Two sources of cosmopolitan right

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In this article, I discuss the implications of a famous natural law category for questions of border-crossing mobility and migration,[1] the law and right of hospitality. I fear no anachronism in suggesting that today's migrants, and especially refugees, can have recourse to the notion as used by Kant, given that Kant himself was reacting to a situation in which political conflicts caused mass migration.[2] The debate so far has sometimes registered, but not systematically adressed, an „unbridgeable gap" in the interpretation of cosmopolitan right. In Seyla Benhabib's account, this is a gap between the right to temporary sojourn and the privilege of taking up permanent residency.[3] We need some explanation of how this gap comes about, and to understand it from a systematic point of view. In what follows, I want to draw on two strategies that have not been exploited to a great extent so far. The first is historical and systematic clarification of the two independent, and diverging, motives on which Kant's notion of cosmopolitan right is based. For this strand of the argument, I shall go back to Grotius. My claim is that the controversial character of cosmopolitan right results from the fact that Kant is drawing on two very different sources from the Grotian tradition, two sources which cover different situations and yield diverging normative entitlements.

The second, and complementary, strategy is to insist on a distinction that does not yet play a role in the literature on Kant's cosmopolitan right. This is the distinction between natural cosmopolitan right and public cosmopolitan right. While the distinction between a state of nature among states and a condition of law („rightful condition") is routinely used for

[1] For the purposes of this chapter, by ‚mobility' I understand border-crossing movement, ‚migration' as border-crossing movement followed by residency (though not necessarily permanent).
[2] Pauline Kleingeld, *Kant and Cosmopolitanism.* Cambridge: Cambridge UP 2011, 78. Ingeborg Maus, *Menschenrechte, Demokratie und Frieden*. Berlin: Suhrkamp 2015.
[3] S. Benhabib, *The Rights of Strangers.* Cambridge: Cambridge UP 2004, 38.

explanatory purposes, and while commentators agree that the difference between provisional and peremptory law must be heeded for intra-state and international law,[4] no such duality has been explored for cosmopolitan right. While authors agree that Kant only sketches, in his writings on international law narrowly conceived, the „conditions of possibility of a public peace" (TTP VIII 368), and moves on from the state of nature among states to public international law, there is no awareness that cosmopolitan right likewise stands in need of transcending its origins in natural law, towards an omnilaterally consented and positivized legal condition. If we aim to spell out what Kant's approach can tell us today, as many authors do, the two Grotian sources of his argument must not be taken as yielding fixed results, but interpreted and developed within a transformation of natural law towards global public law.

In the first part of what follows, I want to show how the tension between two options to understand cosmopolitan right grows out of Grotius, one of the historical references for Kant's use of the category of original common ownership. For Grotius, original common ownership has two different functions, one distributive and exclusive, the other collective and inclusive. The category serves to licence private acquisition of some parts of the earth – territory – and at the same time forbids the private acquisition of others – the seaways. I label the first strand the argument from *original possession in common*, the second strand the argument from the *common heritage of mankind*.[5] In the second part, I discuss how Kant draws on both in

[4] Howard Williams, *Kant and the End of War*. Cardiff: Univ. of Wales Press 2011; Oliver Eberl and Peter Niesen, Kommentar. In: Immanuel Kant, *Zum Ewigen Frieden und Auszüge aus der Rechtslehre*. Berlin: Suhrkamp 2011; Heather Roff, Provisional Publicity; Dilek Huseyinzadegan, Rereading Kantian Hospitality for the Present, both in Garrett W. Brown and Áron Telegdi-Csetri (eds.), *Kant's Cosmopolitics, Contemporary Issues and Global Debates*. Edinburgh: Edinburgh UP 2019, 51-69 and 151-176.

[5] The use of this label is of course anachronistic, since it was only in the 1960s, at the initiative of the Maltese diplomat Arvid Pardo, that the phrase „the common heritage of mankind" was introduced into international law. (Wilhelm Kewenig, Common heritage of mankind – politischer Slogan oder völkerrechtlicher Schlüsselbegriff? In I. v. Münch (ed.), *Staatsrecht- Völkerrecht – Europarecht*, Berlin: de Gruyter 1981, 385-406.) Grotius does speak of humankind as „inheritors of one general patrimony" (Law of War and Peace, II.2.2), but goes on to have humans divide it up for their private use. The reason I suggest to speak of „heritage" is that – unlike „ownership" or „possession", however abstract they may be understood – it does not suggest any particular relation toward its object. True, in the eyes of the early modern natural lawyers the commons of the

developing his idea of cosmopolitan right, and I point out the irreconcilable difference between the two sources. In the third part, I discuss three possible strategies for developing cosmopolitan right. While the first addresses the transformation of claims to private property in public cosmopolitan right, thus developing the strand of original possession in common, the second latches onto the idea of a common heritage of mankind. The third somewhat speculatively tries to combine the two, without thereby claiming that its fusion of elements yields a sufficient response to their distinctive characteristics, or to contemporary challenges.

## I. Grotius

Grotius has recently been rediscovered as a theorist of original common ownership by authors like Georg Cavallar, Martine van Ittersum, Mathias Risse, and Johan Olsthoorn.[6] The doctrine of original common ownership of the earth is a normative interpretation of the empirical fact that all human beings reside on the surface of the globe, and that nobody 'originally' had a more stringent claim to a specific bit of territory than their neighbors had. Mathias Risse skilfully plays down the original theological meaning of the common ownership premise, derived from the book of *Genesis*, which is still important for Grotius, but which according to Risse can be substituted by a secular argument: We should regard the earth as our original possession in common since nobody had any part in bringing about its existence. If merit is no criterion that claims to territory can be based on, we should view every human being as

earth is free to be used. But I want to highlight that the heritage relation does not signal a particular form of (common, collective, joint) holding, but may also be consistent with a stewardship relation that may or may not entail specific use rights.

