International Legal Theory

PUBLICATION OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW
INTEREST GROUP ON THE THEORY OF INTERNATIONAL LAW

VOLUME 5 (2) • 1999 ISSN: 1527-8352

LETTER FROM THE CHAIR

In this issue, *ILT* features a paper whose author, Harry Gould, is a doctoral student in the Political Science Department at Johns Hopkins University. Hopkins is well known for its scholars in political theory and international relations, but it has not had anyone teaching international law on a regular basis since my own days as a Hopkins student in the 1960s. There is, of course, nothing new about this story. Throughout the United States most departments of political science offer no international law beyond the introductory level, if then. The steadily growing interest in international law in vocationally oriented law schools offers some compensation, but not enough. International legal theory too often falls between the cracks.

I find it heartening that a student as serious and as capable as Harry Gould has turned to international law and put it at the center of his theoretical concerns. There must be others, perhaps quite a few. For any of them who chance to read these words, I want to emphasize that *ILT* is the ideal forum for scholars, new and established, to try out their work in progress on a sympathetic and superbly qualified audience.

Every time I write this letter, I make the same plea: Submit your work in progress! And some of you may have thought that I should put my money where my mouth is. I contributed to the very first issue, but not since. It seems fitting then, as my tenure as Chair comes to an end, that a paper of mine will appear in the next issue. It is a pilot study for a long-term project that I am undertaking with two historians, James Lewis and Peter Onuf, to show how the rise of the liberal world in the decades following the Congress of Vienna affected the increasingly troubled experiment, in the United States, with federal republicanism. Please consider writing a comment for inclusion in the next issue. *ILT* depends on you--at least some of you--doing so, and I personally will be very, very grateful.

Nicholas Onuf
Florida International University

TOWARD A KANTIAN INTERNATIONAL LAW

Seeing Immanuel Kant invoked by Professor Nardin and his respondents in an earlier issue of International Legal Theory stirred a long dormant question: what would a Kantian theory of international law look like? (Fernando Tesón, The Kantian Theory of International Law, 92 *Colum. L. Rev.* 1, 53-102). My answer will rest on two strongly held positions which run contrary to much contemporary commentary: Kant is neither a Natural Law theorist (*contra* Nardin) nor a Cosmopolitan (*contra* nearly everyone writing on ethics and International Relations). I should also state at the outset, that while I will strongly defend my interpretation of Kant, I do not claim that he would necessarily agree with any or all of the uses to which I have put his work, although I believe we share a common set of ends.

I will begin with two sections in which each of my rather contrarian claims will be elucidated and defended. Section three will look closely at Kant's remarks on law, justice and public

international law. Armed with this and some discussion of Kant's moral theory, (which for Kant imbues all of these topics), I shall outline my vision of what a Kantian International Law might look like, and conclude that the current state of international relations stands somewhere between the state of nature over which Kant (following Hobbes) so famously fretted, and his goal of a world existing in a condition of right. We have moved some of the way toward a state of right. The world is still composed of states, but their rights and freedoms are delineated, limited and ensured by a supranational authority with (some) coercive capability. Self-help still exists but its allowable usage has been greatly circumscribed. The theory I propose is based upon viewing states as both legal and moral persons, and articulating categorical yet wide duties backed by coercive sanction. My theory is humanistic, duty-based, and at times moralistic as Kant's views require.

Kant and Natural Law

Professor Nardin makes a very strong claim about Kant's commitment to natural law. Natural Law did influence Kant (especially his moral philosophy), but only slightly, as with Hobbes. Professor Nardin seems to believe that any non-consequentialist theory will be *ipso facto* naturalist. "It is this priority of principles forbidding wrong over injunctions to produce good ends that distinguishes natural law as a moral system." (Nardin, *International Legal Theory* 8-9 (1999)). Kant's Categorical Imperative holds without regard to consequences, so Nardin places Kant's legal (and moral) philosophy within the naturalist tradition.

The problem with Nardin's view is that Kant's system of maxims and imperatives is based on the internal legislation of moral law (autonomy). To derive one's morality from any external source, even the Natural Law (or divine law or any other source) is to fall into heteronomy. "I am not under any obligation even to divine laws except in so far as I have been able to give my consent to them" (All citations to Kant will utilize the standardized Academy pagination; 8:350). This is not a re-articulation of natural law theory; it is its rejection. Kant eschews the teleology of the ancient natural law thinkers, the deductive natural law, which the Thomists shared with Grotius (and despite some differences, Pufendorf) and the perfectionism of Leibniz and Wolff as bases for the derivation of the moral law. Kant is quite adamant that morality is not rooted in nature. (4:409-411). J.B. Schneewind nicely delineates another of Kant's differences with the natural law tradition. Unlike Kant, natural law theorists did not believe that people could comprehend the requirements of morality without being told by an outside source (authority). Although God had given humanity the ability to understand most basic principles, the majority of people were unable to discern the moral requirements implicit in those principles. Likewise, the natural law theorists felt that most persons could not grasp what was required in particular cases. (J.B. Schneewind, Autonomy, Obligation and Virtue: An Overview of Kant's Moral Philosophy, in *The Cambridge Companion to Kant*, 311-12, (Paul Guyer ed., 1996)).

Even setting aside the limited ability to know what the natural law commands, they viewed most of humanity as unwilling to obey the natural law, and hence in need of coercion with the threat of punishment. This coercive principle was consistent with their conception of obligation. Kant rejected this as pure heteronomy, because for him, to act out of fear of punishment, even if this entailed acting in accord with the moral law, was not acting morally.

Kant and Cosmopolitanism

It has become commonplace to consider Kant a Cosmopolitan; it is my contention that this is incorrect for several reasons. Kant is indebted in his moral philosophy to the Stoa, and he does appropriate selectively the language of Cosmopolitanism, but there is little beyond this, and much to the contrary. A useful foil for these purposes is the work on Cosmopolitanism by Martha Nussbaum. (Martha Nussbaum, Kant and Cosmopolitanism, in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Bohman,

et al. eds. 1997); Martha Nussbaum, Patriotism and Cosmopolitanism, in *For Love of Country: Debating the Limits of Patriotism* (Nussbaum ed., 1996)).

Nussbaum begins her articulation of Kant's purported cosmopolitanism with the textual argument that Kant frequently uses the term "Cosmopolitanism," and does so often in close proximity to quotations from classical, Stoic figures. The Cosmopolitanism that Kant is claimed to espouse is Stoic in origin, but mediated by modern natural law theory. (Nussbaum leaves the meaning and consequences of this claim unexplored.

Nussbaum focuses upon Kant's notion of the Kingdom of Ends to illustrate his indebtedness to the Stoics; however, she mistakenly attributes a teleological function to this concept, rather than the regulatory function which Kant assigns to it. (8:433-434).

Without any textual support, Nussbaum makes the very bold assertion:

> As do Marcus and Cicero, Kant stresses that the community of all human beings in reason entails a common participation in law (*jus*), and, by our very rational existence, a common participation in a virtual polity, a Cosmopolis that has an implicit structure of claims and obligations regardless of whether or not there is an actual political organization in place to promote and vindicate them. (Nussbaum (1997) at 37).

Kant argues that there can be no law or right outside of a political organization that can "promote and vindicate" them. For Kant virtual polities can only yield virtual rights.

Nussbaum attaches significant weight to Kant's discussion of "Cosmopolitan Law," and the "organic interconnectedness" it seems to imply. Referring to the discussions in *Perpetual Peace* in which Kant claims that "the idea of a cosmopolitan law" complements politics and international law, Nussbaum sees strong affinities to Cicero and Marcus Aurelius -- she fails, however, to provide textual references for comparison. (Nussbaum (1997) at 37). Examination of the way in which Kant articulates the content of cosmopolitan law, obviates this criticism, because his vision of cosmopolitan law is largely without content.(8:360-362; 6:352-372).

In Kant's claim regarding the "organic interconnectedness" of humanity, Nussbaum again sees debts to the ancients; however, it is mistaken to construe the assertion that "[t]he peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of laws in one part of the world is felt everywhere"(8:360) as equivalent to the Stoic *topos* that the contingent political community is without moral value. As formulated by Kant, the cosmopolitan moral community is volitional and contingent, rather than the matter of *physis* the Stoa considered it.

For Kant, the state is far from irrelevant; his modified contract theory (6:312-316; 8:289-297) may indicate that states are contingent creations, but there can be no doubt that they are absolutely necessary. Prior to entering into a lawful state, there exists, as for Hobbes, only a situation of self-help; for Kant this is the situation of ultimate moral degradation for mankind. (6:312). While the specific citizenship one carries may be contingent and *in se* morally indifferent, loyalty and obedience to that state are absolute requirements with significant moral weight -- hardly the views of a Natural Law thinker, especially the potentially subversive Natural Law of Nardin's article.

As the state is a necessity for justice and the exercise of right within a given territory, Kant states that they are both the bearers and guarantors of rights among themselves. This is a point often repeated by Kant; it is found in the Seventh Proposition of Idea for a Universal History with a Cosmopolitan Purpose (8:24-26), all three definitive articles of Perpetual Peace (8:350-360), implied in several of its Preliminary Articles, and the closing passages of Theory and Practice. (8:312-313). Nowhere in these pieces does Kant envision a world without states.

For Kant, human universality does not, and cannot outweigh the necessity of the state. It is telling that the only alternative to a world of states Kant can conceive, a single world state, is rejected peremptorily (8:357); Zeno's ideal of the abolition of states is, if not utterly alien to Kant, at least beyond the moral will of Kant's humanity.

This is so because for Kant, the primary obligation that each citizen owes is to her state, there is no possibility for cosmopolitan obligation except between states. In essence, cosmopolitanism deals with supererogatory duties, but for Kant, there are no duties superior to those owed to the state. There were for Kant no political or legal duties owed humanity *per se*. To the extent he recognized anything approaching this notion at all, it was only realizable within the juridical framework of states, and could only be sustained by discrete individuals.

Kant on Law and Justice

The bulk of Kant's writings on law and justice are found in the *Metaphysics of Morals*, particularly in the *Rechtslehre* (Doctrine of Right); however, elements important to the development of a theory of international law can also be found in the *Tugendlehre* (Doctrine of Virtue). (Section II of *On the Common Saying: This may be True in Theory, but does not Apply in Practice*, has some useful supplementary remarks. Cf. 8:289-307.) As is to be inferred from the term *Rechtslehre*, the central focus is upon Right (and rights in the plural to a lesser extent).

