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Europe’s Cosmopolitan Union

A Kantian Reading of EU Internal Market Law and the Refugee Crisis

Bertjan Wolthuis and Luigi Corrias

1. Introduction

Cosmopolitan law, in Kant’s theory, is restricted to rules of universal hospitality. A person who comes in peace to a foreign state has the right to be received in peace by that state. In this chapter we claim that European Union (EU) law is best viewed as an instance of cosmopolitan law in Kant’s sense. The reason is that Kant’s universal hospitality right and EU law both concern the relation between a state and a foreign person—in the EU case: between an EU member state and a person from another EU member state. One might object that Kant’s right is quite narrow whereas EU law is extensive. Our response is that Kant’s right has to be limited only because it is natural; EU law can be extensive because it is positive. Another objection is that the EU is a superstate and, as Kant has explained, several such superstates are necessarily in a state of war with one another. Our response here is that the EU is no state but a union of states, of the cosmopolitan kind, which entails that these states have brought the relation between their citizens and the participating states under law, to advance peace in this way. The question in this chapter is whether EU law viewed as positive cosmopolitan law can be consistent with state law and international law, especially with the freedom of EU member states. Our answer is affirmative. It rests on Kant’s idea of the civil or legal condition (section 3), on the constitution of EU internal market law (section 4), and on EU external cosmopolitan law (section 5). First we introduce the EU as a cosmopolitan union.

2. Europe’s Cosmopolitan Union

The claim in this chapter is that the EU is a union of cosmopolitan law, in Kant’s sense of cosmopolitan law, with EU internal market law as presumably the most extensive.
system of positive cosmopolitan law in history. In Kant's legal theory, public law consists of three parts: state law, international law, and cosmopolitan law.\(^2\) The first concerns the relation between persons (within a state), the second applies to the relation between states, and the third to the relation between persons and foreign states (and, through this, to the relation between persons from different states). In a world of persons and states these three types of law are required to bring all possible relations between persons and states under public law, to create a universal civil condition.\(^3\) In the vocabulary of Kant's theory, EU law has to be classified as an instance of cosmopolitan law, we argue, because this law grants the citizen of an EU member state rights in foreign states that are members of the EU. The citizen of an EU member state has the right to freely bring goods, services, and capital to foreign EU member states, for example. Trade tariffs or similar obstacles are prohibited. The citizen of an EU member state also has the right to travel, work, study, and retire in the foreign state that is a member of the EU. EU internal market law is cosmopolitan law in Kant's sense because it creates rights and duties that bear on the relation between each member state citizen on the one hand and each member state on the other. These cosmopolitan rights aim to establish an internal market and an ever closer union between Europe's peoples—which echoes Kant's (1977: para. 62) emphasis on "Verkehr" or "commercium."

The EU is, as far as we know, not yet regarded by Kant scholars as a possible contribution to a universal civil condition.\(^4\) An explanation is that the EU is often viewed as a continental state;\(^5\) and that Kant wrote that such "Korporationen" necessarily stand in a state of war with each other.\(^6\) But this qualification of the EU fails to appreciate the cosmopolitan way in which the member states of this union seek to establish peace between them. The peace logic of the superstate, and that of the world state, is that the independent states that preceded it are discontinued by it, so that the peoples that have become part of it no longer have the right to wage war on each other. The EU does not follow this scenario. Its member states aim to establish peace between them themselves under law with only such proclamations. Yet these find their way into EU law handbooks. So positivist EU lawyers perhaps find our cosmopolitan union and its law a stripped-down version of what they have come to know as the EU and its law through EU law handbooks. Our claim that the EU legal order is cosmopolitan is not a political proposal (about what the EU should be) but a philosophical analysis (of what the EU is).

\(^2\) Our translations of Kant's vocabulary do not always follow those proposed in the Cambridge edition of Kant's *Metaphysics of Morals*. We write "law" and "civil/legal" condition, for instance, whereas Gregor writes "right" and "rightful" condition (Kant, 2017: xvi). On the topic of terminology, see the contribution by Mertens in this volume.

\(^3\) See on these categories Ripstein (2021: chap. 8, section I). This contribution builds upon Ripstein's work on Kant and aims to add to it this Kantian analysis of EU law and the refugee crisis. We thank Arthur Ripstein for his comments and the editors of this volume, Ester Herlin-Karnell and Enzo Rossi, for hosting two authors' conferences at which we discussed contributions against the background of themes from Ripstein's work. We thank all participants for their comments. We thank Jelena Belic, Dion Kramer, Irina Leichenko, Peter Niesen, and the editors for their comments on an earlier version of the paper.

\(^4\) Höffe (2007) is no exception because he thinks he has to distance himself from Kant to include the EU, which he sees as a continental state. For an alternative line of reasoning, see the argument in this paragraph.

\(^5\) See the discussion in Eberl and Niesen (2011: 349–350).

\(^6\) Kant, *Metaphysik der Sitten*, Rechtslehre, para. 61. Notice, however, that Kant writes about the situation in which there is no positive international law between such "Korporationen," which means that his argument does not apply to the situation in which the EU finds itself, even if the EU were a superstate.
by granting cosmopolitan rights to each other's citizens, so by bringing the relation between citizens and participating states under positive law. It is too hasty, therefore, to dismiss the EU as “unkantisch.” A world of cosmopolitan unions need not be a world at war. What matters in Kant's theory is that there is positive state law, that there is positive international law (in the form of a voluntary federative league of nations), and that there is positive cosmopolitan law. A set of cosmopolitan unions could be a legitimate temporary form of cosmopolitan law; as long as the more extensive cosmopolitan rights enjoyed within these legal orders are consistent with the more restricted universal hospitality right given shape in migration and refugee law. We discuss the latter in section 5. Our basic point here is that the EU should not be categorized as a continental state or a superstate but as a cosmopolitan union.

The EU is not commonly viewed as a cosmopolitan union of states, however. An explanation is that the differences between Kant's cosmopolitan law and EU law are easier to notice than the similarities. Kant's Weltbürgerecht is restricted to the right of a person to make an offer, in a peaceful manner, to a foreign state, concerning this person's visit; and to be heard by this state, again in peace. There is no unqualified right to visit a nation; the foreigner's offer need not be accepted. The provisions of EU internal market law are numerous and far-reaching compared to Kant's “narrow” (Ripstein 2021: chap. 9, section VII) cosmopolitan right. However, what matters is that Kant's cosmopolitan law and EU internal market law both concern the rights of persons vis-à-vis foreign states. The structure is the same. Some deny this and say that EU internal market law cannot be cosmopolitan law because it is more or less equivalent to state law and has erased internal borders.

