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# A Kantian Critique of Grotius

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**Abstract.** During the last few years, it has become usual to turn to some seventeenth century readings of the traditional idea of an original common possession of the earth for philosophical aid to explain and support the rights of persons in situations of extreme need, including refugees. Hugo Grotius's conception of this idea is one of the most cited ones. In this paper, I hold that a Grotian reading of the idea of an original common possession of the earth is not a fruitful principle if we want to elaborate a solid defence of the rights of the ones in need. I reconstruct and analyse the role this idea has in Grotius's theory of private property and present objections to it from a Kantian perspective.

**Keywords:** original common possession, property rights, Grotius, Kant

## Kantiška Grocijaus kritika

**Santrauka.** Per pastaruosius kelerius metus tapo įprasta atsigręžti į septynioliktojo amžiaus tradicinę idėją apie pirmąją bendrą žemės nuosavybę. Hugo Grocijaus koncepcija yra viena iš dažniausiai minimų kaip filosofinė pagalba aiškinant ir remiant asmenų, turinčių ypatingų poreikių, įskaitant pabėgėlius, teises. Šiame straipsnyje teigiū, kad pirmąją bendros žemės nuosavybės idėjos grociškoji interpretacija nėra produktyvus principas, jei norime parengti tvirtą asmenų, kuriems reikia pagalbos, teisių apsaugą. Aš rekonstruoju ir analizuoju šios idėjos vaidmenį Grocijaus privačios nuosavybės teorijoje ir pateikiu prieštaravimus jai iš Kanto perspektyvos.

**Pagrindiniai žodžiai:** pirmąją bendra nuosavybė, nuosavybės teisė, Grocijus, Kantas

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## I

In a series of works published during the last ten years, Mathias Risse has elaborated a theory of justice that encompasses accounts of human rights, migration, duties toward future generations and duties arising from climate change (Risse 2012: 90). What is particularly interesting about this wide-ranging normative theory is that it is based in part upon the idea of our co-ownership of the earth, which Risse in turn develops out of his interpretation of Grotius's treatment of the hypothesis of an original common possession of the earth (henceforth OCP). Risse thinks, perhaps not mistakenly, that "we have much to gain from revitalizing this idea" as it was treated in the seventeenth century (2012: 90). Although the notion was not new, it was only in the seventeenth century that it could be used within the systematic framework of secularized theorizations working with a fully modern notion of subjective rights. To Grotius we owe the modern general notion of subjective rights that we still employ in contemporary legal and political philosophy and theory and in concrete moral, juridical and political practices (Haakonsen 1985: 241). In a nutshell, early modern political thought is defined by the effort (not necessarily successful) to deliver non-parochial political theories and to ground political institutions in a way such that they could be morally compatible with universal rights held innately and equally by all. This double feature alone could be very plausibly construed as an intuitively good reason to borrow a concept from Grotius's work and apply it to contemporary theoretical concerns. Moreover, turning to modern authors for philosophical inspiration is an established practice within cosmopolitan normative debates, in which references to Kant's law of peoples and cosmopolitan right are virtually omnipresent. In the particular case of OCP, there is a further reason for finding the notion conceptually and morally attractive, for it seems to entail a strong defence of equality and equity regarding access to (at least) the means necessary to securing our basic needs. The equality of status that could be derived from the idea of an OCP does indeed have strong attractiveness when we read it in negative terms.<sup>1</sup> If no one is private proprietor by nature, inequality and

<sup>1</sup> Pufendorf (1672/1998: 354) distinguished between positive and negative meanings of "communion". Positive *communio* is collective ownership proceeding from an act of agreement. Negative communion is the proper basic idea of an OCP: before any agreement concerning property arrangements, "things are said to be *nullius* [nobody's] more in a negative than privative sense, i.e. that it was not yet assigned to anyone, not that they cannot be assigned to somebody". In the negative sense, things are accessible for all, up for grabs, and so Pufendorf (and Risse) consider that Grotius's OCP is negative. In the positive sense, things are held as property by *many* persons, and so what is held in common in this sense is not absolutely free for take: everyone outside the common dominium is excluded. Thus, Pufendorf's distinction between positive and negative meanings of common possession does not divide the concept of OCP in two, but differentiates *original* common possession from collective legal ownership. Somewhat following this path, Kant made a critical methodological distinction between *communio fundi originaria* and *communio primaeva* (1797/1991: 250, 251, 258). Grotius's OCP is a *communio primaeva* in Kant's view, being, as it is, an empirical hypothesis describing a historical state of affairs instead of an idea of juridical-practical reason. For Kant, Grotius's OCP would be positive in Pufendorffian terms (i.e., non-original).

