

# **A New World Order?**

**- An investigation into the possibility of creating a Kantian model of international relations.**

**A thesis submitted for the partial fulfilment of the degree of  
'Hovedfag - filosfi'  
at the University of Bergen, September 2004, by  
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## *Preface*

February 2004 I attended an academic conference in Bergen chaired by Bruce Kapferer of the department of Social Anthropology at the University of Bergen with the topic 'War and the State'. In his opening speech at day two, Dr Kapferer raised an important point which in some respects recapitulates the issues of this paper, saying that the world is now in an experimenting phase. He illustrated this by referring to the American constitution which also emerged out of an experimenting world where an oligarchic constitution could have been the solution instead of democracy. An experimenting world is a world that is trying to establish itself again and this claim is at the core of the main argument in this paper. This reconstruction is now taking place on the global level under the process of globalisation, which in turn is just another aspect of modernity. What consequence has this reconstruction for the normative arrangements of world politics? This vital question, together with its underlying presuppositions, is haunting this paper and will make its presence felt all the way down to the conclusion.

When writing a paper like this there are many people who deserves to be acknowledged for contributing to it's fulfilment, and there are a few that I like to mention her: The idea for this paper was conceived after studying a year in New Zealand under the supervision of Associate Professor Robert G. Patman at the University of Otago. Under the framework of the interdisciplinary 'Master of International Studies' - including courses in international history, international politics, the global economy and international law - Associate Professor Patman has created an excellent academic environment to discuss and treat problems facing the world society. Part A of this paper is in large based on the knowledge I gained from my stay in New Zealand, and I am therefore indebted to Robert Patman for this part.

I started writing this paper last October, which would never have happened without the backing of my supervisor, Professor Knut Vennesslan. I am really impressed with your clear vision of the problems being treated, and often I get the impression that you understand my thinking better than myself. I am also amazed by the tireless efforts you have shown by spending summer holidays reading my paper

and supervising me by phone, and later by the careful reading of the paper in which you pointed out problems that I never would have seen on my own. I've learned a lot in this process, and I am really grateful.

Last, but not least, I like to thank my dear Elisabeth for supporting me in doing this paper. Not only have you supported me, but you have also been an excellent critique on whom I can test my ideas.

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Bergen, September 14<sup>th</sup> - 2004

Jørn Osmundsen.

### *Abbreviations and Acronyms*

ECHR	European Convention on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
IGO	Inter Governmental Organization
ILO	The International Labor Organization
MNC	Multi National Corporation
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organization
OSCE	Organization of Security and Cooperation in Europe
TNC	Transnational Corporation
UDHR	Universal Declaration on Human Rights
UN	United Nations





*Asked where he came from, Diogenes the Cynic replied*

*"I am a citizen of the world".*

*(Nussbaum 1997: 29)*



## *Introduction*

This paper is about the international society, and the possibilities this society is facing. Traditionally this society has been understood as a society of states, which is a historical arrangement of norms and institutions that is periodically reconstituted in response to changing ideas and circumstances. *International law* is the basic element of the society of states. Robert Jackson (2000) labels this normative arrangement of world politics as 'the global covenant': "The global covenant is the first attempt in world history to construct a society of states that operates with a doctrine of recognition and non-intervention that bridges different civilizations and cultures around the world" (Jackson 2000: 13). Whatever this arrangement may be labelled there are rules governing the states of the world, and central among these are the doctrine of non-intervention and the principle of exclusive state sovereignty. The procedural starting point of modern European international society is usually identified with the 1648 Peace of Westphalia (Jackson 2001: 43). After thirty years of religious wars in Europe there was a strong incentive to establish some rules for an evolving international society. With the defeat of the Catholic Habsburgs, ruling Spain and Austria, the idea of *Respublica Christiania* was also defeated and the language of international justification moved away from Christian unity and religious orthodoxy towards international diversity based on a secular society of sovereign states. Westphalian international society was founded on three principles. The first principle specifies that sovereigns are not subject to any higher political authority - *res est imperator in regno suo* (the king is emperor in his own realm). Every king is independent and equal to every other king. The second principle specifies that outsiders have no right to intervene in a sovereign jurisdiction on religious grounds - *cujus regio, ejus religio* (the ruler determines the religion of his realm). The third principle was the balance of power, which was intended to prevent any hegemon from arising and dominating everybody else. In short, Europe moved away from its non-territorial power structure, i.e. the Catholic Church, towards territorial sovereignty where the society of nation states emerged as the new power structure. The ethics underlying this structure is of a *pluralist* character since it ignores what

type of regimes and governments being in power in the different states. This means that in international law a government's legitimacy to rule over a country is recognised *de facto*, and not *de jure*. The idea of international law was spelled out by Hugo Grotius, who's *Laws of War and Peace* (1625) provides an intellectual foundation for this regime. Grotius' aim was to restrict war and expand peace by clarifying a common standard of conduct which were separated from all religious doctrines and could therefore govern the relations of all independent states, Protestant and Catholic alike.

The Westphalian way of organising the world into sovereign nation states has been the basis for the international society up to the present, where the principle of sovereignty and the doctrine of non-intervention have been at the heart of the organisation. The international system is horizontal consisting of around 200 states, all equal in legal theory and recognising no one in authority over them. International law is **between** states, and not **above** like with the individual person in the domestic system (Shaw 1997: 5-7). International law is primarily formulated by international agreements, which create rules binding upon the signatories. Treaties are the most frequent method of creating binding international rules. These agreements can also be called convention, protocol, covenant, pact, act, and so on. The 1945 UN Charter is the most important treaty in international law. A second source of international law are customary rules, which are basically state practises recognised by the international community at large as laying down patterns of conduct that have to be complied with. This means that it is not necessary for a state to have expressly or impliedly consented to a rule of customary law that has crystallised as such in order to be bound by it. The identification of customary international law remains by its very nature problematical, and most legal writers find that some form of consent must exist to establish new customary rules. Treaties and customs are the two major sources of international law, but there are other sources as well like the UN General Assembly Resolutions and Declarations, general principles of international law<sup>1</sup>,

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<sup>1</sup> Examples on this are the principles of equity, saying that things have to be fair, and the principle of proportionality, saying that any response to an incident have to be proportionate.

judicial decisions<sup>2</sup> and the writings of theoreticians which are researching the topic (Birnie 1992). An important observation with regards to the international society is based on an anti-hegemonial principle. Therefore it has been argued that international law appear to consist of a series of rules displayed as if on a market stall for states to pick and choose from. Even so, states do observe international law. When violations appear, it gets widely published and seems to strike at the heart of the international system (Shaw 1997: 6). The bi-polar world of the cold war also showed that superpowers tried to justify their actions in accordance with the law. The Soviet Union made considerable use of legal arguments in its efforts to establish its non-liability to contribute towards the peace-keeping operations of the United Nations, and the US too justified their activities with regards to Cuba and Vietnam by reference to international law (Shaw 1997: 8). Even today, in the post-cold war world where the US is the only great power, still a considerable amount of efforts is taken place to justify their actions in accordance with international law. Recent examples are US interventions in Afghanistan and Iraq. Truly, the current US administration is attempting to redefine the outlaw of war in international law with the concept of 'pre-emptive use of force'. Still, an effort is being done to accommodate their actions in accordance with a common conduct. It is thus important to note that while states from time to time object to particular rules of international law and seek to change them, no states have sought to maintain that it is free to object to the system as a whole.

Human rights as a political agenda became prominent, through conventions and declarations, in the international political discourse in the second half of the twentieth century. The importance of the 1948 *Universal Declaration of Human Rights* cannot be over-emphasised. In addition the world after the cold war has seen several *humanitarian interventions*. The doctrine of humanitarian interventions has the consequence that human rights displace state sovereignty as the primary normative consideration in deciding questions of intervention. Richard Falk is promoting the

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<sup>2</sup> Judicial decisions from, for instance, the International Court of Justice (ICJ) provides authoritative precedence for the application of law.

idea that the contemporary world is entering another 'Grotian moment'<sup>3</sup>. He is claiming that a transformative change in the organization and approach of international life presently occurring is similar to the revolutionary change three or four centuries ago which was captured by the jurisprudence of Grotius. Falk is advocating a *solidarist* conception of the ethics underlying international society, which is in conflict with the pluralist conception in that the global community of humankind has normative priority over the society of states; it is the idea that unjust actions have to be punished no matter where they take place. By contrast, the classical conception of the international society regards the state system as the only applicable institution. This conflict between a pluralist and a solidarist conception of the ethics underlying international society sets the agenda for this paper, in which the conflict between the pursuit of human rights and exclusive state sovereignty acts as an expression of this.

The structure of this paper is in accordance with the method employed by the American political philosopher Francis Fukuyama<sup>4</sup>. Fukuyama is in his works deeply influenced by Hegel in that he is looking to what is alive in Hegel and offering suggestions as to how that may be applied to the contemporary situation. Fukuyama is thereby showing the two roles as a political philosopher: 1) The starting point; the political philosopher as an analyst; in our case an analyst of contemporary international relations. 2) Turn to philosophy - in Fukuyama's case Hegel, in this paper Kant - to find tools to help the analysis of international relations. This method of linking philosophy to practical problems was also highlighted by Kant. He emphasised that philosophy must not end up as a mere self-reflecting academic discipline, but that philosophical problems motivation and meaning must also be seen in relation to practical problems.

The idea is first to describe a field of investigation, which can be said to be world politics, and then apply philosophy as an analytical tool to the investigation. The important issue is current world politics, and this implies reading the

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<sup>3</sup> By a 'Grotian moment' Falk is referring to the shift from *Respublica Christiania* to Westphalian sovereignty.

<sup>4</sup> It is worth emphasising that it is Fukuyama's *method* which is taken in to account here, and not his conclusion on the topic.

philosopher in light of contemporary history – and not vice versa. Part A of this essay will survey the relevant literature and establish the hypothesis that: **There exists today a human rights culture which necessitates the redefinition of the international constitution – and in this circumstance especially the concept of exclusive state sovereignty (and the norm of non-intervention).** This will be referred to as the conflict between human rights and the principle of sovereignty in the international constitution. The intention behind Part A of this paper is to be considered as a practical, political part which breaks ground for Part B where the philosophical dimension is outplayed in accordance with the method of Fukuyama. It is worth emphasising that the function of Part A is simply to set an agenda and to get familiarised with some concepts from international politics and international law. Chapter 1 intends to show the importance of human rights, and the power in which these rights have established themselves as both the theoretical discourses and also as a political fact. Chapter 2 outlines the doctrine of exclusive state sovereignty and the accompanying norm of non-intervention in international law. This will be done in relation to the inferences made in chapter 1, i.e. how do these norms relate to an interventionist human rights regime? In chapter 3 it is claimed that this conflict between human rights and sovereignty makes it necessary to pursue the concept of the nation state, and also point out its role, if any, in a world in which the concept of exclusive state sovereignty is being redefined. It is also argued that with globalisation these concepts are being placed in a new framework, and this necessitates a new approach to these concepts. Within this field of study Kantian cosmopolitanism will be applied in Part B of the paper.

Traditionally the subject of international system and international law has been states. If Falk is right in claiming that there is a transformative change from a pluralist conception of international society towards a solidarist conception of international society, this also suggests a move towards a Kantian ethics of the international society and opens up for an investigation into the move towards Kantian cosmopolitanism<sup>5</sup>. The hypothesis guiding the investigations of Part B of this

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<sup>5</sup> Especially interesting in this case is the establishment of the International Criminal court (ICC), in which the subject for international law is individuals and not mere states.

paper will thus be: **With globalisation the framework for human rights discourses changes, as globalisation means not just a change in the human self perception but also that industrial modernity is replaced by reflexive modernity. The consequence of these changes is that some new possibilities opens up, and one such possibility is the creation of the Kantian model of international relations; i.e. a cosmopolitan society.** One pressing question that need to be clarified is how Kant is relevant to this project, what is alive in Kant that might be applied to the contemporary situation? Kant responded to problems in his own time in his political writings and by invoking his texts to the current situation I am attempting to trace out in Kant's solutions a mode of thinking – or a special kind of perception – which might yield more universal solutions to these problems. Post-Cold War developments – with the genocidal civil wars in Rwanda and the Balkans as horrific examples – give Kant's call for a basic shift from international to a cosmopolitan order a new meaning. The pacifying effects of law<sup>6</sup> is that main theme of *Towards Perpetual Peace* (Bohman and Lutz-Bachman 1997: 2), which is probably the most quoted and influential piece of writing Kant did on international politics. A peaceful global order needs a cosmopolitan law and this law has to take place on a much more profound level than today's international law. A cosmopolitan law is about the rights of the world citizen, and has to replace the classic law among nations. The basic innovation Kant made is this idea of a cosmopolitan **law**. This cosmopolitan approach to international politics stands in opposition to the Hobbesian 'realistic' approach, which have been dominant since the peace treaties of Westphalia. Such a balance of power, finding its most extreme expression in the bi-polar world of the Cold War can, according to Kant, never be a **true** peace (Bohman and Lutz-Bachman 1997: 4-5). This will be elaborated on in chapter four where in addition to *Towards Perpetual Peace* (1795) also *An Idea of a Universal History with a Cosmopolitan Purpose* (1784) will be interpreted. Chapter 5 will expand on the shift towards a more Kantian ethics in international relations, i.e. a so-called solidarist ethics, but it will mainly

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<sup>6</sup> Some, like Reiss, translates the German word 'Recht' with 'right'. This may not be a good translation, and there is a general understanding among commentators – for instance Nussbaum (1997) and Williams (1983) that 'law', at least in some circumstances, is a better word. For the Norwegian reader: 'Recht' can be translated as 'rett', while the English translation 'right' more corresponds to 'rettigheter'. This is also discussed by Syse (1996).



discuss the link between Kant and a global implementation of human rights. This will be done by first referring Jürgen Habermas' critical assessment of Kant's *Towards Perpetual Peace*, and second by adopting a more general perspective from Ulrich Beck, as his thinking on the cosmopolitan society is influenced by the Kant. Chapter 6 will pursue the possible establishment of a new regime of global governance and global – cosmopolitan – law. This raises concerns about diversity and difference, therefore the possibility of cross-cultural criticism will also be handled in this chapter. The establishment of a new regime of global governance – a third way – will be discussed in relation to Daniele Archibugi's model of cosmopolitan democracy.



## Part A

This part of the paper will attempt to establish the first hypothesis given in the introduction, i.e. that 'there exists today a human rights culture which necessitates the redefinition of the international constitution - and in this circumstance especially the concept of exclusive state sovereignty (and the norm of non-intervention)'. Before going ahead with these examinations it is necessary to make a reservation though: in establishing human rights as universal standard I am being normative. It is impossible to avoid ethical judgements even if the main focus of part A of this paper is merely to establish a human rights culture as a theoretical position and a political fact of the current world. As the international system is a construction made by the rich world - and arguably for the rich world - and as scholars are no doubt a part of this as they are inside the system, they cannot be neutral (Jackson 2000: 51). To accept human rights is a value judgement in itself; it is the acceptance of some form of universalism based on a notion of individual rights. As this part of the paper merely is attempting to establish human rights as a political fact, it is not going to be questioned in depth here. In the second part of this paper this problem will have to be taken more into account as it is more normative with regards to the structure of the international society. But even if the ethical legitimacy of human rights are not the main subject in this part, some introductory comments on human rights as a moral standard are necessary when establishing the field for investigation for this paper. In order to comprehend world politics it is crucial to know its normative discourse, and Robert Jackson makes a useful distinction establishing two different vocabularies. On the one hand are the *procedural norms* of the global covenant, which is the vocabulary of international procedure. It is a part of a larger ethics of principle, and it centres upon the morality of state sovereignty. International law is a part of the procedural norms of the global covenant.<sup>7</sup> These norms are based on the principle of

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<sup>7</sup> The procedural norms are specified by the Organization of Security and Cooperation in Europe (OSCE) in the 'Helsinki Decalogue' and are listed in the following order: (1) sovereign equality, respect for the rights inherent in sovereignty; (2) refraining from threat or use of force; (3) inviolability of frontiers; (4) territorial integrity of states; (5) peaceful settlement of disputes; (6) non-intervention in internal affairs; (7) respect for human rights; (8) equal rights and self-determination of peoples; (9) co-operation among states; (10) fulfilment in good faith of obligations under international law.

independent states and of international freedom (Jackson 2000: 16-17). 'International freedom' is just a specific historical expression of classical liberalism. The keystones of this procedural arrangement are the doctrines of state sovereignty and non-intervention<sup>8</sup>. The other vocabulary is *the prudential norms* of global covenant, which is the vocabulary of international prudence. This is a part of a larger ethics of virtue, and it focuses on the ethics of statecraft and the claims of the national interest. World politics is a sphere of power and freedom in which there are opportunities but also risks and dangers. It is a prudential world. In international politics prudence arguably is the cardinal virtue because power is so great. No states are alike, and every national leader looks upon the world from a particular viewpoint. Every state has its own national interest, which flow out of that specific situation. This may coincide with other states but need not. The ethics of statecraft is a situational ethics at which the core is prudence, and could be summed up as the intellectual and moral disciplines (political virtues) that state leaders should be able to call upon to make responsible choices (Jackson 2000: 19-22). I will attempt to pursue this distinction in this part of the paper and assign the problems treated to with respect to this.

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<sup>8</sup> This will be elaborated on in chapter 2.

## ***1 Human Rights***

The thinking about politics in terms of 'rights' emerged in Western Europe during the Middle Age, and this thinking was greatly influenced by its inheritance from the Roman and the Greek tradition. From the Roman tradition especially the legal notion of 'a contract' between the people and the authority is of importance, in which rights are rights of reciprocity and they are accompanied by correlative duties. This implies that rights are in relation to something, and that just being human does not qualify for having rights. A right is also to be specific and the parties involved must be specified. The positive law shares these features and some argue that "the only true rights are specific and correlative 'claim' rights" (Brown 2000: 37). As a consequence there cannot be genuine 'human rights', that is, a right given simply on the basis on humanity.

The other aspect of the term right is from the Christian notion of 'natural law'. This is rooted in Greek ideas of human flourishing and points towards universalism. The idea is that human beings have an essential nature and that certain kind of human goods are always and everywhere desired as necessary for human flourishing. There is a common human moral standard that govern human relations, and this can be applied through the exercise of practical reason. This view deeply influenced medieval Catholic ideology.

The importance of these two aspects of rights is the distinction between legal rights and rights as expression of a universal moral standard. Henrik Syse claims that it is impossible to understand the breakthrough for human rights with reference to the positive law, as there are no legal norms beyond the positive law. The only way to understand the great expansion of human rights is from the natural law tradition since the idea of natural rights are originally constructed within the framework of a much older natural law tradition which asserts certain natural and divine laws. Syse applies Margareth MacDonald's definition of natural rights; "rights people have as human beings, independently of the laws and governments of any existing society" (Syse 1996: 17). Thus, natural law will always be beyond the scope of the positive law. The clearest evidence supporting this argument is found in the Nuremburg

trials after World War II, from which Syse extract the paradox of legal positivism: If all law are positive law and there are no higher orders to judge a legal or political system, how can positive law condemn a concentration camp commandant? This problem will be handled throughout the paper, but, to anticipate my conclusions a bit, this paper is encouraging de-linking the concept of human rights from its historical background. Part B will show that Habermas is advocating an application of human rights as mere legal rights in order to avoid confusing them with a form of moral universalism. But since human rights do provoke some controversies with regards to their morality, I will for now treat them as moral rights and work out theoretical positions – or strategies – to solve this moral problem.

### **1.1 Human rights as a theoretical position**

In some sense human rights are moral rights. They provide a moral standard to the political legitimacy on both a national and an international level. However, in order to link being human with rights it is necessary to have a theory of the human nature. What does it mean to be human? To take departure from the human needs in answering this question is not satisfactory. The human rights are to protect human dignity, or the human being as a person. The idea is to preserve the human nature, and there are obviously different approaches to this. Of the traditional approaches there are, for instance, *utilitarianism* as developed by Jeremy Bentham and John Stuart Mill. These consider the moral quality of an act as a function of its good or bad consequences, or the utility. Good and bad is understood as pleasure and pain. This made Bentham forming the Principle of Utility: “to act so as to maximize the balance of pleasure over pain” (Donnelly 1993: 23). From a utilitarian perspective, human rights can be defended morally because they are increasing the aggregated pleasure in the world. A different approach is given by John Locke, which is based on a more divine perspective in which he saw the idea of natural rights as given by God. Human rights can be perceived as natural rights, and are justified in being a part of Gods will and thus universal. A third approach to human rights is given by Immanuel Kant. With the categorical imperative he developed the universal

command that we have a duty to treat other people as ends, and not only as means. To act in accordance to our duty is the only way to preserve our freedom as human beings. Otherwise we would be living in a natural condition where everybody is potentially each other's enemy, and the others would then be a restriction on our freedom. Freedom is the ideal condition for living our lives, and human rights can be seen as promoting this freedom. Human rights are to be treated as a vital tool for the gradual elimination of tyranny and arbitrary rule. This is the approach of Kantian universal history, and part B will pursue this approach.

What kind of moral problems do human rights create? If we accept the premise that human rights are moral rights, then human rights are within the domain of the relation between morality and foreign policy, and the problem is to identify moral values which encompass all the multiple modes of moral communities that exist in the world. Do human rights represent all humanity, or just a section of it? Much of the critique of human rights is directed to the fact that the current international human rights regime is just representing the industrialised liberal democratic west's moral values, and thus this is cultural imperialism and not a universal conception. For instance Confucians and other supporters of 'Asian values' attack the individualism of the rights, some Islamic leaders reject the notions of the equality of the sexes and religious freedom and Hinduism denies that all men are equal. So, will the universal project of the west lead to "the clash of civilisations", as Samuel Huntington perceived it? (Brown 2000: 34) The problem is: With great cultural diversity in the world, how can human rights be universal morally? (Brown 2000: 37) Further problematic is it that twentieth century social philosophy, comparative religion and social anthropology advocate a moral and cultural relativism incompatible with the notion of universal rights. The human beings share some common basic needs, but what about human beings as social and moral being - do moral codes have a common basis? Many of the mentioned sciences refuse such essentialism. So here are important conceptual difficulties connected with the notion of universal human rights. In short; it is difficult to find a common morality and customs in the actual practices of the civilisations of the world, but does this necessarily imply moral relativism? Does the absence of a point beyond all cultures,

or the lack of a 'view from nowhere', mean accepting all forms for life as just 'givens', and without the possibility of making moral judgements? Chris Brown (2000) denies this accepting of everything, even if we are critical to the project of imposing a Western notion of universal human rights on people who have developed their own distinctive way of asserting their humanity. The argument is that being a long-standing culture does not justify continuing being such a culture. There are too many long-standing injustices in the world for this to be acceptable.

There are several theories of solving the problem of relativism and how human rights can be made universal, even when accepting that there is no view of nowhere. Among these solutions are the ideas of Rawls and Habermas, which are in accordance with Bikhu Parekhs proposition "Even if there is no 'view of nowhere'; we can construct one" (Brown 2000: 43). The attempt is to construct a point beyond all cultures, and "the idea is to create an artificial foundation for moral debate within and between societies by building upon the idea of consensus constructed under ideal conditions" (Brown 2000: 44). When there is no foundation for moral standard, we have to agree on one. The way to do this is: If we can agree on what normative issues would look like under ideal conditions, we have created a basis for the critique of our own and all other societies. Human rights in this view are perceived as belonging to the procedural norms of the global covenant and are merely creating a common legal standard.

Martha Nussbaum gives another consideration, which is based on the classical notion of 'virtues' as known from the works of especially Aristotle. Virtues are the basis of the construction of the human and thus not vulnerable to cultural imperialism because they are universal. Nussbaum says:

**"Everyone (...) has *some* attitude (...), and corresponding behaviour, towards her own death; her bodily appetites and their management; her property and its use; the distribution of social goods; telling the truth; being kind to others; cultivating a sense of play and delight, and so on. No matter where one lives one cannot escape questions, so long as one is living a human life" (Brown 2000: 47).**



Nussbaum worked at the UN University and reacted against an extreme moral relativism that had developed, where at one instance there were presented a case against the elimination of a special disease because it was a part of the authentic lives of those it afflicted. Her goal was to rule out this perverse position by giving a minimalist account of circumstances under which the human life can flourish. There are many ways to live human life, i.e. there are different virtues, but here are some ways that prevent human flourish and these must be ruled out. So this is not a project of telling people how to live their lives, but to identify ways people are not expected to live their lives. Nussbaum differs from Habermas and Rawls in that she is pursuing human rights within the vocabulary of prudential norms, and she is thus explicitly being more morally normative. This does not mean that she is advocating knock-down moral reasoning though. In line with Aristotle's knowledge a sound moral judgement must respect the different circumstances of situations. Based on this knowledge there are two vital points to be underlined when adopting it to human rights: i) Natural law thinking must be more sensitive to cases and context. ii) The importance of rhetoric, content and presentation cannot be separated. The presentation is a part of the argument. The rhetoric point is of great importance to inter-cultural politics. When the west address others, the 'tone of the voice' is just as important as what is said. Promoting the human rights culture as belonging to a higher form of humanity, would most likely create a reaction against this<sup>9</sup> (Brown 2000).

The last position I'll sketch out is the one given by Richard Rorty<sup>10</sup>. His solution states that from the time of the Enlightenment, the Americans and the

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<sup>9</sup> Unfortunately the current situation in Iraq is giving evidence to this statement.

<sup>10</sup> Rorty consider himself as a pragmatist. "Truth", he states, is just the name of a property which all true statements share. Pragmatists think that the history of attempts to isolate the True or the Good, or to define the word "true" or "good," supports their suspicion that there is no interesting work to be done in this area. The pragmatist tries to defend himself by saying that one can be a philosopher precisely by being anti-Philosophical, that the best way to make things hang together is to step back from the issues between Platonists and positivists, and thereby give up the presuppositions of Philosophy. He drops the notion of truth as correspondence with reality altogether, and says that modern science does not enable us to cope because it corresponds; it just plain enables us to cope. Rorty believes that analytic philosophy culminates in Quine, the later Wittgenstein, Sellars, and Davidson, which for him is to say that it transcends and cancels itself. Any attempts to get back behind language to something which "grounds" it, or which it "expresses", or to which it might hope to be "adequate", have not, worked (Rorty 1982).

