on ethics: *The Metaphysics of Morals.* This work falls into two parts: *The Metaphysical Elements of Justice*6and *The Metaphysical Principles of Virtue.*7 *The Metaphysical Elements of Justice* contains a systematic exposition by Kant of his political philosophy. However, the main elements of his political thought are also to be found expounded in a number of shorter works. One of these works is *Perpetual Peace.* Others of note are the essays *Idea for a Universal History with a Cosmopolitan Purpose* (1784),8 *What is Enlightenment?* (1784),9 *Theory and Practice* (1793),l0 and *The Contest of Faculties* (1798).11

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Of Kant's political writings, *Perpetual Peace* is the work that best reflects his own particular concerns as a political theorist. For Kant stands out among political theorists by virtue of the attention he focused on politics in its international dimension. As will be brought out in the examination of the argument of *Perpetual Peace* in this volume, Kant did not consider that the elaboration of the first-order moral-political principles of law, rights, justice and legitimacy involved nothing more than an explanation of how these principles had application to the form of human association that was to be found in the civil state. From the standpoint that Kant adopted in political philosophy, the elaboration of the first-order moral-political principles also required a comprehensive explanation of the conditions governing their application to the sphere in which separate and independent states co-existed.

The sphere of the co-existence of states, for Kant, was the sphere of international politics, and the fact of international politics he saw as giving rise to a quite specific problem. The essence of the international problem, as Kant conceived it, was that the natural condition of the society obtaining among states was to be thought of as a condition of war. The natural condition of the society obtaining among states was, therefore, a condition of society which was to be thought of as one distinguished by the absence of a rule of law adequate to the proper securing of the rights of states.

Against this, there was the demand of reason and of justice that men and states should be brought to co-exist in a condition of peace. The demand that there should be a condition of peace among men and states implied the necessity of a solution to the international problem. The solution that Kant proposed was one that involved the establishing of a rule of law, and the establishing of forms of lawful constitution, that were to embody the juridical framework for peace in the international sphere. The peace that Kant saw as following from the establishing of law and the appropriate forms of constitutional order was to be a perpetual peace. For he took the view that the extension of the rule of law to international society necessitated nothing less than the permanent abandonment by men and states of war as the means for the determination and enforcement of their rights. Hence, for Kant, peace in the international sphere presupposed the establishing of law as the basis for the rights of states, with a peace based in law being a perpetual peace in the respect that it was understood to be a condition of the society of states whose coming into being was to mark the final and conclusive end to the

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natural condition of the society of states considered as a condition of war.

The solution to the problem of international politics that Kant set out was certainly one that he saw as requiring a settling of the issue of the form of law and the form of constitution that were to establish the basis for the government of men in the sphere of domestic politics. Thus the effecting of the solution to the international problem, as Kant envisaged it, required that men should associate together in states, and submit themselves to the form of law and form of constitution that were specific to the internal domestic political organization of states. This was so because Kant was quite clear that the natural condition of the society obtaining among men prior to the institution of the state, no less than the natural condition of the society obtaining among the separate states in the sphere of their external relations, was to be thought of as a state of warif not in fact, then at least in the sense that it remained a condition of society wherein there was no rule of law adequate for the determining and enforcement of rights in circumstances of general peace. Nevertheless, it was Kant's view that while the realization of lasting peace required the submission of men to a lawful form of government within states, since this was necessary for the proper security of the rights of men, the establishing of the lawful form of government within states itself presupposed the acceptance by men and states of the constraints of law and constitutional order in the international sphere, and, hence, their acceptance of the obligation to act for peace therein through basing their rights in law rather than in mere force or power.

For Kant, then, the problem of war among men, as a problem to be overcome through the submission of men to the form of political organization that was to be maintained in states, was inseparable from the problem of war as it presented itself in the external relations between states. As for the perpetual peace that was the antithesis of war, and the solution to the problem war posed, this Kant thought of as a peace whose realization depended on the possibility of the rule of law being established and made effective in both the domestic and international spheres of politics.

This, essentially, was the position Kant argued for in *Idea for a Universal History with a Cosmopolitan Purpose* and, later, in *Perpetual Peace.* It was also the position he argued for in *The Metaphysical Elements of Justice.* In concluding the analysis of law he provided in the latter work, Kant gave expression to an idea that everywhere informed his international thought. This was the idea that the

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establishing of perpetual peace stood as the final purpose of law, and that the attainment of perpetual peace stood as the highest political good. 12 It is because Kant affirmed peace as the highest political good, and because he thought of peace as requiring the establishing of a rule of law that was to apply both within states and as between states in the sphere of their external relations, that he must be set apart from other leading political theorists, including, for example, such of his successors in the German tradition in political thought as Georg Wilhelm Friedrich Hegel (1770-1831) and Karl Marx (1818-83).

If Kant's treatment of the problem of international peace is an integral part of his political thought, so also is it linked very directly to his ethics. Hence Chapter 1 of the present volume is devoted to an exposition of the principal elements of his ethics, and Chapter 2 to an exposition of the principal elements of his political philosophy. The discussion of Kant's ethics and political thought in Chapters 1 and 2 prepares the ground for the detailed examination of the argument of *Perpetual Peace* that comes in Chapters 3-6. In these chapters, it is explained how precisely Kant thought of perpetual peace as presupposing, and following from, the acceptance by men and states of the constraints of the rule of law in their mutual external relations, and their adoption of the forms of lawful constitution that he held were to found the different parts of the law which he saw as making for peace among men and states.

The law that Kant saw as making for peace among men and states was public law. This he expounded as a system of law possessing three distinct forms or parts, with each form or part being understood to have its own essential contribution to make to the realization of a perpetual peace among men and states. First, there was municipal law. This part of public law was the law maintained in states for the purpose of their internal domestic political organization. However, if municipal law was law whose sphere of application was that of the domestic politics of states, it was still law that Kant thought of as having a very direct bearing on the prospects for international peace. For municipal law was law whose foundation lay in the civil constitution, and it was a central claim of Kant's that it was only through the adoption by states of an appropriate form of civil constitution that it would be possible for peace to be achieved between men and states in the international sphere. The second part of public law that Kant identified was the law of nations. This was the body of public international law that, following traditional usage, Kant saw as applying to the external relations between independent states, and as serving to

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define their basic rights and obligations. The law of nations was to have its own constitutional foundation, and this Kant held was to consist in a federation brought into being through an agreement, or more exactly a treaty, between states. The third part of public law was what Kant called world law or cosmopolitan law. This was the form of public international law that he held was to order the mutual intercourse of men and states in the international sphere, to the end that their relations would eventually come to be founded in a world or cosmopolitan constitution.

Kant thought of municipal law, the law of nations and cosmopolitan law as forming a unified, interlocking system of law. It was this system of public law, together with the forms of lawful constitution that were to found its different parts, which comprised what Kant understood to be the law of peace. Of the three parts of public law that Kant identified as making up the law of peace, it was the law of nations which received the most detailed consideration in *Perpetual Peace.* In Chapters 3-6, it is argued that Kant broke decisively with earlier writers on the law of nations, and that he did so in the respect that he appealed to the will and agreement of states, rather than to natural law, in the explanation he provided as to the origin and basis of the binding normative force of the law of nations. As we shall see, Kant explained the law of nations in this way because he took the view that a peace based in law was not the natural condition of the society obtaining among states, but a condition of society that it was necessary that men and states should found, or institute, through specific acts on their part, where these acts involved their establishing, and entering into, fully constitutional forms of mutual relationship.

We shall also see that Kant's attempt to explain the law of nations without reference to a containing framework of natural law was such as to involve the assigning of a quite privileged position to state sovereignty as a foundational principle of the law of peace. Thus in presenting the law of nations as law that was to be thought of as being based in the will and agreement of states, Kant implied that the binding normative force belonging to this part of the law of peace was conditional on the exercise by states of those of their rights and capacities that presupposed, and were essential to, their sovereign freedom and independence as states. In the respect that Kant's presentation of the law of nations carried this implication, then it must be reckoned that the law of peace, as he expounded it, was a law under whose terms states were to be

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regarded as forming a primary constituent juridical element of the international order.

The privileged position that Kant implied for state sovereignty as a foundational principle of the law of peace underlines the modernity of the view he took of the law that was to apply to men and states in the international sphere. For the principle of the sovereignty and independence of states stands as the basic constitutional principle of contemporary public international law. In the event, Kant affirmed other principles of the law of peace, which further underline his anticipation of the system of international law of the contemporary era. Chief among these are the principles belonging to what he laid down as forming the substantive law of nations. Here, for example, he affirmed the principle of the faith of treaties as fundamental to the law of nations, as well as a principle concerning procedures for the acquiring and disposing of states which, in its meaning and implications, is closely linked to what is now accepted as the principle of the selfdetermination of peoples. He also affirmed a substantive principle of the law of nations that must be taken to be given in the very concept of state sovereignty. This was the principle that states were to refrain from forcible interference in the constitution and government of other states.

There is a further anticipation of the subsequent direction of international law in Kant's insistence that a federation of states was to stand as the constitutional foundation of the law of nations. The federation of states for which Kant called must not be confused with such international organizations of the present day as the United Nations. Nevertheless, the fact remains that in stipulating that the law of nations should be founded in a federation of states, Kant gave expression to a view as to the basis of international law that has proved to be particularly influential during the twentieth century. This is the view that the extension of the rule of law to the international sphere requires the establishing of institutions and organizations possessing formal responsibilities for the maintenance of the law applying to men and states in international society, and hence also for the maintenance of peace as such.

Kant's anticipation of present international law is not confined to what he had to say about the law of nations. In addition, there is what he had to say about the other parts of the law of peace, and the forms of constitution pertaining to them. As we have noted, Kant saw the law of nations as enshrining the principle that states were to refrain from forcibly interfering in the constitution and government of other

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states. Yet while Kant in this respect assumed that, from the standpoint of the law of nations, states were to be regarded as having the lawful right to be free from forcible external interference in matters relating to their constitution and government, it is certainly not the case that he thought of the law of peace as such as having no reference to the form and manner in which states were internally constituted and governed. For he treated the municipal law of states as part of the law of peace, and, in discussion of the constitution that he held was to found municipal law, he was quite clear that international peace depended on the adoption by states of a form of constitutional government which would serve, among other things, to guarantee certain fundamental rights of the individual. Here, once again, he anticipated future developments in international law, particularly developments in the area of the law of human rights.

So, likewise, did Kant anticipate the future with his specification of that part of the law of peace which he saw as leading to the establishing of a world or cosmopolitan constitution. Here, Kant is to be linked with subsequent developments in the establishing of a commonly accepted international law of trade and commerce as a framework for peace. For in calling for the union of men and states under a cosmopolitan constitution, he looked forward to the time when international law had evolved to the stage where there existed a comprehensive legal regime providing for the regulation of the commercial and other forms of peaceful intercourse among men and states on the global plane. At the same time, Kant's specification of cosmopolitan law and the constitution it pointed to, no less than his specification of the constitution that was to found the municipal law of states, serves to establish his links with the international law of human rights of the present day. For he envisaged cosmopolitan law as a form of public law that would lead to the founding of a constitutional framework providing for universal recognition of the rights and juridical personality of all men and all states.

The principles of the law of peace that Kant affirmed are principles that are central to the philosophy of international law and international relations that forms an integral part of what is one of the dominant traditions in modern political thought. This is the tradition of liberalism. Kant's place in the liberal tradition is now very well understood, in large part as a result of the immense influence of a general theory of justice which, during the last twenty-five years or so, has been widely discussed by philosophers belonging to the Englishspeaking academic community as the *liberal theory of justice*. This

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theory is recognized to derive much of its conceptual framework from Kant's moral and political thought. Indeed, the theory is associated with a particular philosophical viewpoint that is sometimes referred to as *Kantian liberalism.* The thinker whose work has been of crucial importance in stimulating interest in the liberal conception of justice, and in bringing out its bases in Kantian thought, is the American political philosopher John Rawls. In 1971, Rawls published *A Theory of Justice.*13 This work stands as the classic expression of the liberal principles of justice and political morality, and serves to define the principal claims of Kantian liberalism considered as a distinct viewpoint in moral and political thought.

Essential to the liberal theory of justice, as it has been expounded by philosophers like Rawls, is an argument regarding the status of the rights of the individual in the determination of the fundamental requirements of justice. In this argument, it is not only maintained that the first principles of political society are to be described and justified as principles that affirm the rights of the individual. More strongly, it is maintained that the rights of the individual are to be thought of as possessing a normative priority over other goods and values, such as those relating to the collectively defined interests and welfare of society as a whole.

The claim made for the primacy of individual rights forms a quite distinctive element in the Kantian-liberal conception of justice. Certainly, it is this claim which serves to mark off the Kantian-liberal view of justice and rights from the view taken of these matters that is associated with a tradition in moral and political thought to which the Kantian tradition is assumed, by Rawls and other recent liberal theorists, to be radically opposed. This is the tradition of utilitarianism, whose foundations were laid in Britain in the eighteenth century by such leading thinkers of the Scottish Enlightenment as David Hume (1711-76) and Adam Smith (1723-90), and whose classic exponents in the late eighteenth and nineteenth centuries were the philosophers Jeremy Bentham (1748-1832), John Austin (1790-1859) and John Stuart Mill (1806-73).

Critical commentaries on Kant of recent years everywhere reflect the influence of Rawls in moral and political thought, while also giving full recognition to the signal contribution that Kant is held to have made to the philosophy of liberalism.14 That said, it must be admitted that it is no simple matter to determine when liberalism first emerged in the West as a distinct tradition of reflection on the first principles of justice and political morality. For this reason, it is no

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simple matter either to determine which thinkers are to be picked out as belonging to the liberal tradition, or, at least, as having contributed through their work to its emergence at a later time. Nevertheless, the thinkers who must certainly be taken to belong to the liberal tradition include Benedict de Spinoza (1632-77), John Locke (1632-1704) and Charles-Louis de Secondat, Baron de Montesquieu (1689-1755). So also is Kant to be included, as well as classical utilitarians like Bentham and Mill.

Related to the difficulties involved in determining the origins of liberalism as a tradition in moral and political thought, there remains the problem of establishing the defining claims of liberalism as a philosophy of law, state and government. For example, thinkers standing in the liberal tradition have affirmed the centrality of individual freedom and human equality among the ends of justice. This is true not least of Kant himself, who, as we shall see, thought of individual freedom and human equality as intimately connected moral-political concepts. However, while thinkers standing in the liberal tradition have given full recognition to the principles of freedom and equality, it is unclear whether, and if so how, these principles are to be brought together within the framework of a coherent theory of justice and political morality. Indeed, the philosophy of liberalism has been distinguished by a tension internal to itself between rival libertarian and egalitarian conceptions of justice. This is certainly the case with the liberal theory of justice as it has been discussed since the publication of Rawls's *Theory of Justice.*

Rawls himself argued for a substantially egalitarian conception of justice, which he called justice as fairness. The essence of this conception of justice was given in two fundamental principles of justice. The first principle provided that individual members of society were to have an equal right to all the basic political liberties. The second principle provided that such social and economic inequalities as existed in society were to be so arranged that they worked to the greatest benefit of the least advantaged members of society, and that they were attached to offices and positions which were open to all members of society on terms of fair equality of opportunity. 5 The conception of justice as fairness, as Rawls expounded it, was such that it implied a legitimate role for the state in establishing the conditions for material equality among members of society. However, other defenders of liberalism have maintained that any attempt on the part of the state to act to promote material equality must inevitably violate rights that are essential to the freedom of the individual. This,

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for example, is the position that is to be found argued for by Rawls's fellow-American Robert Nozick in his *Anarchy, State, and Utopia* (1974).16

There are, then, serious difficulties regarding both the origins and defining claims of liberalism as a tradition in moral and political thought. Despite this, it can be said with confidence that, in the form in which it was developed by thinkers like Locke, Kant and Mill, the philosophy of liberalism is one where it is assumed that the authority belonging to the state is to be thought of as an authority founded in, and deriving from, the consent of those individuals who are its subjects. That this is so is reflected in the central importance in the development of liberalism of theories of political society, like those of Locke and Kant, where the first principles of law, state and government are explained through appeal to the idea of a social contract. Then again, philosophers standing in the liberal tradition have been concerned to affirm the ideals of limited constitutional government and the rule of law. This is why thinkers in the liberal tradition have sought to specify certain underlying principles of justice and political morality that are understood to define, and so also to set limits to, the conditions under which the coercive powers belonging to the state are to be exercised against the individual citizen.

The principles of this sort, as focused on by thinkers in the liberal tradition, are such as to underline that the fundamental value affirmed in the liberal tradition is that of individual freedom and the rights which are essential to this freedom. As we have noted, thinkers belonging to the liberal tradition have differed as to how individual freedom is to be reconciled with the ends of human equality. Nevertheless, there is also agreement among thinkers in the liberal tradition that the rights that are understood to be essential to the freedom of the individual are rights which each individual is to be regarded as holding with all other individuals on an equal basis, and rights which for this reason serve to establish the underlying conditions for the equality of individuals in political association. Hence there follows the argument advanced by liberal theorists that, in the circumstances of the state, the basic rights of the individual are rights which are to be protected by, and claimed against, the institutions of government responsible for the care of the collectively defined interests and welfare of society.

Situating Kant in the tradition of liberalism is of course not unproblematic. In the view he took of international politics and in his discussion of the state and the authority it exercised over the

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individual, Kant adopted positions which point to important parallels between his political thought and that of the English philosopher Thomas Hobbes (1588-1679). Hobbes emphasized the rights of the individual in explaining the origin and limits of political authority, and, for this reason, may be read as a founder of the tradition of liberalism. Despite this, Hobbes is generally thought of as a defender of absolute government, rather than as a defender of the principles of limited government that were to become central to the philosophy of liberalism in the form in which it is taken to be embodied in the work of Kant. Certainly, Kant himself was critical of what he saw as Hobbes's failure to give adequate recognition to political freedoms that he considered essential to the possibility of individuals having rights which might be claimed against the state. On the other hand, there are strong absolutist elements in Kant's political thought which very clearly align him with Hobbes. This is so not least with regard to the solution Kant offered for the international problem. For Kant was here led to affirm the rights of states in terms which, if anything, moved him beyond Hobbes in the absolutism of the authority he was prepared to accord to states in the juridical organization of the international order.

One of the respects in which Kant must be set apart from Hobbes in the account he provided of the foundations of the state and its authority concerns his treatment of the question of the sovereign power in the state. For, in this matter, he adopted the theory of popular sovereignty argued for by the Swiss-born philosopher JeanJacques Rousseau (1712-78). Many of Rousseau's ideas were to have their practical realization during the French Revolution. The latter was an event in world history which played a decisive role in advancing the cause of liberalism, as is underlined by what Kant himself thought about it. In The Contest of Faculties, for example, Kant took the French Revolution as evidence for the progress being made by mankind towards the development of the constitutional form of state government.17 He did so despite his abiding conviction as to the unlawfulness of any attempt by peoples to engage in revolutionary activities against the ruling political authorities to which they were subject. However, while Kant was prepared to express approval of the French Revolution, it is evident from his writings that he would not have approved of certain of the longer term trends in European politics which the Revolution served to establish.

One of these trends was the trend running in favour of enlarging the scale of democratic participation by the people in the process of

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government. In the nineteenth and twentieth centuries, liberalism was to become closely bound up with the cause of democracy. Here, though, it must be emphasized that Kant himself was set very firmly against democracy as an underlying political trend. Indeed, he denounced democracy as a form of despotism, for the reason that he considered it to be a form of government that was subversive of the representative principle which he regarded as being essential to constitutional government.

Alignment with Hobbes, the defender of absolute government, and opposition to democracy as a form of despotism: these are some of the elements of Kant's political thought which suggest that his relation to liberalism is by no means straightforward. Even so, there is in the end no question that Kant must be situated in the tradition of liberalism. If nothing else, Kant's place in the tradition is assured by virtue of the statement of the first principles of justice and morality that is given in his ethics. For Kant's ethical theory was one where the moral law was explained as a law based in human freedom, and as a law whose terms were such that it demanded universal recognition for all human beings in their equality as individuals possessing freedom and the rights essential to it.

The principles of freedom and equality that are fundamental to Kant's ethics are also principles that are everywhere appealed to in his political thought. This is so particularly with his specification of the forms of law and constitution that he saw as making for peace among men and states. Here, Kant affirmed principles that are integral to liberalism both as a general philosophy of law, state and government, and as a philosophy of international law and international relations. Thus in setting out the elements of the law of peace, he affirmed the ideal of the constitutional state based in the principles of limited government and the principles of the rule of law. This, as he described it, was the ideal of the state founded in the consent of the individuals who comprised it, and justified through its securing their rights and, through this, their freedom. It was also the ideal of the state wherein the laws that secured the rights and freedom of the individual were laws which set the conditions for the exercise of the coercive powers belonging to the state and the institutions of government therein.

In addition to the law of peace as it applied to the internal domestic political organization of states, there are the parts of the law of peace that had application to the relations between men and states in the international sphere. Here, Kant expounded the law of nations as a

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body of law that secured the rights and freedom of states, and hence also the rights and freedom of the peoples associated together in states. In doing so, he pointed to foundational principles of international law, such as those of state sovereignty and the selfdetermination of peoples, which have been central to the tradition of liberal internationalism.

As for the cosmopolitan law, this was envisaged by Kant as serving to establish a juridical framework that would make for peaceful commerce and intercourse between men and states in the international sphere, while also implying the possibility of all men and all states being accorded recognition of their rights under a universally binding system of law. So with his specification of the cosmopolitan form of public international law, Kant gave expression to principles, such as the principle of freedom of trade and commerce and the principle of the universality of the lawful rights of men and states, which occupy as prominent a position as the principles of state sovereignty and selfdetermination in the liberal tradition in international thought and practice.

As Kant explained it, then, the law of peace was a liberal law of peace, and one that gave determinate juridical form to principles of justice and political morality that are integral to the philosophy of liberalism. In recent years, international society has witnessed victories for liberalism very much, if not entirely, in the form in which its core principles are given expression in the thought of Kant. Since the collapse of confidence in state socialism that came with the ending of the Cold War, there has occurred a marked ideological shift in favour of the principles of constitutional government as the basis for the internal domestic political organization of states. To be sure, this commitment to constitutionalism has been inseparable from a commitment to the democratization of political processes and institutions that Kant himself feared would lead to despotism. However, to the extent that the current commitment to constitutionalism has involved a commitment on the part of states and their governments to conform with the constraints of the rule of law, and hence to give effect to the fundamental moral and political rights of individuals, then the legitimacy of this Kant would not have challenged, whatever his doubts about democracy as tending towards the despotic form of government.

Not only has contemporary international society seen a movement towards the acceptance of constitutionalism in the sphere of domestic politics. It has also seen the establishing of new international regimes,

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frameworks and organizations, and the enlarging of existing international regimes, frameworks and organizations, that are intended to promote political and economic co-operation between states and peoples, where these forms of international association point to the everincreasing interdependence of states and peoples and so also to the eventual formation of a fully global community. The development in international society here noticed would certainly appear to involve a realization of the ideal that informs Kant's statement and explanation of the law of peace. This is the ideal of a peace based in a law which would secure the rights of men in states and the rights of states in international society, and yet which at the same time would establish conditions facilitating commerce and intercourse among men and states in the international sphere without regard to the limitations imposed by the territorial and jurisdictional boundaries of states.

There are, therefore, good reasons for supposing that Kant, and the version of liberalism that is to be associated with his moral and political thought, will be of central importance in understanding the future development of international society and of its law and principles. Even so, there are also trends present in contemporary international society, some of them mutually antagonistic, that must be taken as running counter to the realization of the ideals of liberalism that are affirmed in Kant's thought. The conception of the law of peace that Kant defended was one where it was assumed that the existence of the state was a fundamental requirement of justice, and that the state was to stand in perpetuity as one of the principal institutional forms through which justice was to be secured in the world. However, if Kant's international thought is profoundly statist in what it offers as an account of the juridical bases of international society, then, against this, there have to be reckoned with those trends in current world politics which point to a weakening of the institution of the state, and to a diminution in the importance that is to be assigned to the state as a constituent element of the international order. Here must be mentioned the fragmentation of existing state structures caused through civil war and ethnic conflict, as well as the challenge to the international system as a system of states that is posed by the momentum in favour of the establishing of regimes, frameworks and organizations promoting regional integration.

The processes of regional integration that are now going on in Europe, the Americas and Asia-Pacific may well be interpreted as a practical fulfilment of Kant's hopes for a peace based in an extension of the rule of law to the sphere of international politics. Even so, it is

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still pertinent to observe that the strengthening of regional organizations of states may as likely prove obstructive of the realization of the global cosmopolitan society to which Kant looked forward. Beyond this, there are the implications for international society that must be taken to follow from the emergence of such urgent issues of international concern as the accelerating growth in the world population, the migration of peoples, the spread of disease and famine, and the underlying threat to the world environment. These, of course, are issues which imply the necessity of their peaceful resolution on the international plane. Nevertheless, they are also issues that are not self-evidently capable of resolution in accordance with the constraints of a rule of international law that is founded in principles of justice and political morality which enshrine the rights of men and the rights of states.

The above-mentioned trends in current world politics are not such as to call into question the validity of liberalism as a philosophy of international law and international relations. They are, however, such as to direct attention to certain contradictions inherent in liberalism in its application to the circumstances of contemporary international society, and contradictions that become apparent through consideration of the international thought of Kant himself. It is with a sense of the contradictions inherent in liberalism that the Conclusion to this volume has been drafted so as to point to some of the aspects of Kant's law of peace which appear problematic when it is considered in relation to the present condition of international society.18

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1 Kant's Ethics

Kant's philosophy stands as a unified body of thought. The arguments Kant set out regarding international peace formed an integral component of the exposition of the fundamental principles of law, state and government that comprise his political philosophy. In expounding the principles of law, state and government, Kant appealed to the more abstract principles of human practical reason whose analysis was central to his moral thought. In turn, Kant's arguments regarding the nature of practical reason followed from, and complemented, the arguments regarding human reason and understanding in their theoretical employment that he set out in the *Critique of Pure Reason.*

Kant's concern in the *Critique of Pure Reason* was with the underlying foundations of human knowledge. More specifically, he was concerned with the conditions governing the exercise of human reason and understanding that he saw as essential to the possibility of there being established fully objective knowledge of the natural order. The view of knowledge that Kant argued for in the *Critique of Pure Reason* was fundamentally opposed to the one that had been argued for by the thinkers in Britain like Locke and Hume who belonged to the tradition in modern philosophy known as empiricism.

The emergence of the empiricist tradition in the philosophy of Locke and Hume reflected the impact of the scientific revolution that took place in Europe during the sixteenth and seventeenth centuries. The revolution in science in this period involved the establishing of a dominant conception of nature. This was the conception of nature as an order governed by regular law-like principles, such as the mechanical laws of cause and effect that lay at the foundation of Newtonian physics. The empiricist philosophers were to construct arguments about knowledge and experience that appeared to make good the claims of the human mind to generate scientific knowledge of nature. However, they also produced arguments whose implications were such as to call into question the validity of the principles essential to the conception of nature as a law-governed order. This was true particularly of Hume.

Hume was the greatest of the British empiricists, with his statement of the empiricist standpoint in philosophy coming in such seminal works as *A Treatise of Human Nature* (1739-40)1 and *An Enquiry*

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concerning Human Understanding (1748).2 Central to the view of knowledge that Hume argued for was an account of the principal elements of human consciousness and the proper objects of human reason. According to Hume, the principal elements of human consciousness were impressions and ideas. Impressions were the perceptions that entered the mind through sensation, and ideas the faded or less forceful images of the sensory data of experience received through the impressions.3 As for the objects of reason, these concerned the internal relations among ideas and matters of fact. Reasoning about the relations among ideas resulted in the discovery of necessary truths, such as those affirmed in the branches of mathematics of geometry, algebra and arithmetic. Reasoning about matters of fact, on the other hand, resulted in the establishing of knowledge which was true not of necessity but only contingently.4

From this specification of the elements of consciousness, and of the objects of reason, it followed that the human subject was to be thought of as having no knowledge concerning matters of fact about the order of nature which remained independent of his experience, as this was constituted through his impressions and the ideas formed from them. Hume's explanation of how knowledge of nature derived from experience brought him to call into question the very possibility of human reason aspiring to objective knowledge of the natural order. So, for example, he called into question the objective necessity of certain of the fundamental principles underlying scientific thought and enquiry. Among these were the principle that the natural order was subject to regular laws of cause and effect, and the principle that the natural order to which these laws applied was an order made up of objects possessing a continuous existence and identity.5

It was largely to counter the sort of scepticism reflected in Humean empiricism, and so validate the first principles of scientific thought and enquiry, that Kant wrote the *Critique of Pure Reason.* Kant accepted Hume's premise that experience was the basis of knowledge of nature in the respect that he held that knowledge, to be authentic, had to be knowledge of a world actually encountered in experience. Indeed, it is Kant's acceptance of this tenet of empiricism that marks his break with thinkers belonging to the tradition in philosophy that was opposed to that of empiricism. This was the tradition of rationalism, which included among its most notable exponents the German philosopher Gottfried Wilhelm von Leibniz (1646-1716). For rationalist philosophers such as Leibniz, it had been assumed that knowledge of nature could be derived from ideas and principles of

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reason which, as such, involved no reference to nature as it was actually experienced. Kant rejected the assumption of the rationalists that knowledge of nature could be derived without reference to experience. However, he did not accept that all knowledge of the natural order was derived from experience in Hume's sense. This was so because he held that experience possessed a certain universal form and organizing conceptual structure, and that this was such as to allow for the establishing of a body of knowledge about nature which remained independent of any empirical experience of it.

Kant's explanation of the bases of knowledge of the natural order in the *Critique of Pure Reason* followed from his description of the elements of experience. As he described it, experience was made up of what he called sensibility and understanding. The faculty pertaining to sensibility was that of intuition, and it was through intuition that the sensory data of experience were received into the human consciousness. The understanding was the faculty through which the sensory data received in intuition were made intelligible through being rendered subject to concepts.

For Kant, space and time were the essential forms of intuition. As for the elements of the conceptual structure through which the understanding organized experience, these were what Kant called the categories of the understanding. The categories were the universal forms of human thought, and contained such basic concepts as the concepts of substance and cause and effect. The faculty of understanding generated knowledge through the application of the concepts contained in the categories to the sensory data of experience given in intuition. The application of the categories to experience was governed by certain rules or principles. As Kant elaborated them, these principles served to establish the objective necessity of the fundamental principles of the natural sciences, including, crucially, those principles of scientific enquiry on whose objective necessity Hume had cast doubt. Hence, the principles governing the application of the categories to experience were such as to provide that the natural order was of necessity experienced as an order comprising objects with a permanent identity and existence, and as an order wherein the interaction of objects was determined by regular laws of cause and effect.6

The knowledge of the natural order that Kant saw as being established through the faculty of the understanding was theoretical knowledge. In Kant's view, the understanding was competent to establish genuine theoretical knowledge only of such objects as fell within the

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limits of empirical experience. This meant that the sphere of theoretical knowledge was strictly that of objects to which the principles of the understanding were capable of possessing application. In other words, theoretical knowledge, for Kant, was essentially knowledge of the natural order as conceived from the standpoint of scientific thought and enquiry. However, Kant also gave detailed consideration in the *Critique of Pure Reason* to what he saw as the tendency of the understanding to generate concepts which lacked any context for their empirical application, and which, in consequence, were powerless to enlarge the sphere of theoretical knowledge. Such concepts Kant called ideas, and the faculty which entertained them pure reason. The ideas of pure reason that Kant treated of in the *Critique of Pure Reason* were the ideas forming the subject-matter of traditional speculative metaphysics. These were the ideas of God, freedom and the immortality of the soul.

In Kant's discussion of the matter, the ideas of pure reason, and the arguments expounded to substantiate them in such branches of traditional metaphysics as rational theology and cosmology, involved no more than the illusion of knowledge. Kant's sense of the ideas of pure reason as the source of illusion is well reflected in his analysis of the arguments advanced in rational theology to prove the existence of God.7 However, among the ideas of pure reason that Kant treated of, it is the idea of freedom that bears most directly on his moral thought.

Kant's discussion of the idea of freedom comes in the third of the four so-called antinomies of pure reason, which he stated in order to demonstrate the contradictions inherent in the metaphysical doctrines of cosmology. The contradiction that Kant set out in the third antinomy of pure reason was the contradiction between freedom and determinism. On the one hand, reason was led to entertain the idea of freedom as a form of unconditioned causality, and hence as a form of causality distinct from the one presupposed in the laws of cause and effect that governed the natural order. On the other hand, the idea of freedom as an unconditioned causality remained an illusion, given that nature could be rendered intelligible to the understanding only if all events occurring therein were considered subject to necessary laws of causal connection. The contradiction between freedom and determinism set out in the third antinomy obviously posed a challenge to human morality at its very foundations. This was so because, in the terms in which Kant stated it, the contradiction was such as to imply that reason could establish no theoretical support or justification for the idea of free agency essential to the possibility of morality. Thus,

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for Kant, the principles of the understanding provided that the human agent, as part of the natural order, was to be thought of as subject to the natural laws of cause and effect. Against this, the idea of freedom was such that it enabled the agent to think of himself as the author of his actions, and hence as standing apart from the order of nature and so exempt from the laws of causal necessity obtaining therein.8

In the event, Kant argued that the contradiction between freedom and determinism was to be overcome, and the reality of freedom established, through appeal to the perspective afforded by reason in its practical form. This was also how he sought to explain the truth contained in the ideas of God and immortality. Thus in the *Critique of Practical Reason,* he described the metaphysical ideas of God, freedom and immortality as postulates of pure practical reason: that is, as ideas which while providing for no significant enlargement of theoretical knowledge, were nonetheless ideas whose ground of objective validity was disclosed to the human agent through his possession of moral consciousness.9 In this way, Kant's examination of the foundations and limits of human reason and understanding in their theoretical form led directly to his examination of the nature of human practical reason.

The essentials of Kant's examination of practical reason are contained in the *Fundamental Principles of the Metaphysic of Morals* and the *Critique of Practical Reason.* Among the concerns running through the argument of these works, two are crucially important in understanding Kant's ethics. First, there is Kant's concern to demonstrate the objectivity of human morals, by making clear the inherently rational structure of practical deliberation. Second, there is his concern to demonstrate that reason in its practical form constituted an independent, or autonomous, source of moral principles and moral values. With both of these concerns, Kant opposed himself to the sort of view of practical reason that had been taken up by Hume.

In Hume's explanation of it in *A Treatise of Human Nature,* the subject-matter of moralitythe human virtues and viceswas an object not of reason, but of the feelings or the passions. For Hume, reason was concerned with the discovery of relations between ideas and the discovery of matters of fact. However, in neither of these concerns did reason discharge the specifically practical function of guiding or directing action. On the contrary, Hume argued that the human agent could be moved to act only by the prospect of obtaining pleasure or avoiding pain. This, he insisted, remained a matter to be determined by the passions rather than by reason. It

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was in accordance with this view of the passions as the ultimate spring of human conduct that Hume claimed that reason was, and indeed should be, the *slave of the passions,* and that reason was to be thought of as having no function or office other than to serve and obey the passions.10

Hume's definition of reason as the slave of the passions carried with it the implication that reasoning about moral matters remained irreducibly subjective. This was so in the respect that Hume implied that the judgments that were the outcome of moral reasoning were to be thought of as being determined by, or as the expression of, the wants, desires and other subjective states of the particular human agents who engaged in it. The radically subjectivist conception of morality that Hume assumed is to be found running through the analysis of morals that forms Book 3 of *A Treatise of Human Nature,* although it is also everywhere suggested in the analysis of the passions contained in Book 2. Hume's subjectivist conception of morality is evident, most particularly, in his celebrated argument to the effect that judgments of moral value could not be established through, or supported by, the procedures of reasoning that governed the establishing of factual knowledge about the order of nature. This was the argument that judgments of moral value were logically distinct from judgments regarding matters of fact, and hence that no proposition expressing a judgment of moral value could be logically entailed by, or derived or inferred from, any proposition that contained mere statements of fact.11

Hume did not dispute that human reason played a significant role in deliberation about action.12 However, Hume's definition of reason as the slave of the passions, and the subjectivist conception of morality it implied, committed him to a quite particular view as to the nature of practical reason. This was that practical reason consisted essentially in the calculation of means appropriate in some instrumental sense to the satisfaction of the wants and desires of the agent. In adopting this view of practical reason, Hume helped lay the foundations for the philosophy of utilitarianism as it was to be developed in its classical form during the late eighteenth and nineteenth centuries by Bentham, Austin and Mill. For it was to be an essential claim advanced in the arguments of the classical utilitarians that human actions were to be considered meritorious, and the laws and political institutions of society justified, to the extent that they contributed instrumentally to the promotion of the welfare or happiness of the individual, and, more generally, to the overall welfare

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or happiness of the individuals who together comprised the whole community. 13

Kant followed Hume in assuming that morality could have no foundation in any matters of fact discoverable by reason. He assumed this because, in his philosophical system, the sphere of morality was thought of as being fully autonomous, and hence as standing opposed to the sphere of the natural order that formed the object of the theoretical understanding. However, Hume had regarded morals as having their source in the human passions and hence as being irreducibly subjective. Kant, on the other hand, saw reason as the source of morality and the guarantee of its objectivity.

In explaining how morality originated in the reason, Kant decisively rejected the instrumentalist view of practical reason favoured by Hume and his utilitarian successors. For Kant, the essential concern of practical reason did not lie with the calculation of means that served to realize an extrinsic end or good, such as the welfare or happiness of the individual, or the welfare or happiness of the community in some collective sense. In Kant's explanation of it, practical reasoning about morals was understood to be a form of reasoning whose concern lay with the prescribing of laws which possessed a direct, and non-instrumental, application to the final ends of human conduct. As we shall see, it was Kant's view that the final ends of human conduct related to the possession and exercise by human beings of the freedom that belonged to them by virtue of their inherent rational nature. This meant that it was freedom and the rights of the individual essential to it, rather than the welfare or happiness of the individual or the community, which Kant assumed to stand as the fundamental value pointed to in the moral law.

Kant developed his view of morality and moral reasoning through an analysis of what he regarded as the underlying imperative structure of practical reason. This analysis turned on a distinction between two different types of imperative. First, there were what Kant called *hypothetical imperatives.* As Kant explained their logical structure, hypothetical imperatives embodied what Hume and the later utilitarians understood to be the essential form of practical reasoning. Second, there were *categorical imperatives.* These imperatives Kant considered to embody the essential form of practical reason as it related to specifically moral subject-matters, and, hence, to describe the foundations of morality as such. According to Kant, a hypothetical imperative was an imperative that set out, or commanded, a course of action which was represented as the means to some other

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end. The categorical imperative, however, was an imperative that set out, or commanded, a course of action which was represented as necessary without regard to any extrinsic end, and thus as being objectively necessary in its own right. As Kant put it in the *Fundamental Principles of the Metaphysic of Morals:*

> Now all *imperatives* command either *hypothetically* or *categorically.* The former represent the practical necessity of a possible action as means to something else that is willed (or at least which one might possibly will). The categorical imperative would be that which represented an action as necessary of itself without reference to another end, *i.e.,* as objectively necessary.
>
> Since every practical law represents a possible action as good, and on this account, for a subject who is practically determinable by reason, necessary, all imperatives are formulae determining an action which is necessary according to the principle of a will good in some respects. If now the action is good only as a means *to something else,* then the imperative is *hypothetical;* if it is conceived as good *in itself and* consequently as being necessarily the principle of a will which of itself conforms to reason, then it is *categorical.*14

Kant's examination of the logical properties of the categorical imperative was informed by his conviction that the essential form of moral goodness was to be found in the *good will:*

> Nothing can possibly be conceived in the world, or even out of it, which can be called good, without qualification, except a Good Will.15

What Kant meant by the good will was the bare disposition of the human agent to fulfil the requirements of duty for the sake of duty and without regard to any material purpose or advantage, and so to act purely out of respect for the moral law itself. As Kant explained it, the good will was to be distinguished from the naturalistically defined attributes of the agent, such as intelligence, wit and judgment, as well as from such socially defined attributes as power, wealth and status. At the same time, Kant described the good will in such a way that it was to be distinguished, as the disposition to conform with the moral law for its own sake, from pathologically determined motives for action like sympathy and love.16 Thus explained, the idea of the good will was the idea of a moral disposition which it was possible for all human beings to possess and act from, without regard to the particular natural and social attributes, or to the particular subjectively determined wants, desires

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and interests, that served to differentiate human beings one from another. It was in this sense that the idea of the good will informed Kant's exposition of the principles of practical reason that he saw implied in the structure of the categorical imperative.

In the *Fundamental Principles of the Metaphysic of Morals,* Kant gave as the first formulation of the categorical imperative the principle of practical reason that directed the agent to act only in accordance with a maxim which could be willed as a universal law.

> There is . . but one categorical imperative, namely, this: *Act only on that maxim whereby thou canst at the same time will that it should become a universal law.*17

This procedural principle of *universalizability,* as the condition for the promulgation of binding laws of conduct, was closely linked to the principle of practical reason that Kant laid down in another of the main formulations of the categorical imperative. Kant picked out as the supreme criterion of value the absolute and intrinsic worth of *rational nature:*

> If then there is a supreme practical principle or, in respect of the human will, a categorical imperative, it must be one which being drawn from the conception of that which is necessarily an end for everyone because it is *an end in itself,* constitutes an *objective* principle of will, and can therefore serve as a universal practical law. The foundation of this principle is: *rational nature exists as an end in itself.* 18

Hence the practical principle followed:

> So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only.19

From the principle that the human person was entitled to treatment as an end, by virtue of his rational nature, Kant derived a further practical principle implicit in the categorical imperative. This was the principle given in the idea that the will of every rational being was to be thought of as a universally legislative will. What the principle provided for was that the agent was to adopt only such maxims of conduct as were capable of being thought of as universal laws whose origin and authority lay in his own will.

> On this principle all maxims are rejected which are inconsistent with the will being itself universal legislator. Thus the will is not subject

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simply to the law, but so subject that it must be regarded *as itself giving the law,* and on this ground only, subject to the law (of which it can regard itself as the author).20

The idea of the will of the rational being as a universally legislative will was such as to lead Kant to expound the conception of an ideal moral community. This ideal moral community he called the *kingdom ofends.* As Kant explained it, the kingdom of ends was understood as a realm in which the terms of the moral law were perfectly honoured and fulfilled by all rational beings. To be sure, the Kantian kingdom of ends was only an ideal. Even so, the ideal conception of the kingdom of ends did give rise to the practical principle that the human agent, as a rational being, was to exercise his power of moral legislation on the premise that he belonged to this kingdom, both as a member of it and as a sovereign law-maker therein.

> For all rational beings come under the *law* that each of them must treat itself and all others *never merely as means,* but in every case *at the same time as ends in themselves.* Hence results a systematic union of rational beings by common objective laws, *i.e.,* a kingdom which may be called a kingdom of ends, since what these laws have in view is just the relation of these beings to one another as ends and means. It is certainly only an ideal.
>
> A rational being belongs as a *member* to the kingdom of ends when, although giving universal laws in it, he is also himself subject to these laws. He belongs to it *as sovereign* when, while giving laws, he is not subject to the will of any other.21

Hence it followed, as a general principle governing the exercise of practical reason, that:

> A rational being must always regard himself as giving laws either as member or as sovereign in a kingdom of ends which is rendered possible by the freedom of will.22

The principles of practical reason that Kant took to be given in the idea of the categorical imperative were essentially formal or procedural principles of reasoning. Nevertheless, they were principles that Kant saw as underwriting the substantive requirements of conventional morality. Thus in the *Fundamental Principles of the Metaphysic of Morals,* he sought to explain how certain substantive moral duties followed from the application of the practical principles contained in the categorical imperative. The specific moral duties that

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Kant derived in this way were: the duty of the human person not to take his own life; the duty to fulfil the terms of promises made; the duty of the person to develop and perfect his natural talents and faculties; and the duty to act to contribute to the welfare and happiness of others.23

In the event, it must be considered controversial whether Kant was correct in supposing that substantive moral rules and duties could be determined through principles of practical reason which, like the principle of universalizability, remained purely formal in character. Particularly relevant here is the argument central to the sort of objection to Kant's method in ethics that was to be raised by Hegel in his *Philosophy of Right* (1821),24 and later by Mill in his *Utilitarianism* (1861).25 This is the argument that the formal principles of practical reason identified by Kant were not such as to exclude the possibility of their being used to justify the choice of substantive actions, or the adoption of substantive rules of conduct, which involved the manifest violation of established standards of conventional morality.26

That said, there is no denying that Kant's doctrine of the categorical imperative, and the principles of practical reason it implied, did serve to give expression to ideas that are fundamental to conventional morality and conventional principles of moral reasoning. For example, Kant's specification of the categorical imperative underlines that the principle of impartiality is to be ranked as an integral component of the concept of justice. This is so in the respect that, under the terms of the first formulation of the categorical imperative, it was provided that all rational agents were to be regarded as equals from the standpoint of the moral law. Again, there is the second formulation of the categorical imperative. Here was stated the principle that the human being was to be treated always as an end, and never as a means only. The principle that the human being was entitled to respect as an end in himself involved appeal to an idea that informs many of the basic prohibitions which structure conventional morality. This is the idea of the integrity and inviolability of the individual as the bearer of a distinct moral personality, and as the bearer of the rights and freedoms essential to this personality. The prohibitions contained in conventional morality which most obviously work to preserve the integrity and inviolability of the individual as a moral person, and hence to guarantee his status as an end in himself in the sense Kant intended, are those relating to murder, theft, lying and other forms of deliberate deception, and the prohibitions relating to the use of arbitrary force and violence against the person.

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It is plain, therefore, that Kant's specification of the categorical imperative does answer to certain of our most basic convictions about the essential principles of justice and morality. Some of these are principles that find their expression in the contemporary world in the doctrine of universal human rights. Since the end of the Second World War, the idea of human rights has come to play a central part in the process of establishing the general principles of justice and morality that are assumed to have application to international society. Thus in the Charter of the United Nations, it is asserted in Article 1, paragraph 3 that an essential purpose of the United Nations Organization is to bring about international co-operation in promoting and encouraging respect for human rights and fundamental freedoms.27 Following the founding of the United Nations in 1945, detailed specifications of the human rights of the individual were provided in what are some of the principal documents in current public international law. Of these, the document that states the basic framework of the international law of human rights is the Universal Declaration of Human Rights, which was formally adopted by the General Assembly of the United Nations on 10 December 1948.28

The question of the historical and philosophical origins of the doctrine of human rights is a complex one. Here, it needs to be noted only that the human rights now recognized to form an integral part of international law are rights that are conceived of, and stated, in terms which conform closely with the spirit and substance of Kantian ethics. So, for example, human rights are understood to be universal rights, and hence rights that are understood to belong to all human beings equally and without exception. Thus Article I of the Universal Declaration of Human Rights affirms that all human beings are born free and equal in their dignity and their rights. Again, Article 2 provides that all human beings are entitled to all the rights and freedoms set out in the Declaration, without regard for distinctions based in such considerations as their race or colour, sex, language, religion, political or other opinions, national or social origins, property, or their birth or other status.

Not only are the rights affirmed in the Universal Declaration of Human Rights recognized to be rights possessing universal application to all mankind. They are also rights that are consistent in their meaning with the Kantian principle that the human being, as the bearer of a rational nature, should be treated as an end in himself, rather than as a means. The idea of the intrinsic worth of the human being, as embodied in this principle, is one that is appealed to

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implicitly in many of the provisions contained in the Declaration. Thus Article 4 affirms the right of human beings not to be subjected to slavery or servitude, while Article 5 affirms their right not to be subjected to torture, or to forms of treatment or punishment that are cruel, inhuman or degrading. Then again, Articles 6-11 affirm the entitlement of human beings to the rights essential to their freedom and integrity under the rule of law. Among these rights are the right to recognition as a person before the law, the right to equal protection under the law, and the rights guaranteed by due process in the application and enforcement of the law.