[6] Georg Cavallar, *The Rights of Strangers*. Avebury: Ashgate 2002; Martine Julia van Ittersum, *Profit and Principle*. Leiden: Brill 2006; Mathias Risse, *On Global Justice*. Princeton: Princeton UP 2012; Johan Olsthoorn, Two ways of theorising ‚Collective Ownership of the Earth', in J. Penner & M. Otsuka (eds.), *Property Theory. Legal and Political Perspectives*. Oxford: OUP 2018, 187-214.

equipped with a „symmetrical“ claim to ownership. Risse makes clear that his distributive argument is valid only for those objects that nobody had a share in producing. In contrast, for things „whose form of existence depends on human interference, it is not generally true that of any two individuals, neither has a stronger claim to them.“[7] The argument from original common ownership Risse extracts from Grotius‘ opus magnum *On the Law of War and Peace* (*De Iure Belli ac Pacis,* 1625). I myself want to draw on a discussion of the same category in an earlier work, *The Free Sea* (*Mare Liberum*, 1609), a pre-published chapter of the posthumously discovered *De Iure Praedae* (*On the Law of Prize and Booty*, 1868). In fact, sections one and five of *The Free Sea* can be read as a *preçis* of the later argument in *On the Law of War and Peace,* but *The Free Sea,* in contrast to the bulk of Grotius‘ *opus magnum,* foregrounds non-appropriation.

Risse highlights how Grotius draws on the idea of original common ownership in order to spell out the conditions under which a global commons could have been divided up and distributed, and what kind of limits all acts of privatisation would have had to respect. As to principled limits to apropriation, he references the fact that the idea of unowned and unownable spaces is still relevant today in the Law of the Sea, the Law of the Seabed, the Law of the Antarctic and the Law of Aerospace.[8] But Risse is exclusively interested in the distributive and redistributive claims individuals have on the basis of their stake in the original common ownership of the earth. He sees that our contemporary global order of states and of individual private property heavily restricts many people’s access to land and to resources, and asks what corrective implications the principle of original common ownership yields for the global property order, given contemporary challenges of migration, climate refugees, claims to

[7] Risse, *On Global Justice*, 114.
[8] Risse, *On Global Justice*, 89.

natural resources, a human right to water, and so on.[9] Just as Grotius derives a right, in *Law of War and Peace,* to violate private property in situations of necessity, Risse concludes that all humans must be given the opportunity to satisfy their basic needs out of humanity's common stock. If this should prove impossible – for example, if the original territorial commons has all been divided up, or if state borders restrict their mobility – there exist obligations of justice and reason on the part of those who profit from privatisation to satisfy those needs.

While the idea of original common ownership, in Grotius' *De Iure Belli ac Pacis* as well as in Risse's *On Global Justice*, is mainly used to derive distributive consequences from unilateral acquisitions, *Mare Liberum,* as its name suggests, is about the *limits* to privatisation. It starts out by claiming that „it is lawful for any nation to go to any other and trade with it", deriving from it „that most sacred law of hospitality", i.e. subjective rights to passage, contact, trade, pilgrimage, and residence.[10] Grotius quotes and relies on Francisco de Vitoria's *Relectio De Indis*, where the same bundle of rights was awarded to travellers. Although *Mare Liberum* acknowledges that subjective entitlements to property acquisition follow from original common ownership of the earth, it is largely concerned with setting limits to such entitlements by postulating counter-entitlements, in this case the right of the citizens of the Low Countries to make use of the high seas for navigation, fishing, and making prizes. Its central section sets out two claims:

> The first is that those things which cannot be occupied or were never occupied can be proper to none because all propriety has his beginning from occupation. The other is that all those things which are so ordained by nature that anyone using them they may nevertheless suffice

[9] Besides his *On Global Justice*, see Mathias Risse, The Human Right to Water and Common Ownership of the Earth. *Journal of Political Philosophy* 22, 2, 2014, 178-203.
[10] Hugo Grotius, *The Free Sea*. Transl. R. Hakluyt, ed. D. Armitage. Indianapolis: Liberty Fund 2004, 10-12.

> others whomsoever for the common use are at this day (and perpetually ought to be) of the same condition whereof they were when nature first discovered them.[11]

Grotius' idea is that insofar as the world belonged to all, certain things are „*publica iuris gentium*: that is, common to all and proper to none".[12] They cannot be claimed as private property, given they afford to offer all humans a ‚symmetrical' right, to use Risse's phrase, to their use. In his attempt to identify things that qualify for general and common use, Grotius formulates two criteria. The first is technical-scientific: things that cannot be occupied or controlled cannot be acquired. More important than this first, pragmatic barrier to acquisition, which can ostensibly be overcome by technological advancement, is the second criterion. Everybody who uses a common good in a way that all others can, must leave such use open for others in permanence. The supposition of compossible use is of course not unproblematic. Although Grotius insists that it covers navigation as well as fishing, it is easy to see that insofar as intensive fishing is liable to exhaust the oceans, his argument will not go far toward resolving conflicts over fisheries.[13] The argument is more useful with regard to seafaring, a practice that „may nevertheless suffice others whomsoever for the common use", such that the oceans should therefore perpetually remain in common ownership. But already the differentiation between fishing and seafaring leads us to second-guessing Grotius and to suspecting that one and the same object (the sea) could appear among the things that qualify for common ownership in one respect, though not in another, depending on the use one is making of them. Also, if Grotius accepts that fishing will exhaust the oceans, then the question

[11] *The Free Sea*, 23. The original Latin of the second part is: "Alterum vero, eas res omnes, quae ita a natura comparatae sunt, ut aliquo utente nihilominus aliis quibusvis ad usum promiscue sufficiant, eius hodieque condicionis esse, et perpetuo esse debere cuius fuerant cum primum a natura proditae sunt."
[12] *The Free Sea*, 24.
[13] *The Free Sea*, 25. As William Welwood and John Selden were quick to point out. William Welwood, *Of the Community and Propriety of the Sea* [1613], in Hugo Grotius, *The Free Sea*. Ed. David Armitage, Indianapolis: Liberty Fund , 65-74, 67ff. Cf. John Selden, *Mare Clausum seu De dominio maris* [1619], London: Ricardo Meighen 1635, repr. London 2004.

is whether the use of the global commons can be regulated without its ceasing to remain a common heritage of mankind.[14]

