I. Introduction

The Doctrine of Right concludes with the claim that “morally practical reason pronounces an irresistible veto: there is to be no war, neither war between you and me in the state of nature nor war between us as states, which, although they are internally in a lawful condition, are still externally (in relation to one another) in a lawless condition; for war is not the way in which everyone should seek his rights.” Kant continues, “a universal and lasting peace constitutes not merely a part of the doctrine of right but rather the entire final end of the doctrine of right within the limits of mere reason; for the condition of peace is alone that condition in which what is mine and what is yours for a multitude of human beings is secured under laws living in proximity to one another.”

Kant elsewhere characterizes war as the “barbaric way (the way of savages)” of deciding disputes. “Barbarism” is a technical term for Kant; in the Anthropology he defines it as “force without freedom or law.” The distinctive feature of barbarism is that one party is subject to the private choice of another, based entirely on the power of the stronger.

Kant’s opposition to war is paired with a discussion of right in war, with respect to each of going to war, the conduct of war, and the behaviour of the victorious party after a war. My aim in this paper is to...
explain how Kant can have a conception of right in war, against the background of his more general view that war is by its nature barbaric and to be repudiated entirely.

The combination of regarding war as barbaric and as subject to distinctive moral constraints is puzzling on its face. In other contexts, Kant’s arguments from the nature of a thing or activity to its regulative principle target things and activities whose moral value is not in question. The argument of the *Groundwork* to establish the categorical imperative as the supreme principle of morality begins from the premise that a good will – one that satisfies its own internal standard – is good without qualification.4 The *Critique of Practical Reason* seeks to establish that the categorical imperative is the will’s own principle works from the concept of a free will.5 In the *Doctrine of Right* Kant characterizes the “idea of the original contract” as the regulative principle inherent in the very idea of a rightful condition, the moral necessity of which he supposes himself to have already established. The puzzle raised by Kant’s treatment of war is that this general strategy of seeking a normative or regulative principle by looking to the constitutive principle of that thing does not obviously recommend itself in cases in which the thing is “barbaric [barbarisch],” or “savage [wild].” (MS, AA 06: 307n.4-6)

In introducing his view that the regulative principle for a thing is to be found in its nature, Kant appeals to Plato’s theory of forms,6 but there focuses on cases for which the idea of reason can be found as a rule or archetype, not on empirical particulars. When faced with Parmenides’ challenge as to whether there are forms for mud, hair and dirt, Socrates concluded that that such things are merely empirical, and do not have forms.7 Despite his disdain for war, Kant does not regard it as merely empirical; instead he insists that it is possible to find right in a condition of war, even while recognizing that war is by its nature the absence of right. My aim is to explain why.8

Kant’s arguments are of importance even to those who suppose that Kant’s views of these matters are either utopian or merely of antiquarian interest. He develops an alternative to prominent views according to which the sole moral purpose of the law of war is to limit death and destruction; on this view,
the true morality governing war looks nothing like the *modus vivendi* between enemies that makes up the law of war.⁹ From this perspective, the Kantian law of war might be made to look both excessively and insufficiently ambitious; it might be thought too ambitious because it places moral demands that are out of place in war, and supposes that as such they must be treated as legally binding. So some charge that its account of morality is too legalistic, others that its moralizing stance makes it unwilling to compromise principle in order to reduce bloodshed. In his recent book, *The Verdict of Battle*, James Q. Whitman suggests that the eighteenth century attitude to war as a legal proceeding did more to rein in its destructive forces than more recent humanitarian attempts to moralize war. Kant appears in Whitman’s narrative as a moralizer whose advice is self-defeating, a counterpoint to a realistic diagnosis of how best to contain war.¹⁰

I will argue that Kant provides an alternative to both high-minded moralizing and “realistic” attempts to displace it. He argues that war is both barbaric and must be understood as akin to legal proceeding in its ability to provide closure, but unlike one in all other ways. Right cannot be decided by war,¹¹ but it is possible to “find a right in a condition of war”¹², if we suppose it can decide a dispute, and so in another sense resolve a question of right. The morality appropriate to war reflects the fact that it resolves a dispute independently of its merits. It is this morality, rather than the restriction of war’s effects, that provides the appropriate standard for evaluating the conduct of war; it also provides the only basis for law governing war.

