

# Kant's principle of publicity, global governance, and international negotiations: some aporias and misunderstandings

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## Introduction

This article examines the use of the Kantian concept of publicity in the study of international relations and considers the role this principle could play in global governance — the set of actors and norms that regulate and constrain behavior in international affairs. In a context where transparency has become a global norm<sup>1</sup>, contemporary studies often refer to transparency as a means of democratizing global governance and making it more legitimate<sup>2</sup>. Such an approach is regularly presented as a legacy of the Enlightenment and, in particular, of Kant's principle of publicity<sup>3</sup>. According to Hood<sup>4</sup>, to explain the contemporary norm of transparency, we can refer to three ideas that emerged before the 20th century: the idea of rule-governed administration; open and frank social communication; and the idea that social organization can be understood using the same methods as the natural sciences. The second idea corresponds to Kant's thesis that social affairs must be conducted with a high degree of frankness, openness, and sincerity<sup>5</sup>. The genealogical importance of Kant's

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<sup>1</sup> A. PETERS, *Towards transparency as a global norm*, in «Transparency in international law», 534, 2013, pp. 568-569.

<sup>2</sup> See, for example, A. FLORINI, *The End of Secrecy*, in «Foreign Policy», 111, 1998, pp. 50-63; R. A. PAYNE, N. H. SAMHAT, *Democratizing global politics: Discourse norms, international regimes, and political community*, Albany, Suny Press, 2004; R. W. GRANT, R. O. KEOHANE, *Accountability and Abuses of Power in World Politics*, in «American Political Science Review», vol. 99, 1, 2005, pp. 29-43; A. BUCHANAN, R. O. KEOHANE, *The legitimacy of global governance institutions*, in «Ethics & International affairs», vol.20, 4, 2006, pp. 405-437; A. GRIGORESCU, *Transparency of intergovernmental organizations: The roles of member states, international bureaucracies and nongovernmental organizations*, in «International Studies Quarterly», vol.51, 3, 2007, pp. 625-648; J. A. SCHOLTE (Eds.), *Building global democracy? Civil society and accountable global governance*, Cambridge, Cambridge University Press, 2011; J. TALLBERG, T. SOMMERER, T. SQUATRITO, *The opening up of international organizations*, Cambridge, Cambridge University Press, 2013.

<sup>3</sup> According to McCarthy and Fluck: «Since the 18th-century 'Perpetual peace' essays of Kant [...] and Bentham [...], the availability of information has been presented as a means of overcoming conflict and arriving at a more just international system. In the present day, transparency often appears as a source for the legitimization, or even democratization, of global governance structures», D. R. MCCARTHY, M. FLUCK, *The concept of transparency in International Relations: Towards a critical approach*, in «European Journal of International Relations», vol.23, 2, 2017, p.418. See also, among others, K. BAYNES, *Making Global Governance Public? Habermas's Model for a Two-track Cosmopolitan Order*, in L. BECKMAN, E. ERMAN (Eds.), *Territories of Citizenship*, London, Palgrave Macmillan UK, 2012, pp.124-125.

<sup>4</sup> C. HOOD, *Transparency in Historical Perspective*, in C. HOOD, D. HEALD (Eds.), *Transparency: The key to better governance?*, Oxford, Oxford University Press for The British Academy, 2006, vol.135, pp. 5-8.

<sup>5</sup> Ivi, p. 6.

principle can be explained by its originality. According to Ellis<sup>6</sup>, what Kant says about the ideal state (rule of law, defense of human rights, international peace) reflects what the Enlightenment said in general and is not unique to his work: what is more original and important is what he says about the mechanism of publicity that enables this transition to the ideal state.

One common feature of Kantian writings and contemporary studies of global governance is that they present a laudatory conception of publicity. Enlightenment philosophy and many contemporary studies on transparency share the idea that publicity compels actors to act fairly. According to Bentham, the publicity of parliamentary debates compels members of parliament to fulfil their duties, which guarantees the trust of the people and their consent to legislative measures<sup>7</sup>. As for contemporary laudatory interpretations of publicity, one example is a frequently quoted statement by Louis Brandeis: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>8</sup>

However, references to Kant’s principle of publicity in studies on global governance raise two problems.

First, these studies cite various writings, some of which do not actually present the “principle” of publicity. This principle is set out in *Perpetual Peace* (Appendix 2; Kant refers to “*Publizität*”), while other Kantian writings, notably *What is Enlightenment?*, invoke publicity without formulating it as a principle, for example when Kant refers to the public use of reason (“*der öffentliche Gebrauch seiner Vernunft*”). For this reason, this article will refer to the “notion” of publicity, which Kant uses in several ways, and not only to the “principle” *stricto sensu*. Terminologically, it is also important to note that Kant does not use the notion of transparency; it seems that in the 18th century, authors did not make a real distinction between the concepts of publicity and transparency<sup>9</sup>. One of the objectives of this article will be to clarify the main meanings of the concept of publicity in Kant – without claiming to be exhaustive, given that this concept may be present in writings that we have not identified<sup>10</sup> – and to compare it with the ideal of transparency as presented in studies aiming to democratize global governance, which often claim to be part of the legacy of the Enlightenment.

Furthermore, contemporary studies tend to overlook the fact that international negotiations have taken on an increasingly important role in global governance, while this mode of decision-making is notoriously incompatible with publicity. Habermas, who refers to Kant’s principle of publicity in his writings, is regularly cited in these studies<sup>11</sup>.

<sup>6</sup> E. ELLIS, *Kant’s politics: Provisional theory for an uncertain world*, New Haven, Yale University Press, 2005, pp. 12-13.

<sup>7</sup> J. TALLBERG, *Transparency and openness*, in J. K. COGAN, I. HURD, I. JOHNSTONE (Eds.), *The Oxford handbook of international organizations*, Oxford, Oxford University Press, 2014, p.1180.

<sup>8</sup> L. D. BRANDEIS, *Other People’s Money and How the Bankers Use It*, New York, Frederick A. Stokes Company Publishers, 1914.

<sup>9</sup> S. BAUME, *La transparence dans la conduite des affaires publiques. Origines et sens d’une exigence*, in «Raison publique», 2011, p. 4.

<sup>10</sup> In this regard, the article “Publicité” in Eisler’s *Kant-Lexikon* one of the most comprehensive sources of information, R. EISLER, *Kant-Lexikon*, édition établie et augmentée par Anne-Dominique Balmès et Pierre Osmo, Paris, Gallimard, 1994, p. 874-875.

<sup>11</sup> See, for example, R. A. PAYNE, N. H. SAMHAT, *op. cit.*, p. 9: «Habermas’ ideas about communicative rationality, deliberation, and the public sphere have gone far to reinvigorate the

However, the philosopher has advocated a multi-level federal system in which negotiations would play a decisive role. Between a supranational body whose role would be to guarantee international security and the states, there would be a “system of transnational negotiations” in which regional institutions would deal with global policies, particularly in the fields of the environment and the economy<sup>12</sup>. The second objective of this study will be to understand the extent to which the growing importance of international negotiations is compatible with the imperative of publicity. Despite repeated invocations of Kantian publicity and Habermas’ theses, the secretive nature of negotiations seems to be more in line with a tradition of political thought different from that of the Enlightenment, represented by Plato and Machiavelli, that justifies the use of secrecy<sup>13</sup>. To our knowledge, studies of global governance that advocate transparency have not emphasized this important tension. They argue that greater openness is necessary to democratize global governance, but do not address in depth what we see as the political aporia of the growing role of international negotiations in a context where the demand for democratization and accountability in global political life has intensified.