Here I employ a different distinction between "negative" and "positive" meanings of OCP, which stresses the idea that no one is private proprietor by nature; the differentiation between "negative" and "positive" OCP I use applies to the concept of an *original* common possession. In the negative sense, "original" points to the fact that no one is owner of anything, so we could not properly call our status concerning land or natural resources "co-

exploitative relations of production are human doings and so the unfair states of affairs they generate can be transformed into more equitable ones. More or less, this is the idea behind Rousseau's thesis that the first proprietor invented all the malaises of the civil condition by convincing others that his claim to a certain piece of land was a legitimate property right, which entailed their duty of staying out of his land. To make sure they would stay out, this first proprietor went on to persuade them that they should all sign an iniquitous political covenant (Rousseau 1754/1992: 222ff).

But we have to be careful with the concept in question, for it is not univocal. When we take for instance Locke's treatment of the hypothesis of an initial common possession in chapter 5 of the *Second Treatise* (1689/1963), we see it working first in a problematic way. If we postulate that we are all by nature in common possession of the earth and everything on it, appropriation and acquisition are problematic in the literal sense that we have to offer a solid normative justification for excluding others from the use of things to which they had had free access until the moment before our appropriation took place. We now have to prove that we have that claim-right regarding the possession and use of an object corresponding to a juridical duty of everyone else. Locke deproblematizes the notion by giving OCP and private property the same normative and teleological basis: the natural and universal end of preserving ourselves and achieving a more commodious lifestyle. This natural-law grounding also produces the provisos that enable us to legitimately own land privately in the state of nature without being morally requested to ask the rest of the original co-owners for their consent, although we are actually forbidding them to use things that were previously part of a common stock. By virtue of this shared normative foundation, OCP is, in Locke, an axiom within a theorem designed to show how inequality in the distribution of land and goods is completely compatible with natural law and morally permissible.

In modern political thought, the idea of an original community of the possession is always part of theorization about property rights and their relation to the role of the state. The idea that land and natural resources originally belonged to all human beings has multiple *prima facie* interpretations, and it cannot be simply isolated from the wider philosophical systems within which it is inscribed. Because of this, we can expect that the idea of an original common possession alone will not unavoidably entail a clear advantage for grounding a normative theory to defend the rights of persons who do not have their minimum subsistence rights materially guaranteed. To say that this depends on how OCP works within a certain philosophical-political setting, on its systematic role in a wider normative conceptual context, that it all comes down to how it relates to private

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*ownership*"; in this sense, we should say "the Earth does not belong to anyone" rather than "the Earth belongs to us all". This negative sense underscores that there are no natural property rights to exclude others from access to the use of things. In the positive sense, we are considered as original co-owners: everything belongs to everyone. In these more literal senses I am drafting here, Grotius, Hobbes, and Locke would have a positive reading of the OCP. Kant should be considered a defender of a negative reading of the OCP in both senses. The point for Kant is that by acquiring things as property we are generating duties for others, not that we are taking common things out of a common stock.

property, juridical normativity, the justification of the state, and the preferability of a certain institutional design, is not to venture anything bold.

My aim in this text is modest. I affirm the thesis that the Grotian version of OCP is not a fruitful principle if we want to elaborate a solid defence of the rights of the ones in need.<sup>2</sup> I will only concentrate on its capacity to render a solid basis to protect the rights of persons in situations of hardship to access the means necessary to satisfy their basic needs, which is one of the purposes OCP does have in Grotius theory. Grotius held that “in case of necessity men have a right of using that which others have a property in” (1625/2005: 433-434). The ground of this right is “that in a case of Absolute Necessity, that antient Right of using Things, as if they still remained common, must revive” (1625/2005: 434). My position is that if we want a vigorous theory to protect the rights of the persons in extreme need, then we should not choose a Grotian strategy. I will use a Kantian critical standpoint to show why. Putting Grotius’s theory under the light of Kantian political philosophy is pertinent not only because Kant offered an account of OCP which critically and radically differs from the seventeenth century ones, but also because Kant seems to be one of the greatest sources of real or alleged inspiration for most normative contemporary cosmopolitan theories.<sup>3</sup> My underlying conviction in undertaking this study is that as many authors today reflect on pressing moral and political concerns (such as the relationship between refugee rights and territorial rights) by borrowing conceptual tools from modern authors, we should pay attention to the way those modern authors handled their own contextual concrete practical challenges, and consider the merits of the concept we borrow by reference not only to the way it could work today, but mainly to the fashion in which it functioned in the systematic theory to which it belonged.

