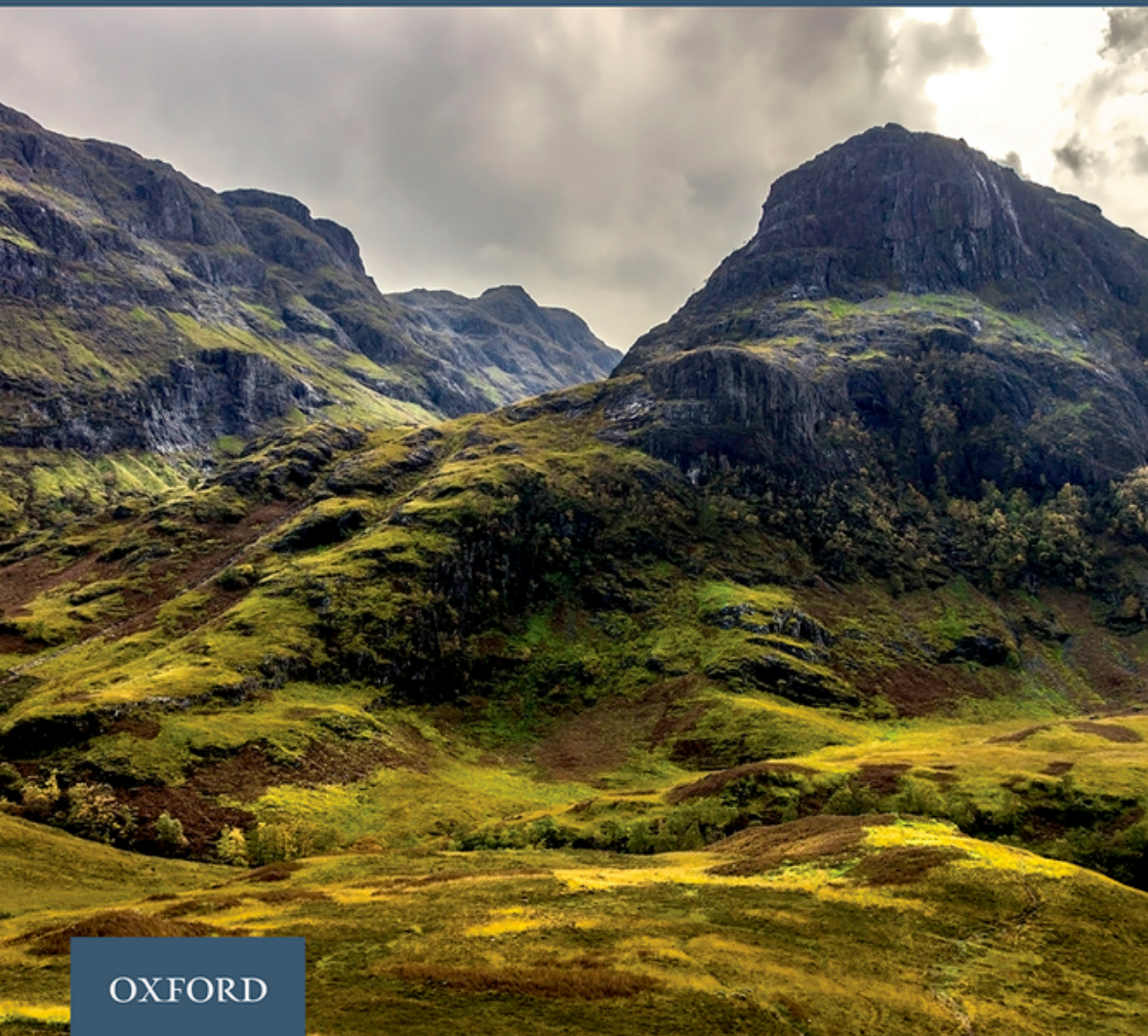
# Kant and the Law of War

Arthur Ripstein



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ARTHUR RIPSTEIN
*University of Toronto*

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*To the memory of my parents, who knew war too well:*
*Reginald Ripstein, 1909–2004*
*patriot and soldier*
*Ellen Ripstein, 1922–2013*
*refugee and spy*

# Contents

# Acknowledgments

I have been working on this project for many years and have benefited from the generosity of many people and many institutions. I discussed the right of nations only briefly in my 2009 book, *Force and Freedom*. I realized I had to give the matter much more thought when the late Ruth Gavison served as my commentator at a 2010 conference celebrating the work of Barbara Herman. I was not fully satisfied with my response to one of her objections; I hope this book provides a more adequate response. Around the same time, Karen Knop convinced me to comment on a lecture on the Salamanca scholastics, deepening my understanding of Kant's disdain for the just war tradition.

Material included in this book was presented at universities in Europe, North America, Argentina, and Israel. I am grateful to members of those audiences for their comments and questions, and to Haim Abraham, Arthur Applbaum, Sorin Baiasu, Gabriela Blum, Matthew Braham, Jutta Brunnée, Patrick Capps, Georg Cavallar, Alejandro Chehtman, Joshua Cohen, Hanoch Dagan, Steve Darwall, Jeremy Davis, Yasmin Dawood, Avihay Dorfman, David Dyzenhaus, David Enoch, Chris Essert, Ruth Gavison, Ido Geiger, Maytal Gilboa, Micha Gläser, John Goldberg, Javier Habib, Martín Hevia, Louis-Philippe Hodgson, Kinch Hoekstra, Jakob Huber, Tom Hurka, Edward Iacobucci, Shelly Kagan, Frances Kamm, Larissa Katz, Michael Kessler, Pauline Kleingeld, Dennis Klimchuk, Karen Knop, Nico Kolodny, Mattias Kumm, Christopher Kutz, Joanna Langille, Arthur Lau, Thomas Lee, Sylvie Loriaux, Reidar Maliks, Macarena Marey, Avishai Margalit, Christopher Meckstroth, Naz Modirzadeh, Saira Mohamed, Sofie Møller, Sankar Muthu, Marie Newhouse, Cara Nine, Kristi Olson, Jennifer Page, Japa Pallikkathayil, Herlinde Pauer-Studer, Jonathan Quong, Leonard Randall, Mathias Risse, Michal Saliternik, Douglas Sanderson, Tim Scanlon, Tamar Schapiro, Rudolf Schüssler, Daniel Schwartz, Konstanze von Schütz, Camilla Serck-Hanssen, Ayelet Shachar, Scott Shapiro, Stephen Smith, Horacio Spector, Gopal Sreenivasan, Nick Stang, Daniel Statman, Hamish Stewart, Martin Stone, Sergio Tenenbaum, Elad Uzan, Helga Varden, Nina Varsava, Emmanuel Voyiakis, Jay Wallace, Ernest Weinrib, Jacob Weinrib,

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participants, came to my office weekly for eight years of Kant, three and a half years of Grotius, a year of Suárez, and two years of Pufendorf, and then spent an additional fifteen weeks working through the manuscript with me. While working on this book, I learned much from the students whose doctoral dissertations I supervised: Haim Abraham, Lu-Vada Dunford, and Joanna Langille.

I had the good fortune to work on this project in a period of growing interest in Kant's legal and political philosophy and in his views about international right. My views have developed through studying the views of, and conversations with, many people. I have benefitted especially from engagement with the groundbreaking work of Katrin Flikschuh, Pauline Kleingeld, and Anna Stilz.

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My late parents did not live to see this book, but their memory was pervasive as I worked on it. They had direct experience of war, figuring in some of the key roles discussed in this book. Committed to fighting aggression, my father, Reginald, enlisted in the Canadian army at the age of thirty-one. Too old to be sent to the front, he taught ballistics in Canada and Britain. My mother, Ellen, fled Germany in 1935 to the apparent safety of Amsterdam—the only place that would admit German Jews at the time. She was seventeen when the Netherlands was invaded. In 1943, her parents were deported and murdered, her mother in Auschwitz and her father in Sobibor. My mother survived the war through the protection of the Herrndorf family and sheer nerve. She served in the Dutch underground, smuggling documents and sometimes weapons. Her blond hair, blue eyes, and perfectly accented German enabled her to calmly talk her way past murderous guards. After the war, she was a stateless refugee. The Herrndorf family were given immigrant visas to Canada. My mother's application was denied. Stanley Knowles, the CCF member of Parliament for Winnipeg North Centre, learned of her situation and called a senior official in the department of immigration. He was told that Canada did not want more of "those people." Knowles told the official that he would quote him in Parliament during question period the next day. Within an hour, the visa was slipped under his door. I dedicate this book

to the memory of my parents, in the hope that their grandchildren will live in a peaceful world.

* * *

Earlier versions of some of the material included in this book has appeared elsewhere:

- An earlier version of parts of Chapter 1 appeared in *Kant Studien* Band 107 Heft 1 (2016).
- An earlier version of parts of Chapter 2 appeared in *Kantian Review*, vol. 24, no. 3 (2019).
- An earlier and much condensed version of some material interspersed throughout Chapters 4, 5, and 6 appeared in Arthur Ripstein, *Rules for Wrongdoers: Law, Morality, War* (Saira Mohammad ed., Oxford: Oxford University Press, 2021). The Berkeley Tanner Lectures book series aims to reproduce as far as possible the live events that provide their basis. That occasion was directed to an audience with limited familiarity with or interest in Kant, so that the presentation engages much less with the specifics of the Kantian texts and the relation between war and the broader structure of public right. The present text also reflects much that I learned from the responses to the lectures, in particular, avoiding several formulations that I now recognize to have been potentially misleading.
- An earlier version of some material included in Chapter 8 appeared in Katrin Flikschuh and Lea Ypi (eds.), *Kant and Colonialism: Historical and Critical Perspectives* (Oxford: Oxford University Press, 2014).
- Some material included in Chapter 9 revisits issues introduced in "Bringing Rights and Citizenship under Law on a *Globus Terraqueus*," in Camilla Serck-Hansen et al. (eds.), *Proceedings of the 13th International Kant Congress* (Berlin: De Gruyter, 2021).

* * *

A note on references to Kant: All references to Kant are cited by their Prussian academy pagination. Unless otherwise indicated, the translations are taken from the Cambridge Edition of the Works of Immanuel Kant, edited by Paul Guyer and Allan Wood, particularly the volume, *Practical Philosophy* (Mary Gregor ed. and trans., Cambridge: Cambridge University

Press, 1996). Because the Gregor translation of the *Doctrine of Right* is available in multiple editions and paginations, all references are to the Prussian Academy pagination appearing in the margins. References to the *Doctrine of Right* are by Academy pagination only; other works are cited by title and Academy pagination.

# 1

# Perpetual War or Perpetual Peace

## I. Introduction

Kant's *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."[1]

Kant elsewhere characterizes war as the "barbaric way (the way of savages)"[2] of deciding disputes. "Barbarism" is a technical term for Kant; in the *Anthropology*, he defines it as "force without freedom or law."[3] Barbarism is the condition in which force alone decides how things stand between human beings. In such a condition, one party is entirely subject to the private choice of another; which one prevails depends only on their comparative power. To remain in such a condition is therefore "wrong in the highest degree"[4] because it is inconsistent with rightful relations in which free beings are independent of each other.

War has a distinctive morality because of this distinctive immorality. Kant's opposition to war is paired with a discussion of right in war, with respect to going to war, the conduct of war, and the behavior of the victorious party after a war. My aim in this introductory chapter is to explain how Kant

[1] *The Doctrine of Right*, 6:355.
[2] 6:351.
[3] Kant, *Anthropology from a Pragmatic Point of View* (Robert Louden trans., Cambridge: Cambridge University Press, 2006), 7:330.
[4] 6:307.

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. I will introduce Kant's organizing idea that peace is a positive moral idea, an idea that is inseparable from a family of ideas about the moral significance of a legal order. These ideas provide a compelling account of the moral and legal principles governing the initiation, conduct, and conclusion of war. The organizing thought is simple, though its implications are sometimes complex: the very thing that makes war wrongful, that is, the fact that, as Kant puts it, "it hands everything over to savage violence," actually provides the basis for norms governing each of its initiation, its conduct, and its conclusion.

The basic norm governing initiating war is a straightforward prohibition of aggressive war. Resort to force is only acceptable when defensive. The norms governing the conduct of war restrict the means that can be used in war to ones that are consistent with the possibility of a future peace; these restrictions apply to both sides in a war, because the requirement to act in a way that is consistent with the possibility of a future peace applies in the same way to defender and aggressor alike. The norms governing what happens after war are also driven by the demands of peace. So, too, are the requirements for creating public international legal institutions.

These norms governing the initiation, conduct, and results of war are merely preliminary to the possibility of a "universal and lasting peace," which is why Kant characterizes those norms as "Preliminary Articles for Perpetual Peace." Conformity with them would be sufficient to mark a transition from a state of barbarism, in which force (or its prospect) decides everything, to a state of anarchy, in which nations do not in fact resort to war but still lack common institutions. A condition of anarchy is empirically more peaceful than a condition of war, but it is unstable, because it depends on the particular choices made by particular nations.[5] As important as those articles are in reducing the temptations of war, they are not sufficient for peace. The further transition to a condition of peace requires what Kant characterizes as "Definitive Articles" for Perpetual Peace—the creation of institutions through which the principle of freedom under law applies to every human interaction, both between individual human beings, between each person and the nations of which that person is a member, between nations, and between individual human beings and nations of which they are not members.

[5] Hobbes marks this same distinction in Chapter 13 of *Leviathan* when he describes war as the condition "wherein the Will to contend by Battell is sufficiently known," but then notes that war includes "all the time there is no assurance to the contrary."

Kant's conception of right in war is distinctively legal. He understands law to be the alternative to war and identifies a condition of peace as one in which interaction is governed by law. Conversely, his account of legality is distinctively moral, and comes out of a broader view of what it is for free human beings to interact with each other on terms consistent with the freedom of everyone. The demands of interpersonal morality can only be properly realized under a public legal order. The moral requirements of a public legal order, in turn, dictate the way in which nations may rightfully interact with each other, culminating in the prohibition of aggressive war and limitations on the ways in which a war (whether justified or not) may be fought. This idea of the priority of peace therefore understands questions about the morality of war and questions about its legality as inseparable. The idea that there could be a distinctive conception of war, at once both moral and legal, is Kant's fundamental contribution to the study of peace and war. The purpose of this book is to fill out that overlooked contribution.[6]

Kant has been claimed as a champion by almost every view about the moral status of war.[7] He is sometimes claimed, other times criticized, as a kind of naïve moralist, urging restraint in war, as if doing so was the most promising strategy to hasten the coming of peace. Some have sought to situate (sometimes to discredit) his views of war as aspects of a comprehensive, if outdated, philosophy of history. Other, more recent, readings have reacted against this naïve pacifist reading and made him out to be a hard-nosed realist[8] and, on still another cluster of accounts, a champion of "regime change" so as to spread democracy.[9] On another familiar view, he is heir to

[6] The great international lawyer Hersch Lauterpacht endorsed a version of Kant's position (although without reference to Kant) in the closing pages of his 1933 book, *The Function of Law in the International Community*, when he wrote: "For peace is not only a moral idea. In a sense (although only in one sense) the idea of peace is morally indifferent, inasmuch as it may involve the sacrifice of justice on the altar of stability and security. Peace is pre-eminently a legal postulate. Juridically it is a metaphor for the postulate of the unity of the legal system. Juridical logic inevitably leads to condemnation, as a matter of law, of anarchy and private force." Hersch Lauterpacht, *Function of Law in the International Community* (Oxford: Clarendon Press, 1933), 438.

[7] Allen Wood's remark that "[t]he views people attribute to Kant on religion often tell you far more about those people than they do about Kant" has a parallel here. See Allen W. Wood, *Kant and Religion* (Cambridge: Cambridge University Press, 2020), xv.

[8] Richard Tuck, "The Hobbesianism of Kant," in his *Rights of War and Peace* (Cambridge: Cambridge University Press, 2001); Kenneth Waltz, "Introduction," "Kant, Liberalism and War," and "Structural Realism after the Cold War," in his *Realism and International Politics* (New York: Routledge, 1998); William E. Scheuerman, "Realism and the Kantian Tradition: A Revisionist Account," *International Relations* 26(4), (2012), 453–477.

[9] Susan Meld Shell, "Kant on Just War and 'Unjust Enemies': Reflections on a 'Pleonasm,'" *Kantian Review* 10 (2005), 82–111. See Georg Cavallar's reply, "Commentary on Susan Meld Shell's 'Kant on Just War and 'Unjust Enemies': Reflections on a 'Pleonasm,'" *Kantian Review*, 11 (2006), 117–124; Fernando Téson, "The Kantian Theory of International Law," *Columbia Law Review* 92(1) (January

a tradition of thinking about justice in war that flows more or less continuously from Augustine and Aquinas through Grotius and Vattel. On still other readings, he is a precursor of modern social science, putting forward a bold (and at the time completely unsubstantiated) "democratic peace hypothesis," according to which democracies do not go to war with each other.[10] Some assert that this view commits Kant to licensing democracies to wage war against non-democracies.[11]

I will offer an alternative to these readings, situating Kant's theory of war in his views about the nature of public law. In order to do so, I will draw on, without developing in full detail, several broad themes from Kantian legal and political philosophy. The *Doctrine of Right* is the first part of Kant's *Metaphysics of Morals*, which he presents as an a priori inquiry, independent of empirical inquiries and questions of virtue. Some of Kant's factual claims, including some that show up in his examples, are hopelessly mistaken; others (especially, prior to the 1790s, about differences between races,[12] and throughout his life about the abilities of women[13]) are both hopelessly mistaken and morally outrageous. These claims are in no way excused by the fact that Kant drew on what he often recognized to be the unreliable reports of travelers of his day.[14] That reliance does show that he had no special gifts as a social scientist, and more generally, that the application of concepts of

1992), 53–102; Roger Scruton, "Immanuel Kant and the Iraq War," https://www.opendemocracy.net/en/article_1749jsp/. See the reply by Antje Vollmer, "Immanuel Kant and Iraq: A Reply to Roger Scruton" (April 2004), https://www.opendemocracy.net/globalization-iraqwarphiloshophy/article_1821.jsp#comments1.

[10] Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy & Public Affairs* 12(3) (Summer 1983), 205–235. And "Kant, Liberal Legacies, and Foreign Affairs, Part 2," *Philosophy & Public Affairs* 12(4) (Autumn 1983), 323–353. For a contrasting reading, see also Georg Cavallar, "Kantian Perspectives on Democratic Peace: Alternatives to Doyle," *Review of International Studies* 27(2) (April 2001), 229–248.

[11] See, e.g., Anthony Angie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 295–296. Angie somehow concludes from Kant's claim in *Toward Perpetual Peace* that individual human beings and nations do wrong by remaining in a nonlegal condition that Kant must therefore suppose that those who are in a legal condition are entitled to use force against those who are not, a claim that Kant explicitly denies in both *Toward Perpetual Peace* and the *Doctrine of Right*. In support of his reading, Angie does not refer to Kant or Kantians, instead, he quotes claims made by Ann-Marie Slaughter. Although Slaughter mentions Doyle's attribution of the "democratic peace hypothesis" to Kant in several footnotes of the piece Angie cites, she does not refer to Kant or claim to be making Kant's argument or even a Kantian one.

[12] See the discussion in Pauline Kleingeld, "Kant's Second thoughts on Race," *The Philosophical Quarterly* 57(229) (2007), 573–592, and Lucy Allais, "Kant's Racism," *Philosophical Papers* 45(1–2) (2016), 1–36.

[13] See Pauline Kleingeld, "The Problematic Status of Gender-Neutral Language in the History of Philosophy: The Case of Kant," *The Philosophical Forum* XXV(2) (1993), 134–150.

[14] Oliver Eberl, "Kant on Race and Barbarism: Towards a More Complex View on Racism and Anti-Colonialism in Kant," *Kantian Review* 24(3) (2019), 385–413.

right to empirical particulars is, as Kant argues, dependent both on facts and the exercise of judgment. In what follows, I take seriously Kant's claim that the *Doctrine of Right* provides a metaphysics rather than an anthropology of morals, looking at his arguments and their presuppositions and implications.

## II. Just War, Regular War, and Perpetual Peace

Kant develops his account of war against the background of two contending and sometimes competing approaches to it in the history of philosophy. These two approaches share a common moral and legal vocabulary, but differ in their animating conceptions and the legal metaphors through which they articulate them. The groupings mask important areas of overlap, but we can think of each of them as an ideal type, each of which organizes its understanding of war in terms of a familiar legal relationship.

One of these, usually described as the just war tradition, begins in Augustine and Aquinas, and reaches its fullest articulation in the work of the Salamanca scholastics, especially Francisco de Vitoria and Francisco Suárez. It understands war as a sort of enforcement action and focuses on the justice of the cause for the sake of which the war is initiated. Because they regarded war as essentially an enforcement action, these writers articulated a list of "just war conditions,"[15] each of which was necessary in order for the conduct of the war to be just; in addition to a catalog of just grounds for war, those lists included not only such factors as the necessity of going to war and the prospect of success but, no less significantly, factors that are specific to the justice of punishment, including not only the guilt of the party to be punished and the requirement that the punishment be carried out with proper authority and with the right intention, but also that it be proportionate to the seriousness of the wrong.

Just war writers did not always agree among themselves, and some members of the "second scholastic," such as Melchor Cano, were harshly critical of others, including Vitoria, especially concerning the Spanish conquest of the Americans.[16] Despite these differences, they shared an organizing set

[15] For a standard list, see James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981).

[16] See the discussion by Anthony Pagden, "Defending Empire: The School of Salamanca and the 'Affair of the Indies,'" in *The Burdens of Empire: 1539 to the Present* (Cambridge: Cambridge University Press, 2015), 45–74. Pagden points out that Melchor Cano rejected the claim that the Spaniards could claim the rights of travelers when conquest was the purpose of their travels, and argued that even if the inhabitants were like children, incapable of ruling themselves, others were

of ideas, the most significant of which was the idea, no longer familiar, that the basic ground for going to war was backward looking, either in the form of punishment or of reclaiming something wrongfully taken. Just war writers view a state engaged in war as prosecutor, judge, and executioner, competent to address both past and prospective wrongdoing. Augustine distinguishes offensive from defensive wars and makes the former his main focus; Suárez concentrates primarily on offensive wars, noting almost in passing that the rationale for fighting them also justifies defensive force.[17] Augustine and Aquinas defended remedial and punitive wars; Suárez added what may look to the modern reader like claims to distributive justice[18] to the list of grounds of war, defending the Spanish conquest of the Americas on the grounds that the Indigenous inhabitants were likely to resist settlers and missionaries and therefore deny people access to their just shares of the earth's resources.[19]

These just war writers articulated the familiar thought that in war it very much matters who is in the right. They concluded from this that in war at most one side could be in the right, although the other might be excused through what Vitoria described as "invincible error."[20] For these writers, all of the rules governing the conduct of war are rules for restraining the ways in which those with a just case could prosecute it. In his description of what he called the "natural law of nations," the seventeenth-century German

not entitled to use force because their duty to protect was a duty of charity. Annabel Brett, "Scholastic Political Thought and the Modern Concept of the State," in A. Brett and J. Tully, and H. Hamilton-Bleakley, (eds.) *Rethinking The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press), 130–148, draws attention to Melchor Cano's appeal to the analogy between wars among European states and colonial conquest.

[17] Suárez writes "we have to consider whether the injustice is, practically speaking, simply about to take place; or whether it has already done so, and redress is sought through war. In this second case, the war is aggressive." Francisco Suárez, "Disputation XIII: On War," in *Selections from Three Works of Francisco Suárez* (Gwladys L. Williams, Ammi Brown, and John Waldron trans., Oxford: Clarendon Press, 1944), 802, ¶ 5.

[18] The scholastic writers represented the refusal of the Indigenous inhabitants of the Americas to yield land to Spanish settlers as an instance of what Aquinas called "communitive justice," because the contended that doing so interfered with the settlers' right to underutilized land, rather than a claim in distributive justice to a specific share of the earth's land or fruits.

[19] 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*, *supra* note 17, at 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* 15 (1991), 879. See also Francisco de Vitoria, "On the American Indians," 1. Conclusion, in Vitoria, *Political Writings* (A. Pagden and J. Lawrence eds., Cambridge: Cambridge University Press, 1991), 250.

[20] Vitoria, *Political Writings*, *supra* note 19, at 313.

rationalist writer Christian Wolff wrote, "He who wages an unjust war has no right in war, and all his force is illegal."[21] For the just war tradition, then, war is a unilateral act designed to right or prevent a wrong. Versions of the just war approach structure most contemporary moral discussions of 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.[22]

The other important strand in Western thought about war (sometimes described as the "regular war" tradition)[23] was developed by writers often described as the founders of international law: Grotius, Pufendorf, and Vattel.[24] Kant characterized these three as "miserable comforters [*leidige Tröster*]," because they had an even more expansive conception of the acceptable grounds of going to war than did the earlier just war writers.[25] Grotius argued that a sovereign may resort to war if no court is available, or if it 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

[21] "Quamobrem qui bellum injustum gerit, ei jus nullum in bello." Christian Wolff, *Jus Gentium Methodo Scientifica* (Frankfurt and Leipzig: Societas Veneta, 1764), 777; for the English translation, see Christian Wolff, *Jus Gentium Methodo Scientifica* (Joseph H. Drake trans., Oxford: Clarendon Press, 1934), 2:402.

[22] Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

[23] Peter Haggenmacher, "Just War and Regular War in Sixteenth Century Spanish Doctrine," *International Review of the Red Cross* 32 (1992), 434–445, attributes this term to Maurice Bourquin, "Grotius est-il le pere du droit des gens?," in *Grandes figures et grandes a'uvres juridiques* (Geneva: Memoires publies par la faculte de droit de l'Universite de Geneve, No. 6, 1948), 77–95. Haggenmacher develops his reading of Grotius in detail in his *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983), esp. Ch. 6: "Les limites formelles du droit de guerre: le problème des effets de la guerre publique solennelle et le "ius in bello" classique," at 568–612. Whewell sometimes translates Grotius's *solenne* as "formal" and other times as "regular." Drawing on Haggenmacher, Gregory Reichberg compares the two in "Just War and Regular War: Competing Paradigms," in David Rodin and Henry Shue, *Just and Unjust Warriors* (Oxford: Oxford University Press, 2008), 193–213. Stephen C. Neff refers to Vattel's approach as "War in Due Form," a term he takes from Vattel. Stephen C. Neff, *War and the Law of Nations* (Cambridge: Cambridge University Press, 2005), 95. See also Carl Schmitt's defense of what he calls the "non-discriminating" conception of war, based on the claim that any alternative will turn every war into a "crusade." Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), translated in *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G.L. Ulmen trans., Telos Press, 2003).

[24] E.g., Suárez, Disp. XIII: On War in *Selections*, *supra* note 17, at 851, almost states the regular war position when he writes that a war fought by agreements of both sides is unjust in the eyes of God but gives rise to just effects.

[25] Immanuel Kant, *Toward Perpetual Peace*, translated by Mary Gregor in Kant, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996), 326 (8:355). Like Eliphaz, Bildad, and Zophar in the Book of Job in the Hebrew Bible, they conclude from any display of force that justice has been done, in so doing "speak as if they are secretly being listened to by the mighty one, over whose cause they are passing judgment, and as if gaining his favor through their judgment were closer to their heart than the truth." Kant, "On the Miscarriage of all Philosophical Trials in Theodicy," translated by Allen W. Wood and George Di Giovanni in *Religion and Rational Theology* (Cambridge: Cambridge University Press, 1996), 33 (8:265).

means of acquisition.[26] Where the just war tradition views war as an enforcement action in which a right is enforced against a wrongdoer, Grotius and Vattel view it instead as a mode of dispute resolution.[27] No court or procedure has jurisdiction over sovereigns, and when they cannot agree, or agree on a procedure to resolve their dispute, they submit it to what Pufendorf describes as the "dice of Mars."[28]

Just as the views of the just war writers was structured by their legal metaphor of the execution of a judgment, so too the views of the regular war writers were structured by theirs of a procedure for dispute resolution. Their central question is whether a war is conducted in accordance with the appropriate procedure; even 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. If a state had a cause of action, it was entitled to go to war; the procedure of war was supposed to resolve the dispute, and so the authorization to go to war could not depend on knowing who was in the right. Grotius's *The Law of War and Peace*[29] is explicitly organized on the model of a legal treatise, beginning with a discussion of the nature of war (Book I), then going through the possible grounds of war or causes of action (Book II), before turning to the procedures through which a war is conducted, including both the acceptable moves within those procedures and the legal consequences of that resolution (Book III).

By viewing war as a mode of dispute resolution, early international lawyers had a ready explanation of why the same rules would apply to both sides in a conflict: the dispute arose because neither was under any duty to defer to the other's judgment about the underlying merits of the dispute. As such, the norms governing it could not track those underlying merits. Wolff referred to this as the "voluntary law of nations," arguing that the nations of the world had agreed to suspend the "natural law of nations"[30] that denied

[26] Emerich de Vattel, *Le Droit des Gens, ou Principes de loi Naturelle, Appliques à la conduite & aux affaires des Nations & des Souverains, Tome Second* 3:74 (Bk. III, Ch. 13, § 193), at 170, London: Chez Benjamin Gibert 1758, translated as *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, edited and with an Introduction by Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008).

[27] See Neff, *War and the Law of Nations*, *supra* note 23, esp. Ch. 3, "War in Due Form"; also Schmitt, *Nomos of the Earth*, *supra* note 23.

[28] Samuel Freher von Pufendorf, *Two Books of the Elements of Universal Jurisprudence* (William Abbott Oldfather trans., Oxford: Clarendon Press, 1931), revised by Thomas Behme (Indianapolis: Liberty Fund, 2009), 57.

[29] Hugo Grotius, *de iure belli ac pacis* 1625, translated by William Whewell, as *On the Laws of War and Peace* (Cambridge: Cambridge University Press, 1853).

[30] Wolff, *supra* note 21, 2:402.

any right to use force to those lacking a just cause in order to resolve disputes in an orderly manner and minimize the costs and devastation of war. Some of the norms of the voluntary law of nations limited the use of force; others demanded that coerced peace agreements be binding so that it would be possible for wars to end. All of these rules applied to both sides, so as to avoid prejudging the merits of the dispute that the war was supposed to resolve. If you and I agree to resolve a dispute by playing chess, I am in no position to demand that you play without a queen because I am in the right. So too with war, according to these writers.

Both of these positions seek to make moral sense of war; each does so by bringing more general moral and legal ideas to bear on it. 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, only to reject 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, 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.[31]

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 right holders. Within a state, disputants are required to consult their superior—their sovereign or his magistrates—in order to resolve disputes. When disputes arise between sovereigns, however, no superior is available. If mediation, arbitration, lottery, and battle by individual champions are not acceptable to the parties to a dispute,[32] war is available as a last resort. War differs from these

[31] "On Charity," in Suárez, *Selections from Three Works*, *supra* note 17, at 818. Compare Vitoria's remark that "the prince has the authority not only over his own people but also over foreigners to force them to abstain from harming others; this is his right by the law of nations and the authority of the whole world." Vitoria, *Political Writings*, *supra* note 19, at 305.

[32] Grotius, Bk. II, Ch. XXXIII, *supra* note 29, at ss. vii–x (Whewell, 273–277).

alternatives 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 no empirical or conceptual space between victory in war and the resolution of the conflict. Force alone decides, but its result gives rise to a right on the part of the victor.

The just war approach attracted more philosophical attention in the modern period, but the regular war approach dominated law and international affairs. By the early twentieth century, the widely acknowledged legal, if not moral, position was that going to war was a sovereign prerogative. In the nineteenth century, leading writers about international law supposed that the voluntary law of nations, constituted by the customary conduct and implicit agreement of the nations that regarded each other as "civilized," displaced any competing background natural law of nations. In the middle of the last century, a leading international lawyer could write an article suggesting justice in going to war was not a legal concept at all.[33]

Kant is sharply critical of what he calls the "veil of injustice"[34] of the just war tradition and the "miserable comforters"[35] of the regular war tradition. Kant regards the most prominent scholastic just war writers as disingenuous apologists for European colonialism, and notes that the miserable comforters were always "duly cited" in justifications for aggressive war. Their defenses of such wars were not misapplications of their more general accounts, or even of lax standards within those accounts. The larger problem is that both approaches 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 feature of war because its focus on just cause presupposes that the question of who is in the right has already been resolved. The regular war tradition is not bothered by the realization that war is not about the merits, because it regards force as an agreed and therefore acceptable way for sovereigns to resolve their disputes.

Kant's objection to the legal metaphors that animate both traditions reflects a deeper objection to their conception of a legitimate legal proceeding, whether the enforcement of the judgment or the litigation of a claim. For Kant, any properly legal proceeding must be structured by what he

[33] See Arthur Nussbaum, "Just War: A Legal Concept?," *Michigan Law Review* 42(3) (December 1943), 453–479.

[34] 6:266.

[35] 8:355. He later (implicitly) describes them as "political moralists," that is, those who "[frame] morals to suit the statesman's advantage." 8:372.

calls "the right to be beyond reproach," the requirement that any wrongdoing be established against the presumption that the accused person has done no wrong. This idea structures the burden of proof in modern legal systems and marks its fundamental distance from older ideas of trial by ordeal, in which the accused person was presumed guilty, and only divine intervention could establish innocence. The just war approach rejects the presumption of innocence in favor of the idea that the aggrieved prince will investigate carefully; the regular war approach favors a "procedure" structured by nothing more than the might of the stronger.

The irresolvable tension between force and right leads Kant to the surprising claim that peace is the central concept in the morality of war. Kant's solution has two parts: an account of the distinctively public nature of a state, and an account of peace as an essentially public condition under which disputes can be resolved on their merits. War is "wrong in the highest degree" because it "hands everything to savage violence, as if by law."[36] War is the condition in which might makes right; peace is a condition in which, through the establishment of procedures, right guides might. Kant's characterization of the difference between peace and war is the systematic development of Cicero's older distinction between two fundamental ways in which human beings might conduct their affairs: through words and through the use of force.[37] Kant develops this idea to argue that peace is the condition in which legal institutions and procedures discipline all uses of force. On this Kantian view, a condition of peace is also a condition of law, one in which institutions are in place through which claims can be made and disputes resolved. Public institutions charged with making, applying, and enforcing law determine which norms can be enforced and who can enforce them. In bringing both conduct and enforcement under general and public rules, law limits uses of force to those that are publicly authorized under those rules. In a legal order, force is thereby subordinated to words, because any use of force requires legal authorization. The moral idea of legality and the idea of peace are therefore inseparable. Together they explain what is distinctively wrongful about war: war is on the wrong side of Cicero's distinction. As Kant observes, "it is difficult even to form a concept of this or to think of law in this lawless state without contradicting oneself."[38] Difficult, but not impossible: leaving

[36] 6:307.

[37] Cicero, *De Officiis*, translated by Walter Miller as *On Duties* (Cambridge, MA: Harvard University Press, 1913), 36–37. As Cicero puts it, discussion is proper to humans, force to animals.

[38] 6:347. In framing the challenge, Kant paraphrases (but does not endorse) Cicero's pessimistic conclusion, "When arms speak, the laws are silent." Cicero, *Pro Milone*. In Cicero, *Orations* (N.H.

a condition of peace and entering a condition of war is always wrong; conversely, "Right during a war would, then, have to be the waging of war in accordance with principles that always leave open the possibility of leaving the state of nature among states (in external relation to one another) and entering a rightful condition."[39]

## III. The Public Nature of the State

Kant's alternative rejects both the just war tradition's idea that the state is a moral agent with a universal mandate to right wrongs and the regular war tradition's view of the state as just one private actor in relation to other private actors. In place of these conceptions, the Kantian account focuses on the distinctively public nature of the state[40] as a public rightful condition, however defective. The sole purpose for which the state is supposed to act—"the idea of the original contract"[41]—is the provision of a rightful condition for its inhabitants. Kant's central idea is that something counts as a public legal order if it has a structure that can be understood as a defective attempt to provide such a condition. All legal orders will be defective in relation to the ideal case of a united people ruling itself through its institutions. If a social order has sufficient structure, however defectively realized, it qualifies as a state. As such, it is obligated and thereby entitled to do justice between those on the territory where it exercises power by making, applying, and enforcing laws. It is thereby obligated to provide the necessary institutions and structures, everything from courts of law and 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 requirement that citizens govern themselves through law and in which no private person is subject to the determining choice of another.

Watts trans., Cambridge, MA: Harvard University Press, 1913), 16–17. Cicero's remark is often brought forward in the context of war, but he is discussing individual defense against armed attack.

[39] 6:347.

[40] I will follow Kant in using the words "state" and "nation" interchangeably. Kant remarks that the people of a state must be presumed to have inherited it (hence Kant's use of the Latin term for nation, *gens*), not because they cannot have come from elsewhere, but rather because how the state came into being, or how particular human beings came to be its members, has no bearing on the state's relations with any other state. 6:311.

[41] 6:315.

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 objections to 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. It 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.

In addition to these implications for the state's internal organization, this conception of the state as a public rightful condition governs its external relations. Like other writers in the eighteenth century, Kant represents nations as in a "state of nature" in relation to each other and treats their relations as analogous to those between private individuals. Unlike those other writers, 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. As we will see in Chapter 2, the same reasoning leads him to treat a state's territory as the place it is entitled to exercise jurisdiction, rather than as its property or even its body. The fact that borders between states are typically the products of unjust wars does not undermine any state's claim to political independence and territorial integrity. Kant argues that the rights of individual human beings can only be secured within a legal order, through its provision of institutions capable of making, applying, and enforcing laws on behalf of, and so consistently with, the freedom of everyone.

Public legal institutions secure individual rights through their procedures, but the origins and external legitimacy of a state cannot be subject to any such procedures. Until the state comes into being, there are no such procedures and no state to comply (or not) with them. Its right against invasion by other states therefore cannot be conditional on coming about through a legal process, because no such process could exist prior to the state. Any such requirement would require the state to precede itself in order to be legitimate. Instead, each state's claim against invasion does not depend on its having come into being or acquired its territory in the right way.

The relation of states as against other states follows from this distinctive nature. As an artificial person, a state is not free in the way that natural persons are. The difficulty is not that a state lacks psychological capacities, or the full freedom of self-determination that Kant elsewhere identifies with *wille*.

Instead, the limitation follows from its distinctive role in relation to its citizens. A state lacks the free purposiveness of a natural person because its existence and its moral status depend on its fixed purpose, that is, its provision of a rightful condition for those over whom it exercises power. 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, beyond its competence.

The essentially public character of the state also restricts how others may treat it; as against other states, it is private in that no other state is entitled to tell it what purposes to pursue; one state does not wrong another by providing a rightful condition (even a defective one) for the inhabitants of its own territory. Instead, one state only wrongs another by interfering with it. If no state has authority over another, then each state is, as against other states, sovereign—*sui iuris*. The internal organization of a state, as such, is not a wrong against any of its neighbors. This does not mean that barbarism or genocide within a state is not a concern to outside states; the point is rather that the basis of any such concern cannot be found in the right of some other state.

Kant's account of the public nature of the state marks a fundamental departure from both the just war and the regular war traditions. It shapes the ways in which the law of war is not merely the application of a general morality of enforcing justice or resolving private disputes to a special case. The just war tradition's conception of the state as each of prosecutor, judge, and executioner reflects its conception of the scope of the state's mandate and executive authority as universal rather than public.[42] On this view, common to views otherwise as different as those of the Salamanca scholastics and the English utilitarians, any seemingly distinctive powers the state has follow from the fact that it is well positioned to give effect to a set of moral demands that are already complete without any reference to the existence of states. The just war tradition sees uses of force that Kant contends can only be exercised by the officials of a public rightful condition—seeing to the repairing of wrongs and the punishment of wrongdoers—as ones to which a state may find itself in a position to give effect beyond its borders. For the just war writers, a state's role within its borders is merely a matter of being effective in meeting

[42] In criminal law, different organs of the state perform these functions; most notably, the judiciary is supposed to be independent of the legislative and executive branches.

those same moral requirements. Thus, for the just war tradition, the duty to prevent wrongs and punish wrongdoers are instances of a perfectly general power, both within and sometimes outside its territory, rather than as an aspect of the state's provision of a rightful condition for those over whom it rules. For the same reasons, the leading writers of the just war tradition insisted on an expansive conception of "cosmopolitan right," including the right to see to it that all regions of the earth were used effectively and to go to war against those who stood in the way of such effective use. Kant repudiates this "veil of injustice" not only because it was used to apologize for brutal forms of colonialism but also because any claim to general universal executive jurisdiction based on (asserted) correctness is a wrongful usurpation of political authority. The Kantian idea that a state has a distinctive public mandate, limited to providing a rightful condition to its inhabitants, precludes this kind of universal mandate.

