

DOI: https://doi.org/10.56550/d.4.1.2	Original research article	
Received on: January 30, 2025	Accepted on: December, 19 2025	Published on: March, 24, 2026

Bertjan Wolthuis

Vrije Universiteit Amsterdam
a.j.wolthuis@vu.nl

IS EU LAW POSITIVE COSMOPOLITAN RIGHT À LA KANT?

Abstract

The question raised in this article is whether EU law is positive cosmopolitan right in Kant's sense. If it is, it could be viewed as a contribution to Kant's project of 'perpetual peace.' The conclusion of this article is that EU law is not positive cosmopolitan right. The main reason is that cosmopolitan right is limited to the right of travellers to be treated peacefully by foreign states. EU law accomplishes much more than that. EU member states have agreed by treaty to *host* each other's nationals, who thereby have attained the status of *guests* in foreign EU member states. The implication of this is that EU law qualifies as hospitality right or '*Gastrecht*,' as Kant calls it (AK 8:358),¹ which is a right that can be acquired by treaty, whereas cosmopolitan right—which specifies the innate right of human beings and states to be on Earth—is limited to the *conditions* of hospitality, as Kant writes in *Zum ewigen Frieden*. This means that the European Union fulfils much more than a requirement of peace as understood by Kant. Its treaties are 'wohltätiger Verträge' (AK 8:358), fulfilling requirements of *integration* between the participating states and their nationals.

Key words: Kant; Cosmopolitan right; Hospitality right; EU law

¹ The references to Kant's text are to the Berlin Academy Edition (abbreviated as AK) by volume: page number. I use Mary Gregor's translation but deviate in this article from her use of 'commerce' as a translation of 'Verkehr'; I translate this as 'interaction'.

IST DAS EU-RECHT POSITIVES WELTBÜRGERRECHT À LA KANT?

Zusammenfassung

Die in diesem Artikel aufgeworfene Frage lautet, ob das EU-Recht im Sinne Kants positives Weltbürgerrecht ist. Wenn ja, könnte es als Beitrag zu Kants Projekt des „ewigen Friedens“ angesehen werden. Die Schlussfolgerung dieses Artikels lautet, dass das EU-Recht kein positives Weltbürgerrecht ist. Der Hauptgrund dafür ist, dass das Weltbürgerrecht auf das Recht von Reisenden beschränkt ist, von fremden Staaten friedlich behandelt zu werden. Das EU-Recht leistet weit mehr als das. Die EU-Mitgliedstaaten haben sich vertraglich darauf geeinigt, die Staatsangehörigen der anderen Mitgliedstaaten aufzunehmen, die dadurch den Status von Gästen in fremden EU-Mitgliedstaaten erlangt haben. Daraus folgt, dass das EU-Recht als „Gastrecht“ im Sinne Kants (AK 8:358) zu qualifizieren ist, das durch einen Vertrag erworben werden kann, während das Weltbürgerrecht – das das angeborene Recht von Menschen und Staaten auf Aufenthalt auf der Erde festlegt – auf die Bedingungen der Hospitalität beschränkt ist, wie Kant in Zum ewigen Frieden schreibt. Das bedeutet, dass die Europäische Union weit mehr als nur eine Voraussetzung für Frieden im Sinne Kants erfüllt. Ihre Verträge sind „wohlthätige Verträge“ (AK 8:358), die die Voraussetzungen für die Integration zwischen den teilnehmenden Staaten und ihren Staatsangehörigen erfüllen.

Schlüsselwörter: Kant; Weltbürgerrecht; Gastrecht; EU-recht

Introduction

A working paper version of this article was presented at a Kant conference in Zadar, Croatia, at November 21 and 22, 2024, on the occasion of the 300th anniversary of Kant's birth.² The conference was organized around the question: 'Is the European Union a realization of Kant's idea of perpetual peace?' The main question of this article, the title question, is closely related to the conference question. Kant equates peace with the situation in which all unavoidable interactions between persons and states have been brought under law, so that conflicts about the rightfulness of these interactions can be settled in a court of law instead of by war (AK 6:311; AK 8:349). Kant explains that there are three types of such interactions:

² I want to use this occasion to thank the organizers of this conference, including Josip Čapin, Christoph Horn and Jure Zovko, for the work done and for the friendly get-together in Zadar.