For Kant, right and freedom coincide, and address the external relations between individuals; the term right is defined as the ability to act upon one's innate (i.e., natural) freedom. As Kant explains, "[r]ight is the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."(6:230). Translating this into action, Kant goes on to state: "Any action is right if it 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." (6:230). Freedom is thus the absence of interference by another's external actions upon one's own external actions.

Possession of a right entails authorization to employ coercion to ensure that right.

> Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it . . . coercion is a hindrance or resistance to freedom . . . if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws, coercion that is opposed to this is consistent with freedom in accordance with universal laws, that is, it is right. (6:231).

What is entailed, is not a subsidiary right of coercion (or perhaps counter-coercion); for Kant, "one can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone's Right and authorization to use coercion therefore mean one and the same thing." (6:232).

In the state of nature, everyone possesses this right, and because everyone serves as the judge in their own case, there is complete lawlessness; it is because of this lawlessness that we derive the imperative *exeundum e statu naturali*. As he recounts, it is necessary (imperative) to substitute authoritative, enforceable (coercive) judgment for combat (self-help). (Pierre Laberge, Kant on Justice and the Law of Nations, in *International Society: Diverse Ethical Perspectives*, 85 (Mapel et al. eds., (1998)).

> . . . unless it [one] wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others . . . subject itself to a public lawful external coercion, and to enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate power (not its own but an external power); that is, it ought above all else to enter a civil condition. (6:312).

The highest task which nature has set for mankind must therefore be that of establishing a society in which freedom under external laws would be combined to the greatest possible extent with irresistible force. (8:22).

This is no less true of states than of individuals for Kant. There remains an -- to my mind uninteresting -- exegetical struggle over whether Kant ultimately sought a world republic, or a confederacy of states. However, he was consistently explicit in his demand that whatever form the supranational body might take, it must not be sovereign. (I find both uninteresting and unhelpful the question of whether non-democratic states might be admitted into whatever institution is ultimately created. Each time Tesón links Kant and democracy, he does Kant, a republican and noted opponent of democracy, a great disservice. (8:352).

Kant on *Jus Gentium*

Nowhere does human nature appear less admirable that in the relationships which exist between peoples.(8:312).

> In the state of nature among states, the *right to go to war* (to engage in hostilities) is the way in which a state is permitted to prosecute its right against another state, namely by its own *force* . . . when it believes it has been wronged by the other state, for this cannot be done in the state of nature by a lawsuit (the only means by which disputes are settled in a rightful condition.). (6:346).

Kant had little to say about International Law per se; his commentary focuses upon what he termed cosmopolitan law, what today might be referred to as international private law, and of course, famously, the necessity to establish "a law governed ***external relationship*** with other states..." (8:24)(Emphasis in original) Kant was also famously critical of the international law of his day; his scathing remarks about the sorry comforters Grotius, Pufendorf and Vattel (8:355) is perhaps one of the best known passages from *Perpetual Peace*. It is curious (and perhaps self-serving on Kant's part) that Christian Wolff was not included among those excoriated. Returning to my earlier remarks, Kant's vision of the cosmopolitan is very tepid when compared to the strong articulations of the *Stoa*. Consider the following: "Cosmopolitan Right shall be limited to conditions of Universal Hospitality." (8:357). The only duty one is owed, the only right one carries is to not be treated with hostility. To be fair to Kant, this has developed into a powerful anti-imperialist argument. To compare this sentiment to notions of natural universal community, and the supererogation of local duties, grossly overstates the kernel of the cosmopolitical in *Perpetual Peace*. In the *Rechtslehre* at 6:352-353, Kant is even more restrictive, limiting his conception to universal laws of commerce. Unlike Professor Tesón, I do not consider this a helpful starting point. In the next section, I will go beyond Kant's strictly political and juridical writings to construct my own vision of a Kantian international legal theory.

Toward a Kantian Theory of International Law

The elements of the right of nations are these: (1) states, considered in external relations to one another, are (like lawless savages) by nature in a non-rightful condition. (2) This non-rightful condition is a *condition of war* (of the right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made (hostilities).(6:344).

> . . . There is no possible way of counteracting this except a state of international right, based upon enforceable laws to which each state must submit (by analogy with a state of civil or political right among individual men). (8:313).

As I indicated in the introduction, I hold that the contemporary international environment carries elements of both the state of nature and the state of right. States do retain a circumscribed right of self-help, and there are coercion-based rights enforceable by supranational congeries of organizations and regimes -- some of what Kant called for has come about. That this UN-based system is imperfect is an indication of the extent to which the world is still a state of nature. However, for

the theoretical purposes at hand, I shall bracket the element of actual lawlessness to focus on deriving the rights and duties of states -- beyond Kant's tepid claims discussed earlier -- for prescriptive purposes.

It is no accident that these derivations map very closely onto those of individuals. Kant is ambivalent about the moral, although not the legal, personality of states; for the purposes at hand, I shall take the position that states are to be treated and conduct themselves *as if* they were moral persons. Moral personality, like legal personality, entails the possession of enforceable rights as well as obligations to others, some of which entail non-interference with the exercise of rights; others connote positive duties. Perhaps if not more novel at least more provocative, this analogy also entails the holding of ends by states, some of which themselves entail duties. (The great amount of reification this obviously implies is simply heuristic. The reader should be aware, however, that I am not taking the Hegelian line regarding the organic character of the state; G.W.F. Hegal, *Philosophy of Right*, 321-329).

Kant shares the traditional notion that every right entails a correlative duty; going beyond this common assumption, he further claims that some duties are innate. We have previously seen what Kant calls his "Universal Principle of Right:" "Any action is *right* if it can coexist with everyone's freedom in accordance with 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."(6:320). In practical terms, this means that as long as an individual does not impede another person by their external actions, then that person is free; refraining from impeding is an issue of right, and later law; the motivation behind this, which is equally important to Kant, remains a matter of ethics. From his "Universal Principle of Right," Kant derives the binding 'Universal Law of Right.' It states: "act externally [so] that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law." (6:231).

As regards states, I take this to found a basic rule of non-intervention (similar to that posited at 8:346); however, we are not yet ready for a full discussion of the topic. I will make one preliminary remark; Kant claims only one innate right: freedom. (6:237-238). This freedom entails the "innate equality," *sui generis*, meaning "beyond reproach" and freedom of action. We will address below how these criteria of freedom manifest themselves for sovereign states.

The translation of the rules regarding coercion (and its relation to right) to the realm of the interaction between states should be quite simple; in the pure state of nature, the rule is self-help. As a result, of the insecurity which reigns, the imperative is to exit the state of nature in favor of something analogous to civil society, thereby renouncing the right of self-help. Since 1945, the world has been moving in precisely this direction; membership in the UN entails the renunciation of self-help; resort to it outside of self-defense -- itself quite narrowly defined -- becomes a crime subject to sanction. That the system works imperfectly (to be extraordinarily generous) is on Kantian grounds a failure of will among states.

Since right, as formulated by Kant, by and large entails just being left alone, a potentially more fruitful path for generating an international law is by recourse to states' duties; I intend to argue for the creation of several new legal duties. An immediate difficulty presents itself: the most elaborate discussion of duties is to be found in the *Tugendlehre*, but there Kant explicitly states that these duties of virtue -- which come from the possession of ends -- are subject only to self-binding, not external coercion, because the ends -- possession of which generate them -- cannot be dictated. (6:381, 394). My provisional solution is to take the notion of public declaration and the view of treaties as voluntary agreement to limit one's actions subject to external coercion as the bridge between moral and legal duties. In effect, this can make one's private (moral) duty a binding, external legal duty by taking the appropriate symbolic steps or uttering the requisite speech-acts. If a state declares itself to be bound to do

or refrain from doing something, this becomes an obligation, even if the act in question arises from a moral duty. In Kantian terms, this serves to codify a duty of virtue into a duty of right. (See also, Dorothy Jones, The Declaratory Tradition in Modern International Law, in *Traditions of International Ethics*, 42-61 (Nardin et al. eds., 1992)). This does not necessarily meet Kant's criterion of acting for the right reason, but we have left the realm of the explicitly ethical to create a new juridical sensibility.

Kant offers two ends, which are in themselves also, duties; I find them exceedingly useful starting points, despite some *prima facie* difficulties. The first is the duty to oneself to strive for perfection; the second duty is to promote the happiness of others. Kant's discussion of individual perfection is very Aristotelian in its teleological focus on capacities; the duty is to harmonize one's abilities with one's ends, a qualitative/formal conception. What Kant has in mind is cultivating the will to satisfy the requirements of duty; "cultivate the *will* up to the purest virtuous disposition, in which the *law* becomes also the incentive to his actions that conforms with duty and he obeys the law from duty. This disposition is practical perfection." (6:387). By doing this, we make ourselves worthy of the humanity in us. "Cultivate your powers of mind and body so that they are fit to realize any ends you might encounter." (6:932).

On its face, this fails to lead to anything readily helpful for international law, because notions of state perfection are abstruse at best, and chilling when put in terms of purity at worst. The important aspect is Kant's emphasis on the necessity to perform duty for the sake of duty, instead of for less worthy motivations such as fear of punishment or desire for reward. While not readily codified, this is a useful regulative principle given its insistence on lawfulness for law's sake.

The duty to promote the happiness of others is the more useful of the two. Kant subdivides it into four components, prosperity, strength, health and general well-being; he then proceeds to make the seemingly contradictory remark that the real end is not happiness, but removing obstacles to others' morality; herein lies the big payoff. (I find the notion of "general well being" to be too vacuous to found international legal duties, and so shall not address it). By giving attention to what Laberge calls "taking needs seriously," incentives toward lawlessness are reduced.

For each of these obligations, we can formulate negative and positive articulations; from these maxims can be derived (I envision the maxims taking the form of formal declarations or multilateral treaties) binding obligations; in each instance, the negative obligations seem easier to universalize, although the positive obligations give more discretion and latitude.

