

# ANARCHISM AND UTOPIISM IN INTERNATIONAL LAW

*Some Philosophical Struggles with an Ambiguous Phenomenon*

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# CONTENTS

<b>PART 1: INTRODUCTION</b> .....	3
I. THE AMBIGUITY OF INTERNATIONAL LAW.....	4
II. THE PROGRESSION OF INTERNATIONAL LAW .....	8
<i>II.1. Institutional transformation</i> .....	8
<i>II.2. The European Union as avant-garde international law</i> .....	11
<i>II.3. The fate of the juridical concept of sovereignty</i> .....	13
<b>PART 2: KANT, HEGEL, HABERMAS AND THE TENACITY OF INTERNATIONAL LAW</b> .....	15
III. PUTTING KANT, HEGEL AND HABERMAS INTO ONE BASKET .....	16
IV. KANT.....	19
<i>IV.1. The novelty of Kant's Perpetual Peace</i> .....	19
<i>IV.2. The different sides of Kant</i> .....	20
<i>IV.3. Hegel and Habermas on Kant's notion of history</i> .....	24
<i>IV.4. Kant's legal model for perpetual peace</i> .....	25
V. HEGEL.....	30
<i>V.1. Hegel contra Kant</i> .....	30
<i>V.2. Hegel's particularism: speculative necessity or provincial attitude?</i> .....	31
<i>V.3. World history: cosmic justice or sorry comfort?</i> .....	35
VI. HABERMAS.....	37
<i>VI.1. Habermas and the modernists</i> .....	37
<i>VI.2. Habermas and international law</i> .....	39
<b>PART 3: CONCLUSION</b> .....	40
BIBLIOGRAPHY .....	42

**PART 1:**  
**INTRODUCTION**

# I. THE AMBIGUITY OF INTERNATIONAL LAW

When asked to define the term ‘terrorist’, of which he has made so much political use, George W. Bush answered: “a terrorist is anyone who is against America”.<sup>1</sup> Although a clear-cut division of friend and enemy does remind one of Carl Schmitt’s notion of the essence of (international) politics, it is open to question if such attitudes are the most beneficial with regard to world peace, prosperity - or in short a viable structure of international law. But let me again call Schmitt to the stand: Bush’s definition of terrorism would actually infuriate him, for (as far as the rhetoric of good and evil is concerned) the ‘war against terrorism’ is a clear example of “a war wherein a particular state seeks to usurp a universal concept in its struggle against its enemy”<sup>2</sup>, which implies a confusion of the political animosity – which is morally neutral - and moral repulsion.<sup>3</sup> This serves to illustrate that the theory of international law is a subject of hot debate.

As a matter of fact, the American attitude regarding international law lays bare some important weaknesses at the heart of its very concept. Witnessing the US withdrawal from the Kyoto agreement, from the ABM-treaty, and most of all their near paranoid fear of the International Criminal Court – which is the closest approximation of the cosmopolitan ideal the world has ever seen – a world spectator can hardly conclude otherwise than that international law is a toy of the arbitrary will (*Willkür*) of the (major) states. In terms of the philosophy of international relations, Bush’s statement is a good example of a particularistic conception of moral obligation.<sup>4</sup> According to this view, one owes a great deal of respect to fellow nationals, but comparatively little to the human individual as such. Furthermore, it seems accurate to characterise the US foreign policy as pragmatic, or based on a realist theory of international relations. Suffice it to quote the Bush administration’s current national security advisor: “[the US should] proceed from the firm ground of national interest and not from the interest of an *illusory* international community.”<sup>5</sup>

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<sup>1</sup> News report in *Nederlands Dagblad*; source lost.

<sup>2</sup> Quoted by J. Habermas, “Kant’s Idea of Perpetual Peace: At Two Hundred Years Historical Remove”, in: *The Inclusion of the Other – Studies in Political Theory*, Cambridge: Polity Press, 1998, p. 188.

<sup>3</sup> The political enemy is *hostis*, not *inimicus*. C. Schmitt, *Der Begriff des Politischen*, Berlin: Duncker & Humblot, 1963, p. 29.

<sup>4</sup> Linklater calls this an “internal concept of moral obligation”. An external concept regards every human being as equally worthy and worthy of equal moral consideration. A. Linklater, *Men and Citizens in the Theory of International Relations*, London: Macmillan, 1982, Chapter 3.

<sup>5</sup> Quoted in: T. Judt, “Its Own Worst Enemy”, *The New York Review of Books*, August 15, 2002, p. 14. [cursive mine].

The intention here is not to criticise the attitude of the US, but merely to show the connection of theory and practice in international law. Of course there is not one single theory of international law, but many contrasting ones. Carl Schmitt, who I mentioned, qualifies as an extreme realist thinker, as opposed to more idealist thinkers like Kant, Held<sup>6</sup>, Höffe<sup>7</sup> and Habermas. I have chosen to isolate three thinkers: Kant, Hegel and Habermas. They have important things to say especially about three subjects: 1) the relationship between morality and international law; 2) the relationship between theory and practice and 3) the contribution of history in bridging morality and law, theory and practice.

The question of the relationship between theory and practice is a delicate one. It touches on the legitimacy of philosophising. This poses a serious challenge to philosophy, that actually takes up much of its thought: “The subject-matter of modern political philosophy [...] is not the polis or its politics, but the relation between philosophy and politics.”<sup>8</sup> Different philosophers have had different ideas on this relation, and likewise on the legitimacy of philosophising. I remember a near shocking experience in a first year philosophy class, when the teacher argued the culturally useless status of philosophy.<sup>9</sup> A lot has changed since Scholasticism, when theology and philosophy were at the forefront of culture, but it still an immediate reflex to insist on the relevance of theory, especially when one is personally interested in it. Surprisingly, Kant also argues the connection between theory and practice in this way. Freely formulated, he states that if this connection was not there (or put less ontologically: if we could not see it) we would not be theorising.<sup>10</sup>

I am convinced that there is thought at least implicitly in every practice. But in the field of international law, this is especially hard to retain. The states-system possesses a very tenacious facticity, as I have illustrated at the beginning of this paper. But only as a combination of theory and practice – or, with Habermas, facticity and validity - can the idea of international law be real at all. The necessity of a kind of unity of theory and practice of international law, is a common conviction of the three philosophers who I will be discussing.

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<sup>6</sup> Cf. D. Held, *Democracy and the Global Order*, Cambridge: Polity Press, 1995.

<sup>7</sup> O. Höffe, “Globalität statt Globalismus. Über eine subsidiäre und föderale Weltrepublik”, in: M. Lutz-Bachmann & J. Bohman (ed.), *Weltstaat oder Staatenwelt? – Für und wider die Idee einer Weltrepublik*, Frankfurt a. M.: Suhrkamp, 2002, p.8 ff.

<sup>8</sup> R.D. Cumming, *Human Nature and History: A Study of the Development of Liberal Political Thought*, University of Chicago Press, 1969, Vol 2, p. 16. Quoted by: H. Arendt, *Lectures on Kant's Political Philosophy*, University of Chicago Press, 1982, p. 22.

<sup>9</sup> I refer to Th.C.W. Oudemans.

<sup>10</sup> Kant uses a motivational argument for the postulate of progress of history (which is a theoretical postulate): if there was no progress, it basically would be no fun to watch. I. Kant, “Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis”, in: *Werke – Band 9*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1968, p.167 (Section III, §3).

But besides being a common characteristic, this polarity also represents a common philosophical problem, and a source of tensions within their respective philosophies. As I will proceed to show, a theory of international law forms a bottleneck of their theories. In the face of international law's radical ambiguities, normative theories are put to the utmost test of consistency. At stake is the tenability of the idealism that connects these thinkers, even though it is very different in nature. For Kant, it is the absolute validity of the moral judgement that holds all humans as being equally free. For Hegel, it is the idea of a *Weltgeist*, which becomes manifest in, and propels universal history; implying an appeal to a higher justice which does not coincide with international law. For Habermas, it is the idea of the rationalisation of society through law.

Why does international law pose such a great challenge to existing political and legal philosophy? As said, international law is radically ambiguous. It is defined by constant fluctuation between different poles. Koskenniemi has characterised international law as caught between two extremes: apology and utopia.<sup>11</sup> On the one side is the apologetic (or: anarchistic) perspective which focuses on international law as related to the concrete behaviour of states – which is often messy, arbitrary and above all solipsistic. On the other side is the utopian perspective, formed by claims about the supposed ideal nature of international law - the universal claims, such as human rights, that it contains. He holds that these perspectives are contradictory, but that as a matter of fact both are characteristic for the nature of legal reasoning in the international scene. It is important to see that there are conflicting theories at stake here, and not two sides of the same coin. But Koskenniemi does have a point that international law shows traces of both extremes. This leads to the classical doubt that many legal positivists have had, namely: “Is international law really law?”<sup>12</sup> Anarchy and utopia both disqualify international law *as* law, for law can not be a mere idea, nor a bare fact. Notably, Hart has taken upon himself that international law does not coincide with the factual behaviour of states. In the first place, he rejects a strict state personalization *à la* Austin, which sees the sovereign will as absolutely unbound, because it negates the fact that states by and large actually behave as if international law represents a higher authority. A Hartian participants' perspective then also implies that the factual occurrence of normativity

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<sup>11</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Helsinki, 1989, Chapter 1.

<sup>12</sup> Due to the absence of an international sanctioning institution, and due to the conceptual ‘impossibility’ of envisaging obligations of the state itself. Cf. H.L.A. Hart criticism of these views in his *The Concept of Law*, Oxford U.P., 1994, Chapter X. Further discussion of these problems will follow.

constitutes law proper, in other words that one need not search for a *Grundnorm* in international law.<sup>13</sup> Law is a social system that contains a notion of validity.

There is apparently a link between Habermas and Hart<sup>14</sup>, for the central objective of Habermas' *Faktizität und Geltung*, is to show how law belongs to the realms of fact as well as idea.<sup>15</sup> According to Habermas, law is the accomplishment of resolving the tension between facticity and validity. He sees "camps" of legal philosophy as fundamentally split between these two poles, and consequently in a state of incomprehension regarding each others claims.<sup>16</sup> They refuse to see that law, as a specific form of communicative action, can succeed in a synthesis of social fact (norm conforming behaviour irrespective of motivation) and intersubjective recognition of validity (insight into and consensus on the reasonability, i.e. legitimacy of the law).<sup>17</sup> Building on this contention, one can demand that a theory of international law adheres to neither extreme: it should not merely present a universal ethic (a "utopian dream"), nor merely an account of strategic or pragmatic categories like balance of powers, or economic globalising mechanisms (an "orgy of sovereignties"). In short, it should pay respect to the ideal *and* the positive aspect of law. Habermas has even introduced this polarity in the very *definition* of law. His definition of law as the *accomplishment* of bridging the divide between theory and practice, rationality and real life, is actually quite ambitious. This paper is aimed at questioning this accomplishment once again, along the lines of Kant, Hegel and Habermas. These philosophers have experienced the often contradictory nature of the international arena, which makes a simple transposition of principles of the nation state impossible.