My analysis will thus be both historical and systematic. In the next section, I reconstruct the function the OCP premise has in Grotius’s theory of property. To show that a Grotian OCP cannot do much work when it comes to guaranteeing the rights of the ones in need, I present three specific critical arguments, two in Section 2 and the last one in the conclusive Section 3. The first argument has to do with the *applicability* of OCP taken as a principle. I will hold that OCP and the right of necessity do not work within

<sup>2</sup> I do engage directly not with Risse’s theory but with Grotius’s. For a sharp analysis and lucid critique of Risse’s use of the OCP thesis, see Stilz (2014). See also Huber (2016) for a brief critique of Risse (mainly) and Grotius (to a lesser extent) also from a Kantian perspective. Clearly following the line of thought expounded by Flikschuh (2017), Huber’s paper focuses mainly on offering a very interesting reading of Kant’s cosmopolitan theory as a way of theorizing from a cosmopolitan standpoint, which entails a radical shift of perspective in the history of political philosophy. My work here is kin to Huber’s (although I do not completely agree with his reading of what an inclusive standpoint should be), but in this paper I focus mainly on the problems of Grotius’s OCP itself, i.e. on the *pars destruens*, with more detail. A good rendering of Kant’s OCP in cosmopolitan Right that also compares it with Grotius’s can be found in Pinheiro Walla (2016). Pinheiro Walla (2018) concentrates on the function of Kant’s OCP in Kant’s theory of property.

<sup>3</sup> In recent years, a number of Kantian scholars have provided sound renderings of Kant’s legal and political philosophy that are greatly useful for contemporary debates on cosmopolitanism and territorial rights. The most salient ones are: Pinheiro Walla (2016), who focuses on Kant’s OCP, Ypi (2012), Stilz (2011) (these last two do not concentrate on OCP but merely mention it without developing the importance and role of the concept much further; for a solid critique of these two papers, see Pinheiro Walla (2014)), and Flikschuh (2010). Even though I do not complete share all their views and although I do not engage in conversation with them in this particular piece, I am of course greatly indebted to the work of these authors.

concrete practical contexts in a significant way because of the amount and complexity of the discursive justificatory work their conjunct application demands. Besides, these requirements of justification are much more burdensome for the person in need than for legal proprietors and institutional agents, against whom OCP and the right of necessity are meant to work in the hands of the person suffering hardship. The second argument focuses on OCP as a *source of juridical normativity* and points to the fact that the existence of positive law guaranteeing property rights entails a normative situation that differs from the historical OCP situation in that any supposed co-owner status we could retain would cease to be a source of normativity once private property laws are in effect. I will also turn to Kant's critique of the right of necessity to underscore the importance of the fact that it does not generate duties and, consequently, does not support claim-rights for the ones in need. In Section 3, I concentrate on the relationship between OCP taken as a natural law principle and positive law. I hold that in Grotius the right of necessity and OCP are supra-judicial elements that override positive law *only* when used by the state authority to justify revoking positive legitimate right; they are, ultimately, instrumental to *raison d'État* types of political reasoning, functional to a theory of sovereignty close to a Schmittean state of exception.

## II

The first thing we notice about the way OCP works within the political system expounded in *De iure belli ac pacis* is that it is the first moment in the genesis of private property rights and depicts a historical state of affairs. Grotius is explicit about the fact that his theory of private property is a theory of its historical origin and he even provides empirical evidence in support of the concrete existence of a primitive OCP situation by pointing to the ways of life of American peoples and ancient religious communities (1625/2005: 421). He also calls it "*primæva communitio*" (1625/1913: 114), "ancient community" (1625/2005: 426). Humanity had to leave the simple and harmonious OCP initial situation behind because of a mixture of ethical, economic and demographical reasons. We can distinguish different historical causes that determine and justify the consequent origination of private property: loss of simplicity of manners and of ethical bonds, outset of abstract needs (desire of more commodious lifestyles), intensification and qualification of labour, increase in population, and scarcity of natural resources. The outcome of the interrelation of these historical processes is that the community of moveable and immovable things was rendered factually impossible to maintain:

And there was no Possibility then of using Things in common; first, by Reason of the Distance of Places where each was settled; and afterwards because of the Defect of Equity and Love, whereby a just Equality would not have been observed, either in their Labour, or in the Consumption of their Fruits and Revenues. (Grotius 1625/2005: 426)

The purpose of Grotius's description of the historical genesis of property is to show that property rights and arrangements are *necessary*. Grotius's history of private property

is also a normative justification of property rights, of why we should have them secured by state authority, not merely an explanation of what private property arrangements are. We could say that all history is contingent and incapable of lending a strong normative foundation to property rights, but this would miss the point, for Grotius's strategy is to prove that the present empirical configuration of property rights is normatively justified. Much of the justificatory work in question is done by the idea of hypothetical consent. Grotius thinks (in contrast to Locke's unilateral normative grounding of individual appropriation on natural legality only) that property rights as claim-rights are the product of voluntary consent and agreement:

We see what was the Original of Property, which was derived not from a mere internal Act of the Mind ...; but it resulted from a certain Compact and agreement, either expressly, as by a Division; or else tacitly, as by Seizure. For as soon as living in common was no longer approved of, all Men were supposed, and ought to be supposed to have consented, that each should appropriate to himself, by Right of first Possession, what could not have been divided. (1625/2005: 427)

The consensual origin of property rights does not preclude that they are also justified in purely rational natural law terms.<sup>4</sup> In the context of the passage just quoted, Grotius reconnects private property rights originated by voluntary agreement to natural legality by citing Cicero: "Tis no more, saith Cicero, than what Nature will allow of, that each Man should acquire the Necessaries of Life rather for himself than for another" (1625/2005: 427). We agree to private property because it is something to which we can agree in the first place, and this is so because it is not unjust in itself insofar, in turn, as it is a means to comply with our natural end of preserving our own lives. Being useful to the attainment of our natural end and not repugnant to a society of rational beings, first possession (appropriation) is morally permissible: it is both voluntarily consented and in accordance with natural law. By virtue of this double normative grounding in voluntary consent and natural law, a given historical practice becomes a rightful source of juridical duties and of claim-rights in strict sense.

To sum up, history has made private property *empirically necessary*, while a widespread hypothetical moral agreement makes actual property rights *morally justified*. As property claim-rights are the result of both history and consent, Grotius's account of property is in the end a rationalization of a given state of affairs. By "rationalization" I mean that instead of making consent a critical standard to evaluate the legitimacy of private property arrangements, Grotius's theory reverses the relation: if this particular state of affairs regarding property actually exists in the present time, then it has been so

<sup>4</sup> Grotius works with an epistemic toolbox that harmonizes voluntarism and rationalism. The relationship between consent and natural law in Grotius's property theory is bidirectional: voluntary agreements are grounded upon the rationality of the act of consenting to a certain practice and at the same time voluntary agreements base the morality of the resulting practices. (Thus, for instance, once property rights are established by agreement, some practices that were allowed are now forbidden.) Consequently, voluntary agreements and natural law are equally normatively valid as criteria for judging and acting. As some voluntary laws are taken to be part of the natural legal corpus, it also results that the distinction between natural and voluntary right is diffuse.

agreed and, having been so agreed, it is therefore right. Now, what matters to us here is that this empirical character of the Grotian OCP is not innocuous regarding the role it plays in grounding rights for the ones in need. Grotius's OCP is empirically possible, but once private property rights exist, collective ownership is left in an irreversible past. Even if all property rights are derogated to create a community of possession, that ownership arrangement would not be original, for it would be the result of a voluntary agreement, a new convention or even sanctioned by positive law. As I explain in the following paragraphs, this historical irreversibility of the original community of possession impinges on the way OCP works as a normative principle when someone who is in the condition of also invoking the right of necessity appeals to it.

To study the plausibility of using Grotius's OCP to ground progressive rights, we have to keep in mind that this author used the hypothesis as an empirical tool to explain how private property rights originated. Consequently, we have to pay attention to the fact that Grotius's OCP hypothesis is part of the normativization of a historically given distribution of property, part of a conceptual framework within which the present state of affairs concerning private property rights is made necessary and morally justified by the course of human history, natural law and voluntary consent. In contrast to the empirical character of Grotius's OCP, in the "Private Right" section of Kant's *Doctrine of Right*, OCP is a rational critical idea that "contains a priori the ground for the possibility of a private possession" (1797/1991: 251, translation amended) insofar as it works together with the idea of an a priori united will (1797/1991: 267). Kant holds that an original common possession of the earth can only be an idea and never be defined as a *communio primaeva*: "This original community of land, and with it of things upon it (*communio fundi originaria*), is an idea that has objective (rightfully practical) reality, and is absolutely and completely different from the *primitive community (communio primaeva)*, which is a fiction" (1797/1991: 251, translation amended).

Kant's OCP is non-empirical because it is the ground for the conceptual possibility of the notion of a purely juridical or intelligible possession. The role of Kant's OCP regarding property is answering the question about how rightful private possession is permitted. The proposition about the possibility of a "*possessio noumenon*" states that the concept of an intelligible possession, of a possession without empirical tenure or occupancy, is "necessary for the concept of something external that is mine or yours" (1797/1991: 250). Being, as it is, a synthetic proposition that goes beyond the analyticity of the concept of empirical possession, reason has to prove its possibility. The normative justification of the possibility of a purely juridical possession relies on three principles: the postulate of practical reason (1797/1991: 252)<sup>5</sup>, the idea of an "innate possession in common of the surface of the earth", and the idea of a general will that corresponds a priori to this OCP (1797/1991: 250). If I want to acquire something external as mine in a non-arbitrary

<sup>5</sup> This postulate, which only says that it is possible to have things but not how we can acquire them legitimately, is formulated in §2 and in §6 of the *Doctrine of Right*. Literature on this topic is quite extensive. A relatively recent reliable piece is Szymkowiak (2009).



way, so that I can generate a juridical duty for everyone else to abstain from that object, I have to be able to connect the acquisition of the object to the idea of an omnilateral will, something possible only in a juridical condition under a general will.

