

3. Visit of Kant's Original Community of Land

A. Introduction

Having argued that statehood does not rest on a necessary territorial ground, I turn now to Kant's legal philosophy as a canonical site where this relationship is conceptualised. I will show that Kant's system supports the view that the state's relation to territory is derivative and contingent — and that this insight opens the path to a state-agnostic reading of cosmopolitical right and *government* theory.

In the previous part I have argued for a view of statehood grounded in government. Government — civil authority — is a moral-political mode of social organisation. It may be realised through the legal and empirical vehicle of statehood, which is a particular form of government that has manufactured for and around itself, in cooperation with others, a 'given' territorial container. The division of the whole surface of the globe into such containers is the work of a set of governments and states, but is neither conceptually prior to civil authority nor its necessary consequence.

In what follows, I consider Kant's legal philosophy as a test case for the framework developed in part 1.

Rather than dealing with Kant's theory of the state generally, I target a neglected concept in the literature: the Original Community of Land. OCL is the juridical relation between human beings and the surface of the Earth. How and whether this relationship is determined by the intercession of statehood is a question inseparable from the nature of

statehood itself. My argument in short hinges on the question of why in Kant's account, human beings possess the soil collectively in the pre-political situation, but collective possession is explicitly denied in the cosmopolitical situation. While it is possible to interpret this as the result of a transfer of possession to states, the contrary reading — that states are only ever contingent owners of whatever pieces of land their citizens happen to own — is also possible.

I do not claim that this interpretation is what Kant had in mind, merely that it is one compatible with his principles. It does require a reconstruction: reading Kant's *civitas* here as "government" rather than "state". But this is sensible because as I have shown in the previous part, the standard definition of the word state is now that of an inherently territorial unit, something I will strive to show is not the case in Kant's account. In the subsequent part, I show the conceptual break that transformed the Kantian limited state into the Hegelian total state. As the notion of statehood presently dominant in theory has many Hegelian implications, it is sensible to apply the label of government to Kant's state, its present meaning being much closer to the polity he envisions.

The starting point for this part is the double meaning of OCL in the Doctrine of Right. In the section of private right, the OCL is an idea with "practical and juridical reality".⁷² It is a situation of "the common collective possession of the soil of the whole Earth (*communio fundi originaria*)".⁷³ It is thus a *communio* in a juridical, property law sense. But there is another OCL in the chapter on cosmopolitical right: "all nations originally hold a community of the soil, but not a juridical community of possession (*communio*), nor consequently of the use or proprietorship of the soil, but only of a possible physical intercourse (*commercium*)."⁷⁴ Kant derives OCL, in both senses, from the finite size of the Earth's surface. Yet one OCL is a *communio* and the other only a *commercium*.

72 Kant, *Doctrine of Right* (1797) §6.

73 Kant, *Doctrine of Right* (1797) §16.

74 Kant, *Doctrine of Right* (1797) §62.

Contemporary scholarship often focuses on how, accepting this distinction, it might nevertheless be possible to derive from the OCL a thicker set of cosmopolitical rights than Kant does. But these strands of cosmopolitanism rarely interrogate *why* the OCL in the cosmopolitical situation is not a juridical *originaria communio fundi* (*communio* for short here). As I will attempt to show, one reason for this might be that Kant gives a structuring role to territorial statehood. Indeed, this seems to be the assumption under normative theory that seeks to show that Kant's conception of guest right does not go far enough. But I propose an alternative reading: the relative weakness of the situation of OCL that obtains between nations can itself be evidence of the contingent nature of statehood.

This reading leads to a key claim: that within Kant's framework, land ownership is always tied to a civil condition, and that the state possesses territory only derivatively, through the land entitlements of its citizens. It follows that there is no structural reason in Kant's principles of right why, in theory, land could not transfer lawfully across civil conditions — provided the original civil condition did not prohibit such transfer, and the transfer respects public right. Essentially, one must submit to civil authority to secure one's rights but it does not necessarily follow that one wrongs one's compatriots by transferring property into a different civil condition. No more than one harms those not included in the first civil condition by entering into it. The civil condition is not the Leviathan, it is merely the requirement for self-legislation which makes possession legitimate and not at the expense of the freedom of others.

While this possibility may seem surprising, it illustrates the extent to which territorial statehood is not a moral precondition of rightful landholding, but a juridical consequence of civil association that remains contingent.

B. Background of the Original Community

In this section, I introduce the Original Community of Land (OCL), a notion of Kant's legal-philosophical system explaining the original juridical position of human beings vis-a-vis the Earth's surface. I begin with some relevant introductory clarifications on Kant's legal philosophy, then situate the notion of OCL in his doctrine, especially the types of right and how they relate to one another. My aim is both to provide context for OCL and to set up how the necessity of the civil condition—though not necessarily the state—relates to the postulates of right in Kant's philosophy and his theory of state.

(i) The Doctrine and the necessity of the civil condition

Because OCL cuts across several paradigms or sites of Kant's legal doctrine, some clarifications of Kant's legal philosophy should be made: the relationship between the types of constitutions and types of right—private, public, international and cosmopolitical, and the meaning of “state”.

The distinction between the types of constitutions is present in the *Doctrine of Right* but Kant provides a much more explicit summary in *Toward Perpetual Peace*. In the latter, he distinguishes between three constitutional categories: civil, international, and cosmopolitical. The civil constitution, pertaining to the sphere of private right and public right, governs relations between individuals and their state.⁷⁵ The international constitution governs relations between states.⁷⁶ Finally, the cosmopolitical constitution “embodies the law of world citizenship, governing the relations amongst men and nation-states considered as citizens of a universal state of mankind.”⁷⁷ If the civil constitution is

⁷⁵ Kant, *Toward Perpetual Peace* (1795) Second Definitive Article.

⁷⁶ Kant, *Toward Perpetual Peace* (1795) Second Definitive Article.