Kant's anticipation of the contemporary doctrine of human rights suggests something of the central position he occupies in the history of ethics. The element of Kant's moral thought which underlines the central role he played in the history of ethics is the categorical imperative. Certainly, it is the idea of the categorical imperative that serves to mark off Kantian ethics from the tradition in ethics which developed in the classical Graeco-Roman world, and which found its most complete embodiment in the moral thought of Plato (c. 428-348/ 7 BC) and Aristotle (384-322 BC). In this tradition, the principles of the moral life, and the concept of the moral good, were derived and established through reflection on human nature as it was actually constituted. Kant stands opposed to the classical tradition in ethics, and for that matter to the naturalistic tradition in Western moral thought generally. In Kant's view, the substance of morality lay in the moral law. This, he argued, could not be explained as being based in the particular constitution of human nature, or in material principles, like happiness, which were determined by the empirically given condition of human nature. On the contrary, he insisted that the moral law was to be explained in terms of its origin in the human will and reason, and in terms of the formal conditions for its promulgation embodied in the principles of practical reason given in the categorical imperative.29

If the doctrine of the categorical imperative serves to mark off Kant's ethics from classical Graeco-Roman ethics, so also does it serve to mark Kant off from the tradition in moral thought that belongs to Judaeo-Christian civilization. In this tradition, the principles of morality were thought of as forming a system of laws whose ultimate ground of derivation lay not in the human will and reason, but in the will and reason of God. In Kant's view, however, the moral law was not to be thought of as founded in, or deriving from, the will of God or the will of some absolutely perfect divine being. For Kant,

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the intuition of a perfect divine being presupposed the human conception of morality, and so presupposed the existence of precisely the moral law it was intended to explain.30 This did not mean that Kant was led to deny the rationality of belief in God as such. To be sure, he did not accept that reason was competent to provide a theoretical demonstration of God's existence. Nevertheless, he was able to argue that the idea of God, and the faith in God that informed the religious disposition, were capable of being understood and explained from the perspective of the moral consciousness as it was constituted through reason in its practical form.31 This, essentially, was the position Kant expounded in his treatise *Religion within the Limits of Reason Alone* (1793; 2nd edition, 1794),32 where he sought to explain the respects in which morality led inevitably to religion.33

The emphasis Kant placed on the categorical imperative in the examination of the nature of practical reason is indicative of what he considered to be a fundamental truth about human morality. This was that the essence of morality consisted in the human agent being able to obey a law which he gave to himself through the exercise of his own will and reason. In Kant's view, those conceptions of morality that appealed to the actual constitution of human nature, or to the will of a perfect divine being, as their foundation were conceptions of morality which presupposed what he called the *heteronomy of the will.* By the heteronomy of the will Kant meant the idea of the will as conditioned by, and subject to, causes that remained external to the will and reason of the human agent. In this sense, the idea of the heteronomy of the will involved the idea of the will of an agent who acted not in conformity with practical maxims that were capable of promulgation as universally valid laws which related to the ends of conduct, but in conformity with practical maxims whose observance was understood to promote the realization of some extrinsic end or object of the will. Accordingly, the conceptions of morality that presupposed the heteronomy of the will, as their foundation, were conceptions of morality whose constitutive principles were to be explained as practical principles possessing the form of hypothetical imperatives. Such conceptions could not, however, be thought of as conceptions of morality whose constitutive principles were practical principles possessing the form of the categorical imperative.34

Opposed to the idea of the heteronomy of the will, there was what Kant called the *autonomy of the will.* By this Kant meant the idea of the will as unconditioned by any cause or causes external to itself. Hence, the idea of the autonomy of the will involved the idea of the

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will of an agent who remained bound by, and subject to, only such restrictions on conduct as were given in laws that proceeded from his own will and reason. For Kant, the autonomy of the will stood as the supreme principle of morality. This was so in the sense that the autonomy of the will was understood to be a principle given in, and indeed required by, the very conception of the categorical imperative itself. Thus in the explanation Kant provided of it as the supreme principle of morality in the *Fundamental Principles of the Metaphysic of Morals,* the autonomy of the will was pointed to as a condition essential to the possibility of there being a procedure of practical reason capable of resulting in the promulgation of universal laws of conduct. At the same time, the principle of autonomy was explained as a principle of morality that was itself commanded through the categorical imperative. As Kant put it:

> Autonomy of the will is that property of it by which it is a law to itself (independently on any property of the objects of volition). The principle of autonomy then is: Always so to choose that the same volition shall comprehend the maxims of our choice as a universal law.... [T]hat the principle of autonomy in question is the sole principle of morals can be readily shown by mere analysis of the conceptions of morality. For by this analysis we find that its principle must be a categorical imperative, and that what this commands is neither more nor less than this very autonomy.35

Kant's discussion of the autonomy of the will was such as to bring him to address the metaphysical question of the freedom of the will. In addressing the question, he set out a solution to the problem which he had posed with his statement of the third antinomy of pure reason. This was the problem of the contradiction between freedom, considered as a distinct form of causality, and determinism, considered as causality in accordance with the laws of nature.

In its essentials, Kant's answer to the problem consisted in the argument that practical reason, and the conditions for its exercise, were such that the human agent could conceive of himself and his own actions only in accordance with the idea or presupposition of freedom. That is to say, the nature of practical reason, and of the categorical imperative towards the formulation of which the exercise of practical reason pointed, were such as to demand that the human agent should think of himself as subject to laws of freedom whose origin and determining ground lay in his own autonomous will and reason, and hence as being, in this respect at least, exempt from the

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mechanical laws of cause and effect that applied to him in his status as part of the order of the natural universe. Kant's argument for the reality of freedom is crucially important in grasping the links between his analysis of human practical reason and his examination of the foundations of human knowledge. For it is here that is brought out how the idea of the categorical imperative, and the principle of autonomy it presupposed, were appealed to by Kant to explain, from the standpoint of practical reason, the element of truth in those metaphysical ideas which, in the *Critique of Pure Reason,* he had claimed could not be made good from the perspective of the human understanding.36

Central to Kant's ethics was the theory of the categorical imperative. The special relevance of the theory for the concerns of the present volume lies in the connection it served to establish between the concept of morality and the ideas of human freedom and human equality. Kant's discussion of the categorical imperative was informed by the conviction that moral freedom consisted in the agent obeying some law which originated in his own will and reason. This conviction comes out most clearly in Kant's insistence that the autonomy of the will was the supreme principle of morality, in the respect that it was a condition for the exercise of practical reason issuing in the promulgation of universally valid laws of conduct. For Kant, of course, a universal law was a law that applied to all rational beings equally and without exception, and thus a law that was not only grounded in the principle of freedom but also one that gave meaning and effect to the principle of equality as between the beings who were subject to it. In its status as the condition for the generation of universal laws of conduct, therefore, the principle of the autonomy of the will bore directly on the ideas of freedom and equality, as these are to be found linked together under the terms of the categorical imperative. As we shall now see, it was as an ethics affirming the values of freedom and equality that Kant's analysis of practical reason, and the theory of the categorical imperative which was its result, provided the framework for his exposition of the first principles of political society and the state.

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2 Kant's Political Philosophy

The most complete statement Kant gave of his political philosophy comes in *The Metaphysical Elements of Justice*. In this work, Kant expounded a comprehensive theory of law, state and government. This theory was based in certain general principles of justice and morality that followed from the principles of practical reason which Kant saw as given in the idea of the categorical imperative. The underlying normative principles that Kant appealed to in explaining the bases of law, state and government are to be found set out in the preliminary section of *The Metaphysical Elements of Justice* entitled 'Introduction to the Elements of Justice'. The substance of the argument of *The Metaphysical Elements of Justice* is set out in the main section of the work, which is entitled 'The General Theory of Justice'. In the first part of 'The General Theory of Justice', Kant explained the principles of private law. In the second part, he explained the principles of what he identified as the three basic forms or parts of public law, these being municipal law, the law of nations, and world or cosmopolitan law. In the section of the second part of 'The General Theory of Justice' that is devoted to discussion of municipal law, Kant addressed such concerns central to political philosophy as the constitutional order of the state, the basis of its sovereignty, and the rights and powers of civil government.

When placed in the history of political philosophy, the argument of *The Metaphysical Elements of Justice* must be considered in relation to the theories of natural right expounded in the seventeenth century by thinkers like Hobbes and Spinoza. These theories occupied a central position in the modern secular natural law tradition in moral, legal and political thought that established itself in Europe during the seventeenth and eighteenth centuries. In the discussion of *Perpetual Peace* that comes in Chapters 3-6, it will be argued that Kant diverged from the secular natural law tradition in the explanation he provided as to the normative foundations of the law he saw as making for peace between states. At the same time, it will be argued that Kant followed Hobbes in assuming that war was to be thought of as the natural condition of the relations obtaining among states in the international sphere. As we shall see in the present

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chapter, Kant also followed Hobbes in much of what he had to say about the origin of the civil state, and about the rights and powers belonging to it.

2.1 HOBBES'S CIVIL PHILOSOPHY

Hobbes was the greatest of the seventeenth-century natural rights theorists. The definitive statement of his politicalor *civil*philosophy is to be found in *Leviathan* (1651).1 This work stands as a seminal contribution to the development of modern political thought. The modernity of Hobbes as a political theorist is reflected in the radicalism with which he called into question the assumptions underlying the philosophy of natural law in the form in which it had emerged in Europe during the classical and medieval periods. The origins of the pre-modern tradition of natural law go back to the work of such leading thinkers of the classical age as Plato and Aristotle, the Stoic philosophers and the theorists of Roman law. The development of the tradition continued into the Middle Ages, when it became bound up with the teachings of the Church. The culmination of the tradition came in the thirteenth century, with the synthesis of classical Aristotelian philosophy and Christian theology embodied in the work of St Thomas Aquinas (1224/5-74).

The pre-modern tradition of natural law philosophy was distinguished by certain quite specific ideas regarding the individual and his relation to society and the state. One idea distinctive to the tradition was that the state was based in, and instituted in accordance with, what was understood to be the objectively given order of nature. Another was the idea that association in society and the state was natural to man in his status as a rational being. Then again, there was the idea that the state was an essentially moral form of human association, whose justification lay in its promoting the common good and so providing conditions for the realization by the individual of the ends of the good life within an organized community. Still further, there was the idea that the state was prior to the individualan idea that carried with it the implication that the state exercised a direct and naturally sanctioned authority over the individuals who comprised it. These ideas were central to the political thought of Aristotle, and everywhere inform the argument of his *Politics.*2So also do they inform Aquinas' writings on law, the state and civil government.

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The substance of Aquinas' political thought is to be found in the defence of monarchical government set out in the treatise *De Regimine Principum,*[3]and in the discussion of the principles of law and justice in the work that is his crowning achievement as a philosopher: the *Summa Theologiae* (c. 1265-73).[4] Aquinas followed Aristotle in assuming that man was by nature a social and political animal, and hence that the individual could fulfil his naturally determined destiny only through participation in a political order established for the common good.[5] Where he went beyond Aristotle was in the systematic treatment he gave to the concept of law in explaining the foundations of political society and the state.

In the examination of the concept of law in the *Summa Theologiae,* Aquinas treated of four distinct forms of law. These were the eternal law *(lex aeterna),* natural law *(lex naturalis),* human law *(lex humana),* and divine law *(lex divina).* The eternal law embodied God's conception of the ultimate end of the created universe, and so stood as the ultimate metaphysical ground of all the other forms of law.[6] The natural law was that part of the eternal law which was transparent to human reason, and which thus reflected the degree of participation, or sharing, in the eternal law appropriate to man as a rational being.[7] Human law was law made by men for their self-government in society. Its essential form was the civil law, this being the law laid down for the common good in a city or state through the command of the ruler thereof.[8] Divine law was the law laid down in the word of God as revealed in the Scriptures, and was to be thought of as supplementing the natural law in providing guidance for human beings as to the meaning of the eternal law.[9]

For Aquinas, the basic principles of human association in society and the state, and the principles of the common good maintained therein, were given in the natural law. In explaining the natural law, Aquinas argued that the natural law comprised certain universal principles of practical reason. These principles related to the fundamental human goods, and to the naturally determined tendencies and inclinations of human beings to pursue these goods and to avoid what was contrary to them. Thus, the natural law had application to the natural inclinations, like the inclination to self-preservation, which human beings shared with all other substances. Here, the natural law comprehended the practical principles whose observance was conducive to the defence and maintenance of human life. Other practical principles included in the natural law were those based in the inclinations which human beings shared with other animals, such

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as the inclination of men and women to join together for the producing and nurture of offspring. Finally, the natural law related to the inclinations to pursue goods such as the knowledge of God, and association in society, which were unique to human beings by virtue of their rational nature. Hence, the natural law included such firstorder practical principles as those requiring men to avoid ignorance, and to avoid doing harm or injury to one another.10

In specifying association in society as a human good and describing the practical principles that ordered the inclination of men to pursue this good, the natural law constituted the normative foundation of the civil state and the underlying ground of justification for the subjection of the individual to the authorities established therein. Thus it was the natural law, and so indirectly the eternal law of which natural law was an expression, that Aquinas saw as founding the laws laid down by rulers for the common good of men in political society. According to Aquinas, natural law stood as the basis for the derivation of human laws.11 The natural law was also the measure of the justice of human laws. This was so in the sense that the justice of human laws was understood to depend on their conformity with or lack of significant deviation from natural law.12

The conditions that Aquinas saw as securing the justice of human laws related to their end, their authority and their form. Thus, human laws were to have the common good as their object, they were to be enacted in accordance with the powers belonging to the law-makers, and the burdens they imposed were to be distributed in equitable proportion as between the different members of the communities in which they were in force. When these conditions were satisfied, then human laws were in accord with the eternal law as the ultimate ground of natural law, and were therefore to be considered as imposing an obligation of compliance with their terms which was strictly binding in conscience.13 In this way, the natural law stood as the foundation for the duty of obedience to the laws laid down by the civil ruler, and so also as the foundation for the obligation falling on the individual to act in conformity with what Aquinas saw as the order of justice maintained through the laws of the community for the furtherance of the common good. 14

Hobbes broke decisively with the pre-modern tradition of natural law. He did so in the respect that he did not assume that the basis of human association in the civil state could be adequately described, and explained, in terms of principles of law, authority and obligation that were understood to be given directly in the condition of the

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society formed by nature among men. For Hobbes, the basis of political society was also to be explained in terms of the idea of a voluntary act of agreement on the part of the individuals who comprised it, and in terms of the principles of law, authority and obligation that were understood to derive from this act. Hobbes adopted this voluntaristic view of political society because, in contrast to thinkers like Aristotle and Aquinas, he did not assume that the condition of association in society and the state was the natural condition of the relations among men. On the contrary, he insisted that the natural condition of the relations among men was that of a state of war. In this natural state of war, each individual was understood to have a right to all things. This was so in the sense that, in the state of war, the individual was understood to possess the right and the liberty to do, and to take, whatever was necessary to defend and preserve his person to the extent of his strength and power.

As Hobbes explained it in Chapter 13 of *Leviathan,* the natural state of universal war stood in absolute opposition to the form of society obtaining among men that was to be found in the civil state. Thus, the natural state of war was distinguished by the absence of any power providing effective government, and by the absence of proper security for the person. It was also distinguished by the absence of settled rules of law for determining the principles of just and unjust conduct, and the principles governing the possession of property.

> Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man.
>
> Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withal.
>
> To this war of every man, against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice.... It is consequent also to the same condition, that there be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can keep it.15

Hobbes's view of the state of nature as a state of war marks a crucial departure from the Aristotelian-Thomist tradition in natural

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law philosophy. However, this does not mean that Hobbes rejected the idea of natural law as such. In fact, he made explicit appeal to principles of natural law in describing the origin and foundation of political society and the state. Thus, in *Leviathan,* he stated nineteen laws of nature, which, as he explained them, were laws that were disclosed to the natural reason of men as the fundamental articles, or principles, of peaceful association.16 As the laws of peace, the laws of nature embodied principles of conduct whose acceptance by men Hobbes saw as the condition for the ending of the natural state of war. Hobbes was apt to describe the laws of nature as being not laws in the proper sense, but mere conclusions of reason concerning what made for the peace and security of men.17 However, he still very clearly included the laws of nature in his classification of the different parts of law.18 He also regarded the laws of nature as possessing much of the sort of binding normative force that he saw as distinctive to law. So, crucially, he held that the laws of nature were strictly binding on men in conscience *(in foro interno).* This was so even though, as he emphasized, the laws of nature were to be thought of as binding in effect *(in foro externo)* only where there existed the security of a common power to ensure that men would act in compliance with their requirements.19

While Hobbes made full appeal to the idea of natural law, he broke with the tradition of Aristotle and Aquinas in the matter of what he took the essential requirements of natural law to consist in. For Aquinas, the natural law had comprised practical principles whose observance by men was necessary for the realization of the ends of the common good in society and the state. For Hobbes, however, the natural law comprised principles of conduct that men were to observe in the exercise of the right that belonged to them by nature, and to do this for the end of securing their own self-preservation as sanctioned by natural right. The view Hobbes took of natural law is brought out in the distinction he drew, at the beginning of Chapter 14 of *Leviathan,* between the idea of the right of nature and the idea of a law of nature.

> THE RIGHT OF NATURE, which writers commonly call *jus naturale,* is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.

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> By LIBERTY, is understood, according to the proper signification of the word, the absence of external impediments: which impediments, may oft take away part of a man's power to do what he would; but cannot hinder him from using the power left him, according as his judgment, and reason shall dictate to him.
>
> A LAW OF NATURE, *lex naturalis,* is a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to con*found jus,* and *lex, right* and *law:* yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbear: whereas LAW, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty; which in one and the same matter are inconsistent.20

Central to Hobbes's argument, here, is the contrast between the concept of a right and the concept of a law. Thus, a right Hobbes defined as the liberty or freedom of the individual to act without being subject to external constraint or restriction. As for the right of nature *(jus naturale),* this was the liberty of each individual to use his own power to act to preserve himself and his life, by such means as he determined through his own judgment and reason. A law, by contrast, Hobbes defined in terms of the idea of an obligation imposing an external constraint or restriction on the natural right and liberty of the individual. As for a law of nature *(lex naturalis),* this was a general principle or rule that bound the individual to refrain from doing that which was destructive of his life and the means for its preservation. Considered in accordance with his definition of law, therefore, a law of nature for Hobbes was essentially a principle or rule that imposed a constraint or restriction on the exercise of the natural right and liberty of the individual, where the observance of this constraint or restriction was necessary as a condition for the preservation of the individual and his life.

The nineteen laws of nature stated in *Leviathan* were understood by Hobbes to stand as the basic principles of peace, and hence as the principles stipulating the basic conditions of social order essential for the mutual defence and preservation of men. Of the nineteen laws of nature, the first, second and third occupy a central position in the argument of *Leviathan.* The first law of nature provided that each individual should endeavour peace whenever there existed a

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reasonable hope of obtaining it. This requirement was qualified by the proviso that when peace was not to be obtained, then the individual should continue to exercise his natural right to act in his own defence as though in a state of war.

> [I]t is a precept, or general rule of reason, *that every man, ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war.* The first branch of which rule, containeth the first, and fundamental law of nature; which is, *to seek peace, and follow it.* The second, the sum of the right of nature; which is, *by all means we can, to defend ourselves.*21

The second law of nature followed directly from the first. This law required that each individual should be prepared, when others were too, to lay down the right that belonged to him by nature, and to rest content with as much liberty regarding others as he would allow others to have regarding himself.

> From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law; *that a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.* For as long as every man holdeth this right, of doing any thing he liketh; so long are all men in the condition of war.22

In Hobbes's view, the laying down by men of their natural right, as required by the second law of nature, could take place only through some voluntary act on their part. The essence of this act was not the renunciation of right, but the mutual transference of it by men to some other person or persons.23 The form of the act was that of a type of contractual agreement that Hobbes termed *pact* or *covenant.* As he explained it, a covenant was an agreement where the parties trusted one another to fulfil its terms. Hence, covenants involved the keeping of promises, or faith, and, where not performed, the violation of faith.24

Hobbes's identification of covenanting, as the form of agreement through which men were to be thought of as laying down their natural right, led directly to what he stated to be the third law of nature. This law provided that men were to abide by the terms of the covenants they had entered into.

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> From that law of nature, by which we are obliged to transfer to another, such rights, as being retained, hinder the peace of mankind, there followeth a third; which is this, *that men perform their covenants made:* without which, covenants are in vain, and but empty words; and the right of all men to all things remaining, we are still in the condition of war.25

So formulated, the third law of nature expressed the fundamental principle of justice.

> And in this law of nature, consisteth the fountain and original of JUSTICE. For where no covenant hath preceded, there hath no right been transferred, and every man has right to every thing; and consequently, no action can be unjust. But when a covenant is made, then to break it is *unjust:* and the definition of INJUSTICE, is no other than *the not performance of covenant.* And whatsoever is not unjust, is *just.*26

It was in terms of the idea of covenant referred to in the second and third laws of nature that Hobbes explained how men were able to abandon the natural state of war, and to secure their mutual defence and preservation within a fully political form of society. This form of society was the civil state, or commonwealth. According to Hobbes, a commonwealth existing by what he called institution was to be thought of as being brought into being through an act of covenant. Essential to the covenant through which Hobbes saw the commonwealth as being instituted was an act of mutual agreement among a number or multitude of men. By the covenant, each man was understood to agree to give up the right to govern himself according to his own will and judgment, and to transfer this right to some man or assembly of men who would bear the person of all those party to the covenant, and use their combined strength and power for their peace and common defence. The man or assembly of men so established was the sovereign of the commonwealth, with the parties to the covenant being the subjects of the sovereign. The status of the sovereign was that of a representative person, whose authority derived from the will and consent of his subjects as this was embodied in the covenant through which the commonwealth was instituted.27

As Hobbes explained it, the covenant instituting the commonwealth was an act which marked the decisive abandonment by men of the natural state of war obtaining among themselves. This was so in the respect that the agreement to institute the commonwealth involved

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the subjection of the parties to it to a common sovereign power. The establishing of this power brought into being a condition of society which provided for the effective enforcement of the principles of peace stipulated in the laws of nature. So also, of course, did it bring into being a condition of society where there existed the degree of security which, in Hobbes's view, was necessary if there was to be a real and external obligation on men to act in compliance with the normative requirements given in the natural law. In this way, the institution of the commonwealth, with a sovereign power established therein, stood for Hobbes as the essential precondition for covenants being binding in effect, and hence as the essential precondition for there being binding rules of justice and propriety, as these had their basis in the law of nature requiring men to perform covenants made.28

The power belonging to the sovereign was exercised through certain rights and faculties of sovereignty. These rights and faculties derived from the covenant through which the commonwealth was instituted, and belonged to the sovereign because, under the terms of the covenant, the sovereign was authorized to act to the end of securing the peace and defence of the commonwealth. As Hobbes stated them in *Leviathan,* the rights and faculties of sovereignty served to establish the absolute authority of the sovereign with regard to his subjects. Hence, the rights of sovereignty were such that the subjects of a commonwealth were not permitted to change the sovereign, or to claim that the sovereign had forfeited his power on the ground of some alleged breach of the covenant instituting the commonwealth. Nor could subjects rightfully accuse the sovereign of injustice against them, or seek to inflict punishment upon him.29 As the bearer of an absolute authority, the sovereign was the sole judge of the means necessary to preserve the peace and security of the commonwealth. So, for example, the sovereign had the right to judge and regulate all opinions and doctrines, and to determine which were conducive to the maintenance of peace and thus fit to be taught among subjects.30

Foremost among the rights of sovereignty that Hobbes identified were those relating to the legislative, judicial and executive powers of government. Thus, the sovereign had the right to prescribe the rules of propriety and just conduct that were to be observed by subjects. The rules prescribed, or commanded, by the sovereign in his capacity as legislator were the civil laws, these being the laws specific to commonwealths.31 In consequence of possessing the right of lawmaking, the sovereign possessed also the right of judicature. This was the right of hearing and deciding all controversies among subjects

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concerning matters that related to the civil law and the laws of nature, and concerning matters of fact.32 As for the executive powers of government, the sovereign held the right of making war and peace with other nations and commonwealths, and of raising and maintaining armed forces for the defence of the commonwealth. Again, the sovereign had the right to choose and appoint all counsellors, ministers and other officials of the commonwealth in both peace and wartime. So also did it fall within the rights of the sovereign to reward subjects, and to punish subjects for breaches of the lawor, where no law existed, to inflict punishment for the purpose of encouraging subjects to serve the commonwealth and deterring them from doing disservice to it.33 The various rights of sovereignty were indivisible,34 and their possession by the sovereign was essential to the maintenance of the commonwealth in its integrity and independence.35

2.2 ROUSSEAU

With his specification of the rights of sovereignty, Hobbes effectively described the basic structure of the constitutional order of the modern European state. It was with this constitutional order, and the principles of its justification, that later political philosophers up to Kant and beyond were concerned. One of the most notable political philosophers coming between Hobbes and Kant was Rousseau. Central to Rousseau's contribution to political thought was the theory of sovereignty he expounded in his seminal work *The Social Contract* (1762).36 According to this theory, sovereignty was understood to belong to the whole body of the people that formed the state. The essence of the sovereign power that belonged to the people was a legislative or lawmaking power, with the basis for its exercise lying in what Rousseau called the general will. The latter was the will of the community that the people formed through their association in the state. The laws established in accordance with the general will were the expression of the sovereignty of the people, and, as such, set the conditions for their rights and their freedom both as a people and as individuals.

As Rousseau explained it in Book 1 of *The Social Contract,* the general will was brought into being through the social contract that he saw as marking the transition made by men from the state of nature to the condition of political society. Essential to the act of contract founding political society was the total and unconditional alienation by each individual to the community of the rights and freedom that

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belonged to him in his natural condition, and, with this, the submission by each individual to the supreme direction of the general will which was embodied in the community and through which the community acted as a single person or entity. The form of association established through the social contract was the republic or body politic. In its passive condition, the body politic was the state, in its active role a sovereign, and in relation to other like associations a power. The individuals associated together in the state, considered in their collective aspect, were the people. When considered as individuals, they possessed the status both of citizens and subjects: citizens, in the respect that they shared in the sovereign power whose basis lay in the general will, and subjects in the respect that they were bound in obedience to the sovereign and to the laws of the state that issued from the sovereign.37

The laws that issued from the sovereign defined the public interest of the state. It was to this public interest that the general will of the community was directed.38 Given that the object of the general will lay with laws defining the public interest of the state, there existed the possibility, as Rousseau recognized, that the general will of the community might be at odds with the will and private interests of an individual member of the community. In this case, it was permissible for the individual to be constrained to conform his will to the dictates of the general will. For in being so constrained, the individual would, as Rousseau put it, be no more than forced to be free.39

In writing of the individual coming to freedom through being constrained to conform with the general will of the community to which he belonged, Rousseau gave particularly strong expression to how he conceived of the freedom that men attained through their membership of the state. For Rousseau, the attainment of freedom by the individual presupposed his being a party to the contract founding political society, and hence his entry into the state and subjection to the laws established in accordance with the general will of the people that formed it. To be sure, Rousseau accepted that men possessed liberty in their natural condition. The liberty that belonged to men in the state of nature, as Rousseau explained it, was a form of liberty where the individual had an absolute right to take whatever he desired and was capable of holding. However, the natural liberty of the individual was limited by the extent of his physical power, whereas that which the individual desired and took was held by him only through possession based in force or in the right of first occupation. The terms of the contract founding political society, as Rousseau

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described them, were such as to involve the renunciation by the individual of his natural liberty and right, in exchange for freedom in the form in which it existed in the state. This form of freedom was civil liberty, the essence of which was that it was liberty that was not limited by the physical power of the individuals who held and exercised it, but liberty that was limited by the general will of the community, and hence also by the laws that derived from the general will. So, for example, the liberty of men in the state was such that the holdings of individuals were not mere possessions based in force or the right of first occupation, but personal property based in a lawful title.40

The laws that limited the liberty of men in the state were laws which, in deriving from the general will of the people, embodied the sovereign will of the people. For Rousseau saw sovereignty as belonging to the people, and as a power that was to be exercised in accordance with the general will through which the people acted collectively as a united citizen-body. The view that Rousseau took of sovereignty is plainly opposed to the one that Hobbes had argued for. Hobbes had defined sovereignty in terms of certain rights which, while brought into being through the covenant he saw as instituting political society, were nonetheless rights that could be held and exercised only by the representative person or persons who ruled the commonwealth. Rousseau, however, maintained that the rights of sovereignty belonged to the people that formed the state. Hence, he insisted that the sovereignty belonging to the people was inalienable, and that the people, as a collective sovereign acting through the exercise of their general will, could be *represented* by no one other than themselves.41

It is because Rousseau saw sovereignty as belonging to the people that he very clearly distinguished (as Hobbes had not) between the sovereign power in the state and the institutions of government in the state. Thus in the discussion of government in Book 3 of *The Social Contract,* he emphasized that whereas the sovereign power that belonged to the people was a power of legislation, the power of government was an executive power which could not properly belong to the people as sovereign.42 As Rousseau explained it, government was the agent of the people, in the respect that it was the power which was to give effect to the will of the people, and which, for this reason, was to be thought of as bound by the laws that derived from their will. The status of government, for Rousseau, was therefore that of an intermediary body placed between the people as sovereign and the people as subjects of the laws, and having responsibility for the

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execution of the laws and the maintenance of the conditions of freedom in the state.43

Since government was an intermediary body in this sense, it was necessary for the good order of the state that the different powers in the state should be maintained in proper equilibrium. Thus it was essential that the legislative power belonging to the people as sovereign should remain separate from the executive power belonging to the magistrate as the governor of the state. So also was it essential that the people in their status as subjects of the state should actually obey the laws and the government. As Rousseau put it:

> If the sovereign seeks to govern, or if the magistrate seeks to legislate, or if the subjects refuse to obey, then order gives way to chaos, power and will cease to act in concert, and the state, disintegrating, will lapse either into despotism or into anarchy.44

Rousseau's claim that the sovereign power that belonged to the people was a legislative power, rather than a power of government, was intimately bound up with an argument he advanced in Book 2 of *The Social Contract* regarding law as the concern of the general will. This was the argument that the general will was directed to laws, considered as a subject-matter possessing the measure of generality, or universality, appropriate to the character of the will in accordance with which sovereignty was to be exercised by the people. Thus Rousseau insisted that the general will could not be made to have application to particular objects, such as specific individuals or specific actions, without this meaning that the general will ceased to be general with respect to the whole people that formed the state. The laws established in accordance with the general will of the people were laws which applied to the people as a whole, and which therefore had reference to all the individuals who were subjects of the state in a collective sense, and to their actions in an abstract sense. As for particular objects of will, such as specific individuals or specific actions, these, for Rousseau, could not be a proper subject-matter of laws, but only of commands having the status of acts of government.45

This argument of Rousseau's underlines that it was law, rather than the institutions of government, which he considered to establish the fundamental conditions of association among men in political society. For the argument underlines that he saw law as the basis of the authority for the exercise of all governmental powers in the state. Rousseau's view of law as the foundation of state and government is

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crucial in understanding the sense in which he conceived of government as being the agent of the people. For in accordance with his theory of sovereignty, the laws maintained in the state, as embodying the basis and framework for all acts of government therein, were not only laws which he held were to be thought of as binding on those exercising the powers of government. Much more strongly, they were laws which the people had to be thought of as determining for themselves through their own will and authority. Indeed, Rousseau was quite explicit that laws set the conditions for the existence of political society, and that a people, since subject to laws, should also be their authors.

> Laws are really nothing other than the conditions on which civil society exists. A people, since it is subject to laws, ought to be the author of them.46

Rousseau did not claim that the people were competent to determine the laws of the state through the direct exercise of their legislative power. As he noted:

> By themselves the people always will what is good, but by themselves they do not always discern it. The general will is always rightful, but the judgement which guides it is not always enlightened.47

Hence it was necessary that there should be a lawgiver, whose function in the state would be to formulate the laws by which the people were to be governed. Nevertheless, Rousseau emphasized that the lawgiver was not to possess a right of legislation. For the right of law-making belonged only to the people, and was untransferable even by the people themselves.48

There was nothing intrinsically original about Rousseau's insistence that the people that formed the state were to be thought of as the authors of the laws to which they were subject. After all, Hobbes had assumed that men associated together in a commonwealth were authors of the laws that bound them therein. However, he had assumed this in the respect that he had held that the subjects of the commonwealth were parties to the covenant instituting it, and, by virtue of this act of association, the authors of the representative person of the sovereign who exercised the right of law-making on their behalf.49 For Hobbes, then, the laws maintained in the state were based in the will and authority of the individuals who formed it in nothing more than an indirect sense. That Hobbes saw the basis of the

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authority of laws in this way explains why he described the liberty belonging to the subjects of the commonwealth in largely negative terms, and so as consisting essentially in the absence of legal constraints imposed by the sovereign. Thus, as he put it in *Leviathan,* the greatest liberty of subjects depended on the silence of the law:

> In cases where the sovereign has prescribed no rule, there the subject hath the liberty to do, or forbear, according to his own discretion.50

Rousseau moved beyond Hobbes because he affirmed that the liberty belonging to men in the civil state consisted in very much more than their mere freedom from legal constraints. In Rousseau's explanation of it, the freedom that belonged to men in the state presupposed their subjection to laws, since laws were the condition for the securing of the rights and property of men. However, men associated together in the state were still to be thought of as free, and free through the very fact of their dependence on laws. This was so, for Rousseau, because he held that the laws that were binding on men in the state in their capacity as subjects were, at the same time, laws which they were to be thought of as having prescribed to themselves as citizens who shared in the sovereign power in the state. Indeed, the freedom that Rousseau saw as coming to men through their being bound in obedience to laws that they prescribed to themselves was the essence of the moral freedom which, as he claimed, individuals gained through entering into political society.51 It was precisely to account for the basis of this positive form of freedom that Rousseau constructed a theory of sovereignty according to which the will and authority to make laws in the state were understood to belong not to a representative person, but to the collective body of the people that comprised the state.

2.3 KANT: NATURAL RIGHT, JUSTICE AND COERCION

The influence of Rousseau is everywhere apparent in Kant's political writings. This is true particularly of the view Kant took as to the nature and location of the sovereign power in the state. It is true also with regard to Kant's emphasis on the universal form of the laws applying to men in the state, and with regard to the emphasis he placed on law as the precondition for the freedom of men in political society. However, while it is clear that Kant was much influenced by

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Rousseau, there remain crucial respects in which his political thought must be linked with that of Hobbes. One respect in which this is so concerns the appeal he made to the idea of natural right in his explanation of the bases of political society and the state.

In the 'Introduction to the Elements of Justice' in *The Metaphysical Elements of Justice,* Kant drew a fundamental distinction between the idea of an *innate right* and the idea of an *acquired right.* An innate right Kant defined as a right that belonged to human beings by nature independently of any juridical act. An acquired right, by contrast, was a right which presupposed some juridical act through which it was created or conferred. In Kant's view, there existed only one right which every human being could be thought of as possessing by nature. This was the innate natural right of the human being to freedom, where freedom was understood to consist in independence from the constraints imposed through the will of some other person or persons.52

Hobbes had defined the right of nature in terms of the liberty or freedom of the individual, and explained this natural liberty or freedom as consisting in the absence of external constraint or restriction. However, Hobbes had also argued that the exercise by the individual of his natural liberty under conditions of peace and security demanded that the individual should accept such limitations on his liberty as would guarantee the liberty and freedom of all men in equal measure. This, indeed, was the essential meaning of the requirement laid down in the second law of nature stated in *Leviathan.* Kant took much the same position as Hobbes had done as to the necessity that the freedom of the individual should be limited in such a way as to secure the equal freedom of all. Thus he maintained that the innate natural right of freedom was subject to one crucial limiting condition. This was that the exercise of freedom by the individual was to be such that it remained consistent with the freedom of everyone else in accordance with the constraints of a universal law. It was in these terms that Kant defined freedom as a right belonging to each human being by virtue of his human nature.

> Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.53

The condition that Kant saw as limiting the exercise of the innate natural right of freedom carried important implications for the prin-

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ciples of human association in political society. For in stating the condition as he did, Kant implied that the only restrictions that might legitimately be placed on the freedom of the individual were restrictions possessing a foundation, and justification, in laws which were universally binding on all the persons to whom they had application. Kant himself confirmed this as an implication of the condition he saw as limiting the exercise of freedom with his statement of the various moral rights he took to be given in the idea of the innate natural freedom of men. Thus, the first of these rights was that of innate equality. This was the right of the individual to equality of treatment, where this meant that the individual was to be thought of as being bound to do by others only that which he was able to bind them to do on a reciprocal basis. Then again, there was the right that belonged to the individual by virtue of his being his own master, and hence an irreproachable man. What this meant, as Kant explained it, was that, prior to some juridical act, the individual could not rightfully be held to have done injustice to any other person or persons.54

For Kant, then, the innate natural right of men to freedom implied the necessity that they should be subject to universal laws. That Kant saw the natural right of men to freedom as giving rise to the necessity of their being bound by universal laws is underlined by what, prior to his discussion of innate and acquired rights, he had identified as the foundational principle of political morality. This principle Kant called the *universal principle of justice*. The principle was stated as follows:

> Every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law.55

As stated, the universal principle of justice obviously conforms, in its essential meaning, with the principle of universalizability that Kant laid down as the first formulation of the categorical imperative. That said, it must be emphasized that, in his ethical writings, Kant's concern with the categorical imperative lay in explaining the formal conditions necessary for the promulgation of universally valid laws of morality. With the universal principle of justice, by contrast, Kant was concerned to explain how the practical requirements stated in universally valid moral laws could be legitimately enforced through the application of external coercion. As we have seen, one idea essential to the doctrine of the categorical imperative was the idea that the moral law was a law that the agent was to conform with for the sake

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of the duty or obligation the law imposed. However, this was not an idea to which Kant appealed in his explanation of the universal principle of justice. Certainly, Kant admitted that the principle imposed an obligation on the individual to make the exercise of his freedom consistent with the freedom of all according to a universal law. Nevertheless, he was quite clear that the universal principle of justice gave rise to no requirement that the individual should restrict the exercise of his freedom for the sake of the obligation the principle stipulated.56

Accordingly, Kant did not seek to explain the universal principle of justice in terms of the consciousness of obligation on the part of the persons to whom the principle was assumed to have application. For Kant, the universal principle of justice was explained as a principle that presupposed the existence of external means to compel men to comply with what justice required. Hence, he argued that the idea of justice was inseparably bound up with the idea of the authorization to use coercive force against anyone who violated justice and the rights it secured. Indeed, he insisted that justice, in its strict sense, was to be understood as depending on the principle of the possibility of a general use of external coercion that could be made consistent with the freedom of all in accordance with universal laws.57

The connection that Kant argued for between justice and the possibility of a right of external coercion in *The Metaphysical Elements of Justice* was more or less the one that Hobbes had argued for. Hobbes had maintained that if men were to be bound to observe the natural laws of peace, and so bound to observe laws stipulating effective rules of justice and propriety, then this required that they should submit to some common power possessing means of coercion sufficient to compel them to perform the obligations stated in these laws. The establishing of such a common power had been taken by Hobbes to mark the essential step in the abandonment by men of the natural state of war and their entry into the civil state. So also had he taken the establishing of a common power in the civil state to presuppose the consent of those who submitted to it, in the sense that it was a power which was to be explained as originating in an act of covenant. In all of this, Hobbes was followed very closely by Kant. First, Kant assumed as fundamental an opposition as Hobbes had done between the state of nature and the civil state. Second, he followed Hobbes in assuming that the state of nature was to be distinguished from the civil state by virtue of the existence in the latter of laws of just conduct that were supported by a coercive power. Third, he insisted that the transition

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from the state of nature to the civil state, and the establishing of a coercive power to enforce the laws of justice, could be explained only in terms of the idea of a contractual agreement.

2.4 KANT ON THE STATE OF NATURE

For Kant, as for Hobbes before him, the state of nature was the condition of society in which individual men were to be thought of as co-existing prior to the founding of political society. In Kant's account of it in 'The General Theory of Justice' in *The Metaphysical Elements of Justice,* the state of nature obtaining among individual men was not as such a state of war. It was, however, a condition of society in which men could possess no security against being done violence by one another. For in the state of nature, the individual was entitled as of right to act in accordance with his own partial judgment as to what was just and good for him, and to do this without regard for any judgment made by others. Hence, Kant argued that it was required in justice that the individual should abandon the state of nature, and unite with all others with whom he came into contact in a form of society wherein there existed a power of public lawful external coercion. This meant that it was required that the individual should enter with others into civil society. For civil society was a condition of society where that to which the individual had rights was given recognition in laws, and secured to him not through his own power but through the agency of an external power.

In Kant's view, the establishing of a condition of society in which there existed the means of public lawful external coercion was a matter of necessity. However, it was a necessity based in an idea of reason whose validity was independent of any factual premises regarding the tendencies of men to do violence to one another prior to the establishing of public laws. Thus, Kant emphasized that the state of nature was not necessarily a condition of injustice, where men acted towards one another solely according to the power at their disposal. Nevertheless, he did insist that the state of nature was a condition of society that remained devoid of justice. For the state of nature was a condition of society where, in disputes among men concerning their rights, there was present no judge empowered to render decisions possessing the force of law. The lawful determination and enforcement of rights, for Kant, could take place only in civil society. The establishing of this condition of society was therefore a binding

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requirement of justice, with the consequence that men were permitted to resort to violent means to compel one another to enter it.58

The establishing of civil society, as Kant explained it, presupposed that there should be a system of private law which served to define the rights of individuals in respect of the possession and use of property. Hobbes had held that rules of propriety existed only in the condition of political society. In contrast to Hobbes, Kant allowed that property forming the subject-matter of private law was to be thought of as existing in the state of nature. However, he insisted that the property rights of individuals in the state of nature remained purely provisional. For these rights to acquire peremptory force, it was required that men should enter into a juridical form of society, wherein rights relating to property were underwritten by a system of legislation that was supported by a power of external coercion. This system of legislation was the public law, and by means of it a binding legal validity was conferred on the particular distribution of property among members of society as was determined in accordance with private law.59

Kant defined public law as law that required public promulgation in order to establish a juridical condition of society. The possibility of the promulgating of a system of public law depended on the persons subject to it being associated together under a formal constitution. When a multitude of men were united in a society based in a system of public law and a formal constitution, they were to be regarded as forming a civil society. This society viewed as a whole in relation to its members was the civil state.60

2.5 KANT ON THE STATE AND THE CIVIL CONSTITUTION

In Kant's discussion of it in *The Metaphysical Elements of Justice,* the state was understood to be an association of men under laws of justice. Essential to the state were the three authorities which formed the basis of its constitution and government. These authorities were the legislative authority, the executive authority, and the judicial authority. Of the three authorities, the legislative authority was foundational. For it was this authority that stood as the sovereign authority in the state.61 Kant held that the legislative authority in the state was to be attributed to the united general will of the people who comprised its citizen-body. Since the legislative power was to be attributed to the general will of the people, the laws maintained in the state were to be thought of as laws which were decided by each

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individual for all the people and by all the people for each individual on an equal basis.62

In holding that the power of legislation in the state belonged to the whole body of the people that formed it, Kant adopted the view of sovereignty that had been argued for by Rousseau. In doing so, he also followed Rousseau in the view he took as to the bases of the form of civil freedom that belonged to the individual as a member of the state. As Rousseau had explained the matter, the individual as citizen was to be considered free because his rights and property, and hence also his freedom, were secured to him through laws. The citizen was also to be considered free in the respect that the laws that secured his rights and freedom were laws that derived from his own will and consent as a sharer in the sovereign power in the state, rather than laws that derived from the will of some power or agency which remained external to himself, and on which he was dependent. Beyond this, Rousseau had conceived of civil freedom in terms where the freedom that belonged to the citizen, through his subjection to laws deriving from his own will and consent, was understood to be such that the citizen was to be thought of as having full equality with other citizens under the laws maintained in the state. For, in Rousseau's explanation of them, the laws issuing from the sovereign power in the state were general laws, and hence laws which, in securing the rights and freedom of each citizen, secured the rights and freedom of all citizens on the basis of a strict equality, and laws which, by virtue of their generality, were to be thought of as binding on all the persons associated together in the state, including those persons bearing the powers of government.

That Kant took the same view of civil freedom as Rousseau had done is evident from his specification of what he identified as the juridical attributes of the citizen as a member of the sovereign legislative authority in the state. For, here, Kant appealed to the ideas of law, consent and equality that had everywhere informed Rousseau's discussion of civil freedom. Thus the first juridical attribute of citizenship that Kant identified was the attribute of lawful freedom. By this Kant meant that the citizen was to be considered as bound to obey only such laws as those to which he had given his consent. The second juridical attribute of the citizen was that of civil equality. The civil equality of the citizen was such that the citizen was to be thought of as being subject to no superior save a person whom he had as much moral capacity to bind by law as that person had to bind him. The third juridical attribute of citizenship was that of civil independence.

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This meant that the citizen was to be understood as owing his existence and security not to the mere will of some other person in society, but only to his own rights and powers as a member of the state. In consequence of this independence, the citizen was to be thought of as possessing a personality such that he could not be represented by any other person in matters of right and justice.63

While Kant followed Rousseau in attributing the legislative authority in the state to the general will of the people, he went beyond Rousseau in allowing that the legislative authority might be exercised by representatives acting on behalf of the people.64 Indeed, as Kant explained it, the legislative authority that belonged to the people could be exercised only in the context of a state wherein there existed specific institutions and agencies of government. As we have seen, Kant held that the legislative authority went together with the executive and judicial authorities to form the constitutional order of the state. It was through this constitutional order that he conceived of the sovereignty belonging to the people as being expressed and organized, and the people made subject to the laws that derived from their own united will. In this way, the three authorities in the state established a determinate relationship between a universal sovereign political authority and the people. From the standpoint of the laws maintained in the state, sovereignty was to be considered as lying with the whole people united together as a collective person. However, when the people were considered as a mere aggregation of individuals, then they were to be thought of as the subjects of a sovereignty that was exercised through the supreme political authority in the state, as this was embodied in the constitutional order of the state. The relationship between the constituted sovereign political authority and the people as an aggregation of individuals was hierarchical in form. Kant described it as a relationship obtaining between one possessing the right of command and one who owed this commander the duty of obedience.65

It was Kant's position that the people could constitute themselves as a state (and thereby subject themselves to a supreme political authority) only through some voluntary act of their own. The act that Kant saw as essential to the founding of the state and its constitutional order was that of the original contract. Kant did not claim that the state was brought into being through an original contract as a matter of historical fact. On the contrary, the original contract to which he appealed in explanation of the foundation of the state and its constitutional order was essentially an idea of reason, and as an idea of reason that the original contract was understood by him to

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express the principles of right and justice that established the basis of the legitimacy of the state as an institution for the government of men. As he put it:

> The act by means of which the people constitute themselves a state is the original contract. More properly, it is the Idea of that act that alone enables us to conceive of the legitimacy of the state.66

For Kant, the idea of the original contract served to explain the transition made by men from the state of nature to the condition of the civil state. The account Kant gave of what was involved in this transition closely followed the one that had been provided by Rousseau. In the state of nature, as Kant described it, men were to be thought of as possessing a freedom that was unconstrained by coercive laws. In the civil state, on the other hand, the freedom of men was based in laws that served to secure their rights. Thus under the terms of the original contract, all the individuals comprising a people were to be considered to have given up their innate natural freedom, in return for the freedom belonging to a people organized under a constitutional order in the state. This meant that each individual member of the state was to be thought of as having abandoned his lawless freedom, and as having entered into a form of society where his whole freedom was realized through his dependence on laws that derived from his own legislative will.

> According to the original contract, all *(omnes et singuli)* the people give up their external freedom in order to take it back again immediately as members of a commonwealth, that is, the people regarded as the state *(universi).* Accordingly, we cannot say that a man has sacrificed in the state a part of his inborn external freedom for some particular purpose; rather, we must say that he has completely abandoned his wild, lawless freedom in order to find his whole freedom again undiminished in a lawful dependency, that is, in a juridical state of society, since this dependency comes from his own legislative Will.67

The idea of the original contract, then, was an idea that Kant saw as explaining the foundation of the constitutional order through which the supreme sovereign authority in the state exercised its right of command over the people, considered as the subjects of the state and its laws. As Kant described it, the constitutional order of the state possessed a complex internal structure. On the one hand, the

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legislative, executive and judicial authorities that formed the constitution of the state were to be thought of as complementary to one another, and thus as bringing completeness to the constitution. On the other hand, the three authorities were to be thought of as subordinate to one another, in the sense that none was to usurp functions that belonged to the others.68

Here, Kant committed himself to the position that the constitutional order of the state was to be based in the principle of the separation of powers. In doing so, he followed Rousseau in emphasizing that the bearer of the executive power of government in the state was essentially the agent of the people as the source of all legislative authority. In Kant's view, the ruler, as bearer of the executive power of the state, was to govern only in conformity with the laws that derived from the will of the people. To be sure, the ruler was empowered to issue commands to the people and to the ministers of the state. However, such commands were mere orders or decrees, in the sense that they related to particular subject-matters and remained subject to alteration. What the ruler was not empowered to exercise was the right of making laws. For a government that made the laws it executed would be a despotic government (since, for Kant, it would be a government that was not limited by laws). At the same time, Kant insisted that the people, as bearers of the sovereign law-making authority, were not to assume the executive powers of rulership. This was so because the ruler of the state was to remain subject to law, and this presupposed the ruler being bound by the sovereign will of the people as an independent source of law.69

In *The Metaphysical Elements of Justice,* Kant gave detailed consideration to the rights of command exercised by the supreme political authority in the state. These rights of command were, of course, sovereign rights. Kant explained them as the juridical consequences of the union of men under a civil constitution. Among the juridical consequences Kant saw as following from the civil union was the consequence that whenever a people were united under a lawful civil constitution, then they were to be thought of as owing an absolute and unconditional duty of obedience to the political authorities established in the state and to the laws and constitution maintained therein. Accordingly, Kant emphatically denied that a people united in the civil state could be thought of as possessing a right to resist the political authorities, or to engage in sedition or revolution, or to use coercive force against their rulers. The prohibition Kant placed

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on all violent resistance to the political authorities was strict and overriding. Indeed, he insisted that where a revolution had succeeded, and a new civil constitution been established, then the subjects of the state were bound to act in obedience to the newly created political order, notwithstanding the illegitimate means through which it had come into being.70

Kant's exclusion of a right of popular resistance against the lawfully constituted authorities in the state marks a fundamental point of departure on his part from earlier social contract theorists. Hobbes, of course, had denied that the covenant instituting political society was such that it conferred on the subjects of the commonwealth the right to resist or punish the sovereign, or to deprive the sovereign of his power on the ground of some alleged breach of covenant. However, some of the more important of the social contract theorists coming after Hobbes had taken a different view. So, for example, Locke, in his *Two Treatises of Government* (1690),71 had argued that the people held a right to resist a government that acted contrary to what he called its trust, as when it invaded the rights and property of the people, and so acted contrary to the ends given in the agreement or compact which he saw as underlying political society.72

In this matter, Kant followed Hobbes, and went against writers such as Locke. For he was quite clear that the idea of the original contract founding the state and its constitution carried with it no implication that the people possessed a right to resist their rulers on the ground of some claimed abrogation of the terms of the contract. He took this view for the reason, among others, that he understood the terms of the civil constitution, as given in the idea of the original contract, to be such as to provide for a public coercive power for the enforcement of the laws of the state, but that since this power was to be exercised by the ruler of the state, the people could claim no lawful right of coercion with respect to the ruler himself without thereby laying claim to the powers of rulership. The assumption by the people of the powers of rulership in this way obviously ran counter to the original contract as Kant conceived it. For the idea of the original contract was to be appealed to in order to explain how the people were to be thought of as subject to a lawful constitution, and this, for Kant, presupposed their subjection to a ruling political authority whose power was irresistible.73

Following the discussion of the question of the right of resistance in *The Metaphysical Elements of Justice,* Kant set out the positive rights of sovereign command vested in the supreme political authority in the

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state. Central among these rights was the right of supreme proprietorship. By this Kant meant that all rights relating to the possession and use of land and property by private citizens were to be thought of as based in principles of public distributive justice which were derived from, and subject to, the will of the sovereign as expressed through the supreme political authority. The right of supreme proprietorship was the basis of other such rights of command. These included the right to tax private citizens, the right to administer the national economy, the national finances and the police force, and the right to subject all political, religious and other like associations to inspection. Among the purposes for which taxes were to be imposed were those to do with the welfare of the people, such as the relief of the poor and support for foundling hospitals and churches. Of the associations falling under the jurisdiction of the state, the church was one of the most important. Regarding the jurisdictional rights of the state over the church, Kant emphasized that while the state had no right to order the internal constitution of the church or to prescribe the beliefs and rituals of the people, it did have the right to prevent any activities of the church and its ministers that were likely to prejudice the public peace. Other rights of command that Kant discussed were those relating to the distribution of offices of profit in the state, and to the distribution of positions based in honour. The supreme political authority in the state also possessed the right to inflict punishment on subjects in consequence of their commission of crimes, and, in certain circumstances, to pardon criminals.74

Kant's specification of the rights of sovereign command belonging to the supreme political authority in the state conforms closely with Hobbes's specification of the rights and faculties of sovereignty. Here, in the matter of the rights of sovereignty, Kant must be seen as having followed Hobbes in assuming that the constitutional order of the state was such that the state was to be regarded as exercising an absolute authority with respect to its subjects. Even so, in Part 2 of *Theory and Practice,* Kant picked out Hobbes for special attack. He did so in terms that indicate that he considered that Hobbes had failed to identify the principles of political association essential to the idea of the original contract. Central to Kant's case against Hobbes in *Theory and Practice* was his claim that Hobbes had denied that the people were to be thought of as possessing inalienable rights against the state and the ruling authorities therein.75 In claiming this, Kant substantially misrepresented Hobbes. For Hobbes had very clearly accepted that men held inalienable rights against their political rulers.