between persons who are part of the same state (to be brought under the right of state), between states (to be brought under the right of nations) and between a person and a state of which that person is not a part (to be brought under cosmopolitan right). There is some reason to believe that EU law could be positive cosmopolitan law: it has two classes of subjects—states and persons³—and the core area of European integration involves the movement of persons migrating from their home state to another member state.⁴ Some theorists have also referred to the EU as a union of a cosmopolitan kind.⁵ If EU law happens to be positive cosmopolitan right, then it brings under law unavoidable interactions that need to be brought under law to contribute to peace and hence the EU can be said to contribute to the aim of perpetual peace. If EU law is not positive cosmopolitan right, then it may not make this direct contribution to the establishment of peace in Kant's strict meaning of this term. Of course, finding out whether EU law is positive cosmopolitan law or not (and if not, what could it be then, according to Kant?), is also interesting for EU lawyers and EU legal theorists, since the question what the EU is, has been troubling them since the beginning of the project of European integration.⁶

This article is constructed as follows. In section 2, I explain what it is that makes the main question of this article so difficult to address. The reason is, I suggest, the interpretation of Kant's category of cosmopolitan right. Kant scholars disagree radically about the restrictedness, the status and the source of cosmopolitan right. In order to address the main question, I need to solve these disagreements, which I shall do in section 3, which concerns

³ See Art. 10.2 Treaty on European Union.

⁴ These freedoms of movement can be found in the Treaty on the Functioning of the European Union (TFEU). See, for instance, Artt. 30, 45.1, 56, 63 TFEU.

⁵ See, for instance, Jean-Marc Ferry, "European integration and the cosmopolitan way" in: Mario Telò (ed.), *The European Union and Global Governance*, Routledge, London 2009 and Bertjan Wolthuis & Luigi Corrias, "Europe's Cosmopolitan Union: A Kantian Reading of EU Internal Market Law and the Refugee Crisis" in: Ester Herlin-Karnell & Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War*, Oxford University Press, Oxford 2021.

⁶ It is not uncommon to refer to the European Union as an entity neither of international law nor of national law but as something that is in a class of its own, *sui generis*. See, for an introduction to this topic, Koen Lenaerts & José A. Gutiérrez-Fons, "A Constitutional Perspective" in: Robert Schütze & Takis Tridimas (eds.), *Oxford Principles of European Union Law: The European Legal Order. Volume I*, Oxford University Press, Oxford 2019. However, could this class to which the EU belongs not be the class of systems of cosmopolitan law? This article aims to contribute to addressing that question.

the source of cosmopolitan right, in section 4, which concerns this right's status and in section 5, which concerns its restrictedness. These sections clarify what cosmopolitan right is. In section 6 I briefly sketch the nature of EU law,⁷ which enables me to answer, in section 6, the main question, and to reflect upon the nature of EU law, viewed from a Kantian perspective.

1. Why it is so difficult to assess whether EU law is positive cosmopolitan right à la Kant

When we read the parts in *Zum ewigen Frieden* and the *Rechtslehre* about cosmopolitan right, it is particularly striking, I suggest, that Kant places so much emphasis on the restrictedness of this right. *Zum ewigen Frieden* is constructed as a list of articles for peace and the 'third definitive article,' which is about cosmopolitan right, reads: 'Cosmopolitan right shall be limited to the conditions of universal hospitality' (AK 8:357). It appears that cosmopolitan right—hereafter also: CR—is not the right to be treated as a guest, by a host, in a hospitable way, but that it has to do with the conditions of hospitality, that its immediate objective is to establish the peaceful circumstances in which a *prospective* host and a *prospective* guest can meet. This suspicion is further strengthened by the text under the third article and in the corresponding part of the *Rechtslehre*, where Kant writes that a human being has the right 'to try to' interact with the members of the foreign state (AK 6:353). And Kant also uses the word 'attempt' in this regard (AK 6:352). The state has the duty to receive the foreigner peacefully. It has the right to 'turn' the foreigner 'away' (AK 8:358). CR is apparently the right to make the attempt to visit another country, whereby there is minimal duty on the part of the state to receive the traveller at the border in peace.

However, once we turn from Kant's texts to the interpretations offered by Kant scholars, an altogether different picture emerges. Kant's CR is described by them without qualification as a the 'right to hospitality', the 'right to visit' or presented as 'limited to a right of "universal hospitality"' with the 'conditions'-part deleted!⁸ Arthur Ripstein discusses under the

⁷ The focus in this article is on Kant's notion of cosmopolitan right, not on EU law, also because it was originally written and presented at a conference on the occasion of the 300th anniversary of Kant's birth.