⁷⁷ Kant, *Toward Perpetual Peace* (1795) Second Definitive Article; There is an apparent discrepancy on this between *TPP* and the *Doctrine*. In §62 of the *Doctrine*, on cosmopolitical right, Kant speaks broadly of relations between nations, but the

vertical and the international is horizontal, then the cosmopolitical is diagonal.

The types of right are at the forefront of the *Doctrine* and Kant distinguishes between four: private, public, international and cosmopolitical. International and cosmopolitical right track the contents of the international and cosmopolitical constitutions respectively. Public right consists of the laws which require public promulgation “in order to produce a juridical state of society”.⁷⁸ Public right is the right of the civil condition and thus falls under the civil constitution. Finally, private right is the system of laws between individuals which requires no external promulgation and is *ipso facto* outside the scope of the constitution types.⁷⁹

To explain why no external promulgation is necessary and the relationship between private right and public right, a more detailed point about the *Doctrine* must be made. The entire system of the *Doctrine of Right* reconstructs law from the “single assumption” that everyone has a right to external freedom.⁸⁰ External freedom can be limited only by the conditions of its own possibility,⁸¹ hence the cornerstone is the Universal Principle of Right (UPR): “act externally in such a manner that the free exercise of thy will may be able to coexist with the freedom of all others, according to a universal law.”⁸²

The doctrine proceeds as an authorisation chain from the UPR to private right and public right respectively.⁸³ Assuming the UPR, the rules of private right -limiting the external freedom of action of one where it would interfere with the external freedom of action of another- become discoverable free of any promulgation. But there are

specific contents and rights he discusses regulate nations vis-a-vis people in a more private capacity. Thus the distinction drawn in *TPP* is, in practice, applicable.

78 Kant, *Doctrine of Right* (1797) §34.

79 Kant, *Doctrine of Right* (1797) Introduction, Division C.

80 Byrd and Hruschka (n 71) 24.

81 Marcus Willaschek, ‘Right and Coercion: Can Kant’s Conception of Right be Derived from his Moral Theory?’ (2009) 17(1) *International Journal of Philosophical Studies* 49, 54–60.

82 Kant, *Doctrine of Right* (1797), Introduction, Division C.

83 Kant, *Doctrine of Right* (1797), Introduction, Division C.

also certain limits which, while necessary to permit more complex freedoms —acquisition of land, for instance— which cannot be based on the will of one dominating the will of another but only on a public, omnilateral will. Hence the necessity of public right and *ipso facto* the civil constitution and the civil condition.

To summarise, Kant's argument begins in a pre-institutional situation where the harmonisation of external freedom is the universal postulate. From this postulate, the authorisation chain follows to private right, then to public right and the necessity of the civil condition, then to the relations that obtain between states and humans in more complicated constitutional frames. OCL as a doctrine cuts right across the structure of the Doctrine. Being itself pre-institutional —original— the relation between humans and the surface of the Earth determines how land rights and states can operate upon it, both in the private and cosmopolitical constitutional frame.

(ii) Kant's concept of the state

I begin here from the canonical distinction between the state in the idea and the state in reality. I then propose to map the first concept onto my notion of government and the second onto the practical, positive phenomenon of statehood.

The state in the idea is a moral and juridical reality. It is “the state operating under ideal constitutional principles and the norm for any juridical state actually founded by human beings”.⁸⁴ It contains in itself two related concepts. First, that of the civil condition (*Zustand, status civilis*) as opposed to the state of nature.⁸⁵ Second, that of the state as the ideal institutional form (*Staat, civitas*).⁸⁶

84 Byrd and Hruschka (n 71) 143.

85 Kant, *Doctrine of Right* (1797) §43–45; see generally Thomas Vesting, *State Theory and the Law: An Introduction* (Elgar 2022) 4–5.

86 Kant, *Doctrine of Right* (1797) §43–45.

A state (*civitas*) is the union of a number of men under juridical laws. These laws, as such, are to be regarded as necessary a priori — that is, as following of themselves from the conceptions of external right generally — and not as merely established by statute.⁸⁷

The state in reality by contrast refers to actual, historical states independent of the moral criterion. Byrd and Hruschka: “States’ indistinguishable from dens of thieves, slavery, despotism, concentration camps, confining walls, and the like have existed from time immemorial.”⁸⁸

For the purposes of this paper, I map these notions onto concepts established in part I. The “state in idea” (*civitas*) corresponds to my notion of government. First, because as the ideal manifestation of the civil condition it entails the same criterion — the existence of an omnilateral civil authority over a group of people. Second, because the *civitas* is in fact territory agnostic. It does not itself own territory in the way that a person owns land. Rather, its territory is meta-ownership of the land its citizens rightfully occupy, necessary to provide an omnilateral authority for land ownership and make the latter non-provisional.⁸⁹ Presumably, a *civitas* could be non territorial if its citizens declined or failed to occupy any land.⁹⁰ To the extent that they wish to do so, however, the *civitas* must have authority over that land so that it is occupied and divided pursuant to an omnilateral rather than unilateral will. But this is not incompatible with a territory-agnostic view because it again brings back this point: that saying territory should be subject to civil authority is not the same as saying that civil authority should be monopolised by territorial authority. In other words, legitimate states should exercise functional authority over land, land authority does not automatically give one sovereign civil authority.

The “state in reality” is in law and sociology simply called “the state”, an empirically existing institutional framework and a practical manifestation of government. In fact, since the state in reality could, in principle, fail to fulfil the normative criteria of the state in the idea

87 Kant, *Doctrine of Right* (1797) §45.

88 Byrd and Hruschka (n 71) 168.

89 See Byrd and Hruschka (n 71) 118, 121 and 141.

90 I explore this point in detail in chapter 4.

completely, it is an even more contingent and broad concept than the notion of statehood — the territorialised manifestation of government — proposed in part 1.