Within Kant's wider treatment of private property, OCP works as a critical standard *vis-à-vis* concrete property rights arrangements. Both the idea of an original common possession *and* the idea of a purely juridical possession are completely juridical, non-empirical concepts that have "practical objective reality", which means that they are normative criteria to be critically applied to "objects of experience" (Kant 1797/1991: 252-253). While the historicity of the OCP hypothesis never loses, in Grotius, its *rationalizing* character, analogously Kant's OCP never loses its *critical* character: it never completely justifies property rights and on the contrary serves to evaluate their legitimacy.

We thus discover a methodological premise of Grotius's theory: as OCP is an empirical form of possession out of which current-time property rights evolved, it most probably will not jeopardize those property rights in existence. And it most certainly does not when it comes to juridical equals. In the realm of interaction among equals (private right), Grotius's theory accommodates the rights of the ones in need to the guarantee of absolute property rights, subjecting the rights of the dispossessed to private property arrangements. This is the main reason why OCP cannot work in a progressive way to protect and promote the rights of people in extreme need. I now present some reasons to support this. All of them derive from the fact that in Grotius theory, we can appeal to the OCP hypothesis only when we find ourselves in the situation of also invoking the right of necessity, but when the OCP situation is already far in the past.

Grotius strictly limits the instances of the situation of severe need: the situation must be extreme, unavoidable (not our fault), and our last resort; we also have to compensate the owner and we cannot seize something the owner needs with the same urgency (1625/2005: IV). The question arises: who decides whether someone is under these circumstances? And: Is there a significant amount of cases when this is so out of the question that the person appealing to the right of necessity is completely safe from being punished for flagrantly violating property rights? Can persons in need actually defend their behaviour as authorized by natural law if the proprietor questions the very description of their situation? Does the one in need stand a chance of winning an argument about the pertinence of the application of the right of necessity? It seems that appealing to our co-owner status to override property rights is not something we can do, in Grotius's theory, without a considerable amount of interpretation.<sup>6</sup>

In a Grotian framework, the right of necessity is what gives OCP taken as a principle its practical efficiency. We have to be in a specific condition of extreme necessity to be allowed to use OCP as a normative principle, as a basis for claiming access to a certain good. But the description of that condition is subjected to a series of criteria. If our present

<sup>6</sup> Risse thinks that we have a co-owner inalienable status derived from the common ownership of the earth and from which in turn our human rights derive. I do not think this thought could be attributed to Grotius, but here I analyse Grotius's theory to see if it can be used as Risse intends to use it.

situation does not meet them, then we cannot appeal to our co-owner status. Here it does not matter that we never lose this status (if we concede that we have it and that it is inalienable). The point is that in order for it to do normative work, it has to be accompanied by a situation that calls for the right of necessity to enter the picture. It all comes down then to the way we define that situation and if we are able to defend that our situation is indeed one of extreme necessity, but this is always a matter of concrete practices of interpretation. If a person in extreme need has to defend the case that their situation is of extreme need in the face of persons who are proprietors and of a legal corpus already enforced, does this person have a real chance of being lawfully authorized to appeal to the right of necessity? The actual number of cases when this could actually work in practice is too small, and it is simply unfair to burden someone already burdened with material hardship with high exigencies of justification. Moreover, because it is only when we enter the situation of hardship that the right of necessity is triggered, we will need an objective metric and objective criteria to determine, for instance, in which precise moment someone has entered in a situation of extreme necessity. In a nutshell, appealing to the right of necessity and the OCP principle to justify access to means of subsistence is a course of action we would be allowed to take in so few occasions that as a result Grotius's OCP taken as a principle would hardly work in practice in a meaningful way.

The problem with this is that normative principles do have to work in concrete practical contexts; they ought to have operative fruitfulness, at least in an evaluative fashion. If they do not, then they are not good normative practical principles – unless our aim is that they perform feebly. Much of this inutility of Grotius's combination of right of necessity and OCP as a normative principle has to do with the fact that we cannot return to the OCP situation once property rights are in vigour. There are two situations in which we can find ourselves regarding OCP, and that they differ in substantial respects:

*Situation 1.* When I am appropriating something for the first time, something that was not previously held by you as *tuum*, you and I find ourselves in a practical situation where you have no (claim-)rights (concerning that thing) that I could possibly transgress. I had no previous duty to refrain from using that good precisely because it was held in common, meaning that it had no previous private owner. We both had a liberty right to use it (here, OCP enables and bases private property rights), and by appropriating it, I now have a claim-right to use it and you have the corresponding duty not to use it without my consent.

