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Constructivism in cosmopolitan law: Kant's right to visit

CLAUDIO CORRADETTI
University of Rome, 'Tor Vergata', Via Columbia 1, 00133 Roma, Italy

Email: Claudio.Corradetti@uniroma2.it

Abstract: Kant is regarded as one of the most influential cosmopolitan thinkers. Indeed his legacy still influences the contemporary legal and philosophical debate on this issue. But what is the Kantian conception of cosmopolitan law? In which terms does it arise out of his notion of a 'right to visit'? How does it contribute to the construction of a 'cosmopolitan constitution'? In this article the view is advanced that Kant was a legal constructivist. The argument assumes also that within Kant's view of an 'original community of interaction', the justification of a cosmopolitan notion of authority allows exercises of freedom under a general scheme of right. Kant's 'cosmopolitan constitution' depends therefore upon such rationale, as well as on the jurisdictional link that the right to visit determines in allowing individuals with the possibility to have a 'place on earth'.

Keywords: cosmopolitan constitution; Kant; legal constructivism; original community; right to visit

I. Introduction

Constitutionalism in global law has gained significant new momentum in recent years, benefitting from a truly interdisciplinary debate among international law scholars, political theorists and legal-political philosophers. It is hard to believe, though, that this has been the outcome of a simply fashionable academic thinking. It is rather the case that post-1989 international relations have profoundly changed the way states act in relation to new conceptions of legitimate sovereignty, authority and state powers, in particular the democratic rule of law and respect for human rights. As a result, academic interest in global constitutionalism has followed the course of development of new jurisdictional events: from the end of a bipolar world to the emergence of a plurality of regimes. These developments have also raised the question of whether national and international law should be conceived as integrated elements of one

single constitutional framework and, furthermore, what degree of pluralism it should allow.[1] However, one could hardly claim that also as a *political project* the cosmopolitan ideal is anything new. Limited to modern times, cosmopolitanism was a project of the Abbé de St Pierre and Rousseau whose conception, as Kant reminds us, was 'ridiculed' by contemporaries 'because they believed its execution was too near'.[2] Kant began his reflections bearing this legacy in mind, while aiming to relaunch cosmopolitanism as a serious philosophical framing for understanding the legitimate relation of the individual and the state and, ultimately, for the achievement of a gradual approximation to peace. Kantian insights, as sketchy as they are, help to explain nevertheless several of the contemporary issues of constitutionalism that we are now facing. Kant is neither a blunt natural law philosopher nor just a positivist legal thinker. He is, as I claim, a legal constructivist. As in the more recent case of Rawls,[3] the starting point of legal constructivism for Kant is a conception of rational agency marked by freedom and equality as the basis of a procedure of justification of the law. With regard to the procedure, it is only the protection of a formal condition of right that autonomous beings can be enabled to bring their aims together into rational union. This allows for the exercise of external freedom in view of the requirements of the Universal Principle of Right, making possible a transition from a 'provisional' to a 'conclusive' ownership under an a priori civil constitution (since for Kant 'conclusive acquisition takes place only in the civil condition').[4]

[1] Selecting from the burgeoning literature on the topic I suggest M Kumm, 'On the Past and Future of European Constitutional Scholarship' (2009) 7(3) *International Journal of Constitutional Law* 401; N Walker, 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies 519; P Dobner and M Loughlin (eds), *The Twilight of Constitutional Law: Demise or Transmutation?* (Oxford University Press, Oxford, 2010).

[2] I Kant, 'Idea for a Universal History with a Cosmopolitan Aim' in A Oksenberg Rorty and J Schmidt (eds), *Kant's Idea for a Universal History with a Cosmopolitan Aim: A Critical Guide* (Cambridge University Press, Cambridge, 2009 [1784]) 17. For a comprehensive reconstruction of this debate until Kant see G Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community and Political Justice since Vitoria* (Ashgate, Aldershot, 2002).

[3] See in particular J Rawls, 'Kantian Constructivism in Moral Theory' (1980) 77(9) *The Journal of Philosophy* 515.

[4] See I Kant, 'The Metaphysics of Morals' in M Gregor (ed), *Immanuel Kant: Practical Philosophy* (Cambridge University Press, Cambridge, 1996 [1797]) section 15, 416. On a different interpretation of the role that 'a community of rational beings' holds with regard to the mediation between Kant's ethics (Categorical Imperative) and Kant's philosophy of right (Universal Principle of Right), see H Pauer-Studer, '"A Community of Rational Beings": Kant's Realm of Ends and the Distinction between Internal and External Freedom' (2016) 107(1) *Kant-Studien* 125. Unlike Pauer-Studer I argue that this mediation is of a regulative and not of a constitutive type.

Kant's cosmopolitan constructivism unfolds from the role that the right to visit plays in linking republican states and peoples among themselves into a cosmopolitan constitution. Yet, not surprisingly, this requires a transcendental justification. To this purpose, the idea of a synthetic transcendental unity between the *possessio phaenomenon* (as physical possession, i.e. *occupatio*) and the *possessio noumenon* (possession according to a juridical standpoint), as realised by an a priori 'originally united will',[5] justifies the notion of cosmopolitan authority (II.). The basic idea here is that first-order principles of right are, at least provisionally, valid as they are agreed upon by all members of an initial condition of choice (as exercises of external freedom). It follows that the coerciveness of any system of law depends upon a procedure of justification that specifies the conditions of validity for external acquisition. For Kant, the peremptory justification of the provisional character of unilateral appropriations is understandable under the idea of a synthetic a priori will from which both private and public rights are held together. In so far as such originally united will allows such shift, it defines also the authority of the law.

Legal constructivism takes form starting from the move from the provisional to the peremptory possession, that is, from the transcendental synthetic unity of an originally united will. The latter is in turn grounded on a concept of cosmopolitan authority, that is, on a priori obligation of juridical coercion. The cosmopolitan right to visit arises from the move from the *possessio phaenomenon* in unilateral external acquisitions to peremptory possession according to public right. In such respect, the cosmopolitan 'right to visit'[6] stands as a limitatory clause to peremptory appropriation, that is, as a generalised guarantee of non-exclusion from territorial accessibility. It maintains a constructivist element in so far as it realises a constitutionally justified unification of juridically differentiated domains. Cosmopolitan law, therefore, brings into legal effectiveness the synthetic transcendental unity of peremptory possessions under the coercive force of an originally united will. For Kant the notion of cosmopolitanism embraces two dimensions: one concerning the general international order that is required for perpetual peace (and primarily the interstate relations of international law) and the other concerning the cosmopolitan right in a strict sense, that is, the third section of public right.[7]

[5] Kant speaks of the role of a 'will that is united *originally* and a priori', one 'that presupposes no rightful act [rechtlichen Akt] for its union', and which grounds, as I argue, a non-contractual obligation to enter into a civil condition. Kant (n 4) section 16, 418.

[6] I Kant, 'Toward Perpetual Peace' in Gregor, *Immanuel Kant: Practical Philosophy* (n 4) 329.

[7] On this distinction see M Mori, *La pace e la ragione: Kant e le relazioni internazionali: diritto, politica, storia* (Il Mulino, Bologna, 2008) 144.

In the following article, I examine therefore a particular relation that Kant establishes between 'the right to visit'[8] and the generation of a global rule of law – what is called alternatively a 'cosmopolitan constitution' (*Weltbürgerliche Verfassung*), a 'cosmopolitan commonwealth' (*Weltbürgerliches gemeines Wesen*)[9] or even, in the *Critique of the Power of Judgment*, 'a cosmopolitan whole' (*Weltbürgerliches Ganze*).[10] Here, I pursue a Kantian argument grounded on textual evidence but arguably extensible beyond Kant's writings. A connection between the above-mentioned concepts is evidently established in the following passage:

> *this right to hospitality [or to visit]* – that is, the authorization of a foreign newcomer – does not extend beyond the conditions which make it possible to *seek* commerce with the old inhabitants. In this way distant parts of the world can enter peaceably into relations with one another, which can eventually *become publicly lawful* and so finally bring the human race ever *closer to a cosmopolitan constitution*.[11]

Kant's legal constructivism answers to the general question of how to establish a cosmopolitan civil condition on the base of a synthetic transcendental foundation of the law.[12] Furthermore, the idea of a cosmopolitan constitution reflects a process of progressive constitutionalisation of international law, starting from the adoption of a domestic 'civil constitution' and then converging towards an incipient transnational arrangement identifying peremptory norms (*foedus pacificum*).[13]

Based on these premises the 'right to visit'[14] establishes a relation with domestic constituencies. In other words, it creates a constitutional connection among previously autonomous jurisdictions. The rational engagement of different peoples in peaceful relations follows from a

[8] Kant (n 6) 329.