The two main findings of this research are as follows. First, the link between Kantian publicity and contemporary transparency is not so clear, particularly because the inclusion of as many particular interests and viewpoints as possible, as advocated by studies aimed at increasing the transparency of global governance, differs from the universalization of the viewpoint that Kant’s public use of reason allows. Second, we identify two aporias. Firstly, international political life is characterized by an expansion of international negotiations, which are themselves inherently opaque: this development conflicts with the fact that transparency has become a global norm. In addition, despite calls for greater transparency in international negotiations, and the fact that secrecy can mask illegitimate practices, there are relevant arguments to justify the secrecy of negotiations.

The first section will analyze how Kant presents the notion of publicity in his various writings. The second section will attempt to clarify the main reasons why negotiations are associated with secrecy and then contrast Kant’s notion of publicity with contemporary calls for greater transparency in global governance.

### *The different dimensions of Kant’s concept of publicity*

The purpose of this section is to shed light on the occurrences and meaning of the concept of publicity in Kant’s writings. Over the past forty years, Kant’s principle of publicity has been the subject of numerous publications<sup>14</sup>. This interest in the question

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Enlightenment project of emancipation, and the implications for international relations theory and global institutions are substantial. As we shall examine later, these institutions, particularly the international regime, commonly incorporate procedural norms of participation (or inclusion) and transparency (or openness)». These authors establish a connection between their project, Habermas, and the Enlightenment, invoking what they see as the corollary norms of inclusion and transparency.

<sup>12</sup> Cited by K. BAYNES, *op. cit.*, p. 126.

<sup>13</sup> D. LUBAN, *The publicity principle*, in R. E. GOODIN (Ed.), *The theory of institutional design*, Cambridge, Cambridge University Press, 1996, p. 155.

<sup>14</sup> D. GARCÍA-MARZÁ, *Kant’s principle of publicity: The intrinsic relationship between the two formulations*, in «Kant-Studien», vol.103, 1, 2012, pp.96-113; A. WOOD, *Kant’s principles of publicity*, in P. FORMOSA, A. GOLDMAN, T. PATRONE (Eds.), *Politics and Teleology in Kant*,

could be explained by the growing attention paid to transparency in public life—transparency has become a norm that no one can reject—and by the development of research on administrative and political transparency. We will see that for Kant, publicity is essentially a means, or a test<sup>15</sup>, in the service of reason, political responsibility, and universalism, which is important to emphasize in a contemporary context where transparency sometimes seems to be considered an end in itself.

Contemporary studies of global governance often refer to the principle of publicity as if there were a single formulation. However, Kant's work sets out different formulations<sup>16</sup>. According to *Perpetual Peace* (1795), publicity serves as a test for the legitimacy of our actions—this is the version most often cited by Kantian studies, and in this case, Kant indicates that it is a principle (*Prinzip*), which he compares to “axioms,” meaning that it “has a certainty incapable of demonstration.”<sup>17</sup> *Perpetual Peace* itself sets out a negative and a positive version of the principle. Furthermore, the notion of publicity is present in *Perpetual Peace* when Kant condemns secret treaties that can cause war. In addition, publicity allows us to test our arguments, and even simply to think, as explained in *What is Enlightenment?* (1784). The plurality of the concept of publicity also stems from the fact that, as Davis notes<sup>18</sup>, the concept of “public” is used by Kant in several writings published at different times and for different purposes. For example, the public of the negative principle of publicity set out in *Perpetual Peace*, which serves to judge the moral acceptability of an action and is an instance of universalizing my maxim of action, is not the same as the public invoked in *What is Enlightenment?*, which is made up of scholars.

### *The principles of publicity in Perpetual Peace and the legitimacy of our actions*

Scholars who have analyzed the role of publicity in Kant's philosophy most often refer to its formulation as a principle in *Perpetual Peace*<sup>19</sup> (1795). However, as noted above, the concept of publicity is in fact already present in earlier writings such as *What is Enlightenment?* (see next subsection). The principle of publicity in *Perpetual Peace* is formulated in two ways. The negative version of the principle is itself most often cited<sup>20</sup>

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Cardiff, University of Wales Press, 2014, pp. 76-91; J. LIPPING, *Kant and the Two Principles of Publicity*, in «*The European Legacy*», vol.25, 2, 2020, pp. 115-133; among the less recent articles, we can mention: S. VENTURELLI, *The “Principle of Publicity” and policies of the Information Age*, in «*Javnost-The Public*», vol.2, 1, 1995, pp. 7-31; K. DELIGIORGI, *Universalisability, publicity, and communication: Kant's conception of reason*, in «*The Review of Metaphysics*», vol.55, 3, 2002, pp. 661-662; J. C. LAURSEN, *The Subversive Kant: The Vocabulary of ‘Public’ and ‘Publicity’*, in «*Political Theory*», vol.14, 4, 1986, pp. 584-603; J. C. LAURSEN, *Scepticism and Intellectual Freedom: The Philosophical Foundations of Kant's Politics of Publicity*, in «*History of Political Thought*», vol.10, 3, 1989, pp. 439-455; D. LUBAN, *op. cit.*.

<sup>15</sup> See, for example, D. R. MCCARTHY, M. FLUCK, *op. cit.*, pp. 422-423.

<sup>16</sup> For Kant's different meanings of publicity, see also S. BAUME, *op. cit.*

<sup>17</sup> I. KANT, *Perpetual Peace: A Philosophical Essay. Translated with introduction and notes by M. Campbell Smith, M.A.*, London, George Allen & Unwin LTD, first edition 1903, p. 186.

<sup>18</sup> K. R. DAVIS, *Kant's different “publics” and the justice of publicity*, in «*Kant-Studien*», vol.83, 2, 1992, p. 170.

<sup>19</sup> See, for example, D. GARCÍA-MARZÁ, *op.cit.*, J. LIPPING, *op.cit.* and A. WOOD, *op.cit.*

<sup>20</sup> J. LIPPING, *op.cit.*, p.116, D. GARCÍA-MARZÁ, *op.cit.*, p.96. See also S. CHAMBERS, *Behind closed doors: Publicity, secrecy, and the quality of deliberation*, in «*Journal of Political Philosophy*», vol.12, 4, 2004, p. 530.

and is, according to commentators, the clearest, so that strictly speaking, Kant's principle of publicity corresponds to this negative version. Kant thus states the principle of publicity, "the transcendental formula of public law":

All actions relating to the rights of other human beings are wrong, if the maxims from which they follow are inconsistent with publicity<sup>21</sup>.

According to this formulation, if a maxim cannot be made public, it is illegitimate or unjust. Luban formulates this test as follows: «Could I still get away with this if my action and my reason for doing it were publicly known?<sup>22</sup>» Davis cites this other version of the principle, which he considers more illuminating, contained in the *Vorarbeiten*: «That which one cannot trust to announce publicly as one's maxim, without thereby making it impossible to act on the maxim, is in conflict with public law»<sup>23</sup>.