But first I will describe the background against which to set the philosophical part, viz. the transformation of international law, which will also serve to make the facticity and validity dimensions more clear.

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<sup>13</sup> Hart 1994, especially p. 225, where he explains that treaty making (sovereign will formation) conceptually presupposes the existence of rules that create the possibility to be bound. Although these rules are constituted by social practice, it would be wrong to conclude that the concrete behaviour of states determines international law. Instead, Hart's view could be restated in a strikingly Habermasian way: the validity of international law is accomplished in the facticity of social practice.

<sup>14</sup> In fact, Harts *The Concept of Law* qualifies as the kind of synthesis that Habermas himself defines: a sociology of law and a philosophy of justice. Cf. Habermas *Faktizität und Geltung* (see note 15), Chapter 2.

<sup>15</sup> J. Habermas, *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1994.

<sup>16</sup> J. Habermas, *Between Facts and Norms*, Cambridge (Mass.): MIT Press, 1996, p. 6.

<sup>17</sup> Habermas 1996, p. 27.

## II. THE PROGRESSION OF INTERNATIONAL LAW

### *II.1. Institutional transformation*

The idea of world peace through law is an ancient one. Prior to Kant, in 1713, the Abbé de St. Pierre published an institutional design for peace in Europe, the *Projet pour rendre la paix perpétuelle en Europe*. He was convinced that “le problème de la paix [...] appartient au droit politique plus qu’à l’éthique”<sup>18</sup>. He was the first to emphasise the need for an institutional solution to the problem of international anarchy. As we will see, Kant followed this institutional vein with his *Zum ewigen Frieden; ein philosophischer Entwurf*.<sup>19</sup> Both ‘designs’ were overtly idealistic, in that they offered a vision of peace through law that stretched beyond a description of international law as it was at the time. A description would at the time have been rather gloomy, to such an extent that Rousseau couldn’t believe in perpetual peace however much he wanted to. He believed that state behaviour is ruled by perceived interests, rather than real interests, which are of a more enlightened nature.<sup>20</sup>

Since the Second World war, however, the world has seen a great intensification of international law. Due to ever increasing level of institutionalisation of international law, it has progressed far beyond the topics it was confined to in Kant’s time, namely the law of treaties directed at coexistence, and the law of war. Parallel to this ‘factual’ development, the theory of international law has also changed dramatically. By ‘theory of international law’, I do not mean the normative or ideal dimension, but the positive, formal dimension of law, which is as necessary for its concept, as I have stated in accordance with Habermas. It is of the utmost importance to determine how the law ‘works’, because this is the concrete mould in which one can pour whatever cosmopolitan ideas one may have.

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<sup>18</sup> So M. Lequan (ed.), *La paix*, Paris: Flammarion, 1998, p. 148.

<sup>19</sup> In: I. Kant, *Werke – Band 9*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1968.

<sup>20</sup> Cf. C. Covell, *Kant and the Law of Peace – A Study in the Philosophy of International Law and International Relations*, London: Macmillan, 1998, p. 130. I will return to this problem of the short-sightedness of actual actors on the world scene shortly. It is a problem for Kant’s, and on the contrary an express premise of Hegel’s conception of international law.

Summarising, one could say that international law has progressed to a substantively more universal category, and thus to a more cosmopolitan medium.<sup>21</sup> In the first place, it presents itself to us with an ever expanding horizontal scope. There are more and more policy areas, among them very important ones – traditionally identified as the domain of ‘high politics’ or essential state powers, that are substantially influenced by international law. This development has made the clear-cut division of domestic and foreign politics illusory. The empirical causes behind this process are of no concern to us here. But they clearly belong to the domain of facticity: global economic structures, global problems like the environment, global possibilities like the internet. Besides this factual or quantitative change, international law has also undergone a qualitative, and as such more theoretical transformation, which can be described as a shift from a classical concept of the law of nations to a halfway cosmopolitan status. The speculative side of this transformation can best be comprehended along the lines of the historical fate of the classical notion of sovereignty (Section II.3.). In terms of concrete results, there are a number of elements of current international law that were unthinkable under the classical law of nations.

Most importantly, the emergence of a global human rights framework has limited not only the factual autonomy of states, but also the conceptual sovereignty of states. The latter can best be shown by means of the institution of ‘crimes against humanity’, which is considered to be *ius cogens*, and was applicable as such in the Nuremberg and Tokyo tribunals.<sup>22</sup> This institution breaks through the ‘Gesetz ist Gesetz’ rationale according to which there has to be prior sovereign legislation (or treaty-making) before one can speak of a criminal act. Furthermore, it breaks through the ‘black box’ character of sovereignty, i.e. the fact that one could not hold individuals accountable for the state’s actions, due to the strict personalization of the state in the classic law of nations. The field of criminal law has acquired the highest level of cosmopolitanism, thanks to the institution of human rights. A recent qualitative addition in this field is the International Criminal Court. Whereas the UN Charter model only allows advisory opinions on its matters, and the tribunals that deal with crimes against humanity do adjudicate, but function on an ad hoc basis, the International Criminal Court introduces adjudication on a universal scale.

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<sup>21</sup> Habermas goes so far as to state that the current world order is in-between the Law of Nations and a true Cosmopolitan law. J. Habermas, “Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren”, in: *Die Einbeziehung des Anderen*, Frankfurt a. M.: Suhrkamp, 1999, p. 214.

<sup>22</sup> For a most interesting, though not legal-philosophical analysis of this topic, see H. Arendt, *Eichmann in Jerusalem – A Report on the Banality of Evil*, New York: Penguin Books, 1994, p. 234 ff.

Also in the field of the law of war, there have been great innovations. The UN Charter contains a general prohibition of the use of violence, except with the authorisation of the Security Council. So the right to wage war – the central instrument of ‘getting one’s right’ in the old world order - has been substantially limited. In this development Habermas sees a change in the concept of peace as compared to Kant.<sup>23</sup> Kant still encountered a world order that he had to call unjuridical by nature, so he could not qualify any war as illegal. That is one reason why his *Zum ewigen Frieden* is completely voluntaristic.

Another development which has altered its very structure is the admission of individuals and other non-state entities as derivative subjects of international law. They are only derivative subjects in the sense that it is up to states to confer this status of subject, i.e. bearer of international rights and duties. But the mere fact of this possibility is in itself groundbreaking when one compares it with the world of sovereign states – a society of nations, not of men.<sup>24</sup> In contrast to this, cosmopolitan law seems to demand by its very concept “an *unmediated* membership in the community of free and equal world citizens”<sup>25</sup>. The subjectivity of individuals takes a number of forms. In the first place, the recognition of universal human rights implies the existence of subjective *duties*, or accountability of individuals. In the second place, individuals can have limited subjective *rights*, i.e. they can make their own claims without the mediation of states, e.g. in the context of the EU or the European Convention of Human Rights.

However - this is a major refinement - such universality, with the exception of *ius cogens*, still takes shape solely within the margins of the law of treaties, i.e. under the condition of the prior consent of states. And even *ius cogens* requires a side note: there is no *ius cogens* about the adjudication of *ius cogens*. Hence international law is still an *à la carte* affair, in which states can venture as far as they see fit in terms of cosmopolitanism. The world’s legal grid is fragmented between areas of concentration and barrenness. Another refinement lies in the fact that large areas of international law have kept the incompleteness of Kant’s time: that the interpretation of many rules is still self-interpretation instead of third-party adjudication. This is especially the case in delicate matters like war and peace, which were Kant’s central concern. For example the prohibition of violence in the UN Charter, while of enormous importance in principle, is of considerably less importance in practice. One

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<sup>23</sup> Habermas 1999, p. 195.

<sup>24</sup> This assumption is, as far as I can judge, common to all thinkers prior to WWII. Even the most cosmopolitan-sounding of notions, such as Von Wolff’s *civitas maxima*, rest on it.

<sup>25</sup> Habermas 1999, p. 210-211. [Translation and cursive mine]

only has to think of the politicised nature of the Security Council, or else the politicised interpretation of the notion of humanitarian intervention.

## *II.2. The European Union as avant-garde international law*

One area of great legal concentration is the European Union; which is arguably the most advanced international legal structure. As such, it is a good laboratory for legal theory. What will be dealt with here is merely how a supranational structure such as the EU further upsets the classical notions of the law of peoples. The European Court of Justice (ECJ) doctrines of supremacy and direct effect are famous examples.

The concept of sovereignty has become more and more unfit for understanding the EU in relation to the member states, and perhaps still more unfit for utilisation as a normative idea. The logic of sovereignty is too simple to cover a complex phenomenon like the EU.<sup>26</sup> The logic of sovereignty has the tendency to subsume everything under the sovereign act of founding or treaty making, if not to subsuming everything under the constitutional law underlying the treaty-making power. The act of treaty making is held (e.g. by constitutional courts) to be under the condition of constitutionality, and subsequently all acts of a supranational organ are supposed to be valid under constitutional law by implication. A fine example of such an interpretation is the *Maastrichturteil* of the German Bundesverfassungsgericht (BVerfG).<sup>27</sup> This judgement states that every act of the EU must be covered by the German Constitution, and that in an extreme case the validity of an EU act can be annulled by the German constitutional court.

