

## The United Nations – a Kantian Dream Come True?

### *Philosophical Perspectives On The Constitutional Legitimacy Of The World Organisation*

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#### I. Introduction

'[T]he politician, we say, looks to the next election, the statesman to the next generation, and the philosopher to the indefinite future.'<sup>1</sup> Immanuel Kant certainly belonged to the latter category and so it is no surprise that, although over 200 years have passed since the publication of his writings *Towards Perpetual Peace* and *The Metaphysics of Morals*, the full potential of the Kantian legacy for legal and political theory has not been exhausted yet.<sup>2</sup> For Kantian thoughts on justice and right in international relations, this proves particularly true. While philosophers all over the world discuss Kant's theses on international order primarily within the bounds of their own profession,<sup>3</sup> among legal scholars the debate on legitimacy in international law is only about to evolve<sup>4</sup> and international organisations are still in quest of their jurisprudential soul(s).<sup>5</sup> On that score the United Nations is no exception.

This article sketches the first step on the path to a Kantian solution of this dilemma. It proceeds on the conviction that the significance of philosophical classics for today's legal scholarship consists in the provision of arguments with outstanding force and a justified claim of validity – features, which allow for a theoretically sound and coherent evaluation of the legitimacy of any form of governance.<sup>6</sup> The first part will sketch out why for this endeavour Kantian philosophy is not merely one possible starting point but rather – given its philosophical virtue and historical link to the UN – the most plausible guideline when the

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<sup>1</sup> Rawls, John, 'The Idea of an Overlapping Consensus', [1987] 7 *Oxford Journal of Legal Studies* 1, 24.

<sup>2</sup> Lutz-Bachmann, Matthias, 'Kant's Idea of Peace and the Philosophical Conception of a World Republic', in Bohman, J. and Lutz-Bachmann, M. (eds), *Perpetual Peace – Essays on Kant's Cosmopolitan Ideal* (MIT Press, London, 1997) 59.

<sup>3</sup> Exceptions: Höffe, Otfried, 'Ausblick: Die Vereinten Nationen im Lichte Kants', in Höffe, O. (ed), *Immanuel Kant – Zum ewigen Frieden* (Akademie Verlag, Berlin, 1995), 245 and Cavallar, Georg, *Kant and the Theory and Practice of International Right* (University of Wales Press, Cardiff, 1999).

<sup>4</sup> Cp. the initial work of Franck, Thomas, 'Legitimacy in the International System', [1988] 82 *AJIL* 705 and his *The Power of Legitimacy among Nations* (Oxford University Press, 1990). Later studies can be found at, e.g., Clark, Ian, 'Legitimacy in a global order', [2003] 29 *RIS* 75; Coicaud, Jean-Marc and Heiskanen, Veijo (eds), *The Legitimacy of International Organizations* (UN University Press, New York, 2001); Kumm, Matthias, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', [2004] 15 *EJIL* 907; Wolfrum, Rüdiger and Röben, Volker (eds), *Legitimacy in International Law* (Springer, Berlin, 2008).

<sup>5</sup> Explicitly for the European Community, Ward, Ian, 'Kant and the Transnational Order: Towards a European Community Jurisprudence', [1995] 8 *Ratio Juris* 315.

<sup>6</sup> Similarly Delbrück, Jost, "Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet sein" – Kant und die Entwicklung internationaler Organisation', in Dicke, K. and Kodalle, K.-M. (eds), *Republik und Weltbürgerrecht* (Böhlau Verlag, Weimar, 1998), 181, 185.

question is for justice of the insitutional make-up of the UN.<sup>7</sup> The second part will briefly summarise Kant's peace project. Examining the United Nations as the core of contemporary global order in light of a critical reconsideration and elaboration of Kant's ideas, the main part of the essay shall asses to what extend the UN Charter and the UN organs' practice by now in fact reflect standards of Kantian legal and political philosophy. Thereby, it is argued for a twofold thesis: First, one pivotal argument in Kant's theory of peace is flawed. Kant was mistaken in his rejection of a world republic in favour of a lose federation of states. Once this thesis is revised further elaboration along the lines of the Kantian 'domestic analogy argument' may offer a profound basis for a normative theory of international organisations. Secondly, although there are substantial similarities between the revised Kantian proposal and its counterpart in current international law, the differences between both remain crucial as they spot moral flaws and legitimacy deficiencies of the present international legal system – deviations which call for either institutional change or an alternative philosophical foundation.

## II. Why a Kantian Frame of Reference?

In the official records of the UN, the word 'Kant' has never been used: The UN Charter architects have desisted from making any – explicit or implicit – reference to the philosophical groundwork that they indirectly built upon<sup>8</sup> and in the now more than 60 years practice of the UN it has never owned up to Kantian philosophy either. So why consider the constitutional legitimacy of the world organisation from a Kantian perspective? Here, in particular two kinds of arguments shall be advanced: one philosophical, one historical.

### 1. The Philosophical Argument

The origins of the philosophical debate on how justice in the international system is to be conceived date back to a time long before Kant. Since then much has been thought and written, but no universal consensus has been reached on the legitimacy principles for the international case. Partly this is due to the inherent limits that practical philosophy faces: Any normative principle can only be derived from a normative meta-principle.<sup>9</sup> To this meta-principle, however, the same logic applies so that, in order to avoid a *regressus ad infinitum*, there has to be an ultimate principle, which itself is not based on a normative meta-principle, and thus can neither be logically derived nor cogently proven.<sup>10</sup> Consequently, the ultimate basis for any normative legal philosophy is confession, not

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<sup>7</sup> The concept of a guideline-philosophy ("Leitphilosophie") is taken from Lange-Bertalot, Nils, *Weltbürgerliches Völkerrecht – Kantianische Brücke zwischen konstitutioneller Souveränität und humanitärer Intervention* (Duncker & Humblot, Berlin, 2007), 27, 37 and *passim*.

<sup>8</sup> Given the League of Nations experience, recourse to philosophical sketches was dispensable, see Grewe, Wilhelm G. and Khan, Daniel-Erasmus, 'The History of the United Nations', in Simma, B. (ed), *The Charter of the United Nations – A Commentary*, vol. 1 (2<sup>nd</sup> edition, Oxford University Press, 2002), n. 1.

<sup>9</sup> Cp. on the impossibility to derive principles on what "ought" to be from what actually "is": Hume, David, *A Treatise of Human Nature* (London, 1740), book III, part I, section I.

<sup>10</sup> This is brilliantly illustrated by Finnis, John, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) who attempts to show that and why the values which his theory is based on are simply "self-evident" and "unprovable".

compelling scientific insight.<sup>11</sup> Hence, debating political-philosophical concepts is about testing their plausibility, not about unveiling necessary truths. From this twofold complicity – the great variety of different philosophical proposals and the limits of an ultimate justification in practical philosophy – it is evident, that a theoretically impregnable and comprehensive defence of Kantian legal philosophy constitutes a task that neither can nor need to be done in the present context. Suffice therefore to briefly summarize four key characteristics of Kantian thought, that lend a Kantian starting point the essential plausibility.<sup>12</sup>

*First of all*, Kant has created a self-contained, comprehensive system of philosophy which in terms of thematic versatility and theoretical foundation has only seldom been truly challenged.<sup>13</sup> His arguments cover a broad variety of issues and the solutions he proposes are well-founded.<sup>14</sup> *Secondly*, Kantian practical philosophy departs from a highly plausible premise: the conception of man as a free and autonomous being. Although this premise cannot be proven by means of pure reason, it can not be rebutted either.<sup>15</sup> Moreover, no legal system can renounce this premise: there was no point in having laws which are designed to guide human behaviour, if men were not even free to choose whether to follow the given rules or not. *Thirdly*, Kant posits “perpetual peace” as the ultimate virtue and the main purpose of practical philosophy. This philosophical orientation matches the most prominent concern of international law.<sup>16</sup> *Fourthly* and finally, Kantian practical philosophy is not empirical in nature. It strictly avoids to take “reasons of experience”<sup>17</sup> as its basis, and therefore is neither dependent on nor open to interference by temporal, local, social or cultural contingencies. Instead, Kant founds his ethical and legal theory in pure practical reason. The principle of right he arrives at is thus a truth *a priori* and as such of universal validity. For a philosophical discussion of the UN or any other truly international organisation this is of particular virtue.<sup>18</sup> Today, the legal regime of the UN extends to almost every country on the globe. It comprises states in the most different social or geographical circumstances, stages of development and with various cultural backgrounds. It exercises legal authority over all of them and is thus in need of a justificatory basis and legal principles bearing ubiquitous validity. Given the locally differing and temporally changing nature of empirical facts, any theory departing from “reasons of experience” necessarily fails at this point. Offering such a universal legitimacy standard, Kant’s *a priori* principle of right though can stand this proof.

<sup>11</sup> Aply: Radbruch, Gustav, *Rechtsphilosophie – Studienausgabe* (2<sup>nd</sup> edition, C.F. Müller Verlag, Heidelberg, 2003) 15: “Sollensätze sind nur durch andere Sollensätze begründbar und beweisbar. Eben deshalb sind die letzten Sollensätze unbeweisbar, axiomatisch, nicht der Erkenntnis, sondern nur des Bekenntnisses fähig.”

<sup>12</sup> Here, my arguments have greatly benefitted from the impressive study of Lange-Bertalot, 27 f. and 32 ff.

<sup>13</sup> G.W.F. Hegel was probably the only philosopher with a comparably rich and well-reasoned work.

<sup>14</sup> As such, kantian arguments are still frequently drawn upon, see, *inter alia*, Lange-Bertalot, *passim*; Gierhake, Katrin, *Begründung des Völkerstrafrechts auf der Grundlage der Kantischen Rechtslehre* (Duncker & Humblot, Berlin, 2005).

<sup>15</sup> Kant, Immanuel, *Kritik der reinen Vernunft*, A 444 ff and A 532 ff. (the page numbers refer to the first edition, published in Riga, 1781). This remains true, even in light of recent neuro-biological insights, cp. Pauen, Michael, *Illusion Freiheit? Mögliche und unmögliche Konsequenzen der Hirnforschung* (Fischer Verlag, Frankfurt am Main, 2004).

<sup>16</sup> With regard to the purposes of the UN Charter, see *infra*.

<sup>17</sup> Kant, Immanuel, *Grundlegung zur Metaphysik der Sitten*, AA 387 (page number refers to the so-called *Akademie-Ausgabe* published in 1911).

<sup>18</sup> This argument is also suggested by Delbrück, 185.

## 2. The Historical Argument

Historically, too, evaluating the UN in light of Kantian standards bears considerable plausibility. Although the UN has been founded not less than 150 years after Kantian thoughts on perpetual peace have been published, they have left visible traces in every stage of the historical development from the merely philosophical conception to the present stage of political realisation. In this process, the foundation of the League of Nations constitutes the first attempt to put philosophical peace projects into practice and therefore is of particular importance. The mastermind behind this attempt was the then US president Thomas Woodrow Wilson. Wilson has come to know the philosophy of the Königsberg scholar during his studies in Princeton and Baltimore and in his later career as a politician he has greatly benefitted from and often implicitly promoted Kantian ideas. This influence on Wilson's political mindset has become salient when in January 1918 he presented his famous fourteen points, many of which were closely related to Kantian principles of right – including the proposal of an association of nations.<sup>19</sup> It is of no surprise and has often been noted that the political realisation of this proposal, i.e. the League of Nations, also bore notable traces of Kantian thought.<sup>20</sup> Thus, Kantian philosophy has found its way into the political practice of the early 20<sup>th</sup> century via the Wilsonian project of the League of Nations. By now, the League of Nations has in its main function: preserving international peace, been replaced by the United Nations Organisation. Notwithstanding the fact that the UN is not the legal successor of the League, has always conceived itself as a chance for a new beginning and has therefore tried to avoid any connection to the League and its failure,<sup>21</sup> it can hardly be denied that the UN has taken on the spiritual heritage, including the Kantian marks, left by the Geneva peace-league. This is aptly put by Leeland Goodrich: “[I]t should be a cause of neither surprise nor of concern that the United Nations is for all practical purposes a continuation of the League of Nations. [...] There is no real break in the stream of organizational development.”<sup>22</sup>

Given this three-step-bond – from Kant to Wilson to the League of Nations to the UN – it may be overstating the case to suggest that the UN therefore is traditionally bound by Kantian principles. It is not exaggerating, however, to suggest that there is an indirect and unique<sup>23</sup> historical link connecting the UN to Kantian philosophy that makes Kantian philosophy the *primus inter pares* for a philosophical examination of the UN.<sup>24</sup> As the similarities between the Kantian proposal and the UN which shall, after the following

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<sup>19</sup> For a closer examination of Kantian influence on Wilson's political thought see Vorländer, Karl, *Kant und der Gedanke des Völkerbundes* (Meiner, Leipzig, 1919), 67 ff.; Bruns, Thomas, *Kant et L'Europe* (Diss. Saarbrücken, 1973), 289 ff.; Beestermöller, Gerhard, *Die Völkerbundsidee* (Kohlhammer, Stuttgart, 1995), 94-142; Cede, Franz, 'Historische Einführung', in Cede, F. and Sucharipa-Behrmann, L. (eds), *Die Vereinten Nationen – Recht und Praxis* (C.H.Beck, München, 1999), 3, 4 und Hackel, Volker Marcus, *Kants Friedensschrift und das Völkerrecht* (Duncker & Humblot, Berlin, 2000), 170 ff. with further references.