---

⁹ Jeff McMahan contrasts what he calls “the ‘deep’ morality of war: the criterion of moral liability to attack, the relation between just cause and the *jus in bello* requirement of proportionality, and so on,” with “another dimension to the morality of war that I have not explored: the laws of war, which are conventions established to mitigate the savagery of war.” Although he notes that it “is in everyone’s interests that such conventions be recognized and obeyed.” He continues “It is, indeed, entirely clear that the laws of war must diverge significantly from the deep morality of war as I have presented it.” See McMahan “The Ethics of Killing in War” *Ethics* 114 (July 2004) p 730.


¹² MS, AA 06: 307 346. Hierauf gründet sich also das Recht des Gleichgewichts aller einander thätig berührenden Staaten.

Was die thätige Verletzung betrifft, die ein Recht zum Kriege giebt, so gehört dazu die selbstgenommene Genugthuung für die Beleidigung des einen Volks durch das Volk des anderen Staats, die Wiedervergeltung (retorsio), ohne eine Erstattung (durch friedliche Wege) bei dem anderen Staate zu suchen, womit der Förmlichkeit nach der Ausbruch des Krieges ohne vorhergehende Aufkündigung des Friedens (Kriegsankündigung) eine Ähnlichkeit hat: weil, wenn man einmal ein Recht im Kriegszustande finden will, etwas Analogisches mit einem Vertrag angenommen werden muß, nämlich Annahme der Erklärung des anderen Theils, daß beide ihr Recht auf diese Art suchen wollen.
In setting things up in this way, Kant offers a synthesis and partial reconciliation of two strands in medieval thinking about war, each of which continues to have contemporary defenders. The first of these is the Just War tradition, which focuses on the morality of going to war, and makes the question of just cause fundamental. For the Just War tradition, a just war is a unilateral act designed to right or prevent a wrong. Versions of the just war approach structure most contemporary moral debates about war. Recent writers in this tradition have questioned the familiar idea that combatants on both sides of the war are subject to the same moral restrictions, arguing that those who lack a just cause are not permitted to use any form of force, even in war. The same approach structures contemporary debates about humanitarian intervention (sometimes called the “Responsibility to Protect”).

The competing approach is sometimes called the “regular war” tradition, and is less prominent in contemporary debates. It has its origins in Roman law, and is developed (sometimes in the vocabulary of the just war view) in 17th century writers including Grotius, Pufendorf, and Vattel. The regular war view conceives war as a procedure for resolving disputes. Sovereigns resort to it because no court or procedure has jurisdiction over them – that is the sense in which they are sovereign. For these writers, the central question is whether a war is conducted in accordance with the procedure; questions about just cause are framed as questions of whether the party starting the war has what lawyers call a “cause of action,” that is, whether there is a genuine dispute about the respective rights of the two states. Questions about who is in the right do not enter into the moral analysis of the war, because war is the procedure through which such disputes are supposed to be resolved. Grotius’s *The Law of War and Peace* is explicitly organized on the model of a legal treatise, beginning with a discussion of the nature of war, then going through the possible grounds of war or causes of action, before turning to the procedures through which a war is conducted.

---

including both the way in which it serves to resolve the dispute and the legal consequences of that resolution.

Both of these approaches assume broad powers to wage war. Just war writers view a state engaged in war as each of prosecutor, judge and executioner, competent to address both past and prospective wrongdoing. Augustine defended punitive wars; Suárez defended the Spanish conquest of the Americas on the grounds that the indigenous inhabitants were likely to resist settlers and missionaries. As such, wars of conquest were justified to prevent wrongs and advance civilization.

The regular war tradition is even more permissive. Grotius argued that a sovereign may resort to war if no court is available, or if one party is not satisfied that an available court will deliver the correct verdict. Vattel explicitly compares battles to legal proceedings, and describes war as a legitimate means of acquisition.