The regular war tradition, by contrast, understands the relation between the state and its citizens as essentially private. In both *Toward 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. Unsurprisingly, this conception of the relation between ruler and ruled as fundamentally private 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*. For Kant, the early modern practices of marrying, selling, exchanging, bequeathing, or donating a state[43] that follow from this patrimonial conception of the state are necessarily inconsistent with right.

The regular war tradition is today less visible than it was in Kant's time, but its influence remains. Some contemporary just war writers have put forward a version of the Wolffian idea of a "voluntary law of nations" to explain and justify international law's departures from what they describe as the deep morality of war, most strikingly, its application of the same rules to both sides in a conflict, including its protection of civilians and prisoners of war.[44] A more troubling example is the renewed interest in and influence

[43] 8:344.

[44] Jeff McMahan, "The Morality of War and the Law of War," in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford: Oxford University Press, 2008), 19–43; Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017); Yitzhak Benbaji and Daniel Statman, *War by Agreement* (Oxford: Oxford University Press, 2019).

of Nazi legal theorist Carl Schmitt, who contends that politics is organized around the distinction between friend and enemy. For Schmitt, the sovereign is "he who decides the exception," that is, he who determines whether the state is threatened by an enemy, and in so doing the sovereign decides who is an enemy.[45] The grounds of that decision are not subject to any internal standard. Instead, a Schmittian sovereign unilaterally defines its own mandate. Schmitt takes it to be a sociological feature of the modern world that sovereigns will appeal to popular sentiments, whether imperfectly through electoral politics, or ideally, through acclamation, in the form of street demonstrations and the like. But such features are presented as factual conditions of homogeneity; although they may affect the content of the decision taken, they do not provide a ground or basis for it.[46] For Schmitt, the sovereign who ignores street demonstrations (or decides which ones count as acclamation) does not abuse his office, because it is in the nature of the office to decide its own scope. Put differently, Schmitt's political thought is often described as a form of "decisionism." Decisionism has the same structure as the basic norm of property—the owner gets to decide the purposes for which the thing will be used—and so his view of politics is an expression of the private conception of the state. That conception is no less troubling when it takes the form of populism according to which the private choices of voters are aggregated through some procedure. It is no surprise that in his 1950 work, *The Nomos of the Earth*, in which he works out the implications of this view for war, Schmitt advocates what he calls the "non-discriminating" concept of war he finds in Grotius, Pufendorf, and Vattel.[47] For Schmitt, it is always open to a sovereign to decide to use force for whatever grounds he sees fit. As such, the Schmittian account not only must reject the just war tradition's idea of just cause; it must also deny the significance of the distinction between aggressive and defensive war.

Kant also identifies the private conception of the state 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."[48] If states are essentially

[45] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans., Chicago: University of Chicago Press, 1985), 5.

[46] See the discussion in David Dyzenhaus, *Legality and Legitimacy* (Oxford: Oxford University Press, 1997).

[47] Schmitt expresses special disdain for Kant, both accusing him of presupposing a distinction between public and private law "which only took effect later," and insinuating that his conception of an unjust enemy as one who makes peace impossible itself makes peace impossible, turning every war into a "crusade." Schmitt, *The Nomos of the Earth*, *supra* note 23, at 46, 171.

[48] 8:351.

private and subject to the claims of private right, disputes about them will multiply and war becomes a means of acquisition.[49] Kant's rejection of the proprietary or patrimonial conception of the state leads to a broader rejection of the idea that a state or its territory can be acquired at all.

If, instead, as Kant agues, a state is essentially public rather than either private or universal, it is only entitled to act for public purposes. The only external purpose for which it could act is the preservation of its own (current) rightful condition, or of peace more generally. 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 other states, to expend 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?[50]

The state may not treat its citizens as natural products to be used or put in peril for the ruler's private purposes.[51] 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.[52] Such a state would fight only when it judged that it had to, which is to say, only defensively.

[49] Grotius 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, *supra* note 28.

[50] 6:344.

[51] 6:345.

[52] In the *Doctrine of Right*, Kant also insists any war must first be authorized by citizens through their representatives (6:346). This claim 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 rulers. As James Q. 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; 8:344) reflects 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* (Cambridge, MA: Harvard University Press, 2012).

That is also the only ground on which a state does not wrong its citizens by requiring them to fight or to pay for others to do so.

The just war tradition's 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 war writers move back and forth between specifying necessary conditions for war to be permissible and sufficient ones for which it is mandated. Even the doing of justice—as judged by a sovereign who is, Suárez concedes, the judge in his own case—fails to be a properly public purpose into which citizens and their possessions can be rightfully conscripted. So in addition to the difficulty of justifying one state's entitlement to attack another on punitive or remedial grounds, the satisfaction of the multiple requirements of just war theory do nothing to establish the state's entitlement to compel its citizens to support, let alone participate in, such adventures.

The problem faced by both traditions is that a state has neither internal standing as against its citizens nor external standing as against another state to make and act on judgments of international right. The just war and the regular war traditions are alike in their refusal to accept this: the regular war tradition asks for only a colorable claim of right; the just war tradition, for the sovereign to conclude it has 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 something that only the powerful can do. That is why both lead to too much war; each regards war as an appropriate way of realizing an ordinary public purpose, either the punishment or remedying of wrongdoing or the adjudication of disputes. Clausewitz's famous remark that war is the continuation of politics by other means fits both the just war and the regular war approaches. Both understand war as a way in which a state goes about some aspect of its ordinary legitimate business.

## IV. Not on the Merits

The second pillar of Kant's account is that the fundamental feature of war is that it is the condition in which force decides, independently of the merits of either party's claim in the dispute. This distinctive immorality generates a distinctive set of moral demands: anyone asserting a claim seeking to establish a right must do so in a way that is consistent with leaving that condition and entering a condition in which claims can be decided on their merits.

The norms governing force must, then, be those that govern the assertion of claims of right in the absence of authoritative public legal procedures. Kant's argument is that those norms must be structured by the need to replace force with law.

*The Right to Be beyond Reproach*. From Kant's perspective, both the just war and the regular war approaches use juridical metaphors that are out of place in relations between nations, because both are incompatible with moral relations between states. Any morally acceptable procedure for enforcing or resolving claims of right must be structured by the requirement that the claim be established by the party asserting or enforcing it, which Kant characterizes in the individual case as the "right to be beyond reproach."[53] In domestic legal systems, this requirement demands that the burden of proof lies with the party who alleges a wrong has been done.

A legal order is the only condition in which the right to be beyond reproach can be secure, because only in such an order are public procedures available to address allegations of wrongdoing. Private punishment is never legitimate, because nobody has standing to act on or enforce a judgment about another's wrong, *even if that judgment is true*, in the absence of impartial procedures that have been applied to both accuser and accused on behalf of everyone including, again, both accuser and accused. For all of the same reasons, there can be no private (that is, extralegal) remedies in the case of a private wrong. You are only entitled to exact a remedy if you have established, through appropriate public procedures, that another has wronged you. If you and I have a dispute in a legal order, I can take you to court, and the burden then lies with me of convincing the court of my claim; you do not need to defend yourself but are entitled to do so. If I fail to make my case, you do not need to mount a defense: you are entitled to the disputed object or right unless I can establish that you are not. The entire proceeding is thus structured by your right to be beyond reproach. In the absence of such a court, however, I am not entitled to compel you to participate in a procedure, let alone to compel you to participate in a mechanism that bears no relation to the merits of our underlying dispute.

Both the just war and the regular war approaches model war on procedures that are unavailable outside of a legal order. The just war model supposes that a state can act as prosecutor, judge, and executioner of a judgment, a set of roles that cannot be combined consistently with each other or with the

[53] 6:238.

right to be beyond reproach of the accused party. The regular war tradition makes a different mistake: in assimilating war to a legal proceeding, it leaves out the distinctive feature of legality, the fact that a procedure must be structured by the right to be beyond reproach. A war in which the two belligerents submit themselves to Pufendorf's "dice of Mars" is not structured in that way. It is not that one side needs to make a prima facie case and then the other to respond; instead, each side goes all out to defeat the other. It is more like a game of skill or chance, with no presumptions structuring it. Such a contest is not structured by the presumption that the party against whom the war was initiated had done no wrong; it is structured only by force. Nor is there any reason to suppose that the party in the right will be victorious. Because might does not make right, the "procedure"—that is, the war and the peace treaty that follows—does not so much *resolve* the dispute as *end* it; it determines the terms on which the parties must go forward, rather than justifying them. Even if both sides in the war agreed to resolve their dispute in this way, what they do is still inconsistent with the parties interacting on the basis of their rights, and so, in Kant's words, "wrong in the highest degree."

## A. Finding Right in a Condition of War

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."[54]

This may seem disturbingly close to the regular war approach. Kant's rationale is fundamentally different, however: absent some pre-established harmony,[55] force and right are not aligned, so a procedure that turns on force gives up on right. As Kant remarks, it is "difficult even to form a concept" of "law in this lawless state without contradicting oneself." Difficult, but not

[54] 6:346.

[55] At various times in human history, people appear to have thought differently. Dante, in his *Monarchia*, argued that the military successes of the Romans showed that God intended for them to rule; he took success on the battlefield as a measure of the moral merit. "By now it is sufficiently clear that what is won through trial by combat is won by right. But the Roman people acquired the empire through trial by combat." Dante Alighieri, *De Monarchia* [1559] (Prue Shaw trans., Cambridge: Cambridge University Press, 1996), Bk. 2, Ch. 9, Para. 12, at 56. It may be that medieval trials by battle worked on something like this model.

impossible: right during war "would then, have to be the waging of war in accordance with principles that always leaves open the possibility of leaving the state of nature among states."[56] That is, the grounds and conduct of war must be consistent with future peaceful resolution of disputes; war, horrible though it is, must be conducted in a way that leaves open the possibility of a future peace. For Kant, peace is not merely the absence of open fighting, in the form of an ongoing ceasefire; it is a positive condition in which states accept that disputes will not be resolved through force, but instead on their merits as established through shared procedures. As we will see in Chapters 4 and 5, the duty to fight in a way that makes a future peace possible can be followed (or violated) by both sides in a war, apart from the question of which one has a just cause. When Kant suggests something analogous to a contract by which the belligerents have accepted that they will "resolve their dispute in this way," the only terms to which they could agree are those consistent with the possibility of a future peace. A state, understood as a public rightful condition, lacks the moral power to agree to barbaric dispute resolution; the only thing states at war would be entitled to accept is using force in ways consistent with a future peace.

The positive role of peace sheds further light on the misconceptions common to the just war and the regular war traditions. Peace restricts both the possible grounds of going to war and the means through which war can be fought. It restricts the grounds because, although each side in a war purports to be making a claim of right, the only claim of right it could be entitled to make in the absence of authoritative public procedures is defensive, that is, a claim to be entitled to what it already has, rather than any claim to redress or punish past wrongs. If that is the only claim of right that a belligerent can make, then it cannot use any means other than those consistent with that very claim, that is, the means that it could use in defending its political independence and territorial integrity. Further, as we will see in detail in Chapter 4, it cannot use any means inconsistent with the possibility of a future peace, most prominently, any form of perfidy—of which the paradigmatic instance is a false surrender—could never be rightful. These two restrictions on means generate the limits on the conduct of war: the prohibition on perfidy holds out the possibility of a future peace; the prohibition on targeting noncombatants enables wars to end by limiting the class

[56] 6:347.

of participants in a war and enabling those who do participate to exit war at any time.

Kant's position on war reflects a more general view that disputes can only be resolved on their merits in a condition of peace. 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 even if not based on their merits. Conversely, the right to go to war is limited to national defense because peace requires that the past be settled so that the results of past disputes can give no new grounds for war. 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.[57]

That is just to say that peace can only be achieved if the past is taken by all to be settled, that is, if everyone accepts that past disputes are fully and adequately resolved, even though their resolution was through force, and so although not necessarily inconsistently with their merits, not necessarily on the basis of those merits. Otherwise, peace would always have to precede itself and so finally be impossible. Peace precludes future wars by accepting the results of past ones.

Still, the thought that aggressor and defender have agreed or "must be taken to have agreed to resolve their dispute" through conflict may seem forced. Even if the formalities of declarations of war are observed, or the belligerents expressly agree to a "pitched battle" in which eighteenth-century monarchs willingly submitted their disputes to what they regarded as a game of chance,[58] fighting a war is not a joint activity in which the belligerents participate together. That is exactly Kant's point: belligerents can only permissibly engage in it in a way that is consistent with it *becoming* a joint activity, namely, that of negotiating and entering into a condition of peace. Neither side is entitled to initiate a war; nor can the two sides agree to resolve a dispute through war. But if they find themselves in the midst of a war, regardless of who started it, they must be taken to have agreed to conduct it in a way that

[57] 8:343–344.
[58] See Whitman, *The Verdict of Battle*, *supra* note 52.

is consistent with future peace—to conduct it in a way that allows the violent conflict to end—and so with the possibility of governing interaction through agreement.

The requirement that war be conducted in a way that is consistent with the possibility of future peace has implications for each of the elements of the law of war. First, it will limit the permissible ground of war—*ius ad bellum*—to preservation of peace, the central case of which is national defense. Second, it will limit the norms governing the conduct of war—*ius in bello*—to those consistent with a future peace, prohibiting perfidy and the targeting of those who are not part of the war, on the grounds that doing these things is inconsistent with a future peace. These prohibitions apply to both sides in a war, not, as the regular war writers suggest, because the parties have agreed to them, but rather because violating them is inconsistent with future peace, and so is a distinctive type of wrongdoing specific to the organized use of force. Third, it will impose restrictions on what happens after a war. War must not "become a way of acquiring,"[59] but once a dispute has ended through force, the belligerents must go forward on the assumption that force has indeed resolved it.

I will also show that the same approach has fundamental implications for *post-bellum*: Kant writes:

> 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 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.[60]

The war did not resolve the dispute on its merits; as such, although the victor is indeed victorious, any claims established through war depend on force rather than right. A peace treaty 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."[61] Nor, as we will see in Chapter 8, can it reduce

[59] 6:342.
[60] 6:348.
[61] 6:349.

the defeated state to the status of a colony.[62] Nor, as we will see in Chapter 6, can it punish enemy combatants for having fought an aggressive war.

## V. Some Contrasts

My aim in this book is to articulate Kant's views about war in a systematic fashion, drawing on his broader account of the nature of rightful relations between human beings and on his account of the legitimate use of force. In so doing, I hope also to bring it to bear on contemporary debates, both philosophical and political. Kantian philosophy operates at one remove from political institutions and debates, and, indeed, one of its central messages is that morality is incomplete in the absence of public legal institutions, and so incomplete in the absence of positive law. The role of a philosopher in a free and democratic society is not to serve as either an open or secret adviser to governments. The Kantian account rejects the idea of a philosopher king, not only out of disdain for the hereditary and hierarchical nature of monarchy but, more significantly, because the questions the philosopher is able to answer concern the broad structure of forms of thought, not their particular implementation in a concrete historical and political context.[63] From the principle of right, one must move to a "principle of politics" informed by "experiential cognitions of human beings."[64] Right must never yield to politics, but for all of the same reasons, right must not pretend to displace politics.

This approach to the law and morality of war contrasts with two other prominent approaches, one to morality, and the other to Kant's writings about politics and war. It is appropriate that I say something about why I reject each of them.

[62] I explain Kant's objections to colonialism in detail in Chapter 8.

[63] For a recent statement of the Kantian rejection of the idea of the philosopher king, see Jürgen Habermas, "¡Por Dios, nada de gobernantes filósofos!," *El Pais Seminal* (May 10, 2018). "Look, I am of the antiquated opinion that philosophy should continue trying to answer Kant's questions: what can I know? what should I do? what may I hope for? and, what is the human being?" These are questions for philosophers, not for kings.

[64] "On a Supposed Right to Lie from Benevolent Motives," 8:429.

## A. Applied Moral Philosophy

Contemporary philosophical writing about war has been shaped by a movement that has come to be described as "revisionist" just war theory, although much of its structure follows the just war tradition of the Salamanca scholastics. There are, to be sure, fundamental differences. The Salamanca scholastics were generally sympathetic to the uses of war made by their rulers, defending, as we saw, the Spanish conquest of the Americas. Revisionists are much more suspicious of powerful contemporary governments; Jeff McMahan, who is arguably the most prominent revisionist, has long been a trenchant critic of uses of force by the United States and its allies.[65] The similarities lie in the way in which they regard morality as complete in the absence of legal institutions and regard those institutions as having at most a causal role. Contemporary revisionist writers also often endorse the regular war tradition's conception of legal rules as a mutually beneficial compromise with morality.[66] At various points in this book, I engage with the contemporary revisionist literature, more frequently in footnotes than in the main text. I note here several distinctive methodological assumptions of a Kantian approach.

The first of these is that there is a fundamental distinction between questions of right (*recht*) and questions of virtue (what Kant calls "ethics" [*tugend*]). Right is concerned exclusively with the "external" relations between persons, whether individual human beings or artificial persons.

The distinctive status of right shapes Kant's attitude toward examples. On an approach that has been prominent in much recent philosophical writing about morality in general and war in particular, moral norms are assessed by the construction and examination of intricate and elaborate examples involving runaway trolleys, charging carnivores, human projectiles hurtling toward trapped people, and human stoppers blocking paths of escape. This approach assumes that by comparing intuitive verdicts about such cases, morally relevant factors can be identified, and then classified. The Kantian approach must reject this strategy; as Kant remarks in the closing pages of the *Doctrine of Right*, "all examples (which only illustrate but cannot prove anything) are treacherous, so that they certainly require a metaphysics."[67] That

[65] Beginning with his *Reagan and the World* (New York: Monthly Review Press, 1985).

[66] For two very different recent statements, see Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017); and Yitzhak Benbaji and Daniel Statman, *War by Agreement* (Oxford: Oxford University Press, 2019).

[67] 6:355.

metaphysics requires a general account of the different forms of interpersonal interaction. The general principles properly governing human interaction are abstract; on their own they do not classify particulars. In practical thought, unlike, perhaps, some other domains, we have a far firmer grasp of certain kinds of distinctions than we do of particular cases, since particular cases require an exercise of practical judgment.

This Kantian approach to examples is embedded in a broader understanding of the role of judgment in bringing abstract moral ideas to bear on particular cases. The concepts that are relevant to the morality and legality of war—aggression, defense, surrender, participation—are abstract and often raise difficult questions of application. Defensive force can be used against those who are attacking or participating in the attack, but participation can be understood broadly or narrowly: it does not include everyone who contributes to military success (medical personnel may not be targeted even though they contribute). The relevant concepts are somewhat open-ended, and one of the important functions of positive law, both domestic and international, is to further specify their content.

This understanding of the structural features of moral thought prevents the Kantian account from providing detailed advice to the individual combatant about what to do in a specific situation. The demand for such direct application figured in the writings of the Salamanca scholastics. Many contemporary revisionist writers about war also consider it essential. Where the Salamanca scholastics thought that their general accounts were to be supplemented by pastoral casuistry, many contemporary writers think that a complete moral theory must be able to provide guidance on every question. The Kantian account does not provide such answers or suppose that the principal obstacle to providing them is lack of information. Instead, it provides resources for framing the moral issues surrounding war.

It would be a mistake to assign any sort of consensus view to revisionist writers. Nonetheless, many begin with an insistence that their views follow from a certain kind of individualism about morality in general and the morality of war in particular. This conception demands that the fact that wars are fought between larger units, that is, nations, introduces no new moral principles. As a leading revisionist writer puts it: "War is, moreover, continuous with other areas of human activity. It differs from other conflicts, including individual self-defence and other-defence, only in scale and complexity."[68]

[68] Jeff McMahan, "Laws of War," in John Tasioulous and Samantha Besson (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 505.

On this view, principles governing individual uses of force are sufficient to determine the full range of permissible actions in wartime.

Cécile Fabre sums up this approach when she writes, "human beings are the fundamental and primary loci for moral concern and respect and have equal moral worth. It is individualist, egalitarian, and universal, and insists that political borders are arbitrary from a moral point of view, and more precisely ought not to have a bearing on individuals' prospects for a flourishing life."[69] This conception of individualism understands the relevant individual morality exclusively in terms of all-things-considered judgments about what is permissible, where those judgments are, as Fabre puts it, rooted in judgments about the effect of various courses of action on individual prospects for a flourishing life.

Kant is committed to a fundamentally different conception of individualism. Rather than seeing individual human beings as things whose well-being matters, Kant focuses on the fundamental moral status of individuals as persons rather than things, each of whom is entitled to be independent of the choice of each of the others. As such, Kantian individualism must reject the characterization of moral significance in terms of promoting "prospects for a flourishing life." The idea of independence cannot be reduced to any idea of well-being or comparative well-being or opportunity; instead, it is a matter of how things stand between two persons, of whom neither is the superior nor the subordinate of the other. "Superior" and "subordinate" are irreducibly relational concepts; nobody could be superior or subordinate except in relation to some other person, and relations of subordination are objectionable even if they do not set back any person's nonrelational interests.

On the Kantian view, then, interpersonal morality is always focused on how things stand between people, and therefore concerned with which person is entitled to decide about some matter. In the simplest case, you, rather than anyone else, are the one who is entitled to decide about what purposes you pursue and what others do with or to your body. The issue of who is allowed to answer a question and on what grounds governs the ways in which people are entitled to treat each other, how officials are entitled to treat ordinary citizens, when nations are allowed to use force, and the moral and legal status of people from other countries. All of these questions concern the use of particular means on specific occasions. I cannot take it upon

[69] Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), 16.

myself to decide what purposes you pursue, or how your property will be used; the state has powers to tax, regulate, and prohibit various activities, but some things are outside the scope of its power.

The same structure animates the private law of property and contract; it, too, is about who decides about which question rather than the actual or anticipated effect of various proposed rules on well-being. Ideas of interpersonal authority shape public law in another way, creating public legal institutions charged with making, applying, and enforcing law on behalf of everyone subject to their power. As I will explain in detail in Chapter 2, Kant argues that individual human beings can only enjoy their freedom under a system of public law. Any such system requires that officials have powers that no individual human being could have in the absence of a legal order. The significance of those institutions is in providing an alternative to what Kant describes as "savage violence," by creating a situation in which human beings can enjoy their respective independence of each other.

In addition to providing a distinctive understanding of public legal institutions, the Kantian conception of interpersonal morality provides a distinctive set of questions for thinking about both the morality and the law of war. First, because it supposes that morality is fundamentally incomplete in the absence of public legal institutions, it brings familiar legal and moral questions about war—questions about nations rather than individuals, and questions about distinctive statuses such as combatant or prisoner of war—into sharper focus. It also demonstrates the importance of these questions on their own terms. The vocabulary in which international law frames them is not a proxy for a different moral vocabulary but rather the fundamental moral vocabulary in the context of war. Second, it asks distinctively relational questions about how things stand between a state and a combatant fighting against it, or whether someone is part of an attack, in place of an all-things-considered question of whether a particular killing that happens to take place in the course of a particular war is morally justified.

## B. Peace as an End: The *Doctrine of Right* and the Philosophy of History

Writers about war, beginning with Cicero, have insisted that the goal of war must always be peace. Many of those writers regarded peace and security as an external end, that is, a desirable result, the prospect of which would justify

going to war.[70] If peace is represented as an external end, the choice of norms of war would be empirical, and it would always be possible to decide that a norm could be violated when doing so was more likely to hasten peace. Francis Lieber, whose codification of the *in bello* rules of war is widely said to have shaped later documents, thought that increasing the suffering brought about by war would be better because the higher costs would lead to peace more quickly.[71]

Kant regards peace as the end of war differently: his claim that "establishing 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"[72] represents peace as an internal rather than an external end, because "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*."[73] As the internal final end of rightful interaction, peace also restricts the means that can be used in its own production.

Kant's conception of peace as an end is also independent of his philosophy of history. He discusses war and relations between nations in his *Idea of a Universal History with Cosmopolitan Aim* (1784), which purports to "discover an aim of nature in this nonsensical course of things human; from which aim a history in accordance with a determinate plan of nature might nevertheless be possible even of creatures who do not behave in accordance with their own plan."[74] His answer identifies the realization of human capacities as the end of history and "unsocial sociability" as the mechanism through which this will be achieved. In the "First Supplement" to *Perpetual Peace*, Kant similarly points to a variety of mechanisms though which peace might be realized, including commerce, differences of language and religion, and even war.

In developing the Kantian account of war, I put these discussions to one side, because I take Kant at his word when he insists that they have no bearing on any question of right. Although some critics have misread these

[70] "The only excuse, therefore, for going to war is that we may live in peace unharmed." Cicero, *De Officiis*, *supra* note 37, at 37.

[71] "The more vigorously wars are pursued," Lieber wrote, "the better it is for humanity. Sharp wars are brief." Instructions for the Government of Armies of the United States in the Field (Lieber Code). April 24, 1863. Section I: Martial Law—Military Jurisdiction—Military Necessity—Retaliation—Art. 29.

[72] 6:355.

[73] 6:355.

[74] *Idea for a Universal History with a Cosmopolitan Aim* (Allen Wood trans., Cambridge: Cambridge University Press, 2009), 11.

works as offering a justification for war or colonial conquest,[75] Kant's more general views about both teleology and right preclude any such reading. Kant characterizes the role of teleological concepts in terms of the "concept of a thing as a natural end," which he explicates as "a thing in which each part is conceived as if it exists only through all the others, thus as if existing for *the sake of the others and on account* of the whole" and each part as "an organ that *produces* the other parts."[76] He goes on to explain that "the concept of a thing as in itself a natural end is therefore not a constitutive concept of the understanding or of reason, but it can still be a regulative concept for the reflecting power of judgment, for guiding research into objects of this kind and thinking over their highest ground in accordance with a remote analogy with our own causality in accordance with ends; not, of course for the sake of knowledge of nature or of its original ground."[77] Kant also describes the human being as the "ultimate end of nature here on earth,"[78] only to conclude that any attempt to hasten the realization of the end will be self-destructive and at most haphazardly and indirectly progressive. As with natural teleology, so with history: any teleology one might purport to find in history cannot provide a justification for anything other than hope that peace is not an unattainable goal, and with it the determination to refrain from acting in ways inconsistent with it. More significantly, the independence of right entails that right is not in the service of any end that is external to it, and so no external end (as either peace or the full development of the human species, understood teleologically, would have to be) can underwrite any novel permission to make war.

Rather than peace being an external purpose because it makes explanatory sense of the nonsensical course of history, then, any connection would have to go in the opposite direction: peace is the *telos* of history because it is the internal final end of right. The course of history could only be anything other than nonsensical if it is, despite all appearances, tending toward peace. The most the philosophy of history could do is provide a way to hope that refraining from using wrongful means will not prevent peace from eventually being achieved. In *Perpetual Peace*, Kant rejects the idea that peace or moral progress is a technical task, disparaging the "political moralist" who

[75] See, e.g., James Tully, *Strange Multiplicity* (Cambridge: Cambridge University Press, 1995); and Seán Molloy, *Kant's International Relations* (Ann Arbor: University of Michigan Press, 2017).

[76] *Critique of the Power of Judgment* (Paul Guyer trans., Cambridge: Cambridge University Press, 2000), 5:373–374.

[77] *Id.* 5:375.

[78] *Id.* 5:429.

treats peace as "a mere technical problem," pointing out that theoretical cognition of human affairs "is uncertain with respect to its result."[79] Right is not a matter of prudence in relation to an end but rather of morality, which "has in it the peculiarity—and indeed with respect to its principles of public right (hence with reference to a politics cognizable a priori)—that the less it makes conduct dependent upon the proposed end, the intended advantage whether natural or moral, so much the more does it harmonize with it on the whole."[80] By the time Kant concludes the *Doctrine of Right,* the only thing that is required to underwrite the hope of peace, and so the rationality of working toward it, is that its impossibility cannot be demonstrated, even if "there is not the slightest theoretical likelihood that it can be realized."[81]

In rejecting the idea that the morality or law of war is a tool in the service of achieving something else, the Kantian approach offers no hypothesis about the origins of the law or morality of war. The law of war has developed over a period of centuries, and legal historians have documented various concrete circumstances that led to various developments, usually in response to the horrors of a recent conflict. Other scholars present the modern law of war as the product of a modus vivendi struck by a group of amoral and self-interested actors. In *Toward Perpetual Peace*, Kant suggests that the problem of right is "soluble even for a nation of devils (if only they have understanding)."[82] Some might find it interesting to speculate about whether a nation of devils would settle on principles of right governing war, for example, whether powerful nations would be receptive to calls to outlaw war just as their opportunities for further colonial conquest were exhausted, or whether they agreed to use less damaging weapons or the protection of civilians and civilian installations because they thought it would make war less expensive.[83] A different social-science account sees the *in bello* rules as a tit-for-tat equilibrium between enemies, both of whom can see that defection will be too costly. Sunnier pictures of the law of war present it as a series of utilitarian innovations, designed by well-meaning and public-spirited international lawyers and bureaucrats who were resigned to the fact of war and concerned only to limit its carnage or minimize its worst effects. Yet another account,

[79] 8:377.
[80] 8:378.
[81] 6:354.
[82] 8:366.
[83] See Eyal Benvenisti and Doreen Lustig, "Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874," *European Journal of International Law* 31(1) (February 2020), 127–169.

which figures explicitly in the narrative of the International Committee of the Red Cross, represents international humanitarian law as designed only to limit suffering, and its requirement of symmetry as grounded in the fact that both aggressors and defenders must be urged to mitigate the suffering they cause.[84] Still another historical account sees the *in bello* rules as the holdover of a chivalric code of conduct.

I put all such speculations to one side; the Kantian account articulates a powerful way of thinking about war's distinctive morality by thinking about war's distinctive immorality. The appropriate assessment of such an account is moral. It does not depend on establishing or even imagining that people who ignored or dismissed Kant were secretly influenced by him. Instead, by developing a Kantian account, I seek to identify a distinctive way of looking at problems of war. The restriction of the grounds of war to defensive war and the sharp distinction between *ad bellum* and *in bello* rules of war are already in place in Kant's discussion of the Right of Nations in the *Doctrine of Right*. In drawing attention to Kant's development—I will not say "anticipation"—of these ideas with contemporary resonance, I am not, I repeat, putting forward a historical hypothesis.

## VI. 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; but war is the wrong means for achieving any result; the only acceptable ground of war is the preservation of peace, and the only acceptable way to conduct it is in a way that is not only consistent with but structured by the possibility of a future peace. Despite its horrors, war is not to be grouped with mud, hair, and dirt,[85] as something that simply is what it is. Even in horrific circumstances, morality still has something to say, even if neither side will listen.

[84] Notably in the introduction to Henry Dunant, *A Memory of Solferino* (Geneva: International Committee of the Red Cross, 1986). The immediate priority for Dunant was eliminating weapons that lead to slow and painful death.

[85] Plato, *Parmenides* (Mary Louise Gill and Paul Ryan trans.), in John M. Cooper and D.S. Hutchinson (eds.), 130d 3–5, Plato, *Complete Works* (Indianapolis: Hackett, 1997), 364.

# 2

# Political Independence, Territorial Integrity, and Private Law Analogies

The steady, if uncertain, march of globalization has led many people to conclude that the idea of the territorial state has outlived its usefulness. Kant is invoked on all sides of these debates. He defends not only individual rights and cosmopolitanism but also the territorial state. This chapter will examine his development of these ideas, situating them in his public conception of the state and his concomitant conception of each state's right to political independence and territorial integrity. Once the public nature of a rightful condition is understood in the right way, political independence and territorial integrity are different formulations of a single idea, which is inseparable from the idea that the state is charged with upholding individual rights. Taken together, they give shape to a distinctive understanding of the global legal order.

I will explain Kant's position from two directions: first, in terms of the distinctively public nature of a rightful condition, and second, in terms of the private law analogies Kant deploys in describing relations between states outside of global legal institutions. For example, in *Perpetual Peace*, he remarks that "apart from some kind of rightful condition, . . . the only kind of right there can be is private right,"[1] suggesting that although each state is itself a public rightful condition, absent a global legal order, their relations to each other cannot be other than private.

Kant understands the state as the solution to a set of moral problems that necessarily arise in the absence of legal and political institutions, "no matter how good and right-loving human beings might be."[2] This account contrasts with both the private conception of the state that figures prominently in the writings of Grotius, Pufendorf, and Vattel, as well as the universal and

[1] 8:383.

[2] 6:312. The translation is modified from Gregor, substituting "right-loving" for "law-abiding," as suggested by Helga Varden. The most recent Cambridge edition of the Gregor translation of the *Metaphysics of Morals*, edited by Lara Denis, adopts Varden's translation.

instrumental conception of the state that figures in Thomistic and scholastic just war theory and, in a different form, in utilitarian conceptions of the state. I briefly fill out Kant's reasons for conceiving of the state in this way, by looking to the distinctive problem of right to which the state is a solution, in order to explain why states, understood as public things, stand in horizontal, private legal relations without themselves being private. I articulate the international law analogs of the three titles of private right, explaining how territory differs from property and treaty from contract, and the specific form of status relations between nations. I conclude with a brief discussion of the ongoing relevance of these horizontal relations, even when international law becomes more nearly public.

## I. Private Law Analogies in International Law

In his 1927 book, *Private Law Sources and Analogies of International Law*, the great international lawyer Hersch Lauterpacht wrote that "if the main distinction between private and public law is that the first regulates the relations of legal entities in a state of co-ordination, and the second the relations of those in a state of subordination to one another, then, formally, international public law belongs to the genus private law."[3] Lauterpacht's claim is obvious but puzzling. It is obvious because it accurately reports the way international law treats nations as the bearers of rights as against each other. Treaties are modeled on contracts, and the obligation to perform under them is subsumed under the more general contractual principle *pacta sunt servanda*. In discussions of war, national defense is modeled on individual self-defense. It is no less puzzling: people and nations differ in so many ways that they seem to be subject to different moral standards and protections.

Early modern writers in international law borrowed from the inherited Roman law of their time in representing nations as individuals. They found the parallels so obvious that they were equally comfortable using

[3] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (London: Longmans, Green and Co., 1927), 82. In a later work, Lauterpacht emphasized that the absence of subordination of states to one another did not mean that they were not subordinated to international law, writing "In both cases the basic rule constitutes a command, i.e. a rule existing independently of the will of the parties. It is of no consequence that in the international sphere the command does not issue from a political superior." Hersch Lauterpacht, *The Function of Law in the International Community* (1933, reprinted, Oxford: Oxford University Press, 2011), 427.

relations between nations to illustrate those between private persons. They not only saw relations between states as private but states themselves as private domains. Grotius, not to be outdone, went further and characterized sovereignty not only as mastery of the state's territory and resources but also of its citizens, characterizing slavery as the basic form of political relationship.[4] In its most extreme form this led to a patrimonial conception of the state according to which an entire state could be alienated; on other, less extreme conceptions, the state itself could not be alienated, but it could be used for the sovereign's purposes, whatever they were.[5] Even Vattel, who insists on a distinction between the state and its ruler, and argues that the prince must serve the state rather than vice versa,[6] represents the state as a private person, arguing that each state is entitled to use its people and resources in pursuit of its own purposes.

More recent writers have suggested that these inherited categories lead to confusion rather than clarity. Writing close to a century ago, Roscoe Pound complained that the analogy between states and persons is outdated, and to employ it "is to put morals in terms of law, not law in terms of morals."[7] Pound concedes that such analogies figure in legal practice but doubts their normative significance. Pound suggests that however useful the analogies may have been in the age in which relations between patrimonial states were ultimately private arrangements between their rulers, the external relations of modern states should not be modeled on this outdated and repugnant picture.

[4] Hugo Grotius, *de iure belli ac pacis* (1625), translated by William Whewell as *On the Laws of War and Peace* (Cambridge: Cambridge University Press, 1853), Bk. II, Ch. v, § xxxi, at 106.

[5] Burlamaqui, whose published lectures on the work of Grotius and Pufendorf, draws just this contrast, and writes: "We shall here add, that those kings possess the crown in full property, who have acquired the sovereignty by right of conquest; or those to whom a people have delivered themselves up without reserve, in order to avoid a greater evil; but that, on the contrary, those kings, who have been established by a free consent of the people, possess the crown in the way of use only. Grotius on the right of war and peace, lib. i. chap. iii. § 11 and 12, &c.' Puffendorf on the law of nature and nations, lib. vii. chap. vi. § 14, 15." Jean-Jacques Burlamaqui, *Principes Du Droit Naturel Et Politique*, translated by Thomas Nugent as *The Principles of Natural and Politic Law* (1747), edited and with an Introduction by Peter Korkman (Indianapolis: Liberty Fund, 2006), 321.

[6] "The state neither is nor can be a patrimony, since the end of patrimony is the advantage of the possessor, whereas the prince is established only for the advantage of the state." Emerich de Vattel, *Le Droit des Gens, ou Principes de loi Naturelle, Appliques à la conduite & aux affaires des Nations & des Souverains, Tome Second* (Bk. I, Ch. 5, § 59) (London: Chez Benjamin Gibert, 1758), 61, translated as *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, edited and with an Introduction by Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), 114.

[7] Roscoe Pound, "Philosophical Theory and International Law," in *Bibliotheca Visseriana Dissertationvm Ivs Inter-nationale Illvstrantivm* (Leiden: Brill, 1923), 80. Cited in Lauterpacht, *Private Law Sources*, *supra* note 3, at 73.

More recent critics have suggested that states and persons are so different that no insight is to be gained by comparing them. Much of this criticism has been directed at Michael Walzer's use of what he calls the "domestic analogy" between individuals and states.[8] Walzer's strategy is to identify the distinctive good that is produced by a nation, understood as "a people governed in accordance with its own traditions,"[9] and to argue that its entitlement to territorial integrity and political independence protects that good.[10] Walzer's critics have questioned whether all states provide this good,[11] whether only states do,[12] and whether it is important enough to outweigh the harms that many states do to their members.[13] Walzer and his critics are alike in seeking to assess a relational norm governing the ways in which states interact with each other in terms of a nonrelational monadic feature of states.

Kant's approach is fundamentally different; he understands political independence and territorial integrity relationally, building on an analogy between private law relations and juridical relations between nations. I will not fully endorse Lauterpacht's claim that international law is (or ever was) a species of private law. Nor will I contend that the private law analogies exhaust an international legal order. I am interested in how they can be any part of it at all, in how nations can stand in "horizontal" private relations.

The Kantian approach I will develop contrasts with other understandings of the private legal relations between states. Hobbes, for example, uses relations between nations to illustrate what relations between individuals would be in a state of nature, that is, in the absence of legal institutions. The Hobbesian conclusion is that both have no rights against each other, only a liberty to do what seems useful to them. Grotius, Pufendorf, and Vattel see nations as having rights and duties in relation to each other, but those rights are thought to be grounded in their express or implied, that is, customary, agreement.

[8] Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977). See also Michael Walzer, "The Moral Standing of States: A Response to Four Critics," *Philosophy & Public Affairs*, 9(3): 209–229 (1980).

[9] Walzer, "Moral Standing," *supra* note 8, at 210.

[10] Walzer draws on an earlier argument by Mill. See John Stuart Mill, "A Few Words on Non-intervention," in John M. Robson (ed.), *Essays on Equality, Law and Education*, Volume XXI of *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1984), 109–124.

[11] Charles Beitz, "The Moral Standing of States Revisited," *Ethics and International Affairs* 23(4) (2009), 325–347.

[12] David Rodin, "The Myth of National Self-Defense," in Cécile Fabre and Seth Lazar (eds.), *The Morality of Defensive War* (Oxford: Oxford University Press, 2014).

[13] David Luban, "Just War and Human Rights," *Philosophy & Public Affairs* 9(2) (1980), 160–181. Beitz, *supra* note 11.