<sup>20</sup> At the time of the League of Nations this connection has often been drawn. For a discussion of this influence and a comprehensive collection of respective scholarly works, cp. Hackel, 169 ff and the references in n. 18.

<sup>21</sup> Goodrich, Leeland M., 'From League of Nations to United Nations', [1947] 1 *International Organization* 3; Barandon, Paul, *Die Vereinten Nationen und der Völkerbund* (Rechts- und Staatswissenschaftlicher Verlag, Hamburg, 1948), 7.

<sup>22</sup> Goodrich, 20 f.; similarly: Cede, 4.

<sup>23</sup> As far as my research has shown, there is no proof for a comparable connection of the UN to any other philosophy.

<sup>24</sup> On this indirect connection see also Leonard, Larry L., *International Organization* (Mac Graw-Hill, New York, 1951), 27 f. and Bruns, 298 f. with further references.

summary of the kantian sketch on perpetual peace, be examined in the course of the article are too great in number to be merely accidental, they will help giving further proof to this finding.

### III. Kant's Philosophical Sketch on Perpetual Peace – a Brief Overview

The structure of Kant's philosophical sketch on perpetual peace follows contemporary peace treaties.<sup>25</sup> Its main part is divided into two sections and consists of six 'preliminary articles' (negative conditions of peace) and three 'definitive articles' (positive conditions of peace). In these nine short paragraphs Kant sets out his doctrine of international right in its most comprehensive form.<sup>26</sup> Just like the entire Kantian philosophy of right the doctrine of international right is based on the Kantian principle of justice, a derivation from the categorical imperative: 'Right is [...] the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom.'<sup>27</sup> It is therefore moral practical reason that provides the rules Kant arrives at with the philosophical justification they need.<sup>28</sup> 'moral-practical reason within us pronounces the following irresistible veto: *There shall be no war*'.<sup>29</sup> And in *Perpetual Peace* he states: 'reason, as the highest legislative moral power, absolutely condemns war as a test of rights and sets up peace as an immediate duty.'<sup>30</sup> These rules link back to a universal moral principle and are therefore more than just legal rules; they are rules of political justice,<sup>31</sup> moral rules derived from reason.<sup>32</sup> Hence, the function of Kant's philosophical sketch is more than a political idea of international relations it rather constitutes '*the rules and the basis of legitimation for internal and external State activity*'.<sup>33</sup>

#### 1. The Preliminary Articles

The six preliminary articles of the essay formulate the negative conditions or preconditions of peace.<sup>34</sup> They ban certain forms of state behaviour the persistence of which would constitute a hindrance to the establishment of peace. However, compliance with them alone will not guarantee eternal peace.<sup>35</sup> In detail they run:

<sup>25</sup> Friedrich, Carl Joachim, 'The Ideology of the United Nations Charter and the Philosophy of Peace of Immanuel Kant 1795-1945', [1947] 9 *The Journal of Politics* 10, 18.

<sup>26</sup> Cavallar, *Kant and International Right*, 50.

<sup>27</sup> Kant, Immanuel, 'The Metaphysics of Morals', translated by Nisbet, H.B., in Reiss, H. (ed), *Kant – Political Writings* (2<sup>nd</sup> edition, Cambridge University Press, 1990), 133.

<sup>28</sup> The legitimitary function of reason is also stressed by Lutz-Bachmann, 60.

<sup>29</sup> Kant, 'The Metaphysics of Morals', 174.

<sup>30</sup> Kant, 'Perpetual Peace', translated by Nisbet, H.B., in Reiss, H. (ed), *Kant – Political Writings* (2<sup>nd</sup> edition, Cambridge University Press, 1990), 104. Of course Klenner, Hermann, 'Kants Entwurf 'Zum ewigen Frieden' – Illusion oder Utopie?', [1996] 50 *Neue Justiz* 1, 3 f. is right in stressing a second – for our purposes less important – Kantian perspective on peace: the perspective of the philosophy of history.

<sup>31</sup> Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 245 f.

<sup>32</sup> Lutz-Bachmann, 60 f.

<sup>33</sup> Geismann, Georg, 'World peace: rational idea and reality. On the principles of Kant's political philosophy', in Oberer, H. (ed), *Kant. Analysen – Probleme – Kritik*, vol. 2 (Königshausen & Neumann, Würzburg, 1996), 266, 283.

<sup>34</sup> Friedrich, 19; Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 246; Klenner, 3; Lutz-Bachmann, 61.

<sup>35</sup> Cavallar, *Kant and International Right*, 51.

- (1) No conclusion of peace shall be considered valid as such if fit was made with a secret reservation of the material for a future war.<sup>36</sup>
- (2) No independently existing state, whether it be large or small, may be acquired by another state by inheritance, barter, purchase or gift.<sup>37</sup>
- (3) Standing armies (*miles perpetuus*) will gradually be abolished altogether.<sup>38</sup>
- (4) No national debt shall be contracted in connection with the external affairs of the state.<sup>39</sup>
- (5) No state shall forcibly interfere in the constitution and government of another state.<sup>40</sup>
- (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.<sup>41</sup>

In fact, for the most of them there is little need for explanation and even at this stage of the peace treatise the affinity to 21<sup>st</sup> century international law (and international politics) is astoundingly evident. Stating that no separate state shall be capable of being acquired by another state the second preliminary article foresees one of the UN Charter's leading principles: the principle of self-determination.<sup>42</sup> Kant's own explanatory notes elucidate that even more: 'It [i.e. the state] is a society of men, which no-one other than itself can command or dispose of.'<sup>43</sup> Although the UN Friendly Relations Declaration adds some details, the underlying idea is well recognisable:<sup>44</sup> 'all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.'

The spirit of the third preliminary article seems to have found its counterpart in modern international law, too, without however having the status of a principle. In Art 11(1) UNC the Charter itself recognises disarmament within its plan for cooperation in the maintenance of international peace and security.<sup>45</sup> And when in 1979 the General Assembly agreed that 'genuine and lasting peace can be created only through the effective implementation of the security system provided for in the Charter of the United Nations and through the speedy and substantial reduction of arms and armed forces by international agreement [...] leading ultimately to general and complete disarmament'<sup>46</sup> the ideology of the UN seems to coincide with Kantian postulations. This congruency is *a fortiori* true with regard to the

<sup>36</sup> Kant, 'Perpetual Peace', 93.

<sup>37</sup> *Ibid.*, 94.

<sup>38</sup> *Ibid.* One of the early predecessors in this demand was Thomas More in his famous *Utopia* (Yale University Press, New Haven, 2001), 22.

<sup>39</sup> Kant, 'Perpetual Peace', 95.

<sup>40</sup> *Ibid.*, 96.

<sup>41</sup> *Ibid.*

<sup>42</sup> Covell, Charles, *Kant and the Law of Peace – A Study in the Philosophy of International Law and International Relations* (Macmillan Press, London, 1998), 173; Höffe, Otfried, 'Völkerbund oder Weltrepublik?', in Höffe, O. (ed), *Immanuel Kant – Zum ewigen Frieden* (Akademie Verlag, Berlin, 1995), 109, 117.

<sup>43</sup> Kant, 'Perpetual Peace', 94.

<sup>44</sup> GA Res. 2625 (XXV), October 24, 1970 (Declaration on Principles of International Law, Friendly Relations, and Co-Operation Among States in Accordance with the Charter of the United Nations).

<sup>45</sup> See for the UN agenda on disarmament Krause, Keith, 'Disarmament', in Weiss, T.G. and Davis, S. (eds), *The Oxford Handbook on the United Nations* (Oxford University Press, 2007), 287.

<sup>46</sup> GA Res. 34/83, December 11, 1979.

fifth preliminary. Its similarity to the non-intervention clause in Art 2 (4) of the Charter of the United Nations is salient.<sup>47</sup>

The sixth preliminary article, finally, defines the boundaries of legitimate warfare. The fact that not the allowance for confidence during a future peace but mainly considerations of humanity constituted the motivating rationale of the Geneva Conventions notwithstanding, spiritual similarities between the Conventions and Kant's sixth article can hardly be denied. That in practice, the international state community has failed to put at least half of the Kantian requirements into effect is another matter.<sup>48</sup> Instead of abolishing standing armies, even the UN Charter itself relies on the military forces of its member states, when they are obliged by Art 43 UNC to put their armed forces at the disposal of the UN organs should the Security Council require so. When, during the cold war period, the UN did not succeed in stopping the arms race, the financial basis for which – in violation of the fourth preliminary article – often were debts,<sup>49</sup> deficiencies of implementation in international practice were openly displayed. Even the fifth preliminary article, seeming closest to the status quo in theory, in practice reveals a weak degree of implementation as several examples – probably the most recent one being the US invasion in Iraq – illustrate.<sup>50</sup>

## 2. The Definitive Articles

Whereas the preliminary articles state prohibitions the definitive articles lay down positive obligations. They offer the positive conditions for peace,<sup>51</sup> by prescribing three requirements.

- (1) The civil constitution of every state shall be republican.<sup>52</sup>
- (2) The right of nations shall be based on a federation of free states.<sup>53</sup>
- (3) Cosmopolitan right shall be limited to conditions of universal hospitality.<sup>54</sup>

In three short articles Kant sketches the leading principles of his entire theory of public law.<sup>55</sup> As a guideline Kant posits: '[A]ll men who can at all influence one another must adhere to some kind of civil constitution.'<sup>56</sup> In short: the non-legal state of nature has to be overcome in all possible relations. Therefore the nation state (the relations between individuals – first definitive article), the international peace federation (the relation between states – second definitive article) and cosmopolitan law (the relation between individuals and foreign states – third definitive article) constitute the three levels of constitutional order for men, which are necessary to the idea of perpetual peace.<sup>57</sup>

<sup>47</sup> Laberge, Pierre, 'Kant on Justice and the Law of Nations', in Mapel, D.R. and Nardin, T. (eds), *International Society – Diverse Ethical Perspectives* (Princeton University Press, Princeton, 1998), 82, 94.

<sup>48</sup> Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 256. Immediately after the Second World War Friedrich's conclusion leaves little hope for the Kantian project: 'Now it can be readily seen that virtually none of these conditions are fulfilled at the present time. [...] it is apparent that no time in recent centuries has been as unpromising in terms of these conditions as the present moment.' (Friedrich, 19).

<sup>49</sup> Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 256.

<sup>50</sup> *Ibid.* with further examples.

<sup>51</sup> Klenner, 3.

<sup>52</sup> Kant, 'Perpetual Peace', 99.

<sup>53</sup> *Ibid.*, 102.

<sup>54</sup> *Ibid.*, 105.

