

RE-EVALUATING KANT'S COSMOPOLITAN LAW

European Citizenship as a Transition from the Right to Visitation to the Right to Residence

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Translated from French by Sarah-Louise Raillard

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RE-EVALUATING

KANT'S COSMOPOLITAN LAW

EUROPEAN CITIZENSHIP AS A TRANSITION
FROM THE RIGHT TO VISITATION TO THE RIGHT TO RESIDENCE

Martin Deleixhe

Translated from French by Sarah-Louise Raillard

A canonical work of political theory, Kant's essay *Perpetual Peace* exposes a legal systematicity that nonetheless comes up against an internal contradiction: how can we institute liberal cosmopolitanism without dissolving the political communities that compose it? The most direct way of answering this question means discrediting the sovereignty of nation-states in order to better advance the hypothesis of future global political unification. But Kant deliberately rejects this easy solution, which permits itself to ignore realities which contradict his theoretical goal. It is difficult to imagine that states would willingly give up their sovereignty. Since it establishes neither a world state nor even a sovereign federation, Kantian cosmopolitanism is often described as a hybrid solution, a sort of confederalism shot through with centralising impulses, devoid of any real institutional substance. However, this criticism collapses if we break from a well-established tradition and stop thinking of Kantian legal architectonics as being based on only two legal foundations – civil law and the law of nations – and we reinstate the role of the third legal foundation, cosmopolitan law, whose normative core is the right to hospitality.

This article in applied political theory takes an exegetic approach to develop a three-fold argument. First, it posits that we cannot downplay the right to hospitality within Kantian legal architectonics without exposing ourselves to contradictions in its interpretation and its transposition to positive law. Second, it aims to show that the airtight distinction that Kant establishes between the two forms of the right to hospitality – the right to visitation [*Besuchsrecht*] and the right to residence [*Gastrecht*] – is in fact at odds with the teleological dynamics of his practical philosophy, and that the achievement of cosmopolitan peace would only be possible if a continuous migratory trajectory were authorised, which moved seamlessly from visit to residence. Finally, it concludes that European citizenship, as it is set out in the Treaty of Maastricht, hints at the possibility of establishing an institutional foundation for Kantian hospitality, but that this materialisation of cosmopolitan law nevertheless remains partial and imperfect. In order to meet the demands of the Kantian ideal, the European Union must consider the possibility of integrating non-EU foreigners within the current European citizenship regime.

Perpetual Peace's skewed reception

The reception of Kant's essay *Perpetual Peace* was influenced by exceptional circumstances. Although the signing of the Treaty of The Hague and the Treaty of Basle in 1795 guaranteed relative stability for the French Republic, it also illustrated the fact that the hope of communicating revolutionary fervour across national borders was fading.¹ The Republic was safe, but revolution would not occur on a European scale. One of the first philosophers to be influenced by Kant, Johan Fichte considered this issue to be the key to interpreting Kant's peace project:

"Righteousness in the international relations that populations have with each other and the universal peace between them thus necessarily result from the establishment of a Constitution founded on domestic law and the consolidation of peace between individuals."²

The juridification of relations between individuals, a synonym for pacification,³ was destined to extend into the juridification of relations between states. Although the spread of republicanism might subsequently encounter historical setbacks, much like those borne by French revolutionaries, its constitutionalist logic nevertheless inevitably leads to cosmopolitanism. But the road it takes to get there looks nothing like the one taken by the Jacobins: juridical pacifism will emerge from progress in the law *within* states themselves, and not from any foreign policy encouraging – aggressively if necessary – republican values. Even though the fate of the French Revolution is no longer exactly a burning question for us today, this interpretation of the peace project – which Alain Renaut has summarised simply as "republicanism (condition) entails cosmopolitan pacifism (conditioned)"⁴ – is still supported today by a number of informed readers of Kant. Habermas was saying the same thing as Fichte when he wrote:

"Cosmopolitan law is thus a consequence of the idea of the constitutional state. In it, symmetry is finally established between the juridification of social and political relations both inside and outside the state's boundaries."⁵

This was likewise the position defended by Françoise Proust ("it's the republic itself that produces peace"⁶) and Noberto Bobbio, who only emphasises the originality of the peace project's first definitive article in order to better grant it "the function of presupposition or of the condition for the effectiveness of the maxim of the law of nations, contained in the second article".⁷

1. André Tosel, *Kant révolutionnaire. Droit et politique* (Philosophies) (Paris: PUF, 1988), 97.

2. As cited by Alain Renaut, *Kant, aujourd'hui* (Paris: Flammarion, 1997), 483. All translations from French-language works cited in the text are undertaken by the translator of this article, unless an English-language source is given in the footnotes.

3. Johan Gottlieb Fichte, "Compte rendu du projet de paix perpétuelle de Kant", in *Machiavel et autres écrits philosophiques et politiques de 1806-1807 (Dialogues patriotiques)* (Paris: Payot, 1981), 185-6.

4. A. Renaut, *Kant, aujourd'hui*, 483.

5. Jürgen Habermas, "La paix perpétuelle. Le bicentenaire d'une idée kantienne", in *L'intégration républicaine. Essais de théorie politique* (Paris: Fayard, 1998), 201. / "Kant's idea of Perpetual Peace, with the benefit of two hundred years' hindsight", in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, ed. James Bohman and Matthias Lutz-Bachmann (Cambridge: MIT Press, 1997), 146.

6. See Françoise Proust's introduction in Immanuel Kant, *Vers la paix perpétuelle – Que signifie s'orienter dans la pensée? – Qu'est-ce que les Lumières?* (Paris: Flammarion, 1991), 23.