The idea that the fundamental source of international law is either express agreement between nations or their customary practices, what Christian Wolff called the "voluntary law of nations," is central to the way in which international law has operated and the way in which international lawyers formulate their arguments. The Kantian approach does not deny the relevance of treaty and custom to the creation of international law; it provides a different explanation of the place of arrangements and practices, focused on the moral problems they are required to solve rather than supposing that customary or treaty norms are binding because mutually advantageous, or that the wrong of breaching them is the wrong of promise breaking, or that if nations had agreed to radically different norms, they would be binding in just the same way.[14] The general problem of legal philosophy, as Kant formulates it in the opening pages of the *Doctrine of Right*, is the question of how positive, that is, chosen law, can be binding. Positive law is chosen in the sense that its specifics depend on decisions made by properly constituted public officials. Had different people held those offices, or decided differently, the law would be no less binding. Kant's general solution to this problem is to see that the problem itself arises against the background assumption that individual human beings are entitled to be independent of each other's choice. As such, any explanation of the bindingness of positive law in the domestic case must show it to be consistent with the independence of individual human beings. That explanation is the central task of Kant's characterization of private right and the transition to public right. Human beings must already be capable of standing in rightful relations to each other; they need public legal institutions to secure their rights. I will say more about that transition below. An adequate explanation of the binding character of custom and treaty must have the same broad structure, showing it to be consistent with the independence of the states whose interactions it governs. Voluntary arrangements between nations, whether explicit (treaty) or implicit (custom), can only be binding against the background of their precontractual rights and obligations. They can modify their relations with each other, but only in ways that are consistent with their distinctive status as independent public rightful conditions.

Customary law has historically been taken to include such things as the power of a nation to unilaterally declare war, conquer, and exterminate or

[14] I am grateful here to Yitzhak Benbaji, "A Semi-Kantian Just War Theory," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

enslave the vanquished, and a general permission for those fighting aggressive wars to kill members of the defender's armed forces. On the Kantian view, a system that permits any of these things is not only morally but legally defective. I will say more about the nature of these limits on custom and treaty later in this chapter.

The Kantian account of private law and its international analog begins with relations as they can be conceived in a "state of nature," but does not end with them. Private legal relations could, at least in principle, constitute a condition of anarchy in which peaceful coexistence is contingently possible. Indeed, the "preliminary articles" of *Perpetual Peace* are meant to characterize such a condition, that is, one in which horizontal relations between nations are peaceful and subject to norms of conduct in the absence of a public legal order. But rights are not secure in such a condition; a condition of peace must instead be established.[15] As I will explain in detail in Chapter 9, individual human beings, and, by analogy, states, must enter a public legal condition in which their rights are secure, and properly public international law includes institutions and rules that go beyond private law and its analogs. Only in such a situation will all interactions between human beings be subject to right rather than force. As in the case of individuals, the state of nature between nations is defective because it lacks a common standpoint through which competing claims can be assessed and uses of force brought under law. Modern international legal institutions—including both customary international law and formal institutions such as the United Nations—have made some progress toward providing such a standpoint and thereby creating a legal order in which both individuals and nations are able to enjoy their rights. Kant's point is that in creating that structure, however, the international legal order does not give rise to any new *private* rights as between nations.[16] Instead, they serve to enable collective security and to protect individuals and the natural environment from the structural effects of a system in which states are sovereign within their borders.

I will develop the analogy between relations between individual human beings and relations between nations in three steps, focusing first on the formal nature of an analogy, second on the structure of private law, and third on the moral nature and status of states. When Kant characterizes a nation "as a moral person, considered as living in relation to another state in the

[15] 8:349.

[16] Kant remarks that a public rightful condition "contains no further or other duties of human beings among themselves than can be conceived" in the state of nature. 6:306.

condition of natural freedom,"[17] his claim is not that a nation is like a natural person. "Moral person" is a technical term in eighteenth-century philosophy, referring to any artificial organization to which acts can be imputed.[18] If a university or religious order can own land or enter into contracts, then it is a private moral person in this sense; it can only act through natural persons, but it has a separate legal personality from its officers or directors. Nations are public moral persons that live in relation to each other "in a condition of natural freedom" because rightful relations between nations are like rightful relations between persons in such a condition and because the characteristic wrongs that violate them are analogous. So, too, when Kant writes that right demands that nations interact in conformity with the idea of "an antagonism in accordance with outer freedom by which each can preserve what belongs to it, but not a way of acquiring."[19] I will develop Kantian interpretations of the international law analogs of what Kant identifies as the three titles of private right: property, contract, and what Kant calls "status," that is, relations in which one party is in control of some aspect of the affairs of another. Each form of relation is different in the international case—a state's territory is neither its body nor its property, a treaty is not a private contract, and a state that exercises power over another's territory is precluded from engaging in its own constitutive activity, that is, acting on behalf of its own inhabitants. These differences, in turn, reflect the ways in which the different forms of interaction apply to states rather than individuals. I will conclude by drawing out the implications of these private law conceptions for a properly public conception of relations between states.

## II. The Concept of Analogy

The commonplace of recent philosophy that any two things are alike in some respects and unlike in others[20] raises a challenge to any attempt to draw material analogies between states and persons. Kant focuses instead on formal ones; as he explains in several places, analogies are between relations, rather

[17] 6:344.

[18] See the discussion in Christopher Meckstroth, "Kant on the Politics of History," unpublished MS on file with the author.

[19] 6:347.

[20] Nelson Goodman, "Seven Strictures on Similarity," in *Problems and Projects* (Indianapolis: Bobbs-Merrill, 1972).

than objects.[21] The form of a mathematical analogy is A:B::C:D because it compares relations to each other and, abstracting from the quantity of the numbers in each relation, looks instead only to the relations within each pair.[22] In the *Prolegomena to Any Future Metaphysics*, Kant illustrates this idea with his own use of the principle of action and reaction in physics to elucidate the juridical relation between human actions.[23] In offering that analogy, he does not suppose that human beings are point masses, or that laws of right have the same type of necessity as laws of physics. Instead, the point is that the form of relation is the same.

The same point applies to the analogy between the private rights of natural persons and those of states: the focus is the form of the relations between them, rather than the relata understood apart from the relations in which they stand.[24] If nations stand in private legal relations, it is not because they are like individuals human beings.[25] Clarifying those points of analogy, therefore, requires careful attention to both the structure of private

[21] Immanuel Kant, *Critique of Pure Reason* (Paul Guyer and Allen Wood trans., Cambridge: Cambridge University Press, 1999), A 179/B222; *Critique of the Power of Judgment* (Paul Guyer trans., Cambridge: Cambridge University Press, 2000). 5:464. *Prolegomena to Any Future Metaphysics* (Gary Hatfield trans., Cambridge: Cambridge University Press, 1997). 4:357.

[22] See the discussion in Chiara Bottici, "The Domestic Analogy and the Kantian Project of Perpetual Peace," *Journal of Political Philosophy* 11(4) (2003), 392–410.

[23] *Prolegomena*, 4:357.

[24] In the *Doctrine of Virtue*, Kant represents the ability of a person's conscience to sit in judgment on that person through the analogy of a separation of powers of a unified state. 6:439. Conversely, in the *Doctrine of Right*, Kant's emphasis on the state's duty to bring itself more fully into conformity to "the idea of the original contract" can be represented as a duty of virtue because, as Bernd Ludwig has pointed out, it is a duty to adopt an end which no outside legal person is entitled to enforce. Bernd Ludwig, "Kants Verabschiedung der Vertragstheorie—Konsequenzen für eine Theorie der sozialen Gerchtigkeit," *Jahrbuch für Recht und Ethik* 1 (1993), 239–243.

[25] The late Sharon Byrd (B. Sharon Byrd, "The State as a 'Moral Person,'" in Hoke Robinson (ed.), *Proceedings of the Eighth International Kant Congress Memphis*, vol. I/1 (1995), 171–189) suggested that the similarities between nations and persons as duty bearers underwrite external relations between states, but that cannot be right. These similarities show analogous internal relations within a state and within a person; they do not provide the basis for external relations, because, as Kant explains in the Transcendental Aesthetic of the *Critique of Pure Reason*, and reiterates in his claim that the Universal Principle of Right is a "postulate incapable of further proof," relational properties cannot be reduced to or grounded in monadic ones. Beyond these textual matters, the idea that a state's internal duties are duties of virtue rather than right makes the idea of *ius cogens* norms of international law concerning human rights impossible. Such norms are not externally enforceable, but they can be externally justiciable, and they are norms of right, not virtue. On this point, see the discussion of the disanalogies between the juridical situation of individuals and states in Katrin Flikschuh, "Kant's Sovereignty Dilemma: A Contemporary Analysis," *The Journal of Political Philosophy* 18(4) (2010), 469–493. As Flikschuh puts it, "On a systemic approach one need not take the view that the concept of Right, having been applied in relation to individuals domestically, must now be re-applied in exactly the same way in relation to states internationally." (487).

law and to the important differences between nations and individuals. Those differences shape the application of the analogies in important ways.[26]

## III. Private Legal Relations

Kant's conception of political morality is resolutely individualist in its premises, which it develops through a sequence of ideas. The *Doctrine of Right* begins with a traditional first-order normative question about law and legal institutions: how can positive (that is, chosen) law be morally binding? Kant is not merely making the familiar empirical observation that positive law varies from place to place. Instead, the question arises because positive law is presumptively in tension with the fundamental moral idea, to which legal systems pay at least lip service, at least for some subset of those living under them: the idea that each person is *sui iuris*, his or her own master.[27] The relevant idea that you are your own master is not a positive idea of self-mastery, but rather is a relational and contrastive one: the entire content of the idea that you are your own master is exhausted by the thought that no *other* person is your master, that you are entitled to be independent of another person's determining choice. The task of the *Doctrine of Right* is to answer a question parallel to one that many children ask, "Why do you get to make the rules?" The answer articulates the forms of moral relation that are consistent with the organizing principle that each person is *sui iuris*. Your status as *sui iuris* thus contrasts with the status of *alieni iuris*, a slave or serf or dependent child who is subject to the authority of another. As *sui iuris*, you can stand on your rights, making a claim in your own name for wrongs that are personal to you.[28] The contrast between being *sui iuris* and *alieni iuris*

[26] Lauterpacht, *Private Law Sources*, *supra* note 3, at 54. See also "Of course, in order to fully understand this formal analogy, it is necessary to discard the misleading notion that whereas private law is above the subjects of law, international law is a law between them, and that therefore every analogy is inadequate." (Lauterpacht, 82).

[27] A conspicuous example: Roman law did not grant this status to slaves, women or children, but made it its organizing principle for relations between heads of households.

[28] This conception of the moral importance of independent legal personality runs deep in legal thought. As Judge Cardozo puts it in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), a "plaintiff sues in her own right for a wrong personal to her." Even H.L.A. Hart, who rejected the Kantian idea of a system of equal freedom, views the right to assert a claim in your own name as fundamental to just law, writing, "The crudest case of such unjust refusal of redress would be a system in which no one could obtain damages for physical harm wantonly inflicted. It is worth observing that this injustice would still remain even if the criminal law prohibited such assaults under penalty." H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 3rd ed. 2012), 164. As Lauterpacht remarks in the context of international law, "It would appear that, apart from physical or similar incapacity, the right to bring a claim is of the essence of juridical personality." Hersch Lauterpacht,

does not suppose that you are somehow internally your own master, factually independent of your circumstances, or that every decision you make is correct just because you make it. Each person's entitlement to independence is only from the choice of others—each is neither the other's superior nor their subordinate.

This is the basic form of moral relations between persons. It is basic because your status as *sui iuris* is not delegated by some higher authority that has granted you the power to decide, say, whether to enforce your right against battery or contractual rights, under a general rule based on the hypothesis that each person is better informed about when being touched by others is most beneficial, or that commercial activity will be facilitated if creditors decide whether to collect. Nor does your standing to decide rest on its direct or indirect contribution to well-being, either your own or that of your debtor. Rather than saying that others must not interfere with your body or may only do so with your permission because this will contribute to your well-being, the Kantian says instead that they must not interfere because you are entitled to be independent of their (or any other person's) determining choice. This thought is especially clear with respect to rights against bodily interference: nobody else gets to tell you what to do with your body because nobody else is in charge of you. The basic form of your right is thus a right against a certain kind of domination. The secondary form of that right is the power to make a claim in your own name—the entitlement to stand (or not) on your own right.

Your status as *sui iuris* is formal because it is fundamentally and nonderivatively relational. Although only a certain type of being can stand in such a relation—only a being capable of setting and pursuing ends could either subordinate another to its ends or be subordinated by another[29] —this boundary condition on its application does not show that your status as *sui iuris* is in the service of enabling you to set and pursue your ends. Indeed, because being *sui iuris* is a reciprocal relation between persons, the standing of others as *sui iuris* will sometimes compromise your ability to pursue and achieve your own ends. Their standing precludes you from having the

*The Development of International Law by the International Court* (Cambridge: Cambridge University Press, 1982), 178.

[29] This follows from the analogy between juridical standing and spatial location: only bodies that occupy space can be on top of or under other such bodies; so, too, only a person capable of setting and purposes can subordinate or be subordinated by another such person.

rightful power to compel them to assist you, or, what comes to the same thing, it entails that those others are not under any obligation to organize their pursuits around your ends. No person is subject to the private authority of another. Absent a special relationship, created through some affirmative act on your part, either of contract or some form of fiduciary obligation, your primary duty to others is one of non-interference, rather than assistance.

By locating the fundamental question of right in terms of an idea of standing or authority, Kant's conception of interpersonal morality—the subject matter of private right—focuses not on the ends for which a person acts, but rather on the means he or she uses. Although the doctrine of right as a whole has the final end of perpetual peace,[30] norms of private right do not depend on the ends for which the private parties are acting. Instead, as Kant explains when introducing the contrast between right and virtue, both right and its enforcement focus on what can coexist with "ends as such,"[31] that is, with the coexistence of a plurality of separate persons, each of whom is free to pursue whatever purposes they have set for themselves, restricted only in the means that they use in pursuit of them. It does not matter what you were trying to achieve when you made a contract with me, or whether you will succeed;[32] having made the agreement, we are now both bound to perform, because our contract subjects the question of the performance of each to the choice of the other. Nor does it matter why you decided to agree or decline a proposal I make to you; to say that it is up to you leaves it to you alone to determine the grounds on which you will decide. Again, as an owner of property, you are entitled to determine the ends for which it will be used, which is just to say that you have it available to you as a means, because no other person is entitled to determine the purposes for which you use it. The only restrictions on your use come from the rights of others to use their bodies and property. Just as others must not interfere with your person without your authorization, and you must not interfere with theirs, so, too, others may not compel you to accommodate their particular purposes. That is just what it is for you and others to be independent of each other: your purposes are not subordinated to those of any other.

The requirements of right are, as Kant observes, entirely external. The universal principle of right "does not at all expect, far less demand, that I myself

[30] 6:355.
[31] 6:396.
[32] 6:230.

should limit my freedom to those conditions just for the sake of this obligation; instead, it says only that freedom is limited to those conditions in conformity with the idea of it and that it may be actively limited by others."[33] Right protects external freedom, that is, freedom in the external relations in which people stand to each other, and limits it only to the extent necessary for everyone to enjoy their freedom together, the coexistence "of everyone's freedom in accordance with the universal law."[34]

Kant also argues that right is equivalent to the authorization to use coercion, that is, the only authorization for the use of force is the upholding of a system of individual freedom, where freedom is once again understood relationally and contrastively. A system of reciprocal limits on independence is, at the same time, a system of reciprocal limits on the enforcement of that independence.[35] The authorization to prevent a wrong is nothing over and above the right that is protected or upheld. As we shall see, rightful relations require a public legal order in which all enforcement is subject to public oversight.

## IV. The Public Nature of a Rightful Condition

Kant's argument that begins with external freedom and its enforcement and results in the moral necessity of a rightful condition follows a sequence of steps. From reciprocal independence and the right of each person to be presumed to have done no wrong, he proceeds through private legal relations, including property, contract, and relations of agency and status, showing how entering into these relations is provisionally consistent with the freedom of everyone. That consistency is only provisional, however, because the moral norms governing private rights are only enforceable through public institutions, capable of making, applying, and enforcing law on behalf of everyone.

Kant frames the argument for the necessity of entering a public rightful condition using conceptions of property that have figured centrally in Western legal traditions over the past two millennia, but its core is intelligible

[33] 6:321.
[34] 6:230.
[35] Kant makes this point using the analogy between right and dynamics in vocabulary borrowed from Newtonian physics: "resistance that counteracts the hindering of an effect promotes this effect and is consistent with it." 6:321.

in abstraction from the particulars of those conceptions. Kant argues first, that if (as is contingently the case) there are usable things that free beings are capable of subjecting to their choice, that is, using as means to achieve their own purposes, it must be possible for them to use those things rightfully. Because each human being is *sui iuris*, any entitlement to use things must be formal: the use of things cannot require the approval of every other person, or the comparative assessment of alternative uses to which it might be put. Instead, the use of things is only consistent with everyone's freedom if everyone can have things fully subject to their own choice.

This formal conception of usability, in turn, requires that people be able to make things their own, on their own initiative, that is, without consulting everyone else, yet putting all others under new obligations to forbear from using the thing that has been acquired. Acquiring an object makes it wrong for others to interfere with it. The puzzle is to understand how such a change could ever be consistent with each person's right to independence, rather than being a case of one person unilaterally binding another in a way that the other cannot bind the first. Kant's solution is to bring particular acts of acquisition under a general and public power-conferring rule, which must be seen to have issued from the omnilateral will, that is, from the people considered as a collective body.[36] Absent omnilateral authorization, the fact that someone has taken physical possession of the object does not change the rights of others. Without a public authorization of acquisition, I wrong you if I wrest the apple that you are holding away from you only because, in so doing, I interfere with your person. If you put the apple down, I am free to take it. With the appropriate public authorization, you can acquire a property right in the apple, and I wrong you if I pick it up when you have put it down.

Although Kant illustrates this point with the traditional example of acquiring land that is unowned and unoccupied, it applies in the same way to any institutional procedure through which people apply for homesteads, mining licenses, and so on, or through which an organization assigns them to particular people. Many contemporary writers follow Grotius and Hume in locating the origin of property in an agreement, convention, or practice. Grotius's version of this account develops the biblical image of Noah's children dividing the earth after the flood. Hume's more secular version does not

[36] "For a unilateral will (and a bilateral but still particular will is also unilateral) cannot put everyone under an obligation that is in itself contingent; this requires a will that is omnilateral, that is united not contingently but a priori and therefore necessarily, and because of this is the only will that is lawgiving." 6:263.

appeal to any such datable event, focusing instead on self-interested parties grasping the advantages of a general rule.[37] The Kantian objection to any such account is that an arrangement by the members of a group could only bind nonparticipants if the parties to the arrangement were already entitled to determine how usable things could be used in a way that binds everyone, that is, if some form of property is already in place. As a matter of private right, a bilateral agreement only binds the parties to it. How a group could create a norm that binds those who are not party to it, including future generations, is the very question of public right.[38] Registering your land claim at the homestead office only binds others if the homestead office is a properly constituted public authority. No matter how beneficial a procedure provided by a private organization is, it would still be unilateral in the relevant sense and therefore unable to bind everyone.[39] Only authoritative public lawmaking institutions can constitute an omnilateral standpoint and so make acquisition binding on everyone.

Second, Kant argues that acquired rights are merely provisional in a state of nature because, although they are presumptively enforceable, in the absence of authoritative public institutions, each person's standing as *sui iuris* entails that no person needs to permit another person to enforce an acquired right, but may instead rightfully resist all attempts at enforcement.[40] As a general matter, remedial enforcement of private claims is only legitimate if it is conditioned by an appropriate procedure to establish that a wrong has been committed. Any such procedure must be structured by the defendant's right to be beyond reproach. Further, not just any person or institution can provide the relevant procedure. It must be properly public in relation to the parties before it, that is, it must be part of a system in which all disputes about private rights can be adjudicated consistently with the freedom of everyone.

[37] Hume's account is supposed to explain why we approve of the general rule of property or promise keeping even in cases in which upholding it provides no benefit. As such, he may not be trying to explain obligation at all. Others, developing broadly Humean accounts seek to explain obligation as such. See, for example, John Rawls, "Two Concepts of Rules," in John Rawls, *Collected Papers* (Samuel Freeman ed., Cambridge, MA: Harvard University Press, 1999), 20–46.

[38] "Primitive community would have to be one that was instituted and arose from a contract by which everyone gave up private possessions and, by uniting his possessions with those of everyone else, transformed them into a collective possession [*Gesammtbesitz*]; and history would have to give us proof of such a contract. But it is contradictory to claim that such a procedure is an original taking possession and that each human being could and should have based his separate possession upon it." 6:251.

[39] "For a unilateral will (and a bilateral but still particular will is also unilateral) cannot put everyone under an obligation that is in itself contingent." 6:263.

[40] 6:256.

Once again, this requires authoritative public institutions overseeing enforcement of private rights. That is, your status as *sui iuris*—your entitlement to bring a claim in your own right for a wrong personal to you—requires institutions consistent with everyone's independence. Otherwise, your action of enforcement is merely unilateral, and so inconsistent with every other person's right to be beyond reproach.

Third, Kant develops a distinctive version of the traditional natural law argument that juridical concepts are indeterminate in their application, and so require authoritative determination and specification, as well as authoritative application to particulars in cases of dispute. The Kantian approach does not turn on assumptions about the likelihood of empirical disagreement; it focuses exclusively on the juridical structure of the situation. The argument is clearest in the case of property. The basic form of acquiring property is taking possession, but the concept of property has general application and so must in principle be applicable to things larger than can be subject to that person's current factual control. That in turn entails that even the simplest case of acquisition must be brought under a public norm through a public procedure specifying both the factual conditions under which the procedure is satisfied and the appropriate public forum in which disputes about acquisition can be resolved. Even such natural-seeming procedures as picking up a stick or grabbing an apple in your mouth only create a continuing property right, binding on others, if they are instances of a more general public system of acquisition. Similar difficulties pervade other relations, including contract, where the idea that the parties must agree needs to be given an external procedural marker, and the terms of the agreement need to be justiciable by a court. The point is not that disagreement is inevitable, or even likely, but rather that concepts of right need to be subject to a common articulation, and the application of that common articulation to particulars must be subject to properly public adjudication, providing closure.

All three arguments turn on the general idea that public institutions are required to create a system in which everyone can enjoy their rights. The state can only solve the problems of unilateral acquisition, enforcement, and judgment if it is a distinctively public thing, capable of acting on behalf of everyone, and occupying a distinctive standpoint. No private body could solve any of these problems. No private person or organization could authorize one person to put a third under obligation, require that one person refrain from defending holdings against another who contests them, or institute binding

determinations of abstract concepts of right. Only a public authority can constitute such a standpoint.

Kant emphasizes that the analysis incorporates what he calls "the state as idea," that is, the state understood through its ideal case as a system of public institutions both empowered and restricted by distinctive juridical norms. Private right abstracts from all ends; by contrast, public right requires the state to have no discretionary ends and one mandatory end, that is, the provision of a rightful condition to its inhabitants.

Kant's focus on the ideal case highlights the way in which the creation and legitimacy of a legal order can only be understood in terms of the case in which public legal institutions are genuinely public, and genuinely act on behalf of everyone, enabling the citizens to rule themselves through their institutions. Actual states fall far short of the ideal, but it is analytically basic, because actual cases encountered in experience must be understood as defective versions of what Kant calls "the idea of the original contract." The contract does not rest on some historical event, but only on "the idea of this act, in terms of which alone we can think of the legitimacy of a state."[41] The idea of the original contract therefore has both a constitutive and a regulative use.[42] In its constitutive use it sets the conditions for identifying something as a state at all; in its regulative use it provides the norm against which existing states are to be assessed. All existing legal orders are defective in relation to it; some, those Kant characterizes as "despotic," are gravely defective.

There is a nice question about just how defective institutions can be, consistent with solving the problems of the state of nature. Kant's answer sets a very low bar for satisfying what he calls "the postulate of public right," that is, for solving the problem of a state of nature. Any legal order that satisfies the postulate of public right will have powers that no private person could have, including the right to determine legitimate uses of force, the right to impose binding and enforceable resolutions on private disputes, and the right to confer powers on both private persons and public officials. A public authority has the further power to see to its own continued existence, and to take up the means necessary to do so, always consistent with the rights of the human being subject to its power and authority.

[41] 6:315.

[42] I am grateful to Rainer Forst, "Might and Right: Ripstein, Kant and the Paradox of Peace," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021) for pressing me to be clearer about this point.

Contemporary debates about rights are usually more focused on human rights than individual property rights, and more concerned about the proper limits of state power than the role of the state in providing systematic protection of individuals from each other. Kant's articulation of the problems of private right in a state of nature might strike some as out of date in relation to these more recent ideas. But the Kantian conception of the relation between private and public law has enduring importance. The Kantian account does not represent the state as exclusively in the service of private right; nor does it imagine (as some Lockean arguments do) that interpersonal morality is somehow complete in the absence of legal institutions. A state of nature—a system of pure private right—is not adequate to its own normative demands, because it contemplates property and contractual rights without the institutional structure required to make them binding. A legal order both articulates norms of conduct and specifies rules governing who is charged with interpreting, applying, and enforcing them. In so doing, it provides closure with respect to how things stand both horizontally, as between private individuals (private right), and vertically, between itself and those over whom it exercises power and jurisdiction (public right). The Kantian claim is not that a legal order specifies in advance rules governing every conceivable situation, or that it makes it easier for people to plan their affairs knowing the precise legal consequences of anything they might do. Actual legal orders never manage anything so precise, and Kant does not regard it as a defect that they do not. Instead, a legal order must articulate both first-order norms of conduct governing how things stand between persons and second-order norms about who will resolve disputes about the application of those norms. In each case, the distinctively legal task is to determine who gets to answer a particular question. The only way that this can be done consistently with the freedom of everyone is if the officials who comprise the legal order adopt an exclusively public standpoint, both empowering officials to do things that no private person is entitled to do and restricting the means that those officials can use in carrying out their mandates.[43]

[43] Avihay Dorfman and Alon Harel, "The Case Against Privatization," *Philosophy & Public Affairs* 41 (2013). Chiara Cordelli, *The Privatized State* (Princeton: Princeton University Press, 2020).

## V. Private Legal Relations between Nations

So far, I have introduced an account of private legal relationships in terms of each person's right to independence of each of the others, and an account of public law as charged with the distinctively public purpose of providing a rightful condition to those living under its jurisdiction. These two levels of analysis provide the materials from which the private law analogies can be analyzed.

A successful development of the analogies would need to show how legal orders stand in irreducible relations to each other, organized around rights of nonsubordination, but focused not on an entitlement to pursue their private purposes but instead on preserving their status as distinctively public legal orders. Just as private relations of right hold only between beings capable of setting and pursuing purposes (because they prohibit the subordination of one person's choice to another's), international relations of right hold only between systems of public law, and their organizing norm would prohibit the subordination of one system of public law to another. Rather than a system "consistent with ends as such,"[44] a system of rightful private relations between nations would have to be one that was consistent with "public legal order as such," that is, one in which each legal order was entitled to be the legal order that it was, consistent with the equivalent entitlement of other legal orders. This thought is captured in the principle, *par in parem non habet imperium*, that states are legal equals. As an empirical claim, the suggestion that states are equal along some factual dimension is palpably false; as a relational normative claim—that none is the superior and so none the subordinate of another—it is both true and important.

The distinctive purpose of each state thus gives rise to its claim to independence of others. A system of public law's claim to rule is grounded in the provision of closure with respect to actual and potential disputes between private persons. Its provision of closure, in turn, is itself subject to closure.[45] If you and I have a dispute, a legal system can only provide a binding resolution of it if at some point it allows for finality, and so is not dependent on further determination or oversight by any other institution. Scott Shapiro explains this structure with the idea of self-certification: a legal system is self-certifying

[44] 6:396.

[45] As Jeremy Waldron puts Kant's point, closure requires that there be only one closure-imposing agency. Jeremy Waldron, "Special Ties and Natural Duties," *Philosophy & Public Affairs* 22(1) (Winter 1993), 3–30.

if nothing outside of it is relevant to it is entitlement to provide closure.[46] It brings human interaction under law by providing a unique standpoint from which disputes can be resolved, remedies determined, and enforcement authorized. Shapiro offers the example of a condominium corporation that can make its own bylaws, but does so only subject to powers conferred on it by the jurisdiction in which it is located. Within a federal system, a jurisdiction might be subject to limits of the federation as a whole, but once again, that just shows that the federation as a whole rather than the member state or province is self-certifying.

This idea of self-certification does not lead to the conclusion that all legal systems are equally good, that all methods of providing closure are equally good, or that all ways of resolving a particular dispute are equally good. Nor does it lead to the conclusion that a legal system must be able to do whatever it wants; constitutional limitations on its lawmaking powers, including those contained in a bill of rights or basic law, are entirely consistent with it. Self-certification requires only that the provision of closure by the legal system is independent of the say-so of any *other* national legal system: no legal order wrongs any other legal order by bringing uses of force under law within its own territory—each has a mandate to provide a rightful condition for the human beings subject to it, but not for those outside it. Each legal order's entitlement to be self-certifying is thus its entitlement that other legal orders not displace or preempt it in bringing human conduct under law. It does so through its own procedures. If another nation uses force to interfere in those procedures or to preempt their operation, that other nation replaces law with mere force. The Kantian argument that individual human beings must replace force with right by entering a civil condition thus leads to the conclusion that each civil condition must not disrupt another existing legal order through force.

This idea of self-certification does not support a patrimonial conception of sovereignty on which a state's lawmaking power is not subject to any internal norm; it is subject to the idea of the original contract. It is only self-certifying in relation to other legal orders; it is not their subordinate. These internal and external structures come together to prohibit the state from compelling its citizens to interfere with another state's independence.[47]

[46] Scott J. Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 221 ff.
[47] 6:345.

The relational understanding of self-certification leads directly to each nation's right to political independence and territorial integrity. Nations are politically independent of each other because the national legal order's lawmaking powers are not an instance of and so not dependent on another nation's lawmaking powers. Each nation's status as a public legal order thus gives it a claim against other nations, over and above the claims its individual members have against outsiders. The legal order has authority over those subject to it because it has solved the problem of right for them; another legal order that seeks to impose itself forcibly interferes with the provision of a rightful condition.

This Kantian account of how things stand between nations is purely relational. Rather than asking from a third-person perspective whether some other nation is fully in conformity with the requirements of right—a question certain to receive a disappointing answer, because no actual empirical legal order could be fully adequate to the rational idea of a system of equal freedom[48]—the idea that nations are entitled to be independent of each other entails that no nation stands in a supervisory relation to another. As such, no nation is entitled to take it upon itself to determine whether another organized group of human beings living on some region of the earth's surface is entitled to political independence or territorial integrity. Their organized presence is sufficient to make them a bearer of rights as against outside interference. In this, the situation is analogous to the way things stand between individual human beings. Your obligation to treat other human beings as bearers of rights is not conditional on your first satisfying yourself that they are living sufficiently autonomous lives or that they are noumenally free rational beings. Nor do you extend moral status to them based on some analogy with your own case. Even in your own case, nothing could count as evidence to establish that your empirical thought processes and deliberations are manifestations of your freedom. Instead, you are morally obligated to act under the idea of freedom, which, in your own case requires you to think of yourself under the idea of obligation and, in your dealings with others, to treat anything with human form as a bearer of rights.[49] The structure is the same with respect to people traveling to other regions of the

[48] "Every actual deed (fact) is an object in appearance (to the senses). On the other hand, what can be represented only by pure reason and must be counted among ideas, to which no object given in experience can be adequate—and a perfectly rightful constitution among human beings is of this sort—is the thing in itself." 6:371.

[49] *Critique of Practical Reason*. 4:452.

earth and encountering groups of human beings: they must be treated as collective rights holders.[50] As we will see in more detail in Chapter 3, the only thing that could authorize the use of force against such a group would be its active aggression against states or individual human beings.

A focus on moral relations between states shows the difficulties of a recent argument made by John Simmons. Simmons argues that a Kantian account cannot explain why the functions of a state—provision of a legal order—are not fully fungible. Simmons offers the hypothetical example of a bloodless annexation in which all private property claims remain intact. He stipulates that the invader's government does at least as good a job in functional terms as did the government it displaces. By making the invasion bloodless and property-preserving, Simmons's example seeks to circumvent the idea that the provision of a rightful condition has been interfered with, on the assumption that a transfer of power that violates no private rights is functionally indistinguishable from no change at all. From this he contends that the Kantian approach lacks the resources to condemn the invasion.[51]

The implicit premise underlying Simmons's argument is that the legitimacy of a legal order must depend either on its origins or its functions. Since the Kantian position denies that legitimacy depends on origins, he concludes that it must be committed instead to a purely functional conception of legitimacy,[52] and so cannot object to a function-preserving invasion. This argument rests on two misunderstandings. The first is the assumption that because the state has the function of providing a rightful condition, substituting one rightful condition for another is not wrongful. As a general matter, the fact that something has a function never entitles others to take it upon themselves to replace it with some functional equivalent. Your right that I not interfere with your person or property, or that I perform my contracts with you, is not a right that you be left in the functional condition that you were in. I am not entitled to embezzle from your bank account and repay the money

[50] I am grateful to Anna Stilz, "The Moral Basis of State Independence," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021) and Alice Pinheiro Walla, "Three Models of Territory: Arthur Ripstein on Territorial Rights," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021), for their instructive discussions of this point.

[51] A. John Simmons, *Boundaries of Authority* (Oxford: Oxford University Press, 2016). I have benefitted from the discussion of these issues in Massimo Renzo, "National Defence and the Value of Independence," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

[52] For such an account, see Kjartan Koch Mikalsen, "The Irrelevance of History: In Defense of a Pure Functionalist Theory of Territorial Jurisdiction," *Ratio Juris* 33(3) (September 2020), 291–306.

with interest—I wrong you by taking it upon myself to decide what will be done with your money, even if I do not materially worsen your situation. The suggestion that functional things can be replaced at will, and Simmons's application of it to the international case, depends on ignoring or denying the authority structure involved in both rights and wrongdoing, representing it instead in terms of functions performed.

A bloodless invasion is not only a wrong against the invaded state; it is also wrong "in the highest degree," because it is the initiation of a condition in which force rather than right decides. It is not up to the invader to take it upon itself to make a substitution of its legal order for that of the invaded country, even if it is correct in its assessment that doing so will provide no net disadvantage to any inhabitant. Even a bloodless private-right-preserving invasion violates the principle of freedom under law, because it makes the change through nonlegal means. The problem is not merely that positive law does not permit those means; it is that nothing could make them consistent with right, because the change in the legal system to which the invaded country's inhabitants are now subject does not come about through that country's own procedures. If the invaded state's officials resign or flee out of fear, or abandon their offices because they have been paid off by the invaders, force has been substituted for right: the invasion is effective only because the rule of law has been subverted, because those officials have stopped doing their jobs in response to extrinsic incentives. Not only are they replaced; their official positions are replaced, even if the new rulers put different people in functionally indistinguishable roles. The bloodless invasion thereby wrongs the invaded country and its citizens by subjecting them to what must be, from their perspective, arbitrary force.

Those who are in a rightful condition are entitled to remain in that rightful condition, which means that the citizens, considered as a collective body, have a right against subversion of their legal order by outsiders. That is the sense in which Kant conceives a state as "a society of human beings that no one other than itself can command or dispose of."[53] Just as a monarch cannot give a state away or sell it, so outsiders cannot take it for themselves, either through force or guile. The invasion violates their right to be members of the legal order they are in, even if it does not affect their welfare or violate any of their private rights, and it violates the rights even of those who would make no use of public services during the period of invasion. Its entitlement

[53] 8:344.

to remain in a rightful condition cannot be a question for any outside agency because that would subordinate the rights of its inhabitants to outsiders. This is a right that it has because it is public; a private corporation that offered dispute resolution and enforcement services would have no comparable claim against outsiders.

To see the sense in which a violation of political independence is a wrong against the people whose independence is violated, consider first an intermediate case, that of an outside power bribing or blackmailing corrupt officials. Officials have duties, owed to members of the public, to act within the mandate of their offices. They sometimes breach those duties simply by acting for private purposes of their own; other times they do so by accepting inducements to breach offered by others. By accepting bribes or succumbing to blackmail, corrupt officials wrong those whom they are supposed to serve. By inducing breach of official duties, those who bribe or blackmail them also commit a wrong, not only in the abstract but also against those to whom those official duties are owed, by depriving them of the loyalty to which they are entitled. Even when officials are appointed by contract, their duties are not merely contractual; in Kant's taxonomy, a duty of loyalty is a "right to a person akin to a right to a thing," precisely because third parties commit a wrong by depriving someone of the loyalty of those who stand in such relations.[54] This structure is on conspicuous display in the case of a public trust, in which the bribe-giver induces the official to act out of a private interest, not for the public trust with which the official is charged. The official who accepts a bribe is corrupt; the one who pays the bribe corrupts. The state that sponsors the pressure wrongs the members of the society whose officials it corrupts.

If another state is not permitted to bribe officials to step down, it certainly cannot remove them by threatening or killing them. The new occupants of those (new) offices still owe a duty to those over whom they exercise power, but even if they act in strict conformity with that duty, their installation through force would still be a wrong against those subject to that official power. They have been wrongfully deprived of the loyalty of those officials, even if they have received an adequate or perhaps superior substitute.

If replacing the officials or the offices wrongs the people for whose sake the officials are supposed to act, it is only a wrong against those people as

[54] The wrong is therefore similar to but distinct from the wrong of tortious interference with contracts, as in the case of *Lumley v. Gye*, [1853] EWHC QB J73.

members of the public. It is not that they are disadvantaged in relation to their pre- or non-institutional interests or advantage, and by Simmons's stipulation, all private rights are secure. The people do not simply have a right to receive a package of functional benefits; they have a right as members of the public to continue to be members of the same ongoing political society, to have officials selected through that society's procedures act on their behalf as citizens. Even bloodless and seamless invasion deprives them of those officials, and so substitutes force for right.

For all of the same reasons, a state's right against invasion does not depend on whether it is self-governing in any more robust sense, such as whether it depends on citizens participating in democratic deliberations or sharing a public political culture with which most inhabitants can be expected to identify.[55] All of these factors are relevant to the quality of the rightful condition a legal order provides to its members; a legal order has a duty of right to improve itself in relation to them. But that duty of right is not enforceable, and it especially is not enforceable by outsiders. An invasion wrongs the invaded countries and its inhabitants. Any defects in its political culture and procedures do not license invasion by outsiders, any more than the fact that someone fails to live up to ideals of a self-directing life (autonomy in the contemporary sense, not the precise sense meant by Kant) entitles others to take charge of that person. All that matters for its right to political independence and territorial integrity is that it is *sui iuris* as against other legal orders. The functional parts of it—the tasks that it performs for its members—can only be understood in relation to the whole of which they are a part, a whole of which the members of a state are entitled, as against outsiders, to be members.[56] That is why the wars that wracked Europe in Kant's time were wrongful, even though none of the belligerents had properly realized the idea of republican government. It also explains the wrongfulness of colonial conquests in Kant's time, a topic that will be examined in more detail in Chapter 8.

Understood in this way, the starting point for all of the private law analogies is a familiar conception of what it is for legal persons to stand in distinctively legal forms of relation: the idea that states are entitled to be independent of each other so that they can stand on their rights, make claims in their own name, and have special standing to protest wrongs that are personal to them. This idea entails that one party cannot unilaterally negate

[55] As argued in Anna Stilz in Chapter 4 of Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford: Oxford University Press, 2019).
[56] 6:372.

another's legal status. Lauterpacht makes this point in his discussion of the Kellogg-Briand Pact of 1928, which outlawed war as an instrument of national policy. He notes that a system of international law is internally, that is to say, legally, defective if one state can unilaterally deprive another state of the law's protections.[57] Lauterpacht was discussing the law of war, but his point applies much more generally, and indeed, he goes on to deploy it in characterizing the role of recognition in international law. The word "recognition" might seem to suggest an affirmative and voluntary act by the recognizing nation, but, as Lauterpacht argues, that cannot be the right way to think about it. Instead, recognition must be a part of the peremptory law of nations, rather than of the voluntary law of nations. Prior to any voluntary agreements, states must view each other as states—with all the normative implications that entails. If one nation breaks off diplomatic relations with another, the former does not thereby suspend the rights of the other.

Lauterpacht's point is that any voluntary arrangement presupposes some background of a peremptory law of nations. Nations can modify their relations *inter se* only against the background of a set of norms laying out their antecedent relations. The status of each nation as *sui iuris* does not depend on an optional affirmative act by any other nation or nations. Separate legal orders are juridical equals, not because of some agreement that they have made (what standing could they have to enter into an agreement, or to decline to do so, and how could they have the capacity to bind themselves in relation to each other?) nor because of a positive act by any superior international legal order to which both are subordinated. As in the individual case, any capacity to enter into voluntary arrangements presupposes their prior right to independence. Just as your right against attack by others is not the product of an agreement but the background against which agreements can be made, so, too, the right of each nation to political independence and territorial integrity is the background against which agreements between nations can be binding.