In Kant's terminology, these positive obligations are "wide"; they prescribe maxims, but not specific actions. There remains latitude for choice in following the law, since neither "how" nor "how much" is specified by the duty. It is in the maxim that these aspects are determined, and by the relevant tests that their satisfactoriness is determined. Wideness, however, does not entail permission for one to make exceptions.

Before any maxim/policy is publicly announced and transformed into a legal obligation it must be subjected to the same criteria which a Kantian would subject any maxim. Only once a proposed policy/maxim has met these criteria is it suitable for being turned into black letter or being declared a binding obligation. For demonstrative purposes, I shall subject several of my proposals to these Kantian hurdles.

Maxims are "the practical principle of a particular rational agent at a particular time." (Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy*, 83 (1989). It is the role of the Categorical Imperative to test which maxims conform to practical laws. The general form of a maxim is: In circumstance C, the agent will (will not) do action A. Or, more specifically, In C, I will

(not) do A. The imperative form is thus: in C do A. (4:412-414). This can include a purposive component. Such a maxim would now take the form: In C, I will (or will not) do, A for reason / end R; its imperative form: in C, do (or do not do) A (for R).

The first step in testing a maxim is the prudential test of the Hypothetical Imperative; does the proposed act bring about the end? If it does not the maxim must be reformulated. Only if it meets this criterion is a maxim subject to testing by the Categorical Imperative.

The First Formulation of the Categorical Imperative demands that we determine if the maxim can be made into a universal law; this is done first by rephrasing it in a universalized form: Everyone do A in C. Once one has formulated the maxim, Kant offers two ways of testing it to determine whether it passes the criterion of the Categorical Imperative. (See, J.B. Schneewind at 320-21). The first is the so-called contradiction in conception test. (4:422). If you cannot coherently think of a world for which your maxim is a universal (natural) law, you are not permitted to act upon it. Take for example, the maxim of stealing whatever one needs. Where this concept a universal law, the effect would be the insecurity of the willer's own property. In effect, he simultaneously wills property and not-property, a logically impossible condition.

His other test is the contradiction in willing; in it, what may well be conceptually coherent is still not able to be willed to be a universal law. Perhaps the best example of this is the maxim of never assisting anyone. For this to be universal, the willer robs herself of the possible assistance she might need to realize her own future ends, but because it is an analytic truth that willing an end entails willing the means toward it, this maxim cannot pass.

Prosperity

Just as the prosperity of an individual entails a duty of ensuring her material subsistence at minimum and material satisfaction at maximum (a maxim of encouraging gluttony or over consumption would not be universalizable), the same can be derived for states. A negative duty would be to refrain from predation or discrimination; the positive duty allows for a range of policies from granting "Most Favored Nation" status to the international redistribution of wealth.

In the form of maxims, the negative duty would take the form: *In relation with other states always refrain from predatory (discriminatory) behavior*. This is easily derived and articulated; positive duties do not generate maxims as easily, because each posited action must not conflict with any other duty, to self or other. Provisionally, it might take the form: *In relations with states in material need, always give such assistance that you aid without discrimination to others in need or to the detriment to the pursuit of your own legitimate ends*.

It should be quite evident that there is no contradiction in willing non-predation; in fact, it is perhaps of greater explanatory to test the converse maxim: *Everyone always behave in a predatory manner*; here we can see that so willing posits a world of universal predation, pushing us back into the state of nature, and eliminating the security of person and property. We can likewise determine that the positive formulation neither eliminates the institution of aiding, nor endangers the willer's capacity to aid or pursue her own ends.

Strength

As a scholar of international relations, I am predisposed to equate strength with military security; however, contemporary scholarship now deals with topics including environmental security and notions of security imbued with concepts imported from Critical Theory. For the purposes at hand, I shall restrict myself to the military security of the state, but invite readers to formulate duties and maxims addressing other conceptions of security.

Again, the negative duty is quite straightforward, and the positive both wide and complex. The simplest way to promote the

strength of a state is by refraining from harming it, a policy of non-aggression. Hence: *In relation with other states always refrain from aggression / refrain from promoting your ends through aggression*. Very straightforward, and of course, already a legal duty. One need not even perform the logical tests utilized above, because the converse maxim of utilizing force to meet one's ends entails treating the other state as merely a means, which is forbidden by the second formulation of the Categorical Imperative. (4:427-429).

For the positive aspect of the duty, I envision a range spanning aid through alliance. *In relations with other states facing external threat (specifically aggression) always offer aid to redress the aggression which goes neither beyond stopping the aggression nor to the detriment to the pursuit of your own legitimate ends*. Given the particularly wide nature of this duty, prudential issues will determine where along the spectrum the specific obligation lies; once this determination has been made, the now more specific maxim is to be subject to testing. It is perfectly conceivable that a wrong choice of action will be rejected. In particular, violating either of the criteria built in to the proposed maxim is to be rejected; one cannot coherently will a universal law of retribution nor aid to the detriment of one's own ends.

Several other issues immediately confront this maxim: Is the state facing aggression or lawful coercion? What is the rule with regard to preemptive or anticipatory attack? Can actions be taken which are intended to prevent a repeat of the aggression? Both Kant and extant international law have useful responses to these questions.

In response to the first, Kant is absolutely clear that no resistance to lawful coercion can be just, and hence in a law governed environment to do so would be illegal and subject to further sanction, as would any party complicit in such resistance. While typically thought of in terms of the use of force, coercion, it must be remembered, can also take the form of UN imposed sanctions. In a system which more closely approximates the state of international right, coercive action will be taken not just in instances of violating Security Council resolutions, but also pursuant to non-compliance with ICJ judgments or those of regional and human rights courts.

Notions of preemptive attack are anathema to Kant, whereas there is some room for them in international law. For Kant, this falls under the discredited category of *Jus Necessitatis*; "It is a matter of violence being permitted against someone who has used no violence against me." (6:235). The standard delineated in the *Caroline* episode: the "necessity of that self-defense is instant, overwhelming and leaving no choice of means and no moment for deliberation" is perhaps better than the answer provided by a strictly Kantian analysis. Given how narrowly circumscribed the conditions are, it is universalizable, but a great deal of good faith must be presupposed.

The final question about preventive measures is tricky; in the international state of nature, this would not be allowed because it would be simply a punitive war against the defeated nation which presupposes a hierarchy of authority absent from that condition. In the current international situation, in which such a hierarchy does exist, it is plainly allowable when undertaken or authorized by the Security Council, but in the absence of this criterion, the situation is simply *bellum punitivum*.

In principle, Laberge and Tesón are correct in that there will be no aggression in the Confederation (Republic) Kant envisions, but until that time, issues of the physical security of states remain. If such a system as envisioned in Perpetual Peace does come about, coercion (*contra* Tesón) will remain, just as it is a necessity in domestic society -- at least until all persons organic and juridical have perfected themselves.

Health

I envision two equally plausible conceptualizations of health for the purposes at hand: we might consider the health of a state's populace, or equally plausibly (if rather

metaphoric) the health of the body politic. Kant would have found the latter perfectly reasonable. I shall address both, although my own preference is for the former.

The very simple negative duty with regard to the populace is to refrain from intentionally harming them. A maxim derived from this duty would reject such policies as very broad economic embargoes in which the brunt of the sanctions are borne by the populace at large. In this instance, the converse maxim is again more easily tested and rejected; a rejection made all the more pointed by the fact that it represents such a grievous violation of the second formulation of the categorical imperative.

A difficulty arises when this is easily rejected in the form of a unilateral action, e.g., the US embargo of Cuba, but remains, *strictu sensu*, legal when done under UN auspices (Iraq since 1991). The solution, as I see it, is to start from the recognition of this duty and delegitimize it universally; the UN itself must repudiate practices directly harmful to populations -- this, of course, entails legal and moral personality for the UN.

The very wide positive duty is to assume responsibility for aiding in the improvement in the health of a population. Again, this leaves great discretion, and bears the caveat that this must be done without discrimination to other states in need insofar as means allow. Kant's remarks on beneficence (6:452-454) and charity (27:455-456) offer interesting starting points for practical guidelines.

The notion that the body politic exhibits health and illness the same as any individual has an intellectual lineage which goes back at least to the early-moderns; Kant accepted this notion, and utilized it, for example, in his discussion representing non-republican forms of government as "deformed." For these purposes, I shall focus on political institutions, although plausible cases could be made for addressing the polity or even political culture, which I again invite.

The negative form of the obligation is simply non-interference in a state's political system. If things seem to be working well, do not attempt to bring about changes which are intended to make the system or its institutions more to your liking. Provisionally, we might conceptualize "working well" not necessarily as robust republicanism, but merely as orderly (non-violent succession) and without grievous violation of the rights of the population.

The positive obligation is to promote good (i.e. republican for Kant, liberal-democratic for Tesón) governance and institutions. A caveat must, however, be added: this should not involve foisting institutions on societies, which do not desire them; in line with Kant's own position, a good example can go a long way. The relevant maxim might look something like: "*In relations with other states always promote (republican) institutions and forms of governance as far as popular will accepts them.*" A maxim, which proposed any such sort of paternalistic imposition, could not be coherently willed because it would entail the very same imposition on the willer. It is further paramount that they not be forced where they are not wanted. Insofar as Kant's account of Perpetual Peace is teleological, this would surely promote a reactionary backlash impeding realization of the *telos*.

Freedom, Sovereignty and Non-intervention

As mentioned earlier, by starting from the stance that states are to be treated and comport themselves *as if* they were moral persons, states are also to be considered to be by nature free. There are four aspects of juridical freedom for Kant, which is not to be confused with his concept of autonomy; the innate equality of all, being *sui generis*, being beyond reproach, and possessing freedom of action. I believe that the narrow way in which Kant defines each of these aspects can actually clarify theoretical as well as legal questions about sovereignty.

Innate equality simply connotes not being able to be bound by others to an extent greater than that to which you can bind them. This is already a part of the law, it is enshrined in the

Vienna Convention on the Law of Treaties, and in the general rule of *rebus sic stantibus*. Articles 61 & 62 dealing with subsequent impossibility of performance and *rebus* . . . protect this equality from changes in material circumstance and prevents the inequality of burden. While not part of positive law, Woodrow Wilson's Fourteen Points also incorporate this point.