7. Noberto Bobbio, *L'État et la démocratie internationale. De l'histoire des idées à la science politique* (Études européennes) (Brussels: Complexe, 1998), 152.

The remarkable thing is not that this reading, which has the weight of numerous textual elements in its favour,¹ has enjoyed the limelight for such a long time. It is more that the commentators who challenge its validity only very rarely challenge the terms in which it is framed. Consequently, when Alain Renaut seeks to take the opposing view by basing his argument on proposition VII from *Idea for a Universal History with a Cosmopolitan Purpose* (which stipulates, let us recall, that “the problem of establishing a perfect civic constitution is inseparable from the problem of establishing lawful external relations between states and cannot be solved without a solution to this latter problem”²), he merely inverts the terms of the equation:

“The link between republicanism and cosmopolitanism (juridical pacifism) is clearly inverted this time: the implementation of cosmopolitan law and a legally regulated relationship between states becomes the condition permitting their republicanisation.”³

This polemic poses a significant issue. Beyond the exegetic debate, it is a question of whether or not it can be legitimate to wage war to obtain peace. Is war a legitimate means of imposing peace, or must we turn to gentler methods, such as the publicity of legal standards and edification through example? The importance of the political issues should not be allowed to overshadow the violent distortion that Renaut and Fichte inflict on Kant's text. Reducing *Perpetual Peace* to a debate on the ordering of two principles means ignoring the fact that the text has not two, but three definitive articles. It is cosmopolitan law that escapes our attention, a law that is set out in a vague but crucial phrase:

“*Cosmopolitan law* shall be limited to conditions of universal hospitality.”⁴

The fact that the third definitive article was absent from Renaut and Fichte's interpretations is even more surprising because Kant was careful to stipulate that “this division [of the law's three levels] is not arbitrary, being necessary in relation to the idea of perpetual peace”.⁵ This single statement has the ring of a warning against any attack on the systematicity of Kant's legal architectonics.

In this article, I shall defend the idea that the third definitive article cannot be downplayed without perverting the text's original meaning and its fundamental intentions. A “binary” reading of the text gives us a biased view of the form its implementation takes, by obscuring the essential role assigned to the right to hospitality in Kant's legal architectonics. This argument will be made in close dialogue with the important research done by Stéphane Chauvier on this topic. However, I shall also challenge the strict analytical distinction that

1. Notably this famous passage: “If, as is inevitably the case under this constitution, the consent of the citizens is required to decide whether or not war is to be declared, it is very natural that they will have great hesitation in embarking on so dangerous an enterprise. For this would mean calling down on themselves all the miseries of war, such as doing the fighting themselves, supplying the costs of war from their own resources, painfully making good the ensuing devastation, and, as the crowning evil, having to take upon themselves a burden of debt which will embitter peace itself and which can never be paid off on account of the constant threat of new wars.” (cf. Immanuel Kant, *Kant: Political Writings* (ed. H. S. Reiss, trans. H. B. Nisbet, in Cambridge Texts in the History of Political Thought) (Cambridge: Cambridge University Press, 1991), 100).

2. Emmanuel Kant, “Idée pour une histoire universelle d'un point cosmopolitique”, in *Histoire et politique* (Textes et commentaires) (Paris: Vrin, 1999), 87-100 (93).

3. A. Renaut, *Kant, aujourd'hui*, 490.

4. I. Kant, “Vers la paix perpétuelle”, 93.

5. I. Kant, “Vers la paix perpétuelle”, 83-4.

Chauvier establishes between the unconditional right to visitation and the privilege of permanent residence. Following the logic of my argument, a coherent form of juridical cosmopolitanism requires us instead to consider the gradual blurring of the difference between visitation [*séjour*] and residence [*résidence*].

Challenging the minimalist and maximalist interpretations of cosmopolitan law

What role does the right to hospitality play in Kant's legal architectonics? For the sake of clarity, let us begin by identifying what role the right to hospitality does *not* play. In order to do so, we must challenge two misleading interpretations of its function: what we might call the minimalist and the maximalist interpretations, respectively. According to the minimalist reading, the Kantian right to hospitality is nothing more than a condemnation of colonialism, the contextualised criticism of the "inhospitable actions of the civilized and especially of the commercial states of our part of the world, and the injustice which they show to the lands and peoples they visit (visiting, for them, being tantamount to conquest)".¹ From this perspective, might we not, therefore, see cosmopolitan law as nothing more than an attempt to ban Europe from unfairly subjugating foreign peoples and appropriating their lands?

If this were the case, the right to hospitality would ultimately only have a negative impact. It would seek only to define the boundaries beyond which the behaviour of Europeans with regard to populations of other continents should be deemed legally unacceptable. From a systematic point of view, this interpretation of cosmopolitan law would downgrade its status. Whereas civil law and the law of nations can claim to stem from a universalism that is indispensable for their effectiveness, cosmopolitan law would only apply to a subset of legal cases. In short, cosmopolitan law would be reduced to colonial law.² This interpretation overlooks the text's properly philosophical dimension and short-sightedly views it as a polemical contribution of its time. To go beyond this historicist reading, we must illustrate how Kant links the contextualised legal cases that he uses as empirical referents to the *a priori* concept of cosmopolitan law. Such a connection means identifying the missing link, finding a way to join together these two extremes deduced from reason and experience, respectively.