*Situation 2.* When I am in a dire situation in which my own preservation is at stake, and I find no *res nullius* to use to get out of it, I am placed in a different normative situation because I am acting in a normative context where I have duties I did not have in Situation 1. Am I returning to that original situation if, by means of the right of necessity, I appeal to OCP as a normative principle to justify my seizing someone's property? Of course I am not, for something really important has changed – and it is not merely the passing of time. We now have a normative order that *did not exist* in the original situation. I am not traveling back in time to the OCP moment, so the OCP principle has to work in a different way now. Actually, this is why in Grotius the right of necessity suspends *the application* of positive law (at least, of the criminal code). But it does not cause positive law and property

rights to lose their validity. The proprietor does not cease to own the thing the person in need took from them. The person in need does not become a proprietor of the thing seized.

The consequence is clear and it is what Grotius was looking for: finding oneself in those circumstances that would allow one to appeal to the right of necessity does not suffice to generate a juridical duty to provide the one in need with means of subsistence; analogously, appealing to OCP in a situation of extreme need does not suffice to generate and justify a claim-right for the person in need, who does not become a claim-right holder regarding the means of subsistence needed to get out of the extreme necessity situation. Property rights remain at all times legally and rightfully absolute and unchanged between juridical equals. In sum, when we are in dire straits and successfully appeal to OCP as a justificatory principle, we are normatively justifying our behaviour in front of others via natural law to gain immunity for a particular act of seizing, but we are not generating a duty towards us. From a Kantian perspective, there is an obvious reason why this is so, which is the connection between OCP and the alleged right of necessity.

For Kant, the right of necessity is not *ius strictum* but *ius aequivocum*. By “*ius strictum*” Kant understands any right to which “an authorization to use coercion is connected” (1797/1991: 233), so right (law) and rights *stricto sensu* involve a legitimate, rightful *titulum* to coerce. The use of coercion is morally authorized only when it is a “resistance that counteracts the hindering” of freedom, a “*hindering of a hindrance to freedom*” (1797/1991: 231), in which case coercion promotes freedom and “is consistent with freedom in accordance with universal laws, that is, it is right” (ibid.). The *ius necessitatis* is a mere alleged right because it does not ground a universally valid authorization to coerce. Precisely because it gives us no authorization to exercise coercion and therefore does not entail a correspondent juridical duty, we cannot employ it as a solid ground for deriving or justifying subjective rights, which are “(moral) *capacities* for putting others under obligations” (1797/1991: 237). If we want to hold that we have duties towards the ones in extreme need, then Grotius’s theory is not for us: grounding the subsistence and social rights of the ones in need in the right of necessity bears the same consequences as leaving them to the arbitrary hands of private charity. The right of necessity simply lacks the normative status to work in favour of the ones in need, and Grotius’s right of necessity is unable to get a critical potential out of the OCP hypothesis.

### III

The idea of an original community of the earth is a natural law concept. By “natural law” we do not necessarily have to understand a metaphysically robust ontological conception of pre-political normativity. The basic function of modern natural law principles and concepts is to perform normative tasks *vis-à-vis* positive law, to rationally ground it and to evaluate if positive norms are fair and just. OCP is a natural law principle insofar as it is part of a large argument that aims at explaining and justifying the need of a juridical condition and to the extent that it operates as a supra-judicial evaluative criterion.

In Grotius's rational system, natural law contains, in the first place, precepts for actions that are defined as just in themselves and prohibitions for actions that are defined as unjust in themselves. These norms command and forbid independently of any will, including God's. In the second place, natural law also encompasses norms regarding permissible actions. To this group belong all those practices and norms that are not obligatory in themselves but that are allowed by natural law because they are not repugnant to a society of rational beings. These practices and norms are considered just "by accommodation" (1625/2005: 153). It is not difficult to determine how a given practice can become part of natural law. We only need to establish that it does not contradict the definition of "right" in terms of the features of a society of rational beings nor the delimitation of the normative scope of the "right of equality".<sup>7</sup> In addition to this, a practice or action can be considered as legitimately authorized by natural right if it was prompted by extreme need or if it enjoys a wide consent, or both.

