Self-determination in international law: A Kantian perspective

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Introduction

Article 1(2) of the United Nations Charter declares that the UN has as one of its purposes to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Similarly, Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) proclaims that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Notwithstanding its status as "one of the essential principles of international law"[1] and as one of the few norms having both *erga omnes* application and arguably a *jus cogens* status,[2] the theoretical foundations of the right to self-determination generally remain unclear and underexplored in most works of international law. Its history is generally portrayed as a fairly linear and logical development from the American and French Revolutions, through Wilson and Lenin, to post-World War II decolonization (Weitz 2015, 467).[3]

A name notably absent in most histories of self-determination is that of Kant. Even when discussing the philosophical ideas surrounding the French Revolution most authors, though they often discuss the likes of Rousseau and Locke at some length, make no mention of Kant or his thought on democracy and popular sovereignty. Kant himself also made little use of the term *Selbstbestimmung*, which appears mostly in his unpublished work (see e.g. OP, VII.VI.4,

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[1] International Court of Justice (30 June 1995), *East Timor (Portugal v. Australia)* (Judgment), *ICJ Reports* 1995, 90, para. 29.

[2] *East Timor*, para. 29; International Law Commission, commentary to Art. 26 ARSIWA, para. 5 (Crawford 2002, 188).

[3] See e.g. Cassese's major monograph on the subject, where he spends only three pages on pre-Wilsonian self-determination (Cassese 1996, 11-13).

AA 22:73; OP, VII.VII.2, AA 22:81–82), and then only in reference to personal and moral self-determination rather than a political context (Weitz 2015, 469).

Although Orford has recently pointed to the trend among historians of international law to claim that "their histories challenge conventional narratives of international law by correcting those narratives or completing them" (Orford 2021, 100), this paper does not attempt to "uncover" a more Kantian history of the right to self-determination that has until now remained obscure. Its main claim is that Kant's theory of public right allows for the construction of a coherent theory of self-determination in international law. Although not explicitly referenced anywhere, a nascent conception of self-determination underlies many of the ideas developed in Kant's political and legal philosophy as they relate to international right. This paper discusses four examples: Kant's emphasis on sovereignty and non-intervention; the relevance of the "original contract" and republican government; his permissive theory of territorial rights; and the role of his proposed "league of nations".

Sovereignty and non-intervention

Kant places a notable emphasis on the importance of State sovereignty throughout his political and legal philosophy. In his explanations to the second Preliminary Article of *Perpetual peace*, which declares that "no independently existing State (whether large or small) shall be acquired by another State", he explains that:

> [A] State is not (like the land on which it resides) a belonging (*patrimonium*). It is a society of human beings that no one other than itself can command or dispose of. Like a trunk, it has its own roots; and to annex it to another state as a graft is to do away with its existence as a moral person and to make a moral person into a thing, and so to contradict the idea of the original contract, apart from which no right over a people can be thought. (ZeF, AA 8:344; Kant 1996, 318)

This passage is particularly enlightening in explaining Kant's views of the State in relation to other States: it is not merely any "object" occupying a certain piece of land, but a "moral person" and as such entitled to a certain amount of respect and non-intervention. Kant clearly establishes a parallel with his ethics: the reference to a State being a moral person which should not be made "into a thing" invokes the idea that one should never treat another human being merely as a means or as an object (cf. GMS, AA 4:429; Kant 1996, 80). Although Kant's remarks are clearly inspired by the practice of entire States being passed on through marriage or inheritance, its foundations reach beyond a mere aversion to such monarchical and hereditary

practices: he explicitly invokes the idea of the "original contract" to which all citizens of the state are presumed to be a party as the basis for the second Preliminary Article.

The fifth Preliminary Article contains another important norm: it declares that "No state shall forcibly interfere in the constitution and government of another state." (ZeF, AA 8:346; Kant 1996, 319) This provision, strikingly similar to the current international legal prohibition on intervention as codified in for example the Friendly Relations Declaration,[4] is not accompanied by as clear a grounding in the idea of the State as a moral person as is the case for the second Preliminary Article. Kant adds that this prohibition on intervention does not apply "if a state, through internal discord, should split into two parts, each putting itself forward as a separate state and laying claim to the whole … (for this is anarchy)" (ZeF, AA 8:346; Kant 1996, 319). In other cases, however, "interference by foreign powers would be a violation of the *right of a people dependent upon no other*" (ZeF, AA 8:346; Kant 1996, 319-320; emphasis added).