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Foremost among these rights was the right of the individual to resist violence to his life and person.76 Thus, as Hobbes had explained it, the right of self-defence was a natural right, and one which no man could relinquish in favour of another through an act of covenant.77 Accordingly, it was a right that the subjects of the commonwealth were at liberty to exercise even with regard to those who acted against their lives and persons with the lawful authority of the sovereign.78

If Kant misrepresented Hobbes regarding the question of inalienable rights, he must nevertheless be set apart from his predecessor by virtue of what he conceived to be the essential end and justification of the state as a form of human association. For Hobbes, the end and justification of the civil state had been described in the laws of nature, and concerned what was necessary for the securing of the defence and preservation of men. It was in accordance with this conception of the end and justification of political society that Hobbes had assigned absolute right and authority to the sovereign ruler of the commonwealth. For he had taken the view that it was only through the subjection of men to a sovereign power possessing absolute right and authority that there would be brought into being the conditions of peace necessary to ensure their mutual defence and preservation.

In contrast to Hobbes, Kant did not see the end and justification of the state as consisting merely in the mutual defence and preservation of its members under conditions of general peace. For Kant, the essential end and justification of the state lay in its providing the conditions necessary for the full realization by men of their rights, as these were based in the principle of moral freedom given in the idea of the categorical imperative. That Kant saw the civil state in this way, as a form of association that existed to enable men to realize their rights and freedom, is crucially important in explaining why he was brought to affirm certain of the fundamental principles of political order that have come to be regarded as integral to the ideal of limited constitutional government based in the rule of law. Among these were the principle of the separation of powers, the principle of equality before the law, and the principle that the law should stand as the basis and justification for the exercise of coercive power by the state against the individual.

It is Kant's affirmation of the principles of limited constitutional government that establishes his central position in the liberal tradition in political thought. In the Introduction to the present volume, it was suggested that the thinkers standing in the liberal tradition are to be distinguished by virtue of their assigning of primacy to the idea

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of the rights of the individual in the explanation of the normative foundations of political society. Given this, Kant must obviously be taken to stand in the tradition of liberalism. For the principles of limited government he affirmed were principles that he thought of as founding a political order in which the rights of the individual citizen would be secured and respected.

Of course, Kant's specification of individual rights was more limited than those that were to be provided by later theorists in the liberal tradition. For example, Kant saw the right to vote on matters of public legislation as an essential right of the citizen. However, he was explicit that this right did not extend to all those persons who formed the state, and that among the persons who were to be denied it were women and servants and those without property.79 Despite this, he still insisted that regardless of the matter of their entitlement to vote as citizens on public legislation, all members of the state were to enjoy the rights that belonged to them as subjects of the rule of law. In consequence, all members of the state were to be recognized as having personality and equality under the law, and hence as being entitled to claim that the law should be uniformly enforced so as to secure and protect their rights on a universal basis.80

Kant does not stand in the tradition of liberalism merely by virtue of his affirmation of the principles of limited government. He stands in the liberal tradition in the more fundamental respect that he explained the foundational principles of law, state and government as principles that derived from the concept of freedom itself. It is here that there exists the strongest connection between Kant's ethics and his political thought. As we saw in Chapter 1, Kant maintained that the moral law was a law based in the autonomous rational nature of the human agent, rather than in any heteronomous principles of the will such as welfare or happiness. This, in Kant's view, was the essential condition for the moral law being a universal law, and the essential condition for the moral law standing as a law of freedom whose observance by the agent would involve his exemption from the laws of natural necessity. It was in accordance with the idea of the moral law as a law based in the autonomous will and reason of the agent that Kant appealed to freedom as the ground of derivation for the principles of right and justice that were to base the external relations among men in the civil state. As he put it in *Theory and Practice,* the principles of law and government that provided for the securing of rights under coercive laws in the civil state were to be derived from the concept of freedom in the mutual external relations

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of men, rather than from any considerations to do with happiness as the end set for men by nature.81

The appeal Kant made to freedom as the ground of derivation for the first principles of law, state and government underlines his remoteness from the pre-modern tradition in natural law, as much as it underlines the contrast between the view he took of the normative foundations of political society and the state and the view of this matter that was later to be adopted by the classical utilitarians. In the pre-modern tradition of natural law, the terms of human association in the state were derived from the ends of the common good, as these were defined through the first principles of natural law. With the classical utilitarians, the first principles of law and government in the state were derived in accordance with a ruling conception of the welfare or happiness of the community, where this was understood to be the end that the institutions of law and government were to serve and promote in an instrumental sense. In Kant's view, however, it was the freedom of the individual, unrestricted by any prior conception of the material ends that individuals might pursue, that stood as the ultimate ground of derivation for the first principles of law, state and government.82

Hence, for Kant, the rights through which the freedom of individuals was embodied in the state were rights that were to be thought of as possessing a quite special kind of overridingness, and inviolability, with respect to the collectively defined ends and interests of the whole community in the state. This view of freedom and rights is central to Kant's own distinctive contribution to the development of the liberal tradition in moral and political philosophy. So also is it central to the rights-based conception of justice which, in the Introduction, we noted is associated with the standpoint in moral and political philosophy that has come to be referred to as Kantian liberalism.

2.6 KANT: REPUBLICANISM AND DEMOCRACY

Kant's vision of the liberal state has its most powerful expression in his ideal of the state based in the republican form of civil constitution. In *The Metaphysical Elements of Justice,* Kant maintained that the principles of constitutional government could find their complete embodiment only in the state whose form of constitution was that of the pure or true republic. As he discussed it in this work, the constitution of the true republic was commended as the one fully

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legitimate civil constitution, in the respect that it was held to be the constitution that conformed with the idea of the original contract founding the state. Thus it was the republican civil constitution which Kant held that all existing states were to adopt as the basis for their own self-government. This was not to come about through the people resorting to the means of violent revolution. For, as we have seen, Kant did not consider that the terms of the contract founding the state were such that the people were to be thought of as possessing the right to resist the political authorities in the state, or to repudiate its established constitution. Nevertheless, he did insist that the terms of the original contract entailed an obligation falling on the ruling authorities in existing states to make gradual, progressive alterations to the systems of government established therein, so as to bring them into agreement with the principles essential to the republican constitution.83

In Kant's explanation of it in *The Metaphysical Elements of Justice,* the constitution of the true republic was the constitution under which the principle of freedom was presupposed as the precondition for the exercise of coercive power by the state against the people. Accordingly, the republican constitution was the form of state constitution under which the law was fully autonomous, and thus independent of the will of any particular person or persons. It was because Kant regarded the republic as the state that gave effect to the principles of government based in the rule of law that he was able to claim that the true republic provided for an essentially representative system of government. Hence, the true republic provided for a system of government where the rights of citizens were upheld by the state in their own name, and protected by the citizen-body acting through its own representatives or deputies.84

Kant's endorsement of the republican constitution in *The Metaphysical Elements of Justice* confirmed the substance of the position he had taken in *Perpetual Peace* as to the special legitimacy belonging to this form of civil constitution. In *Perpetual Peace,* Kant called for the adoption by states of the republican constitution in the first of what he laid down as the three definitive articles of a perpetual peace between states. In the opening paragraph of the explanation of the first definitive article of perpetual peace, Kant set out the three principles on which he took the republican constitution to be founded. These were the principles of *freedom, dependence* and *equality.* As is clear from his enunciation of them, it was the principles of freedom, dependence and equality that Kant saw as establishing that

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the republican constitution stood as the only form of constitution which could be derived from, and made consistent with, the idea of the original contract founding the state.

> *A republican constitution* is founded upon three principles: firstly, the principle of *freedom* for all members of a society (as men); secondly, the principle of the *dependence* of everyone upon a single common legislation (as subjects); and thirdly, the principle of legal *equality* for everyone (as citizens). It is the only constitution which can be derived from the idea of an original contract, upon which all rightful legislation of a people must be founded. Thus as far as right is concerned, republicanism is in itself the original basis of every kind of civil constitution... 85

The first of the three principles that Kant identified as founding the republican constitution was such as to provide that, in the state based in the republican form of constitution, all individuals belonging to it would have the opportunity to exercise the freedom which was theirs by right. In the explanation Kant gave of the principles, the freedom secured to men under the republican constitution was defined as a form of freedom based in the guarantee that the individual should be bound to obey only such external laws as those to which he was able to give his consent. As for the second principle founding the republican constitution, this Kant claimed to need no explanation, since the principle of dependence was presupposed in the very concept of a political constitution. However, it would appear that the principle of dependence, as Kant appealed to it, was the principle according to which all members of the state based in the republican constitution would be regarded as possessing equal status as the subjects of a single constituted law-making authority. In this sense, the principle of dependence was intimately related to the third principle of the republican constitution. According to this principle, the state based in the republican constitution was the state where citizens would enjoy equality of treatment under the laws maintained in the state. Essential to the conception of equality to which Kant appealed, here, was the idea that the freedom of the individual citizen was to be restricted only through the constraints imposed by obligations laid down in laws which were reciprocally binding on all citizens.86

The discussion of the republican constitution in *Perpetual Peace* makes it clear that what Kant had in mind when writing of this constitution was not some type or form of actually existing state

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constitution, like a monarchy or a democracy. On the contrary, it is evident that his concern lay with the first principles of constitutional government as such, as these were given directly in the idea of the original contract. That this was Kant's concern is underlined by his insistence, in the explanation of the first definitive article of perpetual peace, that there should be no confusion of the republican constitution with democracy as a type or form of constitution. Indeed, a substantial part of the explanation of the article was devoted to showing how, and why, the republican constitution and the democratic form of state constitution were to be distinguished from each other. It was to this end that Kant argued that the different forms of the state could be classified in accordance with one or other of two quite distinct principles. The first of these principles referred to the question of the different person or persons who held and exercised the supreme power of rulership in the state. The second referred to the question of the way in which the state was governed by its ruler, irrespective of which person or persons happened to bear the rights and powers of rulership therein.87

The first principle for the classification of states went by what Kant called the form of sovereignty *(forma imperii).* This principle related to the actual form of rulership adopted in the state. In Kant's view, there were only three possible forms of sovereignty or rulership: *autocracy* (or *monarchy),* where the ruling power in the state was held by a single individual; *aristocracy,* where the ruling power was held by several persons acting in association; *democracy,* where the ruling power was held by all the persons who together constituted civil society. In an autocracy, the ruling power in the state was vested in the person of a prince. In an aristocracy, the ruling power was vested in a nobility. In a democracy, the ruling power was vested in the people as a whole.88

The second principle for the classification of states went by the form of their government *(forma regiminis).* This principle related to the way in which the state exercised the sovereign power of rulership in accordance with the terms of its established constitution. Applying the second principle of classification, Kant distinguished between two forms of government: the *republican* and the *despotic.* The republican form of government, for Kant, was of course the form of government based in the representative principle, and in the other principles essential to the ideal of government limited by the rule of law. Kant identified one quite specific attribute of the republican form of government, in order to distinguish it from despotic government. This was the agreement of the republican form of government with the

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principle that the executive power of government in the state was to be separate from the legislative power.

> *Republicanism* is that political principle whereby the executive power (the government) is separated from the legislative power.89

Since the republican form of government preserved the separation of the legislative and executive powers, it was a form of government where it was guaranteed that the executive power held by the ruler in the state would be limited by law, and so remain a power that would be representative of the people. As for despotism, this Kant explained as a negation of the principle of representative government based in the rule of law. For under a despotic form of government, the laws of the state were made and executed by the same power. Hence, in a despotism, there could be no guarantee that the ruler bearing the executive power in the state would be bound by law. Indeed, Kant emphasized that, under a despotic form of government, the laws of the state were to be regarded not as an expression of the will of the people, but merely as an instrument of the private will of the ruler.

In Kant's view, the democratic form of rulership could result only in a despotic form of government. Kant emphasized that democracy was a form of rulership which permitted the citizen-body to participate directly in the exercise of the executive power in the state. From his standpoint, therefore, democracy necessarily violated the principle of the formal separation of the legislative and executive powers of the state. This was so because in a democracy, as Kant described it, executive power was exercised by the whole citizen-body, while it was of course precisely the general will of the citizen-body which, following Rousseau, he saw as the basis of the sovereign legislative power in the state.

In undermining the separation of legislative and executive powers in this way, the democratic form of rulership was fundamentally opposed to what Kant upheld as the ideal of individual freedom under a system of representative government limited by law and based in consent. For in Kant's explanation of the matter, the individual citizen in a democracy remained subject to decisions taken by the whole citizen-body through the exercise of the executive power of the state. However, there was nothing to guarantee that these decisions would be in agreement with, and so be limited by, laws that proceeded from the general will of the citizen-body in its legislative capacity. Accordingly, there was also nothing to guarantee

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that executive decisions taken with regard to, or against, the individual citizen would follow from laws which were based in some prior act of consent on his part as a sharer in the sovereign legislative power in the state. For this reason, the exercise of executive power in a democracy was not limited in such a way as to safeguard the lawful rights and freedom of the individual. In consequence, democracy placed the general will, as the principle of freedom, in opposition to itself. As Kant put it:

> Despotism prevails in a state if the laws are made and arbitrarily executed by one and the same power, and it reflects the will of the people only in so far as the ruler treats the will of the people as his own private will. Of the three forms of sovereignty, *democracy,* in the truest sense of the word, is necessarily a *despotism,* because it establishes an executive power through which all the citizens may make decisions about (and indeed against) the single individual without his consent, so that decisions are made by all the people and yet not by all the people; and this means that the general will is in contradiction with itself, and thus also with freedom.90

Given these strictures about the perils of democracy, it is no wonder that Kant should have gone on to declare a preference for monarchy among the actually existing forms of state constitution. Thus it was the autocratic or monarchical constitution (such as the constitution maintained in Prussia under Frederick the Great) which he claimed was the one most likely to accord with the spirit of the representative system of government, and so give practical effect to the principles essential to the idea of the republican constitution. Likewise, it was under a monarchy that there existed the greatest possibility that, through progressive reform, the established form of state constitution would be brought to the full realization of its republican potential. In a democracy, however, the state could be brought to adopt the republican constitution only through violent revolution (and so, for Kant, only through means that violated the terms of association given in the original contract founding the state).

> For any form of government which is not *representative* is essentially an *anomaly,* because one and the same person cannot at the same time be both the legislator and the executor of his own will.... And even if the other two political constitutions (i.e. autocracy and aristocracy) are always defective in as much as they leave room for a despotic form of government, it is at least possible that

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> they will be associated with a form of government which accords with the spirit of a representative system. Thus Frederick II at least said that he was merely the highest servant of the state, while a democratic constitution makes this attitude impossible, because everyone under it wants to be a ruler. We can therefore say that the smaller the number of ruling persons in a state and the greater their powers of representation, the more the constitution will approximate to its republican potentiality, which it may hope to realise eventually by gradual reforms. For this reason, it is more difficult in an aristocracy than in a monarchy to reach this one and only perfectly lawful kind of constitution, while it is possible in a democracy only by means of violent revolution.91

The idea of the republican constitution as the legitimate form of civil constitution occupies a central position in the argument of *Perpetual Peace*. For Kant viewed the adoption by states of the republican constitution as a precondition for their coming to conform with the rule of law in the sphere of their mutual external relations, and hence as an essential precondition for the establishing of a lasting international peace. Nevertheless, Kant's commitment to the republican constitution, as a precondition for peace among men and states, was qualified by his commitment to what he conceived of as a foundational juridical principle of the international order. This was the principle of the freedom and sovereign independence of states. In the examination of the argument of *Perpetual Peace* that follows in Chapters 3-6, we shall see that the terms of the substantive law of nations that Kant thought should govern the relations between states in the international sphere were such that this law would work to legitimate, and entrench, the freedom and independence of states essential to their sovereignty. At the same time, however, we shall see that this body of international law included no explicit provision stipulating the specific form of constitution and government through which the sovereign authority of states was to be defined and embodied.

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3 The Treaty of Perpetual Peace

The main substance of the argument of *Perpetual Peace* was presented by Kant in the form of an imaginary treaty between states. In this imaginary treaty, Kant stipulated the conditions that he considered to be essential for the realization of international peace on a lasting basis. The conditions of peace were stated in the articles which set the terms of the treaty, and which, in doing so, described the terms of the law that was to apply in the international sphere to the end of securing lasting peace therein. The treaty of perpetual peace was divided into two sections. In the First Section, Kant stated and explained six preliminary articles of a perpetual peace between states. In the Second Section, he stated and explained the three definitive articles of a perpetual peace between states to which we have already made reference.

The six preliminary articles of perpetual peace were stated as follows:

1. 'No conclusion of peace shall be considered valid as such if it was made with a secret reservation of the material for a future war.'

2. 'No independently existing state, whether it be large or small, may be acquired by another state by inheritance, exchange, purchase or gift.'

3. 'Standing armies *(miles perpetuus)* will gradually be abolished altogether.'

4. 'No national debt shall be contracted in connection with the external affairs of the state.'

5. 'No state shall forcibly interfere in the constitution and government of another state.'

6. 'No state at war with another shall permit such acts of hostility as would make mutual confidence impossible during a future time of peace. Such acts would include the employment of *assassins (percussores) or poisoners (venefici), breach of agreements, the instigation of treason (perduellio)* within the enemy state, etc.'1

The three definitive articles of perpetual peace were stated thus:

1. The Civil Constitution of Every State shall be Republican.

2. The Right of Nations shall be based on a Federation of Free States.

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3. *Cosmopolitan Right shall be limited to Conditions of Universal Hospitality.*2

After the statement and explanation of the preliminary and definitive articles of perpetual peace, Kant proceeded to develop his views about the conditions for international peace in two supplementary sections. In the First Supplement, he described how the order of nature was such as to guarantee the ultimate realization of perpetual peace among men and states. In the Second Supplement, he stated and explained a so-called secret article of perpetual peace. This article provided that the maxims of the philosophers regarding the conditions necessary for the possibility of public peace were to be consulted by states which were armed for war. Following the Second Supplement, there comes an Appendix that Kant added for the second edition of *Perpetual Peace* of 1796. In the first part of the Appendix, Kant treated of the disagreement between politics and morality with respect to perpetual peace. In the second part, he treated of the agreement between politics and morality from the standpoint of what he called the transcendental concept of public right.

It is of the first importance in understanding the argument of *Perpetual Peace* that Kant should have laid down the conditions of peace as articles setting out the terms of a treaty between states. For Kant did not regard peace as the natural condition of the relations obtaining among men and states. On the contrary, he regarded the natural condition of the relations obtaining among men and states as a state of war. Hence, it was his conviction that it was necessary that the state of peace should be formally instituted.3 Kant's insistence as to the necessity that peace should be formally instituted points to the quite specific view he took as to the essential precondition for lasting international peace. This was that the establishing of peace in the international sphere depended on some explicit act or acts by men and states, which involved a deliberate decision on their part to opt for peace. As we shall see when we discuss the second definitive article of perpetual peace, the particular act that Kant thought of as being required of states if international peace was to be established was an act of agreement, and one that possessed the character of a particular kind of treaty entered into by independent states.

The subject-matter of the second definitive article was the form of lawful association among independent states which Kant claimed was to stand as the constitutional foundation for the law of nations. It is therefore appropriate, here, to emphasize another conviction of

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Kant's which everywhere informs the terms of his proposed treaty of perpetual peace. This was that an international order committed to lasting peace had to be an order based not in the mere power and self-interest of states, but an order based in normatively binding principles of right and justice.

In seeking to identify the principles of right and justice that would serve to promote lasting peace among states, Kant hoped to provide an alternative to the balance of power as a basis for international peace.4 The alternative to the power-based form of international order that Kant argued for in *Perpetual Peace* was a form of international order in which lasting peace was to rest on the acceptance by men and states of an interlocking system of public law. In explaining this, Kant gave consideration to each of what he saw as the three forms or parts of public law: municipal law, the law of nations, and world or cosmopolitan law. The three parts of public law that Kant identified, together with the three forms of lawful constitution that he claimed were to found them, comprised the elements of what he conceived to be the law of peace. Of the three parts of public law that Kant identified as making up the principal elements of the law of peace, it is the law of nations that must be taken as occupying the central position in the argument of *Perpetual Peace.* For the preliminary articles of perpetual peace summarize what Kant thought were to stand as the basic substantive principles of the law of nations, considered as the body of public law that was to govern the external relations between independent states.5 It is for this reason, as much as for the reason that he thought of an international order committed to lasting peace as being essentially a law-governed order, that the Kant of *Perpetual Peace* is to be situated in the line of European writers who contributed to the elaboration of the theoretical structure of the modern law of nations.

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4 Kant and the Law of Nations

The foundations of the modern system of international law or the law of nations, together with the foundations of much of its theoretical framework, were laid in Europe during the sixteenth and seventeenth centuries.1 This was the period when the law of nations began to be expounded primarily as a body of laws which were understood to govern the external relations between independent states and political communities. The founding of the modern system of the law of nations is therefore bound up with the emergence of the modern states system which, following the upheavals of the Renaissance and the Reformation, came to be firmly established in Europe with the Peace of Westphalia that concluded the Thirty Years' War (1618-48). The founding of the modern law of nations is also bound up with the overseas expansion of the European powers into Africa, the Americas and the Far East. Thus it was during the sixteenth and seventeenth centuries that the law of nations began to be expounded as a body of laws which were understood to possess a direct application to the lands and peoples falling outside the confines of European Christendom.

Among the writers who exercised a formative influence on the development of the law of nations in the sixteenth and seventeenth centuries must be included the Spanish theologians Francisco de Vitoria (c. 1483-1546) and Francisco Suarez (1548-1617), and the Italian-born jurist Alberico Gentili (1552-1608). The greatest and most influential of the early modern writers on the law of nations, however, is generally held to be the Dutch jurist and political philosopher Hugo Grotius (1583-1645).2

4.1 GROTIUS

Grotius wrote two major works treating of subjects relating to the law of nations. The first was a work on the law of prize and booty written around 1604: *De Jure Praedae Commentarius.*3The second was the treatise on the law of war and peace on which rests Grotius' greatness as a writer on the law of nations: *De Jure Belli ac Pacis Libri Tres* (1625).4

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Grotius' concern in *De Jure Belli ac Pacis* did not lie exclusively with the law governing the external relations between nations and states. As Grotius expounded it, the law of war and peace was a body of law which, among much else, served to identify the natural rights and obligations of the individual, to explain the origin and justification of the state, and to explain the rights and powers of the state in respect of its subjects.5 Nevertheless, there is no denying that the greater part of *De Jure Belli ac Pacis* was taken up with the exposition of the law of war and peace as it applied to nations and states in their external relations with one another. Indeed at the beginning of the Prolegomena to the work, Grotius declared it to be his intention to address a subject which, as he claimed, had hitherto received no comprehensive and systematic treatment. This was:

> [The] body of law . . which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement....6

Of the different elements of the law of war and peace that Grotius saw as governing the relations between nations and states, two occupy a central position in the argument of *De Jure Belli ac Pacis.* First, there was the law of nature: the *ius naturale.* Second, there was the positive, or voluntary, law of nations: the *ius gentium.* As we shall see, a further principal element of the law of war and peace that Grotius identified was the municipal law maintained in the state: the *ius civile.* In writing of the *ius civile,* the *ius gentium* and the *ius naturale,* Grotius followed the classification of the principal parts of law that had been central to the classical Roman law tradition. However, while Grotius adopted the terminology of classical Roman law, his work reflects a fundamental change in the meaning of certain of the basic legal terms that he derived from the Roman sources. This is true, not least, with regard to how he understood the *ius gentium.*

In classical Roman law, the *ius gentium* had come to acquire two quite distinct meanings. On the one hand, the *ius gentium* had been taken to comprise that part of Roman law which had application both to the citizens of Rome and to the foreigners living within the territories falling under Roman jurisdiction. On the other hand, the *ius gentium* had been defined as the body of laws which were established by natural reason among all men, and which were therefore to be found commonly observed by all nations and peoples. However, in neither of these understandings of it had the *ius gentium* of classical

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Roman law involved the idea of a system of law whose essential sphere of application was that of the relations between separate and independent political communities.7 With Grotius, the matter is different. In his work, the *ius gentium* was not understood merely as a body of laws commonly observed by all nations and peoples. It was also understood as the body of laws brought into being through the will of nations and states for the regulation of their mutual external relations. Indeed, it is in its character as the body of laws pertaining to the external relations between nations and states that the *ius gentium* expounded in *De Jure Belli ac Pacis* must be set apart from the Grotian law of nature. For in Grotius' exposition of it, the *ius naturale* was law which applied as much to individual men as it applied to nations and states, and to the rulers thereof.

Grotius played as crucial a part as Hobbes in developing the conceptual structure of the modern secular natural law tradition. In the Prolegomena to *De Jure Belli ac Pacis,* Grotius explained the law of nature as a law based directly in what he saw as the essential condition of human nature. This essential condition of human nature was reflected in certain traits characteristic of human beings. Of these traits, the most important, for Grotius, was the natural inclination of men towards sociability, or *sociableness.*8In explaining the law of nature in this way, Grotius was brought to assert that the law of nature possessed a validity which did not depend on any prior assumption as to the existence of God. As he put it in discussion of the law of nature in the Prolegomena:

> What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.9

Despite this claim, Grotius is not to be situated in the modern secular natural law tradition merely because he sought to make the explanation of the law of nature independent of all theological presupposition. He is to be situated in this tradition, and to be counted as a forerunner of Hobbes, by virtue of the specification he provided of the substantive normative principles he saw as being constitutive of the law of nature.

For Grotius, the normative principles embodied in the law of nature were understood as first-order principles of justice and morality. As he explained them, these principles of justice and morality were concerned with the rights and obligations of individual men in

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respect of their person and property. They were also principles that stated such minimum conditions of peaceful association as were necessary for the safety and preservation of individual men in political society, and for the securing of their rights therein.

Take, for example, the Prolegomena to *De Jure Praedae.* Here, Grotius stated two fundamental laws of nature, which specified what the individual was permitted to do to the end of his own defence and self-preservation:

> [1.] *It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious....*
>
> [2.] *It shall be permissible to acquire for oneself, and to retain, those things which are useful for life*.10

Assuming these two fundamental laws of self-preservation as his starting-point, Grotius proceeded to state certain basic laws of just conduct as between men, such as those prohibiting the individual from inflicting personal injury on others and seizing their possessions. The fundamental laws of self-preservation also served as the basis for Grotius' specification of certain first-order principles of political association. Among these was the principle that the enforcement of rights as between individual citizens in the state should take place only in accordance with a judicial procedure.11

Then again, there is the statement of the essential principles of the law of nature that comes in the Prolegomena to *De Jure Belli ac Pacis.* Here, Grotius described the first-order principles of justice and morality given in the law of nature as principles that related to the duties falling on men to respect one another's personal, property and contractual rights, and to fulfil the obligations that were the obverse of these rights. It was in such terms that Grotius described the elements of the law which he considered to have its foundation in the natural desire and inclination of men to maintain social order.

> To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.12

As Grotius explained it, the law of nature was not only a body of law that stated the first-order principles of just conduct among men, and the first-order principles of association in political society. The

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law of nature was also a body of law that was understood to possess a direct application to nations and states in their external relations. So, for example, it was in terms of principles given in the law of nature that Grotius identified the basic just causes of war, and some of the most basic rules governing the conduct of war.13

Nevertheless, Grotius drew a very clear distinction between the law of nature itself and what he saw as the positive or voluntary law of nations. In Grotius' classification of the different forms of law, the law of nature was distinguished from what he called volitional law: the *ius voluntarium.* Whereas the law of nature was a dictate of right reason and so based directly in principles of natural reason, volitional law was law whose origin lay not in the reason but in the will.14According to Grotius, the law of nations went together with the municipal law of the state to constitute the specifically human form of volitional law: the *ius voluntarium humanum.* Municipal law was the law brought into being by the civil power in the state. The law of nations, by contrast, was the body of law which originated in the will of nations, and which derived its binding normative force therefrom. As for the evidence for this positive or voluntary law of nations, this, Grotius maintained, was to be found in the unbroken customary practice of the nations and in the testimony of the writers versed in it.15

In the argument of *De Jure Belli ac Pacis,* the law of nature was closely bound up with the law of nations considered as a form of *ius voluntarium humanum.* Indeed, in Grotius' system, the law of nature stood as the underlying, presupposed foundation for the positive or voluntary law of nations. For, as Grotius expounded it, the law of nature included a general principle of just conduct whose observance by nations and states must be taken to stand as an essential precondition for the possibility of nations and states being able to generate, through their own will, a body of law for the regulation of their mutual external relations. This was the principle of pacts: that is, the principle that the terms of promises, and other such voluntary agreements, were to be fulfilled by the parties to them.16

However, while it is evident that, for Grotius, the law of nature and the law of nations were closely linked together, and while it is also evident that he saw the law of nature as embodying certain of the presupposed principles underlying the law of nations, it remains the case that he insisted that the law of nations proper was a form of law whose origin and ground were to be looked for in the will and consent of nations and states, rather than in normative principles given

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directly in the order of nature. As he put it in the Prolegomena to *De Jure Belli ac Pacis:*

> But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature.17

It is because Grotius recognized that the law governing the relations between nations and states was predominantly a form of positive or voluntary law that he is to be distinguished from Hobbes in the view he took of the law that applied in the sphere of international politics. Grotius looked forward to Hobbes with his specification of the law of nature as a body of law which defined the minimum conditions of peaceful association necessary for the preservation of individual men and their rights within political society. He looked forward to Hobbes in the further respect that he sought to account for the generation of political society in terms of a voluntary act of agreement on the part of its members. Thus it was by appeal to the rule of nature requiring the performance of promises made that Grotius explained the origin and normative basis of the form of legal organization maintained within the civil state.

> [S]ince it is a rule of the law of nature to abide by pacts (for it was necessary that among men there be some method of obligating themselves one to another, and no other natural method can be imagined), out of this source the bodies of municipal law have arisen. For those who had associated themselves with some group, or had subjected themselves to a man or to men, had either expressly promised, or from the nature of the transaction must be understood impliedly to have promised, that they would conform to that which should have been determined, in the one case by the majority, in the other by those upon whom authority had been conferred. 18

However, Grotius must be set apart from Hobbes by virtue of what he took to follow from the principle of pacts here stated concerning the status of the form of legal regulation obtaining in the international sphere. For in marked contrast to Hobbes after him, Grotius took the view that nations and states, and not only the individuals who were

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the subjects of states, might be brought to oblige themselves to conform with laws whose origin and normative basis were to be explained in terms of the ideas of will and voluntary agreement. 19

4.2 HOBBES

Grotius distinguished the law of nature from volitional law, and took the specifically human form of volitional law to comprehend both municipal law and the law of nations. Hobbes, too, was to distinguish natural law from the form of law that he understood to have its origin in some act of will or volition. According to the division of the forms of law set out in Chapter 26 of *Leviathan,* the laws of nature were universally valid laws which had existed from all eternity. In contrast to the eternal laws of nature, there were positive laws. These were laws which were brought into being through the will of a person or persons holding sovereign power over others. Hobbes recognized two forms of positive law. First, there were human positive laws. Second, there were divine positive laws, these being the laws which were embodied in such of the commandments of God as were addressed to particular peoples.20

As Hobbes explained it, the sphere of human positive law was exclusively that of civil law: that is, the law commanded and enforced through the will of the person or persons bearing the sovereign power in an independent commonwealth.21 Accordingly, human positive law was law that presupposed as the condition for its generation, and as the condition for its binding normative force, the voluntary act of covenant through which, for Hobbes, a commonwealth was to be thought of as being instituted and the sovereign law-maker therein authorized.

Given that Hobbes saw the sphere of human positive law as limited to civil law, it was not open to him to take the position that the external relations between independent commonwealths might be thought of as being regulated by laws whose origin and binding normative force were to be explained in terms of the ideas of will and voluntary agreement. That this position remained unavailable to Hobbes is underlined by the view he took as to the condition of the society formed by commonwealths in the sphere of their mutual coexistence. In Hobbes's view, the separate commonwealths were to be thought of as co-existing in the state of natural freedom, wherein their rights were limited only by the extent of their power. This, of course,

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was none other than the natural state of universal war. For Hobbes, therefore, the separate commonwealths co-existed in the same state of nature as the one in which individual men were to be thought of as coexisting prior to the institution of commonwealths by covenant. Indeed, it was precisely the condition of continual war distinguishing the relations between commonwealths, as maintained by their sovereign rulers, that Hobbes pointed to in support of his claim that the natural state of man was that of the war of all against all.

> But though there had never been any time, wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continual spies upon their neighbours; which is a posture of war.22

While Hobbes saw commonwealths as co-existing in the natural state of war, this did not mean that he considered that commonwealths were unconstrained by law in the sphere of their mutual external relations. What it did mean was that commonwealths were not to be thought of as being subject to laws possessing the attributes and qualities that he held to be distinctive to human positive laws. For Hobbes, human positive laws were laws that presupposed some act of will on the part of a person or persons holding sovereign power over others, and hence also an agreement on the part of those subject to this power to acknowledge it. However, the logic of Hobbes's argument in *Leviathan* was such that there could be no covenant between the separate commonwealths to institute a common power to govern over them, without this involving the relinquishing by their respective rulers of the rights and faculties of sovereignty and hence also the ending of their independence as commonwealths.23

As for the laws that Hobbes *did* recognize as having application to the relations between commonwealths, these consisted of the eternal laws of nature which he saw as summarizing the fundamental principles of peaceful association among men. Thus when the question of the law of nations was raised in *Leviathan,* Hobbes passed over it by asserting that the law of nations was identical with the law of nature (and hence a form of law which was binding on sovereign rulers in conscience, but not binding by virtue of the existence of a common power to enforce it):

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> Concerning the offices of one sovereign to another, which are comprehended in that law, which is commonly called the *law of nations,* I need not say any thing in this place; because the law of nations, and the law of nature, is the same thing. And every sovereign hath the same right, in procuring the safety of his people, that any particular man can have, in procuring the safety of his own body. And the same law, that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard of one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes and sovereign assemblies; there being no court of natural justice, but in the conscience only... 24

As Hobbes specified them, the laws of nature stated general principles of conduct which are obviously to be ranked among the basic substantive elements of the law making for peace among nations. Take, for example, the first, second and third of the nineteen laws of nature set out in Part I of *Leviathan.* The first law of nature stated the endeavouring of peace to be the fundamental duty falling on men, and hence by implication the fundamental duty falling on the sovereign rulers of commonwealths. At the same time, this law enshrined the natural right of individual men, and so also by implication the natural right of commonwealths and their rulers, to act in their own self-defence with all the means and advantages of war when peace was unobtainable. The second law of nature stated the principle that men, and by implication commonwealths and their rulers, were to act for peace through accepting reciprocally binding limitations on their natural freedom. For the law provided that men, and so also by implication commonwealths and their rulers, were to lay down their natural right to all things, as far as this was consistent with their mutual defence, and to remain content with as much liberty as they would allow to others. The third law of nature stated the fundamental rule of justice that covenants made were always to be performed by the parties to them. In its international dimension, this law of nature implied the principle that agreements between sovereign rulers were binding in conscience, and therefore to be performed (and this despite the absence of a superior power to compel performance).

Then again, to take other examples, there are the sixth and seventh laws of nature laid down in Leviathan. These laws stated principles requiring that men should observe moderation in the punishing of wrong-doing. Thus the sixth law stated the principle of facility in

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pardoning offences, and the seventh the principle that retribution for offences should be guided by consideration of the good to follow from it. Still further, there are the fifteenth and sixteenth laws of nature, which stated principles relating to procedures to be followed for the securing of peace. Thus the fifteenth law provided that persons charged with responsibility for the negotiation of peace should be allowed safe conduct. The sixteenth law provided that parties to disputes should submit to the judgment of an independent arbitrator.25

The general principles of conduct laid down in the Hobbesian laws of nature very clearly go together to constitute what is intelligible as a containing normative framework for the regulation of the relations between nations and states, as much as they constitute what is intelligible as a containing normative framework for the maintenance of peace among individual men in the circumstances of political association. Certainly, the argument of *Leviathan* was such that Hobbes must be read as having conceived of the laws of nature as laws whose observance by commonwealths, and by their rulers, was to be regarded as essential for their own defence and self-preservation, and so also as essential for the maintenance of international peace. Nevertheless, the fact remains that the only form of law that Hobbes would recognize as applying to the separate commonwealths and their rulers in the international sphere was natural law. For Grotius, by contrast, the law that applied in the international sphere was in part the law of nature, but also, and indeed predominantly, the positive or voluntary law of nations.

4.3 WOLFF AND VATTEL

In the period after Grotius, there emerged two distinct traditions or schools of writers on the law of nations. On the one hand, there emerged a *naturalist* school. The members of this school saw the law governing the relations between nations and states as given in what they understood to be universally valid principles of natural law. On the other hand, there emerged a *positivist* school of writers on the law of nations. The positivist writers saw the law of nations as a law based in, and deriving from, the actual practice of nations and states. Accordingly, they looked for the substantive rules and principles comprising the law of nations in such of its conventional, or positive, sources as state custom and treaties.

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The most important of the naturalist writers was the German jurist and political philosopher Samuel Pufendorf (1632-94). Pufendorf constructed a complex system of natural law jurisprudence which was based in first-order principles of self-preservation and sociability, and the rights and duties of men that followed from these principles. This system is to be found expounded in three works: *Elementorum Jurisprudentiae Universalis Libri Duo* (1660); *De Jure Naturae et Gentium Libri Octo* (1672); *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1673).26

Pufendorf's system exercised a profound influence on the teaching of law and philosophy in Europe that lasted well into the eighteenth century. However, it cannot be said that Pufendorf made a decisive contribution to enlarging the understanding of the theoretical bases of the law of nations. For regarding this subject, he did no more than restate Hobbes's position that the entire substance of the law of nations was to be found embodied in the same principles of the law of nature that were binding on individual men. As he put the matter in the *Elementorum Jurisprudentiae Universalis:*

> Something must be added now also on the subject of the *Law of Nations,* which, in the eyes of some men, is nothing other than the law of nature, in so far as different nations, not united with another by a supreme command, observe it, who must render one another the same duties in their fashion, as are prescribed for individuals by the law of nature. On this point there is no reason for our conducting any special discussion here, since what we recount on the subject of the law of nature and of the duties of individuals, can be readily applied to whole states and nations which have also coalesced into one moral person. Aside from this law, we are of the opinion that there is no law of nations, at least none which can properly be designated by such a name.27

Among the positivist writers on the law of nations, one of the most notable was the Dutch jurist Cornelius van Bynkershoek (1673-1743), whose principal work was *Quaestionum Juris Publici Libri Duo* (1737).28 Another positivist writer of note was the German jurist Samuel Rachel (1628-91), in whose *De Jure Naturae et Gentium Dissertationes* (1676)29 can be found detailed arguments against the sort of view of the law of nations taken up by Hobbes and Pufendorf.30 The positivist tradition of writing on the law of nations was to prove particularly strong in Germany in the later eighteenth century, with Johann Jakob Moser (1701-85) and Georg Friedrich

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von Martens (1756-1821) being its two most important representatives during this period.

The eighteenth century saw two influential writers who looked back directly to Grotius in the approach they adopted in the exposition of the law governing the relations between nations and states. These were the German rationalist philosopher Christian von Wolff (1679-1754) and the Swiss jurist Emer (or Emmerich) de Vattel (1714-67).

Wolff and Vattel belonged to the modern secular natural law tradition of Grotius, Hobbes and Pufendorf. Both writers understood the form of society obtaining among men in the civil state, and the form of society obtaining among nations and states in the international sphere, as existing to promote the common good and advantage of their respective members. Both saw civil society as being instituted through a contractual agreement entered into between individuals in the state of nature, and hence as founded in the laws that they assumed to be universally binding on men in the natural state. Both saw the laws established in the civil state as deriving from natural law. Both conceived of nations and states as distinct persons or entities coexisting in a state of nature, and hence as being subject in an absolute sense to the principles embodied in the law of nature. Both saw natural law as a law of reason, and sought to explain its first principles in terms of the system of fundamental obligations and rights that they considered to be essential to the mutual preservation and perfection of individuals in civil society, and to the mutual preservation and perfection of nations and states in the sphere of their coexistence. Where Wolff and Vattel are to be aligned with Grotius, and to be set apart from Hobbes and Pufendorf, is in the respect that they took the law applying to the relations between nations and states to comprise not only the law of nature, but also what they recognized to comprise the positive law of nations.

Wolff sought to expound the law of nature and the law of nations in accordance with the principles of scientific method. The work which best reflects Wolff's application of the scientific method in the exposition of the elements of the law of nations is the treatise *Jus Gentium Methodo Scientifica Pertractatum* (1749).31In this work, Wolff identified four distinct forms or parts of the law of nations. First, there was what Wolff called the necessary law of nations: the *ius gentium necessarium.* The necessary law of nations consisted of the law of nature in its direct application to nations and states. As the law of nature applied directly to nations and states, the necessary law of nations was strictly binding in conscience, and in its essence absolutely

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immutable. Accordingly, this form of the law of nations was universally and unalterably binding on nations, in the respect that no nation was at liberty to free itself, or any other nation, from the obligation the law imposed.32 The second part of the law of nations was a body of law that Wolff saw as deriving from the necessary law of nations, but as embodying such adaptations of it as were essential for the promoting of the common good of nations. This was the voluntary law of nations: the *ius gentium voluntarium.* The third part of the law of nations was the stipulative law of nations: the *ius gentium pactitium.* The stipulative law of nations was the law of nations as it was established through the treaties (pacts), or stipulations, entered into between two or more nations.33 The fourth part of the law of nations was the customary law of nations: the *ius gentium consuetudinarium.* The customary law of nations was the part of the law of nations brought into being through long usage and the observance of nations.34

In Grotius' classification of the elements of the law of war and peace, the law of nature had been clearly distinguished from the voluntary law of nations. As Grotius had explained it, the voluntary law of nations was generated through the will and consent of nations, and found its essential embodiment in those forms of law which Wolff identified as the stipulative and customary law of nations. In Wolff's classification of the elements of the law of nations, however, the voluntary law of nations proper was distinguished from the stipulative and customary law of nations. In contrast to the latter, the voluntary law of nations, as Wolff explained it, was understood to derive from the necessary law of nations, and hence to possess the sort of necessity and universal binding force that he saw as belonging to the necessary law of nations in its status as a law based directly in the order of nature.35

Nevertheless, Wolff quite explicitly placed the voluntary law of nations with the stipulative and customary law as the forms of law comprising what he took to be the sphere of the positive law of nations: the *ius gentium positivum.* Thus the voluntary law belonged to the positive law of nations in the respects that it proceeded from the will of nations, and that it rested on their presumed consent.36 To explain the precise status of the voluntary law of nations, Wolff argued that the source of this law, and the sphere of its application, lay in a quite particular form of association that he saw as obtaining among nations and states. This association of states Wolff called the *civitas maxima:* that is, a supreme state of which all the nations and states of the world were members or citizens.37

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According to Wolff, the separate nations and states were to be thought of as having been brought together by nature, and by their agreement, to constitute a single unified state, in much the same way as individual men were to be thought of as having been brought together to form particular nations and states. This state of nations had its own defining end and purpose, which Wolff explained as consisting in the promotion of the common good of the nations through the means of their combined powers.38 The supreme state thus formed among all the nations was conceived of by Wolff as possessing certain of the attributes that belonged to the civil state. Hence, the supreme state was understood to possess its own system of laws, together with the right and power of law-making.39 The laws of the supreme state were assumed to be binding on all nations, and to be underwritten by a right belonging to the nations as a whole to coerce any nation which failed to fulfil its obligations under the laws.40 This right was taken to imply that the nations combined together in the supreme state were to be thought of as possessing a certain measure of sovereignty over each individual nation.41 Again, the supreme state was understood to possess its own government. This was democratic in form, with sovereignty being understood to be vested in the whole body of the nations that comprised the supreme state.42

The supreme state was also understood by Wolff to embody the will of all the nations, and to have a ruler who gave effect to this will. Since the supreme state was based in the democratic form of government, the united will of the nations was to be identified through the will of the majority of nations. This will of the nations had its embodiment in the law of nations, as this law had been approved by the more civilized nations.

> Since in a democratic state that must be considered the will of the whole people which shall have seemed best to the majority, since moreover the supreme state is a kind of democratic form of government, and is made up of all the nations, in the supreme state also that must be considered the will of all the nations which shall have seemed best to the majority. Nevertheless, since in a democratic state it is necessary that individuals assemble in a definite place and declare their will as to what ought to be done, since moreover all the nations scattered throughout the whole world cannot assemble together, as is self-evident, that must be taken to be the will of all nations which they are bound to agree upon, if following the leader-

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> ship of nature they use right reason. Hence it is plain, because it has to be admitted, that what has been approved by the more civilized nations is the law of nations.43

As for the ruler of the supreme state, his office was understood to lie in defining the law which embodied the will of all the nations. This law was to be considered as binding on all nations, even though it was not in all respects the same as the natural law.

> Since in the supreme state that is to be considered as the will of all nations, to which they ought to agree, if following the leadership of nature they use right reason, and since the superior in the state is he to whom belongs the right over the actions of the individuals, consequently he who exercises the sovereignty, therefore he can be considered the ruler of the supreme state who, following the leadership of nature, defines by the right use of reason what nations ought to consider as law among themselves, although it does not conform in all respects to the natural law of nations, nor altogether differ from it.44

As Wolff explained it, the idea of the ruler of the supreme state was a fiction. However, it was a fiction that served to explain the adaptations which had to be made of the necessary law of nations, such as to render this law consistent with the defining purpose of the supreme state.

> [The] fictitious ruler of the supreme state is assumed, in order to adapt the natural or necessary law of nations to the purpose of the supreme state, as far as human conditions allow, using the right of making laws, which we have shown above belongs to the supreme state.45

The law resulting from the adaptations made of the necessary law of nations was the voluntary law of nations. Thus in Wolff's definition of it, the voluntary law of nations was understood to be the law laid down by the ruler of the supreme state, and so, in accordance with the sense of this fiction, to be law that proceeded from the will of nations. Nevertheless, the ultimate foundation of the voluntary law of nations lay in nature, rather than in the will of nations as such. For, as Wolff insisted, it was from the necessary law of nations that the voluntary law was derived (in the same manner as he claimed that the civil law was derived from natural law).46

Hence the voluntary law of nations was not understood by Wolff to proceed from the will of nations in the sense that nations were free to

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determine this law without regard for the constraints imposed by the terms of the law of nature. On the contrary, the voluntary law of nations was understood to proceed from the will of nations in the sense that the will of nations was involved in the agreement that they were bound, *of necessity,* to render to a law whose ground of derivation was already given in natural law. As Wolff put it in the Preface to *Jus Gentium Methodo Scientifica Pertractatum,* in a passage where he differentiated his own view of the voluntary law of nations from that of Grotius:

> But this law itself we, in company with Grotius, have been pleased to call the voluntary law of nations, although with not exactly the same signification, but with a slightly narrower meaning. But far be it from you to imagine that this voluntary law of nations is developed from the will of nations in such a way that their will is free to establish it and that freewill alone takes the place of reason, without any regard to natural law.... [T]he voluntary law of nations does not depend upon the free will of nations, but natural law itself prescribes the method by which the voluntary law is to be made out of natural law, so that only that may be admitted which necessity demands. Since nature herself has united nations into a supreme state in the same manner as individuals have united into particular states, the manner also in which the voluntary law of nations ought to be fashioned out of natural law, is exactly the same as that by which civil laws in a state ought to be fashioned out of natural laws. For that reason the law of nations, which we call voluntary, is not, as Grotius thought, to be determined from the acts of nations, as though from their acts their general consent is to be assumed, but from the purpose of the supreme state which nature herself established, just as she established society among all men, so that nations are bound to agree to that law, and it is not left to their caprice as to whether they should prefer to agree or not.47

The idea of the *civitas maxima* played a central explanatory role in Wolff's exposition of the law of nations. For he used the idea to explain how nations were to be thought of as bound by a system of universal law which, while founded in and deriving from a normative order embodied in nature, nonetheless presupposed the will and consent of nations as the condition for its application to their actual relations within international society. In the event, the idea of the *civitas maxima* was to be squarely rejected by Vattel, who denied any place to it in the explanation of the foundations of the law of nations.

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Vattel was the author of *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758).48 This work was intended as a translation and popularization of Wolff's *Jus Gentium Methodo Scientifica Pertractatum.* However, it went on to become established in its own right as an authoritative statement of the public law of nations observed by the states of Europe.