The member states are united by treaties through which each contracting state has granted the citizens of the other contracting states the same set of rights to travel, study, work, conduct business, retire, etc., on its territory. The result is one body of positive cosmopolitan law which is precisely the "new legal order [...] the subjects of which comprise

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7 For this qualification of continental states such as the EU, see Eberl and Niesen (2007): "Charakteristisch für heutige, sich an Kant anlehrende Weltstaatskonzepte ist, daß sie eine ganz und gar unanktische Zwischenebene zwischen die staatliche und die globale Ebene schieben, die mit "kontinentale[n] oder subkontinentale[n] Zwischeneinheiten" bzw. "kontinentalistischen" Akteuren bevölkert ist. Im Hintergrund stehen regionale Großregime nach dem Vorbild der Europäische Union, die nun für den ganzen Erdkreis verbindlich werden sollen. Kant lehnt solche partikularen staatlichen Zusammenschlüsse ab, da sich zwischen ihnen unweigerlich ein machtpolitisches Rivalitätsverhältnis herausschält, das 'einen Kriegszustand herbeiführt.'"

8 Ferry (2009) and Hoogenboom (2016: 81–88) view the EU as a cosmopolitan union. There are several publications about Europe and cosmopolitanism, but these do not analyze EU law as cosmopolitan law in Kant's sense. Eriksen (2006: 252–269), discusses EU foreign policy and not from Kant's point of view. Beck and Grande's Cosmopolitan Europe (2007) concerns the spirit of toleration in Europe. Alec Sweet Stone and Clare Ryan view the legal order erected by the European Convention on Human Rights as a cosmopolitan order in Kant's sense. See their A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights (2018). Their interpretation of Kant's cosmopolitan law differs remarkably from ours, however: they do not structure this law in terms of the rights of citizens vis-à-vis a foreign state (contra Kant, we think); they also view cosmopolitan law neither as narrow in Kant's writings (contra Ripstein) nor as natural (contra Niesen).

9 Kant, Zum ewigen Frieden, Dritter Definitivartikel. Kant writes that both parties, foreigner and state, have to be "friedlich," "nicht feindselig."

10 Idem: a foreigner can only be rejected if that can be done "ohne seinen Untergang."

11 This remark was made at the second authors' conference leading up to this volume, at the University of Amsterdam, on June 7, 2019.
not only member states but also their nationals” (Court of Justice, Case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen, 1963). So at the border of an EU member state, citizens from other EU member states no longer need to make an individual offer about the terms of their visit. The terms of visits for all these citizens are equal; they are now laid down in EU law. The promulgation of these terms makes the crossing of internal borders clearly much less complicated than before but it does not erase the member states or the borders that come with states. Without these borders EU law would make no sense; internal borders are the raison d’être of EU law.

That Kant’s Weltbürgerrecht is narrow and EU internal market law is not does not mean that EU internal market law cannot be cosmopolitan law, in terms of Kant’s theory of law. The reason that Kant’s cosmopolitan right has to be limited while EU cosmopolitan law can be wider, is that Kant’s right to a hospitable reception is natural while EU cosmopolitan law is positive. In the absence of positive cosmopolitan law, persons only have the limited natural right to make the foreign state an offer in peace. A less narrow natural right would subordinate the foreign state’s freedom to this too wide natural cosmopolitan right of persons. A narrower natural right, however, would no longer protect the freedom of the person in question. However, a less narrow positive cosmopolitan law, for example, EU internal market law, need not necessarily subordinate the participating states’ freedoms to the cosmopolitan union because these states have chosen to give each other’s citizens these rights; and they remain free to make a different choice; they are free to leave the union.

Kant’s theory of law requires the three parts of public law to be “coordinate” with each other in this way, in order to establish a legal condition in which all persons and states can be free. It is against the background of this idea of a legal condition, in which the equal freedom of persons and states is possible, and the requirement of consistency between the three parts of public law, that we analyze EU law in the remainder of this chapter. Kant’s understanding of law as “the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom” already makes clear that persons or states, in order to be equally free, have to be subjected to law. That is only possible if the executive and judicial authorities themselves also stand “under law” and are not in the hands of legislators.

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12 What is “new” about this order, we propose, is exactly the cosmopolitan way in which member states and their citizens are tied together as subjects to this law. Technically speaking, the EU is an international governmental organization (because it is treaty-based and member states are free to leave) of a cosmopolitan kind: the material law the states have agreed upon by treaty is cosmopolitan.

13 We follow here the reading of Kant’s Zum ewigen Frieden and his Rechtslehre as defended by Eberl and Niesen, “Kommentar.” This reading is crucial for our argument in this paper. See on the topic of natural and positive law in Kant: Niesen (2017: 83–106; 2014: 170–196).

14 Kant’s natural cosmopolitan right is, in a sense, the right to the peaceful conditions under which communication about positive cosmopolitan law (an individual agreement between a person and a state about a visit; EU internal market law is the result of an agreement between states about visits of their subjects) has to take place. Some authors appear inclined to think that cosmopolitan law in Kant has to remain limited to this, perhaps driven to this thought by the title of the third article of Zum ewigen Frieden. We think this does not make sense; clearly the natural right has to be limited to this; but notice that this natural right concerns the conditions under which cosmopolitan law should be made.

15 Ripstein (2021: chap. 9, sections I and VII) examines the consistency between the three parts of law systematically. What is meant by coordinate or consistent in this context is discussed in section 3 of our chapter.

16 Kant, Metaphysics of Morals, 6: 230.
A legal condition in which all three types of relations between persons and states are brought under law in a consistent way makes the equal freedom of states and persons possible. We discuss this in section 3.

So, in this contribution, with the EU viewed now as a cosmopolitan union we ask whether EU law, understood as positive cosmopolitan law, can indeed be qualified as an extension of the legal condition, and whether it can be viewed as consistent with the other two parts of public law, especially with the freedom of EU member states (section 4). The answers to these questions also depend on the possible connection to global, much less extensive, systems of positive cosmopolitan law such as migration law (section 5). The rest of this chapter is structured as follows. First we briefly review the three parts of public right, the requirement of coordination and the civil condition (section 3), to prepare the discussion of the issues just distinguished (sections 4 and 5).

3. The Idea of a Legal Condition

In this section, we discuss the three parts of public law and the legal condition these coordinate parts are meant to establish.