What is the "minimal empirical drain" [*ponction empirique minimale*]³ specific to cosmopolitan law? If we wish to subsume a variety of different examples under a single experience, we must obviously position ourselves at a level of generality that is greater than simply a reference to colonisation. One specific scenario in human relations, overlooked by both civil law and interstate law, requires consideration. It is no longer a question of pacifying interpersonal or interstate relations, and not even, strictly speaking, a question of pacification itself, but of the conditions for the circulation of individuals. An individual's relationship with a state of which s/he is not a member must be endowed with a legal framework that is as yet non-existent. Cosmopolitan law corresponds to the juridification of hospitality relations, understood in all of their possible variations. Thus, reducing the right to hospitality

1. I. Kant, "Vers la paix perpétuelle", 94-5.

2. Stéphane Chauvier, *Du droit d'être étranger. Essai sur le concept kantien d'un droit cosmopolitique* (Aujourd'hui l'Europe) (Paris: L'Harmattan, 1996), 14-18.

3. S. Chauvier, *Du droit d'être étranger*, 23.

to a historically dated concept would simultaneously represent a philological error and the proof of a cruel lack of exegetic ambition.

We must likewise challenge the minimalist interpretation's counterpart: the maximalist interpretation. This rather dated reading of Kant comes to us courtesy of Théodore Ruysen and Georges Del Vecchio.¹ More recently, it has been updated and reintroduced in contemporary debate by Jürgen Habermas on the occasion of *Perpetual Peace's* bicentennial.² The works of David Held, Brian Barry and Charles Beitz likewise draw on this interpretation of cosmopolitanism even if, for them, Kant's legacy remains more implicit and is not always explicitly discussed.³ These authors perceive in cosmopolitan law the legal level that allows them to mitigate the ongoing – and crippling – legal duality. In this approach, cosmopolitan law does not really have its own specific content, but serves only to fill in the blanks of what came before it: the perpetuation of the law of nations as separate and distinct from civil law. A world without cosmopolitan law could certainly be peaceful, but it would remain legally fragmented, divided into various states. The multiplicity of sovereignties, even if governed by the law of nations, would still present a possible risk of war. The only task Kant could therefore have been able to assign to cosmopolitan law was to solve this problem by extrapolating civil law to the universal level. According to this interpretation, cosmopolitan law becomes the Constitution of a world state.⁴ The three levels of the law would thus only be able to subsist in the form of a cosmetic division, since Kantian law would have to become, given the inherent expansionism of republicanism, a legal monism.

But advocates for the maximalist interpretation do not sufficiently account for (or accept as an inconsistent about-face)⁵ the fact that Kant manifestly revised his approach. If a world state temporarily seemed like a solution to Kant – notably in 1784 in his opusculum *Idea for a Universal History with a Cosmopolitan Purpose* – he abandoned this idea as early as 1793 in *Theory and Practice*, where he mentioned “a State which is indeed not a cosmopolitan community subject to a head of State, but which is nonetheless still a federated State governed by international law that has been jointly agreed upon”.⁶ From this point on, it appears that Kant did indeed abandon the pure and simple renewal of the contractualist logic of jusnaturalism at the state level. Kant no longer envisioned a pyramidal institutional structure where a universal state would govern individual states in the same way that the latter governed their citizens. From this point of view, there is no clear-cut analogy between the exit from the state of nature that occurred at the civil level, and that which seeks to emerge at the cosmopolitan level.

1. See respectively Théodore Ruysen, “Les origines kantienne de la SDN”, *Revue de métaphysique et de morale*, 31, 1924; Georges Del Vecchio, *Philosophie du droit* (Paris: Dalloz, 1953), 121-2.

2. J. Habermas, “La paix perpétuelle...”, 161-204.

3. Consequently, the neo-Rawlsian defence of an “original global position” revives the principal thrust of the maximalist interpretation: that cosmopolitanism is a legal form of monism. This is the reason why the principles defended behind “the veil of ignorance” must be able to follow the same logic at the national and international levels. Cf. Brian Barry, *Theories of Justice* (Berkeley: University of California Press, 1989); Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979). See also David Held, *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995).

4. S. Chauvier, *Du droit d'être étranger*, 14-15.

5. J. Habermas, “La paix perpétuelle...”, 165-8. This notion of Kant's later revision is strongly challenged by Mai Lequan, “Le repli kantien de la solution maximale d'une république mondiale à la solution minimale d'une confédération d'États”, in Caroline Guibet-Lafaye, Charles Yves Zarka (eds), *Kant cosmopolitique* (Paris: Éd. de l'Éclat, 2008), 97-117.

6. Immanuel Kant, *Théorie et pratique – D'un prétendu droit de mentir par humanité – La fin de toutes choses* (Paris: Flammarion, 1994), 90.

The three dimensions of the right to hospitality

If we reject both the minimalist and the maximalist interpretations of the right to hospitality, what are we left with? What would the positive definition of its content look like? We can distinguish three subjective rights that together compose what Kant classifies under the umbrella term of the right to hospitality. The first of these rights – the right to asylum – is not, strictly speaking, a right, but rather a meta-legal obligation. According to Kant's practical philosophy, the law emerges from the conflict between freedoms. The law is designed to arbitrate between opposing free wills. It is the meeting point between what these conflicting freedoms recognise as reciprocal obligations. Hence, its perpetuity becomes possible. For while altruism might become depleted, reasonable reciprocity indefinitely maintains its equilibrium. In this sense, Kantian hospitality differs radically from the charity of a host or unilateral generosity, as it is narrowly defined as a *right* to hospitality: "it is not a question of philanthropy but of right".¹ Kant thus ruthlessly expulses asylum from the scope of the right to hospitality, since the former stems from a situation of necessity.² In fact, refugees do not willingly decide to set foot in a foreign country; they are forced to do so by external circumstances. If asylum does not belong to the same category as the right to hospitality, it is because it is *already* subject to a moral obligation. Protecting the physical integrity of all individuals is an unconditional obligation that supersedes all legal obligations. Territorial access can only be restricted or denied to a migrant under the clear and limited condition that "this can be done without causing his destruction".³ Consequently, any individual who is threatened in his or her country of origin is recognised as having a right to asylum, but one that is the result of a universal moral obligation, rather than a legal provision.