[9] See, respectively, for 'cosmopolitan constitution' Kant (n 6) 329; whereas for 'cosmopolitan commonwealth', see I Kant, 'On the Common Saying: That May be Correct in Theory' in Gregor, *Immanuel Kant: Practical Philosophy* (n 4) 308. In the following sections I quote different English editions of Kantian works. The choice will depend on the version I find most adequate to the point I intend to elucidate.

[10] I Kant, *Critique of the Power of Judgment* in P Guyer (ed), (Cambridge, Cambridge University Press, 2000 [1790]) 300.

[11] Kant (n 6) 329 (emphasis added).

[12] See the parallel for moral and political constructivism in L Krasnoff, 'How Kantian is Constructivism?' (1999) 90(30) *Kant Studien* 385. This seems also the strategy endorsed by Forst's 'right to justification' as the most 'fundamental moral demand that no culture or society may reject'. R Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press, New York, NY, 2014) 209ff.

[13] Kant (n 6) 327. In the following sections I use 'cosmopolitan' and 'global' constitution(alism) as synonymous terms.

[14] Kant (n 6) 329.

constructivist role played by the cosmopolitan right to visit – something, as Kant considers, that is not simply equivalent to a moral sentiment of philanthropy or virtue.[15] In turn, the overall structure of Kant's cosmopolitan constructivism assumes that a system of rights is valid if it fulfills the standard of a normative theory, one based on the grounding concept of equal freedom as an 'innate right'[16] of humanity and thus realising the presupposition of the Universal Principle of Right (*Allgemeines Prinzip des Rechts*).[17]

Each domestic jurisdiction has to strive not only internally but also externally towards the realisation of peace as an approximation of the idea of reason 'to which no object given in experience can be adequate – and a perfectly *rightful constitution* among human beings is of this sort – is the thing in itself'[18] and that this is also the task of the 'moral politician'[19] in aligning the critical demands of cosmopolitan citizens with the requirements of public use of reason set by a Universal Principle of Right – (III.).

Taken together, these three components contribute to a general 'transitional' scheme for Kantian cosmopolitan constitutionalism, one which accounts for why a) Kant can claim that 'each of them [states], for the sake of its securing peremptorily possessions as rights, can and ought to require to others to enter with it into a constitution similar to a civil constitution',[20] and one where b) the constitutional level established by the '*league of nations*' (*foedus pacificum* or *Völkerbund*), is in continuous approximation with the ideal of a republican multistate confederation (or 'state of nations', *Völkerstaat*).[21]

The notion of a transitionality, i.e. political approximation to peace, is not a spurious notion to Kant's system of though. On the contrary it derives from the overall systemic partition between theoretical absolutely prescriptive disciplines where right is together with ethics a component of morality, on the one hand, and politics as 'doctrine of right put into practice'.[22] All this structure of reasoning, which will be unpacked in the following sections, makes of Kant a relevant starting point also for our contemporary understanding of a global (or cosmopolitan, as Kant calls it) constitution.

[15] Kant (n 6) 328.
[16] Kant (n 4) 393.
[17] Kant (n 4) 387.
[18] Kant (n 4) 505.
[19] Kant (n 6) 340. On this point see M Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization' (2006) 8(1) *Theoretical Inquiries in Law* 9.
[20] Kant (n 6) 326.
[21] ibid.
[22] Kant (n 6) 338.

II. Starting points for a constructivist justification of cosmopolitan right: on the inherent connection between (external) freedom and possession within the original community

Kant's idea of an original community reinterprets in ideal-normative terms the traditional conceptions of Grotius and Pufendorf of the *communio primaeva* as well as later criticisms in Achenwall's *Elementa Iuris Naturae*.[23] For Kant the *communio fundi originaria* is *not* similar to the *communio primaeva* '[…] one that was *instituted* and arose from a contract by which everyone gave up private possessions […]',[24] since the 'factual' understanding of the original community is mistaken. This is because for Kant a community regulated by features of identity and property relations is a non-starter, as it is the community of the mine and thine (*communio*).

Kant introduces the conditions under which something can be acquired originally by referring to the idea of an '*original* community of land'.[25] Given the limited and spherical shape of the earth, individuals cannot disperse and must instead relate to each other in a condition of free interaction (*communio fundi originaria*). Since 'all nations are *originally* members of a community of the land' and since the community of the land is not a legal community of ownership but rather 'a community of possible physical *interaction* (*commercium*)', everyone is in 'a thoroughgoing relation of each to all the others *of offering to engage in commerce* with any other […] without the other being authorized to behave toward it as an enemy because it has made this attempt'.[26]

Originally, all human beings are 'in a possession of the land that is in conformity with right', namely, to the right to 'be wherever nature or

[23] See respectively, H Grotius, *De Iure Belli ac Pacis* in BJA de Kanter-van Hettinga Tromp (ed), (Leiden, Brill, 1939 [1625]) and S Pufendorf, *De Jure Naturae et Gentium* in F Böhling (ed), (Berlin, Akademie Verlag, 1998 [1672]). See also, G Achenwall and J S Pütter, 'Elementa Iuris Naturae', G Achenwall and JS Pütter, *Anfangsgründe des Naturrechts* in J Schröder (ed), (Insel, Frankfurt, 1995 [1750]). For Kant 'community' is primarily, even if not uniquely, a 'pure concept of the understanding'. As Milstein notes, this illustrates a form of 'relation' rather than a sociological or a political concept. This relation of interaction is characterised by 'reciprocal causality', one where the affirmation of one member implies the denial of all others and vice versa. In B Milstein, 'Kantian Cosmopolitanism beyond "Perpetual Peace": Commercium, Critique, and the Cosmopolitan Problematic' (2010) (21)1 *European Journal of Philosophy* 121. The disjunctive relation between a member and the original community can be understood only on the presumption of an original unified concept of possession which considers the totality of human beings. It is only on the premise of an original form of interconnection among all individuals that a disjunctive relation of interaction among all members is established.

[24] Kant (n 4) 405.

[25] ibid.

[26] Kant (n 4) 489.

chance […] has placed them'.[27] This is what is also called in the *Perpetual Peace* as the 'right of possession in common of the earth's surface',[28] from which it follows the disjunctively universal right for each to have a place on earth.[29] For Kant, the original appropriation is never an appropriation of a *res nullius* but of something *already* occurring within a domain of possession in common of the earth (one that is not of common property). The exit from the state of nature is therefore grounded on the shifting from a provisional to a peremptory possession which can only take place within an established system of coercive (public) rights. This shift is what allows the move from a *possessio phaenomenon* to a *possessio noumenon*, that is, possession in accordance to right. In order to justify a move to a civil condition, Kant has to introduce the idea of an originally united will on the base of which the original community constitutes itself as a coercive authority. In such way the will of the original community performs a transition from a state of nature regulated on the base of a private-natural-law-type to a civil condition structured by publicly proclaimed, and therefore positive, laws. Lacking the presupposition of an already 'rightful act', as it would be instead if the original condition of common possession had juridically valid features, the coercive character of an originally united will articulates a system of positive legal duties enforceable towards all. In such a way, the omnilateral dimension of an originally united will constitutes a response to unilateral appropriations within the state of nature. From a conceptual point of view, the analytical justification of unilateral appropriations of the will based on an innate right to freedom (as a coordination among different wills), are synthetically subsumed within a transcendental notion of authority that legislates a priori. You must 'leave the state of nature and enter into the civil condition'.[30] Such authority enacts a coercive obligation that commands omnilaterally.

Perhaps not surprisingly, from the original community it unfolds also the justification of establishing rightful terms of interaction both from the relation of the citizens with the states and from the relation of states among themselves. A distinct set of reasons applies to the connection between an original community and the formulation of a cosmopolitan right to visit. Kant's argument for the justification of the cosmopolitan right assumes, on a preliminary basis, that we are all endowed with an original right to

[27] Kant (n 4) 414.

[28] Kant (n 6) 329.

[29] I Kant, 'Vorlesungen Rechtslehre' [23:323: 26–30; 23:320: 20–23] and [23:321:14–16]. Quoted in BS Byrd, 'Intelligible Possession of Objects of Choice' in L Denis (ed), *Kant's Metaphysics of Morals: A Critical Guide* (Cambridge University Press, Cambridge, 2010) 108.