State law. According to Kant (Metaphysics of Morals), every human being has the innate right to be independent from the constraining choice of another.\footnote{See Ripstein (2009a: chap. 2) for an interpretation of this right.} But this natural innate right, together with natural acquired rights such as the right to property, can only be enjoyed if they are specified in a system of positive law and maintained by state institutions. The reason for this is ultimately not that man is a wolf to man in the state of nature (Hobbes, 1997: 3–4) or that natural law, while clear, is not safe in the hands of ignorant and self-interested private persons (Locke, 1980: par. 124). Even if human beings were “well-disposed and right-loving” (Kant, Metaphysics of Morals, 6: 312), public law is necessary. The reason is contained in the idea of the state of nature itself. What natural law prescribes in concrete cases is something persons might reasonably disagree about (contra Locke).\footnote{For a detailed discussion see Ripstein (2009a: 190).} Hence, in the state of nature you ought to rely necessarily on your own view of what is right. If you follow another person’s view, you are dependent upon that person, which frustrates your innate right to independence from the start. However, if all persons rely, as they should, on their own view of what is right, each person’s right to be independent from the constraining choice of others still depends upon the constraining choice of others, who (in the best of cases) make their choices according to their own view of what is right. So the state of nature is a state in which a plurality of persons can never be free and equal, no matter how good or righteous they are. Persons can only be independent from each other if the equal freedom of persons is secured through a system of positive law through which a collective of persons ultimately governs itself (cf. Ripstein: chap. 2, section I). Then all persons can be independent because they can depend upon the positive law that is administered by independent state institutions in the name of them all.

\footnote{See Ripstein (2009a: chap. 2) for an interpretation of this right.}
International law. States, understood as such systems of positive law, themselves stand in a state of nature relation to each other, in the absence of a system of positive international law. The equivalent of the innate, natural right of a person to independence is the right of a state to decide how to act in its relations to other states, which is constrained only by what a state ought to be, that is, a civil condition for its subjects, who have, as a people, “an original right to unite itself” (Kant, Metaphysics of Morals, 6: 349). This limit means that a state cannot abandon its task to establish a legal condition for those subjected to its system of positive law. So we see here how international law has to be coordinate with state law. This view of the relation between state law and international law also implies that states cannot legitimately be forced into a world state (in which states cease to be), while persons have the duty to enter a civil condition with persons with which they cannot avoid interaction. States can freely enter a federative union, if “that [union] can be renounced at any time” (Kant, Metaphysics of Morals, 6: 344). Positive international law governing their relations, administered by an international court, is a form of peace, a civil condition, between them. They are subordinated to rules given to each other by treaty, administered by treaty-based judicial and administrative authorities in the name of all of the participating states.

Cosmopolitan law. Cosmopolitan law is the third part of public law. Kant's natural cosmopolitan right states that a person who wants to enter a foreign land in peace has the right to make an offer to the foreign state about the terms of this person's visit and to be received in peace by the foreign state while the offer is being made. Kant uses the words “Wechselwirkung (commercium)” and “Verkehr” (Kant, Metaphysik der Sitten: para. 62) to refer to the exchange or, more broadly, interaction between world citizens that is indirectly at stake here (the content of the offer). Eberl and Niesen (“Kommentar,” 251) argue that Kant’s commercium has to be viewed broadly as including economic, political, and cultural interaction. The natural cosmopolitan right formulated by Kant only prohibits the addressee of the offer to treat the foreigner with hostility; and, vice versa, the foreigner has to come in peace. The reason for this restriction is that a broader understanding of the natural right (a foreigner’s right to settle, for instance) would subordinate the freedom of the state in question to the freedom of the globetrotter (or a movement of settlers: colonialism) while an even narrower view (a hostile reception?) would of course no longer protect the freedom of the globetrotter.19

Legal condition. With these three kinds of public law now distinguished, we move on to what public law itself is and what it is meant to establish. In Kant’s theory, public law is defined as law that has to be positivized to create a legal condition. (cf. Kant, Metaphysics of Morals, 6: 311) This normative understanding makes it an open question whether EU law is public law. Does EU law extend the legal condition on the territory of the EU member states? The answer will depend on what a legal condition is and how it can be brought about. From the Rechtslehre and Zum ewigen Frieden we learn that not all kinds of rule necessarily constitute a legal condition. A despotic regime is not rule of law at all but rule of men. Kant distinguishes despotism from republicanism; republicanism is for Kant the doctrine of the separation of powers.

19 See the thorough discussion in Eberl and Niesen (2007: para. 3.3.3).
Law should ideally be given by all persons who are also subjected to the law, since volenti non fit iniuria (cf. Kant, Metaphysics of Morals, 6: 313–314). However, these persons can only be subjected to law (as opposed to men) if they do not also execute the law, because then the executive power is not “under” or “bound by” law, since it is in the hands of those who already stand “above” law, as legislators. Then a majority of “men” would rule over a minority of men. This makes such a direct democracy an “Unform”;20 it does not constitute a legal condition at all; it may have the appearance of a constitution and it may produce laws but the executive power is never under law.21

Coordinate. A recurring theme in Ripstein’s Kant and the Law of War is that the three parts of public law have to be “coordinate,” a Ripsteinian term of art we borrow here. They have to be coordinate in the obvious sense that they have to bring all possible relations between persons, between states, and between persons and states under law. Ripstein (2021: chap. 9, section X) uses the term coordinate in this sense in a discussion of “legal black holes,” which designate relations not covered by public law. It has to be distinguished from the second meaning of coordinate in Ripstein, which concerns the possibility of equal freedom of persons and states in one system of public law. So the requirement is not only that there has to be public law to cover all relations, the relations also have to be shaped through public law in such a way that each person’s and each state’s equality and freedom is made possible.

It is the latter understanding of coordinate that implies that the three parts of public law are not necessarily coordinate with each other in the sense that the three parts have to be of equal rank. The concern is that the equal freedom of persons and states is protected.

In this regard the sequence of Kant’s line of argument, from innate human right to private right, to state law, to international law and, finally, to cosmopolitan law, appears to be relevant. In the above overview of the three parts of public law, we emphasized, following Ripstein, that state law (whereby a civil condition between persons is provided) limits international law (treaties whereby this condition is threatened are invalid) and that international law (the equal freedom or independence of states) limits cosmopolitan law (natural cosmopolitan right has to be narrow because of states’ equal freedom). An argument in reverse order would generate a different kind of public law, if it would generate anything comprehensible at all.

The normative implications of this sequence need not necessarily be interpreted as conservative, as protecting the status quo of a world of states.22 After all, the crucial point is that the equal freedom of persons is only conceivable in the form of state law, which makes the state the correct place to start. A similar argument is made by Rawls, who takes the “basic structure” of a society as the first subject of justice, for the reason that “the freedom and equality of moral persons require some public form” (“at some level there must exist a closed background system”) (Rawls, 1993).23 The sequence in

20 Kant (Zum ewigen Frieden, Erster Definitivartikel).
21 These insights about law, the legal condition, and the republic can already be found in Rousseau (1997, Book II).
22 That opinion is prevalent among contemporary cosmopolitans (not, we think, in Kant’s sense). For example: Valentini (2011).
Rawls’s constructivism is also one-directional: in his *Law of Peoples* the principles of justice chosen by parties representing citizens in the first original position determine the interests ascribed to peoples represented by parties in the second original position. These interests in turn shape the law of peoples.\(^{24}\)

Against the background of this understanding of the legal condition and the requirement that the equal freedoms of persons and states have to be coordinate, our question in the next section is whether EU law really extends the legal condition and whether it is coordinate with the freedom of the European states who are united by the cosmopolitan rights they have reciprocally given to each other’s citizens.