The two elements of Grotius' account of original common ownership spring from two distinct principles. The first governs unilateral acts of acquisition from original possession in common, and the potential subsequent compensation owed under natural law (Grotius) or justice (Risse) to those who start out propertyless, or have remained so, or are temporarily unable to meet their basic needs. These are re-distributive claims owed under the law of necessity (Grotius) or the normativity of basic needs (Risse), and they result from precipitate or excessive annexations. The second principle governs goods that cannot and ought not be appropriated, because if they were to be privatised that would keep *humani generis societatem* away from *volentium populorum commercio*, or, in Hakluyt's translation, „intercourse and interchange".[15] However different both principles are, the private acquisition from original possession in common and the guarantee of its free-for-all use, they both appear to overlap in an important point, the right to free passage. In both *Mare Liberum* and in *De Iure Belli ac Pacis,* Grotius explicitly invokes the right to passage, in the latter case including the use of the highway, as Jochen Bung has highlighted.[16] Foreigners are to register or apply for the use of the highway, but even if they do not receive permission, they are free to use it.[17] The highway, however, in contrast to the free ocean, is not a necessarily unowned thing for the existence of which nobody is responsible. Risse's reconstruction that original

[14] This ambiguity weighs heavily on all attempts to draw consequences from the international legal category of the „common heritage of mankind". Besides the criteria of non-appropriation, co-management and preservation, Pardo suggested that the exploitation of the heritage of humanity should be to the benefit and in the interest of all nations. For a comprehensive account, see Klaus Dieter Wolf, *Die dritte Seerechtskonferenz der Vereinten Nationen.* Baden-Baden: Nomos 1981.
[15] The Free Sea, 11.
[16] Jochen Bung, Naturrecht – Völkerrecht – Weltrecht – Der Code des Hugo Grotius, *Archiv des Völkerrechts* 55, 2, 2017, 125-147, 144.
[17] See Grotius, *The Law of War and Peace*. Indianapolis: Liberty Fund 2005, bk. II.2.13; 13.3.

possession in common comprises all those things that have been produced by nature alone, cannot (exceptions like natural roads excepted) be applied to traffic infrastructure. Thus we turn from Grotius to Kant, equipped not with a two-fold, but with a tri-partite distinction. First, *privatisation*: From the idea of original common ownership of the earth, extensive rights to transformation into private property follow, with some distributive constraints attached in case of human need. Second, *non-privatisation*: From the idea of a common heritage of mankind, it follows that there is a right to common use in permanence of unowned goods, the key example being the sea as traffic route. Finally, *public use of privatised infrastructure*: In the rare cases in which both principles find application, such as practices of communication and transportation traditionally comprised by a right of free passage, their combination seems to yield an enigmatic further entitlement to the omnilateral use of unilaterally approriated objects.

## II. Kant's Cosmopolitan Right

In the next section, I briefly distinguish Kant's idea of „cosmopolitan right", a notion he himself introduced in 1795, from its Grotian predecessor account (1). In a next step, I discuss the relevance of the argument from original possession in common (2), before I turn to its counterpart from the common heritage of mankind (3).

(1) Kant's account differs from Grotius' in methodology, content, and political ambition. First, he uses the idea of original common ownership as an idea of reason (or „pure rational concept"), while it seems fair to say that Grotius, along with the scholastic tradition, had used it as a historical category, describing the actual process of carving up the globe by different proprietors, and capable of guiding the actions of the Dutch seafarers at owned or un-owned

shores. For Kant, original common ownership is less a ‚possible history' (Nozick) invoked for legitimatory purposes, than a normative framing of our current situation in which we contemporaries ought to think of each other.

Second, Kant no longer uses the idea of ‚original common ownership of the earth' in the context of the law of necessity, where it could be invoked to trump the *pro tanto* justification of all claims to private property.[18] His goal is to use the category of original common ownership to increase, not decrease international legal security and open up a way toward a lasting cosmopolitan law, as a part, alongside public international law in the narrow sense, of a „cosmopolitan constitution".[19] Given that the law of necessity authorises claimants to use force for self-preservation, the step from Grotius to Kant is therefore at the same time one from self-help in international law to the implementation of impartial institutions that are to exclude such self-help. This entails that in Kant, the doctrine of cosmopolitan right is not only purifying the doctrine of *ius ad bellum* in doing away with border-crossing private claims to property,[20] but part of an omnilateral transformative *Codex* (AA XXIII, 175). I will make some suggestions as to the content of this international Code in the final section of this chapter.

Third, only Kant would introduce the third definitive article and cosmopolitan right by explicitly limiting it: „'Cosmopolitan right shall be limited to conditions of universal hospitality'" (TPP VIII, 357). Its limits are to push back the colonial abuses of earlier formulations of global mobility rights. Neither Vitoria nor Grotius believed that strangers were under strict rules of non-acquisition, which is why *De Indis* and *De Iure Belli ac Pacis* had immediate pro-colonial implications. Moving on from Vitoria's view that parts of the globe were *res*

[18] Oliviero Angeli, *Cosmopolitanism, Self-Determination and Territory: Justice with Borders*, Basingstoke: Palgrave 2015, 5 and fn. 6.
[19] See Kant's essays on Theory and Practice and Toward Perpetual Peace, AA VIII 307; 358.
[20] Christopher Meckstroth, Hospitality, or Kant's Critique of Cosmopolitanism and Human Rights. *Political Theory* 46, 4, 2018, 537–559.