[30] Kant (n 4) 416.

freedom as non-domination.[31] Freedom for Kant is either internal – related to virtue – or external, that is, connected to an interpersonal obligation for agents to comply with the Universal Principle of Right for which 'Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law'.[32] Coexistence of free choices requires that formal constraints on justice are defined in terms of standards of 'interpersonal consistency' and 'demands for universality'.[33] Freedom and particularly 'external freedom' is equal to independence, that is, to be an equal subject of self-determination. External independence from the mastery of others, from control, follows from the postulate of 'giving laws to oneself' of the Categorical Imperative.[34] As a result, a reciprocal coercive authority of legal obligations is ultimately derived from respect for everyone's freedom.

In addition to these formal constraints, material limitations apply. Unlike internal freedom, external freedom is subject to space boundaries, that is, to the shape of the earth as a condition for social formation and demands for justice in circumstances of moderate scarcity ('determinate limits' and 'spherical shape' of the earth).[35] As noted, for Kant there is a necessary connection between external freedom and the possession of external objects, so that if I were denied a place on earth my original right to freedom would also be infringed. The original right to external freedom justifies therefore my right to a 'place on earth' – what Kant defines as a 'disjunctively universal right', that is, a right to be here or there.[36] In Kant, the legitimate

[31] Kant (n 4) 392.

[32] I follow here Gregor's translation (n 4) 387.

[33] As Pogge puts it: 'If persons were to embrace […] 'what seems just and good' (Rechtslehre 312), then a social order ensuring interpersonal consistency would once again not be achieved. Different schemes for achieving mutual consistency will be mutually inconsistent […] Kant's later theory of justice sees its task then in pruning further the set of consistent systems of constraints – ideally down to a single one […] The first step in this reduction is taken through the other component of pure practical reason's formal aspect – the demand of universality. One person should have a particular external freedom only if that same freedom is enjoyed by everyone'; see T Pogge, 'Kant's Theory of Justice' in BS Byrd and J Hruschka (eds), *Kant and Law* (Ashgate, Aldershot, 2006) 413.

[34] As Ripstein synthesises this point: 'Interference with another person's freedom creates a form of dependence; independence requires that one person not be subject to another person's choice' in A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, Boston, MA, 2009) 15.

[35] Kant (n 4) 489. With regard to T Pogge's 'lexical hierarchy' of Kant's principles of justice, two formal and one material {FP-1}Consistency{FP-2}Universality{MP}Enlightenment, I would add a fourth element concerning the 'circumstances of justice' as the material constraints on justice. I would suggest calling this {MC-2} Geographical/Resources Scarcity. See T Pogge (n 33) 414.

[36] Kant (n 29) 108.

acquisition of an external object depends on the possibility of 'taking control of it [*occupatio*]'[37] and this, in turn, requires the recognition of having a place on earth. As one moves from original acquisition to property and from a state of nature to a juridical state, the general recognition of a place on earth shifts into a cosmopolitan right not to be refused hospitality whenever one's life is endangered if returned ('the right to visit' as *non-refoulement*).[38] This rationale shows how for Kant there holds an inherent connection between the innate right to freedom and the idea of possession of the earth given in common.

The interactions within an original community of *commercium* grant to its members the possibility to put forward reciprocal requests. Relations of this type define a community that is radically different from that regulated by property relations (*communio*). However, a community of common possession lacks features of freedom-guarantees and social stability. For Kant, the state of nature, and with that an original community of interaction, though not necessarily unjust (*iniustus*) because allowing a system of private rights expressed in the natural law form, is certainly '*devoid of justice*' (*status iustitia vacuus*) due to the non-peremptory character of the law and the absence of a 'judge competent to render a verdict having rightful force'.[39] As a result, in order to defend the right to externally acquired objects, as well as for these rights to be granted a peremptory status, a form of coercion is required. It would be contradictory to claim rights to external objects without at the same time holding others to a duty of compliance. 'Hence', Kant concludes, '[…] there is connected with right by principle of contradiction an authorization to coerce someone who infringes upon it'.[40] In this way, Kant justifies the duty to enter into a juridical condition as a dimension regulated primarily by a coercive authority acting on the base of a system of rights. Indeed, since my right to intelligible possession (*possessio noumenon*, 'possession merely by right')[41] is implicit in an a priori united will,[42] I assume that my rights to property 'do not depend on social approval'.[43] Intellectual possession of external

[37] Kant (n 4) 412.
[38] Kant (n 6) 329.
[39] Kant (n 4) 456.
[40] Kant (n 4) 388.
[41] Gregor's translation of Kant (n 4) 412.
[42] Kant distinguishes between three types of possession (empirical, as a concept of the understanding and as intelligible possession); Gregor's translation of Kant (n 4) 401. Where the first two categories pertain to the notion of having control over something, either directly or indirectly, intelligible possession pertains to the legal requirement that others should not interfere with my possession.
[43] Byrd (n 29) 94.

objects is based on an originally united will that is given a priori and which legislates necessarily, not contingently: 'But the *rational title* of acquisition can lie only in the idea of a will of all united a priori (necessarily to be united) […]'.[44] The subjective right to a particular possession on earth holds only in so far as this becomes a generalisable interest for all other members (Principle of External Acquisition). What follows is an obligation to divide the earth in accordance with a will 'that commands absolutely',[45] namely, a coercive authority as a concept grounding a priori the idea of a 'civil constitution'.[46]

If this is the case, then, also my duty to be part of a civil order is linked to securing everybody's rights through the coercive force of the law. It is with a view to securing my *provisional* rights to external objects that the right to coerce others is upheld. The originally united will, in so far as it justifies coercive laws through an omnilateral will, it defines also a general *standard of public authority* of a *cosmopolitan* nature. It is indeed from the presumption of 'possession of the land […] as possession of a part of a determinate whole […] to which each [...] has a right' that cosmopolitan right as right to hospitality is ultimately derived.[47] The cosmopolitan character of the authority of the originally united will consists therefore in assuring that each individual is conferred a peremptory right to territorial occupancy under a system of law. The cosmopolitan right to visit is 'co-original' to the peremptory will of this authority since, in so far as it commands the division of the earth, it assigns to each the right to territorial visit in the name of an original possession of the earth held in common.

As it appears, indeed, it is from the acceptability of an original appropriation that it follows that those who are excluded by territorial seizure must be compensated through the allocation of a qualified right – the right to visit – in order to respect their original right to have a place on earth. I define the right to visit as establishing state obligations to individuals that are excluded from a legitimate appropriation of land under the legislation of an a priori united will. Such will establishes a synthetic a priori unity of coercive rights in a context of limited availability of land and resources. A legitimate appropriation of land in circumstances of limited resources demands that others are left with comparatively undiminished opportunities to an original appropriation of the earth.

This understanding reformulates the Lockean clause of appropriation, as famously defined with the 'enough and as good left in common

[44] Kant (n 4).
[45] Kant (n 4) 415.
[46] Kant (n 4) 416.
[47] Kant (n 4) 489.

for others'.[48] But, more generally, it responds to a fundamental problem discussed in the natural law debate and concerning the way in which to justify negative externalities of territorial appropriation by establishing obligations towards the exclusion of third parties. This was indeed also the problem of Grotius who allowed for interference with private property in cases of necessity by non-members.[49] For Locke the 'enough and as good' represents a 'factual circumstance' and it is not a restrictive standard for original appropriation. Accordingly, when money is introduced, as with civil society, Locke appeals to a natural duty 'to preserve the rest of Mankind'[50] in response to the 'spoilage proviso'.[51] Following the suggestion here proposed, Kant seems instead to hold that, cosmopolitan public authority, justifies the entry into a system of public right on the base of the maintenance of a restrictive standard of an original appropriation of the earth. In contrast with the general Lockean natural law 'duty of preservation', the cosmopolitan right to visit leaves unaltered the possibility of interaction by members of an original community. Accordingly, the institutionalisation of a juridical authority within a state comes to depend not only on an inner-boundary but also on an outer-boundary lawful relation. Both elements, together, define states' territorial rights in accordance to a cosmopolitan standard of the law.[52] Unlike a permissible principle for territorial rights,[53] a compensatory theory of cosmopolitan law considers

[48] J Locke, *Two Treaties on Government* in P Laslett (ed), (Cambridge University Press, Cambridge, 1960 [1690]) section 27. With regard to Locke, if the 'enough and as good' clause is interpreted as a sufficiency, than space is left for a restrictive interpretation of the compensatory principle for cosmopolitan public authority. As Waldron acutely remarks with regard to Locke 'In §27 the rather ambiguous logical connective 'at least where'. the meaning of 'at least where' may differ, but surely reading of it is as a connective introducing a sufficient where Q' seems to me to be most naturally rendered as than as 'If P then Q'; the words 'at least' indicate that whenever Q obtains, there may also be other circumstances even though Q does *not* obtain'. In J Waldron, 'Enough and as good left for others' (1979) 29(117) *The Philosophical Quarterly* 321.