<sup>55</sup> Lorz, Ralph Alexander, 'Die dauerhafte Aktualität des Ewigen Friedens – Neuere Entwicklungen zur Interpretation der Friedensschrift Kants', [1998] 37 *Der Staat* 75, 78.

<sup>56</sup> Kant, 'Perpetual Peace', 98 in note \*.

<sup>57</sup> Cavallar, *Kant and International Right*, 52; Friedrich, 21; see also the explanatory note by Kant, 'Perpetual Peace', 98 note \*.

On the first level, the nation state, republicanism is the order of choice. Although the terminology seems rather uncommon, Kant's republicanism can be equated with what in today's terms would define a representative democratic constitutional order.<sup>58</sup> Kant gives two reasons for the primacy of republicanism. Hidden in an accessory sentence, Kant's first reason seizes on an idea which in some depth has been dealt with in other writings: the republican constitution is 'the only constitution that can be derived from the idea of an original contract, upon which all rightful legislation of a people must be founded'.<sup>59</sup> Kant's second argument rests on the assumed tendency of republicanism to promote peace: 'The republican constitution [...] also offers a prospect of attaining the desired result, i.e. perpetual peace.'<sup>60</sup> Kant thought, that, if a declaration of war had to be consented by those who would suffer from it and would have to bear its costs: the citizens – as necessary under a republican constitution –, little of the war-proneness of absolutist regimes would persist.<sup>61</sup> On the second level, the interstate relations, Kant clearly goes back to its predecessors Abbé Saint Pierre and Rousseau, supporting the idea of a cooperative structure between states at least similar to an international organisation – a structure 'extending gradually to encompass *all* states and thus leading to perpetual peace'.<sup>62</sup> Without at this stage clarifying the scholarly struggles about what exactly the Kantian formula 'federalism of free states' means, it is nonetheless apparent that for a Kantian theory of international organisations the second definitive article is the keynote.<sup>63</sup> On the third level finally, Kant envisages an individual right under international law to legally regulate the possible relations between individuals and foreign states. The right entailed in the third definitive article is, however, a narrow one.<sup>64</sup> It is 'the right of a stranger not to be treated with hostility when he arrives on someone else's territory'<sup>65</sup>; a right to visit (*Besuchsrecht*), but no guest's right (*Gastrecht*).

<sup>58</sup> Friedrich, 22 f.; Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 246; the element of representation is often overlooked, not so however by Magnis-Suseno, Franz, 'Nail of the World or Umbrella of reason? Javanese Ideas on Power and Immanuel Kant's Republicanism', in Puri, B. and Sievers, H. (eds), *Terror, Peace, and Universalism – Essays on the Philosophy of Immanuel Kant* (Oxford University Press, 2007), 66, 69.

<sup>59</sup> Kant, 'Perpetual Peace', 99 f.

<sup>60</sup> *Ibid.*, 100.

<sup>61</sup> *Ibid.* Drawing upon this famous argument, international political theory has developed what has become known as "the theory of democratic peace" or "liberal peace theory". The basic thesis of this approach is, that democracies do not go to war (with each other), see especially the seminal two-part essay by Michael Doyle: 'Kant, Liberal Legacies, and Foreign Affairs', [1983] 12 *Philosophy & Public Affairs* 205 and 323. Cp. for further debate, *inter alia*: David Singer and Melvin Small, 'The War-Proneness of democratic Regimes, 1816-1965', [1976] 1 *The Jerusalem Journal of International Relations* 50; Vesna Danilovic and Joe Clare, 'The Kantian Liberal Peace (Revisited)', [2007] 51 *American Journal of Political Science* 397; John R. Oneal and Bruce Russett, 'The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885-1992', [1999/2000] 52 *World Politics* 1; David Garnham, 'War-Proneness, War-Weariness and Regime Type: 1816-1980', [1986] 23 *Journal of Peace Research* 279.

<sup>62</sup> Kant, 'Perpetual Peace', 104.

<sup>63</sup> Friedrich, 26.

<sup>64</sup> Bielefeldt, Heiner, 'Towards a Cosmopolitan Framework of Freedom: the Contribution of Kantian Universalism to Cross-Cultural Debates on Human Rights', [1997] 5 *Jahrbuch für Recht und Ethik* 349, 351; Hackel, Volker Marcus, *Kants Friedensschrift und das Völkerrecht* (Duncker & Humblot, Berlin, 2000), 190; Kleingeld, Pauline, 'Kants politischer Kosmopolitismus', [1997] 5 *Jahrbuch für Recht und Ethik* 333, 337.

<sup>65</sup> Kant, 'Perpetual Peace', 105.



#### IV. The United Nations vs. Kantian State Federalism

The 200<sup>th</sup> anniversary of *Perpetual Peace* has launched a revival of the discussion on Kantian international political philosophy.<sup>66</sup> Although the beginning of this ‘startling comeback’<sup>67</sup> at the same time ended the first fifty years of United Nations practice, connections have hardly ever been drawn and comparisons have seldom been attempted.<sup>68</sup> The following part intends to challenge this indifference towards a comparative inquiry and will examine analogies and differences of the United Nations Organisation and Kantian state federalism in respect of their respective goals, the characteristics of their members, their organisational structure and their competences.

##### 1. Objectives

###### a) Global Peace – the Common Goal

Surprisingly, *Perpetual Peace*, although similar to contemporary peace treaties in composition and form, contains no preamble setting out the intentions of the contracting parties. Systematic considerations and the title of the philosophical sketch, however, leave little doubt about the goal of its drafter: a plan for perpetual peace. While only a footnote in *Perpetual Peace* alludes that it is the ‘state of war [...] which it is precisely the aim to become free of here’,<sup>69</sup> the later work *The Metaphysics of Morals* names perpetual peace ‘the supreme political good’<sup>70</sup> and states in clear terms that ‘this task of establishing a universal and lasting peace is not just a part of the theory of right within the limits of pure reason, but its entire ultimate purpose’.<sup>71</sup> As a part of the Kantian doctrine of rights

<sup>66</sup> For recent publications in relation to the anniversary see Geismann, Georg, ‘Nachlese zum Jahr des ‘ewigen Friedens’, [1996] 3 *Logos*, 317 and Lorz, ‘Die dauerhafte Aktualität des Ewigen Friedens – Neuere Entwicklungen zur Interpretation der Friedensschrift Kants’, both with further references; See also Bialas, Volker and Haessler, Hans-Jürgen (eds), *200 Jahre Kants Entwurf ‘Zum ewigen Frieden’* (Koenigshausen & Neumann, Würzburg, 1996); Habermas, Jürgen, ‘Kant's Idea of Perpetual Peace With the Benefit of Two Hundred Years' Hindsight’, in Bohman, J. and Lutz-Bachmann, Matthias (eds), *Perpetual Peace – Essays on Kant's Cosmopolitan Ideal* (MIT Press, London, 1997), 113; Klenner, ‘Kants Entwurf ‘Zum ewigen Frieden’ – Illusion oder Utopie?’; Schmidt, Hajo, ‘Ein bedenkenswertes Jubiläum - Kants Traktat “Zum ewigen Frieden” (1795)’, in Birckenbach, M., Jäger, U. and Wellmann, C. (eds), *Jahrbuch Frieden 1995* (Beck, München, 1995), 17; Lutz-Bachmann, Matthias and Bohman, James (eds), *Frieden durch Recht. Kants Friedensidee und das Problem einer neuen Weltordnung* (Suhrkamp, Frankfurt am Main, 1996); Laberge, Pierre, Lafrance, Guy and Dumas, Denis (eds), *L'Année 1795: Kant, Essai sur la Paix* (J. Vrin, Paris, 1997).

<sup>67</sup> Cavallar, Georg, ‘Kantian perspectives on democratic peace: alternatives to Doyle’, [2001] 27 *RIS* 229, and Galston, William A., ‘What is living and what is dead in Kant's Practical Philosophy?’, in Beiner, R. and Booth, W.J. (eds), *Kant & Political Philosophy – The Contemporary Legacy* (Yale University Press, New Haven, 1993), 207.

<sup>68</sup> The most comprehensive study on the subject is Höffe, ‘Ausblick: Die Vereinten Nationen im Lichte Kants’. From an earlier stage see also Friedrich, [1947] 9 *The Journal of Politics* 10. The subject is also touched upon by Lutz-Bachmann, 59; Laberge, *passim* and Schwarz, Wolfgang, ‘Kant's Philosophy of Law and International Peace’, [1962] 23 *Philosophy and Phenomenological Research* 71, 76 ff. and Capps, Patrick, ‘The Kantian Project in Modern International Theory’, [2001] 12 *EJIL* 1003, 1004. Unfortunately no legal scholar has tackled the subject so far in a more comprehensive article.

<sup>69</sup> Kant, Immanuel, ‘Zum ewigen Frieden’, in Klemme, H. (ed), *Immanuel Kant – Über den Gemeinspruch/Zum ewigen Frieden* (Meiner, Hamburg, 1992), 349 in fn.\*. See Kant, ‘Perpetual Peace’, 99 where Nisbet translates somewhat more freely ‘in a state of nature, there would be a risk of war, which it is precisely the aim of the above articles to prevent.’

<sup>70</sup> Kant, ‘The Metaphysics of Morals’, 175.

<sup>71</sup> *Ibid.*, 174.

*Perpetual Peace*, too, is designed to serve this moral-political purpose: ‘unlimited and at the same time unconditional peace’.<sup>72</sup>

In most of these aspects the Charter of the United Nations reads like a 20<sup>th</sup> century restatement of the Königsberg peace essay:<sup>73</sup> ‘to save succeeding generations from the scourge of war’, ‘[to] live together in peace’, ‘to unite our strength to maintain international peace and security’ are only some of the ambitious goals specified in the UN-Charter preamble. In Art 1(1) UNC the maintenance of international peace and security even heads the list of the organisation’s purposes, the second paragraph of the same article immediately recalls ‘to take [...] measures to strengthen universal peace’ and the prohibition of the use of force in Art 2(4) UNC is almost tantamount to the Kantian call ‘There shall be no war!’<sup>74</sup> <sup>75</sup> Taking peace as the common goal for given at this point, though, would be jumping at conclusions. Given the possible distinction between *inter-state and intra-state peace* and the academic divide between *positive and negative conceptions of peace* one doubt remains to be cleared up: Does the assumption of a shared aim hold even beyond a mere accordance of wording?

#### b) Global Peace – an Interstate Concept?

Since *Perpetual Peace* is a theory of international right, the peace it endorses is (mainly) a peace *inter nationes*, a peace between states. The reason for this is that Kant’s theory faces a situation in which there is no need to pacify the relation between individuals anymore: they have already left the state of nature when they formed nation states and have entered a legal civil constitution. But not so have states. For states already being legally structured, at least internally, the state of nature remaining to be overcome is not an entirely lawless state. Rightly, Höffe characterises it as a residual state of nature (*Rest-Naturzustand*)<sup>76</sup> which has to be resolved by an association of states for the protection of their rights (not individual rights)<sup>77</sup>. Aiming at ‘*international peace and security*’<sup>78</sup>, the UN Charter, at least in theory, acknowledges this inter-national scope of the Kantian conception.<sup>79</sup> In practice however, conflicts the UN have dealt with did not always transcend the national borders and even the respective resolutions of the Security Council have occasionally done without the reference to a particular cross-border dimension of the threat to peace. In fact many times, the resolution of inner state conflicts – mostly involving severe violations of human rights – has constituted the focal point and the primary concern of Security Council measures; even

<sup>72</sup> Höffe, ‘Ausblick: Die Vereinten Nationen im Lichte Kants’, 245; similar Kriele, Martin, ‘Menschenrechte und Friedenspolitik’, in Börner, B. (ed), *Einigkeit und Recht und Freiheit* (Heymanns, Köln, 1984), 661, 662: ‘a lasting world peace’.

<sup>73</sup> Höffe, ‘Ausblick: Die Vereinten Nationen im Lichte Kants’, 250; Lorz, 97 und Negretto, Gabriel L., ‘Kant and the Illusion of Collective Security’, [1993] 46 *Journal of International Affairs* 501, 502; Schmidt, 17.

