

# Kant, International Right and Cosmopolitan Institutions

Gary Banham, *Kant Studies Online*

**K**ant's philosophy of right is a response to a set of problems inherited from two different traditions of modern political philosophy. The philosophy of right is presented as a form of social contract theory and bears close resemblance in particular to Rousseau's discussion. However, this part of the background to the philosophy of right has to be balanced by a way that it also incorporates a surprising reference to the theory of natural rights and Kant's account of the state of nature is particularly intricate in the way that it reveals a debt to this latter tradition. The reason for beginning a discussion of the way Kant treats cosmopolitan right and cosmopolitan institutions with a reference to this is that the account of these areas is part of Kant's overall philosophy of right and especially includes an account of a state of nature picture at the international level.

What I want to bring out is how the view of the state of nature at the international level motivates Kant to introduce a distinction between international right, on the one hand, and cosmopolitan right on the other. Kant's discussions of this area have met with much resistance, firstly on the grounds that his view of international right fails to resolve the problem of inter-state coordination and secondly on the grounds that his conception of cosmopolitan right is unduly restrictive in scope.<sup>1</sup> Whilst I will not be attempting to suggest that Kant has complete responses to these charges

---

<sup>1</sup> The argument that Kant fails to resolve the problem of inter-state coordination in his account of international right is central to Katrin Flikschuch (2010) "Kant's Sovereignty Dilemma: A Contemporary Analysis", *The Journal of Political Philosophy* 18: 4 whilst the view that his account of cosmopolitan right is unduly restrictive is given in Seyla Benhabib (2004) *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press: Cambridge and New York).

the effect of my analysis should be to show some reasons why the account of international right and cosmopolitan right has the shape it does.

### The State of Nature

In discussing the way Kant describes there to be a “state of nature” at the international level I want to disentangle the kind of analogy Kant is making when he compares the situation states face with regard to each other by comparison with that which individuals confront in an apparently similar condition. In order to do this it will be necessary to look at the basic picture of the state of nature that Kant uses to motivate his argument for a civil condition. There are two distinct elements to this picture that need to both be mentioned and contrasted. On the one hand, Kant uses his account of the state of nature to present a picture of rights that enables a claim to be made with regard to them independently of the institution of a civil condition. On the other hand, Kant does also want to argue that the state of nature is a state that is incompatible with right broadly conceived and hence one that should be left and a civil condition instituted in its place. So there is a tension in Kant’s view of the state of nature as the account he gives of it enables a conception of rights that is not merely “positive” whilst it is also the case that the state envisaged has to be insufficient for right to be exercised as otherwise the ground of justification for a civil condition would not emerge. As we will see this tension re-emerges at the level of international and cosmopolitan right.

Prior to exploring Kant’s account of the state of nature, however, it is important to begin with the basic notion of right that he is operating with. In a general sense “right” concerns external relations between persons in which the formal character of choice is treated in relation to universal laws. Kant formulates this idea through his “universal principle of right” (UPR): “Any action is *right* if can coexist with everyone’s freedom in accordance with a universal law,

or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (Ak. 6: 231). The formula here given covers two areas as it provides in the first clause an "action norm" and in the second covers the way in which acceptable maxims can be understood.<sup>2</sup> However the key point from it is that right is determined not simply by a test of universality but by the way that actions of any one person connect to those of others.<sup>3</sup> Indeed, as Kant argues, the "strict" sense of right concerns only "external grounds for determining choice" and thus freedom is understood when related to in terms of right as the manner in which actions unconstrained by others are performed. This does not, however, entail that right is itself distinct from coercion since it is possible for some to act in ways that undercut the freedom of action of others. In acting in such a way that the freedom of others is undermined we act wrongly and such wrong action is a hindrance to freedom which can itself be hindered. So, as Kant puts it: "there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it" (Ak. 6: 231).