For an individual to be *sui generis*, he or she must be their own master or mistress; this is surely the *sine qua non* of sovereignty. If a state does not rule itself, it is simply not sovereign. This is inviolable; should one state subject another to itself, it has committed the equivalent of enslavement; any attempt to do so is equivalent to an attempt on one's life and generative of a right to self-defense. Kant discusses this under the topic of *bellum subjugatorium*, which he equates with the moral annihilation of the state. Just as a person's legal and moral personality is destroyed by involuntary servitude the same is true for the conquest of a state.(6:347). Kant elaborates the relevance of this principle for the populace:

> Still less can bondage and its legitimacy be derived from a people's being overcome in war, since for this one would have to admit that a war could be punitive. Least of all can hereditary bondage be derived from it; hereditary bondage as such is absurd since guilt from someone's crime cannot be inherited.(6:349).

Setting aside the rendering *alieni generis* by aggression, another complicating possibility presents itself, the voluntary cession of sovereignty to a supranational body (at present the EU, perhaps ultimately the UN). In the case of voluntary merger, there would seem to be no problem; although it might be claimed that this violates the Second Preliminary Article of Perpetual Peace, I find this unconvincing (assuming, of course, republican principles guided the decision).

Kant's principle of a person being beyond reproach simply connotes that she cannot have wronged anyone prior to acting, i.e., there must be no presumption of harmful intent. This seems only relevant to the extent that the international community exists in a state of right, because in the state of nature, one must always assume threat.

The final aspect of juridical freedom is the freedom of action; in various guises it has been seen throughout this work: one can do anything to others that does not diminish what is theirs. This is perhaps the fundamental principle of liberalism, and presupposed in commerce. This also seems a *sine qua non* of sovereignty; to the extent that a state is limited in its actions it is that much less sovereign. I see, however, no conceptual problem with the voluntary cession of freedom of action and hence sovereignty entailed by membership in the UN; in fact, each of the maxims proposed in the previous discussion entails some limitation upon the freedom of action, as does every treaty.

A difficult question arises with regard to societies which choose to be closed and autarkic. Their wishes must be respected, but following Kant's discussion of Cosmopolitan Right which I have so assiduously shunned, they are obliged a certain number of duties to outsiders.(6:352-353; 8:358-360).

Bolstering *Pacta sunt Servanda*

Because Kant's account of the impermissibility of lying is so controversial, I would like to view it alongside the rule of *pacta sunt servanda*. This is particularly important because each of the duties discussed in the previous section is based upon a pledge, which even though enforceable should be considered binding in the absence of coercion. In a way, Kant's categorical prohibition of lying can be viewed as reinforcing the existing norm of *pacta sunt servanda* (which is albeit already black letter and, perhaps, *jus cogens*). In the opinion of Kant, lying is the greatest violation of the duty owed to oneself; it makes one contemptible in his or her own eyes, and annihilates their dignity as a human being.(6:429-431). Presumably this will hold for (reified) states as well, given the stipulation premising this whole endeavor, that states are morally equivalent to individual persons; a premise which directly rejects all of

the fundaments of *raison d'etat*. Making lying pledges is not only a prudential error in that the state will lose credibility, it is morally wrong because inherently non-universalizable. To explore this, we need to go back to the Grundlegung, which discusses lying in three contexts. (4:402-03, 4:422, 4:429-30; *See also, On a Supposed Right to Lie from Philanthropy*, 8:423-30).

When one tries to universalize a maxim of lying, or as Kant expresses it, making false promises, the maxim fails because in such a world there could be no promises at all, because all pledges would be assumed false. Without promises, there would be no lying, hence "my maxim, as soon as it was made a universal law, would be bound to annul itself." (4:403). This tests also fails the contradiction in conception test; promising would become impossible, "and the very purpose of promising, itself impossible, since no one would believe he was being promised anything, but would laugh at utterances of this kind as empty shams." (4:422). It is plainly evident that in terms of the second formulation, no one could rationally wish him or herself to be lied to because this is to be used as merely a means to an end. (4:429).

Conclusion

Although using Kant as a starting point does not on all matters lead to a radical departure from the corpus of international law as we currently have it. I believe I have demonstrated the ways in which it can create several new sets of duties which will bring the world much closer to the end advocated in *Perpetual Peace*, without undo attention to or squabbling about uninteresting specifics of *Perpetual Peace*. While the political world within which Kant wrote no longer exists, the moral universe is plausibly the same; hence, if we share his ends, which I believe most scholars of International Law and International Relations do, resorting to a more fruitful set of tools than the Articles of Perpetual Peace is needed. I believe I have demonstrated some of these.

I would like to thank John Clark, William Connolly, Richard Flathman, Siba Grovogui, Nicholas Onuf, Anthony Pagden, J.B Schneewind, Nicholas Tampio and Joseph Ward for their criticism and assistance with this paper.

Harry D. Gould
Department of Political Science
Johns Hopkins University

REPLY TO GOULD

Harry Gould takes some remarks of mine on natural law in the preceding issue of *International Legal Theory* as a point of departure for rethinking the question of what a Kantian theory of international law might look like. He suggests (among other things) that Kant's moral theory, when applied to international relations, is capable of supporting positive duties of benevolence on the part of states (such as to promote the prosperity, strength, and health of other states or their inhabitants). This is an unusual but entirely reasonable extension of Kantian ethics, and he is right that it takes the usual discussion of Kant's international theorizing in a new direction.

Gould is also right when he joins Pierre Laberge in criticizing, as un-Kantian, the usual view that Kant's international theory idealizes a world order that is cosmopolitan, not international. But his dart misses the board when he takes exception to my characterization of Kant as a natural law theorist. Gould argues that Kant disagreed with the ethical theories of his Greek, Roman, Thomist, Grotian, and Leibnitzian predecessors, rejecting their claim that morality is rooted in nature. He takes it as definitive of the natural law perspective that morality is a body of laws divinely ordained and enforced by fear of punishment.

This is not what I meant by natural law, however. Like Alan Donagan, I regard Kant as the greatest of all natural law theorists precisely because he escapes the errors of his predecessors. The essence of natural law is that morality binds rational beings and can be known, in principle, by the use of reason. Morality is not, then, derived from an external

source, unless "autonomy" is to maintain one's own views against reason itself, which is a possible view, but not one held by Kant.

Gould is correct that Kant is not a natural law thinker if by natural law we mean a conception embracing the authoritarianism discerned by Jerome Schneewind in some of Kant's predecessors. But I see no reason to be governed by such a historically specific definition of natural law. I have no allegiance to the expression "natural law," however, and indeed would prefer to speak simply of "morality." I chose it as the best way of making my argument in terms familiar to legal theorists, who are in the habit of discussing the relationship between morality and law by contrasting "natural" and "positive" law.

Terry Nardin
University of Wisconsin-Milwaukee

THE KANTIAN THEORY OF PUBLIC INTERNATIONAL LAW

Immanuel Kant seems so often to be right, in the eyes of contemporary philosophers and legal academics, that his writings have taken on a nearly scriptural authority. To find one's views in Kant confirms their validity. To challenge Kant implies reactionary prejudice, or pointless iconoclasm. John Rawls has made so many new Kantians in the academy that every scrap and letter of the great Königsberger's work has its own scholiast, and school of eager exegetes. Finally the commentators have turned even to Kant's short late essay on *Perpetual Peace* (1795), which closely follows a tradition of proposals deriving through Kant's model Jean-Jacques Rousseau (1761) from the Abbé, de Saint Pierre (1713) and William Penn (1693). The question addressed is how the different nations of the world can live together in peace.

By joining the gaggle of Kant interpreters I do not intend so much to question their consensus, as to ask (of whatever Kant says): is he right? I will briefly review Kant's proposals, considering them as actual policies, which might be applied to contemporary relations between states. Kant proposes six preliminary articles of a perpetual peace among states, and three definitive articles, supplemented by a guarantee, a secret article, and two appendices, to maintain a universal community (*Gemeinschaft*) of political, international and cosmopolitan right.

Kant's Preliminary Articles of Perpetual Peace

Kant's six preliminary articles of perpetual peace are practical and prospective. They lay out basic rules through which existing states may bring an end to hostilities and develop the basis for creating perpetual peace. Kant intended several of his proposals (2, 3 and 4) to admit some flexibility or subjective latitude, so long as their ultimate purposes not be lost. Kant's six preliminary articles of perpetual peace propose that: (1) No conclusion of peace shall be considered valid if it was made with a secret reservation of the material for future war; (2) No independently existing state, whether large or small, may be acquired by another state by inheritance, exchange, purchase or gift; (3) Standing armies will gradually be abolished altogether; (4) No national debt shall be contracted in connection with the external affairs of state; (5) No state shall forcibly interfere in the constitution and government of another state; and (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 (All translations here and henceforth by H. B. Nisbet in *Kant, Political Writings* (Cambridge University Press 1970)).

The first preliminary article forbidding the secret reservation of material for war reflects Kant's commitment to honesty. Honest states that agree to peace would relinquish their capability for war. This preliminary article will be impractical in a multipolar world of mutually distrustful powers. Full disarmament requires universal compliance and trust. In the absence of either, prudent states will retain their capability for war, while working to create the necessary conditions for peace. Perhaps Kant's first provision will be a necessary preliminary to real peace, in the sense that complete and

permanent peace (in its strongest sense) cannot exist without disarmament. As applied to contemporary international relations, the trusting renunciation of all material for war would be unwise, and likely to provoke avoidable conflicts between states.

Kant's second preliminary article of perpetual peace, forbidding exchanges of national territory, recognizes the fundamental principals of self-determination and cultural stability. Each society has its own life and history, which would be destroyed by transfer or amalgamation. Kant recognizes the folly of a single consolidated world empire. This clause is elegant, convincing and true, but should not be read to prevent federation. Kant simply endorses the stability of existing administrative borders and the doctrine of *uti possidetis juris*. Each community or separate republic must develop its own sense of the common good and consensus about justice, standing on its own cultural history. This does not preclude a broader cosmopolitan citizenship that encompasses all humanity.