*nullius*,[21] Grotius' treatment of them as *res omnium* still preserved the legitimacy of European expansionism. As Howard Williams has shown, Kant's limited cosmopolitan right was to exclude all claims to territorial appropriation and to taking up residency,[22] since such acts, even under Kant's own conception of private right, could trigger processes of legitimate defense and legitimate colonisation. Kant was well aware that a right to unilateral *prima occupatio* would give the Europeans a claim to introduce statist orders outside Europe.[23] It is its anti-colonial purpose that entails that cosmopolitan right should be seen as a right to contact others, not a right to take up residence. In order to settle down under principles of public law anywhere on earth, a contractual agreement is necessary. The request to take up residence can be turned down, and contact can be ended, while no justification is owed to the unsuccessful applicant. The candidate can be rejected as long as she need not fear to „perish" (*Untergang*). The core of cosmopolitan right is thus said to lie in the international legal principle of „non-refoulement". [24]

The narrow confines of the subjective right to hospitality have been extensively discussed in recent literature. Authors have generally attempted to interpret Kantian hospitality extensively, reflecting the moral seriousness of the claims of non-member applicants. Pauline Kleingeld, for example, argues for a broad interpretation of „perishing" and suggests a „development" of Kant's argument in the sense of its „reasonable" extension.[25] Despite the

[21] Ascribing this notion to Vitoria appears justified although the phrase 'res nullius' does not come up in his works. See the discussion in Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000*. Cambridge: Cambridge UP 2014, 51-58.
[22] Williams, Kantian Cosmopolitan Right, *Politics and Ethics Review* 3, 1, 2007, 57-72.
[23] Exceptions excepted, e.g. the occupation of uninhabited land, unconnected to existing habitations. On Kant's critique of colonialism s. Peter Niesen, Colonialism and Hospitality, *Politics and Ethics Review* 3, 1, 2007, 90-107. For a more historically nuanced view, Pauline Kleingeld, Kant's Second Thoughts on Colonialism. In Katrin Flikschuh & Lea Ypi (eds.), *Kant and Colonialism: Historical and Critical Perspectives*. Oxford: Oxford University Press 2014, 43-67.
[24] Jörg Paul Müller, Das Weltbürgerrecht. In Otfried Höffe (ed.), *Metaphysische Anfangsgründe der Rechtslehre*. Berlin: Akademie 1999, 272-292.
[25] Kleingeld, *Kant and Cosmopolitanism*, 78-9.

lack of a duty to justify rejection in Kant, she argues that arbitrary or discriminatory reasons ought to play no role in the acceptance or rejection of applicants, and that the notion of „perishing“ is to cover not only the loss of life, but also the loss of applicants‘ physical or psychological integrity. It is not just the responsibility for survival that is shifted to the society debating the acceptance or rejection of an applicant: The receiving society owes the new arrivals a concern with their fundamental interests, and they must abstain, Kleingeld argues, from rejecting them based on unacceptable reasons.

The extension Kleingeld proposes is certainly reasonable, and would go some way toward reducing the „unbridgeable gap“ diagnosed by Benhabib, in that it rejects the use of certain types of reasons for the termination of migrants‘ residency. But besides the methodological problem that Kleingeld attempts to determine by means of natural law reflection the extension of claims that would have to be fixed omnilaterally, in public cosmopolitan right, there is also the problem that her proposal, as long as it does not reflect the purpose and function of cosmopolitan right, cannot explain the diagnosed gap between entitlements, between the entitlement to visit and the absence of an entitlement to stay. What is it about the normative source(s) of cosmopolitan right that necessitates interpreters to resort to *ad hoc* measures in order to extend its scope and reduce the gap between temporary sojourn (which is covered by cosmopolitan right) and permanent residency (which is not)?

(2) What explains the diagnosed abyss are two conflicting sources in Kant’s justification of cosmopolitan right from original common ownership of the earth. My claim in this chapter is that they go back to the two halves of Grotian natural law and point in two irreconcilable directions. Kant‘s first motive is that everybody has to be able to be somewhere, rightfully. His second motive is that every person is entitled to voluntaristically strike up contact with everybody else. While the first motive is based on Kant’s understanding of spatial freedom

and intelligible property, the second relies on a broad notion of free *commercium* and serves as a basis for a community of communication. I explain both motives in turn, starting with freedom and property, and moving on to communication and contact, in the next subsection (II.3).

Both justifications for cosmopolitan right argue from the empirical conditions under which humans find themselves on the globe. In so far, Benhabib is right to refer to spherical nature of the earth as no more than a „circumstance of justice".[26] But the empirical fact that humans cannot but exist under conditions of co-existence with all others on the finite surface of the earth cannot fail to take on a justificatory function, given how it relates people to each other. Hence the first justification for cosmopolitan right is that it is owed to all humans „by virtue of the right of possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely" (TTP VIII 358). The „spherical shape of the place they live in" (MM VI 352) entails that any ownership of territory/land can be thought only „as possession of that to which each of them originally has a right" (ibid.). The reference to the fact that everybody „originally has a right" must not be read as justifying any property claims to circumscribed plots of land. On the contrary, it is meant to underline that „originally no one had more right than another to be on a place of the earth" (TTP VIII 358), i.e. to stress that there are no innate property claims, only provisionally and controversially acquired ones. What precedes them is, as Jakob Huber has shown, the original entitlement of humans to be somewhere.[27] This entitlement is vindicated through the idea of common ownership:

> All human beings are originally (i.e., prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever

[26] Benhabib, *The Rights of Others*, 33.
[27] Jakob Huber, Cosmopolitanism for Earth Dwellers: Kant on the Right to be Somewhere, *Kantian Review*, 22, 1, 2017, 1-23.

> nature or chance (apart from their will) has placed them. This kind of possession (*possessio*) – which is to be distinguished from residence (*sedes*), a chosen and therefore acquired lasting possession – is a possession in common because the spherical surface of the earth unites all the places on its surface. (...) Original possession in common is ... a practical rational concept which contains a priori the principle in accordance with which alone people can use a place on the earth in accordance with right. (MM VI 262)

Negatively, the lack of permanent property claims on the place where one is located follows from Kant's theory of imputation. It says that a deed must precede the legal allocation of any entitlement, since free, intentional activity is a condition for a circumstance to have consequences in law.[28] Positively, in Huber's reading, Kant deduces cosmopolitan right exclusively from the necessity for extended bodies to take up space on the earth's surface. It is a merit of Huber's interpretation to have separated the justification of cosmopolitan right from the fulfilment of needs, thus rejecting the sufficentarian reasoning that pervades Grotius right of necessity and, no less, Risse's obligations of justice. Huber reads relations of cosmopolitan law exclusively as relations within a „community of possible physical interaction" (MM VI 352).[29] Only extended beings, not pure intelligences (angels, self-learning algorithms) can claim cosmopolitan right on the basis of original possession in common, but their needful nature does not come into it.