Kant goes further than this and indicates that right and the authorization of coercion are reciprocally related to each other so much that the account of: "fully reciprocal and equal coercion brought under a universal law and consistent

---

<sup>2</sup> Kant's theory of maxims is, however, a complex area and would require much separate discussion so I intend here to leave it aside except to say that Kant here is using the term to describe "effective choices", that is, "choices that issue in publicly performed actions" or "external actions" as Kant puts it, actions, that is, performed in such a way that others are capable of being aware of them. For a fuller discussion of these formulations see Gary Banham (2007) "Publicity and Provisional Right" *Politics and Ethics Review* 3.1: pp. 75-77. Meanwhile for a more detailed account of the nature of maxims and the controversies concerning their status see Rob Gressis (2010a) "Recent Work on Kantian Maxims I: Established Approaches" *Philosophy Compass* 5:3: pp. 216-27 and Rob Gressis (2010b) "Recent Work on Kantian Maxims II" *Philosophy Compass* 5: 3: pp. 228-39.

<sup>3</sup> In making the relation to others cardinal for right Kant distinguishes it from virtue since virtue can include duties to oneself. There are no corresponding duties of right to oneself so right exclusively concerns relations to others and is thereby social in nature. For the contrasting virtues that do concern duties to oneself see Robert N. Johnson (2011) *Self-Improvement: An Essay in Kantian Ethics* (Oxford University Press: Oxford and New York).

with it” is the presentation of the concept of right in terms of how action is really freely governed. Having captured the generic sense of right it is now necessary to attend to the most important sub-divisions of it in order first to specify the way in which it has validity even in the state of nature and the manner in which we have to depart from a state of nature picture in order to arrive at its full sense. There are two essential types of division within the philosophy of right that comprehensively between them demarcate the area of it. On the one hand there is a division between “innate” and “acquired” right and on the other there is the division between “private” right and “public” right. These two divisions are not exclusive of each other since whilst “innate” and “acquired” rights are distinctive parts of “private” right they also have validity in the area of “public” right.<sup>4</sup> The reasons for this cross-over are not my concern here since I rather wish to focus on that between “innate” and “acquired” right as this will help us to see the sense in which there is, within the area of the state of nature, a set of normative claims that are not derived from the sovereign power within the civil condition.

Kant’s notion of “innate” right is the ground of his relationship to the natural law tradition since by this idea he refers to the “original” right that belongs to all persons *as* persons and it specifies the universal principle of right so that it becomes presented as the right not to be constrained by the choice of another. This right corresponds to the Formula of Humanity in the general moral philosophy since Kant also describes it as the requirement not to be taken as a mere end by others. This expanded notion of right is more than simply an expression of external freedom as it also authorizes the requirement of equality in the sense that one is independent of being bound by others except to the degree

---

<sup>4</sup> Understanding the way that “innate” and “acquired” right function in the civil condition would require a different analysis than I am providing here since it would bring in intricate details of the account of domestic right. For an important view of how this works see B. Sharon Byrd and Joachim Hruschka (2010) *Kant’s Doctrine of Right: A Commentary* (Cambridge University Press: Cambridge and New York), Chapter 2.

that one can oneself bind these others. Alongside the claim of such innate equality is also the standing of being treated prior to any action as having nothing about one that is to be taken as a ground for reproach or, in other words, one has the original standing of presumptive innocence of wrong. Finally, the authorization that also arises from innate right is that of having the ability to express oneself openly to others.<sup>5</sup> So there is, on Kant's view, a basic right to have these claims grounded simply on the standing of being a person rather than a thing that can be merely used. In a fundamental way the area of "innate right" thus defines what it is to be someone who can have rights imputed to one and describes further the qualities that attach to those who we take to be ones we are related to reciprocally in the system of right. Due to the fact that "innate right" essentially describes the subject of rights Kant also describes it as a ground of "internal" right. In summation Kant describes innate right as that "which belongs to everyone by nature, independently of any act that would establish a right" so the status of innate right does not await any particular acts and nor is it conferred by virtue of the performance of any acts.<sup>6</sup>

By contrast, the area of "acquired" right is a form of right for which the performance of certain kinds of act is required. Due to its relationship to kinds of act it is also understood as "external" right and whilst there is only one form of "innate" right (albeit with subsidiary authorizations) there are many forms of "acquired" right. Acquired rights are rights to something that is external to one whether this is an object for use, a right claimed over another by virtue of contract or a right over another by virtue of status of some sort.<sup>7</sup> All

---

<sup>5</sup> There is one essential guard-rail around this concerning lying with regard to right which infringes on another's right. As we will see this is of considerable importance in cosmopolitan right.