⁸ See, for instance, Pauline Kleingeld, "Kant's Cosmopolitan Law: World Citizenship for a Global Order", *Kantian Review* 2 (1998), p. 72, Arthur Ripstein, *Kant and the Law of War*, Oxford University Press, Oxford 2021, p. 247. The final quote is from Arthur

heading of CR the rights and duties that foreign visitors have in their interactions with the nationals of the country they visit⁹ and Peter Niesen argues that CR should comprise ‘universal access and entry rights, in and through all states.’¹⁰

So the question arises how this remarkable difference between Kant’s seemingly unequivocal statements about the restrictedness of CR in the text and these capacious interpretations of Kant’s CR can be explained. One explanation involves the status of Kant’s CR. According to Niesen, the duties and rights that Kant discusses under the heading of CR comprise ‘private’ right. With this he means that these rights and duties concern persons and states in a ‘cosmopolitan state of nature,’ in which there are no institutions of cosmopolitan right that can settle questions of interpretation of CR.¹¹ Niesen’s general argument is that it is crucial to keep track of the status of the law discussed by Kant in *Zum ewigen Frieden* and the *Rechtslehre*: does it concern the relations between parties in a state of nature or does it concern the relation between parties in a juridical context, whereby institutions authorized to settle questions of interpretation are already available? With respect to CR Niesen argues that its provisions concern a state of nature, which implies that CR should be further transformed and also extended.¹²

Another explanation involves the source of Kant’s CR. There appears to be some agreement among Kant scholars that Kant is a bit vague about the source of this right or how CR is derived from it.¹³ And the source that some scholars agree he refers to, is according to them incapable of justifying the precepts that Kant lists under CR.¹⁴ They have therefore proposed alternative sources,¹⁵ which has led them to argue for a more extensive

Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy*, Harvard University Press, Cambridge Massachusetts 2009, p. 296.

⁹ Ripstein 2021, p. 238-239.

¹⁰ Peter Niesen, “What Kant Would Have Said in the Refugee Crisis”, *Danish Yearbook of Philosophy* 50 (2017), p. 104.

¹¹ Peter Niesen, “Vulnerability, Space, Communication: Three Conditions of Adequacy for Cosmopolitan Right”, in: Herlin-Karnell & Rossi 2021, p. 66-67.

¹² Niesen makes this argument in Niesen 2017.

¹³ According to Niesen (2021, p. 66), ‘Kant does not spend much time in justifying hospitality’.

¹⁴ According to Kleingeld (1998, p. 78), ‘the argument [given by Kant] provides at best a partial grounding for cosmopolitan law’.

¹⁵ See for instance the sources discussed in Peter Niesen, ‘Colonialism and Hospitality’, *Politics and Ethics Review* 3 (1) 2007, p. 100 and further.

interpretation of CR, perhaps also because of the assumption that the restricted version ‘would not amount to very much at all’.¹⁶

So the restrictedness of CR in Kant’s writings and the more extensive interpretations of CR by Kant scholars seem related to the status and source of CR. All three issues—restrictedness, status and source—make the question whether EU law is positive CR à la Kant not as straightforward as it may seem. They make it difficult to assess what CR exactly comprises, and also why. The three issues have to be settled in order to understand what CR really is, after which the main question can be answered. This is what I do in the next two sections. I begin with the most fundamental issue, the source of CR, since this issue determines the other two, as I shall show below.

2. Where does cosmopolitan right come from?

In the last sentence of the first paragraph of section 62 of the *Rechtslehre*, Kant writes that the right to possession in common of land that ‘nations’ and also ‘inhabitants of the Earth’ have can also be called (‘genannt werden kann’) cosmopolitan right. Kant writes that each of the Earth’s inhabitants (‘*Erbewohner*’) has the right of ‘original’ possession and also that ‘nations stand originally in a community of land’ (AK 6:352).¹⁷

The original right of possession in common of land itself is introduced in an earlier section of the *Rechtslehre* dealing with the appropriation of land. According to Kant, human beings have the right to appropriate unappropriated land by taking it under control (AK 6:263). But appropriation of land can only be legitimate if human beings first have the right to be on the land that they are about to take under control. This right is the right to possession in common of land. Human beings have this right in light of their nature as inhabitants of the Earth. Hence, this right is an ‘original’ or an ‘innate’ right (AK 6:262). It is not a right that depends upon an act, which would make it an ‘acquired’ right. So it is important to keep in mind that there is a crucial difference between the original right to possession in common, which is the innate right of human beings to be on Earth, and the right to property of a piece of land, which is an acquired right, a right

¹⁶ Jakob Huber, *Kant’s Grounded Cosmopolitanism*, Oxford University Press, Oxford 2022, p. 103.

¹⁷ Niesen (2021, p. 66) writes that the right to hospitality is ‘derived’ from possession in common of the Earth’s surface. My point here is that it is the same right but that cosmopolitan right is the public right version of the innate right to be on Earth.

that is acquired by taking an unappropriated piece of land under control. In section 62 of the *Rechtslehre*, the section about CR, Kant explains that the right of nations and inhabitants of the Earth to common possession of land can also be called cosmopolitan right. Kant refers here to the innate right to be on Earth. He explicitly writes that he is not referring to the acquired right ‘of property in it’ (AK 6:352).