This means that if the maxims of an action, i.e., the agent's motivations or subjective principles of action—as opposed to objective principles such as laws<sup>24</sup>—cannot be made public, they are immoral. According to this principle, if a maxim cannot withstand publicity, it means that it cannot be universalized and is therefore immoral: thus, we can say that the principle of publicity is a "variant" of the categorical imperative<sup>25</sup>, or that it is deduced from it, as Vlachos asserts<sup>26</sup>, because it is itself based on the test of universalization. The categorical imperative is formulated as follows: «Act only according to that maxim whereby you can at the same time will that it should become a universal law»<sup>27</sup>.

When Kant states that a maxim of action is "unjust" if it is incompatible with publicity, he means that it would lead to its own downfall by causing the agent's plan to fail and triggering general opposition:

For there is something wrong in a maxim of conduct which I cannot divulge without at once defeating my purpose, a maxim which must therefore be kept secret, if it is to succeed, and which I could not publicly acknowledge without infallibly stirring up the opposition of everyone. This necessary and universal resistance with which everyone meets me, a resistance therefore evident *a priori*, can be due to no other cause than the injustice with which such a maxim threatens everyone.<sup>28</sup>

<sup>21</sup> I. KANT, *Perpetual Peace: A Philosophical Essay*, *op. cit.*, (translation modified by the author), *cit.*, p.185: «Alle auf das Recht anderer Menschen bezogene Handlungen, deren Maxime sich nicht mit der Publizität verträgt, sind unrecht», I. KANT, *Projet de paix perpétuelle*, Édition bilingue traduction de J. Gibelin, Paris, Vrin, 2002, p. 120.

<sup>22</sup> D. LUBAN, *op. cit.*, p. 156.

<sup>23</sup> K. R. DAVIS, *op. cit.*, p. 170. In addition, Davis cites this version of the principle: «Act in such a way that if you were publicly seen, you would be respected, tolerated, and loved», (*Reflexion* 7082), K. R. DAVIS, *op. cit.*, p. 181.

<sup>24</sup> For an analysis of the concept of maxim, see D. LUBAN, *op.cit.*, pp.168-169 and D. GARCÍA-MARZÁ, *op.cit.*, pp. 102-103

<sup>25</sup> See K. BAYNES, *op. cit.*, pp. 129-130.

<sup>26</sup> G. VLACHOS, *La pensée politique de Kant : métaphysique de l'ordre et dialectique du progrès*, Paris, Presses Universitaires de France, 1962, p. 568.

<sup>27</sup> I. KANT, *Grounding for the metaphysics of morals; with On a supposed right to lie because of philanthropic concerns*. Translated by James W. Ellington, Indianapolis/Cambridge, Hackett Publishing Company, 3<sup>rd</sup> edition, 1993, p. 30.

<sup>28</sup> I. KANT, *Perpetual Peace: A Philosophical Essay*, *op. cit.*, p.185: «Denn eine Maxime, die ich

The publicity test thus serves to understand whether, by making the maxim of my action public, I make my action impossible. This principle has a “merely negative<sup>29</sup>” role because it does not determine what is right, but rather what is wrong. It does not mean that only maxims that can be stated publicly are right. Indeed, in the case of a dictatorship, maxims can be revealed publicly and still not be right. Kant observes:

For we cannot conclude that the converse holds, and that all maxims which can bear publicity are therefore just. For anyone who has a decided supremacy has no need to make any secret about his maxims<sup>30</sup>.

The principle of publicity plays an instrumental role: it is a test used to determine whether a law or action is unjust. The fact that it is a test implies that the maxims of actions must theoretically be able to withstand publicity, not that in practice they must be made public systematically<sup>31</sup>. It is an *a priori*, transcendental test of pure reason: there is no need to resort to experience to discover whether opposition exists or not. The principle of publicity would thus be a principle of “publicizability”<sup>32</sup>. The negative principle of publicity is paradoxical since it can be implemented in a non-public manner<sup>33</sup>.

One might wonder what is meant by the “public” to whom arguments or maxims must be revealed. According to García-Marzá, Kantian studies have paid little attention to this question. Davis and Laursen are exceptions and consider the public to be a group of all rational persons capable of transcending individual interests in pursuit of the resolution of problems or conflicts of action<sup>34</sup>. According to Davis, the different meanings of the public have one thing in common: it is composed of rational, disinterested individuals who consider the general interest. If we follow Davis’ reading, the negative test of publicity is all the more *a priori* since Kant conceives of the public as an ideal public of rational citizens whose goal is the common interest<sup>35</sup>: an empirical public would not necessarily condemn unjust actions.

A distinction must be made between the negative formulation of the principle of publicity and the positive formulation that concludes the second appendix:

All maxims which require publicity, in order that they may not fail to attain their end,

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nicht darf *laut werden lassen*, ohne dadurch meine eigene Absicht zugleich zu vereiteln, die durchaus *verheimlicht* werden muß, wenn sie gelingen soll, und zu der ich mich nicht *öffentlich* bekennen kann, ohne daß dadurch unausbleiblich der Widerstand aller gegen meinen Vorsatz gereizt werde, kann diese nothwendige und allgemeine, mithin *a priori* einzusehende, Gegenbearbeitung aller gegen mich nirgend wovon anders als von der Ungerechtigkeit her haben, womit sie jedermann bedroht», *Projet de paix perpétuelle*, cit., p. 120.

<sup>29</sup> Ivi, p. 185: «bloß negative», I. KANT, *Projet de paix perpétuelle*, op. cit., p. 121.

<sup>30</sup> I. KANT, *Perpetual Peace: A Philosophical Essay*, op. cit., p.192. “Denn es läßt sich nicht umgekehrt schließen: daß, welche Maximen die Publicität vertragen, dieselbe darum auch gerecht sind, weil, wer die entschiedene Obermacht hat, seiner Maximen nicht Hehl haben darf”, *Projet de Paix Perpétuelle*, cit., p. 128.

<sup>31</sup> See D. LUBAN, op.cit., p.156 and D. GARCÍA-MARZÁ, op. cit., p. 101.

<sup>32</sup> O. O’NEILL, *The Public Use of Reason*, in «*Political Theory*», vol. 14, 4, 1986, p. 530.

<sup>33</sup> According to S. CHAMBERS: «The odd thing about this publicity test is that the test itself may be undertaken in private, indeed alone. According to Kant the principle of publicity allows us to recognize the unjustness of laws “as if by an experiment of pure reason”», op. cit., p. 406.

<sup>34</sup> D. GARCÍA-MARZÁ, op. cit., p. 103.

<sup>35</sup> K. R. DAVIS, op. cit., p. 179.

are in agreement both with right and politics.<sup>36</sup>

On this other transcendental principle of publicity, Kant provides no examples or detailed explanations, postponing these explanations, which will in fact not be given in other writings<sup>37</sup>. According to García-Marzá, this principle is not necessarily compatible with the negative version because it appeals to the real consequences of a maxim - it would no longer be a test of pure or transcendental reason - by requiring the effective approval of the public: empirical publicity becomes necessary for an action to succeed. García-Marzá even notes that the second formulation may seem inconsistent with the negative formulation, which only required that maxims could be made public<sup>38</sup>. However, Kant indicates that this second version of the principle of publicity is transcendental. According to Wood<sup>39</sup>, if a policy needs publicity to succeed, it is because it spontaneously harmonizes with the universal end of all and its disclosure is necessary to obtain the support of the population. While it is possible to understand how the negative test is carried out to test our maxims, it is less clear how the positive test can be implemented. Lastly, a distinction must be made between transcendental tests of publicity and the condemnation of secret treaties. *Perpetual Peace* argues that international agreements kept secret are one of the primary causes of war and should therefore never be established. The prohibition of secret treaties was also advocated by Abbé de Saint-Pierre and Bentham<sup>40</sup>.