<sup>6</sup> This is also why the status that attaches to "innate" right is determined on occasion as that which belongs to an "original" as opposed to an "adventitious" state of nature. For discussion of this distinction see again *Kant's Doctrine of Right: A Commentary* Chapter 2.

<sup>7</sup> The last element brings in the vexed notion of a "right to a person akin to that to a right over a thing" which is invested in domestic right and would require an extensive account of its own.

forms of acquired right are not simply “acquired” by virtue of relating to that which is external to one but also by requiring a relationship with others. Kant describes these “acquired” rights as belonging to private right of which they make up the majority due to the point that all these rights are both rights of particular persons and part of the formation of a status of such persons above and beyond the simple category of being a person. The most basic form of “acquired” right is the right to hold an object for use in a manner that excludes others from similar holding except if one consents to their engagement with the holding in question.<sup>8</sup> Kant describes the way in which the basic form of acquired right arises in a manner that relates acquired right back to the earlier description of “innate” right:

All human beings are originally in *common possession* of the land of the entire earth (*communio fundi originaria*) and each has by nature the *will* to use it (*lex iusti*) which, because the choice of one is unavoidably opposed by nature to that of another, would do away with any use of it if this will did not also contain the principle for choice by which a *particular possession* for each on the common land could be determined (*lex iuridica*). (Ak. 6: 267)

The reference here to the nature of each as including the “will” to use the land indicates the manner in which the internal “innate” right manifests itself as a basis for external action but the discussion of the “common possession” that attaches in the first place to the land indicates that we require here an authorization from others to ground the basic form of “acquired” right. In one sense action with regard to external possession is naturally a claim each has as without this being granted there would be nothing for the basic choice granted to us by virtue of our status as persons to have hold of. However the problem arises that our claim to have a holding meets with resistance from the others as Kant

---

<sup>8</sup> Kant in fact reserves the term “holding” for an empirical claim whilst the right to the holding is a “having”, a distinction made at Ak 6: 253. Whilst the point of this is one that would be worth elaboration I will here abstract from it.

points out in this quote since these others also make claims that are in principle capable of being incompatible with ours.

Without exploring acquired right further it is already evident that it involves some form of negotiation with others and the invocation of the shared original common possession of the earth includes the sense that this negotiation is in principle concerned with every part of the earth. So the questions that arise from “acquired” right are not merely applicable to the comprehension of the *institution* of a domestic civil constitution since the claims involved in these rights are not limited in their scope and so accommodation has to be attained between persons even *within* civil constitutions. Not only is this so but there are also relations between persons in civil constitutions and those who are not within them and the ground for conduct in such a relation is effectively part of a state of nature. Kant addresses this point in a remark in his account of “private” right where he declaims against forceful founding of colonies and fraudulent purchase of land (Ak. 6: 266) points that in his discussion of cosmopolitan right.

Before turning to the problem of the “defects” of the state of nature that motivate the need to found civil constitutions it is worth summarising what we have found in the account given here of the status of right even within the state of nature. The basic ability to be regarded as a subject of rights is not instituted through any civil condition and is not dependent upon it so Kant’s view of right is decisively not positivist but nor is it purely contractarian since the civil constitution whilst answering certain problems within the state of nature is also one that will have to guarantee rights that are conceptually distinct from its formation. Secondly, the notion of “acquired” right, whilst derivative of “innate” right, refers us in the first place to an idea of connection with others that shows that the right to possessions is not grounded on self-interest or upon a claim founded either on labour or the claims that could be stated by means of

improvement of original materials<sup>9</sup>. The claim that is recognised within acquired right is a claim in view of a relation to others and implies some form of “consent” from them. It is a form of right only given this mutuality of consent and thus is a directly social right even within the state of nature as the state of nature includes the notion that there could be societies that whilst not being states of right could be “in accord with” right.