Let me fill in this innate right to be on Earth—as I shall refer to it briefly; Kant somewhere uses the phrase right to the Earth’s surface, ‘Recht der Oberfläche’ (AK 8:358)—of individual human beings. Readers may have some doubt about the innateness of this right since Kant has famously stated, at the start of the *Rechtslehre*, ‘that there is only one innate right’ (AK 6:237) and that this is the right to freedom. However, Kant distinguishes also several parts (see AK 6:237 and AK 6:238) of this right, and he insists that these parts all are connected to the ‘humanity’ of human beings. I propose that the right to be on Earth can be added as a part of the innate right to freedom but not as a part connected to the ‘humanity’ of human beings but as a part connected to the planet where human beings have to live, to human beings’ quality as ‘inhabitants of the Earth’ (*Erdbewohner*; AK 6:352).¹⁸ Ripstein agrees that it is part of the innate right to freedom and refers to the right to be on Earth as the ‘spatial’ aspect of it.¹⁹

In light of the argument in this article it is important to understand that the right to be on Earth that a particular human being has, is limited. It is limited especially by the rights to be on Earth that all other human beings have. This mutually limiting character of right is typical of Kant’s understanding of right. With respect to the right to be on Earth the implication is that my right to be on Earth does not extend so far that you do not have this right. It is not part of my right to be on Earth to corner you, for example. And it is not part of this right either to force you to an unsafe, uninhabitable location—off a cliff, for example, or on board of a vessel that is not seaworthy, or into the desert, without any resources. It is also not part of this right to force you to leave your present place, if that place was unoccupied. The reason is that you do not have less right to be in that place than I have or

¹⁸ It could be argued that not only human beings are inhabitants of the Earth but that other animals are as well—and what about trees, plants, *life*? Kant does not develop this thought and Kantians have not developed it either, as far as I know. I think it could be interesting to try to construct on the basis of the ‘Erdbewohner’-argument an entire approach to animal rights etc.

¹⁹ Ripstein 2021, p. 237.

than any other human being has. Moreover, I do not have the right to decide where you should go. Kant understands freedom always as independence: you alone are the one to decide whether you move or not, and whereto, as long as you do not hinder other persons exercising their right to be on Earth. You are your own master, not in the sense of self-mastery but in the sense that another is not your master. And this is the case for every human being.

Let me now turn to states. In section 62 on CR Kant writes that not only individual persons but also states ‘stand originally in a community of land’ (AK 6:352). What a state is, has been explained by Kant earlier. A state is a ‘whole of individuals in a rightful condition’ (AK 6:311). The intermediate conclusion is that not only an individual person has the right to be on Earth but also a people, which Kant calls at some point a bunch of human beings (‘eine Menge von Menschen’; AK 6:313). Kant seems to assume that a people, a state or a nation—Kant uses these terms interchangeably at times—does not move, or cannot move, that its territory is fixed.²⁰ Whereas a person’s right to be on Earth includes the right to change location, he nowhere seems to assume that states have that right. A state right’s to be on Earth appears to come down to the right to be just where it is, to be where it exercises its authority. This does not mean that the individual persons who make up a people also lack the right to change location. On the contrary, according to Kant they have the right to leave that part of the Earth’s surface where their people exercises its authority. They have the right to emigrate (‘Auswanderung’; AK 6:338).

3. The status of cosmopolitan right

At the beginning of the previous section I pointed out that Kant writes that the right to be on Earth ‘can be called’ cosmopolitan right. In the previous section I have discussed this right to be on Earth. Now I want to discuss the relation between this right and CR. Kant’s expression ‘can be called’ raises a question. What is difficult is that the right to be on Earth, which

²⁰ With respect to a nomadic people Kant seems to assume that they move around on a fixed territory (AK 6:266), which can then be quite vast, and that this makes it illegal for persons to enter that territory without permission, also if it looks deserted. Kant’s assumption that a people or state cannot move appears to fit modern but not premodern statehood. The history of mankind shows that peoples have been on the move at least since the beginning of homo sapiens, in reaction to changing natural conditions and changes in technology, among other factors. Kant’s notion of CR need not be modified to accommodate this.

Kant has qualified as an original or innate right, is mentioned in the part devoted to private right, whereas cosmopolitan right is in Part II of *The Doctrine of Right*, which is entitled ‘Public right’. The question is how we should conceptualize the relation between the innate, private right to be on Earth and public CR, with which I refer to the rights and duties Kant lists in the section on CR.