These clarifications establish the conceptual background necessary for understanding the Original Community of Land in its proper doctrinal setting. What follows reconstructs Kant's treatment of the OCL and explains how it functions within the architecture of private and cosmopolitical right.

C. The Original Community

The OCL has two meanings — *communio* and *commercium*. I argue that the difference between the two, and their presence in different parts of Kant's doctrine, opens the question of the relation between the state and territory.

The Original Community of Land⁹¹ is the situation human beings find themselves in in relation to the surface of the Earth. The stakes of this notion are high since it shapes the fundamental relation between authority and space. The idea is that the finite nature of the global surface means that humans possess common rights to it. I first sketch the historical origins of OCL and Kant's divergence, then delineate the two meanings of OCL in Kant's doctrine.

This idea of the OCL was not invented by Kant but was already present in natural law. For instance, Emer de Vattel writing (1758):

91 My copy of the *Doctrine* (ZincRead 2023) uses the literal “original community of the soil”, so this formulation is used in quotes.

The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and derive from it whatever is necessary for their subsistence, and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might, without being disturbed in their labor, or disappointed of the fruits of their industry, apply themselves to render those lands fertile, and thence derive their subsistence. Such must have been the origin of the rights of *property* and *dominion*: and it was a sufficient ground to justify their establishment.⁹²

This idea in its most rudimentary form is present at the birth of international law when Francisco de Vitoria says that “in the beginning of the world, when all things were held in common, everyone was allowed to visit and travel through any land he wished”.⁹³ But it was Kant who “secularised” this doctrine, criticising Grotius and Pufendorf for seeing it as a historical fact and proposing that it is instead an idea of reason with a practical reality.⁹⁴

Kant does not speak about the historically original situation, reasoning rather from the nature of the Earth:

All men have this right by virtue of their common possession of the surface of the earth, where (because it is a ·finite· sphere) they can't spread out for ever, and so must eventually tolerate each other's presence. Originally no-one had more right than anyone else to any particular part of the earth.⁹⁵

92 Emer de Vattel, *The Law of Nations or Principles of Natural Law* (1758) §203; also cited in Michela Massimi, ‘Normative Foundations of Kant’s Cosmopolitan Right: The Overlooked Legacy of Kant’s Metaphysics of Nature’ (2023) 28(3) *Kantian Review* 373, 379.

93 Francisco de Vitoria, *On the American Indians* (1538) in Anthony Pagden and Jeremy Lawrence (eds), *Vitoria: the Political Writings* (Cambridge University Press 1992, 2010) 278.

94 Massimi (n 92) 377; cf Rousseau: ‘Let us begin by laying the facts aside, for they have no bearing upon the question’ in *Discourse on the Origins of Inequality* (GDH Cole tr, JM Dent & Sons Ltd 1913) [1754] 12.

95 Kant, *Toward Perpetual Peace* (1795), Second Definitive Article, The Law of World Citizenship.

The Earth is finite, human beings cannot disperse so much as to avoid having relations, nor can they appropriate land without limiting others, thus there is an OCL. This relation cuts across Kant's legal philosophy, from private right to cosmopolitical right as the original, juridical condition of humanity. It determines the contents and nature of right vis-a-vis land because it explains the original position.

In Kant's doctrine, OCL actually has two different meanings: it is the idea of the Earth as a common space of interaction (*commercium*) and of the common possession of land (*communio*).⁹⁶ While Kant invokes *commercium* in both the context of private law and cosmopolitical law, *communio originaria fundi* only applies in his doctrine of private law.

(i) *Commercium*

Commercium is the thinner meaning of OCL; it is the relations based notion that all places on Earth are connected with one another and one cannot avoid having relations with others. The basic idea is "that my

96 As Byrd and Hruschka point out, the word *communio* has two meanings in Kant's usage, see Byrd and Hruschka (n 71) 129–130. The first (narrower) is that of a common ownership of a thing, which is in line with the meaning of *communio* in Roman law, see D.10.3 esp D.10.3.2.1 Gaius 7 ad ed. The second (broader) meaning refers to common membership in a whole. Kant is using both meanings because he is seeking to replace Grotius' concept of the *communio primaeva*, which is broader than a community of ownership, see Macarena Marey, 'A Kantian Critique of Grotius' (2019) 95 *Problemas* 67–80. Byrd and Hruschka argue that the *communio fundi originaria* is not a narrow *communio* but by appealing to what Kant says about the Original Community of Land (broad *communio*) in cosmopolitical right, i.e. that it is not a juridical community of ownership, see Byrd and Hruschka (n 71) 130, note 40. But one may not use what Kant says of OCL in the cosmopolitical doctrine (§62) to clarify what he says in the private doctrine. For not only does he never refer to the *communio fundi originaria* in his cosmopolitical doctrine, but he speaks there of the situation arising between peoples not people (*Alle Völker* not *Alle Menschen*). Even if Kant is using *communio* with a broader meaning than it has in Roman law, this does not mean that he does not mean still a *juridical* community. I use *communio* for the narrower meaning, entailing at least a degree of juridical ownership as in the *communio fundi originaria*, and I use OCL for the broader meaning encompassing also *commercium*.

right to be here on this portion of the earth must be counterbalanced by your right to be there on that portion of the earth”.⁹⁷ This is already dynamic since, in an echo of Kant’s natural philosophy, this balance is already a dynamic relation in which the latter two rights are inherently connected.⁹⁸ Moreover, from this reality the rightfulness to attempt (commercial) intercourse follows.