The unsatisfactory nature of the logic of sovereignty is mainly due to the fact that legal practice has long overtaken the conceptual dogmatism – especially the rigorous hierarchy – of international law. Rather than analysing the distribution of legal powers in terms of hierarchy,

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<sup>26</sup> There is a vast amount of literature on this topic. A number of representative opinions stating that sovereignty is *passé* are: N. MacCormick, “Beyond the Sovereign State”, *Modern Law Review* 1993, p. 1-18; T. Koopmans, “Rechter, D-mark en democratie: het Bundesverfassungsgericht en de Europese Unie”, *Nederlands Juristen Blad* 1994, p. 245-251; Weiler, J.H.H., “The autonomy of the Community legal order: through the looking glass”, in: *The Constitution of Europe - “Do the new Clothes have an Emperor?” and other essays on European Integration*, Cambridge 1999; B. De Witte, “Sovereignty and European Integration: The Weight of Legal Tradition”, *Maastricht Journal of European and Comparative Law* 1995, p. 145-173; A. von Bogdandy, “The European Union as a Supranational Federation: a conceptual attempt in the light of the Amsterdam Treaty”, *Columbia Journal of International Law* 2000, p. 27-54. However, there are also scholars who ‘still’ expound the logic of sovereignty minutely, such as (notably British contributions such as) T.C. Hartley, “The Constitutional Foundations of the European Union”, *The Law Quarterly Review* 2001, p. 225-246. Here the title says it all: in such an analysis a supranational structure is never allowed to break loose from its constitutional foundations; it is fixed in time on the moment of treaty-making.

many writers now prefer to use the notions of ‘network’<sup>28</sup> or ‘pluricentricity’. Moreover, in the context of the EU it has become largely irrelevant if one is fond of fashionable notions like ‘network’ or not: it is simply an empirical given that the legal distribution in the EU is a network rather than a pyramid, and that this fares badly with classic dogmatics. Let me illustrate this claim by means of the above mentioned *Maastrichturteil*. It is no surprise that the interpretation the BVerfG had given of its own competence to scrutinise EU acts (i.e. judicial *Kompetenz-Kompetenz*) could not count on an overly enthusiastic reaction ‘in Brussels’. In fact, it is hard to argue otherwise than that the *Maastrichturteil* is in direct contradiction with the settled case-law<sup>29</sup> of the ECJ on the matter of its own exclusive competence to scrutinise EU acts. But despite this direct and theoretically central contradiction between two courts, there has never been a resolution of this conflict in the traditional judicial sense, for the simple reason *that there is no legal resolution of such conflicts*. In two respects: first, regarding content, it is impossible to decide who has the valid interpretation, because there are different perspectives, different locations in question<sup>30</sup>. Secondly, formally speaking, there is no institutional medium to resolve this conflict. The conclusion must be that the division of powers in the EU cannot be understood in strict legal terms of hierarchy, but only in terms that are legal in a vaguer way: co-ordination, conciliation or discussion.<sup>31</sup> Put metaphorically, a contest between different (meta-<sup>32</sup>)constitutional levels can only end in mutual defeat or *remise*, but (for all parties concerned) preferably the latter.

The legal ‘operating system’ of the EU<sup>33</sup> is its most advanced element, and the key to European legal integration. Where the politics of the EU are still strongly influenced by an intergovernmental ethos and structure, its legal functioning is so advanced that it is hard to distinguish from a federal state system.<sup>34</sup> The EU is the site *par excellence* to witness the

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<sup>27</sup> BVerfG 12 oktober 1993, (89, 155)

<sup>28</sup> E.g. M. van de Kerchove & F. Ost, *Legal System Between Order and Disorder*, Oxford U.P., 1994.

<sup>29</sup> Oft repeated doctrine, e.g. in landmark cases such as *Van Gend en Loos*, *Costa/ENEL* and *Simmenthal*.

<sup>30</sup> The BVerfG has to interpret the Grundgesetz and the ECJ the Treaties, but they can substantially overlap.

<sup>31</sup> E.g. M. La Torre, “Legal Pluralism as an Evolutionary Achievement of European Community Law”, in: F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford: Hart, 2000, p. 132 ff.; A.S. Sweet, “Constitutional Dialogues in the European Community”, in: A.M. Slaughter, A.S. Sweet, J.H.H. Weiler (ed), *The European Courts and National Courts – Doctrine and Jurisprudence; Legal Change in Its Social Context*, Oxford: Hart, 1998.

<sup>32</sup> This concept comes from N. Walker, “Flexibility within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe”, in: G. De Burca & J. Scott, *Constitutional Change in the EU; From Uniformity to Flexibility?*, Oxford: Hart, 2000.

<sup>33</sup> In summary, this operating system consists in the doctrines of direct effect, supremacy, implied powers and human rights as a common tradition of the Member States, as formulated and upheld by the ECJ.

<sup>34</sup> So J.H.H. Weiler: “the European Court in a series of landmark decisions established [...] doctrines that fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states.” “The Transformation of Europe”, in: Weiler 1999, p.19.

convergence of the law of peoples and cosmopolitan law. This includes a revolutionary status of individuals: EU law directly confers rights on them, and the mechanisms of enforcement of these rights are extremely effective<sup>35</sup>, completely bypassing constitutional law. All in all, this privileged position of the individual under EU law is one of the major sources of the great momentum that the European integration has.<sup>36</sup> The same logic can be witnessed in the development of a general European human rights regime through the European Convention for Human Rights.

### *II.3. The fate of the juridical concept of sovereignty*

The legal concept of sovereignty was the despot of the classical society of nations. Philosophically speaking, it was the counterfactual<sup>37</sup> assumption of absolute state authority over a given territory and people.<sup>38</sup> One could say that sovereignty was the condition of possibility of international law. The concept of sovereignty constituted the actors on this stage, who could properly be called ‘sovereigns’ regardless of the political systems adhered to, because a strict conceptual personification of the state was adhered to.<sup>39</sup> Legally translated, sovereignty was the condition of membership of the international legal community, *which knew no other members than states*. Classical international law was of an entirely contractual nature. But unlike the case of contracting that takes place in civil society, the world society knew no higher norm, no overarching framework and therefore no legal guarantees. The highest norm, being the adagium *pacta sunt servanda*, lacked institutional support and therefore factual force. This gave it a highly fragile status; the supreme will of the ‘sovereigns’ (meaning the state considered as a person) being the touchstone of the system, easily led to the interpretation of international law as merely an extension of constitutional law. Jellinek’s typification of an obligation under international law as “Selbstbindung”, or Hegel’s description of international law as “das äußere Staatsrecht”<sup>40</sup>, are quite logical in this

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<sup>35</sup> Especially the mechanism of obligatory reference by national courts of preliminary rulings to the ECJ.

<sup>36</sup> Cf. R. Dehousse, “Integration Through Law Revisited: Some Thoughts on the Juridification of the European Political Process”, in: Snyder 2000.

<sup>37</sup> ‘Counterfactual’ in that it was not deemed necessary that sovereignty as a binary (all-or-nothing) concept was in accordance with real power and authority relations, which never could be binary.

<sup>38</sup> Cf. notably to thinkers as Bodin and Hobbes. But even a cosmopolitan thinker like Kant could not dispense with sovereignty altogether, as will be discussed in Chapter IV.

<sup>39</sup> Cf. the picture of the sovereign on the cover of the original edition of the *Leviathan*. Hobbes calls the state an “artificial Person”.

<sup>40</sup> This is the title of section 3.3.B. of G.W.F. Hegel’s *Grundlinien der Philosophie des Rechts*, Hamburg: Meiner, 1955.

light. International law was left at the mercy of the self-centred rationale of the states. For discussion of Hegel's views I refer to Chapter V.

The inheritance of the development sketched in Sections II.1. and II.2. for the concept of sovereignty is far from evident. It cannot be discarded just like that: sovereignty and constitutionalism are too much related to consider that a wise decision.<sup>41</sup> Perhaps the result can only be stated in the negative: sovereignty is not absolute, but rather permeable.

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<sup>41</sup> Cf. De Witte 1995 and Walker 2000.

**PART 2:**  
**KANT, HEGEL, HABERMAS AND THE**  
**TENACITY OF INTERNATIONAL LAW**

### III. PUTTING KANT, HEGEL AND HABERMAS INTO ONE BASKET

The central objective of this paper is to reflect of the viability of idealism in the face of the supposed anarchy of the world order. I bring Kant, Hegel and Habermas together because they can all be termed idealist in a broad way, and because they all designed a theory of international law, to extend their political philosophies to the global scale. The tension between fact and norm of international law is apparent in all three.

As for the discussion of Kant, it is unnecessary to go to great lengths in justifying its relevance. He constitutes the high point of Enlightenment philosophy. Let me sum up a few elements that are of particular relevance to us here. In the first place he represents a rationalism of the most consistent kind. Kant's work constitutes the high point of the faith in human reason, autonomy and freedom. In that respect he represents a transformation of the natural law theory that existed before his time, and which Kant rejected as heteronomous. With his critical projects, led by the questions 'What can we know?', 'What must we believe?' and 'What may we hope?' he intended to condense the whole world into the transcendental subject. The general tensions of his work, like freedom-determinism, moral reflection-political action, idea-institution, also appear in his cosmopolitan project, and perhaps more so than elsewhere. In the second place, Kant starts to think historically, which adds a completely different dimension to his philosophy from that of the dictates of reason. It is a version of history that Hegel and Habermas reject. I will try to show that, in the context of the cosmopolitan project, Kant's concept of history figures as a safety valve to release the pressure induced by the contrast between theory and practice, i.e. the dictates of reason and concrete action.

As for Hegel, he is a definite heavyweight. His philosophy is modernism stretched to the extreme.<sup>42</sup> His pretension to bring together – and to a conclusion - everything, including the history of philosophy, may seem grotesque, but it is certainly rich. In his philosophy the movement of history runs parallel to the development of ideas (*begriffliche Entwicklung*). At the basis of this is a conviction that everything is already potentially there in a concept, but that the actualisation of a concept needs history. Thus the 'logic' of the long journey to

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<sup>42</sup> Cf. R.B. Pippin, "Hegel, Modernity and Habermas", in: D.M. Rasmussen & J. Swindal (ed.), *Jürgen Habermas – Volume II*, London: Sage, 2002.

absolute *knowledge*<sup>43</sup> (that is true philosophy) has the same structure as the journey toward absolute *freedom* (that is the institution of the modern state), namely an immanent development towards actualisation of the concept. This actualisation always entails the *Aufhebung*<sup>44</sup> of contradictions that occur on the course of the concept's development. For example in the state, where the particularism of civil society is overcome. To overcome always means: to be integrated into a greater whole, but not annihilated. The necessity of a greater whole that gives meaning to the particular is the reason for Hegel's vehement criticism of social contract thinkers, such as Kant, and for rejecting Kant's rationalism, for instance his philosophy of human rights, as abstract. But there is a surprising twist at the end of the *Grundlinien der Philosophie des Rechts*, which seems to be at odds with the scheme of overcoming particularity by integrating it into a greater whole. Viz. Hegel's justification of the particularity of states on the world stage. Hegel's theory is idealism without cosmopolitanism. Suddenly there is no higher form for the state, as the state was for civil society. This apparent inconsistency makes Hegel's theory of international law very interesting to investigate, to see whether his philosophy of history contains a blind spot for nationalism<sup>45</sup>, that is insufficiently speculatively justified.