To clarify: this question involves a critical assessment of a given, “empirical” system of positive cosmopolitan law against the background of Kant’s view of law “as idea” or “norm.”\(^{25}\) This approach need not be alien to the Kant scholarship as proposed by Niesen. Niesen draws from his reading of Kant’s cosmopolitan right as a natural right the conclusion that “it makes more sense to understand the positions “developed” from Kant in the secondary literature not as rivaling interpretations of natural cosmopolitan law, but as arguments to be considered in its transformation toward a global public legal condition” (Niesen, 2017: 100). We agree. We take an instance of positive cosmopolitan law and ask whether it contributes to the global legal condition. EU internal market law raises interesting issues with respect to Kant’s theory because it is an extensive system of positive cosmopolitan law (section 4) between only a limited group of states (section 5).

### 4. EU Internal Market Law and the EMU

In the second section we introduced the EU as a cosmopolitan union. In the third section we examined Kant’s notion of the legal condition and the requirement that the three parts of public law are coordinate. In this section and the next we answer the question whether EU law contributes to the establishment of a global legal condition, for EU member states and their citizens (this section) and for non-EU citizens (next section).

We do not concentrate on individual EU rules (individual EU treaty articles or pieces of EU legislation) or policies but on the structure or “constitution” of EU law, because we are interested in the legal condition (4.A), which concerns the separation of powers, as we have seen, and because we are also interested in the way EU law coordinates with international law (4.B), especially with the equal freedom or independence of its member states.

\(^{24}\) See for an analysis of Rawls’s “sequential” constructivism: Wolthuis (2017: 454–466). Rawls’s justice as fairness offers no cosmopolitan principles. In that article Wolthuis proposes a third-level original position, to make justice as fairness applicable to the European Union. In light of this chapter (see also the third section), we think the title of Wolthuis’s article should have read: “Principles of Cosmopolitan Union,” since the principles do not concern the participating states’ household management (which is the topic of the EMU) but *commecium*.

\(^{25}\) We adopt here phrases used in paras. 45 and 51–52 of Kant’s *Rechtslehre*; on this topic of noumenal and phenomenal state/law: Ludwig (1999: 173–194).
4.A. Legal Condition

The answer to the main question is not a straightforward “yes” or “no” because there are multiple parts of EU law, which are structured rather differently.26 Here we zoom in, to keep it manageable, only on EU internal market law on the one hand and on EU economic and monetary union (EMU) law on the other. The first extends the legal condition, we argue, and is coordinate with the freedom of states, whereas the second does not extend the civil condition. Moreover, we submit that EMU law as it is cannot be coordinate with the freedom of states. We have selected EMU law only because it stands in clear contrast to the way EU internal market law is constituted.27

*Internal market law.* Kant’s cosmopolitan law and EU internal market law are both concerned with “Verkehr,” with exchange or interaction between persons. The German “freie Verkehr von Waren, Personen, Dienstenleistungen und Kapital” (art. 26 TFEU) captures this better than the English “free movement of goods, persons, services and capital.” These four freedoms define the rights of citizens of EU member states and prohibit EU member states to restrict the border crossing transport of goods, services and capital and to hinder the free border crossing exchange of workers and students, irrespective of the member states of which they are citizens.

These rights and prohibitions fall under titles I, II, and IV of part three of the Treaty on the Functioning of the European Union. These provisions are maintained by the Commission, which is an executive authority independent from the member states. They can be invoked by persons and states before national courts of law, who can refer questions about them to the European Court of Justice. Legal conflict about what this law entails need not be resolved through force, and need not depend upon certain persons, but can be settled in a court of law. The legislative, executive, and judicial powers are separated within internal market law, which does not conflict with but instead appears to extend the legal condition for citizens of EU member states and these member states with respect to border crossing *commercium* within the EU.28

*EMU.* Several EU member states have a common currency and aim to create an economic and monetary union (EMU).29 The member states who have chosen to cooperate with each other within the EMU regime have subjected themselves to economic standards: they have to avoid excessive government deficits (126 (1) TFEU); they have to coordinate their economic policies with the Council (121 (1) TFEU); and their economic policies have to be guided by certain “principles: stable prices, sound

26 EU member states cooperate in a many different ways, on various policy areas, and sometimes they codify their common aims. This does not place them under law but is intended to foster international solidarity. EU internal market law is different. See on this topic, Wolthuis (2021).

27 So we ignore here that the character of EMU law is not cosmopolitan; we discuss it only to illustrate how EU law can fail to establish, from a Kantian point of view, a legal condition.

28 The implication is that a state that decides to leave the EU internal market willingly takes away some of its citizens’ cosmopolitan rights.

29 So we stress the distinction between an economic union and what could be called a “commercial” union (in the Latin sense) or, better, “cosmopolitan” union. While “commerce” and “economy” may be thought to refer to identical phenomena, for present purposes we suggest they should be sharply distinguished. “Economy” refers here and in the EMU to the classical Greek *oikos,* to household management. It makes sense to talk about a family’s economy, a business’s or a state’s. The unit in question has to decide how to conduct its business, how to invest, how much to save, etc.
public finances and monetary conditions and a sustainable balance of payments” (128 (3) TFEU). If a member state has an “excessive deficit,” the Commission is obligated to write a report. If the Council decides that such a deficit exists (126 TFEU), it adopts a recommendation. If the member state fails or refuses to comply with the recommendation, sanctions must be applied by the Council.

Some EU lawyers doubt whether these EMU rules really constitute law. These provisions are given by treaty and are in this sense obviously promulgated, positive norms. However, they do not specify rights but are mere “guards of economic wisdom” (Herdegen, 1998: 9–32). It is this character of the rules that may explain that they are not executed ultimately by an independent authority (such as the Commission) and cannot be appealed to in a court of law. They are executed by the member states themselves, in their capacity as members of the Council, to themselves, in their capacity as subjects of EMU law. This constitution of the EMU resembles the structure of the direct democracy that Kant rejects in Zum ewigen Frieden as an “Uniform” (see previous section). The implication of its constitutional structure is that EMU “law” cannot be viewed as an extension of the legal condition. EMU “law” may have the appearance of law but does not establish the rule of law. Member states do not stand under law, as they do in internal market law, but above it, because they have in their own hands legislative, executive, and (quasi-)judicial powers. That establishes no legal condition; it is a form of despotic rule. Stronger member states (or the majority of member states) may overrule weaker member states (or a minority of member states). The conditions under which the Eurogroup (minus Greece) was prepared to lend support to Greece, as an answer to the Greek debt crisis, illustrated according to some commentators that the Eurogroup is a form of rule by these states over Greece. In the aftermath of the sovereign debt crisis, several measures were taken to prevent new crises of this kind (Chalmers et al., 2014: 46). We need not discuss these here; sufficient for our purposes is that even EU law handbooks disqualify these measures in terms of the relations of dependency and hierarchy they generate between member states (ibid.). We conclude that Kant’s theory of law can supply the arguments on which such judgments can be based.