<sup>74</sup> Kant, ‘The Metaphysics of Morals’, 174.

<sup>75</sup> Laberge, 94.

<sup>76</sup> Höffe, ‘Völkerbund oder Weltrepublik?’, 115.

<sup>77</sup> One exception of course is the relation of individuals to foreign states and the cosmopolitan right.

<sup>78</sup> See, e.g., Art 1(1), Art 2(3), (6), Art 11(1), (2), (3), Art 12(2), Art 15(1) UNC (italics added) to name only some. Here, it should be noted that Art 1(1) UNC refers to ‘universal peace’. A universal peace, however – since universal – excludes the limitation on inter-state relations and will therefore include peace on an innerstate, inter-individual level. From a Kantian perspective it would have been preferable to stick to the expression ‘international peace and security’ even though the drafters probably did not intend a different meaning.

<sup>79</sup> Frowein, Jochen Abr. and Krisch, Nico, ‘Art 39 UNC’, in Simma, n. 7; Cot, Jean-Pierre and Pellet, Allain, *La Charte des Nations Unies* (Economica, Paris, 1985), 32.

if those internal crises often also had an impact on international relations, be it because a possible interference by third parties was to be expected<sup>80</sup> or because of tremendous refugee flows.<sup>81</sup> Whereas in these cases the UN relied on a so-called ‘double strategy’<sup>82</sup> and dealt with internal conflicts under the pretext of the prevention of regional destabilisation that could possibly result in an interstate conflict, in December 1993 the Security Council blew its cover and in Resolution 794 acknowledged that ‘the magnitude of the human tragedy caused by the conflict in Somalia [...] constitutes a threat to international peace and security’.<sup>83</sup> Neither in the debates preparing this resolution nor in the text of the resolution itself reference to international consequences or the conflict’s effect on regional stability was made, peace was considered to be threatened by the internal situation as such.<sup>84</sup> This concept has been applied several times without the principled opposition of any member state.<sup>85</sup> Thus, the emphasis within the UN notion of peace shifts away from the requirement of internationality towards a concept including the absence of human suffering from the use of force in inter- and intra-state relations – contrary to the strict wording of the Charter, contrary to Kant’s philosophical argument. Thereby the UN clearly deviates from its philosophical groundwork. With regard to *Perpetual Peace*, peace is inter-state peace.<sup>86</sup>

### c) Global Peace - a Positive Concept?

In the academic divide between positive and negative notions of peace the Kantian proposal clearly favours the former.<sup>87</sup> It doesn’t confine itself to the elimination of military force in international relations, as a conception based on a negative concept of peace would. Although terms like ‘putting “an end to all hostilities”’<sup>88</sup> and ‘seeking the absence of “all [...] reasons for a future war”’<sup>89</sup> appear to imply that the absence of war (understood as an armed conflict) satisfies Kantian criteria, Kant applies a broad notion of war, that is not limited to military strife but distinguishes between two different kinds of violations of right: active injuries (*laesio*), a ‘legal civil state’ provided, and injuries *per statum* in the state of nature.<sup>90</sup> For Kant even these injuries *per statum* constitute a state of war, a lawless state of

<sup>80</sup> Frowein and Krisch, n. 18 consider the UN intervention in the Yugoslav War in 1991 to be such a case, see SC Res. 713 of September 25, 1991.

<sup>81</sup> This was the case in 1991 when the UN took measures to protect the Kurdish population in Northern Iraq, see SC Res. 688 of April 5, 1991.

<sup>82</sup> De Wet, Erika, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford, 2004), 150 ff.

<sup>83</sup> SC Res. 794 of 3 December 1992.

<sup>84</sup> Frowein and Krisch, n. 18; De Wet, 156 f.

<sup>85</sup> See, e.g., SC Res. 929 of June 22, 1994 (on Rwanda) and SC Res. 1078 of November 9, 1996 (on Zaire); further SC Res. 1296 of April 19, 2000; SC Res. 1314 of August 11, 2000.

<sup>86</sup> If this deviation can in cases of humanitarian interventions nonetheless be justified applying Kantian assumptions is currently discussed between Kant scholars, see, e.g. Cavallar, *Kant and International Right*, 81-93; Cavallar, Georg and Reinisch, August, ‘Kant, Intervention and the Failed State’, in Byrd, S. and Hruschka, J. (eds), *Kant and Law* (Ashgate, Aldershot, 2006), 431; Habermas, ‘Kant’s Idea of Perpetual Peace With the Benefit of Two Hundred Years’ Hindsight’, 127-134; Habermas, Jürgen, ‘Bestialität und Humanität’, *Die Zeit* No. 18/1999 (April 29, 1999), 1; Jaberg, Sabine, *Kants Friedensschrift und die Idee kollektiver Sicherheit – Eine Rechtfertigungsgrundlage für den Kosovo-Krieg der Nato?* (IFSH, Hamburg, 2002), 42 ff., Lange-Bertalot, *passim* and Tesón, Fernando R. ‘The Kantian Theory of International Law’, [1992] 92 *Columbia Law Review* 53, 74-84 and *passim*; for a critical review of the latter’s position see Capps, *passim*.

<sup>87</sup> Lutz-Bachmann, 61 f.

<sup>88</sup> Kant, ‘Perpetual Peace’, 93.

<sup>89</sup> *Ibid.*

<sup>90</sup> See Cavallar, *Kant and International Right*, 53.

nature in which ‘man (or an individual people) [...] robs me of any such security and injures me by this very state in which he coexists with me. He may not have injured me actively (*facto*), but he does injure me by the very lawlessness of his state (*statu iniusto*), for he is a permanent threat to me’.<sup>91</sup> Given this wide notion of war, which rather resembles what in political theory is often referred to as the so-called ‘security dilemma’,<sup>92</sup> a Kantian peace entails more than the factual absence of the use of force. In Kantian terms peace necessarily implies a state of lawfulness, a legal relation between possibly conflicting parties, in short: the rule of law.<sup>93</sup> In sum, his concept of peace not only prohibits the use of force but encompasses the duty to establish a legal order maintaining the conditions of future peace. Restricting one’s examination to Art 2(4) UNC, one might be likely to conclude that the UN Charter lags behind this Kantian approach, since Art 2(4) UNC only guarantees the absence of a threat or use of force against the territorial integrity and the political independence of a State and therefore reads like a classical formulation of negative peace.<sup>94</sup> The establishment of conditions making future or lasting peace possible is not contained in this provision. A consideration of the Preamble, Art 1(1), (2), (3) UNC and of several statements of the General Assembly,<sup>95</sup> though, increases the degree of overlap and urges an interpretation towards a positive peace concept.<sup>96</sup> The intention to ‘bring about by peaceful means [...] adjustment or settlement of international disputes or situations which might lead to a breach of the peace’ (Art 1(1) UNC), ‘to develop friendly relations among nations [...] to strengthen universal peace’ (Art 1(2) UNC) and ‘to achieve international co-operation’ (Art 1(3) UNC) proves that to the UN Charter, too, peace is more than the mere absence of armed conflicts.<sup>97</sup> The debate about the Charter of the United Nations as a ‘world constitution’<sup>98</sup> and the intention of the Charter, expressed in its preamble, to ‘establish conditions under which [...] respect for the obligations arising from treaties and other sources of international law can be maintained’, constitute further hints to the UN Charter’s allegiance to the Kantian notion of peace as a lawful state between nations, banning the use of force and safeguarding the conditions of future peace.

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<sup>91</sup> Kant, ‘Perpetual Peace’, 98 note \*.

<sup>92</sup> Jaberg, 11.

<sup>93</sup> Cavallar, *Kant and International Right*, 53; Habermas, Jürgen, ‘Eine politische Verfassung für die Weltgesellschaft?’, [2005] *Kritische Justiz* 222.

<sup>94</sup> Wolfrum, Rüdiger, ‘Art 1 UNC’, in Simma, n. 8.

<sup>95</sup> In several resolutions the GA has named various components of peace and has stressed the close link between international peace and disarmament, decolonisation and development as conditions for the former. See, e.g., GA Res. 290 (IV), Dec. 1, 1989; 380 (V), Nov. 17, 1950; 1236 (XII), Dec. 14, 1957; GA Res. 33/73, Dec. 15, 1978.

<sup>96</sup> At this stage it is however important to note that this is only one possible positive notion of peace and that although both are positive concepts – as I will argue below – the Kantian position and the UN position differ slightly.

<sup>97</sup> Wolfrum, ‘Art 1 UNC’, n. 9.

<sup>98</sup> See for a comprehensive discussion Dupuy, Pierre-Marie, ‘The Constitutional Dimension of the Charter of the United Nations Revisited’, [1997] 1 *Max Planck Yearbook of the United Nations* 1; Fassbender, Bardo, ‘The United Nations Charter as Constitution of the International Community’, [1998] 36 *Columbia Journal of Transnational Law* 529; Franck, Thomas M., ‘Is the UN Charter a constitution?’, in Frowein, J. (ed), *Verhandeln für den Frieden* (Springer, Berlin, 2003), 95; Macdonald, Ronald St.J., ‘The United Nations Charter: Constitution or Contract?’, in Macdonald, R.St.J and Johnston, D.M. (eds), *The Structure and Process of International Law* (Martinus Nijhoff Publishers, The Hague, 1983), 889.

## d) Peace and Beyond – UN Charter Purposes and Kantian Criticism

Yet, even if by far the most important purpose,<sup>99</sup> the establishment, preservation and development of world-wide peace is only one among the San Francisco objectives, the development of friendly relations among nations, the promotion of the economic and social advancement of all people, the achievement of international cooperation and the harmonisation of the actions of the signing nations setting up a periphery, which is open to criticism from a *Perpetual Peace* perspective. All of these purposes lack a corresponding legal-moral duty that would justify their implementation in a legal organisation as the United Nations Organisation, since for Kant they don't seem to be essential to the preservation of peace.<sup>100</sup> Within the Kantian system of philosophy they form a part of the doctrine of virtue, but they do not belong to the doctrine of rights. All these purposes may hold moral value, but they are not part of the moral duties the performance of which peoples (or states) owe each other. This is nothing a person (or on an international level: a state) is entitled to. From a strict Kantian perspective these purposes are misplaced. Thus, the Charter advocates a positive notion of peace, but in doing so it exceeds the Kantian conception. In the end however, this difference in objective comes down to a difference in judgment: If Kant had considered friendly relations to be essential for the preservation of peace, his theory would have known a corresponding legal duty. An assessment of the correctness of this judgment cannot be done here and is better left to a historical inquiry.

## 2. Members

Read in conjunction with the Kantian demand for a 'federation of free states', the first definitive article 'The civil constitution of every state shall be republican'<sup>101</sup> doesn't only hold the criterion for inner state legitimacy but sketches out the internal composition of the Kantian world league.<sup>102</sup> If justice requires every state to be republican, contemporarily spoken: to have a representative democratic constitutional order, only a union of republics can be a just association of states. Hence, 'the only just international arrangement is an alliance of liberal democracies'.<sup>103</sup> Accordingly, for reasons of justice and legitimacy, the members of the Kantian state federation are to be thought of as republican.<sup>104</sup> However, even from a non-normative perspective republicanism proves important to the Kantian state association, since it takes the single republic as a starting point, serving as a model for other states: 'if by good fortune one powerful and enlightened nation can form a republic [...], this will provide a focal point for a 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'.<sup>105</sup> So, over time more and more states will follow the model of the

<sup>99</sup> See, e.g. Wolfrum, 'Art 1 UNC', n. 14 who speaks of the maintenance of international peace and security as 'the overarching purpose of the United Nations'.

<sup>100</sup> See for a broader argument Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 257 ff.

<sup>101</sup> Kant, 'Perpetual Peace', 99.

<sup>102</sup> Tesón, 'The Kantian Theory of International Law', 60 ff.

<sup>103</sup> Tesón, 'Kantian International Liberalism', in Mapel, D. and Nardin, T. (eds), *International Society – Diverse Ethical Perspectives* (Princeton University Press, 1998), 101, 107 f.