### *The public use of reason and the validity of arguments*

However, the concept of publicity is present in writings prior to *Perpetual Peace*, but it is not formulated as a transcendental principle. Rather, it is considered as empirical publicity. In *What is Enlightenment?* (1784), Kant refers to the public use of one's own reason:

by the public use of one's own reason I understand that use that someone makes of it as a scholar before the entire public of the world of readers. What I call the private use of reason is that which one may make of it in a certain civil post or office with which he is entrusted.<sup>41</sup>

<sup>36</sup> I. KANT, *Perpetual Peace. A Philosophical Essay*, op. cit., p. 195: «Alle Maximen, die der Publizität bedürfen (um ihren Zweck nicht zu verfehlen), stimmen mit Recht und Politik vereinigt zusammen», *Projet de Paix Perpétuelle*, cit., p. 132.

<sup>37</sup> D. GARCÍA-MARZÁ, op. cit., p. 107.

<sup>38</sup> *Ibid.*, pp.107-108.

<sup>39</sup> A. WOOD, op. cit., p. 81.

<sup>40</sup> G. VLACHOS, op.cit., p. 568. On the role of this Kantian idea in the emergence of a norm of publication of international treaties, see M. DONALDSON, *The survival of the secret treaty: publicity, secrecy, and legality in the international order*, in «American Journal of International Law», vol.111, 3, 2017, pp. 575-627.

<sup>41</sup> *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy*, translated and edited by Mary J. Gregor, Cambridge, Cambridge University Press, 1996, p. 18: «Ich verstehe aber unter dem öffentlichen Gebrauch seiner eigenen Vernunft denjenigen, den jemand als *Gelehrter* von ihr vor dem ganzen Publikum der *Leserwelt* macht. Den Privatgebrauch nenne ich denjenigen, den er in einem gewissen ihm anvertrauten *bürgerlichen* Posten oder Amte von seiner Vernunft machen darf», I. KANT, *Beantwortung der Frage: Was ist Aufklärung?*, in «Berlinische

In this case, the public is an audience of readers who think and reason as disinterested readers and not according to their private interests. The use of reason enables humanity to progress, and this use must be public because only public debate ensures the quality of arguments: publicity is necessary here because social interaction allows enlightenment to spread through the reasoned exchange of ideas<sup>42</sup>. Kant therefore introduces the essay by observing:

*Enlightenment is the humanity's emergence from self-incurred immaturity. Immaturity is the inability to make use of one's own understanding without direction from another*<sup>43</sup>.

Furthermore, *What does it mean to orient oneself in thinking?* (1786) deals with the concept of publicity, explaining that only by presenting arguments publicly can their validity be tested – publicity is necessary for the exercise of thought:

The freedom to think is opposed *first of all to civil compulsion*. Of course it is said that the freedom to *speak* or to write could be taken from us by a superior power, but the freedom to *think* cannot be. Yet how much and how correctly would we *think* if we did not think as it were in community with others to whom we *communicate* our thoughts, and who communicate theirs with us! Thus one can very well say that this external power which wrenches away people's freedom publicly to *communicate* their thoughts also takes from them the freedom to *think* – that single gem remaining to us in the midst of all the burdens of civil life, through which alone we can devise means of overcoming all the evils of our condition<sup>44</sup>.

The idea that publicly communicating our arguments allows us to test their validity runs throughout Kant's work; in *Anthropology from a Pragmatic Point of View* (1798), the philosopher expresses a similar idea<sup>45</sup>, noting that the soundness of our understanding

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Monatsschrift», 1784, Hh 3.

<sup>42</sup> K. R. DAVIS, *op. cit.*, p. 172

<sup>43</sup> *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy*, cit., p.17 (translation modified by the author): «Aufklärung ist der Ausgang des Menschen aus seiner selbst verschuldeten Unmündigkeit. Unmündigkeit ist das Unvermögen, sich seines Verstandes ohne Leitung eines anderen zu bedienen», in I. KANT, *Beantwortung der Frage: Was ist Aufklärung?*, cit.

<sup>44</sup> I. KANT, *What does it mean to orient oneself in thinking?* (1786), in A.W. WOOD and G. DI GIOVANNI, (Eds.) *Religion and Rational Theology. The Cambridge Edition of the Works of Immanuel Kant*, Cambridge, Cambridge University Press, 1996, p. 16; «Der Freiheit zu denken ist erstlich der bürgerliche Zwang entgegengesetzt. Zwar sagt man: die Freiheit zu sprechen oder zu schreiben, könne uns zwar durch obere Gewalt, aber die Freiheit zu denken durch sie gar nicht genommen werden. Allein wie viel und mit welcher Richtigkeit würden wir wohl denken, wenn wir nicht gleichsam in Gemeinschaft mit andern, denen wir unsere und die uns ihre Gedanken mitteilen, dächten! Also kann man wohl sagen, daß diejenige äußere Gewalt, welche die Freiheit, seine Gedanken öffentlich mitzuteilen, den Menschen entreißt, ihnen auch die Freiheit zu denken nehme; das einzige Kleinod, das uns bei allen bürgerlichen Lasten noch übrig bleibt, und wodurch allein wider alle Übel dieses Zustandes noch Rat geschafft werden kann», *Was heisst: Sich im Denken orientiren?*, *Immanuel Kants Werke. Band IV. Schriften von 1783–1788. Herausgegeben von Dr. Artur Buchenau und Dr. Ernst Cassirer, Berlin, Bruno Cassirer, 1913*, p. 363.

<sup>45</sup> Cited in R. EISLER, *op. cit.*, p. 1067.

depends on our ability to confront the understanding of others, to avoid isolating ourselves, and to make our judgments public. The best way to rectify our thoughts is to state them publicly in order to understand whether they agree with the understanding of others<sup>46</sup>. According to Eisler, this is an external criterion of truth that reduces the risk of error<sup>47</sup>. Thus emerges the idea specific to the Enlightenment that scholars must formulate their arguments publicly<sup>48</sup>.

This public use of reason, which differs from private use whereby each corporation reasons according to the logic of its own profession and addresses the audience of its profession<sup>49</sup>, concerns the individual as an intellectual citizen who addresses the general public. According to Baynes, it corresponds to a new meaning of the concept of “public,” which before Kant applied mainly to the law issued by the sovereign and to everything concerning power, its limits, and the commonweal of the country<sup>50</sup>. This new Kantian conception of publicity as a source of progress is found in *The Conflict of the Faculties* (1798), which once again advocates empirical publicity in order to educate the people and make them aware of their rights (section VIII).

What is the relationship between the public use of reason, which refers to empirical publicity, and the principles of publicity formulated in *Perpetual Peace*? Various commentators seem to link these two dimensions of publicity. While they do not clearly articulate the analytical relationship, the idea is that public use of reason ensures the quality and accuracy of arguments, enabling the establishment of law. This is because, to be legitimate, law must be public and cannot be based on hidden motives or arbitrary rules. In other words, publicity in these different dimensions aims to avoid arbitrariness<sup>51</sup>. This passage from *The Structural Transformation of the Public Sphere* reflects the link between the public use of reason and the fact that the “unpublicizable” nature (to use O'Neill's concept<sup>52</sup>) of a maxim of action means that it is unjust:

In the “law” the quintessence of general, abstract, and permanent norms, inheres a rationality in which what is right converges with what is just; the exercise of power is to be demoted to a mere executor of such norms. Historically, the polemical claim of this kind of rationality was developed, in conjunction with the critical public debate among private people, against the reliance of princely authority on secrets of state. Just as secrecy was supposed to serve the maintenance of sovereignty on *voluntas*, so publicity was supposed to serve the promotion of legislation based on *ratio*<sup>53</sup>.