Both of these positions seek to make moral sense of war; each does so by bringing more general moral ideas to bear on what they regard as a specific case. The just war tradition insists that war is permissible in order to do justice, and, further, that justice must be done in this world. Suárez entertains the objection to a sovereign serving as judge in his own case but rejects it, concluding

“in the world as a whole, there must exist, in order that the various states may dwell in concord, some power for the punishment of injuries inflicted by one state upon another; and this power is not to be found in any superior, for we assume that these states have no commonly acknowledged superior; therefore, the power in question must reside in the sovereign prince of the injured state,

16 Francisco Suárez, (De Fide, disp. 18, sec. 1, n. 9 (vol. 5, 440]) Suárez restricts this to occasions on which the infidel prince has first been asked to allow missionaries in. Francisco Suárez, Selections from Three Works, vol 2, translated by G Williams (Oxford: Oxford University Press, 1944 p, 748. “But if the unbelieving princes resist, and do not grant entrance, then, in my opinion and on account of the reasons given above, they may be coerced by the sending of preachers accompanied by an adequate army.” See the discussion in John P. Doyle “Francisco Suárez: On Preaching the Gospel to People Like the American Indians” Fordham International Law Journal [Vol. 15:879]. See also Vitoria, “On the American Indians,” 1. Conclusion, in Vitoria Political Writings, 250, ed. A. Pagden and J. Lawrance (Cambridge, 1991)
to whom, by reason of that injury, the opposing prince is made subject; and consequently, war of
the kind in question has been instituted in place of a tribunal administering just punishment.\footnote{18}

Injustice cannot be tolerated.

For its part, the regular war tradition insists that it must be possible to give effect to rights if they
are to be anything at all. But that means that should a dispute about rights arise, there must be a procedure
through which it can be resolved, consistent with the status of both disputants as rightholders. If mediation,
arbitration, lottery, and battle by individual champions are not acceptable to the parties to a dispute,\footnote{19} war is
a last resort. War differs from these alternative because it is the only procedure for dispute resolution that is
self-executing: the party that prevails is in a position to guarantee compliance from the vanquished party.
There is simply empirical or no conceptual space between defeat in war and the result of the conflict.

Kant is sharply critical of what he calls the “veil of injustice [Schleier der Ungerechtigkeit]\footnote{20} of
the just war tradition and the “miserable comforters [leidige Tröster]\footnote{21} of the regular war tradition. His
complaint is not simply that they justify too many wars. The larger problem is that both fail to grasp the
fundamental moral problem with war: it resolves matters through force, and so determines results
independently of the merits. The just war tradition overlooks this because its focus on just cause
presupposes that the question of who is in the right has already been resolved. The regular war tradition
grasps that war is not about the merits, but regards it as acceptable anyway, because it supposes that a
sovereign state must be able to enforce what it believes to be its rights.

The irresolvable tension between force and right leads Kant to the surprising claim that peace is
the central concept in the morality of war. For the just war tradition, the central concept is the concept of a
just cause; for the regular war tradition it is the concept of a right. How can peace be central to
understanding the morality and legality of war?

Kant's solution has two pillars: an account of the distinctively public nature of a state, and an
account of peace as the only condition under which disputes can be resolved on their merits. War is

\footnote{18}{On Charity in Francisco Suarez, Selections from Three Works, vol 2, translated by G Williams (Oxford:
Oxford University Press, 1944 p 818.}
\footnote{19}{Grotius, Bk II CH. XXXIII, ss Vii-X (Whewell, 273-77.)}
\footnote{20}{MS, AA 06: 266.12.}
\footnote{21}{ZeF, AA 08:355.6.}
“wrong in the highest degree” because it “hands everything to savage violence, as if by law.”  

War is the condition in which might makes right; peace is a condition in which, through the establishment of procedures, right guides might.

II. The Public Nature of the State

The first pillar of Kant’s account is his focus on the distinctive nature of the state as a public rightful condition, however defective. The sole purpose for which the state is supposed to act – "the idea of the original contract" – is the provision of a rightful condition for its inhabitants. It is obligated and thereby entitled to do justice between its citizens, by making, applying, and enforcing laws. It is entitled, indeed obligated, to provide the necessary infrastructure, everything from defensive armies through public roads and adequate provision for the health of its citizens. It is also under an obligation to bring itself more fully into conformity with the "idea of the original contract," that is, to make its institutions ones through which the citizens govern themselves through law, and in which no private person is subject to the determining choice of another.