<sup>104</sup> Habermas, 'Kant's Idea of Perpetual Peace With the Benefit of Two Hundred Years' Hindsight', 131; Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 248 ff., 254; Tesón, 'Kantian International Liberalism', 107.

<sup>105</sup> Kant, 'Perpetual Peace', 104.

‘powerful and enlightened nation’ and adopt republican principles until the republican alliance extends to all states. Since republics are said to be peaceful, they will then join the other republican states for a peace association among states.<sup>106</sup> At this point it is important to note that, according to Kant, states must not be forced to enter the state federation. Therefore it is exactly and exclusively this imitation of the republican ‘model state’ which leads to the union of states. With this in mind, republicanism seems to be not only a normatively necessary requirement of justice but an empirical condition of a universal and peaceful association of free states.<sup>107</sup>

International legal practice has, over time, left this Kantian path. Whereas in 1919 the Covenant establishing the League of Nations still upheld the enlightened ideal of a union of republics and provided: ‘Any *fully self-governing* State, Dominion or Colony [...] may become a Member of the League’ (Art 1(2), italics added), in state practice this provision turned out to be subject to constant breach and disregard.<sup>108</sup> In contrast to the League of Nations Covenant, the drafters of the San Francisco Charter decided to dispense with any requirement of homogeneity concerning the de facto composition of its contracting states altogether,<sup>109</sup> since they agreed that an admission criterion referring to the internal political structure of a state would amount to an unlawful interference in its internal affairs.<sup>110</sup> They adhered to a minimal standard and in Art 4(1) UNC replaced the requirement of a democratic structure by the formulation ‘peace-loving states’ – a wording, the interpretation of which in time has undergone considerable changes.<sup>111</sup> Whereas in the early stages the term ‘peace-loving states’ was primarily including all states actively opposing the Axis powers during the Second World War, later on the peace-loving character of a state has occasionally even been judged by reference to the Kantian criterion: a democratic government.<sup>112</sup> Mostly however the criteria for membership have been interpreted liberally for the sake of a UN as universal as possible and ‘the criterion ‘peace-loving State’ was of no practical importance at all’<sup>113</sup> – a thesis that is given further proof by the fact that international conflicts still exist, although the throughout peace-loving UN have reached a state of entire inclusion.

<sup>106</sup> See for this reasoning Höffe, ‘Ausblick: Die Vereinten Nationen im Lichte Kants’, 247 ff.

<sup>107</sup> Friedrich, 27 considers the United States to have taken the position of the one enlightened role model nation for the UNO. Friedrich, 26 and Höffe, ‘Völkerbund oder Weltrepublik?’, 113 provide a further, in my mind rather implausible, rationale for the republican nature of the member states by interpreting Kants referral to ‘free states’ in the second definitive article to imply their republican status. In their opinion ‘free’ refers to the innerstate structure of the confederated states (republicanism). However, republicanism is not the cause for states being free but for their citizens being granted freedom! Against Friedrich also Laberge, 95.

<sup>108</sup> Friedrich, 24 f.; Negretto, 514. further commentators suggesting this interpretation of the quoted provision are Walters, Francis Paul, *A History of the League of Nations* (Oxford University Press, 1967), 44; Wehberg, Hans, *Die Völkerbundsatzung* (3<sup>rd</sup> edition, Hensel, Berlin, 1929), 29; Göppert, Otto, *Der Völkerbund* (Kohlhammer, Stuttgart, 1938), 81 and Verdross, Alfred, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer, Berlin, 1926), 119 et seq.

<sup>109</sup> This difference between Kant’s proposal and the UN is also noted by Friedrich, 25; Habermas, ‘Kant’s Idea of Perpetual Peace With the Benefit of Two Hundred Years’ Hindsight’, 131; Höffe, ‘Ausblick: Die Vereinten Nationen im Lichte Kants’, 254; Wight, Martin, ‘An anatomy of international thought’, [1987] 13 *RIS* 221, 225.

<sup>110</sup> Ginther, Konrad, ‘Art 4(1) UNC’, in Simma, n. 21.

<sup>111</sup> According to Luard, Evan, *A History of the United Nations*, vol. 1, (Macmillan Press, London, 1982), 361 these changes were subject to the political arbitrariness of the Security Council powers.

<sup>112</sup> Ginther, n. 20 ff.; Goodrich, Leeland M., Hambro, Edvard and Simons, Anne Patricia, *Charter of the United Nations* (3<sup>rd</sup> edition, Columbia University Press, New York, London, 1969), 90.

<sup>113</sup> Ginther, n. 22.

Today as a matter of fact the UN have united *all* states,<sup>114</sup> regardless of their internal structure and not even all of the permanent members of the Security Council would be able to meet democratic standards. Thus it is clear that differences in legitimation among member states do not effect their legal position within the United Nations Organisation at all. Neither does domestic justice provide a criterion for access to the institution, nor has it any effect on the states' rights within UN organs. In the view of some scholars the UN's abstraction from legitimacy requirements is worthy of critique:

*[T]he Kantian theory [...] necessitates amendment of the conditions of admission and permanence in the United Nations. Articles 4 and 6 of the Charter of the United Nations should be amended to include the requirement that only democratic governments that respect human rights should be allowed to represent members, and that only democratic states will be accepted as new members.*<sup>115</sup>

Yet, it has to be kept in mind that a strictly applied criterion, be it 'peace-loving' or 'democratic', might run the risk of getting into conflict not only with the UN prohibition of interference into the domestic domain – as the drafters rightly realised – but with another guiding UN principle: the equality of states, since 'every substantial concretion of the concept of a state necessarily contradicts the equality principle'.<sup>116</sup> Somewhat provoking, one might ask nonetheless: if only a democratic constitution is morally justifiable, why should the principle of equality still be upheld, why interference for the sake of the establishment of justice still be tabooed? Here a simple answer does not exist.

### 3. Structure and Competences

The probably most controversial questions arise under a structural comparison. Does Kant's idea support a loose federation of free states or a uniform world state? Does approaching eternal peace implicate giving up on the idea of nation states for the sake of statehood on a global level or is a compulsory federal world republic leaving nation states untouched the right way? How is the system of the United Nations to be evaluated in light of these categories? Has it already exceeded the philosophical groundwork or does it still fall behind the moral imperative of reason?

#### a) A Federation of Free States – Kant's Ambiguous Statements

Kant – directly and indirectly – discusses three possible alternatives for the structure of his peace league. The universal monarchy as a homogeneous world state, the world republic as an extremely minimal world state and finally the league of nations as an ultra-minimal world state.<sup>117</sup> The first alternative, the homogenous world state, is clearly rejected by Kant. In lack of a moral requirement for the dissolution of the nation states – since they already provide for the legal security, which is demanded by legal morality – there is no need for

<sup>114</sup> For a complete list of UN member states see <<http://www.un.org/members/list.shtml>>. The newly emerged independent Republic of Kosovo has not yet acceded the UN and most likely won't do so for quite some time as Russia does not accept the former's independent status.

<sup>115</sup> Tesón, 'The Kantian Theory of International Law', 100.

<sup>116</sup> Frank, Joachim, 'Kants Friedenstheorie im Lichte aktueller sicherheitspolitischer Herausforderungen', 12 available at <[http://www.bmlv.gv.at/pdf\\_pool/publikationen/07\\_kft\\_frank\\_10.pdf](http://www.bmlv.gv.at/pdf_pool/publikationen/07_kft_frank_10.pdf)>.

<sup>117</sup> See Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 247 for an analysis of the options and for the terminology.

the establishment of a uniform world realm.<sup>118</sup> The choice between the remaining options however seems obscure and the academic debate about whether he considered a loose federation, a ‘*permanent and free association*’<sup>119</sup>, which ‘does not aim to acquire any power like that of a state’<sup>120</sup> – in short: a league of nations (*Völkerbund*) – or a republican association of democratic states in an ‘organisation based on coercive laws’ – in short: a world republic (*Weltrepublik*) – as the proper solution, has not yet found its way out of the juxtaposition of two rival camps.<sup>121</sup> Throughout his writings the Kantian answer to this dilemma is confusing. His remarks lack consistency and his attitude seems to be changing over time. In a comprehensive study on Kant’s philosophical peace project Georg Cavallar has shown that 1793 seems to be the turning point of Kantian thought on this issue. While overall he had clearly favoured a system including a supreme power before, his tendency changes towards a free federation after 1793.<sup>122</sup> It seems however that from *Perpetual Peace* (1795) both positions can be deduced.<sup>123</sup> Especially Kant’s earlier remarks in *Perpetual Peace* seem to support Cavallar’s argument. They clearly favour a federation of non-compulsory, non-coercive character. Demanding ‘a federation of free states’, the wording of the second definitive article itself already seems to leave no room for further interpretation. When states are entirely free within the federation, the learned league cannot have own coercive powers vis-à-vis its member states. Only a few lines below, Kant explains, that this federation is supposed to be ‘a *federation of peoples* [that] would not be the same thing as an international state.’<sup>124</sup> And he gives a reason: ‘states as such are not subject to a common legal constraint’.<sup>125</sup> Rather he envisages ‘a particular kind of league’ which ‘does not aim to acquire any power like that of a state’ and ‘does not mean that they [i.e. the confederated states] need to submit to public laws and to a coercive power’.<sup>126</sup> Even though this sounds clear enough, Kant appears to change his mind towards the end of the section. All the sudden his idea of a federation of free states remains nothing more than a ‘negative substitute’;<sup>127</sup> a substitute for the ‘positive idea of a *world republic*’<sup>128</sup> because

<sup>118</sup> Höffe, Otfried, ‘Global peace through democratization and a league of nations? Kantian Scepticism against Kant’, in Puri, B. and Sievers, H. (eds), *Terror, Peace, and Universalism – Essays on the Philosophy of Immanuel Kant* (Oxford University Press, 2007), 46, 55.

<sup>119</sup> Kant, ‘Perpetual Peace’, 127.

<sup>120</sup> *Ibid.*, 104.

<sup>121</sup> On the one hand (world-republic) Carl Joachim Friedrich, Sidney Axinn, Howard Williams, Otfried Höffe and Thomas Carson; on the other hand (league of free nations) Julius Ebbinghaus, Walter Gallie, Georg Geismann, Volker Gehrhardt, Leslie Mullholland. For detailed references see Cavallar, *Kant and International Right*, 113 with notes 1 and 2. Kleingeld, Pauline, ‘Approaching Perpetual Peace: Kant’s Defence of a League of States and his Ideal of a World Federation’, [2004] 12 *European Journal of Philosophy* 304 tries to find a reconciling midway through the camps.

<sup>122</sup> Cavallar, *Kant and International Right*, 112 ff.

<sup>123</sup> Perpetual peace seems to be the writing in which Kant lays down the arguments that will determine his later position. Two years later, in his *Metaphysics of Morals* the Kantian position does not seem to be controversial at all. There he states: ‘[T]his association must not embody a sovereign power as in a civil constitution, but only a partnership or *confederation*’ (Kant, ‘The Metaphysics of Morals’, 165) and a few pages later ‘Such a *union of several states* designed to preserve peace may be called a *permanent congress of states* [...]. In the present context however, a *congress* merely signifies a voluntary gathering of various states which can be *dissolved* at any time, not an association which, like that of the American states, is based on a constitution and is therefore indissoluble.’ (*Ibid.*, 171).

<sup>124</sup> Kant, ‘Perpetual Peace’, 102.

<sup>125</sup> *Ibid.*, 103.

<sup>126</sup> *Ibid.*, 104.

<sup>127</sup> *Ibid.*, 105.

<sup>128</sup> *Ibid.*



states ‘must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an *international state (civitas gentium)*’.<sup>129</sup> Nevertheless, Kant’s concluding remarks opt – in conformity with his introductory thesis – for the establishment of a mere league of free nations. He might not consider it to be the best, but the best possible solution.