As a juridical situation, *commercium* is inseparable from older concepts of guest right and trade. De Vitoria bases his defence of colonialism on the notion that since intercourse between humans is inevitable, Europeans have a right to trade with non-Europeans and to conquer them if they resist.⁹⁹ *Commercium* originates in universal economy doctrine, appearing at least as far back as the 4th century: “God had made sure that commodities were dispersed among various countries and different regions, thus offering an incentive to trade”.¹⁰⁰ The necessity of and thus right to commercial intercourse is thought to be a God-designed feature of the Earth. Kant rejects the colonial implications of the argument, namely that Europeans may conquer those who resist or impede trade.¹⁰¹ But he still bases guest right upon it as a weaker right to *present oneself* for intercourse with the new caveat that the intercourse may decline.¹⁰²

97 Massimi (n 92) 382.

98 Massimi (n 92) 382.

99 Anghie (n 22).

100 Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Justice since Vitoria* (Ashgate 2002) 265; For the theological rootedness of the universal economy doctrine, see also: ‘In the world to come there will be no eating and drinking, nor any generation and reproduction. There will be no commerce and trade [...]’ (Talmud, b Berakhot, 17a) in Giorgio Agamben, *The Kingdom and the Glory* (Stanford University Press 2011) 247.

101 Anghie (n 22).

102 Kant, *Doctrine of Right* (1797) §62; see also Pauline Kleingeld, ‘Kant’s Second Thoughts on Colonialism’ in Katrin Flikschuh and Lea Ypi (eds), *Kant and Colonialism: Historical and Critical Perspectives* (Oxford University Press 2014) 43.

(ii) *Communio*

Communio is the stronger meaning of OCL, and implies not only intercourse but in fact the common possession of land by all:

All men are originally and before any juridical act of will in rightful possession of the soil; that is they have a right to be wherever nature or chance has placed them without their will. Possession (*possessio*), which is to be distinguished from residential settlement (*sedes*) as a voluntary, acquired and permanent possession, becomes common possession, on account of the connection with each other of all the places on the surface of the Earth as a globe.¹⁰³

OCL in the sense of *communio* is juridical, common possession¹⁰⁴ of the soil:

This original community of the soil and of the things upon it (*communio fundi originaria*) is an idea which has objective and practical juridical reality and is entirely different from the idea of a primitive community of things, which is a fiction.¹⁰⁵

Communio is what simultaneously opens the way and constrains property rights in land. Occupancy, though rooted in OCL, entails the taking of possession of a portion of the Earth.¹⁰⁶ Since the Earth is limited in size, taking possession of part of it limits the external freedom of another, since they then cannot do the same.¹⁰⁷ Having a right to be where I am does not entitle me to any particular part of the Earth, but it does entitle me to *some* part of it, thus it would be contrary to my external freedom if the entirety of it were expropriated through

103 Kant, *Doctrine of Right* (1797) §13; There is a possibly significant difference between Kant's account and Vattel's: Vattel presupposes an original position before men became significantly multiplied where scarcity was not an issue whereas Kant's abstraction would hold true even if there were only two or three people on the globe.

104 Byrd and Hruschka (n 71) 130: 'Achenwall uses the word in its legally technical sense to mean a community of right-holders, in particular a community of co-owners of a thing. In obvious reliance on Achenwall, Kant also uses the word *communio* in this narrower sense.'

105 Kant, *Doctrine of Right* (1797) §6.

106 Kant, *Doctrine of Right* (1797) §14.

107 Kant, *Doctrine of Right* (1797) §14.

unilateral will(s).¹⁰⁸ Thus the taking of possession of land is a coercive act of will which, if it were unilateral, would without a proper basis arbitrarily limit the freedom of another and would therefore breach the UPR.¹⁰⁹ Thus, peremptory — as opposed to provisional — acquisition of a thing, in this case the soil, requires an omnilateral authorisation and, *ipso facto*, a civil condition.¹¹⁰ The necessity of basing land rights on omnilateral authorisation thus explains why territory should be subject to civil authority, anything else would entail not only a constraint on the freedom of another, but also their expropriation from the *communio* in which humanity holds ownership of land.

(iii) The Two Communities

Considering the fundamental role of OCL in urging and shaping the emergence of civil authority, the doctrine of right contains a strange reversal of it: in the private right paradigm, OCL includes both *commercium* and *communio* but in cosmopolitical right, it is only *commercium*.

That the private right entails *communio* is clear enough from Kant's explication of the *originaria communio fundi* in section 6 of the Doctrine. That the private right OCL is *also* a *commercium* is less obvious — unless we were to assume that *communio* is a subset of *commercium* cases. But the *commercium* in private right becomes apparent in the dispersal counterfactual in ss 13:

For, had the surface of the Earth been an infinite plain, men could have become so dispersed upon it that they might not have come into any necessary communion with each other [...]¹¹¹

This proof, being identical to the proof for *commercium* both in ss 63 of the Doctrine and in 2:3 of *Toward Perpetual Peace*, suggests that the weaker case of OCL also obtains at the base of private right.

108 Byrd and Hruschka (n 71) 128.

109 Byrd and Hruschka (n 71) 128.

110 Kant, *Doctrine of Right* (1797) §15.

111 Kant, *Doctrine of Right* (1797) §13.

On the contrary, addressing cosmopolitical right, Kant explicitly identifies the relevant OCL as being not *communio* but only *commercium*:

Nature has enclosed them together within definite boundaries [...] Hence all nations¹¹² originally hold a community of the soil, but not a juridical community of possession (*communio*), nor consequently of the use or proprietorship of the soil, but only of a possible physical intercourse (*commercium*) by means of it.¹¹³

Thus, within the doctrine, *communio* appears at the beginning but either does not apply to mankind within the law of world citizenship, or has somehow been lost or expropriated along the way.

Table 1: OCL in constitution types, my reconstruction.

	<i>Commercium</i>	<i>Communio</i>
In Private Right	Yes	Yes
In Cosmopolitical Right	Yes	No

Kant does not explicitly argue why in the cosmopolitical situation, OCL is only *commercium*. As I argue in the following chapter, the answer to that question is not obvious but is inseparable from the role and nature of the state.