And why involve Habermas as the only contemporary philosopher? Not only because he focuses on the tension between facticity and validity. Nor just because he wrote an essay about Kant's *Zum ewigen Frieden*.<sup>46</sup> Rather it is because of his characteristic stance vis-à-vis modernity. He can be understood as trying to save normativity from the scientists. He regrets the fact that contemporary philosophy and legal theory ignore the intuition of normativity that everybody has in everyday life. And he goes on to argue that this normativity emerges within the process of social reproduction, namely when people actively seek to reach an understanding with each other. For as a precondition of such "communicative action", one has to agree to, and act on, an number of validity claims. The search for communicational validity implies the redemption of reason, which has been heavily trodden on. A number of questions come to mind. What distinguishes communicative reason from Kant's practical reason and Hegel's Spirit? What does communicative reason dictate about international law? Does his

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<sup>43</sup> G.W.F. Hegel, *Phänomenologie des Geistes*, Hamburg: Meiner, 1988.

<sup>44</sup> Strictly speaking, *Aufhebung* is cancellation plus overcoming.

<sup>45</sup> Can a philosopher be blamed for what his followers make of him? The prosecutors of Socrates thought so. If it is the case, then Hegel is severely blemished by (part of the) so called 'right-Hegelian school', which served as an intellectual basis for the nazi *Machtsstaat* idea. Cf. H. Kieseewetter, *Von Hegel zu Hitler*, Hamburg: Hoffmann und Campe, 1974. Kieseewetter himself interprets Hegel as a totalitarian thinker, typifying the *Grundlinien* as the "stufenweise Entwicklung von der Idee des Nationalstaates zum Machtsstaat als Selbstzweck" (p.83).

<sup>46</sup> Cf. note 2.

conception of facticity and validity resolve any of the tensions of Kant's and Hegel's philosophy?

## IV. KANT

### *IV.1. The novelty of Kant's Perpetual Peace*

Kant knew very well that he was up against a great challenge in writing a project of perpetual peace. There was a serious danger of merely coming up with a philosophical dream. That Kant was aware of this danger becomes clear from his preface to *Zum ewigen Frieden*, alluding to the possibility that perpetual peace might only be found in the grave. He also knew what reflection on international law had preceded him. His diagnosis of that inheritance was relentless: “Grotius, Pufendorf, Vattel – miserable comforters all of them”.<sup>47</sup> Their codes of the natural law of nations never acquired *force* of law: they only served rhetorical purposes in the real world.<sup>48</sup> Linklater explains that Kant’s major contribution was in correcting the inconsistency of previous rationalists like Pufendorf and Vattel, who did not enlarge the moral perspective of citizens to that of men, but instead justified moral particularism as soon as reflection exceeded the boundaries of the state.

What Kant blamed these prior philosophers for was not the universalism inherent to a natural law theory, but a defective conception of law. Pufendorf and Vattel held that there is a natural law for the international states-system. However, this is a moral natural law, that is not enforceable, and therefore not legal. The law of the states-system is restricted to contractual law, according to these thinkers.<sup>49</sup> Kant was convinced of the opposite. The international states-system is in a state of nature, hence there is no natural law, moral or legal. However, there is a universal moral duty to create the conditions of freedom. For freedom is the innate right of every human, by virtue of his rational nature.<sup>50</sup> For individuals that means that there is an unconditional moral duty to enter into a civil constitution, for states it implies such a duty to enter into a federation of free states. The state is seen as a moral person, with an unconditional duty to promote peace.<sup>51</sup>

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<sup>47</sup> Translation by Linklater 1982, 97.

<sup>48</sup> Kant 1964, p. 210 (*Zum ewigen Frieden*).

<sup>49</sup> Cf. Linklater 1982, Chapters 5 & 6.

<sup>50</sup> I. Kant, *The Metaphysical Elements of Justice*, New York, 1965, p. 43.

<sup>51</sup> Kant 1964, p. 223 (*Zum ewigen Frieden*).

Kant is not a natural lawyer, at least not in the traditional sense, because he believes that it is not nature, but the reason which everyone possesses to the same degree,<sup>52</sup> that institutes moral obligations. The individual moral agent, who is also universal because everybody is a moral agent, is the only source of normativity for Kant. This is not a solipsistic philosophy, because recognising that every individual is a moral agent due to its possession of reason, implies treating every individual as a “legislative will”, on which a notion of legislative community can be built.<sup>53</sup> Because Kant does not see a contradiction between morality and law, practical reason forms the core of his cosmopolitan project as well as his ethics. If what is morally wrong should be ended through force of law, then the moral particularism apparent in states’ behaviour is crying out for a global legal institution.

#### ***IV.2. The different sides of Kant***

So far, we have only encountered one register of Kant’s philosophy: the universalistic basic motive which necessitates of a global system of law to ensure the freedom of all, which rests on the reflection of practical reason. This reason is the foundation of morality, it is universal and *a priori*. Obviously something more concrete than this is needed to elaborate a project for perpetual peace. Kant could not refuse to enter the empirical world. Consequently, his argument for a federation of free states is a combination of *a priori* and experiential elements. In itself, it is not so strange that more is needed than practical reason, because even individual moral action needs application of a moral principle to factual data. Moral *judgement* is indispensable for moral action. In contrast with moral reflection, judgement is concerned with the particular. But this creates a tension between reflection and judgement in Kant’s work. How can the will be autonomous if it is conditioned (in judgement) by factual data?<sup>54</sup> Kant’s answer is that autonomy, freedom, progress, God are all postulates, in other words that they are beyond proof but also beyond possible doubt.<sup>55</sup>

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<sup>52</sup> That every human possesses reason to the same degree, or rather that reason is not a matter of degree like intelligence, is a common assumption for rationalist philosophers. Cf. R. Descartes, *Discours de la méthode*, Chapter 1. It is generally a silent assumption, that is not argued for. It does not share its binary nature with contemporary usage of the term reason, like Habermas’ communicative reason.

<sup>53</sup> Linklater 1982, p. 102.

<sup>54</sup> Cf. F. Copleston, *Kant, A History of Philosophy, Volume 6, Part 2*, New York: Image Books, 1964, p. 101-107.

<sup>55</sup> About the assumption of progress, and therefore meaning, in history, Kant states: “Diese Voraussetzung zu beweisen, habe ich nicht nötig; der Gegner derselben muß beweisen” (I do not need to prove this assumption; its opponent needs to prove its falsity). This is quite an irregular statement in an argument, proving how fragile these postulates are. Kant 1964, p. 167 (*Über den Gemeinspruch...*).

In his design of perpetual peace, Kant had to employ every side of his philosophy. We have already encountered the ‘transcendental’ side, but following Hannah Arendt’s analysis, one can say that there are two further aspects of his philosophy. Arendt distinguishes three perspectives on human affairs in Kant: “we have the human species and its progress; we have man as a moral being and an end in himself; and we have men in the plural, who actually are in the center of our [political philosophical] considerations and whose true “end” is [...] *sociability*”.<sup>56</sup> Arendt focuses on the third sense, because she wants to argue that Kant developed a complete political philosophy (without systematising it), and that the key human capacity in that context is judgement, not reason. She was looking for what Kant thought about politics, *ergo* real human affairs: humanity in its diversity, and in its interdependence (non-autonomy). According to her, the key to Kant’s political philosophy lay in his *Kritik der Urteilskraft*, notably aesthetic (!) judgement. She notes that later in his life, Kant became more occupied with the problem of theory and practice, and that consequently his attention shifted from morality to politics. He came to define what Arendt calls his “theory of enlightened self interest”<sup>57</sup> which seeks to explain why people of flesh and blood, who more often than not lack strength of will, behave morally. In other words, he sought to redeem his idealism. In the field of law this meant that he paid more attention to the institutional requisites of actual moral behaviour. This theory of enlightened self-interest plays an important role in his project for perpetual peace. He famously claims that constitutionalism can even form a totality of devils into a well ordered society, in which the members behave *as if* their morality is impeccable.<sup>58</sup> Here we meet man<sup>59</sup> in the third sense, political man, who acts (at best) out of a strategic rationality. But this is also where the genius of nature comes in: nature guarantees that in so opting for his own interests, man *unwillingly* behaves in accordance with the laws of reason. Kant holds that such strategic action can only take place in a non-destructive way within the framework of a constitution based on reason.<sup>60</sup> This means in the first place that no opposition between morality and politics needs to be admitted: the foundation of all legal institutions is still the reflection of practical reason. On the other hand, it is also quite clear that Kant has to employ man in the first sense (as enumerated by Arendt), “human species and its progress” to guarantee the congruence of strategic action and

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<sup>56</sup> Arendt 1982, p. 26.

<sup>57</sup> Arendt 1982, p. 18.

<sup>58</sup> Kant 1964, p. 224 (*Zum ewigen Frieden*).

<sup>59</sup> I consistently use male forms, for no particular reason.

<sup>60</sup> Cf. Kant 1964, p. 249 (*Zum ewigen Frieden*): the *Staatsklugheit* (instrumental rationality of the state) can only be allowed by virtue of a “mit der Freiheit [...] vereinbare, rechtliche Zustand” (a legal situation that is in accordance with the idea of freedom).

enlightened reflection. For Kant expressly states that it is nature that guarantees that man actually does his duties, which according to practical reason, are dependent on the freedom of the will. Under this perspective, we perceive humanity as completely determined by nature, which ‘sees’ mankind as a class of animals.<sup>61</sup> And as for the active man, he not at all aware of, nor able to gain insight in, this activity of nature, because nature is “despotic”.<sup>62</sup> I conclude that an element of ‘cosmic trust’ figures at the core of the argument for perpetual peace, and Kant’s political philosophy as a whole. Without cosmic trust, morality and politics could not be held together.

In sum, we can recognise all three perspectives on human affairs in Kant’s project for perpetual peace, and it is not always clear how they relate to each other. There is a clear tension between the first and the second perspective on human affairs. One would have to characterise this tension as a contradiction, if one did not agree with Kant’s discernment of these three perspective on human affairs. On the one hand, Kant fully admits that reason alone is “incapable towards practice”, needing nature for its completion.<sup>63</sup> On the other hand, he claims the necessary relation of moral theory and practice, because in moral theory the principle holds that nobody can be obliged to the impossible.<sup>64</sup>

There is another dimension to Kant’s justification of postulates such as progress in history, which brings the problem of theory and practice to the fore in yet another light. This is what Arendt calls the actor’s and the spectator’s perspective. As stated, the genius of nature is hidden from the practical man, but it can be penetrated by philosophical judgement. The philosopher is the spectator, who is unbiased towards what is happening. His judgement abstracts from his own conditions; it is in Arendt’s words “thinking with an enlarged mentality”.<sup>65</sup> This judgement does not yield the same results as moral judgement, as it does not concern the same subject matter: it concerns the multitude of men in an empirical sense, and not the transcendental subject of morality. In the end, there can be “a clash between the principle according to which you should act, and the principle according to which you should judge”.<sup>66</sup> Arendt uses the example of different ways to view war in Kant: moral judgement

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<sup>61</sup> “...Ansehung der Menschengattung als einer Tierklasse” Kant 1964, p. 222 (*Zum ewigen Frieden*).