Europeans have created a 'human rights culture'. This culture is in opposition to prejudice (against race, religion, women, homosexuals, and so on). As the resistance to prejudice extends, so is the scope of shared moral identity. Rorty's starting point is the switch from the platonic question 'What is our nature?' to the question 'What can we make of ourselves?'. Instead of considering ourselves as a rational – or cruel – animal we have to see ourselves as a flexible, mutable, self-shaping animal. One of the shapes we have recently assumed is that of a human rights culture (Rorty 1993: 115)<sup>11</sup>, which is simply a new political fact about the post-Holocaust world. Philosophers should recognise this instead of trying to get behind or beneath this fact. In fact, philosophers should stop trying to detect or defend the philosophical foundations of human rights, like for instance Alan Gewirth<sup>12</sup> is doing. Eduardo Rabossi says it is a fact that the world has changed after World War II in which "the human rights phenomenon renders human rights fundamentalism outmoded and irrelevant" (Rorty 1993: 116). In the two centuries after the French revolution more and more the human recreations has been fascinating us. The more we have become impressed with our flexibility, the more we have lost interest in our ahistorical nature. To nowadays say that we are clever animals is not to be philosophical or pessimistic, but to be political and optimistic. It is to set aside the question of "What is Man?" and substitute with the question "What kind of world can we create for our great-grandchildren?". In doing this we need to focus on *sentimental* education. The notion of 'the sentimental' is a key notion in Rorty's pragmatism, and the goal of this manipulation of sentiment is to expand the reference of the terms "our kind of people" and "people like us". Rorty wants to erase the 'us-them' division by including more and more people in the 'us' category, and to achieve this we have to

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<sup>11</sup> The term 'human rights culture' is taken from an article by Argentinean lawyer and philosopher Eduardo Rabossi *Human rights Naturalized*.

<sup>12</sup> Gewirth developed a theory in which human rights has the function of providing conditions for humans to act as moral agents. So in order the live a moral life, the individual need an environment that makes this possible. This also means that we cannot expect a person living in a society that violates human rights to act morally. The essential principle is the principle of **generic consistency** (saying that "... if some predicate P belongs to some subject S because S has the property Q...then P must also belong to all other subjects S1, S2,...,Sn, that have Q" - Dictionary of Philosophy, p. 823), which is a deontological approach to ethics, i.e. based on duty. Philosophically this is the idea of some form of universalism and its roots can be traced back to Kant's categorical imperative.

focus upon the children. Plato was wrong to insist that he could re-educate people who had matured without acquiring appropriate moral sentiment by invoking a higher power than sentiment, viz. the power of reason. This way Plato got moral philosophy off on the wrong foot, and led moral philosophers to concentrate on the rather rare figure of the psychopath, the person who has no concern for any human being other than himself. In consequence moral philosophy has neglected the much more common case: the person whose treatment of his range of fellow human beings is flawless, but indifferent to the suffering of those outside his range – the one he considers pseudohumans<sup>13</sup>. Plato thought that people would be nice to each other if they were shown what they had in common – their rationality. This is just not the case. The Nazis for sure knew that the Jews were just as rational as themselves, the point is that they did not consider them as just as human as themselves. The same was the situation for Black people in the eyes of most white people until very recently, and a lot of women in the world are facing the same dehumanization. For Rorty moral standards are constructions, like for example the Universal Declaration on Human Rights. However, this does not mean that we cannot judge those who do not share our human rights culture, but – and here Rorty makes an important inference – instead of judging them as wrong or irrational Rorty perceives them as ‘deprived’ of the security and sympathy that has allowed us to create a culture in which rights make sense. The extension of the human rights has to be an extension as a culture, and not as a movement grounded on knockdown moral reasoning. Rights cannot be taken out of context and promoted as universal solutions to the political ills of an unfair world. The people outside our human rights culture are deprived, not of rationality and morality, but security and sympathy. Security makes it risk free to

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<sup>13</sup> The dehumanisation that happens in war times illustrates this point. This report by David Rieff from the Bosnian war is just one random picked example: “A Muslim man in Bosanski Petrovac...[was] forced to bite off the penis of a fellow-Muslim...If you say that a man is not human, but the man looks like you and the only way to identify this devil is to make him drop his trousers-Muslim men are circumcised and Serb men are not-it is probably only a short step, psychologically, to cutting off his prick...There has never been a campaign of ethnic cleansing from which sexual sadism has gone missing (Rorty 1993, p 112). The relevance of this story is that the Serbs did not consider themselves committing human rights violation because they did not consider doing these things to fellow human beings, but to *Muslims*. Recent examples from the Abu Ghraib prison where Iraqi detainees have been tortured while held in US custody shows that even representatives of one of the oldest liberal democracies in the world get dragged into wartime dehumanisation.

differ from the others, and sympathy is the ability to put oneself in the others place as a fellow human being. The spread of the human rights culture is not a matter of becoming more aware of the requirements of moral law, but rather what can be labelled as a 'progress of sentiments' as a result of the sentimental education (Rorty 1993: 129). Rorty claims his argument is not meta-ethical or metaphysical, but pragmatic. A better hope for further progress in the human rights culture lays in sentimental stories, friendship, intermarriage, and the way we raise our young: in the continued progress of sentimental education. This is an important point, and it is also the reason why I here have spent comparatively much space on Rorty, as the notion of education of sentiments will re-emerge later in the paper. But if we are to conclude with Rorty that a human rights culture is about to be established as a **political** fact of the present world, and not merely as a theoretical position, this has to be qualified further.

## 1.2 Human rights as a political fact

To establish a human rights culture – or regime<sup>14</sup> – as a political fact it is necessary to show that this culture<sup>15</sup> has had a severe influence on political decision. The increased number of humanitarian interventions after the cold war indicates that this is indeed the case. In the 1990s there were international interventions in northern Iraq, Somalia, Bosnia, Rwanda, Haiti, Albania, Kosovo and Timor (Weiss 2000: 18), and they all had a common link. This is the conflict in the UN Charter between the article 1.3<sup>16</sup> and the articles 2.4 , 2.7<sup>17</sup>, that is, the conflict between human rights as a

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<sup>14</sup> There are several definitions of regime, but the one that has been most widely used was formulated in the early 1980s by Stephen Krasner. This definition emphasises that a regime is more than a set of rules as it presupposes a high level of institutionalisation. Krasner defines a regime as "sets of implicit or explicit principles, norms, rules, and decision making procedures around which actors' expectations converge in a given area of international relations" (Little 2001: 303). Krasner identifies the General Agreement on Trade and Tariff (GATT) as an example on a regime.

<sup>15</sup> A human rights culture is, roughly speaking, referring to human rights as a theoretical position, while a human rights regime refers to human rights as implemented and enforced through laws and legal institutions.

<sup>16</sup> Article 1 of the UN Charter gives the purposes of the United Nations and article 1.3 specifies: "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;" (UN Charter 1945).

universal legal standard and the principle of state sovereignty with non-intervention as the norm for inter-state action. Article 1.3 declares the support of human rights “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;”. In art 2.4 war is outlawed and in art 2.7 non-interventions as a norm is affirmed, “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...”. According to Thomas Weiss “the UN Charter’s contradiction between sovereignty and justice has been resolved in favour of the latter because responsibility is becoming an additional attribute of statehood” (Weiss 2000: 18). Nevertheless, the incorporation of human rights in peace operations makes it necessary to assess the legal quality and the moral quality of such operations as different aspects. The traditional strong position of state sovereignty has been weakened with the breakthrough of human rights. Nina Graeger puts it this way: “The relationship between human rights and state sovereignty goes beyond that of intervention” (Graeger 2000: 177). The point is that in the relation; people – state, the people give up their sovereignty and in return the state offers the protection of human rights. When the same state violates the human rights it is supposed to protect, we have a constitutional paradox (Best 1995: 788). The UN Secretary General Kofi Annan is clear on the conflict between sovereignty and human rights. In his opening speech to the General Assembly in September 1999, he said that borders are not a defence for states that violates human rights and that “...massive and systematic violations of human rights – wherever they may take place – should not be allowed” (Weiss 2000: 11). These statements and the increase in humanitarian interventions indicates that human rights is about to be established as a political fact.

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<sup>17</sup> Article 2 gives the principle in which the members shall act in accordance to, and article 2.4 states “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” and 2.7 says: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” (UN Charter 1945).

Moreover, a substantial body of human rights initiative and agreements in international law has been established through the last 50 years, as shown in Table 1, which too indicates the rising prominence of human rights as a political fact.

**Table 1 - Some human rights initiatives and agreements**

Date	Initiative/ Agreement
Jun 1945	Charter of the United Nations
Jun 1946	UN Commission on Human Rights
Dec 1948	Genocide Convention/Universal Declaration of Human Rights
Aug 1949	The four Geneva Conventions: I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. III. Geneva Convention relative to the Treatment of Prisoners of War. IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War
Nov 1950	European convention on Human Rights
Jul 1951	Convention Relating to the Status of refugees
Dec 1952	Convention on the Political rights of women
Sep 1954	Convention on the Status of Stateless Persons
Sep 1956	Convention on Abolishing Slavery
Jun 1957	ILO's Convention on the Abolition of Forced Labor
Nov 1962	Convention on the Consent to Marriage
Dec 1965	Convention on the Elimination of Racial Discrimination
Dec 1966	International Covenants on: Economic, Social, and Cultural Rights/Political Rights; Optional Protocol
Nov 1973	Convention on the Suppression of Apartheid
Jun 1977	Two Additional protocols to the Geneva Conventions
Dec 1979	Convention on the Elimination of all Forms of Discrimination against Women
Dec 1984	Convention against Torture
Nov 1989	Convention on the Rights of the Child
May 1993	International Criminal Tribunal for the Former Yugoslavia
Nov 1994	International Tribunal for Rwanda
Jul 2002	The Permanent International Criminal Court comes into force

Source: Held (2003: 167)<sup>18</sup>.

If we look at the 1948 Universal Declaration on Human Rights (UDHR) itself there are two significant events which form its background. First there is the Nuremberg War Crimes Trial after World War II. Of special importance here is the introduction of the category 'crimes against humanity' in international law. This presumed a common and universal moral standard that could be valid to all human beings. Second there is the UN Charter of 1945, which in the preamble express faith in fundamental human rights ("to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"), and also the article 1.3 which establishes the purpose of promoting these rights (Patman 2000: 2). The Human Rights Declaration itself consists of a preamble and 30 articles. A useful way of understanding the structure of the Declaration is through the notion of three "generations" of human rights developed by Karel Vasak (Murray - internet source). Inspired by the three themes of the French Revolution, they are: i) *Liberté* (Civil and political rights): The first generation is of civil and political rights, and they define human rights in more negative terms than positive, i.e. "freedoms from" instead of "rights to". Articles 2-21 of the Declaration are in conformity with this, such as freedom from gender, racial and equivalent forms of discrimination. ii) *Égalité* (Economic, social, and cultural rights): The second generation is of economic, social, and cultural rights. These are in opposition to the first generation as they conceive of human rights more in positive terms than in negative ones. Articles 22-27 of the Declaration conform with this, such as the right to social security. iii) *Fraternité* (Solidarity rights): The third generation is of solidarity rights, and is indicated by article 28 of the declaration "everyone is entitled to a social and international order in which the rights set forth in this declaration can be fully realized". It is precisely this solidarist principle of an **international** order which is in conflict with the notion of exclusive state sovereignty, which, as shown above, is based on a pluralist notion of the international society. It is worth emphasising that this third generation of solidarist rights are not in conflict with the two other generations. Vasak's model is a simplified expression and is not

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<sup>18</sup> Held did not name the four Geneva Conventions, which I have added to his list.

intended to suggest a process in which each generation gives birth to the next and then dies away. Nor is it to imply that one generation is more important than another. The three generations are understood to be cumulative and overlapping. But what is important for this paper is that this notion of a solidarist society is establishing itself as a political fact, and this political fact is in conflict with the manner in which world politics traditionally have been gestalted.

Janne Haaland Matlárý is more geographically specific on this point when she is describing a **European** Human Rights Regime. In characterising this as a regime she understands a regime to be “a set of rules, norms, regulations and decision-making procedures that regulate an issue area” (Matlárý 2002: 60). This set of norms she finds particularly in The European Convention on Human Rights (ECHR) which stresses the *rule of law*. What is significant with the ECHR is that it is, in difference from the UDHR<sup>19</sup>, legally binding on its signatories. The convention entered into force in 1953, and the power of the European Court of Human Rights (created in 1959) has been far-reaching as it is executing supranational jurisdiction. In fact, since the convention entered into force there have been created more than 170 additional treaties. The most important ones include the European Social Charter; The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (‘The Torture Convention’); the Framework Convention for the Protection of National Minorities; and the European Charter for Regional or Minority Languages. The organisation supervising this is the Council of Europe, and its human rights regime has developed throughout the post-war period when new conventions have been added to the ECHR. The main part of the regime is still the ECHR and its implementing body, the European Court. The court is becoming more and more prominent over the years, and this highlights the importance of human rights as a political fact. One illustration of this is that “each time Norway has been judged in the court there has been much media attention, and an immediate response by policymakers that they will implement the judgement, in law as well in politics” (Matlárý 2002: 68). Also within the European Union (EU) the human rights regime is

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<sup>19</sup> The two covenants from 1966 – on political and civil rights, economic and social rights - are legally binding though. But these have not been ratified as universally as UDHR.



making its presence felt. For instance, the European Court of Justice has taken international human rights into account in its rulings, thereby *de facto* as well as *de jure* incorporating these laws into the case law of the EU.

Lately this human rights regime has found itself a more global expression as well. In the war crime trials after World War II (Nuremburg and Tokyo) two new categories were invented in international law in which governmental subjects were made responsible for *crime of war* and *crimes against humanity*. This was also the first step towards the establishment of the International Criminal Court (ICC). The ICC is the first international body which can be said to performing cosmopolitan law. It is able to investigate and prosecute those individuals accused of crimes against humanity, genocide, and crimes of war. The ICC complements existing national judicial systems and will step in only if national courts are unwilling or unable to investigate or prosecute such crimes. As to the present status of the court the Statute outlining the creation of the court was adopted at an international conference in Rome in July 1998, and 139 states signed the treaty by the deadline of 31 December 2000. 66 countries (6 more than the threshold needed to establish the court) ratified the treaty in April 2002, which meant that the ICC's jurisdiction came into force on July 1, 2002. In February 2003, the court's Assembly of States Parties – the ICC's governing body – elected the court's first 18 judges and they were sworn into office in March 2003 in The Hague, the seat of the court. On April 21, 2003, the Assembly of States Parties elected the chief prosecutor, Luis Moreno Ocampo<sup>20</sup>, whom took office on June 16<sup>th</sup>, 2003. As of May 21<sup>st</sup> 2004, 92 countries have ratified it. With this court the international community has strengthen the link to global protection of human rights in that the it can be implemented against the will of the government of states. The conclusion is that the prohibition against intervention in international law must be revised, and that human rights are presenting a case for solidarism in political decision-making. The consequence for the global covenant is that the procedural discourse has to be redefined, and the central concept targeted here is the concept of

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<sup>20</sup> Ocampo is best known for his role as deputy prosecutor in the trials of Argentina's former military junta in the 1980s.

exclusive state sovereignty. This concept of sovereignty is the topic for the next chapter.

## ***2 Sovereignty and intervention***

With the recognition of the spread of a human rights culture as both a theoretical position and as a political regime established, it is time to outline the doctrine of exclusive state sovereignty and the accompanying norm of non-intervention in international law. Importantly this will be done in relation to the inferences made in chapter 1, i.e. how do these norms interact to an interventionist human rights regime? I will also attempt to allocate this to Jackson's vocabulary, but prior to these considerations it is necessary to give some notes on the term *legitimacy*.

Francis Fukuyama maintains that legitimacy is the central concept of political analysis. He claims this in opposition to, for instance, the realist account of international relations where *force* is the dominant power. In justifying this view Fukuyama takes Britain's relation to their colonies after World War II as an example. With the end of the war many Britons came to believe that colonialism was inconsistent with the *Atlantic Charter* and the *Universal Declaration of Human Rights*, which had been the basis for concluding the war with Germany. If the maximization of power had been its chief objective, it could have pursued to hang on to its colonies – like France did – but this was unconceivable to the fact that Britain accepted the modern world's verdict that colonialism was an *illegitimate* form of domination (Williams et al 1997: 118). Carl J. Friedrich considers legitimacy to be about the question of the *right* to rule, which can only be achieved when there exists a common belief as to what provides a rightful title to rule. This is a critique of Max Weber, who, according to Friedrich, deployed legitimacy as a classification of *claims to authority*. Friedrich finds that this ignores the reasons for people to submit to a rule. Thus it confuses legitimacy with authority, as “authority as the capacity for reasoned elaboration is capable of creating legitimacy whenever it provides good “reasons” for the title to rule” (Smith, internet source). Friedrich claims that there are two key elements attached to legitimacy. First, he focuses on the character of belief rather than the type of claim, and thus changes focus from ruler to the ruled in comparison to Weber. Second, he displays that belief about legitimacy involves some values, i.e. by what rights does someone rule (or act). Legitimacy involves value-laden belief as

to who is entitled to rule on the basis of particular principles, which are of four types: i) religious, ii) juristic (philosophical), iii) traditional, iv) procedural and pragmatic, based on performance. Friedrich point out that legitimate rule is more effective because it is based on consensual belief rather than sheer coercion or fear. Legitimate and illegitimate regimes can be expected to behave quite differently both internally and externally. Regimes confident of their own legitimacy, especially when the foundation of that legitimacy is a substantive belief in particular values, tend to treat regimes with the same kind of legitimacy with greater respect. Indeed, following Kant's insight, there is now a whole literature suggesting that democratic or liberal states seldom, if ever, go to war with other democratic or liberal states – the so-called *democratic peace proposition*. On the domestic level the beliefs of the ruled combine substantive and procedural/pragmatic elements. For instance, a conservative can accept the rule of a socialist because he believes in democracy and/or democratic procedures. Smith argues that on the inter-state level the norms of sovereignty amount to the kind of legitimacy Friedrich calls procedural and pragmatic. This means that there are few that believes that the state should be the sole focus and source of political values, but accept pragmatically that the system of sovereign states works to preserve domestic values. When deeply held domestic values, like human rights, conflicts with sovereign independence, it will here be argued that the substantive beliefs in human rights are slowly, but inevitably, coming to trump the procedural beliefs associated with sovereignty<sup>21</sup>. In other words, a change in the prudential norms of the global covenant – from a pluralist to solidarist ethics – has the consequence that also the procedural norms of the global covenant have to change.

## 2.1 Sovereignty

The doctrine of sovereignty has two different dimensions to it; either as *supreme authority*, as in a domestic, political context; or as a *juridical, international legal*

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<sup>21</sup> According to Matlár, there is now a growing consensus that only democratic states are legitimate states (Matlár 2002: 16), but the problem concerning democratic vs. non-democratic states and their legitimacy is beyond the scope of this paper.

*sovereignty*, the so-called *Westphalian* sovereignty, the characteristic institutional arrangement of the world into separate, independent territorial units. The *internal* aspect of sovereignty says that a person, or a political body, established as sovereign rightly exercises the supreme command over a society. Government, whether this be monarchical, aristocratic or democratic, must enjoy the final and absolute authority within a given territory. The *external* aspect of sovereignty asserts that there is no final and absolute authority above and beyond the sovereign state. States must be regarded as independent in all matter of internal politics and should in principle be free to determine their own fate within this framework. External sovereignty is a quality that political societies possess in relationship to one another and it is associated with the aspiration of a community to determine its own direction and politics without excessive interferences from other powers (Held 2003). The sovereign states system became entrenched in a complex of rules that evolved, from the seventeenth century, to secure the concept of an order of states as an international society of sovereign states. In forming this *Westphalian* system the works of Hugo Grotius were, as noted above, significant, but maybe even more influential were the contributions by Machiavelli, Jean Bodin and especially Thomas Hobbes. The political thinking of the 17<sup>th</sup> century in general is marked by the battle towards the Pope demanding secular power, and the reformist movement's attempts to break ground (Koch 1983: 28). Machiavelli instituted the distinction between individual ethics and the ethics of the statesman. The statesman has only one goal, which is the state's security. His actions are to be judged solely in respect to this aim (Koch 1983: 29-30). This is political realism, and the consequence was the establishment of a power balance within the international system which were set up with the Peace of Westphalia.

Concerning the **concept** of sovereignty especially Jean Bodin broke ground. Bodin defines a state as a number of families which is subject to a sovereign or one supreme power, and he emphasise that there can only be one sovereign (either a person or a political body). The supreme power has to be single and indivisible. The sovereign is defined by its rights, and there are six such rights: i) the right to give law; ii) the right to make war; iii) the right to make peace; iv) the right to pardon; v)

the right to appear at coins; and vi) the right to collect taxes. 'Law' is defined as the sovereign's commands, and it is an expression of his will. The right to give laws are the first right, and the other rights follows from this right. Bodin defined the concept of the state as an absolute power, and thus made a theoretical framework for the evolving absolutism (Koch 1983: 37-38). Bodin's political thinking became vital in the later political philosophy, and especially his concept of sovereignty, which were adopted by Thomas Hobbes. In Hobbes' writing the concept of one sovereign, one absolute and indivisible power, re-appears. In fact, as Krasner express, "[w]hen philosophers Jean Bodin and Thomas Hobbes first elaborated the notion of sovereignty in the 16<sup>th</sup> and 17<sup>th</sup> centuries, they were concerned with establishing the legitimacy of a single hierarchy of domestic authority" (Krasner 2001)<sup>22</sup>. With these ideas the framework for the centralised nation state were established.

The emergence of a "society" of such centralised nation states, first in Europe and later across the globe, the *Westphalian regime*, covers the period of international law and regulation from 1648 to the early twentieth century (some will argue that this is in function even today). Its fullest articulation was not given until the late eighteenth and early nineteenth centuries though, when territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states, and state consent as the basis of international legal obligation became the core principles of international society. This classic regime of sovereignty highlights the development of a world order in which states are nominally free and equal; they enjoy supreme authority over all subjects and objects within a given territory; they form separate and discrete political orders with their own interests (backed by their organization of coercive power); they recognize no temporal authority superior to themselves; they engage in diplomatic initiatives but otherwise in limited measures of cooperation; they regard cross-border processes as a 'private matter' concerning only those immediately affected; and they accept the principle of effectiveness, that is, the principle that might eventually makes right in the international world - appropriation becomes legitimation (Held 2003).

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<sup>22</sup> I found the article at <http://ben.aubg.bg/Courses/fall2001/pos312/SOVEREIGNTY.htm> and thus I have no page number on this quote.

Four important effects to the development of this regime should be emphasized. In the first instance, the crystallisation of international law as interstate law gave heads of state or government the capacity to enter into agreements with the representatives of other states without regard to the constitutional standing of such figures; that is, without regard to whether or not heads of state were entitled by specific national legal arrangements to commit the state to particular treaty rights and duties. Second, interstate law was indifferent to the form of national political organisation. It accepted a *de facto* approach to statehood and government, an approach that followed the facts of political power and made few inquiries into how that power was established. Absolutist regimes, constitutional monarchies, authoritarian states, and liberal democratic states were all regarded as equally legitimate types of polity. The third effect involved the creation of a disjuncture between the organising principles of national and international affairs. In principle and practice, the political and ethical rules governing these two spheres diverged. As liberal democratic nation-states became slowly entrenched in the West, so did a political world that tolerated democracy in nation-states and non-democratic relations among states; the entrenchment of accountability and democratic legitimacy inside state boundaries and the pursuit of reasons of state (and maximum political advantage) outside such boundaries; democracy and citizenship rights for those regarded as 'insiders' and the frequent negation of these for those beyond their borders. The gulf between *Sichtlichkeit* and *Realpolitik* was taken for granted. The fourth effect to the classic regime of sovereign international law concerns the delegitimation of all those groups and non-state actors who sought to contest territorial boundaries, with paradoxical consequences. Stripped of traditional habitats and territories by colonial powers and hegemonic interests, such groups often had no alternative but to resort to coercion or armed force in order to press their claims to secure homelands. For they too had to establish 'effective control' over the area they sought as their territory if they were going to make their case for international recognition.

The retreat and defeat of European empires from the late nineteenth century, the spread of democratic ideas throughout the world's regions in the twentieth

century, and the establishment of new transnational and multilateral forms of organization and activity throughout the last one hundred years have altered the political and legal landscape. The questions are: Has a new framework of international law been established where the Westphalian regime is being replaced by a human rights regime? Has the balance changed between the claims made on behalf of the states system and those made on behalf of alternative political and normative positions? In other words, the principle of 'concentration of power inside a given territory' became the cornerstone of the international system and in the 350 years or so since the Peace of Westphalia the state system has become firmly entrenched and consolidated (Matlár 2002: 13). But already Hobbes did emphasise that in its contract the people give up their rights in return for protection - thus a constitutional paradox arises when a state is abusing the people it is supposed to protect - and Hobbes says that when this is happening an individual may take whatever efforts to save his own life (Koch 1983: 196-198). In a present context this might arguably read humanitarian intervention.

## 2.2 Humanitarian Intervention

Robert Jackson defines an intervention as

**“interference by a sovereign state, group of such states, or international organisations, involving the threat or use of force or some other means of duress, in the domestic jurisdiction of an independent state against the will or wishes of its government”** (Jackson 200: 250).

A humanitarian intervention can be seen as an act that seeks to intervene to stop a government murdering its people. During the cold-war humanitarian interventions was not considered legal practise<sup>23</sup>, but as mentioned above there has been a shift

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<sup>23</sup> The cold war did though see some interventions, like when the USSR intervened militarily in Hungary in 1956 and Czechoslovakia in 1968. In addition the states of Eastern Europe were subordinate to Moscow. The USSR also intervened in the third world, like Ethiopia, Angola and Afghanistan. The US as well had its interventions, like in Lebanon, the Dominican Republic, South Vietnam, Angola, and so on. Hence, interventions are not something new. The Israeli - Arab conflict,



after 1990. The growth of the human rights culture has influenced the politics on intervention, and genocide, torture and massive human rights abuses have been outlawed. It is worth noting that interventions do not need to be military, and of non-forcible humanitarian interventions there are examples on both consensual and non-consensual. An example on the latter is the activities of Médecins Sans Frontières who through non-violent methods bring humanitarian relief by for example handing out medicines, and they frequently operate without the consent of the host government. Examples on consensual non-forcible humanitarian intervention are the diplomacy of third party mediation, and also the practise of the International Committee of the Red Cross (Wheeler and Bellamy 2001). Nevertheless, as shown over the basic presumption in international theory is that to intervene is to break the norm. Wheeler and Bellamy outline five frequently outspoken objections on humanitarian interventions: i) States do not intervene for primarily humanitarian reasons since it is national interests that motivate states, and not ethical solidarity. ii) States are not allowed to risk their soldier's lives on humanitarian crusades since the only responsibility for states is the citizens. iii) There is a problem of abuse with regards to such a norm of humanitarian intervention since it always potentially will be the weapon of strong states against weak states, where the powerful states is using it as an excuse to cover the pursuit of self interest. iv) There will always be the issue of selectivity of response, that is, the problem of treating like cases alike. An example is NATO's involvement in Kosovo in 1999<sup>24</sup>, and lack of involvement for the Turkish Kurds at the same time. v) The problem of disagreement on what principles should govern a right of humanitarian intervention as interventions are going to be based on the preferences of those with the power to carry it out.