#### b) Beyond a Free Federation – What Kant Should Have Said

Kant’s argument for this free federation is based on an analogy. He transfers the model of the state of nature to a second level:

*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 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.*<sup>130</sup>

Just like individuals escape the war-like, freedom-threatening state of nature by the conclusion of a *contractus originarius*, states have – for the sake of their own security – a moral duty to enter a legal state, again, as on the first level, based on a compact. Since according to the first definitive article the civil constitution has to be republican on the first level between individuals, an analogously built inter-state constitution would have to comply with this criterion, too. The logical conclusion of Kant’s moral reasoning would be the postulation of a republic of states, a republic of republics – an argument which Kant certainly was aware of when he honours the world republic as the positive idea, which unfortunately does not prevail. He rejects a global republican state in favour of the negative substitute: the federation of free states, the league of nations. However, the justification Kant offers for his deviation from the ‘positive idea’ turns out to be rather unKantian. His arguments are inconclusive and the question for what he has in fact said might better be followed by the question what he should have said.<sup>131</sup>

His first and central argument for the rejection of a state of peoples<sup>132</sup> is a supposedly conceptual self-contradiction. For in a state of peoples all confederated states would become one single nation, the contradiction in terms is supposed to consist in the fact that a merger of all nations into a single state would overlook the initial intention to establish a law of peoples, a law governing the relations between *different* nations.<sup>133</sup> Individually considered, this is a rather weak argument, since the initial intention might well be mistaken. Habermas suggests it is not and explains that the inconsistency Kant tries to point at follows from the fact that the citizens of a world republic would have to give up the substantial freedoms they already enjoy as members of a nation state – namely, *inter alia*,

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*, 102.

<sup>131</sup> See Carson, Thomas, ‘Perpetual Peace: What Kant should have said’, [1988] 14 *Social Theory and Practice* 173 and Marini, Giuliano, ‘Kant’s Idea of a World Republic’, in Byrd, S. and Hruschka, J. (eds), *Kant and Law* (Ashgate, Aldershot, 2006), 369, 372-375.

<sup>132</sup> Nisbet at Kant, ‘Perpetual Peace’, 102 unfortunately translates the German *Völkerstaat* in this passage with *international state* which rather supports the idea of the absence of statehood on a national level. The German *Völkerstaat* however leaves room for the domestic peoples to form states.

<sup>133</sup> Kant, ‘Perpetual Peace’, 102.

cultural, religious and political autonomy – for the safeguard of peace and civil freedoms within a peoples’ republic.<sup>134</sup> However, as Habermas correctly argues, this ignores the possibility of a shared sovereignty within a federalist multilevel state system. Not every competence would have to be transferred to the world republic; in fact the various nations could still be subject to different domestic laws, because the domestic republics could retain legislative powers in most areas. Only in what Höffe calls a ‘homogeneous world state’ the domestic state structures would be replaced by one single global state and the pre-existing nations would fuse into one. Given the abovementioned theoretical background this choice was not even up for debate.<sup>135</sup> Analogous to the *contractus originarius* between individuals, and according to the principle laid down in the first definitive article, the newly-founded entity had to be a world republic, a secondary democratic constitution which would roof the persisting national republics. The Kantian contractual rationale cannot be reconciled with and cannot lead to the assumption of a homogeneous world state, replacing statehood on a domestic level. That is why the Kantian contradiction argument cannot rule out the logical consequence of the domestic analogy: the world republic.

In the final part of the section Kant raises a second objection, leaving reason-based arguments entirely aside: The ‘negative substitute’ of a league of nations should have precedence over the ‘positive idea of a world republic’ because states are in fact unwilling to restrict their sovereignty. ‘According to their idea of international law’ existing states ‘in no way want’ a world republic, therefore ‘what is correct in thesi, they repudiate in hypothesi’.<sup>136</sup> Solely based on empirical assumptions, this argument is quite exceptional in the overall system of Kant’s philosophical thought and obviously at odds with the domestic analogy rationale of *Perpetual Peace*. In particular within the Kantian system of thought, the foundation of which is mere practical reason, it is hard to see how a theory of political justice and international right can be derived from a factual situation without falling into the trap of a naturalistic fallacy. Even understood as a mere political instruction, as a first step measure on the way to the positive idea, the argument clearly runs counter to what Kant had tried to show only two years before the publication of *Perpetual Peace* in his essay on the relation of theory and practice. There the section covering the law of peoples concludes: ‘Whatever reason shows to be valid in theory, is also valid in practice.’<sup>137</sup> Though, for the development of Kantian thought, two years seem to be a long time.

Overall, the rejection of a world republic is of rather weak persuasive force. The republic of republics remains the ideal, for the deviation from which Kant gives no compelling arguments. What Kant should have said is ‘The right of nations shall be based on a republic of republics’.<sup>138</sup>

### c) The World Republic - Characteristics and Competences

Since Kant – falsely – rejects the world republic, he provides only little information about its actual shape in *Perpetual Peace*. Returning to the domestic analogy argument I will try

<sup>134</sup> See Habermas, Jürgen, ‘Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?’, in Habermas, J. (ed), *Der gesplittene Westen* (Suhrkamp, Frankfurt am Main, 2004), 113, 126 ff.

<sup>135</sup> Lutz-Bachmann, 71.

<sup>136</sup> Kant, ‘Zum ewigen Frieden’, *loc. cit.*, 357, translation taken from Lutz-Bachmann, 73.

<sup>137</sup> Kant, ‘On the Common Saying: This May be True in Theory, but it does not Apply in Practice’, translated by Nisbet, in Reiss, H. (ed), *Kant – Political Writings* (2<sup>nd</sup> edition, Cambridge University Press, 1990), 61, 92.

<sup>138</sup> Höffe, ‘Völkerbund oder Weltrepublik?’, 115. In favour of this conclusion also Mertens, Thomas, ‘War and International Order in Kant’s Legal Thought’, [1995] 8 *Ratio Juris* 296, 309 ff. and the authors named in note 121.

to elaborate on characteristics and competences of the world republic and expand the picture beyond the abovementioned paralogism.

'The civil constitution of every state shall be republican'<sup>139</sup> – I have already argued that the analogy between the state of nature among individuals and the state of nature among states leads to the republic requirement on a world level. Therefore what is true for the domestic republic must analogously be true for the world republic. Kant's description of a republic reads as follows: 'A *republican constitution* is founded upon three principles: firstly the principle of *freedom* for all members of society [...]; secondly, the principle of the [derivation of all legal acts from,<sup>140</sup> and the] *dependence* of everyone upon a single common legislation; and thirdly, the principle of legal *equality* for everyone.'<sup>141</sup> Considering Kant's explanatory notes and his remarks in *The Metaphysics of Morals* and *Theory and Practice*,<sup>142</sup> by republican Kant referred to what we would call today a constitutional liberal democracy providing full respect for human rights. Thus a republican constitution can be characterised by four elements:<sup>143</sup>

- (1) Respect for inalienable human rights,
- (2) the principle of popular sovereignty,
- (3) Equality before the law, and
- (4) Separated public powers enforcing the abovementioned rights.

Transferring this conception to the level of a peoples' republic poses no difficulty for the elements (3) and (4): The republic of republics must have independent legislative, executive and judicial institutions exercising public power and enforcing a legal system granting equal rights and duties to each of its member states.

Likewise the second republican feature, popular sovereignty, can be applied to the global context without serious intellectual challenges. It stipulates that like citizens in a domestic order, on a global level states are entitled 'to obey no external laws except those to which [they] have been able to give [their] own consent.'<sup>144</sup> While within the domestic state all state authority is derived from the people consisting of individual persons, within the world republic the people of states has to be the holder of all state authority.<sup>145</sup> Of course, when it comes to the genesis of obligations, for Kant too, this implies neither a strict universal consensus requirement, nor direct democratic structures. Even in Kant's visionary mind, this would be utopian. Rather he imagined decisions to be made and legislative acts to be passed by elected representatives on the basis of certain majority rules, provided however that these latter rules could follow from an *contractus originarius* or *pactum sociale* as 'the test of the rightfulness of every public law'.<sup>146</sup> Hence, the validity of every constitution is not simply presupposed but has to be tested by the intellectual device of the social contract: could free and rational persons in a state of nature universally agree on this particular constitution?

<sup>139</sup> Kant, 'Perpetual Peace', 99 (italics added).

<sup>140</sup> Kant, 'On the Common Saying', 77 f.; Tesón, 'The Kantian Theory of International Law', 66.

<sup>141</sup> Kant, 'Perpetual Peace', 99.

<sup>142</sup> See esp. the footnote at Kant, 'Perpetual Peace', 99 and §§ 45 et seq. of Kant, 'The Metaphysics of Morals', 138 ff.

<sup>143</sup> See Höffe, 'Völkerbund oder Weltrepublik?', 119; Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 246 and Magnis-Suseno, 68 f.

<sup>144</sup> Kant, 'Perpetual Peace', 99.

<sup>145</sup> Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 261.

<sup>146</sup> Kant, 'On the Common Saying', 79.

Somewhat more obscure and confusing, the transference of the first republican element leads to a concept of ‘human rights of states’.<sup>147</sup> Yet, the meaning behind this notion turns out to be rather familiar, when the Kantian explanations are changed accordingly:

*No-one can compel a state to be happy in accordance with his conception of the welfare of others, for each state may seek its happiness in whatever way it sees fit, so long as it does not infringe upon the freedom of other states to pursue a similar end which can be reconciled with the freedom of every other state within a workable general law.*<sup>148</sup>

Thus, the ‘human rights of states’ simply reiterate two aspects already contained in the preliminary articles: *state autonomy* and *territorial integrity*.<sup>149</sup> *First*, states have the right to find their own way to happiness and are thus entitled to determine their political and cultural status on their own, provided that they don’t interfere with the rightful freedom of other states. *Secondly*, as an *a priori* precondition thereto, states have the right not to be forcefully interfered in. These principles do not only set limits to the behaviour of other member states but also to the actions of the state of peoples, the world republic, itself: States may neither be forced to establish a republican constitution, nor may they be forced to enter the state of peoples. These rights are ‘innate and inalienable’, a ‘necessary property of [state]kind’.<sup>150</sup>

Which competences, then, are left to the peoples’ republic? The aforementioned rights granted the limits to the competences of the republic of peoples are set. Inner-state issues such as private and criminal law, legal regulations with regard to culture, language, work or social affairs necessarily fall outside the scope of the world republic’s jurisdiction. Would the state of peoples interfere in these domains, it would violate the states’ rights to self-determination. This limitation to the range of competences again is founded upon the Kantian analogy. Just like individuals, states may act at their own discretion, given that their behaviour does not restrict another state’s freedom. Just like individuals, states, too, have the moral duty to overcome the security dilemma they face in the state of nature and to reconcile their wills ‘in accordance with a universal law of freedom’. For the states already being legally structured, at least internally, the state of nature remaining to be overcome is however only a residual state of nature (*Rest-Naturzustand*).<sup>151</sup> The realm in which wills might still collide is the inter-state relation (for the sake of completeness one might add: and the relation of individuals to foreign states which is dealt with by cosmopolitan right). In accordance with Kantian premises the international legal community can claim competences only within this very restricted area. So, the world republic comes close to what we intra-nationally would call a nightwatch-man state: a *laissez-faire* state providing for security only.<sup>152</sup> The entities in need of this security are, at this stage of history, first and foremost the states. Hence, it is the sole concern of a state of peoples to protect its members’, the primary states’, rights to territorial integrity and their right to self-determination. The world republics range of competence does not exceed the enforcement of these rights and thus does not go beyond the enforcement of peace in *inter-state* not *intra-state* relations.

<sup>147</sup> See, e.g., Höffe, ‘Völkerbund oder Weltrepublik?’, 119.

<sup>148</sup> Kant, ‘On the Common Saying’, 74.

<sup>149</sup> Höffe, ‘Völkerbund oder Weltrepublik?’, 117.

<sup>150</sup> Cp. Kant, ‘Perpetual Peace’, 99; slightly changed, Kant of course speaks of the ‘property of mankind’.

<sup>151</sup> Höffe, ‘Völkerbund oder Weltrepublik?’, 115.

<sup>152</sup> *Ibid.*, 117.