<sup>62</sup> Kant 1964, p. 221 (*Zum ewigen Frieden*).

<sup>63</sup> “...kommt die Natur dem verehrter, aber zur Praxis ohnmächtigen allgemeinen, in der Vernunft gegründeten Willen, zu Hülfe...” Kant 1964, p. 222 (*Zum ewigen Frieden*).

<sup>64</sup> Kant 1964, p. 129 (*Über den Gemeinspruch...*). He goes on to say (p. 168) that “eine moralische Absicht, welche, wenn ihre Bewirkung nur nicht demonstrativ-unmöglich ist, Pflicht wird” (a moral intention becomes duty, when only its accomplishment is not demonstrably impossible). We have seen the same distribution of the burden of proof with the notion of historical progress. Cf. note 55.

<sup>65</sup> Arendt 1982, p. 43.

<sup>66</sup> Arendt 1982, p. 48.

legislates the categorical “No!”, but still historical judgement can discern something sublime in it<sup>67</sup>, and it can even discover something beneficial to the ulterior goal of progress.<sup>68</sup> The same clash of principles occurs in an unjust civil constitution: as I will discuss later, citizens have an unconditional moral obligation to obey the law, even though they can see that it is contrary to the idea of freedom.

According to Kant, it is the spectators perspective that gives meaning to historical events, and not the motivations and ambitions of the actors.<sup>69</sup> Understanding world history as a spectacle is the key to understanding Kants opinion on the connection of theory and practice. In *Über den Gemeinspruch*<sup>70</sup> Kant compares world history with a play, and argues that as a spectacle it must be progressive, otherwise it is not worth watching: a depressing tragedy. The fact that everything gets better perpetually is presupposed in the activity of reflecting on human affairs in their diversity. In other words, it is the philosopher who postulates the genius of nature (or Providence) because he cannot help being optimistic. Kant would have had a hard time reading the works of pessimistic philosophers after him, like Schopenhauer, Nietzsche and Heidegger, who have let go of the notion of meaning in history.

Arendt concludes that “Kant’s world citizen is actually a *Weltbetrachter*, a world spectator. Kant knew quite well that a world government would be the worst tyranny imaginable.”<sup>71</sup> We can distil two elements out of this quote that will prove to be of special importance in Kant’s project for perpetual peace. In the first place that Kant’s political philosophy is all about enlightenment, not of the moral agent, but of empirical man.<sup>72</sup> This enlightenment is what Arendt described as an “enlarged mentality”. It is a philosophical attitude. Consequently, and this is the second point, his theory of right, which stems from the universalism of practical reason, has to be moderated. It cannot be stretched to its utmost limits.

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<sup>67</sup> Arendt 1982, p. 53.

<sup>68</sup> For example in *Zum ewigen Frieden*, where Kant explains that nature has used war to disperse humankind all around the globe; something they would not have done otherwise. Kant does not address the problem that this dispersion is a source of great inequality. His vision of international law does not allow global distributive justice anyhow. Kant 1964, p. 219-222.

<sup>69</sup> This is evident from what he writes about the French Revolution, quoted by Arendt 1982, on p. 45-46.

<sup>70</sup> Supra note 10.

<sup>71</sup> Arendt 1982, p. 44.

<sup>72</sup> Cf. *Beantwortung der Frage: Was ist Aufklärung?*, in: Kant 1964.

### *IV.3. Hegel and Habermas on Kant's notion of history*

Although there are *prima facie* resemblances of Hegel's philosophy apparent here, the latter firmly rejected Kant's conception of nature or history. For Hegel, Kant's progress of humankind was a category that was too simplistic. He could never approve of something so abstract, and above all, so over the heads of the subjects concerned.<sup>73</sup> In Hegel's philosophy, no movement (of the concept of the Spirit) can occur without human (self)consciousness; every development is by definition self-generating. This is the demand of concreteness that is essential to Hegel. But this discussion will have to wait. There is more to be said for Kant, and there are also ambiguities of this kind in Hegel, notably in his conception of the *Weltgeist*.

As for Habermas, he states that Kant could not yet think historically. To conclude that his communicative reason by contrast must be historical, is premature. It is not at all clear that Habermas solves these problems.<sup>74</sup> Evidently, he rejects Hegelian teleology, because "the philosophy of history can only glean from historical processes the reason it has already put into them with the help of teleological concepts"<sup>75</sup> Whereas in contrast Habermas' universality of communicative reason is not pre-existent, but only *accomplished* in a concrete intersubjective understanding. Men do not possess reason, they generate it. "Nothing is prior to the citizens practice of self-determination other than the discourse principle, which is built into the conditions of communicative sociation in general [...]"<sup>76</sup> If the creation of social meaning is self-determination, does this mean that it is completely a-historical according to Habermas? No, because his philosophy rests on the "linguistic turn", hence even self-determination is hermeneutic. But because universality can only be generated in a context of fact, Habermas' entire philosophy is considerably more empiricist than Kant's or Hegel's, and his notion of reason wider and more flexible. Although he wishes to reinstate the discourse of modernity, he has virtually thrown its speculative nature overboard. What will be left for a theory of international law remains to be seen.

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<sup>73</sup> However, Hegel's *Weltgeist* also suffers of this abstraction from self-consciousness. Cf. Section V.3.

<sup>74</sup> Cf. Pippin 2002.

<sup>75</sup> Habermas 1996, p. 2.

<sup>76</sup> Habermas 1996, p. 127-128.

#### *IV.4. Kant's legal model for perpetual peace*

Kant is extremely clear on one condition: peace must be instituted (*gestiftet*).<sup>77</sup> Peace demands the legal form in order to be rescued from the arbitrariness of the *Staatsraison*. Kant's solution is a confederation of free states, directed at perpetual peace. The basic form of this confederation will still be a treaty, but contrary to 'regular' peace treaties, it will not designate a temporary truce, but the intention to take away the possibility of war. However, Kant does not envisage any institutional arrangements to add force to the confederation. He rejects the institution of any kind of governmental power above that of each of the separate states. Even though he considers his own model to be a transformation of the law of nations, it is not so clear wherein this transformation lies. The law of nations that he proposes, is still firmly based on sovereignty and non-intervention; classical principles. Kant has run into the challenge of reconciling his ethical and legal universalism with the institutional dimension of empirical human affairs. He admits that reason seems to demand a global legal order in the full sense:

Für Staaten, im Verhältnisse unter einander, kann es nach Vernunft keine andere Art geben, aus dem gesetzlosen Zustande, der lauter Krieg enthält, herauszukommen, als daß sie, eben so wie einzelne Menschen, ihre wilde (gesetzlose) Freiheit aufgeben, sich zu Öffentlichen Zwangsgesetzen bequemen, und so einen [...] Völkerstaat (*civitas gentium*), der zuletzt alle Völker der Erde befassen würde, bilden.<sup>78</sup>

He asserts that this *Völkerstaat* will not develop, because states, in line with their conception of the law of nations (solipsism?) will not want it. However, in a different context, Kant clearly rejects the idea of a world state himself. Once again, the tension is caused by the existence of different registers of thought in Kant's philosophy. Part of the argumentation employed in this rejection is contingent – a world state being unmanageable and becoming despotic<sup>79</sup> – but the greater part is a principled critique. Firstly, Kant states the uniqueness of the constitution that transforms men into citizens. He claims that the transition to a legal constitution can only occur once, so he holds it to be conceptually impossible that sovereign

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<sup>77</sup> Kant 1964, p. 203 (*Zum ewigen Frieden*).

<sup>78</sup> Kant 1964, p. 212 (*Zum ewigen Frieden*). [My translation: "For states in their relations with each other, reason implies that there is no other possibility to get out of the lawless situation that consists in war alone, than that they, similar to individual human beings, give up their wild and arbitrary freedom, and bring themselves under public coercive laws, to form in this way a state of peoples, that would in the end encompass all the states of the world."]

<sup>79</sup> Kant 1964, p. 264 (*Zum ewigen Frieden*).

states are subsumed under a higher power.<sup>80</sup> This argument betrays a very classical concept of sovereignty, that has been discussed above. It should be noted that Kant also has quite an absolute conviction of internal sovereignty: his categorical rejection of rebellion and civil disobedience bears witness to this.<sup>81</sup> It is easy to summarise why these two aspects of sovereignty pose a threat to the very notion of cosmopolitan law: such law must be due to the individual *qua* individual, and not mediated by the state. The second argument for the rejection of a world state is that the existence of a plurality of states works as a stimulus for the progress of humankind.<sup>82</sup> In the third place, the law of nations is built on a mutual respect that Kant is in favour of: he rejects world politics that have a pretension of moral paternalism, as becomes clear from his rejection of a “war of punishment” (5th Preliminary Article).

Let us take a closer look at these arguments, to see to what register of Kant’s thought they belong. The argument in favour of the world state is obviously one of practical reason. But it is not recognised for its worth by empirical acting man, i.e. monarchs etc.. The claim that a world state would turn into a despotic state, is a result of historical judgement. It is based on experience, not on *a priori* knowledge. The argument about the progress of humankind is clearly a proposition about nature’s mysterious ways, which can only be grasped by the philosophical spectator. But is also a judgement. The same holds for the rejection of global moralism.

But the argument about sovereignty is strikingly different. The binary nature of the concept of sovereignty suggest that we are dealing with a deduction of reason. But this cannot be the case: reason, with its universalistic meaning, cannot imply a preference as to the size of a free society, so there would be nothing against bringing states under a fully legal constitution, even though this would mean giving up the concept of sovereignty as it was previously defined. In the end, Kant’s theory and practice do not ‘add up’. Kant has tried to mask sovereignty as a concept of reason, while it is in reality the basis of particularism and xenophobic moralities. If he would have chose to design a truly idealistic project, he should have rejected the concept of sovereignty. This would have been more consistent with what he stated elsewhere: that the state is also a moral person. Working this out would have meant that the freedom of these persons among each other must be institutionalised.

At this point it is good take a glance at Hegel’s philosophy of international law. In his thought, sovereignty is not a *Fremdkörper* like in Kant’s. He can fully concur with the

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<sup>80</sup> Kant 1964, p. 209 (*Zum ewigen Frieden*).

<sup>81</sup> Kant 1964, p. 233-234 (*Zum ewigen Frieden*).