Huber's further claim is less convincing. According to Huber, interaction under cosmopolitan right is „external (as located in time and space), but not property-mediated."[30] Of course, living beings take up space, such that no two people can be in the same place at the same time. Moving bodies need to coordinate. But Huber's interpretation ignores the further

[28] MM 251; cf. Leslie A. Mulholland, *Kant's System of Rights.* New York: Columbia University Press 1990.
[29] Huber, Cosmopolitanism for Earth Dwellers, 20. He rightly criticizes the need-based argument that I had put at the basis of the rights of shipwrecked claimants of cosmopolitan right (in an unpublished paper on transnational freedom of speech).
[30] Huber, Cosmopolitanism for Earth Dwellers, 2.

complication, without which the right to be somewhere cannot arise, namely the relevance of property rights and political government for the legal status of being physically present. He ignores the fact that the earth has been divided up into political segments of territory and chunks of private landownership, such that cosmopolitan right is to regulate legal compossibility even where physical compossibility (not bumping into each other in corridors) can be taken for granted. To enter a space, or remain where one is at, only become legally relevant circumstances through the fact that somebody else – a private individual, a state – has taken a plot into their possession. At sea, or on unclaimed desert tracks, such conflicts will not arise.[31]

The property-mediated character of the right to be somewhere, derived from original possession in common, can be illustrated with Kant's description of what happens when a child is born. The parents have "brought a person into the world without his consent and on [their] own initiative", i.e. without a deed on the part of the new arrival. This qualifies the child for cosmopolitan status: Its parents "brought not merely a worldly being but a citizen of the world" into a legally relevant condition (*herübergezogen,* MM VI 280). The child never chose to be born into some particular place on earth, therefore her physical presence, even if the land should be owned by somebody else, cannot be illegal.

Cosmopolitan claims are like newborn children's (MM VI 281) in that they react to the problem of "possible physical interaction" in bounded space, given the pre-existing institutions of territorial statehood and territorial property (either of which would have been sufficient to

[31] At the same time, Huber's spatio-temporal argument is incapable of accounting for the humanitarian element in cosmopolitan right, the fact that responsibility for the survival of the newly arriving human shifts to the receiving community. I develop the point vis-a-vis Arthur Ripstein's interpretation of cosmopolitan right in Peter Niesen, Vulnerability, Space, Communication: Three Conditions of Adequacy for Cosmopolitan Right, in: *The Public Use of Coercion and Force*, Ester Herlin-Karnell & Enzo Rossi (eds.). Oxford Unversity Press: Oxford 2021, 64-77

trigger such claims). Without institutions such as these, it is hard to see how claims to the legality of presence could ever be necessary. At the time when Kant writes *Perpetual Peace* and the *Doctrine of Right* (in 1795 and 1797), the globe has already been carved up to a large extent among private owners, states, and non-state peoples who have secured parts of the earth for themselves, however unilaterally, in the sense of provisional appropriation or in the sense of criminal annexation. This entails a problem for latecomers like children or migrants. If the ground has been divided up among territorial authorities or property-holders, physical presence can no longer be the first step to converting a claim into provisional property. The shipwrecked person, washed ashore by the waves, will find herself always already on somebody else's ground. The dividing-up of the earth would then lead to the potential state of affairs that somebody could not legally be present anywhere on earth. This scandalous result is averted by the existence of cosmopolitan right. It results from our presence on a limited and circumscribed, largely privately owned and territorially controlled, globe.

However, the claiming of subjective cosmopolitan right from original possession in common so far relies on a hidden third premise which we must now make explicit, and which severely restricts its application for the phenomena of refuge and migration. Cosmopolitan right is yielded from possible physical interaction insofar presence is unintentional or non-voluntary. Original possession of land yields a title to be somewhere whenever "nature or chance" has placed people there (MM VI 262). If somebody could possibly be legally present at point A, but is actually at point B, her rights will not automatically be violated when rejected at point B. The relevance of this point is obscured by Kant's apparent narrowing of the voluntariness criterion to voluntary arrival, as opposed to voluntary stay. Kant starts the third Definitive Article with a formulation that is neutral between voluntary and involuntary presence: one should not be treated with hostility „because one has arrived on the land of another".

Freedom of rejection seems warranted for both voluntary and involuntary arrivals, and not just for voluntary ones. Likewise, the constraint that the new arrivals must not be left to perish seems to apply to both voluntary and involuntary arrivals. However, in preparatory remarks, Kant seems to derive it from unintended (*unwillkürlich*) attempts at contact:

> Wer diesen [Versuch, *attempt,* PN] Willkührlich macht kann allerdings von den Einwohnern abgewiesen aber nicht bekriegt werden der aber unwillkührlich dahin verschlagen wird (ein Schiff das im Sturm einen Nothhafen sucht oder ein gestrandetes Schiffsvolk) kann nicht von den Küsten oder Oase wohin er sich gerettet hat in die drohende Gefahr wieder verjagt noch weniger erobert werden sondern muß bis zur günstigen Gelegenheit der Abkunft daselbst seinen Aufenthalt finden können. (VN XXIII 174)

This passage clarifies that involuntary presence can be terminated in the same way that voluntary presence can, as soon as danger has subsided, and for its legality depends wholly on the risks of rejection. But certainly, Kant did not think that voluntary visitors, in contrast to involuntary ones, could be exposed to storms or other dangers. It seems more plausible to connect involuntariness with the impossibility of a safe departure, independently of the vicissitudes of arrival.

However, the mobility rights that can be derived from the right to be somewhere seem limited if they only accrue to involuntary presence (whether arrival was by intent or not). Of course, it is possible to interpret refugee status as a marker for non-voluntary presence. In contrast, if we are only concerned about voluntary presence, it will not matter whether the country of arrival is reached involuntarily, since more often than not there will be a number of potential countries of arrival; this distinguishes seeking refuge from being shipwrecked. Nevertheless, the constraint not to leave applicants to perish yields the humanitarian aspect of cosmopolitan right – it follows from the contingency of having arrived somewhere, not from the spurious involuntary character of movement. Huber's ingenious reading fails to include an explanation

for why a right to be somewhere should be connected with such a humanitarian claim: it seems hard to derive, from the right to be somewhere, more than a severely limited claim not to be blamed or expelled in cases of involuntary presence. Huber's interpretation, in elegantly separating Kant's account from all connection to human needs, pays for this in deriving a reduced scope.