## d) The United Nations between League of Nations and World Republic

At first sight, one might tend to confirm a considerable degree of accordance with these features of the Kantian world republic to the United Nations. The rule ranking first among the general principles of Art 2 UNC embodies two Kantian requirements at once: popular sovereignty and legal equality of states. The prohibition of intervention in Art 2(4) UNC gives expression to the second right of states, the right to territorial integrity. And the Security Council, the General Assembly and the different UN-established international courts might be said to form a system of clearly separated executive, legislative and judicial powers.<sup>153</sup> A closer examination however will reveal the deficiencies of such a conclusion.

*aa) The UN and the 'Human Rights of States'*

The first part of Kant's principle of freedom, the two inalienable state rights to territorial integrity and self-determination, are indeed given sufficient expression in the Charter of the United Nations. Art 2(1) UNC recognises the sovereignty of all member states, containing on the internal side the unrestricted competence to decide upon all legal questions within their territory, cultural and political self-determination included, and Art 2(7) UNC emphasises the sanctity of the domestic domain. Screening these rights off against outside interference and at the same time granting protection to the second right of states – the right to territorial integrity – Art 2(4) UNC complements especially the first paragraph and formulates a prohibition to forcibly intervene in the territorial integrity and political independence of a state. *De facto*, however, especially with regard to Art 2(4) UNC state practice is moulded by arbitrary obedience or even intentional disregard and the efficacy of the norm is undermined by counteracting political preferences. In light of Art 2(7) UNC it is the Security Council practice in particular that arouses further doubt concerning the actual respect for the human rights of states. At times Security Council measures have addressed clear inner state conflicts.<sup>154</sup> With Security Council Resolution 1373<sup>155</sup> finally, this trend took the next step. As an immediate reaction to the terrorist attacks of 9/11 the Security Council committed all member states to criminalise terrorism and all kinds of supporting acts or preparatives and change their domestic criminal laws accordingly. All that may be necessary for the re-establishment of peace, nonetheless its interference in the domestic affairs of UN member states can hardly be contested.

*bb) The UN and Popular Sovereignty*

In terms of popular sovereignty a manifest starting point for the evaluation of UN practice and of the Charter itself is the statement that neither the Security Council nor the General Assembly are entirely elected representative (legislative) bodies. Whereas in the General Assembly every single member state occupies a seat and thus elections of representatives are dispensable, only two thirds of the UN Security Council members are in fact elected. Kant would have rejected both institutional set-ups: the direct democratic structure of the General Assembly establishes '[a governmental] *anomaly*, because one and the same person cannot at the same time be both the legislator and the executer of his own will'<sup>156</sup>; the fact that the five veto powers in the Security Council have never faced the necessity to

<sup>153</sup> A similar conclusion is indeed drawn by Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 250 f.

<sup>154</sup> For examples see *supra* IV 1 b) and note 85.

<sup>155</sup> SC Res 1373 of September 28, 2001.

<sup>156</sup> Kant, 'Perpetual Peace', 101.

tout for the support of the electorate of states, and will – at least under the present Charter – never have to, constitutes an evident breach of the maxim that states must ‘obey no external laws except those to which [they have] been able to give [their] own consent’<sup>157</sup>. While the former argument is rather formal and certainly debatable, the latter is persuasive, since the composition of the Security Council leaves room for state participation and influence only within very narrowly defined boundaries.

The voting procedures in both bodies, follow – just as Kant had imagined – well-established majority rules. In the Security Council, however, decisions on substantial questions can only be made with the consent of the five permanent members. This veto privilege has in fact even been accepted by all member states when they signed the Charter, philosophically though, its justification does not depend on the actual agreement of the states but on the social contract as ‘merely an *idea* of reason’<sup>158</sup>, a purely intellectual device. The essential issue is, whether rational states could under conditions of freedom have reasonably agreed on these provisions. For the Security Council balloting rules this seems far less plausible than for the respective General Assembly provisions. Given the historical circumstances, namely that facing the protest of several smaller and medium sized states the now permanent five Security Council members declared the veto rule a *conditio sine qua non* for the adoption of the Charter,<sup>159</sup> one might pose the question how freely states could really chose their obligations? In fact, their choice was ‘all or nothing – and nothing [was] not an option so it ha[d] to be all!’<sup>160</sup>. At any rate it seems highly likely that the protesters had not agreed, had they been entirely free in their choices! Since for Kant ‘[r]ight entails the authority to use coercion’<sup>161</sup> and since the veto in fact excludes this enforceability when it comes to the five permanent members,<sup>162</sup> Art. 27 UNC entails a contradiction in terms: it is part of a legal document but at the same time denies it universal enforceability. That is why the Security Council structure does not stand the social contract test. The veto privilege contradicts the notion of the UN Charter as the core of international *right*; thus Kant would have considered it unreasonable and under conditions of freedom rational states would not have adopted the provision.

When the statal veil is pierced and the individual comes to the fore of international law things get even more complicated. With the International Criminal Court, criminal tribunals as e.g. the ICTY, the ICTR or the Hybrid Court for Sierra Leone, for instance, UN or UN-sponsored institutions prosecute individuals for severe criminal offences and thereby impose obligations directly on individual persons. These duties, too, have neither been agreed upon by (a majority of) the obliged individuals, nor can the domestic legislator elected by those individuals be said to have made the principal decision to enact these obligations. Since delegates of the executive branch represent states on an international level, international law making is in its core executive law making on which the addressee of the resulting obligation can have only little influence. In cases where the Security

<sup>157</sup> Kant, ‘Perpetual Peace’, 99.

<sup>158</sup> Kant, ‘On the Common Saying’, 79.

<sup>159</sup> Simma, Bruno, Brunner, Stefan and Kaul, Hans-Peter, ‘Art 27 UNC’, in Simma, n. 7. The powerful nations of course were aware of this fact and intended to draft a charter as far as possible meeting their interests, see Simons, Geoff, *The United Nations* (Macmillan Press, London, 1994), 40 ff.

<sup>160</sup> Weiler, Joseph H.H., ‘The Geology of International Law – Governance, Democracy and Legitimacy’, [2004] 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547, 558 who does not explicitly refer to the UN context, however.

<sup>161</sup> Kant, ‘The Metaphysics of Morals’, 134.

<sup>162</sup> Cp. also *infra* IV 3 d cc).

Council addresses particular individuals in its resolutions and decides to take so-called 'smart-sanctions' a related issue emerges: the individual is obliged to obey international rules and orders but in their creation it has very little say. Somewhat polemically Weiler concludes: '[With regard to the individual] the surface language of international legal [...] discourse may be neo-Kantian. Its deep structure is utterly pre-modern. [...] The individual in international law [is] seen, structurally, as an object of rights but not as the source of authority'. Indeed, a Kantian might ask: can a majority of states supporting a decision still provide a sufficient legitimacy basis for particular international rules or would a majority vote of the world's citizens not be the more appropriate solution?<sup>163</sup>

*cc) The UN and the Principle of Equality*

As for the third Kantian principle, equality before the law, again it is Art 2(1) of the Charter that acknowledges the Kantian postulation in principle. Explicitly it accepts the 'equality of all its members' as part of its fundamental norm. But again it is the section on the Security Council which exposes the former to be little more than merely paying lip service to the philosophical outline. The Security Council, the only non-judicial organ whose decisions are binding upon the member states, is strongly dependent on five of its members. The Republic of China, France, Russia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America are permanently represented and even hold a right to veto all decisions on non-procedural matters. Because in practice, the veto-privilege results in the absurd setting, that exempts the five permanent members from being subject to Security Council measures, it becomes perfectly clear that even among those states having the privilege to be represented in the Security Council 'some are more equal than others'. Thus, although the rights and obligations under the United Nations Charter are meant to address all states, their application cannot be enforced against the permanent member states by the means provided for in the Charter; in light of Kantian philosophy this constitutes a conceptual flaw, because 'all who are subjects to laws are the subjects of the state, and are thus subject to the right of coercion along with all other members of the commonwealth'.<sup>164</sup> In the General Assembly however, voting rules do renounce veto privileges, rather the 'one country, one vote'-rule still upholds even procedural equality among states.<sup>165</sup>

<sup>163</sup> Elaborating this idea, many philosophical approaches to the legitimate shape of a world organisation like the UN demand the establishment of a world parliament, see e.g. Archibugi, Daniele, 'From the United Nations to Cosmopolitan Democracy', in Archibugi D., Held, D. (eds), *Cosmopolitan Democracy – An Agenda for a New World Order* (Polity Press, Cambridge, 1995), 121-162; Archibugi, Daniele, 'The Reform of the UN and Cosmopolitan Democracy: A Critical Review', [1993] 30 *Journal of Peace Research* 301; Habermas, 'Kant's Idea of Perpetual Peace With the Benefit of Two Hundred Years' Hindsight', 134; Held, David, 'Democracy: From City States to a Cosmopolitan Order', [1992] 40 *Political Studies* (special issue) 10 and Höffe, Otfried, *Demokratie im Zeitalter der Globalisierung* (Beck, München, 1999), 310. Others suggest increased parliamentary involvement when it comes to foreign affairs, see, e.g., Wolfrum, Rüdiger, 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations', in Wolfrum, R., Röben, V. (eds), *Legitimacy in International Law* (Springer, Berlin, 2008), 1, 20 and Harrington, Joanna, 'Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament', [2005] 50 *McGill Law Journal* 465.

<sup>164</sup> Kant, 'On the Common Saying', 75.

<sup>165</sup> Yet, especially for the General Assembly this rule has often been criticised since it entirely disregards the size of the population of the respective countries. See for a review of alternatives Dixon, William J., 'The Evaluation of Weighted Voting Schemes for The United Nations General Assembly', [1983] 27 *International Studies Quarterly* 295.

*dd) The UN and Separated Public Powers*

I have argued above that the second republican principle which Kant proposes, demands a state with separated public powers to define and enforce the law regulating the inter-state relations. Based on a treaty not meaning to establish a state-like structure it might seem unlikely that the UN in its present shape reflects these features of the Kantian world republic. This, however remains a hypothesis before, in a more thorough analysis, three issues have been faced: First, does the UN perform legislative, judicial and executive tasks? If the answer is in the affirmative, secondly, are they performed by clearly separated UN institutions? And thirdly and finally, are these institutions comparable to public powers of a nation state?

That the UN performs judicial tasks is perhaps the least controversial observation. Since 1946 the International Court of Justice in The Hague decides on inter-state conflicts by interpreting and applying international law. Yet, the range of its jurisdiction is limited and in fact in every single case rests – and thus depends – on some form of consent of the conflicting parties, be it in form of an ad hoc agreement to refer a case to the court, in form of a treaty agreed on in advance providing for the ICJ's jurisdiction in cases of conflicts arising from its application or in form of a declaration under the optional clause.<sup>166</sup> For now more than ten years the International Tribunal for the Law of the Sea has been complementing the ICJ's competences. And finally, after the setting up of several ad hoc tribunals – most famous the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda – and special or hybrid courts<sup>167</sup> by the Security Council, the International Criminal Court (ICC) in The Hague extended the UN jurisdiction to matters of international criminal law. However, at present the ICC still lacks state support. As of 17 October 2007, 105 countries are State Parties to the Rome Statute of the International Criminal Court, Russia, the United States, the People's Republic of China, Germany and many others still missing.

An executive branch, too, may be made out. On the one hand it is the Secretary General, who determines the political agenda of the United Nations, just like a government within the domestic state. On the other hand the Security Council may be regarded as an (administrative) executive organ.<sup>168</sup> It decides on the use of peace-keeping troops, thereby commands the 'UN army' and decides on concrete measures that are necessary for the preservation or re-establishment of peace. Characterwise many of these measures taken under chapter VII resemble administrative acts on a national level: mostly, they are decisions binding on and directed at the member states (not necessarily all of them) and pursue to solve a *concrete* conflict.

The answer to the question if there is also a UN legislature is considerably harder. Even the question what is to be considered legislation on an international level produces a myriad of different conceptions.<sup>169</sup> A comprehensive discussion on this topic cannot be given here.<sup>170</sup>

<sup>166</sup> See Brownlie, Ian, *Principles of Public International Law* (6<sup>th</sup> edition, Oxford University Press, 2003), 682 ff.