As a consequence of such objections non-intervention has traditionally been regarded as the norm, and states have the right to be left on their own unless there

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with major wars in 1948, -56, -67, -73, and -82, resulted in the invention of UN Peacekeeping. Robert Jackson makes the case that the cold war saw three 'real' incidents of humanitarian interventions: i) 1971: India intervened in East Pakistan (Bangladesh); ii) 1978: Tanzania intervened in Uganda; iii) 1978: Vietnam intervened in Cambodia (Jackson 2000).

<sup>24</sup> The case of Kosovo 1999 will be further developed below.

are good reasons otherwise. But what is this presumption really based on? An opponent to this presumption is Charles Beitz, who says that

**“[o]ne of the most basic reasons for accepting that state autonomy is morally defensible rests upon a the quasi-empirical proposition about the quality and the depth of relationship between citizens of a state as opposed to relations between non-citizens” (Brown 1977: 114).**

The essential premise is that there is a clear difference between the quality and quantity of interpersonal relations within states as opposed to those that take place across state borders. It is this premise that has been challenged by Beitz. He claims that state autonomy can only be morally justifiable if it reflects certain empirical possibilities. The best defence for this he finds in the position of social contract theory. Here the states relations can be seen as analogue to the Hobbesian state of nature. But for this analogy to hold, the international relations have to show some characteristic. These are i) that states are the actors in international relations, ii) that the states have equal power iii) that they can be independent, iv) that there are no reasons for assuming them to cooperate. Beitz argues that these conditions do not hold, based for example on the economic interdependence in the modern world. On such a basis, the whole problem of intervention becomes a quasi-problem as there is no moral reason for state autonomy. Lately representatives of the UN have been advocating a variant of this view. The Secretary General’s Special Representative for Internally Displaced Persons, Francis Deng, has introduced the notion of sovereignty as responsibility. The idea is that in addition to the three normal characteristics of sovereignty (territory, a people and authority), Deng is introducing a fourth condition which is respect for a minimum standard of human rights. This implies that a state cannot claim the right of sovereignty unless it meets the international agreed standard and such a standard should include human rights and providing life-sustenance to its citizens. Failure to this may lead to humanitarian interventions (Weiss 2000). What Deng in fact is advocating is what Ulrich Beck labels *inclusive sovereignty*, and this point will be expanded on in Part B.

A good illustration on the new policy of intervention is Kosovo, which by many commentators has been seen as making new precedence. In March 1999 NATO attacked Yugoslavia with air power after a humanitarian crisis had accelerated in Kosovo in 1998. Operation Allied Force was the first time in NATO's fifty-year history it had gone to war, and primarily for humanitarian reasons and not security or defensive reasons (Jackson 2000: 277). The Kosovo intervention intruded on basic norms of the UN charter and took place without the mandate of the UN Security Council, and this called for fundamental justifications. US President Bill Clinton declared statements such as "we are upholding our values, protecting our interests, and advancing the cause of peace"; "[the Kosovo crisis is] a genocide in the heart of Europe [which is] testing our humanity"; "[we are] preventing another holocaust". NATO Secretary General Javier Solano said that "NATO is not waging war against the Yugoslav people but against the brutal regime of Slobodan Milosevic". The German Chancellor Gerhard Schröder stated that the air strikes were "not aimed at the Serbian people", while his Foreign Minister Joschka Fischer said "This is about preventing a human catastrophe". French President Jaques Chirac claimed that the air attacks "were launched to defend peace on our soil, peace in Europe", and British Prime Minister Tony Blair asserted that "Barbarity cannot be allowed to defeat justice". Japanese Foreign Minister Masahiko Komura stated that "Japan understands NATO's use of force as measures that had to be taken to prevent humanitarian catastrophe"<sup>25</sup>. All these statements share a common humanitarian tone in justifying NATO's actions, and they are in effect arguing a redefinition of the procedural norms of the global covenant since humanitarian interventions traditionally has been blocked by the non-intervention norm. On the other side were those who wished to maintain this norm as shown through the condemnations of Yugoslavia, China and Russia. Russian President Boris Yeltsin stated that "Russia is deeply upset by NATO's military action against sovereign Yugoslavia, which is nothing less than open aggression." The Russian Ambassador to London said that "breaking international law leads to catastrophes...Nothing in the UN charter or the North Atlantic treaty can justify taking military actions against the sovereign state of

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<sup>25</sup> All quotes are taken from Jackson 2000, pp. 281-282.

Yugoslavia". Chinese President Jiang Zemin called for an immediate halt to the air strikes and a return to the search for a political solution to the Kosovo problem through peace negotiations."<sup>26</sup> The common tone of these statements is concerned with the traditional view on international law and the most fundamental values of the UN charter, i.e. national sovereignty, territorial integrity and international peace and security (Jackson 2000: 282). The Kosovo case is illustrative for the clash between the traditional rules of sovereignty in international law with the newly developed ideas of the need to act to protect against human rights violations. Legal scholars Allan Gerson and T.G. Carpenter says that NATO's bombings

**"flouts the traditional interpretation of the charter...but it is compatible with the emerging international humanitarian law that recognizes the rights of individuals to be protected from genocidal practises, torture and other gross human rights abuses"** (Jackson 2000: 285-285).

The question is whether to redefine the doctrine of non-intervention as expressed in the UN charter or not. This would mean expanding *Jus ad bellum*<sup>27</sup>. Robert Jackson puts the questions if there is a new 'standard of civilization' according to which humanitarian interventions can be justified on the grounds of defending human rights? And does experience since the end of the cold war offer any solid evidence for the claim that in certain circumstances humanitarian considerations pre-empt sovereign rights in the justification of military interventions<sup>28</sup>? (Jackson 2000: 287) Further, it is also a fact, as noted by Kranser (1999) that it is the weaker and most repressive states that always have supported Westphalian sovereignty most. When such states are criticised on human rights ground they respond by invoking the Westphalian sovereignty norm of non-intervention. Examples on such states today

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<sup>26</sup> Ibid.

<sup>27</sup> *Jus ad bellum* are the rules regulating the legality of warfare. This will be elaborated on in chapter 2.3.

<sup>28</sup> The interventions in Somalia 1994, for instance, can be described as invoking a cosmopolitan notion of human security (Jackson 2000: 288). In these circumstances a practical problem arises though: countries that fight for humanitarian values are unwilling to risk the life of their soldier's to defend human rights as this is difficult to sell to the public opinion. The only viable solution to this would be through the establishment of an international army, for instance a UN Army. This point will be addressed again in Part B.

are Russia, China, Algeria, Cuba, Myanmar, North Korea, Mexico and Vietnam (Matlary 2002: 12). It is noteworthy though, that fewer and fewer states respond to human rights criticism in this ‘old-fashioned’ way. This implies, as observed by Matlary, that “[m]ostly governments engage in the terms of the human rights discourse when criticised, a sign that the state accepts the discourse itself as legitimate and universally valid” (Matlary 2002: 12). Another aspect to this debate is that this form for interventionism is a return to medieval policy. Jackson makes the point that in attacking the sovereign state of Yugoslavia NATO repudiated the traditional Westphalian doctrine of *cujus refio, ejus religio* and instead adopted a secular version of the older interventionist doctrine of *Respublica Christiana* (Jackson 2000: 290). As will be shown in Part B Ulrich Beck partly shares this view, while the question remains whether it is a good or a bad thing. But before I continue on this conflict between human rights and sovereignty in international law it is necessary to go a bit more in depth on how interventions and use of force are treated in international law.

### 2.3 Some judicial considerations

As noted above non-intervention is the norm of the international society, but even so there are some exemptions. The classical justifications for overriding this norm are (Jackson 2000: 252-253):

- i) For the sake of international order; the intervention is taken for valid reasons of international peace and security. This is stated in Chapter VII and article 51 of the UN Charter, which is the *Jus ad bellum* of the post-1945 international society as defined by the UN Charter).
- ii) Consent; the intervention is at the request of the legal government of the target state.

These two justifications are rather trivial and are universal accepted. The problematical case arises when the government that is supposed to protect its people

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against grave abuses itself commits these actions. This has led advocates of the human rights culture to establish a third justification for intervention:

- iii) Humanitarianism; the intervention is to protect the population of the target state from grave abuses at the hands of their own government or anti-government rebels or as a result of domestic anarchy.

This justification is highly controversial, and it is at the core of the conflict between sovereignty and human rights. Since it is the norm of non-intervention this conflict relates to - and since in turn the norm of non-intervention is a part of the general debate on use of force in international relations - it is necessary to describe two of the central concepts in this debate, which are *jus ad bellum* and *jus in bello*.

### *Jus ad bellum* and *jus in bello*

International law is a part of the procedural norms of the global covenant, and it is embodied in the Charter of the United Nations, the Helsinki Final Act of the OSCE, the Charter of the Organization of African Unity, and other treaties, protocols, accords, conventions, declarations, resolutions, and formal undertakings between sovereign states (Jackson 2000: 19).<sup>29</sup> The UN Charter is the main body, and in Art 2 (4) of the charter - use, and also the threat, of force is prohibited.

**“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”**

This is a fundamental principle of the UN Charter, and it has become an accepted norm of customary international law. In the vocabulary of international law it means that it is an *erga omnes* principle, i.e. it is present everywhere and also those countries

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<sup>29</sup> When making these more judicial considerations it is worth pointing out that the term ‘international law’ as used in this paper actually refers to ‘public international law’, which must be distinguished from ‘private international law’. The latter is also known as ‘conflict of laws’ and deal with cases within particular legal systems in which foreign elements obtrude, and thus raises questions as to the application of foreign law or the role of foreign courts.

that have not signed and ratified the UN Charter<sup>30</sup> is bound by this. There are four principle exceptions from art 2 (4). i) In chapter VII of the Charter, the Security Council is given the right to take collective actions on behalf of the UN nations. ii) Article 53 allows regional organisation to take forceful action with the prior authorization of the Security Council. iii) Articles 10, 11 and 14 incorporate a role for the General Assembly to make recommendations for forceful measures by UN members against other states. iv) Article 51 accepts the right to use of force in individual or collective self-defence under an armed attack.

*Jus ad bellum* are the rules that regulate the legality of warfare<sup>31</sup>. An important treatise in this connection is the 1907 Hague Convention, but it is especially article 51 of the charter that has been used arguing against interventionist policies. The article states that

**“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”** (Article 51 – UN Charter)

Even if there is a situation where use of force is legal there are still limitations on the use of force, and the law on this is the *Jus in bello*.

The *jus in bello* is the law in war, i.e. the rules regulating warfare. A central source of this law is the 1949 Geneva conventions which generally speaking are concerned with the victims of war, both civilian and military<sup>32</sup>. The *jus in bello* also gives that a state cannot do whatever it want, even if it is in self-defence. These limitations are connected to two general principles of law; the principle of equity and the principle of proportionality. Equity is a general principle of law; domestic and

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<sup>30</sup> At the present this is the case for just three countries – including the Vatican state.

<sup>31</sup> ‘Bellum’ means ‘war’, so *jus ad bellum* translates ‘the law on war’.

<sup>32</sup> See chapter 1.2 - table 1.

international, just like the concept of good faith. It has a place in the overall picture of law, but cannot in itself ground a basis for decisions as it is too imprecise. The function and application of the principle of equity is a bit vague and disputed. But the main function seems to be a corrective, and some perceive this as a common sense quality. It is lacking a specific content, so it is rather a process of taking account of all the relevant circumstances in a case. Thus it has an ever-present factor in the law. Equity is a notion of fairness. In, for instance, a dispute over the application of a treaty, the conduct of the parties may arise equitable considerations. These will not of themselves determine the matter, but rather be an aspect of a dispute centred on the substantive law of treaties. The principle is a customary rule, and in international law it is not often applied<sup>33</sup>. The principle of equity has three possible applications:

- 1) *Infra legem*, which means the possibility of choosing between different interpretations of the law. The idea is that it allows the judge to choose in accordance with justice. How this is done, is unclear and disputed. It simply cannot mean that the judge is free to choose what he finds just, which would leave the law totally subjective.
- 2) *Praeter legem*, which is the opportunity for the judge to elaborate rules that are too general, i.e. there is a lacuna in the law. The judge's opportunity to fill this lacuna is also controversial among the theorists.
- 3) *Contra legem*, which is a softening of the application of a norm for extra-legal reasons.

The purpose behind this is the recognition that legal material in international law does not cover what ever happens, and this gives room for use of the principle of equity. So the principle of equity demands things to be fair. As a consequence the search for fairness, or justice, can be said to be the search for the equitable result. And

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<sup>33</sup> One example though, is the North Sea continental shelf case 1969, in which ICJ in its judgement said: "shelf limitations must be determined by reference to equitable principles". This is a highly controversial verdict, and many believe the hidden reason for this is to seek a compromise. Then the principle of equity would be a principle of distributive justice, which all theorists deny it is.



in order for things to be fair when it comes to use of force in self-defence, they have to be proportionate. So the link between equity and proportionality is that from the obligation to be fair this requires that every response to events have to be proportionate. The intention of the principle of proportionality in the law on the use of force is to limit permitted harm done to others. This limitation is one known to all systems of domestic law as well as international law. And like the principle of equity it is a customary rule. So, use of force in self-defence under an armed attack is legal, but that does not mean that you can do whatever you want. It has to be proportionate, and it has to be proportionate in relation to something. The question of what it has to be proportionate in relation to marks the shift from *jus ad bellum* to *jus in bello* (Higgins 1994: 231).

Traditionally in cases of self defence the *Carolina incident* has been commonly cited as the authority and precedent on this question. In 1837 there was a rebellion against the British rule in Upper Canada. The rebellions took control over an island on the Canadian side of the Hudson River/Niagara River, and launched raids into the UK occupied Canadian territory from the island. The American population on the other side of the river sympathized with the rebellion, and a steamboat called *Carolina* was used to supply men and material from the port town of Schlosser on the US bank to the island. Obviously the British did not appreciate this, and protested to the US government. When the protest failed, the British took control over the boat, and sunk it into the Niagara Falls. Two Americans were killed and several were injured. The British invoked self-defence, which were met by US Secretary of State, Daniel Webster. His response has often been cited in cases of self-defence, and he used a formulation of the conditions of self-defence that required the British Government to show the existence of “a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.” Further “[t]hat the local authorities did ... nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within in it” (Alexandrov 1996: 20). Thus Webster’s formula says that in order to justify use of force in self-defence, the conditions of necessity, immediacy and proportionality have to be met. First he outlined the condition of necessity, and also

in some respect the condition of immediacy, for justifying use of force in self-defence. Second he stated that if these conditions are met, the state under attack has to meet the condition of proportionality. Necessity and immediacy justifies the use of force, while proportionality limits this use of force. This is been considered as the three main requirements for self-defence, and the formula has influenced the general material of self-defence, and was for instanced used in the international military tribunal in Nuremberg 1946 to reject the German claims that, for instance, the invasion of Norway was self-defence.

In order to formulate an answer to the question 'Proportionate in respect to what?' it is necessary to distinct between a single incident of use of force and a sustained armed attack. In a single incident of use of force the response must be proportionate to the harm inflicted, fFor instance: It is not proportionate to respond to a raid across a border by exploding a nuclear device. When an armed attack is a sustained one, the situation becomes more difficult. A nation under attack does not in order to defend itself sit and wait for each blow, and assuring that each respond is proportionate to each blow. Proportionate thus becomes proportionate in respect of the object legitimately to be achieved. Some argue further that proportionality also is an attempt in international law to distinct self-defence and self-help. Self-defence is what is (strict) necessary, and everything that goes beyond this is self-help - and illegal in international law. The verdict in the Corfu Channel case in 1949, which was the first case before the International Court of Justice (ICJ), established this by drawing a line between self-help and self-defence. This distinction did not exist prior to the UN Charter, hence, in *jus in bello*, there is a dualism between the principle of necessity that justifies military violence and the principle of proportionality that forbids (counter) measures that are not necessary, that is relevant and proportionate.

Why, then, are the *jus ad bellum* and the *jus in bello* so central to my discussion of sovereignty, non-intervention and human rights? That is, why are the judicial considerations so important to this debate? *Jus ad bellum* and *jus in bello* have defined the nation state practises in this field of international interaction, and it is this precedence which now is about to change. In the introduction Falk perceived this as the world is entering another Grotian moment. If one relates these judicial

considerations to Jackson's distinction between the two normative vocabularies, then both the *jus ad bellum* and the *jus in bello* can be seen as corresponding to the procedural discourse as it refers to a legal framework. This is by no means a clear cut, as there are no clear cut between the procedural and the prudential discourses, and the *jus in bello* can to some degree also be seen as corresponding to the prudential discourse as it to a larger degree is concerned with general principles of law. But both are in large a part of the procedural norms. Taking this a step further it was also stated in the introduction that the ethical principle underlying the prudential discourse of the global covenant were of a pluralist character. If this is shifting charactering becoming solidarist, then this change in the prudential discourse also have to effect the procedural discourse - including the *jus ad bellum* and the *jus in bello*. In our case the effects would be on the *jus ad bellum* and not the *jus in bello*, since the first considerer when forceful measures are to be taken, while the second considers what kind of measures that are necessary. But in advocating humanitarian interventions, these still have to respect the *jus in bello*; they have to be proportionate in respect to the object they wish to attain - which is to stop a government murdering its people - and they have to be fair with respect the principle of equity.

Interventions will though have consequences for the nation state, and this will be pursued next.

### ***3 The Nation State in a globalising world***

The conflict of human rights and sovereignty makes it necessary to pursue the concept of the nation state, and also point out its role, if any, in a re-structuring world where the concept of state sovereignty is being redefined. This re-structuring of the world is closely connected to the general process of globalisation. Jan Aart Scholte says that “[g]lobalization has presented a fundamental challenge to the Westphalian state system and its central principle of state autonomy”, but he also claims that “[a]lthough globalization has brought to the demise of sovereignty, it is by no means dissolving the state” still “[t]he post-sovereign state may well behave differently from its Westphalian predecessor” (Scholte 2001: 24). The argument runs that the inter-state system is indeed changing and that there is going on a redefinition of global institutions. This chapter will examine whether it is plausible to believe that the nation state will sustain in a globalised world, or whether we now are facing its demise. Chapter 3.1 will consider the relation between nation, nationalism and nation state, while chapter 3.1 will consider how the nation state is affected of globalisation.

#### **3.1 The nation state**

The concept of a nation state is closely connected to the concepts of nation and nationalism, and these will here be described before outlining the concept of the nation state.

*A nation* in Oxford English Dictionary is defined as:

**“...an extensive aggregate of persons, so closely associated with each other by common descent, language or history as to form a distinct race or people, usually organized as a separate political state and occupying a definite territory.”** (Nossal 1998: 285)

This gives, as Kim Nossal points out, no clearer understanding of what a nation really is. It is an attempt to define a nation objectively, and Nossal shows how this is

a problem by isolating the different parts of the definition, and then investigating their evidence. The first attribute given by the definition is a common descent. A counterargument to this is that we all share a common descent. In genetics and palaeontology there is the concept of a single Homo mother, called 'African Eve', which all the people of the world share. So it is all a question about how, or from where, to define an original point of departure when defining a people's descent. And the same counts for the attribute of a common history. History, as such, is a construction, and a nation's common history is a shared, or an agreed, constructed story and "[t]he purpose of a national history is to provide a national mythology" (Nossal 1998: 300), or, like in the words of Benedict Anderson, "[t]he nation is an imagined community" (Nossal 1998: 295). As to the attribute of common language there are only a few countries in the world that have coincidence between language and nations. For most the picture is not that clear, and bilingual and multilingual countries are not unusual. There are between 5000 and 10 000 different languages in the world<sup>34</sup>, which in itself ought to serve as an indication that one language cannot always serve as an attribute of one nation. With regard to the last attribute, a separate state and territory, there are in the world too many states encompassing different nations, and too many nations settled in different states for this attribute to be valid. How then define a nation? According to Nossal, a nation cannot be defined objectively. A more appropriate way to define it is inter-subjectively, and Nossal offer this definition: "...any group of people who define themselves as a nation and are committed to the ideology of nationalism" (Nossal 1998: 298). This inter-subjective definition of nation can be identified as a common state of mind.

In Nossal's definition of nation we also encounter the concept of nationalism, which is considered as an ideological construct. Fred Halliday finds it important to distinct two different functions of nationalism, which are nationalism as an ideology and nationalism as a movement. As an ideology nationalism is a set of political principles that movements and individuals support, but it is an ideology without a clear founding theorist. The concept itself has no clear definition; it is a 'cluster-

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<sup>34</sup> SIL International operates with 6 800 main languages, visited May 11 - 2002 at

[http://www.ethnologue.com/language\\_index.asp](http://www.ethnologue.com/language_index.asp).

concept', i.e., an idea with several elements attached to it. Halliday says that "Nationalism as an ideology is above all a moral and normative principle, a belief about how the world is and should be" (Halliday 2001: 443). When Halliday consider nationalism as a movement, it is the principle of national self-determination. This principle tells us that every nation has the right to decide to be independent. In this respect nationalism can be compared to a country's 'deep culture'. This deep culture, according to Johan Galtung, is a set of shared believes about the social world which none of the members of that culture questions (Galtung 2000). It is an unspoken agreement that the members are unaware of, but still believes in. Thus, it is a society's inter-subjective perception of the world, and it is a set of believes nationalists necessarily have to believe in.

The use of the word 'nation' and its connected doctrine 'nationalism' dates from the eighteenth century. It was created in three interlinked phases: i) From the Enlightenment thinkers emerged especially the principle of self-determination. It was derived from the Greek idea of polis, the city-state. Especially relevant are the works of Rousseau, Kant and Mill. ii) From the French revolution the ideas of a nation and a people, that is, a self-determined people, and the principle of equality evolved. iii) Finally, the German idea of a *volkgeist* as advocated by Herder and Fichte, which states that clearly different people, or tribes, constitute the world. These tribes can be categorised, in the same way as animal species are categorised. As a combination of these three phases rose the political doctrine of nationalism in the early nineteenth century.

Close connected to the idea of a nation is the idea of a nation state. It is the idea that "a nation without a state is a nation a sleep" (Nossal 1998: 303). The birth of the nation state can be dated to the Peace of Westphalia in 1648 ending thirty years of religious wars in Europe. The most important feature of this treaty according to Hirst and Thompson (1995) is that governments agreed to keep out of each other's internal affairs. The background was 30 years of bloody war in continental Europe, which started out as a German civil war fought over both the Catholic-Protestant issue, and German constitutional issues. But it was also an international war between France and the Habsburgs, between Spain and the Dutch, and with the kings of Denmark

and Sweden and the prince of Transylvania becoming involved. All these outsiders found themselves allies within Germany where the battles were fought<sup>35</sup>. Importantly this launching of the principle of sovereignty did not evolve within the state, but from outside through international agreements. Thus, paradoxically, the ideology of nationalism evolved only after the nation state, which in turn merely was a power structure that had been instituted to accommodate foreign policy concerns.

Another event of great importance of the shaping of the nation state is the French revolution (Horsman & Mashall 1995). The most significant implication of the revolution was that the people, and not the ruler, became the principle of the nation state. The idea of state and sovereignty had a slow evolution. It started with a group of people spread across a territory beginning to recognise themselves as constituting a people, and further, in opposition to another group of people. This is the emergence of national consciousness, and it appeared first in Britain and France. In explaining why these two countries, some factors were that; the state as a post-feudal form first occurred here; both countries were involved in a lot of war fighting, with the effect of grouping a people; the evolution of communication between different parts of a territory. The result of these factors was the building of nations, and the construction of a story connected to this nation state. This new order developed the modern global system, and Chris Brown (1977) emphasizes three essential features connected to the new nation state. It was i) a territorially based unit, ii) sovereign and iii) existing in a world of similar nation states.

The next step is to consider what happens to this nation state when its sovereignty is being redefined. I will start out by introducing the globalisation process as this gives the concepts of the nation state, sovereignty, and even human rights, a new framework for discussion – the concepts are been given a re-actualisation. Based on this it should be possible to consider the role of the nation state, if any, in a globalised world.

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<sup>35</sup> See, for instance, Palmer / Colton (1995: 142).

### 3.2 Globalisation

In order to understand the globalisation process it is useful to have an idea of who the most central global actors are. First, there are the Inter Governmental Organisations (IGO's), which are of two types; universal and regional. These are what we can call the official political players on the world arena since they represent nation state governments. It is these that form world politics and make international laws. United Nations is the most influential IGO, and most of the world nation states have signed the UN Charter. Secondly, there are the Non-Governmental Organisations (NGO's), often also referred to as the (global) civil society. These exercise pressure on the official players, and are supported by members. Of special importance the last decades have been the environmental organisations, such as Greenpeace, and the humanitarian organisations, such as Amnesty International. Thirdly, there are the Multi National Corporations (MNC's)<sup>36</sup>. These are companies that have spread their production and business all over the world, and thus exercise great economic, and often social, power over the nation states.

The **concept** of globalisation became popular in the late eighties, replacing the concept of 'interdependence'. Since then there has been produced a vast amount of articles and books with the title *What is globalization?*. Globalisation is still a buzz word, but what it actually designates, in spite of vast use, is highly controversial. Gary Teeple (in his article *What is Globalization?*) offer this definition: "...the unfolding resolution of the contradiction between ever expanding capital and its national political and social formations" (Teeple 2000: 9). I find this to be a too narrow definition of globalisation as it is only emphasising the economic aspect of globalisation. A better definition is given by Jan Aart Scholte:

**"globalization refers to processes whereby many social relations becomes relatively delinked from territorial geography, so that human lives are increasingly played out in the world as a single place"** (Scholte 2001: 14-15).

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<sup>36</sup> These are almost equivalent with Transnational Corporations (TNC's).



The significance of this definition is that it does **not** narrow globalisation to mere capitalisation. Teeple does this, and then globalisation becomes just an economic process in which the different nation states are becoming more interdependent economically. The problem in limiting globalisation to a mere acceleration in economic interaction is that this implies that the opposite of globalisation would be to accept that the nation states as totally independent and isolated islands, which has never been the fact. It would then become meaningless to talk about globalisation, as there is no alternative. Thus, to give meaning to the concept of globalisation, we have to apply a definition like Scholtes, which includes the deconstruction of borders in social life. Furthermore, Ulrich Beck points out that globalisation is a process that happens **within** a country, and not something that becomes forced on from outside. The same is the situation with human rights. Beck illustrates the process of globalisation by reference to the food we eat. The dinner made today by an average family is clearly different from what was the case 25 years ago. Traditional national food is being replaced by the world cuisine. According to Beck, the globalisation is a change in the human self-perception. This is a point which will be developed in part B, and if it is the case one possible development is the evolution towards the cosmopolitan citizen described by Kant in *Perpetual Peace* and *Idea for a Universal History with a Cosmopolitan Purpose*. In chapter 5.2 'Modernity Revisited' the globalisation process will be subject for a more thorough analysis (including Beck's analysis's), while I for now perceive it as a form of closer integration of nation states and societies that is causing a change in the human self-perception. This last point is important with regards to human rights; it is this new image of a globalised 'me' and a globalised 'you' which is at the base of the claim that everybody, everywhere have some basic needs, and that these needs should be met. In this way human rights are received in a new manner, and it is possible to imagine a situation "where a violation of rights in *one* part of the world is felt *everywhere*" (Kant 1795: 107). But what is the faith of the nation state in this process?