(3) But ostensibly Kant is very much interested in deriving a universal human right to mobility (though not a universal right to immigration) from the figure of original common ownership of the earth. This brings me finally to the other, heterogeneous and freestanding source of cosmopolitan right. This second source is designed as a voluntaristic option. It supports a concern for communication among strangers, for „offering to engage in commerce with any other" (MM VI 352), i.e. trade, talk, pilgrimage, guest lecture etc.; in a next step „offering oneself for society" (TTP VIII 358), i.e. seeking inclusion in a polity. Subjective entitlements to communicative offers extend only to the „conditions which make it possible to seek commerce with the old inhabitants" (TTP VIII 358), they do not secure the success of such attempts. In cases of success, emerging communicative relations are then to contribute to the realisation of a global legal condition, since „[i]n that way distant parts of the world can enter peacably into relations which bring the human race ever closer to a cosmopolitan constitution." (ibid.) Already in *Mare Liberum,* Grotius had accentuated this second justification for sailing toward each other and for striking up acquaintance and commerce: „How ... unjust is it therefore for any that are willing to be secluded from intercourse and interchange with people that are also willing", on the basis of a „society of mankind".[32] Kant is clear that the second justification

[32] *The Free Sea*, 11. "They, therefore, that take away this [i.e. freedom to sail ... and entertain traffic], take away that most laudable society of mankind" (ibid.).

relates to a "*surface* of the earth" on which earth dwellers can *move*[33] and presupposes the integrity of traffic routes, as he underlines in preparatory writings for *Toward Perpetual Peace*:

> [There] exist uninhabitable passages of the earth's surface such as the sea or the deserts which belong to no-one – [they] separate the community of mankind but in a way that ships, in the first case, or camels (the ships of the desert), in the second case make possible the visiting of one people by another (VN XXIII 173).[34]

In *Toward Perpetual Peace* itself, Kant explains that humankind collectively have „the right of the surface" at their disposal in order to use it for „possible travel (*möglichen Verkehr*)" (TTP VIII 358). In sum, the surface of the earth is to serve all humans as a medium for communication and mobility.[35]

In earlier work, I have overly dramatised the freestanding character of this second justification in arguing that Kantian cosmopolitan right *is* a communicative right.[36] It is more than that, as can be seen from its humanitarian and spatial dimensions. Yet its communicative dimension founds the claim, for each and every human being, to connect with each other across state boundaries, in order to convey content, make offers or promises, or phrase requests. The obvious counterexamples of China and Japan, to whom Kant concedes they may exclude strangers, can then be interpreted as exceptions based on the experience of injustice, or as

[33] TTP VIII 358; my emphasis, PN. In contrast, MM VI 352 has "ground (*Boden*)" – a resource on which earth dwellers can *live*.

[34] Transl. PN. „Unbewohnbare Strecken der Erdfläche dergleichen das Meer und die Sandwüsten sind die keinem angehören trennen die Gemeinschaft der Menschen doch so daß die Schiffe in dem ersteren und das Cameel (das Schiff der Wüste) in den anderen den Besuch eines Volks von dem Anderen möglich machen." Kant alludes to the world-historical function of the camel also in the first Addendum to Toward Perpetual Peace, where „salzigen Sandwüsten doch noch dem Kamel [dienen], welches zur Bereisung derselben gleichsam geschaffen zu sein scheint" (TTP VIII 363).

[35] It could be objected that cosmopolitan right does not give every human being the right to attempt communicating with every other human being on earth, since for inhabitants of landlocked countries this would entail a right to violate other countries' borders in the service of universal mobility. I try to rule out this counterexample in subsection III.3. below, where I discuss the public use of private or state-funded infrastructure, but must stress that this is a development of Kant's position. I thank Daniel Häuser for the objection.

[36] Peter Niesen, *Kants Theorie der Redefreiheit*, Baden-Baden: Nomos 2nd ed. 2008, chapter III.

limits to certain risky modes of communication like commercial speech or missionary religion (TTP VIII 359; XXIII 174). However, what the hypostatisation of communicative claims to separate rights ignores is the question in how far global attempts at contact and communication are themselves spatio-temporal phenomena. For Kant, communication spanning the globe is unimaginable without the physical presence of at least some travellers somewhere, while today's communicative technologies provide the in-principle infrastructural capacities to install bilateral relations of communication between any two earth dwellers, anywhere.

In order to secure more than an entitlement to dis-embodied communication, the justification of the cosmopolitan right to universally attempt contact seems to require, as its complement, a corresponding right to physical presence or to potential physical interaction. Still, the combination of the two seems shaky and unstable, given that receiving the full benefit of the right to be somewhere, combining its spatial and its humanitarian aspect, is based on a type of contact that persists involuntarily. The shipwrecked person, protected by cosmopolitan right, may not even want to be where she is, while the intentional and voluntary exercise of a right to communicate will not yield the circumscribed right to be present that the shipwrecked person enjoys. As a matter of technological evolution, a claim to strike up universal communicative contact, make suggestions and offer oneself to community everywhere, with a little institutional fantasy could be satisfied in a world in which nobody has a right to physical mobility except in order to escape danger to life or limb. To be sure, every person would still have a right to make communicative offers to every individual and collective including the right to have an application for residence or community elsewhere processed, but such applications could be routinely turned down without falling foul of cosmopolitan right. Think of extra-territorial visa applications and immigration claims to Europe from holding centres in

North Africa, which would not be obviously incompatible with granting cosmopolitan right in its two dimensions, the right to be somewhere and the right to make communicative offers.