Nations stand in reciprocal relations of independence because each is its own legal order and not the other's legal order. Each nation is entitled to exercise its public powers within its territorial boundaries, but none has extraterritorial application. The first, and most basic of these powers, is the tripartite

[57] Hersch Lauterpacht, "Recognition of States in International Law," *The Yale Law Journal*, 53 (3) (1944), 385–458 at 388. See also Hersch Lauterpacht, "General Rules of the Law of Peace," *International Law: Collected Papers of Hersch Lauterpacht* (Elihu Lauterpacht ed., Cambridge: Cambridge University Press, 2009), 193–443.

power to make, apply, and enforce laws. No nation enjoys this power in relation to another: it lacks lawmaking power, and so the power to enforce its laws, as well as the concomitant power to apply them. Nor do nations enjoy any analog of what Kant calls the "police power" over each other, and so they do not enjoy the power to impose taxes, redistribute assets, or facilitate interaction. Nor do states have standing to punish other states, or even to impose binding resolution of disputes on them.

Kant represents nations as in a state of nature and characterizes that condition as barbaric and warlike because no rights are secure. In the closing section of *Anthropology from a Practical Point of View*, Kant distinguishes between two ways of conceiving such a state of nature: first, as a system of anarchy, which would be the state of nature as an idea of reason, that is, in its pure case; and second, as a state of barbarism, which would be its defective (and indeed actual) version. A state of anarchy is a condition of freedom with neither force nor law; that is, the independent coexistence of separate nations, a way in which—however accidentally—all in fact enjoy their freedom in relation to each other, because none is subject to the factual choice of another. The moral principles governing the international state of nature—the private law of nations—are articulated in the "Preliminary Articles" of *Toward Perpetual Peace.* Those articles describe the conditions for the transition from the actual barbarism of the international state of nature to a possible anarchic version of it. They are preliminary because at most they can secure a fragile and temporary peace.

Just as initiating a war is wrong in the highest degree because force rather than right decides, so, too, remaining in a state of nature which is inevitably a condition of war or imminent war is wrong in the highest degree.[58] In its place, Kant suggests that they should set up "a league of nations in accordance with the idea of an original social contract,"[59] that is, set up institutions, corresponding to the "Definitive Articles" of *Toward Perpetual Peace*, so as to expand the reach of the principle of freedom under law. Just as leaving the individual state of nature first brings human interaction under that principle, so, too, leaving the international state of nature would have the effect of bringing more human interaction under that principle, because it would lead interactions between nations to no longer be a matter of each doing "what seems right and good to it,"[60] but instead bring those interactions under a

[58] 6:307.
[59] 6:344.
[60] 6:312.

shared standpoint of general public norms and shared fora for interpreting and applying them.

Although Kant does not expressly discuss whether such a system introduces further duties of nations "among themselves than can be conceived" in a state of nature,[61] his analogy with private legal relations suggests that it does not. How things stand between nations is not changed by their entry into a public international legal order. Their right to independence—their sovereignty—continues to limit what they may do to each other; it does not rule out further duties of international law owed to the public legal authority.[62] To the extent that such an authority exists, it exists not through the voluntary agreement of states, but rather through the development of what has come to be called "customary international law," that is, the articulation of both norms and fora of dispute resolution that are recognized by most nations is sufficient to bind even those who reject them.

## VI. How a Public Thing Stands in Private Relations

Kant identifies three titles of private right. Property governs the ways in which separate persons interact independently, contract the ways in which they interact interdependently and consensually, and fiduciary-type relations in which they interact interdependently and nonconsensually. In the right of nations, these forms of interaction are reconfigured as territory (which is not property), treaty (which is not contract), and public trusteeship (which is not a private fiduciary relation). In each of the three cases, the differences between the individual private law case and its international law analog do not show that the analogies do not fit; instead, they illustrate the ways in which they do. The three titles of private right correspond to the three forms of interaction consistent with reciprocal independence. Their international law analogs differ in their matter but not in their form.

1. *Property and Territory*. Writers in the regular war tradition, such as Grotius, Pufendorf, and Vattel, treated a nation's territory as its property.[63]

[61] 6:306.

[62] In the often quoted formulation of Judge Anzilotti, a state is sovereign if it "has over it no other authority than that of international law." *Austro-German Customs Union Case*, PCIJ, Ser. A/B No. 41 (1931), p. 57.

[63] On the complex relation between *dominium* and *imperium* in Grotius, see Annabel Brett, "The Space of Politics and the Space of War in Hugo Grotius's *De iure belli ac pacis*," *Global Intellectual History* 1(1) (2016), 33–60.

Other writers sometimes reject this account in favor of a different private law analogy, according to which each nation's territory is its body. If the basic private law analogy is understood relationally, neither specification can be entirely right. Both natural persons and states are both juridical and spatial; in the case of a natural person, the body is the spatial instantiation of the juridically independent person; in the case of the state, the territory is the spatial location of the self-governing "moral person." A nation's claim to its territory is an incident of its claim as a system of public law; its territory is just *where* it is effective as such a system, not a means available to it for purposes that it is free to determine. If a powerful nation uses force outside its territory, that does not show that the place where it used the force was its territory after all, but rather that it is not exercising jurisdiction but mere force. In the individual case, you need to avoid subordinating another person's body or property to your purposes because they are not yours; in the international case, each state must avoid subordinating another state's institutions and territory to its public law because it has no jurisdiction over it.

A nation does not have its territory as a belonging that it can use for whatever purpose it sees fit. Instead, it has a claim to its territory against other nations because its territory is the place where it exercises its jurisdiction as a legal order. That jurisdiction does not depend on its mode of acquisition in the way that a property claim does. The founding of a state is not an act by the state—otherwise it would need to exist before it came into being—and so cannot depend on any analog of the procedure through which an individual property owner acquires property. A public authorization is required for property acquisition because a property right entitles the owner to exclude others; acquisition puts those other persons under a new obligation. Creating a legal order does not impose new obligations on outsiders in the same way; the fact that other states must now not interfere with the legal order does not stop them from doing anything they (as states) had a prior right to do. That is why a state does not need external authorization to commence jurisdiction in the way in which individual property acquisition requires public authorization.[64] If no other state already had jurisdiction on the territory, creating a legal order does not deprive any individual or state of a right to do something it was antecedently entitled to do.

[64] Contrary to a suggestion by David Miller, "Neo-Kantian Theories of Self-Determination: A Critique," *Review of International Studies* 42(Part 5) (2016), 862, and Jakob Huber, "No Right to Unilaterally Claim Your Territory: On the Consistency of Kantian Statism," *Critical Review of International Social and Political Philosophy* 20(6) (2017), 677–696.

Nor is the manner in which a state came about relevant to its territorial claim as against other states. As Kant remarks in the context of revolution, "it is futile to inquire into the historical documentation of the mechanism of government," not merely for lack of a historical record,[65] but more fundamentally because questions of "whether a state began with an actual contract of submission (*pactum subjectionis civilis*) as a fact, or whether power came first and law arrived only afterwards, or even whether they should have followed in this order,"[66] has no moral implications. The futility of such an inquiry follows from the fact that the state's right to rule is not the result of its having come about through appropriate procedures.

There can be no procedure required for a state to come into being, because the existence of a state is the precondition of binding procedures. The same point applies to territory acquired through other non-rightful transactions. The second Preliminary Article of *Toward Perpetual Peace* stipulates that "no independently existing state (whether small or large) shall be acquired by another state through inheritance, exchange, purchase or donation."[67] Kant makes this point about entire states, but it also applies to parts of states; he is sharply critical of supposed purchases of sovereignty by European colonists in Africa and the Americas,[68] and would certainly have condemned the widespread practices of purchasing land and claiming sovereignty by European in nineteenth-century Africa.[69] Kant characterizes the way in which a prohibition applies going forward but not retroactively as a "permissive law," by which he means that such acquisition is wrongful in the future, but retroactively gives rise to a legitimate claim. On this understanding, although there was no rightful basis for France to sell Louisiana, or for Russia to sell Alaska, or for the United States to purchase either territory, once jurisdiction has been successfully exercised over them, they become parts of the country that incorporated them. The quality of the transaction that gives rise to a state having jurisdiction in an area is highly relevant in prospect, potentially relevant shortly after, but must eventually become irrelevant. For all of the same reasons, as we will see in Chapter 3, a nation can defend its territory from wrongful conquest, and continue that defense during ongoing hostilities, but after a peace is concluded cannot exercise any right of corrective justice to

[65] 6:340.
[66] 6:318.
[67] 8:345.
[68] 6:266.
[69] See the description in Steven Press, *Rogue Empires: Contracts and Conmen in Europe's Scramble for Africa* (Cambridge, MA: Harvard University Press, 2017).

reclaim territory it lost. The only right that it needs to stand on is its right to be *sui iuris*, not subject to the jurisdiction of another legal order. If a peace has not yet been concluded, there may be a period of time in which the question of jurisdiction has no clear answer.[70]

The analogy between territory and property therefore collapses. A private person's claim to property depends on how that property was acquired. There is no backward-looking procedure that counts as the rightful way of acquiring territory, only a forward-looking prohibition on wrongful acquisitions. The combined effect is to make past wrongful acquisitions binding. The closest thing to a property model would be a system in which the current holder of territory has a superior claim to it than anyone else. That model describes territorial integrity as property only by leaving no distinctive work for the idea of the acquisition of property to do.

In Kant's time, acquisitions through war (and other non-rightful transactions such as purchase and bequest) were frequent. Since the end of the First World War, a series of international documents and institutions have progressively outlawed acquisition through war, beginning with the League of Nations charter, through the Kellogg-Briand Pact of 1928, and the UN Charter. These legal documents have marked a transition from an international order structured exclusively by private relations between nations to a more public order. As we will see in Chapter 9, the resulting legal order is more public, but not fully so, because enforcement depends on the voluntary participation of its members. In another sense, as noted above, that transition just gives effect to what is required by private interactions between nations; no "further duties and rights" between nations are created by the prohibition on war as an instrument of national policy. Instead, the prohibition has the effect of retroactively making any actual past acquisition binding, because that prohibition entails that force can never be used to displace a functioning legal order. As we saw in Chapter 1, the forward-looking principle that denies that might makes right with respect to territory is equivalent to the principle that might made right in the past; both follow from the more general

[70] In his discussion of revolution (6:323), Kant raises the casuistical question of whether, or for how long, a deposed monarch can try to reclaim the throne. The question was not merely topical in Kant's time, because following the French Revolution, royalists supposed that they could reclaim the throne. Kant's point is not that they still have good title, such that citizens living in post-Revolutionary France should obey the deposed monarchy, rather than the new regime. It is rather that the question of whether the new regime is in fact a permanent regime or rather a brief interruption of the *ancien régime*, must be still open for a period of time. But even if it is an interruption, that does not mean that there is no legal order or that other nations may intervene.

prohibition on displacing law with force. That prohibition applies regardless of the pedigree of the current legal order. Just as it is futile for citizens to ask how a state began,[71] it is no less futile for another nation to ask; a legal order's right to independence flows from the fact that it is a legal order, not from the fact that it came about in the right way.

These difficulties of the property model do not lead to the conclusion that a state's territory is its body, something with which it is born and which it cannot alienate. Even if each territorial state is "born" with some territory, since it must already be legally effective somewhere in order to act, and so must have territory before any act of acquisition, once it exists, its boundaries may change. Not only may alluvial or volcanic islands spring up, or unoccupied regions be acquired through accession,[72] but also through its own official acts, what was once the territory of one state may have become the rightful territory of another. That is, a nation's territory could belong to another nation, in a way that a person's body or parts of it normally do not and morally could not.[73] The other difficulty with the body analogy is shared with the property model: characteristic private wrongs against bodies subordinate one person's power of choice to another's particular choices. Wrongs against territory are different: they subordinate one nation's legal order to that of another.

On this understanding, political independence and territorial integrity are different aspects of a single form of relation. A nation's territory is just where it is entitled to be politically independent. The right to political independence carries with it the right to exclude other legal orders, which is not equivalent to a right to exclude individual human beings.[74]

2. *Contracts and Treaties*. Each nation's entitlement as against others to its own territory is the organizing norm of international law, against the background of which voluntary arrangements can be made. Bringing private legal relations under public law requires *ius cogens* norms that restrict the ability of nations to arrange their affairs through treaty,[75] but in another way those norms create no new juridical relations. Although such norms are often described as prohibiting treaties that are contrary to good morals or violate

[71] 6:318.
[72] 6:353.
[73] 6:350. I am grateful to Anna Stilz and Macarena Marey for pointing out my earlier misconception about this.
[74] As pointed out by Jeremy Waldron, "Exclusion: Property Analogies in the Immigration Debate," *Theoretical Inquiries in Law* 18(2) (2017), 469–490.
[75] Vienna Convention on Treaties, arts. 54, 63.

the ethics of the international community,[76] they are better understood as aspects of the organizing structure of private legal relations between states. The restrictions apply to the basic form of interaction between nations that are *sui iuris*, and they are already contained in the idea of nations as independent legal orders. The rules about juridical capacity to enter into treaties are so contained; so, too, is the rule that two states cannot make a treaty voiding the rights of a third, which is just the international analog of contract law's principle of privity. The most prominent *ius cogens* norms go to the minimal conditions of a rightful condition, such as the prohibition of slavery and genocide and the continued operation of public institutions; others go to the minimal conditions of political independence and territorial integrity, such as the prohibition of aggression.[77] States lack the legal power to exempt themselves from these core public functions because they go directly to the application of the postulate of public right to each state. Any undertaking to violate those prohibitions would be an undertaking to abandon a rightful condition and descend into barbarism. A treaty authorizing slavery or genocide would do more than subordinate one legal order to another. Instead, it would be the international equivalent of an individual human being selling himself or herself into slavery. Just as you could not be bound by a contract that annihilated your legal personality, since you would not legally be capable of bearing duties and so could not be bound by that very contract, so, too, a nation could not enter into a binding agreement inconsistent with the postulate of public right because to do so would be to annihilate its legal personality and so render it incapable of obligations of compliance.[78] The Kantian argument against slave contracts is purely formal, and some have doubted

[76] Alfred von Verdross, "Forbidden Treaties in International Law: Comments on Professor Garner's Report on 'The Law of Treaties,'" *American Journal of International Law* 31(4) (October 1937), 571–577, at 572. In a later essay, Alfred von Verdross, "Jus Dispositivum and Jus Cogens in International Law," *The American Journal of International Law* 60(1) (January 1966), 55–63, Verdross writes that the "criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community." (58). See also the discussion in the *Yearbook of the International Law Commission*, Vol. II, 1953, 154–156. A more recent articulation of Verdross's approach can be found in Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006). I do not mean to deny that there can be purely pubic *ius cogens* norms. My claim is only that some of the primary *ius cogens* norms are private in the sense that they govern relations between independent states.

[77] In his classic discussion, Verdross also includes the protection of citizens while they are abroad.

[78] "On the common saying: That may be correct in theory, but it is of no use in practice," Kant makes this point by saying that a person "cannot, by means of any rightful deed (whether his own or another's), cease to be in rightful possession of himself." (8:293). Kant makes a similar claim in the *Doctrine of Right*: "No one can bind himself to this kind of dependence, by which he ceases to be a person, by a contract, since it is only as a person that he can make a contract." 6:330.

whether a conceptual argument could lead to such a robust conclusion.[79] The same query might be raised here. The answer must be the same in both cases: the starting point of the analysis is the right to independence, which is already a robust moral norm. In both the individual and international cases, it entails that no person or nation can make a binding arrangement to exempt itself from standing in rightful relations. Just as the power of contract is restricted by each natural person's moral status, so, too, it must be consistent with public law as such in the international case, ruling out treaties through which a nation agrees to no longer provide a rightful condition for its inhabitants.

The other class of norms that are sometimes said to be *ius cogens* are the basic human rights norms, including more than the prohibitions on slavery, genocide, and stripping of citizenship that are already included in the postulate of public right. These further norms are aspects of the idea of the original contract, and so regulative for states, but conformity with them is not a precondition for a state's right to political independence and territorial integrity.[80] A state cannot contract out of its human rights obligation because it could not give another state the rightful power to prohibit it from acting in conformity with its own regulative principle.[81] Although states often fail to bring themselves into conformity with the idea of the original contract, they cannot make arrangements that prohibit them from doing so.

*Ius cogens* norms restrict the ability to make agreements; permissible agreements contrast with private contracts (this is not an exhaustive list).

(a) A peace treaty is different from any other agreements because its bindingness does not depend on the fact that it was entered into voluntarily.[82] Although it is a treaty, governing how things stand between the

[79] For example, G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), 212.

[80] See Ariel Zylberman, "Why Human Rights? Because of *You*," *The Journal of Political Philosophy* 24(3) (2016), 321–343.

[81] *Ius cogens* norms are now widely held to apply outside of the treaty context but have their origin in it and figure in it via private law analogies.

[82] In his lectures of 1784, Kant rejects Achenwall's claim that a peace treaty is binding because voluntary on the part of the parties, writing that "[t]he concurrence of the vanquished is at its basis only a formality." Kant, *Naturrecht Feyerabend*, 27:1377, edited and translated by Frederick Rauscher as "Natural Right Course Lecture Notes by Feyerabend," in Rauscher (ed.), *Lectures and Drafts on Political Philosophy* (Cambridge: Cambridge University Press, 2016). The passage in Achenwall is in Gottfried Achenwall, *Ius Naturae In Usum Auditorum* (Gottingen, 4th ed. 1763), 255, translated by Corinna Vermeulen as *Natural Law: A Translation of the Textbook for Kant's Lectures on Legal and Political Philosophy* (London: Bloomsbury, 2020), 199.

parties to it, it cannot be modeled on a contract. Its particulars may be negotiated, but its basic form is mandatory because it ends a war and resolves residual claims, not on their merits but on based on the outcome of the war. That is what is barbaric about war: it is the context in which might makes right. But a peace treaty is binding nonetheless, because if a peace treaty needed to be in accordance with the merits or was void if one party entered into it out of fear, peace would be impossible. Put differently, a peace treaty is the entry into a rightful condition between states, and so cannot be analyzed as a private act between them at all, because private arrangements are only binding in a condition of peace. This is just another route to the conclusion that the territory of any rightful condition is rightful as such, independently of whether it was brought about in the right way, because there is no such thing as the right way to bring it about. The juridical form of a peace treaty is not contract (*pacto*) but status (*lege*)[83] because its basic terms must, as a matter of right, be determined by law, in particular the continued existence of both belligerents. As we will see in the next three chapters, the prohibition of aggressive war, the prohibition of perfidy, and the prohibition of targeting civilians in wartime are also binding *lege* rather than *pacto*. International customary practices and express agreements such as the Geneva Conventions are important to giving effect to and reinforcing these requirements, but in none of these cases would a different fundamental rule be binding, no matter how widespread agreement on it were to be.

(b) *Secession and division.* In circumstances in which the residues of war or colonialism create units in which internal divisions make it difficult for institutions to properly represent everyone, it is within the power of a legal order to modify its borders, for example, by permitting secession.[84] The fact that it is entitled to modify them in this way does not entitle other nations to compel it to do so. None of this shows that territory is a form of property; negotiations are always preferable to conflict, but they are binding for the same reason that the results of conflict must ultimately end up being binding. In the transition from a state of nature

[83] Kant divides the three titles of private right, *facto* (acquisition by deed, that is, property), *pacto* acquisition by agreement, that is contract), and *lege* (acquisition determined by law) in accordance with the three categories of relation from the *Critique of Pure Reason*, substance, causality, and community. 6:247.

[84] 8:347.

to a more fully law-governed condition between nations, such changes are the best way to come to terms with the past, not because they are discretionary exchanges or because they restore proprietary claims.[85] Like all exercises of political power, any such adjustments are subject to an internal standard set by the idea of the original contract. A state can only engage in them rightfully in the service of improving the rightful condition of its inhabitants, that is, to bring itself into greater conformity with the idea of a situation in which the citizens better rule themselves through their laws and institutions. Rather than being organized under the patrimonial conception of territory as property, or the just war tradition's assumption that the state has a universal jurisdiction, any power that is exercised must be exercised on behalf of the inhabitants of the territory over which it is exercised, consistent with the independence of other legal orders. The same point applies to two or more states forming a federation or, as happened in Europe in the 1990s, additional states joining an already existing federation. In so doing, they do not give up their independence, but they accept limitations on some of the ways in which they exercise it in relation to each other and each other's citizens.

(c) *Economic treaties*. A nation can enter into arrangements with others to manage its economy through trade, investment, or borrowing, because managing the economy is one of its core public duties, so as to maintain and secure the material basis of its continued existence. In cases in which the arrangement is purely private—massive borrowing transparently in the service of privately enriching corrupt rulers—the resulting debts can be repudiated as odious precisely because the power to enter into arrangements is public rather than private.[86]

3. *Trusteeship*. Kant introduces the concept of status relation though cases in which one person is in control of some aspect of another's affairs, and the other is not in a position, either factually or juridically, to oversee that control. In such cases—including parents and children, agents and those for whom they act, bailors and bailees, and trustees and their beneficiaries—the nonconsensual nature of the interaction can only be rightful if the person

[85] See the discussion in Peter Niesen, "Restorative Justice in International and Cosmopolitan Law," in Katrin Flikschuh and Lea Ypi (eds.), *Kant and Colonialism: Historical and Interpretive Essays* (Oxford: Oxford University Press, 2014).

[86] Cristian Dimitriu, "Agency Law and Odious Debts," *Jurisprudence* 6(3) (2015), 470–491.

in control acts for the actual or imputed purposes of the one whose affairs are being controlled. Governments stand in a form of this relation to the inhabitants of the territories over whom they exercise political power. That is why public officials must not act for their own private purposes. A different version of this juridical structure can arise if one nation comes into possession of another territory on a short-term basis, for example, as the result of victory in fighting a defensive war (or of prevailing in an aggressive one). The victor does not become the owner of the vanquished nation's territory, able to use it for its own purposes. Not only is it precluded from using the territory for the private purposes of its rulers or their political allies; it is also precluded from using it for its own public purposes. Instead, it must exercise power on behalf of the inhabitants, until the original government is able to resume its role.[87] In the individual human case, such dependence need not be pathological or even unfortunate. But in the international case, it is always problematic.

## VII. Conclusion: Bringing Horizontal Relations under Law

Recent developments in international law have given global institutions a new prominence, leading a number of commentators to suggest that the idea of a world of sovereign states standing in horizontal relations to each other is outmoded and that, instead, states should be understood as having those powers delegated to them by the international legal order. Hans Kelsen had already made such a suggestion before World War II, writing, "If establishing a norm-issuing power whose system is continuously effective for a certain area represents, in terms of positive law, the emergence of a lawmaking authority, it is because international law invests the authority with this property, which means that international law empowers the authority to make law."[88] Kelsen's argument paralleled an argument that he had earlier deployed to argue that people have private rights—including even each person's innate right of humanity—only because a legal system has adopted capitalist organization

[87] I discuss this issue in detail in Chapter 8.

[88] Hans Kelsen, *Introduction to the Problems of Legal Theory* (translation of the first edition of *The Pure Theory of Law*) (Bonnie Litchewski Paulson and Stanley L. Paulson trans., Oxford: Clarendon Press, 1992), 120. For the international case, see Hans Kelsen, *Principles of International Law* (New York: Rinehart, 1952), 408 ff.

of economic activity.[89] In both cases, the meaning of the word "because" is somewhat mysterious. The claim is not causal/explanatory, since in neither case does it support the counterfactual necessary for such a claim: that is, it is not the case that if international law had been different, then states would be free to invade each other or contract into servitude, or, in the domestic case, human beings would not have the innate right of humanity in their own person,[90] or indeed that legality is possible without legal persons standing in horizontal relations, such that a legal person is one who can assert a claim in its own right for a wrong another has done to it.[91] The difficulty is that for international or domestic law to be different in the ways presupposed by the implicit contrast—if nations were free to invade each other or contract into servitude, or individuals to sell themselves into slavery—there would be no law at all. There is no difference between a legal order which sets no limits on conduct and the absence of legal order; the claim that they are free to invade and attack as they see fit because the basic law of a legal order permits it is no different from the claim that they are in a state of nature subject to no norms. Kelsen's claim does better if it is understood merely as a formal claim, that is, that basic relational norms must be given effect in a coordinate system of public law, both in the interpersonal and in the international case. That is, rather than debunking the idea that individual human beings have rights, or that nations are entitled to be independent of each other, Kelsen's argument is more fruitfully understood as articulating the fundamental principle that all forms of interaction—between individual human beings, between the individual and the state of which that human being is a member, between

[89] Kelsen, *supra* note 88, at 44. By the second edition of the *Reine Rechtslehre*, he had moved to the more nuanced view that the distinction between public and private law is intra-systematic. Hans Kelsen, *The Pure Theory of Law* (Max Knight trans., Berkeley: University of California Press, 1967), 282.

[90] Kelsen's student, Josef Kunz, to whom he dedicates *The Principles of International Law*, refers to "the so-called innate rights of the individuals." Josef L. Kunz, "On the Theoretical Basis of the Law of Nations," *Transactions of the Grotius Society* 10 (1924), 115–142, 130.

[91] See the discussion of the relation between legal capacity and the possibility of bringing a claim for a wrong personal to the entity with capacity in *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174, 11th April 1949. The International Court of Justice concludes from the fact that the United Nations is "a subject of international law and capable of possessing international rights and duties . . . that it has capacity to maintain its rights by bringing international claims." Para. 17. Scholars have disputed the manner in which it arrived at the premise that the United Nations is a subject of international law. (See Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010), 99–110.) The consequence drawn from it—that if it has legal personality, it can assert a claim in its own right for a wrong personal to it—is beyond dispute. As Lauterpacht remarks of the case, "It would appear that, apart from physical or similar incapacity, the right to bring a claim is of the essence of juridical personality." Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Cambridge University Press, 1982), 178.

states, and between individual human beings and states of which they are not members—must all be brought under the principle of freedom under law.

What is needed, then, is a way of understanding the sense in which political independence and territorial integrity are insecure outside of a public international rightful condition, and Ben: or "so in which"? private rights are also insecure. In the interpersonal case, exiting the state of nature and entering a rightful condition replaces force with right by providing a public standpoint within which there is always a way of answering every question about how things stand between private persons. Institutions for making and applying law are empowered to formulate and apply general rules, including rules about who gets to decide about what question, and further procedural rules about how things stand vertically between the legal order and those who are subject to its authority. That provision of closure must itself be closed with respect to outside claimants to authority, including other nations that claim authority either with respect to private claims or with respect to how things stand between the legal order and private claimants. Others can say what they think, but they cannot be entitled to use force, because any force that they use would be merely unilateral, and so replacing law with unauthorized force. A plurality of such systems therefore introduces a new form of horizontal relation between nations, with respect to which the same questions of independence recur. Therefore, just as individual human beings must leave the state of nature, so, too, must nations exit the state of nature in which they find themselves, which is a "non-rightful condition." As in the interpersonal case, entry into a public rightful condition introduces "no further or other duties of human beings among themselves than can be conceived" in a state of nature. As we will see in more detail in Chapter 9, an international legal order replaces "an antagonism in accordance with outer freedom by which each can preserve what belongs to it, but not a way of acquiring,"[92] with the "rational idea of a peaceful, even if not friendly, thoroughgoing community of all nations on the earth,"[93] making it possible for disputes to be decided "in a civil way, as if by a lawsuit, rather than in a barbaric way."[94] Kant acknowledges the possibility that "the complete realization of this objective always remains a pious wish,"[95] but its incomplete realization must govern nations that remain in horizontal relations to each other.

[92] 6:347.
[93] 6:352.
[94] 6:351.
[95] 6:354.

# 3

# National Defense

We saw in the previous chapters that Kant rejects all versions of the patrimonial conception of the state on which its territory (and in some versions, its people) is its private possession, including the populist conception on which the citizens through their institutions exercise anything like patrimonial power. He also rejects the idea that the state exists to do as much good as possible, and with it the idea that the scope of its jurisdiction is to be assessed in terms of its competence, rather than its location. In place of these, Kant develops a distinctively public conception of the state.

This way of conceiving the moral claims of a state or nation has fundamental implications for the morality and law governing war. We already saw in Chapter 2 that this public conception of the state leads to the idea that each nation is entitled to be independent of every other. That right to independence is analogous to the right of individual human beings in a state of nature to independence from each other, but it is marked by one striking difference: in introducing the right of nations, Kant notes that "[t]he rights of states consist, therefore partly of their right *to go to* war, partly of the right *in* war, and partly of the right to constrain each other to leave this condition of war and so form a constitution that will establish lasting peace, that is right *after* war."[1] Individual human beings in a state of nature have neither a right to go to war nor rights in war. This chapter takes up Kant's characterization of the right to go to war, in particular its limitation to national defense. Later chapters take up right in war and right after war.

Kant's exclusive focus on national defense marks a striking departure from earlier writing about war. For both the just war and regular war traditions, the right to engage in defensive war was taken for granted to the point that it received little attention. Instead, as we saw in Chapter 1, a distinction was drawn between defensive and aggressive wars, with the latter receiving detailed analysis and the former receiving almost none. Kant takes a very different approach, characterizing "right during a war" as "the greatest difficulty

[1] 6:343.

in the Right of Nations" because war must be situated within "the concept of an antagonism in accordance with outer freedom by which each can preserve what belongs to it, but not a way of acquiring."[2] The idea that "each may preserve what belongs to it" might be taken to suggest that both sides in every war are defending themselves. Considered as an empirical hypothesis, this claim has limited application; although some just war writers puzzled over cases in which each side had adequate grounds for believing it was under attack,[3] in the normal course of events, defensive force is the appropriate response to aggression. Kant is certainly aware of this; his point instead is that, although at most one side could be defending itself—there have been many wars in which neither side actually was—only defensive force is permissible, and so the use of force to "preserve what belongs to it" provides the model against which their conduct can be assessed. For the same reason, Kant's brief discussion of wrongful means in war focuses on prohibited means of defense.[4] All means of offensive war are prohibited, simply as such. As we will see in Chapter 4, means that even a defender is not allowed to use are also not available to aggressors.

The limitation of war to national defense marks out a contrast with the types of enforceable claims familiar within a domestic legal order, in which there are at least four such sources: defensive, remedial, punitive, and administrative (which I will treat as including each of the traditional police powers as well as the redistributive and insurance functions of a state, despite the many important differences between these). Nondefensive uses of force presuppose institutional structures that are absent in the current international legal order. More than that, other uses of force presuppose a public legal authority. As we saw in Chapter 2, each nation's entitlement to political independence and territorial integrity is a right to be independent of another nation's public law. Remedial, punitive, and administrative enforcement are all exercises of public law; to permit their enforcement as a ground of war would be to subordinate one legal order to another.[5]

[2] 6:346.

[3] Daniel Schwartz, "Part II: War," in *The Political Morality of the Late Scholastics* (Cambridge: Cambridge University Press, 2019), 119–210.

[4] 6:347.

[5] Perhaps one can imagine an international court with authority over all nations that resolved disputes and then permitted the parties to those disputes to use force in accordance with its rulings. Whatever the difficulties of such an arrangement, it would not be a case in which remedial, punitive, or administrative force was a ground for war. It would rather be a mechanism through which the imagined international court gave effect to its orders.

## I. A Taxonomy of Public Uses of Force

Defensive force will be the main focus of this chapter. Before turning to it, let me differentiate it from these other forms of potentially enforceable claims. As we saw in Chapter 1, the writers of the just war and regular war traditions both drew on legal analogies in articulating the grounds for going to war. For Aquinas, war was a kind of enforcement action, and its grounds were the punishment of wrongdoers or the remedying of wrongs. Suárez added what would today seem to be cases of redistribution to the grounds of war when he argued that war could be made against the Indigenous peoples of the Americas because they were claiming more than their fair share of land for themselves while farmers in Spain had less land than they needed. For Suárez, such claims were framed as instances of corrective (remedial) rather than distributive justice, because of the way in which he conceptualized individual rights to fair shares: he thought of the inhabitants of the Americas as having wrongfully taken something that already properly belonged to others. Some more recent writers have argued in favor of redistributive wars by poor people who have less than their share of the earth's resources against those who have more than their share.[6] These writers often point out that their arguments are unlikely to authorize an actual war, because in the context of the expensive nature of contemporary warfare, those whose resource claims give them grounds for war lack the resources to carry out a war with any prospect of success.[7] Still, the contention that distributive justice underwrites the use of force in both domestic and international contexts is a straightforward extension of the just war picture.

Remedial force is used in order to claim a remedy in the case of a wrong. If I breach my contract with you, or take your property without your permission, you can bring me before a court to demand a remedy. You face the burden of convincing the court of each element of the wrong you allege. If you prevail, the court can authorize a remedy exacted through such measures as the seizure of my goods, the attaching of my assets, or the garnishing

[6] Charles R. Beitz, "Justice and International Relations," *Philosophy & Public Affairs* 4(4) (Summer 1975), 360–389; Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), 97–129; Kasper Lippert-Rasmussen, "Global Injustice and Redistributive Wars," *Law, Ethics and Philosophy* (LEAP) 1(1) (November 21, 2013), 65–86; Laura Valentini, "Just War and Global Justice," in David Held and Pietro Maffettone (eds.), *Global Political Theory* (Cambridge: Polity Press, 2016), 143–157.

[7] See, e.g., Fabre, *supra* note 6, at 213. See the illuminating discussion in Johan Oltsthoorn, "Conceptualizing Private Rights of Enforcement in Revisionist Just War Theory: The Case of Human Rights to Subsistence," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

of my wages. The wrong must be established before a public court before it can be remedied.

Punitive force addresses a wrong that has been expressly prohibited and (paradigmatically) willfully committed. If I commit a crime, I can be punished, but only after a trial that is structured by the presumption that I did no wrong. The burden lies with the prosecution to establish each of the elements of the crime. These familiar features of legal proceedings are not merely a concession to the difficulty of gathering information or the predicted likelihood of error. Instead, they rest on the idea that one person is entitled to be free of the determining choice of another, which is the idea that human beings do not stand in relations of superiority and subordination. That idea entails that no person needs to defer to the judgment of another (even if it is correct), unless that judgment has been established by a public court with authority over both parties.

The category of administrative force is different again from both of these. The term "administrative force" may sound strange. We normally do not think about the regulation of food safety or the requirement to pay your taxes or obtain a building permit as coercive in anything like the sense in which we think of punishment or even the enforcement of a remedy as coercive. These differences are important, but should not distract from the way in which participation in a wide variety of schemes of social cooperation is both an essential feature of a system of ordered freedom under law and a ground for compulsion. Many forms of mandatory social cooperation are essential to the functioning of a legal order; others are essential to making the order properly public in relation to those over whom it exercises power. That is why those forms of cooperation can be enforced in a variety of familiar ways. If you violate food safety regulations, your restaurant or shop will be closed down; if you fail to pay your taxes your assets will be attached, or your wages garnished; if you park in the wrong spot, your vehicle will be towed away and you will need to pay a fine in order to recover it. You may also be subject to punishment for some of these acts, but each is a way in which the state, having told you what you must do, forces you to do as you are told. Many familiar forms of mandatory social cooperation fall under the traditional category of the police power; others are characterized in terms of the administrative state; still others enforce participation in redistributive schemes, including forms of social insurance such as publicly funded healthcare and education, as well as provision for those in need. These range from the payment of taxes through conformity to traffic rules, licensing requirements,

and environmental regulations, to doing their administratively determined share in contributing to the provision of properly public goods, construed broadly enough to include the provision of education and other elements of equality of opportunity. So, too, with the provision of adequate resources to those in need, conformity with workplace and environmental regulations, and rules prohibiting discrimination. Additional administrative procedures govern the enforcement of these claims in cases of violation, but the claims are themselves enforceable within an established legal order. The government does not need to consult you before demanding that your employer deduct taxes from your wages or that your server add them to your bill.

Administrative power is bounded in the same way that remedial and punitive force are: a legal order can only exercise it over those who are already subject to its jurisdiction. If you are subject to the state's jurisdiction, you can be made to pay in accordance with whatever criteria of distribution are in effect. By contrast, those who are not subject to its jurisdiction do not need to pay taxes or contribute to worthwhile public projects and cannot be compelled to do so. The issue of who falls within the jurisdiction of a particular legal order is often straightforward, but sometimes morally and legally complex. In the case of relations between nations, one thing is clear: no nation falls within another nation's administrative jurisdiction. That is one of the many reasons we recoil at the historical practice of a conqueror demanding tribute from a vanquished or threatened enemy.

On a Kantian view, the familiar restrictions on the operation of each of these types of enforceable claims fit into a systematic structure. Each is an incident of the original right of every human being to be independent of the choice of each of the others. Remedial force is only warranted if established through a properly public and authoritative procedure that respects the right to be beyond reproach of the person against whom the remedy is exacted. The person who alleges some wrong faces the burden of establishing each of its elements: in our example, you must establish that I owed you a contractual obligation and that I failed to perform. If you prevail, you must then establish the type and magnitude of the remedy you seek. Punitive force faces a still higher threshold: the prosecution, as agent of the state, must meet a higher standard of proof and must establish the relevant mental element, that is, it must show that the person accused of a crime committed it knowingly or willingly. The legitimacy of both remedial and punitive force therefore presupposes the existence of a court entitled to make determinations

of wrongdoing through procedures structured by the right to be beyond reproach.

Administrative enforcement is only legitimate for powers that the state has, and only over those who are subject to its jurisdiction. That jurisdiction is the precondition for systems of mandatory cooperation to which administrative or redistributive force give effect. Further, administrative jurisdiction presupposes some account of a fair sharing of burdens, as well as some conceptions of procedural fairness. That is why a state must have either territorial (over those on its territory) or personal (over its citizens) jurisdiction over those from whom it demands contributions.

Attempts to reduce one of these forms of enforcement to another—trying to show that punishment redresses a distributive imbalance because criminals take a benefit for themselves that others do not receive,[8] that private remedies are a redistributive allocation of loss between a wrongdoer and an innocent party,[9] that self-defense is a micro-redistribution of harm from an innocent party to a wrongdoer,[10] or (conversely) that the provision of government services is a form of compensation for restrictions on private enforcement[11]—all overlook the distinctive relationships that are at issue.[12]

Defensive force is different from each of these; although it is subject to judicial oversight in a domestic legal order, it is consistent with independence even in the absence of legal institutions. Neither remedial nor punitive nor administrative force could be justified in this way, because in the absence of appropriate institutions, nothing could establish their warrant in a way consistent with each person's right to be beyond reproach. Each of them requires that the enforcing body stand in the right relation to the party against whom the force is used. Defensive force, by contrast, can be consistent with the right to be beyond reproach. This may seem surprising: the person using defensive

[8] Herbert Morris, "Persons and Punishment," *The Monist* 52(4) (1968), 475–501.

[9] H.L.A. Hart and Tony Honoré, *Causation in the Law* (Oxford: Oxford University Press, 2nd ed. 1985), 267; William Prosser, "Palsgraf Revisited," *Michigan Law Review* 2 (1953).

[10] Jeff McMahan writes that "the determination of liability to defensive harm is a matter of justice in the *ex ante* distribution of unavoidable harm." Jeff McMahan, "Self-Defense Against Justified Threateners," in Helen Frowe and Gerald Lang (eds.), *How We Fight: Ethics in War* (Oxford: Oxford University Press, 2014), 117. The earliest version of the account I have found is Phillip Montague, "Self-Defense and Choosing Among Lives," *Philosophical Studies* 40 (1981), 207–219. I will examine this account in more detail *infra*.

[11] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

[12] I do not claim to have cataloged all of the ills of political philosophy in the past century; the idea that one or more of these can be explained in terms of cost internalization or harm minimization has also been prominent. Unlike distributive justice, neither of these ever figures on its own as a justification for coercion.

force might appear to be acting as judge in his or her own case. As I will explain, the justification of defensive force is the right of each to be independent of others. Defensive force resists uses of force which must be presumed to be unauthorized, precisely because of the right to be beyond reproach. In the absence of appropriate procedures, anyone who uses unilateral force against another is presumed to be acting inconsistently with the independence of the one against whom the force is used.