D. How States Did Not appropriate Territory

The question is why humanity possesses the Earth in common in private right but loses this right by the time we arrive at the cosmopolitical

112 The reference to nations here reflects the ambiguity about the subjects of cosmopolitical right which is present in the Doctrine, specifically whether cosmopolitical right concerns relations between nations or between nations and citizens of third countries. However, though the first part of the chapter is ambiguous, the only right of world citizenship is guest right, which obtains between nations and citizens of third countries. Furthermore, since Kant does not provide an explicit definition of the cosmopolitical constitution, there is no reason to depart from that presented in Definitive Article 2 of *Toward Perpetual Peace*.

113 Kant, *Doctrine of Right* (1797) §62.

question. The world as we encounter it in the cosmopolitical situation is divided into territorial states, real states. Between these states, only the weaker notion of *commercium* obtains. Why? To clarify: *communio* stops applying between individuals when they enter into the civil condition. But states still find themselves in an original situation vis-a-vis each other yet this is not one of *communio*.

I argue in this part that there are two potential explanations. The first, in line with the orthodox construction in which Kant's state is inherently territorial, claims that *communio* was extinguished by the creation of states. Following the dissolution of the state of nature¹¹⁴ the juridical possession right held by all in common is vested in states and therefore expropriated from individuals. Arguments that adopt this conception have to concede that for Kant, statehood implies virtual omnipotence limited in the cosmopolitical sphere only by guest right. To the extent that they nevertheless seek to find an external juridical limit to state power, they argue that one can derive from *commercium* stronger rights than Kant did.¹¹⁵ But considering Kant's treatment of territory as a contingent meta-position, this answer is not as convincing as it may appear. This is why I propose a contrary interpretation: that *communio* between individuals is never abolished but only suspended by statehood. If *communio* were to apply in the cosmopolitical situation, this would entail expropriating ownership from individuals to states, which is why it cannot be the case. On this reading, the *communio* does not obtain in the cosmopolitical situation not because states expropriated this right but precisely because they did not. States themselves are not proper but only contingent owners of land and the *communio* thus continues to underpin the relationship between human beings generally, though it is dissolved between them locally to the extent that they find themselves in a mutual civil condition.

My argument will proceed in the following way. I first return to a clarification of what the state is and is not for Kant, highlighting its contingency in two dimensions: the non-structuring nature of territory

114 Massimi (n 92) 377.

115 Kant, *Doctrine of Right* (1797) §21.

for Kant and the precarity of the state's possession of land. After clarifying this, I will show why it is only the existence of the civil condition, not statehood, which can suspend or dissolve the state of nature and *ipso facto* the *communio fundi originaria*. Consequently, owned land is not locked away in territorial containers but is in a state of flux not entirely subject to state will. Hence, in the third part, I defend the claim that land should be transferable between sovereigns without authorisation by the sovereign within whose public authority it was originally acquired. In doing so I actualise the general government-first, territory-second claim.

(i) Necessity of the civil condition; contingency of the state

Returning to the clarification in B(ii), Kant's primary distinction is between the state in the idea (which contains both the general *status civilis* and the *civitas*) and the state in reality which, given our present reality, refers to the 200 territorial sovereigns. Although Kant does use the word state for *civitas*, I will favour here the word government not only to distinguish it more easily from the state in reality but also because, as I have argued, the *civitas* as an idea works just as well without territory. It is simply the civil condition human beings must enter in order to limit their freedom through a unilateral will. *Civitas* contains certain stronger criteria such as the separation of powers as necessary but it is only territorial insofar as its members choose to occupy territory and, in fact, they can only non-provisionally occupy territory once they have entered into the *civitas*.¹¹⁶

The way in which the state owns territory is fundamentally contingent and precarious. It only owns it in virtue of its citizens owning it. Rather than being fixed, territory is dynamic and relational. The radical version of this view would suggest that while one may need government to acquire land, one would nevertheless be free to change citizenship and take land with them into a new government. There would thus

116 See Japa Pallikkathayil, 'Kant on the State' in Anil Gomes and Andrew Stephenson (eds), *The Oxford Handbook of Kant* (Oxford University Press 2024) 432–4.

be no fixed territorial containers, only mappings of the authoritative division of land at any given time. I dedicate this section to showing the compatibility and support of this view with Kant's account.

Territorialisation is, for Kant, a posterior juridical effect. States are not themselves landowners in the same way that citizens are. State territory is merely meta-ownership of the territory a state's citizens occupy.¹¹⁷ This being the case, territory is a synthetic normative category which requires, in the first instance, occupation. But occupation itself already presupposes a public element since one of its requirements is "[a]ppropriation, as the act, *in idea*, of an externally legislative common will, by which all and each are obliged to respect and act in conformity with my act of will".¹¹⁸ Until such an omnilateral will is constituted, occupation remains only provisional.¹¹⁹ Presumably, if state territory is meta-ownership, it would itself remain provisional unless there were a civil condition.¹²⁰ Since it is the civil condition that comes first and territorialisation that comes second, then the civil condition itself only enables but does not require statehood. A group of people could submit themselves to a civil authority and then decline or fail to occupy any land.¹²¹

To recapitulate here, land ownership requires a rightful condition to become acquired but it is then only held by the state in virtue of being held by the citizen. If I were to acquire land rightfully and then declare that I change my citizenship to another, equally rightful *civitas*, there does not appear to be an axiomatic reason why the land I own would therefore not become part of my new state. As bizarre as this example may sound, it is not alien to the logic of feudal law in Mediaeval Europe. Limitations *could* presumably be placed on such

117 see Byrd and Hruschka (n 71) 118, 121 and 141.