One defect of Kant's conception, then, lies in the fact that the communicative entitlement to *seek institutional access* (in other words to secure inclusion into a polity by way of a residence permit), can be separated off from one's physical presence on the territory, since it relies on the argument from the *common heritage of mankind*, not on the argument from legal physical presence under conditions of unilateral annexation of territory, i.e. the argument from *original possession in common*. Global freedom of communication could be vindicated even where such applications can routinely be turned down, bringing voluntary border-crossing mobility to zero. That Kant's cosmopolitan right cannot be understood other than as leading to aporias for our contemporary questions results from the decoupling of two elements that go into the justification for protected sojourn: the demand for compensation for denying people a share in *prima occupatio,* coming out of our elementary stakes in *original possession in common*, and access to the *global infrastructure of communication,* part of our *common heritage as humans,* which must likewise be accessible for all. Kant ties a mute humanitarian right to be present, however involuntarily, which has no plausible interface to a right to have one's application for community considered, to a non-humanitarian, thus easy to reject, right to application that flows from the desire for free universal interaction and contact. The two normative sources do not flow into each other; this is one reason why the abyss between temporary sojourn and residence in permancy cannot be bridged.

## III. Normative Consequences: Correction of Property Regime or Guarantee of Traffic Infrastructure?

Although the two sources of cosmopolitan right will not flow together to yield a plausible and unified commitment, both independent arguments can be developed further, and I want to end the paper with three constructive suggestions, which stray from the interpretation of Kant's works. I hope that they will not diverge from Kant's systematic architecture of law, since Kant consistently calls for a transformation of provisional into peremptory law by way of transforming a state of nature (between individuals or between states) into a condition governed by public law.[37] The normative consequences that each argument can yield are as different as the two Grotian motives that Kant fuses in his single category of cosmopolitan right. They range from a global revision of the allocation of private property (1) to the guarantee of the integrity of traffic routes (2) to a possibly complicated junction between them (3). My remarks are meant to be indicative of possible routes of argument, but cannot claim to provide those arguments already.

(1) Corrections to the global property regime

The first suggestion starts from humans' involuntary spatial localisation given persistent threats, and continues to project their unavoidable predicament onto Kant's theory of property. Kant distinguishes between unilateral and *provisional* annexation on the one hand and the generally consented and *peremptory* omnilateral ratification of property claims on the other. The literature is characterised by an interminable conflict as to how extensive the correction of unilaterally acquired provisional possession can, or will, turn out to be under

[37] Christopher Meckstroth denies that cosmopolitan right is to be institutionalised in the way that state law and international law are. He sees the function of cosmopolitan law as exclusively negative and pacifying, as doing away with one particular reason for just war. This historical purpose of cosmopolitan right notwithstanding, it should not blind us to drawing systematic consequences from the indeterminacy and non-binding nature of natural cosmopolitan right. See Meckstroth, Hospitality, or Kant's Critique of Cosmopolitanism and Human Rights. *Political Theory* 46, 4, 2018, 537–559

Kant's conceptual pair.[38] For our purposes, it is important that the necessity of subjecting property claims to an omnilateral will holds not only at the domestic, but also at the global level. In the *International Law* passages of the *Doctrine of Right,* Kant claims that "any right of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely provisional. Only in a universal association of states (analogous to that by which a people becomes a state) can rights come to hold conclusively and a true condition of peace come about." (MM VI 350) Now the obligation to proceed to a post-provisional *international* property order (as an order among states) does not immediately yield the conclusion that a similar order is to be developed as a matter of *cosmopolitan* right, i.e. between nations and individual strangers (i.e., for cosmopolitan right).[39] On the other hand, we have seen that the property relevance of humans' predicament to be physically present on *some* territory gives birth to cosmopolitan right. Thus it is plausible to interpret Kant as saying that the development of cosmopolitan right from provisional to peremptory, i.e. from private to public law, which again is the same as to say from natural to positive law will not necessarily leave the global property order unaffected. One reason for this reading is that the distributive consequences of provisional appropriation have historically been so all-permeating and exclusionary that the right to be somewhere at some stage will have to be vindicated by a corrected or new allocation of territory. Another reason is that cosmopolitan law, no less than international law, relates to colonial and imperial violations of original property orders that may have to be set right. If cosmopolitan right in its permanent, peremptory sense is thought

[38] For two positions on opposite ends of the spectrum, see J. Hruschka and B. Sharon Byrd's libertarian interpretation in their book-length commentary *Kant's Doctrine of Right*. Cambridge: CUP 2011; and Merten Reglitz' redistributivist A Kantian Argument Against World Poverty. *European Journal of Political Theory* 18, 4, 2019, 489-507.

[39] I argue for the systematic necessity of the category of public cosmopolitan right, and the political necessity of its development in Peter Niesen, 'What Kant would have said in the refugee crisis', *Danish Yearbook of Philosophy* 50, 2017, 83-106 and in Peter Niesen, Restitutive Justice in International and Cosmpolitan Law, in K. Flikschuh & L. Ypi (eds.), *Kant and Colonialism*. Oxford: OUP 2014, 170-196.

of as the corrected version of an exclusionary or historically compromised property order, large-scale demands across borders are to follow.

(2) Some things (e.g. the *mare liberum*) are not apt to be privatised because they should remain open for everybody's use. They should be converted into public stock and permanently protected from unilateral appropriation.

Kant's understanding of the idea of original common ownership, as I have argued, is not just a right for people to be legitimately, though involuntarily, present wherever they should find themselves on earth, and be secure when in danger, which results from the idea of *original possession in common,* but includes a right to get somewhere from somewhere else. This latter right is exercised via the *common heritage of mankind*, for example via the oceans that cannot, or at least should not be occupied, as means for communication, travel and transport, or the deserts to be crossed by camel. Neither oceans nor deserts serve as places that afford a right to be somewhere, but as traffic routes for the common use.