The definition Nossal gives of the nation state (an inter-subjective community) opens up some possibilities for the notion of the nation state, unlike more traditional articulations based on the idea of a *people* (*Volk*), in a globalising world where borders

are breaking down in social life. With an inter-subjective determination of nation state it is possible to consider this construction as having developed into a force capable of sustaining the nation state in a globalised world. Moreover, it is not inconsistent to be both a cosmopolitan and a national at the same time. We will always carry our 'deep culture' with us because this has defined our way of thinking and feeling. And to become a cosmopolitan does not mean that we have to abolish our nationalism, but rather that it is only from nationalism a cosmopolitan citizen can evolve. It is also to be acknowledged that one effects of globalisation is that it globalises nationalism as a movement. It can thus be argued that globalisation does in a way provoke nationalism, that is, nationalism need to reply to globalisation. So, nationalism is both a reaction against globalisation, and a product of globalisation. The communist collapse led to secession. In 1991 the four nation states USSR, Czechoslovakia, Yugoslavia and Ethiopia were altogether divided into 22 new nation states. So, in a globalised world it seems like people demand secession, independence and access to the world market on their own terms. But the communist collapse also led to ideas of unification, for instance in Germany, Yemen, China and Korea. So, to follow Halliday, the link between nationalism and globalisation can be said to be fragmentation, through secession, and unification, through fusion.

Even so, the question remains about the concept of the traditional nation state. The point that I like to rise here, and which is going to be discussed further in part B, is based on the claims made by Scholte and Beck. With globalisation the environment for the nation state is changing, and there are reasons to believe that this may cause the state to behave differently from its Westphalian predecessor, as Scholte asserts. One possibility that open up is to see this state as a part of global civil society. For instance, the globalisation of economic activity has moved the questions from the domestic agenda to the global political agenda since domestic deregulation of the economy have become a global phenomenon. As strong political pressure led to regulation in the past, it is to be expected that there will occur reactions against this deregulation. But the contemporary process will be different where regulations are more likely to take place at the global level then within individual governments. The consequence is a push towards the globalisation of politics as it is only collectively

that governments can control MNC's. In other words, the significant element to this reconstruction of the procedural norms of the global covenant is the authority it gives to the building of international institutions. This will be pursued in detail in Part B, where the possibility of including both NGO's and regional IGO's as actors at the global political arena are followed up. Beck makes the point that this is not in conflict with the idea of a new position of the state in the global society, but it is in conflict with a *national* state. What is more, his hypothesis of a change in the human self-perception has the consequence that the way we think and feel actually get affected by globalisation. This is though not to refuse the idea of cosmopolitan and a national at the same time, but it is rather an acceptance of it in which the two fuses into a symbiosis where the world citizen is understood as a world citizen from a local point of view. Thus the national reference to the individual is not as simple as it used to be where Germans lived in Germany, Japanese in Japan and Africans in Africa. To talk about a Greek German, or a Black Jew, are actually two rather trivial examples on the confusion with regards to the old vocabulary. Beck claims that "[w]orld society means the emergence of new power opportunities and new spaces for action, living and perception, which break up and muddle that nation-state orthodoxy of politics and society" (Beck 2000: 65). It is the old perception of the nation state that breaks down and not necessarily the state as one of the significant actors in the global civil society. The problem with the concept of the nation state is that the national side of it is fading away, and the question is for how long it is meaningful to call them **nation** states. In a globalised world there is probably still room for the states as central actors, but when this ceases to be perceived in national terms then there might open up possibilities for more transnational perceptions. This will be worked out in the next part of this paper.

## *Conclusion*

It is time to take a step back and compare the findings with the hypothesis given in the introduction: “There exists today a human rights culture which necessitates the redefinition of the international constitution – and in this circumstance especially the concept of exclusive state sovereignty (and the norm of non-intervention)”. By applying the vocabulary of Robert Jackson<sup>37</sup> it becomes clear that there is arguably a change in the prudential norms of the global covenant which is necessitating the transformation of the procedural norms of the global covenant. This change in the prudential norms has been identified as the movement from pluralist conception towards solidarist conception underlying the ethics of the international society, and it has been identified in this paper as materialising itself both in the theoretical discourses on international relations and as a political fact. The consequence is that human rights increasingly are dictating foreign policy decision-making. This in turn – as anticipated by my hypothesis – has the consequence that the traditional conception of Westphalian sovereignty is under siege, and that a new conception is evolving in which a minimum standard of basic human rights is incorporated<sup>38</sup>. This opens up question of the traditional unit of political action in the Westphalian system – the nation state. Its environment is changing, and with the process of globalisation all this concepts are being received in a new way. This confuses the role of the nation state. Beck observes that globalisation is accompanied by a change in the human self-perception, and this vitalises some quite new possibilities. One such possibility is to perceive the states in more transnational terms in place of national terms<sup>39</sup>. If this is the case it might not be utopian to imagine the

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<sup>37</sup> I must here point out that it is the Jackson’s vocabulary I am applying, and not his conclusion which is not in line with my conclusions.

<sup>38</sup> There is though a practical problem arising in relation to this. If a minimum standard of human rights were to be incorporated as a fourth criterion of sovereignty, then who is going to take action when this is not fulfilled? After all, the United Nations does not have its own force, and thus one or more of the member countries have to supply these troops. Which leader got the stomach to sacrifice his soldiers on the altar of humanity? The answer is probably none, especially if he or she intends to get re-elected. The only viable solution is that the UN starts recruiting its own professional force for this task. Habermas emphasises that if an implementation of human rights are to happen it need to be backed by appropriate legal institutions and coercive force.

<sup>39</sup> Chapter 6.2 will discuss this in detail.

creation of a cosmopolitan society in line with Kant's suggestions. This will now be investigated in Part B.



## Part B

The existence of a Human Rights culture as described in Part A will now be taken as a point of departure for the second part of this paper, and the hypothesis which is to be investigated here is: **With globalisation the framework for human rights discourses changes, as globalisation mean not just a change in the human self perception but also that industrial modernity is replaced by reflexive modernity. The consequence of these changes is that some new possibilities opens up, and one such possibility is the creation of the Kantian model of international relations; i.e. a cosmopolitan society.** This is not to say that a cosmopolitan society is necessarily under creation, but rather that human rights culture and the globalisation process offers some possibilities which we the human beings can choose to pursue, or not. As it is the individuals that become the subjects of the law in Kant's vision, this means that the traditional regime of international law cannot deal with these problems as they are directed at the states and not at the person. As a consequence there is a need basic shift in the global order; from international law among states to a cosmopolitan law directed at the free and equal citizens of the world. Furthermore, if cosmopolitan society is to be conceived as a real possibility there are two presuppositions which have to be meet: i) self-experience of global civil society and ii) basic legal relationships that are universally valid (Beck 2000: 89). In this paper the experience of global civil society will be understood as a change in self-perception, while the basic legal relationships will be identified with the need for a legal implementation of human rights universally.

Axel Honneth states that for the first time in history a politics of human rights has room for effective action. "A foreign policy of the worldwide implementation of human rights as a means of peacemaking - with such a slogan we can summarize the ideas of those who...argue for the Kantian model off international relations." (Honneth 1997: 157) It is such a model that this part of the paper is seeking describe - to redefine to our own time - and to apply to hypothesis given above. As Part A this second part of the paper will consist of three chapters. The first - chapter four - introduces Kant's model of international relations. Chapter five will expand on the

shift towards a more Kantian ethics in international relations, and discuss the link between Kant and a global implementation of human rights. Chapter six will pursue the possible establishment of a new regime of global governance and cosmopolitan law.



#### *4 Kant's political philosophy*

Kant's main concern is moral philosophy, which is philosophy about practical reason. Practical reason is directed at solving practical problems, and to a certain degree the value of practical philosophy is determined by whether this is accomplished. Philosophy must not only be a mere self-reflecting academic discipline, which marginalise itself to the practical problems. One of these practical problems in the world is to give an analysis on how to achieve perpetual peace, which Kant regards as man's highest political goal (Williams 1983: 244). Kant's aim in his political writings is to describe how we think that peace can be acquired. Now, already here Kant, and with him this paper, makes at least one presupposition: *peace is desirable*. The whole idea of conducting a theory of a way to acquire peace in the world would seem almost irrelevant for classic realists like, for instance, Hans Morgenthau and also neorealists like, for instance, Kenneth Walz. In both classical realism and neorealism international relations are at a state of anarchy, and each nation state has a duty to protect its own citizens against any alien danger. Within this paradigm it makes no sense to speak of morality in the relations between states; morality can only exist on a national level. Thus the whole project of creating a theory on how to achieve peace will also become meaningless. This is not to say that a realist prefers war in place of peace, but the whole project makes no sense as a nation state has no obligation towards no one else but it's citizens. In fact, a national leader's moral obligation is to pursue the interests of its citizens on the international arena, and *Realpolitik* believes that these interests are best maintained through power politics. Other approaches, as for instance liberalism (idealism) and cosmopolitanism, are seen as jeopardising the security of the citizens, and thus the leaders are not fulfilling their moral obligation towards the people it are ruling. My point here is to show that constructing a theory on cosmopolitanism carries with it some presuppositions – and even value judgements – that some critics just cannot accept. For them this Kantian engineering of a cosmopolitan society is neither possible to achieve **nor** desirable to achieve. For Kant peace was highly desirable and according to him things does not happen without a purpose. When Kant thinks the evolution of

nature; of man; of the state; or of the international society, it is always in the light of a purpose. Things happen for a reason and there is some kind of will behind every single incident or occurrence in the world – at least in the grand view of history. This means that we might not now be able to grasp the will of our own time as this is a process that in many respects is going on behind our backs. Kant's political writings are deeply connected to this concept of history - which is a moral one. The alternative - to refuse that history serves a purpose in nature is - is from a moral point of view to accept the possibility that men might regress to barbarianism. This is unacceptable for Kant (Williams 1983: 19), and thus the confirmation of progress is motivated not by empirical, nor theoretical, but by moral considerations. When Kant argues that the international society at some point will live in harmony and peace, he bases this on an analogy to the purposive evolution of nature; the nature has developed to functioning in perfect harmony 'as if' designed by a wise creator. From this we can infer that the social world will develop in the same accord as the natural world. As the focus of this paper is Kant's cosmopolitan ideal, and not his teleology, I will not carry out any analysis of his 'as if' thinking. Before outlining Kant's cosmopolitanism I will though make some notes on how he perceives that state, and then I will continue by looking at two of his most central texts with respect to the cosmopolitan ideal, viz. *The Idea for a Universal History with a Cosmopolitan Purpose* (1784) and *Towards Perpetual Peace* (1795).

#### **4.1 The State**

Howard Williams claims that in the theory of the state, Kant attempts to combine the freedom and consent of Rousseau's 'Social Contract' with the domination and absolute authority of Hobbes 'Leviathan' (Williams 1983: 161). Whilst outlining his approach to the state Kant makes an important point about political philosophy since he draws the distinction between a historical, factual account of the origins of the state (descriptive) and the ethical justification and analysis of the state (normative). This is an important point when discussing state sovereignty and its normative qualifications. Thus there is a need for the state to be derived from an analysis of the

a priori ideas of Reason. Kant does not accept that the state can be justified from the fear of 'the state of nature' like Hobbes believed. This is just an empirical fact, and facts are always the product of experience, and all experience is contingent. Facts cannot teach us what ought to be the case – just what is the case at an arbitrary point in time. What have to be decided upon are the conditions under which men will accept the authority of the rule of law. A state is not truly a state unless the united will of the people stands at its head in the form of an elected legislative assembly. The idea of social contract is central in Kant's political theory. It is from considerations of self-interest that men bring the state into being. When the social contract fails, Rousseau would have perceived it as broken and that the people can revoke. For Kant, once you have given somebody sovereign authority it can never be taken back (Williams 1983: 186). The only basis upon which a practical historian could criticise the way in which the state has been founded is on the basis of existing justice and law. But Kant claim it would be contradictory to use existing justice and law to condemn those acts which first brought it into being – these are beyond the judgement of the modern citizen (Williams 1983: 199). The citizen is bound to the state as he is to his own body, and Kant claims that a constitution which would extend to the individual at all times the right to resist the sovereign would be unworkable. Therefore he believes this to imply that any resistance at any time to the authority of the sovereign is unethical. According to Williams Kant argues that it is the citizen's duty to tolerate even the most excessive abuses of power on the part of the ruler and however despotic or unjust sovereign, it is a thousand times better than none sovereign. Based on these reflections Kant's position on multilateral intervention should be clear, but thing may not be this straightforward. Before going into detail on this it is necessary to outline the two texts, *The Idea for a Universal History with a Cosmopolitan Purpose* and *Towards Perpetual Peace*.

## 4.2 Idea for a Universal history

Kant's main concern in *Idea...* is to describe 'the hidden plan of nature'. Kant understands history as the aggregate of freely willed human actions. This aggregate

is independent of the individual's imperative for action because the manifestation of such an aggregate is determined by the natural laws. The reference to natural laws is based on an observed statistical regularity on the quantitative occurrences of births, deaths, marriages, and so on, from year to year. When the philosopher is to explain how it can be that history is developing in accordance to a rational plan - and since this is not a purpose in each individual - then the purpose has to be found in nature itself. To analyze this further is a comprehensive task, which would also lead to the reading of *Critique of Judgement* in which Kant develops his teleology. This becomes a bit beside the point here as I am not emphasising Kant's teleological view of history, but his cosmopolitanism. I like to stress that this paper's application of Kant bases itself mainly on his political writings. Since Kant published most of these essays in *Berlinsche Monatschrift* these essays must have been directed to a broader audience than an academic, including people who had not read his *Critiques*, and hence he must have intended them to stand on their own feet. What is to say about Kant's philosophy of history though is that it rests on a notion of natural teleology as the engine for historical development towards a higher state<sup>40</sup>.

Kant outlines nine propositions for the idea of a universal history. The first three propositions establish a purpose in history intended by nature itself. In the first proposition he states that all living creatures have to fully develop their capacities in conformity with their end, and bases this on his idea of teleology in nature. This depends heavily on imagining the evolution of nature as if there is a wise creator that has designed it. What Kant is saying is that this does not necessarily have to be like this, but this is the only way we can *think* this to be. In other words, this is something we cannot know, but it is something we can think - i.e. this is 'as if' philosophy. In the second proposition the consequence of the first proposition is drawn in that 'reason' - as a human capacity - has to be fully developed. This is also a modification of the first proposition since it is perceived as a slow evolution which only can be

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<sup>40</sup> This paper will not connect to such a concept, but will instead attempt to develop a concept of *education* - or *conscious realisation* - as the central engine to historical development. An inference of this is that the historical development is seen as an indefinite number of possibilities. In this picture the globalisation process becomes an expression of the current path of history, and it opens up some new possibilities to world society. Whether this is something 'good' or 'bad' is an open question which can only be answered by how we eventually will treat the possibilities which globalisation is giving us.

accomplished in the species and not in the individual. Thus it becomes crucial that the enlightenment from one generation is carried on to the next one. In the third proposition the free will of the actions of human beings is emphasised. Man can only be happy when acting out of his own will, and this corresponds to man being beyond 'the purpose in nature itself' since every person is a goal in itself. Man is intended to have reason and to develop his reason completely. This may seem confusing, but – as Kant sums up at the end of the third proposition –

**“...no matter how puzzling this may be, it will appear as necessary as it is puzzling if we simply assume that one animal species was intended to have reason, and that, as a class of rational beings who are mortal as individuals but immortal as species, it was still meant to develop its capacities completely” (Kant 1784: 44).**

In the next four propositions (that is four, five, six and seven) Kant leaves the purpose of nature, and carries on with the question of a just constitution. To bring about the development of innate capacities nature has left the mean of *antagonism* within society. This antagonism Kant describes as man's unsocial sociability, i.e. a form of individualism, and it is based on an anthropological observation: man comes together in society and lives in co-existence at the same time as each individuals are opposing society and pursuing their own goals and ideas. It is this antagonism which is the engine in the development of society because it escapes man from laziness and inspire man's hunt for status and prestige. Accordingly the self-seeking of the man, which on the face of it is not a praiseworthy character, inspires people to work and nurture their natural capacities. This leads Kant to conclude that the antagonism of man suggest the existence of a wise creator and not a cruel spirit who has intruded the creator's glorious work. Kant depends his analysis on the antagonism, and the resemblance between Kant's idea of the self-seeking to his contemporary Adam Smith's idea of the 'invisible hand' is interesting. It is also illustrative for how Kant imagines that these forces within society are functioning. What Kant and Smith share in common is the influence from some of the same sources as both are heavily inspired by the Stoics, and both thinkers assume a natural order on which they can

construct their philosophies, and where Kant speaks of a 'wise creator' or a 'purpose in nature itself', Smith speaks of the invisible hand<sup>41</sup>.

The next step for the human specie, which also is its greatest task, is to create a civil society which can administer *justice universally*, in other words a true commonwealth. The solution to this task is the most difficult and the one to be last solved by the human race. For Kant the development of human capacities can only take place within society, thus the assignment is to establish a perfectly just civil constitution where the greatest possible freedom under external law is fulfilled. The idea is that the only way that each individual's freedom would not limit other individuals' freedom is within such a constitution. The problem of creating a perfectly just civil constitution is twofold. The first problem is that "man is *an animal who needs a master*" (Kant 1784: 46). This master must determine laws which limit individual freedom, and each person must be 'forced' to break his self-will and obey a universal valid will under which everyone can be free. But this leader does not exist as there is no-one that at the same time is just in itself and yet also a man<sup>42</sup>. Therefore nature only requires that we should approximate to this idea; *this is a thought ideal on how we can think that a perfectly just civil constitution could be established in the future*.<sup>43</sup> This is in some respect also the intention behind this paper, to contribute to a process towards the establishment of such a society.

The second problem relates to the problem of a law-governed external relationship with other states, and - importantly - the solution to the first problem cannot be solved unless this one is solved. Here we encounter what Habermas calls Kant's conceptual problem: the distinction between cosmopolitan law and classical international law (Habermas 1997: 116). According to Habermas Kant infers that

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<sup>41</sup> Smith advocates an economy where the norm for economic motivation and action is the individual choice. He believes in a 'natural' economic freedom and says that the best form of an economy is one in which the law always has to assume that people maintain their interests. The main engine in this form of economic freedom is the element of natural order, which in turn is based on natural law.

<sup>42</sup> Even a group of people who where to rule would need a master to limit their will.

<sup>43</sup> Kant lists up three reason why this ideal is impossible at his time: First, man needs a correct conception of the nature of a possible constitution, secondly it needs to be tested and experienced under many affairs of the world, and thirdly it needs a good will to accept the findings of the experience. Kant claims that this three conditions are not present in his time, and the ideal constitution has to wait for a possible future where it can be fulfilled "after many unsuccessful attempts" (Kant 1784: 47).

anarchy on the external level may spread to the internal level<sup>44</sup>. The anarchical relationship between states limits each states freedom, just like the situation is on the individual level. Habermas interprets Kant as finding a solution by entering into a federation of peoples where “every state could expect to derive its security and rights not from its own power or its own legal judgement, but solely from this great federation (...), from a united power and the law-governed decisions of a united will (Kant 1784: 47). The significant consequence is not just about nation states coming together in a society where each nation state is the legal entity, like present international law, but that each ‘person’ is the legal entity under a universally valid law. This is the idea of a cosmopolitan law<sup>45</sup> with a joint power, and, as will become evident from reading *Towards Perpetual Peace* below, Kant clearly has in mind an idea of human rights – or as he formulate it in *Towards Perpetual Peace*: “a universal right of humanity” (Kant 1795: 107)<sup>46</sup>, and so far Habermas agree with Kant. But it is the next step taken by Kant that Habermas criticises; Kant is advocating a federation of free states as the best solution to the problem of the external relation between states. Kant states that the federation must be governed by – and here Kant is inspired by Rousseau – a united will. Obviously new relations between states is necessary, old ones have to be deconstructed and new ones have to be constructed “until state of affairs are created which, like a civil commonwealth, can maintain itself *automatically*” (Kant 1784: 48). Habermas argues that to reach this commonwealth-like condition it is necessary institution in some way or another to institutionalise cosmopolitan law, and this point will be elaborated on below.

Kant is aware that the road towards the perfectly just civil constitution is most likely pretty bumpy, and that such a constitution will just come about after numerous reconstructions through wars and revolutions. In fact, how will this come about? Kant lists up three alternative explanations. The first expects states by Epicurean concourse (i.e. by coincidence and without a purpose) to enter into

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<sup>44</sup> The question is whether Kant got it the wrong way around here, that rather democracy will spread from inside and out, than anarchy will spread from outside and in.

<sup>45</sup> I refer to this as ‘global law’ as well.

<sup>46</sup> Another topic which is highly relevant to this is the establishment of the International Criminal Court (ICC). The ICC is about people, and not states, and gives the individual responsibilities in the

random collisions until they arrive by chance at a formation which can survive and make ground for a constitution. The second possibility is that there is a purpose in nature which follows a course that leads from the lower level of animality upwards to the highest level of humanity, and the third alternative is that nothing rational at all will emerge from these human interactions – that it is impossible with any predictions and that it is just as likely that the human race will regenerate back into barbarity and animality as to develop into a rational being capable of creating a perfectly just civil constitution. For a man that believes that something that is purposeful in parts cannot be purposeless in the whole – and here Kant argues by analogy to the pathological – the second explanation is the only possible. In the purposeless state of savagery all the natural capacities of human beings were developed, but for man to develop his dormant capacities nature forced him into society; we have been cultivated by art and science; we have been civilised in our social interactions; but there is still a human capacity that is not fully developed – our moral nature. This can only take place when the international relations are forced to reinforce the law by introducing a system of united power, “hence a cosmopolitan system of general political security” (Kant 1784: 49).

Kant finishes off his essay with propositions eight and nine, which sums up his idea for a cosmopolitan society. In the eight propositions he sets out to detect from experience any indications of a purposeful nature. And he does find, as he says, ‘*a little*’. To begin with international trade causes state interdependence, which in turn has the effect that each state cannot neglect its internal culture without losing power and influence in relation to the other. Furthermore, the civil freedom cannot easily be infringed without disadvantageous trade and commerce, whereby state power will also decline. The individual will seek to maximize his welfare, and as long it is consistent with others freedom this will benefit business in general. Therefore the restrictions on personal activities are relaxed, and eventually general freedom of religion is granted. And thus “*enlightenment* gradually arises” (Kant 1784: 51). This enlightenment will spread, and even end up where decisions are made among the

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case of war and war crimes. Unfortunately there is not enough space here to apply a Kantian perspective on the ICC, as it carries enough material to a thesis in itself.



political leaders. The rulers will then find that it is in their advantage to bring an end to the making of wars as this is a risky business, and it is also very expensive. The cost of war may lead to a build up in national debt which can be hard to serve in the future as it is an investment with no return. So, the leaders will realise that it is better to use these money on education, since this will pay back later. This will also guide political leaders to start thinking about the whole world, and not just the national, until "...after many revolutions,...,the highest purpose of nature, a universal *cosmopolitan existence*, will at last be realised as the matrix within which all the original capacities of the human race may develop" (Kant 1784: 51). Importantly, it is a *matrix* for cosmopolitan existence Kant is prescribing. This point will be emphasised further in the next chapter (on *Towards Perpetual Peace*), and it is significant to realise that Kant with his project does not refuse the problem of evil and predicts the end of all hostility – he is sketching out a framework<sup>47</sup> within which we - the human species - can deal with these hostilities in a moral way. In the last proposition Kant congratulates himself on discovering the purpose in nature itself. Up till now this has been a process going on without us being aware of it. Now that it have been discovered this can in itself contribute to speeding up the process.

To sum up a bit: Kant's philosophy of history centres around two poles; man and nature. Nature limits the freedom of man in that we can never escape the limitations of the natural laws. At the same time there is a teleological sense in nature – a wise creator – which in some respect can be compared with the Christian concept of 'God'. *The Idea of a Universal History with a Cosmopolitan Purpose* describes 'the hidden plan of nature', where the individual is limited but the specie is capable of immortality. Nature has brought antagonism, or man's unsocial sociability, into society to see to that man is progressing, and in arguing for a purpose in nature itself Kant bases this on statistical regularities. To conclude that what happens in nature happens entirely as the result of random chance is unthinkable for Kant. These forces from nature that has brought man in to society and made him progress on a national level will also see to this happening on a global. Then also man's last dormant

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<sup>47</sup> A point worth noting on this framework, i.e. the civil society, is that Kant does not distinguish between civil society and the state. Thus it becomes possible for Kant to conclude that the civil society is the end goal for the ideal constitution.

capacity, his morality, will be fully evolved as a cosmopolitan citizen of the world. This paper is not invoking such a *teleos* on the road towards the cosmopolitan citizen, but is initially concerned with Rorty's idea of education of sentiments. This will be pursued further below through the works of Martha Nussbaum and Ulrich Beck. In detaching from Kant's idea of a teleological nature I am also escaping his concept of *Providence*. When Kant speak of historical development and natures higher agent – or a purpose in nature itself – he refers to this as *Providence*. His teleological view of nature resides on *Providence*, and it is a highly problematic concept as it has a somewhat religious character. This means that it carries to much baggage of one specific culture and religion, i.e. Christian Protestantism, to serve as a ground for any form of universalism which this paper is advocating – viz. institutionalising human rights globally. On the other hand, in connecting to Rorty's advice on the education of sentiments this does not exclude the existence of teleology though. Stephen Toumlin (1990) makes an interesting observation by claiming that the writers of early Modernity and Enlightenment were involved in de-contextualising the mysteries of nature and history, while it has now been realised that for these stories of nature and history to make sense they have to again be re-contextualised. In our case when speaking of human rights these are not to be found 'out there' based on a universally objective nature, but it is about creating a context in which human rights makes sense. This is of course not a straightforward thing to do, and it is actually the theme around which this paper is constantly orbiting. The point to Toumlin's observation is that by following his line of argument we would end up doing the same as Kant, that is, acknowledging that even if there is no matrix such a cosmopolitan ideal we can pretend 'as if' there were one.

### **4.3 Perpetual Peace**

Kant regards, as noted above, perpetual peace as man's highest political goal. States internal and external order is linked, thus the division between domestic and international politics is an artificial one. *Towards Perpetual Peace* from 1795 articulates Kant's plan for achieving just that; a perpetual peace. His plan takes the form of a

peace treaty signed by a number of nations on the conclusion of a war, and it is divided into two parts. Part one outlines six preliminary articles representing the preconditions for peace, while part two outlines three definitive articles representing the sole conditions for peace. This is followed by two supplements and two appendices which seek to strengthen the claims made in the articles of the treaty. As I regard this essay especially important in relation to Kant's cosmopolitan ideal I will continue by a brief look at all the preliminary and definitive articles.