<sup>82</sup> Kant 1964, p. 222 (*Zum ewigen Frieden*).

particularistic logic of sovereignty, because he believes that the state is *the* ethical substance, i.e. that there is no higher moral or political rationale, nor an international community. Without getting into the merit of this view, it can be noted here that the ambiguity of Kant's recognition of sovereignty is due to the fact that transcendental philosophy (which implies a rejection of sovereignty) forms the core of his philosophy. This is even the case for his political philosophy, contrary to what Arendt argues. The other dimensions of his thought fulfil a role subservient to practical reason: they serve to compensate the divergence between theory and practice created by transcendental philosophy. Reason is the surest foundation; other registers are secondary. This is also the case in *Zum ewigen Frieden*: the agenda is set by universalistic considerations, and it is filled up with examples of nature's force of bringing humanity to its cosmopolitan goal. That is why I called Kant's conception of history a 'safety valve' earlier: it seeks to take away the tension between facticity and validity. This is also why Hegel makes such short work of rejecting Kant's philosophy, by simply calling it abstract. In Habermas' jargon, it was Kant's mistake that he did not explicitly treat facticity. But making very short work of Kant is not fair, because his justification for postulates such as progress in history is actually quite interesting.<sup>83</sup>

Back to Kant's project. Habermas has put his finger on the fact that the core of the project is a "bloßen Appell an die Vernunft".<sup>84</sup> According to him, Kant succeeds in nothing more than conceptualising an international moral community, but certainly not a legal one. He thus considers Kant's central objective a failure. Perhaps Habermas is slightly too strict in the application of the label 'law' here,<sup>85</sup> but it is certainly true that this is a weakness in Kant's project. Kant himself was fully aware of the fact that his confederation of states rests on trust, and not on legal force. He suggests that there are communities in civil society which can also retain their coherence without the aid of a coercive legal structure. His confederation is a "surrogate"<sup>86</sup> of that.

A strange characteristic of Kant's *Zum ewigen Frieden* is that the greatest part of it is not about international law at all. The international law reflections are restricted to the notion of sovereignty and the elaboration of the confederation of free states. The greater part of the *corpus* of the work (without the appendices concerning nature's genius and the relation politics-morality) is about the factual conditions under which perpetual peace can take shape.

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<sup>83</sup> Cf. note 10.

<sup>84</sup> "... a mere appeal to reason..." Habermas 1998, p. 170.

<sup>85</sup> As I have argued in section II.1. and II.2., the concept of law in international law is undergoing a transformation that slackens the demarcation of 'law' and 'non-law'.

<sup>86</sup> Kant 1964, p. 212 (*Zum ewigen Frieden*).

Some of these conditions concern morally responsible behaviour of states, like the prescription of the abolishment of standing armies (3rd Preliminary Article), or the prohibition of forceful intervention into the affairs of another state (5th Preliminary Article). But by far the most important precondition is the following: states must have a republican constitution (1st Definitive Article). If they have such a constitution based on the idea of freedom, chances are great that they will respect each other's freedom and renounce the possibility of war. It is only within under such a constitution that a community is ruled by the principle that Kant designates as the first principle of law (Second Appendix): the principle of publicity. Actions that demand secrecy for their success, cannot be in accordance with the ideas of morality and politics. This is where we encounter the enlightenment spirit of the philosopher who wrote in *Was ist Aufklärung?* that enlightenment is to think for oneself, and to be able to make public use of one's reason under all circumstances.<sup>87</sup> The principle of publicity really belongs to the domain of the plurality of empirical (political) men. As Arendt suggests, publicity implies a translation of morality as that which is "fit to be seen"<sup>88</sup> and scrutinised for its worth.

A prerequisite for a community of people that think for themselves is a free public sphere. This sphere is the Holy of Holies of Kant's political philosophy, perhaps even legitimating civil disobedience if it is not respected. Kant himself does not make it a secret that he understands 'public' as 'reading public', hence the philosophically informed few.<sup>89</sup> He is not so much concerned about the freedom of the tabloid press. Now we should recall that according to Arendt the key to Kant's political philosophy is the faculty of judgement, because this is connected with the multitude of men, who do not form their opinions by themselves, in contradistinction to man as a moral agent, who is merely introspective. Her interpretation of Kant, which isolated the enlarged mentality of philosophical judgement and the fact that the world historical meaning of an event is determined not by its actors, but by its interpreters, helps us understand the project for perpetual peace better as well. Especially the fact that in the end he does not define it in strict legal terms, but as a process of civilisation. What Kant is putting his money on is the progress of the philosophical wisdom of judgement - which is a social wisdom - and not on transcendental philosophy. This philosophical wisdom of judgement in the end cannot but inform the decisions of legislators and administrators,

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<sup>87</sup> "... von seiner Vernunft in allen Stücken öffentlichen Gebrauch zu machen"; Kant 1964, p. 55 (*Was ist Aufklärung*).

<sup>88</sup> Arendt 1982, p. 49.

<sup>89</sup> Kant 1964, p. 55 (*Was ist Aufklärung*).

finally bringing about the convergence of principles of freedom<sup>90</sup> that the *Zum ewigen Frieden* seeks to promote. It is because of this hope for a transnational enlightenment that Kant is able to moderate his universalism in the face of the facts.

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<sup>90</sup> Kant 1964, p. 226 (*Zum ewigen Frieden*)

## V. HEGEL

### *V.1. Hegel contra Kant*

Practically every work on the theory of international relations opens with the complaint that political philosophers concentrate themselves too exclusively on the nation state.<sup>91</sup> This is a complaint that Kant could have stated also. Hegel, on the other hand, would have been able to explain precisely why this is so. Ethics and politics (factually and conceptually) do not exceed the nation state. Reflection that does exceed these borders is by definition either speculative-historical or nonsensical.

Hegel is perhaps the thinker whose philosophy is *the* most based on a philosophy of history. Reason itself is, unlike in Kant, historical. In Hegel's philosophy, history plays a more complex role than in Kant. We saw that Kant appeals to the teleology of history where his transcendental philosophy needs to be made compatible with the facts. For Hegel by contrast, history is a much more independent category. It is central to his thought because it is in history that the conceptual development of humanity takes place. This is an immanent process, in which no 'moment', however incomplete, is lost, but always synthesised into a higher moment. It is a self-imposed imperative for Hegel that every empirical phenomenon be understandable in a speculative framework. Conversely, it is necessary that speculative reflection is in accordance with the facts. Naturally, speculation should not coincide with the facts, as there is still an essential difference between *Verstand* and *Vernunft* – i.e. empirical science and reflection. It is in this light that we can understand Hegel's critique of Kantian rationalism, and specifically of his project for perpetual peace. This project was, to Hegel's mind, a mere philosophical idea.<sup>92</sup> It was simply not in line with the reality of the law of nations, and the self-centred practice of states. Hegel states: "independent entities [...] stipulate among themselves, but at the same time remain above these stipulations. And this breach of treaties is nothing immoral, because the eternal peace is only an ought and in the ought lies non-being."<sup>93</sup> Kant's objective was to envisage a world order based on law. He demanded that this be an order not just of converging civilisational ideas, but an order which

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<sup>91</sup> For example Linklater 1982, Held 1995, and H. Williams, *International Relations and the Limits of Political Theory*, London: MacMillan, 1996.

<sup>92</sup> G.W.F. Hegel, *Philosophy of Right*, trans. T.M. Knox, Oxford U.P., 1967, p. 210 (§324).

<sup>93</sup> G.W.F. Hegel, *Vorlesungen über Rechtsphilosophie 1818-1831*, Frommann-Holzboog, 1973-1974, Volume 3, p. 833. Quoted and translated by A. Peperzak, *Modern Freedom – Hegel's Legal, Moral and Political Philosophy*, Dordrecht: Kluwer, 2001, p. 582.

possesses legal validity. But Kant's design presupposes precisely what it sets out to prove: a fundamental consensus among states.<sup>94</sup> Now we did see that the main thrust of Kant's argument is in the progressive nature of an enlightened attitude. Hegel is therefore justified to assert that Kant placed his trust on the states as the medium to bring about perpetual peace (§333). With the idea of the state as the exclusive site of international law, Hegel could concur entirely: the will of the state is the highest will in the objective world, there is no universal will. Hegel would reject the ascription of a universal will to a counterfactual totality of humanity, because it is completely abstract. The will of the state is a good example of a concrete will, a constituted will under which the wills of many lower forms (family, civil society, the corporation) is subsumed. States are therefore a reality in the full sense, but the same cannot be said of cosmopolitan law.

## ***V.2. Hegel's particularism: speculative necessity or provincial attitude?***

Hegel's theory of international law entails the full endorsement of the particularistic rationale of the states-system, which was to Kant more of a philosophical *problem*. Hegel mentions aspects of international law that he views as essential, but that a cosmopolitan thinker could only describe with aversion. I will give some examples. International law is "only an ought" (§333), so it can be rational for a state to break its obligations, as the highest principle is, and should be, only its own welfare (§336). The world order is marked by arbitrariness; the content of international law is indeterminable (§334). Foreign politics should be ruled by smartness<sup>95</sup> ("particular wisdom") and not "universal Providence"<sup>96</sup> or the "thought of philanthropy"<sup>97</sup> But most importantly, Hegel sees sovereignty as fully justified. The fact that he even morally justifies war seems repulsive, but it can be understood within the context of his thought. Wars happen, and this is not even an illogical circumstance given the structure of the law of nations, where disputes are ultimately not settled by process, but by might (§334). The essential reason why international law is nothing more (and often less) than the contractual law (§332) of states, is that the state is the realisation of the ethical idea. The particular state is the ultimate point of reference of all people, in which (ideally) they have

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<sup>94</sup> I take this line of reasoning from L. Heyde, who ascribes it to Hegel: L. Heyde, *De verwerkelijking van de vrijheid; Een inleiding in Hegels rechtsfilosofie*, U.P. Leuven, 1987, p. 243.

<sup>95</sup> Cf Kant's *Staatsklugheit*, which he uses as a pejorative term.

<sup>96</sup> Cf. America's quest "to make the world a safer place".

found their freedom objectified. It is the most general of communities; no higher form can be accomplished. Hegel claims that by consequence, political and ethical considerations do not exceed the ethical community of the state.

These are unusually strong views; one could recognise a trace of unreflective nationalism. Why did Hegel hold these views? The final analysis of Hegel's philosophy of right depends on exactly this question. Hegel claims that there is a speculative necessity to the finitude of the scope of the ethical community. This finitude is embodied in international law by the concept of sovereignty, which is therefore a necessary concept, according to Hegel. Hegel has to show this necessity to counter the reproach of unreflective nationalism. Peperzak thinks that Hegel has not succeeded in showing this necessity. I believe that the post-WWII development of (especially avant-garde) international law also cast doubts on Hegel's conceptual framework. But before getting into that discussion, we should first grasp what the particularity of the state, which is the reason for its being the ultimate political organisation, consists in.