4.B. Coordination

*Internal market law.* By itself the creation of positive cosmopolitan law is not necessarily contrary to the freedom of persons and states as protected by state and international law. A person has no natural right to travel or settle in a foreign country. Those rights can only be created. We regard EU internal market law as positive cosmopolitan law. By treaty the member states have given each other’s citizens the border crossing four freedoms referred to earlier and specified in many regulations and EU

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30 See also the analysis of the UN Security Council as a form of despotic rule in Eberl and Niesen (2007: 326).

31 “The European Stability Mechanism generates new forms of dependency and hierarchy, whereby, through the conditions established in the Memoranda of Understanding, donor states have the opportunity to impose their own vision of economic life on recipient states.”

32 See the discussion in sections 2 and 3. Kant’s natural right refers to positive cosmopolitan law.
case law. There are no obvious reasons why states are not free to make treaties of this kind. As discussed in the previous section, the freedom to make treaties is only restricted by what states ought to be or provide, that is, legal conditions in which their citizens can enjoy their rights. States also have to be independent, in the sense that they have to be free to decide for themselves what is required for maintaining the civil condition for its citizens. EU internal market law leaves this freedom of EU member states intact. These states may even have succeeded, by creating by treaty positive cosmopolitan law, in extending the civil condition for their citizens (4.A).

Perhaps this could have been different, if EU member states had reciprocally granted their citizens an unqualified right to settle in the member state of their choice.\(^{33}\) Large-scale migration (also by persons not able or willing to provide for themselves; sometimes called “welfare tourism”) may frustrate a state’s capacity to preserve itself as a civil condition.\(^{34}\) Is it also problematic if a state subjects itself to rules of positive cosmopolitan law but has no authority to change the rules? Boris Johnson wrote that a state who finds itself in that situation—which he feared would be the outcome of a Brexit with “backstop”—has the “status of colony” (@BorisJohnson, July 9, 2018). Because the element of force is absent here, we believe this term is not accurate.

**EMU.** Now that the economic and monetary union is unmasked as an “Uniform,” whereby no legal condition is established (4.A), the issue of coordination (coordinate or not coordinate?) may no longer seem to apply, since there is no law (at least in Kant’s sense) to begin with, for other parts of law to be coordinate with or not. However, recall that we interpreted the coordination requirement in terms of the possibility of equal freedom of persons and states. Coordination in this substantial sense is still relevant here. The rule of states in EMU “law,” with dependency and hierarchy between donor and recipient states (section 4.A) is clearly in conflict with the equal freedom of states. The Greek debt crisis is for this reason better classified as a crisis of international justice—whereby the independence of Greece is at stake—than as a crisis of international solidarity (Wolthuis, 2021). That Greece found itself in a situation in which it had to depend upon the solidarity of other member states, already implies that its independence, its freedom, and equal position was at stake. The conditions under which it received help were of such a nature that it no longer could decide how to manage its own household.

This “rule of states” character of EMU raises the issue whether a hypothetical “rule of law” type EMU could be coordinate with the equality and independence of participating states.\(^{35}\) The topic of household management may be thought to be too intimately connected to a state’s freedom to decide for itself how to preserve itself as a legal condition for its citizens. However, if a state can enter a rule of law type EMU freely and has the freedom to exit it, its independence need not be threatened by

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34 See on this topic of a state’s mandate to preserve itself: Ripstein (2009a: chap. 8).
35 It is crucial to see that “supranational” (as used by EU lawyers) does not imply “civil condition” (as used by Kantians). The first notion is already used when the Council decides with qualitative majority. See the discussion in the previous section.
membership of such a union. Its membership of such a union may be, according to this state, the best way to preserve itself as a legal condition, at least for the time being. So the provisional conclusion is that the EU is, as it is, best approached as a cosmopolitan union, as soon as it is viewed from the point of view of Kant’s theory of law. The states that are part of this union have used their freedom of choice—and they remain free to choose differently in the future—to bring themselves and their citizens under cosmopolitan positive law, enacted by themselves by treaty, but administered by the Commission and the Court of Justice, authorities independent from them.

5. EU Migration Law

The analysis in this section is driven by two main questions. The first question concerns whether the system of EU migration law constitutes a civil or legal condition in the sense envisioned by Kant (see section 3 above). In order to answer this question, we will first sketch the constitutional outline of this area of EU law (5.A). The second question is how this part of EU law—understood as a form of positive cosmopolitan law—relates to universal cosmopolitan law. In other words: is EU migration law coordinate with universal cosmopolitan standards (5.B)? This latter question contains two sub-questions: first, whether coordination is in principle possible; second, whether the factual situation is coordinate.

5.A. Legal Condition

EU migration law is part and parcel of the so-called Area of Freedom, Security and Justice (AFSJ). Article 3 (2) TEU offers the legal basis for the AFSJ: “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.” The objectives of the AFSJ that are relevant for our purposes are enumerated in the first two paragraphs of Article 67 TFEU: “1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. (...)”

Institutionally, the Lisbon Treaty has brought about a number of important changes in this area. First, the European Commission has been given a more important role within the AFSJ. The Commission now holds the power to monitor the application of the law of the AFSJ and to start proceedings against those member states that fail to comply with their duties. Second, the European Court of Justice has obtained more powers. The Court has attained the competence to deliver preliminary rulings on all aspects of the AFSJ. Third, several special agencies have been established that are tasked with monitoring policies that are part of the AFSJ. For the purposes of this
contribution, the European Border and Coast Guard Agency (Frontex) is the most relevant one: the agency is charged with the coordination of external border control. Nevertheless, fourth, in chapters 1 and 2 of Title V of the Treaty on the Functioning of the European Union the treaty-making states have granted themselves, within their role as members of the Council, an important role, along with the European Parliament, in the development and execution of policies in the AFSJ.36

Nowadays, EU law contains a comprehensive system of migration law consisting on rules of entry, residence, and return of migrants (cf. Boeles, den Heijer, Lodder, & Wouters, 2014: 37) The rationale of the system as a whole resides in the need to regulate the *external* borders of the EU, now that the *internal* border controls are abolished.37 Central here is the distinction between EU citizens and third-country nationals. As the Treaty also establishes, EU citizens are all persons with the nationality of a member state. (cf. Article 20 (1) TFEU) The group of third-country nationals consists of those persons who are not EU citizens, including stateless persons. Furthermore, European migration law distinguishes between forced and voluntary migration (cf. Boeles, Den Heijer, Lodder, & Wouters, 2014). Starting with the latter: voluntary migration may have different reasons, including economic activity. In case of voluntary migration, migrants may enjoy a number of rights under EU migration law. The precise content and scope of these rights depend mainly on the reason why a person wants to migrate to the EU and for how long (s)he plans to stay.