[49] See A Pinheiro Walla, 'Common Possession of the Earth and Cosmopolitan Right' (2016) 107(1) *Kant-Studien* 160–78.

[50] Locke (n 48) II 6; also in Waldron (n 48) 325.

[51] Waldron (n 48) 319.

[52] This view therefore integrates the purely domestic conception of state's territorial rights legitimacy advanced by A Stilz, 'Nations, States and Territory' (2011) 121(3) *Ethics* 572. The author explicitly recognises that the rights to territorial jurisdiction are 'limited by *external legitimacy conditions* that constrain how the state should exercise these rights when their exercise affects foreigners', 573–4.

[53] As Ypi in her otherwise well-conceived argument argues that 'permissive principles justify states of affairs incompatible with the idea of ''right'' only provisionally and conditionally'; L Ypi, 'A Permissive Theory of Territorial Rights' (2012) 22(2) *European Journal of Philosophy* 290ff. The problem I see with this account, in so far as it relies on a Kantian argument, is that the 'permissible' justifies an act of the will in a condition deprived of law, as with the unilateral exercise of the will (*lex permissiva*).

that states are peremptory jurisdictional entities, but where the reduction of opportunities they create for legally excluded members is acceptable only on the ground of the respect of a minimal threshold that guarantees a place on earth to state's non-members.

It follows that the instantiation of a public authority is not only required for the purpose of constraining, under the law, unilateral appropriations of the will through the creation of states, but also in view of compensating, as it were, those subjects who are excluded from such appropriations. Due to the limited shape of the earth, territorial exclusion is omnilaterally acceptable only if state authority is held under an obligation to allocate a cosmopolitan compensatory measure. From this it results that states have the right to rule. Therefore, they may reasonably expect others to accept territorial/jurisdictional exclusion not only if (a) they establish a rule of law and a system of justice on their territory, but also if (b) they allow foreign visitors to enter their territory on the basis of publicly justifiable reasons for compensating what would be, otherwise, a unilateral appropriation of the land.

A crucial question arises at this point: what sort of institutional progression is generated by the Kantian originally united will and how does it connect to state sovereignty and more in general to a cosmopolitan order? These remarks also help framing under a constructivist form the institutional aspects of cosmopolitan approximation. I consider that Kant conceived of the role of a republican confederation of states in terms of counterfactual guidance and not as an empirical condition to be realised.[54]

The idea of a positive instantiation of a cosmopolitan republic would be plausible only if it were the case that Kant's concept of an originally united will justified a shift beyond a lawless scenario on contractarian terms. In other words, only if a global cosmopolitan covenant as a way to move from the original condition would it be possible to conceive the idea of world sovereignty and a global state. However, this hardly seems to be the case from the interpretation outlined above since the notion of a contract would conflate the unconditional and transcendental force of the cosmopolitan authority coming from an originally united will with a conditional and contractual will of a constituent people. Furthermore, it would lack consideration of the fact that Kant's objective is the explanation of an 'original acquisition' to an external object. Were it simply an acquisition within the civil condition, then, a contract would be the way of transferring property. Similarly, were something originally mine, it would

[54] In contrast with W Scheuerman, I do not consider that for Kant the realisation of a republican confederation was just a matter of time. See W Scheuerman, 'Cosmopolitanism and the World State' (2014) 40(3) *Review of International Studies* 419, in particular 440.

not require external appropriation.[55] But these are not the cases Kant has in mind and therefore an account of what is an original external appropriation has to resort to a non-contractualist account. As noted above, the distinctive element that Kant introduces into the debate is that the *communio fundi originaria* does not represent an historical event but it is rather an idea of reason. It is therefore a regulative idea. In fact, if it were a determinative idea one would objectify the command of the originally united will and the realisation of freedom. For Kant '[…] the concept of freedom cannot hold as a constitutive but solely as a regulative' and therefore unilateral choices can be assessed only 'as if' they were in line with the regulative standards of a general (a priori) united will.[56]

All the argument developed so far justifies the view that, for Kant, the unification of the unilateral wills appeals to a form of public authority that is inherently cosmopolitan – a prerequisite to understand also the a priori nature of the constitutional form.[57] In this respect, it is the originally united will that confers legitimacy to the appropriations of the individual unilateral wills and not the other way around, that is, through contractual agreements.

Kant reinterprets transcendentally the Rousseauian '*volonté générale*' in terms of the co-legislating activity among equal members.[58] For Kant Rousseau's conception of the general will does not suffice to account for the transformation of a multitude into a unity of self-legislating constituent people. Sovereignty in this regard, as for Hobbes, pertains not to the people alone but to the ruler and to the state as a community.[59] Unlike Hobbes, though, Kant does not accept the idea that coercive authority is justified simply because a multitude has transferred authority on it. On the contrary, he holds that coercive authority is subjected to a concept of legitimacy. As a result, the notion of an originally united will lays down a standard of legitimacy for coercive authority. A multitude of interactive individuals can be thought of as a community of right only in so far as an originally united will is *presupposed a priori* as a unifying concept, so that the sum total of individual actions is accountable

[55] K Flikschuh, *Kant and Modern Political Philosophy* (Cambridge University Press, Cambridge, 2000) 154.

[56] Kant (n 4) 376.

[57] One significant exception in this respect is Flikschuh (n 55) 168ff as well as K Flikschuh, 'Elusive Unity: the General Will in Hobbes and Kant' (2012) 25 *Hobbes Studies*, in particular 36ff. There it is argued for a notion of a 'general united will' as a form of coercive public authority which legislates in the name of a common possession of the earth, not by means of a social contract.

[58] See Flikschuh (n 57) 21–42.

[59] Kant (n 4) 85.

to a standard of a cosmopolitan public authority within a civil condition. This means that the absence of an antecedently constituted people, which in Hobbes justifies the rejection of a democratic standard, is reconstituted in Kant based on the notion of an originally united will, one of equal deliberating members as for Rousseau, where real citizens take part in town assemblies. Unlike Rousseau, though, Kant believes that an association of equals is not a society, because there is no '*commander* (*imperans*) and the *subject* (*subditus*) [...] it rather *makes* one'.[60] This is where Kant envisages conferring a distinctively legitimating form of the authority of an originally united will to state's sovereignty. The originally united will represents a more fundamental concept, one that justifies, a priori, a civil condition from which individual sovereign authority within the state derives legitimacy while ceasing to be arbitrary coercive forces.

The absence of a rightful condition reappears at an international level in the relations between states. Also with regard to states' *external relations* there is a duty to move beyond the state of nature and to comply with the principles of public right. However, since for Kant cosmopolitan peace requires to embrace a rule of law, it may be asked: on the basis of what reasons should states be obliged to move to an external condition in compliance with a global rule of law?

Consider an *a contrario* argument. In the absence of a scheme of (distributive) justice among states, one that for Kant would result in a civil condition and therefore require an impartial adjudicator, solutions could be sought only on an individual basis and with the use of force. This would eventually undermine the internal juridical condition of republics. For instance, it is imaginable that as a result of unregulated controversies between states, at least some citizens would lose their possessions and ultimately their freedom.[61] It could be argued, then, that it is only in so far as inter-state external relations are regulated by principles of public law that it would follow that internal conditions of states could be lawfully maintained.

All in all it seems that it is possible to conclude that in Kant the peremptory command to enter a civil condition is due to the practical and reflexive character of an originally united will that is given a priori.

[60] Flikschuh (n 57) 32.

[61] This is mentioned by Kant in various ways in his writings, as in the *Seventh Proposition* of Kant (n 2) 9–23, where war is said to prevent human enhancement; or in I Kant, 'Conjectures on the Beginning of Human History' in HS Reiss (ed), *Kant: Political Writings* (Cambridge University Press, Cambridge, 1991) 231–2, where even 'preparation for the war' is said to exhaust the internal resources of the state.

Such will establishes that in a condition of common possession of the earth any unilateral appropriation ceases to be arbitrary and provisional only when it recognises the peremptory force of an omnilateral will. Such obligating force is not based on a contractualist form for political obligation but it is, instead, postulated a priori through the idea of common possession of the earth – a dimension that is normative in itself. This interpretive strategy does not push us back to a natural law interpretation of Kant's theory of political obligation. Instead, allows for a justification based on two strands of account, namely 1) on the view of a preservation of a cosmopolitan dimension for entering a civil condition (which would instead be lost if state's formation was to follow from a state of nature), and 2) on the view of a constructivist relation holding between the authority of an originally united will and the exercise of external freedom granted through a cosmopolitan right to visit.