In *Le Droit des Gens,* Vattel adopted Wolffs four-part division of the basic elements of the law of nations. First, there was the necessary law of nations: *le droit des gens nécessaire.* This consisted of the law of nature applied to nations, and so stood as that part of the law of nations which was strictly binding on nations and rulers in conscience.49 Second, there was the voluntary law of nations: *le droit des gens volontaire.* This was the law that resulted from the modifications made to the strictness of the law of nature in its application to the actual affairs of nations.50 Third, there was the law of treaties, or the conventional law of nations: *le droit des gens conventionnel.*51Fourth, there was the customary law of nations, or international custom: *le droit des gens coûtumier,* or *la coûtume des nations.*52The voluntary, conventional and customary law of nations presupposed the agreement of nations, and so went together to form the sphere of the positive law of nations: *le droit des gens positif.* The voluntary law proceeded from the presumed consent of nations, the conventional law from their express consent, and the customary law from their tacit consent. 53

While Vattel adopted Wolff's division of the parts of the law of nations, he did not follow Wolff in the explanation he provided of the foundation of the voluntary law of nations. It was here that Vattel rejected the idea of the *civitas maxima,* and with it Wolff's implication that there might exist an international state which possessed the sort of rights and powers that belonged to the civil state, and to which the independent nations and states were to be thought of as subordinate.

> From the outset it will be seen that I differ entirely from Mr Wolff in the foundation I lay for that division of the Law of Nations which we term voluntary. Mr Wolff deduces it from the idea of a sort of great republic (Civitas Maxima) set up by nature herself, of which all the Nations of the world are members. To his mind, the voluntary Law of Nations acts as the civil law of this great republic. This does not satisfy me, and I find the fiction of such a republic neither reasonable nor well enough founded to deduce therefrom

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> the rules of a Law of Nations at once universal in character, and necessarily accepted by sovereign States. I recognize no other natural society among Nations than that which nature has set up among men in general. It is essential to every civil society *(Civitas)* that each member should yield certain of his rights to the general body, and that there should be some authority capable of giving commands, prescribing laws, and compelling those who refuse to obey. Such an idea is not to be thought of as between Nations. Each independent State claims to be, and actually is, independent of all the others.54

In Vattel's view, it was unnecessary to postulate an international governmental structure, such as the *civitas maxima,* in order to explain the foundation of the voluntary law of nations. Instead, he argued that the principles of the voluntary law of nations were to be derived in accordance with the purpose and general laws of the form of natural society that he saw as existing among all nations. For Vattel, nations and states were to be thought of as possessing the moral status and attributes of free and independent persons. Considered as free and independent persons, nations and states stood to one another in the same condition and relation as individual men stood to one another in the state of nature that preceded the establishment of civil society.55 In the natural condition of their co-existence, nations and states, no less than the individuals who comprised them, were the subjects of the obligations and rights embodied in the law of nature.56

It was this law, and the obligations and rights it defined, which constituted the foundation of what Vattel saw as the universal society established by nature among all men.57 At the same time, it was the law of nature that lay at the foundation of what Vattel saw as the universal society established by nature among all nations and states.58 These two forms of natural society were linked together through the law which founded them, and which served to define their respective ends. For the end that nations and states were bound to promote, as members of the natural society they formed, was understood to be neither more nor less than the end which men were bound to promote as members of the universal society of mankind. Thus, just as men were united in a natural society wherein they were bound to assist one another to the end of perfecting themselves and their condition, so also were nations and states bound to assist one another in the realization of their own perfection, and that of their condition, as the ultimate end of the natural society they formed among themselves.

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> The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many free persons living together in a state of nature, are bound mutually to advance this human society. Hence the end of the great society established by nature among all nations is likewise that of mutual assistance in order to perfect themselves and their condition.59

Wolff had recognized that nations were bound together in a natural form of society continuous with the society that nature had established among all men. So too had he recognized that the common good of the natural society of nations lay in the nations assisting one another to promote the end of their own perfection, and that of their condition.60 However, Wolff had argued that the full realization of the ends essential to the common good of nations presupposed that the separate nations were to be thought of as having passed beyond the natural form of their mutual society, through their binding themselves together in membership of the form of political association embodied in the *civitas maxima.*61This was not the position Vattel took. For Vattel, the ends of the natural society of nations were given in the general laws that he held to lie at its foundations. These, as he explained them, were laws whose terms were such as to exclude the possibility that the separate nations might be thought of as being subject to the authority of a supreme international state.

The first of the general laws that Vattel saw as founding the natural society of nations was that each nation was to contribute to the happiness and advancement of other nations, to the extent that this was in its power and consistent with the pursuit of its own happiness and advancement.62 The second general law affirmed the natural freedom and independence of nations:

> Since Nations are free and independent of one another as men are by nature, the second general law of their society is that each Nation should be left to the peaceable enjoyment of that liberty which belongs to it by nature. The natural society of nations can not continue unless the rights which belong to each by nature are respected.63

As a further general law of the natural society of nations, there was the principle of the equality of nations:

> Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations,

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> which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.64

For Vattel, then, the natural society of nations was a society made up of free, independent and equal nations. It was from the principle that nations were free, independent and equal that there followed all the modifications to the strictness of the law of nature which Vattel considered to be required for the establishing of a body of law appropriate to the regulation of the relations between nations in the condition of their mutual society. Hence, it was the natural society of nations itselfconceived of as a society of free, independent and equal nationsthat constituted the foundation of the voluntary law of nations. For in Vattel's explanation of it, the voluntary law of nations was essentially the law of nature modified to form rules that accorded with the general laws which provided that the perfection of nations, and that of their condition, lay in their contributing to one another's happiness and advancement, and in the preservation of their mutual freedom, independence and equality.

Central to Vattel's explanation as to how the voluntary law of nations derived from natural law was his appeal to the classification of the different types of obligation and right that had become standard among the modern natural law thinkers. According to this classification, obligations were either *internal* or *external.* Obligations were internal when they were binding on the individual in conscience, and derived from rules stating the basic duties of men under natural law. External obligations were obligations which could be considered as giving rise to rights held by other men. Such external obligations were divided into *perfect obligations* and *imperfect obligations,* with the rights to which they gave rise being divided into *perfect rights* and *imperfect rights.* Perfect rights were rights where there was present a right to compel the performance of the obligations to which they corresponded. Imperfect rights were rights whose corresponding obligations were not capable of enforcement in this way. Perfect obligations were obligations where there existed a right to enforce the fulfilment of their terms. Imperfect obligations, by contrast, were obligations where there existed no right of enforcement, but only a right to request that the terms of the obligations should be fulfilled.65

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This division of obligations and rights bore on the explanation of the voluntary law of nations as law deriving from natural law in the following way. From the standpoint of the voluntary law of nations, the separate nations were not answerable to one another for the intrinsic justice of their conduct, as this was determined through interpretation of what was owed in conscience under natural law. This was so, for Vattel, because nations were to be assumed to be free to decide for themselves what was required of them in conscience in the fulfilment of their natural obligations, and, in consequence of this, to possess a perfect equality in rights in the sphere of their mutual relations. Vattel accepted that the freedom of nations remained limited, but only in the respect that they were answerable to one another for violations of those of their obligations and rights which were perfect external obligations and rights, and which were therefore *enforceable* as between their bearers. As Vattel explained it, then, the voluntary law of nations did not pertain to the law of nature in its entirety. It pertained to the obligations and rights of nations whose enforcement remained consistent with their natural liberty and equality. As for the justification for the voluntary law of nations and the modifications of natural law that it involved, this Vattel saw as lying in the consideration that force was not to be used by, and against, nations in such a way as to undermine the freedom, independence and equality that belonged to them by nature. It was to this voluntary law that the nations were to be presumed to have consented, as a system of rules and principles whose observance by nations was essential for the realization of the ends of the natural society they formed together.66

The view of the law pertaining to nations as natural law modified to accord with the liberty, independence and equality of nations everywhere informs Vattel's statement of substantive law in *Le Droit des Gens.* Certainly, this view of the law of nations is to be found informing Vattel's exposition of the elements of the law of war. For, here, he insisted that nations were not to act to enforce the natural law against one another in all its rigour, but that nations at war were to abide by rules based in, or following from, the voluntary law of nations which worked to preserve an equality of rights as between belligerents.67

Then again, there is Vattel's treatment of the law of commerce. As Vattel explained it, natural law was the basis of the fundamental right of nations to engage in mutual commerce for the securing of that which satisfied their needs. However, the naturally sanctioned rights of buying and selling involved in commercial exchange were imperfect

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rights. That is to say, they were rights that gave rise to no obligations which were enforceable as between nations, unless these were made the subject of a treaty between specific consenting nations and thereby given the force of conventional law. This was so, for Vattel, because it followed from the natural liberty belonging to nations that the nations were free to determine for themselves whether, and if so to what extent and on what conditions, they would enter into commercial relations with one another. Thus did Vattel see the principle of freedom of commerce among men and nations as a principle based in natural law, yet one that stood qualified by a system of international law which enshrined and gave effect to the liberty, independence and equality of the separate nations.68

Vattel's insistence that nations were free, independent and equal by nature underlines his commitment to the principle that, from the standpoint of the law of nations, the separate nations were to be thought of as *sovereign* nations. Indeed, Vattel emphasized that the qualification of a nation or state for membership of the natural society of nations, and hence for status as the subject of the law of nations, consisted precisely in its being sovereign and independent.

> Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign State*. Its rights are, in the natural order, the same as those of every other State. Such is the character of the moral persons who live together in a society established by nature and subject to the Law of Nations. To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.69

Le Droit des Gens stands as a seminal contribution to the development of the modern conception of state sovereignty. The importance of Vattel's treatment of sovereignty derives from his affirmation that the possession of sovereignty by nations and states presupposed not only their liberty and independence, but also the recognition of their equality as co-existing legal entities. Thus it was the principle of the sovereign equality of states that F.H. Hinsley emphasized in his assessment of Vattel as a writer on the law of nations. As Hinsley summed up the matter in his *Sovereignty* (1966),70 Vattel's achievement had consisted in his articulating, from the standpoint of international law, the new conception of the European order that came to be formed in the mid-eighteenth century.

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[Vattel's] *Droit des Gens* provided the legal version of the new political understanding of Europe as an international system. More explicitly than any previous writer on international law, Vattel denied that Europe was a single body-politic; it was an association of independent states. He still insisted, on the other hand, no less than Grotius had done, that the natural law was the fount of international law. But he proclaimed that the first, the fundamental, principle of the natural law was the sovereignty of the independent state. International law was to be respected by all states because they were bound by the natural law to respect the sovereignty of every state. But because states were equal in their state-ishness under the natural lawas sheep were equal in their sheep-ishness, as sheepit followed that the fundamental principle of international law was the sovereign equality of states.71

4.4 KANT AND THE SORRY COMFORTERS

In *Perpetual Peace,* Kant wrote of Grotius, Pufendorf and Vattel as 'sorry comforters', who had fallen short of setting out an adequate juridical foundation for lasting peace among states. As he put it, the work of these writers was referred to in justification of acts of military aggression. However, the codes the writers had expounded possessed no legal force, given that states were not subject to common external constraints on their actions. Moreover, there was no evidence that states had ever been brought to abandon their own objectives on account of arguments based in the work of the writers.

> Hugo Grotius, Pufendorf, Vattel and the rest (sorry comforters as they are) are still dutifully quoted in *justification* of military aggression, although their philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force, since states as such are not subject to a common external constraint. Yet there is no instance of a state ever having been moved to desist from its purpose by arguments supported by the testimonies of such notable men.72

This judgment underlines that Kant conceived of his proposals for international peace as bringing into question the conceptual framework of the law of nations in the form in which it had been evolved by the leading writers of the seventeenth and eighteenth centuries. However, Kant should not be set apart from the sorry comforters he

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disparaged by reason of the specific principles that he affirmed as forming the substance of the law of nations. On the contrary, it must be emphasized, among other things, that certain of the substantive principles of the law of nations that he affirmed in *Perpetual Peace* were principles to which Vattel had given clear recognition in *Le Droit des Gens.*

This is not to say that Kant did not depart significantly from Vattelian doctrine. Indeed, Kant's departures from the doctrines of Vattel, and from those of Vattel's predecessors, are crucially important in understanding his international thought. For it is where Kant departed from positions adopted by earlier writers that is brought out the transformation in the view of the conceptual framework of the law of nations which is reflected in his work, and which serves to mark the decisiveness of his break with the past. This is true, particularly, with respect to Kant's treatment of the law of nations as it related to the rights and duties of states in the waging of war. Nevertheless, it is still vitally important to grasp that it is not simply because of differences regarding the substance of the law of nations that Kant must be judged to have broken with writers like Grotius, Pufendorf and Vattel. For, in the last resort, there can be no overlooking the general continuity between what Kant stated to be the main elements of the law of nations and the exposition of the elements of this law provided by previous writers.

The substantive principles of the law of nations that Kant affirmed in *Perpetual Peace* were principles which belonged to the conventional law of nations of his own time. The sources of this law were the customary practice of nations, treaties and the opinions of the recognized authorities. As opposed to what had been the case with earlier writers, it was not Kant's concern to provide a systematic exposition of the law of nations as it was to be found given in the positive sources of the law. His concern lay rather with the origin and basis of the binding normative force of the law of nations. That is to say, it was Kant's concern to explain how, and under what conditions, the existing conventional law of nations could be considered to be binding upon the nations and states to which it was assumed to have application. It is here, in the matter of what Kant took to be the normative foundations of the law of nations, that he broke decisively with the tradition of Grotius, Pufendorf and Vattel. For in marked contrast to his predecessors, Kant made no appeal to natural law in what he said in explanation of the origin and basis of the binding normative force of the law of nations.

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This is a truth about Kant's approach to the law of nations that is in no way qualified by consideration of those elements of his thought which are evidence of his alignment with the modern secular natural law tradition. In Chapter 2, it was suggested how Kant must be situated in relation to the seventeenth-century natural rights theorists like Hobbes and Spinoza. Thus it was explained that Kant assumed the primacy of the natural right of the individual to freedom in his specification of the first-order principles of justice and political morality that he saw as lying at the foundations of civil society and the state. In Chapter 5, it will be explained that Kant thought of nations and states as possessing a natural right that was analogous to the right to freedom which belonged to the individual prior to his entry into political society. This was the natural right of states to resort to war in their own defence.

As with Hobbes before him, Kant conceived of the right of states to wage war in their own defence as a natural right for the reason that states were understood to be free and independent by nature. Again like Hobbes, Kant conceived of the natural condition of the society in which free and independent states co-existed to be that of the state of war. In contrast to Hobbes, however, Kant did not take the position that the law that was to define the limits for the exercise by states of the right of war was law whose binding force derived from its being given in the order of nature.

It is true, as we shall see, that Kant regarded the greater part of the law of nations as law that concerned the waging of war by states. So also shall we see that the exposition he provided of this part of the law of nations followed directly from his assumption that the right of war was a right that belonged to states by virtue of their natural freedom. In these respects, Kant did indeed present the law of nations as a form of law that applied to states in the natural condition of their society. Nevertheless, what it is here crucial to grasp is that Kant thought that the law of nations was to stand as a law of peace (rather than a law of war), and that, in his view, a peace based in law was a condition of the relations between states which stood in absolute opposition to war as the natural condition of their mutual external relations. Accordingly, while Kant certainly conceived of states as possessing a natural right of war, it was not to the idea of natural law that he appealed in order to explain the foundations of the laws that he believed were necessary to promote peace between states. On the contrary, it was Kant's conviction that the foundations of that part of the law of peace he saw as comprising the law of nations were to be looked for in the will and agreement of nations and states.

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Kant's conviction that the law of nations was founded in the will and agreement of states everywhere informs the argument of *Perpetual Peace*. His conviction about this is reflected most clearly in the terms of the second definitive article of a perpetual peace between states. This article provided that a federation of free states was to stand as the constitutional basis of the law of nations. The federation of free states that Kant called for must be distinguished from the sort of association of states that Wolff had envisaged when writing of a *civitas maxima*. For Kant did not think of his proposed federation as embodying a form of international government exercising powers concerned with the stipulation and enforcement of the law applying to nations and states. On the contrary, the federation was understood by Kant to be a constituted association of states whose essence consisted in the form of treaty through which it was to be brought into being. In other words, what was essential to Kant's federation of free states was not an international organization for the government of states, but the voluntary act through which member states were to express their will and agreement to be bound by the law that the federation was to base.

In the present chapter, we have argued that the foundations of the modern law of nations were laid in Europe during the sixteenth and seventeenth centuries. In Chapters 5 and 6, something will be conveyed of how, in contrast to thinkers like Grotius, Hobbes and Vattel, Kant stands out as an international theorist of quite striking modernity, and one who is linked very directly to the contemporary era in international politics. Thus in Chapter 5, it will be explained how Kant gave expression to ideas that are now embodied in some of the most fundamental principles of public international law. Foremost among these are the ideas of the faith of treaties and the sovereignty and equality of states.

However, the particular modernity of Kant as an international theorist does not consist merely in the recognition he gave to principles that are central to current international law. For the principles of good faith and the sovereignty and equality of states were hardly original to Kant. What underlines Kant's links with the future direction of thought about international law, and his break with earlier writers, is that, in his exposition of the substantive law of nations, the ideas of good faith and the sovereignty and equality of states are detached from any containing framework of natural law. It is here that Kant's affirmation of the idea of the sovereignty and equality of states assumes a special importance. This is so because in abandoning

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natural law in favour of the will and agreement of states, as the foundation of the law of nations, Kant committed himself to a quite specific view of state sovereignty as a fundamental juridical principle of the international order.

The view of sovereignty that Kant adopted was one which carried important implications for the understanding of the relationship between politics and morality in the international sphere. Specifically, the view of the sovereignty of states that Kant adopted was such as to call into question the possibility of states being thought of as subject to a rule of law possessing a moral force and validity which remained independent of their will to be bound by it. For it followed from Kant's explanation of the foundations of the law of nations that the will of states was to be thought of as the source and precondition for the binding normative force of the law obtaining within the international order. This was so in the respect that, under the terms of the explanation, the law to which states were to be thought of as being subject was law that they were to bind themselves to conform with through their own free consent and agreement. Thus, it may be said that, from the Kantian standpoint, the law binding on states was a form of law that was to be founded by states in accordance with the rights and capacities which embodied, and presupposed, their freedom and sovereign independence as states.

For Kant, then, the explanation of the normative foundations of the law of nations was such that states were to be assumed to be the final determinants of the principles of law and right that were to govern their relations in the international sphere. This, obviously, involved a radical view as to the implications of the freedom and sovereign independence belonging to states with respect to the possibility of an international rule of law that would make for peace. Certainly, Kant's was a more radical view of sovereignty than anything that is to be found in the thought of Hobbes, or in that of Vattel.

Superficially, it would seem that Hobbes was more uncompromising than Kant in the implications for international law that he took to follow from the sovereign rights that he saw as belonging to states and their rulers. For the Hobbesian position was such that there was no sense in which independent states, or commonwealths, and their rulers could be thought of as being bound by laws whose basis was to be explained in terms of ideas of will and agreement. Laws of the latter type, for Hobbes, were positive laws, and so laws which had to be explained as originating in the will of some person or persons

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possessing a sovereign power of law-making. However, the argument of *Leviathan* was such as to exclude the possibility of independent commonwealths agreeing to covenant together to subject themselves to a superior governmental power which was to possess the right of law-making, and the other rights and faculties of sovereignty.

Hobbes's exclusion of covenants between commonwealths to institute an international sovereign power is a central consideration in explaining why he thought of independent commonwealths as coexisting in the state of nature, and hence as being destined to remain in the state of the war of all against all. Even so, while Hobbes took this view of the situation of independent commonwealths, he did not consider that commonwealths and their rulers were free from all normative constraints in the sphere of their mutual co-existence. For Hobbes was quite clear that the rulers of commonwealths were bound in conscience to act in conformity with the principles of peace embodied in what he saw as being the eternal laws of nature. Accordingly, the following paradox suggests itself. This is that Hobbes the exponent of absolute government was able to allow, as Kant the defender of limited constitutional government was not, that states, while free and independent in their sovereign rights, nonetheless remained subject to laws that formed a normative order whose existence and binding force were not conditional on their own will and agreement.

Vattel stands with Kant as a defender of the principles of limited constitutional government. Thus in *Le Droit des Gens,* there are arguments to the effect that the sovereignty belonging to a nation or state was a power that belonged originally, and essentially, to the whole body of the society that formed it, and hence that the sovereign ruler in the state possessed only the status of a representative of the people.73 There are also arguments that the rights and powers held by the ruler were to be exercised in accordance with the laws and constitution of the state.74 So indeed are there arguments for limited government of the sort that Kant was later to reject: namely, arguments explaining the circumstances in which a people were to be considered entitled to resist their ruler, as when the ruler acted contrary to the fundamental laws of the state or violated its constitution.75 It is in his unequivocal commitment to these and the other principles of limited government that Vattel is to be set apart from Hobbes, and so too, for that matter, from Grotius.76 However, as a writer on the law of nations, Vattel must be placed squarely with Grotius and Hobbes in the secular natural law tradition. Here, the conceptual divide that separates Vattel from Kant is immense. This is

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so not least with regard to the matter of the principle of sovereign independence and equality that Vattel saw as fundamental to the law of nations.

In Vattel's view, nations and states were sovereign in law in the respect that they possessed the attributes of freedom, independence and equality. As for the condition of the society that Vattel saw as obtaining among sovereign nations and states, this was essentially, and irreducibly, one of the co-existence of free, independent and equal persons or entities. For as opposed to Wolff, Vattel would not accept that independent nations and states might be thought of as being united under the authority of an international state.

This was more or less the position that Hobbes had taken. Vattel is to be distinguished from his predecessor in several important respects. For example, he accepted, as Hobbes had not, that the law of nations included elements of positive law. Again, he regarded the natural condition of the society of independent nations and states as one of peace, rather than of war.77 Nevertheless, there is one crucial respect in which Vattel looked back directly to Hobbes. This is that he saw states as co-existing within a containing normative order based in unchanging laws of nature, where these laws were understood to be binding on states without regard to their will and agreement to be bound.78 Indeed, the freedom, independence and equality that Vattel took to define the status of nations and states as sovereign entities were underwritten by the general laws which, as we have seen, he identified as organizing the natural form of society existing among all nations and states. These fundamental laws of nature played a pivotal role in the Vattelian system of international law. For it was in accordance with the assumption that states were free, independent and equal that there were derived the modifications to the natural law which, as embodied in the voluntary law of nations, were considered by Vattel to be essential to the realization of the defining ends of the natural society of nations.

Kant wrote with as strong a sense as Vattel as to how freedom, independence and equality were essential aspects of the sovereignty belonging to nations and states. Where Kant diverged from Vattel was in the respect that, for him, the sovereign independence of states was not grounded in principles of natural law which were to be thought of as constituting the basic containing normative framework for the regulation of the relations between nations and states. Accordingly, Kant did not follow Vattel in seeing peace among independent states as depending on their subjection to laws that were given in the natural

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condition of their mutual society. As we have suggested, Kant followed Hobbes in viewing the natural society obtaining among states as a state of war, and hence as a form of society that was opposed to that of a society based in the rule of law. However, Hobbes had still been able to conceive of states, and their rulers, as being bound to act for peace under the terms of the eternal laws of nature. For Kant, by contrast, the laws that were to regulate the relations between states, and so make for peace, were laws that comprised a normative order that it fell to states to bring into being and underwrite through some voluntary act which expressed, and presupposed, the freedom and independence belonging to them as sovereign entities.

From the Kantian standpoint, therefore, the sovereign independence of states was not merely a substantive principle of the law pertaining to the relations between nations and states. This was how Vattel had understood the sovereign independence and equality of statesalbeit that he expounded the principle by reference to the system of natural law which, for him, was the foundation of the law of nations. Kant went much further than this. He did so in the respect that, in his arguments for perpetual peace, the sovereign independence of states was taken to stand *both* as a principle enshrined in the law of nations, and, as it were, as the foundational presupposition of this law. This, certainly, was the implication of Kant's argument that the law of nations was to be based in a federation of free states. For, as has been hinted at already, Kant's specification of the federation was such as to underline that it was only through the exercise of the rights and capacities belonging to states, as free and independent entities, that they would be able to perform the act of agreement necessary for them to bind themselves to conform with the law which was to establish peace in the sphere of their mutual external relations.

In Chapters 5 and 6, we turn to the detailed consideration of Kant's proposals for perpetual peace. In Chapter 6, we shall be examining, among other matters, Kant's claims for his projected federation of free states as a constituted association of states that was understood both to preserve and to presuppose the freedom and independence of the states that entered it. In Chapter 5, we shall examine Kant's specification of the substantive principles of the law of nations. Here, it will be explained how the law of nations was specified such that it was understood to work to guarantee the rights of states that defined the basis of their freedom and independence.

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5 The Preliminary Articles of Perpetual Peace

In Chapter 3 we saw that Kant presented his proposals for perpetual peace in the form of an imaginary treaty between states. The terms of the treaty are given in the six preliminary articles of perpetual peace that comprise the First Section of *Perpetual Peace* and in the three definitive articles of perpetual peace comprising the Second Section. The concern of the present chapter is with the preliminary articles of perpetual peace. The first preliminary article provided that peace treaties made with secret reservations were to be considered invalid. The second preliminary article provided that no existing independent state was to be disposed of through inheritance, exchange, purchase or gift. The third preliminary article provided that states were gradually to abolish their standing armies. The fourth preliminary article provided that no state was to contract a national debt in connection with its foreign policy. The fifth preliminary article provided that no state was to interfere forcibly in the constitution and government of another state. The sixth preliminary article provided that states at war were to refrain from the use of assassins and poisoners, and from other like acts destructive of the confidence between belligerent states that was necessary for the restoration of peace.

With the six preliminary articles of perpetual peace Kant stated general principles of international conduct that were to be observed by states and governments. The principles stated all receive broad acceptance in the contemporary world as desirable principles of international relations. Take, for example, the third preliminary article, which stipulated that states should abolish their standing armies on a gradual basis. This article expressed a principle of international relations that is widely followed by contemporary statesmen and policymakers. This is the principle that international peace depends not on the maintenance of a balance of military power between states, but on the preparedness of states to give up the means at their disposal to wage aggressive war against one another. Again, there is the fourth preliminary article, which called for a prohibition on states incurring international debts in connection with their foreign policies. As with the third, this preliminary article points in the direction of a principle of international relations that is widely accepted by present-day

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policy-makers. This is the principle of conditionalitythis being a principle that provides that credit is to be extended to states and governments subject to restrictions on the uses to which it is to be put.

The preliminary articles of perpetual peace do not only state general principles of international conduct. They also state what Kant believed were to stand as the substantive principles of the law of nations, considered as an integral part of the law of peace. Indeed, Kant explicitly assigned a legal status to the preliminary articles when, in the closing paragraph of the First Section of *Perpetual Peace,* he described the articles as being prohibitive laws: *leges prohibitivae.*1It is in their status as prohibitive laws that the preliminary articles serve to underline the modernity of the view Kant took of the substantive law that was to set the basic juridical framework for the relations between states in the international sphere. For, as we suggested in Chapter 4, the ideas informing the principles of international conduct stated in certain of the preliminary articles are ideas that are embodied in some of the most fundamental principles of current public international law. This is true particularly with respect to the principles stated in the first, second and fifth preliminary articles.

5.1 GOOD FAITH, SELF-DETERMINATION AND NONINTERFERENCE

The first preliminary article of perpetual peace concerned the formal arrangements made by states for the ending of wars. The principle the article stipulated was one whose observance by belligerent states Kant saw as essential if an agreement to end a war was to be a *peace,* rather than a mere truce or suspension of hostilities. As Kant explained it, the article provided that an agreement for the conclusion of a peace between belligerent states was to be considered invalid whenever one or other of the parties to it made a secret mental reservation, with a view to reviving at a later time the claim that had caused the war the agreement in question was intended to end.2 Thus explained, the first preliminary article underlines that Kant saw international peace as depending on the honesty and good intentions of states and governments. In denying any validity to peace treaties made with secret reservations, and in so underlining that the maintenance of peace presupposed the honesty and good intentions of states and governments, Kant gave recognition to a principle that stands as a general principle of public international law. This is the principle enshrined in

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the rule *pacta sunt servanda:* namely, the principle that a treaty is to be regarded as binding upon the states that are the parties to it, and that it is to be performed by them in good faith.3

The second preliminary article of perpetual peace provided that no independently existing state, whatever its size, was ever to be acquired by another state through inheritance, exchange, purchase or gift. In his explanation of the article, Kant insisted that the state itself, as distinct from the land on which it was based, was not to be regarded as a mere possession or *patrimonium.* On the contrary, the state was an association of men, which no person or entity other than itself was entitled to command or dispose of. Hence, the disposal of the state by means of inheritance, exchange, purchase or gift involved the destruction of the state as a moral entity, and its transformation into nothing more than a thing or commodity. This, in Kant's view, ran counter to the idea of the original contract founding the civil state. For the idea of the original contract was the idea by means of which the state was understood to be a form of association whose end lay with securing the rights of the individuals who formed it.4

Kant's denial that the state was to be regarded as a possession, and hence as something that could be acquired or disposed of through inheritance, exchange, purchase or gift, was intimately bound up with two arguments that are central to his political philosophy. The first is the one referred to in the explanation of the second preliminary article. This was the argument that the state was to be thought of as originating in a contract, and hence (for Kant) as a form of association among men that existed to secure their rights and freedom as bearers of the capacities of citizenship. Second, there is the argument that Kant advanced in support of his claims for the republican constitution. This was the argument that government in the civil state was to be based in the representative principle. For informing the principle of representation to which Kant appealed was the idea that civil government was an institution that remained based in, and subject to, laws that were to be thought of as deriving from the will and consent of the citizen-body in its status as the sovereign legislative power in the state. Each of these arguments had the effect of calling into question the legitimacy of the particular conception of the state that Kant rejected in his explanation of the second preliminary article: namely, the conception of the state as a patrimony, and hence as the subject of a proprietary right held by its ruler.5

The second preliminary article of perpetual peace reflects Kant's links with the past in the matter of his specification of the substantive

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principles of the law of nations. Certainly, it is this article which brings out the extent of Kant's adherence to the doctrines of Vattel. For Vattel had insisted that the state could not be thought of as a possession or patrimony of its ruler, for the reason that the status of the ruler of a state was that of a representative person (and this even when the ruler happened to be an hereditary ruler).6

At the same time, the second preliminary article reflects Kant's anticipation of later developments in international law. As Kant explained it, the article carried with it the implication that fundamental alterations to the status and position of a state within the international order as affecting its rights and independence, and fundamental alterations to the form of the government that determined its internal domestic political organization, were to take place only in accordance with the consent of the people who comprised its citizen-body. In this way, the article expressed something of the essential meaning of what, in the twentieth century, has gained acceptance in international law as the principle or right of self-determination. Thus the principle or right of self-determination, as it is understood in current public international law, provides that distinct peoples should be recognized to have the right to determine for themselves their political status and their form of self-government. It is in these terms that the principle of equal rights and self-determination of peoples is affirmed in the Charter of the United Nations, and in such basic documents of international law as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations which was adopted by the General Assembly of the United Nations on 24 October 1970.7

The second preliminary article of perpetual peace laid down a principle of the law of nations which affirmed the freedom and independence of states. However, it is the fifth preliminary article that most clearly brings out that Kant conceived of the law of nations as a body of law that was to work to guarantee the rights of states which were essential to their freedom and independence. The fifth preliminary article provided that no state was to interfere forcibly in the constitution and government of any other state. For Kant, the principle of non-interference stated in the article was unconditional and overriding. Indeed, he classified the fifth preliminary article, together with the first and sixth preliminary articles, as belonging to the category of prohibitive laws of the strictest sort. These were laws whose validity did not depend on the circumstances of the cases to which they had application, and where the abuses of

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states which they prohibited were to be ended immediately. As a strict prohibitive law, the fifth preliminary article was to be distinguished from the second, third and fourth preliminary articles. The latter Kant classified as prohibitive laws which permitted some measure of subjective latitude in their application as determined by circumstances, and hence as laws which allowed for some delay in their implementation.8

Kant began the explanation of the fifth preliminary article by asking what justification there could be for the form of interference prohibited under the terms of the article. In answering the question, he noted that the fact that a state conducted itself in such a way as to cause a sense of scandal, or offence, among the subjects of some other state was not a sufficient ground for that other state to interfere in its internal affairs. This provided an object lesson in the evils befalling a people through their lawlessness. However, it did not constitute a wrong or injury justifying interference in the internal political arrangements of the state concerned.

> [A] bad example which one free person gives to another (as a *scandalum acceptum)* is not the same as an injury to the latter.9

The abruptness of the answer Kant gave to the question with which he opened the explanation of the fifth preliminary article indicates the position he took regarding the overridingness of the prohibition the article stated. This was that, in principle, there could be no justification whatsoever for the forcible interference by one state in the constitution and government of another state. Nevertheless, Kant did allow that the prohibition on forcible external interference in the political arrangements of a state remained subject to one important qualification. Thus, he considered the case of a state which had split into two parts as the result of some internal conflict, such as a civil war. In a conflict of this sort, each of the two sides might seek to establish itself as a separate state purporting to have authority over the whole of the original state. In this situation, it was not to be counted as interference in the constitution and government of the state in question were an external power to intervene, through giving its active support to one or other of the parties to the conflict. For the condition of a state wracked by such internal disorder was one of anarchy. Even so, Kant insisted that until such time as the conflict had been decided, interference by external powers would involve a violation of the right to independence of the people among whom the conflict was taking place. Such interference would be 'an active

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offence', and one that threatened all other states through making their own independence 'insecure'.10

The prohibition laid down in the fifth preliminary article on forcible external interference in the constitution and government of states underlines something of Kant's conservatism as a theorist of international politics. For the terms of the article indicate that Kant saw the establishing of lasting international peace as demanding the acceptance by states of the law of nations as a body of law that would work to validate the international order in its existing form, and hence as working to confer legitimacy on the rights to freedom and independence of the particular states that comprised it. That Kant saw the law of nations in this way is reflected in his explanation of the legal status of the preliminary articles. As we have noted, the fifth preliminary article was classified by Kant as a prohibitive law of the strictest sort. This classification of the article was such as to imply that the obligation on states to refrain from forcible interference in one another's constitution and government, as stipulated in the article, was a principle of the law of nations that was to be thought of as possessing an absolute priority over other principles embodied in this law. Certainly, it was a principle that Kant considered to possess priority over the principle that freedom should be restored to states which had been deprived of it in the past, through transactions of the sort prohibited under the second preliminary article. For while he insisted that the restoration of freedom to such states, the ultimate purpose of this article, was not to be lost sight of altogether, he also insisted that the prohibition on the forms of acquiring states described in the article was to apply only prospectively, but to have no application to the existing political possessions held by states.11

The fifth preliminary article stipulated a principle of the law of nations which presupposed, and followed from, the possession by states of the rights and attributes of sovereignty. Not only did the principle of non-interference laid down in the article serve to guarantee the freedom and independence of states in regard to their internal constitution and government. The principle also served to give recognition to the formal juridical equality of states, in the respect that the freedom from external interference it guaranteed to states was a freedom that was to be guaranteed to all states equally and without exception. It is here, in its bearing on the idea of state sovereignty, that the fifth preliminary article testifies to Kant's anticipation of the system of public international law of the contemporary era. For Kant's principle that states should be prohibited from forcibly

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interfering in one another's constitution and government conforms, in its meaning, to the principle which is fundamental to current public international law. This is the principle that states remain subject to a duty of non-interference, or non-intervention, in the area of the exclusive jurisdiction exercised by other states. Central among the matters accepted as coming under the exclusive jurisdiction of states are those relating to their respective political and social systems, and to their respective economic systems. The duty of non-intervention, as here defined, is an integral part of the general conception of state sovereignty that informs current international law. Thus, within this general conception, the duty of non-intervention is understood to follow as a consequence of the sovereignty and equality of states considered as the foundational constitutional principle of public international law.12

5.2 THE LAW OF WAR

The prohibitive law laid down in the fifth preliminary article of perpetual peace was a law that affirmed the freedom and independence of states. With the sixth preliminary article Kant proceeded to stipulate that states were to be prohibited from certain practices in the exercise of a right that he saw as belonging to states by virtue of their being free and independent entities. This was the right of states to wage war in defence of their rights and interests. The specific practices of states for the prohibition of which Kant called were the employment of assassins and poisoners, breaches of agreements among belligerent states, and the instigation of treason in an enemy state. These were acts of hostility which undermined the mutual confidences between states that Kant claimed were the precondition for the possibility of the state of war being ended, and a return made to the state of peace. Without these confidences, he insisted, war could be concluded only through the total destruction of one or other of the belligerent states.13

Kant classified the sixth preliminary article as a strict prohibitive law. That he did so underlines that he regarded the rules governing the conduct of war as occupying a central position in the substantive law of nations. Indeed, the exposition of the principles of the law of nations provided in the second section of Part 2 of 'The General Theory of Justice' in *The Metaphysical Elements of Justice* is devoted almost entirely to discussion of the law of war.

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Here, Kant set out a detailed explanation of the basis of the right of states to wage war. As he explained it, the right of states to wage war was a natural right. This was so in the respect that the right of states to wage war was a right that followed from what, for Kant, was the truism that states were free and independent entities, or persons, which were to be thought of as co-existing in a state of nature. The state of nature in which states co-existed was the state of their natural freedom. Considered as entities or persons co-existing in the state of natural freedom, states were assumed by Kant to stand in a nonjuridical condition of society. Accordingly, he argued that states coexisted in a condition of society where, by definition, there could be no judicial remedies or procedures for the peaceful settlement of disputes about their conflicting rights. The natural condition of the society of states was therefore one of strict legal injustice, and hence one which states were obliged to abandon. This was so because, in this condition of international society, the external relations between states were founded not in principles of law and justice, but only in the right of the most powerful. For Kant, then, the natural condition of the society obtaining among free and independent states was to be viewed as a state of war, even when their relations were distinguished by the absence of actual fighting.

It was in terms of the international state of nature considered as a state of war that Kant defined the standing of states as the subjects of the law of nations. This was how he put the matter at the start of his discussion of the law of nations in *The Metaphysical Elements of Justice.*

> Under the Law of nations, a state is regarded as a moral person living with and in opposition to another state in a condition of natural freedom, which itself is a condition of continual war.14

Again, it was in terms of the international state of nature considered as a state of war that Kant went on to begin his statement of the basic principles of the law of nations.

> With regard to their external relationship to one another, states are naturally in a nonjuridical condition (like lawless savages).
>
> This condition is a state of war (the right of the stronger), even though there may not be an actual war or continuous fighting (hostility). Nevertheless (inasmuch as neither side wants to have it better), it is still a condition that is in the highest degree unjust, and it is a condition that states adjoining one another are obligated to abandon.15

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Then again, it was in terms of the natural condition of war among states that Kant affirmed in discussion of the rights of war that, in the international state of nature, war was the legitimate means by which states were to secure their rights against one another, and to seek redress for injury done to them.

> In the state of nature among states, the right to go to war (to commence hostilities) constitutes the permitted means by which one state prosecutes its right against another. In other words, a state is permitted to employ violent measures to secure redress when it believes that it has been injured by another state, inasmuch as, in the state of nature, this cannot be accomplished through a judicial process (which is the only means by which such disputes are settled under a juridical condition of affairs).16

Kant's discussion of the law of war in *The Metaphysical Elements of Justice* was not confined to the explanation of the basis of the natural right of states to defend their rights and property through resort to war. He also set out the substantive rights that belonged to states in respect of the waging of war. These rights were discussed under six categories.

First, there was the right of states to wage war in relation to their own subjects. Here, Kant argued that the state was to wage war only with the consent of the representatives of the citizen-body.17

Second, there was the right of states to wage war in relation to other states. Here, Kant described the offences that provided states with lawful justification for the resort to war. The principal offence justifying war that Kant identified was an actual injury to the state caused through the first aggression of some other state or states. However, he also allowed that a state might resort to war on account of some perceived threat to its own security. So, for example, the engagement in military preparations by another state might provide a state with the right to wage preventive war *(ius praeventionis).* Again, the increase in the power of a state, through its acquisition of new territory, might provide other states with legitimate cause to wage war against it. Hence there followed the right of states that were capable of acting upon one another to preserve a balance of power among themselves.18

Third, there were the rights of belligerent states during a war. Kant recognized that the entire question of rights of this sort was problematic. For it appeared to involve a contradiction in terms to think of concepts of justice and rights in connection with a form of

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relationship among states which was inherently lawless. Nevertheless, Kant suggested that there was one general idea about war which implied the possibility of justice and rights existing among states at war. This was the idea that war was to be conducted in conformity with principles which did not preclude the possibility of states abandoning the natural state of war obtaining among themselves, and entering into a juridical condition of society.

As Kant explained them, these principles set the limits to the ends and objects that might permissibly be pursued by states in waging war. Hence, no war between independent states was to be a punitive war *(bellum punitivum).* Again, no war was to be a war of extermination *(bellum internecinum),* or one of subjugation *(bellum subjugatorium).* A war with the extermination or subjugation of the enemy state as its end would result in the destruction of that state, with the absorption of its population into the body of the victorious state or their reduction to slavery. Such a war was therefore in conflict with what Kant specified as a general principle of the law of nations. This was that states were to resort to force only in order to maintain and defend their existing property, but not in order to make new acquisitions that would threaten other states through an increase in their relative power. Kant's discussion of the rights of belligerent states also included consideration of practices that were to be prohibited during wartime. Here, he condemned the use of assassins and poisoners, and the other practices of the sort excluded under the terms of the sixth preliminary article of perpetual peace. In addition, he insisted that no belligerent state was permitted to seize by force the private property of the subjects of a vanquished enemy state.19

The fourth set of rights relating to war that Kant discussed were the rights of states on the conclusion of a war. Here, he listed certain conditions that it was not permissible for a victorious state to include in a treaty of peace concluded with a defeated enemy. Thus, it was not permitted for a victorious state to demand compensation from a vanquished enemy state to meet the costs of war, or to demand that it should forfeit its freedom and independence through being reduced to the status of a colony.20

Fifth, there were the rights of states at peace. These included the right of states to neutrality, and the right of states to form alliances for the purpose of mutual defence against internal and external aggression.21

Sixth, there were the rights of states with respect to an unjust enemy. Kant's discussion of this question was somewhat obscure.

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(Understandably so, given that he regarded states at war as being in a state of nature, and hence as in a condition of strict legal injustice.) However, Kant did pick out, as an example of an unjust enemy, the state which acted in violation of the terms of treaty obligations. Such a state was unjust because its publicly expressed will demonstrated that it acted from a maxim which, if adopted by states as a universal principle, would preclude the very possibility of establishing international peace, and so prolong forever the natural condition of war obtaining among states. All states were at liberty to unite against a state guilty of this injustice, and, if necessary, to compel it to adopt a civil constitution which would incline it to peace.22

Kant's exposition of the rights of states at war is in some respects continuous with the expositions of the law of war provided by the leading writers on the law of nations of the seventeenth and eighteenth centuries. The two most influential of these expositions were the ones provided by Grotius in *De Jure Belli ac Pacis* and by Vattel in *Le Droit des Gens.*23Both Grotius and Vattel gave recognition to the rules and principles that Kant was to affirm as central to the law of war. For example, Grotius condemned poisoning and assassination as contrary to the law of nations,24 and insisted that agreements between states at war were to be honoured in good faith.25 So, too, did Vattel after him.26 Again, there are in Vattel arguments to the effect that states were not to resort to war merely for their own gain,27 and arguments to the effect that states were permitted to act in concert to maintain a balance of power.28

There were, then, clear precedents in Grotius and Vattel for certain of the principles of the law of war that Kant affirmed. Nevertheless, Kant still departed significantly from Grotius and Vattel in his exposition of the elements of the law of war. The respects in which he did so underline his break with these writers in the matter of the view he took as to the natural form of society obtaining among states, and as to the foundations of the law that was to apply to states in the sphere of their mutual external relations. This is so most notably with Kant's discussion of the grounds of justification available to states for resort to war. For in contrast to Grotius and Vattel, Kant insisted that the rights of states were such that no war was to be thought of as having punishment as its cause and object.

With Grotius and Vattel, the fundamental basis for the justification for war was explained in terms of the idea of a wrong or injury to the state that resorted to it, where the wrong or injury in question was understood to involve the violation of some lawful right or rights

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of that state.29 In accordance with this idea, Grotius and Vattel identified the following as the three principal just causes for a state to resort to war. First, there was defence against an actual or threatened injury from some other state or states. Second, there was recovery of, or redress for the loss of, that which lawfully belonged to or was lawfully due to the injured state. The third just cause of war was punishment of the state or states guilty of wrong-doing.30 This specification of the just causes of war was an orthodox one. As such, it testifies to the continuity between the thought of Grotius and Vattel and the tradition of reflection on the nature of the just war as it had established itself during the Middle Ages.31

The medieval tradition of just war theory exercised a profound influence on the development of modern international law. In the event, the influence of the tradition persisted long after the abandonment of the theological ideas with which it had been bound up in the Middle Ages, and long after international law had come to be expounded as a system of law that was understood to be founded in purely secular principles of justification. For this reason, the just war tradition is of central importance in explaining how the ideas belonging to the pre-modern philosophy of natural law came to form so much of the conceptual framework for the expositions of the law of nations provided by writers such as Grotius and Vattel.

Among the major just war theorists of the pre-modern period, the punishment (or avenging) of wrong-doing had been commonly accepted as a lawful cause and object of war. This had been so for St Augustine (354-430), in whose writingssuch as the late fourthcentury polemic *Contra Faustum*32are to be found many of the ideas that were to be central to subsequent theorizing about the conditions necessary for the just war. As for punishment of wrong-doing, this Augustine explained as a justification for war in the following terms:

> The real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power, and such like; and it is generally to punish these things, when force is required to inflict the punishment, that, in obedience to God or some lawful authority, good men undertake wars, when they find themselves in such a position as regards the conduct of human affairs, that right conduct requires them to act, or to make others act in this way.33

Augustine's view of punishment of wrong-doing as a just cause of war was to be adopted by Aquinas, who in the *Summa Theologiae*

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provided the classic statement of the requirements for justice in war.34 Thus, Aquinas laid it down that in war

> a just cause is required, namely that those who are attacked are attacked because they deserve it on account of some wrong they have done. So Augustine, *We usually describe a just war as one that avenges wrongs, that is, when a nation or state has to be punished either for refusing to make amends for outrages done by its subjects, or to restore what it has seized injuriously.*35

Punishment of wrong-doing was also to be identified as a principal just cause for war by later thinkers in the Thomist tradition, such as Vitoria and Suarez.36 So likewise was it a just cause and object of war for Grotius and Vattel.

In identifying punishment of wrong-doing as a just cause and object of war, Grotius and Vattel adopted a quite specific view of war, and one which must be taken as being intimately bound up with their appeal to the idea of natural law as the underlying foundation for the law governing the relations between nations and states. This was the view of war as a means for the maintenance, and the enforcement, of a normative order obtaining among states which was understood to possess an objective reality that transcended the will and interests of the separate states, and hence to stand as a basis for the objective determination of the justice of the claims of right of the states that were the parties to war. That Grotius and Vattel took this view of war is underlined by their affirmation of a doctrine that had been integral to classic just war theory. This was the doctrine that, in respect of the essential nature of its cause, no war could be considered just on both sides.37

Like Grotius and Vattel, Kant identified an actual or threatened injury to the state as the principal justification for its resort to war. Nevertheless, he expressly denied that a war between independent states could be a war of punishment. As he explained the matter in *Perpetual Peace* and in *The Metaphysical Elements of Justice,* punishment presupposed a relationship obtaining between a superior and an inferior. However, no such relationship obtained as between independent states, with the consequence that no state could be thought of as waging a war whose justification and objective were understood to concern the punishment of another state.38

In Kant's view, the sort of relationship between a superior and an inferior required for a right of punishment existed only in the juridical form of society that was to be found in the civil state. For, as he explained it, the right to punish those guilty of transgressing public

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laws was a right of sovereign command, and rights of sovereign command, for Kant, presupposed the existence of a civil state wherein a people were bound in subjection to a supreme political authority through which these rights were exercised. As for states at war, these, Kant argued, were to be thought of as co-existing in the state of nature. For Kant, the international state of nature was a non-juridical condition of society, and thus a condition of society where, by definition, there could exist no lawful basis for a right of punishment. Since Kant saw states at war as standing to one another in a natural, and hence non-juridical, condition of society, it was not open to him to take up the view of war that had been adopted by Grotius and Vattel, and by the earlier just war theorists. Specifically, Kant's conception of the international state of nature, as a state of war, was such that he was unable to view war as the means for the maintenance and enforcement of a normative order which was understood to exist independently of the will of states, and thus as constituting a containing framework of objectively binding laws and principles of justice for the regulation of states in the sphere of their mutual external relations.

As Kant conceived it, the international state of nature was a condition of society with no system of law given or embodied in itself apart, that is, from the law that defined the rights of states in respect of the waging of war. In this, the natural condition of the society of states, there was no objective normative order for states to maintain and enforce through the resort to war (and so, of course, no normative order whose violation by individual states might provide other states with lawful justification to wage wars with punishment as their cause and object). Indeed, it may be said that, in the Kantian international state of nature, there was nothing other than states acting in defence of their respective rights and interests, through the exercise of the right to wage war which belonged to them by virtue of their natural freedom and independence.

Kant's conception of the international state of nature, as a state of war, was also such that he was unable to make another of the assumptions about war that informed the legal thought of Grotius and Vattel. This was the assumption that the relations between states were founded in a self-subsisting normative order, which was understood to provide a basis for the objective determination of the justice of the claims of right advanced by states at war.

We have noted that Grotius and Vattel remained faithful to classical just war theory in holding to the position that, as regards its essential cause, no war could be considered just on both sides. This

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was obviously not a position that Kant was able to take. In Kant's explanation of it, the international state of nature, as a state of war, was a condition of society wherein the rights of states were to be determined not by binding principles of law and justice, but only by the right of the strongest. Indeed, he was quite specific that the international state of nature was a non-juridical condition of society precisely for the reason that there existed within it no judicial procedures competent to provide an objective determination of the justice of the claims of right asserted by states at war. Given that he maintained this about the international state of nature, it followed that, for Kant, there could be no properly objective determination of the justice of the cause of a war *per se.* As he put it in explaining the sixth preliminary article of perpetual peace, war involved the assertion of rights by force in a state of nature where there was no court competent to judge with lawful authority. Hence, if any determination of the justice of the claims of states at war was to be made, then this would have to be based on the *outcome* of the war.39

Kant looked back to Hobbes in the starkness of the view he took of the natural condition of the society obtaining among states. For Kant, as for Hobbes before him, states stood to one another in the natural state of continual war, wherein they were to be assumed as holding a natural right to act in their own defence through resort to war. However, while Kant and Hobbes are in this respect to be linked together as theorists of international politics, what divides them is more significant still. From Hobbes's standpoint, the right of states to resort to war, in their own defence, had been understood to be a natural right that was formally equivalent to the right of individual men to defend themselves in the state of nature which preceded the institution of commonwealths through covenants. Nevertheless, this was also a right whose exercise Hobbes had understood to be qualified by the moral constraints stipulated in the laws that he saw as obtaining in the state of nature. These were the eternal laws of nature, which Hobbes had taken to summarize the conditions necessary for peaceful association among men. In summarizing the conditions of peace, the laws of nature constituted the underlying normative framework which, as Hobbes had explained it, was to structure the relations between states in the international sphere. Thus it was Hobbes's view that the law of nations was nothing other than the laws of nature as they applied to commonwealths and their rulers.