One way of ensuring continued use in common would be the ratification of public or common ownership as a means to get from A to B. As far as I see, Kant explicitly refers to Grotius' *Mare Liberum* argument only in the passages on *Private Right* of the *Metaphysics of Morals* (MM VI, 270) and never touches on its conversion into peremptory international law, but he does seem to have the conceptual means at his disposal. Kant rejects the idea of a permanent *res nullius* since it leads to the counterintuitive idea that a thing could have a claim against persons not to be annexed by them. But things cannot have claims against persons. Thus within the confines of his theory, a thing that is not to be converted into individual possession must not be represented as nobody's property (*res nullius*), but instead can be represented as

everybody's property (*res omnium*). If a river separates two estates, then it does not belong to nobody, but to both neighbouring residents. While original common ownership functions as an idea of reason that does not correspond to any reality either historical or present, the system of natural traffic routes, as a common heritage of mankind, could be transformed into *common property of mankind*. There are obvious alternatives to this interpretation, such as non-property-dependent ways of representing the global commons. But I think one advantage of turning a natural right to the use of a common heritage into a positive right to the use of common property would be that it could mark the difference between *Mare Liberum* and *Mare Nostrum.*[40] Neither Grotius nor Kant imagined that for reasons of jurisdiction, current European states would not just routinely reject new arrivals' attempts at offering themselves for society, but keep survivors from shipwrecks in the Mediterranean from disembarking and applying for asylum. Even where such restrictions follow a distributive logic, as in current burden-sharing negotiations among EU states, such attempts at a positivization of inter- or supranational refugee law appear clearly incompatible with, and therefore cannot be entertained as a peremptory realisation of, Kantian cosmopolitan right, which conferred an immediate claim to non-refoulement on those claiming refugee status.

In a more general sense, the case of refugees attempting to reach Europe illustrates the point made in this article, namely that cosmopolitan right is built on two normative bases that do not go together coherently.[41] While migrants base their cosmopolitan claim to reach Europe on a humanitarian argument, the humanitarian rights claim can only refer to spatial and property-related arguments in Kant, that is, result from the idea of original possession in common, not the common heritage of mankind. In a narrow construal, it only covers

[40] Rainer Bauböck, Mare nostrum: the political ethics of migration in the Mediterranean. *Comparative Migration Studies* 7, 4, 2019, 1-15.
[41] Thanks to Ying (Eric) Chen for pointing this out to me.

involuntary presence, i.e. presupposes some connection with our extended nature and past annexations of property. However, their mobility claim, and with it the communicative right to apply for asylum is based on the right to use mankind's common infrastructure, the sea, which does not connect with the humanitarian reasons for their flight to Europe, nor with the spatial and property-based derivation of humanitarian claims.

(3) A remaining difficulty, and a remaining potential as well, lies in the problem of how to relate the system of routes of traffic and communication, on the one hand, with private and political rights to property and control, on the other.

This is a problem we inherit from Grotius' generous disposition over the public highways of all countries as an infrastructure to be used in common. Recall that Grotius vindicated the right for foreigners (in his case foreign troops, which need not concern us here, since for Kant this case would be governed by international not cosmopolitan law) to traverse a third country on its public roads, whereas Kant restricted himself to the more parsimonious guarantee of the use of natural highways (deserts) between countries. Intuitively, traffic routes and their upkeep cannot seem to be included within the common heritage of mankind, for the Risse-type reason that somebody had a hand in bringing them into existence. How, then, should a peremptory global legal order protect individuals' claims to universal communication and mobility?

One variant, compatible with Kant's thoughts on the subject, would be to exempt routes of traffic and communication, insofar as they are to be used by individuals to make contact, from the territorial control of domestic governments. While our first suggestion on how to transform provisional into peremptory property was based on the idea from original

possession in common, our second suggestion, based on the common heritage of mankind, was geared toward guaranteeing the maintenance of *natural* preconditions for traffic and communication. Our final concern is with the *man-made* presuppositions, guarantees and devices of ongoing communication. In considering those, we need to be aware of the difficulty that some elements of communicative infrastructure – highways and railtracks, print and electronic media – have, at the same time, a property aspect and a transmission or transportation aspect. Providing them requires investment, not just conservation, as is the case with the natural heritage of mankind, with deserts or the sea. Still, their collective use will rarely deplete and exhaust them, unlike the oceans when robbed of their fish. What seems desirable here is introducing a category of a man-made heritage of mankind, drawing on the functional necessity of such infrastructure to fulfil cosmopolitan right.

## IV. Conclusion

If we are to connect our current debates about mobility, migration and global communication to Kant's central categories, we need to distinguish more clearly than we did so far between two orientations. The first is a focus on an indivisible common heritage of mankind, which cannot be privatised and is being passed on from one generation to the next as a common stock, free for all and excluding no-one, securing mobility and contact. The second is a focus on divisible original possession in common, the private appropriation of which yields humanitarian rights, and may yield, in transforming the current provisional global property regime into a lasting order, corrections to that regime based on distributive or corrective considerations. While the former orientation governs voluntary exchanges, the latter mainly governs involuntary exposure and confrontation. While the former, at least in principle, can

be separated off from the connection to physical contiguity and spatio co-existence, the latter specialises in the confrontation of owners and non-owners who are nevertheless physically present.

Given this duality, we are faced with the question of what we appreciate in Kantian cosmopolitan right: Is it the protection of strangers as helpless and vulnerable objects of fate or the elements, or do we value and respect their communicative autonomy when seeking cooperation, residence or inclusion? The advantage of the latter lies in the stronger valuation of the foreigner as a responsible, decisionmaking agent; its possible disadvantage in the weakening of the humanitarian aspect, since the claim to mobility, communication, and application for social membership can, as we have seen, be severed from all substantive claims to immigration and residence. The two readings overlap only in the single case in which deportation is ruled out where a danger to perish exists – since it does not matter whether such hospitality is claimed voluntarily or involuntarily. Reflecting on this undeclared duality of Kant's, but perhaps everybody's intuitions may go some way towards clarifying them and the normative arguments we advance when discussing claims to migration and mobility. [42]

*References*

Parenthetical references to Kant's writings give the volume and page number(s) of the Royal Prussian Academy edition (*Kants gesammelte Schriften*), which are included in the margins of

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the translations. English translations are from the Cambridge Edition of the Works of Immanuel Kant, except where indicated otherwise. I use the following abbreviations: MM= The Metaphysics of Morals (Kant 1996a: 353–491); TPP= Toward Perpetual Peace (Kant 1996a: 315–51).