The original contract and republican government

As we saw above, Kant grounds his emphasis on sovereignty and his rejection of the idea that a State can be disposed of by inheritance or marriage on the idea that the State is a "moral person" with its own identity. The respect that is owed to States and their peoples is derived directly from the original contract that lies at the basis of the creation of the Kantian State (cf. RL, AA 6:318; Kant 1996, 461-462; TP, AA 8:289 and 297; Kant 1996, 290 and 296-297; Tesón 1992, 70-71): the State is for Kant not a Hegelian "march of God in the world" but inextricably linked to the existence of a people and a territory. We find here an expression of the nascent idea of popular sovereignty in Kant's philosophy, which around the time of writing of *Perpetual peace* found expression in the French Revolution, which Kant famously admired and disapproved of at the same time.

Kant points the importance of popular legitimacy in another context, namely that of the right to wage war. While in *Perpetual peace* the emphasis is more on the "empirical" idea that republican States are less likely to wage war because their citizens have no interest in its

[4] UNGA Res 2625 (XXIX) (24 October 1970). The duty of non-intervention itself has been described as "a corollary of every state's right to sovereignty, territorial integrity and political independence" (Jennings/Watts 2008, 428). The prohibition on intervention in the internal affairs of states by Kant's proposed league of nations (RL, AA 6:343) incidentally also bears a strong similarity to that of Art. 2(7) of the UN Charter (Schilling 1997, 435).

destructive consequences, in the *Doctrine of Right* Kant explicates the ground for requiring the citizens' consent to any wars: "they must always be regarded as co-legislating members of a State (*not merely as means, but also as ends in themselves*), and must therefore give their free assent, through their representatives, not only to waging war in general but also to each particular declaration of war" (RL, AA 6:345-346; Kant 1996, 484; emphasis added). Kant makes a clear reference to his categorical imperative here, both in form of the "ends in themselves" and in the idea that citizens are co-legislators who must consent to such wars (resembling the autonomy / heteronomy distinction).

From this emphasis on citizens' status as co-legislating members of a society, over whom "no right can be thought" without an original contract, another pillar of a Kantian theory of self-determination can be derived: the importance of at least some form of popular consent to the government. The complete disenfranchisement of a population or a part of it, something is patently a violation of this right (Stilz 2015, 8-11; Stilz 2019, 101-104). This applies particularly to the case of a colony – Kant's very definition of a colony is that it does not enjoy an equal status (RL, AA 6:348; Kant 1996, 486) – but it is no different in the case of territories not subject to colonial domination.

The permissive law of territorial occupation

As Kant argues in his concluding remarks to the Preliminary Articles, some of those provisions are "strict right" – that is, they apply without any derogation – whereas others may be implemented with a certain delay – the so-called "permissive laws" (*leges latae* or *leges permissivae*; ZeF, AA 8:347; Kant 1996, 320-321), which "involve necessitation to an action such that one cannot be necessitated to do it." (ZeF, AA 8:348n; Kant 1996, 321) This rather cryptic description involves a situation in which the permissive law does not prohibit a certain action or an existing state of affairs, provided that a state of affairs that is compatible with right is brought about in due course (Ypi 2014, 290).

The consequence of a permissive theory of territory, like the one adopted by Kant in *Perpetual peace*, is that the way in which control over territory was obtained in the past – generally but not invariably by some form of conquest – may itself be in violation of a principle of right (for example, the prohibition on hereditary acquisition or the prohibition on forcible intervention) but is provisionally allowed, provided that the owner of the territory works toward the realization of what right demands (Ypi 2014, 290-291). This is to some extent an extension of one of the basic principles of Kant's theory of private right, namely that no definitive

ownership of land (which for Kant is the basis of all other forms of property; cf. RL, AA 6:262-263; Kant 1996, 414) is possible without "a collective general (common) and powerful will, that can provide everyone [the] assurance" that everyone else will refrain from infringing upon their property; in other words, "only in a civil condition can something external be mine or yours" (RL, AA 6:255-256; Kant 1996, 409).