Sophisticated contemporary legal systems work either implicitly or explicitly with some version of this Kantian idea of the state as a public rightful condition. Constitutional courts review legislation to make sure that it is properly within the state's legitimate mandate, and throughout the world recent awareness of problems of institutional corruption reflect the recognition of the fundamental importance of the distinction between properly public and improperly private purposes in the internal management of states. Conversely, is widely appreciated that the proper role of the state is not simply to bring about as much good as possible in the world, and that states have a special responsibility to their own citizens and residents.

This conception of the status of public rightful condition has these implications for the state's internal organization, but its implications for its external relations are no less significant: like other writers in the 18th century, Kant represents nations as in a "state of nature [Naturzustande]" in relation to each other, and treats them as private individuals as against each other. Unlike other writers in the 18th century, however, Kant sees that the state is fundamentally different from a private person, because, as a public rightful condition, it does not have private purposes.

23 “[..] [D]ie Idee [...] ist der ursprüngliche Contract“.(MS, AA 06: 315. 05-06).
The relation of states as against other states follows from this distinctive nature. As an artificial person, a state does not enjoy the free purposiveness that individual human beings enjoy. This is not a claim about it lacking psychological capacities, or the full freedom of self-determination that Kant identifies with *wille*. Instead, it follows from its distinctive role in relation to its citizens. A state lacks the free purposiveness of a natural person because its moral status depends exclusively on its provision of a rightful condition for its people. It does not have any entitlement as against either its members or other states to set and pursue private purposes, not even the purposes that a majority, or even all of its members happen to share. It is essentially public; any pursuit of private purposes is, simply as such, *ultra vires*. If it violates this essentially public character by acting for other than public purposes, it thereby violates its duty to its citizens.

This essentially public character also restricts how others may treat it; as against other states, it is a private moral person, and does them no wrong by providing a rightful condition (even a defective one) for the inhabitants of its territory. Another way of saying that it does no wrong is to say that no other state has authority over it; the authority of each state is restricted to what concerns it, namely providing a rightful condition for its members. If no other state has authority over it, then it is, as against those other states, sovereign – *sui iuris*. Relations between states are structured by the form of private relation more generally: none wrongs another by declining to accommodate itself to another’s wishes, and the internal organization of a state, as such, is not a wrong against any of its neighbors.

Kant’s account of the public nature of the state marks a fundamental departure from both the just war and regular traditions, and shapes the ways in which the law of war is not merely the application of a general morality of the doing of justice or resolution of private disputes to a special case. The just war

24 MS, AA 06: 230. 32-34.

25 In order to preempt misunderstanding, I should note that nothing in this account precludes one state intervening in another that has lapsed into a condition of barbarism, that is, condition of failing to provide a rightful condition for its members. Genocide, slavery, and the deprivation of the right of a class of persons to own property are marks of barbarism, a condition that Kant characterizes as a defective form of a state of nature, in which force rules without freedom or law. Just as human beings are entitled to take up arms against a barbaric power that rules over them, so, too, other states are entitled to intervene to stop barbarism. In such a situation, they are not committing a wrong against the barbaric power, because it is not a rightful condition. Kant’s position here reflects this distinction between what he calls the “Postulate of Public Right [das Postulat des öffentlichen Rechts]” and the “Idea of the Original Contract [die Idee des ursprünglichen Vertrags]”. The former requires the state to create rightful “horizontal” relations between individual human beings; the latter is the regulative principle for states, and describes the ideal situation in which the “vertical” relation between the state and its citizens is fully consistent with the freedom of everyone.
tradition's conception of the state as each of prosecutor, judge, and executioner reflects conception of the state as universal rather than public. On this view, common to views otherwise as different as those of the Salamanca Scholastics and the English Utilitarians, any powers the state has flow from the degree to which it is well positioned to give effect to a set of moral demands that are what they are and are already complete without any reference to the existence of states. Ideas that Kant contends can only be fully comprehended under the aspect of a public rightful condition – such as that wrongs should be repaired and wrongdoers brought to justice – are for the just war tradition ones to which a state may find itself in a position to give effect beyond its borders, because fundamentally, its role within its borders is merely one of being effective in meeting those same moral requirements. Thus, for the Just War tradition, the duty to prevent wrongs and punish wrongdoers is not seen as an aspect of the state's provision of a rightful condition of those over whom it rules, but rather as an perfectly general standing requirement which it finds itself able to take up both within and sometimes outside its territory.