Forced migration refers to people fleeing their country and asking for a form of protection (asylum). While traditionally perceived as a direct repercussion of a state’s sovereignty, the right of asylum is nowadays understood as a human right under what lawyers refer to as international law (cf. ibid.: 234), and Kant scholars as positive cosmopolitan law. Central is the right of *non-refoulement*: the protection of a refugee against "being returned to his or her country of origin, or any other country for that matter, where he or she is at risk of being subjected to serious harm" (ibid.: 244). It is codified in the 1951 Refugee Convention in article 33 (1). Besides this Convention, human rights law forms a second fundament underlying the international law of asylum and both are central to an emerging EU asylum law, or Common European Asylum System. (cf. ibid.: 245).

An important instrument is the Dublin Regulation (604/2013), which aims at reducing the secondary movements of asylum seekers within the EU. (cf. ibid.: 257) It determines that only one member state is in principle responsible for an application, usually the one through which the applicant has entered the EU (either regularly or irregularly), provided that the applicant was registered there. (cf. ibid.: 258–259)

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36 See, TFEU, Title V, chapters 1 and 2. This is an executive authority, in terms of Kant’s theory of law; that the treaty and EU lawyers refer in some of these matters to “legislation” does not make this different. Within Kant’s theory of law the treaty makers are the legislators and the treaty is the legislation. See also sections 2 and 3.

37 “It should not be forgotten that the main reason why the EU stepped in to implement the rules on asylum, whether those of the Refugee Convention or of the ECHR, as interpreted by the ECtHR, was the need to regulate asylum in a uniform manner. This was a necessary step towards establishing a common juridical space in which, among other things, the freedom of movement of European citizens is assured as this would be hindered by the presence of internal border controls. The origin of the Schengen Agreements illustrates very clearly the link between the desire to create that space and the harmonisation of legislation on asylum and immigration in general” (Cherubini 2014: 254).
Among other things, the Regulation gives the applicant the right to a personal interview (article 5), to appeal against a transfer decision and to stay while the appeal is pending (article 27).

The Reception Conditions Directive (2013/33/EU) gives the regulatory framework for the reception of asylum seekers within member states (cf. ibid.: 267). Important for our purposes: it grants asylum seekers the freedom of movement and residence, yet under certain conditions (article 7). The Qualification Directive (2011/95/EU) has as its aim to ensure that the member states apply the 1951 Refugee Convention in a uniform way (cf. ibid.: 293). The Directive gives refugees a number of rights, such as protection from *refoulement* (article 21), a residence permit (article 24), access to employment (article 26), and the freedom of movement (article 33) (cf. ibid.: 338–339). Furthermore, it offers so-called subsidiary protection to forced migrants who do not qualify as a refugee but “face a real risk of suffering serious harm” (ibid.: 347) in their country of origin. Here too the protection against *refoulement* (e.g., when execution, torture, or inhuman treatment looms) forms the cornerstone of the protection. (cf. ibid.: 334–346). Just like the protection given to refugees, subsidiary protection cannot be invoked by EU citizens (yet, they do possess the right of non-*refoulement* as it derives from both the ECHR and the EU Charter of Fundamental Rights) (cf. ibid.: 348). The prohibition of *refoulement* as it derives from article 3 ECHR is absolute and *notstandfest* (meaning that not even in times of war or other emergencies may it be set aside) (cf. ibid.: 366). Regarding the content of the protection: the Qualification Directive also envisions such rights as access to employment (article 26), initial residence of one year to start with (article 24), and free movement within the member state (article 33) (cf. ibid.: 370–371).

Let us now return to the main question of this subsection: Does the AFSJ, particularly regarding EU migration law, establish a legal condition in the sense of Kant? It appears to approach it. Just as is the case with internal market law, the rights and duties regarding European migration law are monitored by the European Commission. In this way, an authority independent from the member states is responsible for their correct execution. Furthermore, the national judge and, ultimately, the European Court of Justice may be called upon to settle conflicts. However, the Council has crucial executive powers, which means that within AFSJ powers are not as clearly separated as in internal market law. Hence, our provisional conclusion is that EU migration law as discussed earlier may be understood as approaching but still falling short of a civil or legal condition in the Kantian sense.

5.B. Coordination

Now, we will analyze EU migration law from a Kantian perspective. More specifically, the question is whether EU migration law is consistent with universal cosmopolitan

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38 Whereas it falls outside the scope of this chapter, we acknowledge the important role played by the case law of the European Court of Justice in interpreting the relevant directives and pointing at the limits of mutual recognition. Important judgements include Case C-163/17, Jawo v. Germany of March 19, 2019; Joined Cases C-411/10 and C-493/10, N.S. and Others of December 21, 2011; and Case C-578/16 PPU, C. K. and Others of February 16, 2017.
This analysis is driven by two major lines of thought, both constitutive of the Kantian framework. The first submits that every individual ought to reside within a state of law: every person is a member of a legal order. The second says that legal orders ought to respect each other’s independence. As we have discussed above (sections 2 and 3), cosmopolitan right forms the final step in Kant’s architecture of perpetual peace. As a project to bring the whole globe under the rule of law—indeed, to make the world into a legal world—the relations of states with people who are not members of those states must also “be brought under law: there must be both a rule that governs them and a rule identifying the officials charged with its application” (Ripstein 2021: chap. 9, section IV). So, using the terminology of H.L.A. Hart, cosmopolitan right consists of both the primary and secondary rules on this theme. Ripstein stresses that Kant’s starting point in conceptualizing cosmopolitan right is “the presumption that everyone is always already a member of some state, and the correlative presumption that every inhabited region of the earth’s surface is—as against both other nations and their individual members—always already a rightful condition and entitled to occupy the space that it does” (ibid.). Hence, “individual visitors always bring with them their membership in some nation, and always visit a rightful condition over which the visitor has no authority” (ibid.).