For Hobbes, then, the situation of states in the sphere of their mutual external relations was that of the natural state of continual

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war. However, it was also one where states remained subject to laws conducive to peace that were to be found given in the natural condition of their mutual society. In contrast to Hobbes, Kant did not look for a solution to the problem of peace in terms of the idea of a system of laws that were to be thought of as objectively given in the natural condition of the society obtaining among states. To be sure, Kant expounded the law of nations as being in large part the law of war. In this sense, he certainly recognized that there were laws which had application to states in the natural condition of their mutual relations. Nevertheless, it was essential to his approach to the problem of peace that the establishing of fully lawful relations between states required very much more than their observance of the law which defined their rights in the waging of war.

As is clear from the argument of *Perpetual Peace,* it was Kant's view that the gulf between the natural condition of the society of states, as a condition of continual war, and the law-governed condition of international society, as a condition of peace, was absolute. It was not a gulf that was to be bridged through appeal to laws that were understood to have their foundation in nature. Thus it was that Kant insisted that if there was to be a normative order embodying such binding laws of peace as would restrict the exercise of the right of war belonging to states by nature, then this would have to be an order which it fell to states to bring into beingor *institute*through some explicit act of their own. From the Kantian standpoint (as distinct from that of Hobbes), therefore, the normative order that was to embody the conditions for peace between states was one whose foundations were to be explained not in terms of laws given in nature, but in terms of the will and agreement of the states to which it had application. Given this, it is hardly surprising that to the extent that Kant was able to accept that a state at war might be counted as an unjust enemy, the example he gave of such a state was the state which violated the terms of public treaties. For this was a state which, in violating the terms of the law set through voluntary agreements among states, acted to undermine what, for Kant, was the basis on which states were to be thought of as binding themselves to conform with the rule of law in the sphere of their mutual external relations.

The differences between Hobbes and Kant in their respective views as to the foundation of the law of peace are reflected in what Kant wrote in *Perpetual Peace,* when he began his discussion of the definitive articles of perpetual peace.

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> A state of peace among men living together is not the same as the state of nature, which is rather a state of war. For even if it does not involve active hostilities, it involves a constant threat of their breaking out. Thus the state of peace must be *formally instituted,* for a suspension of hostilities is not in itself a guarantee of peace. And unless one neighbour gives a guarantee to the other at his request (which can happen only in a *lawful* state), the latter may treat him as an enemy.40

Kant's insistence that peace was a condition of society which had to be formally instituted does not serve only to underline his differences with Hobbes regarding the question of the foundation of the law that was to make for peace among states. It also serves to underline the fundamental contrast between his approach to the law of nations and that of the writers whom he denounced as sorry comforters.

For Grotius and Vattel, the law of war had been a central concern in the exposition of the law of nations. In setting out the elements of the law of war, these writers had followed the medieval just war theorists in assuming that war should be governed by law, and that the legal regulation of war stood as a precondition for war being concluded and a return made to the state of peace. However, neither Grotius nor Vattel had been able to move from the position that there should be a law providing for justice in war, to the position that justice among states demanded the establishing of a rule of law under which war would cease to be a means for the enforcement of what was just.41

This was the decisive move that Kant made in his explanation of the juridical foundations of peace. For, as we have suggested, Kant assumed that if the relations between states were to be based in the rule of law, and peace secured thereby, then it was not sufficient merely that states should observe that part of the law of nations which defined their rights and duties in the waging of war. Indeed, in *Perpetual Peace,* he was explicit that the idea of international law was rendered meaningless if it was understood as implying nothing more than the bare right of states to resort to war. To identify international law with the right of war in this way, he emphasized, would mean that the rights of states were to be determined not by universally valid laws, but only by the right of force.42

Kant's conviction regarding this matter explains why he came to argue that the extension of the rule of law to the international sphere necessitated a radical transformation in the situation of men and

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states, and one that would mark a final abandonment on their part of the natural condition of the society obtaining among them. What this transformation in the international order was to involve, as Kant projected it in *Perpetual Peace,* was not just the acceptance by states of the constraints of law in the waging of war. It was also to involve the permanent renunciation by states of war as the means for settling disputes about their rights, and the adoption by states of a juridical framework based in a rule of law that would provide for the determination of their rights under conditions of general peace. It was because Kant associated the ideal of a peace based in law with the permanent renunciation of war by states that he understood a true peace based in law to be a perpetual peace. Likewise, it was because Kant conceived of perpetual peace as requiring that states submit to a juridical framework in the sphere of their mutual external relations, and so leave forever the natural condition of their mutual society, that he insisted that peace was a condition of society which it was necessary that states should formally institute. As we shall now see, the juridical framework that Kant envisaged as necessary for the establishing of a perpetual peace was one that presupposed that states, and the individuals who comprised them, should base their mutual relations in certain specific forms of *lawful constitution.*

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6 The Definitive Articles of Perpetual Peace

The three definitive articles of a perpetual peace between states described the forms of lawful constitution whose adoption by men and states Kant thought of as the essential precondition for the realization of a lasting international peace based in the rule of law. In a footnote to the paragraph introducing discussion of the definitive articles in the Second Section of *Perpetual Peace,* Kant explained that the articles were based in a governing postulate or assumption. This was that whenever men were able to influence one another (and hence able to do or threaten injury to one another), it was required that they should subject themselves to some kind of lawful constitution. Kant then identified three forms of lawful constitution. Each of these constitutions had application to one or other of what he saw as the three parts of public law. The first form of lawful constitution was the constitution pertaining to the rights of individuals within the state. The part of public law to which this constitution had application was municipal or state law: the *ius civitatis.* The second form of lawful constitution was the constitution pertaining to the rights of states in the sphere of their mutual external relations. The part of public law to which this constitution had application was the law of nations: the *ius gentium.* The third form of lawful constitution was the constitution pertaining to the rights of individuals and states considered as bearers of the attributes of citizenship in an ideal universal state of all mankind. The part of public law to which this constitution had application was that of world or cosmopolitan law: the *ius cosmopoliticum.*1

The first form of lawful constitution was the subject-matter of the first definitive article of perpetual peace. The second form of lawful constitution was the subject-matter of the second definitive article. The third form of lawful constitution was the subject-matter of the third definitive article. Thus, the first definitive article provided that each state was to adopt the republican form of civil constitution. The second definitive article provided that the law of nations was to be based in a federation of free states. The third definitive article provided that cosmopolitan law was to be limited to conditions of universal hospitality.

In the present volume, the view has been taken that the law that Kant thought of as making for peace among men and states was a law

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that comprised all three of what he saw as the constituent parts of public law. That is to say, the law of peace, as Kant understood it, was a law whose elements consisted of the municipal law of states, the law of nations, and the cosmopolitan law considered as a quite distinct form of public international law. That Kant understood the law of peace in this way is, of course, confirmed through examination of the three definitive articles of perpetual peace. For with these articles, he made it clear that it was a precondition for peace among men and states that each of what he saw as the three parts of public law should be founded in an appropriate form of lawful constitution.

However, if it is vitally important to grasp that Kant's law of peace was a compound of the different parts of public law, and that it was not formally identical with the law of nations as the law governing the external relations between states, it is no less important to grasp that the constitutional principles underlying those parts of the law of peace that were distinct from the law of nations were not thought of by Kant as in any way diminishing the meaning and force of the substantive principles of the law of nations as he laid them down in the preliminary articles of perpetual peace. As we have seen, the preliminary articles stipulated principles of the law of nations which worked to preserve the freedom and independence of states. In turning to consider the definitive articles of perpetual peace, it is essential to recognize that the international order whose constitutional structure the articles described was not one which presupposed that states should relinquish any of the lawful rights that were intrinsic to their freedom and independence. On the contrary, Kant's commitment to the freedom and independence of states, as a foundational principle of the law of peace, is everywhere apparent in the statement and explanation of the definitive articles.

6.1 THE REPUBLICAN CONSTITUTION

The first definitive article provided that the civil constitution in every state was to be republican in form. As Kant explained the article, the republican form of constitution was not only the legitimate form of civil constitution, in the respect that it was the constitution whose underlying principles were principles deriving from the idea of the original contract founding the state. It was also the form of civil constitution whose adoption by states offered the best prospect for the establishing of lasting international peace.

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Kant's reason for taking this view was as follows. In a state based in the republican constitution, the consent of the citizen-body was required in order to decide whether or not the state should declare war. This consent would be difficult to obtain in such a state, for the citizens therein would not readily opt for war given that they would have to suffer the hardships and deprivations resulting from it. However, the situation was quite different in a state without a republican constitution (i.e. a despotism). For, here, the ruler of the state remained subject to virtually no constraints preventing him from waging war at his own arbitrary will and discretion.

> If, as is inevitably the case under this [i.e. republican] constitution, the consent of the citizens is required to decide whether or not war is to be declared, it is very natural that they will have great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war, such as doing the fighting themselves, supplying the costs of the war from their own resources, painfully making good the ensuing devastation, and, as the crowning evil, having to take upon themselves a burden of debt which will embitter peace itself and which can never be paid off on account of the constant threat of new wars. But under a constitution where the subject is not a citizen, and which is therefore not republican, it is the simplest thing in the world to go to war. For the head of state is not a fellow citizen, but the owner of the state, and a war will not force him to make the slightest sacrifice so far as his banquets, hunts, pleasure palaces and court festivals are concerned. He can thus decide on war, without any significant reason, as a kind of amusement, and unconcernedly leave it to the diplomatic corps (who are always ready for such purposes) to justify the war for the sake of propriety.2

Kant's argument for the inherent pacificity of states with republican constitutions is not unproblematic. For it would appear that the argument calls into question the point of the distinction between the republican form of government and democracy, as a despotic form of government, which Kant tried to establish in the remainder of the explanation of the first definitive article.

As we saw in Chapter 2, Kant's case against democracy in the explanation of the first definitive article was that democracy combined the legislative and executive powers of the state in the person of its citizen-body, and that, in doing so, the democratic form of government made it possible for the executive power of rulership in the state

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to be exercised against the individual citizen without there being any guarantee that this power would remain subject to, or limited by, laws to which the individual citizen had given his consent. Kant was no doubt correct to emphasize how the democratic form of government threatened the rights and freedom of the individual. So also was he correct to emphasize that if the rights and freedom of the individual were to be secured, then what this required was not rule by the people, but a form of government where citizens, as the authors of the laws binding them in the state, were represented by a ruler who was as much subject to the laws as they, the citizen-body, were subject to his power and authority. Nevertheless, it remains the case that, in Kant's account of it, democracy was a form of government where citizens were understood to exercise a direct control over the institutions of state power. Given this, and given Kant's assumption that citizenbodies as distinct from rulers were naturally reluctant to opt for war for reasons of self-interest, it is unclear why Kant should not have been prepared to recognize democracy as a form of government that would promote peace, whatever else he might have wanted to say about its tendencies towards popular despotism with regard to the rights of the individual citizen.3

Despite the difficulties with the explanation of the first definitive article, there can be no question as to the depth of Kant's conviction that the adoption by states of the republican form of civil constitution would incline them to refrain from war, and so contribute to the realization of lasting international peace. Kant's conviction about this is a vitally important feature of his international thought. As is evident from the explanation of the article, it was Kant's view that the establishing of a lasting international peace required a fundamental transformation in the structure of internal domestic political organization existing within states. This transformation in the internal domestic political organization of states, as Kant called for it, is one element in the radical transformation of the international order which, as we have suggested, he regarded as essential if states were to leave the natural condition of continual war, and enter into a condition of society where their relations would be governed by the rule of law.

The emphasis Kant placed on transformation in the structure of the internal domestic political organization of states, as a condition for an international peace based in law, is a further respect in which he broke away from Grotius and Vattel, and from the medieval just war tradition to which they were heirs. In the just war tradition, it had been

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recognized that the just war was a war waged on the command of a sovereign ruler possessing lawful authority. Thus Augustine had written that the natural order conducive to peace provided that the ruler should have the power to undertake war.4 Aquinas had gone on to specify the lawful authority of the sovereign as the first requirement for a just war.5 Grotius had made lawful authority the condition for a public war, this being a war waged with the authority of the sovereign power in the state.6 Vattel had taken the same view, asserting that a public war was a war waged between nations or sovereigns and undertaken in the name of the public authority and on its command, and that the right of war was a right which belonged only to the sovereign power.7

In contrast to these writers, Kant brought out into the open the question of how justice in war depended on the form of constitution through which the authority to declare and wage war was to be exercised by the ruling power in the state. He did so because he was concerned not only with the formal conditions necessary for the lawful waging of war, but also, and primarily so, with the conditions under which states would come to abandon war altogether as the means for settling disputes about their rights.

Hence it is entirely understandable why Kant should have gone beyond any mere stipulation that war be waged with lawful authority, and why he should have focused instead on the form of civil constitution which he considered to hold out the prospect that the authority to wage war would never have to be exercised by states at all. In the event, Kant's confidence that states with republican constitutions would tend to remain at peace, for the reason that their citizen-bodies would be naturally reluctant to opt for war, must be viewed as somewhat misplaced. For it is not self-evident that citizen-bodies are to be considered more enlightened or more reliable than governments and rulers in determining the external policies of states. Despite this, the claim Kant made for the republican constitution as the constitution of peace does certainly mark a significant advance in reflection on the conditions for justice in war. For in claiming the republican constitution as the constitution of peace, he went beyond writers like Grotius and Vattel to give expression to what is a morally most compelling idea regarding the legitimacy of wars waged by states and governments. This is the idea that wars waged by states and governments should be waged only with the willing consent of citizens, and hence only with the willing consent of those individuals most directly affected by war.8

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While this idea was clearly very compelling for Kant, his entertaining of it did not lead him to conclude that the rights of states were to be qualified in the cause of promoting the spread of the political constitution conducive to peace. The transformation in the internal domestic political organization of states which Kant called for with the first definitive article was to involve their adoption of the republican constitution. This, of course, was the form of civil constitution that embodied the universal principles of justice and morality he saw as given in the idea of the original contract founding the state.

That said, it must be emphasized that Kant did not consider that the transformation in the internal domestic political organization of states, as required for lasting peace, was to be brought about through any power or agency external to states, or, indeed, through any means other than that of the will of states and the citizen-bodies that formed them. Certainly, there was no suggestion on Kant's part that it was to stand as a binding requirement of the law of nations that states were to adopt the republican form of constitutional government. Nor could it have been open to Kant to take such a position, given the view he expressed of what were to stand as the substantive principles of the law of nations in his statement of the preliminary articles of perpetual peace. For had Kant stipulated that states were to be bound under the law of nations to adopt the republican form of constitution as the basis for their self-government, then this stipulation would have been in conflict with the principle enshrined in the fifth preliminary article: that is, the principle that states were to be free from all forcible external interference in their constitution and government.

6.2 THE FEDERATION OF FREE STATES

We have emphasized that Kant explained the law of nations as a body of law that secured the freedom and independence of states. Kant's view of the law of nations, as law underwriting the freedom and independence of states, finds its clearest expression in the second definitive article of perpetual peace. The article provided that the law of nations was to be based in a federation of free states. This federation was to embody the constitutional foundation for the law applying to states in the sphere of their mutual external relations. Hence, the establishing of the federation was understood by Kant to involve the abandonment of the natural state of war on the part of the states that entered it, and to express their commitment to act towards

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one another in conformity with the rule of law and so also to act to maintain a lasting international peace.

However, the federation of free states was not conceived of by Kant as an association of states that was to have the form of constitution that was to be found in the civil state. For this reason, the law the federation was intended to base was law that was to remain unsupported by a right which Kant regarded as essential to the idea of the civil state, and one whose existence he regarded as marking the emergence of the civil state from the condition of society obtaining among men in the state of nature. This was the right of public lawful external coercion, as vested in, and exercised through, the legislative, executive and judicial authorities that formed the constitution of the civil state.

As is clear from the explanation of the second definitive article, what Kant meant in writing of a federation of free states was not the idea of an international state or a world state, where the separate states were to be brought together under a system of international government possessing functions and powers analogous to those which he saw as belonging to government as it was constituted in the civil state. On the contrary, the federation of free states, as Kant explained it, was a voluntary, progressively expanding association of free and independent states, whose defining purpose was merely to bring a permanent end to war. Thus, while the federation of free states was understood by Kant to possess the character of a fully juridical, or constituted, form of association among states, it was nevertheless commended as one falling far short of an international state or world state.9

Kant's rejection of international government within the framework of an international state or world state, as the basis for a lasting peace between states, underlines the fundamental contrast between the argument of *Perpetual Peace* and the argument contained in a notable plan for perpetual peace which had been set out in the early decades of the eighteenth century. The author of this plan was the French cleric and diplomat Charles Francois Irénée Castel de Saint-Pierre, Abbé de Tiron (1658-1743). Saint-Pierre first published his plan in 1712 under the title *Mémoires pour rendre la Paix perpétuelle en Europe.* In the following year, the work was reprinted in two volumes with the title *Projet pour rendre la Paix perpétuelle en Europe.* In 1717, Saint-Pierre published a further presentation of the plan. He later went on to publish an abridged version of the plan, with the first and second editions of the *Abrégé du Projet de Paix Perpétuelle* appearing in 1729 and 1738.10

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Saint-Pierre's concern was with the problem of establishing an enduring peace between the European states. The solution to the problem he proposed was that the sovereign rulers of the Christian states of Europe should sign a fundamental treaty providing for the institution of a kind of confederal union, or so-called grand alliance, among themselves. The purpose of this grand alliance was to be the maintenance and, where necessary, the enforcement of a general peace based in respect for the actual possessions of sovereigns, and for their rights and obligations as stipulated in the latest treaties.

As Saint-Pierre explained it, the grand alliance of sovereigns was to be an organization of international government, and to have much of the structure, and certain of the functions and powers, of the government of an independent state. Thus, the alliance was to have its own permanent general assembly made up of plenipotentiaries representing the rulers of the member states. The costs of the alliance were to be borne by the rulers, in proportion to the actual revenues and charges of their respective states. The alliance was to have certain law-making and regulatory powers. So, crucially, the sovereign rulers entering the alliance were to renounce for ever the resort to war as the means for the settlement of disputes. Instead, they were to undertake to submit disputes for mediation by the other allies, and, where this failed, to accept as binding the judgments given in arbitration by the general assembly of plenipotentiaries. To support this arrangement for the peaceful settlement of disputes, the grand alliance was to be empowered to raise an international army from among the member states. This force was to be used to proceed against any sovereign ruler who refused to comply with the regulations of the alliance or with the arbitral judgments of the general assembly, as well as against any sovereign who negotiated treaties contrary to the terms of the alliance or who made preparations for war.11 The grand alliance was to be a permanent and indissoluble union of states. Accordingly, the alliance was to be empowered to coerce any sovereign who proceeded to secede from it, which sovereign was to be treated as the common enemy of the states associated together in the alliance.12

The importance of Saint-Pierre in the history of international thought derives, in part, from the two essays Rousseau wrote on his plan for perpetual peace in the mid-eighteenth century. The first of these was the *Abstract of Saint-Pierre's Project for Perpetual Peace,* which was written in 1756 and published in 1761; the second was the *Judgement of Saint-Pierre's Project for Perpetual Peace,* also written in 1756 but not published until 1782.13 In the *Abstract,* Rousseau

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summarized the elements of Saint-Pierre's plan. In doing so, he broadly endorsed Saint-Pierre's view that lasting peace in Europe demanded an indissoluble union of states under a system of international government modelled on the system of government that applied in the separate states. Thus, the solution to the problem of the state of war obtaining among independent states was to be found

> in such a form of federal government as shall unite nations by bonds similar to those which already unite their individual members, and place the one no less than the other under the authority of the law.14

Rousseau gave full recognition to those features of European civilization, such as identity of religion, common moral standards, a shared system of international law and commercial ties, which were evidence of the underlying community that he saw as existing among the separate states.15 However, he also pointed to the conflicts and antagonisms between the European states which underlined that, despite the bonds of community linking the different nations and states, the essential condition of their mutual relations was that of the state of war.16 Given that the bonds of community uniting the states of Europe were not such as to prevent war, it followed, for Rousseau, that the establishing of a lasting peace necessitated that the states transform the basis of their mutual relations through agreeing to institute among themselves a fully political form of union. This union was to have the form of a federal government, and, as Rousseau described it, was to exercise the powers that Saint-Pierre had assigned to his projected grand alliance of Christian sovereigns.

> Let us ask how the free and voluntary association which now unites the states of Europe may be converted, by taking to itself the strength and firmness of a genuine body politic, into an authentic federation. There is no doubt that such a federation, by giving to the existing bond the completeness which it now lacks, will increase all its advantages and compel all the parts to unite for the benefit of the whole body. But, before this result can be brought about, the federation must embrace all the important powers in its membership; it must have a legislative body, with powers to pass laws and ordinances binding upon all its members; it must have a coercive force capable of compelling every state to obey its common resolves whether in the way of command or of prohibition; finally, it must be strong and firm enough to make it impossible for any member to

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> withdraw at his own pleasure the moment he conceives his private interest to clash with that of the whole body.17

In the remainder of the *Abstract,* Rousseau explained how this federation would bring about a lasting peace between the European states, and how it was therefore in the true interests of sovereign rulers that it be instituted and maintained in being.18 In the *Judgement,* Rousseau proceeded to criticism of Saint-Pierre's project for perpetual peace. Central to Rousseau's critique of the project was his insistence that Saint-Pierre's proposal for a confederal form of international government was utopian, for the reason that any attempt to implement it would run counter to the actual will of the rulers of states. To be sure, an international government for peace, if ever established, would prove to be so conducive to the advancement of the common good of nations that rulers would act to maintain and defend it. Even so, the fact remained that international government in the form in which Saint-Pierre had advocated it could never be brought about, because rulers would resist any proposal to have it instituted.

> Realize his [i.e. Saint-Pierre's] commonwealth of Europe for a single day, and you may be sure it will last forever; so fully would experience convince men that their own gain is to be found in the good of all. For all that, the very princes who would defend it with all their might, if it once existed, would resist with all their might any proposal for its creation; they will as infallibly throw obstacles in the way of its establishment as they would in the way of its abolition.19

As this passage underlines, Rousseau's critique of Saint-Pierre's project for perpetual peace did not involve any abandonment of the position taken in the *Abstract* to the effect that the realization of the project would be in the true interests of rulers. What he emphasized in the *Judgement* was that the project did not accord with what rulers actually perceived to be their interests. These rulers regarded as demanding the maintenance of states in a condition of absolute independence, where, for all its risks and instability, rulers nevertheless remained free from the restrictions of law. It was in these terms that Rousseau distinguished between the real and the apparent interests of rulers.

> Let us distinguish then, in politics as in morals, between real and apparent interest. The former could be secured by an abiding peace; that is demonstrated in the project. The latter is to be found in the

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> state of absolute independence which frees sovereigns from the reign of law only to put them under that of chance. They are, in fact, like a madcap pilot who, to show off his idle skill and his power over his sailors, would rather toss to and fro among the rocks in a storm than moor his vessel at anchor in safety.20

Given that the particularist interests of rulers were such as to divert them from their own true interests and so prevent them from submitting to the rule of law, it followed, for Rousseau, that Saint-Pierre's projected confederal form of international government would never be instituted through the agreement of rulers, but only through the means of force and violence.21 As he concluded the *Judgement,* the institution of a federation for peace of the sort advocated by Saint-Pierre would involve the revolutionary overthrow of the existing international order, and so would most likely do greater damage than good.

> No federation could ever be established except by a revolution. That being so, which of us would dare to say whether the league of Europe is a thing more to be desired or feared? It would perhaps do more harm in a moment than it would guard against for ages.22

In the *Idea for a Universal History with a Cosmopolitan Purpose* and in *Theory and Practice,* Kant was to cite Saint-Pierre and Rousseau in discussion of his conception of a federation of free states as the constitutional foundation for the law of nations.23 However, it is plain from the argument of *Perpetual Peace* that Kant's projected federation should not be mistaken for the form of political union among states that Saint-Pierre had advocated, and that Rousseau had gone on to endorse in the *Abstract.* Indeed, if Kant's international thought is to be linked with Rousseau's, then this is because, like his predecessor, he squarely rejected international government as the basis for peace among states. So, for example, he followed Rousseau in emphasizing how states and their rulers remained resistant to any attempt to subject them to the legal constraints imposed by some external coercive power.24 He also followed Rousseau in emphasizing that the bringing of states under an international governmental authority would do no good, in the sense that the establishing of it would prove to be subversive of the end of a peace based in law. It was in these terms that he rejected the ideal of an international state in the First Supplement in *Perpetual Peace* and in the exposition of the

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principles of the law of nations in *The Metaphysical Elements of Justice.*[25] As he argued in the latter work, an international state would extend itself over vast regions, and so be too large to provide effective government and protection for member states, with the consequence that it would result in a return to the condition of war.[26]

Where Kant departed from Rousseau was in the respect that while he rejected international government as a basis for peace, he still was able to envisage lasting peace coming to be established on the foundations of an alternative form of constituted association among states. The only form of such association that Rousseau had been able to conceive of as an adequate basis for peace was the sort of confederal system of international government proposed by Saint-Pierre. However, by arguing that this form of international government was necessary to achieve lasting peace between states, but that it was nevertheless to be excluded as contrary to the will of sovereign rulers and as destructive of peace because of the element of force and violence required for its implementation, Rousseau had provided no answer to the question of how and whether international peace was ever to be established. This was not a question that Kant left unanswered. As we shall now see, the answer he gave with the second definitive article of perpetual peace was that peace was to be established through states associating together in mutual observance of the law that was to apply to their mutual external relations, but without this involving their subordination to any international governmental authority.

Kant began the explanation of the second definitive article by observing that the separate states stood to one another in a state of nature, and thus in a mutually antagonistic relationship that remained exclusive of the constraints of law. Given this, it was legitimate for states to require of one another that they should subject themselves to a form of lawful constitution like that of the civil state, in order to secure their respective rights.

> Peoples who have grouped themselves into nation states may be judged in the same way as individual men living in a state of nature, independent of external laws; for they are a standing offence to one another by the very fact that they are neighbours. Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured.[27]

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It followed that there should be established a federation of states. Nevertheless, Kant insisted that such a federation was not to be thought of as an international state. In Kant's view, the idea of an international state involved an internal contradiction. This was so because, as Kant explained, it was essential to the form of political organization maintained in the state that it embodied a relationship between a superior and an inferior, with the superior being the lawmaking power and the inferior being the people who were bound by the laws issuing from this legislative power. However, he emphasized that the idea of an international state involving the relationship of a superior to an inferior was not to be reconciled with the underlying principle of the law of nations. For the law of nations was a form of law that applied to the relations between separate states, rather than a form of law which presupposed that states were to be brought together in a single political entity.

> [T]he idea of an international state is contradictory, since every state involves a relationship between a superior (the legislator) and an inferior (the people obeying the laws), whereas a number of nations forming one state would constitute a single nation. And this contradicts our initial assumption, as we are here considering the right of nations in relation to one another in so far as they are a group of separate states which are not to be welded together as a unit.28

This passage gives expression to an idea that was central to the view Kant took of the law of nations. This was the idea that the law of nations, as the part of the law of peace that applied to the relations between states, was not and could not be based in a constitution which involved the subjection of states to some external governmental power, and which thereby qualified their independence and equality as states.

In the remainder of the explanation, Kant proceeded to restate and develop this core idea. In doing so, he brought out the impropriety of conceiving of the juridical relationship that was to obtain among independent states on the analogy of the form of juridical relationship that obtained in the civil state. So, for example, he explicitly denied any strict parallel between the situation of individual men in the state of nature that preceded the establishing of the civil state and the situation of independent states in the international state of nature. It was consistent with the idea of natural right, he argued, that individual men should be required to abandon the state of nature, and so be compelled to subject themselves to a form of constitution where

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laws were supported by a right of external coercion. However, there was no comparable requirement on states when their situation was considered from the standpoint of the law of nations. For states possessed their own internal form of lawful constitution, and were therefore to be thought of as having passed beyond the stage where they might be legitimately compelled to submit to a constitutional regime through means of coercion.

> Yet while natural right allows us to say of men living in a lawless condition that they ought to abandon it, the right of nations does not allow us to say the same of states. For as states, they already have a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right.29

Later in the explanation, Kant observed that it was intelligible for an individual people to be thought of as having abandoned war among themselves through forming a state, wherein there were established legislative, executive and judicial institutions empowered to bring about the peaceful settlement of disputes about rights. However, this was not the means by which the state so formed was to put an end to the condition of war in which it co-existed with other states. For as between independent states there could be instituted no sovereign legislative power to secure their rights. Hence, if the rights of states were to be secured, and the idea of international law to possess any meaning, then it followed that states should enter into a free federation as a substitute for the form of civil union embodied in the condition of statehood.

> It would be understandable for a people to say: 'There shall be no war among us; for we will form ourselves into a state, appointing for ourselves a supreme legislative, executive and juridical power to resolve our conflicts by peaceful means.' But if this state says: 'There shall be no war between myself and other states, although I do not recognise any supreme legislative power which could secure my rights and whose rights I should in turn secure', it is impossible to understand what justification I can have for placing any confidence in my rights, unless I can rely on some substitute for the union of civil society, i.e. on a free federation. If the concept of international right is to retain any meaning at all, reason must necessarily couple it with a federation of this kind.30

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Finally, there is what Kant wrote in the concluding paragraph of the explanation. Here, he noted that the idea of the law of nations had to involve more than the bare principle of the right of states to wage war. For otherwise the rights of states would have to be thought of as being determined not by reference to universally binding external laws, but only in accordance with arbitrary principles supported by mere physical power. Hence, reason appeared to demand the establishing of an international state, as a basis for the ending of the natural condition of continual war obtaining among states. However, as Kant emphasized, an international state was contrary to the will of nations, as this was reflected in the conception they had formed of their own lawful rights. Accordingly, the positive ideal of a world state, or world republic, was to be regarded as incapable of realization, with the result that the juridical basis for peace between states was to be looked for in the more negative alternative of a federation instituted to prevent war.

> The concept of international right becomes meaningless if interpreted as a right to go to war. For this would make it a right to determine what is lawful not by means of universally valid external laws, but by means of one-sided maxims backed up by physical force. It could be taken to mean that it is perfectly just for men who adopt this attitude to destroy one another, and thus to find perpetual peace in the vast grave where all the horrors of violence and those responsible for them would be buried. There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an *international state (civitas gentium),* which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (so that they reject *in hypothesi* what is true *in thesi),* the positive idea of a *world republic* cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding *federation* likely to prevent war.31

The argument here underlines that while Kant rejected the idea of an international state as a solution to the problem of war, he did not, for that reason, deny the necessity that the problem should be addressed and resolved. Earlier in the explanation of the second definitive article, Kant spelled out the central implication of his

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fundamental assumption that the natural condition of the relations obtaining between states was one of war. As he pointed out, it was evident that war was the means through which states set about securing their rights. However, it was a contradiction in terms to suppose that military outcomes provided a reliable basis for the determination of rights. As for treaties of peace between states, these served only to conclude particular wars, but without bringing an end to the condition of continual war obtaining among states as such.

> The way in which states seek their rights can only be by war, since there is no external tribunal to put their claims to trial. But rights cannot be decided by military victory, and a *peace treaty* may put an end to the current war, but not to that general warlike condition within which pretexts can always be found for a new war.32

In Kant's judgment, the existing condition of international society, which in the terms he described it was nothing more than the natural state of war, was as contrary to reason as it was contrary to principles of right and justice. For reason, as the supreme legislative moral power, absolutely condemned war as a basis for the determination of rights, and pointed to the establishing of peace as an immediate obligation. As we have argued, the view Kant took of the problem posed by international politics was one where the establishing of peace among men and states was understood to require a radical transformation of the international order. One element in this transformation of the international order, of course, was to consist in the adoption by states of the republican form of civil constitution. The element in the transformation of the international order with which Kant was concerned with the second definitive article was the institution by states of a juridical framework for the regulation of their external relations that would provide for the determination, and securing, of their rights on the basis of law rather than through resort to war.

The means through which this juridical framework was to be instituted, and the condition of a peace based in law brought into being, was to be that of a general agreement between states. The subject of the agreement was to be the particular form of association of states that was to establish the juridical framework for their external relations in the international sphere. This association of states was the federation of free states, or pacific federation *(foedus pacificum),* which Kant prescribed as the form of constitution that was to base the law of nations.

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> [R]eason, as the highest legislative moral power, absolutely condemns war as a test of rights and sets up peace as an immediate duty. But peace can neither be inaugurated nor secured without a general agreement between the nations; thus a particular kind of league, which we might call a *pacific federation (foedus pacificum),* is required.33

The general agreement between states through which the pacific federation was to be instituted was described by Kant as an agreement having the form of a *treaty.* The agreement was not to be a conventional peace treaty *(pactum pacis).* A conventional peace treaty was entered into by states in order to end some particular war between them. Hence, it involved no commitment to ending the natural condition of continual war obtaining among states. The general agreement instituting the pacific federation, by contrast, was to have as its aim the ending of war as such. As Kant put it, this agreement

> would differ from a *peace treaty (pactum pacis)* in that the latter terminates *one* war, whereas the former would seek to end *all* wars for good.34

Thus, the agreement instituting the federation of free states was to mark the final abandonment by states of what Kant saw as the natural condition of war obtaining among them, and their entering into a fully juridical form of mutual relationship. However, the agreement, as Kant explained it, was to possess the quality of the standard treaty in one quite essential respect. This was that the agreement was to be a purely voluntary agreement, and one which both presupposed and preserved the freedom and independence of the states that were the parties to it. Indeed, Kant was very specific that the federation was to have as its aim the securing and preservation of the freedom of member states. For, in contrast to the situation of individual men in the state of nature, states were not to be subjected to public laws which were to be enforced through the exercise of a higher coercive power.

> This federation does not aim to acquire any power like that of a state, but merely to preserve and secure *the freedom* of each state in itself, along with that of the other confederated states, although this does not mean that they need to submit to public laws and to a coercive power which enforces them, as do men in a state of nature.35

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That Kant thought of the federation as a voluntary association of states, which both presupposed and preserved their freedom and independence as states, is underlined by the view he took as to how the federation would come into being. For, regarding this matter, he stressed that the federation would come into being only on a gradual basis, starting with the example set by a single state with a republican constitution, and then establishing and enlarging itself through the progressive accession of an ever increasing number of states.

> It can be shown that this idea *of federalism,* extending gradually to encompass all states and thus leading to perpetual peace, is practicable and has objective reality. For if by good fortune one powerful and enlightened nation can form a republic (which is by its nature inclined to seek perpetual peace), this will provide a focal point for federal association among other states. These will join up with the first one, thus securing the freedom of each state in accordance with the idea of international right, and the whole will gradually spread further and further by a series of alliances of this kind.36

It is evident from the explanation of the second definitive article that Kant thought of the federation of free states as an association of states that was to be instituted with a view to bringing an end to war on a permanent basis. It is equally evident that he did not think of the peace the federation was to bring into being as a condition of the relations between states that the federation was to act to maintain, in the sense that peace was to be maintained by the federation through the exercise of any formally institutionalized rights and powers. On the contrary, the peace the federation was to bring into being was understood by Kant to be, in essence, a condition of the relations between states that would consist in, and follow from, the observance by states of the law which applied to them, and for which the federation was to stand as the constitutional foundation.

The principles of the law of nations that Kant assumed were to define the terms of peace between states in the international sphere are those given in the preliminary articles of perpetual peace. Thus, for Kant, peace was envisaged as resting on the acceptance by states of a rule of law which enshrined such principles as the following: the principle that states should fulfil the terms of treaties in good faith; the principle that states should refrain from interference in one another's constitution and government; the principle that wars between states should be subject to such constraints of law as would make possible the return to peace. The federation of free states was to

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base the part of the law of peace embodied in the law of nations, and, in so doing, transform the situation of states through establishing a fully constituted, or juridical, relationship among them. However, the federation was not to base the law of nations in the sense that it was required that this law was to be applied to states by means of a system of international government.

Here, it must be emphasized that Kant did not think that the federation was to have as its purpose the enforcement of the law of nations through the exercise of a power of coercion. For Kant, the right of public lawful external coercion presupposed the form of constitution that was the basis for government in the civil state. As for the form of constitution that was to be embodied in the federation of free states, this Kant took great pains to distinguish from the constitution of the civil state. Thus, whereas the constitution basing the civil state was such as to provide that government therein was to be exercised through institutions holding the powers of legislation, adjudication and executive authority, this was not so with the form of constitution that Kant associated with the idea of the federation of free states. As Kant explained it, the form of constitution that was to be embodied in the federation of free states was to provide for the establishing of no specific governmental institutions of law-making, adjudication and executive rule, for the reason that it was to provide for the establishing of no form of *government* whatsoever.

The latter half of the nineteenth century was to see the beginning of a strong trend in international law that ran in the direction of the establishing of international organizations concerned to promote cooperation among states, and in the direction of states coming increasingly to submit to international procedures and arrangements for the peaceful settlement of disputes. This trend was to continue into the twentieth century with the establishing of international organizations whose intended purpose was understood to lie with the maintenance of peace between states and peoples. The most notable examples of such organizations are, of course, the League of Nations, which came into being after the First World War, and the United Nations Organization which was established in 1945.

Some commentators have seen Kant as looking forward to the establishing of organizations of this sort, as witness the parallels between Kant's proposals for perpetual peace and the principles enshrined in the Charter of the United Nations pointed to by C.J. Friedrich in his *Inevitable Peace* (1948).37 In the event, it is doubtful that Kant would have been able to recognize the United Nations as a

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true and perfect embodiment of his ideal of a federation of free states. For, given his denial of a right of coercion to the pacific federation, he would have had great difficulty in accepting the legitimacy of certain of the functions and powers belonging to the United Nations particularly so those relating to the right of the organization to use force to preserve international peace and security.38

That said, it has to be admitted that to the extent that the era of the United Nations has witnessed an increasing reliance by states on international institutions and arrangements charged with responsibility for the peaceful settlement of disputes between states, then with this development in international law Kant would have found no problem. For he maintained that the natural condition of the society obtaining among states was one of war, for the reason that it was distinguished by the absence of any judicial procedure for securing rights.39 He was also on occasion quite explicit that the possibility of founding a lasting peace among states required that they should settle their disputes by means of judicial procedure.40

To be sure, Kant did not go so far as to advocate anything like a permanent international court for the application of the law of nations. Indeed, it remains unclear whetherand, if so, in what senseKant would have been able to allow that the procedure for the resolution of disputes between states should be counted as a procedure of *adjudication*. For his discussion of adjudication was confined to adjudication as a power belonging to the civil state in respect of its subjects, and hence as a procedure that presupposed the right of public lawful external coercion that he considered to be brought into being through the act of contract founding the civil state and the form of lawful constitution specific to it.41 Nevertheless, there is every reason to suppose that Kant would have seen no inconsistency between the form of lawful constitution that was to be embodied in the federation of free states and the establishing by the federation of procedures for the judicial settlement of disputes between statessubject only to the condition that such procedures remained free of any power of coercion. After all, the federation was to be instituted to the end of providing for the determination of the lawful rights of states by means other than war. This, obviously, was an end whose realization demanded the acceptance by states of an obligation to refrain from basing their claims of right on their own will and judgment, and to submit their claims to decision through independent procedures of dispute-settlement.42

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Be all that as it may, the essential truth about Kant's ideal of the pacific federation of free states must not be obscured. This is that, in describing the federation in the terms he did, Kant gave clear and unambiguous expression to the view that the fundamental precondition for peace between states in the international sphere was not the existence of international institutions and organizations empowered to act to maintain and enforce the peace, but rather the preparedness of states to conform with the rule of international law on a voluntary basis. Thus the essence of the constitution that was to be embodied in the federation was seen by Kant as lying in the formal agreementor treatybetween states through which it was to be instituted. As for the terms of the agreement, these were to provide not that states were to subject themselves to an international governmental authority, but only that they should undertake to act in accordance with the constraints of law in the sphere of their mutual external relations.43

Kant's argument for the federation of free states underlines that he saw the law of nations as law founded in the agreement of states.44 So also does it underline that he saw the binding force of the law of nations as being conditional on the will and consent of the states to which it had application. It is in this respect that Kant's idea of the federation of free states as the constitutional basis of the law of nations is crucial in explaining what, as we maintained in Chapter 4, is the decisive break that is reflected in his work with the view of the law of nations adopted by the earlier secular natural law thinkers. With Grotius, Hobbes, Pufendorf and Vattel, the law of nations had been explained as forming part of a containing normative order which was understood to be given in the order of nature itself. The essence of this normative order was embodied in the laws of nature, which laws were assumed to be binding on states without regard to their will and consent. For Kant, on the other hand, the law of nations was explained as law that was to have its foundation and embodiment in a normative order established through the will and agreement of states. The essence of this normative order was to be the form of association among states brought into being through their instituting the pacific federation, as the constitutional foundation for the law of nations. The association of states so instituted was to be a juridical form of association, and hence one that would stand in absolute opposition to the natural condition of the society of states, which, in Kant's view, was nothing other than the state of war.

In Chapter 4, it was also maintained that Kant looked forward to the system of international law of the contemporary era. Thus it was

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suggested that he affirmed certain fundamental principles of the law of nations, such as those of the faith of treaties and the sovereignty and equality of states, but that, in contrast to writers like Grotius, Hobbes and Vattel, he did so without referring these principles back to a containing framework of natural law. It was suggested further that in explaining the bases of the law of nations without reference to natural law, Kant adopted a radical view as to the meaning and implications of state sovereignty as a foundational juridical principle of the international order. So with the argument that the law of nations was to be based in a federation instituted through an agreement among states, Kant implied that the will of states was to stand as the ultimate determinant of the law governing their mutual external relations. For implicit in the argument was the idea that the legal restrictions that were to be considered as binding on states were restrictions that it was necessary that states should bind themselves to observe through some voluntary act on their part.

Kant's insistence that the law of nations was to be founded in the will and agreement of states not only reflects his break with the past, and his anticipation of the contemporary system of international law. It also brings out a fundamental assumption that Kant made in explaining the bases of the law of peace as such. This was the assumption that free and independent states were to be taken as forming the primary constituent juridical element of the international order. The statist bias of Kant's international thought is evident in what he maintained were to stand as the main substantive principles of the law of nations.45 For the six preliminary articles of perpetual peace with which Kant set out these principles were articles stipulating rights and obligations of states that were essential to the securing of their lawful freedom and independence. Then, again, there is the explanation of the second definitive article itself. Here, of course, Kant expressly excluded the idea of an international state or that of a world state, and emphasized that the federation that was to embody the constitutional framework for the law of nations was to have as its aim the preservation of the freedom and independence of the states that entered it.46

What distinguishes the statism of Kant's international thought, and the statist quality of his conception of the law of peace, is not the bare fact of the assumption he made that the institution of the free and independent state was to stand as a primary constituent juridical element of the international order. For some of the earlier natural law theorists had had just as strong a commitment to the idea of the

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freedom and independence of the state. This is obviously true of Hobbes. So also is it true of Vattel, as witness his rejection of Wolff's conception of the *civitas maxima,* and his insistence that the freedom, independence and equality of states were underwritten by the fundamental laws of nature. Where Kant moved beyond writers like Hobbes and Vattel is in the respect that, in his international thought, the idea of the freedom and independence of the state was not only given expression to as a substantive principle enshrined in the law governing the relations between states. It was also appealed to as a foundational presupposition of this law.

For Hobbes and Vattel, the law defining the freedom and independence of states had been understood to be binding by virtue of its being law that was given directly in the natural condition of the society obtaining among states. In Kant's account of the matter, however, the law defining the freedom and independence of states was law whose binding force for states was understood to be conditional on some act of agreement which both expressed, and presupposed, their freedom and independence. For Kant's argument for the federation of free states was such that it was presupposed that it was only through the exercise of the rights and capacities belonging to states, as free and independent entities, that they would be able to make the act of agreement necessary to found the law that was to apply to them in the sphere of their mutual external relations. Indeed, it may be said that in explaining the law of nations as law founded in the will and agreement of states, Kant understood this law in the only way in which it could possibly have been understood, if it was to be consistent with what he recognized to be the lawful rights of states to their freedom and independence as states.47

6.3 COSMOPOLITAN LAW

With the second definitive article of perpetual peace, Kant confirmed that the law governing the relations between states was to be such as to preserve their freedom and independence. Kant's commitment to the principle of the lawful freedom and independence of the state is underlined by his statement and explanation of the third definitive article of perpetual peace. The subject-matter of the article was the part of the law of peace that Kant called world or cosmopolitan law. This was the body of public international law that Kant saw as constituting the juridical framework for the intercourse of men and

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states, considered in their status as bearers of the attributes of citizenship in an ideal universal state that extended to embrace all mankind. Thus conceived, cosmopolitan law was a form of law which Kant held to be essential for the maintenance of lasting peace among men and states.

The third definitive article provided that cosmopolitan law was to be limited to the conditions of universal hospitality. In the explanation of the article, Kant described the right of universal hospitality as the right of a stranger not to be treated with hostility when he arrived in foreign lands. It was conceded that a stranger might be turned away, although this was not to be done in circumstances that were likely to lead to his death. However, Kant's point was that, even when the stranger was turned away, he was still entitled not to be treated with hostility, provided only that he conducted himself in a law-abiding manner.

> *[H]ospitality* means the right of a stranger not to be treated with hostility when he arrives on someone else's territory. He can indeed be turned away, if this can be done without causing his death, but he must not be treated with hostility, so long as he behaves in a peaceable manner in the place he happens to be in.48

Kant emphasized that the right of a stranger to receive hospitality in foreign lands did not mean that the stranger was to be thought of as being entitled to claim the *right of a guest.* The right of a guest implied a right of settlement. However, this was a right that could exist only where the stranger made a specific agreement with the native inhabitants of the territory into which he had entered. The right of the stranger was strictly a *right of resort.* The right of resort belonging to the stranger was based in the entitlement of all men to present themselves in societies other than their own. This entitlement Kant saw as deriving from what he took to be the principle that the entire land surface of the earth was subject to an original right of common possession.

> The stranger cannot claim the *right of a guest* to be entertained, for this would require a special friendly agreement whereby he might become a member of the native household for a certain time. He may only claim a *right of resort,* for all men are entitled to present themselves in the society of others by virtue of their right to communal possession of the earth's surface. Since the earth is a globe, they cannot disperse over an infinite area, but must necessarily tolerate one another's company. And no-one originally has any

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> greater right than anyone else to occupy any particular portion of the earth. The community of man is divided by uninhabitable parts of the earth's surface such as oceans and deserts, but even then, the *ship* or the *camel* (the ship of the desert) make it possible for them to approach their fellows over these ownerless tracts, and to utilise as a means of social intercourse that *right to the earth's surface* which the human race shares in common.49

For Kant, the right to hospitality was an authentic legal right.50 It was, moreover, a right that he thought of as belonging to all human beings without exception. In this sense, the right to hospitality was by way of a natural right, and one whose existence implied the underlying unity of the peoples comprising the different nations and states of the world. However, the right was also a limited right. For it meant no more than that the stranger was entitled to *attempt* to enter into relations with the native inhabitants of foreign lands. Even so, while the right to hospitality was strictly limited, it was still one whose exercise by men Kant saw as serving to bring the different peoples of the world together, through peaceful forms of mutual intercourse which remained subject to a universally accepted system of law. In this way, the right of men to hospitality carried with it the possibility of the whole human race being able to progress towards eventual union under a lawful cosmopolitan constitution.

> [T]his natural right of hospitality, i.e. the right of strangers, does not extend beyond those conditions which make it possible for them to *attempt* to enter into relations with the native inhabitants. In this way, continents distant from each other can enter into peaceful mutual relations which may eventually be regulated by public laws, thus bringing the human race nearer and nearer to a cosmopolitan constitution.51

The eventual realization of the cosmopolitan constitution, as Kant envisaged it, must be viewed as the third element in the radical transformation of the international order which, as we have argued, he took to be the precondition for lasting peace among men and states. For Kant, the cosmopolitan constitution was to be a form of juridical relationship extending to all men and all states on a universal basis. For this reason, the third definitive article of perpetual peace may well be taken to support the interpretation of Kant's international thought developed by Martin Wight and Hedley Bull. According to Wight and Bull, Kant belonged to, and represented, a so-called

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revolutionist or *universalist* tradition in international thought. This revolutionist or universalist tradition was contrasted with two other such traditions: the *realist* tradition, represented by thinkers such as Machiavelli and Hobbes, and the *rationalist* or *internationalist* tradition represented by Grotius.

The principal analytical claims associated with each of the three traditions in international thought are to be found summarized in Bull's *The Anarchical Society* (1977).52 In the Hobbesian-realist tradition, as Bull described it, international relations were understood in terms of conflicts between states taking place in the condition of the war of all against all. In this condition of general war, each state was assumed to be free to pursue its own goals without regard for any moral or legal constraints, and to be bound only by certain rules of prudence and expediency. As with the Hobbesian-realist tradition, the Grotian-internationalist tradition was explained by Bull as one in which international relations were understood to concern primarily the relations between states. However, the Grotian-internationalist tradition was a tradition in which the relations between states were seen as taking place within the framework of an international society based in certain commonly accepted rules and institutions. These rules and institutions embodied the principles, or imperatives, of law and morality which defined the conditions of co-existence and cooperation among states in the society they formed together.