## II. The Individual Case: Self-Defense as Equal Freedom

Self-defense has been a central topic in moral and legal philosophy for centuries. It has been studied with new attention and vigor in recent decades. Much of this recent writing analyzes self-defense as a kind of exception to a background right not to be killed and seeks to explain it in terms of ideas of distributive justice or the temporary forfeiture of a right. The Kantian approach treats it as a distinctively juridical problem instead. As we saw in Chapter 2, for Kant, a distinctive part of morality governs the legitimate use of force and that morality is structured by a set of questions about how things stand as between individual human beings. The domain of right protects each person's independence as against each of the others. This structure applies with respect to each person's innate right of humanity in his or her own person—rights to bodily integrity and reputation—and, with significant modification, to acquired rights. Rather than seeking to explain how someone could lose their right not to be killed, the Kantian account understands your right to security of your person as part of a system in which each person is entitled to be independent of the determining choice of others. The entitlement to engage in defensive force is already contained in this structure, because protective force is nothing more than the prevention of a violation of it. As Kant puts it, defensive force is the hindering of a hindrance to freedom.[13] As we saw in Chapter 2, enforcement of acquired rights requires more, because acquired rights only bind others under a system of public law. Your right to the security of your own body, by contrast, can be enforced apart from legal institutions, because your right to repel aggression against you is already included in your right to independence: it is the authorization to prevent others from subjecting you to their choice. As will become clear in the case

[13] 6:231.

of national defense, the enforcement of any acquired right depends on the existence of authoritative legal procedures, which are absent in an imagined state of nature between individual human beings and in the actual state of nature between nations.

## A. Some Contrasts

On the Kantian view, then, the right to defend your own person is a reflex of your right to independence. The Kantian account therefore rejects many views of defensive force that have been prominent in recent literature. These accounts fail to articulate the relational nature of the authorization to use defensive force, and so fail to make sense of its distinctive authorization. Worse, when extended to the case of national defense, such accounts must suppose that any defensive authorizations depend on the sort of material analogy between nations and individual human beings that were considered and rejected in Chapter 2. Such material analogies are not only weak, but irrelevant, since the ground of national defense is not that nations have a right to continue existing, but rather that they are not subject to other nations.

In the individual case, the right to defend yourself against attack does not depend on any right to preserve yourself[14] (as Hobbes is often taken to contend). Nor is it a matter of an aggressor having somehow forfeited the right not to be killed. You can only forfeit something if you already had a right to it, but nobody could have a right against being subject to warranted defensive force, so nobody could lose it by engaging in aggression. You are entitled to stop me from grabbing or attacking you because my act is wrongful; I have not forfeited my right against your defensive response to that wrong.

Forfeiture accounts sometimes appear to be saying something different, focusing not on a right against defensive force but some more general idea of a right not to be killed or a right not to be harmed, which can then be temporarily forfeited through bad behavior. The source of the difficulty is

[14] As Kant is quoted in student notes from his 1784 lectures on natural right, "How does his self-preservation concern me? I am required only not to resist his freedom. In right I have to arrange everything according to laws of freedom, or else everything gets confused." Kant, *Naturrecht Feyerabend*, 27:1377, edited and translated by Frederick Rauscher as "Natural Right Course Lecture Notes by Feyerabend," in Rauscher (ed.), *Lectures and Drafts on Political Philosophy* (Cambridge: Cambridge University Press, 2016) (translation modified). For an argument that Kant's account of defensive force rests on self-preservation, see Thomas Mertens, "Reading Kant's Rechtslehre; Some Observations on Ripstein's *Kant and the Law of War,*" in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

an overly broad description of the right: everyone is always liable to defensive force if they attack others. Forfeiture views face a further difficulty in the case of defensive force, which is only permissible while the defender is being attacked.[15] The restricted scope of the supposed forfeiture makes it unlike cases of legal forfeiture or forfeiting a match in a chess tournament or even forfeiting your freedom for the term of a prison sentence; the aggressor who has supposedly forfeited the right not to be killed immediately regains it by ceasing to attack.

Nor is the right to use defensive force based on some distributive idea of making the responsible party bear a cost that must fall somewhere.[16] Any such comparative or distributive inquiry has no way of restricting its scope to the aggressor and the aggressor's victim. Perhaps there is some third party, even guiltier, on whom the burden of the unavoidable harm could more justly fall.[17] If the point of distributive justice is understood in terms of people

[15] As we shall see, in the international case, the concept of an attack is more complex in both its structure and its application, but the same general principle holds: once the war is over, defensive force can no longer be used.

[16] McMahan, *supra* note 10, at 117.

[17] Much recent writing about distributive justice has articulated or presupposed some version of luck-egalitarianism, the view, broadly speaking, that people can be made to bear costs for which they are responsible, which include their choices but not their circumstances. I have argued elsewhere that luck egalitarianism cannot be coherently formulated (see *Equality, Responsibility, and the Law*, Cambridge: Cambridge University Press, 1998). Here I limit myself to one observation: the idea that an aggressor can be stopped because otherwise the aggressor's victim would be bearing the costs of someone else's choices—implicitly subsidizing them—does not capture what is wrong with one person attacking another. Killing or endangering other people is not wrong because it is an expensive taste the cost of which must be borne by the killer. Although one could idiomatically say that the killer "took" the victim's life, the wrong of murder is not that the killer now has something that properly belongs to somebody else, or has more than his or her fair share. If the point of preventively redistributing risks is to prevent a maldistribution of outcomes (what other point could the luck egalitarian suppose it to have?), the wrong to be prevented must be specified in those perplexing terms. It is not surprising that leading defenders of distributive justice views of defensive force, such as Jeff McMahan, think of defensive force in terms of costs rather than wrongdoing, and then try to filter costs through ideas of responsibility that they expressly distinguish from fault. The concept they propose has an expansive reach: McMahan argues that lethal force is warranted in cases in which someone knowingly and voluntarily chooses to do something, such as driving carefully and imposing minimal risk but, through no fault of their own, loses control of their car. Since their voluntary decision to drive was a causal antecedent of the danger, that person can be made to bear its cost, and so is subject to lethal defensive force. (Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (July 2004), 693–733, at 729. The same example occurs in Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 165.) This conception of responsibility is said to apply to actions that are excused, despite the more familiar view, standard at least since Aristotle, that excuses (such as mistake of fact) defeat responsibility. Aside from intuitive overbreadth, an account focused on costs faces a further conceptual difficulty: normally someone in the path of danger, in this, or almost any other case, is in the path as a result of that person's past choices also. The pedestrian went out while in a position to know that freak accidents sometimes occur; on this expansive conception of responsibility, the collision appears to be the joint "responsibility" of both driver and pedestrian. McMahan's approach describes the driver alone as the creator of the risk, but the luck-egalitarian framework within which he operates cannot generate such an asymmetry, because it represents the danger as a loss to be distributed based on the possibility of avoiding it. As such, it cannot depend

bearing the costs that they should, the availability of other comparators, other than aggressor and defender, cannot be left out of the analysis.[18] (Imagine that a serial killer can be used as a human shield to deflect an attack of which he is not a part). As a general matter, the claims of distributive justice operate on groups of persons, not on individual transactions. Restricting their operation to only two people for the duration of an attack requires further justification.

Defenders of ideas of forfeiture or distributive justice accounts of defensive force often seek to overcome some of these problems by restricting the scope within which their principles are supposed to operate, so that the forfeiture is temporary, limited to the duration of the threat,[19] or the pool of those among whom the distribution is to take place contains only the aggressor and defender.[20] The difficulty is not that such proposals cannot be made to fit someone's intuitive judgments about cases in which defensive force is justified. It is that the relational ideas introduced to supplement ideas of forfeiture or distributive justice are already sufficient to explain the scope and structure of self-defense. In particular, restricting the application of concepts of distributive justice or forfeiture requires focusing on the specific interaction between aggressor and defender—the former's wrongful attack on the latter. If the focus is narrowed to the specific interaction between aggressor and defender, it is not surprising that the forfeiture ends as soon as the attack does, and that the distributive exercise looks only to the parties to that transaction.

on the claim that the driver is a wrongdoer; that is why McMahan focuses on the fact that the driver knew there was a risk of harm, not on the driver endangering the pedestrian. The same point applies in cases of aggression; the past choices of people who are the targets of aggression typically had something to do with the fact that they are in the path of the peril they now face, because risks are always the joint product of many actors. If the inquiry really is distributive, its focus must be on foreseeable contribution to the existence of an unavoidable harm; yet acquiring things others want foreseeably leads to covetousness. McMahan could insist that the aggressor is more responsible than the defender, but the luck-egalitarian version of that judgment may or may not be true. An aggressor's turn to a life of crime might be explicable as the product of unjust circumstances rather than anything that would count as a meaningful choice, while the defender's appearing to be a promising target could be the result of a calculated risk and so a choice. In such a situation, the comparative exercise seems to be beside the point; the attack is the basis of self-defense. No such comparative exercise is required if the concept of wrongdoing is admitted from the start, rather than being reduced to distributive justice.

[18] As Jonathan Quong puts this point, "The principles govern the whole scheme—they can't be directly applied in isolated instances without reference to the broader distributive scheme." Jonathan Quong, *Self-Defense* (Oxford: Oxford University Press, 2020), 7. Particulars only fall under such a conception of distributive justice as parts of the broader distribution.

[19] For a recent attempt to do so, see Gerald Lang, "Why Not Forfeiture?," in Helen Frowe and Gerald Lang (eds.), *How We Fight: Ethics in War* (Oxford: Oxford University Press, 2014), 38–61.

[20] Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104(2) (January 1994), 252–290, at 279, citing Jules Coleman, *Risk and Wrongs* (Cambridge: Cambridge University Press, 1992).

Once these transactional ideas are introduced, they are already sufficient to explain why defensive force can only be used against an aggressor for the duration of the aggression. You cannot shift the burden of attack onto the more deserving third party because that person is not attacking you; the forfeiture ends when the attack does because nothing was had or forfeited to begin with.

The Kantian approach must therefore repudiate all of these ideas, because none of them focuses on how things stand exclusively as between the aggressor and the defender with respect to the specific transaction between them.

## III. From Individual Self-Defense to National Defense

In the individual case, your right to defend yourself is not an instance of a more general right to self-preservation. You do not have a right to use force to compel others to provide you with what you need or to protect you from perils they did not create; you only have a right to prevent them from interfering with your person. Analogously, the right of a nation to defend itself or another nation is not in the service of any nonrelational idea of its self-determination. The right to national defense, like all interpersonal rights (whether between natural or artificial persons), is irreducibly relational. It concerns the defender's entitlement to independence from the attacker, rather than any claim to have means adequate to its survival or flourishing.[21] Defensive force prevents a wrong; it upholds the defender's right to independence as against the attacker. The right is relational in both its form and its content: as a matter of form, defensive force can only be used to prevent or push back an attack on one nation's independence as against another; as a matter of content, it can only be exercised to block aggression. Like other interpersonal rights, the entitlement to use defensive force, both in the individual and in the national case, is not a matter of the significance of the end for which it is used, but rather of the permissibility of the means. A system in which individual human beings are entitled to be independent of each other is one in which interference with another person is necessarily prohibited;

[21] As Kant explains, there can be no right of necessity: a right against other people to self-preservation in the face of natural perils is not a right that everyone could consistently enjoy, as it would permit one person to preserve himself by taking the life of another. (6:235). You only have a right to preserve yourself against the wrongful deeds of others.

conversely, preventing interference with another person is not something that is added onto the prohibition on the interference. It is just the systematic upholding of the prohibition. As Kant puts it, the connection between the right and the authorization to coerce is "analytic," because it is already contained in the idea of reciprocal limits on choice.[22] The only ground for using force is the prevention of wrongful force.

Talk about the legitimate grounds for using force "to stop aggression" might seem to introduce a determinate end into what is supposed to be an analysis that is restricted to the rightful use of means. But the permissibility of defensive force does not depend on supposing that your independence is something that is good or worthwhile when viewed from any standpoint *other* than that of right. It is irreducibly relational; it is not in the service of your ability to lead an autonomous life (or any other good). It is your standing in relation to others. Compare: rather than supposing that people must pay their debts because it is good that debts be paid, it is better to suppose that the good in the payment of debts is the meeting of an obligation. So, too, defensive force is nothing more than upholding the restrictions on permissible means that govern interactions between independent parties. The person or state that uses force to defend itself or another is preventing the wrongful use of means, and the rationale for legitimate defensive force is already contained in the idea of a system of restrictions on acceptable means. The aggressor is prohibited from attacking the defender, regardless of the end for the sake of which the aggressor attacks.

The defender's defensive force just is the enforcement of the prohibition in the particular case, preventing the aggressor from wronging the defender. Third parties can take an interest in and come to the defender's aid, but the rationale remains the same. The right to defend yourself or another just is the right to stop a particular wrong. It enforces that prohibition in two senses. First, where effective, defensive force makes aggressive force ineffective, and so preserves the independence of the party attacked. Second, and more fundamentally, the entitlement to use defensive force does not depend upon its efficacy as a mechanism in preventing or reversing wrongs; an essential part of what it is to have a right to independence and be free of aggression by others is to be authorized to act to uphold that independence. If some other person could compromise your independence, and you were not permitted to do anything in response (and others were not permitted to assist you),

[22] 6:396.

then you would not be fully independent of that person; you would be their subject. So, too, if defensive force was prohibited when the prospect of success was low; that would mean that the attacker could, through its aggression alone, make defensive force unwarranted. Your entitlement to prevent the compromise of your independence is not something over and above your entitlement that it not be compromised.

This structure remains in place even if the specific use of defensive force is in the service of a variety of underlying motives. Perhaps a state unconcerned about some small, disputed island defends it to deter other aggressors who covet more important territory, or because its leaders hope to rally domestic support for other programs through a show of force. Parallels in cases of individual self-defense may be unusual, because people who are attacked typically want to survive unscathed. But even if you secretly welcome an attack in order to prove to yourself or others that you are a brave or skillful fighter, or to get at a rival (but have done nothing to create or provoke the attack), you can respond defensively if, and only if, wrongfully attacked. In both cases, the only acceptable means remain defensive, and the fact that their use also serves your other ends has no bearing on its justification.

## IV. National Defense as an Organizing Principle of the International Legal Order

Although the individual and national cases differ, national defense is ultimately a matter of upholding the reciprocal independence of states and, as such, is a necessary element of the international legal order. This claim may seem anachronistic: as we saw in Chapter 2, war was not outlawed by international law until 1928, by the Pact of Paris (usually called the Kellogg-Briand Pact), and many historians and scholars of international relations regard it as a complete failure that did nothing to stop the world war that followed. The UN Charter is later still and, on many readings, no more effective. So, it might be asked, in what sense is this restriction just "built in" to the idea of a system of freedom under law? Here, it might be helpful to draw attention to a point frequently made by Lauterpacht. He notes that a system of international law is internally defective if one state can unilaterally deprive another of the law's protections.[23] But that just is the system in which war is available

[23] Hersch Lauterpacht, "Recognition of States in International Law," *Yale Law Journal*, 53, 3 (1944), 385–458, at 388.

as an instrument of national policy. The thought, then, is that restrictions on the grounds of war are not an issue about which an international legal order could go any number of different ways. Instead, the restriction is implicitly contained in the idea of an international legal order. To bring a domain of interaction under law is to restrict the use of force. The most basic of these restrictions, on which all others must rest, is the restriction of the resort to armed force. Any license to use force unilaterally to assert or enforce a prior claim is a license to unilaterally substitute force for law, that is, a license to exit the legal order. The prohibition on force, and the correlative restriction of legitimate force to national defense, is already implicit in any system in which nations interact under law. That possibility already requires the distinction between law and brute force, and with that, the requirement that its rules apply regardless of the unilateral rejection of them by any particular state on any particular occasion.

Kant makes the same point when he characterizes peace as "the final end" of the doctrine of right.[24] His claim is not that everyone should work diligently toward achieving peace—though, of course, we should—but rather, as we saw in Chapter 1, that peace is the internal norm of right. The distinction between force and freedom under law just is the distinction between war and peace. The moral importance of peace does not depend on the fact that it is a condition in which, as it turns out, most people have much better lives than they would in war, or one in which they prudently trade away liberty because they want security. Instead, even though a legal order is not always fully a system in which all are free, the existence of a legal order is always the precondition of freedom, the situation in which claims can be made and assessed and disputed on their merits, rather than through force alone.

It might seem possible to imagine a world in which *all* uses of force, both aggressive and defensive, are prohibited. The difficulty is not that such a proposal is impossible to imagine, but rather that it is inconsistent with the rationale for the prohibition of aggression: each nation is entitled to be independent of all of the others. The Kantian account and a world in which defensive force was outlawed would overlap in practice so long as there was no aggression. Both would be systems of anarchy, of freedom with neither force nor law. The difference between them emerges only in the case in which one nation wrongfully commits aggression against another. If that aggression cannot be resisted, then the state that is attacked is subject to the other state's

[24] 6:355.

choice after all. Preventive force simply upholds the independence of the state that is attacked. In the absence of any analog of an international police force or international court with powers of enforcement, the right to independence and the right to resist aggression are inseparable.[25] Again, the grounds of the authorization to use defensive force do not preclude oversight of its exercise, in either the individual or the international case. Although the occasions on which defensive force is warranted are urgent, in the individual case this does not mean that the defender is entitled to act on the mere perception of danger; in the international case, this account of defensive force is consistent with limiting its operation to situations in which international organizations such as the United Nations have not yet had time to act.[26]

Now this might seem to leave open the possibility that nations could also use force in other ways. The pre-1928 law of war was ambiguous on the authorization of force; it might be thought that it was not fully available unilaterally, but rather that a nation initiating a war had to have a just cause or, in Vattel's convenient vocabulary, at least a "pretext."[27] On this view, reclaiming lost territory, seeking compensation for historical wrongs, or punishing wrongdoing might also provide grounds for using force, since each is a response to a wrong, and it might further be thought that responses meant to remedy such wrongs might (perhaps by analogy to the way in which they operate within a domestic legal system) be modeled on extended or ongoing versions of active violations. On such an understanding, then, there would be conceptual space for the traditional just war view, expounded, for example, by Aquinas, Vitoria, and Suárez, according to which aggressive (their term for nondefensive) war is permissible provided that it has a just cause. Rather than preventing a wrong, such a conception of war would be, as it is for the Salamanca scholastics, remedial or punitive. Its remedial aspect would consist in reclaiming something wrongfully taken, and its punitive aspect in responding to the wrongfulness of the acts of the enemy. On such a view, war

[25] The situation thus differs from that in a domestic legal order in which other enforcement mechanisms, both immediate and remedial, are in place.

[26] The UN Charter permits two further uses of force outside a nation's own borders: one nation to operate its military on another's territory at the invitation of that nation, and with Security Council authorization. These categories of grounds of war are not at odds with the narrowly defensive account developed here but are indicative of the way in which the distinction between force and law governs all legitimate cases of resort to force.

[27] Emerich de Vattel, *Le Droit des Gens, ou Principes de loi Naturelle, Appliques à la conduite & aux affaires des Nations & des Souverains, Tome Second* 3:74 (Bk. III, Ch. 3, § 33), at 170, London, Chez Benjamin Gibert 1758, translated as *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, edited and with an Introduction by Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), 487.

would be more nearly analogous to the forms of self-help that survive in domestic legal systems, but be much more pervasive, because in the absence of a central agency of enforcement, each state has the privilege, and perhaps also the obligation, to see to it that wrongs are righted. So conceived, the availability of self-help reflects the lack of a unitary executive for the international legal order, rather than a fundamental defect in it.

Such a view, however, makes war conditional on one nation's judgment of another's fault or past wrong, permitting each nation to be, as Suárez conceded, judge in its own case. That just underscores Lauterpacht's point: the system in which one party can unilaterally act on its own judgments about the rights of another is necessarily defective as a system of law. This is so even if we accept Suárez's optimistic assessment of the likelihood of a "prince" having wise advisers and judging impartially.[28] Because any legal order must be structured by the right to be beyond reproach, a nation cannot be coerced by another, even by one with a benevolent and wise ruler. Instead, if one nation "takes it upon itself to obtain satisfaction for an offence against its people by the people of another state,"[29] that other state is entitled to defend itself. The point is not just that the attacker might be, or even is, mistaken; it is that in the absence of authoritative procedures structured by the right to be beyond reproach, the attacker has no standing to seek satisfaction in the form of either remedy or punishment.

Even the use of defensive force does not fully escape the problem of the defender being judge in its own case. Legal systems address this problem by making all uses of defensive force subject to review, after the fact, asking whether the defender believed on reasonable grounds that the attack was imminent, and if the degree of force used was both necessary and proportionate to the threat. Outside of a legal order, no institution is available to answer such questions. In such a situation, each can only do what seems good and right in its own eyes.[30] As a result, in a state of nature, whether between individual human beings or between states, the right to be beyond reproach is always necessarily insecure. In such a situation, one nation's protection of its own right to be beyond reproach, its refusal to defer to another nation's allegation

[28] Francisco Suárez, "On Charity," in *Selections from Three Works* (G. Williams trans., Oxford: Oxford University Press, 1944), 818.

[29] 6:346.

[30] 6:312. Here Kant echoes a traditional theme; compare the Book of Judges in the Hebrew Bible, "In those days there was no king in Israel; everyone did what was right in his own eyes." Judges 17:6. In the *Crito*, Socrates makes the converse point when he points out that a state could not subsist if everyone decided on their own whether to obey laws or the verdicts of a court. *Crito* 50b.

that it has done wrong, will lead it to act on its own judgment that another state is a wrongdoer, or about to be one, each giving the other apparent grounds for not only reproach but attack. This structure underlies Kant's appeal to the Latin maxim *Quilibet praesumitur malus, donec securitatem dederit oppositi* ("Everyone is presumed bad until he has provided security to the contrary"),[31] the apparent opposite of the right to be beyond reproach. In both the domestic and international cases, this insecurity—which is conceptual, not empirical—provides a compelling reason to exit the state of nature and set up appropriate institutions.

Still, the case of defensive force is different in one important respect: the defender is protecting what it already has—its political independence and territorial integrity, that is, itself—and so preventing the aggressor from interfering with it. In so doing, the defender is thus preventing the aggressor from acting without authorization, since the aggressor claims something in another's possession for itself without having established the superiority of its claim through a procedure structured by the defender's right to be beyond reproach.[32]

Therefore, although there is one sense in which the defender acts as judge in its own case—it makes the judgment of fact that the aggressor is attacking its use of defensive force serves to prevent a unilateral violation by the aggressor. It rests on the defender's claim to be beyond reproach: the aggressor is seizing the defender's territory in the absence of a proper procedure for determining any defect in the defender's entitlement to it. Given the absence of any such procedure in the international case, the defender's right to be beyond reproach takes the form of its entitlement to retain what it already has.

This understanding of protective force is fundamentally conservative: your right to what you have is beyond reproach by others, because the

[31] As B. Sharon Byrd and Joachim Hruschka point out, Gregor mistranslates this maxim as "He is presumed evil who threatens the safety of his opposite." B. Sharon Byrd and Joachim Hruschka, "From the State of Nature to the Juridical State of States," *Law and Philosophy* 27(6) (November 2008), 605.

[32] Kant identifies the right to be beyond reproach with the Latin tag *iusti* (6:238), which then recurs in his specification of *protective justice* (*iusititia tutatrix*) in which the law "says what conduct is intrinsically *right* in terms of its form (*lex iusti*)." This contrasts with "what is rightful" (the range of things with respect to which acquired rights are possible) and "what is laid down as right" (the decision of a court). (6:306). The same Latin tag *iusti* appears in Kant's gloss on Ulpian's precept of rightful honor, *honeste vive*, the requirement that one never allow oneself to be made a mere means for others (6:236), which is Kant's replacement for Achenwall's rendering of the first principle of right as self-preservation. For Kant, juridical honor replaces material self-preservation. The same structure appears again in Kant's exposition of original acquisition of property, where it stands in for the claim Pufendorf expresses as the idea that no one is presumed to make a gift. *On the Law of Nature and Nations* (Bk. V, Ch. 3, Para. 8).

only way in which they could contest your claim to it would be through some competent forum. If one nation has not established that another's claim to its territory is non-rightful through appropriate procedures, the other's use of force to defend it is just the instantiation of its right to be beyond reproach. That does not lead to the conclusion that there are no restrictions on the amount or type of force it can use, or on the occasions on which it can use it. It leads only to the conclusion that its exercise of jurisdiction over its territory is presumed good until someone has successfully contested it before competent institutions. In this, the structure is parallel to the structure of a defamation action: if someone says you have done wrong, you can compel your accuser to either prove the truth of the accusation or withdraw it. In the absence of institutions, the nation that contests another's claim to territory must be taken to be executing a judgment that has not been established. The defending nation can prevent it from doing so. Once more, the conservative bias of the right to national defense may support arguments in favor of setting up competent institutions. The very structure that demands such institutions be set up entails that, in their absence, protective force is permissible. The defender exercises a protective privilege against an act of aggression that can have no parallel justification.

The consistency of defensive force with each nation's right to be presumed to have done no wrong does not, on its own, establish that all uses of defensive force between nations are fully rightful. In the absence of a public international legal order, each nation is in a state of nature in relation to all the others, and so can only do "what seems good and right to it." In such a situation, the question of whether another nation is attacking will require judgment, not only about multiple questions of fact—what are those soldiers doing so close to our border? how many of them are there? are they preparing to attack, simply defending themselves, or bluffing in the hope of extracting advantage, or seeking to provoke us?—but also on the proper articulation of the relevant juridical standard: Where, exactly, is the line between preparing to attack and attacking (an analog of the requirement that defensive force only be used when attack is imminent)? How much evidence of an attack is required before defensive measures can be used (an analog of the criminal law's requirement that the defender believe on reasonable and probable grounds that it is under attack)? Is the attack in progress or are preparations being undertaken for what may turn out to be an attack (an analog of the criminal law's distinction between preparation and attempt)? In such a situation, there is ample room for misunderstanding and mistake, so much room,

indeed, that two nations might each satisfy themselves in their own eyes that the other is about to attack.[33] A more careful investigation of the surrounding facts will not always resolve matters: without a shared legal authority, there may be no precise determination of the relevant legal standard, and each may have grounds for erring on the side of caution in dealing with an apparently hostile neighbor.

Such indeterminacies and uncertainties make a state of nature unstable "no matter how good or right-loving" states might be, because the lack of a shared standpoint leaves even well-meaning states with a plurality of potentially inconsistent authorizations. They do not, however, warrant the conclusion that national defense is not a ground of war, only the conclusion that even with respect to national defense, an international state of nature is gravely defective. War is not a procedure for establishing rights. That is just to say that a nation is entitled to defend itself, but as a matter of right, who wins the war does not properly establish who had a right. Defensive war is not a defective procedure, because it is not a procedure at all.

Cast in Kant's vocabulary, the defensive force exercised by a state protects something closer to an innate right, rather than any acquired right, because, as we saw in Chapter 2, it does not need to engage in any affirmative act to be entitled to political independence and territorial integrity; its claim to each is good simply as such. A state does not need to point to either the correct type of acquisition (as suggested by the regular war tradition) or competent stewardship (as the just war approach would have it) in order to establish its claim, as against another state, to that territory.

## V. Internal Prohibitions on External Aggression

Kant argues that the sovereign does not stand to the citizens of the state as their proprietor, and so, as such, is not entitled to "lead them into war"[34] for private purposes. This idea reflects the fundamental difference between an individual human being and a public legal order: individual human beings have no mandatory purposes from the standpoint of right; you are entitled to use your body as you see fit to set and pursue your own purposes,

[33] See Alon Harel, "A Kantian Defense of Remedial Wars," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021) for helpful discussion of this issue.

[34] 6:345.

restricted only by norms prohibiting wrongful interference with the bodies of other people.[35] A nation is different; it does not have private purposes in this sense. Instead, it has only an immanent public purpose of providing a rightful condition to its inhabitants. This immanent public purpose puts additional restrictions on what a state may demand of its citizens; it cannot send soldiers to war in order to achieve external purposes such as acquiring territorial resources, or rent them out as mercenaries in order to enrich the national treasury. Conversely, one nation wrongs another if it interferes with that nation's provision of a rightful condition to its inhabitants.

The restriction of war to national defense thus has an internal as well as an external dimension. The state cannot send citizens to war to advance some private purpose, and any purpose other than national defense will be private in the relevant sense, because it will be done in the service of something other than creating or preserving a rightful condition. Even aims that are sometimes still defended as just grounds of war,[36] such as increasing a nation's wealth or expanding its territory, qualify as private in this sense.

## VI. Protection and Prevention

The rationale for defensive force does not generate a parallel rationale for preventive force. In *Toward Perpetual Peace*, Kant argues that preventive war could never be rightful. He puts the point in terms of the idea of publicity: a state that announced its intention to attack for fear that its neighbor would attack it would simply precipitate an earlier attack by the neighbor. This may seem to simply reveal Kant's limited knowledge of international affairs. On many accounts, Germany invaded Belgium in 1914 because it seemed like the most promising time to start what it took to be an inevitable war with France; historians often suggest that Japan bombed Pearl Harbor when it did because its chances of success were greatest if it attacked from a position of strength, before its supply of oil was depleted. Such examples might be multiplied, including some that worked out better for those starting the war than did either of these examples. Kant's claim is not that preemptive

[35] In the second part of the *Metaphysics of Morals*, the *Doctrine of Virtue*, Kant does specify two mandatory ends: your own perfection and the happiness of others. These play no part in right.

[36] In the lead up to the 1991 Gulf War, Richard Nixon wrote an op-ed in the *New York Times* advocating war on the grounds that to allow the Iraqi annexation of Kuwait would raise the price of oil. As Nixon put it, "We should not apologize for defending our vital economic interests." Richard Nixon, "Why," *New York Times*, January 6, 1991, at E.19.

attack is poor strategy, that a particular preventive war, or the possibility of letting the enemy know that one is planned, is likely to fail, but rather that its failures as a public principle already show that it is defective. He illustrates with examples of smaller states banding together to attack a large one or a large state attacking a smaller one, each regarding the other as potentially menacing in the future. That principle, if made public, amounts to an announcement that the state is indeed menacing to others, as well as an invitation to others to act preventively against it. It is equivalent to a standing declaration of war against its neighbors. This could not be a principle of right, that is, a principle that secures the independence of each from the others, because it would entitle every nation to attack any other at any time; no nation could be secure from any of the others, except by accident of being strong enough to repel them. That is just to say that a right to wage preventive war would be the rule that might makes right. Although a state might have an interest in security that could be served in a particular case by preventive war, the limit of its right to security must be the same as the limit of every other nation's right to security. Therefore, it could not have a right to go to war to protect its security against all potential threats, because on that principle all nations are always potential threats to each other. Therefore, preventive war cannot be rightful.[37]

Kant appears to view preventive war more positively in the *Doctrine of Right* when he speaks of threatened violations, preparations, and "even just the menacing increase in another state's *power* (by its acquisition of territory)."[38] As his subsequent discussion of an "unjust enemy" makes clear, the wrong of aggression consists in acting on "a maxim by which, if it were made a universal rule, any condition of peace among nations would be impossible and, instead, a state of nature would be perpetuated."[39] Kant's immediate example is violation of public contracts: to repudiate a treaty is not merely to repudiate a particular agreement, but to act on a principle which, if generalized, would make it impossible for nations to govern their interactions through treaties and leave only force in place. The same point applies to a maxim of acquiring territory through aggression: it makes peace impossible, because it gives every nation a right to resort to force entirely at its own initiative.

[37] 8:385.
[38] 6:346.
[39] 6:349.

The distinction between defensive and preventive war is categorical, but its application may be unclear or even indeterminate. If someone is attacking you, you do not need to wait until they have successfully attacked you to use defensive force; you are entitled to stop them as they are attacking or about to attack you. But the question of whether someone is attacking or is about to attack is subject not only to uncertainty but indeterminacy. In such a situation, you can do no better than what seems good and right to you. So, too, with nations. In a state of nature, each nation can only do what seems good and right to it; in using defensive force in the individual case, the defender will sometimes have imperfect information about the (seeming) attacker's intentions and abilities. There may be circumstances in which the only form of defense is preemptive.

Two important points follow. The first is that the fact that defensive force will sometimes aim to preempt an attack does not show that preventive war is defensible. The second is that the availability of self-defense in a state of nature reveals a further fundamental defect of any state of nature, that is, the fact that where each can only do what seems good and right to it, it is possible at least in principle for each of two sides to have as good a warrant as is available for supposing the other is attacking, and so for attacking first. How often this situation has arisen is not relevant here; the fact that it could arise reveals a possible structure of interaction and with it the fundamental defect of the non-rightful state of nature between nations. If each can do no better than what seems good and right in its own eyes, two nations might be entitled to attack each other.

The structure described so far generates the restriction on the grounds of war to defensive force. The only ground of war is repelling aggression, that is, either preventing a wrong or reversing one that is in progress. Just as defensive force may be used to assist another who is under attack in the case of individual self-defense, so, too, it can in the international case. Only such protective force is consistent with "the concept of an antagonism in accordance with principles of outer freedom by which each can preserve what belongs to it, but not a way of acquiring."[40]

The law of nations protects what nations already have, not based on any claim that the chain of title was without stain, but rather because a system of independent nations presupposes that no nation has standing to forcibly

[40] 6:347.

contest another's current title. The possibility of a peaceful international order rests on this structure.[41]

## VII. Other Just War Conditions

So far, I have developed the Kantian argument that national defense is the only ground for one nation going to war against another. This argument distinguishes the Kantian position from both the just war and regular war traditions, each of which offers much more expansive grounds for war. In concluding, however, I want to draw attention not to the way in which the Kantian approach is narrower than these other traditions, but to a way in which it is also broader.

The traditional *ad bellum* principles articulated by medieval just war writers and reiterated into the present century include not only just cause but also requirements of right intention, proper authority, proportionality, and a reasonable prospect of success. These conditions strike many writers as obvious, even bordering on platitudes, but neither the traditional nor contemporary explanations for them are obvious or platitudinous. In the hands of Aquinas and later Suárez, these are simply special cases of the requirement of sound practical thought in any instance, with as much application to procreation or surgery as to war. They have the most obvious home in discussions of punishment, which fits well with the Thomist and scholastic idea of war as an enforcement action. But they have a broad following that goes beyond their Thomistic origins. Many contemporary writers seek to explain them in terms of some idea of a proper balance between good and bad consequences, which they describe as "the proportionality calculation." This concluding section considers whether any version of them can be aligned with an account that limits the grounds of war to national defense.

Each of the other conditions is presented by the traditional just war writers as a necessary condition for the justice of punishment or exacting a remedy. Aquinas and Suárez both distinguish between defensive wars, which they do not regard as requiring detailed analysis, and aggressive ones; their

[41] That does not mean that an international legal order cannot institute a system protecting the distinctive rights of Indigenous peoples, only that such a system focuses exclusively on the rights of those peoples against the modern nation states asserting sovereignty over the lands that they inhabit. As I explain in Chapter 8, the second preliminary article of perpetual peace is a permissive law because the wrongs of the past leave residues that can be addressed as ways of improving an already existing rightful condition, rather than as grounds for war or revolution in overturning one.

characterizations of the "just war conditions" focuses on aggressive, that is, punitive or remedial wars. Aquinas focuses on necessity (the requirement that there be no other way of addressing the wrong), proper authority (that the war be initiated by political leaders rather than private persons or organizations), and right intention (that the war be carried out for the sake of the just cause, rather than opportunistically in pursuit of some other advantage). In characterizing the additional grounds of war, Suárez adds a requirement of what would now be called proportionality.

*Proper Authority*. The Kantian account keeps a version of the requirement of proper authority because war is essentially public, conducted between states. In an era in which communication was slow and uncertain, who, exactly, had authority may have been a complex question, but the starting point for the analysis is that private wars are ruled out, simply as such. The possibility of war among nations presupposes that there are, indeed, separate nations, each of which serves to replace unilateral private judgment with a public authority. That public authority has a monopoly on the authorization of the use of force—not, as Max Weber suggested, a factual monopoly (which may or may not be present, depending on the level of crime), but a normative one—that is, an exclusive entitlement to decide when force will be used. Even individual self-defense is subject to legal oversight, because all uses of force are. It follows that the use of force in war requires proper authority.

*Necessity*. The Kantian account also keeps the requirement of necessity: force is only to be used when aggression cannot be stopped through diplomacy. The rights-based account does not, in the first instance, look to the importance of the territorial or other right being protected; necessity is not subordinated to proportionality,[42] because the necessity of using force does not depend upon the magnitude of that force or the collateral effects that it will have. Nor does it depend upon the goods in the service of which the force is being used. Force that is not required in order to stop aggression is prohibited because inconsistent with the limit of the use of force to protection. This requirement follows from the restriction of the grounds of war to national defense: any force beyond what is required defensively cannot be justified on the ground that it is defensive.

*Right Intention*. The Kantian view reconfigures the idea that a proper authority must act with the right intention in going to war. Concepts of right

[42] As suggested by Thomas Hurka, "Proportionality in the Morality of War," *Philosophy & Public Affairs* 33(1) (January 2005), 34–66.

govern external conduct, and look to the means that people use and the compatibility of using those means with the independence of everyone. To recognize that right intention is concerned with the conditions of external freedom is to do away with the thought that it must be some kind of attitude or mental state. The reasons that political leaders give for going to war are subject to a test of right; if their decision is also animated by hidden motives, they wrong their citizens through dishonesty, but the stated rationale for going to war stands or falls on its own.[43]

*Reasonable Prospect of Success and Proportionality*. The traditional requirements of reasonable prospect of success and proportionality also operate differently in the Kantian account than in the Thomistic one. A police officer should not attempt an arrest if unsure of the criminal's whereabouts, heavily outnumbered, or unable to block clear avenues of escape. So, too, in an enforcement action, you want to make sure that using force is not excessive in response to the wrong you seek to correct or punish. If punishment was a ground of war, it would be subject to the same constraints.

If the grounds of war are restricted to national defense, however, the requirement of a reasonable prospect of success and proportionality take a different form, structured by the broad structure of right. If a remedial or punitive war was ever justified, the magnitude of the delict or crime might properly enter into an assessment of whether it is important enough to go to war. If only a defensive war is rightful, however, the nature of the wrong—interference with political independence and territorial integrity—is the same independently of its magnitude. Although it might be foolish to go to war to defend a small amount of uninhabited land, doing so need not be disproportionate. The measure of proportion in this context cannot be the amount of harm done by the invasion as opposed to the amount of harm that will result from defending against it. There may be questions of prudence about whether to stand on a right in a particular case, but a foolish war is not an unjust one, even if most wars have been both foolish and unjust.

*Contemporary Accounts of Reasonable Prospect of Success and Proportionality*. Recent writers in the just war tradition have tended to characterize both proportionality and necessity in terms of the actual reversal of aggression, as well as some sort of balance between the amount of harm

[43] Suppose that a nation goes to war to provide business opportunities for oil supply contractors or to resolve complex feelings a leader has about his father, each of which is sometimes claimed about the US invasion of Iraq under President George W. Bush. If the war is a legitimate response to genuine aggression, as the Iraq War was not, the bad intention does not make the war wrongful.

that the aggression will do and the amount of harm that will be done in preventing it. Much ingenuity has gone into the characterization and appropriate weighting of the relevant harms, but the organizing thought in all of these efforts is that the prevention of suitably characterized harm must be the currency in which assessments of the prospect of success and proportionality are to be made. If proportionality is understood in this way, however, it overwhelms all of the other just war conditions. Taken to the limit, it undermines the distinction between defensive and aggressive war, because the balance between the costs imposed by going to war and the benefits to be gained or harm to be prevented and the costs of preventing it applies to all costs, including harms that are not wrongs between states. That is, the idea that bad consequences can be offset by good ones operates on gains and losses symmetrically. Even on a narrower, merely preventative interpretation, a focus on harm prevention and costs leads to the conclusion that a nation does wrong if it defends itself when there is no hope of success, or if its defensive efforts will cause sufficiently serious losses, or if it defends itself against an army whose members are nonculpable because they have been conscripted into fighting, or are mistaken about the aggressive nature of the war.[44] The Kantian account must reject this balancing conception, because the rationale for defensive force must be understood relationally, in terms of a nation's entitlement not to be subject to aggression from other nations. A nation's entitlement to use force to protect its independence from an aggressor does not depend on the idea that doing so will produce greater benefits for itself than costs to the aggressor.