The first preliminary article states that *"No conclusion of peace shall be considered valid as such if it was made with a secret reservation of the material for a future war"* (Kant 1795: 93). In order to make a peace settlement into a real peace it is decisive to put an end to all hostilities and to nullify all existing reasons for future wars. This article will make no sense if one considers the main target of a state to accumulate power - *Realpolitik* - and thus Kant can here be seen as arguing against the prevailing politic of international relations from the peace of Westphalia and into the first half of the 20<sup>th</sup> century. The second preliminary article for a perpetual peace states that *"No independently existing state, whether it be large or small, may be acquired by another state by inheritance, exchange purchase or gift"* (Kant 1795: 94). Kant argues that a state cannot be a possession since it is a society of men which no-one other than itself can command or dispose of. In fact, to perceive a state as a possession is contradicting the idea of an original contract, without which the right of a people are unthinkable. This idea of a social contract is crucial in Kant's state theory because without as social contract, the state will lose its legitimacy. The third article says that *"Standing armies will gradually be abolished altogether"* (Kant 1795: 94). The very existence of a standing army is in itself a threat, and it is not comprehensible with a lasting peace. Instead of a professional army it is better that the citizens undertake voluntary military training as they will not have any personal interest in undertaking a war. On the fourth article Kant states that *"No national debt will be contracted in connection with external affairs of the state"* (Kant 1795: 95). The idea is that it is sensible to borrow funds for projects which will later return the investments, and the problem is to increase foreign debt from waging war since this does not return the investments. The increase in the debt will not see an increase in the general wealth and at a certain point it will be

impossible to repay the debt. The consequence of this is bankruptcy and the potential for more wars. The fifth article states that *“No state shall forcibly interfere in the constitution and government of another state”* (Kant 1795: 96). The main argument is that interference would be an active offence and would make the autonomy of all other states insecure. Kant is here seemingly giving unconditional support to a non-interventionist politics, but as we will see from the definitive articles the picture is not that clear. The sixth and last preliminary article of a perpetual peace between states says that *“No state at war with another state shall permit such act of hostilities as would make mutual confidence impossible during a future time of peace. Such acts would include the employment of assassins or poisoners, breach of agreements, the instigation of treason within the enemy state, etc.”* (Kant 1795: 96). Even in wartime it is necessary to have some sort of trust to avoid the total extermination. Kant also defines war in this article as *“a regrettable expedient for asserting one’s rights by force within a state of nature, where no court of justice is available to judge with legal authority”* (Kant 1795: 96).

The six preliminary articles formulate six conditions which Kant believes must be fulfilled if a true peace among nations is to emerge. The ultimate purpose of these six articles is to be prohibitive laws, but for the time being they are though seen as varying in strictness. In Kant’s view it is possible to apply articles one, five and six at once, while articles two, three and four are to be taken as permissive laws. These latter articles can in fact be seen more as a political manifesto than an international treaty – and especially article three refusing standing armies. In any case, Kant says that article five is particularly important, since harmony in international relations can only be achieved on the basis of a mutual recognition of autonomy (Williams 1983: 246). If this were not the case there would be constant friction and tension, and there are no excuse for deviating from this rule. Political leaders must be prepared to allow other states to find their own path of development and to seek maturity in their own. Any disorder in neighbouring state should thus not be interfered with, and just serve as a warning not to follow the same path.<sup>48</sup> Article six shows the tentative nature of

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<sup>48</sup> This is by all means highly relevant to my discussion of *multilateral* interventions in the name of human rights, and I will discuss this when presenting the second definitive article below.

Kant's hope for perpetual peace. He expects war to occur again, but under certain laws. This was prior to any formulation of the *Jus in bello*, which in fact now do regulate warfare. Article two emphasise every state being a society of men which only themselves can rule over, and this can also be found in article 1(2) of the UN Charter saying: "[The purpose of the UN is] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". It is although necessary to underline that this is not a watertight plan for perpetual peace and Kant is not trying to present such a plan. He wants to preserve in international society the element of unsociable sociability which is the spur to progress for individuals within states.

The second part of the peace treaty gives the **conditions** for peace, which are three definitive articles for perpetual peace between states. A state of peace must be formally instituted to end the threat of hostilities. The need for this to be a formal arrangement is given in the fact that the opposite of a formal constitution is the state of nature, which for Kant is pretty similar with a state of war. The postulate behind this is that "all men who can at all influence one another must adhere to some kind of civil constitution" (Kant 1795: 98), and there are three such types: i) a constitution based on the civil rights of individual within a nation (*jus civitas*); ii) a constitution based on the international rights of states in their relationships with one another (*jus gentium*); and iii) a constitution based on cosmopolitan right insofar as individuals and states, which are co-existing in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (*jus cosmopolitanum*). This idea of cosmopolitan law was mentioned in the previous chapter and **it is exactly this step from jus gentium to jus cosmopolitanum which this paper is trying to establish as the new possibility the world is facing through the process of globalisation**. In Kant's view nature and morality are mutually pursuing this plan for perpetual peace. Nature provides the external conditions for peace where the natural condition of state is permanent insecurity. In a peaceful condition brought about by natural international events, morality must provide what nature cannot, viz. legislation, and thereby Kant places the plan within the domain of practical

reason. In addition the founding of a just international order has, on some level, a great deal in common with the founding of civil society, but it is on this degree of commonness that Kant is a bit contradictory. I am here again referring to the problem of classic international law vs. global law, in which just the latter remove anarchy in international relations.

Of the three definitive articles of Kant's plan the first article states that "*The Civil constitution of Every State shall be Republican*" (Kant 1795: 99). The republican constitution makes a nation genuinely self-determining and for Kant it is the only constitution which can be derived from the idea of an original contract – upon which any rightful and legitimate legislation of a people must be founded. It furnishes a powerful level of control over governments and curbs their aggressive instincts since in the republican constitution the 'cannon-fodder' must itself declare war as the head of the state is a fellow citizen. This correspond with what today is often referred to as the *democratic peace proposition*, which says that war is unpopular among the citizens and therefore a democratic leader who wishes to become re-elected will hesitate more than, say, a despotic leader who do not need to care for his re-election and can more easily wage war.

The second article says that "*The Law<sup>49</sup> of Nations should be based on a Federation of Free States*" (Kant 1795: 102). This article commits one striking contradiction, according to Williams (1983), since the international legal system has no means for **enforcements**, and positive law requires an institution which can enforce it. The problem Williams is pointing out relates to the conflict between the positive law tradition and natural law tradition as well. The positive law tradition finds it highly problematic to apply the world 'law' when there are no means of enforcement. The natural law tradition derives their laws from a more divine source, which makes it meaningful to speak of the law without means of enforcement. Kant is definitely writing in a natural law tradition and the contradiction is from this view not that obvious. But as Kant is pursuing the codification of this law this means that his aim is to make this into positive law – and in consequence the contradiction still remains.

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<sup>49</sup> As noted in a footnote above I will in some circumstances be in breach with Reiss' translation of 'Recht'. This is one such circumstance where I have replaced Reiss' translation ('right') with 'law', like also advocated by Nussbaum and Williams – among others.

Williams reckons that Kant probably is aware of this problem, and that he recognises that it is just in this contradictory field between independence and federation that it is possible to create the condition for peace. Kant stresses that he has not in mind an international state, although on practical grounds as it is too large for one government to completely rule since protection of each member of such a world state would be impossible with all the vast corners of the world. Even so, the federation should from the standpoint of morality and justice take the international state to be the guiding ideal underlying the law of nations. The federation must be a particular kind of league, that is, a pacific federation. Kant imagines this to come to being by good fortune where one powerful and enlightened nation can form a republic. This will provide a focal point for federal association among other states which will join up with the first one and thereby securing the freedom of each state in accordance with the idea of international right. Such will the idea of federalism gradually spread by a series of alliances of this kind. Note that Kant in this ways preserves the importance of the state since the federation is supposed to be the coming together of free nations. In effect the anarchical condition between states **cannot** be solved like the anarchical condition between human beings and their invention of the civil society; thus these two conditions **are not analogical for Kant**. Even so he do find, as noted over, similarities between the coming together of civil society and the coming together of the international society.

Habermas finds that this conclusion is actually somewhat surprising. As mentioned above Kant is advocating the idea of global law – *jus cosmopolitanum*. He also compared the formation of international society with civil society saying that they have a great deal in common. To some degree Kant is here not drawing the conclusion which his preceding arguments have been suggesting. Kant admits in fact that a world republic is the rational way to archive peace, but from the fear that the world republic to end up as a ‘soulless despotism’ he pursues a ‘peaceable’ federation among independent republican states. Each of these states in turn respects the basic rights of its citizens and establishes a public sphere where people can regard each other as free and equal ‘citizens of the world’. In Habermas’ view Kant’s problem is that in civil society there is a need for laws and an institution to enforce

this; in principle the same goes for the international society, but here Kant cannot find a practical solution to the problem of establishing an institution to enforce such a cosmopolitan law. This is what Habermas refers to as Kant's conceptual problem, and Habermas maintains that it is the lack of central authority which forces Kant to conclude that the world society has to take form of a federation of free states that voluntarily comes together in a law governed relationship. If this is to be compared with civil society - to put it the other way around - it would be a society of free human beings coming together, making laws regulating their interactions, but without an institution to enforce this (i.e. no police forces), which seems to be somewhat anarchical.

The third and final definitive article of a perpetual peace draws the consequence of article two in giving that "*Cosmopolitan Law*<sup>50</sup> shall be limited to *Conditions of Universal Hospitality*" (Kant 1795: 105). Kant is strongly opposing slavery, and his idea of a cosmopolitan law is a reaction to this. The idea of world citizen law is a necessary complement to the unwritten code of political and international right transforming it into a 'universal right of humanity'<sup>51</sup> (Williams 1983: 270). This is an important point with regards to the present situation where gross human right violations - as discussed in chapter one of this paper - may be seen as provoking similar reactions. Accordingly this article may arguably give way for interventionist policies - it may at least be seen as in conflict with the fifth preliminary article (advocating non-intervention). There is one significant difference between Kant's view of how justice and right should be established among states at the international level and his view of how justice and right should be established within state: Rights can - and should - on the national level be established by the use of force. This is impossible on the international level, justice and peace has here to be instituted as a result of conscious moral choice. Therefore the plan's success **depends on the moral progress of man**. As there are no source of enforcement of the law on the international level, Kant finds no other options that envisage the hope that man will be a more moral being. This is for Habermas a wrong conclusion, and Kant's

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<sup>50</sup> Again I am using 'law' instead of Reiss' 'right'.

<sup>51</sup> The link to the current idea of a human rights regime should clear, and this will be elaborated on in chapter five.



idea of a cosmopolitan order needs to be reformulated if it is not to lose touch with a world situation that Habermas finds to have fundamentally changed.

In the argumentation of Habermas these fundamental changes takes the following form: What cosmopolitan law shares with civil law is that both end the state of nature, while international law does not in fact fully accomplish this. It seems a bit strange that Kant does not fully recognise this considering the importance he gives the social contract for the civil society. By analogy should a similar contract on an international level be just as important. In *Theory and Practise*, which was published just two years before *Towards Perpetual Peace*, he does in fact consider the process in which to create a cosmopolitan order as parallel to the process in which civil society came into being. He describes a process towards a “universal state of all peoples. To whose powers all states shall freely submit themselves” and “...a lasting universal peace by means of the so-called European balance of power is nothing but an illusion” (both quotes: Habermas 1997: 116). Here is nothing about the distinction between ‘a federation of nations’ and ‘a state of all peoples’ which we encounter in *Towards Perpetual Peace*. In the federation of free states that will forgo war in their external relation the sovereignty of each member remains inviolable – the states preserve their sovereign powers and jurisdiction. In Habermas’ view Kant has replaced the “positive idea of a world republic” with “negative substitute of and enduring and gradually expanding federation likely to prevent war” (Habermas 1997: 117). Kant compares the federation of nations to a “permanent congress of state”, and according to Habermas the contradictory character of this construction is quite apparent. Kant wants both to preserve state sovereignty and establish a federation where its member’s feels obligated to subordinate their own *raison d’etat* in which all has the goal of “not deciding their differences by war, but by a process analogues to a court of law” (Habermas 1997: 117). The decisive point here is that the members feel an obligation to fulfil this, and since Kant is not advocating a common authority this cannot be a legal obligation - it has to be a moral obligation. Habermas finds that this has to be replaced with a purely legal conception of rights, and he claims that the first step on the road from international law towards cosmopolitan world was taken in Nuremburg/Tokyo tribunals after World War II. The

background was of course that behind the veil of total war contrived by Hitler, the breakdown of civilisation was so complete that a shaken world accelerated the transition from international to cosmopolitan law based on the rights of the world citizen. The outlawing of war was already mentioned in the 1928 Kellogg-Briand Pact, but the real invention was found in the war crime trials after World War II where governmental subjects were made responsible for *crime of war* and *crimes against humanity*. Habermas considers this to be the first step towards the establishment of the ICC. The ICC is the first international body which can be said to performing cosmopolitan law, and its consequence is that the prohibition against intervention in international law must be revised. Thus, according to Habermas, a conceptual revision of Kant's plan ought to focus on state sovereignty and the normative limitations of classical power politics. With regards to the *external* sovereignty of states Kant's concept of a federation of states that respect each state's sovereignty (fifth preliminary article) is inconsistent (Habermas 1997: 127), and the rights of the world citizen must be institutionalised in such way that it actually binds the individual governments. Habermas finds the present situation in international law on this point to be rather confused. Under article 2.4 in the UN Charter violence is banned, while the Security Council can take collective measures in case of, for instance, offensive wars. At the same time is non-intervention affirmed in article 2.7 which, Habermas claims, contradicts taking such measures<sup>52</sup>. In addition the UN has no forces so it has to rely on voluntary cooperation by its member. As to the *internal* sovereignty of states (and the normative limitations of classical power politics) Kant sees the cosmopolitan community as a federation of states and not of world citizens. Habermas judge this to be inconsistent because Kant derived every legal order (also civil law) from a more original law which gives rights to every person 'quo human being' – just by being human. Every individual has the right to equal freedom under universal laws, i.e. individuals are bearers of rights. "If Kant holds that this guarantee of freedom ... is precisely the essential purpose of perpetual peace... then he ought not allow the autonomy of citizens to be mediated through the sovereignty of their states." (Habermas 1997: 128) The point of cosmopolitan law is rather to give

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<sup>52</sup> I have to stress that this is Habermas view. I have also discussed these articles in chapter 1.2.

legal status to the individual subjects where each individual being at the same time a world citizen and a citizen of the state. The most important consequence of a form of law being able to puncture the sovereignty of states is the arrest of individual person for crimes committed in the service of a state and its military, which is the purpose of the ICC. And significantly, Habermas conclude with Charles Greenwood, after the 1991 Iraq war the “idea that the UN can use the powers granted in its Charter to intervene in a state for humanitarian reason appears now to be much more strongly established” (Habermas 1997: 151).

After the six preliminary articles and the three definitive articles, Kant finishes off his essay by two supplements and two appendixes. I will not discuss these in detail as has been done by the preceding articles, but just point to some main features. Kant states here that the guarantee for perpetual peace is found in the purposive plan of nature itself, in *Providence*. The teleology of nature indicates the foresight of a wise agency governing nature, and – importantly – this cannot be **recognised**. It rather has to be supplied mentally in order to conceive of its possibility. In other words, we have to imagine it ‘as if’ possible. To make this statement a bit more meaningful it is necessary to have an idea of the role of *reflective judgement* in Kant’s philosophy<sup>53</sup>. Kant defines philosophy as reasons cognition of the world through concepts, and as there are two different kinds of concepts philosophy is divided in two separate realms: On the one hand there is theoretical philosophy which is based on the concepts of nature, and on the other hand is practical philosophy which is based on the concept of freedom - the moral law. This means that we have two sources of knowledge: receptive knowledge in the theoretical realm through understanding and spontaneous in the practical realm through reason. The problem for Kant is that in separating the sphere of freedom from a wholly deterministic nature, it becomes difficult to understand how we can have an objective perspective on law-bound nature and at the same time be self-legislating. The question is how can spontaneity, being at the basis both of knowledge and of action, affect nature if it exists in a *wholly* different realm from

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<sup>53</sup> I wrote above that I would mainly base my use of Kant on the two articles outlined. This is the exception where I am using some material from *Critique of Judgment*, and it relies heavily on Bowie’s (2003) interpretation.

nature? (Bowie 2003: 35) In *Critique of Judgement* Kant consider judgement to be a third source of knowledge, in addition to reason and understanding, which has the ability to relate the particular to the general. In this process there are two possibilities: The first possibility is when the general is given; the rule is given by reason and judgement subsumes the particular in accordance with the rule. This is the *cognitive* judgement, which is in work when understanding and reason are applying the natural laws and the moral laws, and this is not treated in *Critique of Judgement*. What is treated in *Critique of Judgement* is when we have the second possibility, i.e. when the particular is given; in this case judgement needs a principle to find the general rule. This can not be found in experience, as it is from experience that this principle is to be inducted. Hence judgement has to give this principle itself if it is not be cognitive. The principle is *a purpose in nature itself*, and this new source of knowledge is *reflective* judgement. Kant says there is no cognitive reason to assume that nature is a unified system whose particular laws fit together. At the same time knowledge requires the assumption that what is being investigated is not merely a “labyrinth of the multiplicity of possible particular laws”<sup>54</sup> if the move from particular to general is to be plausible. Thus we have to look at nature “as if an understanding contained the basis of the unity of the multiplicity of its empirical laws”<sup>55</sup>. So in relating the parts to the whole in nature we should look at it ‘as if’ there is a purpose. This movement from the particular to the general is made by reflective judgement via an assumption of coherence in nature that does not have the status of knowledge in Kant’s terms. The purpose in nature is a transcendental principle, and it is also a subjective principle for judgement since it is not dictating a law for nature but for judgments own reflection over nature. It is within this domain of reflective judgement that Kant’s plan is taking form. The importance of this reflexive cognition will re-emerge below<sup>56</sup> when I am considering Ulrich Beck’s responses to modernity.

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<sup>54</sup> This quote is taken from Bowie (2003: 36), which in turn is quoting Kant’s *Critique of Judgement*.

<sup>55</sup> Ibid.

<sup>56</sup> See chapter 5.2 – Beck.

I am now taking a step back to finish off the introduction of Kant's plan for a perpetual peace. In the first supplement (on the guarantee of perpetual peace) Kant states that:

**“Yet while this idea is indeed far-fetched in *theory*, it does possess dogmatic validity and has a very real foundation in *practice*, as with the concept of *perpetual peace*, which makes it our duty to promote it by using the natural mechanism described above”** (Kant 1795: 109).

The natural mechanism that Kant refers to is reflective judgment's transcendental principle of a purpose in nature, which Kant calls *Providence*. Nature has made some provisional arrangements to force nation states to live in harmony with each other, and Kant does in fact identify three steps whereby this is accomplished: First, nature has made human beings able to live anywhere. Second, through wars and imperial conquest nature has seen to it that people do live everywhere. Third, when all space is taken, then the people have to find an arrangement in which they can live in peace which compels humans to enter into more or less legal relationships. Kant does not believe that conflict and hostility between states will disappear, but his hope is that these will be subject to the rule of law – just as with the individuals on the state level. In addition nature helps to promote man's moral purpose without imposing it as a duty on us, which is in the realm of freedom, through for instance antagonism. Kant also identifies three factors given by nature to see to the fulfilment of the plan: i) the *spirit of commerce*; the world is connected through trade, therefore business and economic co-operation will be a force in bringing the international society together. The desire for peace can thus be seen as growing out of commercial reasons. ii) Military necessity; when the weapons become too effective a war would mean total annihilation and thus no rational man dare risking this. iii) Political freedom; in the republican constitution the 'cannon-fodder' must itself declare war. All these three factors have with 200 years of hindsight arguably been falsified; i) the world trade around the turn of the 20<sup>th</sup> century was in some respect even more deeply intermingled than it is today, but this did not prevent the world from elapsing into

two destructive world wars. ii) Experiences from the cold war with incidences where the world was on the brink of large scale nuclear war, in which the 1962 Cuban Missile Crises are the most quoted example. Without going into depth on why these conflicts eventually did not end up as nuclear wars, US Secretary of Defence at that time, Robert S. McNamara, describes it like this in the 2003 documentary *Fog of War*:

**“I want to say...and this is very important. At the end we lucked out. It was luck! That prevented nuclear war. We came that close to nuclear war in the end. Rational individuals! Kennedy was rational. Khrushchev was rational. Castro was rational. Rational individuals came that close to total destruction of their societies.”<sup>57</sup>**

It seem plausible to say that war has it owns logic, and when the wheels of war starts rolling it takes something else than the individuals rationality to stop them. iii) The rising nationalism of the 19<sup>th</sup> century which exploded in the 20<sup>th</sup> century was impossible for Kant to predict, but it does falsify his third statement. This statement has also been compared with the democratic peace proposition<sup>58</sup>, but historical and statistical research shows that states with democratic constitutions do not necessarily conduct fewer wars than authoritarian regimes (even if they though are less likely to be warlike in their relations toward one another). However, these falsifications do not mean that that the idea of *Jus Cosmopoliticum* has to be abandoned. Rather it strengthens the claim and need for some constitutional guarantees in securing more peaceful relations. Kant depend his analysis on, as compared with Smith above, the invisible hand where the spread and interconnection of peoples across the face of the earth will create the conditions for peace. As noted I am attempting to detach from this concept of *Providence*, and this will be discussed further in the next chapters. What I will keep from Kant though, is the crucial need of building a cosmopolitan constitution. It has also already been noted that globalisation is offering a unique possibility in this regards, in which globalisation becomes the process by which the condition for a peace comes about.

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<sup>57</sup> The quote can also be played at <http://www.sonyclassics.com/fogofwar/> - visited 22 August 2004.

<sup>58</sup> See chapter 2.

The next chapters will attempt to establish the link between Kant and a global institutionalising of human rights more profoundly.

## ***5 Modernity revisited***

What kind of tool is Kant actually in relations to the conflict described in Part A? What is the Kantian model of international relations? The answer being pursued here is encapsulated in the idea of *Jus cosmopolitanum*. Kant is a kind of pivoting point when it comes to discussing cosmopolitanism, meaning that Kant started this discussion so we have to continue discussing it with him. International relations has been characterised by resting on a pluralist conception of ethics, and chapter 5.1 will expand on the shift towards a more Kantian ethics in international relations, i.e. a so-called solidarist ethics. When establishing the importance of Kant in relation to the idea of globalisation and cosmopolitanism, it becomes clear that the whole idea of the possibility of a cosmopolitan society is deeply connected to concepts of modernity. Chapter 5.2 will discuss the link between Kant and a global implementation of human rights. This will be done by first referring Jürgen Habermas' critical assessment of Kant's *Towards Perpetual Peace*, and second by adopting a more general perspective from Ulrich Beck, as his thinking on the cosmopolitan society is influenced by the Kant.

### **5.1 Solidarist ethics**

In the introduction it was given from Richard Falk that the ethics traditionally underlying international society has been based on a pluralist conception of ethics where cross-cultural criticism becomes impossible. On this issue there is now going on a normative transformation in which a solidarist conception of the ethics underlying international society is breaking ground. Falk's articulation of this says that "[g]lobal democracy to be realised implies a solidarist world order, which in turn presupposes the completion of a normative global revolution" (Falk 2002: 20 - internet). Robert Jackson as well makes the point that the ethics that have underwritten international society since 1945 have been basically pluralist, i.e. primarily concerned to uphold international order and the sovereignty of independent states. With the emergence of humanitarian interventions it seem like



the ethics of international society is becoming more solidarist, i.e. Kantian<sup>59</sup> (Jackson 2000: 297). Jackson continues by stating that the *societas* of states is a pluralist arrangement of world politics. Pluralism is an expression of the constitutional freedom of sovereign states and the wide variety of domestic values accommodated by those states. Pluralism in that classical meaning is meant to be contrasted with the opposite ideas of monism and solidarism: the singular notion of one commanding authority (source of law) that everybody must obey and one directing doctrine (religion or ideology) that everybody must follow, in other words, *universitas* (Jackson 2000: 178-179). Is this so? We can agree with Jackson that cosmopolitan law needs one source of law, but does a solidarist conception of the society of states necessarily mean that everybody has to obey one religion or ideology? What Jackson is advocating is nothing less than the same main concern Kant had on the implementation of cosmopolitan law; the fear that it would take the form of a world republic and end up as a soulless despotism. This concern will be taken into account when outlining solutions to the implementation of cosmopolitan law in the next chapter.

What this discussion boils down to is whether international society should have any responsibility for states that clearly are a disaster for their populations but only an annoyance for their neighbours and other outsiders. R.J. Vincent compares international society to an egg-carton. The sovereign states are the eggs, the carton is international society, and the point of that arrangement obviously is to separate and cushion the eggs. Egg-cartons are necessary because eggshells are fragile and their contents are valuable. The container reduces the chances of cracking or smashing the eggs and decreasing or destroying their valuable contents. By analogy, international society serves an important value beyond that of international order (the fundamental value) and that of political independence of member states (the value next in importance). It also serves the good life within member states. That, according to the logic of Vincent's argument, is its further and more fundamental justification. That justification of international society is challenged by the existence

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<sup>59</sup> Nussbaum refuses that a solidarist ethics is a Kantian ethics, since Kant bases his ethics on reason and not solidarism. See chapter 6.2.

of failed states. Egg-cartons would be pointless for rotten eggs. All that one can do with rotten eggs is throw them away and replace them with fresh eggs. Vincent's analogy carries solidarist implications that failed states should lose their sovereign rights and privileges and be made wards of international society until such time as domestic civil conditions are restored. According to this reasoning, the non-intervention principle only makes sense if states are at least benign if not beneficial places in which to live. What is the point of protecting and upholding the independence of states where large numbers of people gain no protection from the state authorities and many people if not most live in fear of the government or their fellow citizens or both? "If failed states are tolerated by successful states – if their independence is respected but nothing is done to correct their uncivil domestic conditions – neither failed states nor successful will be truly free"<sup>60</sup> (Jackson 2000: 300). The basic question is: "to what extent should international society continue to be a *societas* of independent states and to what extent should it revert to a *universitas* which presupposes the existence of both independent states and dependents states based on a principle of competence or merit in providing domestic peace, law and order, and good governance?" (Jackson 2000, p. 301). Robert Jackson outlines an answer designed to uphold the *societas* based on a pluralist conception of ethics, while I am applying Kant's cosmopolitan vision. The solution being sought questions if whether a more solidarist international community is really incomprehensible with a *societas*, and if it is possible to replace the either-or' solution with a 'both-and' solution?