In the Kantian-universalist tradition, as Bull described it, the essential nature of international politics was looked for in the transnational social bonds that were understood to link together the individual human beings who were the members of the different states. Accordingly, the real focus of concern of international relations in this tradition was not the relations between states, but the relationship obtaining among all men in what was conceived to be the greater community of mankind. As for the imperatives of morality applying in the international sphere, these, from the Kantian-universalist standpoint in international thought, were imperatives which were understood to demand 'not coexistence and co-operation among states but rather the overthrow of the system of states and its replacement by a cosmopolitan society'. Hence in the Kantian-universalist tradition, the community of mankind was seen as 'the end or object of the highest moral endeavour', with the consequence that it was assumed that the rules sustaining 'coexistence and social intercourse among states' were to be disregarded if this was required by 'the imperatives of this higher morality'.53

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The obvious objection to the idea of the Kantian-universalist tradition in international thought, as Bull summarized its core claims, is that it is difficult to see why Kant himself is to be regarded as belonging to the tradition or as being representative of it. At any rate, Kant's place in the tradition is difficult to reconcile with the actual argument of *Perpetual Peace.* 54Indeed, there are respects in which the argument of *Perpetual Peace* points more to Kant's alignment with what Bull identified as the Hobbesian-realist and Grotian-internationalist traditions.55 For example, Bull claimed that, in these traditions, it was assumed that sovereign rulers or states formed 'the principal reality in international politics'.56 However, this was more or less the view that Kant took of the essential nature of the international order in *Perpetual Peace.* For the juridical principles of international order that Kant described in the work were principles that served to legitimate the institution of the state, and to preserve the freedom and sovereign independence of existing states.

Thus with the preliminary articles of perpetual peace, Kant laid down substantive principles of the law of nations that were to secure the rights of states. With the second definitive article, he proposed as the constitutional foundation for the law of nations a form of association among states whose end was to maintain their rights, and their freedom and independence. As for the third definitive article, it is evident that neither the idea of cosmopolitan law as he defined it, nor the right of the stranger to hospitable treatment which he saw as its essential principle, involved any revolutionary implications for the international order as an order based in the institution of the state. Certainly, there is nothing in the explanation of the article to suggest that cosmopolitan law was understood by Kant in such a way that its realization was to involve the abolition, superseding or qualification of the lawful rights which he regarded as belonging to states, and as defining the basis of their freedom and independence.57

Here, it must be emphasized that Kant explicitly *restricted* cosmopolitan law to conditions of universal hospitality. In doing so, he implied that cosmopolitan law was law that would work to preserve something of the separateness of the different nations, states and societies of the world, and so work also to establish and preserve the integrity of the juridical relationship which he believed should obtain between individual nations, states and societies and the particular peoples who formed them. Thus, for Kant, the right to hospitality was a right of resort. It was not the right of a guest, and so not a right which conferred rights of permanent abode or settlement (still less

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rights of citizenship) on strangers in respect of the foreign lands in which they presented themselves. Given the restrictions Kant placed on cosmopolitan law, it is understandable why discussion of this part of the law of peace should have led him to denounce what he saw as the abuses of the commercial states of Europe in their dealings with the foreign lands and peoples they had brought under colonial domination. In Kant's judgment, the conduct of the European commercial states was manifestly inhospitable, and so in violation of the terms of cosmopolitan law. Hence, after introducing the idea of the union of mankind under a cosmopolitan constitution, he went on to observe:

> If we compare with this ultimate end the *inhospitable* conduct of the civilised states of our continent, especially the commercial states, the injustice which they display in *visiting* foreign countries and peoples (which in their case is the same as *conquering* them) seems appallingly great. America, the negro countries, the Spice Islands, the Cape, etc. were looked upon at the time of their discovery as ownerless territories; for the native inhabitants were counted as nothing. In East India (Hindustan), foreign troops were brought in under the pretext of merely setting up trading posts. This led to oppression of the natives, incitement of the various Indian states to widespread wars, famine, insurrection, treachery and the whole litany of evils which can afflict the human race.58

Kant's condemnation of the colonialism practised by the European powers is a centrally important part of his treatment of the law of peace. For it underlines that he believed that lasting international peace depended on the establishing of a system of law under which all men, and all the nations and peoples of the world, would be accorded recognition of their rights and personality without regard to differences between them as to nationality, race or religion, or differences based in their relative levels of economic and political development. Here, certainly, Kant's conception of cosmopolitan law testifies to the universalist dimension present in his international thought. So also does it reflect the continuity between the assumptions informing his writings on international politics and those informing his moral and political thought generally. Indeed, the cosmopolitan law appealed to in *Perpetual Peace* must be understood as the form of public law which, in Kant's terms, provided the most complete juridical embodiment of the ethical conception of human personality given in the idea of the categorical imperative. For the cosmopolitan law, as Kant explained it, was a form of law which answered to the

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conception of the human person as a being possessing reason and moral autonomy, and who, in consequence of this, was entitled in justice to respect as the bearer of the fundamental rights that belonged universally to all rational beings.

With all that said, it is nonetheless crucial in explaining the place that Kant gave to cosmopolitan law in the law of peace that his condemnation of the vicious practices of the European commercial states overseas should not be mistaken for a repudiation of the institution of the state as such. To be sure, such abuses of the European powers as the colonial domination of foreign lands, and the enslavement of their inhabitants, were in violation of the terms of the cosmopolitan law.59 So, indeed, were they in contravention of the law of nations as Kant expounded it in *The Metaphysical Elements of Justice.*60Even so, the fact remains that the right of peoples to freedom and independence in the condition of the civil state was a right recognized, and provided for, in the preliminary articles of perpetual peace, as well as in the first and second of the definitive articles.

Of course, there is no denying that Kant looked forward to the time when cosmopolitan law had extended universally to embrace all mankind, and that he regarded this as a necessary precondition for perpetual peace. But then nor is there any denying that he regarded the coming of perpetual peace as the time when all nations and peoples had entered into a form of statehood founded in the republican constitution, and, thus established as separate states, had united together in a federation whose defining end and purpose lay in securing their lawful freedom and independence on a permanent basis. As against Hedley Bull, therefore, it cannot be allowed that the cosmopolitan ideal, as Kant appealed to it, was such as to imply a wish on his part to see the eventual overthrow of the international order as an order based in a system of states. On the contrary, the cosmopolitan law, as an integral part of the law of peace, is best described as a form of law that Kant thought would have application to, and in some way cement, an international order in which the institution of the state was recognized both as a foundational juridical element, and as an institution whose existence was to stand as a moral value in its own right.61

While Kant was scathing in his criticisms of the colonial practices of the European states, he was not entirely negative about their pursuit of commercial interests overseas.62 For he took this as evidence for the progress being made by the peoples of the world towards the forming of a universal community of all mankind based in a shared conception of law, and so as evidence for the reality of cosmopolitan

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law as an essential precondition for perpetual peace. As he put it in concluding the explanation of the third definitive article:

> The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere.* The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only under this condition can we flatter ourselves that we are continually advancing towards a perpetual peace.63

This conclusion conveys a certain cautious optimism on Kant's part about the future prospects for international peace. Following the statement and explanation of the third definitive article, Kant set out an argument in which he made it clear how, and why, perpetual peace among men and states would eventually come to be realized.

6.4 PEACE, NATURE AND HISTORY

In *Perpetual Peace,* Kant did not only specify the formal principles of law and constitutional order which he believed were necessary for the establishing of international peace. He also described the underlying process of historical development through which he believed that men and states would be brought to conform with these principles. Kant described this process in the First Supplement, this being the section of *Perpetual Peace* where it was explained how lasting peace among men and states was guaranteed by the order of nature.

The explanation of nature's guarantee of peace that Kant provided in *Perpetual Peace* involved the restatement of the substance of the argument he had set out in the earlier essay *Idea for a Universal History with a Cosmopolitan Purpose.* In this work, Kant sought to demonstrate that the entire course of human history could be explained in terms of certain general laws or principles of development. These principles he took to govern, and to be implicit in, the natural development of the human species and the natural development of human society.

The general principles of natural development that Kant appealed to are summarized in the nine propositions around which the argument of the *Idea for a Universal History* is structured. In the

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introductory section of the essay, Kant claimed that while individual men and even whole nations pursued their own particular ends, they were nevertheless to be thought of as acting to bring about another presiding end which they did not as such intend, and which, if they knew what it was, would not engage their interest. In recognition of this, Kant set out the framework for his projected universal history of mankind in accordance with the metaphysical viewpoint of nature considered as a teleological, or purposive, order. Kant adopted this viewpoint because, as he insisted, human history could be made intelligible only if it was assumed that there existed a *purpose in nature,* as distinct from some rational purpose that mankind formulated for itself and then followed in its actions. As Kant explained it, the purpose in nature related to the ultimate end of human history, as an end determined by nature. In this way, the assumption of a purpose in nature allowed for the construction of a history of mankind that accorded with the idea of an ordered plan or design.64

In the *Idea for a Universal History,* Kant picked out a quite specific end or goal towards which the human race was to be thought of as moving through its involvement in the historical process. The ultimate end of human history that Kant identified was the realization of the perfect form of political constitution, both as the lawful basis for the internal self-government of states, and as the lawful basis for the government of the separate states in the sphere of their external relations. This was how he put the matter in the Eighth Proposition stated in the essay, where he wrote of the establishing of the perfect political constitution within states, and as between states in the sphere of their external relations, as the realization through human history of the end given in what he described as the hidden plan of nature.

> *The history of the human race as a whole can be regarded as the realisation of a hidden plan of nature to bring about an internally and for this purpose also externallyperfect political constitution as the only possible state within which all natural capacities of mankind can be developed completely.*65

The political constitution referred to in the Eighth Proposition was understood by Kant as providing the framework for the attainment by men of a fully cosmopolitan form of existence. Since cosmopolitan existence was a universal form of existence among men, it followed, for Kant, that the possibility of achieving the cosmopolitan condition itself presupposed the possibility of the construction of a universal history of mankind. Indeed with the Ninth Proposition, he underlined

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that the constructing of such a history was not only possible, but that it would serve to further the realization of the perfect political condition among men as the purpose set by nature.

> *A philosophical attempt to work out a universal history of the world in accordance with a plan of nature aimed at a perfect civil union of mankind, must be regarded as possible and even as capable of furthering the purpose of nature itself.*66

Under the terms of the Eighth Proposition, the realization of the civil state based in the perfect form of political constitution was held to be necessary in order to bring about the complete development of the natural capacities of man. The naturalistic justification for the civil state that Kant appealed to under the terms of the proposition followed from the explanation of the development of the innate natural capacities of man as a rational agent which formed the subject-matter of the First, Second and Third Propositions.

The First Proposition stated that the natural capacities of any living being were always to be thought of as destined to achieve their complete development, and in accordance with the end implicit in these capacities.

> *All the natural capacities of a creature are destined sooner or later to be developed completely and in conformity with their end.*67

The Second Proposition stated that the natural capacities that directed man to exercise his reason were such that they would find their complete development not in the individual, but only in the whole species.

> *In man* (as the only rational creature on earth), *those natural capacities which are directed towards the use of his reason are such that they could be fully developed only in the species, but not in the individual.*68

The Third Proposition stated that nature had provided that man should create through his own initiative all that went beyond the necessities of his animal existence, and that the happiness and perfection appropriate to man were to be realized by him through the exercise of his own reason.

> *Nature has willed that man should produce entirely by his own initiative everything which goes beyond the mechanical ordering of his animal existence, and that he should not partake of any other*

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> *happiness or perfection than that which he has procured for himself without instinct and by his own reason.*69

With the First, Second and Third Propositions, Kant described how nature provided for the development of the innate capacities of man as a rational agent. With the statement and explanation of the Fourth, Fifth and Sixth Propositions, he described the means that nature employed for the developing of these capacities within society. The propositions were stated as follows:

> *4. The means which nature employs to bring about the development of innate capacities is that of antagonism within society, in so far as this antagonism becomes in the long run the cause of a law-governed social order.*
>
> *5. The greatest problem for the human species, the solution of which nature compels him to seek, is that of attaining a civil society which can administer justice universally.*
>
> *6. This problem is both the most difficult and the last to be solved by the human race.*70

The antagonism within society referred to in the Fourth Proposition was defined by Kant as an antagonism involving what he called the *unsocial sociability* of men. By this Kant meant the natural tendency of men to unite in society, coupled with the no less natural tendency on their part to live apart as individuals and in resistance to the constraints of social discipline. It was this unsocial sociability, as manifested in such of the self-serving inclinations of men as the desire for honour, power and property, that Kant saw as bringing men even against their will to the full development of their natural capacities in society. Hence it was through their unsocial sociability that men were to be brought to achieve culture and enlightenment, and so also eventually to establish and maintain in being a fully lawgoverned form of social order.71

The form of law-governed social order that Kant saw as being caused to be established through the unsocial sociability of men was that of the state based in the just civil constitution. In explaining the Fifth Proposition, he claimed that the development of the natural capacities of men, as the ultimate purpose of nature, required a form of society where there was to be the greatest possible freedom, and so also a continual antagonism as between its members, but where freedom would be restricted such as to secure the freedom of all. The form of society whose establishing stood as the supreme task

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set for men by nature was, therefore, a society where freedom was to be secured through external laws supported by coercive power, and thus a society with a just civil constitution as its foundation. As for the restrictions on freedom that civil society imposed, these, in Kant's view, would be accepted by men as a matter of natural necessity, given that their own inclinations would make it impossible for them to continue to co-exist without the constraints of laws.72

Kant did not restrict his use of the idea of the unsocial sociability of men to the explanation of the establishing of the institutions of the constitutional state within independent societies. He also used the idea to explain how the separate states would come to accept the limitations of law and constitutional order in their external relations with one another. He did so because he took the view that states would be able to establish a lawful form of constitution for their own self-government only if, at the same time, they were able to establish a lawful form of constitution to govern their external relations in the international sphere.

This was the view Kant expressed in the Seventh Proposition stated in the *Idea for a Universal History,* where he made it clear that the finding of a solution to the problem posed by the fact of international politics was inseparable from the finding of a solution to the problem of establishing a proper constitutional regime within states for their internal domestic political organization.

> *The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved.*73

As Kant explained the Seventh Proposition, states were to be thought of as being driven by nature to construct a lawful constitutional order in the international sphere through the experience of their mutual antagonism, in the same way that nature was to be thought of as using the unsocial sociability of men to compel individual men to enter into political society and establish a just form of civil constitution. Indeed, for Kant, war was the means through which nature would bring states to the stage where they would come to found a pacific federation for the ordering of their external relations.

> Wars, tense and unremitting military preparations, and the resultant distress which every state must eventually feel within itself, even in the midst of peacethese are the means by which nature drives nations to make initially imperfect attempts, but finally, after many

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> devastations, upheavals and even complete inner exhaustation of their powers, to take the step which reason could have suggested to them even without so many sad experiencesthat of abandoning a lawless state of savagery and entering a federation of peoples in which every state, even the smallest, could expect to derive its security and rights not from its own power or its own legal judgement, but solely from this great federation *(Foedus Amphictyonum),* from a united power and the law-governed decisions of a united will.74

Kant was to provide a detailed treatment of the idea of nature as a purposive order in Part Two of *The Critique of Judgement.* In doing so, he returned to the theme of how the ultimate end for man, as set by nature, lay in men entering into civil society and the separate states entering into a cosmopolitan form of union.75 However, Kant's most powerful restatement of the position he had argued for in the *Idea for a Universal History* comes in the First Supplement in *Perpetual Peace.* Following the argument of the earlier work, he here maintained that the end of a lasting international peace accorded with the plan given in the purposive order of nature, and that nature had provided that this end would be brought about through the means of conflict among men. This, as he put it in opening the First Supplement, was the essence of nature's guarantee of perpetual peace.

> Perpetual Peace is *guaranteed* by no less an authority than the great artist *Nature* herself *(natura daedala rerum).* The mechanical process of nature visibly exhibits the purposive plan of producing concord among men, even against their will and indeed by means of their very discord.76

Again following the argument of the *Idea for a Universal History,* Kant pointed to war as the particular form of conflict by means of which nature worked to guarantee peace. Thus it was through wars that nature drove human beings to live separately, while at the same time forcing them to enter into juridical forms of mutual relationship.

> Nature's provisional arrangement is as follows. Firstly, she has taken care that human beings are able to live in all the areas where they are settled. Secondly, she has driven them in all directions by means of *war,* so that they inhabit even the most inhospitable regions. And thirdly, she has compelled them by the same means to enter into more or less legal relationships.77

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It was by reference to this design or arrangement of nature that Kant in the First Supplement explained the necessity, and the limits, of the forms of civil constitutional law, international law and cosmopolitan law which were the respective subject-matters of the first, second and third definitive articles of perpetual peace. Thus, he argued that it was the natural self-seeking inclinations of men making for internal conflicts among particular peoples, and (more important still) for external conflicts between different peoples, that explained how and why men, regardless of their moral imperfection, would nevertheless be brought to establish states whose form of lawful constitution was that of the republican constitution.

> Even if people were not compelled by internal dissent to submit to the coercion of public laws, war would produce the same effect from outside. For in accordance with the natural arrangement..., each people would find itself confronted by another neighbouring people pressing in upon it, thus forcing it to form itself internally into a *state* in order to encounter the other as an armed *power*. Now the *republican* constitution is the only one which does complete justice to the rights of man. But it is also the most difficult to establish, and even more so to preserve, so that many maintain that it would only be possible within a state of *angels,* since men, with their self-seeking inclinations, would be incapable of adhering to a constitution of so sublime a nature. But in fact, nature comes to the aid of the universal and rational human will, so admirable in itself but so impotent in practice, and makes use of precisely those self-seeking inclinations in order to do so. It only remains for men to create a good organisation for the state, a task which is well within their capability, and to arrange it in such a way that their self-seeking energies are opposed to one another, each thereby neutralising or eliminating the destructive effects of the rest. And as far as reason is concerned, the result is the same as if man's selfish tendencies were non-existent, so that man, even if he is not morally good in himself, is nevertheless compelled to be a good citizen. As hard as it may sound, the problem of setting up a state can be solved even by a nation of devils (so long as they possess understanding).78

Likewise, it was to the arrangement of nature that Kant appealed when he turned to the question of international law. Here, he argued that the design of nature was such that it worked to ensure that the law of nations would remain a body of laws which applied to the

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external relations between independent states, rather than one which would lead to the establishing of an international state as its constitutional foundation. For as he explained, it was nature itself that thwarted the establishing of an international governing power through arranging that the nations would remain separated by their linguistic and religious differences. At the same time, however, nature arranged that the very conditions of human existence which worked to prevent the institution of an international government were conditions which, in the longer run, would serve to promote peace and understanding between peoples. In this way, nature provided for a peace that would maintain itself through the balance of forces, and the competition among men and states.

> The idea of international right presupposes the separate existence of many independent adjoining states. And such a state of affairs is essentially a state of war, unless there is a federal union to prevent hostilities breaking out. But in the light of the idea of reason, this state is still to be preferred to an amalgamation of the separate nations under a single power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy. It is nonetheless the desire of every state (or its ruler) to achieve lasting peace by thus dominating the whole world, if at all possible. But *nature* wills it otherwise, and uses two means to separate the nations and prevent them from intermingling*linguistic* and *religious* differences. These may certainly occasion mutual hatred and provide pretexts for wars, but as culture grows and men gradually move towards greater agreement over their principles, they lead to mutual understanding and peace. And unlike that universal despotism which saps all man's energies and ends in the graveyard of freedom, this peace is created and guaranteed by an equilibrium of forces and a most vigorous rivalry.79

Finally, Kant claimed that it was nature working through the mechanism of the self-interested inclinations of men, as expressed through their commercial activity, which created the conditions favourable to the spread of cosmopolitan law, and hence also the conditions favourable for the realization of lasting international peace.

> Thus nature wisely separates the nations, although the will of each individual state, even basing its arguments on international right,

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> would gladly unite them under its own sway by force or by cunning. On the other hand, nature also unites nations which the concept of cosmopolitan right would not have protected from violence and war, and does so by means of their mutual self-interest. For the *spirit of commerce* sooner or later takes hold of every people, and it cannot exist side by side with war. And of all the powers (or means) at the disposal of the power of the state, *financial power* can probably be relied on most. Thus states find themselves compelled to promote the noble cause of peace, though not exactly from motives of morality. And wherever in the world there is a threat of war breaking out, they will try to prevent it by mediation, just as if they had entered into a permanent league for this purpose; for by the very nature of things, large military alliances can only rarely be formed, and will even more rarely be successful.80

In the *Idea for a Universal History* and in *Perpetual Peace,* then, Kant expounded a quite specific thesis as to the principles governing the historical development of human society. The principal claims advanced in this thesis may be summarized as follows. First, it was claimed that the order of nature embodied a purposive plan, design or arrangement, which pointed to the ultimate end or goal of human history. Second, it was claimed that the end or goal of human history, as given in the plan of nature, consisted in the realization of the forms of lawful constitution conducive to the establishing of lasting peace among men and states. Third, it was claimed that the purposive order of nature was such that it provided that human beings would be brought to develop, and then maintain in being, the different forms of lawful constitution through the experience of the effects of those of their self-seeking inclinations which made for conflict and discord.

The obvious difficulty with Kant's historical thesis, as it stands, is one of knowing how to reconcile his arguments concerning the purposive order of nature with what he had to say concerning the normative foundations of the forms of constitution that he held were to base the different parts of the law of peace. In the closing paragraph of the First Supplement in *Perpetual Peace,* Kant suggested that the arrangement of nature was to be thought of as underwriting the obligation falling on men to act to the end of realizing the goal of perpetual peace.

> [N]ature guarantees perpetual peace by the actual mechanism of human inclinations. And while the likelihood of its being attained is not sufficient to enable us to prophesy the future theoretically, it is

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> enough for practical purposes. It makes it our duty to work our way towards this goal, which is more than an empty chimera.81

Here, Kant's suggestion was that nature's arrangement provided a *practical* justification for the pursuit of peace, and one which was sufficient to guide men in this endeavour in the progressive unfolding of human history. In this sense, Kant implied that the order of nature was to be understood as standing as a foundation for the normative order that was to be embodied in the forms of lawful constitution which, in the Second Section of *Perpetual Peace,* he claimed were to make up the juridical framework for a lasting peace. However, if this was Kant's view of the substance of nature's guarantee of perpetual peace, then it must be taken as being problematic when considered in relation to the arguments regarding human practical reason that form the core of his moral thought. For these arguments were such as to exclude appeal to the order of nature as the basis, and justification, for the sort of moral-political principles that Kant saw as underlying the lawful constitution which was to be adopted by men in the civil state, and as underlying the forms of lawful constitution which were to have application to the relations between men and states in the international sphere.

Central to Kant's moral thought was the distinction he drew between the sphere of nature and the sphere of human morality. As we have seen, Kant expressed this distinction in terms of a fundamental contrast between the human being considered as part of the natural universe, and hence as subject to the mechanical laws of cause and effect obtaining therein, and the human being considered as a moral agent who acted freely in conformity with laws originating in his own will and reason. The full meaning and force of Kant's distinction between the spheres of nature and morality are reflected in his insistence that the supreme principle of morality was to be found in the autonomy of the will. At the same time, the distinction between nature and morality was presupposed in his insistence as to the falsehood of all conceptions of morality that presupposed, as their determining ground, those motives and inclinations which originated in the empirically given nature of the human agent. Such conceptions of morality were based in heteronomous principles of the will, and hence in principles which, in Kant's view, were powerless to generate universally binding moral laws.

In the *Idea for a Universal History,* and again in the First Supplement in *Perpetual Peace,* Kant argued that the forms of lawful

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constitution conducive to peace among men and states would evolve in accordance with the purposive order of nature. As Kant constructed it, however, this argument brought into question the absolutism of the distinction between the spheres of nature and morality that he sought to establish through his analysis of the principles of practical reason. For, under the terms of Kant's historical thesis, the mechanism through which nature was understood to provide that men and states would come to establish the constitutions that were to found the different parts of the law of peace was a mechanism that involved the exploitation of precisely those empirically determined attributes of the human agent which reflected, and presupposed, the agent's status as a constituent part of the natural universe.

Here, the guiding principle of explanation was essentially a principle of enlightened self-interest. Thus it was to the self-serving inclinations of men that Kant appealed in order to explain the origin of the civil state, and the origin of what he projected as the law-governed order which was to obtain among men and states in the international sphere. Again, it was to the self-serving inclinations that he appealed in order to explain how, despite their mutual antagonisms, men and states would nonetheless be brought to maintain in being the different forms of lawful constitution that were to comprise the juridical framework for lasting peace. In so appealing to the selfish inclinations of men, Kant was able to demonstrate how the law-governed forms of association that were to order the relations among men and states would remain responsive to naturally determined human needs and interests. Yet, his success in this respect was bought at the cost of basing the explanation of the origin of the lawfully constituted relationships that were to obtain among men and states in heteronomous principles of the will, and, in doing so, at the cost also of a closing of the divide between nature and morality.82

Kant's aim in setting out his historical thesis was to explain what he took to be the agreement between the purposive order of nature and the forms of lawful constitution that were to promote peace within states, and as between states in the sphere of their external relations. There is little problem in assigning an explanatory status to the general principles governing the development of human society with which Kant sought to describe the purposive order of nature. What is not to be admitted is that these principles are to be assigned a normative status consistent with the terms of Kant's analysis of how practical reason stood as the source of the moral law. This is so because if Kant's arguments regarding human practical reason are

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taken as they stand, then the bare fact of the agreement between the order of nature and the forms of lawful constitution conducive to peace could not, by virtue of that fact alone, be thought of as conferring any normative standing on these constitutions, or as generating a binding obligation on men to act to establish them and then to act in compliance with the juridical principles essential to them. On the contrary, Kant's analysis of human practical reason was such as to point to another sort of justification for the normative force belonging to the different parts of public law, and to the forms of lawful constitution that were to stand as their foundation. This was not a justification that involved reference to the naturally given inclinations of men, to the principle of enlightened self-interest, or to any other heteronomous principle of the will. Rather, it was one whose essence lay in the universal principles of justice and morality which were implicit in the idea of the categorical imperative, and which, in consequence of this, were to be understood as being grounded directly in the autonomous will and reason of the human agent.

This justification for the different forms of law and constitution that were to make for peace among men and states is to be found appealed to in the arguments of Kant which reflect the radical voluntarism that runs through his moral and political thought. For example, Kant's conviction that the moral law, as a law of freedom, was grounded in the autonomous rational nature of the human agent is intimately bound up with his argument that the civil state, and the form of constitution specific to it, were to be thought of as being based in an original contract. Thus it was in accordance with the idea of the contract founding the state, and its constitution, that Kant explained how men in the state were free because the laws that bound them therein were laws which were to be thought of as originating in their own will and consent.

Then again, there is Kant's argument that the constitutional basis of the law of nations was to consist in a federation of free states. Essential to this argument was the idea that the law that was to regulate the external relations between states, and to secure their rights and independence, was a form of law which was to be founded in an act of agreement on the part of the states bound by it. Of course, Kant was most specific that this agreement was not to have the form of the original contract founding the state itself. For he insisted that states, in contrast to individual men, were not to be made subject to a form of constitution that provided for a governmental power

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possessing the right of public lawful external coercion. Nevertheless, the very limitations that Kant placed on the agreement that was to institute the federation of free states were such that the law of nations was to be thought of as preserving the right of men to association in a condition of statehood, which, in accordance with the terms of the original contract, provided the framework for their freedom under a civil constitution.

It is true that cosmopolitan law was not thought of by Kant as law that was based in any contract or agreement. As we have seen, Kant described the right to hospitable treatment that he saw as the essential principle of cosmopolitan law as a natural right. As for the foundation of cosmopolitan law, this he saw as lying in what he explained was the original right of men to common possession of the land surface of the earth. It is also true that cosmopolitan law was a form of law which Kant regarded as relating very directly to the material needs and interests of men and states. For he associated the development of cosmopolitan law with the development of the form of mutual intercourse among men and states that was based in trade and commercial enterprise. This was the view Kant took of cosmopolitan law in the First Supplement in *Perpetual Peace*. It was also the view of cosmopolitan law he had earlier implied with those of his arguments in the *Idea for a Universal History* where the commercial interests, and the commercial interdependence, of states were pointed to as evidence for the progress being made by men towards a constitutional framework that would provide for a fully cosmopolitan form of existence.83

The connection that Kant argued for between cosmopolitan law and commerce among men and nations is a further respect in which his specification of the elements of the law of peace must be interpreted as giving expression to principles that inform the now existing system of international law. For in associating cosmopolitan law with the spread of commercial ties between men and nations, Kant affirmed the principle of freedom of commerce as a fundamental principle of international peace. To be sure, Kant did not affirm that commerce was to be free in any sense that implied that freedom of commerce was to be to the detriment of the lawful rights of nations and states. On the contrary, it is evident from the argument of *Perpetual Peace* that Kant, like Vattel before him, considered that commerce was to take place in the international sphere only in accordance with a rule of law that defined and safeguarded those rights of nations and states which were essential to their freedom and independence. On the other hand,

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it must be emphasized that it is equally evident that Kant regarded cosmopolitan law as a law of commerce, and that he did so because he assumed that the establishing of lasting international peace required not only the entering by men into the civil state and the acceptance by nations and states of a law defining their rights and duties, but also the acceptance by men and states of a comprehensive legal regime providing for the proper regulation of their mutual commerce in the international sphere.

Kant's specification of cosmopolitan law as law pertaining to trade and commerce confirms that he saw the law of peace as answering to the naturally given interests and inclinations of men. Nevertheless, if Kant thought of cosmopolitan law as law that pertained to the commercial relations between men and states in the international sphere, and if he thought of cosmopolitan law as the law that was to establish the basic juridical framework for these relations, the fact remains that he did not define cosmopolitan law as being nothing more than a law of trade and commerce. Indeed, it was to the ideal of cosmopolitan law that he appealed in order to denounce the unjust practices of the commercial states of Europe in their treatment of the native peoples of foreign lands. Kant's denunciation of the colonial practices of the European powers underlines that he did not see the justification of cosmopolitan law as consisting merely in its role in facilitating the satisfaction of the commercial needs and interests of men and states. As Kant expounded it, the cosmopolitan law was such that its justification, and the ground of its normative force, must be understood as being given in the moral ideas which it presupposed. Here, it is to be emphasized that Kant thought of the cosmopolitan law as a system of universal law which both implied and promoted the unity of all the nations and peoples of the world, and hence as a system of universal law whose full realization would serve to afford a basic minimum of juridical recognition to each individual as member, or citizen, of a world community. This is why, as we have suggested, Kant's cosmopolitan law is to be regarded as the part of public law that gave determinate juridical form to the more abstract conception of human personality implicit in the idea of the categorical imperative. This was the conception of the human person as a rational being, who, by virtue of his autonomous rational nature, was to be respected as the bearer of certain fundamental rights held by all rational beings equally and without exception.

For Kant, then, the underlying justification for the different parts of the law of peace, and for the forms of constitution that were to found them, was to be looked for in principles of justice and morality

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whose foundation lay in the autonomous will and reason of man as a rational agent. Given this, it is to be concluded that Kant's conception of the purposive order of nature, as the guarantee of perpetual peace in history, should not be read as doing duty for the conception of natural law in the form in which it had been expounded by Wolff, Vattel and the earlier writers on the law of nations. In contrast to these thinkers, Kant saw nature and morality as standing in opposition to each other. Hence, it was not open to him to conceive of nature as embodying an objectively given normative order that stood as the foundation for the forms of law and constitution which were to govern the relations between men and states in the international sphere.84 Indeed, so far from aligning him with the secular natural law tradition of Grotius, Wolff and Vattel, Kant's appeal to nature as the guarantee of perpetual peace, in the particular historical terms in which he explained it, must be taken to underline his status as a transitional thinker. For Kant ranks as a philosopher who comes at the end of the natural law tradition of the seventeenth and eighteenth centuries, and as one who looked forward to the later current of historical thought in Europe which is represented by the work of thinkers such as Hegel and Marx.85

Kant is to be assigned the status of a transitional thinker not least in respect of what he had to say about the law that was to secure peace among nations and states in the sphere of their mutual external relations. From the standpoint assumed by writers like Grotius, Hobbes, Pufendorf, Wolff and Vattel, the law that applied to the external relations between nations and states had been understood to be either in part (Grotius, Wolff and Vattel), or in whole (Hobbes and Pufendorf), a body of natural law which comprised timeless and universally binding principles of justice and morality. Towards the end of Chapter 4, it was argued that Kant broke with these writers through his assumption that the law of nations had its foundation not in the order of nature, but in the will and agreement of states. It must now be emphasized that Kant also broke with the secular natural law theorists in adopting an historical approach to the question of international politics, and, more particularly, to the question of the law that was to govern the relations between states in the international sphere. For in adopting this approach, Kant brought out, as his predecessors could not, that the law applying to nations and states in their external relations was to be thought of as a system of law that stood in an essentially dynamic relation to the political order of which it was a part. It is Kant's recognition of the dynamic, historical

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dimension of the law of peace (as much as the radical voluntarism informing the view he took as to its normative foundations) that sets him apart from Grotius, Hobbes, Pufendorf, Wolff and Vattel, and marks him out as a subverter of the natural law tradition to which they belonged.

For the Kant of the *Idea for a Universal History* and *Perpetual Peace,* as much as for Hegel and Marx after him, it was the unfolding of human history, rather than the bare conformity of men and states with timeless and unchanging norms of conduct, which was to provide the final realization of the first-order principles of justice and political morality. In the event, the view that Kant took of the end of history differed significantly from the views on this matter that were to be taken by Hegel and Marx. The contrast here between Kant and Hegel is particularly instructive. This is so not least because both thinkers assumed that the historical process would culminate in a condition of society where the institution of the state was to remain in being on a permanent basis, and not, as was to be case with Marx, in a condition of society whose coming into being was to involve the disappearance of the state.

In Kant's conception of it, of course, the end of history lay in the realization of a lasting peace among men and states which was to be based in the rule of law, and in the forms of constitutional order that were to found the different parts of the law of peace. The realization of such a peace, as Kant envisaged it, was to depend on the adoption by states of a form of government that embodied the principles essential to the republican constitution. This was so, for Kant, because states where government was based in the republican form of constitution were states where there existed substantial institutional impediments to their resorting to war as the means for settling disputes about their rights. At the same time, Kant saw the realization of the end of lasting peace as depending on the acceptance by men and states of the constraints of law in the international sphere, and on the preparedness of men and states to enter into forms of constitutional relationship such as would found the law that was to apply to them in this sphere of their mutual external relations. Thus, war was to be ended on a permanent basis, and perpetual peace inaugurated, through the law of nations coming to be based in a federation of states, and through the intercourse of men and states coming to be based in the sort of constitutional framework implicit in the idea of cosmopolitan law.

Hegel must be set apart from Kant for the reason that it was not lasting peace among men and states that he thought of as the final end of

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human history. That Hegel did not think of peace as the final end of history is underlined by the fact that, in contrast to Kant, he did not look forward to the time when men and states had entered into forms of lawful constitution that involved a commitment on their part to the permanent abandonment of war as a means for the determination of rights. On the other hand, it must be emphasized that Hegel very clearly followed Kant in the respect that he explained the historical development of mankind in terms of the establishing by men of a form of political society that provided for universal freedom under the rule of law. The form of political society that Hegel saw as securing universal freedom was the constitutional state. This, as he explained it, was the form of the state that had come to be established in modern Europe during the period running from the Reformation to the French Revolution, and the form of the state whose establishing at this time he considered to mark the culminating point of human history.

The work in which Hegel provided his most detailed specification of the principles of the modern European state was the *Philosophy of Right.*86The state whose principles Hegel specified in this work was the state in which all men were accorded equal recognition under the law. It was also the state founded in a constitution, where this constitution served to describe the sovereign rights and powers of government in the state, and to define the basis of the sovereignty and independence of the state in the sphere of its external relations with other states. However, while Hegel affirmed the inherent legitimacy of the form of government to be found in the modern constitutional state, he did not follow Kant in claiming it to be the virtue of the constitutional form of government that the states that adopted it would be led to refrain from waging war in the defence of their rights. On the contrary, he insisted that, in the conditions of modern political society, war was to be thought of not as an absolute evil but as something essential to the ethical well-being of the state, in the sense that war was to be counted as a means through which the people forming the state fulfilled their basic ethical obligation to act to preserve its security and independence.87

If Hegel viewed war as integral to the concept of the state, he did not for that reason deny that states were to be regarded as subject to law in the sphere of their mutual external relations. He accepted the existence of international law, and included in the *Philosophy of Right* a summary exposition of what he saw as its basic elements.

As Hegel expounded its elements, international law was understood to be law that applied to the external relations between states that

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were sovereign and independent. The essential form of international law was that of obligation, rather than that of right. This was so because international law was law whose reality and normative force depended on the will of the separate states to whose relations it applied. It was not law whose reality and normative force depended on the will of some constituted authority standing above states, and through whose power the rights of states implied in their obligations were to be decided and given effect to.

The substantive obligations of states under international law were established through their mutual agreement. Hence, for Hegel, the fundamental principle of international law was the principle that treaties, as the source of the mutual obligations of states, were to be observed. However, since international law applied to the relations between states that were sovereign and independent, and since rights under international law depended on the will of states rather than on the will of a higher constitutional power, the principle of treaties was an obligation which presupposed no effectively enforceable right corresponding to it. This meant that it was the normal condition of international society for those relations between states as were regulated by treaties to alternate with the suspension of such relations. Thus, where states were unable to base their relations in treaty agreements, then disputes between them were to be settled by means of war. For states were to act to secure their own welfare, and it was the welfare of states that stood as the ultimate ground of justification both for their forming treaties and for their resorting to war.

Hegel emphasized that states at war were bound by law. For war was waged by states with a view to bringing war to a conclusion, with the consequence that war was to be thought of as implying the principle of international law that war should be conducted by states only in such a way as to preserve the possibility of their returning to the condition of peace. Hence ambassadors were to be respected, and war waged on the internal institutions of states or on private individuals was to be excluded. However, notwithstanding Hegel's insistence that war between states was governed by law, there was no suggestion on his part that international law was to come to stand as a framework for the establishing of a permanent peace among states. For Hegel, international law was essentially a law of peace *and* a law of war. It was not, as it had been for Kant, a system of law that implied the possibility that it might be founded in a constitution under which states would bind themselves to renounce war for good and to settle disputes about their rights by peaceful means.88

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In the course of expounding the elements of international law, Hegel gave his own judgment on Kant's ideal of a perpetual peace based in a federation of states. Such a peace, he pointed out, presupposed an act of agreement between states. For this reason, he insisted, it would be conditional on the will of states that remained sovereign and independent, and so would be a peace that remained purely contingent.89

The considerations Hegel raised about Kant's idea of perpetual peace are certainly not ones that Kant himself would have regarded as fatal to his argument for a federation of free states as the constitutional foundation of the law of nations. For Kant was clear that the federation was to be instituted through (and hence to be conditional on) the will and agreement of states. He was clear also that the federation was to have as its purpose the preservation of the freedom and sovereign independence of states, as this was guaranteed to them under the terms of the substantive law of nations. However, it was Kant's view that, despite these limitations, the federation he proposed would serve to found the law of nations in such a way as to make for a peace that was not qualified by contingency, but a peace that was universal and perpetual. Here, it must be underlined that what Kant sought to express with the idea of the federation of free states was a hope regarding the future development of international society that Hegel, after him, was not able to entertain. This was the hope that states, while remaining sovereign and independent as states, would nevertheless come to accept the constraints of law on a voluntary basis, and, in so establishing international law through their own will and agreement, establish also the juridical framework for a lasting and permanent peace.

The idea of states coming to accept a system of international law based in a pacific federation was only one component of Kant's vision of the perpetual peace that he believed would eventually come to have its realization in human history. In addition to the idea of the law of nations based in a pacific federation as a condition for peace, there was the idea of states coming to adopt the republican form of civil constitution as the constitution of peace, an idea which, as Kant explained it, was such as to establish the place of municipal law as an integral part of the law of peace. Then again, there was the idea of men and states adopting a system of cosmopolitan law, where this was understood to lead to the establishing of a global constitutional framework that would serve to regulate the mutual trade and commerce of men and states in the international sphere, while also

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providing for full universal recognition of the lawful rights and personality of all men and all states.

In setting out his vision of the historical development of mankind towards the goal of perpetual peace, Kant wrote with impressive realism about the course that the future in international politics would take. For he recognized very clearly that the progress of men and states towards peace, and towards the establishing of the law and forms of constitutional order that were to provide for it, would be arduous, and that it would be distinguished by the wars, rivalries and other sad experiences that he saw as the motor of historical change and development.90 Despite this, Kant left no doubt as to his conviction that the problem of establishing perpetual peace would find its solution in human history. In the event, it must be regarded as open to question whether Kant was justified in his confidence as to the historical inevitability of perpetual peace, and as to the certainty that peace would follow unproblematically from the establishing of the law of peace as he envisaged it. This is so even though, as we shall note in the Conclusion that follows, Kant's thoughts about the international order, about the law that was to apply therein, and about the principles of right and justice that it was to conform to, are thoughts that belong very centrally to our experience and understanding of the international society that we now inhabit.

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Conclusion

In this volume, we have examined the law that Kant saw as embodying the conditions for a lasting, or perpetual, peace among men and states in the international sphere. The law of peace, as Kant expounded it, was a complex system of law, with its elements comprising what he identified as the three parts of public law and the three forms of lawful constitution that he claimed were to found them. The first of the elements of Kant's law of peace was the municipal law of states. This was the law maintained in states for the purpose of their internal domestic political organization, and enforced by states through the exercise of the right of public lawful external coercion which was vested in the institutions of government therein.

Kant saw municipal law as forming part of the law of peace for two reasons. First, he held it to be a condition for peace that men should be brought to associate together in states, and to submit to the laws maintained and enforced therein as a basis for the determination and securing of their rights and property. For it was a premise of his argument about peace that unless men were associated together in subjection to the law and constitutional order maintained in states, then the condition of their mutual society would remain that of the natural state of war. Second, he held it to be essential, if lasting peace was to be established among men and states in the international sphere, that states should adopt a particular form of civil constitution as the basis for their internal domestic law and government. Hence the first definitive article of perpetual peace stipulated that the civil constitution of states was to be republican in form.

The second of the elements of Kant's law of peace was the public law of nations. This was the form of public international law that Kant saw as serving to regulate the external relations between states, and to define the rights and obligations of states that were essential to their freedom and independence. The law of nations was to have a constitution as its foundation. This was to be embodied in a federation of free states, which federation was to be brought into being and maintained through the will and agreement of the states that entered it.

In Kant's view, the agreement of states to enter a federation, as the constitutional foundation for the law of nations, was no less a condition for lasting peace among men and states than was the actual

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conformity of states with the substantive requirements of the law of nations. For he considered that the instituting of a federation of free states was necessary if the rights and property of states were to be secured to them by lawful means, rather than through the resort to warin the same way that he considered that the subjection of men to the form of constitution obtaining in states was the prerequisite for the determination and securing of their lawful rights and property in conditions of peace.

Nevertheless, there are two crucial respects in which Kant saw the form of constitution that was to be embodied in his proposed federation of free states as differing from the form of constitution that he thought was to set the terms of association among men in the civil state. First, he claimed it to be of the essence of the civil constitution that it provided for the subjecting of men to the legislative, executive and judicial authorities through which states exercised their internal sovereignty. Yet, against this, he was quite specific that the federation of free states was not to involve the subjection of member states to governmental authorities of this sort. Second, he claimed that states held a right of external coercion with regard to the application of law against their subjects, which right he explained as one that was given in the very idea of the civil constitution. However, he insisted that the federation of free states was to hold no such right of external coercion with regard to the matter of the application of the law of nations against states. The differences that Kant pointed to between the civil constitution and the federation of free states that was to stand as the constitutional foundation for the law of nations are centrally important in understanding his international thought. For it is here that it is underlined that he thought of the law of nations as a law which was to apply to the relations between free and independent states, and as a law whose terms and conditions of application were to be such as to preserve the freedom and independence of states in the sphere of their mutual external relations.

The third element of Kant's law of peace was the cosmopolitan law. This was a distinct form of public international law, with its basic substantive principle providing that visitors to foreign lands were to be thought of as entitled to receive no hostile, or inhospitable, treatment from native inhabitants. Cosmopolitan law, as Kant explained it, was the part of the law of peace that was to regulate the trade and commerce among men and states in the international sphere. It was also a form of law that he saw as implying the possibility of men and states entering into a global constitutional regime that would come to

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embrace all mankind, and, in so doing, establish the conditions for the recognition of the lawful rights and personality of all men and all states on a universal basis.

For Kant, then, the law of peace was a system of law that comprehended the law and form of lawful constitution which was to obtain among men in the civil state, and the parts of public law and forms of lawful constitution which were to apply to the relations among men and states in the international sphere. In expounding the elements of the law of peace, Kant affirmed certain fundamental principles of international order. These principles may be stated as follows.

With respect to the part of the law of peace that pertained to the internal domestic political organization of states, Kant laid it down, as a principle of international order, that states were to adopt a civil constitution providing for limited government subject to the constraints of the rule of law. The form of constitution that Kant envisaged as the basis for the internal domestic political organization of states was, of course, the republican constitution. This, as he explained it, was the constitution that would serve to constrain the states that adopted it from resorting to war as the means for settling disputes about their rights. At the same time, Kant explained the republican constitution as the constitution that provided for the securing of certain fundamental rights of the individual, like the rights implicit in the principles of the rule of law, which were essential to the freedom and equality of men as bearers of the capacities of citizenship. That he explained the republican constitution in these terms underlines that he saw it as a condition for peace between states that states should adopt a form of internal domestic political organization that would honour and protect the basic civil rights of the individual, as these were implied in what he specified to be the firstorder principles of justice and political morality.

As for the part of the law of peace that applied to states in the sphere of their mutual external relations, this, as we have noted, was a form of law that Kant saw as securing those rights of states that were essential to their freedom and independence. The substantive principles of the law of nations that Kant affirmed were principles of international order whose acceptance by states would work to preserve their freedom and independence, and principles which presupposed, and followed from, the recognition that states were sovereign and equal as entities or persons co-existing in international society. One of the principles of international order that Kant affirmed with his statement of the substantive law of nations was the principle that

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treaties of peace between states were to be entered into in good faith. This principle was appealed to in the first preliminary article of perpetual peace, this being the article which called for the exclusion of peace treaties where the parties made secret reservations regarding possible causes for future hostilities. Then again, Kant affirmed the principle that the disposition of states in international society was to be based in the recognition of their juridical status and personality and that of the individuals who formed them. This was the principle appealed to in the second preliminary article of perpetual peace, this being the article which provided that no independently existing state was to be acquired by another state through such means as inheritance, exchange, purchase or gift.

Among the other principles of international order that Kant laid down in expounding the substantive law of nations were the following: the principle that states should act to give up the means at their disposal of waging war on a gradual basis; the principle that states should receive no international credit in connection with the prosecution of their foreign policies; and the principle, integral to the idea of the sovereignty and equality of states, that states were not to interfere forcibly in matters relating to the constitution and government of other states. In addition, there were the principles that Kant affirmed in respect of the law of nations as it concerned the rights of states in the waging of war. Here, he appealed to an idea that everywhere informs his statement of the law of peace. This was the idea that war was to be conducted only in accordance with rules that ensured that war would remain a law-governed form of relationship between states, and hence a form of relationship that would preserve the possibility of states at war being able to return to the condition of a peace based in law.

Beyond the principles of international order that are pointed to in Kant's specification of the substantive principles of the law of nations, there are the principles of international order that he affirmed through his call for a federation of free states as the constitutional foundation for the law of nations. Here, Kant affirmed it, as a principle of international order, that states were to be associated together within some standing institutional framework, to the end that their rights and property would be secured to them without the necessity of their resorting to war. This was a principle of international order that was essential to Kant's law of peace. For the law of peace, as Kant expounded it, was a system of law that was to establish the conditions for a perpetual peace, and this he took to require nothing less than the

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permanent abandonment by states of war as the means for determining and enforcing their rights.

However, if Kant was clear that peace, to be perpetual, required the association of states within a standing institutional framework, he was equally clear that the terms of the association were to be such as to preserve the freedom and independence that belonged to states under the terms of the law of nations. Hence in calling for a federation of free states as the constitutional foundation for the law of nations, he affirmed it, as a fundamental principle of international order, that the subjection of states to government in an international state or a world state was to be excluded as contrary to the rights of states. Kant's insistence that there was to be no international government or world government was as essential to his conception of the law of peace as was his insistence that states were to look for security for their lawful rights and property in a federation formed among themselves. For the exclusion of international government or world government underlines that Kant saw the law of nations as a form of law that applied to states as free and independent persons or entities, and as a form of law that presupposed the continuing freedom and independence of the states to which it had application.

In his statement and explanation of the principles of cosmopolitan law, Kant affirmed principles of international order which complemented those he affirmed in expounding the other parts of the law of peace. Thus it was in discussion of cosmopolitan law that Kant laid it down that there was to be freedom of trade and commerce between men and states in the international sphere. To be sure, he indicated that commercial activity on the international plane was not to be to the detriment of the rights of states, as witness his restriction of cosmopolitan right to conditions of universal hospitality. Nor was it to be to the detriment of the right of men to association in the condition of statehood, as witness his denunciation of the colonial abuses of the European powers. Nevertheless, it is evident that Kant affirmed freedom of trade and commerce as a fundamental principle of international order, and one whose acceptance by men and states he regarded as being to the furtherance of peace.

Another principle of international order pointed to in the discussion of cosmopolitan law was a principle that was implicit in Kant's idea of a cosmopolitan constitution which was to comprehend all men and all states. The principle of international order implied in the idea of the cosmopolitan constitution was the principle that there should exist a fully global juridical system, which, going beyond a constitution

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establishing a mere association of states, would stand as a system embodying the conditions for the universal recognition of the rights and personality belonging to men and states under the terms of the law of peace.

The principles of international order that Kant affirmed with his exposition of the law of peace are principles that are integral to the law that applies to men and states in the now existing international society. The part of current public international law that is concerned with universal human rights gives clear recognition to the rights and freedoms of the individual that Kant thought of as being secured to men under the republican form of state constitution. To be sure, the law of human rights makes a presumption in favour of democracy as the legitimate form of constitutional government, and this is a development about which Kant himself would have been troubled. Nevertheless, the law of human rights does affirm all the rights that belong to the individual in his status as the subject of the rule of law, such as the right to recognition as a person before the law and the right to receive due process of law. These, of course, are rights that Kant thought of as essential to the individual as a member of the form of society to be found in the civil state. Here, certainly, the present international law of human rights must be taken as fulfilling Kant's requirement that the law of peace was to provide for the adherence by states to the principles essential to constitutional government as the basis for their internal domestic political organization.1

Still further, it must be emphasized that the present system of public international law is founded in principles to which Kant gave expression with his exposition of the substantive law of nations. Among these principles are the principles of the faith of treaties and the principle of non-interference, or non-intervention, considered as an essential component of the foundational principle of public international law that affirms the sovereignty and equality of states. Another principle integral to current public international law is the principle of the self-determination of peoples, a principle which, as we have suggested, Kant looked forward to with the second preliminary article of perpetual peace. In addition, there is the principle that the international law of peace should be supported by international institutions and organizations to be brought into being, and maintained, through treaties between free and independent states. This, of course, is a principle that Kant affirmed with his stipulation that states were to enter into a federation, so as to establish a constitutional foundation for the law of nations.