<sup>167</sup> See for a brief outline Steiner, Henry J., Alston, Philip and Goodman, Ryan (eds), *International Human Rights in Context – Law, Politics, Morals* (3<sup>rd</sup> edition, Oxford University Press, 2008), 1310 ff.

<sup>168</sup> Martti Koskeniemi once named it 'The Police in the Temple' – a clearly executive organ. See Koskeniemi, Martti, 'The Police in the Temple. Order, Justice and the UN: A Dialectical View', [1995] 6 *EJIL* 1.

<sup>169</sup> For an overview see Skubiszewski, Krzysztof, 'International Legislation', in Bernhardt R. (ed), *Encyclopedia of Public International Law*, vol. 2 (Elsevier, Amsterdam, 1995), 1255.

<sup>170</sup> See instead Aston, Jurij Daniel, 'Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Maßnahmen des Sicherheitsrats – Resolution 1373 (2001) im Kontext', [2002] 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 257; Szasz, Paul C., 'The Security Council Starts Legislating', [2002] 96 *AJIL*



Suffice it therefore to briefly sum up the scholarly debate: Even based on a narrow concept of international legislation, which defines legislation as the sovereign and binding enactment of general rules applying in an undefined number of cases to an undefined number of subjects during an unlimited period of time, the debate has yet identified four such cases of UN legislation: the Security Council Resolutions 1373, 1422, 1487 and 1540. From the aforementioned definition it is also clear why, against a common opinion, the General Assembly does not take the role of a UN legislature. All throughout the Charter the General Assembly's power does not exceed the competence to make mere recommendations. Due to this lack of binding force its resolutions do not deserve to be characterised as legislation. However, being intended to solve concrete conflicts, being limited in temporal and geographical scope and defining measures to be taken against single states or even single individuals, most resolutions of the Security Council do not either. It is only a small amount of extraordinary cases in which the Security Council acted as a 'world legislature'.

Considering the second question above, the realization alone that the Security Council acts on behalf of the executive branch and at the same time performs legislative tasks, is already sufficient to answer it in the negative: the UN structure does not establish a clear separation of powers.

The crucial issue with regard to the remaining question whether the UN organs are at least comparable to the public powers of a nation state is the possibility of enforcement of UN measures.

Especially for the judicial branch the deficiencies in this area are salient. After for instance the ICJ has decided the implementation of its judgment is to a large extent dependent on voluntary cooperation by the defeated state. In practice this unfortunately turns out to be a rather weak basis. However, the Charter tries to back the efficacy of the ICJ in two different ways. On the one hand the General Assembly may within its competences of Art 10 UNC address particular judgments of the ICJ and recommend compliance to the defeated member state. On the other hand the prevailing party may seek the Security Council for support when the defeated state does not take any measures to give effect to the judgment, Art 94(2) UNC. Although in this case the Security Council is not bound by Art 39 UNC and thus is not in need to determine the existence of a threat to peace, his measures must stay within the limits of proportionality and may not include the use of force as provided for in Art 42 UNC. Recourse to Art 42 UNC measures depends on the determination of a threat to peace caused by the non-compliance of the defeated state.<sup>171</sup> Though, for several reasons these remedies have not yet been able to save the ICJ from disobedience. Firstly, for the General Assembly political pressure and the statement that the international community disfavours the non-compliant behaviour are at the end of the spectrum of its possibilities – means which often are too weak to persuade, especially when the defeated state holds considerable political power. Secondly, the mechanism provided for in Art 94(2) UNC faces different complications. In the first place, it is dependent on the initiative of the defeated state and thus withholds the Security Council from taking enforcement measures

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901 and Talmon, Stefan, 'The Security Council as World Legislature', [2005] 99 *AJIL* 175 and Rauber, Jochen, 'Weltgesetzgebung durch den Sicherheitsrat – Ein effektives Verfahren zur Setzung ineffektiven Rechts?', [2009] 7 *Greifswalder Halbjahresschrift für Rechtswissenschaft* (forthcoming).

<sup>171</sup> See Mosler, Hermann and Oellers-Frahm, Karin, 'Art 94 UNC', in Simma, n. 11.

on its own.<sup>172</sup> Yet, the member states do not make full use of this option. And in the second place, in the only case in which Art 94(2) UNC had actually been applied the international community had to witness the absurd constellation that the defeated state vetoed the decision to take enforcing steps in the Security Council.<sup>173</sup> Hence, legal enforcement by the Security Council *de facto* excludes cases in which one of the permanent members refuses to implement an ICJ judgment. Therefore, the enforcement mechanisms the Charter provides notwithstanding, the means to implement ICJ judgments still lack the strength which is common to juridic systems within the nation state.

For legislative and executive functions are carried out by the Security Council and since are according to Art 39 UNC dependent on the determination of a threat or breach of peace, the enforcement of these kinds of actions can dispose – within the limits of proportionality and political constraints – of the full spectrum of enforcement measures provided for under Chapter VII of the Charter. In comparison to a nation state, however, one admittedly theoretical distinction must be drawn. Whereas single nation states have the theoretical option to leave the United Nations Organisation and therefore evade the obligations arising from Security Council resolutions and the Charter itself,<sup>174</sup> the world in its present shape does not know state-free zones not subject to a legal system (except for perhaps the High Seas) and therefore makes it impossible to the single individual to evade a state enforcement system. The obligations that might be enforced may change but an alternative of ultimate escape does not exist. A closer look reveals that even within the UN system the possibility to circumvent the subjection to obligations and enforcement by a simple opt-out has limits. Should non-compliance with one of the UN principles cause a threat to or breach of international peace and security, the Security Council could nonetheless enforce behaviour in conformity with the Charter by having recourse to Art 2(6) UNC. As Kelsen put it: '[T]he Charter attaches a sanction to a certain behaviour of non-members, it establishes a true obligation of non-members to observe the contrary behaviour.'<sup>175</sup> If these measures taken against non-members are however to be conceived as the enforcement of an obligation (arising out of Art 2(6) UNC ?) or a measure of collective self-defence does for the present purpose not have to be decided.<sup>176</sup> Suffice it to record that even non-members cannot escape entirely the legal regime of the UN.

I will briefly sum up: The UN performs legislative, executive and judicial functions. A permanent legislative body however is not contained in the UN system, for the General Assembly lacks the power to issue legally binding resolutions and the Security Council is usually limited in its competences to the solution of concrete conflicts by concrete means not abstract legislation. Since the Security Council performs legislative as well as executive

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<sup>172</sup> Different: the Covenant of the League of Nations in Art 13(4) which included a right of the Council to propose what steps should be taken to give effect to the judgment. Art 94(2) UNC however does not bar the Security Council's competence to address a case of non-compliance under Chapter VII.

<sup>173</sup> For the judgment that was supposed to be enforced see *Nicaragua v. United States* (Merits), ICJ Reports (1968), 14.

<sup>174</sup> The question whether there is in fact a right to give up membership of the United Nations is subject to considerable controversy, see for the first attempt to withdraw membership (Indonesia): Schwelb, Anton, 'Withdrawal from the United Nations: The Indonesian Intermezzo', [1967] 61 *AJIL* 661.

<sup>175</sup> Kelsen, Hans, *The Law of the United Nations: a critical analysis of its fundamental problems* (Stevens, London, 1951), 107; in contrast Vitzthum, Wolfgang Graf, 'Art 2(6) UNC', in Simma, n. 23: '[T]hey [i.e. the non UN members] do not infringe any legal obligation [...] but will have to face concerted action by the members of the UN'.

<sup>176</sup> This seem to be the different positions of interpretation of Art 2(6) UNC, see comprehensively Vitzthum, n. 18 ff. who compares Art 2(6) UNC with Art 5 of the NATO treaty.

functions a clear separation of powers does not exist. As to the enforcement system, the UN organs' means lack the degree of coercion which public powers in a nation state usually dispose of. The only public power comparable to its domestic counterpart is the Security Council. In the case of an actual opt-out however, the range of its enforcement competences is limited: it might enforce the most basic UN principles even against non-members but not their assistance in any action taken against other states.<sup>177</sup> Considered in light of the Kantian categories outlined above, the UN Charter establishes an organisation which has long since exceeded the character of the 'negative substitute', the league of nations, and is constantly – but slowly – on its way towards the 'positive idea of a world republic'.<sup>178</sup> Especially recent developments as for instance a legislating Security Council and the establishment of a further permanent Court under the roof of the UN, the International Criminal Court, illustrate this UN tendency towards statelihood on a global level.

#### *ee) The UN Competences*

The competences of the UN have been set up and developed alongside the given goals of the organisation. Therefore much of what would have to be said here has already been explained above.<sup>179</sup> I will just reiterate two crucial deviations from the Kantian ideal: On the one hand UN practice has extended the initial competence of interstate peace-keeping to a competence to engage in regional conflicts, at least where severe violations of human rights are to be expected or have already occurred – a competence that is not covered by *Perpetual Peace*.<sup>180</sup> On the other hand Kant would have (maybe wrongly)<sup>181</sup> rejected the General Assembly's competences to make recommendations relating to 'any matters within the scope of the present Charter' (Art 10 UNC), including of course the promotion of friendly relations between nations, the advancement of economic development and driving forth state cooperation in social, educational, health and cultural fields (Art 13 UNC).

## V. Conclusion

Neo-Kantianism is a prominent stance in modern practical philosophy. In the recent works of Rawls, Habermas and Tesón the continuing relevance of Kantian ideas for the international case has been impressively illustrated. Yet, legal scholars have so far been reluctant to tackle the area from their own jurisprudential perspective. This indifference is objectionable as the Kantian approach – slightly reconsidered and further elaborated – offers a solid basis for a normative theory of international organisations and a – if not the – most plausible guideline for an evaluation of the UN structure in terms of legitimacy. At present, the United Nations does not entirely conform to this scheme. Partly however, the organisational evolution of the UN points to the enlightened ideal of a world republic: Based on a 'constitutional' Charter the United Nations establish a universal league of states for one main purpose: the enforcement of the Kantian peace imperative. The UN substitutes the modern ambition to construct a global rule of law for the security dilemma of the initial

<sup>177</sup> *Ibid.*, n. 21.

<sup>178</sup> Based on a different interpretation of the legal status quo Höffe, 'Ausblick: Die Vereinten Nationen im Lichte Kants', 251 reaches the same conclusion.

<sup>179</sup> Recall the above argument at *supra* IV 1 b) and d).

<sup>180</sup> If such interventions for humanitarian reasons can be justified in terms of Kantian philosophy is currently discussed, see references in note 86.

<sup>181</sup> Cp. *supra* IV 1 d).

state of nature, its two basic principles of non-intervention and of sovereign equality of states embody Kantian notions and the International Court of Justice and first and foremost the Security Council represent the attempted rapprochement to the republic of peoples' public powers envisaged by Kant.

These attempts though are still modest and the gaps left by the implementation of the philosophical sketch necessarily provoke criticism: The UNO as it is now has neither a sufficient system of enforcement backing the decisions and orders of its organs nor does it adhere to a strict separation of powers. Its procedures exclude enforcement measures against five of its members and thus, disregarding the principle of equality, clearly privilege a few members over the broad majority of others. Moreover for the UN the goal of institutional universality seems to outweigh differences in legitimacy of domestic orders so that even non-democratic states can be equal members of the United Nations. Finally, the UN system does not restrict its competences to clear interstate conflicts but – resting upon a notion of peace that includes the absence of severe human suffering, and now and then even obliging member states to change their domestic laws – at times interferes in the internal affairs of its member states and thus violates the rights of states.

From the point of view adopted above these aberrations constitute difficult *moral*, not simply *political or practical*, shortcomings for which two possible remedies exist: *either* the Kantian theory defended here can be shown to be flawed or outdated and can, in consequence, be replaced by a persuasive and modern theory of institutional legitimacy that matches the current features of the UN *or*, in case that Kantian thought prevails as the philosophical yardstick, institutional changes can re-establish constitutional justice in the UN. Given the intellectual challenges of the former and the political difficulties of the latter the status quo affords a rather bleak outlook on the future of the United Nations 'constitutional' legitimacy.