## 5.2 Modernity

The discussion that is taking place here about a Kantian model of international relations and a global implementation of human rights is in fact nothing but a discussion of modernity. It is though to be stressed that I do not intend to invoke a wide discussion of modernity as such, nor modernity as a notion, but just in relation to the international society. As the discussion evolves it will become clear that it is

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<sup>60</sup> Their relation would in fact be that of slave and slave-master.

impossible to talk about international society in isolation from the national societies, or, moreover, the different newer forms of sub-societies which goes beyond national borders. My concern is to show that what is being put forward in this paper is not in breach with modernity, but, rather, an intensification of it. Central in, for instance, Beck's analysis is the notions of a first modernity and a second modernity, and it is this concept of a second modernity which will become important when Beck's notion of a change in the human self perception is to be traced (as promised in Part A). But, before I expand on this it is vital to clarify what *modernity* actually refers to in this context.

Modernity – according to Fukuyama – is about optimism, and both liberalism and communism shares this belief which can be said to be: i) faith in the power of reason; ii) a conviction that progress is possible; and iii) a disapproval of the evils of unbridled capitalism (Williams et al. 1997, p. 75). The central idea for Kant, as well as Hegel and Marx, are just this conviction of progress (Williams et al. 1997: 73). This is also a central presumption of modern Western culture *as such* in that what is most recent – most *modern* – is an improvement of what preceded it. Accordingly, the idea of progress is central to our understanding of the modern world. Occurrences the last 100 years, like Holocaust, Gulag<sup>61</sup>, resurgence of an aggressive and militaristic nationalism in Eastern Europe and the Balkans, have forced us to rethink this belief in progress. These events cannot be ignored, but they can neither be allowed to dominate our thinking to the exclusion of anything positive. After all – considering the long-term effects of Holocaust and Gulag – the systems in whose names they were carried out, failed in their ultimate objectives. They failed because of loss of *legitimacy*, a loss of faith both in ideology and in the political leaders who carried them out.

In *The Consequences of Modernity* Anthony Giddens says that “‘modernity’ refers to modes of social life or organisation which emerged in Europe from about

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<sup>61</sup> Gulag is a Russian acronym for the Soviet government agency that supervised the vast network of forced-labour camps which were located mainly in remote regions of Siberia and the Far North. These made significant contributions to the Soviet economy in the period of Joseph Stalin. The conditions in the camps were extremely harsh; the death rate from exhaustion and disease in the camps was high. After Stalin died in 1953, the Gulag population was reduced significantly.

the seventeenth century onwards and which subsequently became more or less worldwide in their influence" (Giddens 1991: 1). This is a description that gives the time period and the geographical location of modernity. Giddens also says that "[r]ather than entering a period of post-modernity, we are moving into one in which the consequences of modernity is becoming more radicalised and universalised than before" (Giddens 1991: 3). It is a post-modern period, but Giddens is advocating a different post-modernity than the traditional conception. He is invoking the 'discontinuist' interpretation of modern social development. With this he means that modernity has brought about an order which is distinct from the traditional order and that the traditional concept of post-modernity is just about some esthetical reflections on the nature of modernity - i.e. traditional post-modernity is just about some trends within literature, painting, sculpture and architecture. The real important aspect of this is that while earlier civilisations has emerged and then passed away, this civilisation of modernity, which initially was a western civilisation - is something more than another civilisation among its predecessors. It is not a western civilisation anymore - the distinction between the west and the others are eroding - and the process which is doing this is called globalisation (Giddens 1991: 52). The consequence of this is that modernity is being globalised, and it is therefore necessary to evolve our understanding of the globalisation process in more depth. But before continuing this discussion of globalisation I will first sketch out Habermas' critical assessment of Kant's plan. I am basing this on Habermas' 1997 essay *Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight*, in which he highlights the judicial aspects of Kant's plan.

## Habermas

Importantly there are 200 years of hindsight given to us now which Kant could not profit from, and Habermas recognises that this matter when applying Kant's concepts to the present situation. In order to make Kant relevant today it is necessary to update his ideas with these hindsight's. One example is Kant's assertion that one of the means to avoid war is to abolish professional armies. In Kant's time wars were

in large conducted by armies consisting of mercenaries, and the obvious problem with such armies is that their livelihood depends on the continuance of wars. Kant's suggestion was to replace these mercenary armies with compulsory armies composed of the citizens of the different nation states. Then, in a republican constitution, the people who are declaring the war also have to fight, and this will make them less eager to declare war. 200 years later we now know but too well that with the 19<sup>th</sup> century nation-building there also evolved different nationalist ideologies, and these ideologies brought about destructive forces which Kant could never have anticipated. The concept of 'dying for one's country' was unknown to Kant, while it today is perceived in large parts of the different world societies as something of a virtue. In applying Kant's ideas to the current situation these hindsight matters significantly as we now know that the move from professional armies to citizen based compulsory armies is not at all abolishing war – perhaps rather the other way around.

Today globally dispersed media, network and systems bring about the constant reciprocal influence between local and quite distant events. These are processes of globalisation, and they render complex societies ever more vulnerable. Globalisation put into question the very presuppositions of classical international law, namely the sovereignty of states and the sharp distinction between domestic and foreign policies. According to Habermas Kant's anticipation of a global public sphere has emerged in the wake of global communication.

**“The process by which all the people of the earth have entered into a universal community has come to the point where a violation of rights in one part of the world is felt everywhere; this means that the idea of cosmopolitan law is no longer a fantastical or overly exaggerated idea. It is a necessary complement to civil and international law, transforming it into public law of humanity (human rights [Menschenrechte]); only under this condition (namely, the existence of a functioning global public sphere) can we flatter ourselves that we are continually advancing towards perpetual peace.” (Habermas 1997: 124)**

Globalisation is not a unilinear or uniform process; it is dialectical in its fullest sense. Global interactions may have opposing effects at different sites and may also reinforce certain local forms of power and identity, and Habermas claims that historical evidences show that all the basic trends that Kant identified are two-sided: they have promoted the conditions of peace but they have also made the task more difficult because of the failure of liberal democracies to be peaceful in **all** their relations with other states. Globalisation has produced a constellation of forces that makes peace feasible, but – according to Habermas – this requires that the promise of Kant’s cosmopolitan law must be fulfilled. This in turn would mean that *human rights achieve a legal status in the rights of world citizens as individuals*. Habermas rejects the unqualified principle of internal sovereignty, especially in the form which it is incorporated in the international law of the existing nation state system<sup>62</sup>. The obvious objection against cosmopolitan law is that this is impossible to implement, and that it is hard to see this operating under other conditions than via a legitimate system operating at the local level. Habermas maintains though that the rule of law on the international level must in some way institutionalise basic human rights. Human rights that genuinely protect individual rights must be backed by the coercive and constitutional power of an international court that understands violations of human rights as crimes against an enforceable cosmopolitan law. Habermas escapes the problem of universality in moral theory as he argues that human rights ought to be understood not as merely moral rights but as legal rights in the first instance. This accompanies the rejection of the unlimited role of internal sovereignty in current international law. Human rights must be implemented at all levels of local and global governance; and as that final instance human rights must be the domain of cosmopolitan law which institutionalise basic rights of individuals and the rule of law at the supranational level. If there is one realm in which to use force under cosmopolitan law, this is in enforcing human rights against nation states that use their sovereignty to abuse human rights out of political; religious; or nationalist reasons.

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<sup>62</sup> In fact, all the contributors to the volume *Perpetual Peace – Essays on Kant’s Cosmopolitan Ideal* rejects this unqualified principle of internal sovereignty (Bohman & Lutz-Bachmann 1997: 13).

Habermas reads *Towards Perpetual Peace* as an ideal that lends intuitive force to the idea of a cosmopolitan order,

**“[cosmopolitan law] is a third doctrine into his [i.e. Kant’s] “Doctrine of Right”. Along with civil law of states and in place of international law, he now introduces an innovation with broad implications: the idea of a cosmopolitan law based on the rights of world citizen” (Habermas 1997: 113).**

These three doctrines Habermas refers to is what Kant labelled *jus civitas*, *jus gentium* and *jus cosmopoliticum* above. Notably Habermas here states that cosmopolitan law are to be in place of international law and not just in addition to it. He continues that the legal order within each state – based on human rights – was supposed to lead ultimately to a global legal order that unites all peoples and abolishes war. Habermas here points out what he refers to as Kant’s conceptual problem; the distinction between cosmopolitan law and classic international law – i.e. what is specific to *jus cosmopoliticum*? In defence of Kant it is worth remembering that war at his time was not outlawed – it was still seen as a mean of foreign policy. The type of warfare was also very different and he could not imagine what we know from experience: two devastating world wars and genocidal civil wars after the Cold War. Some numbers to illustrate this: At the beginning of the 20<sup>th</sup> century around 10 to 15% of the casualties in a war were civilians; during World War II this number had increased to just above 50%. At the end of the 20<sup>th</sup> century approximately 75% of the casualties in a war are civilians (Syse 2003: 132)<sup>63</sup>. These are experience we have to consider when applying Kant’s ideas to our situation; knowing that the civilians now increasingly are the targets in a war the case for cosmopolitan law in place of international law appears stronger. The clear separation between foreign and domestic policy in Kant’s time was grounded on a narrow and politically well-defined concept of power. Power was measured in terms of the degree to which those in power positions had command over the means of violence (i.e. the military and the police). As long as this classical-modern world of nation states remains an unsurpassable conceptual limit,

any attempt at a cosmopolitan constitution that does not respect the sovereignty of states necessarily appears unrealistic – and it explains, according to Habermas, why Kant never considered the possibility of a community of peoples under the hegemony of a powerful state. Kant did judge the republic as more peaceful than other types of regimes. Kant's first definitive article in *Towards Perpetual Peace*<sup>64</sup> can be seen as corresponding to the *democratic peace proposition*<sup>65</sup>, as noted above. It has been argued that even if democratic states not necessarily conduct fewer wars than authoritarian regimes, they are less likely to be warlike in their relations towards one another. Habermas gives an interesting interpretation of this saying that even if republican polity does not behave more peaceably as a whole *this orientation does change the character of the wars which it conducts*. Consequently foreign policy changes according to the motivation of its citizenry, and if this motivation is the desire to promote the international proliferation of non-authoritarianism then this will be reflected in the foreign policy. Habermas formulates it like this, "if value preferences transcend preserving national interest and extend rather to the implementation of democracy and human rights, then the very conditions under which the balance of power operates have changed irrevocably" (Habermas 1997: 121). The consequence is that even to conduct Realpolitik would change from pursuing national power to the proliferation of certain non-authoritarian ideas, since this would be in the national interests of the state (i.e. its citizens). This may consequently also then be invoked as an argument campaigning democracy.

What we are seeking here is the possible implementation of human rights. Kant refused any notion of a central authority maintaining this and concluded that we have to depend on man's moral progress for such an institution to come true. Habermas, on the other hand, emphasises the need for such a legal implementation along with measures to enforce it. Ulrich Beck gives a quite new perspective to Kant's cosmopolitan vision. While Habermas, as we have seen, concern himself with an assessment and an application of Kant's political texts, Beck is more concerned

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<sup>63</sup> This number can also be found in Dan Smith (1997) *State of War and Peace Atlas*, 3<sup>rd</sup> edition, Penguin reference, London.

<sup>64</sup> "The Civil constitution of Every State shall be Republican"

<sup>65</sup> See Chapter 2.



with adopting the Kantian thinking through the concept of reflexive judgement. And it is this mode of thinking which opens up some new possibilities and perspectives for the organisation of global institutions. It is in this connection it is so crucial to have a clear understanding of the globalisation process, and Beck offers just that. What is more, his thinking also offers some new possibilities for *jus cosmopolitanum*.

## Beck

My application of Beck is mainly based on his book *What is Globalization?* (2000), and the article *The Reinvention of Politics: Towards a Theory of Reflexive Modernization* (1994)<sup>66</sup>. At some crossroads his main theory of risk society necessarily will be referred to, but as it is the link between Kant and Beck's cosmopolitan thinking I am pursuing I will not conduct a discussion of risk society as such. My main interest is his perspective on globalisation and modernity, and the implications these have for the Kantian model of international relations.

Beck's central position says that we now have entered a qualitatively new phase of modernity. The first modernity is that of industrial society, and on the interstate level the plurality of these societies conducted their policies along the global covenants 'Westphalian' structure, as described in Part A. Beck claims that the world is entering a second modernity, and this is a world of reflexive modernity. This process of reflexive modernisation has two sides to it; *individualisation* and *globalisation*. From the book *What is Globalization?* I have identified four aspects in which Beck offers important insights to the globalisation debate: i) the question of a second modernity (which is just another word for reflexive modernity); ii) the distinction between globalism - globality - globalisation; iii) the rejection that globalisation leads to unification (the concept of the 'glocal'), and iv) the notion of inclusive distinction (captured in replacing 'either-or' with 'both-and'). These themes are interconnected and thus it is impossible to treat them separately, but they set the main aspects of Beck's contribution.

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<sup>66</sup> This article can be found in Beck et al. (1994) *Reflexive modernization: politics, tradition and aesthetics in the modern social order*.

Beck finds the consequence of globalisation to be the undermining of the nation state by the world society because of a manifold and a flux of social circles, communication networks, market relations and lifestyles. None of these are specific to any particular locality, and so they cut across the boundaries of that nation state. This has severe implications for the sovereignty of these nation states as it affects its ability to tax-raising; police responsibilities; foreign policy; and military security. The consequence is that there is a change going on in the structures of the modern world which calls for redefinitions. Beck captures this in defining it as a movement from the first modernity to the second modernity. The concept of a second modernity is equivalent to the concept of reflexive modernisation as developed by Beck in his 1994 article *The Reinvention of Politics: Towards a Theory of Reflexive Modernization*. Here Beck defines reflexive modernisation as “the possibility of a creative (self-) destruction for an entire epoch: that of industrial society” (Beck 1994: 2). The key question that is guiding his project is to find out whether the symbiosis between capitalism and democracy that characterises the west is possible to generalise on a global scale without exhausting the different nations physical, cultural and social foundations. The term ‘reflexive’ is to be understood as ‘self-confrontation’, and it indicates that society becomes a theme and a problem for itself. This new society is what Beck calls ‘risk society’, which differs from traditional industrial society in the ‘return of uncertainty to society’.

The **transition** from industrial society of the first modernity to risk society of the second modernity is characterised by *reflexivity* (which must not be confused with the term ‘reflexive’ above). This means that the process is autonomous, undesired and unseen. Beck describes the reflexivity of risk society as follows:

**“The reflexivity and uncontrollability of social development thus encroaches upon the individual subregions, breaking up regional, class-specific, national, political and scientific jurisdiction and boundaries. In the extreme case, facing the consequences of a nuclear catastrophe, there are no longer any non-participants.”**  
(Beck et al 1994: 11)

In the risk society we are all faced with possible catastrophes, and consequently risk society by tendency is a self-critical society in which people cannot be neutral to occurrences that are directly affecting their lives.

There are two sides to this theory of reflexive modernisation; the processes of individualisation and the process of globalisation. Individualisation is to be understood as the disembedding and the subsequent re-embedding of industrial way of life by new ones in which the individuals must produce, stage and put together their biographies themselves. In risk society individualisation means the breakdown of the certainties of the industrial society, but also the urge to find and invent new certainties for one-self. Therefore, with the second modernity a question mark appears over the model of the first, national modernity, which was conceived and organized within a particular identity (a 'people'), a territory and a state. At the same time, however, "no new unity of humanity, planet earth and world state has become visible or even desirable to large numbers of people." (Beck 2000: 7-8). In consequence, Beck argues (as Giddens) that this redefinition is not in contrast to modernity, but that the first modernity opens up into the second modernity in which nothing less than the foundations for a cosmopolitan republicanism centred on freedom of the individual is developing. As the process by which this is taking form has been referred to as globalisation it becomes crucial to distinguish globalisation from *globality* and *globalism*.

The ideology of neo-liberalism (understood as the rule of the world market) believes that a complex structure like Germany – with its state, its society, its culture, its foreign policy – can be run in the way a company is run. According to Beck this is to narrow a view on globalisation, and to distinguish this from globalisation he labels it *globalism*. *Globality* is the label given to the fact that we are living in a world society where the notion of closed space has become illusory and no group or people can shut themselves off from the rest, while *globalisation* stresses the process by which sovereign nation states are crisscrossed and undermined by transnational actors. Especially important is the distinction between globalism as a mere economic incident on the one hand, and globality/globalisation as wider occurrence which we

will see evidently supports the case for a change in the human self-perception<sup>67</sup>. This distinction corresponds to a basic dispute in the globalisation literature between those advocating that there is **one** dominant logic of globalisation, and those who perceives globalisation as a phenomenon with a complex set of causes. A consequence of this dispute is that the word 'globalisation' has often contradictory meanings associated with it. The dispute can also be seen as a repetition of the historical divergence between Marx – with the dominance of the economic – and Weber – with a theoretical pluralism involving economic, social and cultural approaches, and Beck's stance is that an analysis that operates with just a single logic will exclude crucial dimensions of globalisation. Another essential feature which is distinguishing the second modernity from the first modernity (or reflexive modernity from simple modernity) is the fact that the new globality cannot be changed because globality means that from now on nothing which happens on our planet is only a limited local event. On this point Beck is almost echoing Kant predicting a situation "where a violation of rights in *one* part of the world is felt *everywhere*" (Kant 1795: 107).

Globality denotes the new situation of the second modernity. Beck continues by underlining that globalisation does not read world state, but contrary a world society without a world state and without world government. For Beck the process of globalisation is going on in the civil society and is bringing a new beginning to politics. Globalisation 'from below' means a new world citizenship which is not politically grounded, but which is the fact of the civil society. In this we must be careful not to confuse politics with the political system, or to equate politics with the nation state. Rather we need to look for the political at other places than we used to because the traditional political has collapsed, and the new political has exploded beyond the formal responsibilities and hierarchies. On this basis Beck proclaims that the political constellations of industrial society are becoming unpolitical, while what was unpolitical in industrialism is becoming political. Hence, according to Beck, we have to look for the political in the "wrong" places. The 1980s saw the renaissance of political subjectivity which had the consequence that citizen-initiative groups have

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<sup>67</sup> This point was also emphasised in chapter 3.2.

taken power politically. An example on this is the 'lip service morality' in European politics in which ecological concerns and a general renewal of the world has become universal. The important feature to this is that the themes of the future are put on the social agenda by different pressure groups – and against the resistance of established institutions. The conclusion Beck's draws from this is that **sub politics has won a thematic victory**, and the outcome is that the current clarities of politics, like right/left, conservative/socialist, are no longer accurate or valuable. One characterising feature of the reflexive society is that nothing 'goes without saying', and Beck describes it rather amusingly as

**"everything must be inspected, chopped to bits, discussed and debated to death until finally, with the blessing of general dissatisfaction, it takes this particular 'turn' no one wants, perhaps only because otherwise there is the risk for general paralysis, such are the birth pangs of a new action society, a self creation society, which must 'invent' everything, excepts that it does not know how, why, with whom and with whom absolutely not."** (Beck 1994: 21-22)

With this society we are on the paths to a new modernity. The door to industrial modernity was blown open by the French revolution and the Industrial revolution, and the concept of politics in this first modernity was based on a system of axes; one coordinate between left and right, and the other between public and private. The politics of the second modernity is 'life politics', which means that the political issues flow from a process of self-actualisation. The context of this process is that of the globality and consequently these globalising trends intrude deeply into the reflexive project of the self, and thus there arises a change in the human self-perception. Moreover, the flipside of this change is that the whole process of globalisation becomes reflexive in which processes of self-realisation influence global strategies. That is, the change of self-perception means that globalisation becomes reflexive, i.e. the individual reflects herself as a part of a global society, and thus we are on the path to world society.

When considering the implications this has for civil society, or the lifeworld of people, it is necessary to bear in mind the different dimensions to globalisation.

There exist a globalisation in communication technology, in ecology, in economics, in work organisation, in culture and civil society, to name a few. Globalisation means that borders becomes less relevant to everyday behaviour in relation to these dimensions. Beck formulates it as people are thrown into a transnational lifestyle, or with reference to Giddens, they are “acting and living (together) over distances, across apparently separate worlds of national states, religions, regions and continents” (Beck 2000: 20). From cultural theory Beck also get the idea of replacing the linearity assumption of the ‘either-or’ of national axiomatic by ‘both-and’ postulates: globalisation and regionalisation, lineage and fragmentation, centralisation and decentralisation, are dynamics that belong together as two sides of the same coin. The meaning is that there exist **two modes of distinction**. The widespread use of distinction is exclusive (either-or), but there is also the possibility to draw an inclusive distinction (both-and). Roland Robertson, which is seen as one of the founders of cultural globalisation theory, emphasises that globalisation always involves a process of localisation. It is crucial to understand that globalisation is not one-dimensional - or unilaterally. On the contrary, most analysis that bases themselves on ‘globalisation’ is now emphasising the *local* (Beck 2000: 45). So globalisation is in fact its different local expression, and “global culture cannot be understood as a static phenomenon, but only as a *contingent* and *dialectical process*” (Beck 2000: 49). This point cannot be overestimated as the apparently *uniformity* of globalisation has been an endless source of misunderstanding in the globalisation debate. In consequence globalisation can be grasped in one’s own life through the cultural symbols that all bear the signature of the global **and** the local, or what we can call the ‘glocal’. One example on how this is dialectical and contingent is found in the idea of human rights. This is not, according to Beck, a mere western idea. Nearly every culture presents human rights as universal rights, but at the same time they are interpreted and represented in often quite different ways according to the context. Another example is that the ‘glocal’ undermines the idea that the world is facing a ‘McDonaldisation’. Both British and American observers of the global scenery that are trained in cultural theory refuses that there is going on a McDonaldisation, and that the global is everywhere given a local expression. This

means that globalisation **does not necessarily bring about cultural uniformity**, and also that the mass production of cultural symbols, like McDonalds, Coca-Cola, Nike and so on, does not lead to the emergence of anything like a global culture.

More generally speaking the first modernity can be understood as 'methodological nationalism' which presupposed the political definition and control of space by the nation state - the territorial state is the container of society. What happens with the second modernity is that in the course of economic, political, ecological, cultural, and biographical globalisation world society opens up in which the emergence of new power opportunities and new social spaces of action, living and perception break up and mix-ups that nation state orthodoxy of politics and society. Beck continues by saying that "[i]n the relationship between the first and second modernity, we are therefore no longer dealing with a rule governed but with a rule changing politics,"<sup>68</sup> (Beck 2000: 65). It now becomes clear that Beck's concept of reflexive modernisation has its links to Kant and the notion of reflective judgement. Just as the basis for Kant's plan for perpetual peace is found in his switch from a rule governed cognitive judgment to a rule giving reflexive judgement, Beck is finding his switch from simple modernity to reflexive modernity in a politics which is longer rule governed but rule giving. What is going on here, with the reflexive, is that occurrences in the world provoke the subject to pursue the rule for these occurrences. In the world of industrial modernity this was, according to Beck, not a difficult task for the self as the world was seen as simple and rule governed. But in the world of reflexive modernity this changes; the occurrences do not fit into the old forms - the rule is not given anymore and the self has to start searching for the rule itself. In this process the self necessarily becomes self-critical as well, and consequently the occurrences trigger a repetitive re-examination of the self. And considering that globality describes the situation in which this is happening, it becomes visible how globalisation takes part in the change of the human self-perception. Furthermore this change in turn has the effect that globalisation becomes reflexive and puts it on the path towards a world society. This is not due to *Providence* as Kant predicted, but comes about through *conscious realisation* (Beck

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<sup>68</sup> Beck refers to this as politics of politics, or metapolitics.

2000: 108) of the necessity of more cosmopolitan institutions (in Beck's vocabulary: transnational states) to handle the problems facing the world of the second modernity. From Part A we remember that Rorty emphasised that education of sentiments is the mode to the expansion of a human rights culture. Beck is advocating something similar when claiming that the road towards transnational states depends on conscious realisation, and he emphasises that in this regards it is important to distinguish the two concepts of culture; culture 1 and culture 2. The concept of culture 1 views culture as essentially territorial – it is localised. This is culture in the sense that it is *a* culture, that is, the culture of a society or a social group – a *people*. Culture 2 invokes a wider understanding of culture where it is viewed as more general human software, and it can essentially be perceived as a translocal learning process. While culture 1 has a local sense of place, culture 2 has a global sense of place where each place is the focus of a distinct mixture of local and more wider social relations. The consequence of this is that people live and feel at home at different places, belonging to different worlds. Globality is not something that is going on 'out there'. It is in the centre of each person's own life and its effect is the globalisation of biographies, and it takes place:

**"...in multicultural marriages and families, at work, in circles of friends, at school, in the cinema, at the supermarket cheese counter, in listening to music, eating the evening meal, making love, and so on. Although people do not will it and are not even aware of it, we all live more and more in a 'glocal' manner"** (Beck 2000: 73)<sup>69</sup>.

Again, just as Rorty is claiming that a further progress in the human rights culture lays in sentimental stories, friendship, intermarriage, and the way we raise our

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<sup>69</sup> Beck describes the new notion of space like: "One's own life is no longer tied to a particular place; it is not a staid, settled life. It is a life 'on the road' (in direct and transferred sense), a nomadic life, a life in a car, aeroplane and train, on the telephone and Internet, a transnational life media-supported and media-stamped. These technologies are everyday means of bridging time and space: they create proximity over distances, and distances within proximity – absence at the same place. To live in one place no longer means to live together, and living together no longer means living in the same place. The central figure of individual life is no longer the *flâneur* but the answering-machine and mailbox: you are there and not there, not answering yet answering automatically, sending and receiving news that is both temporally and spatially mixed, technologically captured and stored from other parts of the world." (Beck 2000: 74)



young, Beck is seeing the same occurrences has happening in the new culture of the second modernity. This is the concept of education – or conscious realisation – which is to take *Providence's* place in Kant's plan, and it is in such a context that it might be possible to institutionalise human rights globally. In Kant's conception this emphasise on education to establish *jus cosmopolitanum* is not important since the purpose in nature itself will make this happen. What's more, instead of advocating the *moral* progress of man like Kant did, it seems more fitting in its place to follow Beck in advocating a redefinition of the human self-perception – a mere switch from local to 'glocal' (a world vision) in place of the more ambitious project of moral progress.

I started out to see whether it was possible to conclude from Beck that the change in the human self-perception means that one important feature of the modern is the cosmopolitan. Based on the notion of second modernity and especially the concept of the 'glocal', there seem to be real possibilities for cosmopolitan visions in this new modernity. The notion of a 'glocal' living gives a clear positive answer to this question. By discovering the 'glocal' we may also have discovered the point from where *Jus Cosmopolitanum* can be constructed. That is, under a condition in which the person sees herself as a part of a larger world. The consequence is that a solidarist system of international relations might actually be created and thus fulfilling Kant's institutional guarantee – “until state of affairs are created which, like a civil commonwealth, can maintain itself *automatically*” (Kant 1784: 48) in which human rights can be institutionalised rights globally. The next chapter will pursue this possible establishment of a *Jus Cosmopolitanum* further.