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Finally, it must be noticed that the law obtaining in contemporary international society gives effect to the principles of international order to which Kant gave expression with his statement of the principles of cosmopolitan law. For current public international law does purport to provide a juridical framework facilitating free trade and commerce among men and states, albeit one where the principle of freedom of trade and commerce is qualified (as Kant thought it should be) by other principles of international order that serve to define the rights of states. At the same time, current public international law purports to stand as a universal system of law, as witness for example the claims made on behalf of the law of human rights as a law stating universally valid rights and freedom.

That the law applying to men and states in contemporary international society so much fulfils the terms of Kant's law of peace would appear to make good a crucially important claim that runs through his international thought. As we have seen, Kant did not rest content with stating the elements of the law of peace. He also supported his statement of the law of peace with an argument to the effect that the unfolding of human history would see the adoption by men and states of the law making for peace among themselves, and that the realization of a lasting peace based in law, as he conceived it, was to be thought of as the final end of the historical process. To the extent that the law obtaining among men and states in contemporary international society runs along the lines of what Kant specified as the law of peace, then this must surely be taken as a vindication of the claim he made as to the historical inevitability of perpetual peace.

The principles of international order that Kant affirmed are principles that are integral to the law that applies to men and states in contemporary international society. They are also principles that are integral to the distinctively liberal philosophy of international law and international relations. For the principle that states should adopt the constitutional form of government, the principle of the faith of treaties, the principle of self-determination, the principle that states should reduce their armed forces as a condition for peace, the principle of the sovereignty and political independence of states, the principle of freedom of trade and commerce between states, and the principle of the universality of the lawful rights of men and statesthese are all principles of international law and international order that occupy a very central position in the liberal tradition in international thought and practice.2 Given this, and given that Kant saw the historical process as culminating in the adoption by men and states of

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the law of peace as he envisaged it, the conclusion to which we may well be led is that Kant's arguments about peace are such as to point to the establishing of a liberal law of peace as marking the final stage in the historical development of human society.

In the immediate aftermath of the conclusion of the Cold War during the late 1980s and the early 1990s, commentators were apt to regard the repudiation of Marxism-Leninism in the former Communist countries as representing a decisive ideological victory for Western liberalism. Some even went so far as to hail the victory of liberalism as marking an end to the historical process itself. This was the position famously argued for by Francis Fukuyama in his article 'The End of History?' (1989),3 where, among much else, the triumph of liberal democracy over competitor ideologies like Marxism-Leninism was pointed to as confirmation of the truth of Hegel's claim that the final realization of universal freedom in human history had come with the establishing of the modern constitutional state.4

As against Fukuyama, it is possible to object that the triumph of liberal democracy over Marxism-Leninism that was associated with the ending of the Cold War has not served to bring about an end to history as such. Rather, it has served to bring into being an era in world history that will be distinguished by the emergence of new forms of crisis and disorder, such as those resulting from the population explosion, environmental damage and rapid technological change,5 and by the emergence of new forms of ideological conflict, such as the conflicts between the great world civilizations on which Samuel P. Huntington has placed particular emphasis in projecting the future course of international politics.6 With all that said, however, there is still no denying that liberalism occupies a dominant, even if not an unassailable, position among current world ideologies, and that, for this reason, Kant and his argument about peace must be taken to be of the first importance in explaining the law and principles that lie at the foundations of the legitimacy of the now existing international society.

The dominance of liberalism among world ideologies stands confirmed by the fact of the obvious and direct relevance of the liberal view of international law and international relations in understanding the character of contemporary international society. Certainly, the liberal view of international law and international relations is in this matter more relevant than the view that belongs to the tradition in international thought and practice to which liberalism is opposed. This is the tradition of realism. The realist tradition in international

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thought and practice is one where, classically, it has been assumed that the sphere of international politics is the sphere of the relations between independent states, with states being thought of as standing to one another in a condition of mutual conflict and antagonism. So also has it been assumed in classical realism that the structure and organization of the relations obtaining between states are determined by the power of states, and that states will exercise the power at their command so as to preserve their security and to advance their respective interests.

In contrast to realism, liberalism is a tradition in international thought and practice where the sphere of international politics has not been understood simply as the sphere of inter-state relations and inter-state security, but one where it has been accepted, even if only implicitly, that the sphere of international politics comprehends the relations formed among individual men, private associations, communities and peoples within international society, in addition to the relations between independent states. As for the relations between states as such, these, in the liberal tradition, have been assumed to be determined not only by power, but also by normatively compelling principles of law and morality that stand as constraints operating on states and governments in the exercise of their power. Accordingly, the liberal tradition is a tradition where particular emphasis has been placed on the capacity of states to establish rules, procedures and institutions which set the framework for their mutual co-operation, to the end of promoting their mutual benefit and advantage.

As between the realist and liberal traditions, it is the liberal view of international law and international relations that answers the more directly to the realities of international society as it has been developing since the conclusion of the Cold War. The ending of the Cold War marked the end of the era of superpower rivalries. So also would it appear to have marked the end of a period where the primary focus of concern in international politics could be said to have lain with the traditional issues of war and peace, such as those to do with the military and territorial security of states and with the management and resolution of conflicts between states. Of course, contemporary international society is not free of concern for issues affecting interstate security. Even less is it free of conflict, as witness the high incidence of civil war and ethnic violence. Nevertheless, the issues that have now come to prominence in international society, including those of civil war and ethnic violence, are issues that suggest that it is no longer tenable to adopt as the essential framework of international

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politics a framework that is understood to be based primarily in relations between states.

Among the issues now prominent in international society are the issues to do with the growth in the world population, the environment, the movement of peoples, poverty, famine and disease, and the plight of the developing nations. In addition, there are the issues that are bound up with the emergence of a fully global economic system based in open international markets, and organized in accordance with the principles of freedom of trade and commerce. To be sure, there remain important areas of trade conflict as between the states that are implicated in this economic system. Even so, the world economy has now come to be distinguished by an increasingly high level of co-operation among states both on the global level, as witness the World Trade Organization, and on the regional level, as witness the advance towards political and economic union under supranational authorities in Western Europe.

The current condition of the world economy, then, reflects the increasing co-operation among states, as it points, more strongly, to the fact of their interdependence. Beyond this, it must be noticed that the world economy, as it has been developing in recent years, has served to establish international processes and structures in finance, production and distribution which are proving, and will no doubt continue to prove, highly resistant to control and regulation by states and national governments. This development in the world economy has encouraged international relations specialists to argue for the view that states and their governments are no longer to be thought of as forming the primary elements of international society. So also has it led to the increased attention that is now paid by the international relations specialists to the part played in the organization of international society by the so-called non-state actors: the multi-national corporations and the non-governmental organizations, and the transnational communities formed across state boundaries by men and women joined together in common endeavour in such concerns as commerce, science, education, the arts, and religious confession and practice.7

In the circumstances, it is hardly to be wondered at that there have been calls for a new conception of international law that will accord with the realities of an international society in which, as it is held, states are no longer to be regarded as possessing primacy of position, and hence as possessing the rights and privileges of sovereignty as it has been traditionally conceived. So, for example, there is the

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argument of Philip Allott that international law should cease to be thought of as a system of law applying to the relations between sovereign states, but should instead be reconceptualized as a system of law that applies to an international society in which states are to be recognized as subordinate entities, and as co-existing in relative subordination with the non-state entities.8

It is clear from all this that the direction in which international society is moving at present is one that is in general accordance with the liberal view of international law and international relations. The question remains whether or not the trends present in contemporary international society that we have noticed accord unproblematically with the view of international order to which Kant gave expression with his statement of the principles of the law of peace. This is a question that must here be asked, for the reason that it has been accepted in this volume that Kant's law of peace stands as a liberal law of peace. If, as we shall suggest, the terms of Kant's law of peace are somewhat at odds with contemporary trends in international society, then this, as we shall also suggest, may well be evidence of certain contradictions within liberalism as it relates to present international realitiescontradictions that correspond to certain of the contradictions that hold as between the different ideas and principles that are contained within the law of peace that Kant expounded.

There is no difficulty about reconciling the terms of Kant's law of peace with the recent developments in international society that are evidence of the increasing preparedness of states to shy away from conflict in favour of co-operation for mutual benefit and advantage, and to establish legal and institutional frameworks for the ordering of their co-operation. After all, it was a fundamental part of Kant's argument about peace that men and states would be able to overcome the natural condition of war through entering into juridical forms of relationship establishing the basis for peace, and, in doing this, act in conformity with the dictates both of justice and of mutual self-interest. There is also no difficulty about reconciling the terms of Kant's law of peace with the developments in contemporary international society that have involved the increasing interdependence of states, the establishing of a world economic system based in freedom of trade and commerce, and the linking together of human beings in transnational communities with all that this promises about the eventual formation of a truly global society and culture. For these are all developments in international society that accord with the spirit of Kant's cosmopolitan law. Indeed, they are developments for which, it

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may be said, Kant himself would have thought that cosmopolitan law was to provide the framework.

The principal difficulty about Kant and his law of peace with regard to the contemporary situation concerns the question of the position of states in international society. Here, it must be emphasized that the view Kant took of the juridical bases of international order was such that he would have had quite fundamental problems with the trends in present international society which point to the erosion of the rights and powers of states and their governments, and which have encouraged the view that states are no longer to be thought of as having primacy of position among the different elements of international order. For Kant's law of peace was a state-centred system of law, and state-centred with respect to each of its three parts.

As is clear from his exposition of the principles of municipal law, Kant assumed that there could be neither justice nor peace among men unless men were brought to associate together in states, and to submit to the form of law and constitutional order that was to be maintained therein. Regarding the law of nations, this, of course, Kant expounded as law which applied to the relations between states, and which served to define and secure their rights and property. It is true that the terms of cosmopolitan law, as Kant expounded it, were such as to indicate that he conceived of the law that was to apply in the international sphere as being very much more than a system of law that regulated the relations between states. For he thought of cosmopolitan law as a system of law that was to provide a framework for the commercial intercourse of men and states, and for the union of men and states in a condition of society based in a universal world constitution. Nevertheless, it is also true, as we have seen, that the rights essential to cosmopolitan law were limited rights, and limited in such a way as both to preserve the right of men to association in the condition of statehood, and to preserve the rights and powers that belonged to states as primary constituent juridical elements of international order.

That Kant's law of peace was a state-centred system of law does not disqualify it from being taken to stand as a liberal law of peace. On the contrary, the foundational position that Kant assigned to states in expounding the law of peace reflects his acceptance of a principle of justice that is of central importance in the liberal tradition in moral and political thought. This is the principle providing that the subjection of men to law, and to institutions of government charged with the enforcement of law, should be based in the consent of men to be so

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bound. The particular act of consent through which Kant thought of men as subjecting themselves most directly to law, and to institutions of government, was the act of consent whose form was given in what he saw as the idea of the contract founding the state. The contract founding the state was, in Kant's presentation of it, a fundamental act of human association. For, as Kant explained it, the contract founding the state was an essential precondition for the establishing of law and justice among men, and hence an essential precondition for the establishing of a lasting peace among men and states that would be based in law.

In the modern world, of course, states are not based in contract. However, the fact that this is so does not invalidate the claim that is implied in Kant's appeal to the idea of contract in explanation of the origin and foundations of the state. This is the claim that the law, and the institutions of government, maintained in the state should be thought of as comprising a political order that is legitimate, and indeed intelligible, only to the extent that it remains capable of engaging the consent of the persons who are subject to it. The claim that the laws and institutions of government maintained in the state should be thought of as based in the consent of the people, as it is implied in Kant's appeal to the idea of the social contract, is crucial in understanding why Kant insisted as emphatically as he did that the state was to be thought of as standing as a sovereign and independent form of human association. For the idea of the contract founding the state, as Kant explained it, involved the idea of the consent of the people to the authority of a political order based in laws that were an expression of their freedom as a people, and hence an order which in justice was not to be made subject to some external law-making power. Thus, for Kant, did consent, law, sovereignty and independence go together as principles implicit in the very concept of statehood.

Contemporary international society, as we have described it, is distinguished by the entering of states into forms of regime, framework and organization which, while promoting co-operation for mutual benefit and advantage, would appear to involve no little forfeiture of the sovereignty and political independence of the states concerned. There is much about this trend in international society that accords with the spirit of liberalism, and with the spirit of Kant's law of peace. For the co-operation of states for mutual benefit and advantage is obviously much conducive to peace, as Kant himself recognized. Nevertheless, the trend running in the direction of greater co-operation between states is also a trend that has to be taken as

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running counter to the terms of Kant's law of peace as it concerns the position of states in the international order and the principles basing their legitimacy. This is so in the respect that co-operation among states has come to manifest itself in the formation of regimes, frameworks and organizations that involve the establishing of systems of law and governmental institutions in the international sphere, which, in diminishing the sovereignty and independence of states, are deprived of a secure foundation in the consent of men.

Here, certainly, it must be reckoned that Kant would have deplored the loss of control on the part of states and national governments over the social and economic circumstances of men that is pointed to as a consequence of current processes and structures of internationalization. For his argument about peace was such that he would have viewed this loss of control by states and national governments as detrimental to the terms of lawful association among men as given in the idea of the social contract, and hence as being subversive not just of state authority but of the very bases of peace itself.

The current condition of international society, then, is one where the principle of law and government based in consent stands in a certain opposition to the momentum towards organized co-operation between states for the purpose of their mutual benefit and advantage. This opposition is one of the contradictions within liberalism as it relates to contemporary international society, as much as it is a contradiction which, in its essential form, is to be found implicit in the terms of Kant's law of peace. For liberalism is a tradition in moral and political thought which, in its international dimension, affirms that states must seek to realize the ends of peace and justice through mutually beneficial forms of co-operation, while also standing as a tradition which, in respect of the sphere of domestic politics, affirms that men must be bound only by laws and institutions of government that are based in their consent and freedom.

There is another contradiction that Kant implied with his law of peace, which, once again, corresponds to a contradiction within liberalism in its relation to the contemporary situation in international politics. This concerns the question of the rights of men as balanced against the rights of states. As we have seen, Kant regarded the establishing of peace among men and states in the international sphere as necessitating a radical transformation in the internal domestic political organization of states. The transformation in the internal domestic political organization of states for which Kant called was to involve the adoption by states of the republican form of civil

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constitution. This, as we have emphasized, was the form of constitution that Kant thought of as securing certain fundamental rights of the individual, including certain of the rights of men that are now enshrined in the international law of human rights.

Kant was quite clear that only the republican constitution would provide for the securing of the rights of men in the condition of political association, as these rights were grounded in what he took to be the first-order principles of justice and political morality. However, he was no less clear that the adoption by states of the republican constitution was a matter that was to depend on the process of political development internal to states, and that it was to remain a matter where the whole society of the states co-existing in the international sphere was to have no competence and to exercise no direct influence. That he took this position is evident from his insistence that the law of nations was to secure to states complete freedom from forcible external interference in their constitution and government.

The principle of non-interference, as Kant explained it, was strict and overriding, and a principle that stood as an essential part of the juridical basis for what he saw as the lawful right of states to freedom and independence within the international sphere. However, if the principle of non-interference was, for Kant, such that it worked to guarantee the right of states to freedom and independence, it was also a principle which stood as something of an impediment to the full realization of the rights that were guaranteed to men under the terms of the republican form of civil constitution. This was so because the principle, in Kant's statement and explanation of it, was so strict in its meaning and application that it effectively denied to the whole community of states any lawful pretext for acting to protect the rights of men with respect to the particular states and governments to which they were subject.

The international society of the present era has seen, and is continuing to see, a major enlargement in the claims made by the international community over states to the end of safeguarding the fundamental human rights of the individual, and ensuring the compliance of states with the law that defines these rights. This, indeed, is a further respect in which contemporary international society has involved an erosion of the rights and powers of states and national governments, including, it should be noticed here, those rights and powers of states and governments that are implied in the foundational principle of international law that provides that states are to be free from interference in matters pertaining to their domestic constitution

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and government. There is no doubt that Kant would have approved of the dedication of the present-day international community to the cause of the rights of men. Equally, there is no doubt that he would have had misgivings about the erosion of the rights and powers of states and their governments that the concern with the protection of human rights has led to, and this for a reason that is fully intelligible from the standpoint of liberalism itself.

In the argument of *Perpetual Peace,* the principle of non-interference was stated as a principle of the law of nations. However, the principle must obviously be taken to stand for very much more than a formal principle of international law. For the principle presupposed, and served to give effect to, a right that Kant thought of as implicit in the terms of association given in the idea of the contract that founded the state. This was the right of men associated together in the state to be considered free to determine for themselves as a people the constitution and government to which they were to be subject. The right of men to determine their constitution and government was, for Kant, a right that was essential to the sovereignty and independence of a people associated together in the condition of statehood. To be sure, the principle of non-interference, which served to give effect to this right, was a principle which, as Kant explained it, was such that it denied to the international community virtually any lawful justification for interfering in the internal domestic political organization of states, including justifications to do with protecting the constitutional rights and freedoms of the citizens of states with respect to their rulers. However, if the principle of non-interference meant that there was to be no interference by the international community in the domestic affairs of states such as to secure the constitutional rights and freedoms of their citizens, it remained a principle which, in so constraining the international community, served to enshrine a right that is no less central for the liberal tradition than are the rights and freedoms of men that are implicit in the ideal of constitutional government.

To repeat the point, the principle of non-interference, as a principle presupposing the right of men to determine their own constitution and government, was a principle that Kant assigned to the law of nations. Thus it was a right that Kant defined in terms of a principle belonging to the part of public law that he saw as defining the rights of states. To the extent that the principle of non-interference was a principle belonging to the law of nations, and to the extent that the principle denied to the collective community of states any authority regarding

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the securing of the constitutional rights of men within states, then it must be concluded that, with his statement of the law of peace, Kant implied a very clear divide between the rights of men that he thought were to be secured through the constitution that was to base the municipal law of states and the rights of states that he thought were to be secured through the adherence of states to the terms of the substantive law of nations. The divide that Kant implied between the matters to be thought of as falling under domestic law and those to be thought of as falling under the law of nations, as the law of states, is a divide that remains with us today. Indeed, it is the fact of this divide that explains many of the difficulties that are perceived to exist with respect to establishing proper and effective means for applying the law of human rights within contemporary international society.

The existing law of human rights is, of course, an integral part of international law. Yet it is a part of international law that very directly concerns the internal domestic political organization of states, and hence a part of international law where procedures and arrangements for its application must of necessity work to undermine the exclusiveness of the jurisdiction claimed by states with regard to their internal domestic affairs. If, as is in fact the case, the present law of human rights underlines the potential for conflict between the domestic and international spheres of law and politics, then this is a conflict that points to one of the major contradictions within liberalism as it relates to the current circumstances of international society. For liberalism is a doctrine that affirms the overridingness of human rights as universal rights that belong to all men equally and without exception. However, it does so in general acceptance of a system of public international law that is founded in principles, like state sovereignty, which enshrine rights of states whose honouring by the international community is at once a prerequisite for the freedom and autonomy of men in the condition of statehood and a substantial impediment to the securing of human rights on a truly universal basis.

Returning briefly to Kant and the matter of the balance between the rights of men and the rights of states, it should be noted that Kant did not think that the rights of men were to be secured merely through the municipal law of states coming to be based in the republican form of civil constitution. He also thought that the securing of the rights of men required the establishing of a system of world or cosmopolitan law. As we have emphasized in this volume, Kant did not conceive of cosmopolitan law as law whose founding was to work to the

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detriment of the rights that he considered were to belong to states under the terms of the law of nations. At the same time, we have also emphasized that, as Kant explained it, cosmopolitan law was the part of public law that stood as the most complete juridical embodiment of the ideals of human freedom and human equality which are central to his moral thought.

That Kant saw cosmopolitan law as giving expression to the ideals of human freedom and human equality is underlined by how, in his discussion of it, he was led to denounce the colonial abuses of the European powers. For with his denunciation of colonial abuses, he affirmed that all men were to be recognized as possessing the universal right to freedom under law, and to the enjoyment of the equality that went with this. However, the question remains as to why it was that, given his vehement opposition to European colonialism, he was not also able to allow for the possibility that the entrenching of the system of the law of nations, as a body of law that was to secure the rights and property of existing states, might work to obstruct the full realization of freedom and equality among mankind at large. This, of course, is a question that touches on the potential for conflict within Kant's law of peace as between the principles underlying the law of nations and those that he saw as underlying cosmopolitan law.

The colonial era in international relations is over, as Kant wanted it to be, and the fact that this is so represents a major victory for the liberal tradition in international thought and practice. At the same time, the system of international law that obtains in contemporary international society is one that enshrines the rights of states. That this is so should prompt us to ask a question that we have just raised in relation to Kant: namely, whether or not a system of international law that enshrines the rights of states is really to be thought of as conducive to advancing the ends of human freedom and human equality?

This question is central for liberalism, because, as we have suggested, freedom and equality are central among the ends of justice affirmed in the philosophy of liberalism. It is, moreover, a question that will certainly become more and more urgent as international society moves further in the direction of the greater political and economic interdependence of states and nations. For this process of internationalization will serve to underline the enormous variations in the quality of the freedom enjoyed by the different nations and peoples of the world and the enormous material inequalities that exist between them, and, in doing so, underline also the respects in

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which these disparities in the fortunes of the different nations and peoples are themselves perpetuated through the international law of states. Here will become apparent something of the contradiction within liberalism between, on the one hand, the commitment to the institution of the state the tradition assumes and, on the other hand, the commitment to the ultimate ends of justice among men that are endorsed in the moral doctrines with which the tradition is associated.

The sort of contradictions within liberalism that present themselves to us through attention to the current state of international society are contradictions that may well be resolved through future developments in international society. This may in turn lead to a working-out of the contradictions that are present in the terms of Kant's law of peace, and, through this, to the final realization in human history of the ideal of lasting peace based in law in the form in which Kant conceived it. In the event that this occurs, then liberalism will indeed have had its triumph. There is, however, another possibility about the future, and one that it is appropriate to point to in concluding the present volume.

The first principles of justice and political morality that Kant affirmed with his statement of the law of peace, and that, as we have argued, serve to place him in the liberal tradition in moral and political thought, were principles to which he assigned a universal validity. However, the conditions of contemporary international society are such that it is doubtful whether any principles of justice and political morality are to be thought of as possessing universal validity, given what would appear to be the evident fact of the origin and basis of all such principles in the circumstances and histories of particular societies and communities.9 If, in recognition of this fact, we are led to doubt whether liberal principles of justice and political morality are anything more than principles tied to the experience of particular societies and communities and hence as lacking a truly universal validity, then we may perhaps go on to entertain other doubts about liberalism, including doubts as to whether liberalism is not as perishable as are all the societies and communities that belong to particular times and places in the continuum of human history. These, of course, were not doubts that Kant himself was able to entertain with regard to the law of peace. For he assumed that with the establishing of an international order founded in the law of peace as he stated it, there would be no further stage in the development of human society necessitating the construction of a new and radical alternative form of juridical order to obtain among men and states.

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It is open to question whether we should follow Kant in assuming this about the future. Indeed, this is so open to question that we should, for this very reason, be extremely wary of recognizing the liberalism of which Kant is a representative as providing a final and definitive statement of the conditions of lawful association among men and states in international society. There is much about contemporary international society that holds out the promise of a future based in the liberalism that Kant represents. Yet there are also issues in international society of the most urgent concern which suggest that the future is not inevitably assured for liberalism. Central among these are the issues of the growth in the world population and the threat to the world environment. For these are issues which, it is not unreasonable to say, may well be such that they bring us to call into question the continuing durability of an international legal order that is founded in the rights of men and in the rights of states, and so also perhaps the continuing durability of liberalism itself as a commanding world ideology that lays claim to universality. For the present, the way of the future in international society remains unclear. What is quite clear, however, is that if the future involves a retreat from liberalism, then this will compel us to abandon some of our most fundamental beliefs and understandings about international society and about the principles of law that base its legitimacybeliefs and understandings that have as one of their cardinal points of reference the law of peace which Kant expounded.

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INTRODUCTION

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1 KANT'S ETHICS

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5. In Hume's view, reasoning about causes and effects was reasoning based in customary expectations deriving from regularities among impressions and ideas. For Hume's arguments here, see: *Treatise,* I.III. Likewise, Hume argued that the sense of the continuous and distinct existence of bodies derived from a coherence and constancy among impressions. *Treatise,* I.IV.II.

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6. In this connection, see Kant's discussion of the principle of the permanence of substance, the principle of succession in time according to the law of causality, and the principle of co-existence according to the law of reciprocity or community. *CPureR,* I: 'Transcendental Doctrine of Elements', Part II: 'Transcendental Logic', Division I: 'Transcendental Analytic', Book II: 'Analytic of Principles', Chapter II, Part 3: 'Analogies of Experience'.

7. The specific arguments Kant examined, and refuted, were the ontological, cosmological and physico-theological proofs for the existence of God. See: *CPureR,* I.II, Division II: 'Transcendental Dialectic', Book II: 'The Dialectical Inferences of Pure Reason', Chapter III.

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9. For Kant's discussion of freedom, God and immortality as postulates of pure practical reason, see: *CPracR,* Part I: 'Elements of Pure Practical Reason', Book II: 'Dialectic of Pure Practical Reason', Chapter II.

10. For Hume on reason as the slave of the passions, see: *Treatise,* Book II: 'Of the Passions', Part III, Section III, p. 415.

11. For Hume's explanation as to why morality was not to be thought of as consisting in any matters of fact that could be discovered by the reason and understanding, and his explanation as to why no proposition asserting an *ought,* or an *ought not,* could be derived or inferred from a proposition asserting an *is* or an *is not,* see: *Treatise,* Book III: 'Of Morals', Part I, Section I, especially pp. 468-70.

12. For example, Hume allowed that reason served to discover the relation between particular objects and the states of pain and pleasure they engendered in the human agent. However, he still insisted that reason alone could never be a motive to any action of the will, and that reason could never oppose the passions in the direction of the will. For Hume's arguments here, see: *Treatise,* II.III.III.

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14. Kant, *FPMM,* Section II: 'Transition from Popular Moral Philosophy to the Metaphysic of Morals', p. 31.

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24. G.W.F. Hegel, *Elements of the Philosophy of Right,* trans. H.B. Nisbet, ed. Allen W. Wood (Cambridge: Cambridge University Press, 1991). Cited hereafter as *PR.*

25. John Stuart Mill, *Utilitarianism,* in Mill, *Collected Works,* Volume 10: *Essays on Ethics, Religion and Society,* ed. J.M. Robson (Toronto: University of Toronto Press; London: Routledge and Kegan Paul, 1969), pp. 203-59.

26. For Hegel's discussion of this defect of Kant's ethics, see especially: *PR,* Part II: 'Morality', Section 3: 'The Good and the Conscience', subsection 135, pp. 162-3. For Mill's view of the matter, see: *Utilitarianism,* Chapter 1, p. 207.

27. For other references to human rights in the Charter of the United Nations, see the Preamble and Articles 55, 56, 62, 68 and 76. For the text of the Charter, see: *Basic Documents in International Law,* ed. Ian Brownlie, 4th edition (Oxford: Clarendon Press, 1995), pp. 1-35.

28. For the text of the Universal Declaration of Human Rights, see: Brownlie (ed.), *Basic Documents in International Law,* pp. 255-61. For the main source materials for current human rights law, see: *Basic Documents on Human Rights,* ed. Ian Brownlie, 3rd edition (Oxford: Clarendon Press, 1992). On the international law of human rights generally, see: *Human Rights in International Law: Legal and Policy Issues,* ed. Theodor Meron, 2 volumes (Oxford: Clarendon Press, 1984).

29. It was in these terms that Kant opposed himself to the Epicurean school of moral thought of the classical period (as well as to the moral sense school of the eighteenth century). Kant also denied that the principles of the moral law could be founded in, or derived from, a rational conception of human perfection. It was in these terms that he opposed himself to the teachings of the classical philosophers belonging to the Stoic school in moral thought. For Kant's discussion of happiness and perfection as principles of morality, see: *FPMM,* II, pp. 60-2. See also: *CPracR,* Part I, Book I: 'The Analytic of Pure Practical Reason', Chapter I, Section VIII, Theorem IV, Remark II, pp. 129-30. Kant argued that it had been the error of the ancient philosophers belonging to the Epicurean and Stoic schools to have made the notion of the supreme good, the *summum bonum,* the determining principle of the moral law. In Kant's view, the notion of the *summum bonum* could become an object of the will only after the determination of the moral law. For Kant's argument here, see: *CPracR,* I.I.II, pp. 155-6; I.II.II, pp. 206-16.

30. For Kant's explanation as to why morality could not be founded in the will of a divine being, see: *FPMM,* II, pp. 61-2.

31. In this connection, see Kant's discussion of the existence of God as a postulate of pure practical reason. *CPracR,* I.II.II, Section V.

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32. Immanuel Kant, *Religion within the Limits of Reason Alone,* trans. Theodore M. Greene and Hoyt H. Hudson (New York: Harper and Row, 1960).

33. For Kant on morality as leading to religion in *Religion within the Limits of Reason Alone,* see for example the Preface to the First Edition.

34. For Kant's discussion of the heteronomy of the will as the source of all spurious principles of morality, and his classification of these principles, see: *FPMM,* II, pp. 59-64. Regarding the idea of the heteronomy of the will in Kant's explanation of the errors of earlier moral philosophers, see: *CPracR,* I.I.II, pp. 155-6.

35. Kant, *FPMM,* II, p. 59. On the autonomy of the will as the essential principle of morality, see also: *CPracR,* I.I.I, Section VIII.

36. For Kant's discussion of the question of freedom, see: *FPMM,* Section III: 'Transition from the Metaphysic of Morals to the Critique of Pure Practical Reason'. See also: *CPracR,* I.I.II: 'Of the Deduction of the Fundamental Principles of the Pure Practical Reason', pp. 131-40.

2 KANT'S POLITICAL PHILOSOPHY

1. Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil,* edited with an Introduction by Michael Oakeshott (Oxford: Basil Blackwell, 1946). See also Hobbes's *De Cive* (1642; first English version, 1651). The edition of this work referred to in the present volume is: *De Cive,* The English Version, entitled in the first edition *Philosophicall Rudiments concerning Government and Society,* ed. Howard Warrender, The Clarendon Edition of the Philosophical Works of Thomas Hobbes, Volume 3 (Oxford: Clarendon Press, 1983). Spinoza's political writings are the *Tractatus Theologico-Politicus* (1670), and the posthumously published *Tractatus Politicus.* For the original Latin text of these works with an English translation by A.G. Wernham, see: *The Political Works. The Tractatus Theologico-Politicus in Part and the Tractatus Politicus in Full* (Oxford: Clarendon Press, 1958).

2. Aristotle, *Politics,* trans. Benjamin Jowett, in *The Complete Works of Aristotle,* The Revised Oxford Translation, ed. Jonathan Barnes, 2 volumes (Princeton, New Jersey: Princeton University Press, 1984), Volume 2, pp. 1986-2129. For Aristotle on the state as an institution based in nature and established for the common good, and as prior to the individuals comprising it, see for example: *Politics,* Book I, Chapters 1-2.

3. *De Regimine Principum* was written during the period Aquinas spent in Italy between 1259 and 1269. Book 1 and some of Book 2 are the only parts of the work where Aquinas' authorship is certain. For the original Latin text of Book 1 with an English translation by J.G. Dawson, see: Aquinas, *Selected Political Writings,* ed. A.P. D'Entrèves (Oxford: Basil Blackwell, 1959), pp. 2-83.

4. Aquinas' discussion of law in the *Summa Theologiae* comes in the Prima Secundae, Questions 90-97the Prima Secundae being the first sub-part

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of the Second Part of the *Summa.* For the original Latin text with an English translation by Thomas Gilby, see: *Summa Theologiae,* Blackfriars edition, Volume 28: *Law and Political Theory* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1966). The discussion of justice comes in the Secunda Secundae, Questions 57-62the Secunda Secundae being the second sub-part of the Second Part of the *Summa.* For the original Latin text with an English translation by Thomas Gilby, see: *Summa Theologiae,* Blackfriars edition, Volume 37: *Justice* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1975). The *Summa Theologiae* is cited hereafter as *ST.* Following convention, the Prima Secundae is abbreviated to 1a2ae and the Secunda Secundae to 2a2ae.

5. For Aristotle on man as by nature a political animal, see: *Politics,* 1.2, p. 1987. For Aquinas on this point, see for example: *De Regimine Principum,* Book I, Chapter I.

6. For Aquinas on the eternal law, see: *ST,* 1a2ae, Question 91, article 1; Question 93.

7. For Aquinas on natural law, see: *ST,* 1a2ae, 91.2; 94.

8. For Aquinas on human law, see: *ST,* 1a2ae, 91.3; 95-97.

9. For Aquinas on divine law, see: *ST,* 1a2ae, 91.4-5.

10. For Aquinas on the relation between the fundamental human goods and the practical principles embodied in the natural law, as corresponding to the order of human inclinations, see: *ST,* 1a2ae, 94.2, pp. 81, 83.

11. For Aquinas on the derivation of human law from natural law, see: *ST,* 1a2ae, 95.2, pp. 105, 107.

12. For Aquinas on natural law as the basis of the justice of human laws, see: *ST,* 1a2ae, 95.2, p. 105.

13. For Aquinas' argument here, see: *ST,* 1a2ae, 96.4, pp. 131, 133.

14. For Aquinas on the specifically general or legal form of justice maintained within the community, see: *ST,* 2a2ae, 58.5, pp. 31, 33.

15. Hobbes, *Leviathan,* Part I, Chapter XIII, pp. 82, 83.

16. Hobbes stated and explained the nineteen laws of nature in Chapters 14 and 15 of *Leviathan.*

17. For example, Hobbes claimed that the laws of nature were not properly to be called laws, since they were but conclusions or theorems relating to what was conducive to the conservation and defence of men. The laws of nature could be regarded as laws proper only if they were thought of as commanded by God. *Leviathan,* I.XV, pp. 104-5.

18. Hobbes, *Leviathan,* II.XXVI, p. 186.

19. Ibid., I.XV, p. 103.

20. Ibid., I.XIV, p. 84.

21. Ibid., I.XIV, p. 85.

22. Ibid.

23. For Hobbes on the distinction between renouncing and transferring a right, see: *Leviathan,* I.XIV, p. 86.

24. For Hobbes's explanation of covenant, see: *Leviathan,* I.XIV, p. 87.

25. Hobbes, *Leviathan,* I.XV, p. 93.

26. Ibid., I.XV, p. 94.

27. For Hobbes's explanation of the covenant instituting the commonwealth, see: *Leviathan,* II.XVII, pp. 112-13; II.XVIII, p. 113.

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28 Hobbes held that covenants based in the mutual trust of the parties could be considered valid (and so binding in effect) only where there was some common power with right and force sufficient to compel performance. Hence, the validity of covenants, and the possibility of justice and propriety, depended on the existence of a commonwealth with a sovereign power therein. *Leviathan,* I.XIV, pp. 89-90; I.XV, p. 94.

29. For Hobbes's arguments here, see: *Leviathan,* II.XVIII, pp. 113-16.

30. Hobbes, *Leviathan,* II.XVIII, pp. 116-17.

31. Ibid., II.XVIII, p. 117. Hobbes defined civil law as the laws commanded by the sovereign in a commonwealth, and binding on the subjects of the commonwealth in question by virtue of their being obliged to obey the sovereign. *Leviathan,* II.XXVI, pp. 172-3.

32. Hobbes, *Leviathan,* II.XVIII, p. 117. Hobbes held that laws required an authentic interpretation of their meaning, which, in the commonwealth, could be provided only by a person or persons appointed by the sovereign. For Hobbes on the necessity of interpretation of laws, and on the office of judge, see: *Leviathan,* II.XXVI, pp. 179-85.

33. Ibid., II.XVIII, pp. 117-18, 118.

34. Ibid., II.XVIII, pp. 118-19. In Hobbes's view, the dividing of the sovereign power led to the dissolution of the commonwealth. *Leviathan,* II.XXIX, p. 213.

35. Hence, Hobbes maintained that it was contrary to the duty of the sovereign to relinquish any of the essential rights of sovereignty. *Leviathan,* II.XXX, p. 219.

36. Jean-Jacques Rousseau, *The Social Contract,* trans. Maurice Cranston (Harmondsworth: Penguin, 1968). Cited hereafter as *SC.*

37. For Rousseau's specification of the social contract he saw as founding political society, see: *SC,* Book I, Chapter 6.

38. The public interest of the state, to which the general will was directed, was the *public* interest, and was therefore qualitatively distinct from the private interests of the individuals who formed the state. It should be noted, here, that Rousseau distinguished the general will from what he called the will of all. The latter related not to the public interest of the state, but to the private interests of the individual members of the state, and consisted in the sum of their various wants and desires. For the distinction between the general will and the will of all, see: *SC,* 11.3, pp. 72-3.

39. For Rousseau's argument here, see: *SC,* 1.7, pp. 63-4.

40. For Rousseau's distinction between natural liberty and civil liberty, see: *SC, I*.8, p. 65.

41. Rousseau, *SC,* II.1, p. 69.

42. Ibid., III.1, p. 101.

43. Ibid., III.1, p. 102.

44. Ibid., III.1, p. 103.

45. For Rousseau's argument here, see: *SC,* 11.6, pp. 81-2.

46. Rousseau, *SC, II*.6, p. 83.

47. Ibid.

48. For Rousseau's discussion of the lawgiver, see: *SC, II*.7.

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49. In Hobbes's view, the commonwealth possessed the capacity to make laws only through the agency of the representative person of the sovereign. *Leviathan,* II.XXVI, p. 173.

50. Hobbes, *Leviathan,* II.XXI, p. 143.

51. Rousseau, *SC, I*.8, p. 65.

52. For Kant's distinction between innate rights and acquired rights, and his definition and explanation of the innate right of men to freedom, see: *MEJ,* 'Introduction to the Elements of Justice', 'Division of the Theory of Justice', Section B: 'General Division of Justice', pp. 43-5.

53. Kant, *MEJ,* 'Introduction to the Elements of Justice', 'Division of the Theory of Justice', B: 'General Division of Justice', pp. 43-4.

54. For Kant's explanation of these rights, see: *MEJ,* 'Introduction to the Elements of Justice', 'Division of the Theory of Justice', B: 'General Division of Justice', p. 44.

55. Kant, *MEJ,* 'Introduction to the Elements of Justice', Section C, p. 35.

56. For Kant's argument here, see: *MEJ,* 'Introduction to the Elements of Justice', C.

57. For Kant on justice and the right of external coercion, see: *MEJ,* 'Introduction to the Elements of Justice', D-E.

58. For Kant's specification of the state of nature, see: *MEJ,* GTJ, II.I, subsection 44.

59. For Kant's explanation of the basis of property rights, see: *MEJ,* GTJ, Part I: 'Private Law', Chapter 1, Sections 1-7. For his explanation of the provisional juridical status of property rights in the state of nature, and his explanation of how property rights acquired peremptory force only in the condition of civil society, see: *MEJ,* GTJ, I, Chapter 1, Sections 8-9; Chapter 3, Sections 36, 41-42.

60. Kant, *MEJ,* GTJ, II.I.43.

61. Ibid., GTJ, 11.1.45.

62. Ibid., GTJ, 11.1.46, p. 78.

63. Ibid., GTJ, II.I.46, pp. 78-9.

64. Rousseau held that since law was a declaration of the general will, there could be no representation of the people in the exercise of the legislative power in the state. However, there was to be representation in the executive power, given that this power was but a means for the application of the laws. *SC, III*.15, p. 142. In contrast to Rousseau, Kant argued that both the legislative and executive powers in the state were to be thought of as being based in the representative principle. Thus in *Theory and Practice,* he maintained that unanimous acceptance by the people of decisions about public legislation reached by a majority of representatives was the principle on which the civil constitution was based. *TP,* Part II: 'On the Relationship of Theory to Practice in Political Right', pp. 78-9. In *The Metaphysical Elements of Justice,* he claimed that, in the ideal state, the rights of citizens would be protected by the citizen-body acting through deputies. *MEJ,* GTJ, 11.1.52, p. 113.

65. Kant, *MEJ,* GTJ, II.I.47, p. 80.

66. Ibid. In *Theory and Practice,* Kant maintained that the original contract was an idea of reason by means of which the justice of public legislation was to be determined. Thus in accordance with the idea of the original

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contract, the laws of the state were to be framed by legislators in such a way that they could be thought of as proceeding from the general will of the people, and hence as based in the consent of the citizen. *TP,* II, p. 79.

67. Kant, *MEJ,* GTJ, II.I.47, pp. 80-1.

68. Ibid., GTJ, 11.1.48.

69. For Kant's argument here, see: *MEJ,* GTJ, II.I.49, pp. 81-2.

70. For Kant's explanation as to why a people united in the condition of statehood could not be thought of as possessing a lawful right of resistance or revolution, see: *MEJ,* GTJ, II.I: 'General Remarks on the Juridical Consequences arising from the Nature of the Civil Union', Section A. See also: *TP,* II, pp. 79-84.

71. John Locke, *Two Treatises of Government,* ed. Peter Laslett (Cambridge: Cambridge University Press, 1960).

72. For Locke's discussion of the character of political society and the compact he saw underlying it, his specification of the ends for which political society was established, and his explanation of the basis and justification of the right of the people to resist an established government, see: *Two Treatises of Government, Second Treatise: An Essay concerning the True Original, Extent, and End of Civil Government,* Chapters VII-IX, XVIII-XIX.

73. For Kant's argument here, see especially: *TP,* II, pp. 79-82, 83-4. For his arguments as to why the claim that the people possessed a right of resistance against the political authorities was in contradiction with the idea of a people being subject to a lawful constitution, see: *MEJ,* GTJ, II.I: 'General Remarks on the Juridical Consequences arising from the Nature of the Civil Union', A, pp. 84, 85-6, 86-7, 88-9. Further to Kant's exclusion of a right of resistance, it should be noted that he argued that it was immaterial whether the submission of the people to the political authority proceeded from an actual contract, or whether the authority existed prior to their submission to it. For this, he insisted, had no bearing on the duty of the subject not to resist the ruling authorities in the state. *MEJ,* GT, II.I: 'General Remarks on the Juridical Consequences arising from the Nature of the Civil Union', A, p. 84.

74. For Kant's explanation of these rights belonging to the political authorities in the state, see: *MEJ,* GTJ, II.I: 'General Remarks on the Juridical Consequences arising from the Nature of the Civil Union', B-E.

75. The position Kant took against Hobbes was that while the people could claim no right of coercion with respect to the ruling authority in the state, the people were still to be thought of as holding substantial rights against the ruler. In Kant's view, the essential safeguard for the rights of the people lay in the free expression of opinion by citizens concerning the justice of the acts of the ruler. *TP,* II, pp. 84-5. (Regarding the emphasis Kant placed on intellectual freedom in *Theory and Practice,* see the earlier essay *What is Enlightenment?,* where he advanced the argument that enlightenment among men depended on there being freedom in the public use of reason.)

76. For Hobbes on the inalienable rights of men, see: *Leviathan,* I.XIV, pp. 86-7.

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77. In Hobbes's view, a covenant by which a man undertook not to defend himself from force was always to be considered void. So likewise was a covenant by which a man undertook to accuse himself without the assurance of pardon. *Leviathan,* I.XIV, pp. 91-2.

78. For Hobbes's argument here, see: *Leviathan,* II.XXI, p. 142.

79. In Kant's view, women and servants were so-called passive citizens, as opposed to the active citizens who were competent to vote on matters of public legislation. *MEJ,* GTJ, II.I.46, pp. 79-80. For Kant on the right to vote on public laws as a right of the citizen, and on the gender and property qualifications for citizenship, see: *TP,* II, pp. 77-9.

80. According to Kant, the equality of men as subjects of the state lay in their having equal rights of lawful coercion in relation to one another. However, the equality before the law that in this form was enjoyed by men as subjects of the state remained consistent with there existing gross inequalities among them in the extent of their actual possessions. For Kant on the equality of men as subjects of the state, see: *TP,* II, pp. 74-7. It should be noted that, as Kant explained it, the entitlement of subjects of the state to the equal protection of the laws was unaffected by the matter of whether or not they were qualified for citizenship, and hence entitled to vote on public legislation. *TP,* II, p. 77.

81. For Kant's argument here, see: *TP,* II, pp. 73-4.

82. In Kant's view, the subjection of men to external coercion exercised in accordance with a determinate conception of welfare or happiness could not be reconciled with the securing of their freedom under the rule of law. Hence Kant explained the principle of the freedom of men in society in the following terms: 'No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law - i.e. he must accord to others the same right as he enjoys himself.' *TP,* II, p. 74.

83. For Kant's arguments here concerning the republican constitution as the legitimate form of state constitution, see: *MEJ,* GTJ, II.I.52, pp. 111-12.

84. For Kant on the republican constitution in relation to the principle of freedom, the rule of law, and the principle of representative government, see: *MEJ,* GTJ, 11.1.52, pp. 112, 112-13, 113.

85. Kant, *PP,* pp. 99-100.

86. For Kant's explanation of the three principles of republican constitutionalism in *Perpetual Peace,* see the first paragraph of the footnote to the opening paragraph of the explanation of the first definitive article of perpetual peace: *PP,* p. 99n. The principles of republican constitutionalism that Kant stated in *Perpetual Peace* are closely related, in their meaning and implications, to the principles of *freedom, equality* and *independence* that he had earlier identified as the basis of the civil state in Part 2 of *Theory and Practice.* As it was explained in the latter work, the principle of freedom provided that, in their status as human beings, the members of political society were to be free to pursue their own individual ends within the framework of general laws. The principle of

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equality was explained as providing that, as subjects of the state, all members of society were to be considered as equals under the law, and hence as having equal authority to enforce their rights against one another through the exercise of the right of coercion. The principle of independence related to the status of citizens as bearers of the legislative power in the state. It was explained as providing that those members of the state meeting the qualifications for citizenship were to have the right to participate in the procedure through which the laws of the state were determined. *TP,* II, pp. 73-9.

87. For Kant's discussion of the two principles for the classification of states, see: *PP,* pp. 100-1.

88. In this connection, see Kant's discussion of autocracy, aristocracy and democracy as forms of the state in *The Metaphysical Elements of Justice.* Here, the three constitutions were explained as determining the person or persons holding the rights of command in the state, and hence the objective form of the relationship obtaining between the political authority in the state and the people. *MEJ,* GTJ, 11.1.51. However, autocracy, aristocracy and democracy were mere empirically given state constitutions. As forms of the state, they were no more than the *letter* of the original legislation basing political society, and were to be preserved in the states where they were actually established in accordance with custom, to the extent that this served to maintain the states and their internal political orders in being. In contrast to autocracy, aristocracy and democracy, the republican constitution was the constitution which expressed the *spirit* of the original contract founding the state. Hence, it was with the principles essential to this constitution (as given in the idea of the original contract) that all actually existing forms of the state were to be brought to conform. *MEJ,* GTJ, II.I.52, pp. 111-12.

89. Kant, *PP, p.* 101.

90. Ibid. Regarding Kant's objections to democracy, it should be noted that Rousseau considered the danger of democracy to lie in its promise of a constitution which united the legislative and executive powers of the state. Since the democratic form of government made the sovereign and the ruler the same person, it constituted, as he put it, 'a government without government'. *SC,* 111.4, p. 112.

91. Kant, *PP, p.* 101. As Kant did after him, Rousseau held that all legitimate government was republican, and defined republican government as government based in the rule of law, without regard for the form in which it was constituted. Hence, he accepted that the ideal of republican government could be realized in a state with a monarchical constitution (provided only that government therein served the people in their status as sovereign). For Rousseau's argument here, see: *SC,* 11.6, p. 82, 82n.

3 THE TREATY OF PERPETUAL PEACE

1. For Kant's statement and explanation of the preliminary articles of a perpetual peace between states, see: *PP,* pp. 93-7.

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2. For Kant's statement and explanation of the definitive articles of a perpetual peace between states, see: *PP,* pp. 99-108.

3. Kant, *PP,* p. 98.

4. In *Theory and Practice,* Kant maintained that the balance of power in Europe had provided nothing more than the 'illusion' of a lasting universal peace. See: *TP,* Part III: 'On the Relationship of Theory to Practice in International Right', p. 92.

5. On the preliminary articles of perpetual peace as a statement of Kant's view as to what the law of nations ought to be, see: F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge: Cambridge University Press, 1963), Chapter 4, p. 69.

4 KANT AND THE LAW OF NATIONS

1. For summaries of the work of the writers on the law of nations discussed in the present chapter, see: Arthur Nussbaum, *A Concise History of the Law of Nations,* 2nd edition, revised (New York: Macmillan, 1954), Chapters 4-5.

2. On Grotius' thought in its relation to the development of international law, see: Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Year Book of International Law,* 23 (1946), 1-53. For a collection of articles bringing out the seminal importance of Grotius' work for modern international law, and its implications for issues in contemporary international law and international relations, see: *Hugo Grotius and International Relations,* ed. Hedley Bull, Benedict Kingsbury and Adam Roberts (Oxford: Clarendon Press, 1990). For discussion of Grotius in the context of seventeenth-century political thought, see: Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), Chapters 3 and 8; *Philosophy and Government 1572-1651* (Cambridge: Cambridge University Press, 1993), Chapter 5.

3. Hugo Grotius, *De Jure Praedae Commentarius,* translation of the original manuscript of 1604 by Gwladys L. Williams with the collaboration of Walter H. Zeydel, The Classics of International Law, No. 22, Volume 1 (Oxford: Clarendon Press, 1950). Cited hereafter as *JP*. It should be noted that Grotius refrained from publishing *De Jure Praedae,* although he did publish in 1609 a version of the discussion of the principle of the freedom of the seas contained in Chapter 12 of the work in the form of a short treatise entitled *Mare Liberum. De Jure Praedae* was first published in its entirety in 1868, following the discovery of Grotius' original manuscript in 1864.

4. Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1646 edition), trans. Francis W. Kelsey *et al.,* The Classics of International Law, No. 3, Volume 2 (Oxford: Clarendon Press, 1925). Cited hereafter as *JBP.*

5. For example, in Sections 6-24 of Chapter 3 of Book 1 of *De Jure Belli ac Pacis,* Grotius explained the nature of the sovereign power in the

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state. In Chapter 4 of Book 1, he examined the question of the lawfulness of wars waged by subjects against their rulers.

6. Grotius, *JBP,* Prolegomena, Section 1, p. 9.

7. On Roman law in its relation to the historical development of the law of nations, and on the contrast between the *ius gentium* of classical Roman law and the modern law of nations as a form of law applying to the relations between independent states, see: Nussbaum, *A Concise History of the Law of Nations,* Chapter 1, pp. 10-16.

8. Grotius, *JBP,* Prolegomena, 6.

9. Ibid., Prolegomena, 11, p. 13.

10. Grotius, *JP,* II: Prolegomena, p. 10.

11. In the Prolegomena to *De Jure Praedae,* Grotius stated thirteen first-order laws of human conduct and political association. The first and second laws concerned the right of the individual to act in his own defence, and so preserve his person and those of his possessions necessary for life. The third and fourth laws stated the prohibitions on doing personal injury to others and seizing their possessions. The ninth law stated the principle that the enforcement of rights as between citizens should take place only in accordance with a judicial procedure. *JP,* II: Prolegomena, pp. 13, 24.

12. Grotius, *JBP,* Prolegomena, 8, pp. 12-13.

13. Grotius identified defence, recovery of property and the punishment of wrong-doing as the principal lawful justifications for war. *JBP,* Book II, Chapter I, Section II. Each of these just causes of war possessed a foundation in what he stated to be the essential principles of the law of nature. Again, in Chapter 1 of Book 3, he discussed the general rules governing what was permissible in war as these were determined from the standpoint of the law of nature. It was only in subsequent chapters of the Book that he expounded the rules of war deriving from the law of nations proper.

14. Grotius held that the law of nature was a dictate of right reason, which determined the moral necessity or moral baseness of an act or state of affairs according to its agreement, or disagreement, with rational nature. For Grotius on the law of nature as a dictate of right reason, see: *JBP,* I.I.X, sub-section 1. For his definition of volitional law as law originating in the will, see: *JBP,* I.I.XIII.

15. Grotius, *JBP,* I.I.XIV. Grotius divided volitional law into volitional human law and volitional divine law *(ius voluntarium divinum),* with the latter being explained as having its origin in the will of God. *JBP,* I.I.XV.

16. For Grotius' discussion of promises and other forms of voluntary agreements, such as contracts and treaties, see: *JBP,* II.XI-XVI. The obligation to keep promissory agreements, as imposed by the law of nature, must obviously be taken to be presupposed in the principles of good faith that Grotius saw as structuring the law governing the relations between nations and states. For Grotius' exposition of the principles of good faith, see: *JBP,* III.XIX-XXIV.

17. Grotius, *JBP,* Prolegomena, 17, p. 15.

18. Ibid., Prolegomena, 15, pp. 14-15. For Grotius' explanation of the origin of political society in pacts, see also: *JP,* II: Prolegomena, pp. 18-20.

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Grotius' view that the origin of political society lay in the consent and agreement of its members everywhere informs the argument of the Prolegomena to *De Jure Praedae.* For example, he claimed that the law maintained in the state was a form of law based in the will and agreement of the individuals bound by it. He also argued that the power of the ruler in the commonwealth derived from a so-called contract of mandate. *JP,* II: Prolegomena, pp. 23-4, 25-6.

19. In this connection, see Grotius' statement and explanation of the nine basic rules of legal order laid down in the Prolegomena to *De Jure Praedae.* As Grotius explained the matter, the idea of pacts presupposed the principle of good faith given in the third basic rule of law: ' *What each individual has indicated to be his will, that is law with respect to him.' JP,* II: Prolegomena, p. 18. It was through an extension of the sphere of application of the principle of good faith laid down in this rule that Grotius proceeded to state the rules describing the basis of the law maintained in the civil state, and the basis of the law obtaining between nations and states. Thus the fourth, fifth and eighth rules of law were stated as follows: *4. ' Whatever the commonwealth has indicated to be its will, that is law* [ius] *in regard to the whole body of citizens.' 5. ' Whatever the commonwealth has indicated to be its will, that is law for the individual citizens in their mutual relations.'* 8. *' Whatever all states have indicated to be their will, that is law in regard to all of them.' JP,* II: Prolegomena, pp. 23, 24, 26.

20. Hobbes, *Leviathan,* II.XXVI, pp. 186-8.

21. It is evident from the discussion of civil law that forms Chapter 26 of *Leviathan* that Hobbes regarded the sphere of human positive law as restricted to civil law. As he put it in *De Cive:* 'All *humane law* is *civill.' De Cive,* Part II, Chapter XIV, Section V, p. 171.

22. Hobbes, *Leviathan,* I.XIII, p. 83. In *De Cive,* Hobbes characterized the natural state of the relations between commonwealths thus: 'the state of Common-wealths considered in themselves, is natural, that is to say, hostile'. *De Cive,* II.XIII.VII, p. 159. It should be noted that Spinoza took the same view of the international problem: commonwealths stood to one another in the same relation as did men in the state of nature, and were for that reason to be regarded as enemies by nature. *Tractatus Politicus,* Chapter III, Sections 11, 13, p. 295.

23. For Hobbes, a covenant was an agreement involving the transferring of rights belonging to the parties to it to some other person or persons. However, he insisted that it was contrary to the office of the sovereign to relinquish any of the rights of sovereignty in favour of another. *Leviathan,* II.XXX, p. 219.

24. Hobbes, *Leviathan,* II.XXX, pp. 231-2. See also: *De Cive,* II.XIV.IV, p. 171.

25. Of the other laws of nature laid down in *Leviathan,* the following deserve special mention as laws stating general principles of conduct whose observance by commonwealths and their rulers would clearly serve to promote peace in the international sphere: the eleventh, requiring that those judging controversies should deal equally with the parties; the seventeenth, requiring that no man should be judge in his own cause; and the eighteenth, requiring that no man should be judge of a

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controversy where he had an interest in the victory of one or other of the parties. For Hobbes's statement of the sixth, seventh, eleventh, fifteenth, sixteenth, seventeenth and eighteenth laws of nature, see: *Leviathan,* I.XV, pp. 99-100, 100, 101, 102.

26. Samuel Pufendorf: *Elementorum Jurisprudentiae Universalis Libri Duo* (1672 edition), trans. W.A. Oldfather, The Classics of International Law, No. 15, Volume 2 (Oxford: Clarendon Press, 1931); *De Jure Naturae et Gentium Libri Octo* (1688 edition), trans. C.H. and W.A. Oldfather, The Classics of International Law, No. 17, Volume 2 (Oxford: Clarendon Press, 1934); *De Officio Hominis et Civis juxta Legem Naturalem Libri Duo* (1682 edition), trans. Frank Gardner Moore, The Classics of International Law, No. 10, Volume 2 (New York: Oxford University Press, 1927).

27. Pufendorf, *Elementorum Jurisprudentiae Universalis,* Book I, Definition XIII, paragraph 24, p. 165. For Pufendorf's identification of the law of nations with the law of nature, see also: *De Jure Naturae et Gentium,* Book II, Chapter III, Section 23, p. 226.

28. Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* (1737 edition), trans. Tenney Frank, The Classics of International Law, No. 14, Volume 2 (Oxford: Clarendon Press, 1930).

29. Samuel Rachel, *De Jure Naturae et Gentium Dissertationes* (1676 edition), trans. John Pawley Bate, The Classics of International Law, No. 5, Volume 2 (Washington, DC: Carnegie Institution of Washington, 1916).

30. According to Rachel, the law of nations was founded in the agreement of nations, with the usage of nations and treaties being its sources. For Rachel's arguments against the view that the only law binding on nations and states was the law of nature, see particularly: *De Jure Naturae et Gentium Dissertationes,* Dissertation the Second, Sections LXXXIX-CXVIII.

31. Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764 edition), trans. Joseph H. Drake, The Classics of International Law, No. 13, Volume 2 (Oxford: Clarendon Press, 1934). Cited hereafter as *JGMSP.*

32. Wolff, *JGMSP,* Prolegomena, Sections 4-6.

33. Ibid., Prolegomena, 23.

34. Ibid., Prolegomena, 24.

35. The necessity belonging to the Wolffian voluntary law of nations, as law deriving from the necessary law of nations, meant that it was universally binding on all nations and states. This was not so with the stipulative and customary law of nations. The law embodied in stipulations was binding only on the nations that made them; while the customary law of nations was binding only on the nations that consented to observe it, in the sense that it was law based in the tacit consent of nations. For Wolff's explanation of the stipulative and customary law of nations as forms of particular, rather than universal, law, see: *JGMSP,* Prolegomena, 23-4.

36. According to Wolff, the voluntary law of nations rested on the presumed consent of nations, the stipulative law of nations on their express

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consent, and the customary law of nations on their tacit consent. For Wolff's discussion of the voluntary, stipulative and customary law of nations as forms of the positive law of nations, see: *JGMSP,* Prolegomena, 25.

37. Wolff, *JGMSP,* Prolegomena, 10.

38. Ibid., Prolegomena, 9.

39. Ibid., Prolegomena, 11.

40. Ibid., Prolegomena, 12-13.

41. Ibid., Prolegomena, 14-15.

42. Ibid., Prolegomena, 19.

43. Ibid., Prolegomena, 20, pp. 16-17.

44. Ibid., Prolegomena, 21, p. 17.

45. Ibid.

46. Ibid., Prolegomena, 22.

47. Ibid., Preface, p. 6.

48. Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliques à la Conduite et aux Affaires des Nations et des Souverains* (1758 edition), trans. Charles G. Fenwick, The Classics of International Law, No. 4, Volume 3 (Washington DC: Carnegie Institution of Washington, 1916). Cited hereafter as *DG.* For summaries of Vattel's exposition of the law of nations, see: Charles G. Fenwick, 'The Authority of Vattel', *American Political Science Review,* 7 (1913), 395-410, 8 (1914), 375-92; Francis Stephen Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's Le Droit des Gens* (Dobbs Ferry, New York: Oceana, 1975). For an assessment of Vattel's contribution to the theory of international relations, see: Andrew Hurrell, 'Vattel: Pluralism and its Limits', in *Classical Theories of International Relations,* ed. Ian Clark and Iver B. Neumann (London: Macmillan, 1996), pp. 233-55.

49. Vattel, *DG,* Introduction, Sections 6-9.

50. Ibid., Preface, p. 10a.

51. Ibid., Introduction, 24.

52. Ibid., Introduction, 25-6.

53. Ibid., Introduction, 27.

54. Ibid., Preface, p. 9a.

55. Ibid., Introduction, 4.

56. Ibid., Introduction, 5.

57. Ibid., Introduction, 10.

58. Ibid., Introduction, 11.

59. Ibid., Introduction, 12, p. 6.

60. Wolff, *JGMSP,* Prolegomena, 7-8.

61. Ibid., Prolegomena, 9-10.

62. Vattel, *DG,* Introduction, 13-14.

63. Ibid., Introduction, 15, p. 6.

64. Ibid., Introduction, 18, p. 7.

65. Ibid., Introduction, 17.

66. Ibid., Introduction, 20-1.

67. So, for example, Vattel held that the voluntary law of nations provided that a regular war was to be considered just on both sides with regard to

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its legal effects, and that whatever was permitted to one belligerent state was to be permitted to the other on equal terms. For Vattel's arguments here, see: *DG,* Book III, Chapter XII.

68. For Vattel's discussion of the law of commerce, see: *DG,* I.VIII; II.II.

69. Vattel, *DG,* Book I, Chapter I, Section 4, p. 11.

70. F.H. Hinsley, *Sovereignty,* 2nd edition (Cambridge: Cambridge University Press, 1986).

71. Hinsley, *Sovereignty,* Chapter 5, pp. 194-5.

72. Kant, *PP,* p. 103.

73. Vattel, *DG,* I.IV.38-43.

74. Ibid., I.IV.46-49.

75. Ibid., I.IV.51.

76. Regarding the absolutist dimension in Grotius' thought, see, for example, his arguments in refutation of the claim that sovereignty was to be thought of as always residing in the people: *JBP,* I.III.VIII. Here, Grotius argued that there was no obvious reason why an entire people should not be permitted to submit itself to the rule of some other person or persons, and thereby alienate its lawful right of self-government (I.III.VIII. 1). He also argued that a people might be brought to renounce its right of self-government for reasons of necessity (I.III.VIII.3), that rulers had not always derived their power from the will of the people (I.III.VIII.8), and that it was not universally true that government was instituted for the benefit of the governed (I.III.VIII.14).

77. Vattel, *DG,* IV.I.1.

78. Vattel followed Wolff in holding that the law of nature that formed the necessary law of nations was absolutely binding on nations. Hence nations were not able to alter this law by agreement, and no nation was free to release itself or other nations from the obligation it imposed. *DG,* Introduction, 9.

5 THE PRELIMINARY ARTICLES OF PERPETUAL PEACE

1. Kant, *PP,* p. 97.

2. For Kant's explanation of the first preliminary article of perpetual peace, see: *PP,* pp. 93-4. It should be noted that Vattel denounced treaties made with mental reservations as a form of deception. *DG,* II.XVII.275.

3. The rule *pacta sunt servanda* is affirmed in Article 26 of the Vienna Convention on the Law of Treaties (1969), which came into force on 27 January 1980. For the text of the Convention, see: Brownlie (ed.), *Basic Documents in International Law,* pp. 388-425. For discussion of Article 26 of the Vienna Convention in connection with the rule *pacta sunt servanda,* see: Brownlie, *Principles of Public International Law,* 4th edition (Oxford: Clarendon Press, 1990), Chapter 25, p. 616.

4. For Kant's explanation of the second preliminary article, see: *PP,* p. 94.

5. In Kant's view, the ruler bearing the powers of sovereign command in the civil state was the source of all rights relating to the possession and

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use of personal property. However, the ruler was not to be thought of as holding rights of private ownership in any of the land forming the territory of the state. *MEJ,* GTJ, II.I: 'General Remarks on the Juridical Consequences arising from the Nature of the Civil Union', B, pp. 90-1.

6. For Vattel on the representative status of the ruler, and on the patrimonial conception of the state, see generally: *DG,* I.IV.40; I.V.56-61, 68-69.

7. The principle of equal rights and self-determination of peoples is affirmed in Article 1, paragraph 2 of the Charter of the United Nations. The principle also stands as the fifth of the seven fundamental principles of international law stated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. (For the text of the Declaration, see: Brownlie (ed.), *Basic Documents in International Law,* pp. 36-45.) The meaning of the principle of equal rights and self-determination of peoples in current international law is brought out in the elaboration of the principle given in the Declaration on Principles of International Law. There it is affirmed that all peoples have the right to determine their political status, and to pursue their economic, social and cultural development, without being subject to any external interference. So also is it affirmed that the establishing of a sovereign and independent state, free association or integration with an existing independent state, or the emergence into some other freely determined political status constitute the principal modes by which a people may implement its right of self-determination. The practice of the United Nations since 1945 has worked to establish the principle of self-determination as a specifically legal principle. On the principle, or right, of self-determination, see: Brownlie, *Principles of Public International Law,* Chapter 24, pp. 595-8.

8. For Kant's classification of the first, fifth and sixth preliminary articles as strict prohibitive laws *(leges strictae),* and the second, third and fourth preliminary articles as prohibitive laws allowing for latitude and delay in their implementation *(leges latae),* see: *PP,* p. 97.

9. Kant, *PP,* p. 96.

10. Ibid. The principle of non-interference laid down in the fifth preliminary article was not original to Kant. Thus Vattel had affirmed that a state possessed the right to draw up its own constitution, and to regulate all matters relating to its government, without interference by any foreign power. *DG,* 1.111.31, 37; II.IV.54-55. However, Vattel allowed greater scope for intervention by foreign powers in the internal affairs of states than Kant was to do. So, for example, he argued that a foreign power was permitted to assist an oppressed people waging a war of resistance against a tyrannical ruler, provided that the people concerned had requested it to intervene. *DG,* II.IV.56.

11. For Kant's argument here, see: *PP,* p. 97. Regarding the strict legal status of the fifth preliminary article, it should be noted that Kant was prepared to uphold the principle of non-interference even in the context of states wherein the people resorted to what, for him, was the unlawful

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act of revolution against the established political authorities. This is evident from the discussion of the French Revolution in *The Contest of Faculties,* where, in accounting for the widespread sympathy felt by men for the Revolution, he appealed to the moral force attaching to the right of a people to establish a civil constitution of their own preference, without interference from external powers. *The Contest of Faculties,* 'A Renewed Attempt to Answer the Question: "Is the Human Race Continually Improving?"', Section 6, p. 182.

12. Article 2, paragraph 1 of the Charter of the United Nations affirms that the Organization is based in the principle of the sovereign equality of all member states. The principle of the sovereign equality of states is also affirmed as the sixth fundamental principle of international law in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. On the sovereignty and equality of states as the basic constitutional doctrine of international law, see: Brownlie, *Principles of Public International Law,* Chapter 13.

One of the main corollaries of the sovereignty and equality of states that Brownlie identifies is the duty of non-intervention falling on states in respect of the area of the exclusive jurisdiction exercised by other states. *Principles of Public International Law,* Chapter 13, pp. 287, 291-2. As a corollary of the sovereignty and equality of states, the duty of non-intervention is closely connected with the right of states to determine their own political, economic and social systems. It is in these terms that the duty is affirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. Thus, the third principle laid down in the Declaration is the duty not to intervene in matters within the domestic jurisdiction of any state (subject to the provisions of the United Nations Charter relating to the maintenance of international peace and security). In the elaboration of the principle, it is affirmed that no state or group of states has the right to intervene in the internal or external affairs of any other state, for any reason whatsoever. It is further affirmed that each state possesses the inalienable right to choose its own political, economic, social and cultural systems, without interference in any form by another state.

13. For Kant's explanation of the sixth preliminary article, see: *PP,* pp. 96-7.

14. Kant, *MEJ,* GTJ, 11.11.53, p. 115.

15. Ibid., GTJ, II.II.54, p. 116.

16. Ibid., GTJ, II.II.56, pp. 118-19.

17. Ibid., GTJ, II.II.55.

18. Ibid., GTJ, II.II.56.

19. Ibid., GTJ, II.II.57.

20. Ibid., GTJ, II.II.58.

21. Ibid., GTJ, II.II.59.

22. Ibid., GTJ, II.II.60.

23. Among the principal elements of the law of war treated of by Grotius in *De Jure Belli ac Pacis* were: the lawfulness of war (I.II); the distinction between public war and private war (I.III.I-V); the just causes of war

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(II.I); the unjust causes of war (II.XXII); the rights of states, and of their rulers and agents, in waging lawful war (III.IV-VIII); the *temperamenta belli* - that is, the rules and principles to be observed by belligerents in order to moderate the harsh effects of war (III.XIXVI); the principles of good faith binding on the parties to war (III.XIX-XXIV). Vattel devoted Book 3 of *Le Droit des Gens* to the law of war. There, he discussed such matters as: the right to make war (III.I.3-4); the just causes of war (III.III); neutrality (III.VII); the law relating to what it was justifiable, and what it was permissible, to do to the person of the enemy in a just war (III.VIII); the law regarding the property of the enemy (III.IX); faith between enemies (III.X).

24. Grotius, *JBP,* III.IV.XV-XVI, XVIII.4-5.

25. For Grotius on the principles of good faith to be observed between enemies, between states at war, and between other parties to war, see generally: *JBP,* III.XIX-XXIV.

26. For Vattel on assassination and poisoning as contrary to the law of nations and forbidden under natural law, see: *DG,* III.VIII. 155. For his discussion of the principles of good faith holding between enemies, see: *DG,* III.X.174-175.

27. Vattel, *DG, III*.III.33.

28. Ibid., III.III.47-49.

29. Grotius, *JBP, II*.I.I.4. Vattel, *DG, III*.III.26.

30. Grotius, *JBP, II*.I.II.2. Vattel, *DG,* II.IV.49-52; III.III.28.

31. For a concise summary of the elements of classic just war doctrine, see: William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), Chapters 2-3.

32. St Augustine, *Contra Faustum Manichaeum,* Libri XXXIII, trans. Richard Stothert, in St Augustine, *The Writings against the Manichaeans and against the Donatists,* trans. Richard Stothert *et al.* (Grand Rapids, Michigan, 1887), pp. 155-345 - especially Book XXII, Sections 74-79. For Augustine on war, see also: Letters CLXXXIX, CCXXIX, in *Letters of Saint Augustine,* trans. J.G. Cunningham, in 2 Volumes (Edinburgh, 1872, 1875), Volume 2, pp, 366-71, 435-7.

33. Augustine, *Contra Faustum,* XXII.74, p. 301.

34. Aquinas' discussion of the conditions necessary for the just war in the *Summa Theologiae* comes in the Secunda Secundae, Question 40. For the original Latin text of this with an English translation by Thomas R. Heath, see: *Summa Theologiae,* Blackfriars edition, Volume 35: *Consequences of Charity* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1972), pp. 80-93.

35. Aquinas, *ST,* 2a2ae, 40.1, p. 83.

36. Vitoria's contribution to the development of just war doctrine comes in the two Relectiones (or readings) that he delivered in the University of Salamanca in 1539: *De Indis Noviter Inventis; De Jure Belli Hispanorum in Barbaros.* For English translations of the Simon's edition (1696) of these works by John Pawley Bate, see: James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford: Clarendon Press, 1934), Appendix A, Appendix B. For Vitoria

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on punishment for injury received as a justification and object of war, see: *De Jure Belli,* Sections 5, 13, 19. Suarez's treatment of the law of war comes in Disputation 13: *De Bello* in *De Charitate,* this being the last of the three treatises that form his posthumously published work on the theological virtues: *De Triplici Virtute Theologica, Fide, Spe, et Charitate* (1621). For an English translation of the Disputation, see: *Selections from Three Works of Francisco Suarez,* trans. Gwladys L. Williams *et al.,* The Classics of International Law, No. 20, Volume 2 (Oxford: Clarendon Press, 1944), pp. 797-865. For Suarez on punishment as a just cause of war, see: *De Charitate,* Disputation XIII: *De Bello,* Section IV, sub-sections 5-7.

37. While Grotius and Vattel held that no war could be just on both sides with regard to its cause, they emphasized that a war might be considered just on both sides with regard to its legal effects for the parties. For their argument here, see: *JBP,* II.XXIII.XIII; *DG,* III.III.39-40.

38. Kant, *PP,* p. 96; *MEJ,* GTJ, II.II.57, p. 120; II.II.58, pp. 121-2.

39. Kant, *PP,* p. 96.

40. Ibid., p. 98.

41. Grotius and Vattel saw war as the opposite of peace, but also as a necessary means for the maintenance of a just peace among states. That they saw war in these terms testifies to their adherence to a principle that had been central to medieval just war theory. This was the principle that war was to be waged only as a matter of necessity, and then only to the end of establishing peace, with peace being taken to be the condition of the relations between states to the return to which war pointed. Augustine had insisted that war was to be waged as a necessity, and to have peace as its object. *Letters,* CLXXXIX, Volume 2, pp. 369-70. Later, Aquinas had stated that it was a requirement of justice in war that war be waged with right intention, and, basing himself on Augustine, had explained this requirement in terms of the idea that war was to be waged in order to gain peace. *ST,* 2a2ae, 40.1, pp. 83, 85. In *De Jure Belli ac Pacis,* Grotius held that war was to be undertaken to secure peace, and that it led to peace as its ultimate goal (I.I.I); that wars were not to be undertaken rashly, and only as a matter of necessity (II. XXIV); and that peace was always to be kept in view in the waging of war (III.XXV.II). Likewise, Vattel held that nations and sovereigns were to be guided by a love of peace and hence were to make war only through necessity, and that war implied as its end the return to peace as the natural condition of the relations among nations. *DG,* IV.I. While Grotius and Vattel saw war as a means for the maintenance of a just peace, they did not, however, look forward to a time when war as such would become unnecessary as a means for securing law and justice among states.

42. Kant, *PP,* p. 105. In *The Metaphysical Elements of Justice,* Kant argued that those rights and possessions of states which were acquired or maintained through resort to war remained only *provisional.* For the rights and possessions of states to have *peremptory* force, and a lasting peace achieved, it was necessary that states enter into a lawful form of

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relationship through the institution of a union of states. *MEJ,* GTJ, 11.11.61, pp. 123-4.

6 THE DEFINITIVE ARTICLES OF PERPETUAL PEACE

1. Kant, *PP,* pp. 98-9n.

2. Ibid., p. 100.

3. Regarding the inconsistency in Kant's explanation of the first definitive article, see: Hinsley, *Power and the Pursuit of Peace,* p. 71.

4. Augustine, *Contra Faustum,* XXII.75, p. 301.

5. Aquinas, *ST,* 2a2ae, 40.1, pp. 81, 83.

6. For Grotius on public war, see especially: *JBP,* I.III.I.1; I.III.IV-V; III.III.I, IV.

7. Vattel, *DG,* 111.1.2, 4.

8. It should be noted here that Kant recognized that the right of states to wage war in relation to their own subjects was *prima facie* problematic. This recognition is present in Kant's argument that it was necessary that the citizen, as a member of the legislative power in the state, should give his free consent through his representatives to the waging of war by the state in general and to any particular declaration of war. It was only under this condition, Kant insisted, that the state was able to enlist the services of the citizen in the enterprise of war. *MEJ,* GTJ, 11.11.55.

9. It is a commonplace of critical commentaries that Kant rejected international government exercised through an international state, or a world state, as the basis for perpetual peace. In addition to Hinsley in his *Power and the Pursuit of Peace,* see for example: A.C. Armstrong, 'Kant's Philosophy of Peace and War', *Journal of Philosophy,* 28 (1931), 197-204; Sylvester John Hemleben, *Plans for World Peace through Six Centuries* (Chicago, Illinois: University of Chicago Press, 1943), Chapter 2, pp. 87-95; Kenneth N. Waltz, 'Kant, Liberalism, and War', *American Political Science Review,* 56 (1962), 331-40; Patrick Riley, *Kant's Political Philosophy* (Totowa, New Jersey: Rowman and Littlefield, 1983), Chapter 6.

10. For Saint-Pierre's plan for perpetual peace, see: *Selections from the second edition of the Abrégé du Projet de Paix Perpétuelle by C.I. Castel de Saint-Pierre,* trans. H. Hale Bellot, The Grotius Society Publications: Texts for Students of International Relations, No. 5 (London: Sweet and Maxwell, 1927).

11. For Saint-Pierre's specification of the functions and powers of the grand alliance, see his statement and explanation of the five fundamental articles of the proposed treaty for lasting peace in Europe. *Abrégé,* Part I, First Proposition, pp. 24-31.

12. For Saint-Pierre on the question of secession from the grand alliance, see: *Abrégé,* Part I, Second Proposition, Section 10.

13. Jean-Jacques Rousseau, *Abstract and Judgement of Saint-Pierre's Project for Perpetual Peace,* trans. C.E. Vaughan, in *Rousseau on International Relations,* ed. Stanley Hoffmann and David P. Fidler (Oxford:

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Clarendon Press, 1991), pp. 53-100. Cited hereafter as *AJ.* On Rousseau's international thought, see: Kenneth N. Waltz, *Man, the State and War: A Theoretical Analysis* (New York: Columbia University Press, 1959), Chapter 6; Hinsley, *Power and the Pursuit of Peace,* Chapter 3.

14. Rousseau, *AJ,* p. 55.

15. For Rousseau on the origin and bases of the community obtaining among the European states, see: *AJ,* pp. 55-9.

16. For Rousseau on the factors making for conflict among the states of Europe, see: *AJ,* pp. 59-61. Rousseau followed Hobbes in holding that the *natural* condition of the relations between states and rulers was that of war. In contrast to Hobbes, however, he insisted that men were by nature peaceful rather than disposed to war, and that so far from men in their natural condition standing to one another in a state of general war, the state of war was brought into being as a consequence of the forming of independent political societies. Hence for Rousseau, unlike for Hobbes, the natural state of war obtained only between independent states, and existed only by virtue of the existence of states as such. Rousseau's analysis of war comes in the essay *The State of War* (c. 1755-6). For a translation of the essay by M.G. Forsyth, see: *Rousseau on International Relations,* pp. 33-47. For Rousseau on war as a relationship between states rather than one obtaining among men, see also: *SC,* 1.4, pp. 55-6.

17. Rousseau, *AJ,* pp. 67-8. For Rousseau's statement of the five articles describing the constitution of the federation, see: *AJ,* pp. 69-70.

18. In this connection, see Rousseau's summary of the evils flowing from war as the means of settling disputes among sovereigns, and his summary of the advantages for sovereigns of their agreeing to the procedures for the peaceful settlement of disputes provided for by the projected federation. *AJ,* pp. 85-7.

19. Rousseau, *AJ,* pp. 88-9.

20. Ibid., pp. 89-90.

21. For Rousseau's argument here, see: *AJ,* pp. 93-4.

22. Rousseau, *AJ,* p. 100.

23. Kant: *IUH,* 7th Proposition, pp. 47-8; *TP,* Part III, pp. 91-2.

24. Rousseau observed in the *Judgement* that it was unreasonable to expect rulers to be compelled to submit their disputes to a higher tribunal when they boasted that they held their power only by the sword. *AJ,* p. 91. In the explanation of the second definitive article, Kant noted that each state perceived its own majesty to consist in its freedom from subjection to external legal constraint. *PP,* p. 103.

25. In *The Metaphysical Elements of Justice,* Kant discussed the idea of a league or confederation of nations as one of the elements of the law of nations, and the idea of a universal union of states as the condition for lasting peace. *MEJ,* GTJ, 11.11.54, 61.

26. Kant, *MEJ,* GTJ, II.II.61, pp. 123-4.

27. Kant, *PP,* p. 102.

28. Ibid.

29. Ibid., p. 104.

30. Ibid., pp. 104-5.

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31. Ibid., p. 105.

32. Ibid., pp. 103-4.

33. Ibid., p.104.

34. Ibid.

35. Ibid. Kant's writings prior to *Perpetual Peace* suggest that he thought that the sort of association of states that he held was to base the law of nations was to have the right and power of coercion. In the *Idea for a Universal History,* he wrote of how states associated together in a federation for peace would have their rights and security guaranteed by a united power, and by the law-governed judgments of a united will. *IUH,* 7th Proposition, p. 47. In *Theory and Practice,* he claimed that the condition of war obtaining among states could be overcome only through 'a state of international right, based upon enforceable public laws to which each state must submit (by analogy with a state of civil or political right among individual men).' *TP,* III, p. 92. However, it is very clear that, as Kant explained it in *Perpetual Peace,* the federation of free states was not to enforce the law of nations through the exercise of a right of external coercion, and that, in this respect, the federation was to embody a form of lawful constitution quite distinct from the one founding the civil state.

36. Kant, *PP,* p. 104.

37. Carl Joachim Friedrich, *Inevitable Peace* (Cambridge, Massachusetts: Harvard University Press, 1948), Chapter 1. On Kant in relation to the League of Nations, see: Armstrong, 'Kant's Philosophy of Peace and War', pp. 201-4.

38. The Articles (39-51) set out in Chapter VII of the Charter of the United Nations describe the rights and powers of the Organization concerning action to be taken with respect to threats to the peace, breaches of the peace, and acts of aggression. The rights and powers described in the Articles are extensive, and include the right of the United Nations to use force (Article 42), and the right to draw upon the armed forces of member states (Article 43), in order to maintain or restore international peace and security. These are clearly not rights and powers that Kant thought were to belong to the federation of free states. So, for example, there was no suggestion on Kant's part that the federation was to be empowered to use force to maintain peace and security, or to have the means and capacity to raise an international army from among member states for this purpose. Indeed, for Kant, the right of states to form alliances for their common defence and security was a right of war, and hence a right that belonged to states under the law of nations. *MEJ,* GTJ, 11.11.59, p. 122. However, the whole point of the federation of free states, as Kant explained it, was that it was to stand as the constitutional foundation for the law of nations, and thus as establishing a form of association among states wherein disputes between states were to be settled, and the peace maintained, by means other than the resort to force.

39. Kant, *PP,* pp. 96, 103-4; *MEJ,* GTJ, II.II.56, pp. 118-19.

40. For Kant on this point, see for example: *MEJ,* GTJ, II.II.61, pp. 124-5.

41. For Kant's discussion of the judicial power in the civil state, see: *MEJ,* GTJ, II.I.49, pp. 82-3.

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42. Article 33, paragraph 1 of the Charter of the United Nations states that parties to a dispute are to seek a solution through such peaceful means of their own choice as negotiation, mediation, arbitration or judicial settlement. Kant would certainly have accepted the obligation on states to seek a peaceful settlement of disputes about their rights as an obligation implicit in the general agreement that was to establish his projected federation of free states.

43. On the federation of free states as a treaty between independent states, and the peace it was to establish as depending on the acceptance by states of a rule of law which was not to be supported by international organization or coercive force, see: Hinsley, *Power and the Pursuit of Peace,* pp. 66-7.

44. Kant even suggested that the law of nations was to be thought of as based in a contract between states. Thus, on occasion, he argued that the association of states that was to provide the constitutional basis for the law of nations was to be explained as deriving from a contract analogous to the one founding the constitution of the civil state. When he argued this, however, he emphasized that the constitution that was to base the law of nations was to be distinct from the civil constitution in the respect that it was not to involve states being made subject to coercive laws, or to the authority of a sovereign power. See: *PP,* Appendix II: 'On the Agreement between Politics and Morality according to the Transcendental Concept of Public Right', p. 127; *MEJ,* GTJ, II.11.54.

45. In *The Metaphysical Elements of Justice,* Kant emphasized that the law of nations was the law governing the relations between states, and so was more properly to be called the law of states: *ius publicum civitatum. MEJ,* GTJ, II.II.53, p. 115.

46. The statist bias of Kant's international thought is well brought out by Hinsley in Chapter 4 of *Power and the Pursuit of Peace.* See also: W.B. Gallie, *Philosophers of Peace and War. Kant, Clausewitz, Marx, Engels and Tolstoy* (Cambridge: Cambridge University Press, 1978), Chapter 2. On the limitations of Kant's state-centred view of international politics, see Gallie's 'Wanted: A Philosophy of International Relations', *Political Studies,* 27 (1979), 484-92. For an instructive corrective to the statist interpretation of Kant as an international theorist, see: Andrew Hurrell, 'Kant and the Kantian Paradigm in International Relations', *Review of International Studies,* 16 (1990), 183-205.

47. Thus Brownlie notes that it follows from the principle of the sovereignty and equality of states that such obligations falling on states as arise from customary law and the law embodied in treaties depend on the consent of the states obligated. *Principles of Public International Law,* Chapter 13, p. 287.

48. Kant, *PP,* pp. 105-6. This definition of the right of strangers to hospitable treatment involved no radical departure from orthodox opinion regarding the rights of foreigners under the law of nations. Thus Vattel had held that sovereign rulers were entitled to refuse foreigners entry into the territory of states and to impose special conditions on those permitted to enter, and that foreigners admitted were bound by the laws

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of the states they entered. However, Vattel had also emphasized that if a sovereign admitted foreigners into his territory, then this was not to be detrimental to them. Thus, foreigners allowed a right of entry into a state were to enjoy perfect security, in accordance with the basic principles of hospitality. *DG,* II.VIII.100-102, 104.

49. Kant, *PP,* p. 106. In the discussion of cosmopolitan law in 'The General Theory of Justice' in *The Metaphysical Elements of Justice,* Kant explained the respects in which the land surface of the earth was to be thought of as subject to an original right of common possession. According to Kant, the nations were to be thought of as originally having common possession of all land. However, this was not a juridical community of possession involving specific rights of use and ownership. Hence, the form of community originally obtaining among nations could establish no more than a universal right to attempt to enter into commercial relations with the inhabitants of foreign lands (and, of course, to receive no hostile treatment in exercising it). *MEJ,* GTJ, II.III.62, p. 125.

50. Thus, for Kant, cosmopolitan law was a matter of right, not of philanthropy. *PP,* p. 105; *MEJ,* GTJ, 11.111.62, p. 125.

51. Kant, *PP,* p. 106.

52. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics,* 2nd edition with a new Foreword by Stanley Hoffmann (London: Macmillan, 1995), especially Chapter 2, pp. 23-6. Among Bull's other writings, see particularly: 'Society and Anarchy in International Relations' and 'The Grotian Conception of International Society', in *Diplomatic Investigations: Essays in the Theory of International Politics,* ed. Herbert Butterfield and Martin Wight (London: Allen and Unwin, 1966), pp. 35-50, 51-73; 'Hobbes and the International Anarchy', *Social Research,* 48 (Winter 1981), 717-38; 'The Importance of Grotius in the Study of International Relations', in Bull, Kingsbury and Roberts (eds.), *Hugo Grotius and International Relations,* pp. 65-93. For Martin Wight on what he identified as the 'realist' (or Machiavellian), 'rationalist' (or Grotian) and 'revolutionist' (or Kantian) traditions in international thought, see his posthumously published lecture series from the 1950s: *International Theory: The Three Traditions,* ed. Gabriele Wight and Brian Porter, with an introductory essay by Hedley Bull (Leicester and London: Leicester University Press, 1991).

53. Bull, *Anarchical Society,* p. 25.

54. Bull himself recognized this in a note to his discussion of the Kantian tradition. See: *Anarchical Society,* p. 310, note 2.

55. It should be noted, here, that Bull neglected those features of Kant's international thought, such as his view of the international state of nature as a state of war, which place him with Hobbes. He also failed to bring out how Kant emphasized the necessity that states conform with laws defining the conditions of their mutual co-existence in the international order. Given that Kant saw the law of nations as securing the freedom and independence of states (as it is clear from the argument of *Perpetual Peace* he did), then he seems to fit more neatly into the

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Grotian-internationalist tradition. In this connection, see: Hurrell, 'Kant and the Kantian Paradigm in International Relations', pp. 199-200.

56. Bull, *Anarchical Society,* p. 25.

57. The cosmopolitan law was not intended to qualify the rights of states in the sense that it was a form of law that Kant thought of as having direct application to individual human beings, without regard to their membership of nations and states or to the existence of nations and states as such. In *Perpetual Peace,* he described cosmopolitan law as law that applied to the mutual relations of men and states, in so far as they were to be considered as bearers of citizenship in a universal state of all mankind. *PP,* pp. 98-9n. In *The Metaphysical Elements of Justice,* however, he explained cosmopolitan law in terms that made no reference to individual men being its subjects. Here, cosmopolitan law was defined simply as the body of universal laws which applied to the mutual intercourse of nations. *MEJ,* GTJ, II.III.62, p. 125.

58. Kant, *PP,* p. 106. It is hardly surprising that Kant should have refrained from criticizing China and Japan for restricting contacts with European visitors. *PP,* pp. 106-7.

59. Regarding Kant's opposition to slavery, there is his denunciation of the Sugar Islands of the West Indies as a 'stronghold of the cruellest and most calculated slavery'. *PP,* p. 107.

60. Kant was explicit that colonization and slavery were contrary to the law of nations as it defined the rights of states at war. So, for example, he maintained that the rights of conquest on the conclusion of a war were not such as to permit a victorious state to reduce a defeated enemy state to the status of a colony, or to subject its inhabitants to slavery. *MEJ,* GTJ, II.II.58, pp. 121-2.

61. It is obviously impossible to accept Bull's claim that Kant is representative of a tradition in international thought in which it was assumed that the rules sustaining co-existence among states were to be disregarded, whenever the imperatives of the higher morality of the universal community of mankind demanded it. In the argument of *Perpetual Peace,* the rules defining the terms of co-existence among states were those given in the law of nations. For Kant, the disregarding of the law of nations would have threatened the lawful freedom and independence of states, and would thus have been destructive of what he saw as the juridical foundations of peace.

62. In *The Metaphysical Elements of Justice,* Kant explicitly linked the idea of cosmopolitan law with the principle of freedom of commerce among nations. Thus he explained cosmopolitan law in terms of the right to attempt to enter into trading relations with foreign peoples. Even so, he emphasized that cosmopolitan law established no right to colonize the lands of other nations. *MEJ,* GTJ, II.III.62, pp. 125, 126.

63. Kant, *PP,* pp. 107-8.

64. Kant, *IUH,* pp. 41-2.

65. For Kant's statement and explanation of the Eighth Proposition, see: *IUH,* pp. 50-1.

66. For Kant's statement and explanation of the Ninth Proposition, see: *IUH,* pp. 51-3.

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67. For Kant's statement and explanation of the First Proposition, see: *IUH,* p. 42.

68. For Kant's statement and explanation of the Second Proposition, see: *IUH,* pp. 42-3.

69. For Kant's statement and explanation of the Third Proposition, see: *IUH,* pp. 43-4.

70. For Kant's statement and explanation of the Fourth, Fifth, and Sixth Propositions, see: *IUH,* pp. 44-7.

71. For Kant's argument here, see: *IUH,* 4th Proposition, pp. 44-5.

72. For Kant's argument here, see: *IUH,* 5th Proposition, pp. 45-6.

73. For Kant's statement and explanation of the Seventh Proposition, see: *IUH,* pp. 47-9.

74. Kant, *IUH,* 7th Proposition, p. 47. A *Foedus Amphictyonum* (amphictyonic league or alliance) was an alliance of neighbouring states or tribes in ancient Greece, formed for mutual defence or religious purposes. See the translator's note in *The Metaphysical Elements of Justice,* p. 116n2.

75. Kant, *The Critique of Judgement,* Part II: 'Critique of Teleological Judgement', Appendix: 'Theory of the Method of Applying the Teleological Judgement', Section 22: 'The Ultimate End of Nature as a Teleological System' - especially pp. 94-6.

76. Kant, *PP,* p. 108.

77. Ibid., pp. 109-10.

78. Ibid., p. 112.

79. Ibid., pp. 113-14.

80. Ibid., p. 114.

81. Ibid.

82. Kant's appeal to enlightened self-interest in explaining the origin and basis of human society aligns him with those thinkers of the Enlightenment, like Hume and Adam Smith, who had sought to construct an empirically based science of human nature and society. For example, there is a striking parallel between Kant's idea of the unsocial sociability of men and Smith's idea of the invisible hand as an organizing principle of market society. For in each case, what was being referred to was a principle describing the mechanism through which the mutual antagonism and competitiveness of men worked to the end of creating social order and equilibrium. Thus, for Kant, the unsocial sociability of men was the means through which nature utilized the self-serving inclinations of men, and states, to bring them to establish law-governed forms of association. So, likewise, Smith had suggested that it was through the pursuit of their own privately defined interests that individuals were led, as by an invisible hand, to promote the overall good of society, even though this end formed no part of their actual intention. For Smith on the invisible hand, see: *An Inquiry into the Nature and Causes of the Wealth of Nations,* ed. R.H. Campbell, A.S. Skinner and W.B. Todd, 2 volumes (Oxford: Clarendon Press, 1976), Book IV, Chapter II, pp. 455-6.

83. Thus Kant maintained that the commercial interests and the commercial interdependence of states were leading them to adopt a legitimate form of political constitution both internally and in their external

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relations, and so establish the juridical basis for a fully cosmopolitan form of existence. See: *IUH,* 8th Proposition, pp. 50-1.

84. Kant's break with the natural law theorists is reflected in his discussion of the question of the agreement between politics and morality in the second part of the Appendix to *Perpetual Peace.* For the natural law theorists, the agreement between politics and morality had consisted essentially in the conformity of states, and their rulers, to norms of justice and morality that were assumed to be given in the objectively existing order of nature. For Kant, however, the essential conditions for the agreement between politics and morality were embodied in the principles of practical reasoning given in what he called the transcendental concept of public right. Kant laid down two transcendental principles of public right, with each principle giving expression to the idea that any claim grounded in right should possess the formal attribute of *publicness* or *publicity.* The first, negative principle was stated thus: "'All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public.'" The second, positive or affirmative principle was as follows: "'All maxims which *require* publicity if they are not to fail in their purpose can be reconciled both with right and with politics."' *PP,* Appendix II, pp. 126, 130. Kant maintained that the principle of publicity served to underwrite certain substantive principles of international right, such as those relating to promises and the acquisition of territory by states. However, the principle of publicity remained a formal practical principle. Hence, it no more obviously guaranteed an agreement between politics and the substance of morality than the principle of universalizability given in the idea of the categorical imperative provided a foundation for substantive moral duties as such.

85. On Kant's relation to later currents of historical thought, see: George Armstrong Kelly, *Idealism, Politics and History. Sources of Hegelian Thought* (Cambridge: Cambridge University Press, 1969), especially Part 3: 'Immanuel Kant: The Rationalization of the Chimera'; William A. Galston, *Kant and the Problem of History* (Chicago, Illinois: University of Chicago Press, 1975), especially Introduction, pp. 23-38. Galston's is an excellent general discussion of the idea of history in Kant's thought. For another such discussion, see: William James Booth, *Interpreting the World: Kant's Philosophy of History and Politics* (Toronto: University of Toronto Press, 1986).

86. Hegel regarded the modern constitutional state as the product of the German World, and as a form of human association which, in securing freedom on a universal basis, was to be distinguished from the forms of political association that had developed in the Oriental World and in the classical world of Greece and Rome. Hegel's most detailed discussion of how the establishing of the form of the state he associated with the German World stood as the culmination of human history comes in his posthumously published lectures on the philosophy of world history. For an edition of the revised version of the translation of the lectures by J. Sibree of 1899, see: *The Philosophy of History* (New York: Dover, 1956).

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87. For Hegel's argument here, see: *PR,* Part III: 'Ethical Life', Section 3: 'The State', A: 'Constitutional Law', II: 'External Sovereignty', especially sub-section 324.

88. For Hegel's exposition of the elements of international law, see: *PR,* 111.3, B: 'International Law'.

89. Hegel, *PR,* 111.3, B, sub-section 333.

90. On Kant's view of peace as emerging through conflict among states, see for example: Waltz, 'Kant, Liberalism, and War', p. 339; Hinsley, *Power and the Pursuit of Peace,* p. 76.

CONCLUSION

1. Regarding the law of human rights and democracy, Article 21, paragraph 1 of the Universal Declaration of Human Rights affirms the right of each individual to participate in the government of his or her country, either directly or through freely chosen representatives, whereas Article 21, paragraph 3 affirms that the will of the people, as the foundation of the authority of all government, should have its expression in regular elections based in a universal and equal suffrage. See Articles 6-11 of the Declaration for the rights belonging to the individual as the subject of the rule of law. The latter are rights that Kant would have seen as belonging to the individual citizen under the terms of what he specified as the universal principle of justice. However, they are not rights that he would have taken to imply the necessity of a democratic form of rulership.

2. One of the most important twentieth-century representatives of the liberal internationalist tradition is Woodrow Wilson (1856-1924), who was President of the United States from 1913 to 1921. Wilson gave powerful expression to the principles of international order embodied in Kant's law of peace with the famous Fourteen Points he enunciated at the beginning of the last year of the First World War, as a proposed basis for a general peace among the powers. Thus, the First Point provided for open covenants of peace and the exclusion of all private international understandings. The Third Point provided for freedom of commerce, in the respect that it provided for the removal of economic barriers and the establishing of an equality of trade conditions among nations consenting to the terms of the peace. The Fourth Point provided for reductions in national armaments to the degree consistent with the domestic safety of the nations. The Fifth Point provided for a settlement of all colonial claims, based on an equal weighing of the interests of the native populations concerned with the claims of the governments concerned. The Fourteenth Point provided for the instituting of a general association of nations, whose purpose was to lie with the affording of mutual guarantees of political independence and territorial integrity to all states, irrespective of their size. For Wilson's statement of the Fourteen Points, see: Address of President Wilson on the Conditions of Peace Delivered at a Joint Session of the Two Houses

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of Congress, 8 January 1918, in *Official Statements of War Aims and Peace Proposals: December 1916 to November 1918,* prepared under the supervision of James Brown Scott (Washington, DC: Carnegie Endowment for International Peace, 1921), pp. 234-9. For a balanced account of Kant's place in the liberal tradition in international thought and practice, and one where it is argued, among much else, that Kant's view of the conditions for international peace stands confirmed by the success of states with liberal constitutions in maintaining peaceful relations among themselves, see: Michael W. Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', *Philosophy and Public Affairs,* 12 (Summer 1983), 20535, 12 (Fall 1983), 323-53.

3. Francis Fukuyama, 'The End of History?', *National Interest,* 16 (Summer 1989), 3-18.

4. For a fuller statement of Fukuyama's views, see: *The End of History and the Last Man* (New York: Free Press, 1992).

5. For a sober account of future trends in world politics which emphasizes factors like population increase, the environment and technological change, see: Paul Kennedy, *Preparing for the Twentieth-First Century* (London: HarperCollins, 1993).

6. According to Huntington, international politics in the future will be shaped by the interactions among what he identifies as the major world civilizations, with these being, in his classification of them, Western, Latin American, African, Islamic, Sinic, Hindu, Slavic-Orthodox, Buddhist and Japanese. For Huntington's arguments here, see: 'The Clash of Civilizations?', *Foreign Affairs,* 72 (Summer 1993), 22-49; *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996).

7. For discussion of the world economy which reflects this approach in international relations theory, see: Susan Strange, *States and Markets* (1988), 2nd edition (London: Pinter, 1994); *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996).

8. Philip Allott, *International Law and International Revolution: Reconceiving the World,* The Josephine Onoh Memorial Lecture, 21 February 1989 (Hull: Hull University Press, 1989); *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990).

9. Thus the universality of liberal principles of justice and political morality has been called into question through the communitarian critique of liberalism that is associated with the work of philosophers like Alasdair MacIntyre and Michael J. Sandel. For an indication of the main lines of the communitarian approach to politics, see: Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1981), 2nd edition with a Postscript (London: Duckworth, 1985); *Whose Justice? Which Rationality?* (London: Duckworth, 1988); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982). For a general introduction to communitarian thought, see: Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (1992), 2nd edition (Oxford: Basil Blackwell, 1997).

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