Public authority, so conceived, obliges individuals to exit the state of nature and to displace along a general system of rights. The non-conditional character of an originally united will, as a non-contractualist justification, defines public authority in terms of a transcendental synthetic unity. The type of public authority attached to the omnilateral will is inherently cosmopolitan because it claims that any legitimate territorial seizure is bound to recognise the cosmopolitan right to a qualified territorial accession by non-members.

This scheme of justification of public authority justifies also the shift from provisional to peremptory possession. Indeed, the transcendental assumption of a cosmopolitan authority starting from an original condition frames such relation in terms of a *gradual* and *transitional* progression, rather than a 'one-go' move as it would be instead the case of a contractual agreement. This means also that the idea of a cosmopolitan constitution that it results, is primarily an a priori concept in so far as it realises the transcendental unity of liberty and right. Once the a priori scaffolding of Kantian cosmopolitan authority is clarified along these lines, it remains to show how such framework is realised within a practical implementation of the law and in view of the determination of a global constitution. I will attend next to this point.

III. The 'right to visit' as a constructivist principle of cosmopolitan law

In the following section I contend that the cosmopolitan right to visit instantiates a variety of substantive claims: from claims to *non-refoulement* when one's life is endangered, to demands of transnational commercial agreements. The right to visit, in this regard, is characterised primarily by the possibility 'to be heard' left open to state citizens when travelling as

visitors to a foreign country.[62] In so far as it aims at preserving within a dialogic medium a 'response-triggering' process, the right to visit seems to be better understandable in terms of a general 'right to be heard'. Since new claims are introduced in a foreign public sphere, the right to visit performs a constructivist role with regard to its contribution in enlarging patterns of public reasoning and in stabilising an overall rightful condition.

I divide this paragraph into three subsections: first, I clarify in what respect the right to visit is justified from the perspective of a common possession of the earth; second, I group a plurality of right-claims along a spectrum including 'negative' and 'positive' demands of interaction, i.e. from claims 'not to be' rejected when visiting, to commercial demands of exchange of goods etc.; third, I consider how the right to visit proceduralises the divide between natural and positive law laying out a constructivist agenda for the cosmopolitan constitution.

To start with, the cosmopolitan right to visit represents a conditional clause for the peremptory division of earth commanded by the authority of an originally united will. But in so far as a peremptory authority is institutionalised, either in terms of a state authority or in terms of a transnational authority of sort, it follows that a positive system of law is enacted. Thus the procedural character of the right to visit accommodates within itself content-specific domestic and transnational claims. Kant speaks of two forms of citizenship: one which belongs to the authority of one's state and another which regards individuals as 'citizens of a universal state of mankind'[63] ('Bürger eines allgemeinen Menschenstaats').[64] The latter can be thought only by recognising an authoritative force to the originally united will, one which would command first and foremost to recognise the right to visit as a universal right (a man who remains without access to a piece of land due to prevention from interaction must be protected!). The entry into a civil condition and, therefore, into a sphere regulated by peremptory rights is strictly dependent on widespread observance, within juridical systems, of a universal right to visit due to an original right to have a place on earth. Observance of such right is not only due to incorporation of cosmopolitan law by individual state authorities but also by any transnational entity that is instituted beyond the state itself. There is yet an asymmetry here between the two. Indeed, whereas fulfilment of cosmopolitan right, within states, is complete when the obligations of the

[62] See Niesen when he claims that 'The subjective *cosmopolitan* right thus appears to constitute a third category of subjective right to communication'; P Niesen, 'Colonialism and Hospitality' (2007) 3(1) *Politics and Ethics Review* 92.

[63] Kant (n 4) 322.

[64] See I Kant, *Zum ewigen Frieden* in Kommentar von O Eberl und P Niesen (Suhrkamp, Berlin, 2011) 19.

right of *non-refoulement* are satisfied, the same is insufficient to justify full cosmopolitan right-enforceability beyond the state level. In the latter case, the cosmopolitan constitution is realised by approximation through interstate-contracts.

Kant's logic of the transcendental synthetic unity between property and freedom within the original condition requires that also transnational entities bring about peace according to a general condition of law. In this respect both the domestic and the international plane enjoy one same system of law validity, even if they diverge with regard to legal enforceability and constitutional implementation. Due to the constructivist role of the notion of cosmopolitan right (as a right to visit), there occurs a transition from a formal and merely analytical validity of international law securing a non-belligerent coexistence among states, to a conception of peace grounded on a synthetic unity between access to property and freedom under the general guarantee of cosmopolitan law. The transformation into peremptory rights of provisional possessions includes both states among themselves (as proprietors of domestic goods), and individuals as '*citizens of the world*'.[65]

However, this rationale of the Kantian cosmopolitan argument has gone largely unnoticed.

As far as the second point is concerned, namely the plurality of content-related meanings of cosmopolitan claims, in general the debate among scholars has been split among those who have understood the right to visit as derivable from an innate right to freedom,[66] and those who have based it on a more property-oriented understanding of 'the mine and the thine'.[67] Whereas, for instance, Benhabib equates the cosmopolitan right with the right to *non-refoulement*,[68] others define it as a right to commercial exchange.[69] By means of a textually-oriented analysis, Byrd and Hruschka suggest that Kant changes his mind after the *Perpetual Peace*. In particular, they consider whether in the *Doctrine of Right*, the right to visit is included as an element of international law (rather than of cosmopolitan law).[70]

[65] Kant (n 6) 322.

[66] P Kleingeld, 'Kant's Cosmopolitan Law' (1998) 2(1) *Kantian Review* 73; S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, Cambridge, 2004).

[67] As Byrd and Hruschka put this: 'securing the mine and thine … can be done only in a juridical state, only in a state of distributive justice, only in a situation of a *lex iustitiae* … Provisional ownership is not secured, but instead preliminarily legal possession … earth's surface must be divided before any individual has a property claim to secure', in BS Byrd and J Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge University Press, Cambridge, 2012) 138–9. See also K Flikschuh, 'Kant's Sovereignty Dilemma: A Contemporary Analysis' (2010) 18(4) *The Journal of Political Philosophy* 469ff.

[68] Benhabib, *The Rights of Others* (n 66).

[69] Byrd and Hruschka (n 67).

[70] Byrd and Hruschka (n 67) 208.

As a result of this apparent shift, the two scholars argue that the cosmopolitan right to visit is better understood in terms of a collective peoples' right to freedom of trade.[71] Others, like Bohman, advance an interpretation emphasising the role of the cosmopolitan right to visit in terms of a critical exercise of public reason.[72] Kant's apparent change of mind or ambiguity is diffused once we consider, as it has been indicated before, that cosmopolitan law bears two different senses: one general and another technical. Under such lenses, all these interpretations testify rather to a semantic openness of the notion. Being this the case, then the hypothesis of Byrd and Hruschka's semantic reduction of the '*Verkehr*' (*commercium*, interaction) to a notion of 'trade' cannot be held consistently. Indeed, both in Kant's texts and in Grimm's dictionary '*Verkehr*' means not only 'commercial interaction' but also 'contact' – a more socially oriented meaning.[73] Therefore, as it appears, the right to visit in so far as it is reflective of the interactional element of the original community, incorporates a variety of claims. In all these instances, the right to visit is justified on the basis of a general presupposition of individual inclusion into the society of human beings, that is, as a necessary condition to have a place on earth and thus to have a right to freedom. It assumes, that is, that one can be a visitor only as a member of a foreign society. Recursively, the moving beyond a lawless condition justifies the view of a general individual attribution of (world) citizenship. A system of rights can be established together with a rightful condition only if individuals enjoy the status of equal citizenship under general principles of reciprocity and universality of rights.

In section 62 of the *Metaphysics of Morals*, Kant defines the cosmopolitan right as the capacity to 'offer to have commerce with the rest':

> each has a right to make this attempt without the other being authorized to behave toward it as an enemy because it has made this attempt. - This right, since it has to do with the possible union of all nations with a view to certain universal laws for their possible commerce, can be called *cosmopolitan right (ius cosmopoliticum)*.[74]

[71] Byrd and Hruschka (n 67) 208–9. On this restrictive interpretation see also Flikschuh (n 67) 476.

[72] 'In the cosmopolitan case, the supreme coercive power of public right in the state is replaced by the initially very weak power of the public opinion of world citizens, that is, the power of a *critical* public'. J Bohman, *The Public Spheres of the World Citizen* in J Bohman and M Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (MIT Press, Boston, MA, 1997) 180.