The second right is the right to visit. A cursory reading of Kant's definition may leave us rather confused:

"It is only the right of temporary sojourn, a right to associate, which all men have. They have it by virtue of their common possession of the surface of the earth, where, as a globe, they cannot infinitely disperse and hence must finally tolerate the presence of each other. Originally, no one had more right than another to a particular part of the earth."⁴

And yet, the causal link from one to the other is far from obvious. How does Kant deduce a universal right from a mere physical fact – "the Earth is round"? How can a philosopher who devoted so much time and effort to defining the different fields of reasoning jump so nonchalantly from the realm of *what is* to the realm of *what should be*? Should we see this as a slip into naturalism, as Seyla Benhabib suggests?⁵ The only way out of this difficulty of categorisation is to admit that the brevity of Kant's phrases cruelly distorts the complexity of his reasoning.

Stéphane Chauvier concedes that Kant demonstrates a degree of theoretical haste here, but refuses to view this as a conceptually awkward passage. According to him, Kant's legal system

1. I. Kant, "Vers la paix perpétuelle", 93.

2. S. Chauvier, *Du droit d'être étranger*, 38-9.

3. I. Kant, "Vers la paix perpétuelle", 94.

4. I. Kant, "Vers la paix perpétuelle", 94.

5. Seyla Benhabib, *The Right of Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).

displays a remarkable underlying coherence, if we take the time to parse its more subtle elements. Chauvier meticulously recreates Kant's reasoning by referring to the *Doctrine of Right*, in which the philosopher builds his legal edifice on an original definition of property rights. For Kant, ownership is not limited to the empirical possession of an object – in which case, it would not have to be elevated to the level of a right. To use the philosopher's own vocabulary, possession is thus not phenomenal but noumenal.¹ It is the recognition by someone else that I have exclusive use of the object for which I have this right, without it having to be in my immediate individual possession.² Property rights do not therefore establish relations between people and things, but among individuals. As a result, what differentiates sensible or physical possession (*possessio phenomenon*) from rational or juridical possession (*possessio noumenon*) is not a particular relationship to the object (as in Locke's labour theory of property),³ but public recognition of the validity of one's ownership.⁴ An external object is only mine under the condition that I have declared it as such and that this declaration has, for all intents and purposes, been met with collective approval.⁵ But in order to establish the entirely theoretical possibility of such recognition, we must necessarily postulate that the only resource that one can possess which is not the fruit of some kind of production – the earth⁶ – is not without a master. For if we theorise that the earth originally had no owner, there would therefore logically be no one to be concerned about the validity of the founding act that constitutes its acquisition, which would irremediably undermine its legal foundation. Consequently, in order to ensure the legal basis of possession, we must necessarily turn to the postulate of original common possession.⁷ We must be able to consider the earth *as if* its surface belonged to all.⁸

The solution that Kant provides for this problem likewise offers a strong argument in favour of the individual and inalienable freedom of circulation. The multiplicity of states must be permitted the right to govern their respective territories but, in order for these territories to be recognised as such by the other states, minimal communication must be ensured by granting the unconditional right to visitation to all individuals. The right to visitation is not an act of largesse for which individuals should thank the state: it is the condition that makes juridical appropriation by the territory's politically organised communities possible, without which they could not exist. And yet the approval of territorial sovereignty requires a minimal institutional framework that can formally recognise the independence of respective state territories, a *Völkerbund* which, without enjoying all the prerogatives of centralised power, would nevertheless serve to validate the presupposed property rights of states on their soil. Since this would be inconceivable in a universe where states were hermetic entities, closed to the outside world, a provision must be added prohibiting tendencies towards isolationist withdrawal.⁹ The right to visitation would fulfil this role. By maintaining exchange between

1. Immanuel Kant, *Métaphysique des mœurs. Première partie: doctrine du droit* (Bibliothèques des textes philosophiques) (Paris: Vrin, 2011 [1st edn 1971]), 180-1.

2. I. Kant, *Métaphysique des mœurs*, 169-70.

3. I. Kant, *Métaphysique des mœurs*, 200.

4. I. Kant, *Métaphysique des mœurs*, 174-5.

5. I. Kant, *Métaphysique des mœurs*, 190.

6. I. Kant, *Métaphysique des mœurs*, 195.

7. I. Kant, *Métaphysique des mœurs*, 196.

8. Nevertheless, Kant is careful to emphasise the fact that this is an Idea, a postulate of practical reason, and that it would be completely mistaken to interpret it as a reference to some kind of primitive communism (cf. I. Kant, *Métaphysique des mœurs*, 177).

9. S. Chauvier, *Du droit d'être étranger*, 116-19.

states, the right to visitation would stop property on a state's territory from being envisioned through the lens of acquisition, the physical taking possession of an object from which we would try to deduce a form of rational possession (which amounts to mistaking force for law). The right to visitation would likewise reaffirm that property rights are nothing more than someone else's consent to my use of an object. Since populations mutually exclude each other from their respective territories by reciprocally granting each other exclusive rights to use the latter, this isolationist logic must be countered with a right that allows circulation between the borders thus established.