The regular war tradition, by contrast, understands the relation between the state and its citizens as essentially private. In both *Towards Perpetual Peace* and the *Doctrine of Right*, Kant draws attention to the way in which rulers of his time regarded their lands and subjects as property, to be used in pursuit of whatever private purposes the ruler thought appropriate. This conception of the relation between ruler and ruled as fundamentally private unsurprisingly also generates a conception of the state's territory as the property of the sovereign and with it each of the examples of illicit grounds of acquisition that Kant rejects in the second Preliminary Article of *Perpetual Peace*. The idea of selling, exchanging, bequeathing or donating a state follows from the proprietary model of the state. It is no surprise that Kant also identifies this as a source of war; in the first Definitive article of *Perpetual Peace* he characterizes the ruler of a despotic state as “not a member but its proprietor.” If states are essentially private and subject to the claims of private right, disputes about them will multiply, and war become a means of acquisition.

If, instead, as Kant argues, a state is essentially public rather than either private or universal, the only acceptable external purpose for which the state can act is the preservation of its (current) rightful

---

26 ZeF AA 08:344 14.
27 “[…] nicht Staatsgenosse, sondern Staatsegentümer”. (ZeF AA08:351.09)
28 argues that as a mechanism of dispute resolution between sovereigns who accept no higher authority, war escalates into a dispute about which sovereign will get its way and so into a dispute about sovereignty. Although he admonishes sovereigns to follow the path of virtue by giving back what they have taken in war and freeing captives, he allows that they may acquire through war with impunity. Grotius, Bk III, Ch X-XI
condition. An aggressive war is wrongful not only against the target of the aggression, but no less so against the citizens who are called upon (or more likely compelled) to fight for it. Kant asks

“what right has the state against its own subjects to use them for a war against others states, to expand their goods and even their lives in it, or put them at risk, in such a way that whether they shall go to war does not depend on their own judgment, but they may be sent into it by the supreme command of the sovereign?”

The state may not treat its citizens as natural products to be used or put in peril for the ruler’s private purposes. The only fully public purpose, however, is creating a rightful condition; the only such purpose in relation to other states is defending an existing rightful condition. Such a state would fight only when it judged that it had to, which is to say, only defensively. That is also the only ground on which a state does not wrong its citizens by asking or requiring them to fight.

The just war tradition requirement of a just cause for going to war might be thought to provide a more palatable conception of the grounds of war. Yet just warriors move back and forth between specifying necessary conditions for war to be permissible and sufficient ones on which it is mandated; Suárez’s concern that justice must be done is the cornerstone of his account. Even the doing of justice – as judged by a sovereign who is, Suárez concedes, judge in his own case – fails to be a properly public purpose into which citizens and their possessions can be rightfully conscripted.

29 “... Welches Recht hat der Staat gegen seine eigene Untertanen sie zum Kriege gegen andere Staaten zu brauchen, ihre Güter, ja ihr Leben dabei aufzuwenden, oder aufs Spiel zu setzen: so daß es nicht von dieser ihrem eigenen Urtheil abhängt, ob sie in den Krieg ziehen wollen oder nicht, sondern der Oberbefehl des Souveräns sie hineinschicken darf?” (MS AA 06:344.02-05)
30 MS, AA 06: 345. 25-35.
31 In the Doctrine of Right, Kant also insists that citizens must authorize war, (MS, AA 06: 346.01-02) This claim, like his claim in Perpetual Peace that states with republican constitutions will not go to war, (ZeF, AA 08: 350.01-04) reflects his idea of a republican government as committed exclusively to the public purpose of creating and sustaining a rightful condition. A despotism, by contrast, draws no distinction between the public purposes of the state and the private purposes of the rules. As Whitman makes clear in his discussion of Frederick the Great’s conquest of Silesia, Frederick’s pretext for war was that he was reclaiming territory that was rightly his via a complicated series of gifts and inheritances; he supposed that his sovereignty was personal, that territory was property, and that he differed from private persons only in being subject to no higher authority. Kant’s rejection of the acquisition of territory by gift, purchase bequest or marriage (second preliminary article of perpetual peace; ZeF, AA 08: 344.14-16) reflects the same idea as his embrace of republican governments (first definitive article); both reflect the idea that a state must be essentially public and act only for public purposes. Frederick’s claim to Silesia supposed that it was property, not territory, as it could be transferred through private transaction, and could exist apart from the state of the sovereign to whom it belonged. See the discussion in James Q. Whitman, The Verdict of Battle: The Law of Victory and the Making of Modern War (Cambridge, Mass., Harvard University Press).
The problem faced by both traditions is that a state has neither internal standing against its citizens nor external standing as against another state to make and act on judgments of right. The just war and regular war tradition are alike in their refusal to accept this: the regular war tradition asks for only a colourable claim of right; the just war tradition for a correct claim of right. The former concedes that might makes right; the latter affirms the same view, even while expressly denying it, because acting as prosecutor, judge and enforcer is the prerogative of the stronger.