Some recent writers, notably David Rodin, have argued that in cases in which the costs of war are high and the costs of capitulation low, defensive force may not be used. Indeed, Rodin goes further and suggests that if an aggressor makes a conditional threat, for example, demanding access to natural resources or political reforms in the country and threatening military action if it is not granted, the defender is morally required to capitulate rather than defend itself if the amount of harm likely to be done by the aggressor is high and capitulation will not lead to violence against the defender's citizens.[45] Conditional threats of this kind are familiar in the history of war. Napoleon preceded each of his conquests with an ultimatum, insisting that he preferred

[44] As argued in Jeff McMahan, "What Rights May be Defended by Means of War?," in Cécile Fabre and Seth Lazar (eds.), *The Morality of Defensive War* (Oxford: Oxford University Press, 2014), 110–151.

[45] David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2004).

peace, but would resort to war if necessary. Rodin's own illustration is the Soviet Union's 1939 demand that Finland cede territory to it in return for a larger amount of other territory. The government of Finland refused the offer for a variety of reasons, among which was the concern that were it to have agreed to it, it would not be the last "request" from the Soviet Union, which had just entered into an agreement with Germany to divide Poland. Rodin's view is that Finland should have capitulated, given that the requested land was of limited value and the other territory offered by the Soviet Union was just as good for any purpose other than providing a buffer, and with no other costs at stake, the government of Finland owed it to its own citizens to accept the offer, so as to protect them from the horrible losses that war would foreseeably inflict.

The Kantian claim that Finland was entitled to defend itself does not speak directly to the question of whether it should have accepted the offer. Instead, it says only that whether to accept the offer is a question for Finland; it does not have a duty to refuse to capitulate or a duty to capitulate when the costs of defense are high. Finland does not need to yield to a threat, and the Soviet Union cannot put it under an obligation to minimize the effect of its threatened force on Finland's inhabitants. The private law analogy makes room for a distinction between two different relationships that are at stake. As a trustee or fiduciary for its inhabitants, Finland may owe them a duty to avoid getting into a costly war that it cannot win, but the scope of that duty is determined by its overarching obligation to provide a rightful condition for its inhabitants. The question of what it owes to its inhabitants does not have any bearing on the question of whether defending itself is a legitimate ground for war. Its right to defend itself is not changed by the incentives offered by the Soviet Union. The Soviet Union is not entitled to force Finland to accept what is, in fact, a good deal, any more than a private person is entitled to compel another to do so, either retrospectively by taking what they want in return for payment or by threatening to do so. The party to whom the offer is made is entitled to refuse even if the one making the offer is likely to use force in the face of refusal. Any external threat could at most change the incentives at stake, but cannot change the right. It is Finland's question whether to accept an offer, and it is wrong for the Soviet Union either to force a trade or to threaten to do so. Although the Kantian account of coercion rejects the idea that making threats is the only relevant form of coercion, it also must reject the converse idea that genuine threats are not coercive and the related thought that because they are not harmful, simply as such, resistance to them

could only be justified by showing that the expected net harm of resisting is less than that of capitulation. Nations are not under an obligation to choose a lesser harm whenever doing so will avert a greater one; right does not need to yield to wrong just because the costs of doing so will be less.

In the case of individual defensive force, the idea that only force may only be used if it likely to succeed or will not do too much harm is out of place. Frances Kamm gives the example of women enslaved by the Taliban, arguing that they are entitled to rise up against their captors even if their escape is likely to be short-lived.[46] Helen Frowe gives the example of a woman about to be raped, arguing that she is entitled to kill the attempting rapist, even if doing so will also injure or kill bystanders.[47] Daniel Statman has offered a more systematic analysis of such examples, suggesting that there is a reasonable prospect of success in such cases, because the relevant criterion of success is in the victim's asserting his or her dignity. Statman offers the example of the Warsaw Ghetto uprising in which Jews fought against a German army that was vastly larger and better equipped and certain to succeed in its aim of exterminating them, regardless of anything they did to defend themselves.[48] Statman argues that the appropriate criterion of success must be understood in terms of their resistance to serious wrongdoing, rather than the likelihood of reducing the amount of harm they suffer. Statman's analysis of dignity is not the same as Kant's analysis of independence, but the conceptual structure he introduces is already implicit in the Kantian account: the defender is entitled to resist the attacker because the attack is inconsistent with the defender's independence. Right does not need to yield to wrong. Any question about the amount of harm that defensive force will cause is secondary. The authorization to use coercion does not turn on preventing the ultimate success of the wrongdoer's act, or ensuring the longer-term survival of the defender. Instead, the authorization to use force is given by the right to independence consistent with the independence of others.

The same point applies in the case of war. A nation is entitled to defend itself against attack even if the attack is by a much more powerful enemy. In 1939, when German troops invaded Poland, Poland was entitled, as a matter of right, to resist the invasion. That entitlement was not conditional

[46] Frances M. Kamm, "Self-Defence, Resistance and Suicide: The Taliban Women," in Helen Frowe and Gerald Lang (eds.), *How We Fight: Ethics in War* (Oxford: Oxford University Press, 2014), 75–86.

[47] Helen Frowe, "Can Reductive Individualists Allow Defense Against Political Aggression?," *Oxford Studies in Political Philosophy* 1 (2015), 173–193.

[48] Daniel Statman, "On the Success Condition for Legitimate Self-Defense," *Ethics* 118(4) (July 2008), 659–686.

on the fact that it had allies and so could expect that Nazi Germany would ultimately be defeated. In the early days of World War II, when the Molotov-Ribbentrop Pact led the Soviet Union to attack Poland from the other side, and the United States had not yet entered the war, defensive force was not likely to make much long-term difference to Poland's long-term prospects of reclaiming its independence. But it was entitled to fight. More generally, a defender does not wrong an attacker by resisting the attack. A nation does not owe a duty to an aggressor to minimize the overall or net amount of destruction wrought by a war that it did not choose to initiate.[49]

*Reclaiming Proportionality for a System of Rights*. The requirement of proportionality entered the just war tradition in the context of punitive wars. Suárez believed that, in addition to exacting a remedy for past wrongs, those who had a just cause were entitled to punish wrongdoers, by seizing territory and goods and by killing or enslaving inhabitants. If this was actually a rationale for war, then considerations of proportionality would be paramount, because if (as Suárez supposed) the way to punish a nation that is a wrongdoer is to kill or enslave its inhabitants or seize its territory, such actions should only be done in proportion to the wrong being punished. Once these barbaric ideas of the grounds of war and methods of punishment are repudiated, this idea of proportionality has no place in thinking about war.

The Kantian approach to defensive war must repudiate the idea of proportionality as cost-benefit analysis no less than it repudiates the idea that war is a form of punishment. If the sole ground of going to war is protective, then the organizing question must always be whether something is a case of aggression, inconsistent with the political independence and territorial integrity of the nation being attacked. If it is, that is sufficient ground for preventing it. Like the idea of a reasonable prospect of success, the principle must be that right does not need to yield to wrong.

This analysis leaves no place for any idea of proportionality *inter se* with respect to the use of defensive force; the defender does not wrong the aggressor by defending itself, even if the aggression is small and the impact on the defender limited. Rather than being a problematic result, this is no different from the case of proportionality in cases of individual uses of defensive force. As between an aggressor and a defender, the defender does not wrong

[49] This raises an additional complication about humanitarian intervention in cases of barbarism. Because its rationale is the creation of a rightful condition, the prospect of success must be measured against that rationale.

the aggressor by using necessary but disproportionate force to prevent that wrong. As Kant remarks, in such a situation, any leniency would be a matter of virtue rather than right.[50]

This does not entail that the Kantian view can never condemn uses of defensive force as excessive, only that any disproportion in defensive force is not a wrong against the aggressor. Every nation must be concerned to secure a broader condition of peace; as such, it must be committed to de-escalating conflict. As a member of a global public legal order, each state has an obligation to contribute to such de-escalation. In the same way, a defender does not owe it to an aggressor to decline to defend itself because doing so will lead to internal instability for the aggressor, but, at the same time, destabilizing the internal structure of another state, even if done as a matter of right, is potentially a threat to the peace and so something to which the defender must attend. The reason to attend to it is not any right on the part of the aggressor to aggress unimpeded but the duty to create and protect the peace. As we will see in Chapter 8, a victor in war cannot annex or subjugate the vanquished enemy, even if that enemy was itself the aggressor that began the war, because "its people, [ . . . ] cannot lose its original right to unite itself into a commonwealth."[51] For all of the same reasons, a war that is expected to destroy the aggressor's legal order, leaving nothing in its place, would be excessive unless done to preserve the defender's legal order. This is a very difficult criterion to apply, in part because the result of war is often difficult or even impossible to predict. It nonetheless provides a peace-based model of how something can count as an excessive response to an act of aggression. Like the rest of the Kantian account, it focuses exclusively on the idea of preserving a condition of right and peace, rather than on any idea of an appropriate body count. Understanding the vices of excess in this way has the perhaps surprising consequence that whether engaging in defensive war is proportionate will depend on particularities of the aggressor's condition, whether it is likely to escalate the conflict, draw other nations in, or become internally unstable. These factors enter not as harms to be balanced against the benefit of stopping aggression, but rather as factors relevant to creating and maintaining a condition of global peace.

[50] 6:235.
[51] 6:349.

## VIII. Conclusion

A Kantian view conceives of states as moral persons as against each other, each of which is entitled to be independent of each of the others. That is, at a minimum, what is required in order for nations to stand in legal relations to each other. As such, interference with that independence is wrongful, and so, therefore, aggressive war is wrongful. But because independence is itself understood through concepts of right, that is, in terms of the interactions of beings that occupy space, the same argument leads to the conclusion that the right to independence is enforceable. In the absence of legal institutions, any such enforcement must be minimal, that is, structured by the idea of preventing one nation from interfering with another. This generates, in turn, the right to use defensive force. No further types of force can be legitimate in the absence of legal institutions, because the interaction of independent legal persons, whether individual human beings or states, must be structured by what Kant calls the right to be beyond reproach. In the absence of adequate institutions, the use of force is never so structured. As a result, neither remedial nor punitive force could ever be warranted. By contrast, defensive force is at least potentially consistent with the right to be beyond reproach, because it is merely protecting what each nation already has, and so is an instantiation of the defending power's claim to have no force used against it unless established through such a procedure. Nor does it require any inquiries into the aggressor's culpability. The sole rationale is that defensive force prevents a wrong from being completed.

Defensive war thus contrasts with preventive war. Defensive war is just the upholding of the respective independence of nations; by contrast, preventive war is inconsistent with any such independence. This does not entail that an invasion must be already underway before force can be used against it, and it leaves unanswered many specific questions about when, exactly, attack is close enough to warrant defensive force. Those questions have no shared answer in an international legal order without authoritative institutions. One consequence of the absence of legal institutions is that the mere concept of defensive force will sometimes be used opportunistically by nations seeking to achieve other aims through war. Even Nazi Germany's invasion of Poland—widely considered a paradigmatic instance of aggressive war—was claimed to be an act of national defense.[52] But the Kantian claim is not that once the available grounds of war are narrowed, everyone will behave

[52] Otto D. Tolischus, "German Army Attacks Poland; Cities Bombed, Port Blockaded; Danzig Is Accepted into Reich," *New York Times*, September 1, 1939, at A1.

perfectly. Instead, the Kantian account seeks to explain the normative basis of the restriction on the right to go to war and to show that even if it is accepted, in the absence of authoritative legal institutions, rights must remain insecure. That is why the limitation of the grounds of war to national defense is one of the Preliminary Articles for Perpetual Peace rather than one of the definitive ones. Prohibiting aggressive wars—punitive, remedial, and redistributive—marks a transition from a condition of barbarism, in which there is force with neither freedom nor law, to one of anarchy, where, at least in principle if everyone's particular choices align, the independence of a plurality of nations is consistent, and so they have freedom in the absence of either force or law. But it is merely preliminary, and to move to a fully public rightful condition requires public legal institutions, the topic of Chapter 9.

# 4

# *Ius In Bello* I

## Perfidy

Chapter 3 took up the Kantian argument that the only ground of going to war is defensive. We saw that earlier writers had much more expansive views of the grounds of going to war, with the just war writers from Augustine through Aquinas to the Salamanca scholastics understanding war as a kind of enforcement action, through which wrongs were to be righted, either through the exaction of remedies or the infliction of punishment. Writers in the regular war tradition, Grotius, Pufendorf, and Vattel, by contrast, understood war as something closer to a procedure for resolving disputes between sovereigns who had no common superior and thus were in a state of nature. As Kant puts the point, "there can be no procedure in a state of nature."[1] Nor can there be punishment or enforcement of rights to external objects of choice, or redistribution of resources. This leaves only one just cause for the use of force by one nation against another: defense of political independence and territorial integrity.[2] As we have seen, Kant's argument does not proceed by elimination; it rests on systematic considerations about the difference between legal ordering and force. The argument against all of these nondefensive forms of war rests on the need for shared public institutions in order for remedial, punitive, or redistributive/administrative force to be rightful. No state has standing as against any other state to make authoritative judgments about such matters or impose them through force. All nonprotective uses of force are therefore prohibited. In the words of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[3]

[1] Kant, *Naturrecht Feyerabend*, 27:1377, edited and translated by Frederick Rauscher as "Natural Right Course Lecture Notes by Feyerabend," in Rauscher (ed.), *Lectures and Drafts on Political Philosophy* (Cambridge: Cambridge University Press, 2016).

[2] In extreme circumstances in which organized force is used against civilians, intervention can also be legitimate. I take this issue up in Chapter 7.

[3] United Nations Charter, Chapter I Article II, s. 4., available at https://www.un.org/en/sections/un-charter/chapter-i/index.html.

This chapter and the next two take up another part of the law of war, the law of *ius in bello*, made up of norms governing the conduct of war. Like his account of the legitimate grounds of war, Kant's account of the *in bello* norms of war focuses on the distinction between the lawlessness of a situation in which force decides everything and the lawful condition of peace:

> Right during a war would, then, have to be the waging of war in accordance with principles that always leave open the possibility of leaving the state of nature among states (in external relation to one another) and entering a rightful condition.[4]

In the past century and a half, *ius in bello* has been codified in a series of international documents, beginning with the St. Petersburg Declaration outlawing munitions that caused unnecessary suffering, through the Hague Conventions and in a series of Geneva Conventions. Some of these norms are very ancient, in their formulation if not in their implementation, while others are more recent. The most prominent but by no means the only part of those rules is the special status that they attach to noncombatants, those who are not part of the war. The Geneva Convention requires that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack." Other international documents demand the protection of individuals not taking a "direct part in hostilities";[5] still others restrict the admissible means and methods of warfare. All of these rules apply to both sides in any armed conflict.

This absence of any reference to the question of *ius ad bellum* is a striking feature of these documents. There is a historical explanation for this, perhaps, in the fact that most of the rules were codified prior to the 1928 Kellogg-Briand Pact, and so prior to the outlawing of war as an instrument of national policy. As long as international lawyers understood war to be the prerogative of sovereigns, rules governing its conduct could not be tied to the existence of a just cause, because, on this prerogative view, the justice of the cause was either irrelevant to, or vacuously satisfied by, whatever grounds or pretext the sovereign offered. Once the use of aggressive war has been outlawed, however, the lack of reference to *ius ad bellum* becomes puzzling. The puzzle can be stated either in the vocabulary of post-1928 international

[4] 6:347.

[5] Article 51(2) of the First 1977 Additional Protocol; for domestic examples, more generally, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule1_sectionc.

law or, alternatively, in the vocabulary of traditional just war theory as developed by Thomists and the later scholastics. I will go through both of these in what follows; the puzzle grows out of the intuitive idea that once initiating war becomes illegal, then any act done in pursuit of an illegal war will be illegal as such. Yet the Geneva Conventions are often taken to give permission to do certain things but not others in the course of the war—for example, target combatants, but not civilians—regardless of whether the war itself is illegal. Cast in the vocabulary of just war theory, substitute "immoral" for "illegal," and the result is the same: if a war lacks a just cause, then nothing done in the course of the war is morally permitted; once again, the idea that the same rules apply to both sides in a war can have no place in just war theory, because one side is allowed (at the very least) to defend itself, while the other side is at most permitted to protect itself if the defender uses excessive force.

My aim in this chapter is to develop a systematic Kantian account of the basic *in bello* rules and their symmetrical application that shows them to be consistent with the *ad bellum* prohibition on aggression. The textual basis for this account is in one way sparse, and in other ways very robust. Kant's explicit discussion of *in bello* rules, both in *Toward Perpetual Peace* and in the *Doctrine of Right*, is largely limited to the prohibition of false surrender, with passing references to belligerent occupation; in his lectures in the summer of 1784,[6] he makes brief reference to the now prominent distinction between *ad bellum* and *in bello rules*, formulating them as a contrasting Latin pair for what is perhaps the first time,[7] and also refers to rules governing the status

[6] Kant's student Gottfried Feyerabend, who appears to have taken verbatim notes in his 1784 lecture course on natural right in order to make copies for sale to other students, reports Kant as saying "*Jus in bellum* und *ad bellum*." In Immanuel Kant, "Naturrecht Feyerabend," in Heinrich P. Delfosse, Norbert Hinske, and Gianluca Sadun Boroni (eds.), *Kant Index: Band 30: Stellenindex und Konkordanz zum "Naturrecht Feyerabend"* (Stuttgart: Fromann-holzborg, 2014); English translation in Frederick Rauscher (ed.), *Kant: Lectures and Drafts on Political Philosophy* (Cambridge: Cambridge University Press, 2016), 179. The corresponding passage in the textbook from which Kant was required to teach has no such juxtaposition. Gottfried Achenwall, *Ius Naturae In Usum Auditorum* (Gottingen, 4th ed. 1763), translated by Corinna Vermeulen as *Natural Law: A Translation of the Textbook for Kant's Lectures on Legal and Political Philosophy* (London: Bloomsbury, 2020). Christian Wolff, the target of many of Kant's criticisms in metaphysics, used the terms together, but only to align rather than contrast them. "*Qui bellum injustum gerit, cum nullam justam habeat belli causam; ei ad bellum jus nullum est, consequently nec jus ullum in bello competere potest*." ("Since he who carries on an unjust war has no just cause of war, he has no right to wage the war; consequently no right in war can belong to him.") This use of the terms *ad bellum* and *in bello* does not demarcate separate bodies of law or morality; Wolff treats their full alignment as an "axiom." Christian Wolff, *Jus Gentium Methodo Scientifica* (Frankfurt and Leipzig, 1764), 777; vol. 2. (Joseph H. Drake trans., Oxford: Clarendon Press, 1934), 402.

[7] Robert Kolb reports that "Avant 1930, l'utilisation des termes ius ad bellum et ius in bello est extrêmement rare." Robert Kolb, "Sur l'origine du couple terminologique ius ad bellum/ius in bello," *Revue internationale de la Croix-Rouge* 827 (1997), 593–602. Kolb credits the term to Josef Kunz, on whose disdain for Kant, see *infra* note 21. Kunz took up the vocabulary in an article published in

of prisoners of war; in the *Critique of the Power of Judgement*, he refers in passing to the protection of civilians.[8] In the *Doctrine of Right*, he does not use the Latin vocabulary of *ad bellum* and *in bello*, but nonetheless develops the first systematic tripartite distinction between the right to go to war, right in war, and right after war. This tripartite division reveals the systematic structure of the Kantian account of the *in bello* rules. That account will explain how the rules apply to both sides by explaining their distinct normative status as principles of peace rather than war.

## I. The Puzzle

Recent writing about the morality of war has been sharply critical of the symmetrical application of the Geneva Conventions. The general form of the critique is older and received its first explicit articulation by Sir Hartley Shawcross, the British chief prosecutor at the International Military Tribunal at Nuremberg. Shawcross raised the legal version of the puzzle of the *in bello* rules. Having just cataloged the horrible ways in which Hitler's armies had violated the *in bello* rules by targeting "innocent, inoffensive men, women, and children, sleeping in their beds," Shawcross suggested that their killing of allied soldiers was no different: "The killing of combatants in war is justifiable, both in international and in national law, only where the war itself is legal. But where the war is illegal, as a war started not only in breach of the Pact of Paris but also without any sort of declaration clearly is, there is nothing to justify the killing; and these murders are not to be distinguished from those of any other lawless robber band."[9] Shawcross may not have

1934, which does not mention Kant. See Josef Kunz, "Plus de lois de guerre?," *Revue générale de droit international public* 41 (1934), 22. Kolb suggests he took the term *ius ad bellum* from G. Enriques, "Considerazioni sulla teoria della guerra nel diritto internazionale," *Rivista di diritto internazionale* 20 (1928), 172, but Enriques does not use the two terms together.

[8] Immanuel Kant, Paul Guyer (ed. and trans.), *Critique of the Power of Judgment* (Cambridge: Cambridge University Press, 2000), 146. 5:263.

[9] *Proceedings of the Tribunal* (Nuremberg: International Military Tribunal 1948), vol. 19, p. 458, available at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf. Shawcross's argument was made only in passing in his closing speech. The same line of objection figured in the opening comments of the French Prosecutor, de Menthon (Vol. V, p. 386). In the Tokyo war crimes tribunal, the chief prosecutor, Joseph Berry Keenan, argued that since Japan had engaged in an aggressive war, everything its officers and soldiers did qualified simply as murder. He issued a press release in which he said, "It is high time, and indeed was so before this war began, that the promoters of aggressive, ruthless war and treaty-breakers should be stripped of the glamour of national heroes and exposed as what they really are—plain, ordinary murderers." He develops the argument in detail in Joseph Berry Keenan, *Crimes Against International Law* (Washington: Public Affairs Press, 1950).

intended to make so general a claim, but his form of argument has gained a new prominence.

Shortly after Shawcross made this argument, the great international lawyer Hersch Lauterpacht remarked that, although Shawcross's reasoning seemed impeccable, "such consequences lend emphasis to the assertion of the inadequacy of the major proposition from which they are derived."[10] The inadequate major proposition to which Lauterpacht refers is Shawcross's assumption that the *in bello* rules confer novel permissions, that if the war is legal, "[t]he killing of combatants in war is justifiable." He is drawing an implicit contrast between the pre- and post-1928 Kellogg-Briand Pact situations and supposing that prior to 1928, the killing of soldiers on both sides of a war was justified. Shawcross concludes that after 1928, the same provisions no longer apply to both sides in a war, and so aggressors have lost their permission to kill. I will argue that that is the wrong way to frame the issue: the rules of war do not generate novel permissions; they impose distinctive prohibitions, which are specific to war. War has a distinctive morality because of its distinctive immorality.[11]

Recent "revisionist" just war theorists make a similar argument, pointing to how bizarre an argument for the "moral equality of combatants" would seem in the case of individual self-defense. If I attack you, you are entitled to defend yourself from the danger that I pose.[12] If your defensive force endangers me, I am not entitled to defend myself from it.[13] The same point

[10] Hersch Lauterpacht, "The Limits of The Operation of The Law of War," *British Yearbook of International Law* 30 (1953), 206–243 at 217. In a footnote, Lauterpacht concedes that "it is reasonable to interpret Sir Hartley's observations in their context, i.e. as referring not to the responsibility of the individual members of the armed forces of the aggressor but to the liability of those guilty of planning and instigating the unlawful war."

[11] In Adil Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017), Haque also argues—from very different premises—that the *in bello* legal rules are prohibitions. For Haque, this conclusion is grounded in what, following Joseph Raz, he calls the "service view" on which the *in bello* rules provide a generally reliable guide to morality's demands so that "just combatants are more likely to avoid acting wrongfully if they obey the law and unjust combatants will act less wrongfully if they obey the law." (15) As the vocabulary of service and likelihood makes clear, on this view the underlying wrongs do not correspond to the content of the morality with which they promote compliance.

[12] A point made by the US Military Tribunal at Nuremberg in the Weizsaecker case. "The Ministries Case," in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (Washington, DC: USGPO, 1949), 14:28, 105, https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf; and as cited in Lauterpacht, *supra* note 10, at 220.

[13] Jeff McMahan has been at the forefront of revisionist writing about the law of war. See Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), and Jeff McMahan, "The Morality of War and the Law of War," in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors* (Oxford: Oxford University Press, 2008). McMahan finds support for his view in an earlier tradition, including Aquinas and Suárez. He writes that "Thomas Aquinas, for example, was close to the truth when he wrote that 'a just cause is required, viz. that those who are to be warred upon should deserve to be warred upon because of some fault,' " and approvingly quotes Suárez: "no one

applies to other cases of justified force: if a police officer is allowed to use force to make a lawful arrest, the criminal being arrested is not allowed to resist; the only arrest that can be rightfully resisted is one that the police officer is not allowed to make.

## II. The Distinctive Moral Problem of War

In developing Kant's argument about the *in bello* prohibitions, I will show it to be an implication of the same idea that, as we saw, led him to reject both the just war and regular war traditions, and that leads him to reject as illegitimate the entire category of just "aggressive" or "offensive" war. As we have seen, the problem with war is that it is the situation in which force decides, that it "hands everything over to savage violence."[14] The very thing that makes war problematic also provides the moral standard for evaluating its initiation, conduct, and consequences. As we saw in Chapter 3, the *ad bellum* rule prohibits substituting force for peace; in this chapter and the next two I will argue that the *in bello* rules prohibit making everything and everyone a part of the war. These restrictions are specific to war, and so those who violate them are violating rules that are specific to war.

We have already seen why, on a Kantian view, war is wrongful as such: as I put the point in Chapter 1, war is on the wrong side of Cicero's distinction between the two ways in which human beings might govern their interactions: through words and through force. Governing conduct through words does not guarantee that the merits will be tracked, but governing them through force precludes that possibility. Military success never establishes the justice of the victor's cause; might does not make right. At various times in human history, people appear to have thought differently.[15] Although

may be deprived of his life save for reason of his own guilt." On McMahan's analysis, this group includes political leaders as well as soldiers; the innocent are those who "have not shared in the crime nor in the unjust war." Christopher Kutz expresses the same puzzle: "if death and destruction matter morally, as they do, and if reasons matter morally . . . then differences in combatants' reasons for bringing about death and destruction must also matter morally." He therefore concludes that at most one side could be fighting for the relevant reasons. Christopher Kutz, "Fearful symmetries," in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors* (Oxford: Oxford University Press, 2008), 69.

[14] Immanuel Kant, "*Doctrine of Right*: Part I of the *Metaphysics of Morals*," in Immanuel Kant, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996), 452.

[15] "By now it is sufficiently clear that what is won through trial by combat is won by right. But the Roman people acquired the empire through trial by combat." Dante Alighieri, *De Monarchia* [1559] (Prue Shaw trans., Cambridge: Cambridge University Press, 1996), Bk. 2, Ch. 9, Para. 12, at 56.

belligerents still regularly claim that God is on their side and pray for intervention, and victors may convince themselves that their victory in war is proof that they were in the right, nobody is prepared to defend the general premise that victory is sufficient for right.

I will also continue the pattern of Chapters 2 and 3 by analyzing the legality and morality of war primarily in terms of how things stand between belligerent nations and say almost nothing about the role of international legal institutions such as the United Nations. As I explained in Chapter 2, international institutions are fundamentally important, but they introduce no further or other duties among nations than can be conceived (if not always acted on) in their absence. Both the *ad bellum* and *in bello* rules are topics of Kant's "Preliminary Articles for Perpetual Peace." That is, as explained in Chapter 1, they mark the transition from a condition of barbarism, in which might makes right, to a condition of anarchy. Anarchy is, as Kant characterizes it in the *Anthropology*, a state of nature as an idea of reason, a condition of freedom with neither force nor law,[16] one in which nations live together peacefully, even though they are not under common legal institutions. Such a condition remains fundamentally non-rightful, because the continuation of peace depends not on institutions and the formal principles to which they give effect, but rather on the matter of choice of several nations. As Kant remarks in distinguishing between the Preliminary and Definitive Articles of Perpetual Peace, "a condition of peace must therefore be established, for suspension of hostilities is not yet assurance of peace."[17] In such a situation, each can do no better than what seems "good and right to it."[18] The Preliminary Articles—particularly I, V, and VI—specify the principles of possible peaceful condition of anarchy. The first requires that a peace treaty contain no secret reservation allowing for new causes of war, the fifth that nations not intervene in the internal affairs of others, and the sixth that means inconsistent with future peace not be used in the conduct of war.[19] In such a condition, if each does what seems good and right to it, they

[16] Immanuel Kant, *Anthropology from a Pragmatic Point of View* (Robert Louden trans., Cambridge: Cambridge University Press, 2006), 7:330.

[17] 8:348–349.

[18] 6:312.

[19] These "Preliminary Articles" contrast with the "Definitive Articles," which are just the three forms of public right later identified in the *Doctrine of Right*: the right of the state, understood as a republican constitution; the right of nations, understood as a voluntary league through which the nations of the world address their differences; and cosmopolitan right, through which all interactions between individual human beings and those between individual human beings and political institutions are made properly public. All of these are taken up in Chapter 9.

could, indeed coexist peacefully. This would not be a full peace, nor would it be perpetual, because it would lack the ability to persist through changes. Nonetheless, until a public international legal order is created, it provides the preliminary basis of one. The other Preliminary Articles of Perpetual Peace—the second, third, and fourth—restrict the subject matter of war, prohibiting acquired rights as between separate nations, and so limiting the *juridical grounds* of dispute, prohibiting standing armies, thus restricting the *available means* of conducting disputes, and prohibiting national debt for military purposes, thereby limiting the *material incentives* for disputes. The "Definitive Articles of Perpetual Peace," by contrast, describe not a condition of anarchy but a condition of peace. I will take them up in detail in Chapter 9.

Here, as elsewhere, I make no claim about the influence of Kant's views on the development of the law of war;[20] Kant offered his arguments in a very different legal and institutional context, and the statesmen and publicists responsible for much of the development of the law of war either ignored or dismissed him as a naïve moralist.[21] The Kantian account is important because it articulates a form of thought within which the two organizing ideas are not only consistent but mutually supporting.

## III. Shawcross's Challenge

Shawcross's argument, like contemporary revisionist arguments, seems to revive ideas familiar in the just war tradition. The eighteenth-century German rationalist philosopher Christian Wolff thought that the just war and regular war traditions were each right about something, with just warriors giving an account of the "natural law of nations," and regular war writers of a different normative structure, which he called the "voluntary law of nations." In his discussion of the natural law of nations, Wolff articulates the principle, "He

[20] Perhaps the laws of war developed because powerful states found them useful, and so their acceptance is an instance of a "nation of devils" solving the problem of right. 8:366.

[21] Indeed, many central figures in its development seem to have been contemptuous of his writings about war. Francis Lieber, whose "Instructions for the Government of Armies of the United States in the Field," General Order No. 100, art. 60 (April 24, 1863) written for the US forces during the civil war, is sometimes claimed to have laid the basis for the Geneva conventions, disparaged *Perpetual Peace* as Kant's "least profound" work. See John Fabian Witt, *Lincoln's Code* (New York: Simon and Schuster, 2012), 182. Josef Kunz, who introduced the term *ius ad bellum*, drew on Kant's *Metaphysical Foundations of Natural Science*, but refers disparagingly to "the so-called innate rights of the Individuals" (Josef Kunz, "On the Theoretical Basis of the Law of Nations," *Transactions of the Grotius Society, Vol. 10, Problems of Peace and War, Papers Read before the Society in the Year 1924* (1924), 115–142, at 130.

who wages an unjust war has no right in war, and all his force is illegal."[22] Modern articulations of the same thought are less willing to accommodate the idea of a fully justified voluntary law of nations that departs from the natural law, and from this conclude that, by applying to both sides in a war, the Geneva Conventions are fundamentally morally flawed. Contemporary revisionists sometimes go further and conclude that there is no natural law of nations either, only moral principles governing individual conduct, the application of which is more complex in the context of war but not fundamentally changed. In the words of Jeff McMahan, "War is, moreover, continuous with other areas of human activity. It differs from other conflicts, including individual self-defence and other-defence, only in scale and complexity."[23]

Both Shawcross and contemporary revisionists take it for granted that the Geneva Conventions and other articulations of the *in bello* rules confer distinctive and novel permissions on those participating in a war. From this premise they object that, however one goes about securing novel permissions, whether legal or moral, attacking another person is not an acceptable way to secure permission to do things to them that would be otherwise prohibited. For Shawcross, the point of the argument is to show that when war is permitted by international law, that permission presumably carries with it permission to conduct a war. Once war has been prohibited, however, no permissions can remain. Shawcross's formulation cuts across Wolff's distinction between the natural law and the voluntary law of nations, because it applies at the level of any system of rules. A system of rules that both prohibits and permits the same act in different parts of the system is incoherent. Perhaps if nations were to set aside the "natural law of nations" and agree to permit aggressive war, in so doing they could, and might even need to, create a side agreement, so that the same *in bello* permissions apply on both sides. Such a side agreement almost makes sense if appended to an agreement permitting war as a way of resolving disputes, so as to avoid prejudging the issue over which the war is being fought.[24] The regular war

[22] "Quamobrem qui bellum injustum gerit, ei jus nullum in bello est." Wolff, *Jus Gentium Methodo Scientifica*, *supra* note 6, s. 777, 402.

[23] Jeff McMahan "Laws of War," in John Tasioulous and Samantha Besson (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 505.

[24] Vattel explicitly compares war to legal proceedings; Emerich de Vattel, *Le Droit des Gens, ou Principes de loi Naturelle, Appliques à la conduite & aux affaires des Nations & des Souverains, Tome Second* 3:74 (Bk. III, Ch. 13, § 193, at 170, London: Chez Benjamin Gibert, 1758). See also Carl Schmitt's defense of what he calls the "non-discriminating" conception of war, based on the claim that any alternative will turn every war into a "crusade." Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), translated as *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G.L. Ulmen trans., St. Louis: Telos Press, 2003), 46,

writers saw war as a method of dispute resolution, but also as a last resort, reserved for when negotiation, mediation, and arbitration failed. They therefore supposed that every war involved a genuine dispute. In that context, the importance of a side agreement imposing symmetrical rules is intelligible. Absent that context, however, such a side agreement cannot be coherently appended to a general rule that prohibits acts of aggression.

The moral argument rests on the same idea of systematic incoherence. Any exemptions from moral norms must themselves be justified morally. Yet it is difficult to see how there could be any kind of moral justification for giving permission to kill to people who are not permitted to kill. Still, defenders of the moral argument are sometimes prepared to acknowledge that, however morally flawed the Geneva Conventions might be, they can be understood as a version of Wolff's voluntary law of nations, a set of worthwhile compromises with justice to prevent terrible consequences.[25] In a world in which states do not trust each other's political or military leaders, it would be both prudentially and morally appropriate for them to agree to a common set of rules. Various rationales for why this might be the best set of rules have been put forward: ordinary combatants will not actually know whether they are fighting with a just cause, commanders might opportunistically take advantage of any asymmetry in the position of aggressors and defenders, claiming the protection of justice in order to use more force than would otherwise be permissible,[26] the incentives that legal permissions might provide for self-restraint, and incentives that would be absent if participation in an unjust war could be punished.[27] Chapter 6 will consider a narrower version of the contemporary formulation of the voluntary law of nations, according to which the agreement is merely to suspend punishment of unjust combatants. There is a more systematic difficulty with the idea that such considerations provide a positive

171. A more measured defense can be found in James Q. Whitman, *The Verdict of Battle* (Cambridge, MA: Harvard University Press 2012). Whitman argues that "[w]ars will end more easily if we are willing to cut deals and to cut deals you need entitlements that you can trade away. Too much high morality makes it too hard to dicker." (261).

[25] This is a central theme in Witt, *Lincoln's Code*, *supra* note 21.

[26] A representative statement: "This strict separation between *ad bellum* and *in bello* issues is necessary because the conflation of these regimes would systematically weaken IHL. If this were not the case, all, or nearly all, warring parties would claim for themselves the prerogatives associated with the lawful initiation of hostilities and assign to their adversaries the disabilities associated with unlawful initiation of hostilities. IHL, as a matter of sociological imperative, remains indifferent to how or for what reasons the fighting started." Derek Jinks, "International Human Rights Law in Time of Armed Conflict," in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014), 666.

[27] E.g., Haque, *supra* note 11, at 27 ff.

justification: any such justification would rest on the assumption that states are entitled to enter into such an agreement, to grant enemy combatants—an aggressor's combatants—permission to kill. If, as I argued in Chapter 3, nations are not entitled to agree to a system (which is, as we saw, not really a system) in which aggressive war is permitted, then they also lack the power to permit individual acts of violence pursuant to aggressive war.

Some writers have tried to show that the *in bello* rules apply to both sides in a war because of what they represent, as a direct relation between soldiers on either side, a relation that obtains independently of the causes for which they fight. Michael Walzer's passing remarks about this idea have attracted the most attention. Walzer seeks to explain "the moral equality of the battlefield" by pointing to the fact that soldiers on opposing sides in a war endanger each the other, and so each acts out of self-protection.[28] This rationale is both unduly narrow and beside the point; it is too narrow because the distinction between civilians and combatants applies in the same way even when one side has longer-range weapons or better protective armor, and so the dangers combatants on each side pose to the other are not equal; it is irrelevant because ordinarily you are only allowed to protect yourself against someone who was wrongfully attacking you, not against someone who is defending themselves from your attack.

Similar difficulties apply to other familiar strategies for showing that combatants on opposite sides of a war stand in direct moral relations to each other, whether through consent (on an analogy with a boxing match),[29] or the willing undertaking of dangerous roles, on an analogy with police officers or bodyguards.[30] In addition to the specific difficulties all of these analogies have, they have a more general one: such rationales, if they ever apply at all, apply only narrowly outside of the context of war. You cannot forcibly turn a stranger into your consensual sparring partner on the grounds that there are

[28] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 128. For a different development of the mutual endangerment idea, see Patrick Emerton and Toby Handfield, "Order and Affray: Defensive Privileges in Warfare," *Philosophy & Public Affairs* 37(4) (Fall 2009), 82–414.

[29] Thomas Hurka, "Liability and Just Cause," *Ethics and International Affairs* 21(2) (2007), 199–218; Theodor Meron, "The Humanization of Humanitarian Law," *American Journal of International Law* 94(2) (2000), 239–278.

[30] Seth Lazar suggests that just combatants willingly draw fire away from their noncombatant compatriots, accepting risk imposed by their unjust enemy in return for the protection their compatriots receive, making killing them less serious. Lazar puts this point in terms of a "limited waiver of their rights," which is ambiguous between knowingly taking a risk and an express agreement. Lazar also describes combatants as reckless. Seth Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2015), 127. Yet none of these could give anyone else permission to kill them.

special rules for boxing matches and you have just initiated one, not even if you give that stranger time to put on gloves. The consent rationale faces several more specific further problems: many combatants are conscripts, so they did not consent to be attacked; consent is not normally a defense to murder, so it would not justify killing even those who willingly took on combat roles; and, most significantly, consent confers a novel permission between two people with respect to a specific danger only if there is some sort of arrangement between them. Two boxers (perhaps via their managers) might be able to exchange permissions to endanger each other (though not permission to kill).[31] No such bilateral exchange of terms takes place between combatants on opposite sides of a war; the only possible moral or legal effect of consent by a volunteer combatant would be to limit the combatant's claims against his or her *own* military.[32] Nor can the military be treated as occupying a role similar to the boxer's manager. The defender has not, and morally could not, agree to let the defender attack its combatants. That is, the idea that belligerent states have consented on behalf of their combatants presupposes the Wolffian idea of a voluntary law of nations.

The idea that being a combatant is a dangerous occupation also has specific problems. The fact that a police officer or bodyguard has willingly taken on a job that carries known risks does not entitle anyone else to create those risks. If it is wrong for you to attack someone, the fact that they have undertaken to protect another person against your wrongful attack does not give you any novel permission to attack them. The fact that a police officer or firefighter has willingly taken on a dangerous job does not make the dangers created by criminals or arsonists permissible, any more than the fact that a crime victim should have avoided a dangerous neighborhood makes that person a permissible target of attack.[33] People who take risks with their own safety do not give others permission to attack them. Nor can the consent and assumption of risk rationales be combined to show that the police officer or bodyguard has, through an arrangement with somebody else, thereby agreed to be subject to attack. Given how narrow these rationales are, then, they do

[31] Even this example is hardly uncontroversial. Anglo-American legal systems make a narrow exception to the general rule that consent is not a defense to the crime of battery for so-called "manly sports" such as boxing. Outside of sporting contexts, consent is not a defense even in the case of a consensual fistfight; its only legal or moral significance is that it precludes someone charged with battery or murder from claiming self-defense. *R. v. Paice*, [2005] 1 S.C.R. 339.