However, can we deduce from this indispensable function of transnational communication as ensured by the right to visitation that freedom of movement is unconditional? Is the right to visitation the embryonic form of a "right to membership"¹ or a "right of residing with rights" [*droit de cité*]?² This would mean boldly crossing a line that Kant clearly wanted to remain behind. Each time he mentions the right to hospitality, he is careful to clearly outline its limits:

"It is not the right to be a permanent visitor that one may demand. A special beneficent agreement would be needed in order to give an outsider a right to become a fellow inhabitant for a certain length of time. It is only a right of temporary sojourn, a right to associate, which all men have."³

If the right to visitation can impose itself on state sovereignty as a binding meta-standard, the same cannot be said of the right to residence ("the right to be a permanent visitor"). Not cast in the same mould as an inalienable subjective right, the foreigner's "establishment" abroad remains subject to state consent. Kant thus embeds a rupture in the migratory trajectory. Between visitation and residence a juridical discontinuity emerges, beyond which foreigners passing through see their rights disintegrate and the outcome of their sojourn fall under the authority of sovereign will. Where does this rupture occur? How and why is it produced? Nowhere does Kant explicitly answer this question, and the door is consequently left open for speculation.

Common sense seems to provide a preliminary answer to this question. Visitation would be distinguished from residence by its limited duration in time. Foreigners could temporarily visit a host country but, beyond a certain time frame, they would be required to obtain the state's consent to settle more permanently.⁴ Nevertheless, the apparently simplicity of this solution conceals a good number of difficulties that make it less than satisfying: where should we draw a line that is not arbitrary? At what point in time does a stay exceed the length of a visit? Time is a highly subjective experience and thus appears to be a difficult criterion to handle – and, at any rate, far from an objective one, as might be hoped. Like Chauvier, it seems more fruitful to suggest that the distinction between visitation and residence is in fact superimposed on the traditional distinction between society and community (*Gesellschaft* and *Gemeinschaft*). Residence would no longer correspond to the excessive protraction of a stay (this excessiveness being impossible to define, moreover), but would imply a qualitative difference in the nature of the political relationship between a foreigner and his/her host

1. S. Benhabib, *The Right of Others*, 134-43.

2. From Étienne Balibar's *Droit de cité* (Quadrige) (Paris: PUF, 2002 [1st edn 1998]).

3. I. Kant, "Vers la paix perpétuelle", 94.

4. For example, we might cite the argument that the amount of time elapsed forms the cornerstone of a "right to stay": Joseph H. Carens, "The case for amnesty. Time erodes the state's right to deport", *Boston Review*, May 2009, <<http://www.bostonreview.net/forum/case-amnesty-joseph-carens>>.

community.¹ In the case of visitation, the interpersonal relations between foreigners and citizens would be limited to interactions motivated by personal interest and would thus stay within the realm of civil society (and consequently below the level of inclusion in the local political community), whereas residence would imply that a foreigner has access to citizenship status (thus marking his/her assimilation into the political community and participation in public deliberation).

The discontinuity between visitation and residence in the migratory trajectory is perhaps over-determined by the distance maintained between two different ways of forming a community. The mutually beneficial relations of civil society are in fact echoes of the more demanding requirements for participating in republican sociability. If the first option is inherently open and flexible, and thus compatible with a right to visitation, the second implies a closing off of the political community and consequently grants states the right to refuse political membership to certain foreigners. However, since this community is still governed by republican principles, it can only tolerate a form of “republican exclusion”.² In other words, foreigners’ access to the political community can only be limited by the desire to preserve the access of all citizens to the public sphere in which the modalities of the compossibility of everyone’s freedoms are debated. For Kant, the state is much more than a common association and must be characterised as a *res publica*, a public good under the administration of the law.³ This Republic represents more than the juxtaposition of the individuals that comprise it. It is first and foremost the production of its citizens: a whole that is greater than the sum of its parts. This creation of a political sphere governed by the law must in no way be mistaken for a culture, a history, or an identity, whose purity needs to be preserved, but it nevertheless calls for protection. Consequently, citizens are indebted to the state for their access to a political sphere governed by the law. Republican exclusion is merely the reverse of this citizen debt. The right to visitation thus operates like a legal buffer zone, a gateway to the extension of exchanges in the form of assimilation into the political community.

However, it cannot be emphasised highly enough that although Kant grants the state the legitimate right to establish its borders, it is not exempt from explaining its motives for excluding certain individuals. If and when exclusion takes place, it must be justified in accordance with republican principles. A foreigner can only be refused his/her petition for residency within the political community if publicity procedures are respected and complied with. As Éric Weil said, using an expression that he found “not very elegant, but accurate”, the people “must be able to want to obey” the legislator.⁴ For this to happen, each citizen must find it acceptable to be treated in the same way as they treat visitors, and perhaps even residents-to-be, when they travel to foreign territories. If the situation arises, they must be able to want to be subjected to the same conditions for access to citizenship that they offer to foreigners in their country. Publicity thus reveals its transnational nature. In reality, the Republic cannot content itself with publicising and giving

1. S. Chauvier, *Du droit d'être étranger*, 155.

2. S. Chauvier, *Du droit d'être étranger*, 133.

3. “In all social contracts, we find a union of many individuals for some common end which they all share. But a union as an end in itself which they all ought to share and which is thus an absolute and primary duty in all external relationships whatsoever among human beings (who cannot avoid mutually influencing one another), is only found in a society in so far as it constitutes a civil state, i.e. a commonwealth” (cf. Immanuel Kant, “Théorie et pratique”, in *Théorie et pratique...*, 63).