[73] See the entry '*Verkehr*' in *Deutsches Wörterbuch* von Jacob und Wilhelm Grimm. 16 Bde. in 32 Teilbänden, Leipzig 1854–1961. Quellenverzeichnis, Leipzig 1971, Bd.25, Sp.625 bis 637.

[74] Kant (n 4) 489.

What Kant affirms here is that interpersonal relations should be seen primarily in terms of capacities and, only then, as rights. Kant distinguishes between the *privacy* of interpersonal relations, as a capacity, and the *publicity* of the cosmopolitan right as an element of cosmopolitan law. He also considers cosmopolitan right as an individual right of foreign nationals not to be treated as enemies, thus resulting in universal laws that regulate the intercourse among nations. Note here the recursive use of the word 'people' [*Volk*].[75] This explains why Byrd and Hruschka argue for the cosmopolitan right in terms of a collective right.[76] However, this reading leaves unanswered the question as to why Kant considers on an equal plane the individual-collective 'human being', as in the case of when he refers to 'a human being (or a people)' [*Der Mensch … (oder das Volk)*].[77] This use is intelligible only based on the premise of an original community by virtue of which we are individual citizens of a 'universal state of mankind' [*allgemeinen Menschenstaats*].[78] The cosmopolitan right, as a condition of 'universal hospitality',[79] bridges the multidimensional gaps between individuals, peoples and states. The status of world citizenship, when projected onto the political plane, refutes any definitive assimilation within a specific jurisdiction even within a comprehensive world state since, as Kant says, whereas a world republic is an unrealisable ideal, a world monarchy would soon turn into a 'soulless despotism'.[80] The more geopolitically connoted expression 'nations on the earth' [*Völker auf Erden*][81] testifies to the relations that the cosmopolitan right establishes also between individuals and peoples.

In view of ordering the multiplicity of meanings mentioned above, it is worthwhile recalling that the cosmopolitan right to visit spans across a 'negative' and a 'positive' polarity. With regard to the negative side, the cosmopolitan right takes hospitality as a minimum threshold for protecting life as a precondition for legitimate possession. However, preservation of life must be obtained 'without a crime'.[82] Today this right is captured by the notion of *non-refoulement* as Benhabib has rightly pointed out.

[75] Kant (n 6) 322. See original text in Kant (n 64) 19.
[76] Byrd and Hruschka (n 67) 208.
[77] Kant (n 6) 322. See original text in Kant (n 64) 19.
[78] ibid.
[79] Kant (n 6) 328.
[80] Kant (n 6) 336.
[81] Kant (n 4) 489. See original text in Kant (n 64) 85.
[82] As Kant makes this general point: 'For to preserve my life is only a conditional duty (if it can be done without a crime); but not to take the life of another who is committing no offense against me [*der mich nicht beleidigt*] and does not even *lead* me into the danger of losing my life is an unconditional duty' in Kant (n 4) 299. On a similar point see A Pinheiro Walla (49) 160–78.

As the right of a foreign national not to be turned away in the case of mortal danger, the right to visit reflects the core of Kantian cosmopolitanism rooted in the universal entitlement to a place on earth. It is thus a peremptory command issuing directly from the authority of the originally united will.

Moving to the third and final point, the relation between content-related claims arising from a universally valid right to visit and their reception within legal systems as positive laws testifies of a Kantian conception to an existing internal link between natural and positive law. Kantian cosmopolitanism establishes indeed a connection between a critical-political dimension in the exercise of the cosmopolitan right to visit and the form of rationality of any positive juridical system as a whole. This contributes to explaining the proper constructivist characterisation of Kantian cosmopolitanism and his departure from a natural law scheme. Kant attempts to reinterpret the natural law framework of the 'common possession on earth' and 'the right to visit' as elements of a global system of law. By virtue of their earthly affiliation, as original members of a community on earth, individuals are entitled to submit requests for hospitality to contingently formed positive jurisdictions.[83] However, as a right grounded in an original condition, the cosmopolitan right to visit remains in perpetual tension with positively given jurisdictions. There seems to be here a bi-univocal relation between natural and positive law. Whereas natural law establishes a distinct standard for the validity of positive law, its content as a right can be articulated only within a positive system. Kant notes that the lack of compliance of positive law with natural law is 'Like the wooden head in Phaedrus's fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain'.[84] For Kant, there is an appearance of law also when moral normative validity is lacking; but in the absence of moral justification, positive law is defective law.

Taken together, the positive-constitutive and the natural-law character of the cosmopolitan right to visit tend to subordinate the domain of international law to the legitimate demands of individuals as world citizens. Coordination among states by means of international law is justified only when individual requests remain mindful of standards of equality and non-discrimination,

[83] For a different position on this point see A Pinheiro Walla, ibid. The author quite rightly argues that Kant abandons Grotius' traditional view on needs as grounding elements for the common possession on earth. However, while she establishes important connections with the right not to be refused when in danger of life, not much is said with regard to the positive 'interactional' aspect of Kant's right to visit, namely, the right to submit communicative demands that lead to the formulation of transnational legal principles.

[84] Kant (n 4) 387.

thus resulting in further integrations between different legal domains. I turn next to the assessment of how this view of the law impacts on the construction of a cosmopolitan system of state-relations that would hopefully lead to peace.

IV. Thinking cosmopolitan through the 'critical' public use of reason

In this final paragraph, I consider how a cosmopolitan public use of reason realises the Kantian ideal of freedom as independence within a process of constitutionalisation of international law. In particular, I explain how a progressive trajectory of human emancipation is realised by the capacity to give oneself universal laws as a citizen of a *cosmopolis*.[85]

As argued, the right to universal hospitality, the negative-limiting definition of the right to visit (the right 'not to be treated with hostility'),[86] is explicitly connected by Kant to an original community on earth: 'this right [the *right to visit*], to present oneself for society, belongs to all human beings by virtue of the right of possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely but must finally put up with being near one another; but originally no one had more right than another to be on a place on the earth'.[87] Cosmopolitan right, in so far as it is connected to the original community of earth derives its mandatory force from an a priori commanding will which proceeds to the division of the earth held in common.[88] Since the unity of the will has an original character, any factual arrangement is constantly subjected to a check of legitimacy with regard to the maintenance of a condition of interaction.[89] This inherent tension within the original condition is evident also in Kant's characterisation of the cosmopolitan order which remains a project in search of a long-standing approximation towards peace. Consider the following passage:

[85] On the link between autonomy and public reason in Kant, see O O'Neill, 'Autonomy and Public Reason' in M Timmons and RN Johnson (eds), *Reason, Value, and Respect: Kantian Themes from the Philosophy of Thomas E. Hill, Jr.* (Oxford University Press, Oxford, 2015) 119–34.

[86] Kant (n 6) 329.

[87] ibid.

[88] Kant (n 4) section 14, 415.

[89] This hypothesis diverges profoundly from Byrd and Hruschka's thesis for whom once the disjunctively universal right to a place on earth is met, then the right to be located in a particular location disappears 'and with it the right to visit that other place'; see Byrd and Hruschka (n 67) 207. Contrary to this interpretation, I consider that the availability to the cosmopolitan citizen of the right to visit prevents closure as with final-state individual geographical assignment.

> If it is a duty to realize the condition of public right, even if only in approximation by unending progress, and if there is also a well-founded hope of this, then *the perpetual peace* that follows upon what have till now been falsely called peace treaties (strictly speaking, truces) is no empty idea but a task that, gradually solved, comes steadily closer to its goal (since the times during which equal progress takes place will, we hope, become always shorter).[90]

The achievement of peace implies the persistence of an unsolved tension between a cosmopolitan ideal and its positivist instantiation. This should come as no surprise since the original community represents a normative concept: '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 principles of right'.[91] It follows that authority arising from an originally united will establishes that the cosmopolitan demands through visits of another state remain always open to public assessment, even if to what temporal and juridical extent it is not specified by Kant.

What it appears to be the case, instead, is that the positive effects that the right to visit has on domestic legal systems may be considered as resulting from a public justificatory strategy where a cosmopolitan 'right of justification' places both citizens and non-citizens on the same plane of generality and reciprocity with regard to an original claim of earthly affiliation.[92] Certainly this view is at odds with a strictly exclusionary territorial understanding of state powers. Indeed, other candidates of sovereignty could eventually replace Kant's hesitancy to shift away from a Westphalian model of the state. Yet, this does not lead necessarily to the embracement of an overinclusive idea of the state as a 'trustee-of-humanity'.[93] For Kant, instead, the dialectic between the right to visit and the right to be a guest marks the divide between what is mandatory and what is consensual – the latter being an object of voluntary contract for the state. A countervailing standard to sovereign territorial exclusion is for Kant limited to an original right to have a place on earth, even though the idea of *non-refoulement* can be broadened to include more

[90] Kant (n 6) 351.