118 Kant, *Doctrine of Right* (1797) §10. Italics added.

119 Kant, *Doctrine of Right* (1797) §15.

120 Supposing, of course, that there can be 'states' in which a civil condition does not obtain. This proposition seems counterintuitive, but if we suppose that a band of robbers can constitute a sociologically real state entity nevertheless incapable of producing binding omnilateral norms, this would be possible.

121 Consider Jewish communities prohibited from land-ownership in Mediaeval Europe.

switches where, for instance, I were landlocked by neighbours. That is, I could be prevented from forming a territorial enclave were enclaves deemed undesirable or incompatible with the rights of my neighbours. This did not seem to pose an issue for feudal law; indeed there are today communities who live in territorial enclaves more or less happily. But even then, the limitation is only a contingent one, for if I live on the border between two states, there do not appear to be reasonable grounds for an objection to the switch.

This dynamic account of territory disagrees with a particular canon of literature that claims Kant treats territory as an *a priori* and therefore implicitly fixed category.

For an archetype, I turn to Jeremy Larkins' *From Hierarchy to Anarchy*. For Larkins, Kant gives territory a structuring role by providing an "essentialist account of the relationship between the state and territory as the 'territorial a priori.'"¹²² Larkins' argument is that Kant, adopting Newtonian physics and giving space an *a priori* status in the *Critique of Pure Reason*, gives territory an analogous status in his theory of international relations.¹²³ "Kant does not desire the borderless space of a universal state. Indeed, international justice requires the 'separate existence of many independent adjoining states.'"¹²⁴

This argument flounders for several reasons, most importantly because Kant's arguments are equally coherent if we understand the state as contingent. International justice requires the existence of states¹²⁵ conceptually because otherwise it would not be international. Without states, there would be no need for *international* justice, but there could still be interpersonal and institutional justice. Kant's argument about relations between states *can* be read by treating statehood as a practical constraint — as contemporary normative theorists do. If the world is divided into states as a matter of fact, Kant may simply be asking what rights and obligations this facticity generates. To the extent that

122 Jeremy Larkins, *From Hierarchy to Anarchy: Territorial Politics Before Westphalia* (Palgrave Macmillan 2010) 2.

123 Larkins (n 122) 19.

124 Larkins (n 122) 26.

125 "States" being here synonymous with "nations".

the remainder of Kant's legal philosophy does not produce territorial state as a necessity, then his conception of international can itself be understood as contingent rather than necessary.

That this is a better reading is reinforced by the second objection: Kant treats neither space nor territory as neutral. As Massimi points out, Kant's philosophy of nature may favour Newton over Leibniz, but is an altogether different philosophy of nature in that it is relational and dynamic.¹²⁶ Space itself and *Commercium* too are not structured as a pool table but as situations of reciprocal dynamism.¹²⁷ Kantian space is not a pool table because in a pool shot, both balls do not bear equal metaphysical responsibility. Kantian space, contrary to the pool table dream of Early Modernity, is intersubjective and constructed. Thus even if one assumes that, for Kant, territory is the political equivalent to space, this does not mean territory is a structuring condition. Rather, one would have to then imagine Kantian territoriality as itself dynamic and intersubjective, a consequence of states and their interaction.

But actually, for Kant, the role played by territory is not analogous to space, except in that just as every object is situated in space, every person occupies *some* place on Earth. But the analogy struggles for two reasons. First, because it is people that occupy space not states. The world is divided into places occupied by individuals, this is inherently the case. It is not inherently the case that the world is divided into territories. Places of rightful occupation only become territory through the additional and juridical act of social contract. But even without this act, one might argue, the juridical dimension maps onto the category of space through human beings themselves among whom it is *divided* into places of rightful occupation. But in fact it is not divided. For individuals may have an inherent right to be *somewhere* but *where* they have a right to be is not in any particular place but rather wherever they happen to be at any given time.¹²⁸ The world is not *divided* into plots of rightful occupation; it merely *contains* them. To the extent that a place

126 Massimi (n 92).

127 Massimi (n 92).

128 Byrd and Hruschka 128.

of rightful occupation becomes a fixed coordinate, this is through the subjective action of an individual, which is not *a priori* but additional to the basic structure. Since individuals are merely somewhere but not anywhere in particular, the civil condition they enter into through omnilateral contract is itself only contingently territorial.

Even if the latter weren't the case, territory as a feature of political community is necessarily contingent insofar as it requires a public juridical act to be non-provisional and is itself a secondary state of meta-ownership, tying the state only to the people who make it up to the extent that they occupy land not to an *a priori* territorial container. The juridical condition creates but does not fix territory. With these constructions, it is possible to provide a new answer to the *communio-commercium* switch; that is, why the existence of states seems to extinguish individuals' common proprietorship of the Earth.

(ii) Two explanations for the switch

The previous section established two points. First, that the state's possession of land is contingent in a broad sense since the territorial state is not the necessary manifestation of the civil condition or *civitas*. Second, that territory is not, for Kant, an *a priori* juridical category; the world is not *divided* into territorial containers but consists only contingently of the land appropriated by a state's citizens. These premises set up my argument that the weakness of *commercium* in the cosmopolitical situation reflects that the cosmopolitical situation is itself contingent, being a *pro tempore* juridical situation that arises between states not only before the eventual establishment of a federation or world state, but also only following the contingent development of a geopolitical structure of territorial states.

This view of why only *commercium* obtains is different from the alternative *residual conception*, which suggests that states, having appropriated ownership of land from the mass of humanity which held it in common, remain bound only by the residuum of that common right,

manifested in the weak rights of people stemming from the Earth as a common interaction.