4. Éric Weil, *Problèmes kantien*s (Problèmes et controverses) (Paris: Vrin, 1990 [1st ed.: 1970]), 120.

a positive spin to the laws it adopts within its own – both narrow and monologic – legal sphere. It must also disclose its public law to the League of Nations, in the transnational communication space that makes the law of nations possible.¹ Consequently, the enigma, which greatly troubled advocates for cosmopolitan law to be elevated to the rank of a world-state Constitution, is simultaneously resolved. If cosmopolitan law must be universal without being subject to the sanction of a sole authority, this is because it is communicated rhizomatically, via a movement that starts with local communities and ascends to the League of Nations.² The republican principle of the limited liberalisation of migration is the instrument of this progression. It sets up a form of distributive communication, creating an embryonic *demos*, or a *demos* composed of a plurality of *demos*.³ In this sense, cosmopolitan law is the condition of its own realisation. It renders operational the communication that is necessary for the positivisation of its law.

The gradual disappearance of the distinction between visitation and residence

Despite its apparent systematicity, however, Kant's argument appears to contain its own vanishing point. In *Perpetual Peace*, he stipulates that it is *thanks* to hospitality that “distant parts of the world can come into peaceable relations with each other [...]”. Thus the human race can gradually be brought closer and closer to a constitution establishing world citizenship.⁴ And yet, if cosmopolitan law is destined to undertake a task as Herculean as the constitutional unification of humankind via a dialogic construction of universal standards, it is difficult to see how it could accomplish this by relying solely on the meagre resources of a right to visitation, envisioned in its narrowest sense. We would therefore be justified in extrapolating to a certain extent, based on Kant's statement that we cannot “annul the Right of man as a citizen of the world to attempt to enter into communion with all others”.⁵ Taking up this invitation introduces the possibility of a qualitative leap which would allow us to move beyond the discontinuity between the right to visitation and right to residence. Kant appears to burden the visitor with the difficult task of transforming transnational relations by shifting them from the register of the strategic interaction of socio-economic interests to the compossibility of their freedoms within a juridico-political framework.

We should not lose sight of the fact that, for Kant, peace is a governing Idea that we can at best hope to work towards historically. In this sense, it will only be the resultant of a gradual and always unfinished integration of interpersonal relations within the scope of the law. But peace is not and cannot be within the immediate reach of positive law, no matter how

1. S. Chauvier, *Du droit d'être étranger*, 49.

2. Claude Lefort expresses a similar idea using his own theoretical language. He credits Kant with having broken from the representation of humanity as an entire body that encompassed states in the same fashion as these encompassed their citizens. In this sense, Kant was the first to shatter the elective affinities that existed between cosmopolitanism and monarchy (as in Dante's *De Monarchia*) and to depict a decentralised form of cosmopolitanism (cf. “L'idée d'humanité et le projet de paix universelle”, in Claude Lefort, *Écrire. À l'épreuve du politique* (Paris: Calmann-Lévy, 1992), 232-4).

3. This Kantian intuition was developed with great analytical rigour by James Bohman in *Democracy across Borders. From Dêmos to Dêmoi* (Studies in Contemporary German Social Thought) (Cambridge: MIT Press, 2007), 59-99.

4. I. Kant, “Vers la paix perpétuelle”, 94.

5. I. Kant, *Métaphysique des mœurs*, 324.

adroitly the latter is expressed. Consequently, cosmopolitan law is not one level in a structure, but rather the tool of perpetual – because always unfinished – progress. Francis Cheneval has convincingly defended the idea that *Perpetual Peace* loses much of its interest when solely envisioned as a strictly legal project. He writes:

“The Kantian cosmopolitan ideal is a normative procedural principle of the legal and civilising development of humankind, and not a concrete constitutional plan.”¹

Kant's idea only acquires all of its significance once recontextualised within its teleological dimension.

According to a philosophical model that Kant began to develop in 1784 with *Idea for a Universal History with a Cosmopolitan Purpose*, discord among men is the driving force of history.² Discord pushes men into such a state of distress that they are forced to work together to establish a legal framework, if only out of self-preservation. And with the innovation presented by cosmopolitan law appears hope for a new historical horizon. As Philonenko says:

“Thanks to this solution, mankind would finally move from a history determined by war, that is to say a *dialectical* history, to a history founded on peace and consequently *non-dialectical*. Here we see the problem of perpetual peace from a different angle: it is a question of making the shift from dialectical history to non-dialectical history possible.”³

Although the permanent possibility of civil war is the reason behind the state contract, and the fear of international conflicts works similarly to extort the juridification of inter-state relations, this is not what justifies cosmopolitan law. Given that the latter governs the asymmetrical relations between sovereign states and isolated individuals, the antagonisms that affect cosmopolitan law will never lead to the distress of an alternative between self-destruction or a dialectical shift. Consequently, cosmopolitan law will engender no irremediable qualitative leap from the state of nature to the state of law, but will more modestly act to extend and consolidate what has already been achieved.