[91] Kant (n 4) 415.

[92] See R Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice* (Columbia University Press, New York, NY, 2014) 203ff.

[93] As 'The trustee-of-humanity model allows states to claim territory on behalf of humanity because individual states, in their capacity as territorial authorities, are conceived as co-representatives of humanity. As trustees as well as representatives, however, states cannot treat peaceful migrants with indifference.' E Fox-Decent, 'Constitutional Legitimacy Unbound' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, Oxford, 2016) 135.

than just the case of an asylum seeker's threat to her life. One's original right to a place on earth admits also those cases where economic agreements disallow the possibility to conduct a decent life, an existence where freedoms and appropriations would be co-possible. This boundary cannot be traced a priori and it requires rather a public form of reasoning. Practical assessment, in turn, demands that the political autonomy of state citizens is considered in light of an external public use of reason beyond state borders, one where each is not only a 'member of a commonwealth' but 'of the society of citizens of the world'.[94] For this reason, continues Kant, even positive laws within the state, notwithstanding they must be obeyed, can nevertheless be criticised so that a 'citizen cannot refuse to pay the taxes imposed upon him … But the same citizen does not act against the duty of a citizen when, as a scholar, he publicly expresses his thought about the inappropriateness or even injustice of such decrees.'[95]

A corollary to this line of argument expands upon Kant's anthropological views on the 'unsociable sociability' of human nature. This approach, though, captures the problem from an *a posteriori* perspective.[96] As the reasoning goes, it appears that in an empirical perspective, unsociable sociability motivates the perpetuation of claims of interaction in a context of moderate scarcity of land resources.

The idea of unsociable sociability also requires the public justificatory argument to be valid. The fact that, further demands for legitimation are presented following justified schemes of redistributive justice, presupposes that the cosmopolitan right to visit reflects the idea that a rightful relation between individuals and states is conceived independently from constituted determinations of citizenship or, to put it differently, that historically given affiliations are under a 'corrective' scheme of cosmopolitan inclusivity. As Kant states in the *Conclusion* of the *Doctrine of Right*: 'the rule for this constitution, as a norm for others, cannot be derived from the experience of those who have hitherto found it most to their advantage; it must, rather, be derived a priori by reason from the ideal of a rightful association of human beings under public laws as such'.[97]

[94] I Kant, 'An Answer to the Question: What is Enlightenment?' in Gregor, *Immanuel Kant: Practical Philosophy* (n 4) 18.

[95] Kant (n 94) 19. According to Waldron this point seems to prevent any interpretation of Kant as a positivist. See J Waldron, 'Kant's Legal Positivism' (1996) 109(7) *Harvard Law Review* 1535.

[96] See I Kant, '*The means nature employs in order to bring about the development of all their predispositions is their antagonism in society, insofar as the latter is in the end the cause of their lawful order*. Here I understand by 'antagonism' the *unsociable sociability* of human beings, i.e. their propensity to enter into society, which, however, is combined with a thoroughgoing resistance that constantly threatens to break up this society', in Kant (n 2) 13.

[97] Kant (n 4) 491.

Both the public justificatory and the 'unsocial sociability' argument account for establishing a constructivist relation between the 'critical-constitutional' function of the right to visit and the making of the cosmopolitan constitution. This point remains implicit in Kant's writings and it can be reconstructed only conjecturally. In the following paragraph I abandon, therefore, the pretence of a philological reading of the texts in order to pursue a purely Kantian argument.

As Kant observes, since peoples are subjected to a geographically constrained place on earth, each must receive a share of resources in accordance with an original right to earthly affiliations. Since this condition is that of a community of reciprocal action, or commerce, cosmopolitan right allows individuals to engage in communicative interaction under the conditions of limited availability of space and resources. The cosmopolitan right regulates the relation between law and space by legitimately restricting individual external freedoms on the basis of a Universal Principle of Right. From the attempt to enter into differential relations, the right to visit allows the submission of claims as a foreign national to a different public sphere and, ultimately, to a different jurisdiction.

The distinction between a 'negative' and a 'positive' aspect of the right to visit finds a further grounding here. Whereas the threatening of one's life advances only an unchallengeable claim to the 'moral politician',[98] that is, a claim-duty to host temporally anyone who is endangered upon return to her native land, the same does not hold for the 'positive' critical aspect of cosmopolitan constitutionalism. Whereas in the 'negative' aspect of the right to visit the limiting of an original right to equal access to a portion of land compels the moral politician to comply, the 'positive' aspect of the right to visit leaves the claims of the foreign visitor open to rejection. A striking case is that of a claim to trade. In this case nobody could demand, even from a 'moral politician', a duty to comply. Here, *the form* of the claim that is advanced (as with a capability to be heard across different jurisdictions) stands not in a necessary relation to the violation of the *content* of the cosmopolitan right (namely, the respect of an equal right to have a place on earth).

It might be argued that the right to visit has only a minimal constitutional-constructive output. However, Kant explicitly rejects the idea that in a legitimate state there is no such duty. On the contrary, he urges the 'moral politician' to bring the constitution of the state into line with the principles of right. The striving of the moral politician, arguably one administering a republican state, allows to understand a possible link between a universal right of hospitality (*Besuchstrecht*) as something which 'belongs to all human

[98] Kant (n 6) 340. On this point see Koskenniemi (n 19) 9–36.

beings' and which is non-derogable by states, and a '*right to be a guest*' (*Gastrecht*), namely a right requiring the stipulation of a 'beneficent pact' that is discretionary to the will of the state.[99] Derrida speaks in this regard of the relation between a law of unconditional hospitality (*Besuchstrecht*) and the conditional laws of a right to hospitality (*Gastrecht*) in terms of an internal (progressive/emancipative) transformation of the law.[100]

The right to visit, in so far as it triggers a reply, places the moral politician under a duty to provide a justification for the demands of a foreign visitor, either in the case of a mandatory obligation of *non-refoulement*, or in the case of a discretionary acceptance of a claim. In the latter case, the domestic constitution incorporates a cosmopolitan request into a legal framework, establishing a juridical interconnection – a constitutional platform – between differently dispersed legal domains. Although it might appear as a functionalist argument at first sight, i.e. one motivated by protective measures, the rationale described above represents a truly constructivist justification for the consolidation of the cosmopolitan constitution (one realising an original right to have a place on earth). The moral politician has a 'duty of justification', either accepting or rejecting claims to visit so that any acceptable outcome has to be brought into line with an overall system of law.[101] One might speculate and argue that it is only if political judgment strikes an equilibrium between the external freedom of domestic and foreign nationals and the Universal Principle of Right, then justification is achieved. If this is the case, it also becomes possible to understand why the right to universal hospitality, in allowing for a communicative interaction among disparate legal communities, gives rise to the conditions for a state supraordinate rule of law.[102] In turn, the idea of commerce, in order to realise communicative interaction, must admit a critical use of reason in so far as the submission of individual claims as a foreigner raises an obligation to justify territorial exclusion.

These final considerations find textual support in the nexus that Kant establishes between cosmopolitan right and the standard of public use of

[99] Kant (n 6) 329.

[100] In J Derrida, *De l'hospitalité* (Calmann-Lévy, Paris, 1997).

[101] 'A moral politician will make it his principle that, once defects that could not have been prevented are found within the constitution of a state or in the relations of states, it is a duty, especially for heads of state, to be concerned about how they can be improved as soon as possible and brought into conformity with natural right, which stands before us as a model in the idea of reason, even at the cost of sacrifices of their self-seeking [inclinations]'. Kant (n 6) 340. For the idea of a 'duty of justification' as a 'duty that citizens have as "world citizens"', see R Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press, New York, NY, 2014) 225.