The third preliminary article of perpetual peace, proscribing standing armies, follows from the first, concerning material for future wars. Standing armies exist to fight, provoking apprehension in others, expensive arms races, and the danger of prophylactic aggression. Kant proposes a gradual disarmament, which might be possible in a just world of legitimate states, provided that they disarm together. Kant's further prohibition on the accumulation of public currency reserves (which he sees as equivalent to armies, since wealth can hire arms) makes little sense. Governments need wealth and reserves of wealth to serve their citizens. Converting wealth to arms takes time, and even poverty cannot prevent rearmament when states are determined to do so.

Kant's fourth article, forbidding a national debt, follows from his fear of public wealth. Such prohibitions would impoverish the state, without preventing war, and reflect an unreasoning fear of finance. Kant's subsidiary point that foreign debts may lead to war when debtor nations cannot pay, has a kernel of truth in it. His solution that states should band together to prevent foreign borrowing seems unnecessarily harsh. Some states and populations may benefit from timely borrowing, to fund the development of their local resources and economies. Kant's view of debtors as improperly enriched would-be imperialists reveals his conception of Britain as the typical debtor nation. Regulated international borrowing, by satisfying and empowering the poorer nations, may be an important force for world peace, because it promotes greater equality among states.

The fifth preliminary article of perpetual peace comes closer to the substance of contemporary international law by banning forcible intervention in the constitution or government of another state. Kant's reasoning reveals his conception of states as moral persons, with their own political autonomy, comparable to the private autonomy of real human individuals. This analogy supposes that just as individuals may foolishly harm themselves, without legitimating someone else's intervention, so every state or people may freely harm itself, so long as it does not injure others. Accepting any intervention in a state's internal conflicts would (Kant supposes) make the autonomy of all states insecure.

Kant's attribution of moral identity and autonomy to states would be justified, if one's aim were simply to establish a peace between states, preliminary to a more definitive permanent settlement. If one's aim were justice, however, the equivalence would fail. Just as individuals deserve liberty and moral autonomy, so too do nations, but only so long as states stand in the place of the individuals that they represent. State autonomy is derivative, and depends (as Kant recognized) on the collective right to independence and self-determination of the citizens behind it. Oppressive states that disregard their citizen's welfare cannot claim to speak for them, or to enjoy vicariously their citizen’s rights to independence. In such circumstances, other states may sometimes legitimately respond directly to appeals for help from subordinated populations, against oppressive regimes.

Kant's confusion between the moral autonomy of individuals and the moral autonomy of states carries over to his prohibition of certain excesses or dishonesties in war. The sixth preliminary article of perpetual peace rests on Kant's assumption that a state of nature exists between nations, which lack a court of justice to legitimate their wars of punishment (*bella punitiva*) against illegal behavior. In such circumstances, Kant suggests, wars represent a form of trial by battle, to be resolved by the judgment of God. Kant insists that such wars must follow civilized procedures, in order to avoid a descent into total destruction through escalating mutual atrocities.

This last point makes a powerful argument in favor of the laws of war, which Kant rendered almost ridiculous with his rhetorical and transparently insincere reference to the so-called judgment of God (*sogenannt Gottesgericht*). War is not a trial, but mutual destruction, to be avoided at almost any cost. Different parties to the conflict will be more or less at fault, and more or less to blame. Victory goes to the stronger (and often less justified) party, without any reference to justice. Justice plays a part in appealing for allies, or justifying measures taken to win the war. Kant's sixth article misses the decisive importance of justification (which he recognizes elsewhere). When states are at war, the more justified party may legitimately take stronger measures to win or resolve the conflict than the less justified party, whose duty lies more in submission and restitution, than vigorous pursuit of war.

Kant's preliminary articles look less to the justice than to the stabilization of the existing world order. Taken separately and individually his articles hardly apply to contemporary international relations, where international institutions and finance have completely supplanted the structures of his simpler era. Taken collectively, however, Kant's preliminary articles indicate a useful strategy for achieving perpetual peace, by first stabilizing the current administrative borders of states, then moving toward justice. Peace precedes justice in Kant's formulation, but justice justifies and perpetuates the peace, when peace between states facilitates their mutual reform, and more definitive articles of peace.

Kant's Definitive Articles of Perpetual Peace

Having established the minimum preliminary foundations of a perpetual peace in his initial proposals, Kant described his three definitive articles of perpetual peace, which establish the formal relationships between nations, without which states must necessarily regard each other as enemies. Kant takes it as given that only a lawful (*gesetzlich*) state can be trusted. Only states that share a legal civil state of government (*bürgerlichgesetzlich Zustand*) can live in peace. Otherwise, their neighbors must suppress them as law-abiding citizens properly suppress those individuals who refuse allegiance to the common civil society. Kant envisioned three types of legal (*rechtlich*) regimes, depending respectively on civil right (*Staatsbürgerrecht* or *ius civitatis*), international right (*Völkerrecht* or *ius gentium*) and cosmopolitan right (*Weltbürgerrecht* or *ius cosmopoliticum*). Persons without such constitutions live in a state of nature with respect to each other, Kant believed, and so of perpetual war.

Kant's three definitive articles of perpetual peace follow from his conception of *rechtlich* or *gesetzlich* institutions, without which there would be no peace. First, all states' civil (*bürgerlich*) constitutions must be free and republican. Second, international right (*Völkerrecht*) must derive from a federation of free and republican states. Finally, cosmopolitan right (*Weltbürgerrecht*) will be limited to conditions of universal hospitality. All three of these lawful regimes depend on Kant's conception of freedom, in its older republican sense. For Kant rightful freedom (*rechtlich Freiheit*) requires submission only to those laws to which one could actually give one's consent. Rightful equality requires that all possible legal obligations apply equally to all. Kant insists these innate and inalienable rights (*angeborne, zur Menschheit notwendig gehörende und unveräusserliche Rechte*) forbid all relations of unequal power among citizens, except distinctions derived from merit alone.

Kant's powerful commitment to this natural law of reason determines his conclusion that only republican constitutions can sustain a perpetual peace. Kant's conception of the republic depends on the equal freedom (*Freiheit*) of all members of society; their equal dependence upon the civil law (*Gesetz*); and their equality (*Gleichheit*) as citizens. Republican constitutions are the only constitutions that citizens as equals could agree upon, because republics spring directly from the concept of right (*Rechtsbegriff*), and require the consent of their citizens to any public decision. Kant believed that republican citizens armed with the vote would reject war as pernicious to their own well being, while non-republics embrace war, to enrich those in charge.

These last remarks might lead (have led) some commentators on Kant to confuse the republican constitution with democracy. This would be mistaken. Kant followed Rousseau and his classical sources in believing that democracies will always be despotic, unless they separate their legislative and executive powers. Republics, Kant believed (in common with his contemporary James Madison and most other self-styled republicans of the period), will combine the separation of powers with representation or election to executive offices, so that each public officer remains a servant of the state. Kant suggested that the absence of representation will always result in despotism of one, a few, or the many, which amounts to a state of war, in which no one's rights are observed.

Kant's first definitive article confirms his commitment to justice as the basis of perpetual peace. Kant rightly concedes that there will be no peace or safety for the subjects of any state that disregards the inalienable republican civil rights to freedom, equality and law. This adds very little to his underdeveloped concept of republican government, which is restricted (in *Perpetual Peace*) to requiring representation, the separation of powers, and implied doctrines of popular sovereignty and the rule of law. Kant's contemporaries John Adams, Alexander Hamilton and James Madison provided more nuanced descriptions of the republic, as did earlier authors such as James Harrington and the Baron de Montesquieu. Nothing Kant says contradicts their more detailed republican prescriptions for checks and balances, elected senates, and life terms for judges. Kant simply does not address the details of republican government, in an essay dedicated to the relationship between states.

The position of the republic as the basis of world peace becomes much clearer in Kant's second definitive article of perpetual peace, basing his *ius gentium* on a federation of republics or federal free states. This international constitution would correspond to the civil constitution of its several member states, by securing the rights of each state against the others. Kant emphatically rejects the possibility of an international or world state. He wants a *Völkerbund*, not a *Völkerstaat*. The difference lies in maintaining each people's separate identity in separate republics. Each republic must be an equal member of the international federation of peoples, just as every person must be equally a citizen of his or her separate component nation, within the federation.

Kant had no patience for disorganized (*gesetzlos*) peoples, without republican government, and did not see why he should accord any respect to disorganized states that reject the republican federation. Lawless states like lawless persons naturally express the inborn depravity of universal human nature. (*Bösartigkeit der menschlichen Natur*). Kant believed that only republican structures of government will bring out the moral capacity of human nature sufficiently to overcome this natural propensity to vice. Even after peoples acquire a lawful internal constitution (*eine rechtliche Verfassung*), Kant believed that they would continue to need a permanent overarching pacific federation (*foedus pacificum*), to preserve each state's proper freedom, as a separate lawful republic.

This idea of federalism, gradually extending to encompass all states, seemed attainable to Kant, if ever a powerful and enlightened nation could form itself into a republic, as a beacon of

justice to the world. The recent examples of France and the United States may have given some encouragement to Kant's expectation that other states would flock to form a federation around powerful republics, if given the chance. In any case, Kant firmly believed that reason mandates free federalism (*frei Föderalism*) as the ultimate shield of individual rights. Just as individuals must renounce their savage and lawless condition through public coercive laws, so states must accept an enduring and gradually expanding republican federation to prevent war.

Kant's proposal may seem somewhat unreal, in the midst of global lawlessness and war. In fact, Kant contemplated an arrangement considerably short of his ideal world republic (*Weltrepublik* or *civitas gentium*). Kant's second definitive article of perpetual peace clarifies the first by extending republican principles from individuals to peoples. Ideally the international federation should have its own enforcement mechanisms, and public coercive laws. Lacking these, Kant hoped that a weaker federation would at least limit the force of universal human inclinations to injure others, independence of law.

The third definitive article of perpetual peace concerns cosmopolitan right (*Weltbürgerrecht* or *ius cosmopoliticum*), which is to say, right growing out of the relationship between individuals (and states) as citizens of the universal state of mankind. Kant would restrict cosmopolitan right to the rule of universal hospitality. This requires non-hostility to foreign states and foreign nationals, so that no one kills, enslaves or maltreats them, without good reason. Kant believed that foreigners may legitimately be excluded from entry into independent republics (unless their lives are in danger), but expected that friendly overtures would lead to commerce, and gradually to a cosmopolitan constitution (*weltbürgerlich Verfassung*).