This last aspect is important in order to understand the narrow content of the right of the visitor: as a nonmember, (s)he has the right to visit but not the right to stay and settle. This implies a number of negative duties, both for the visitor and the receiving state. For the state, most importantly, it entails the duty to abstain from any form of hostility vis-à-vis the visitor (cf. ibid.) For the visitor, the duty consists in not importing the rules of her home legal order into the state she visits. In this context, Ripstein (ibid.) gives slavery and polygamy as examples. But what exactly are the rights of the visitor? Formally, these “are the rights that every human being has as a member of the global public” (ibid.). Materially, the right to visit grants you the right to travel and bring possessions with you (even if the state you enter may tax them) without losing any rightful property you might have in your home state. (Ripstein 2021: chap. 9, section II) Furthermore, the right to visit includes the right to peacefully interact with the citizens of the host country: the right to commercium. (cf. ibid.) This narrow content of cosmopolitan right is ultimately grounded in the principle of non-domination underlying the whole edifice of peace: coordinating the relations between states and people, guaranteeing the independence of each nation’s legal order by making sure “that relations between individual human beings do not become a means of subordinating one legal order to another” (ibid.).

The EU is viewed here as a league of states, which are united by the cosmopolitan law that regulates the relation between each of them and the citizens of the other states—as, in short, a cosmopolitan union—and this union’s positive cosmopolitan law can be seen as an extension of the civil condition for its member states and these member states’ citizens. So far, so good. However, the EU is not a universal or global cosmopolitan union of state: far from it. This raises the question whether a limited union’s positive cosmopolitan law can be consistent with universal cosmopolitan law, such as Kant’s natural universal hospitality right or the (nearly) worldwide systems of positive cosmopolitan law we know as refugee and migration law. To be more precise: we want to address the following two questions. The first, by way of introduction,
is whether a limited cosmopolitan union can in principle be consistent with universal cosmopolitan law. The second, critical question is whether the actual institutions and practices of the EU and/or its member states with regard to migrants and refugees are in fact consistent with positive refugee and migration law.

Regarding the first question: we do not see why a limited cosmopolitan union has to be in conflict with universal cosmopolitan law, natural or positive. That the civil condition for its member states and citizens is extended need not imply that the rights of others, outside of this union, are thereby threatened. To recall: Kant's natural right only includes a non-hostile reception. A state or union of states may have its reasons to reject migrants and it is allowed to return refugees if their homeland is safe again. That the rights of some have been promulgated and have become more extensive does not mean that others have lost rights. Other states can follow the example and form cosmopolitan unions themselves. To bring relations between states and foreigners under law by itself brings the aim of eternal peace closer, we think.

Does it make a difference whether the union pledges to respect the standards of the universal migration and refugee treaties and has, with the promulgation of union migration and refugee law, subjected itself to a worldwide civil condition with respect to migration and refugee law or whether each of its member states is party to these treaties and has its own rules and procedures of migration and refugee law? We think not; we find that in both cases the more extensive but limited system of EU migration law can be consistent with universal refugee and migration law. The exact difference depends of course on the content of what would then be union migration and refugee law. That law could state that refugees and migrants can reside wherever they want in the union, but it could also say that the refugee or migrant has to reside in the member state with which it came into contact with first. (Or a system of distribution could be agreed upon.) In all these possible cases we assume that legal solutions are arrived at: that legal conditions as specified in the second section are established. We now turn to the solution that the EU and/or its member states have actually have agreed upon and we analyze whether that solution conflicts with universal cosmopolitan law, natural or positive.

The recent migration crisis has shown the failure of the system to distribute asylum seekers fairly over the member states (Boeles, Den Heijer, Lodder, and Wouters 2014: 265). Trying to aid Greece and Italy in the summer of 2015 when these two countries were dealing with a huge inflow of migrants, the Council adopted a majority decision that envisioned the reallocation of 120,000 asylum seekers (Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80)) Yet, several countries refused to cooperate and Slovakia and Hungary asked the European Court of Justice to annul the decision. The Court, however, ruled against the two countries, thus establishing that the decision was taken on the basis of the appropriate legal basis, according to the right procedure and was a suitable instrument to attain the purpose. Nevertheless, what we see here is the discrepancy between what member states are legally obliged to do and what they politically are willing to do. In terms of Kant's understanding of the legal condition the problem is that the

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main executive authority is in the hands of a non-representative body (the Council); it is, in this sense, rule over a minority of states by a (qualitative) majority of states. The Unform that we introduced in section 3 and that we identified in EMU (section 4), also lurks here. That the proper procedure was followed, is one thing; that the procedure itself is proper, is another. This situation also partly explains (but certainly does not excuse) Matteo Salvini’s, Italy’s former Minister of Internal Affairs, blunt refusal to let asylum seekers arriving by boat to Italian ports to leave their ship and set foot on Italian soil as this would make Italy responsible for handling their claim to asylum (following the Dublin Regulation).

One of the developments in EU migration law that also needs to be mentioned in this context is the externalization of migration policies. As Afailal and Fernandez (2018: 217) put it, “to externalize means to delocalize the limits of the control of a sovereign country through the implication and accountability of other countries.” This process has been going on for a while and is at odds with the rule of law, Migration, according to Afailal and Fernandez (2018: 217, 221), “is understood as part of the safeguarding of European security,” “of controlling access to ‘fortress Europe.’” In this process, some scholars have argued, the EU acts as a neocolonial power by trying to influence the sovereignty of its neighboring countries in interfering with their migration policies. The example of this externalization that has recently received most attention is the deal between Turkey and the EU (cf. European Council, EU-Turkey statement, March 18, 2016) on the reallocation of migrants, which was signed on March 18, 2016. According to the agreement (cf. Haferlach & Kurban, 2017: 87), as of March 20, 2016, all new irregular migrants who pass from Turkey to Greece are to be returned. For every Syrian migrant who is returned to Turkey, another Syrian migrant will be resettled in the EU. Turkey and the EU have pledged to improve humanitarian conditions within Syria. In return for its efforts, Turkey will be financially compensated by the EU, the lifting of visa requirements for Turkish citizens traveling to the Union will be accelerated and the process of Turkish accession to the EU will be reinvigorated.

There are several problems with this agreement. This type of “out-sourcing stands in stark contrast to values and norms that the EU member states purport to promote. Moreover, the extra-territorialisation of migration control transfers and diffuses political responsibility, making it difficult to identify the bodies and states responsible for the breaches of international law and hold them accountable” (Haferlach & Kurban, 2017: 86). Most importantly, Turkey has made a restriction to the 1951 Refugee Convention, implying that only persons from Europe can obtain the status of a refugee (cf. Afailal & Fernandez (2018: 218–219). Indeed, the agreement itself does not contain a definition of a refugee, thus giving way to arbitrary treatment. (cf. Afailal & Fernandez, 2018: 220) The agreement falsely regards Turkey as a “safe third country,” despite its ambiguous relationship with regard to the 1951 Refugee Convention and the situation on the ground with its recurrent reports of violence against and maltreatment of refugees by Turkish border guards and police officers.