III. Not on the Merits:
The second pillar of Kant's account is that the fundamental feature of war is that it resolves a dispute between nations independently of the merits of that dispute.

This may seem to repeat the central claim of the regular war tradition, but it is fundamentally different. Although Kant accepts the regular war account of what war is, he rejects its account of its justification.

Despite the barbarism and savagery of war, Kant insists that right can be found in war, subject to a condition: “if one wants to find a right in a condition of war, something analogous to a contract must be assumed, namely acceptance of the declaration of the other party that both want to seek their right in this way.”

War is the procedure through which adversaries accept that their disputes will be resolved through the use of force. On this understanding, fighting a war is something like a battle between champions as a mode of dispute resolution. This barbaric procedure is a procedure nonetheless, inasmuch as it restricts the means to be used to battle between the armed forces of the belligerents.

This may once again seem disturbingly close to the regular war approach. Kant’s rationale is fundamentally different, however: Absent some pre-established harmony, force and right are not aligned, so a procedure that turns on force gives up on right. In one sense, this is exactly correct. As Kant remarks, it is “difficult even to form a concept” of “law in this lawless state without contradicting oneself.” Right during the war “would then, have to be the waging of war in accordance with principles that always leaves

---

32 “[...] Wenn man einmal ein Recht im Kriegszustande finden will, etwas Analogisches mit einem Vertrag angenommen werden muß, nämlich Annahme der Erklärung des anderen Theils, daß beide ihr Recht auf diese Art suchen wollen”. (MS, AA 06: 346.18-20).
open the possibility of leaving the state of nature among states.”33 That is, the grounds and conduct of war must be consistent with future peaceful resolution; war, horrible though it is, must leave open the possibility of a future peace. For Kant, peace is not merely the absence of open fighting, in the form of an ongoing cease-fire; it is a positive condition in which states accept that disputes will be resolved peacefully, that is on their merits.

Kant’s position on war reflects a more general view that disputes can only be resolved on their merits in a condition of peace. War is the way of resolving disputes independently of their merits, in such a way that a future peace becomes possible. If disputes can only be resolved on their merits in a condition of peace, then, the precondition of peace is the acceptance that past disputes have been conclusively resolved independently of their merits. Right can be found in war if it is conducted in a way consistent with the belligerents accepting that it will resolve their dispute.

It is a virtue of this picture that it represents the fully paradoxical nature of the law of war. Part of what makes it paradoxical is the obvious asymmetry between aggressor and defender, and the equally obvious fact that the country that is attacked by another did not agree to a procedure of dispute resolution. Instead, it fought back when attacked, and did so because it supposed it had no choice. That is exactly the point: having exhausted peaceful alternatives, it took up arms, and so, submitted its dispute to this mode of resolution. In resorting war to defend its right, it is accepting that force will decide, and that peace will one day come, that is, that the particular dispute will indeed be resolved through force. Although the belligerents have not united their wills,34 their resolution of their dispute through war can only be rightful if they conduct themselves in accordance with their status as equals, each of which is entitled to be independent of the other and each of which is entitled to survive the dispute.