This conception can be found, for example, in Ripstein. The sole reference to OCL in *Force and Freedom* comes up in the context of roads and freedom of movement. “Consider a system in which all land is privately owned.”¹²⁹ In such a system it is possible for any landowner to become landlocked; surrounded by other landowners who, exercising their property rights, can deny him egress out of his own parcel.¹³⁰ Suppose then that roads are necessarily public goods presupposed by the system of land ownership.¹³¹ Interrogating Taylor and Dworkin’s arguments on the matter, Ripstein proposes a dichotomous basis in the OCL:

Are roads like the high seas, uninhabitable zones that are available for all to traverse? Or are they somehow a residue of an original commons, the bit of land that has not been appropriated?¹³²

Ripstein’s own answer roots roadship, ultimately, in the necessity of harmonising freedom.¹³³ But in the present context, the prior dichotomy deserves further consideration. The high seas, the standard case of *commercium*, are apparently *commercium* because they are uninhabitable and thus unclaimable.¹³⁴ The other option is that a degree of *communio* persists because the land has not been appropriated yet.

Ripstein fits into the general summary of the *residual conception* I now offer. In the beginning, humans held land under *originaria communio fundi*. But, entering into the juridical state, land was divided into territorial spheres, themselves composed of plots of land subject to states. For this reason, *communio* was extinguished and only guest right

129 Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009) 243–250.

130 Suppose, more radically, that a person who owns no land is in this situation everywhere and at all times.

131 Ripstein (n 129) 249.

132 Ripstein (n 129) 249.

133 Ripstein (n 129) 249.

134 That the seas are not property because they are uninhabitable is incompatible not only with the tendency of states to appropriate them but more importantly with ideas such as the Common Heritage of Mankind (seabed) in the Law of the Sea.

prevailed as between peoples on land while it prevailed on sea because the latter was not possessable in the first place.

Essentially, the collective possession of land once held by humanity is now moved into the hands of states and divided between them. That this is a consistent interpretation of Ripstein is supported by his understanding of the relationship between property and sovereignty. Ripstein agrees with the Kantian canon in the assertion that sovereignty is not *just* large-scale ownership. Property and sovereignty, he argues, share structural similarities but are differentiated by the fact that the sovereign is accountable to an internal norm — power must be exercised for and on behalf of the people — while the property owner is not.¹³⁵ Ripstein's is the state known to international law as well as to Rawls, a fixed territorial entity that must be held to minimal internal standards.

This is not the same view as that of “meta-ownership” explained by Byrd and Hruschka, where the state's territory is composed of land only incidentally, in virtue of the landowning status of citizens. Rather, it is a view of territorial containers with internal norms who have appropriated land almost perfectly but remain bound by certain minimal standards.

Yet Byrd and Hruschka also echo the residual conception, seeing *commercium* as what remains after successful appropriation of land out of the juridical situation of the *communio*:

Humankind forms an original community only in relation to division of the land and it is this community alone that can call forth an originally united will. It is this community alone upon which arguments supporting the postulate of public law can be predicated and it is this community alone that is a necessary consequence of our existence on earth. Without the goal and the duty to divide the earth there would be no original community of all human beings whatsoever other than as a product of our imagination.¹³⁶

The entire purpose of the *communio* is to permit the division of the world into states. After that, only *commercium* remains.

135 Arthur Ripstein, ‘Property and Sovereignty: How to Tell the Difference’ (2017) 18(2) *Theoretical Inquiry* 243, 243–244.

136 Byrd and Hruschka (n 71) 140.

The problem with this argument is that it is in fact incompatible with the proposed dynamic view of sovereignty and property ownership, in which the division of land is tied to people rather than states and to states only secondarily. The latter idea — that state meta-ownership results from the members of the body politic and is only as stable as the latter — is much more compatible with Kant's dynamic conception of territory and space. In other words, seeing *Commercium* as a residuum of territorial sovereignty implicitly assumes that territorial sovereignty is necessary rather than contingent.

For a view more compatible with contingent sovereignty, I propose a *persistence conception*, which goes as follows. The *communio* is the situation that obtains between human beings as a default relation toward the surface of the Earth. It requires that we establish a civil condition and *civitas* before acquiring possession of land and determines that the initial acquisition is always tied to a *civitas*. But the government, the state, does not really own the land.¹³⁷ It has territory to the extent that its citizens do. The *communio* is not extinguished; it is merely suspended in the context of the civil condition I happen to find myself in and *vis-a-vis* my co-citizens. Should I wish to change citizenships and take my land elsewhere, this is not incompatible with the principles of right unless it was explicitly prohibited by the original contract and so long as I take my land into a different civil condition.¹³⁸

On this view, *commercium* is not what is left after *communio* is extinguished by states. Rather, *commercium* is the situation that obtains in the specific and contingent condition where the Earth is speckled with states. *Communio*, on the other hand, the stronger relation between

137 Huber proposes a similar but distinct reading in which *commercium* relates to the right to Earth dwellership and is parallel but separate from the structure of innate and state right. The shared instinct here is the idea that entry into civil society is not merely the culmination of the right to the soil. see Jakob Huber, *Kant's Grounded Cosmopolitanism: Original Common Possession and the Right to Visit* (Oxford University Press 2022) 11–37.

138 Of course, whether actual legal systems today permit such transfers is another matter. The claim here is that Kant's principles of right do not, in themselves, prohibit such transfer — provided the original civil condition did not explicitly forbid it.

people and land, is not a question for cosmopolitical law because it is not for states to expropriate. It is only for individuals to suspend if, when and only for as long as they enter into civil society with others.

The upshot of the *persistence conception* is that in it, unlike in the *residual conception*, the invention of territorial sovereignty does not foreclose the horizon of normative possibility. States do not extinguish or expropriate the right to constitute juridical relations. Their existence merely suspends this right between their citizens.

(iii) The permissibility of unauthorised land transfers

I propose at this point that if my view is sound, the latter idea — that there is nothing in the *Doctrine of Right* prohibiting an individual from changing memberships in civil conditions and taking their land with them — is defensible. Or rather: if it is defensible in a Kantian framework, this suggests that my conception is viable.