In the second chapter of the third book of *De iure belli ac pacis*, Grotius analyses how subjects' private property now protected by positive law can be used by the state to pay its debts.<sup>8</sup> Although "naturally no man is bound by the fact of another" (1625/2005: 1231), "by the Law of Nations, the Goods and Persons of Subjects are obliged for their Prince's Debts" (1625/2005: 1232). I cite *in extenso*:

*By the voluntary Law of Nations, it may be, and as appears has been introduced, that whatsoever Debts any State, or the Prince, shall contract [...], all the Goods, both corporal and incorporeal, of their Subjects, shall be obliged to discharge. But this was occasioned by a Kind of Necessity [...]. Wherefore Justinian reckons it among those Rights which Nations have established amongst themselves, because they judge it useful and necessary to Mankind. Neither is this so disagreeable to Nature, a that it might not be brought in by Custom, and the tacit Consent of Nations, since Sureties stand obliged for other Mens Debts, without any other Cause than their own free Consent (1625/2005: 1232-1234; my emphasis).*

What kind of rightful title does a prince (the state) have to legitimately take his subjects' property to pay state debts (his debts) or wage war? Is it a mere provisional permission? Does he have, on the contrary, a claim-right to do this?

There is a strong disanalogy between the way Grotius's right of necessity and Kant's permissible law operate *vis-à-vis* positive law. In Grotius, the right of necessity is meant to suspend the application of positive law. In Kant, a government has a permission to postpone the derogation of an unjust positive norm because its immediate derogation would

<sup>7</sup> In Grotius's theory, the content of the natural law "is generally proved either *a priori*, that is, by Arguments drawn from the very Nature of the Thing; or a *posteriori*, that is, by Reasons taken from something external" (1625/2005: 159). *A priori* arguments show "the necessary Fitness or Unfitness of any Thing, with a reasonable and sociable Nature" (ibid.). In the proof by a *posteriori* arguments, we conclude "with very great probability" that a given practice belongs to the law of nature because it is the case that that practice "is generally believed to be so by all, or at least, the most civilized, Nations" (ibid.). The epistemic basis for this proof is common sense, i.e., opinions in non-corrupted and non-primitive contexts. This a *posteriori* way of proving if something is part of the law of nature is the fashion by which social conventions such as private property are "accommodated" into the natural legal corpus.

<sup>8</sup> Kant explicitly condemns these practices in the "Preliminary articles" of *Towards Perpetual Peace* (1795/1923).

generate an even worse state of affairs. But this does not mean that the political agent has a permission not to derogate that unjust positive norm. On the contrary, the political agent has the duty to do that in the best possible way, given all the relevant circumstances. This disanalogy is very important, for it touches the heart of the strict political meaning of OCP in Grotius: the right of necessity and OCP do not have, as we saw, a significant efficiency when used between juridical equals, but they do have it when used by the head of the state to justify seizing the subjects' property in order to pay public debts or finance wars. Indeed, a central feature of the Grotian political theory is that the person of the sovereign has a "right to action" that overrides positive property rights *for reasons of state* (Grotius 1625/2005: III, II, I). When in the hands of the sovereign, the right of necessity operates in a very successful way, since there is only one agent capable of judging whether a situation calls for the application of the right of necessity, the prince, because he is the only one *entitled* to do so. The right of necessity authorizes the sovereign (the prince, not the people) to supersede the very private right legislation he himself has enforced. Here, it does not matter whether the right of necessity generates or not a corresponding duty for the subjects to hand over their properties: they just *have to* give their property to the government; they *are forced to do that, paradoxically, by the only agent who can legitimately punish someone for encroaching upon positive private law*.

The state resorting to natural law in mere unilateral terms, as it happens in Grotius, is something Kant considers utmost despotism. Kant's permissible law, even when applied by unfair governments, works in the opposite fashion to help us achieving the best compliance with justice we can get, without jeopardizing the *possibility* of a rightful and fair political condition. When any given political authority appeals to natural law principles such as the right of necessity, this authority is most probably looking for ways to transgress sanctioned acquired rights, for example those guaranteed by the constitution and protected by the rule of law, or civil and political rights conquered by once subjugated minorities. In Grotius's case, the reasons invoked are very explicitly *raisons d'État*, not social concerns regarding the wellbeing of the people. As we saw, between equals, appealing to rational natural law principles to override positive property rights is not possible. But on the contrary, the *princeps* can appeal to OCP and other natural law principles to override the subjects' property rights. Because it ends up supporting the discretionary use of natural law by the state authority and by the state authority only, a Grotian strategy is counterproductive if we want to guarantee, protect and promote refugees' rights *vis-à-vis* recipient countries, which are a paradigmatic case of the rights of persons in extreme need whose very life is at stake.