## 6 *Jus Cosmopoliticum*

Before I set out in this rather ambitious project of suggesting a possible outline for *jus cosmopoliticum*, I want to make clear what this really means. In the introduction to part B the hypothesis was given that “with globalisation the framework for human rights discourses changes, as globalisation mean not just a change in the human self perception but also that industrial modernity is replaced by reflexive modernity. The consequence of these changes is that some new possibilities opens up, and one such possibility is the creation of the Kantian model of international relations; i.e. a cosmopolitan society”. Based on the proceeding chapters it has now become evident that there exists a human rights regime in both the theoretical world of academia, and the practical world of politics. Furthermore, the globalisation process is introducing a new situation to the world in which not only the self perception of the person has changed, but also the setting within which we are talking about human rights. This opens up some new possibilities, and it is in this relation the Kantian model is attempted created. I would like to stress that in doing this I will keep in mind from Beck the rejection that globalisation leads to unification and the notion of inclusive distinction – and Habermas insight that if human rights are to genuinely protect individual rights they must achieve a legal status in the rights of world citizens as individuals, and this must be backed by the constitutional power of an international court which understands violations of human rights as crimes against enforceable cosmopolitan law. This means that at the same time as we have the insight that the evolution towards a Kantian model of international relations is going on beyond and beneath the traditional political, through the redefinition of the individuals self-perception, we also have the insight that for this model to have real possibilities it need to be implemented as hard law supported by means of enforcement. What is sought here is nothing less than a third way between Beck’s horizontal power structure and Habermas’ vertical power structure, and one possible solution to this is given by Daniele Archibugi through the model of *cosmopolitan democracy*<sup>70</sup>. Thus I will outline this solution below, and see whether there are any

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real possibilities for it in relation to problems given in this paper. In outlining such a solution it is clear that this raises concerns about diversity and difference. The notion of *jus cosmopolitanum* encapsulates the idea of some universal standard, and at least that cross-cultural criticism is possible. Therefore I will start by elaborating a bit more on the possibility of cross-cultural criticism before sketching the model of cosmopolitan democracy.

## 6.1 Universalism

Martha Nussbaum voices a different view than Robert Jackson and Richard Falk<sup>70</sup> when claiming that Kant's political philosophy was truly universal, rather than communitarian, in that it was based on reason and not patriotism and solidarism. In her conception the Kantian model of international relations is based on moral universalism, and the question then is whether this moral universalism necessarily is hostile to pluralism and if it suppress local attachments and identities. When addressing this problem Nussbaum traces the influence Stoicism had on Kant. The Stoics, who followed the Cynics<sup>72</sup> lead, developed the idea of the world citizen more fully when arguing that each of us dwells in two communities: the local community of our birth and the community of human argument and aspiration, or with Kant, reason. For the Stoics the worth of reason in each and every human being is the basis for human community – reason is a portion of the divine in each of us (Nussbaum 1997: 30). Even so, the Stoics emphasises that to be a world citizen you need not to give up local identification, which can be a great source of richness in life. The deep core at Stoicism is the idea of a kingdom of free rational beings, equal in humanity, each of them to be treated as an end no matter where in the world he or she are situated, and this is idea that Kant appropriates:

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<sup>70</sup> There are several writers which are contributing to this theory, and the possibly most prominent – together with Archibugi – are David Held and Richard Falk.

<sup>71</sup> See chapter 5.1 above.

<sup>72</sup> Asked where he came from, Diogenes the cynic replied “I am a kosmopolitês (citizen of the world)” (Nussbaum 1997: 29).

**“In general we may say that Kant’s conception of a world politics in which moral norms of respect for humanity work to contain aggression and to promote mutual solidarity is a close adaptation of Cicero’s Stoic ideas to the practical problems of his own era”** (Nussbaum 1997: 39).

There are some differences between Kant and the Stoics though, and one important point concerns teleology. Nussbaum sees Kant as especially arguing against Lucretius’ nonprovidential and anti-teleological view of nature. Lucretius also conceives that half of the earth is uninhabitable because of the climate and that war is an example of disorder and nonprovidential order of things. Kant is in direct opposition to this when he claims that war is one of the methods invoked by nature to create a cosmopolitan order (i.e. that the whole earth is inhabitable and that war has seen to it that the whole earth is in fact inhabited). The consequence, following Lucretius, is that the idea of a cosmopolitan ordered society does not depend on a theory in which humanity are seen to have emerged by design. As Nussbaum states, “[h]owever humanity emerged, whether by design or by chance, it is what it is and it compels respect” (Nussbaum 1997: 49). What all this boils down to is a difference in the view of passions. Kant perceives, unlike the Stoics, aggression as innate; as precultural; and thus impossible to remove from human nature. The Stoics link the goal of world citizenship to the goal of passional enlightenment, and the claim that passions and affective attitudes are constructed by social evaluations and can be undone by the patient work of philosophy. While the Stoics adopted the view that all other attitudes than the love for humanity should be removed, it is possible here to adopt a more Aristotelian view in which anger is appropriate in certain circumstances (for instance, when somebody is hurting one’s body, one’s loved one, one’s country, and so on). The importance is that it is possible to adopt the Stoics’ goal of passional enlightenment without adopting the specific content they give to that notion. Kant would in fact, according to Nussbaum, be better off by adopting the Stoic analysis of passions. His pessimistic view of human evil becomes difficult for him as he must struggle against it to find a place for his own political optimism. One

example is how he turns the initially negative force of human antagonism into a positive force as a necessary mean for the enlightenment of a society.

Is it possible to merge these two views? According to Nussbaum it is if we follow an Aristotelian course. It is necessary to keep some anger as described over, while peace requires Kant's institutional guarantees. However, certain forms of anger and hatred can be eradicated by patient reform following the Stoic ideal. Nussbaum here entails a method very similar to the ideas of Rorty, as described in Part A. By early childhood education it is possible to get children to view members of other races and religions "in the Stoic cosmopolitan way, as similarly human, as bearers of an equal moral dignitary, as members of a single body and a single set of purposes, and as no longer impossibly alien and threatening" (Nussbaum 1997: 48). In my view Nussbaum is here surmounting the problem of universalism in advocating **universal respect for both human dignity and differentiation**. Thus Nussbaum arrives from her pre-modern course on the same conclusions as Rorty<sup>73</sup>, where education is at the heart of the solution. Where there is suspicion and hatred of the foreigner there can be sought to establish programs of education that will make the Stoics' and Kant's idea of world citizenship real by teaching children to regard the alien as one from whom they might learn something or somebody they under different circumstances actually could have been. While it is unlikely that full success would be accomplished it is quite realistic expecting to shape the ways our children regard one another and the ways in which marriages and partnerships of all sort take place (Nussbaum 1997: 49). Again I find the core in Nussbaum's view to correspond with Rorty's argument that a better hope for further progress (in the human rights culture) lies in sentimental stories, friendship, intermarriage, and the way we raise our young: in the continued progress of sentimental education. So even if one perceive human rights as a form of universalism, it is still quite possible to see this as a constructed universalism which has no intentions of assimilating as much as possible of the world with a western identity. It is not a one-way road, and when it comes to human rights Rorty is quite right in perceiving some cultures as 'deprived' of the

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<sup>73</sup> See chapter 1.3.

security and sympathy that has allowed the western civilisation to create a culture in which rights make sense.

Beck is outlining another dimension to the possibility of cross-cultural criticism by advocating *contextual universalism* based on the notion of inclusive distinction. Contextual universalism starts from the fact that non-interference actually is impossible. In this age of homogeneity and globality it is impossible to escape into an illusion of separate worlds. The world is a caricature of dialogue, or even non-dialogue<sup>74</sup>, whose participants unavoidably talk at cross-purposes with one another. Ruling out the non-interference pact gives way for accepting the notion of 'glocal' living. Consequently this is not a debate of the **whether** of mutual interference and conflicting forms of involvement, but a debate on **how** these relations should be designed. Every culture (culture 1) has its certainties, which may be conceived also as *truths*, and there is no escape from the unrest of mutual interference between these. The possibility arises then that there are many form for universalisms - my universalism - your universalism - plural universalism. For instance, human rights do not have to take the form as in the West. The idea of human rights exists in other cultures as well, although in different versions. In fact, only in Europe there are different versions where, for instance, the Scandinavian countries count economic rights among the basic human rights. It is the demands in the different regions which give the understanding to the rights, and thus there is an *African Charter on Human and Peoples' Rights*. This charter is based on two central principles which differ from the Western version. First, it is based on communitarianism rejecting western individualism. Second, decision making is based on consensual procedures disposing of the need for competitive elections. The importance of contextual universalism is that it does not oblige anyone because of some misguided relativism, to accept grave human rights violations on other cultures and countries. This is the central point we must keep in mind here; the

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<sup>74</sup> The concept of non-dialogue refers to what can be called the creative power of misunderstanding. Kirk Varnedoe gives an example on how misunderstanding can be more creative than understanding between different cultures. In the sixteenth century the Japanese built their elaborate art of wood-engraving upon a wrong understanding of the European principle of perspective. This in turn inspired Van Gogh and Degas to unleash the European artistic revolution of the twentieth century, which began with a nonchalant treatment of central perspective. (Beck 2000: 170)

project of creating a universal *jus cosmopolitanum* is not about subjugating the different ways of living human lives into one, but it is about creating the universal matrix within which human life can flourish. It is about creating a framework within which it is it makes sense to talk about rights, independent of whether one conceive of these as legal rights (as Habermas) or moral rights (as Nussbaum), and to rule out grave human rights abuses<sup>75</sup>.

Leaving behind the problem of cross-cultural criticism it is now time to make some suggestions on possible paths towards institutionalising *Jus Cosmopolitanum*.

## 6.2 Institutionalising *Jus cosmopolitanum*

Global applicable basic rights have to be provided to create the foundation of *jus cosmopolitanum*. With regards to the applicability of these rights “what matters in Kant’s view is a gradual introduction of rights between citizens of different nationalities, and thus ultimately the establishment of cosmopolitan rights for all” (Beck 2000: 93). These rights needs a universal implementation since civilisation is only protected against barbarianism when the relationship expressed in basic rights applies globally. The question then arise: Is it possible to establish and secure a cosmopolitan legal relationship between different states and citizens which reduce the importance of the national state as guarantor, without either striving for a world state in place of the nation states - or placing basic rights in a space without laws or states? In other words, is it possible to sketch out a third way solution between a confederal and a federal solution? The possibly most recognised articulation of this is the proposals to reconstruct the United Nations in the form of ‘cosmopolitan democracy’, which is an agenda for proposals to a new world order of which I will pursue the contributions made by Daniele Archibugi. And importantly Archibugi bases his model of cosmopolitan democracy on Kant’s cosmopolitan model of international relations.

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<sup>75</sup> For instance like those being committed in Darfur province of Sudan as this paper is being written.

## Archibugi's model of Global Governance

What is to be noted from the outset is that in the perspective of cosmopolitan democracy the state is the central actor in international relations. Archibugi emphasises Rousseau's insight that 'democracy requires small communities in order to function' must not be forgotten. Cosmopolitan democracy is an institutional model, and it essentially advocates a new concept of sovereignty and citizenship. In this model the sovereignty of states are facing some constraints which are to be exercised by authorised transnational organisations. These transnational organisations will in some areas require legitimation by the global civil society, which consequently means a need for political representation beyond borders. And for this to happen we will need a theory of world citizenship rights.

Archibugi believes that the UN organisation should be given a central role in the transition towards a new world order. He considers the current underlying rationale of *legal pacifism*<sup>76</sup> in international law, which is an attempt to overcome conflicts by the establishment of specific institutions designed to solve controversies without violence, as a suitable ideology. The use of force, if needed, is assigned to those institutions entitled to apply laws, as already implanted within democratic states. To create such an institution on the global level would mean to create supranational institutions with legislative, judicial and executive powers. The problem of executive power lays at the heart of the conflict here. On the one hand, legal pacifism has been a success since today's international institutions and the norm of international law is its fruits. On the other hand, the role of legal pacifism has so far been of scant import if we consider whether it has succeeded in holding in check and regulating international conflicts. When conflicts has emerged, both large and small, UN actions has frequently been ignored by the member states, in which the rules of *raison d'état* have taken precedence over legal principles. This is why some have come to argue that the UN has been more successful in peacetime than in wartime, and "legal pacifism has thus achieved an excellent logical construction, but one with little impact in reality" (Archibugi 1995a: 126). But, the real importance of

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<sup>76</sup> This must not be confused with, for instance, social pacifism which focuses on the social causes of transnational conflicts, and religious pacifism which aim at dialogue and equality between religions.



these principles is not to be assessed just on the grounds of their probable effective application in the world today, but also on the grounds of their utility in an indeterminate future. For instance,

**“the Universal Declaration of Human rights was a declaration of good intentions 45 years ago and still is to a great extent today but, by following its outlines, it has been possible on a daily basis to defend some fundamental and quite concrete principles”** (Archibugi 1995a: 126-127).

In other words, this is simply about establishing an agenda and creating a language (a matrix) in which speaking of human rights make sense.

An international institution must also be able to withstand changes in political conditions. Thus a reform proposal must not be assessed on its feasibility but on what is considered to be a desirable global regime. The perspective of cosmopolitan democracy requires, initially, that the state is recognised as the central figure in international relations. “The very notion of thinking and acting politically presupposes the individual’s citizenship of a state; there can be no politics without a *polis*.” (Archibugi 1995a: 128) On the international level the states are representing their citizens, as the individuals traditionally have had no role on the international level. This means that the states play the role of an oligarchy in the realm of international politics. As soon as this is accepted limits must be set. The first justification of the nation state was from the need for *security*, in which the *Leviathan* liberates the individual from the terrors of the natural state. Hobbes constructed the power of the nation state, and accepted the impossibility of extending the social contract beyond the borders of this nation state. This left international relations in a condition of anarchy. The weak point in the Hobbesian line of argument, according to Archibugi, is that the individual cannot consider herself free from fear as they are still exposed to the threat of war. And as long as the state cannot eliminate this threat, the individual has not the obligation of obedience. On the basis of these general considerations Archibugi suggest a reform of the UN. He assesses three

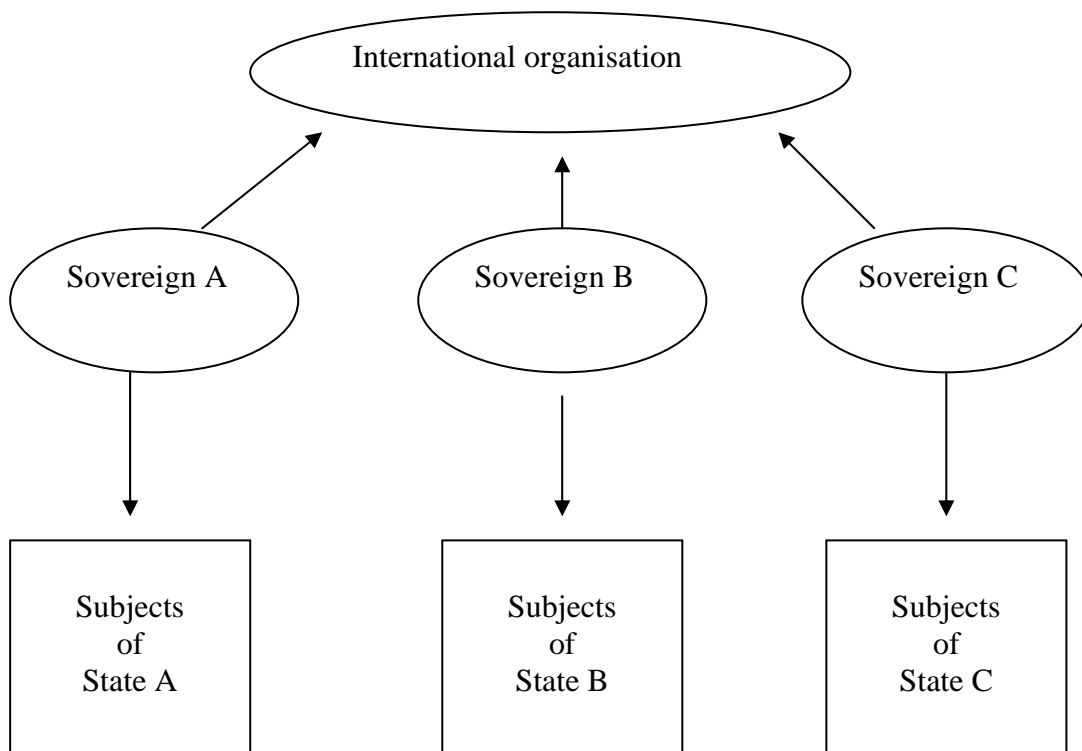
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proposals which attempts to create world order based on consensus and legality. These three centres on i) the establishment of an Assembly of World Citizens (a World Parliament); ii) a reorganisation of the Security Council; and iii) developing a more complete world court system. In other words, these proposals centre on the traditional power trichotomy of legislative power, executive power and judiciary power. The proposals intend to dig out a third way between the two traditional solutions on the problem of anarchy in the international society. The traditional solutions have either been through a confederation of sovereign states, where each member would forsake its autonomy insofar as its relations with other states are concerned; or through the substitution of the multitude of sovereign states with a world-wide *Leviathan* – i.e. a world state.

i) The first proposal of a World Citizen Assembly is based on a cosmopolitan model of international relations, which is attempting to synthesise the two traditional models; the confederal and the federal. The **confederal model** is the model on which the UN (and its predecessor the 'League of Nations') is founded, emphasising sovereignty and non-interference. The problem with this system were outlined in Part A, where the paradox is that it is only possible to sanction a government if it breaks the rule of the international community (that is, in its inter-state relations) while there are no means to sanction its actions towards its own citizens. Archibugi (1992) identifies the confederal model with the theoretical construction of the *pyramidal* model. Its basic characteristics, as illustrated in figure 1, is that the members of the organisation are the sovereigns and not the individuals; disputes between sovereigns are settled through arbitration by the organisation; the electoral criterion is 'one state, one vote'; sovereigns are empowered to determine the constitutional relations within their states; and if the organisation has a joint force at its disposal it may be used to suppress possible rebellions within member states. Two of the problems this model encounters are that, i) it ignores the way in which sovereignty is established and administered within states; ii) the 'one state, one vote' problem in which a state representing 1 million people is just as powerful as a state representing 1 billion people. Both these problems are visible in the UN General Assembly, and what it really amounts to is that the Assembly loses legitimacy and

power. This in turn leaves the arena open for power politics, which is one of the practises Kant as well wanted to get away with in his model. In Kant's view a permanent peace through a balance of power is a pure illusion, "like Swift's story of the house which the builder had constructed in such perfect harmony with all the laws of equilibrium that it collapsed as soon as a sparrow alighted on it" (Kant 1793: 92). For Archibugi the fundamental problem with the confederal model is not that some of its members are non-democratic, but that however democratic a state is, it is forced to act on, and represent the interests of, its citizens on the basis of its own *raison d'état*. The actions of the US and Israel are good illustrations on this point, both have highly democratic constitutions, but both also violates the most elementary norms of international law.

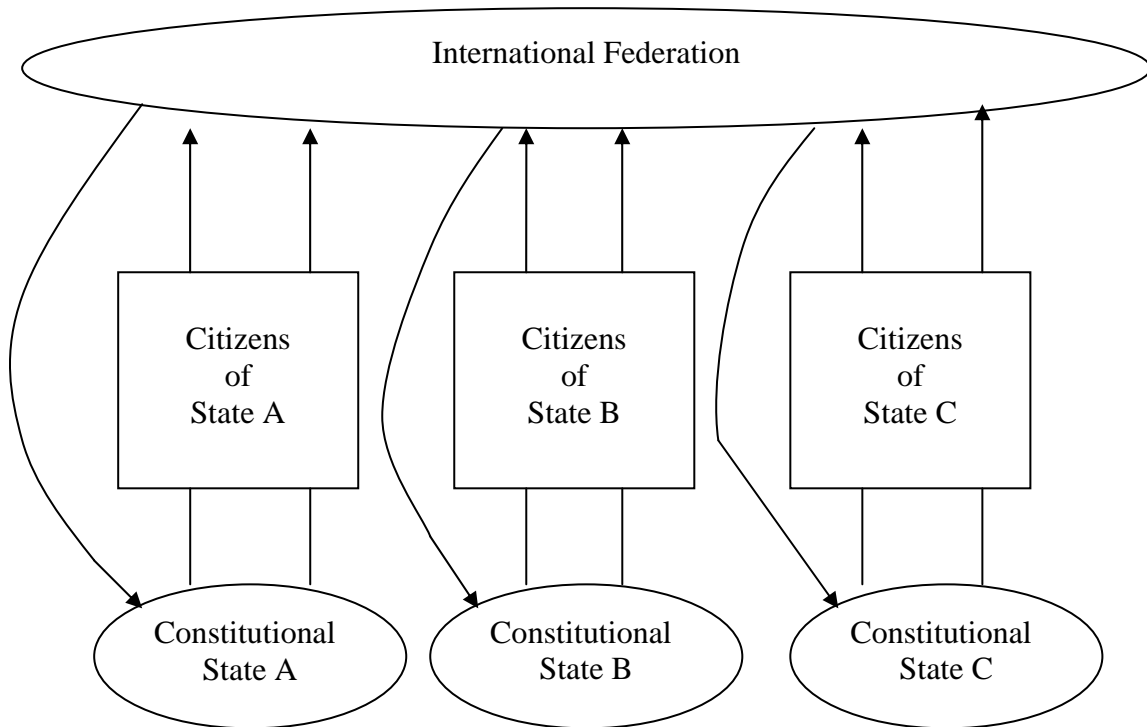
**Figure 1 - The pyramidal model**



Source: Archibugi, D (1992: 296).

The confederal model has traditionally been opposed to the **federal model**, or the *diffused* model, in which the federal state model is extended to a world scale. This model necessarily rejects the idea of a *nation* (a people) and perceives the constellation of nation states as merely a particular inheritance of history. The diffused model differs from the pyramidal model in that the supranational organisation is no longer envisaged as a union of sovereign ruler of states but rather as an institution involving individual belonging to the various states, thus this is a more federalist model. Of historical examples are federalist states such as the United States of America and the German Federation. The basic characteristics of the model are, as shown in figure 2, that the members of the federation are the citizens rather than the governments of states; disputes are resolved through arbitration by international federation, the electoral criteria is 'one citizen, one vote'; and the constitutional form of the member states is influenced by that of the international federation. The objections towards this idea have been twofold. The first concerns its feasibility, and critics doubt that nation states will consensually dispose to transfer their power to a central force. The other objection is towards the desirability of this model. As we have seen rejected already Kant this idea as such an entity most likely would turn into a tyrannical institution. As the concept of a state presuppose a standardisation of norms, a world state would impose norms which large parts of its population would consider as authoritarian imposition. Further, a world state with a monopoly on force would be such a great concentration of force that it render any rebellion impossible, and thus a world state would become an aspiration which jeopardises democracy.

Figure 2 - The diffused model

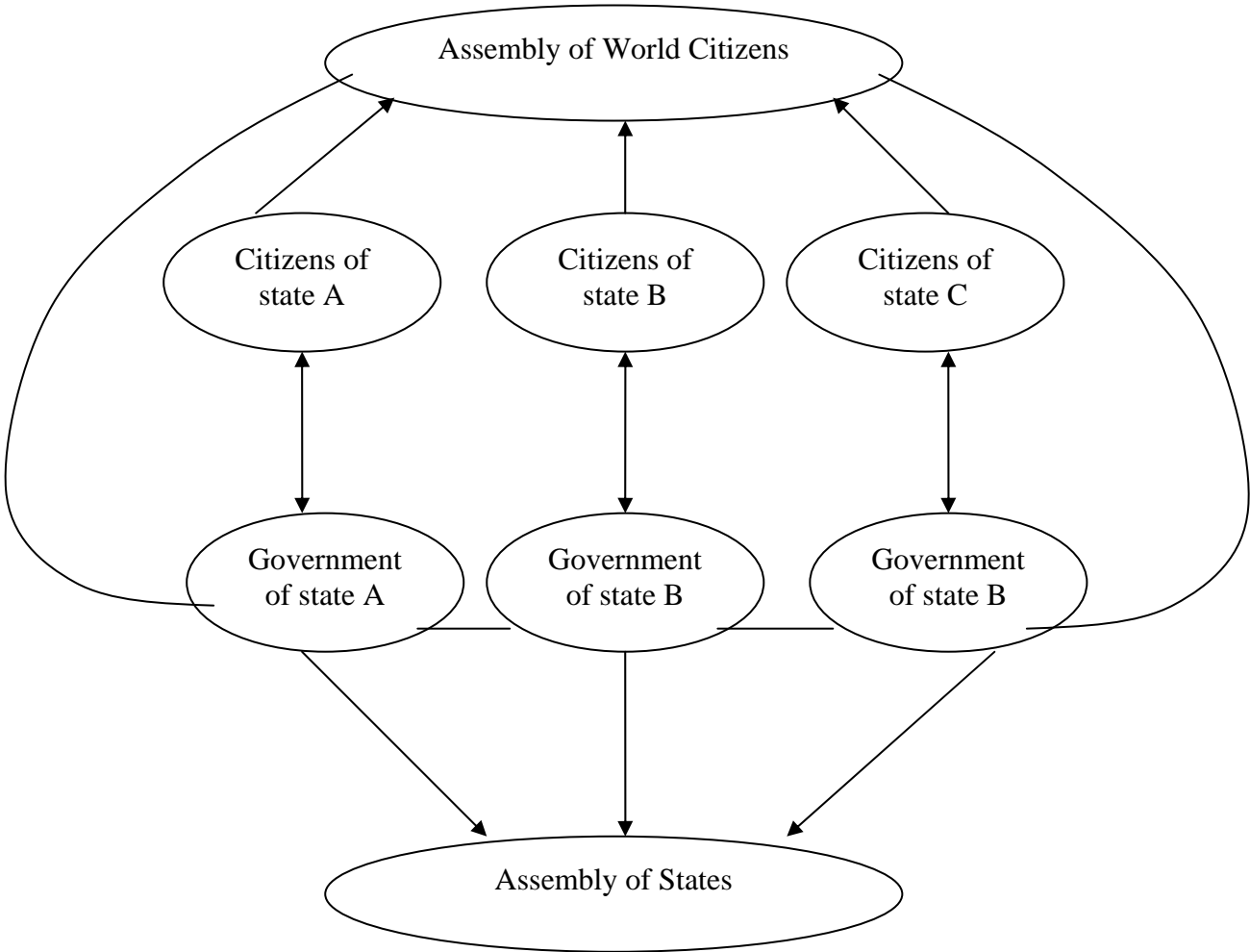


Source: Archibugi, D. (1992: 304).