What does it mean: the state is the realisation of the ethical idea? A political community is not simply a collection of men. An unqualified collection of men is an abstract generality, such as for instance civil society. It is not concrete because there is no bond between the parts; it is an atomistic collection. For Hegel, the state is essentially different: instead of an atomistic collection, it is an organic whole. It is such not merely by virtue of abstract principles, but perhaps more importantly by virtue of concrete institutions. In the use of legitimate coercion, for instance, the state affirms that it is a higher form than the finite individuals that are subject to its laws. A war, which can demand the ultimate sacrifice from these individuals, thus affirms the absolute authority of the state, and therefore its infinity. Let me clarify finitude and infinity. The goal of culture is to overcome nature (finitude). Of course, one cannot overcome nature entirely, seen for instance the fact that all must die. But in terms of the objective world, i.e. the social world of ethics and politics that men create, a certain infinity is possible. Hegel writes that the fact that the world consists of autonomous states, who define themselves negatively as opposed to the others, bears witness to "the state's actual infinity as the ideality of everything finite within it." He goes on to say:

It is the moment wherein the substance of the state – i.e. its absolute power against everything individual and particular, against life, property [...] makes the nullity of these finite things an accomplished fact and brings it home to consciousness.

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<sup>97</sup> This is diametrically opposed to Kant's project, which 'bets on' enlightenment, first of philosophers, then of actors.

Hegel does not mean to suggest that the state *should* prove the nullity of these things. The mere fact that it *could* do this, marks the absolute authority, and in speculative terms the actualisation of the ethical idea<sup>98</sup>. For infinity we might as well read sovereignty. So it is “the ideality of everything finite within it”. That means that everything finite within it – notably individuals, families etc. – are incorporated into the whole, consequently losing their distinctive voice.

Back to Hegel’s particularism. We have seen how the constitution of the state, i.e. the creation of an ‘ethical infinity’ is essential to the actualisation of freedom, which is the ultimate goal. That explains why Hegel wants to hear of no force above the state. For the national communities have not been constituted in a world state, but in particular states. However, the emergence of a world state, or a weaker ethical community, does not become impossible, even on these terms. For this emergence could proceed on a voluntary basis, in line with Kant’s *Zum ewigen Frieden*. In other words, it does not become sufficiently clear why the *Philosophy of Right* declares the existing state-system as sacrosanct. The idea of the state (*Staatsidee*) and the idea of freedom are universal concepts, so it is not evident that they can only be embodied by *particular* states.<sup>99</sup> However, it is quite clear that when Hegel speaks of the state as the ethical substance, he is referring to each *particular* state as an ethical community limited in space.

We need to look for other possible reasons for Hegel’s particularism. One such reason could be formulated in a communitarian style: perhaps the national state is the highest level of abstraction that citizens can still identify with. Such reasoning is also characteristic of nationalistic theories like Herder’s. But with regard to international law, it is an unsubstantial reason. If there is a consensus between peoples about principles of justice, this alone is sufficient justification for supranationalism. Supranationalism does not imply that the degree of representativity of political bodies is ignored, nor does it imply supranational democracy as such.<sup>100</sup> It is perfectly reasonable to propose cosmopolitan law as a concept demanding layered government.<sup>101</sup> There are a number of elements in Hegel’s philosophy that point to this kind of argument for particularism. The monarchistic element in Hegel’s theory of state is the first. The monarch has a minimal legal relevance, as his competences are highly formal,

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<sup>98</sup> The ethical idea is “the concept of freedom developed into the existing world and the nature of self-consciousness” (§142).

<sup>99</sup> Cf. Peperzak 2001, p. 583.

<sup>100</sup> There is nothing democratic about the International Criminal Court, for instance.

<sup>101</sup> Cf. Höffe, in: Lutz-Bachmann & Bohman 2002.

but by contrast he has an important symbolic function. He symbolises the whole as a unity, whereas the legislator symbolises multiplicity and the executive particularity. It is highly improbable that such a monarchistic symbolism could survive a cosmopolitan transformation, as the latter introduces a multitude of cultural identities. The second characteristic of this kind is Hegel's conception of the political constitution of a state as embodying the specific character of a of a given nation (§344). It is evident from this specificity that the ideas of freedom and state leave enough room for cultural contingency.<sup>102</sup> Hegel gives a normative twist to this contingency by introducing the notion of *Volksgeist* in §156 as a necessary element of the ethical substance. According to Peperzak, this introduction is unjustified,<sup>103</sup> and I can concur with him. But as I will discuss shortly, the notion of *Volksgeist* plays a major role in Hegel's conception of world history. There is one other assumption that Peperzak rejects, and that is Hegel's identification of the state with the perfect, autarchic community, that reminds one of Aristotle.<sup>104</sup> That this is an illusion can be illustrated by contrasting the following quote with the current situation of global interdependence. Hegel states that while men in civil society "are reciprocally interdependent in the most numerous respects, [...] autonomous states are principally wholes whose needs are met within their own borders" (§332). Hegel seems not to be able to recognise the possibility of intercultural interaction *because* he cannot recognise an ethical community beyond the state. There is a circularity apparent in Hegel's thought, which suggests that his loyalty to the states-system indeed (as Peperzak states) does not rest on speculative grounds. Or it must be the speculation on world history. Hegel does not see the interpersonal dimension of international relations (like for instance international private law, which he ignores completely) because he subsumes all 'lower forms' (like individuals) into the state, so that they are beyond recognition in the global arena. Kant was much more attentive to this interpersonal dimension, with his reflections on international trade, and his prescription of cosmopolitan hospitality (3rd Definitive Article).

But before advancing to a discussion of world history, we must pay attention to a conceptual justification of sovereignty that Hegel gives, and Heyde agrees with. What Hegel calls the "individuality" of the state is, according to him, only possible due to the states self-definition vis-à-vis other states (§221-223). This makes a plurality of states into a conceptual necessity. Heyde recognises a typical Hegelian idea in this, namely *the* state as such cannot

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<sup>102</sup> Cf. Heyde 1987, p. 250.

<sup>103</sup> Peperzak 2002, p. 583.

<sup>104</sup> Peperzak 2002, p. 579.

exist. Or more generally: that an idea cannot exist except in something particular.<sup>105</sup> But Peperzak tries to be more Hegelian than Hegel, and suggests that the latter is inconsistent. In the domain of international law, Hegel falls back on categories of civil society, like the contract, that dialectically speaking have long been left behind. Furthermore, the categories of civil society could not reach their final completion unless in a higher form. There is no reason, according to Peperzak, that this should not be the case on the global scale. For example, the practice of mutual recognition of states, that Hegel also acknowledges, creates a kind of political community. Like Peperzak, I am not convinced by the conceptual necessity of the concept of sovereignty. Hegel over-stresses the deadlock of sovereignties.

### ***V.3. World history: cosmic justice or sorry comfort?***

To introduce the transition from Hegel's theory of international law to his conception of world history, I will quote him at length:

The principles of the national minds [= *Volksgeister*] are wholly restricted on account of their particularity, for it is in this particularity that, as existent individuals, they have their objective actuality and their self-consciousness. Their deeds and destinies in their reciprocal relations to one another are the dialectic of the finitude of these minds, and out of it arises the universal mind, the mind of the world, free from all restriction, producing itself as that which exercises its right – and its right is the highest right of all – over those finite minds in the 'history of the world which is the world's court of judgement' [= *die Weltgeschichte als Weltgericht*] (§340).

As it turns out, the ethical substance of the state is not the highest form after all. There is a higher form in the *Weltgeist*, which uses the "dialectic of the finitude" of states for its own purposes. Here we have a hidden justification for an absolute concept of sovereignty: it guarantees the dialectic of nations. This justification can only be accepted if one accept this speculative-historical dimension. One can hardly be more opposed to Kant, who indeed shares a purposive conception of nature, but ascribes to it the silent completion of that which reason demands. Whereas Hegel's *Weltgeist* possesses a higher right that does not need to pay respect to the ideas of morality and right in the objective world (§345). From the perspective of history all inferior nations are rightless (§347), because the meaning of the *Weltgeschichte als Weltgericht* is that the superior nation conquers, thus unknowingly furthering the *Weltgeist* (§345). The *Weltgeist* is the right of the nation with the most advanced principles.

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<sup>105</sup> Heyde 1987, p. 241.

It is time to define the *Weltgeist* in non-Hegelian terms. The *Weltgeist* is pure, context-less thought, or philosophy. The actors in the play of history are unconscious of this dimension, although they assist in furthering it (§348). Once more in Hegel's own words: the *Weltgeist* is a coming to itself of mind (§343). Every dominant civilisation adds to this universal wisdom, without coinciding with it, for civilisations come and go by necessity (§344). But the philosopher does have access to this dimension, or rather: he constitutes it, for the *Weltgeist* cannot be transcendent. But even though the *Weltgeist* can be translated as philosophical reflection, it seem too abstract to fit perfectly in Hegel's system. Note for instance that philosophy itself is not considered to be situated in a particular culture. This is really modernism in the extreme. It is cosmic justice regardless of earthly injustice. As Peperzak states the point: "The philosophy of history shows how reason uses a violent history to actualise the suprahistorical wisdom of its Providence."<sup>106</sup> And contrary to Kant's 'cosmic trust', this cosmic justice has a logic of its own, which is unintelligible for a practical man, and is not bound by ideas of ethics and politics.

There are broad similarities and vast dissimilarities between this conception and Kant's. Kant also uses notions like a progressive history and the importance of philosophical reflection. But the contrast between the two versions of teleological history is enormous. Hegel paid special attention to it, and it is in line with his historification of reason itself, that this dimension of the ultimate justice of history is needed to make up for the injustices and irrationalities of the objective world. The essential difference is, that Hegel's historical justice is independent from political justice, while Kant's is merely subservient. This brings me to the philosopher – actor relationship. For both Kant and Hegel, the laws of history are hidden from the actors. But for Kant this is contingent, while for Hegel it is essential.<sup>107</sup> Kant would like to witness the enlightenment of world leaders (after the example of 'his' Frederick), while Hegel enjoys watching them sprawling in the dirt of the battlefield.

If the perception of history is like the witnessing of a play, as Kant said, and we also have a choice of plays, as Kant suggested<sup>108</sup>, I would much rather take up Kant's invitation than Hegel's.

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<sup>106</sup> Peperzak 2002, p. 608.

<sup>107</sup> But we could be happy that the perspective of world history is concealed from actors, because it would be a disaster if leaders would claim historical justice in the Hegelian sense.

<sup>108</sup> Cf. note 10.