García-Marzá seems to bring together the principles of publicity and the public use of reason by emphasizing the need for public communicability of arguments<sup>54</sup>. Baynes also links the two principles by asserting that public reason can serve as a counterweight to the exercise of legislative power; according to him, it is in this context that Kant

<sup>46</sup> R. EISLER, *op. cit.*, pp. 1066-7.

<sup>47</sup> *Ibidem*.

<sup>48</sup> See J. HABERMAS, *The structural transformation of the Public Sphere*, translated by Thomas Burger with the assistance of Frederick Burger, Cambridge, Polity Press, 1992, p. 104.

<sup>49</sup> *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy*, cit., pp. 19-20.

<sup>50</sup> K. BAYNES, *op. cit.*, pp. 129-130.

<sup>51</sup> On this topic, see S. BAUME, *op. cit.*

<sup>52</sup> O. O'NEILL, *op. cit.*, pp. 529-530.

<sup>53</sup> J. HABERMAS, *op. cit.*, p.53, cited in S. BAUME, *op. cit.*, p. 5.

<sup>54</sup> D. GARCÍA-MARZÁ, *op. cit.*, p. 98.

introduces the negative principle of publicity<sup>55</sup>. When Ion defines publicity as expressed in the Second Appendix to *Perpetual Peace*, she, too, refers to the notion of the public use of reason:

A formal condition of right (law) requiring that any claim upon justice be made public (known) in order to ensure that the law-making process remains an exercise of reason and not an expression of individual empirical motivation; it suggests a collective process of deliberation (judgment) upon the principles of justice<sup>56</sup>.

It should be noted, however, that the educated public referred to in *What is Enlightenment?* in relation to the public use of reason is different from the theoretical public conceived as a mechanism of universalization that allows the justice of maxims of action to be tested<sup>57</sup>. What we believe links the different dimensions of the concept of publicity - the two principles and the idea of the public use of reason - is the test of universalization. However, these different dimensions correspond to distinct implementations of universalization - a transcendental universalization for the first negative principle of publicity, an empirical attempt at universalization in the case of public argumentative exchange, and a less clear mechanism in the case of the positive principle of publicity.

Finally, we will examine references to Kant's concept of publicity in contemporary political studies. As noted above, studies of transparency often refer to Kant when establishing the origins of this norm<sup>58</sup>. In addition, some empirical works on national and global governance refer to Kant's concept of publicity. However, what is meant by this concept varies depending on the authors and contexts. To give just a few examples, O'Neill<sup>59</sup> and Hood<sup>60</sup> (when attributing a role to Kant in the genesis of the norm of transparency) refer to the prohibition of secret treaties. In his study of the WTO, Charnovitz<sup>61</sup> presents the negative version of the principle as a key development in the emergence of international transparency norms. He links it directly to Article 18 of the Treaty of Versailles, which states that any international treaty or agreement must be made public as soon as possible. Baynes refers to both the negative principle and the public use of reason, associating this principle with the emergence of an international public sphere and a global civil society seeking greater transparency<sup>62</sup>.

Furthermore, if we distinguish between the moral dimension and the institutional scope

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<sup>55</sup> «For Kant, this notion of public reason could in turn serve as a check on the exercise of legislative power and, in that context, Kant introduces a variant of the categorical imperative that he calls 'the transcendental principle of public right': 'All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public', K. BAYNES, *op. cit.*, p. 130.

<sup>56</sup> D. ION, *Kant and international relations theory: cosmopolitan community-building*, Abington, Routledge, 2012, p. 9.

<sup>57</sup> See K. R. DAVIS, *op. cit.*, pp. 173-174.

<sup>58</sup> See, among others, S. BAUME, *op. cit.*, and C. HOOD, *op. cit.*

<sup>59</sup> O. O'NEILL, *Transparency and the ethics of communication*, in HOOD, HEALD (Eds.) *Transparency: The key to better governance?*, *cit.*, pp. 74-90.

<sup>60</sup> C. HOOD, *op. cit.*

<sup>61</sup> S. CHARNOVITZ, *Transparency and participation in the World Trade Organization*, in «Rutgers L. Rev.», 56, 2004, pp. 928-929.

<sup>62</sup> K. BAYNES, *op. cit.*

of the principle of publicity – if we consider it as a principle of institutional design<sup>63</sup> – we can say that contemporary political studies consider both dimensions, but especially the second, particularly in reference to international organizations. However, curiously, the literature on global governance that cites the principle of publicity and advocates its development has paid very little attention to a particular tension: while the norm of transparency has established itself as a new global norm that could be considered a Kantian legacy, the increasing complexity of global governance and the growing number of issues on which states must cooperate has led to a proliferation of international negotiations. Yet these negotiations are inherently opaque. In the following section, we will focus on the links between international negotiations and opacity; we will then compare Kantian publicity with the transparency requirements formulated by studies on global governance.

### *Publicity and international negotiations*

For several decades, states have been negotiating agreements in a growing number of areas (such as climate, terrorism, and migration), whereas traditionally international negotiations focused on issues such as borders, peace, and trade. As a result, international agreements are having an increasing impact on states' public policies<sup>64</sup>. However, one specific feature of these negotiations is that they are inherently lacking in transparency. This is the subject of fierce criticism from civil society. For example, there have been numerous public protests against the secrecy surrounding the negotiations of various free trade agreements, and central institutions of global governance – such as the IMF, the World Bank, and the WTO – are criticized by social movements for their democratic deficit<sup>65</sup>.

Although there are exceptions and the process has not been linear, the contemporary era is characterized by an international norm of treaty publication<sup>66</sup>, of which the prohibition of secret treaties formulated in *Perpetual Peace* is a precursor<sup>67</sup>. On the contrary, there is no international norm of transparency regarding international and global decision-making processes; this issue is widely debated, as shown by the case of free trade agreements<sup>68</sup>.

<sup>63</sup> D. LUBAN, *op. cit.*, p. 156.

<sup>64</sup> G. LÜBBE-WOLFF, *Democracy, Separation of Powers, and International Treaty-making. The example of TTIP*, in «Current Legal Problems», vol.69, 1, 2016, pp. 175-198.

<sup>65</sup> See, for example, R. O'BRIEN, *Contesting global governance: Multilateral economic institutions and global social movements*, Cambridge, Cambridge University Press, 2000 and T. BENNER, W. H. REINICKE, J. M. WITTE, *Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability*, in «Government and opposition», vol.39, 2, 2004, pp. 191-210. On protests against the lack of transparency of the WTO, the IMF and the World Bank, see, for example, R. A. PAYNE, N. H. SAMHAT, *op. cit.*, p. 4.

<sup>66</sup> M. DONALDSON, *op. cit.*

<sup>67</sup> M. DONALDSON, *op. cit.*; C. GROULIER, S. TORDJMAN, *Chapitre 9. Les organisations intergouvernementales*, in T. BALZACQ, F. CHARILLON, F. RAMEL, *Manuel de diplomatie*, Paris, Presses de Sciences Po, 2018, pp. 163-180.