Kant sets things up in this way because the only thing that the belligerents can be taken to have done that is consistent with a future peace is to have submitted their dispute to a procedure. Their self-understanding may well differ – they may be seeking revenge, or opportunistically attempting to acquire something simply because they suppose they can get away with it. The moral structure of their situation

33 “[D]ie meiste Schwierigkeit ist, um sich auch nur einen Begriff davon zu machen” and “ein Gesetz in diesem gesetzlosen Zustande zu denken [...] ohne sich selbst zu widersprechen. [...] [D]en Krieg nach solchen Grundsätzen zu führen, nach welchen es immer noch möglich bleibt, aus jenem Naturzustande der Staaten (im äußerer Verhältniß gegen einander) herauszugehen und in einen rechtlichen zu treten”. (MS, AA 06:347.01-04)
34 MS, AA 06: 273. 01-10.
does not depend on how they are thinking about it, but rather on what they do in relation to each other. In private right, the principles governing the resolution of a contractual or property dispute are not changed by what they happen to think about it. Instead, their form of interaction determines the relevant principles. The same point applies to war: the norms apply based on what the parties are entitled to do, not on what they want to do or even what they believe they are entitled to do. Indeed, an aggressor might be thought to be someone who rejects the idea that war is a procedure.\(^3\) Kant’s point is that the norms are imposed by structure of the situation rather than the private judgments of the belligerents.

Still, the thought that aggressor and defender have agreed or “must be taken [muß gedacht wird] to have agreed to resolve their dispute through conflict may seem forced. There is no actual agreement, but there is rather reciprocal acceptance that this is how the dispute will be resolved. So fighting a war is not a joint activity in which the belligerents participate together – it is not understood on the model of the “pitched battle” of 18th-century warfare through which monarchs willingly submitted their disputes to a game of chance.\(^3\) Despite the fact that it is not a joint activity, the belligerents can only permissibly participate in it in a way that is consistent with it becoming a joint activity, namely that of negotiating and accepting a peace. Again, the claim that they “must be taken” to have agreed is not the introduction of the hypothesis about the psychology of governments or military leaders, but rather a characterization of the only terms on which what they do could be morally permissible. Even defensive military force is only permissible when used in a way consistent with a future peace.

If resolution of the dispute apart from the merits is the constitutive principle of war, then its regulative principle must reflect that. This will have implications for each of the elements of the law of war. First, it will shape the grounds of war, because the only procedure that allows right to be found in war is the one that contemplates the survival of the disputants. Second, although Kant uses the vocabulary of contract, the contract he is considering is ideal rather than empirical. It is not within the moral power of states to agree to any other terms of resolving their disputes without reference to the merits. Once the

\(^3\) Grotius (Bk III, Chapter 3) argues that a “formal war” (roughly a war to resolve a dispute) requires a declaration, on analogy with the requirement that a legal proceeding requires serving papers to invoke it. He excludes defensive and punitive wars from this requirement. Although he does not put it this way, the organizing thought appears to be that these are non-procedural wars. Kant’s view, by contrast, is that was must always be procedural.

dispute is resolved, the belligerents must go forward on the assumption that force has indeed resolved it. As Kant puts it in the First Preliminary Article Of Perpetual Peace

Causes for a future war, extant even if as yet unrecognized by the contracting parties themselves, are all annihilated by a peace treaty, no matter how acute and skilled the sleuthing by which they may be picked out of documents in archives.37

That is just to say that peace is the constitutive principle of war: peace can only be achieved if the past is taken by all to be settled, that is, if everyone accepts that past disputes our fully and adequately resolved, even though their resolution was through force, and so although not necessarily inconsistently with their merits, necessarily not on the basis of their merits. Otherwise peace would have to precede itself and so finally be impossible.

It follows that neither an aggressive nor a punitive war could be rightful, because both assume the dispute has already been resolved on the part of the party the regards itself as superior.38 It follows further that with respect to the means available for resolving the dispute, the parties are symmetrically situated, because they have given up on the merits. It also follows that both parties must survive the war. None of these claims are empirical, because none says peace is factually impossible if war is fought in a way inconsistent with them.