## VI. HABERMAS

### *VI.1. Habermas and the modernists*

Habermas can be situated in relation to modernity. He seeks to redeem the reason that was central to modernity's reflection against the scientism of his time, but he rejects the foundation of reason in the philosophy of the subject. Both Kant and Hegel are caught in the philosophy of the subject. As a child of his time, Habermas seeks to base his reason on a less metaphysical ground, namely language. While he incorporates many contemporary ideas, like speech-act theory and hermeneutics, the basic idea is this: instead of basing our knowledge on absolute notions like the moral subject or history, we should base it on day-to-day social reproduction. Because of this, Habermas can only be called an idealist by virtue of the product, and not by virtue of the foundation of his reflection. Reason does not exist as such; it is generated in communication:

Again and again this claim [to reason] is silenced, and yet in fantasies and deeds it develops a stubbornly transcending power, because it is renewed by each act of unconstrained understanding, with each moment of living together in solidarity, of successful individuation, and of saving emancipation.<sup>109</sup>

Important consequences follow from this for the nature of morality, the relation of theory and practice, and the view of history.

Morality, for Habermas, is not an autonomous form of knowledge, and certainly not the result of transcendental deductions. Morality is, like all production of social meaning, necessarily embedded in, and dependent on, factual situations. For law, this holds to an even greater degree, because it has facticity written into its very concept. However, this factual basis does not preclude the generation of universality. Indeed, it is Habermas' most important goal to show the possibility of universality in facticity. This he does by means of the counterfactual ideal character of the communication situation. When people want to reach an understanding, for instance in order to co-ordinate action, they cannot help but adhere to these

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<sup>109</sup> Quoted by R.J. Bernstein, "Introduction to *Habermas and Modernity*", in: Rasmussen & Swindal 2002.

counterfactual idealisations: identity of linguistic meaning, mutual accountability of actors and the context-transcending validity of claims to truth and rightness.<sup>110</sup>

This implies an interesting change of perspective on the nature of philosophy, and the relation of theory and practice. We noticed that Kant distinguishes a spectator's and an actor's perspective on human affairs, and associated philosophy with the first. With Hegel, this division – which Kant held to be permeable, due to the enlightenment potential of humanity – becomes absolute. There is virtually no communication between these two domains; think of the “higher right” of the *Weltgeist*, which is completely “concealed” from the relevant actors. What Habermas does is to radicalise what Kant was reluctantly suggesting: that the actor's perspective is what really counts. This is part of his ‘ordinary language’ orientation. It also has to do with Habermas’ radical concept of democracy. To him, everybody is an actor, and everybody should participate in generating the universality (validity) that is needed for a viable political community. In this respect, Kant appears as an intermediary figure. He stressed the freedom and equality of all, but refused to draw the conclusion that seems to follow: the participation of all in political life.

That Habermas’ universality is embedded in factual situations also has important consequences for his conception of history. He cannot accept a Hegelian teleology, or indeed any kind of necessity in history. Like the members of the Frankfurter Schule, by whom he was influenced, he asserted the possibility of alternative courses of history<sup>111</sup>: the existence of choices for the active man. This is linked with what Habermas calls in *Knowledge and Human Interests* one of the quasi-transcendental interests of man: the emancipatory interest.<sup>112</sup> The isolation of the actor's perspective implies that emancipation becomes a universal prescription. Thus Habermas can be characterised as optimistic, though not about the liberating potential of philosophy, but about the potentialities of the everyday practice of socialisation.

All in all Habermas is an interesting reference for any normative theory, because he tries to reconcile the universalism of modernity with contemporary anti-foundationalism. But I have merely used him as a mirror for the theories of Kant and Hegel, because it is impossible to go into the merits of Habermas’ redemption of reason in the face of contemporary philosophy in passing.

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<sup>110</sup> Cf. K. Baynes, “Democracy and the *Rechtsstaat*, Habermas’ *Faktizität und geltung*” in: Rasmussen & Swindal 2002.

<sup>111</sup> Cf. H. Marcuse, *One Dimensional Man*, Boston: Beacon Press, 1968, Chapters 8-10.

<sup>112</sup> Cf. Bernstein, in: Rasmussen & Swindal 2002.

## ***VI.2. Habermas and international law***

Habermas' thought can be seen as a combination of philosophy and empirical science, in an attempt to reconcile them. The necessity of an empirical component marks the factual basis without which reflection is useless. The generation of validity can only go as far as facticity admits. Consequently, Habermas does not design a Grand Theory of international law, as the latter's facticity is fragmented (cf. Chapter II). In his discussion of Kant's *Zum ewigen Frieden*, Habermas mainly limits himself to an empirical critique of the viability of Kant's project. Although he asserts to be formulating a "conceptual reformulation", there is really no speculation involved. It is the kind of reformulation that I advanced in Chapter II. 'Conceptual' comes to mean theoretical, and no longer coincides with 'speculative'. Speculation is a register of modernity that Habermas does not wish to redeem.

# **PART 3: CONCLUSION**

My conclusions can be short. Sitting on the shoulders of giants like Kant, Hegel and (to a lesser extent) Habermas, one can see further than with both feet on the ground. That is why I have tried to force a discussion on these philosophers. I hope that this discussion has contributed to a better understanding of the status of morality, theory and history in international law.

All I can contribute in addition is a fleeting synthesis of the findings in parts 1 and 2. If the historical development of international law itself is the judge, who has to be termed the more prophetic, Kant or Hegel?<sup>113</sup> My diagnosis is that Kant is the winner. This is paradoxical, because his thought is supposedly unhistorical. What Kant saw, but could not expressly state, was the permeability of sovereignty. His voluntaristic model of perpetual peace is a good prophecy of what is happening in *avant-garde* sections of international law like the European Union. This is the supersession of the hard logic of sovereignty for the soft logic of co-operation, trust<sup>114</sup> and cultural convergence.<sup>115</sup> Kant did not expect this supersession, but it was latent in his project. The new logic apparent in *avant-garde* sections of international law proves that the particularistic rationale of states can be diminished, hence that Hegel was mistaken in asserting that there is no ethical substance above the state.

On the other hand it must be admitted that the *à la carte* character that international law still has, is due to the survival of (some) particularistic logic. But even this logic can no longer be seen as absolute. Even if we grant the Bush administration its claim that an international community of states is illusory, the existence of an international community of critical individuals cannot be negated. This much can be said of the global public sphere, fragmented and “semantically degenerated”<sup>116</sup> though it may be.

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<sup>113</sup> I will not allow Habermas into this contest, because it would not be fair to the others. He ‘knows’ too much about the factual development of international law.

<sup>114</sup> Cf. Section II.2.

<sup>115</sup> Cf. J.-M. Ferry, *La question de l’État européen*, Gallimard, 2001, Chapter 1: a constructivist account of the EU fails to understand the essence of this community, which is a convergence of principles.

<sup>116</sup> Habermas 1999, p. 204.

## BIBLIOGRAPHY

- Arendt, H.; *Eichmann in Jerusalem – A Report on the Banality of Evil*, New York: Penguin Books, 1994.
- Arendt, H.; *Lectures on Kant's Political Philosophy*, University of Chicago Press, 1982, p. 22.
- Copleston, F.; *Kant*, A History of Philosophy, Volume 6, Part 2, New York: Image Books, 1964.
- Covell, C.; *Kant and the Law of Peace – A Study in the Philosophy of International Law and International Relations*, London: Macmillan, 1998.
- Cumming, R.D.; *Human Nature and History: A Study of the Development of Liberal Political Thought*, Vol 2, University of Chicago Press, 1969.
- De Burca G. & Scott, J. (ed.); *Constitutional Change in the EU; From Uniformity to Flexibility?*, Oxford: Hart, 2000.
- Descartes, R.; *Discours de la méthode*, any edition.
- Ferry, J.-M.; *La question de l'État européen*, Gallimard, 2001.
- Habermas, J.; *Faktizität und Geltung – Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1994.
- Habermas, J.; *The Inclusion of the Other – Studies in Political Theory*, Cambridge: Polity Press, 1998.
- Habermas, J.; *Die Einbeziehung des Anderen*, Frankfurt a. M.: Suhrkamp, 1999.
- Habermas, J.; *Between Facts and Norms*, Cambridge (Mass.): MIT Press, 1996.
- Hart, H.L.A.; *The Concept of Law*, Oxford U.P., 1994.
- Hegel, G.W.F.; *Phänomenologie des Geistes*, Hamburg: Meiner, 1988.
- Hegel, G.W.F.; *Philosophy of Right*, trans. T.M. Knox, Oxford U.P., 1967.
- Hegel, G.W.F.; *Grundlinien der Philosophie des Rechts*, Hamburg: Meiner, 1955.
- Held, D.; *Democracy and the Global Order*, Cambridge: Polity Press, 1995.
- Heyde, L.; *De verwerkelijking van de vrijheid; Een inleiding in Hegels rechtsfilosofie*, U.P. Leuven, 1987.
- Hobbes; *Leviathan*, any edition.
- Kant, I.; *Werke – Band 9*, Darmstadt: Wissenschaftliche Buchgesellschaft, 1968.
- Kant, I.; *The Metaphysical Elements of Justice*, New York, 1965, p. 43.

- Kerchove, M. van de & Ost, F.; *Legal System Between Order and Disorder*, Oxford U.P., 1994.
- Kiesewetter, H.; *Von Hegel zu Hitler*, Hamburg: Hoffmann und Campe, 1974.
- Koskenniemi, M.; *From Apology to Utopia: The Structure of International Legal Argument*, Helsinki, 1989.
- Lequan, M. (ed.); *La paix*, Paris: Flammarion, 1998.
- Linklater, A.; *Men and Citizens in the Theory of International Relations*, London: Macmillan, 1982.
- Louden, R.B.; *Kant's Impure Ethics – From Rational Beings to Human Beings*, Oxford U.P., 2002.
- Lutz-Bachmann, M. & Bohman J. (ed.); *Weltstaat oder Staatenwelt? – Für und wider die Idee einer Weltrepublik*, Frankfurt a. M.: Suhrkamp, 2002
- Marcuse, H.; *One Dimensional Man*, Boston: Beacon Press, 1968.
- Peperzak, A.; *Modern Freedom – Hegel's Legal, Moral and Political Philosophy*, Dordrecht: Kluwer, 2001.
- Rasmussen, D.M. & Swindal J. (ed.); *Jürgen Habermas – Volume II*, London: Sage, 2002.
- Schmitt, C.; *Der Begriff des Politischen*, Berlin: Duncker & Humblot, 1963.
- Slaughter, A.M.; Sweet, A.S. & Weiler, J.H.H. (ed); *The European Courts and National Courts – Doctrine and Jurisprudence; Legal Change in Its Social Context*, Oxford: Hart, 1998.
- Snyder, F. (ed.); *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford: Hart, 2000.
- Weiler, J.H.H.; *The Constitution of Europe - "Do the new Clothes have an Emperor?" and other essays on European Integration*, Cambridge U.P., 1999.
- Williams, H.; *International Relations and the Limits of Political Theory*, London: MacMillan, 1996.