<sup>68</sup> We can also mention appeals to the Court of Justice of the EU and the European Ombudsman concerning non-public European legislative negotiations, even though these are not international agreements, S. NOVAK, *De la «capacité de négocier»: un concept opaque peut-il justifier une transparence limitée du processus législatif européen?*, in «Revue des affaires européennes», 2, 2023, pp. 469-485.

According to Colson, Kant's idea of publicity opens a new era, that of a persistent movement against secrecy, which nevertheless continues to characterize diplomatic negotiations today<sup>69</sup>. This gives rise to a tension specific to contemporary global governance: while the norm of transparency has spread and calls for the democratization of international institutions have multiplied, the main instrument of global governance, namely negotiation, seems to require opacity by its very nature. It can even be argued that there is such a consensus on the incompatibility between transparency and negotiations that the secrecy of negotiations constitutes an informal norm<sup>70</sup>. The idea that the process must remain secret is widely shared: at the 1919 peace conference, President Wilson himself, despite his advocacy for open diplomacy, insisted that the negotiation process remain secret<sup>71</sup>. The following section will attempt to clarify the main reasons why negotiations are associated with secrecy; then we will contrast the Kantian notion of publicity with contemporary calls for greater transparency in global governance.

### *Limitations of transparency in global governance: secrecy and negotiations*

First, it is necessary to distinguish between the fact that negotiations generally take place behind closed doors and the fact that, even behind closed doors, the interests of the negotiators are not necessarily clear to everyone. On the first point, negotiators and studies on negotiations justify closed doors on a number of grounds<sup>72</sup>. One reason is that publicity would discourage negotiators from making concessions because they would fear being perceived as betraying the interests of their country or their electorate. These are, for example, the arguments used by the European Ombudsman to justify the secrecy of legislative negotiations between the Council of the EU and the European Parliament, despite the European institutions' insistence on transparency<sup>73</sup>. However, negotiation

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<sup>69</sup> A. COLSON, *The ambassador between light and shade: the emergence of secrecy as the norm for international negotiation*, in «International Negotiation», vol.13, 2, 2008, p.193. On the role of publicity in democracy and “invisible power” see N. BOBBIO, *Il futuro della democrazia*, Turin, Einaudi, 1991, pp. 85-113.

<sup>70</sup> M. DONALDSON, who analyzes the spread of the principle of publicity of treaties at the beginning of the 20th century, explains that this principle applies only to treaties and not to the negotiation phase, *op. cit.*, pp. 575-576. According to C. GROULIER, S. TORDJMAN (*op. cit.*, p. 172), while the UN Charter requires the disclosure of treaties in line with Kant's principle of publicity, it does not address the issue of negotiation processes, which are still often secret, even though the post-Cold War period has been characterized by demands for greater transparency in international organizations.

<sup>71</sup> C. HOOD, *op. cit.*, pp. 11-13.

<sup>72</sup> This quote from Walton and McKersie clearly reflects the existing consensus on the links between opacity and negotiation: «[The parties] will not engage in problem-solving behavior unless the activity is relatively safe. Both Party and Opponent need to be assured that if they freely and openly acknowledge their problems, if they willingly explore any solution proposed, and if they candidly discuss their own preferences, this information will not somehow be used against them. [...] The use of transcripts or a stenographer may inhibit exploratory and tentative discussions. Large galleries and disclosure to outside persons have the same effect», cited by M. E. WARREN, J. MANSBRIDGE, *Deliberative negotiation*, in J. MANSBRIDGE and C. J. MARTIN (Eds.) *Negotiating agreement in politics*, Washington, American Political Science Association, Task Force Report, 2013, p. 108.

<sup>73</sup> See S. NOVAK, *op. cit.*

requires a certain degree of flexibility in order to reach an agreement, which will often be a compromise, i.e., the result of an exchange of concessions<sup>74</sup>. Madison himself pointed out that, had the Philadelphia Convention deliberated in public, they would probably not have been able to reach agreement, as the members would have been reluctant to back down from their positions<sup>75</sup>. Thus, publicity could polarize positions and/or lead negotiators to an impasse. In addition, it can encourage demagogic rhetoric and flattery towards the electorate, which could again divide negotiators and hinder the search for compromise<sup>76</sup>. Another reason sometimes cited is that interest groups could exert pressure that would hinder the search for agreement<sup>77</sup>. Furthermore, secrecy would be favored by negotiators because it would minimize the risk of their errors being condemned by the public<sup>78</sup>. Finally, international negotiations often progress because negotiators have the opportunity to link issues in order to exchange concessions: this practice, which may also be perceived negatively by the public, would therefore require secrecy<sup>79</sup>.

This first form of opacity between negotiators and the public should be distinguished from the opacity that can characterize exchanges between negotiators themselves. It is not always easy for negotiators to understand the real interests and red lines of other negotiators<sup>80</sup>. In other words, the fact that negotiations take place behind closed doors does not mean that exchanges between negotiators are sincere. A common tactic, for example, is to demand more than one really wants in order to be able to make concessions later. Furthermore, negotiation processes are not based solely on plenary meetings but also on informal bilateral and multilateral exchanges. Another factor that is sometimes underestimated, and which is related to the previous one, is that negotiations are generally led by a chair who must hold numerous bilateral meetings to gather information on positions in order to build a compromise, which leads to an asymmetrical distribution of information. In these circumstances, it seems difficult in practice to make negotiations public.

In its different meanings, the Kantian notion of publicity is opposed to what is hidden or secret<sup>81</sup> and refers to what can be communicated, to what is publicizable. We will now enumerate some of the reasons why international negotiations seem *a priori* scarcely compatible with Kantian publicity. We will then discuss these different reasons, which will allow us to characterize the way contemporaries approach the question of transparency.

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<sup>74</sup> See S. NOVAK, S. BAUME, *Compromise and publicity in democracy: an ambiguous relationship*, in S. NOVAK, S. BAUME (Eds.) *Compromises in Democracy*, Cham, Springer International Publishing, 2020, pp. 69-94.

<sup>75</sup> M. FARRAND (Eds.), *The Records of the Federal Convention of 1787*, 4 vols, New Haven, Yale University Press, 1966, p. 479.

<sup>76</sup> D. STASAVAGE, *Open-door or closed-door? Transparency in domestic and international bargaining*, in «International organization», vol.58, 4, 2004, pp. 667-703.

<sup>77</sup> S. NOVAK, *op. cit.*, p. 476, note 42.

<sup>78</sup> A. GRIGORESCU, *op. cit.*, p. 634.

<sup>79</sup> A. GRIGORESCU, *op. cit.*, p. 631.

<sup>80</sup> R. FISHER, W. L. URY, B. PATTON, *Getting to yes: Negotiating agreement without giving in*, New York, Penguin, 2011; S. NOVAK, *La prise de décision au Conseil de l'Union européenne. Pratiques du vote et du consensus*, Paris, Dalloz, 2011.

<sup>81</sup> D. GARCIA-MARZA, *op. cit.*, p. 103.