### The Defects of the State of Nature

If Kant’s discussion of “innate” and “acquired” right is sufficient to demonstrate that there are normative standards that apply in some sense even within the state of nature then turning to the negative picture of this state next is essential in order to draw out the general nature of the problems there are with this state. Subsequently I will look at how the picture of international right is formed in different texts, which modify the account of the state of nature in distinct ways. In the generic argument concerning the state of nature there are three arguments that are given for leaving it and these three arguments do not only provide a basis for forming a civil constitution, they also point to three elements of the constitution that are required to meet these defects.<sup>10</sup> The first defect is apparent when we note the condition of “original” claims to acquired right, which referred us to the social character of acquired right, and made evident in the process a presumptive consent to this original claim on behalf of others. Outside the civil constitution this presumptive consent of others has no evident way of being guaranteed and threatens to be merely the claim of some against others. This is manifest precisely in the examples of

---

<sup>9</sup> So Kant’s conception of the basis of “acquired right” is not of a piece with of Locke who does think of the ground of this as based upon the relationship one has with material through labour.

<sup>10</sup> There is a complication that arises from Kant’s attacks on the right to revolution since these seem to point to a view of sovereignty at variance with his general republicanism. See for this worry Elizabeth Ellis (2005) *Kant’s Politics: Provisional Theory for an Uncertain World* (Yale University Press: New Haven and London), pp. 127-35.

colonialism that Kant attacks when considering acquired right. As Kant puts it: “a unilateral will cannot put others under an obligation they would not otherwise have” (Ak. 6: 264) and so original acquisition only has validity if it refers to the “idea of a civil condition”. Unilateral willing is not a valid claim but only an assertion, which can be met with by a counter-assertion. To supersede unilateral willing representation is required in which a general will can be manifested. The first defect of the state of nature points to the need for a mechanism that expresses the general will, which, in the civil constitution is filled by a legislature. This first problem concerns the *legitimacy* of the claimed right in relation to the others against whom it is asserted.

The second problem within the state of nature concerns the *security* of the claimed right by which we are assured that any given holding will really be respected as being ours. This problem concerns how the claimed right can be guaranteed not merely in terms of a general recognition of its legitimacy but also in terms of its actual effective operation. This point requires more than simply the ability of the general will to be asserted as it further requires that the edicts of such a will are enforceable and thus requires power to back up the recognition. This points to the need not merely for a civil condition but also for the executive element of such a condition as that which can guarantee the implementation of the claimed right in practice. The third problem within the state of nature concerns the determinancy of claimed rights. This has two aspects as, firstly, such a claimed right has to be both stated in general terms and given specific form in given cases. Both forms of determinancy point to the need for a third element in the civil constitution, the element that is provided by a judiciary. Having seen these points in relation to the generic state of nature it is now time to look at how Kant views the international situation in terms of the specifics of the state of nature problem it presents and how the specific problems within it are resolved by means of his accounts of international right and cosmopolitan right.

## The International State of Nature and International Right

When we turn from the account of the state of nature in generic form to the discussion given of international right we find Kant repeatedly drawing parallels between the two and yet also partially denying the parallel which suggests a question about international right that needs to be distinguished in some way from the treatment of domestic right. However the treatment of international right also shifts in important ways between distinct texts and I want to indicate how this affects the way Kant views the question of international right. Later I will also suggest that the discussion of cosmopolitan right is meant to fill part of the vacuum left by the incomplete response to the state of nature at the international level that ensues from Kant's arguments concerning international right.