To solve this problem, it is necessary to look at Kant’s specific definition of public right. Public right is defined by Kant as ‘the sum of the laws which need to be promulgated generally in order to bring about a rightful condition.’ (AK 6:311) Kant also discusses private right (Part I of *The Doctrine of Right*), which concerns the rights and duties that persons have in the state of nature, which is the condition without institutions authorized to give, apply and execute law. There is no difference in the content of the private rights and duties between parties²¹ and their public right versions, as Kant stresses (AK 6:306). Both are ‘natural right’ not ‘positive right’ (AK 6:229), since they rest on ‘a priori principles’ (AK 6:237). As indicated earlier, Kant distinguishes three possible forms of rightful condition, corresponding to the three kinds of relation between persons and states: the right of state, the right of nations and cosmopolitan right. The first brings under law primarily the relations between persons who are part of the same state, the second brings under law the relations between states and the third brings under law the relations between persons and states of which they are not part. All rightful conditions have to be connected as one whole, to establish peace.

Do the rights and duties listed under cosmopolitan right have to be promulgated to bring about a rightful condition? In light of the previous section the answer has to be yes. In the previous section I indicated that human beings and peoples have the right to be on Earth and that these innate rights are mutually limiting. The entire point of CR now appears to be that it specifies how these parties can exercise their rights to be on Earth together, in their interactions with each other. The conclusion of this section is that I interpret in this article Kant’s statement that the right of states and persons to be on Earth ‘can be called’ cosmopolitan right to mean that it can be

²¹ This formulation does not mean that public right cannot entail provisions with respect to the institutions that have to be established in order to leave the state of nature and the relations between these institutions and those subjected to them. Kant discusses such provisions in the part on public right. The formulation only concerns the relation between the parties, in the case of CR, states and foreign persons.

called so because CR is no more—and no less—than the public right version of the private, innate right of persons and states to be on Earth.²²

4. The restrictedness of cosmopolitan right

The interpretation offered here about where CR comes from not only explains why CR has to be public right, that is, why it contains rights and duties that have to be promulgated to have a rightful condition (previous section), it also explains why CR has to be limited to the conditions of hospitality, as I intend to show in this section. I propose to distinguish four topics in the discussion of the restrictedness of CR: peacefulness, reception, ‘*Untergang*’—the best English translation is perhaps ‘downfall’—and communication.

4.1. Peacefulness

One of the first things that Kant mentions under the heading of CR is that persons have a right to be received peacefully by the foreign country that they hope to enter. Kant uses in the first sentence under the third definitive article of *Zum ewigen Frieden* the negative formulation ‘nicht feindselig behandeln,’ ‘not to be treated with hostility’ (AK 8:356-357). Of course, if a foreigner—or a group of foreigners—*turns out to be* hostile, then the state in question is entitled to defend itself or close or restrict the access to its border, for example, as Kant clarifies in his discussion of the example of China and Japan, who restricted access to their territory in response to violent European traders and colonists (AK 8:359). But Kant’s point is that *in itself* arriving at the border and trying to come into contact with the inhabitants does not constitute a valid reason for a hostile reception.

That cosmopolitan right is restricted to a non-hostile reception of the traveller by the state of destination may strike some readers as a bit meagre. To value it more, I suggest we compare it to the situation in which there is *no* such right: the state of nature. In that condition human beings do *not* have the duty to be peaceful to each other, according to Kant (AK 6:307). What explains the difference? In the state of nature there is no institution that protects the rights of each and hence human beings cannot give each

²² This position differs sharply from Niesen’s, who views Kant’s cosmopolitan right as ‘private’ right or ‘natural’ right. *Nota bene*: Niesen (2017, p. 100, for example) uses this last term not in Kant’s sense—in Kant’s sense natural right can be either private or public—but in the sense of what Kant calls ‘private’ right.

other the assurance that they will not ‘encroach on what another possesses’ (AK 6:307). Hence no one is ‘bound to refrain from encroaching on what another possesses’, ‘no one need wait’ (AK 6:307). ‘One is authorized to use coercion against someone who already, by his nature, threatens him with coercion.’ (AK 6:307) Kant does not write about institutions of cosmopolitan right. So if the institutional setting does not explain the difference, what does? From Kant’s texts we can learn that the cosmopolitan encounter between a human being and a foreign state differs from this interpersonal confrontation in the state of nature. The main difference Kant stresses is that the parties in the cosmopolitan encounter do not stand in a relation of competition over their appropriations, as do persons in the state of nature, but that they stand instead in a relation of ‘offering to engage in interaction [‘Verkehr’] with each other’ (AK 6:352), which is directly connected to their right to be on Earth. The foreigner is therefore not ‘by nature’ a threat because the foreigner is presumed to come in peace, to come only to offer to engage in interaction—to buy or sell, to learn the culture or simply to visit the country. Of course, a foreigner can always *become* a threat and then a hostile response is warranted but Kant’s point here appears to be that the foreigner is not a threat ‘by nature’. Merely showing up at the border does not constitute a threat and hence there is no reason to be hostile.