### *Incompatibility between Kant's publicity and international negotiations*

First, negotiators regularly argue that if the concessions they are exchanging were revealed during the negotiation process, they could give rise to strong opposition and become unachievable. The idea is that a concession obtained during the negotiation process and then withdrawn would lead to protests from citizens who would believe that this concession was “set in stone.”<sup>82</sup> Furthermore, since the public is often reluctant to compromise, opposition could arise from the fact that negotiators are forced to make concessions and give up certain interests of the state they represent. From the negotiator's perspective, there is a utilitarian justification for secrecy: secret exchanges allow for the achievement of a greater end, namely agreement. From a Kantian perspective, this need for secrecy could mean that these exchanges are illegitimate, since secrecy is justified by the risk that the exchange of concessions will become unfeasible and that it will arouse strong opposition – the two consequences that, according to Kant, an illegitimate action entails<sup>83</sup>.

Moreover, the opacity of the negotiations could be seen as an obstacle to the public use of reason, with public debate only taking place after the negotiators have reached an agreement – even if it has not yet been ratified by parliaments. As noted, the fact that public debate can only take place *ex post*, and that citizens are faced with a *fait accompli*, has given rise to massive protest movements.

However, it is necessary to explore those hypotheses further.

### *The negotiation process and the negative principle of publicity*

First, we will examine the issue of concessions. In our view, the perception that the process lacks legitimacy stems from the restrictive application of the principle of publicity.

From the outset, let us clarify that, without necessarily adopting a cynical perspective, it might seem incongruous to imagine negotiators applying the principle of publicity to their tactics. However, with the ever-increasing number of communication channels and ways to reproduce speech and documents, there is a growing possibility that closed-door actions will be revealed: the secrecy of negotiations is thus precarious, and the risk of disclosure hangs like a sword of Damocles over negotiators. For this reason, it is not so far-fetched to imagine that negotiators would be led to apply the negative publicity test. As we have seen, to justify the secrecy of the decision-making process, the negotiators themselves invoke risks – exchanges of concessions would become unfeasible and massive opposition would arise – which, from a Kantian perspective, can result from illegitimate actions. While applying the principle of publicity can lead to considering each exchange of concessions as illegitimate, from a utilitarian and negotiation perspective, tying one's hands by making each concession public throughout the process would make an agreement impossible. However, it could be argued that this application of the principle of publicity is too restrictive, since the maxim of the action to be made public relates to an exchange made in pursuit of a broader goal that would otherwise be unattainable. In

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<sup>82</sup> European Ombudsman, *Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues*, Brussels, §54.

<sup>83</sup> See above.

this case, the maxim of the action would be publicizable because the question would be whether an acceptable concession would allow an overall agreement to be reached. Furthermore, Kogelmann and Davis observe that, although a law must be capable of being made public in order to be just, this does not mean that it must be publicly disclosed in practice. According to Davis:

As a consequence of making publicity a transcendental condition of justice, Kant actually permits extreme degrees of secrecy and suppression in politics. This consequence will come as a surprise to those who are accustomed to reading Kant's work as a cornerstone of liberal thought<sup>84</sup>.

Davis questions the idea that Kant advocated public decision-making processes. He distinguishes six notions of public in Kant:

Among Kant's six publics, only an ideal public of rational people could serve as an a priori standard of justice. If I am right, then Kant cannot be understood to have accorded any empirical public a normative status. This *fact should lead us to question whether Kant's political thought as a whole is one which supports openness in politics and public decision-making*. It is generally assumed that Kant was one of the first to call for a greater role for the public in politics, but the relevant public is not an empirical group of people, rather an ideal one, whose role is fulfilled when it enters into our moral judgment of politics<sup>85</sup>.

Similarly, according to Kogelmann, Kant's idea of publicity is hypothetical and he is not an advocate of transparency in the sense of openness in decision-making processes<sup>86</sup>. The principle of publicity is a test of universalization, not a principle of institutional functioning.

Thus, the principle of publicity may not be incompatible with the practice of secret negotiations for two reasons. First, the maxim of action is not the will to concede for the sake of it, but rather to make a concession in order to reach a compromise and make cooperation possible. Second, the principle of publicity is a transcendental principle. In other words, from a Kantian perspective, if the negotiation process is not public, this does not necessarily mean that it is illegitimate. If negotiations are not made public, this is not necessarily to hide illegitimate actions, but rather due to the specific expectations and apprehensions of the negotiators. In particular, negotiators may believe that they need to protect themselves from plebiscitary reason<sup>87</sup> and the immaturity and impatience of the public, as these factors could hinder the search for an agreement. Therefore, if the principle of publicity is a test of legitimacy rather than an institutional requirement, the secrecy of the process is not necessarily problematic.

However, the problem remains that secrecy can be used to hide illegitimate concessions. From the perspective of theorists of deliberative democracy, secrecy can have advantages – we can refer again to Madison's remarks on the Federal Convention. Chambers notes:

Sometimes, perhaps often, crucial parts of public policy debate must go *in camera*.

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<sup>84</sup> K. R. DAVIS, *op. cit.*

<sup>85</sup> K. R. DAVIS, *op. cit.*, p. 184, my emphasis.

<sup>86</sup> B. KOGELEMAN, *Secret government*, Cambridge, Cambridge University Press, 2021, pp. 19-23.

<sup>87</sup> S. CHAMBERS, *op. cit.*

[...] The pernicious influence of uniformed public opinion, tabloid journalism, and the public's limited powers of concentration will have a negative effect on the quality of debate. When deliberation takes place in secret, elites need not worry so much about how their arguments will affect their re-election<sup>88</sup>.

Chambers points out that secret decision-making is conducted by an “elite” group of elected individuals. The assumption that those who meet behind closed doors are trustworthy elites is a common justification for the secrecy of negotiations<sup>89</sup>. However, without engaging in populist discourse, it is worth noting that the appointment of state representatives in a diplomatic context may be at the discretion of the sovereign, and that individuals appointed in this way may not necessarily possess the necessary ethics and skills. In his *Mémoires*, Jean Monnet suggests that institutions should be designed to minimise the risk of illegitimate actions, as it is more reliable to rely on institutional mechanisms than individuals<sup>90</sup>. Furthermore, contemporary calls for institutional transparency are partly driven by a distrust of processes based on secrecy<sup>91</sup>. However, relying on institutional design raises the question of institutional publicity and how to implement it legitimately. Moreover, while the Kantian principle of publicity is compatible with closed-door negotiations, the demand for transparency in the contemporary world also extends to processes, particularly under pressure from civil society<sup>92</sup>. This creates an aporia: there are valid arguments in favour of maintaining the secrecy of negotiations, and the Kantian perspective suggests that secrecy is not necessarily an indication of illegitimacy; nevertheless, the secrecy surrounding international negotiations can conceal illegitimate practices and is increasingly being challenged.

#### *The ex post public debate: interest groups vs. public use of reason*

As mentioned above, a global norm has emerged requiring the publication of the results of negotiations. Since international agreements often have legislative consequences for states, it is obviously all the more important to make these results available for public debate. Several theorists of global governance refer to the Habermasian ideal of transnational public debate, which is rooted in Kantian thought, particularly in the essay *What is Enlightenment?* However, without access to the negotiation process, how can citizens engage in public debate? Public debate generally takes place on the results of the process, and this *ex post* publicity is justified by both the actors involved and theoretical studies. In some of her decisions, the European Ombudsman has emphasized the importance of maintaining the secrecy of negotiations while ensuring that public debate on the resulting agreements is possible<sup>93</sup>. According to Warren and Mansbridge:

It often should be sufficient for the democratic norms of inclusion and acceptable agreement that the *rationales* for proposals or agreements are public and transparent,

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<sup>88</sup> S. CHAMBERS, *op. cit.*, p. 409

<sup>89</sup> See, for example, M. E. WARREN, J. MANSBRIDGE, *op. cit.*

<sup>90</sup> J. MONNET, *Mémoires*, Paris, Fayard, 1988.