The first place where Kant treats international right is in his essay on the relationship between theory and practice. Here Kant treats the relations between states as akin to that of a state of nature but he also requires that the resolution of this problem be one that avoids the potential for despotism that could arise from a world state. Rather than argue for a world state he argues instead for a "universal state of nations" although he claims here that such a state would be "based on public laws accompanied by power to which each state would have to submit" making the analogy drawn here between international right and domestic right very tight. One of the reasons why it is so tight is that the defect stated to apply here in the international state of nature is none other than the assurance problem listed in the case of domestic right: "No state is for a moment secure from others in either its independence or its property" (Ak. 8: 312).

If there is an assurance problem at the level of international right then there is a need for not merely a civil

condition to be instituted between states but for the civil condition that arises as a “state of nations” to have executive power which explains Kant’s reference here to “public laws accompanied by power”. This model of a resolution to the problem of international right suggests that the “state of nations” would have some form of general will expressed in terms of a legislative power that would have executive back-up to enforce its rulings. There is, however, an evident problem with this form of resolution of the assurance problem with regard to relations between states which is that it threatens to compromise precisely the “independence” that it is set up to protect by providing an additional level of governance that supersedes that of the states themselves.

The reason why Kant should view this as a problem becomes clearer in his next treatment of the topic in *Perpetual Peace*. The first two sections of this text are written in the form of a peace treaty including six preliminary articles and three definitive ones. Whilst the majority of the preliminary articles concern questions of either right during war (*jus in bello*) or right concerning the ability to declare war (*jus ad bellum*) there is also listed in the second preliminary article an important statement that does not merely touch on these questions but does so in a way that makes clear Kant’s view of the normative standing attaching to states. The second article prohibits treating states as entities that can be “acquired” thus ruling out the view that they can be treated as fungible things. Since Kant’s account of right has however treated the distinction between things and persons as a fundamental dichotomy it is not surprising that the denial that states can be treated as things leads to the view that a state is instead, as Kant explicitly declares, a “moral person” (Ak. 8: 344). Since Kant views a state in this way it follows that a state, like an individual person, is a bearer of the status of being a possessor of “innate right” and that such a status attaches to it even during the state of nature.

As a recognised moral person a state has the right to be viewed in the same way as individual persons. It is worth returning to the status of “innate right” briefly to recall what

this involves. It requires viewing a state as having the same condition as an individual in the sense that it cannot be bound by choices of others except to the same extent it would be able to bind those others and this reciprocal condition is expressed through the universal principle of right. This does not entail that there are no grounds of coercion with regard to states but the universal principle of right specifies that such coercion has its ground in regard to respect for universal laws of freedom. States should also be viewed as having a status of innocence prior to performing given acts and thus only be accountable for acts but the status of the state as a person is inherent to it. However, there is an important difference between a moral person as an individual and the state as a moral person which is that the former does not await any acts instituting itself to be a person but is immediately taken to be one. A state, by contrast, does have to be instituted and its normative standing is dependent on recognition of such institution, a point that follows from Kant's argument for a civil condition. On the grounds of recognition of independence of states as follows from the second preliminary article Kant adds in the fifth preliminary article that there are no grounds for interference in the constitution and government of another state. This article, combined with the second one, is meant to respond to the two aspects of the assurance problem, covering both property (which the second article tells us cannot be acquired by one state from another) and independence.

On the grounds of the recognition of such a status to states it is perhaps unsurprising that Kant, when he describes the resolution of the problem of international right in the second definitive article in terms of a "federalism of free states" draws back from describing this in terms of public law and enforcement of it as he did in the essay on theory and practice. Kant determines the cosmopolitan federation in *Perpetual Peace* as one that: "does not look to acquiring any power of a state but only to preserving and securing the *freedom* of a state itself and of other states in league with it,

but without there being any need for them to subject themselves to public laws and coercion under them” (Ak. 8: 356). This argument thus rejects the “state of nations” model that was proposed in the essay on theory and practice in favour only of a “league of nations” since, as he now puts it, a “state of nations” would be a contradiction since it would require the institution of a sovereign power that would dissolve the specific nations into one state thus losing the conception that they already possessed the standing of states. There are, however, two complexities to the resolution of the problem of international right in *Perpetual Peace* that I wish to bring out.