Cosmopolitan law thus bolsters the constitutive weakness of the law of nations. Since the only definitive solution to the issue of peace would have been the creation of a world state – a possibility which Kant rejects – the law of nations alone cannot ensure its preservation. “The *negative* equivalent of a *permanent* alliance”⁴ is thus a solution which only finds stability in its historical movement. This hybrid institutional architecture – and it is not clear if it possesses the traits of federalism or confederalism – can only hope to gradually *draw closer* to the realisation of peace. In accordance with the irony that Kant displays in the text's opening, peace is an ideal that can only be fully realised in death. This allows Geoffrey Bennington to discern an interrupted teleology in *Perpetual Peace*.⁵ The caesura in Kantian historical progress must necessarily impede cosmopolitanism, prohibiting its full realisation in the form of a world state, in order to prevent it from becoming an empty universalism

1. Francis Cheneval, *La Cité des peuples. Mémoires de cosmopolitismes* (Humanités) (Paris: Cerf, 2005), 165.

2. E. Kant, “Idée pour une histoire universelle d'un point de vue cosmopolitique”, 87-100.

3. Alexis Philonenko, “Kant et le problème de la paix”, in *Essai sur la philosophie de la guerre* (Problèmes et controverses) (Paris: Vrin, 2003), 42.

4. I. Kant, “Vers la paix perpétuelle”, 93.

5. Geoffrey Bennington, *Frontières kantienne*s (La philosophie en effet) (Paris: Gallimard, 2000).

by having its constitutive plurality erased.¹ In this sense, the issues of cosmopolitan law are dialectical no more. It is no longer a question of *converting* an antagonism into its opposite, but more modestly of intensifying the gradualist logic of mutual dependence, of prompting an ever-closer association of humankind that irremediably moves away from the prospect of war, without having recourse to an overarching authority that would guarantee the positivity of international law.

Hospitality is thus governed by an incremental logic. The discontinuity between visitation and residence marks the distance between the ersatz embodied by a “permanent Alliance of peoples” [*Alliance permanente des peuples*] and the ideal of a “Society of peoples” [*Cité des peuples*]. It is the result of the unbridgeable gap between unconditional obligation and its conditioned realisation.² *Perpetual Peace* merely exposes the motives why practical reason has as its obligation the realisation of cosmopolitanism. We must in turn demonstrate that if, *ex hypothesi*, the advent of the law can be stymied, *ex thesi*, it is an obligation to attempt to overcome the obstacles to the institution of its reign.³ However, the permanent alliance of peoples of which Kant dreamt has no known empirical equivalent. It can only be defined negatively, as necessarily drawing closer to a universal Republic, without however conforming to its centralisation of power. We can see that the solution to this problem will inevitably come via a reworking of the sovereignty principle.⁴ In one way or another, in order to resolve this contradiction, we must reject the dichotomy whereby an institution is only sovereign if its power is unquestioned. From the point of view of hospitality, the requirement to maintain state plurality necessarily involves preserving borders, but the relativisation of sovereignty allows us to envision a gradual redefining of their functions. The closer the permanent alliance of peoples draws to a society of peoples, the more the distinction between visitation and residence will be blurred. As interdependence between peoples increases, so the distance separating strategic interactions (of which trade is the paradigmatic illustration) and the republican formation of public opinion in a shared communicational space decreases.

In order for this virtuous logic to be implemented, the conversion of interpersonal relations, in which the foreigner inserts him- or herself on the micro-sociological level, must be echoed by the progress of international sociability on the macro-sociological level (and vice-versa). This distance will never be completely overcome and thus hospitality will never become null and void. But we cannot ignore the fact that, according to its internal teleology, this dynamic should gradually level out the difference between visitation and residence. Without a migratory trajectory that guarantees the possibility of transitioning from foreigner to citizen, there can be no asymptotic approximation of peace via the always-unfinished creation of a universal Republic. This reconstruction of the linearity that leads from visitation to residence should not, however, conceal the persistence of a residual discontinuity.⁵ For if the republican

1. Although he does so from a very different angle, Alexis Philonenko likewise arrives at the idea of a caesura in the Kantian notion of progress. Cf. Alexis Philonenko, “L’idée de progrès chez Kant”, in *Études kantiennes* (Paris: Vrin, 1982), 52-75.

2. F. Cheneval, *La Cité des peuples*, 221.

3. F. Cheneval, *La Cité des peuples* 223.

4. Gérard Mairé and Antonio Negri predict its obsolescence in the more or less short term, cf. Gérard Mairé, *La fable du monde. Enquête philosophique sur la liberté de notre temps* (NRF essais) (Paris: Gallimard, 2005); Michael Hardt, Antonio Negri, *Empire* (Faits et causes) (Paris: Exils, 2000). Jean-Marc Ferry instead suggests moving away from Jean Bodin and envisioning the reorganisation of sovereignty on the basis of the possibility of its being shared: cf. Jean-Marc Ferry, *Europe la voie kantienne. Essai sur l’identité postnationale* (Humanités) (Paris: Cerf, 2005), 151-6.

5. I would like to thank Justine Lacroix and Janie Pélabay for drawing my attention to this point.

state must provide foreigners with the possibility of converting their status into that of a citizen, it is also incumbent upon the latter to convert sociability guided by personal interest into a form of participation in deliberation on the common good. But republican law does not prepare individuals for citizenship: it merely invites them to participate in it.