When applied to possession of land by individuals, this means that everyone who wishes to occupy land ought to enter into a rightful condition with all others around them, creating a State. When applied to such political communities *inter se*, on the other hand, we are not dealing with the private law figures of possession and property but with territorial occupation and rightful sovereignty (Ypi 2014, 291). Just as individuals must enter into a rightful condition between themselves to legitimize their possession under the permissive law, States too have to enter into a rightful condition to legitimize their territorial occupation.

Although the extension of the requirement of a rightful condition to the international level is certainly not illogical, it does raise the question how far it reaches: if the permissive law can legitimize an occupation that is in violation of right, does that mean that colonial occupation, too, can be legitimate? If one takes the principle that the illegality of past conquest does not make current occupation illegal to what seems to be its logical conclusion, one might conclude that Kant does not object against the continuation of colonial occupation.

I do not believe that this is the case. In his discussion of *jus post bellum* Kant states explicitly that "[a] defeated State or its subjects do not lose their civil freedom through the conquest of their country, so that the State would be degraded to a colony and its subjects to bondage" (RL, AA 6:348; Kant 1996, 486). He also condemns the idea of a world State which "extend[s] too far over vast regions" (RL, AA 6:350; Kant 1996, 487) as a "soulless despotism" (ZeF, AA 8:367; Kant 1996, 336). Moreover, as Ripstein has argued, a colony is fundamentally different from merely a part or province of a larger State: it is not a fully participating part of the State and may therefore not participate in decisions on certain crucial matters, including the decision to go to war which, as Kant repeatedly stresses, is one that the people of a State ought to decide on themselves (ZeF, AA 8:350; Kant 1996, 323). Because certain matters are decided for it by another people of what is essentially a different State – Kant makes it quite clear that a colonized people should be considered separate from the people of the metropolitan State (RL, AA 6:348; Kant 1996, 486) – it lacks that "original right, to avoid getting involved in a state of actual war" (RL, AA 6:344; Kant 1996, 483) that all States have (Ripstein 2021, 206-207; cf. Ypi 2013, 169-172).

Another objection against colonialism – and perhaps the most crucial one – relates to the original contract that is, at least hypothetically, at the basis of the Kantian State. If we move beyond the violent beginning of colonial occupation, we are still left with the essence of colonial occupation: that it amounts to rule over a which exists on the earth without it being possible to imagine them as having given their – even hypothetical – consent to the original contract (Van de Riet forthcoming 2025a). They do not have "a will uniting them" (RL, AA 6:311; Kant 1996, 455) with the people of the metropolitan State. A province of a larger State, even if its joining to that State in the past was the results of a violent conquest, generally has as much to say in the government of the State as any other part. A colony, on the other hand, is not: it is ruled over by another State, in the government of which it has no voice (RL, AA 6:348; Kant 1996, 486).

The league of nations

In *Perpetual peace*, Kant famously suggests the creation of an international organization as a solution to the problem of international anarchy. He remarks:

> what holds in accordance with natural right for human beings in a lawless condition, "they ought to leave this condition," cannot hold for States in accordance with the right of nations (since, as States, they already have a rightful constitution internally and hence have outgrown the constraint of others to bring them under a more extended law-governed constitution in accordance with their concepts of right). (ZeF, AA 8:355-356; Kant 1996, 327)

This remark may be quite puzzling given the fact that Kant's idea of the right of nations relies on an analogy between individuals coming together and creating a rightful condition in the form of a State, on the one hand, and States coming together and creating a rightful condition between them in the form of a "league of nations", on the other. In his discussion of the creation of States by individuals, Kant has made it clear that it is permitted to force another into that rightful condition: if my neighbour refuses to join me, I am allowed to use force against him and coerce him into it (ZeF, AA 8:349n; Kant 1996, 322).