[32] Jeff McMahan makes related points in *Killing in War*, *supra* note 13, at 52.

[33] I discuss this point in detail in Chapter 4 of Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

not fit the case of war at all. The only way to make them apply in the case of war would be if war was somehow more permissive than ordinary life, the very thing that is at issue. Aggression is immoral and illegal; it is worse than any peacetime activity, including fistfights and crime; as such, it is less permissive than ordinary life, not more so.

## IV. Prohibition and Permission

Shawcross and the contemporary moral revisionists are correct that war does not generate novel permissions; the problem with their arguments is that they fail to see that the *in bello* rules are not permissions at all, but rather prohibitions. An aggressor's combatants who fight in conformity with the *in bello* rules cannot be punished, while those who violate them can be, regardless of the justice of their cause. This does not show that killing is permissible so long as the *in bello* norms are followed; it shows instead that those norms prohibit distinctive forms of wrongdoing that are specific to war.

Those who conclude that the Geneva Conventions grant novel permission fall into what Kant elsewhere describes as "a strange confusion"[34] or "the common fault (*vitium subreptionis*) of experts on right"[35] by mistaking a principle governing enforcement for a permissive norm of conduct, most prominently by inferring from the fact that an act cannot be punished that it is not prohibited. Kant's own examples of such inferences include the conclusion that crimes committed under necessity are justified because they are not punished and attempts to show that rules a court must accept on procedural grounds reflect underlying rights.

Both Shawcross and contemporary writers analyze the *in bello* rules in terms of a familiar picture of role-based morality, according to which within the confines of a certain role, you are allowed to do things that you would not otherwise be allowed to do. It is hardly surprising that they would object to the suggestion that engaging in illegal and immoral activities such as aggressive war could generate an exemption from the prohibition of murder.

The difficulty is not with the *in bello* rules, however, but with the picture of how morality interacts with institutional roles. Shawcross's objection, and its contemporary moral analog, reject the idea that people occupying

[34] 6:236.
[35] 6:279.

institutional rules somehow gain exemptions from ordinary morality. That is the wrong way to think about institutional rules, however. Occupants of institutional rules are frequently empowered to do things that nonoccupants are not—as a teacher you are allowed to assign grades to students, something that others are not permitted to do. The permission applies in the first instance not to the occupant but to the institution, such as the school at which you teach. So, too, with the power of a police officer to make arrests, a prison guard to detain convicts, and a judge to pronounce a binding verdict. More generally, the government of a public legal order is entitled to levy taxes, impose binding resolution on disputes, and regulate human life in ways that ordinary private persons are never permitted to do. As we saw in Chapter 2, those permissions follow from the need for a rightful condition; officials are entitled to do these things because the legal order is entitled to do them, and, as an artificial person, a legal order can only act through others, through natural persons in particular.

Although the occupants of official roles are empowered to do things that private persons are not permitted to do, the nature of the roles is in fact primarily prohibitive; anyone who occupies a role-differentiated office is prohibited from acting in ways inconsistent with that office. Those charged with carrying out such roles are required to do so in ways that are fundamentally different from the morality governing the rest of their lives. They are prohibited from doing things, or responding to familiar incentives, that are unproblematic outside of their official roles. In your personal life you are allowed to play favorites among people you interact with, spending your time with those you find interesting or pleasant to be with; contrary to the claim made familiar by utilitarians, you have no general duty of impartiality. As a public official, by contrast, you must recuse yourself from any decision involving those with whom you have such a personal relationship. In much of private life, you can give out benefits that are within your power to give as you see fit, giving batches of home baking or comments on manuscripts to your friends but not to similarly situated strangers who might benefit as much or more from them; if you are giving out grades on student papers, by contrast, you are only allowed to give them out on grounds of merit. In each of these examples, an official has power over some aspect of some other person's affairs, in a situation in which for whatever reason (including the factual, legal, or moral impossibility of securing consent and the fact that participation in certain public arrangements is mandatory so that their terms cannot be privately negotiated by participants) being subject to that power is not a

matter of a voluntary transaction, the exercise of that power is restricted to the grounds of its conferral, thus screening out factors on the basis of which others might decide. That is why an official who takes a bribe or exhibits favoritism is corrupt, even though a private person who responds to personal or financial incentives is not.[36] We saw this point in Chapter 1, in Kant's distinctively public conception of legal order. The restrictions on those who act within a public role apply because of the nature of the function or activity in which that person is engaged; as such, they can be violated even by a usurper to such a role, someone who does not properly occupy it. The usurper to such a role is not entitled to occupy it, but is nonetheless subject to its distinctive prohibitions.

Returning to the issue of war, the *in bello* rules prohibit wrongs that are particular to the occupation of specific roles and, in particular, to those of combatants and commanders. The role of combatant—a member of a nation's armed forces—is only morally possible if nations are entitled to defend themselves if attacked. A nation defending itself (like a nation doing anything else) can only act through other, natural persons; the members of the nation's armed forces are the natural persons through which it acts. As with occupants of other official roles, there are things that those natural persons, because they occupy that role, are not allowed to do. Some of those are things that they might be entitled to do in other contexts but are prohibited from doing in war.

The role-based prohibitions specific to war are the *in bello* prohibitions. Precisely because they are specific to war, they are wrongful in just the same way whether committed by a defender's or an aggressor's combatants. Someone who illicitly occupies a role is still subject to the prohibitions that are specific to it: there are certain things that combatants are not permitted to do, regardless of the justice of their cause. The qualifier "regardless" cuts in both directions: those who fight without just cause do an additional wrong by violating the *in bello* prohibitions. Their symmetrical application is completely consistent with the asymmetrical application of *ius ad bellum*. Both those who fight a defensive war and those who fight an aggressive one are

[36] This point is easily lost if, as many contemporary philosophers assume, the starting point for morality is a general requirement of impartiality. Starting from that assumption, the kind of partiality that structures familiar legal and moral rules already looks puzzling; partiality toward friends or family members in any context is suspect on such a view. That is more of a problem for the starting point than for the morality of roles.

prohibited from fighting in certain ways; the prohibitions cut across the question of whether someone has a just cause.

Before turning to the specifics of the *in bello* rules and their relation to the requirements of peace, I first want to draw attention to the familiarity of the thought that someone who illicitly occupies a role or position is nonetheless subject to prohibitions that apply to proper occupants of it. The contrast captured by the Latin prepositions *ad* and *in* applies to other cases. An unlicensed driver is an *ad vehendum* wrongdoer; the question of whether that driver drives in conformity with the traffic code is a question of whether that driver satisfies the *in vehendo* rules. The latter, *in*, set of rules are the same for an unlicensed driver as for a licensed one. The two sets of rules are normatively independent of each other; nobody would think that unlicensed drivers who comply with the *in vehendo* rules thereby acquire some kind of exemption from the *ad vehendum* ones. Even when the express wording of the *in vehendo* rules is permissive, saying, for example, that right turns may be made from the right lane, the unlicensed driver who properly executes a turn is still driving illegally, just as nobody would think that a driver's license generated permission to speed or drive the wrong way down a one-way street. So, too, with the *ad bellum* and *in bello* rules of war: the fact that an aggressor violates the *ad bellum* rules entails that its use of force is wrongful, but has no bearing on the question of whether it committed additional wrongs by using illicit means, just as the fact that a defender is fighting a defensive war does not generate a permission to use illicit means.

The driving example might seem contrived, but there are other, morally weightier ones. The person who kidnaps a child and raises it as his or her own commits a reprehensible wrong. The kidnapper is not thereby exempt from the standards internal to parenting. The *ad parentem* wrong of the kidnapping is in no way redeemed by the fact that such a parent could, conceivably, be a very good, though not perfect (because so dishonest) parent by the relevant *in parente* standards. The kidnapper could be loving, attentive, firm when necessary, and see to the intellectual, physical, and moral development of the child. These parental virtues do nothing to make the kidnapping nonwrongful; indeed, there is much to be said for the thought that every time the kidnapper touches the child, even in the process of attending to its needs, the kidnapper commits a further wrong. Nonetheless, the same *ad/in* distinction applies here as in the driving case and the case of war: the wrong of a parent exploiting, mistreating, or neglecting the child can be committed by a properly authorized parent who has come into the role of parent through

biological or adoptive means, but it is the same wrong if committed by a kidnapper. The wrongs that are specific to parenting are a separate category of wrongs, a category that exists because of the structure of the parent-child relation. They apply in just the same way to anyone who comes into the role of parent, and so to kidnappers no less than to biological or adoptive parents, because the child is involuntarily dependent on the parent and incapable of consenting to the terms of the relationship.[37]

The law and morality of belligerent occupation provide a further instance of the same structure: an occupying army is only justified in occupying enemy territory in the course of a defensive war. Nonetheless, the normative structure of belligerent occupation does not depend on how the occupying force came into occupation, but rather on the relation between it as a ruling power and those over whom it exercises that power: it must rule on behalf of the inhabitants of the territory. If an occupying power finds itself in temporary control of enemy territory in the course of fighting a defensive war, it is entitled to temporarily hold it, but the fact of its occupation, that is, the nature of the powers that it exercises, places it under an obligation to do certain things and prohibits it from doing others. It must maintain civil order and protect the functioning of public infrastructure, maintaining at least the rudiments of a rightful condition for those over whom it exercises power. There are also things that it must not do, and it commits a distinctive *in bello* wrong by doing the things occupying powers so often do: moving its civilian population into the occupied territory, or expelling its inhabitants; annexing it; and removing infrastructure back to its own territory. A nation that comes into occupation of enemy territory as a result of a defensive war commits a distinctive *in bello* wrong if it does any of these acts.

The same structure applies to an aggressor occupying the defender's territory. The fact that the aggressor is not entitled to be there at all makes its violations of the norms of belligerent occupation doubly wrong, but the fact that it is unjustified in being there at all, and in whatever it does, does not entail that its behavior as an occupying power is a matter of moral indifference. The fact that the aggressor that occupies another nation's territory

[37] As Kant explains in the *Doctrine of Right*, the relation between parent and child is structured by the fact that procreation is an act by which parents have "brought a person into the world without his consent and of [their] own initiative." As a nonconsenting party to this relationship, the child has no say about its terms, and, further, until a certain age, the child is not in a cognitive, moral, or legal position to either consent or refuse consent. That requires the parents to act on behalf of the child, to "manage and develop" the child. They cannot treat the child "as if he were something they had made," or as property, or "abandon him to chance." 6:280.

is not entitled to be there does not generate any kind of exemption from the obligations it would otherwise have. There is no special set of laws for aggressors that occupy the territory of defenders. Instead, they are subject to the same obligations, both positive and negative, to which a defender in their position would be subject.

In each of these examples, wrongs particular to the occupation of a specific role can be committed by those who occupy the role legitimately or wrongfully. Even if the rules are represented as generating novel permissions—being a licensed driver exempts you from a background prohibition on operating a heavy and fast-moving object, being a parent lets you take charge of a child in multiple ways which would otherwise be wrongful, legitimately occupying enemy territory in the course of a defensive war allows you to exercise otherwise prohibited political powers—each of these roles includes distinctive prohibitions to their execution, and those who usurp these roles commit an additional wrong, specific to the role, if they violate those prohibitions.

The same point applies to war: just as unlicensed drivers are subject to the *in vehendo* rules, kidnappers of children to *in parente* rules, and aggressors to the rules of belligerent occupation, so, too, the *in bello* prohibitions apply to aggressor and defender alike.

## V. Perfidy

The priority of peace that underwrites the prohibition on aggressive war animates the specific prohibitions contained in the *in bello* rules. All of those rules mark the fundamental distinction between what is and what is not part of the war, each restricting the reach of war. I focus first on the rule that Kant discusses explicitly: the prohibition of perfidy, the paradigmatic cases of which are false negotiation and false surrender. In the next chapter, I will turn to the principle of distinction, which prohibits the targeting of noncombatants, that is, those who are not part of the war. Finally, I will turn to two limits on excess in war: the requirements of necessity, which prohibits using more force than is required to achieve a military objective, and proportionality, which forbids an otherwise effective and even militarily necessary tactic if it will cause excessive collateral damage to civilians or civilian infrastructure. All of these prohibitions apply to both sides, but their structure and rationale is clearest in the case of a nation fighting a defensive war. Even national defense cannot justify perfidy, attacking those who are not part of

the attack on your nation, the use of more force than is necessary to stop the attack, or bringing about excessive collateral damage to people and even things that are not part of the war.

The two basic rules—the prohibition of perfidy and the prohibition of targeting noncombatants—are organized around the idea that means of war must be limited to those consistent with the possibility of a future peace. They prohibit different dimensions of unlimited war. The prohibition of perfidy is the prohibition of war without end; the prohibition of targeting civilians—the principle of distinction—protects against war without limits by distinguishing between what is and what is not part of the war. As I will explain in Chapter 5, these other important rules presuppose the same distinction between what is and what is not part of the war.

The principle of distinction is Shawcross's immediate focus, and it has occupied the attention of writers about the law and morality of war in recent years. That attention is merited but also comparatively recent. Although many of the great legal, philosophical, and religious texts of various cultures emphasize the protection of the innocent,[38] many of those same texts celebrate massacres, a point not lost on the founders of the just war and the regular war traditions. They took it for granted that civilians were answerable for the deeds of their rulers, and so could be killed or enslaved as punishment for those misdeeds.[39]

In order to develop the Kantian account of the prohibition of targeting civilians, I begin with the *in bello* rule that gets much less contemporary attention, the prohibition of perfidy.[40] Perfidy is often thought of as rooted in

[38] Seth Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2015), begins with such a list. Lazar provides a global selection; many of the European writers featured on the list permit a wide range of attack on civilians. Suárez writes that "[a]ll other persons are considered guilty; for human judgment looks upon those able to take up arms as having actually done so." Francisco Suárez, "Disputation XIII: On War," in *Selections from Three Works of Francisco Suárez* (Gwladys L. Williams, Ammi Brown, and John Waldron trans., Oxford: Clarendon Press, 1944), 843. Grotius endorses the killing of children, citing Psalm 137, "Happy shall he be that taketh and dashest thy little ones against the stones." Hugo Grotius, *De jure belli ac pacis* (1625), translated by William Whewell as *On the Laws of War and Peace* (Cambridge: Cambridge University Press, 1853), Bk. III, Ch. 9. Vitoria quotes Deuteronomy 20:10–14 to justify putting to death "all the inhabitants of a captured city." Francisco de Vitoria, *Political Writings* (Anthony Pagden and Jeremy Lawrence eds., Cambridge: Cambridge University Press, 1991), 320.

[39] For example, Suárez, *De Caritas* (On Charity) Disputation XIII, in *Selections from Three Works*, *supra* note 38, at 843.

[40] Seth Lazar draws attention to the striking silence of contemporary writers on the topic in "Endings and Aftermath in the Ethics of War," https://www.politics.ox.ac.uk/materials/centres/social-justice/working-papers/SJ016_Lazar_Endings&Aftermath_War.pdf. In Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), 271, Cécile Fabre denies that soldiers fighting for a just cause do wrong by committing perfidy, on the grounds that good faith is only required when dealing with someone who is themselves behaving in good faith, and holds out a reasonable expectation of peace. In "Deep Morality and the Laws of War," in Seth Lazar and Helen Frowe (eds.), *The Oxford*

ideas of chivalry, or of the picture of war as a sort of gentleman's agreement, a picture that has been rightly repudiated over the past century. The prohibition predates medieval chivalry and was acknowledged by all of the major writers of both the just war and regular war traditions.[41] Although they had expansive conceptions of when war could start, they all also saw, however incompletely, that the distinction between war and peace, and so a way of ending wars, had to be preserved. Despite its more recent neglect, perfidy is systematically important, because it brings into focus the distinctive wrong involved in all *in bello* violations and the relation between that wrong and the distinction between peace and war. If war "hands everything over to savage violence," then perfidy tells savage violence that it may keep everything.[42]

Article 37 of the first additional protocol to the Geneva Convention states: "It is prohibited to kill, injure or capture an adversary by resort to perfidy." Four examples are cited:

*a)* the feigning of an intent to negotiate under a flag of truce or of a surrender;
*b)* the feigning of an incapacitation by wounds or sickness;
*c)* the feigning of civilian, non-combatant status; and

*Handbook of Ethics of War* (Oxford: Oxford, University Press, 2018). Jeremy Waldron draws attention to the way in which reliable signs of peace are essential to the administration of other *in bello* norms.

[41] Cicero: "In my opinion, at least, we should always strive to secure a peace that shall not admit of guile." Cicero, *De Officiis* (Walter Miller trans., Cambridge, MA: Harvard University Press, 1913), 36–37. Augustine: "For when faith is pledged, it is to be kept even with the enemy against whom you are waging war." Augustine, Letter 189 to Boniface, *Select Letters* (James Houston Baxter trans., Cambridge, MA: Harvard University Press, 1930), 329. Ambrose notes that even warring parties recognize the wrong of treachery and breaking faith. Ambrose, *De Officiis* (Ivor Davidson trans., Oxford: Oxford University Press, 2002), 197. Aquinas refers to Augustine and Ambrose's argument in distinguishing between breaking faith in war, which is forbidden, and failing to reveal one's plans to an enemy, which is permitted. *Summa Theologica* IIaIIae 40, in Aquinas, *Political Writings* (R.W. Dyson ed. and trans., Cambridge: Cambridge University Press, 2002), 246. Suárez makes the same point about keeping truces, *On Laws and God the Lawgiver*, Bk. II, Ch. XVII; *Selections from Three Works of Suárez*. In *On the Rights of War and Peace*, Grotius writes (Bk. III, Ch. IV.iv.4; Bk. 3; Bk. III. XXV.i.2): "Therefore Cicero rightly says, that it is atrocious to break that faith which holds life together; *the holiest good of the human heart* of which Seneca speaks. And this, the supreme rulers of mankind ought to be more careful of preserving, in proportion as they have more impunity for their violation of it: so that if faith be taken away, they will be like wild beasts, whose strength is an object of general horror"; Pufendorf, *The Law of Nature and of Nations* Bk. 8, Ch. 5: "There is also this one feature common to all wars, that, although their method and genius, as it were, is force and intimidation, one may still use craft or deceit against an enemy, provided that this does not entail perfidy and the violation of pacts and pledged faith." (1297).

[42] The systematic importance of perfidy is also relevant to the application of the *in bello* rules in new types of war, a topic I take up in Chapter 7.

*d)* the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.[43]

As this list indicates, the central cases of perfidy are false surrender and false negotiation, but other conceptually peripheral but morally significant cases include disguising combatants as civilians, marking military installations as civilian or medical ones, and feigning incapacitation, either death or illness, in order to attack. These other cases will come into sharper focus when I have developed the distinction between combatants and civilians; they are all cases in which the principle of distinction is used perfidiously.

False surrender and false negotiation are paradigmatic cases because they are ones in which the prospect of peace—either a combatant or group of combatants seeks to exit the war or a belligerent seeks to end it—is most directly turned into a weapon of war. Such conduct creates a situation in which there is no way out of war and, worse, one in which there is no way out of the fact that there is no way out of war. The intuitive objection to such conduct is clear: it makes peace impossible to achieve by anything other than what Kant calls "the vast graveyard of the human race"[44] because it repudiates the only tools available to achieve it.

Despite its intuitive power, this objection can be read in two very different ways: as an empirical claim about the likely effects of perfidy in undermining trust and as a formal objection to it, according to which it is wrong apart from those effects. The empirical claim seems straightforward: people will not trust those who have violated trust in the past. Despite its straightforward nature, this empirical interpretation faces two kinds of difficulty, one factual and the other moral. The factual difficulty is that the empirical claim is both over- and underinclusive. Enemies sometimes make peace after one engages in perfidious negotiation or surrender; other times there is so little trust between enemies that there is little or no trust left to undermine; in some situations, an enemy is not interested in peace. Perfidy is no less objectionable in these cases, even though its causal relation to peace is uncertain.

[43] Protocol Additional to the Geneva Conventions, of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37, ¶ 1, June 8, 1977, 1125 U.N.T.S. 4. Article 37. The same definition is Rule 65 of Customary International Law, and appears in the Elements of Crimes for the International Criminal Court. Elements of Crimes for the ICC, Definition of killing or wounding treacherously individuals belonging to the hostile nation or army/a combatant adversary as a war crime (ICC Statute, Article 8(2)(b)(xi) and (e)(ix)).

[44] 8:347.

The moral difficulty is more serious: successful perfidy that left no survivors would do nothing to undermine future trust or peace, provided only that it was successfully kept secret. In such a case, the perfidy seems to be no less wrong because successful; if someone were to break the silence and reveal the fact of the success, that would be the right thing to do, even if its effect would lead to future distrust of that nation's troops. This difficulty could perhaps be addressed by insisting that a general rule against perfidy would extend coverage even to such a case. The difficulty, however, is that this seems like a core case of wrongful perfidy, rather than a peripheral one that is included only because a general rule is required.

In order to fill this thought out further, I want to offer a different, formal interpretation of the intuitive argument for the wrong of perfidy. The empirical argument focused on the effects of perfidy; the argument that I want to consider focuses instead on the form of interaction of which it is an instance. The difficulty is that those who engage in perfidy use means that preclude the possibility of a future peace. They make endless war their principle.

Kant characterizes perfidy as "wrong in the highest degree," that is, as in a category of wrongdoing that is wrongful independently of whether it is a wrong against anyone in particular. He introduces the distinction between these types of wrongs in his discussion of the Postulate of Public Right, that is, the requirement to exit a "state of nature" which is always a "condition of violence"[45] and enter a civil condition in which human beings interact under public laws. The idea that there is something distinctively wrong with deceit even if mutual is a familiar claim in Kant's philosophy; in the student notes from his 1784 lectures on Natural Right, Kant discusses the traditional example of someone selling a horse without acknowledging that it is blind to a buyer who pays with counterfeit money, noting that the parties to such a transaction do not wrong each other, because neither side gains something of value in exchange for something without value, but, nonetheless, each does wrong.[46] In his discussion of punishment in the *Doctrine of Right*, Kant distinguishes between the civil wrong of fraud in buying and selling (which he had earlier identified as a "falsehood in the legal sense") and the distinctively public wrong of counterfeiting, which endangers "the commonwealth and not just an individual person."[47] In each of these examples, the idea is that there is something not only distinctively wrong about deceit, but that

[45] 6:308.
[46] *Naturrecht Feyerabend*, 27:1352.
[47] 6:332.

it is a distinctive kind of wrong, connected to ideas of right even in cases in which no one in particular is wronged.

Kant's discussions in the *Doctrine of Right* and in the notorious late essay "On a Supposed Right to Lie from Benevolent Motives" are explicit in drawing a connection between deceit and the possibility of public law. Counterfeiting endangers the Commonwealth because it is inconsistent with the use of money as a means of exchange; Kant makes the same point when he insists that deceit makes "all rights which are based on contracts come to nothing and lose their force; and this is a wrong inflicted upon humanity generally."[48] These are not consequentialist arguments made to show that deceit is somehow corrosive, or that if everyone lied, lying would undermine itself as an effective means of communication. Nor is Kant claiming that the liar uses his or her dupe as a mere means.[49] Instead of saying any of these things, Kant makes a distinctive claim about public right: deceit is inconsistent with human beings interacting in a way that is governed by words rather than force. This contrast is particularly vivid in the case of perfidy, in which the party who engages in false negotiation or false surrender rejects the only way in which interaction can be made subject to discussion rather than force; in so doing, that person thereby leaves only force in place. Kant supposes that this point holds more generally: if words cannot be believed, there is no way to subject human conduct to them, or to restrict the use of force in light of them. Nor is any kind of shared standpoint possible between frauds and their dupes. Kant therefore concludes that the fundamental principle of deception is inconsistent with bringing human conduct under shared

[48] 8:426.

[49] Several recent attempts to draw on Kant's ethical philosophy to save him from his notorious claim that you must not lie to a murderer who comes to your door seeking his victim who has taken shelter with you, appear to authorize perfidy. The notorious passage is in Immanuel Kant, "On a Supposed Right to Lie from Philanthropy," in Gregor, *Practical Philosophy*, 611–615. Christine Korsgaard argues that different formulations of the Categorical Imperative lead to different conclusions about the example. Christine Korsgaard, "The Right to Lie: Kant on Dealing with Evil," *Philosophy & Public Affairs* 15(4) (1986), 325–349; Tamar Schapiro argues that the murderer at the door is not committed to a "common deliberative standpoint" and so is not a participant in the practice of truthful exchange. See Tamar Schapiro, "Kantian Rigorism and Mitigating Circumstances," *Ethics* 117(1) (October 2006), 55; Japa Pallikkathayil argues that, like the duty to keep a promise, the duty not to lie is subject to boundary conditions that do not apply when dealing with an evildoer. Japa Pallikkathayil, "The Truth About Deception," *Philosophy and Phenomenological Research* 98(1) (January 2019), 147–166. If any of these is the correct assessment of Kant's example of the murder at the door, they would also seem to be true of an aggressor in wartime, who can be redescribed according to Schapiro's distinction, with whom one shares no deliberative context as a co-legislator with the defender, and is an evildoer. More sympathetic readings of the example can be found in Jacob Weinrib, "The Juridical Significance of Kant's 'Supposed Right to Lie'" *Kantian Review* 13(1) (2008), 141–170; and Helga Varden, "Kant and Lying to the Murderer at the Door . . . One More Time: Kant's Legal Philosophy and Lies to Murderers and Nazis," *Journal of Social Philosophy* 41(4) (Winter 2010), 403–421.

laws. Even where there is no wrong by one party against another, the repudiation of any shared standpoint leaves human beings in a condition governed by nothing more than the "right" of the stronger.

Kant illustrates this distinction between this kind of "formal" wrong and the material wrong involved in a particular wrongful bilateral transaction as between two human beings with the example of false surrender:

> An enemy who, instead of honorably carrying out his surrender agreement with the garrison of a besieged fortress, mistreats them as they march out or otherwise breaks the agreement, cannot complain of being wronged if his opponent plays the same trick on him when he can. But in general they do wrong in the highest degree, because they take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of human beings as such.[50]

In saying that the enemy who has committed the same wrong "cannot complain of being wronged," Kant's point is not that the second false surrender was not wrongful. Like his remark that "for what holds for one holds also in turn for the other, as if by mutual consent," and his later comment that "for 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,"[51] the introduction of ideas of agreement here is not meant to show that either consent or a pattern of past conduct is somehow sufficient to make such deeds rightful. Nothing can make them rightful; the problem is that those who use negotiation as a weapon of war put themselves outside the possibility of agreement. If they both engage in it, then they are symmetrically situated in that neither is in a position to complain or do anything about the other's wrong except resort to force, but that is what they were doing already. Nothing is left but violence.

Just as perfidy precludes agreements, so, too, its prohibition cannot be understood as the product of an agreement between belligerents. Instead, the distinction between agreement and nonagreement is the problem of war. The suggestion that the parties have accepted that they will resolve their dispute through force, like the idea that they have agreed to permit perfidy, is

[50] 6:307.
[51] 6:346.

not the object of any possible agreement. (What would count as violating it?) Instead, the prohibition of perfidy is the precondition of any agreement whatsoever. That is why false surrender or false negotiation hands everything over to savage violence: it leaves no way out of war. Further, it does so "as if by law," not merely because it makes peace more difficult in fact, but because it repudiates it in principle by violating the fundamental norm of peaceful interaction.

Kant makes the same point in the first "Preliminary Article" of *Toward Perpetual Peace*, which precludes a peace treaty from including a "secret reservation" containing grounds for future war. That a peace treaty contains no such grounds might at first seem like a trivial requirement; the difference between a genuine peace treaty and a temporary cessation of hostilities is that the peace treaty puts the parties to it in a new and binding relationship. Kant is not merely drawing attention to this distinction; his point is that the difference between peace and war depends on treating peace as not subject to any further conditions. The only way to have peace between enemies is to permanently repudiate the use of force between them and so to impose closure on whatever disagreement or dispute led to the conflict. A peace treaty must be comprehensive and genuine. A peace treaty containing a secret reservation violates not only the requirement of comprehensiveness; it also violates the condition of genuineness. Without it, there can be no peace at all, but at most a temporary and strategic lull in conflict. That is the sense in which false negotiation or false surrender hands everything over to savage violence: whether violence continues does not depend on what has been said. A peace treaty makes the discontinuation of violence depend exclusively on what has been said.

The claim that perfidy repudiates peace rests on the implicit premise that there is no middle ground between deciding things by words and deciding them through force. Either force is subject to words—right disciplines might—or only force decides anything. This is, as we saw in Chapters 1 and 2, the central organizing theme of Kant's doctrine of right. It forms the bridge between the concept of right and the concept of coercion. Right and coercion can only be reciprocally related if all uses of force are subject to requirements of right, which, in turn, requires rejecting the principle that might makes right. At the most general level, this argument explains why it is necessary for human beings to leave a state of nature and set up a public legal order. This is not a "short argument"[52] to Kant's conclusions; it requires all of the

[52] For the difficulties of reading Kant as making short arguments, see Karl Ameriks, "Short Arguments to Humility," in *Interpreting Kant's Critiques* (Oxford: Oxford University Press, 2003).

intermediate steps concerning the way in which freedom governs the use of external objects of choice. The entirety of that argument turns on the distinction between deciding things under concepts of right, which can only be done under public law, and allowing force to decide. Perfidy excludes that possibility, and indeed excludes even the more limited possibility of people entering into a narrower agreement to resolve a specific dispute peacefully.

Understanding perfidy as the repudiation of peace also explains how conventional signs figure in it. Perfidy is wrong because it undermines the possibility of surrender or negotiation itself, not because it damages the convention of using the white flag as a *symbol* of surrender or negotiation. Conventional symbols are used to mark surrender and negotiation—white flags in place of raised hands—mark distinctions that matter apart from how they are marked.

Like any category-based argument, this argument does not purport to show that an army that resorts to perfidy will never in fact achieve peace. It shows instead what is distinctively morally wrong with it. Its emphasis on a distinction, rather than the actual effects of particular cases of perfidy, reflects morality's more general attention to principles rather than consequences. As Thomas Nagel once remarked, the prohibition of murder "does not say that the worst thing in the world is the deliberate murder of an innocent person. For if that were all, then one could presumably justify one such murder on the ground that it would prevent several others, or ten thousand on the ground that they would prevent a hundred thousand more."[53] Murder is not wrong just because it is a bad result. It is therefore not something to be minimized by, where necessary, committing murder. That is why the prohibition on murder cannot be relaxed on the grounds of minimizing the bad result that it prohibits. More generally, moral and legal prohibitions, such as the prohibition of murder, are not a tool adopted in order to avoid bad results, which can be strategically abandoned where doing so will avoid more instances of that result. They are more basic than that; they are the structure of rightful interaction. So, too, with perfidy: it is not wrong just because the continuation of war is a bad result, and so the prohibition on it cannot be relaxed on the grounds that it will, in some particular instance, hasten peace.

The category-based argument also shows the sense in which perfidy is a wrong that is internal to the conduct of war, because it is a principle on which there can never be anything other than war. It also shows that the successful

[53] Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1(2) (Winter 1972), 123–144.

and secret case of perfidy is no less wrong for its secrecy or success. Most importantly, it shows that the problem is not that perfidy somehow undermines an ongoing cooperative activity, but rather that it repudiates the possibility of any cooperative activity.[54]

This prohibition of perfidy is different from other norms regulating deceit; the wrong of perfidy is not the wrong of fraud or the weaker wrong of nondisclosure in negotiations. Both of those may sometimes or even always be wrong, but they leave the context in which opposed parties negotiate intact, in the same way that bluffing can be a part of poker. Perhaps there are cases outside of war that approach perfidy; Seana Shiffrin has argued that police negotiations with hostage-takers might be like this, because it, too, is a situation in which there must be some way out of what she describes as a "suspended context," that is, a situation in which ordinary interpersonal interaction seems to be impossible.[55] If there are such cases—an issue on which I take no position here—the use of deceit in them is wrong precisely because of the wrongfulness of willingly remaining in such a situation.

That is why the distinctive wrong of perfidy differs from other forms of wartime deception, what are called "ruses of war." Here are two examples, the first of which is likely to seem less troubling than the second. Prior to the invasion of Normandy, the Allied forces built an array of decoy military installations near Dover, so as to lead the German army to believe that they were planning to attack at Calais. This counts merely as a ruse, because there was no hiding of the intention to attack, only a misrepresentation about its means, nature, and timing. Genghis Khan is said to have won many of his battles through false retreats, charging the gates of a city, pretending to lay siege, and then, at the first defensive response, having his army retreat, scattering weapons as they fled. It was all a ruse; as soon as the defenders of the city opened the gates in pursuit, his troops would fall on them and defeat them, and capture the city through its open gates. Such conduct is morally

[54] See the discussion in Weinrib, *supra* note 50.

[55] Seana Shiffrin, *Speech Matters* (Princeton: Princeton University Press, 2014). Shiffrin emphasizes the fact that in such cases "one puts the possibility of moral interaction out of reach in the situation and jeopardizes future moral interactions because full moral interaction depends upon our believing and knowing that we are reliably communicating." *Speech Matters*, 46. Shiffrin's approach has important continuities with the account offered here, but, as her use of the word "jeopardizes" indicates, does not take a position on whether the possibility of exiting such a context is to be understood empirically or formally. Someone focused on jeopardizing future interaction might think that it is imprudent but not immoral for the police to renege on a publicly broadcast offer of amnesty to a kidnapper if a child is returned safely. Having reneged on it, the police would never again be able to make such an offer. The secret case of perfidy, by contrast, jeopardizes nothing but is no less wrongful.

problematic, especially when done by a conqueror and made even worse by the way in which the vanquished were treated. But it was not perfidious, because it never meant to suggest that the parties were no longer at war or were in the process of exiting a war. Genghis Khan's enemies pursued his army—and fell into his trap—precisely because they believed that they were still at war.

The contrast with ruses of war shows that the wrong of perfidy differs from the wrongfulness of other forms of deceit and is not just a special case of any of them. Contemporary readers are more likely to approve of the first than the second, in part because of the differing roles of aggressor and defender. Perfidy is different: its wrongfulness is fully on display when it is committed in the service of a just cause, because it is a problem specific to a condition of war, and it is a problem because it creates a structure from which there can be no exit.

The difference between perfidy and ruses of war also shows the difficulty with the idea that the *in bello* rules are part of what Wolff called the "voluntary law of nations,"[56] the agreed terms of war as a joint activity. The fundamental problem of war is that those who are fighting are not engaged in a joint activity at all. Any rules governing their activity cannot be traced to the value of their continuing to interact in this way. A defender is allowed to respond to the aggressor's aggression, but not because they have made an arrangement that includes this among its specific terms; the only possible arrangement they could have made is the outright prohibition of aggression. Once they find themselves in a contest of force, their interaction is fundamentally noncooperative. That is why all of the rules governing that interaction get their point from the importance of the belligerents *ceasing* to interact in this way, that is, from preserving a way out, because of the importance of peace.

Norms governing relations between nations can be articulated and modified through explicit treaty or the implicit development of custom among them; the moral significance of such agreements does not entail that they can take on any content whatsoever, or that they can generate novel permissions.

[56] As suggested, for example, in Cornelius van Bynkershoek, *De Rebus Bellicis*, in *Quaestionum juris public libri duo*, vol. 1 (Leiden: Apud Joannem Kerckhem, 1737), translated by Peter Stephen du Ponceau as *Treatise on the Law of War* (Philadelphia: Farrand & Nicholas, 1810), 3–4. "For my part, I think that every species of deceit is lawful, perfidy only excepted; not that any thing may not lawfully be done against an enemy, but because, when a promise has been made to him, both parties are devested of the hostile character as far as regards that promise." Bynkershoek later compares taking a hostage by offering him passage on a ship to abuse of the flag of truce; the thought seems to be that abuse of the flag of truce is the breach of an earlier promise (15–16).

In particular, explicit agreements permitting aggressive war or perfidy could have no moral or legal significance: they would essentially be agreements that agreements were not binding after all. One way of reading the pre-1928, Grotius-inspired, voluntary law of nations is as doing just this, as giving every nation the unilateral permission to initiate war. But, as Lauterpacht remarked, such a general permission would confer on each nation the power to unilaterally deprive any other nation of legal protection. A related point applies to the suggestion that the prohibition of perfidy is the product of some agreement to prohibit it; the prohibition of perfidy is the precondition of any possible agreement, rather than the product of some particular one. By contrast, the prohibition of ruses of war is not the precondition of any possible agreement, although it is, in principle, the possible subject of an agreement.

So far, I have been focusing on the use of perfidy by the defender. I hope it is by now clear that the fact that it was a defender did not figure in identifying the nature of the wrong; nor did the fact that it was a defender provide an exemption from a more general norm. The distinctive wrong of perfidy is the wrong of repudiating the distinction between war and peace, so it can be committed by anyone who fights in a war. Even though everything the aggressor does is wrong, it commits a further and distinctive wrong by engaging in perfidy. The wrong is particular to violent conflict;[57] it is the wrong of conducting a war in a way that leaves no way out of war, and hands everything over to savage violence.

## VI. Conclusion

I have argued that distinctive prohibitions govern the use of force in war. I have tried to show this by arguing, first, that as a general matter, there are often different rules governing engaging in an activity and the conduct of that activity, a thought that I tried to make familiar by reference to other examples of it. In each of these cases, someone who wrongfully engages in the activity is nonetheless bound by its rules, that is, commits an additional wrong by violating those rules, even though that person is already doing wrong by engaging in the activity at all. I then extended that idea to the case of war,

[57] In cases of conflict between individuals, perfidy by an aggressor—pretending to abandon the attack and suggesting peaceful resolution as an alternative to violent conflict—seems especially egregious.

arguing that both sets of rules are rooted in the priority of peace. The *in bello* restrictions on the means that can be used are not somehow extrinsic to the limitation of the grounds of war to national defense; instead, they are further instance of the more general distinction between a condition in which everything is subject to force and one in which all uses of force are subject to law. Forcible interference with another nation's political independence or territorial integrity is prohibited because it replaces law with force, subjecting one nation's legal order to force from another. A defensive war is restricted in the means that it can use, because it must not use means that are inconsistent with leaving a condition of war. An aggressor that uses those means commits the same wrong in addition to the wrong of aggression.[58]

In the next chapter, I will extend this analysis to the other core *in bello* rule, the principle of distinction, explaining it, too, in terms of the possibility of peace. I will also consider the *in bello* rule of proportionality. In Chapter 6, I will address a residual question. I have explained why the same prohibitions apply to both sides in a war, but have not claimed that it is ever permissible to fight without a just cause. So I have not defended the claim that many find in Walzer's analysis of what he calls the "battlefield equality" of opposing combatants. Shawcross's objection therefore seems to reappear: if unjust combatants can be stopped from engaging in immoral and illegal behavior, why can they not be put on trial? The analogies I used to introduce the idea that there are rules for wrongdoers might be taken to suggest just such a structure: the unlicensed driver who obeys all traffic laws and the kidnapper who is an engaged and loving parent comply with one set of norms but can be prosecuted because they violate another. I will explain how the same Kantian ideas provide an answer to that question.

[58] See the discussion of the double structure of wrongdoing in Aravind Ganesh, "The Relationship between International Humanitarian Law and International Human Rights Law from the Perspective of Kant," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

# 5

# *Ius In Bello* II

## Combatants and Civilians

In Chapter 4, I argued that just as the *ad bellum* rule prohibits breaches of the peace, so, too, the *in bello* rules are restrictions on the ways in which defensive force can be used. I also argued that, although their structure and rationale is most prominently displayed in the case of restrictions on the justified use of defensive force, these same restrictions also apply in cases of nondefensive, that is, aggressive force. They are wrongs specific to war and can therefore be committed by aggressors and defenders alike. As prohibitions, the *in bello* rules do not confer novel permissions on nations at war; they prohibit the use of certain means of conducting a war. If the means are wrongful because of their inconsistency with a future peace, then they are wrongful independently of the justice of the cause in the service of which they are used. Not only can they not be redeemed by a just, that is, defensive cause, so, too, their use by those who are already wrongdoers is an additional wrong, the wrongfulness of which does not depend on the injustice of the cause for which they fight.