Kant's conception of right thus depends on three imagined codices of unwritten law concerning the *ius civitatis*, *ius gentium*, and *ius cosmopoliticum* respectively. Natural law implies fundamental human rights, which only a republican civil constitution can secure or maintain. Protecting republican states against outsiders (and each other) requires an international federation of republican peoples, to govern their mutual relations. Finally, this republican federation will fail to develop or survive without an attitude of universal hospitality.

These three categories of natural law or right (*Recht*) do not represent three levels of duty, as one might expect, but rather, two related systems of obligation, overlayed (or undergirded) by a separate and dominant requirement, applicable to both. The *ius civitatis* (concerning the right of citizens) and the *ius gentium* (concerning the right of peoples) contain within them the universe of public obligations. The *ius cosmopoliticum* embodies the one simple rule that leads (in the end) to developing the rest. Not doing harm to others by simply avoiding hostility will lead to community, Kant believed, as people naturally seek the mutual benefits of commerce and association. People will wish to interact, and doing so without hostility will produce the benefits of natural right, within and between all peoples.

Kant's Definitive Articles of Perpetual Peace constitute the essence of his proposal, unrestricted (unlike the preliminary articles) to specific circumstances of time and place. The threefold project of (1) republican constitutions, (2) republican federation and (3) general (arms-length) non-hostility between states (and individuals) provides a convincing model for developing peace and justice from a common foundation of republican politics. A *weltbürgerlich* attitude on the part of persons and states will lead to better mutual understanding, interdependence, and peace; whether such an attitude will ever actually develop remains to be seen. Kant's republicanism is convincing and morally sound (though politically underdeveloped), but the non-republican institutions of existing states, and their less than *weltbürgerlich* attitude, make it seem a bit utopian, so long as existing regimes maintain their less-than republican political views and institutions.

The Guarantee of Perpetual Peace

Kant would have responded to this criticism by reiterating his argument that peace and justice both depend, and will in the end both arise and prevail, from the inborn structures and desires of ordinary human nature. This optimistic doctrine supplies what Kant identified as the ultimate guarantee (*Garantie*) of perpetual peace. Kant supposed that inherent structures of nature would bring humans into concord, even against their will, so that the moral ends which people *ought* in any case to pursue, as prescribed by reason, will also naturally result from their self-seeking greed and ambition. Kant suggested that all three types of public right *ius civitatis*, *ius gentium*, and *ius cosmopoliticum* will follow eventually from nature, with or without any deliberate human commitment to justice.

In order to secure their own ambition, with mutual protection against each other's avarice and self-interest, people will form states (Kant supposed) with civil laws to bind them. To strengthen their own state's interests against the rest, even wicked citizens and states must seek republican confederations. Kant embraced the republican conclusion, already well articulated by James Harrington, John Adams, and many others, that even a nation of devils would gradually establish the checks and balances of republican government, to control each other's self-interest by the oversight of the rest, so that ambition would counteract ambition, and public interest rule, despite the avarice and bad intentions still eagerly raging in each private devil's own secret heart.

This mechanism of nature (*Mechanism der Natur*), by which selfish inclinations are naturally opposed to one another, compels submission to coercive laws, which in turn preserves peace (as Kant believed), both within and between states. Good morals follow good laws, and dissipate without them. Thus nature irresistibly determines that right will (eventually) gain the upper hand. (*Die Natur will unwiderstehlich, das Recht zuletzt die Obergewalt erhalte*). Virtue and good will do not matter so much, according to Kant's conception of nature, because right follows from selfish conflict, through an equilibrium of power among vigorous rivals, within and between states. Thus nature wisely separates the nations, and Kant would keep them separate, to maintain justice, in perpetual peace.

As separation prevents despotism, Kant believed, so to commerce assures unity and peace among nations, by offering an economic incentive against war. These two forces supply nature's guarantee of lasting peace. Using rivalry, self-interest (to support *Staatsbürgerrecht* and *Völkerrecht*) and avarice (to support *Welbürgerrecht*), nature maintains peace by the universal mechanism of natural human inclination. This is not to say, however, that justice and peace now actually exist (or ever have done). Rather, Kant hopes to establish that nature supplies the materials for perpetual peace, to be gradually channeled and implemented, by those who have the wit to do so.

This constitutes Kant's secret article of perpetual peace. Philosophers have studied and explained the mechanisms of peace in government and international relations. Kant suggests that governments should make use of this wisdom (without attribution). He does not want philosopher kings, or king philosophers but only that kings should secretly implement the philosophers' insights, in pursuit of perpetual peace. Power corrupts, and corruption misleads the public councils. But philosophers have no power, which frees them to think, and better understand the state.

Kant's secret article supplies some of the deficiencies of his earlier guarantee, by acknowledging the extent to which nature requires guidance in realizing its ends. The whole history of the world reveals a procession of violence and injustice so seldom interrupted, as to undermine the plausibility of natural providence or nature's benevolence to man. Nature supplies the materials for human felicity without creating the political structures to support them. The science of politics determines the best system of political checks and balances to harness nature in pursuit of republican government, and social justice for all. Creating just constitutions requires active philosophy and human intervention. The greatest weakness of

Kant's essay on perpetual peace is his lack of specificity about the structures needed to secure and preserve a lawful republican state.

The Identity of International Law, Morals, and Politics

Kant's sanguine reliance on nature's guarantee of perpetual peace reflects his greater interest in moral rather than in political questions. Both appendices to his essay on perpetual peace explain all politics (international and international), as applied branches of right or justice, for which morals supply the theoretical foundation. This means that morals and true politics never conflict. Politics, properly understood, realize the absolutely binding moral laws by which all actions *ought* to be governed, so that anyone who wishes to know her or his own civic duty may do so, simply by consulting the inborn reason that all of us possess. Kant knew that practical political maxims must consider the actual structure of human nature, including its weaknesses. Good Kantian politicians and statesmen will continuously examine their political institutions, to ensure their conformity with natural law or right (*Naturrecht*).

Kantian politicians will not, of course, destroy the existing bonds of any political or cosmopolitan community before they have something better to put in their place, but they will always continue to maintain a course towards eventual reforms to realize political justice (*die nach Rechtsgesetzen beste Verfassung*). Kant hoped that politicians would rule as much as possible in a republican (*republikanisch*) manner, while adjusting the constitution gradually to be itself more republican, and just. Kant concluded that any natural law respecting constitution (*rechtliche*), even if it is not very lawful (*rechtmassig*) itself, will be better than no constitution at all. Revolutions and invasions should not occur, unless they will make things better.

Kant observed that international society does not possess and should never obtain the despotic right to formulate coercive laws for mechanical application by lawyers. Nations must rely instead on the application of reason to universal principles of freedom, to justify their public actions and political constitutions to others. This follows the normal international practice of public argument by reference to public right (*öffentlich Recht*). Even when states and lawyers argue insincerely, their insincere references to public right and justice confirm these concepts' irreducible value, as sources of international obligation, applying Kant's fundamental principle of right, which is always to act in such a way that you could wish your maxim to be the universal law.

Kant's conceptions of political, international and cosmopolitan right are the moral constructs of reason, and universally binding. He considered that genuinely republican (*echt-republikanisch*) government will best secure the obedience and prosperity of the people, so long as politicians introduce it gradually, seizing favorable circumstances, without recourse to hasty, or violent innovation. Kant expected that peace would follow justice, when the general will (*allgemeine Wille*) discovers the concept of right (*Rechtsbegriff*), among or between peoples, on the basis of freedom and equality. *"Fiat iustitia, pereat mundus"* -- for Kant justice came first, and everything else would follow.

Kant's formula for perpetual peace required first that the state should have an internal constitution organized in accordance with pure principles of right. (*eine nach reinen Rechtsprinzipien eingerichtete innere Verfassung des Staats*) and second that it should unite with other states to form some sort of federal union (*allgemein Staat*). Morality, law and politics go together. Without justice, there will be no peace. Kant was confident that human reason will gradually apply moral principles to secure justice, helping right to increase, since all right comes from justice (*Gerechtigkeit*).

This identity between international law, morals and politics demands a more detailed description of republican institutions, at both the national and the federal level, than Kant is ever willing to provide. To claim (as Kant does) that republican institutions will find and implement

justice, requires some description of what republican institutions will look like. *Perpetual Peace* avoids the specifics. Kant's specificity lies instead in his moral formula or calculus, to act in such a way that you could wish your maxim to be the universal law. This leaves the politics too vague to reach any definite understandings, or to resolve any disagreements about justice, which may arise between citizens or states.

The Transcendental Concept of Public Right

Kant concluded his essay on perpetual peace by supplying a new more detailed formula with which to calculate the content of public justice or right, which forms (as he understands it) the only lasting basis of peace. Kant's conception of public right depends on publicity as the final measure of law and justice. Kant's rule holds that all maxims of action that cannot be made public are wrong, while all maxims that require publicity in order to succeed must be right, in morals as well as politics.

This formal attribute of publicness (*Publizität*) epitomizes in a single phrase all Kant's philosophy of right, both ethical and juridical. Kant argues that every claim of right must have this public quality. Concerning the *Staatsrecht* or *ius civitatis* (for example), Kant denies the right of rebellion against unjust tyrants, because such a principle could never be openly accepted, as part of a civil constitution. Similarly, in the case of *Völkerrecht* or *ius gentium*, Kant denies that states can ever legitimately renounce their commitments within the pacific federation, because no state would willingly have joined the federation in the first place, knowing that others could withdraw. Kant explained that *Weltbürgerrecht* or the *ius cosmopoliticum* follows the same principles, by close analogy with international law. Kant did not imagine that everything public is necessarily just, but rather that nothing political can ever be just, that cannot be publicized, or acted on openly.

Publicity discovers morality or rightness best (including international right), only when a lawful (*rechtlich*) state already exists. Kant's conception of public right (*öffentliches Recht*) requires this lawful state or republic. Because Kant believed that only a federative association of states can lawfully support freedom, he concluded that politics and morality will never agree, until the federative union (*Verein*) is in place.