Could there be a third model unifying the positive elements of both the federal and confederal models? Or to rephrase this a bit; is it possible to limit nation states' monopoly of decision-making at the international level without ending up with a world state? Archibugi's third way solution - cosmopolitan democracy - is based on the **cosmopolitan** model as designed by Kant, especially in *Towards Perpetual Peace*. This is an attempt to combine elements present both in the pyramidal and the diffused model while positing as a unifying criterion a different conception of politics and law. Kant's basic invention, according to Archibugi, is the concept of cosmopolitan law - *jus cosmopolitanicum* - which is a third step in the doctrines of right as described over. The European Parliament is a historic example on an organisation based on this model, and its basic characteristics, see figure 3, are that the members of the international community are both individuals and states; it operates with two assemblies: an Assembly of States which is based on the 'one state, one vote' criterion, but also an Assembly of World Citizens which is based on the 'one citizen,

one vote' criterion; accordingly are disputes between states settled within the Assembly of States while the Assembly of the World Citizens handles questions on disarmament and international relations. This clear split between the law of nations (*jus gentium*) and cosmopolitan law is its most essential innovation, and it is this idea which is at the heart of the Archibugi's model of cosmopolitan democracy.

Figure 3 - The cosmopolitan model



Source: Archibugi, D (1992: 313)

It now becomes visible how cosmopolitan democracy attempts to design such a model based upon a new concept of sovereignty and citizenship, and how it intends to put some constraints on government's exercise of sovereignty. This constraint is not to be exercised by other nation states, but by legally authorised

transnational organisations. In some areas intra-governmental organisations can handle this, but in others again this will require legitimation by the global civil society. Such a legitimation involves some form of political representation beyond state borders, and independently of national governments - as anticipated by Kant. Cosmopolitan democracy is the idea of a *cosmopolis* based on a theory of the 'Rights of the Citizen', who at the same time is a citizen of a state and an inhabitant of the whole planet. The overall objective of cosmopolitan democracy is to give voice to citizens in the world community in an institutional model parallel to states. The states are still important as an integrated part of this model, as they are still to carry out important functions.<sup>77</sup>

ii) The second proposal Archibugi considers is to the reform of the executive branch of the UN, the Security Council. As common known, the five permanent members of the council holds the rights to veto any decision taken by the council, which has had the result that the council actually have not been able to make any decision when it is really needed. This means that the victors of World War II gave themselves crucial power over a body of their own creation, and it is quite amazing that an organisation which is based on democratic principles accepts that a few members alone can invalidate the decisions of the majority<sup>78</sup>. It can be argued that at the end of World War II the veto power was a legal codification of the agreed status quo, where the victorious power did not want to oppose each others freedom of action. This legal abuse of power could only find any justification if it in fact contributed to halting conflicts. However, this argument of practicality in place of rationality "can be considered today only as a sterile inheritance of the past rather

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<sup>77</sup> It is to be noted that the models that I now have been discussing under the heading of legislative power also are relevant for the discussion of both the executive power and the judiciary power as the model reflect the underlying ideology that cosmopolitan democracy is based on. The reason that it becomes most evident in the legislative part is just because it actually wants to create a second UN Assembly. Hence the implications of the model become most visible in the legislative reform proposals.

<sup>78</sup> Actually the way that the superpowers has handled the veto right exceeds the intentions of the UN Charter. It's intention was that: "(1) decisions on procedural matters should be taken on a majority vote of nine out of 15, without requiring an affirmative vote by permanent members...(2) parties to a dispute must abstain from voting...In practise the permanent members arrogated to themselves the right of deciding both which mater were procedural and which were substantive, and whether or not to vote in cases where they were directly involved, thus blocking all resolutions against themselves" (Archibugi 1995a: 150).

than as an element of international stability” (Archibugi 1995a: 151). Since 1945 the world picture has changed in which some power has declined (France and UK) and others has arose (especially Japan and Germany<sup>79</sup>), which shows that the practicality argument have become even more unjust. To preserve this balance of power based on the outcome of World War II is really nothing but unacceptable. So, how should the Security Council be designed?

Archibugi lists up several suggestions without actually making any recommendations, except refusing proposals arguing to abolish both the veto and the ‘five’ as permanent members of the council. He finds that the primary responsibility of the council is ‘the maintenance of international peace and security’ (art. 24 of the UN charter), and therefore the countries with the force to implement this must be represented. Hence the council unavoidably must reflect the current balance of power. Other ways to reform the council could be by requiring two vetoes to block the council and through a simple enlargement (including the countries named above as permanent members). A more progressive proposal is to go beyond the traditional state representation. Habermas is in fact making such suggestions. A reformed Security Council must accept at least Germany and Japan as permanent members. It must also accept regional regimes<sup>80</sup> in the council. Habermas is also differing from Archibugi with regards to the voting, as he claims that unanimity must be replaced by an appropriate form of majority rule. According to Habermas the European Council of Ministers of the EU is a good model on how to design the Security Council, where it becomes an executive power which carries out policies. There are also some even more radical proposals than Habermas’ suggestions, for instance that the proposed World Citizen Assembly should be represented in the council, though only with a constitutive role (Archibugi 1995a: 155). I’ll leave the proposals on the reform of the Security Council behind here. My intention on this point has only been to show, just as Archibugi is doing, that the council as it is designed now is not working; and that changes are needed. Rationally Habermas’ suggestions yield great

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<sup>79</sup> Other countries that could get permanent seats are India, Brazil and Nigeria – based on size and continental representation.

<sup>80</sup> Examples on such institutions are the European Union, Organization of American States, the African Union, the Arab League, and Association of Southeast Asian Nations.



power, and they are also more in accordance with the basic ideas of the cosmopolitan model than Archibugi's sudden approval of political realism. But, just as Kant perceived the road towards the perfect constitution bumpy, taking on different forms and middle solutions, Archibugi's concerns might be plausible. This means that the road to Habermas' suggestions to the reform of the Security Council might well go via Archibugi's suggestions.

iii) The third proposal Archibugi is assessing relates to making international judicial power more effective. The traditional judicial power of the UN system has been through the ICJ. This court is intended to solve disputes between nation states, and not individuals, and it also needs both (or all) parts to the conflict to concede to its participation. This world court lacks the power to press charges and make claims, it cannot make binding decisions; in other words, it is more a mediator than a judge. As we have seen the point of cosmopolitan law is to give legal status to the individual subjects of international law, and Archibugi suggests a reform of the ICJ which is somewhat similar of the recently established ICC. Habermas stresses just this need for legal implementation of human rights, which also must be backed by a coercive and constitutional power of an international court that understands violations of human rights as crimes against an enforceable cosmopolitan law. This is a decisive point<sup>81</sup> on attempting to work out a possible path for the implementation of *jus cosmopolitanum*, and it is the point where Habermas position in relation to Archibugi appears most clearly. I'll thus expand a bit more on Habermas' emphasise of the importance of the judicial.

Habermas states that "the most important consequence of a form of law that is able to puncture the sovereignty of states is the arrest of individual persons for crimes committed in the service of a state and its military" (Habermas 1997: 129). This shows also the great significance of the initiation of the ICC which is intended to deal with this. The prominence of human rights as legal rights in this project now becomes evident, and Habermas makes the point that these rights are only to be considered as legal rights and not moral rights. The American Constitution of 1776

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<sup>81</sup> This is one of the two presuppositions that have to be fulfilled if cosmopolitan society is to be a reality. The other is the self experience of a world society.

and the French Constitution of 1789 incorporates the idea of human rights and these are the first times that we meet any codification of this. The two declarations are inspired by the political philosophy of modern natural law, and especially the writings of Locke and Rousseau. The ambiguity concerning a legal codification of human rights, which has provoked much irritation, finds its background in that as constitutional norms they yield positive validity, while as rights attributed each person they yield suprapositive validity. According to Habermas the classical distinction between natural and instituted law sets up the lines of debate in the wrong way.

**“The conception of human rights does not have its origin in morality; rather, it bears the imprint of the modern concept of individual liberties and is therefore distinctly juridical in character. What gives human rights the appearance of being moral rights is neither their content nor even their structure but rather their form of validity, which points beyond the legal order of the nation state.”** (Habermas 1997: 137)

The special feature about human rights is that they are basic rights which can be justified exclusively from the moral point of view – i.e. moral arguments are sufficient for their justification. But, says Habermas, this does not alter the fact that human rights structurally belong within an order of positive and coercive law. That is to say they belong within a framework of some existing legal order, whether it be national, international or global, in which they can be protected. “The mistake of conflating them with moral rights results from their peculiar nature: apart from their universal validity claims, these rights have had an unambiguously positive form only within the national legal order of the democratic state” (Habermas 1997: 140) Establishing a cosmopolitan order means that violations of human rights are no longer condemned and fought from the moral point of view in an unmediated way, but are rather prosecuted as criminal actions within the framework of a state organised legal order according to institutionalised procedures. The concept of human rights has been so attached to its moral upbringing that it has been

impossible to isolate it in the realm of jurisprudence. But at one point it might be necessary to admit human rights their own judicial life in order to turn them into cosmopolitan law, especially considering that by linking them strongly to natural law one is also linking them with **one** kind of belief and **a** certain religion. The point is that in establishing human rights as *Jus Cosmopolitanum* it is crucial to de-link them from their Western origin in order to make them applicable to all cultures<sup>82</sup>. The natural law traditions parenthood over human rights gives them a Western, and Christian, baggage that make them appear imperialistic if this link is not cut off. Human rights are not something that is genuinely Western, the idea just happened to take form in this culture. Human rights are applicable to all cultures, but promoting human rights as *Jus Cosmopolitanum* also means realising that defining this law is a continually process in which different redefinitions and transformation of the current human rights regime will occur. Or as Kant formulated it

**“[T]hese new bodies,...,will in turn be unable to survive, and will thus necessarily undergo further revolutions of a similar sort, till finally, partly by an optimal internal arrangement of the civil constitution, an partly by common external agreement and legislation, a state of affairs is created which, like a civil commonwealth, can maintain itself *automatically*.”** (Kant 1784: 48)

The same idea is formulated like this in *Towards Perpetual Peace*:

**“The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*. The idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only under this condition can we flatter ourselves that we are continually advancing towards a perpetual peace.”** (Kant 1795: 107-108)

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<sup>82</sup> This point was raised already inn chapter 1 as an counter-argument to Syse’s view that human rights law necessarily must be based on a natural law argument.

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What is to be highlighted from this third way solution of cosmopolitan democracy is the emphasise on Kant's innovation of cosmopolitan law; it is the idea of 'a civil society which can administer justice universally', and Archibugi sees Kant's plan as direct forerunner to the UDHR. It has also here been taken into account Habermas' point that if such a cosmopolitan law are to yield any power the rights of the world citizens must be institutionalised in such a way that it actually binds individual government. The model of cosmopolitan democracy is attempting to accomplish this, but it is also at the same time safeguarding sovereignty as it considers the state to be the central actor in international relations. In this respect cosmopolitan democracy is in fact one possible expression of the Kantian model of international relations. And, as was noted in the beginning of this chapter, there are going on some changes beyond and beneath the traditional political institutions which makes these new formations possible. I will therefore at the end sketch out some of Beck's perspectives on the possibilities of a cosmopolitan society - which is highlighting the possibility for a **transnational state** - and then attempt to make some final conclusion. It is to be noticed though that I am not claiming that Beck's ideas are leading to cosmopolitan democracy, or grounding it. What is important is that Beck's perspective opens up new possibilities for some new constellations and constructions.

### Beck's transnational state

Beck claims, as shown above, that in the second modernity the change of self-perception - from local to 'glocal' - means that globalisation becomes reflexive, i.e. the individual reflects herself as a part of a global society, and thus the possibility of world citizen existence becomes plausible. This is not due to *Providence* as Kant predicted, but comes about through the citizens' *conscious realisation* (Beck 2000: 108)

of the necessity of more cosmopolitan institutions to handle the problems facing the world of the second modernity. The notion of conscious realisation is just another way to express the change of self-perception, and it thus becomes evident that this notion in fact differs from Rorty's concept of sentimental education. For Rorty the point is merely to manipulate the sentiments so as people will behave more peaceable and friendly, and this will be obtained through an act of mutual identification (which can be labelled the 'world of we'). What is to worry about in this approach is whether it takes into account concerns about difference and diversity. In my view there is in Rorty's approach a too strong element of making the world into accordance with our (the west) terms, of expanding the 'we', which is not at all what Beck is aiming at. It is therefore necessary to be a bit careful when applying Rorty's approach. Nussbaum also emphasises, as we saw, the importance of education, but she was careful to also incorporate respect for differentiation. What makes Beck's approach most viable is that he is describing a process that happens within the societies - and individuals - of the world, and this happens **unintentionally**. This is not a culture or regime that we are promoting and expanding. It is not a global 'we', but a 'glocal' me, and a 'glocal' you. It is to refuse the concept 'McDonaldisation', and to replace it by (for instance) 'Hawaiian veal sausage'<sup>83</sup> - i.e. an indefinite number of ways of living. In Beck's vocabulary the cosmopolitan institutions which can face these challenges are transnational states, and the central element in working out these transnational states is the notion of inclusive distinction. The alternative of a transnational state is at least one possible response to the challenges raised by globalisation, and it involves a change of perspective from international relations to transnational internal policy. In a polemic against Fukuyama proclaiming the end of history, Beck lines up with Howard Perlmutter who counters this by talking of the beginning of a history of global civilisation, where "globalization becomes reflexive and thus gain a new historical quality that justifies the term 'world society'" (Beck 2000: 51).

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<sup>83</sup> This is Beck's example on what is commonly labelled fusion cuisine, i.e. mixing food from different places.

There are one prerequisite that have to be meet if transnational states are to come true: the different national states must be connected together through the cooperative procedures of a binding cosmopolitan community of states, and this in such a way that it is visible in each country's internal politics. Beck, and on this point also Habermas, claims that the only way to get this project working is through the materialisation of a *cosmopolitan solidarity*, which in turn can only happen through a change in citizens' consciousness. Hence transnational states will only come about through the conscious realisation of the necessity of transnational states. Without stronger citizen elements, solidarity with people in other countries and corresponding extension and restructuring of national institutions (trade unions, consumer movements) will be impossible. But how can this happen? From exclusive distinction Beck promotes the idea of a *transnational state* based on *inclusive sovereignty*, and he defines the prospect of transnational states as follow:

- i) These are non-national and non-territorial states;
- ii) It negate *national* states, but affirm the concept of *states*, recognising globality as a basic an irreversible fact;
- iii) These are not international or supra-national states in the sense of regional world states. It is to be understood as a model of cooperation among states;
- iv) The transnational states see themselves as 'glocal' states, which mean that they perceive themselves as provinces of world society.

What makes this model of cooperation among state special, according to Beck, is that it makes "*globality the irrevocable foundation of political thought and action*" (Beck 2000: 110). This has the consequence that political theory and actual politics open themselves up to a global age where transnational institutions become a real possibility. And it is just in this picture, I will add, that the possibility for cosmopolitan democracy opens up.

Beck, on his side, has the vision that transnational states come together in response to globalisation and in so doing develop their regional sovereignty and

identity beyond the national level. In other words, interstate unions open up new scope for action by post-national individual states.

**“This argument makes sense only if the imaginative world of exclusive sovereignty is replaced with the imaginative world of *inclusive sovereignty*. A well-known case for the division of labour asserts that cooperation does not hinder but *develops* both the productivity and the sovereignty of the individual.”** (Beck 2000: 133)

Beck believes that the consequence of this is that war becomes a luxury that only national states isolated from one another can afford to wage. This may be achieved by reference to two goals or pillars: the principle of a pacifism enshrined in international law, and the federalist principle of interstate controls. The first principle states that, without the creation and expansion of international law and law courts, transnational conflicts cannot be settled by peaceful means. This is legal pacifism, like Kant’s advised plan, which means legally binding decisions with regard to the use of force. The second principle of federalist interstate control means that power is controlled. It is held in check horizontally, and not from above. Beck is terrified of the idea of a world state, which he considers to be the most tyrannical of structures replacing diversity with uniformity. He claims that “No one has come up with answer to the key question of the second modernity: *How is social justice possible in the global age?*” Thus it is also difficult to answer whether there can be anything like a transnational system of social protection. On the other hand, from a pragmatic point of view there is no point in arguing against a world state and a world system of social security, because these are anyway not really imminent. Pragmatically speaking, the task is rather: to establish and develop basic measures of social protection; to strengthen social networks of self-provision and self-organisation; and to raise and keep alive world issues of social and economic justice in the centres of global civil society.

Where does this leave us? Archibugi emphasises the vital need of having a World Court to handle human rights violations. He is in fact admitting the first step towards cosmopolitan democracy is through the establishment of such a legal

institution, and is thus in line with Habermas' demand for the implementation of hard law. At the same time does Archibugi's proposal resemble in large Beck's transnational states, and Archibugi is actually admitting that his model could have been labelled transnational democracy as well. The idea of transnational institutions is shared by all three of them, but it is their focus and emphasises which differs. Habermas emphasises the backing of law and means of enforcement, Beck emphasises the more profound changes within civil society from of which there might evolve new power structures. Beck is in truth important to the model of cosmopolitan democracy in that he identifies some forces - and possibilities - for a cosmopolitan society. There are real possibilities for a *Jus Cosmopolitanum* in the model of cosmopolitan democracy, which also affirms the possibility of creating a Kantian model of international relations.



## *Conclusion*

Before I make any conclusion on part B of the paper I will shortly sum up the findings in part A, as these gave the background for the second hypothesis. As I noted in the introduction the intention behind Part A is to be considered as a practical, political part which sets the framework for Part B, where the philosophical dimension is played out.

The hypothesis given in part A said that “there exists today a human rights culture which necessitates the redefinition of the international constitution – and in this circumstance especially the concept of exclusive state sovereignty (and the norm of non-intervention).” In chapter 1 the importance of human rights was shown, and it was emphasised the power in which these rights has established themselves as both a theoretical discourse and also as a political fact. Chapter 2 outlined the doctrine of exclusive state sovereignty and the accompanying norm of non-intervention in international law, and it was shown how this concept has come under siege while the human rights regime has increased in power. It was also noticed that this will influence the *jus ad bellum*, as it will mean the end of the non-intervention principle. Chapter 3 showed in turn that this will affect the traditional unit of political action in the Westphalian system – the nation state. It was claimed that this conflict between human rights and sovereignty makes it necessary to pursue the concept of the nation state, and also point out its role, if any, in a world in which the concept of exclusive state sovereignty is being redefined. Within this field of international relations the process of globalisation was introduced, focusing on Beck’s observation that globalisation is accompanied by a change in the human self-perception. This vitalises some quite new possibilities and one if these is a cosmopolitan society in line with Kant’s suggestions. Thus the agenda was set for Part B of the paper.

The hypothesis to be investigated in part B said that “with globalisation the framework for human rights discourses changes, as globalisation mean not just a change in the human self perception but also that industrial modernity is replaced by reflexive modernity. The consequence of these changes is that some new possibilities

open up, and one such possibility is the creation of the Kantian model of international relations; i.e. a cosmopolitan society.” Chapter 4 gave an interpretation of two of Kant’s most central texts with regards to cosmopolitanism; *The Idea for a Universal History with a Cosmopolitan Purpose* and *Towards Perpetual Peace*, where especially the invention of cosmopolitan law – *jus cosmopoliticum* – was acknowledged. Chapter 5 expanded on the shift towards a more Kantian ethics in international relations, i.e. a so-called solidarist ethics, and it also gave a more profound discussion of the link between Kant and a global implementation of human rights. This took the form of first applying Habermas’ critical assessment of Kant’s *Towards Perpetual Peace*, and second it was adopted a more general perspective from Beck as his thinking on the cosmopolitan society is influenced by the Kant. Chapter 6 have pursued the possible establishment of a new regime of global governance and global law, that of cosmopolitan democracy. This raises concerns about diversity and difference, and thus the possibility of cross-cultural criticism was handled as well. Finally, the cosmopolitan model was shown as a possible third way, and in our case it took the expression of cosmopolitan democracy. Already in the end of this chapter I started discussing the relation between Beck, Habermas and Archibugi. I will now expand on this, and attempt to identify to most important findings of this paper.

The underlying motive power in this paper has been an attempt to find a path from Kant’s cosmopolitanism to a cosmopolitan society. In this attempt there are three points that have been identified. Two of them were mentioned already in the introduction to part B as the presumptions cosmopolitan society has to meet to be a real possibility: i) self experience of global civil society and; ii) basic legal relationships that are universally valid. The third point is Archibugi’s attempt to design a third way between a federalist and a confederalist conception through a cosmopolitan conception of international relations. These points will now be discussed separately.

i) The self-experience of global society necessitates a change of perspective from local to global-local, or ‘glocal’, which refutes that globalisation leads to unification. Beck’s contributions in this matter have been emphasised here, and especially the transition from industrial modernity to reflexive modernity which is

characterised by the new situation of globality. What characterises reflexive modernity is that the world suddenly appears stripped for rules, and that the self has to supply these rules itself. It becomes evident that this is similar to Kant's notion of reflexive judgement which has to find the rule for the particular occurrences itself. For Kant the guiding principle of reflexive judgment is the idea of purposes, or the 'as-if' thinking. So even if we cannot know whether there is a cosmopolitan ideal, we can imagine 'as if' there were one. Beck is arguing in a similar way, saying the cosmopolitan existence is an also-possibility, among others. This is not due to *Providence* as Kant predicted, but comes about through conscious realisation of the necessity of more cosmopolitan institutions to handle the problems facing the world of the second modernity. This change in turn has the effect that globalisation becomes reflexive and puts it on the path towards a world society. Importantly globality gives the situation this reflexive project of the self, and thus the change in self-perception has the consequence that globalisation becomes reflexive. I started out in chapter 5.2 to see whether it was possible to conclude from Beck that the change in the human self-perception means that one important feature of the modern is the cosmopolitan. Based on the notion of second modernity and especially the concept of the 'glocal', there seem to be real possibilities for cosmopolitan visions in this new modernity. The notion of a 'glocal' perspective on the world encourages a positive answer to this question. The consequence is that a solidarist system of international relations might actually be created and thus fulfilling Kant's institutional guarantee – of creating a state of affairs which maintain itself automatically" in which human rights can be institutionalised rights globally. This leads over to the second presupposition.

ii) The step from *jus gentium* to *jus cosmopolitanicum* is a new possibility the world is facing through the process of globalisation. Habermas highlights that we have a historical opportunity to create such a cosmopolitan law, but this necessitates that human rights achieve a legal status as the rights of world citizens as individuals. Moreover, if human rights are genuinely to protect individual rights they must be backed by the coercive and constitutional power of an international court that understands violations of human rights as crimes against an enforceable

cosmopolitan law. I am arguing that the ICC is such an institution, and thus the idea of cosmopolitan law is not just an idealistic idea of a future utopia. It is about to materialise itself in the world, and this gives us, the citizens of the world, a historical opportunity to approach a cosmopolitan existence. Habermas criticises Kant on this point and claims that Kant has a conceptual problem when he at the same time advocates cosmopolitan law, but refuses any form of central authority to enforce this. Instead, Kant relies on man's moral progress. The problem being put forward here is how it is possible to establish and secure a cosmopolitan legal relationship between different states and citizens which reduce the importance of the national state as guarantor, without either striving for a world state in place of the nation states - or placing basic rights in a space without laws or states. In other words, at the same time as we have the insight that the evolution towards a Kantian model of international relations takes place beyond the traditional political, through the redefinition of the individuals self-perception, we also have the insight that if this model is to have real possibilities it need to be implemented as hard law supported by means of enforcement. This necessitates that we need a third way between Beck's horizontal power structure and Habermas' vertical power structure, and one possible solution to this is given by Daniele Archibugi through the model of cosmopolitan democracy.

iii) The model of cosmopolitan democracy is based on the Kantian model of international relations. When creating such a model it is crucial that this is not out of efficiency reasons, which too easily end up as a justification for despotic regimes. Thus any notion of a world state is ruled out, like Beck and Kant has pointed out clearly. The model is avoiding this by establishing two Assemblies, one for the states and one for the citizens, in which the former handles question related to inter-state conflict and the later handles questions relating to human rights and humanitarian interventions. This means that the model is keeping the concept of *jus gentium* at the same time as it is developing a notion of *jus cosmopolitanicum*. Archibugi claims that the first step in approaching cosmopolitan society would be to create a legal institution based on cosmopolitan law, and is by this highlighting the importance of judiciary power in a cosmopolitan society. In this way the model of cosmopolitan democracy

is meeting Habermas' demand for hard law. Thus it seems like the model is doing what it pretends to, i.e. to combine the best from the confederal and the federal models of international relations. But what obstacles are here? My concern is that the model is just that: a model. It is a construction, and I do find that it misses some aspects on how this construction might come about. In order to suggest how this might happen, I will again apply Beck.

Beck is important in relation to cosmopolitan democracy in that he identifies some forces – and possibilities – for a cosmopolitan society. Archibugi on the other hand is just being normative; he is claiming that realism has lead international relations in a blind alley and that we need to seek out other possibilities. In doing this he designs a model of how these relations should be without identifying by which means this can be accomplished. The question he is not asking is 'What are the forces that make cosmopolitan democracy plausible?'. As we have seen Kant did clearly have a concept on how to arrive at a cosmopolitan society through *Providence*, while Beck has his way through the conscious realisation of the necessity of such a society. This in turn is due to a change in the human self perception - a 'glocal' perspective. What Beck is developing is a cosmopolitan vision, which is much in line with what Kant was imagining: It is the necessity that a violation of rights in one part of the world is felt everywhere. With this aspect there arises new possibilities, and one of them is to create the Kantian model of international relations in the form of cosmopolitan democracy. On the other hand, if Beck is wrong – if this change in the human self-perception is not happening, then no new possibilities opens up. It is status quo, and we can not expect an approach towards a more cosmopolitan society. It was given in the introduction to part B that there are two presuppositions which have to be meet for the cosmopolitan society to come about; i) self-experience of global civil society and ii) basic legal relationships that are universally valid. I will take this a step further by claiming that ii) cannot come about without i) either. Thus, again, my articulations of this project rests in it final instance on Beck's claim of a change in the human self-perception. And if this holds, then there are real possibilities for the Kantian model of international society – a cosmopolitan society.

Finally I like to highlight that all this paper has intended is to show the possibility for a Kantian model of international relation based on the concept of cosmopolitan law. This provokes necessarily more questions than answers, and – as Beck is noting – ‘no one has yet come up with an answer to how social justice is possible in the global age’. Kant reckoned that that such problem of a perfect just civil constitution cannot be solved before the problem of a legal relation between states is solved, and that this is probably the last puzzle the human race is going solve as it is the most difficult. So this paper does not pretend to have solved these puzzles. On the other hand, what it does have accomplished is to set an agenda for further debate and inquires on questions relating to the pursuit of the possibility of global justice.

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