There is a further difference between Grotius's and Kant's interpretations of the idea of an OCP. In Grotius, Pufendorf and Locke, we can take things out of the common stock and make them our private property under the condition that we do so to fulfil the natural end of preserving ourselves while also preserving the possibility of a peaceful coexistence. In this teleological framework, OCP has a teleological philosophical justification: the earth is originally common only insofar as it is a means to achieve the natural end of preserving ourselves peacefully. This is in turn theologically grounded in the idea that God gave us

the earth to comply with a godly given natural end. In strong contraposition to this, Kant's political philosophy cancels all teleological justifications and modes of argumentation, and so his conception of an OCP is not attached to a natural end, but to external freedom. Kant's OCP means primarily that all property rights are acquired rights that are legitimate only if they can be supported by an omnilaterally united popular will. We can then accept the normative idea of an OCP on the reasonable intuition that private property rights are not something we have outside normative orders. Property rights are artificial, not natural, and contingent in their particularities. If we read OCP in these terms, then we do not need to base it on a metaphysical natural end, so we could use it in a less parochial fashion to develop a theory of rights capable of working in favour of the dispossessed ones.

## References

- Flikschuh, K., 2010. Kant's Sovereignty Dilemma: A Contemporary Analysis. *The Journal of Political Philosophy* 18 (4): 469-493. <https://doi.org/10.1111/j.1467-9760.2010.00361.x>
- Flikschuh, K., 2017. *What is orientation in global thinking? A Kantian Enquiry*. Cambridge: CUP.
- Grotius, H., 1913. *De Iure Belli ac Pacis*. Washington, Carnegie Institution of Washington. (Original work published in 1625.)
- Grotius, H., 2005. *The Rights of War and Peace*. Ed. by R. Tuck, Indianapolis: Liberty Fund. (Original work published in 1625.)
- Haakonsen, K., 1985, Hugo Grotius and the History of Political Thought. *Political Theory* 13 (2): 239-265. <https://doi.org/10.1177/0090591785013002005>
- Huber, J., 2016. Theorising from the Global Standpoint: Kant and Grotius on Original Common Possession of the Earth. *European Journal of Philosophy* 25 (2): 231-249. <https://doi.org/10.1111/ejop.12176>
- Kant, I., 1907. *Metaphysik der Sitten*. In *Kant's Gesammelte Schriften, Band 6*, Berlin: Preußische Akademie der Wissenschaften, pp. 205-493. (Original work published 1797.)
- Kant, I., 1991. *The Metaphysics of Morals*. Trans. by M. Gregor. Cambridge: CUP. (Original work published 1797.)
- Kant, I., 1923. *Zum ewigen Frieden*. In *Kant's Gesammelte Schriften, Band 8*, Berlin: W. de Gruyter, pp. 341-386. (Original work published 1795.)
- Locke, J., 1963. *Two Treatises of Government*, ed. by P. Laslett. Cambridge: CUP. (Original work published 1689.)
- Pinheiro Walla, A., 2014. A Commentary on Anna Stilz, Nations, States, and Territory and Lea Ypi, A Permissive Theory of Territorial Rights. In C. Nine (ed.), *Territory and Justice Symposia 3: Kantian Theories of Territorial Rights*. Accessible online at <https://seis.bristol.ac.uk/~plcdib/territory/papers/AlicePW.pdf> <https://doi.org/10.1093/acprof:oso/9780199580217.003.0002>
- Pinheiro Walla, A., 2016. Common Possession of the Earth and Cosmopolitan Right. *Kant-Studien* 107 (1): 160-178. <https://doi.org/10.1515/kant-2016-0008>
- Pinheiro Walla, A., 2018. Private Property and the Possibility of Consent: Kant and Social Contract Theory, In L. Krasnoff, N. Sánchez Madrid and P. Satne (eds.), *Kant's Doctrine of Right in the 21<sup>st</sup> Century*, Cardiff: University of Wales Press, pp. 29-45. <https://doi.org/10.1017/s1369415418000353>
- Pufendorf, S., 1998. *De jure naturae et gentium. Gesammelte Werke*, Band 4, Berlin: Akademie Verlag. (Original work published 1672.)
- Risse, M., 2012. *On Global Justice*. Princeton: PUP.
- Rousseau, J. J., 1992. Discours sur l'origine et les fondements de l'inégalité parmi les hommes. In *Discours sur les sciences et les arts. Discours sur l'origine de l'inégalité*, Paris, Flammarion, pp. 145-257. (Original work published 1754.) <https://doi.org/10.1522/cla.roj.dis3>

Stilz, A., 2011. Nations, States, and Territory. *Ethics* 121 (3): 572-601. <https://doi.org/10.1086/658937>

Stilz, A., 2014. On Collective Ownership of the Earth. *Ethics and International Affairs* 28 (4): 501-510. <https://doi.org/10.1017/s089267941400063x>

Szymkowiak, A., 2009. Kant's Permissive Law: Critical Rights, Sceptical Politics. *British Journal of the History of Philosophy* 17 (3): 567-600. <https://doi.org/10.1080/09608780902986656>

Ypi, L., 2012. A permissive theory of territorial rights. *European Journal of Philosophy* 22, 2: 288-312. <https://doi.org/10.1111/j.1468-0378.2011.00506.x>