Kant's transcendental concept of public right, requiring publicity, captures a central element of republican justice, which recognizes the importance of public debate. Republics test ideas by deliberation, and confirm them by votes. Governments that act without submitting their policies to public examination will make mistakes about justice, by misunderstanding the common good. Public deliberation clarifies moral error by bringing all citizens' experience and observations into play. This true and convincing argument for popular sovereignty becomes nonsense, however, when Kant twists it to protect despotism. To publicize one's planned revolution again non-republican tyrants would be suicide. This does not mean that revolutions should never happen. Secret plans against oppression will be justified, when republican deliberation would be subject to retaliation and violence.

The Kantian Theory of Public International Law

Reviewing Kant's arguments in *Perpetual Peace* reveals the extent to which his conception of right depended on natural law. Kant's two maxims of universality and publicity provide the natural law basis for all legitimate government policy. The only legitimate governments (Kant believed) would be those that implemented republican institutions, as part of a republican federation, to realize the moral rules that Kant's moral maxims endorsed. Some preliminary articles would be necessary to make the world ready for republican government, but even without them Kant expected that justice would eventually prevail.

The central element of Kant's essay on perpetual peace (his list of definitive articles) is also his best and most convincing argument.

Kant believed that *ius civitatis* should rest on whatever political institutions (including the rule of law) will best realize objective morality and justice. This is true. He argues for a *ius gentium* that will protect and coordinate these republics in one large federation. This seems sensible. Kant suggests that the *ius cosmopoliticum* should encourage mutual non-hostility between states. So it should. What Kant lacks is any workable description of what will count as republican forms of government, when applied to the actual constitutions of states.

In this Kant resembles John Locke, useful for the principles, but not for forms of government. When Kant does offer specifics, they are weak and unconvincing (as in his preliminary articles), or pernicious (as in his strictures on revolution, forbidding secrecy against tyrants). Kant's argument for republican government is just and convincing, but he never gives sufficient details about what a republic will look like. This leaves would-be Kantians strangely at sea, committed to principles of liberty and justice, without clear techniques for making them real. To find the *rechtliche Verfassung*, republican internationalists most look to other sources, which is why they so seldom agree on what their master would want. The Kantian Theory of international law is a republican theory of natural law, left deliberately vague, to encourage the gradual development of republican institutions, in a world of illegitimate despots, and lawless tyrannical states.

Mortimer Sellers
University of Baltimore
School of Law

A CRITIQUE OF "KANTIAN INTERNATIONAL LAW"

I. Preliminary Points
The Conception of "International Law" and "States"

Harry Gould approaches "Kantian International Law" from a hypothetical viewpoint, which prompts two criticisms concerning: (1) Gould's lack of a lucid definition of "international law; and (2) his lack of a lucid definition of "the state."

The Kantian-theory of international law, sometimes referred to as "Neo-Kantian legal theory," in some ways resembles the legal theories developed by the late Hans Kelsen (1881-1973). In his work, *The Pure Theory of Law*, Kelsen generally suggests that public international law should be regarded as similar to the norms of municipal state law and should be observed as norms of the same single universal legal system. (Hans Kelsen, *Introduction to the Problems of Legal Theory*, 107-25, (Bonnie Litschewski & Stanley L. Pawlson trans., Clarendon Press)(1992); Hans Kelsen, *Reine Rechtslehre-mit Einem Anhang: Das Problem der Gerechtigkeit*, 328-45 (2nd ed. 1976)). The English translation of Professor Kelsen's theory on the unity of international law and state law put his view very clearly:

> The only given is a cognitive unity of all law; that is, one can conceive of international law together with the state legal systems as unified system of norms in exactly the same way as one is accustomed to regarding the state legal system as unity This view, shared even by proponents of the dualistic doctrine, reflects the epistemological requirement that all law be considered in one system, that it be considered from one and the same standpoint as an integral whole in itself. Because legal cognition aims to comprehend as law - to comprehend within the category of the valid legal norm - material characterized as international law, as well as material presenting itself as state law, legal cognition sets the very same task for itself that natural science sets for itself: to represent its object as a unity. The negative criterion of this unity is non-contradiction, a logical principle that also applies to cognition in the realm of norm. (*Introduction to the Problems of Legal Theory*, supra, at 111, 111(f), 112.)

However, Kelsen's influential legal theory is contrary to other current theories on the relationship of public international law, municipal law, and state practice, such as "monism," "dualism," "inverted monism" and "the theory of harmonization."(D.P. O'Connell, *International Law*, 39-42 (1970)).

"International Law" and the Legal Theory of Public International Law

Gould does not provide a lucid definition of "international law." He, and the other writers referred to in his monograph, including Kant, refer without making a qualified definition of the exact legal nature of the norms or authority referred to as "law" or "international law." This is an important issue because the legal creature referred to as "international law" during the lifetime of the German philosopher Emmanuel Kant (1724-1804), was not identical to the legal norms contemporarily defined as "public international law" (*Völkerrecht* or *droit international public*) (Pierre-Marie Dupuy, *Droit International Public*, 1-23 (5th ed., 1999); Hans Kelsen, *Auseinandersetzungen zur reinen Rechtslehre - kritische Bemerkungen zu Georges Scelle und Michel Virally - Im Auftrag des Hans Kelsen - Institutes aus dem Nachlass Herausgegeben von Kurt Ringhofer und Robert Walter*, (1987); Gerhard van Glahn, *Law Among Nations*, 2-4 (7th ed., 1996); Alfred Verdross and Bruno Simma, *Universelles Völkerrecht - Theorie and Praxis* 1-58 (3d ed. 1984)).

The object of Kant's legal philosophical analysis appears to have partially consisted of the ancient hybrids of "public" and "private" (civil) bundles made up of local or domestic "legal" norms that are sometimes referred to as Roman Law or the *jus gentium*. (Karl-Heinz Ziegler, Die romischen Grundlagen des europaischen Volkerrechts, in *Jus Commune*, 1-27 (1972)). In developing his legal theory, Kant did not make a clear distinction between the different legal, moral, ethical, or pious norms derived from contemporary religious canons. He also did not distinguish between "private" (civil) and "public" municipal "legal" norms and "international" norms in his theoretical observation of norms, which in his opinion, constituted the proper "rule of law."

Many legal philosophers during the eighteenth-century through the twentieth-century were primarily occupied with this entirely different branch of law referred to by Anglo-American legal scholars as "conflict of laws" but by most Continental Law writers as "private international law" (*internationales Privatrecht* or *droit international privé*). That is the branch of private (civil) municipal law of States that governs the operation of conflict rules that control the application of foreign private (civil) law by a court of the forum in cases containing foreign elements, (Ian Brownlie, *Principles of Public International Law*, 302 (5th ed., 1998)), using connecting factors stated in Latin as "*lex domicilii*" and so forth, originally located by the German legal scholar, Friedrich Carl von Savigny (1779 -1861) under the aegis of the conflicts theory, seeking a proper "seat" (*Sitz*), for every legal relationship.

The legal theory behind conflict of laws is, therefore, not cognate with the legal theory of public international law. Moreover, based on the unique legal characteristics of the conflicts rules of conflict of laws, which operate by the operation of designed connection factors, rather than being substantive rules of a subject-matter legal nature the legal theory of conflict of laws is virtually barren of social values. (Konrad Zweigert, Zur Armut des internationalen Privatrechts an Sozialen Werten [On the Death of Social Values in Conflict of Laws], in 37 *Rabels Zeitschrift fur auslandisches and internationales Privatrecht* 435, 435-52 (1973)). Thus, legal theories founded on the conflict of laws are by the virtue of their distinctive nucleus bound to be different from legal theories of public international law. The attempts by Continental Law's conflict of law scholars, (1-4 Ernst Frankenstein, *Internationales Privatrecht* (1926), to develop private international law and legal theory on public international law and legal theory have generally been considered futile.

The methods of legal theory used by Kant are partly akin to the methodology and legal theories emanating from the use of contemporary comparative legal methods by legal scientists or by local judges adhering to methods governed by principles of comparative law. This particularly applies to the legal method or technique referred to as "characterization," which is a legal institution common to both private international law and comparative law. In utilizing characterization, the comparative

law legal scholar or municipal court judges must frequently investigate and compare legal theories of more than one country in reaching his decision on proper characterization of a legal institute foreign to the law of the forum to be applied by virtue of the conflicts rules of the forum. (Ulrich Drobnig and Manfred Rehbinder, *Rechtssoziologie und Rechtsvergleichung* (1977); Richard Hyland, Comparative Law, in *A Companion to Philosophy of Law and Legal Theory* 184, 184-99 (Dennis Patterson ed., Blackwell pub., 1996); Konrad Zweigert and Hein Kötz, Einfuhrung in *die Rechtsvergleichung auf dem Gebiete des Privatrechts* (3d ed., Mohr 1996); Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3d ed., Clarendon Press 1998); *The Use of Comparative Law by Courts* (Ulrich Drobnig & Sjef van Erp eds., Kluwer Law Int'l. 1999)).

Summing up at this point, the legal theories developed by Kant are based on analogies made from municipal legal norms, which are norms of entirely different legal constitutions than the public international legal norms that are recognized today. Therefore, the application of Kant's legal theory to modern juridical international state relations appears incongruous, while the fundamental subject-matter of his inquiry is erroneous (*ab initio*) in light of the modern developments of public international legal theory.

The "State" as an Object of Legal Theory of Public International Law

The "State," as referred to by Gould, did not exist in the modern sense of the concept when Kant developed his legal theory. Hence, the international legal system in which Kant developed his legal philosophy is transposed but not entirely different from the international personas appearing on the modern stage of public international law (e.g., the upsurge of the gigantic multinational private (civil) corporations, the intergovernmental corporations of private law and the *établissements publics internationaux*). The legal personalities referred to as "States" by Gould and the scholars he cites cannot, without proper historical qualification, be applied to modern international legal theory. The systematic discussion of legal history is generally approached from the viewpoint of modern public international law, partly because most writers must make their subject understandable for modern readers. (*Auseinandersetzungen zur Reinen Rechtslehre*, *supra*). This is why international legal scholars mistakenly presume the continued historical existence of an international legal personality known recently as "States." (Arthur Nussbaum, *Geschichte des Völkerrechts* [Translation of a *Concise History of the Law of Nations*] (Herbert Thiele-Fredersdorf trans., 1960)). The better approach is taken by the German historian of public international law Grewe in his work on the history of public international law. In his writing, Grewe refers to some of the international legal personalities preceding the birth of the modern "States" under the aegis of the legend, "Power-Associations" (*Herrschaftsverbände*). (See, Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* 19-98; Karl-Heinz Ziefler, *Völkerrechtsgeschichte* __ (1994); cf. Alfred Verdross, Abendlandische Rechtsphilosophie - Ihre Grundlagen und Hauptprobleme in *Geschichtlicher Schau* (2d ed., 1963)).