4.2. Reception

Within the text on CR in *Zum ewigen Frieden* a clear two-step sequence can be discerned: the reception of the foreigner at the border and the foreigner’s stay as a guest among the population. CR is limited to the first stage. To be admitted as a guest, a contract or treaty between the foreigner, the prospective guest, and the state, the prospective host, is required. The two parties may not reach an agreement. CR is restricted to secure the peaceful conditions under which such an agreement may or may not be struck. The conditions are: a peaceful reception by the state of the foreigner, in which the foreigner can communicate his offer to engage in interaction with the inhabitants.

It is highly unfortunate that Kant uses in the text the term ‘visit’ (‘Besuch’; AK 8:358) and the term ‘hospitable’ (‘inhospitale’; AK 8:358), which are applicable to *both* stages and which Kant scholars have also applied to both stages, thereby proposing interpretations of CR that are imprecise and generally too capacious. In order to make no mistake about the restrictedness of Kant’s CR, it is perhaps better to use the word ‘reception’. The term

‘peacefulness’ or ‘non-hostility’ can then best be used to refer to what the foreigner is owed within the context of this reception. Kant uses ‘hospitable’ in the first sentence of the third definitive article and connects it to the foreigner’s ‘arrival’; it is only in *this* setting something that a foreigner has a ‘right’ to by virtue of his innate right to be on Earth. But Kant’s use of this word is inconsistent with the text of the article—the title—itsself, which limits CR to the *conditions* of hospitality. In *that* sense it refers to the hospitality that a host is owed to his guest, by virtue of an agreement between the two. My general point is that the restrictive reading of Kant’s CR is demanded by my interpretation of Kant’s CR as the public right version of the innate right to be on Earth of persons and states. If a person’s CR includes the right to enter the country, regardless of the state’s consent, this would be infringe upon the state’s right to be on Earth.

Here I also want to point out one way in which Kant’s position can be viewed as perhaps *not* so limited. Kant’s position with respect to CR is that *all* human beings have this right to be received by *all* foreign peoples. A right to be received, to a reception, may be thought of as a right to something that may amount to not very much. Peoples have the cosmopolitan right to deny foreigners *entrance* (‘Eingang’; AK 8:359), after all. But within Kant’s CR there seems to be no legal room to deny foreigners *access* (‘Zugang’). A state has a cosmopolitan legal duty to receive foreigners—that is, as long as foreigners do not abuse the corresponding cosmopolitan right, as indicated by Kant in the China-Japan example. There appears to be no justification for complete isolation.²³ Kant’s position is that human beings and states are on the Earth’s surface together and have to tolerate or accept (‘dulden’;

²³ Complete isolation is: no contact. I think there is a case to be made, at least in certain instances, that no contact is justified or even required—contra Kant. Take, for example, the case of ‘uncontacted tribes,’ a qualification that is adopted by *Survival International*, an NGO that aims to protect the rights of indigenous peoples in general. History shows that such tribes have been wiped out as a consequence of contact with foreigners who brought viruses to them. Another reason not to contact them is that these uncontacted peoples have cultures and economies that are very different from those of ‘contacted’ peoples. An ‘uncontacted’ people has the right, one could argue, to do things its own way. So an alternative rule is to wait for uncontacted peoples to contact us contacted peoples. In the science fiction television series *Star Trek* human beings and inhabitants of other planets have discovered technology that allows them to travel between galaxies. The peaceloving peoples who participate in what is called *Starfleet* have a rule called the ‘Prime Directive,’ according to which inhabitants of planets that do not travel intergalactically are to be left alone. This rule appeals to the argument advanced in this footnote.

AK 8:358) each other as co-inhabitants of the Earth with a right to be on Earth. This toleration includes keeping the lines of communication open and hence receiving foreigners.