IV: The Law of War

I cannot develop the implications of this account in detail. In closing let me simply draw attention to three such implications, corresponding to the traditional distinctions between ius ad bellum, ius in bello, and ius post bellum:

*Ad Bellum*: if peace requires that the past be settled, then the only ground of war – if it can even be called that – is defensive. A breach of the peace can be prevented and resisted, precisely because it is, as such, an

37 “Ursachen zum künftigen Kriege sind durch den Friedensschluß insgesammt vernichtet, sie mögen auch aus archivarischen Dokumenten mit noch so scharfsichtiger Ausspähungsgeschicklichkeit ausgeklaubt sein”. (ZeF AA 08: 343-4.07-08, 01).
illegal use of force. Having violated the peace, an aggressor nation does wrong, but doing wrong does not provide an exemption from legal requirements; it imposes new ones. 39

If the only ground of war is defensive, then the only result of war can be the restoration of the original boundaries: war cannot be a mode of acquisition. Nor can the subject matter of war escalate, as it does for Grotius, into a question of who must defer to whom. Only defensive wars are rightful. Their only rightful result is securing the peace.

_In Bello:_ The relation between symmetry and decision on something other than the merits is clear in cases of other possible mechanisms for resolving disputes apart from their merits. If two countries were to agree to resolve an intractable dispute through a chess tournament, there could be no basis for one side to claim that, because justice was on its side, its players were entitled to make certain types of moves that were forbidden to its opponents, or entitled to the first move. The difficulty, once more, is not that both sides would claim this privilege, but rather that, having failed to agree on the merits, they have substituted a procedure that precludes the consideration of those merits. There is no conceptual space to raise it, and no way to resolve the competing claims. All they could do is have another procedure to resolve that dispute. So, too, with war: the inability to agree on the merits entails that any question of modifying the rules of engagement to reflect the merits can only be resolved through force. War is not a chess match, not least because in war force is both the tribunal and executor of the disputed right. One of the parties might refuse to abide by the result of a chess match, but the results of war are definitive. That only goes to underscore the symmetry of the situation: merits drop out not once but twice in war.

_Post-Bellum:_ Kant writes that

"The victor cannot therefore propose compensation for the costs of war since he would then have to admit that his opponent had fought an unjust war. While he may well think of this argument he

39 Can a state intervene to prevent an impending massacre? The key concept is once again prevention; creating a safe zone in the midst of a civil war (or what amounts to a lopsided version of a civil war, a massacre) is just keeping the peace. Like defensive war, it is a temporary measure through which no acquisition is possible.
still cannot use it, since he would then be saying that he had been waging a unit of war and so, for
his own part, committing an offense against the vanquished.”

The war did not resolve the dispute on its merits; as such, although the victor is indeed victorious, his claim
depends on force rather than right. It establishes what is, going forward, a claim of right, but even this is
subject to further moral constraints: the victor cannot make an enemy state "as it were, disappear from the
earth, since that would be an injustice against its people, which cannot lose its original right to unite itself
into a Commonwealth." Nor can it reduce the defeated state to the status of a colony.

Conclusion:
War is barbaric, and as such, must be abolished. Resort to war always begins with the thought that war will
bring about a result; belligerents go to war because they cannot agree on what that result should be and so
allow might to determine right. Peace is only possible if the results of war are accepted. Future disputes
can only be resolved on their merits if past disputes are regarded as settled. Peace is the constitutive
principle through which war can have a regulative principle. So despite its horrors, war is not to be
grouped with mud, hair, and dirt, as something that simply is what it is. Even in horrific circumstances,
morality still has something to say, even if neither side will listen.

40 “Daher kann der Überwinder nicht auf Erstattung der Kriegskosten antragen, weil er den Krieg seines
Gegners alsdann für ungerecht ausgeben müßte: sondern ob er sich gleich dieses Argument denken mag, so
darf er es doch nicht anführen, weil er ihn sonst für einen Bestrafungskrieg erklären und so wiederum eine
Beleidigung ausüben würde.” (MS, AA 06:348. 05-08).
41 “Einen Staat gleichsam auf der Erde verschwinden zu machen; denn das wäre Ungerechtigkeit gegen
das Volk, welches sein ursprüngliches Recht, sich in ein gemeines Wesen zu verbinden, nicht verlieren
kann”. (MS, AA 06:349.10-11)
42 I explain Kant's objections to colonialism in detail in "Kant's Juridical Theory of Colonialism," in
Katrin Flikschuh and Lea Ypi (eds) Kant and Colonialism: Historical and Interpretive Essays (Oxford:
Oxford University Press, 2014)