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(cf. Haferlach & Kurban, 2017: 88–89). Ever since the failed coup d’etat of July 15, 2016, the general human rights situation in Turkey has also deteriorated (cf. Haferlach & Kurban, 2017: 88). Yet, because of this deal, the EU has become dependent on Turkey. So, the agreement has decreased “the Union’s leverage to push for positive structural reforms in Turkey in the years to come” (Haferlach & Kurban, 2017: 85). Even now, there remains debate whether the agreement has actually been effective in bringing the number of migrants down (cf. Haferlach & Kurban, 2017: 85, 90).

The agreement is a showcase for how the EU has failed as a normative power, betraying its principles and values and, most importantly, the fundamental rights of refugees, in order to defend the walls of the continent (cf. Haferlach & Kurban, 2017: 85). It leaves those who are persecuted without protection, sending them the message that they belong elsewhere, not in the EU: “Despite affirming that ‘human dignity is at the core of our common endeavor,’ Europe continued to give priority to applying problem-oriented policing to an emergency humanitarian situation at its doorstep, treating the forcibly displaced as irregular/illegal migrants that need to be stopped and prevented from entering the fortress” (Afailal & Fernandez, 2018: 220).

When we cast the problem with the EU’s agreement with Turkey in Kantian terms, we could say that the EU does not take the right to hospitality of this group of migrants seriously. It denies them the right to present themselves at the EU border and engage in peaceful interaction. This interaction is precluded by their forceful removal to Turkey. From a Kantian point of view, this is all the more problematic for the group that qualifies as refugees. Toward this group, as Ripstein argues, states bear a special responsibility to protect and welcome it.

Ultimately, including the stateless person into the legal order stems from the idea of independence. As Ripstein also stresses, independence is a relational concept that is developed in the three stages of innate right, private right, and public right. Formulated positively, independence consists in the ability to decide on the purposes which are to be pursued by your means (Ripstein, 2009b: 161–166). Formulated negatively, independence stipulates that one is not dependent on the choice of another person. It is this relational conception of independence, a notion that goes beyond modern autonomy understood as the ability of an individual to identify with her choice from a range of meaningful possibilities, which also acts as the yardstick for the legitimacy of institutions. Furthermore, understood in relation to other persons, independence points at the reciprocal relationships between persons as persons.

Now, the question is whether the EU institutions live up to this norm. What we can conclude from the overview of EU migration law is that the EU is doing its utmost to make it difficult for asylum seekers to present themselves at the border and plead their case for protection. One could argue that in this sense their independence is not respected. The innate right of humanity is a right to independence from and equality with others. As such, it establishes the fundamental norm of reciprocity at the heart of interpersonal relationships. EU migration law fails to live up to independence, for individuals seeking protection from persecution are not regarded as equals with legal entitlements but are seen as rightless. Even in those cases where they are welcomed

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41 We acknowledge that one of the challenges for EU migration law is the phenomenon of mixed migration. For more on this and its relationship to the AFSJ’s claim to justice, see Herlin-Karnell (2019: 113–119).
("Wir schaffen das"), this is done on political and humanitarian but not on legal grounds. Yet, while our pity may grant them access, it also means that these asylum seekers are, when push comes to shove, not equal to us: they remain dependent on us, so no reciprocity can exist between us and them.

It is exactly this condition of rightlessness that is central to the analysis of Hannah Arendt. From his Kantian perspective, Arthur Ripstein also has a sharp eye for the vulnerable position refugees often find themselves in. Those without citizenship—stateless persons—ought to be taken in, since those without membership in a legal order are “not subject to law, but only to force, occupying a legal black hole” (Ripstein 2021: chap. 9, section X). Recalling a famous example of Hannah Arendt (1968: 296–302), in order to leave such a predicament, it may even be advantageous for a refugee to break the law, since that would make her into criminal with all the legal rights that come with such a position. Indeed, Ripstein stresses, also a refugee possesses an “innate right of humanity,” which means that she “must be taken in on a longer term basis, permanently if necessary” (Ripstein 2021: section VIII). In a phrase that resonates with (some interpretations of) Arendt’s “right to have rights,” Ripstein contends that “Everyone is entitled to be a member of a rightful condition, a being with rights” (ibid.). One could thus read Ripstein as defending an interpretation of Kant that would favor a legal reading of Arendt’s “right to have rights”: states are under a legal duty to welcome stateless persons to become a member of their legal order. This duty follows from the necessity that every individual leaves the state of nature and enters a state of law.

6. Conclusion

We have adopted in this chapter Kant’s theory of law and confronted it with the EU and EU law. The EU has revealed itself in that encounter as a league of states united by the rights these states have reciprocally granted to each other’s citizens. That makes this union’s law cosmopolitan. EU internal market law establishes a civil condition: it places EU member states and their citizens under cosmopolitan law, administered by the Commission and the Court of Justice, institutions that are independent from the member states who have created them and who have subjected themselves to their rule, for as long as they want. EU internal market law can be consistent with international law and state law; member states do not abandon their task of maintaining a civil condition for their citizens and they remain independent in the sense that they can choose to leave the union. EU member states obviously do more together than maintain an internal market where their citizens can enjoy the four freedoms. But from Kant’s point of view the EMU, for example, does not establish a legal condition. EMU is not consistent with international law: the states that participate in it come to depend on each other in a way that conflicts with their status as equal and independent states; in its current Unform the EMU cannot be part of a system of public law that protects the equality and independence of states.

The cosmopolitan law of the EU is cosmopolitan in structure but not universal in scope. By itself that does not imply that it cannot be consistent with other, much less extensive but universal systems of positive cosmopolitan law. However, the way in which the EU has constituted its migration and refugee regulations and policies still falls short of establishing a civil condition. The EU refugee crisis shows that certain EU practices come in conflict with such universal systems. In this regard, the refusal of certain member states to let asylum seekers cross their borders, or let people off their ships denies them the opportunity to ask for asylum and is accordingly in conflict with international refugee law. The same can be said about the so-called externalization of EU migration policy of which the Turkey deal is an example.

So we can conclude that with Kant's legal doctrine, fundamental aspects and problems of EU law can come into sharp focus. But we think this chapter has also shown that there is feedback from the EU to Kant scholarship. The EU is an innovation to Kantian doctrine in the sense that its member states have tried to find peace indirectly, not in the international way, by creating a continental state or something similar, but in the cosmopolitan way, by granting rights to each other's citizens. Kantian legal thought has to make sense of this innovative step; it has to address this innovation in the best way possible, as potentially a new route toward eternal peace.

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