4.3. 'Untergang'

Human beings and states have the innate right to be on Earth and these rights are mutually limiting. This explains why CR, viewed as the public right version of this innate right, has to be restricted to the right to a peaceful reception of a foreign person at a state's border. A state has the right to send the foreigner away, 'if this can be done without destroying him', 'wenn es ohne seinen Untergang geschehen kann' (AK 8:358).²⁴ One may wonder whether this addition can still be said to express a cosmopolitan right that is limited. Is Kant referring here to a full-blown principle of non-refoulement? Niesen views the Untergang-rule as a 'humanitarian element in cosmopolitan right.'²⁵ If his qualification is correct, then it is difficult to make sense of this exception to the rule that a state can turn foreigners away. The reason is that Kant's theory of right is written in the vocabulary of freedom, not in that of need. Or can the exception be justified by reference to the rights of persons and states to be on Earth?

I think so. To begin with, the state's authorization to 'turn' the foreigner 'away' (AK 8:358) is justified because the state simply is on the specific part of the Earth's surface where the foreigner wants to be. The place where the foreigner is received, near or at the border, is part of where the state is. The right of the foreigner to be on Earth is limited by the right of the state to be on Earth, as explained in section 3. However, it is not part of the right to be on Earth to force another to an unsafe location, as I have also argued in section 3. Because the foreigner has the right to be on Earth, coercing the foreigner to a place that is currently uninhabitable is equivalent to not granting him the right to be on Earth. So whereas the state is authorized to turn the foreigner away, there can be circumstances—the word 'Untergang' (also: going under) invites the example of a storm at sea—in which that course of action is contrary to right because there is at the moment no inhabitable place to rightfully coerce the foreigner to. This is a non-humanitarian reading of the Untergang-passage that is in line with the interpretation offered above of CR as the public right version of the innate right to be on Earth of persons and states.

²⁴ This qualification is mentioned in *Zum ewigen Frieden* but not in the *Rechtslehre*.

²⁵ Niesen 2021, p. 74.

4.4. Communication

So far the outcome is that CR is limited to the peaceful reception of the foreigner by the state. The outcome of this encounter is that the foreigner can be turned away if there is a way out for the foreigner. The encounter is a necessary but not a sufficient *condition of hospitality* because the access it provides can lead to entrance, but only if state and foreigner reach an agreement about the terms of the visit. Now it is in order to be clearer about the *communicative* nature of the encounter. The traveller has the right ‘to offer to engage in interaction’ (‘Verkehr’; AK 6:352) or, in other words, ‘to present [‘propose,’ ‘offer’ fit better with the German *anzubieten*, BW] oneself for society’ (‘*sich zur Gesellschaft anzubieten*’; AK 8:358). It is not clear what this right to communicate this proposal exactly amounts to. Is the receiving party obligated to listen? To respond? To provide a reasoned response? We cannot distill this readily from the text.

What is clear from the text, I think, is that the state has to let the foreigner speak. It has to be admitted that Kant connects the ‘offer to engage in interaction’-part to an ‘attempt’ in the next sentence in the translation of the *Rechtslehre* but the ‘attempt’ appears to be connected to the interaction with the inhabitants. So the idea is that there is a right to *try* to interact with the inhabitants, and that this attempt consists of a communicative act—hence a right to make this attempt, a right to communicate. In *Zum ewigen Frieden* the situation is formulated clearer: ‘What he can claim is [...] the *right to visit*; this right to present oneself for society, belongs to all human beings by virtue of the right to possession in common of the Earth’s surface [...]’ (AK 8:358)

A question that could come up is whether, and if so how, the right to be on Earth can justify the right to communicate. But this question is, I argue, based on a misunderstanding. The difficulty is not that the right to be on Earth—which is introduced as a ‘spatial’ right connect to our nature as inhabitants of Earth—does not authorize communication. The point is that such an authorization is not required; as human beings our innate right to freedom in virtue of our humanity²⁶ allows us to do anything that ‘does not in itself diminish what is [another’s, BW],’ (AK 6:238) in this case the

²⁶ Notice that in introducing the right to be on Earth, I connected this right to the right to freedom. Human beings have the right to be on Earth in virtue of their nature as inhabitants of Earth and the right to freedom in virtue of their humanity. The pack of rights can nevertheless be understood as ‘one innate right’, although it has different sources.

state's, and merely communicating your thoughts about a stay in a foreign country is not an infringement of the state's rights.

The difficulty with regard to the communicative encounter is not with the speaker, I propose, but with the listener: is the state obligated to listen or to let the speaker speak? (Can listening even be a legal duty?) Viewing CR as the public right version of the right to be on Earth suggests a negative answer: the state has the right to be where it is, where it exercises its authority. The foreigner has no right to tell the state what it should do (in this case: that it has to listen). The state has the right to decide for itself what it wants to do—as far as CR is concerned—as long as it does not infringe upon the foreigner's right to be on Earth.