Kant does not consider the possibility of a change of citizenship or emigration, which opens the conceptual space for the operation that follows. *A contrario*, Hobbes does consider it and believes that emigration entails a forfeiture of all rights except self-preservation.¹³⁹ Kant, unlike Hobbes, believes that property rights do not emanate from civil authority, merely that civil authority is necessary to secure them.

The civil condition is necessary because without it, acquisition of land would be incompatible with the freedom of all others and would amount to an unauthorised unilateral usurpation from that which all, by virtue of its necessity and finitude, hold in common. Thus, one must enter into a civil condition in the first place to secure an omnilateral authorisation for the occupation and possession of land.

My land, thus acquired, was acquired compatibly with the freedom of others. Not only — this is key — without infringing the freedom of my compatriots but to all other human beings on Earth. The latter must mean that an omnilateral authorisation based on social contract,

139 See Patricia Sheridan, 'Resisting the Scaffold: Self-preservation and the Limits of Obligation in Hobbes' *Leviathan*' (2011) 24 *Hobbes Studies* 137–157.

even where the latter does not include the entirety of humanity, is nevertheless legitimate. In other words, it is the fact that the acquisition took place within public right — even of a non-universal scope — that makes it legitimate. Otherwise, it would be impossible to acquire property legitimately outside of a world-republic. It is the mere possibility of the inclusion of all within public right — by virtue of its own universal nature and even without universal membership — that makes it legitimate.

Since my ownership of property is justified against anyone not merely against my compatriots, the only special duty that I could thereby have towards them might be compliance with the terms of a contract. Undoubtedly, it would be possible for the social contract to determine that I cannot take my land elsewhere; this is what the laws of states in reality invariably do. But this cannot be derived by necessity from the nature of the acquisition.

If I decide to emigrate and become the member of a new body politic, it seems logical that my previous body politic loses its meta-ownership of my land and that my new body politic gains it. Certainly, this is permissible with consent of both sovereigns. But my claim is that it does not require the consent of my former sovereign.

The logical counterargument is that the proposed course of action is an act of unilateral will. This is true, but human beings are entirely justified in acting unilaterally with regard to what is theirs; indeed, that is the essence of property. For such an act of will to be impermissible, it would have to be incompatible with the freedom of others.

If, however, the act of taking land away from the state was itself incompatible with the freedom of my compatriots because they did not authorise it, then the original acquisition would have had to have been incompatible with the freedom of citizens of other states since they also did not authorise it. Since the latter is not the case, neither should the former be.

Rather, the only intelligible requirement is that I must take my land into a new civil condition, not merely out of the former one. In doing so, the degree of authorisation remains the same; valid by virtue

of its universal nature. In fact, it cannot be any other way because merely taking land out of the civil condition would mean appropriating for myself without *any* omnilateral authorisation and thus would be incompatible with the freedom of others.

This is precisely the moment in which the *originaria communio fundi* is fictionally unsuspended to prohibit me from withdrawing land without simultaneously submitting myself to a different civil condition.

If *communio* is, in this sense, persistent, then the reason why it does not obtain in the cosmopolitical situation is simply that states themselves are not the owners of land. Their obligations vis-a-vis citizens of other states are mediated by the physical finitude of the Earth and necessity of interaction, yes, but this is in fact proof of the transient nature of their authority. Rather *communio* remains suspended above the citizens of states as a principle that prohibits the unilateral appropriation of the soil but simultaneously, being compatible with land transfer, determines a class of human relations that remain free from states.

E. Chapter Conclusions

The use of the clarifications drawn in the previous chapter is here to show that what Kant defends as necessary is what we may more aptly call government than statehood. Kant does not advocate for the state as a totality but for the *civitas* as a unification of individuals under an omnilateral authority. The basic structure of governmentality is nothing more than compatriotship under a common authority which makes it possible for the individual to exercise more complex freedoms in such a way that others are not thereby limited in theirs. Within the definitions established in this thesis, this is yet only government but not necessarily statehood. Statehood — government actualised in territory — obtains only if such a polity is actualised spatially. That may happen — indeed, it may *always* happen — but it is a further step. In this step, the omnilateral authorisation permits individuals to own land and the government thereby manifests in space as the collection of plots

rightfully held by its citizens. But there is no ontological necessity of this. Many individuals do not — by choice or otherwise — hold land. Such individuals may associate under an omnilateral authority.

If the ‘state’ as it is now understood is a consequence of Kant’s argument, this would only be the case if individuals *must* hold land. One may very reasonably argue that Kant would agree with the latter. Nevertheless, such necessity would still be the consequence of an additional synthetic judgment and is not inherent in the nature of governance or norm-production. Moreover, such a state remains contingent if, though its citizens occupy land, they are nevertheless permitted to change citizenship and transfer their land elsewhere without the consent of the sovereign. The territory of such a state is not only meta-ownership, it is dynamic and unstable. As strange as this idea may appear, it *was* possible in the pre-Modern situation.¹⁴⁰ The suggestion then is that Kant’s account seems pre-Modern in this aspect; incompatible with the 19th century territorial Leviathan that insists on its juripoly.

In the subsequent, final part I propose a materialist explanation for the state-theoretical rupture between Kant and that 19th century totality conceptualised by Hegel in opposition to him. The liberal Leviathan, as I will endeavour to show, is a state fetish that justifies the expropriation of land, abolition rather than suspension of the OCL, prohibition of the unauthorised land transfer, naturalisation of the state and its juripoly. Kant’s theory of the state can be read in just the emancipatory way proposed here: justifying not the totality of the state but the ideal of government.

140 See e.g. David Abulafia and Nora Berend (eds), *Mediaeval Frontiers: Concepts and Practices* (Ashgate 2002) xi-xii; Tony K Moore, ‘The loss of Normandy and the invention of Terre Normannorum, 1204’ (2010) CXXV(516) *The English Historical Review* 1071.