The right to a community integration process as a practical means to resolve the discontinuity between visitation and residence

In many respects, the European Union fulfils and even exceeds Kant's recommendations in terms of welcoming intra-community foreigners. The Treaty of Rome signed in 1957 already provided for the "freedom of movement for workers" within the European Economic Community (EEC). In 1985, when the Schengen Agreement was signed, and in 1990, when it finally went into effect, a right to visitation was officially recognised for foreign nationals from a European state within the European Union, and internal border controls were abolished.¹ Then with the Treaty of Maastricht in 1992 and the introduction of European citizenship, Europeans mutually agreed upon a measure that drew ever closer towards a right to residence. European nationals can now vote in local and European elections and run as candidates for representative mandates anywhere in Europe.² The underlying political hope was that a European public sphere would blossom. Although the results have not exactly lived up to expectations and we have still not witnessed the transnationalisation of political debates and issues, it is nevertheless true that the European Union, as a single entity, has rendered its borders porous and blurred the distinction between visitation and residence. As Jean-Marc Ferry has noted, the recognition of four freedoms of movement (goods, capital, services and especially people) – "signs of the positive future of cosmopolitan law"³ – resolutely puts Europe on a "Kantian path", for it raises the practice of hospitality to the guaranteed status of the principle of publicity at the continent-wide level. By fostering transnational sociability, the free movement of people and things mitigates the absence of a definitive, overarching authority in the juridico-institutional structure of the European Union. This explains the following conclusion:

"Hitherto philosophical, the project of legal cosmopolitanism finds an empirical presentation in the base structure of the Union, wherein the three levels of public law as outlined by Kant intersect."⁴

But this promising picture should not mask its limits and its dark side, since European cosmopolitanism can, by definition, only be an oxymoron. Only cosmopolitanism on the global scale would know no borders and could thus be considered fully realised. In terms of hospitality, the empirical consequences of the incompleteness of the cosmopolitan principle are particularly significant. The disappearance of internal borders and the recognition of a European right to residence produced as their corollary the drastic closing of the European Union's external borders, first with the Schengen Agreement which planned for the implementation

1. Serge Weber, *Nouvelle Europe, nouvelles migrations. Frontières, intégration, mondialisation* (Échéances) (Paris: Félin, 2007), 30.

2. See Catherine Wihtol de Wenden, *La citoyenneté européenne* (Paris: Presses de Sciences Po, 1997); Paul Magnette, *De l'étranger au citoyen. Construire la citoyenneté européenne* (Brussels: De Boeck, 1997).

3. J.-M. Ferry, *Europe...*, 119.

4. J.-M. Ferry, *Europe...*, 118.

of a markedly more restrictive visa policy for third-country nationals,¹ then with the Treaty of Maastricht which rooted the differentiated practice of hospitality at the heart of European citizenship.² Insofar as European citizenship (and all the benefits this confers, especially in terms of mobility) has remained linked to citizenship in one of the European Union's member states, it excludes all third-country nationals from its sphere. Curiously enough, the European Union now seems to be shrinking from its own institutional audacity. While European citizenship was tacked onto national citizenship without replacing it, it was nevertheless not extrapolated to its logical conclusion. Rather than being based on residency and civic participation, European citizenship merely provides the national-state definition of its co-citizens. Because of this institutional mimetism, and despite its claims of cosmopolitanism, European citizenship suspends the possibility of a continuity between increasingly interdependent relations (liberal sociability) and involvement in the political community (republican sociability).³ European citizenship refuses to grant extra-European nationals what it grants its own nationals; that is to say, the possibility of "offering oneself to the community", of moving from mere social participation to involvement in public affairs.⁴

In short, although Europeans benefit from the advantages of a gradual lack of distinction between the right to visitation and the right to residence, this change seems to have been achieved at the cost of denying not only the right to residence for extra-European nationals but also, in many cases, their right to visitation (the Schengen visa regime having as its goal to *preventively* prohibit territorial access to vast swathes of the extra-European population). If the first measure would not have shocked Kant, who saw granting residency as merely a form of largesse, on the contrary he would have perceived the second as an unacceptable violation of an unalienable right. And, if we accept this article's interpretation, Kant would likewise find unacceptable the fact that there exists no political provision that allows for the possibility of transitioning from the status of visitor to the status of resident. In this light, the European Union can justifiably boast that it is an exciting laboratory for a new kind of hospitality; in order to go to the end of the "Kantian path" on which it has embarked, however, it will need to more resolutely embrace its underlying conceptual potential. Recognising a right to access to European citizenship for third-country nationals who demonstrate a desire to go beyond liberal sociability in order to participate in civic life (a right that should not be conflated with the citizenship of residency) could very well be the first element of this dynamic.

1. Didier Bigo, Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Farnham: Ashgate Publishing, 2005); Didier Bigo, Elspeth Guild, *La mise à l'écart des étrangers. La logique du Visa Schengen* (Cultures et conflits) (Paris: L'Harmattan, 2003).

2. See Antje Wiener, "European" *Citizenship Practice. Building Institutions of a Non-State* (Boulder: Westview Press, 1999); Fiorella Dell'Olio, *The Europeanization of Citizenship. Between the Ideology of Nationality, Immigration and European Identity* (Farnham: Ashgate, 2005).

3. Which, in a broader socio-historical perspective, we might call the genesis of civic standards (cf. Yves Déloye, "De la citoyenneté stato-nationale à la citoyenneté européenne: quelques éléments de conceptualisation", *Swiss Political Science Review*, 4(4), 1998, 169-94).

4. However, one European directive (Directive 2003/109 concerning the status of third-country nationals who are long-term residents) adopted in 2003 imperfectly equalises access to mobility rights for extra-European nationals. In particular, see Justine Lacroix, "Une citoyenneté européenne est-elle possible?", *La Vie des idées*, 3 June 2009; Jean-Yves Carlier, *La condition des personnes dans l'Union européenne* (Brussels: Larcier, 2007). But this measure is merely pragmatic and in no way reverses the symbolic economy of participation in political power implemented by European citizenship. Moreover, it underscores and strengthens the dividing line between regular and irregular migrants. Cf. Denis Duez, *L'Union européenne et l'immigration clandestine* (Brussels: Éditions de l'Université de Bruxelles, 2008).

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