5. Is EU law positive cosmopolitan right à la Kant ?

According to EU law, nationals of EU member states have the right to enter foreign EU member states, sell and buy there goods, services and capital; but also study, work and retire there. The main aim of the process of European integration, which started with the European Coal and Steel Community (1951), is to establish one internal market where persons, goods, services and capital can move freely across borders.

And what is more, the laws of European integration are given by representatives of EU member states and of all EU member state nationals—also known as EU citizens—within the Council and the European Parliament respectively. The European Union is a political union of states and persons—the nationals of the member states—and has sovereign legislative, judicial and executive powers. Member states are free to leave. But as long as they are member of the union, they are subjects to its rules, and to the decisions made by the European Court of Justice and the European Commission, which is an institution that has at least surrogate executive authority.

If these features are compared to Kant's category of cosmopolitan right, it is not difficult anymore to answer that EU law is not positive cosmopolitan right à la Kant, since it is not limited to a peaceful reception at the border. (The 1951 United Nations Refugee Convention, or at least a certain part of it, would appear to offer a better fit.²⁷) Within the EU, there are access and

²⁷ This article is limited to an answer to the title question. I cannot develop the comparison between Kant's cosmopolitan right and the Refugee Convention here any further.

entry rights, which the member states have granted each other's nationals. There is also no point in organizing such a reception, since the terms of the foreigner's visit need not be negotiated. They are already given in the treaties of European integration.

These treaties appear to constitute what Kant calls 'wohltätiger Verträge' that specify 'Gastrecht', 'guest right' or hospitality right, since they contain all the rights that nationals of EU member states can enjoy in foreign EU member states. As indicated, these rights are very far-reaching. Not only do EU member state nationals have the right to enter and travel in foreign EU member states, they also have the right to sell and buy goods, services and capital there. They have the right to live there and study, work and retire there. Discrimination based on nationality is not allowed in all areas that comprise the EU internal market. The rights of EU member state nationals in foreign EU member states are not the same as those of their host state's nationals. EU member state nationals have limited social security rights in the foreign EU member state that hosts them. They also have no right to vote in national elections. (But they do in local elections!) This explains why it is still in order to qualify them as guests, although they are special guests, "house" guests.

Because EU law is not positive cosmopolitan right à la Kant, it makes no direct contribution to the establishment of peace in Kant's meaning of that term. Kant formulated the aim of bringing all unavoidable interactions between persons, between states, and also between persons and states under law. Given that the Earth is a globe, Kant reasoned that it is not possible to disperse so that we need not meet each other. States and persons have the right to be on Earth and this right includes for persons the right to move around. Sooner or later they arrive a state borders. By promulgating provisions of cosmopolitan right these interactions can be brought under law. The process of striking treaties of guest right not so much brings unavoidable interactions under law but creates new and more interactions and brings these under law. This means that the European treaties of guest right are not required to establish peace in Kant's restricted sense. They further peace in a more substantial sense, by transforming the nationals of each member states into guests of the other member states and by establishing a political union between all member states and all member state nationals.

References

- Jean-Marc Ferry, “European integration and the cosmopolitan way” in: Mario Telò (ed.), *The European Union and Global Governance*, Routledge, London 2009.
- Jakob Huber, *Kant’s Grounded Cosmopolitanism*, Oxford University Press, Oxford 2022, p. 103.
- Immanuel Kant, *Practical Philosophy*, translation Mary Gregor, Cambridge University Press, Cambridge 1996.
- Pauline Kleingeld, “Kant’s Cosmopolitan Law: World Citizenship for a Global Order”, *Kantian Review* 2 (1998).
- Koen Lenaerts & José A. Gutiérrez-Fons, “A Constitutional Perspective” in: Robert Schütze & Takis Tridimas (eds.), *Oxford Principles of European Union Law: The European Legal Order*. Volume I, Oxford University Press, Oxford 2019.
- Peter Niesen, ‘Colonialism and Hospitality’, *Politics and Ethics Review* 3 (1) 2007.
- Peter Niesen, “What Kant Would Have Said in the Refugee Crisis”, *Danish Yearbook of Philosophy* 50 (2017).
- Peter Niesen, “Vulnerability, Space, Communication: Three Conditions of Adequacy for Cosmopolitan Right”, in: Ester Herlin-Karnell & Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War*, Oxford University Press, Oxford 2021.
- Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy*, Harvard University Press, Cambridge Massachusetts 2009.
- Arthur Ripstein, *Kant and the Law of War*, Oxford University Press, Oxford 2021.
- Bertjan Wolthuis & Luigi Corrias, “Europe’s Cosmopolitan Union: A Kantian Reading of EU Internal Market Law and the Refugee Crisis” in: Ester Herlin-Karnell & Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War*, Oxford University Press, Oxford 2021.