<sup>91</sup> A. GRIGORESCU, *op. cit.*, p. 626.

<sup>92</sup> See J. TALLBERG, *op. cit.*

<sup>93</sup> S. NOVAK, 2023, *op. cit.*

*rather than that every aspect of the process leading to agreement be transparent.* Issues may emerge from affected publics, be negotiated behind closed doors by representatives, and the resulting agreements presented to these same publics for deliberation and ratification *without every move, concession, and tradeoff of a hard-fought negotiation having to be made public.* However, the questions of why this agreement is a good deal, why this solution is the right one, and what the overall public justification is for the result should be publicly argued so that constituents may discuss that rationale and possibly engage in retrospective criticism and sanctions. The rationale *does not, in fact, have to reproduce the actual set of reasons that motivated the negotiators,* but it *should express the best and most reasonable reasons* for (and against) the agreement that produces the legislation. The rationales conveyed to the citizens after the negotiation therefore must convey enough information for the public to initiate or continue informed and even passionate discussion of the issues on the basis of the most relevant evidence<sup>94</sup>.

In support of their argument, Warren and Mansbridge refer to the negative principle of publicity<sup>95</sup>. However, it seems that their thesis is more closely related to the idea of a public use of reason. They go on to explain:

Ideally, representatives should provide reasons for their actions in a two-way process, engaging with constituents or their interest-group representatives in a discussion of why they agreed to a deal or a proposed deal. Because in practice two-way communication with constituents is highly time-consuming, the publicity given an issue by public debates among elected representatives or interest groups often may have to suffice.

The authors refer to elected “representatives” and “interest groups”. In the context of a public use of reason, it is important to distinguish between these two types of actors. Debates involving “interest groups” appear to be barely compatible with the Kantian concept of publicity. This concept implies that the public is a group of rational individuals who aim to achieve the common good by exchanging arguments<sup>96</sup>, rather than representing particular interests. We highlight this aspect because the literature on global governance generally insists on the need to include interest groups. According to this literature, inclusion and transparency are corollary notions<sup>97</sup>, and recent work refers, albeit somewhat vaguely, to a whole host of actors whose inclusion would increase institutional transparency. In particular, it is emphasised that, in order to include as many perspectives as possible, these debates should involve “interest groups”, “non-governmental organisations<sup>98</sup>”, “non-profits<sup>99</sup>”, “stakeholders<sup>100</sup>”, social movements<sup>101</sup> and others who will be impacted by the decision<sup>102</sup>. Some may favor this, but it is a

<sup>94</sup> M. E. WARREN, J. MANSBRIDGE, *op. cit.*, p. 112. My emphasis.

<sup>95</sup> *Ibid.*, note 83.

<sup>96</sup> See O’NEILL, 1986, *op.cit.* and K. BAYNES, *op. cit.*, pp. 129-130.

<sup>97</sup> R. A. PAYNE, N. H. SAMHAT, *op. cit.*

<sup>98</sup> R. A. PAYNE, N. H. SAMHAT, *op. cit.*, p. 4. In their study of the democratization of global governance, Payne and Samhat repeatedly refer to the positive role of NGOs.

<sup>99</sup> *Ibidem.*

<sup>100</sup> J. STEFFEK, *Explaining cooperation between IGOs and NGOs—push factors, pull factors, and the policy cycle*, in «Review of international studies», vol.39, 4, 2013, p. 1010.

<sup>101</sup> R. O’BRIEN, *op. cit.*

<sup>102</sup> On this topic, see M. E. WARREN, J. MANSBRIDGE, *op. cit.*, pp. 90, 112.

different situation than the public use of reason, which aims to make each person universalize their point of view. In *The Critique of Judgment*, Kant emphasizes the importance of detaching oneself from one's subjective perspective and adopting a universal one<sup>103</sup>. Although literature on global governance sometimes invokes a connection with Kantian publicity, there is a discrepancy between some of its premises and the Kantian idea of a "public use of reason". The former is generally based on the inclusive aggregation of different points of view or particular interests, while the latter is based on the universalization of one's point of view. According to the principle of publicity stated in *Perpetual Peace*, everyone should be able to subject themselves to universalization. Furthermore, the logic of inclusion presupposes transparency between civil society actors and the public. However, empirical research on this topic shows that NGOs, which are often seen as a democratic solution, are frequently not accountable to citizens<sup>104</sup>. Therefore, the public use of reason is less incompatible with *ex post* publicity of the debates than with a conception of inclusion that differs from the imperative of universalization.

### Conclusion

This article has highlighted two political aporias. First, while many studies aimed at democratizing global governance emphasize the need for transparency, drawing on the legacy of the Enlightenment, they tend to neglect the fact that global governance involves an increasing number of negotiations, and thus a diffusion of opaque practices. Furthermore, despite calls for greater transparency in international negotiations, and the fact that secrecy can mask illegitimate practices, there are relevant arguments to justify the secrecy of negotiations. Such aporias make it necessary to reflect on the democratic accountability of international negotiators and on what publicity can mean in a context where international agreements negotiated behind closed doors increasingly weigh on national legislation.

Furthermore, this article has attempted to show that, although contemporary political studies frequently invoke what they call Kant's "principle of publicity", this concept encompasses different formulations of the idea of publicity. When examining the practice of international negotiations through the lens of Kantian publicity, two main points emerge. (a) First, the secrecy of negotiation processes is not necessarily a sign of illegitimacy. Moreover, there are relevant arguments for maintaining the secrecy of decision-making processes, particularly the risks of plebiscitary reason<sup>105</sup>. However, this secrecy comes with problems. It requires a high level of trust in those involved in the negotiations; it conflicts with the growing demand for transparency from civil society; secrecy can be used to hide corruption. (b) To ensure publicity for international negotiations, one could rely on *ex post* publicity to highlight the main reasons a policy was adopted, making public debate possible. However, studies of global governance often

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<sup>103</sup> Cited in O'NEILL, 1986, *op.cit.*, p. 544: «To think from the standpoint of everyone else» («the maxim of enlarged thought») means to «detach [oneself] from the subjective personal conditions of [one's] judgement, which cramp the mind of so many others, and [reflect] upon [one's] own judgment from a *universal standpoint* (which [one] can only determine by shifting [one's] ground to the standpoint of others)».

<sup>104</sup> A. GRIGORESCU, *op. cit.*, pp. 628, 641.

<sup>105</sup> S. CHAMBERS, *op. cit.*, p. 510.

emphasize the importance of including various points of view. In contrast, the public use of reason, as advocated by *What Is Enlightenment?*, should enable citizens to think beyond their particular point of view: the goal should be the common good, and the process should involve universalization. Thus, paradoxically, the Kantian principle of publicity does not lead one to condemn the secrecy of negotiations. Furthermore, the public use of reason does not seem to correspond to the inclusion of the greatest possible number of interest groups or actors representing particular interests, as this would contradict the universalization of individual viewpoints. Lastly, inclusion does not necessarily go hand in hand with publicity, as the participation of a greater number of actors does not ensure their accountability to citizens.

In conclusion, our analysis reveals political aporias that the influence of norms negotiated at the international level necessitates confronting, as well as contemporary misunderstandings about the uses of publicity and the Kantian legacy.