The analogy between States and individuals is limited in one major aspect. When individuals leave the state of nature and create a rightful condition in the form of a State, that condition will *always* be an improvement compared to the state of nature, in which there simply is no rightful condition at all. Between several States, this is not necessarily the case: every State – whether republican or despotic – already has a rightful condition in it, and being forced

to join a larger league of States may result in a regression (Kleingeld 2013, 53-54; Mertens 2012, 239). After all, there is no guarantee that a State or a group of States forcing other States to join it – even under the pretension of creating a league of republican States of some sort – actually is such a pacific league, rather than merely a belligerent State or group of belligerent States seeking to annex its neighbours (Kleingeld 2013, 54). In other words, a purported "aggressive republican league" could just as well be an aspiring "world monarchy" in disguise – precisely the sort of "State of States" which Kant has repeatedly denounced (see e.g. RGV, AA 6:34; Kant 2001, 81; ZeF, AA 8:367; Kant 1996, 336).

In the *Doctrine of Right* Kant explicitly reserves for States the impose "new constitution that by its nature will be unfavourable to the inclination of war" on an "unjust enemy" that has been defeated (RL, AA 6:349). This is one major exception to Kant's prohibition on forcible intervention declared in the fifth Preliminary Article. Given Kant's remarks about the relation between a republican form of government and an inclination to peace, it may be tempting to read this passage which gives states a right to force another to adopt a more pacific constitution as legitimating intervention to spread republican constitutionalism (see e.g. Shell 2005, 100). I do not find this interpretation persuasive.[5] Given Kant's rejection of a world monarchy, of forcible intervention in the constitutions of other states, and of the idea of a just war "which would sanction any means to good ends" (RL, AA 6:266; Kant 1996, 418), the idea of waging war "in the name of democracy" seems decidedly un-Kantian. Kant's remarks on the constitution of the "unjust enemy" should not be read as an implicit authorization for forcing another State into the league or as a subtle justification for waging a war of aggression; instead, they should be read in the context of the French Revolutionary wars and the subsequent French attempts to "export" the revolution to neighbouring countries (Eberl 2021, 131-139; Kleingeld 2013, 54-55).

The violent imposition of a republican constitution amounts to the forcible "import" of a new constitution from other countries; as is well known, Kant abhors the idea of a revolution even if he may be sympathetic to its stated goals and its eventual outcome, "for there would then be an intervening moment in which any rightful condition would be annihilated" as a result of this "leap" (RL, AA 6:355; Kant 1996, 491-492). The limited case to which there exists a right to intervene and change the constitution is that of an "unjust enemy" – that is, an explicitly belligerent State whose behaviour constitutes an imminent danger to the surrounding States.

[5] I have discussed Kant's concept of the "unjust enemy" in more detail in Van de Riet (forthcoming 2025b).

Even in that case, the intervention is limited to imposing a constitution that makes the State less likely to wage war against its neighbours in the future. This interpretation also aligns more closely with Kant's own words where he speaks of a people "eine neue Verfassung annehmen zu lassen" (RL, AA 6:350) – that is, "letting it adopt a new constitution" – which clearly suggests that even in the case of such an unjust enemy a people must in the end be allowed to decide upon its own future, rather than having outside powers decide for it (Eberl 2021, 142; cf. Freiin von Villiez 2021, 197-198).

This is another example of the importance Kant's theory of international right attaches to the idea of self-determination of peoples, closely related to his conception of the State as one founded on "lawful *freedom*, the attribute of obeying no other law than that to which [the citizen] has given his consent" (RL, AA 6:314; Kant 1996, 457; note the parallel between this idea of self-legislation and that of moral autonomy). The laws of a State are binding because its people have – at least hypothetically (TP, AA 8:297; Kant 1996, 296) – given their consent to the existence of the legislator through the original contract; forcing a constitution upon a people violates the very idea of that original contract. Similarly, when discussing the appropriate response to the French Revolution, Kant states that "a nation must not be hindered in providing itself with a civil constitution, which appears good to the people themselves" and "that same national constitution alone be just and morally good in itself, created in such a way as to avoid, by its very nature, principles permitting offensive war." (SF, 7:85; Kant 2001, 302) The element of self-legislation by the people – within the State, but particularly relative to other States – and the consequences Kant draws from it are thus another way in which self-determination is reflected in Kant's writings.

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