Firstly, the recognition of the normative standing of states that appears to involve ruling out interference in their affairs on the grounds of the fifth preliminary article is more limited than it first appears. Kant argues that in conditions of civil war once one part declares itself to represent the whole there are grounds for foreign states to give assistance to one of them on the grounds that such assistance would overcome the descent into anarchy that has taken place. So the independent status that attaches to states is one that is capable of being internally undermined which indicates that recognition of its status is provisional. The provisional character of such recognition shows well that the standing of separate states is, in their relationship to each other, one that the preliminary articles is not even intended to overcome.

The definitive articles do, however, in the argument for a federation or league of states present a blue-print for resolution of the problem of international right. But the resolution in question does not involve treating all states as on a par as we would expect given the possession by each state of the status of innate right. Kant pictures the federation as grounded on a union that emerges due to states being formed into republics and creating: “a condition of freedom of states conformably with the idea of the right of nations” (Ak. 8: 356). This is connected to the argument of the first definitive article that the civil constitution in every state shall be republican should we wish to attain conditions of perpetual

peace and is supported by Kant's claim that republics, as containing constitutions that allow for expression of the general will, embody the claims of their peoples and, since they do, will not be inclined to wage war for the sake of insignificant causes. Kant further suggests that only republican constitutions truly have forms of government since it is only they that incarnate the separate powers that respond to the three defects of the state of nature. Opposed to republican governments are despotic states of affairs in which there appears to be only a limited advance on the state of nature since within them there is effectively government of persons rather than government of law which is manifested in the way that private purposes are the primary ones manifested in the state and not the public requirement to represent the lawful state of right.

Given these complexities in Kant's position the argument of *Perpetual Peace* with regard to international right appears to point to the view that the resolution of its problem can only be by means of a union of republican governments as it is only they that have addressed the problem of domestic right. However, just as in the picture of acquired right in the Doctrine of Right Kant argued directly against the colonial policies of taking of land from those outside civil conditions so also in the subsequent account of cosmopolitan right he goes on to utilise this notion principally as a means of articulating a case against colonial relations. Cosmopolitan right is introduced in the third definitive article and it is carefully limited to conditions of universal hospitality but, since this is an account of a form of right and not a form of virtue, hospitality should not be mistaken for friendliness. What Kant means by "hospitality" is not to be treated with hostility beyond the bounds of the state from which one has come. Cosmopolitan right has two distinct functions and is meant to supplement the resolution of international right. One of its functions is to provide a form of right that is held by individual persons trans-nationally and connects them separately from the states to which they belong. It is a right

each one can claim not to be treated by the residents of another state in such a way that their life is endangered.<sup>11</sup>

Considered in this way, as a right of individual persons that can be asserted trans-nationally, it is a right “to present oneself for society” with others and it is grounded on the same basis that original acquisitive right was articulated in terms of the generic state of nature picture as it: “belongs to all human beings by virtue of the right of possession in common of the earth’s surface” (Ak. 8: 358). No one has any original right to be in any particular place over and above anyone else and this original right of possession in common stands as the universal basis in practice of trans-national recognition of any given holdings as secure. Given this there is still a normative ground for seeking to engage with others in other places in such a way that trade with them can take place including trade that would involve contractual purchase of parts of foreign lands. However, as Kant points out using the example of Japan, this does not entail either that the presentation for society that is involved in such acts should be accepted by the receiving nation or, should it be accepted, that the offer of such presentation include any right to reside in the country with which one trades.