[102] On the subjects of cosmopolitan rights including not only individuals, but also states and peoples, see P Niesen, 'Colonialism and Hospitality' (2007) 3(1) *Politics and Ethics Review* 98.

reason as delineated in the *Perpetual Peace*. Kant claims that public reasoning has turned global and that legal integration among different regimes has become so pervasive that 'a violation of right on *one* place of the earth is felt in *all*'.[103] Following on from this, the 'negative' and 'positive' side of the right to visit can be grasped only by presupposing a critical-constitutionalist dimension of public use of reason where cosmopolitan citizens challenge 'from within and from without', so to say, public domestic constitutional standards making them porous. What ensues from this process of dialogical interaction is that the critical bite of Kantian cosmopolitan right highlighted by authors such as Bohman is only a stepping stone towards the juridification of public international relations and, finally, to the constitutionalisation of public international law.[104] This progression represents, therefore, only an intermediate step towards the realisation of the cosmopolitan ideal as ultimately a constitutional project achieved under public standards of reason.[105]

Furthermore, Kant is undoubtedly supportive of anti-colonialist views since any imposition by force, even of a rule of law, would create a legal void in the target population.[106] This means also that he places a global constitutionalist burden primarily on the shoulders of the visitor, as it were. It is for this reason that Kant approved the restrictions on European visitors adopted by China and Japan.[107] Several other examples of kind are on offer here, all marked by a banning of colonialist forms of domination that violate an equal standing of the people before the law. For Kant, states' signatories of voluntary contracts of hospitality (*Gastrecht*) are obliged to respect standards of external freedoms of cosmopolitan citizenship. A notion of trade-fairness applies in this case too. The agreement would turn into one not violating the cosmopolitan constraint of access to the

[103] Kant (n 6) 330.

[104] Bohman (n 72).

[105] Bohman emphasises this point in his reactualisation of Kant's cosmopolitanism when he asserts that: 'When community-wide biases restrict the scope of such self-scrutiny, usually by leaving relevant problems of the public agenda, a new public emerges to press for public self-scrutiny and sometimes for new rules and institutions … The civil rights movement, rather than the Supreme Court, is the exemplar of the public use of reason that can be extended to cosmopolitan conditions.' Bohman (n 72) 190.

[106] On this point see the recent collection of essays edited by K Flikschuh and L Ypi, *Kant and Colonialism* (Oxford University Press, Oxford, 2014).

[107] Kant (n 6) 329. As Risse observes: 'China and Japan may impose restrictions only if *that* is what is required to protect their citizens from assault, that is, only if *that* is what the maintenance of charitable treatment of individuals by foreign government requires. European powers had undermined that requirement. Protection against their intrusion was needed.' (original emphasis); M Risse, 'Taking up space on earth: Theorizing territorial rights, the justification of states and immigration from a global standpoint' (2015) 4(1) *Global Constitutionalism* 98.

earth for humanity, for instance, one causing massive environmental devastation or resulting in severe economic impoverishment for third parties. Were these catastrophes to occur, access to earth's resources would be prevented and an interaction-based standard of cosmopolitan justice violated.[108]

However, it remains the case that any cosmopolitan request, whenever successful, would arguably give rise to a 'constitutional crisis' and raise self-reflectivity by questioning how to relate externally with other constituencies. This would eventually lead to a transformation of the domestic constitutional system. Individual requests nudge domestic constitutions to comply with the generalisable public principles of law. Whereas domestic constitutions, *stricto sensu*, derive their legitimacy from a self-determining collective body that by definition excludes those subjects who are not recognised as members of the constituency – the people –, enactments of the cosmopolitan right to visit challenge such a self-referential understanding by introducing the possibility of interaction between non-citizens, communities and foreign states.

New constraints of public reasoning lay down limits to strategic state-behaviours with regard to external relations and hence to their use of secrecy and political expediency.[109] Publicity empowers the individual as a generalised other, that is, as a representative of an unrestricted audience in the 'communication *between* audience and speaker'.[110] In this way cosmopolitan law realises an interconnection among jurisdictions.

As a result of this overall argument, it appears that the gap is closed between a) the assumptions of a rightful cosmopolitan condition from which the cosmopolitan right to visit is legitimately enforced b) a specific content-related claim submitted by a visitor, and c) a domestically defined context of public use of reason (following a 'constitutional mindset' as Koskenniemi defines the thinking of Kant's 'moral politician').[111] Integration between these three levels allows for the transnationalisation of domestic public legal standards. This process completes what I have referred in the opening sections as the second part of the Kantian juridical aspect of cosmopolitan constructivism.

[108] On the contextualisation of some of these problems in the contemporary world see, T Pogge, *World Poverty and Human Rights* (Polity Press, Cambridge, 2008).

[109] 'Publicity has a limiting effect upon all strategic actions, both within states and between states. In the First Appendix to *Perpetual Peace*, Kant subjects political strategies to tests of publicity alone: if many maxims of political expediency are publicly acknowledged, they cannot attain their own purpose'; Bohman (n 72) 182.

[110] Bohman (n 72) 184.

[111] The relevant passage is Kant (n 6) 338. On this point see Koskenniemi (n 19) 9ff.

As observed, the outcome of the construction of a cosmopolitan public sphere by the public use of reason, while necessary and valuable, should not be regarded as the end point of Kantian cosmopolitan concerns. It is rather the *juridification* of the global public sphere that, ultimately, brings about a lawful condition between citizens and foreign states among themselves, as well as between domestic citizens. As Kant says: 'The problem of establishing a perfect civil constitution is dependent on the problem of a lawful external relation between states and cannot be solved without the latter'.[112] Here is the link with the law: in so far as standards of public reasoning are reflected in domestic constitutionalism, the incorporation of new interactional claims gives rise to further codifications in compliance with the general principles of public law. This time, though, such norms reflect an external – cosmopolitan – perspective, filling the gap between domestic and international law. Whereas national constitutional law may be seen as the product of a domestic constituent power – a sovereign people – the cosmopolitan constitution results from a more fundamental source of legitimacy: the common possession of the earth.

Kant seems to suggest that the construction of a cosmopolitan constitution is to be conceived along the lines of global citizenship and civil society as when he states that 'the condition of peace is alone that condition in which what is mine and what is yours for a multitude of human beings is secured under *laws* living in proximity to one another, hence those who are *united under a constitution*'.[113] More precisely, the cosmopolitan legitimacy of the state as a subject within the international order is the result of two intersecting parameters: national constituent sovereignties for self-legislating peoples and global citizenship. For Kant, this condition is far from being unrealisable. However, if peace has to be preserved as a realisable aspiration, then, it has also to be achieved through counterfactual-regulative conditions. As Kant argues in the *Metaphysics of Morals* 'we must act *as if* it [perpetual peace] is something real, though perhaps it is not; we must work toward establishing perpetual peace and *the kind of constitution* that seems to us most conducive to it (say, a republicanism of all states, together and separately)'.[114] For Kant, the time seemed ripe to conceive a 'realistic utopia'[115] to gain momentum.

[112] Kant (n 2) 16.
[113] Kant (n 4) 491 (emphasis added).
[114] ibid.
[115] The expression is taken from J Rawls, *The Law of Peoples* (Harvard University Press, Cambridge, MA, 1999) 11ff.

V. Conclusion

In this article I have proposed a constructivist interpretation of Kant's theory of cosmopolitanism. To this end I have claimed that the right to visit represents a formalisation of right-interactions among members of an original community of *commercium*. In so far as cosmopolitan right requires the justification of political decision-making and territorial boundaries, it gives rise to the need for mechanisms of constitutional coordination among individuals, peoples and states. A hierarchy of legal principles, equal protections and constraints on hegemonic states are just a few of the features relevant here.

Kantian cosmopolitan constitutionalism includes innovative elements with respect to his natural law tradition as well as to constitutional theory as such. It not only envisages a form of cosmopolitan constitution without a state, wherein the idea of a progression under the guidance of a multistate confederation (*Völkerstaat*) becomes apparent, but it also argues for a form of world citizenship without world sovereignty, one where the cosmopolitan point of view gives rise to a critical stance against an ultimate assimilation to a *de facto* constituency from the perspective of a transcendental authority. It is not only the case that constitutional progression is part of the Kantian vision of a regulative function based on the cosmopolitan ideal of an original shared possession of the earth but also, and more importantly, that the obstinate commitment to the idea of freedom as independence is not only an internal domestic resource but also a cosmopolitan liberty limited to the right to be heard in another jurisdiction.

There is a way in which great thinkers remain contemporary. This is by virtue of a continuous reinterpretation of their ideas in light of presently unsolved challenges. It is in this sense that Kant's cosmopolitan theory is relevant for guiding our contemporary reflections on the standards of legitimacy of international law. For Kant, valid law should reflect an ideal of moral freedom. Following on from this premise, public right generates a rightful condition – a constitution (*constitutio*) – at both state and international level. For Kant, public right enhances freedom not only within the state, that is, internally and in the form of domestic right (civil constitutional law), but also externally through international right – *jus gentium*. The innovative nature of Kant's thinking, as it seems, is that he claims that international law should be supplemented by one further component, one regulating primarily relations between non-citizens and states. This is the right to visit or what Kant calls also the 'right to hospitality'.[116] Arguably, the constitutional effects of such a right should by now be clear.

[116] Kant (n 6) 328.

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