In summation, the thrust of this preliminary criticism of Gould's work is, at the very least, necessary to analyze his hypothesis of a "Kantian International Law" under a "double-hypothetical approach" using preliminary points as criticism. Thus, Kant's legal theory cannot be applied to modern public international legal theory without these two apt preliminary precautions or reservations.

II. Rigging Gould's Hypothesis

The main weakness of Gould's approach is based on the use of unqualified analogies from Kant's legal theory, which leads to the adoption of a double-analogy that is contrary to Kant's legal theory, which was originally mostly founded on the use of analogy from private (civil) legal sources of ancient municipal law. Additionally, even though Gould attempts to make a distinction between legal theory, as

stated by Kant, and the natural law school legal theory, he still observes, "states as both legal and moral persons." Gould's "physical" or "factual situation," "object," "legal creature" of study is likewise a legal personality more akin to legal persons created under municipal law, and thus an improper "object" of analysis under the legal theory of public international law.

Gould attempts to differentiate between Kant's legal theory and the natural or moral legal theory using a lexical dissection, rather than the more appropriate subject-matter analysis employed by many other legal philosophers and publicists. (Hans Kelsen, *Allgemeine Theorie der Normen* 62-69, 140-41 (Kurt Ringhofer & Robert Walter eds., 1979); Hans Kelsen, *General Theory of Norms* 79-86, 175-76 (Michael Hartney trans., Clarendon Press 1991); Johannes Strangas, *Kritik der Kantischen Rechtphilosophie - Ein Beitrag zur Herstellung der praktischen Philosophie* (1988)).

Gould challenges the analogy garnered from the legal institutes found in domestic law of many or most States in public international law (I.L. Oppenheim, *International Law - A Treatise* (H. Lauterpacht eds., 7th ed., Longmans, Green & Co. 1948)), despite the fact that Article 38 (1) (c) of the Statute of the International Court of Justice recognizes "general principles of law recognized by civilized nations" as a source of public international law. The source of public international law recognized under Article 38 (1)(c) has the inherent constitution of being an exceptive source of law despite the fact that public international law recognizes, with the exception of peremptory norms (*jus cogens*), no particular hierarchy of sources. The exceptive nature of law under Article 38 (1)(c) does not make it appear to provide a solid foundation for general conclusions of the sort adopted by Gould. This criticism applies to Gould's references to "self-help" or "self-defense" from the legal institutes of most municipal State law as Kantian norms of public international legal theory applicable to freedom, sovereignty and the principle of non-intervention of States.

Gould's legal analysis of Kantian "self-help" is contrary to the current understanding of Article 2 (4) of the United Nations Charter and does not have sufficient underpinnings to correlate to Article 51 of the United Nations Charter (collective self-defense). Moreover, Gould's legal arguments in favor of Kantian "self-help" have the same legal tendency, as all similar arguments seeking their legal nucleus in the canon of self-preservation of State and so forth, to elude entirely the United Nations' mechanism for securing peace (Article 2 (4) and Chapter VII of the United Nations Charter). His arguments also appear to lay a rather convenient legal foundation for recent embargoes enacted by the United States against Cuba and Iraq after 1991.

My main criticism of Gould's proposal of a "Kantian international law" is that it reinvigorates the naturalistic theory on basic "rights" and "duties" of States, which has been properly refuted by the late Professor Hans Kelsen in his analysis of the now defunct “Draft Declaration on Rights and Duties of States” prepared by the International Law Commission. Professor Kelsen properly states that:

> There is an incontestable primacy of the duty over the right. The norms of general international law impose duties upon the states and by so doing they confer rights upon others. If the duties are correctly formulated, the formulation of the corresponding rights is superfluous. Only if a duty is defined by a formula that is too general, must exceptions be stipulated and these exceptions are frequently presented as "rights." What is called "right" of self-defense stipulated in Article 51 of the Charter, is nothing but a restriction of the duty stipulated in Article 2 (4). (Hans Kelsen, The Draft Declaration on Rights and Duties of States, 44 *American Journal of Int'l. Law* 259, 264-65 (1950)).

Applying Professor Kelsen's conclusion to Gould's arguments in favor of his Kantian legal theory of international law (e.g., Gold's reference to: "self-help," "moral law," "natural law," " the state of nature and the state of right," "new legal duties," "I [i.e., Gould] shall restrict myself to the military security of the state ," "*jus*

necessitatis," [Gould in citing Laberge and Tesón] there will be “no aggression in the Confederation (Republic) Kant envisions," "unilateral action," and so forth) it appears that some of the "rights" or "duties" may not be more essential than any other "duties" or "rights" that Gould failed to address. Moreover, they have in the form given to them by Gould rather the character of being paraphrases of cliché, or postulate of international law such as his analysis of the "duty" to comply with the "moral" rather than "legal" commands of international law by the virtue of itself without proper or practically realizable enforcement thereof - at least under the aegis of "positivism" legal theory of public international law.

Gould's reference to Article 61 and 62 of the Vienna Convention on the Law of Treaties, May 29, 1969, in support of a certain "innate equality" in favor of freedom of States to act, is also partially of the same origin as the unilateral State-power or Superpower-oriented "American School of Public International Law." The legal doctrine of *pacta sunt servanda* under Kant's "impermissibility of lying" is derived from municipal law in addition to being imbued by the religious dogmatism of natural legal theory. Gould appears to accept this aspect of the Kantian legal theory as applicable to modern public international law, even including its pious elements. However, Gould does not attempt to set forward proper legal rhetoric of this Kantian doctrine and its use in public international law. The concept *pacta sunt servanda* is one of the few norms of "general principles of law recognized by civilized nations," that transcends the legal character of public international legal norms, albeit without its orthodox elements. (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publication 1987)(1953)).

It appears to me that Gould's arguments have their origins in the “American School of Public International Law.” Many of his arguments, ostensibly founded on Kant's legal theory, advocate the current international policy and legal opinion of the United States government applied to scholarly and politically disputed world affairs. This standpoint inspires Gould's understanding of the function and status of the United Nations in modern public international law. His approach is quite understandable since the U.S.A. is arguably the mightiest actor in public international affairs.

Summing up the criticism of Gould's hypothetical international legal theory based on Kant's legal theory, it would appear that a majority of the pitfalls may befall those scholars of legal theory who approach public international law from the standpoint that the use or misuse of power by states, including military power, may ignore the existing positive legal norms of the public international law of peace.

III. Synopsis

Kantian legal theory is akin to many of its contemporary legal theories, including the theories of the German legal philosopher Georg Wilhelm Friedrich Hegel (1770-1831). (Regarding Hegel and public international law, especially on the supremacy of the State, *see*, Ignaz Seidl-Hohenveldern, *Völkerrecht* 26-29, 40-41 (9th ed., 1997)). These legal theories of centuries past laid the theoretical foundation for the early twentieth-century bellicose canon of public international legal theory referred to as "self-preservation" - the militant nucleus of self-help, self-defense and other related doctrines of public international law of war (Oppenheim, *supra*).

The inherited practical dangers of Kantian legal theory originates from Natural Law's more or less discredited theory of "rights" and "duties" of States, serving mainly as a legal justification for military action, instead of satisfying the obligations of the U.N Charter by using peaceful means to resolve international disputes (Hans Kelsen, *The Law of the United Nations - A Critical Analysis of its Fundamental Problems* 87-121, 219-295, 359 (1951)). Kant's antiquated legal theory supports the militaristic "right" of states to self-preservation, a "right" that was later to be abused by the most totalitarian regimes of the twentieth-century (far beyond the bounds of the doctrine *abus de droit*), Josef

Stalin's USSR (Hans Kelsen, *Theorie pure du droit* (Charles Eisenmann trans., Dalloz 1955); Josef Mayinge, Hegels "*Rechtsphilosophie" and ihre Bedeutung* in *Der Geschichte der Maristischen Staats - und Gesellschaftslehre* (1983)) and Adolf Hitler's Third Reich.

Sovereignty of reason dictates that "Kantian International Law" is an inapt foundation for the future development of public international law because of its tendency to serve as an improper legal justification for the warlike unilateral acts of states. This theory is founded on international legal concept of natural law, which undermines the peaceful cooperation that should be developed under the aegis of the United Nations Organization.

The legal foundation of "Kantian International Law" is based on the author's misinterpretation of legal norms that are pertinent to the public international legal order, and on a mistaken identification of the objects of the legal norms that properly govern public international law.

Halldör E. Sigurbjörnsson
Max-Planck Institute for
Foreign and Private
International Law (Hamburg)

International Legal Theory (ISSN 1527-8352) is a biannual publication of the American Society of International Law Interest Group on the Theory of International Law. *ILT* facilitates discussion and the exchange of ideas concerning the philosophical foundations of contemporary international law. Each issue contains one lead article, and several comments, discussing international legal theory.

Mailing address: International Legal Theory, Center for International and Comparative Law, University of Baltimore School of Law, 1420 North Charles Street, Baltimore, Maryland 21201-5779
Electronic mail: UBCICL@UBmail.ubalt.edu
Telephone: (410) 837-4532
Telefax: (410) 837-4396

Editorial communications: The editors welcome unsolicited manuscripts, or comments on forthcoming lead articles, which are posted on the *ILT* web site.

Manuscripts should be submitted in duplicate and on a computer disc, or by e-mail. They should not contain any citations (except parenthetically).

Business communications should be directed to American Society of International Law, 2223 Massachusetts Avenue, NW, Washington, D.C. 20008.

Subscriptions: The subscription rate is $25 per year for U.S. Subscribers and $35 for foreign subscribers. Single issues are $15 per copy. All members of the ASIL Legal Theory Interest Group receive *ILT* as one of the benefits of membership.