These guardrails around the individual aspect of cosmopolitan right point to the other element of this right as a further restraint on the behaviour of states including their actions involving commercial proxies. It is not possible for states or their commercial satellites to treat the inhabitants of other places “as nothing” given that “a violation of right on *one* place of the earth is felt in *all*” (Ak. 8: 360). The trade and acquisition that can take place internationally is thus regulated by means of cosmopolitan right and this regulation includes the provision of a security in right that further addresses the assurance problem and extends the address Kant gives to this at an international level to non-state

---

<sup>11</sup> Cosmopolitan right echoes the limitative natural right that Hobbes recognized when he indicated that the sovereign power was limited in one crucial respect, that of not having a ground for being able to treat subjects in such a way that would lead to their death.

actions and peoples outside the civil condition. Not only is this the point of cosmopolitan right it is also the case that such a form of right expresses internationally a form of general will as the standing of cosmopolitan right is as a legislative practice that is mandated legally and provides an accompaniment to the federation of republican states that extends the remit of international cosmopolitan solutions beyond that of the cosmopolitan federation of states as a demand that does not only govern the conduct of these states but is also one that they would have a valid reason for expecting other state and non-state actors to follow.

### War In the Doctrine of Right

The account of international and cosmopolitan right in *Perpetual Peace* has to be supplemented in part by the discussion in the Doctrine of Right. Whilst *Perpetual Peace* includes rules concerning conduct during war the nature of conflicts that are legitimately entered into is less clear in it. In the Doctrine of Right, by contrast, Kant includes such a discussion in his view of international right. Here the notion of the “right to go to war” is defined defensively but includes reference to not only direct acts of aggression as a rationale as it also includes the perception of a: “*menacing* increase in another state’s *power*” (Ak. 6: 346) as this wrongs a lesser power even without the larger power acting directly against the lesser one. What is clearly ruled out is a *punitive* war, which would exact retribution on another state and its peoples. But just as violation of contract is the prime problem with colonial proxy invasion of a country so too the international level of relations between states includes as a crime violation of contracted agreements as freedom is said to be threatened by this so that all nations are: “called upon to unite against such misconduct” (Ak. 6: 349).

Just as Kant argues for a federation of free states in *Perpetual Peace* so also in the Doctrine of Right he indicates that an “association” of states in the form of a

“permanent congress” is the response to the problem of international right. This idea of a “congress” is here compared to the process of establishment of a judiciary since the dispute between nations is viewed here as akin to a lawsuit (Ak. 6: 351) so in the Doctrine of Right the problem of the state of nature at the international level is treated principally as a problem of determinacy. However the earlier remarks about the threat posed by other states in terms of the growth of a rival state show as well a sense of the problem of enforcement.

The different texts in which Kant treats international right point to differences of emphasis with the essay on theory and practice seeing the international state of nature principally through the prism of the problem of assurance, *Perpetual Peace* through assurance and unilateral willing and the Doctrine of Right emphasising the problem of determinacy. Due to differences of emphasis in relation to separate defects of the state of nature Kant nuances his presentation of the resolution of the problem of international right in slightly different ways. However if we present the three treatments of international right together and add to this the question of cosmopolitan right it is apparent that the international state of nature faces all of the problems listed in the generic state of nature but there remains an important difference as states are themselves instituted bodies of right which is the real reason why Kant consistently draws back from making the analogy between the domestic case and the international one complete. Three considerations from *Perpetual Peace* are worth attending to next in order to conclude the question of what a Kantian view of the resolution of the problem of international right should really consist in.

## Concluding Considerations from *Perpetual Peace*

The first considerations worth drawing out from *Perpetual Peace* have already been referred to but are worth a second emphasis. Firstly, the federation is expressly presented in Kant's second definitive article as grounded on republican constitutions amongst its members and this indicates that only states with such constitutions are ones whose internal basis is rightful. Other forms of state are therefore established kinds of despotism and despotism is only a variation on a domestic state of nature. Secondly, this point about the differential status of different kinds of state in Kant's analysis points to a problem with the interpretation of the fifth preliminary article. It is not only that Kant's ban on the interference with the constitution of another state is one that is undermined in cases of civil war but it is worth adding that despotic states are, by their nature, on Kant's analysis, war-like in character and their government is a means by which some essentially exploit the others and fail to respect the grounds of even innate right. As such there is a basis for thinking that there is something problematic about the fifth preliminary article given that some states possess the ability to threaten others not merely by the increase in their territory or by direct behaviour but due to their very character as the kinds of states that they are. The ambiguity that attaches therefore to Kant's fifth preliminary article is captured well when Arthur Ripstein describes the grounds of war that is allowed to a state by writing: "it could never have grounds for going to war except to defend itself or to defend an ally whose defense was important to its own self-defense, or to unite against a state that poses a general threat to the condition of peace among nations".<sup>12</sup> Surely the last part of

---

<sup>12</sup> Arthur Ripstein (2009) *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press: Cambridge, Mass and London), pp. 228-9.

Ripstein's statement here points precisely to despotic states as such which do pose such a threat.

Finally Kant considers two kinds of appeal to publicity as a guide to rightful behaviour in *Perpetual Peace*. The first is given in negative form as: "All actions relating to the rights of others are wrong if their maxim is incompatible with publicity" (Ak. 8: 381). On these grounds Kant suggests various machinations attempted by states would be demonstrated to be wrong in principle because of being unable to be publicly stated. However the problem with this negative formulation is apparent when a dissymmetrical situation of power is considered since more powerful states need not conceal the basis of their actions without this making the basis of them just. In response to this Kant appeals finally to the positive principle of publicity which states that all maxims which *need* publicity to be able to succeed are thereby justified as matters of right. The appeal to this positive maxim of publicity indicates that the ground for supersession of the state of nature at an international level has to be through the construction of cosmopolitan institutions whose processes are publicly transmissible and communicable and whose workings are not fraudulent. This force that would attach to a cosmopolitan institution could be one that, in its direct basis of appeal to its own functional operation, act as a counter-weight of its own sort to the duplicitous behaviour of states that flout right.

### Concluding Reflections

**T**he basis for resolution of the state of nature at the international level is not exactly equivalent to that at the level of the general state of nature since we are dealing at the international level with constituted entities of right. However, Kant's exclusion of despotic states from the federation that is aimed at resolving the problem of the state of nature indicates that not all such states are constituted entities of right and whilst the people who live in such states are to be related to as possessed of the same "innate" rights

as anyone else it is not evident that the constituted states to which they belong should be viewed as moral persons. Given this tentative conclusion and adding to it the general sense Kant has of the inherently war-like character of despotic states it is perhaps less than obvious that the argument of the fifth preliminary article is sufficient to ward off all interference with the constitutions of other states. Secondly, the argument for cosmopolitan right is a guardrail that operates in three ways, as a defence of the right to engage with the subjects of other states, as a way of banning colonial exploitation of other peoples but also as a requirement that republican states can legitimately expect despotic states to meet. When considered in this three-fold way it formulates not only a form of protection for peoples in non-civil conditions as a way of assuring their rights but it also points to a basis for despotic states to be regarded as already before a tribunal of sorts even apart from the establishment of cosmopolitan constitutions. When we add the considerations that arise from cosmopolitan right to those from international right the ground for thinking that the basis of perpetual peace is the formation of republican institutions at an international level suggests that the exit from the state of nature at this level has a greater degree of analogy with the domestic level than first appears even if Kant consistently denies that it is sufficient to argue for a world state.<sup>13</sup>

---

<sup>13</sup> Whilst this argument does not entirely converge with that of Byrd and Hruschka their presentation that Kant's mature philosophy of right favours a coercive ground for a formation of a state that is trans-national is closer to my view than the denial by Arthur Ripstein that the state of nature problem internationally fails to include a treatment of the problem of assurance. For their view see B. Sharon Byrd and Joachim Hruschka (2008) 'From the State of Nature to the Juridical State of States', *Law and Philosophy* 27: 599-641 and compare Ripstein *Force and Freedom* pp. 225-31 but note his problems with the notion of "barbarism" on pp. 336-42.