I illustrated this point with the example of perfidy, the central case of which is false negotiation or surrender. Perfidy is always wrongful, because it repudiates the distinction between peace and war, and so leaves everything as war. As I put it in Chapter 4, an army that uses the possibility of peace as a tool of war by engaging in a false surrender or negotiation creates a situation in which there is no way out of war, and no way out of the fact that there is no way out. This does not mean that a soldier or entire nation that engages in perfidy will never find itself at peace. The claim instead is that the means are wrongful, simply as such, apart from their effects. That is why a successful case of perfidy that leaves no witnesses may not undermine peace empirically but is wrongful because it undermines it in principle.

My explanation of perfidy was category-based rather than empirical, and in this chapter, I provide a similar category-based explanation of what I will treat as the other basic *in bello* prohibition, sometimes called the "principle

of distinction," which prohibits the targeting of civilians. Targeting civilians is wrongful regardless of which side in the war engages in it, aggressor or defender, and violates the requirement of right during a war because it does not leave the possibility of peace open. Like the wrong of perfidy, targeting civilians is wrongful because inconsistent with the distinction between peace and war. To target civilians, I shall argue, is to repudiate that distinction. Perfidy is wrong because it makes war without end its principle; targeting civilians is wrong because it makes unlimited war its principle.

The difference between civilians and combatants provides occasions for perfidy—for example, combatants who disguise themselves as civilians as a military tactic commit perfidy—but the connection goes deeper. The connection can be brought out by focusing on the broader category of those who are not part of the war. Consider surrender, which is a change in status, the transition from being part of the war to no longer being part of it. If a soldier, or group of soldiers, up to and including an entire army, surrenders, people who had been part of the war change their status and are no longer part of the war. Their status is now protected in a fundamental sense: force can no longer be used against them in order to achieve military objectives. If an entire nation surrenders, the war ends, and subsequent uses of force between the belligerent nations become wrongful. A parallel point applies to emissaries of peace: when they propose to negotiate, they are not part of the war. Until the negotiations succeed, the war continues, but not for the emissaries of peace; they are outside the war, for as long as the negotiation continues. If the negotiation is successful, then the nations have exited a condition of war, and nobody is any longer a part of the war.

After an aggressor's soldiers have surrendered and laid down their arms, they are no longer the objects of legitimate defensive force. But the parallel point applies to the defender's soldiers: even though they never were the objects of legitimate aggressive force, an aggressor who targets enemy combatants who have surrendered commits a distinctive type of wrong, by acting in a way that rejects the possibility of leaving a condition of war.

The idea that combatants who lay down their arms have a novel status is deeply entrenched in international law. They become prisoners of war, who can be contained to stop them from rejoining the war. Those who hold them as prisoners are neither entitled to use force against them for military objectives nor to put them on trial for having fought, and killed, without a just cause. These two aspects of the status of prisoner of war—no longer a target, and not subject to punishment simply for having killed or attempted to kill

in an aggressive war—each has a fundamental basis in the very distinction between peace and war. Both apply to prisoners of war, who were once part of the war, and both apply even if the use of force or threats against them could be effective in achieving war aims.[1] I will take up the case of protected status first, and return to the prohibition of punishment in Chapter 6.

## I. Who Is Part of a War?

Both the possibility of negotiation and the possibility of surrender require that there be a status of not being part of the war. If there were no such status, surrender would be impossible, because nobody could make the transition from the status of being part of the war to the status of no longer being part of the war. The same point applies to peace: if there was no status applying to those not part of the war, a war could only end through the complete destruction of the enemy, so that peace would only be possible through what Kant describes as "the vast graveyard of the human race."[2] So the possibility of peace, that is, the possibility of how things stand between nations being governed by law rather than force alone, and so the possibility of a war ending, requires that there be a status of not being part of the war.

My argument will be that noncombatants occupy just this status: they are not part of the war.[3] The conceptual distinction required in order to make surrender and negotiation possible, and so to make peace possible, requires that there be a status of not being part of the war and that this status must always be available. It further requires that not being part of the war is

[1] Seth Lazar cites considerable evidence that the use of force against civilians is not effective in achieving military aims. See Seth Lazar, *Sparing Civilians* (Oxford: Oxford University Press, 2015), Ch. 2. As Lazar points out, the fact that it is ineffective "does not capture the visceral opposition we feel in response to attacks on civilians." (55). It is less clear that mistreating prisoners of war is militarily ineffective, particularly when they interfere with the ability of their captors to operate, or if treating them as hostages (contrary to Geneva Conventions, common Article 3) might yield concessions from the enemy or make hostile populations more compliant. See the discussion in Trial of Wilhelm Liszt and Others, *United States Military Tribunal, Nuremberg* 8th July, 1947, to 19th February, 1948 (The Hostages Trial), in *Law Reports of the Trials of War Criminals* Vol. VII (London: United Nations War Crimes Commission, 1949).

[2] 8:347.

[3] My argument thus explains the second prong of Walzer's arguments about the principle of distinction. I mentioned some difficulties for his account of what he calls the "battlefield equality" of opposing combatants. He concludes that discussion with a remark about the deeper importance of "a certain view of noncombatants" who "cannot be used for some military purpose, even if it is a legitimate one." Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), 137.

everyone's presumptive status, the status they enjoy unless they do something that makes them part of the war and the status to which they can return by surrendering or agreeing to peace.

This formal, category-based argument does not, on its own, tell you who, if anyone, enjoys that status. It shows only that two different statuses must be available, being part of the war and not being part of the war, and that it must always be possible to move from the first to the second. Being at peace must be everyone's presumptive status; people are not part of a war unless shown to be otherwise. A presumptive status is not necessarily anyone's actual status. More specifically, the category-based argument does not yet show that being a member of a belligerent's armed forces counts as being part of the war, or that not being part of those armed forces counts as not being part of the war. In order to show that, I must explain why the distinction between combatants and civilians is aligned with the distinction between being part of the war and not being part of the war.

In order to align the distinctions between combatants and civilians with that between being part and not being part of the war, I want to come back to the central Kantian idea that war is always morally problematic because it is the condition in which force decides. Both the just war and regular war approaches draw their own lines between those who are and those who are not part of the war. If all of the grounds of war proposed by just war writers were acceptable, then the question of whether someone is part of the war would reduce to the question of whether that person stands in the way of achieving the war's just aims. There would be no way for those people to change their status from being part of the war to not being part of it. Instead, those who deserved punishment in a punitive war would continue to be acceptable targets after they surrendered. So, too, those who failed to yield up goods that they wrongfully held, or who had more than their fair share; these people could not change their status and make themselves prohibited targets by surrendering or seeking peace. Some contemporary just war writers understand the grounds of war in terms of the proper distribution of danger to those who are responsible for it. On their view also, those who are responsible for the creation of a risk remain morally acceptable targets even if they have surrendered; surrendering at most makes them less effective targets.[4]

[4] Jeff McMahan argues that those with a just cause are permitted to kill prisoners of war when "they have become an obstacle to the prevention or correction of a serious wrong, or in which they pose an unjust threat to others. In these circumstances, they will have no justified complaint if they are subject to proportionate harm in the service of the just cause, or in order to avert an unjust threat

These expansive views of liability reflect the just war tradition's more general view of war: if war is a legitimate method of law enforcement, whether punitive, remedial, or redistributive, people cannot put themselves beyond its reach simply by laying down their weapons or agreeing to forego the use of violence, any more than someone could escape civil liability or criminal punishment by surrendering. In those contexts, surrender is a prelude to liability or punishment, not an exemption from it.

The regular war writers' view of war as a mode of dispute resolution leads to the same troubling conclusion. Regular war writers progressively narrowed their conception of those who are part of a war, beginning with Grotius's inclusion of children as permissible targets (on the grounds that they might otherwise grow up seeking to avenge the killing of their parents), and ending with Vattel's exclusion of everyone except soldiers participating in or standing by to participate in a pitched battle. At the same time, the continuity they emphasized between the resolution of a dispute and the execution of a judgment entailed that the laying down of arms did not exempt the vanquished party from further uses of force. Instead, it left the defeated enemy at the mercy of the victor. Although Grotius admonished Christian princes to be merciful,[5] and Vattel emphasized the wisdom of treating a conquered people well, neither supposed that those who ignored this advice were acting beyond the scope of their rights.[6] If the point of war is to allow the victorious party to establish a claim or exact a remedy, the entitlement to use force does not end when the war does.

For the just war and regular war writers, then, the fact that someone has surrendered, and so is no longer part of the threat, is at best indirectly relevant to the question of whether that person is an appropriate target of lethal force. Both approaches draw the line between those who are and those who

for which they are responsible." Jeff McMahan, "The Morality of War and the Law of War," in David Rodin and Henry Shue (eds.), *Just and Unjust Warriors* (Oxford: Oxford University Press, 2008), 22.

[5] Hugo Grotius, *de iure belli et pacis* (1625), translated by William Whewell as *The Law of War and Peace* (Cambridge: Cambridge University Press, 1853), Bk. III, Ch. 10, p. 368.

[6] "Provided the inhabitant submit to him who is master of the country, pay the contributions imposed, and refrain from all hostilities, they live in as perfect safety as if they were friends: . . . By protecting the unarmed inhabitants, keeping the soldiery under strict discipline, and preserving the country, a general procures an easy subsistence for his army, and avoids many evils and dangers." Vattel also allows prisoners, including civilians, to be treated as hostages for security and killed in reprisal. Emerich de Vattel, *Le Droit des Gens, ou Principes de loi Naturelle, Appliques à la conduite & aux affaires des Nations & des Souverains, Tome Second* 3:74 (Bk. III, Ch. 8, § 148), 353, translated as *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, edited and with an Introduction by Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), 550–551.

are not part of a war in the wrong place because they do not think that settling matters by force is morally problematic as such.

The Kantian account, by contrast, regards war as barbaric; as such, it requires that anyone who is part of the war always has the option of exiting a condition of war, and that nonparticipation be everyone's presumptive status. On this approach, the two distinctions are therefore aligned. As was the case with perfidy, the structure is easiest to see in the case of a defensive war. The aggressor's combatants are the ones carrying out the attack, and the use of force to stop them is the use of force to stop the attack. Any other use of force is prohibited. Once someone stops attacking, defensive force can no longer be used against that person. Just as a defender commits a distinctive wrong by directing force at those who are not themselves using force, so, too, does an aggressor who does so. Moreover, the rationale is the same. The problem with a defender targeting those who are not part of the war is not that doing so is inconsistent or self-defeating in relation to the defender's own defensive aims. It is that it is inconsistent with the possibility of a future peace. Consider the parallel with perfidy: it is not wrong because self-defeating in relation to the aim of building trust; false negotiation or surrender are wrong even where trust is absent and there is no likelihood of trust in the near future. So, too, with using force against those who are not themselves using force. The wrong of doing so is distinctive, and so can be committed even by those who are not entitled to use force at all.

This alignment of the two distinctions applies to both sides in every war. Attacking those who are not part of the war is wrongful because it deprives belligerents of the possibility of exiting a condition of war and in so doing expands the range of human interactions that are subject to force, leaving no one out of the war. As we saw in the examples in Chapter 4 of driving, parenting, belligerent occupation and perfidy, the structure of the wrong is easiest to identify in the case of someone who is legitimately engaged in the activity, because that person commits only one wrong. It also applies to targeting civilians: when someone engaged in legitimate, that is, defensive war, targets civilians, they are committing only one wrong, violating only one prohibition. An aggressor who targets civilians commits an additional wrong over and above the wrong of its aggression. The distinctiveness of each of the wrongs entails that they can be committed by someone fighting an unjust war, who is not entitled to use any force whatsoever.

## II. Part of the Fighting

For the Kantian account, the question of whether someone is part of a war gets its urgency from the need to preserve a way out of war, by specifying a status that everyone presumptively has, and that anyone who is participating in the war can always regain. This leads to a narrow conception of being part of the war: someone is part of the war if and only if that person is part of the use or threat of military force. A defender commits a distinctive type of wrong by using force against those who are not part of the aggressor's military, because they are not attacking. The same point applies to the aggressor: the distinctive wrong of using force against those who are not using force applies in just the same way, because it is distinctively wrong because of its failure to allow individual human beings and entire nations to exit armed conflict.

As an artificial person, a nation can only act through natural persons who occupy its official roles. In war, the members of the nation's armed forces are the natural persons through whom it engages in conflict, that is, through whom it uses and threatens force against its enemy. They are those through whom it uses force, even if only some of them are voluntary, wholehearted, or effective participants in it. Others might be conscripts, fighting under duress, or fighting willingly only because they have been duped into believing that their nation is under attack, and others might never bring themselves to use their weapons.[7] Still others could be badly trained, poorly equipped, or otherwise ineffectual fighters.

Despite these differences between the motivations and efficacy of different members of a nation's armed forces, all of them are part of the way in which the belligerent nation seeks to achieve its military purposes. Even those who are likely to be ineffective are not like involuntary human shields, nonparticipants whose innocence is meant to engage the enemy's moral scruples. They are part of the threat, not because they participated in an activity that carried the risk that they would be involved in wrongful killing,[8]

[7] D. Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Boston: Little Brown and Co., 2009), cited in Saba Bazargan "Complicitous Liability in War," *Philosophical Studies* 165(1) (2013), 177–195. Although those studies have been disputed (see R.J. Spiller, "S.L.A. Marshall and the Ratio of Fire," *The RUSI Journal* 133(1) (1988), 63–71, cited in Bazargan, "Complicitous Liability in War") and military trainers around the world have responded to them by trying to reduce their members' inhibitions about killing, there are presumably still some combatants in this category.

[8] A possibility entertained by Jeff McMahan, "Pacificism and Moral Theory," *Diametros* 23 (March 2010), 44–68, 52.

but because they are part of the prospect of force through which a nation seeks to prevail. If there was some way to know in advance who, among those who are supposed to attack, will in fact make no contribution to the threat—which ones will lose their nerve, or who has a malfunctioning weapon—force could not be used against them, just as it cannot be used against religious or medical personnel, even if they are paid by the military and wear uniforms. If they could be so identified, they could not be used as part of any threat.[9]

Nobody else is part of the conflict, even if they voted in favor of it, cheered it on, tended to the wounded, and so on.[10] The distinctive wrong of targeting noncombatants is the wrong of making someone part of the conflict who is not already part of it. Once again, the distinctive morality governing war reflects its distinctive immorality: war does not generate a special permission to target those who are part of it; it generates an additional prohibition on targeting those who are not. A defender commits that distinctive wrong by attacking those who are not part of the aggressor's aggression; the aggressor commits the same distinctive wrong by attacking those who are not part of the defender's defense. Whether done by aggressor or defender, the problem with attacking those who are not part of the war is that doing so makes it impossible for those who are fighting to change their status and stop being part of the war.

Recent moral critiques of the Geneva Conventions' application of the principle of distinction to both sides in a war often complain that such an approach makes war more permissive than ordinary morality, because it confers a novel permission to kill on those who fight without justification. The structure of the *in bello* norms as prohibitions shows that the charge is mistaken: war is less, rather than more, permissive, than other situations. Those norms rule out some acts that some might suppose to be permitted by principles that apply elsewhere (such as principles of distributive justice or the unremarkable forms of balancing competing claims on resources in

[9] In a recent discussion, Gabriella Blum has suggested that many uniformed combatants are not part of any military threat in modern conditions of war. See Gabriella Blum, "The Dispensable Lives of Soldiers," *Journal of Legal Analysis* 2(1) (Spring, 2010), 69–124. If Blum's empirical assessment is correct, then those who are not part of any military threat cannot be targeted because the use of force against them is not a way of stopping (any part of) the threat the aggressor poses.

[10] Jeff McMahan has suggested that such people are sometimes responsible for wars even if they do not directly take part in them. As such they are on his view permissible targets of intentional attack, although in practice other factors (limited degree of responsibility, proximity to nonresponsible agents, limited efficacy of such attacks in securing victory) usually make it wrong to attack them. Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), Ch. 5. Such people would be incapable of changing their status through surrender.

which governments frequently engage), as well as acts that are already forbidden (such as the targeting of civilians by an aggressor who is not permitted to target anyone).

## III. Total War?

This way of aligning the category of civilians with the category of those who were not part of the war may seem to be oblivious to the realities of modern war, in which, it is sometimes suggested, entire nations are organized largely or even exclusively around the prospect of a future war. On such a view, the category of combatants is modeled on ancient Sparta, in which everyone was either fighting or in the process of training for war, except for children under the age of seven and their immediate caregivers, all of whom were preparing for such training. I do not know if this was true of Sparta, and doubt that it is true of any nation in the contemporary world, however eager nations at war might be to suppose that it is true of their enemies. The moral significance of the distinction between combatants and civilians does not depend on how many people fit on each side of it. The distinction between combatants and civilians incorporates a further distinction between the activities that are and are not part of the war.

The standard functions of the legal order—public health, provision of public roads, provision of courts of justice, management of the economy, understood as the material basis of the continued existence of the state—can be characterized in terms of their function without any reference to war. So, too, can the economic and cultural life of the society, comprised of the ordinary activities of its civilian population. All of these things can take place peacefully, and the sites in which they take place are civilian rather than military installations. Their successful performance may enable the military to operate, but even if they causally contribute to aggression, they are not part of that aggression. Activities that take place in both peace and war are peaceful activities. The same point applies to medical care and funeral services. Although an army might fail if it is prevented from tending its wounded or burying its dead, either because morale will be sapped or disease spread, these are not part of fighting the war. As a result, stopping them is not part of stopping the aggression. So, too, with the *in bello* prohibition of interfering with the corpses of enemy combatants. Once someone has been killed, that person is no longer part of the threat; those who were entitled to kill that

person must not interfere with a corpse to sap enemy morale or raise their own, even if doing so would be effective. The point applies again to those who are incapacitated by injury or shipwreck; no further force can be used against them, no matter how effective it might be.

These distinctions are neither precise nor self-applying; like other moral concepts, they require judgment in their application, and different people operating in good faith might disagree about particular cases. Their indeterminacy can be addressed in two ways. First, they can be sharpened in light of their underlying moral motivation. Whether someone is part of a threat concerns what that person is currently doing, in relation to the aggressor state's threat to the defender, and cannot be understood in isolation from it. Those who are currently incapacitated or captured are not part of a threat, even if they threatened in the past or might recover or escape and rejoin in the future; medical personnel enable combatants to rejoin the threat without themselves being part of it. Those who participate in the ongoing threat are part of it, whether by fighting or by transporting weapons to those who are. Second, the development of positive law, either customary or codified, further demarcates these same ideas.[11]

If Sparta was indeed always mobilized for war, and everyone was always in training, only called up for occasional rotating duty in all other roles, perhaps all of its inhabitants were combatants. The conceivability of such a mode of social organization would only show that a society made up entirely of combatants is possible, not that the distinction between combatants and civilians has no application elsewhere. If anything, it shows the opposite: this imaginary hyper-Sparta shows that the only way to be a combatant is by engaging in combatant activities; anyone not engaged in such activities is not a combatant, even if, as in the example of hyper-Sparta, everyone is in fact so engaged.

This same point applies more generally: although there will often be difficulties of demarcation, the morally and legally relevant distinction is between those who are part of the use or threat of force and those who are not. A secondary distinction can be drawn between when those people are and

[11] Recent revisionist writers have followed Jeff McMahan in arguing that the distinction between combatants and civilians is imprecise and at best a proxy for what really matters, which they often characterize in the vocabulary of responsibility. The concept of responsibility, however, is, if anything, even more abstract and open ended than the more familiar concept of being part of a threat. I respond to some of McMahan's arguments in Arthur Ripstein, "War's Distinctive Immorality," in Arthur Ripstein (Saira Mohammed ed.), *Rules for Wrongdoers* (Oxford: Oxford University Press, 2021).

when they are not part of the use or threat of force, which in turn generates a distinction between combatants on active service and reservists not on duty. The distinction between those who are and those who are not part of the war is fundamental to the possibility of a limited war; it is the same as the distinction between combatants and civilians.

## IV. A Note about *In Bello* Proportionality

I characterized the prohibition of perfidy and the principle of distinction as the two basic *in bello* rules; in so doing I left out the doctrine of proportionality, which not only figures in the Geneva Conventions but also figures prominently in contemporary discussions of the *in bello* rules of war and in discussions of the new types of war I discuss in Chapter 7. In many armed conflicts, each side accuses the other of fighting without a just cause and of violating the *in bello* rules; proportionality is frequently mentioned as the rule that is violated. There are rhetorical reasons for this, as well as normative and conceptual ones: judgments of proportionality are difficult to formulate with precision and generate widespread disagreement, making accusations of disproportionality particularly easy to mount. In addition, because the word "proportionality" sounds quantitative, it is easy to frame accusations in accountancy terms of the numbers of lives lost on each side. These rhetorical distractions do not, however, lead to the conclusion that proportionality is a matter of body counts or even of weighing good consequences over bad ones, and do not lead to the further conclusion that proportionality is a free-standing principle or a positive justification, separable from the structuring principle of the *in bello* rules.

Kant does not discuss proportionality in war, but it merits special attention in a Kantian account of how *in bello* norms prohibit the same acts on both sides of the war. It is sometimes held out as an example of a moral norm that could not apply to those fighting without just cause, since, it is argued, proportionality is always a matter of the permissibility of producing bad side effects in the pursuit or expectation of good ones, an explanation of how a harm can be justified even though those who are harmed did nothing to make themselves liable for such harm.[12] Such a positive justification could

[12] Jeff McMahan makes this argument in a number of places, most recently Jeff McMahan, "The Battle of the Lexicons," in Saira Mohammed (ed.), *Rules for Wrongdoers* (Oxford: Oxford University Press, 2021).

not be available to those fighting without a just cause, because their military success is never a good consequence, and therefore cannot outweigh any bad side effects.[13]

If proportionality functions as a way of gaining permission to do things that are otherwise impermissible—in something like any of the broadly consequentialist principle of "lesser evils" or the way in which the Thomist doctrine of "double effect" is sometimes thought to operate, or the ways in which moral philosophers who discuss runaway trolleys think about greater goods justifying foreseen evils—it would indeed be difficult to see why or how such a principle could apply to those fighting without just cause. A principle of lesser evils, double effect, or any of their relatives would not be able to count the benefits of an aggressor's victory or military advantage as a good result that could somehow outweigh the foreseen costs of its achievement. Writers developing this approach often speak of "the proportionality calculation," suggesting that the morally relevant factors admit of precise quantification, at least at the level of principle.

In articulating a Kantian alternative to these balancing-type accounts, I draw out the implications of the more Kantian general approach to *in bello* norms, focusing on the structure in which means of fighting are prohibited because they expand war's reach and in so doing violate the general *in bello* requirement to limit war. Those prohibitions apply to both sides in a war because both sides can overreach in the same ways. Proportionality differs from the prohibitions of perfidy and targeting civilians in incorporating comparative ideas. For scholastic just war theory, and recent discussions of runaway trolleys, the question is whether the combatant or trolley-turner is morally answerable for the death foreseeably caused; the answer is said to

[13] Jeff McMahan writes, "The problem with this restriction on the good effects that are allowed to count in wide *in bello* proportionality is that military advantage is in itself neither impartially good nor impartially bad. Whatever value it has is instrumental and depends on the value of whatever the military advantage is advantageous for. Military advantage is impartially good only when it is instrumental to the achievement of a just or at least morally justified aim. When forces pursuing unjust aims gain a military advantage, that is impartially bad." Jeff McMahan, "Proportionality and Necessity in *Jus in Bello*," Seth Lazar and Helen Frowe (eds.), *The Oxford Handbook of Ethics of War* (Oxford: Oxford University Press, 2016). See also Thomas Hurka, "Proportionality in the Morality of War," *Philosophy & Public Affairs* 33 (2005), 34–66. David Rodin, "Justifying Harm," *Ethics* 122(1) (2011), 74–110. Rodin identifies multiple factors that are relevant to this justification. Such justifications might interact in complex ways with the distributive justice theory of self-defense that is prominent in the same literature. In addition to counting the number of innocent lives saved, this conception of proportionality faces a question about whether the doing of distributive justice by placing the burden of the initial attack on those responsible for it counts as a positive benefit to be weighed against the loss of innocent lives of bystanders.

turn on how much good, impartially considered, will be produced by the act that causes the death.

The question for the law and morality of war is importantly different from the one posed by balancing-type accounts. It concerns whether means of defense that would not otherwise be prohibited by the principle of distinction, such as attacking a military installation, are precluded on the basis of their side effects. If too many civilians will die as a result of the operation, it must be called off. The question operates at the level of the military operation, asking whether it is a legitimate means of defense.

By contrast, on the scholastic and contemporary revisionist views, the means used are not the immediate object of inquiry; the deaths, injuries, and other losses are.[14] They are supposed to be redeemed by showing that good effects achieved are sufficient to offset them. If (as Francis Lieber suggested[15]) civilian causalities, even if they are not intended, will sometimes lead to a quicker peace, or quicker victory for those with a just cause, the offset view needs some way of determining whether these foreseen long-term goods are among the good effects that offset those deaths. There is also a question of whether the good effect of saving the lives of those fighting with a just cause counts among the good effects that outweigh civilian deaths and whether placing the costs of war on those responsible for it, or a state showing a preference for its own count as goods to be included in the calculus.[16] All of these

[14] This structural feature has generated a significant literature about whether civilians who will be killed as a proportionate (that is, as a cost-benefit justified lesser evil) effect of a just military action are entitled to use defensive force to stop it. The standard example involves civilians living near an unjust aggressor's military installations who will be killed in a tactical bombing raid. The lesser evils account of proportionality seems to suggest that the death of those civilians is justified and, appealing to the familiar thought that one must not resist a justified action, concludes that they may not resist. For representative treatments of this example, see Jeff McMahan, "Self-Defence against Justified Aggressors," in Helen Frowe and Gerald Lang (eds.), *How We Fight* (Oxford: Oxford University Press, 2014), and McMahan, *Killing in War*, *supra* note 10. For a critique that points out that the civilians do not lose their rights against being exposed to the risk of violent death just because a greater good will accrue, see Rodin, *supra* note 13. Rodin's position is that the issue of proportionality concerns whether the use of means (such as bombing raids) is acceptable, not whether the killings are justified. This debate largely runs parallel to the tracks, loops, and sidings of debates in moral philosophy about whether the "permissibility" of redirecting a trolley toward one person to prevent it from killing five entails that trolley-turners must direct runaway trolleys towards themselves. See Judith Jarvis Thomson, "Turning the Trolley," *Philosophy & Public Affairs* 36(4) (Fall 2008), 359–374, and the exchange between Thomson and Frances M. Kamm in F.M. Kamm, *The Trolley Problem Mysteries* (Eric Rakowski ed., Oxford: Oxford University Press, 2015).

[15] "The more vigorously wars are pursued," Lieber wrote, "the better it is for humanity. Sharp wars are brief." Instructions for the Government of Armies of the United States in the Field (Lieber Code). April 24, 1863. Section I: Martial Law—Military Jurisdiction—Military Necessity—Retaliation—Art. 29.

[16] Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective," *Journal of Military Ethics* 4(1) (2005), 3–32.

seem to be the wrong questions, but they are inescapable on any view that treats proportionality as a positive justification.

The *in bello* requirement of proportionality is one of several different prohibitions of excessive force in the conduct of war, each of which is easily mistaken for elements of a positive justification, because someone acting with a positive justification—just cause—is only entitled to use force in conformity with them. That they limit the reach of any potentially available positive justifications does not show that they are themselves positive forms of justification. To suppose that it does is to fall into the same "strange confusion"[17] or "common fault (*vitium subreptionis*) of experts on right"[18] that leads to the more general assumption that the *in bello* rules generate novel permissions, in this case inferring a positive justification from the absence of a prohibition. The simpler and more consistent view concludes that these requirements block the operation of any otherwise available positive justification because excessive use of force is objectionable.

The first prohibition of excess is the requirement of necessity. Although belligerents have sometimes attempted to treat necessity as a positive form of justification, appealing to it to justify violations of the *in bello* rules on grounds of military necessity,[19] it has only a negative, prohibitive use, forbidding uses of force that do not advance military objectives. The St. Petersburg Declaration of 1868 prohibited munitions that caused unnecessary suffering to already incapacitated soldiers, on the grounds that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."[20] This is not a positive form of justification: it does not permit aggression provided that the aggressor restricts itself to weapons that incapacitate but do not cause additional suffering; instead, it prohibits either side from using weapons that cause injury or suffering beyond incapacitation. Nor does it permit either side to do whatever is necessary to achieve its military aims. Instead, it prohibits force that is unnecessary in relation to direct military purposes. As such, it can be violated by both sides in a war. Necessity also prohibits the use of force when a battle has already been won. Although imposing a requirement of necessity will turn out

[17] 6:236.

[18] 6:279.

[19] For example, to justify the killing of prisoners of war who would otherwise have limited military maneuverability. See the "Trial of Gunther Thiele and Georg Steinert," in *Law Reports of Trials of War Criminals* (London: His Majesty's Stationary Office, 1948), 3:56–59.

[20] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. St. Petersburg, November 29/December 11, 1868.

to prohibit uses of defensive force in which bad consequences outweigh good ones, the point of the prohibition reflects the problem of excess rather than the balance of consequences. Either side that continues fighting after a peace treaty has been concluded violates the prohibition on unnecessary force in the same way, even if neither side has a just cause.[21]

Second, force is excessive if it is indiscriminate. Weapons that kill civilians as well as combatants or that damage all infrastructure, whether military or civilian, are objectionably indiscriminate. That is why land mines, biological agents, and weapons of mass destruction are objectionable. Although they need not aim to kill noncombatants, they kill everyone in their path. Such weapons are prohibited even when their use satisfies the requirement of military necessity, that is, even if a particular battle could only be won by using them. This form of excess, too, can be committed by both sides, because its wrongfulness does not depend on the goodness of the cause in whose service it is being used. Indiscriminate force is wrongful because it fails to limit war's reach.

The requirement of proportionality provides a further restriction on uses of force; even necessary and narrowly targeted force is ruled out if it disproportionate. Article 51 of Additional Protocol I to the Geneva Conventions explicitly expresses it in terms of excess. It prohibits launching "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[22] This excess has an explicitly comparative aspect: disproportionate force is excessive in relation to the concrete and direct military advantage of a specific military operation. Like the other *in bello* wrongs, its normative structure is easy to see in cases in which otherwise permissible military choices are ruled out because disproportionate: it expressly limits means of defense. The limitation depends on the importance of containing war, rather than on some calculation according to which the amount of good produced is not sufficient

[21] I put to one side here important questions about how to determine what is and is not necessary in conditions of double uncertainty about the likelihood of success of defensive measures and their effects if they are successful. For discussion of these issues, see Seth Lazar, "Necessity in Self-Defense and War," *Philosophy & Public Affairs* 40(1) (2012). My only point here is that the requirement of necessity prohibits excessive force.

[22] Geneva Convention, Protocol I, art. 51, ¶ 5. The prohibition is reiterated in Article 57. Geneva Convention, Protocol I, art. 57, ¶ 2. The same wording appears as Rule 14 of Customary International Law, and so (accepting the ICRC's statement of the rule as authoritative) is binding on states not party to the Protocol. International Committee of the Red Cross, Customary IHL Database: Rule 14 (2005), https://ihldatabases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14.

to outweigh the bad results. In using force against those who are part of the war, you must limit the indirect effects of that use on those who are not.

I want to illustrate the internal nature of the proportionality requirement by returning to the law of belligerent occupation, which requires an occupying power to rule on behalf of the inhabitants of the occupied territory. It is prohibited from moving its civilian population into the territory, from moving the civilian inhabitants out, and from moving industrial goods, raw materials, and infrastructure out of the occupied territory. That prohibition applies even if the occupation of the territory is a result of necessary operations in the course of a defensive war. The occupying power also has an affirmative obligation to secure peace and order and the rule of law in the territory, as well as to attend to public infrastructure such as roads and to take charge of public health. It thus has many of the obligations of any other government. At the same time, the occupation is belligerent, and the occupying defensive power is permitted to use its *de facto* control over the occupied territory for its own military purposes, such as transporting troops and munitions. Its obligation to provide basic public services in the territory does not prohibit it from pursuing those military purposes. It does, however, limit their pursuit. Any increase in the provision of public services might compromise military purposes, and any increase in the military use of the land might limit its ability to see to the security of its inhabitants. The belligerent occupier must find an acceptable proportion between the two aspects of that role, rather than subordinating occupation to belligerency. If it gives too much priority to military advantage—closing roads or cutting services in order to be better prepared in case of an attack that is possible but unlikely, or that would lead to the loss only of strategically insignificant positions—its conduct is disproportionate. The obligation to attach sufficient importance to its role as the governing body of the territory is internal to the role of belligerent occupier, which does not depend on the justice of the occupier's cause. The disproportion is a defect not in what it is doing but in how it is doing it. So understood, however, it is a distinctive wrong that can be committed both by defenders and by aggressors, and it is the same wrong in both cases.

This distinction between proportionate and disproportionate force more generally rests on the distinction between those who are and those who are not part of the war. The civilian inhabitants of the occupied territory, their civilian property, and the infrastructure on which they depend are not part of the war and so must be protected from it. In addition to whatever wrongs are involved in aggression, and in holding territory acquired in an unjust

war, an aggressor commits an additional wrong by excessively drawing the inhabitants of that territory, or their property or the infrastructure on which they depend, into the conflict.

I now want to return to the case of proportionality in the effects of other military actions. Those fighting a defensive war are prohibited from targeting civilians. As we have seen, that prohibition is an instance of the much broader obligation to limit war. The defender's entitlement to stop an aggressor's aggression does not disappear whenever the aggressor is attacking or preparing to attack from a location in which some civilians may also be killed or injured. The presence of civilians constrains the extent to which the defender is entitled to act, based on the military significance of the intended target. The disproportion to be avoided is between the military use of force and the protection of those who are not part of the war. Disproportion is the distinctive wrong of increasing the reach of war.

This same disproportion can occur between the military objectives and means used by an aggressor. If it does, then the aggressor's forces commit a wrong that is specific to war. Many of the intra-European wars fought in Kant's time had no just cause on either side. Although every killing in these wars was wrong, different combatants committed different wrongs, and in a war where no one had a just cause, not everything that everyone did was disproportionate, though some of the things that some people did surely were.

Because it compares things with each other, the requirement of proportionality seems to invite quantitative specification, yet inevitably seems to elude it. The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia identified four questions relevant to any such comparison that seem to require, but nonetheless lack, definitive answers: how much weight to give to each of military significance and civilian lives and objects, what kinds of things to include in each of these categories, how broad a spatial or temporal timeframe to apply them to, and whether protecting combatants and enabling them to continue fighting qualifies as a military objective. The Committee concluded that there may be no general answer, and that even on a case-by-case basis, different people coming to the question from different backgrounds might disagree.[23] Even that cautious conclusion may understate the lack of a basis for precision. In a recent article, Daniel Statman and his co-authors analyzed

[23] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶¶ 49–50 (June 13, 2000).

the result of a series of surveys of military commanders and military lawyers in multiple countries.[24] They found no pattern to participants' characterizations of what counted as an acceptable level of civilian deaths for the sake of a particular military objective. All of the participants presumably assumed that they were being asked about proportionality in a just war; if the urgency or degree of goodness of the cause being fought for, or the importance of a particular engagement in relation to the larger conflict were added as a further dimension of comparison, things would become more, rather than less, complex. Nor is this lack of precision likely to be resolved by having more information; the principle of *in bello* proportionality, if it is to do anything at all, must govern situations of imperfect information (or worse). The fact that it fails to specify the ways to identify the relevant factors or the weights to be attached to them, or that people with similar backgrounds and experience do not agree in their judgments about its application, would be a serious problem for a consequentialist balancing principle that served to justify civilian deaths. The lack of precision is not a problem if it is an additional structure of prohibition; the crucial point is that excessive means must not be used even when they are militarily necessary; this limitation applies even if people disagree about what counts as excess. The lack of precision will, however, limit the ability of institutions to hold wrongdoers accountable except in the most egregious cases. Despite its prominence in the official complaints that belligerents make about each other's conduct, proportionality is more difficulty to enforce than the other *in bello* norms.

I have argued that the *in bello* rules are a set of prohibitions rather than permissions and that the acts that they prohibit apply to both sides in a war, because they are specific to the role of combatant, that is, to the role of a certain kind of public official. Just as the prohibitions particular to a certain type of role apply to those who wrongfully occupy it, so, too, the prohibitions on perfidy, the targeting of civilians, and excessive damage to civilians and civilian infrastructure apply to both sides in the war.

[24] Daniel Statman et al., "Unreliable Protection: An Experimental Study of Experts' In-Bello Proportionality Decisions," *European Journal of International Law* 31(2) (September 2020), 429–453.

## V. Conclusion

The contemporary law of war builds on two organizing ideas: the restriction of the grounds of war to national defense and the restrictions on the means used in war, which apply symmetrically to both sides in a conflict. These ideas are sometimes thought to be in tension with each other. Recent writers about the law and morality of war have adopted Shawcross's view, according to which the application of the *in bello* rules to both sides in the conflict reflects a kind of normative incoherence, because nothing that an aggressor does could be permissible. I have argued that the appearance of incoherence rests on a misconception, according to which symmetrical application of the *in bello* rules is taken to show that they generate novel permissions that apply to combatants. That position is indeed incoherent because it makes war more permissive than other moral circumstances. The Kantian approach to war shows that war does indeed have a distinctive morality, one that reflects its distinctive immorality: the rules of war are less permissive than other parts of morality. They restrict the ways in which those fighting a just defensive war can defend themselves and impose additional prohibitions on the conduct of aggressors who should not be fighting at all. Perfidy, targeting civilians, and the use of unnecessary, indiscriminate, or disproportionate force are all wrongs that are specific to war. They apply to both sides in a war because it is wrongful for either side to violate them, regardless of the justice or injustice of the cause for which they fight. In the next chapter I will explain how the same idea of political independence that underwrites the prohibition of aggressive war precludes punishing ordinary combatants who fight in conformity with the rules of war, even if they participate in an unjust war.

# 6

# *Ius In Bello* III

## Punishment

I began Chapter 5 with the example of prisoners of war in order to illustrate the centrality of the status of not being part of the war. I drew attention to two features of that status: first, force cannot be used against them, even in pursuit of military objectives, and second, they cannot be punished for fighting in an aggressive war without just cause. I explained the first by situating it in the broader category of those who are not part of the war. I now turn to the second, situating it in the broader Kantian account of the right of nations as against each other to political independence and territorial integrity.

Ordinary combatants who fight in conformity with "the laws and customs of war"—that is, do not violate the *in bello* rules—cannot be punished for their participation in an unjust war. The fact that international law prohibits their punishment for killings that would be punishable in other contexts leads some commentators, beginning with Shawcross, through an instance of what Kant calls "the strange confusion of jurists"[1] or the "common fault (*vitium subreptionis*) of experts on right,"[2] to the conclusion that international law renders those killings permissible. We have already seen one part of the confusion: the *in bello* rules are additional prohibitions; the failure to prohibit acts that do not violate them does not thereby confer novel permissions on those who commit those acts. In this chapter I take up the other strand of the same misunderstanding, explaining the prohibition of punishment. This misunderstanding has its roots in the close connection between wrongdoing and enforcement, including punishment. John Stuart Mill tried to explain the nature of wrongdoing in terms of the usefulness of punishment as well as of lesser sanctions;[3] other nonutilitarian writers have tried to develop accounts of wrongdoing focused on the appropriateness of resentment, indignation,

[1] 6:236.
[2] 6:279.
[3] John Stuart Mill, "Utilitarianism," in J.M. Robson (ed.), *Essays on Ethics, Religion and Society*: *Collected Works of John Stuart Mill,* vol. 10 (Toronto: University of Toronto Press, 1969), 245.

or blame.[4] For the Kantian account, by contrast, punishment is a response to wrongdoing, but, like all moral relations, it depends fundamentally on how things stand between one party and another. Punishment can only be done by those who have the standing to punish the specific wrongdoer.

## I. The Return of Shawcross's Challenge

Understanding the *in bello* rules as prohibitions defuses the tension on which what I have been calling Shawcross's argument rests. At the same time, as the *in vehendo* or *in parente* examples show, the distinction between the two sets of rules does not protect you from punishment for violations of both. Those same analogies open space for Shawcross to offer a response: he can concede that there is a difference between perfidious and nonperfidious killing, and between attacking combatants and attacking civilians, but reiterate his claim that nonetheless, everyone who fights without a just cause is a murderer who should be punished as such.

In this chapter, I take up that argument. I concede that those who fight in aggressive, that is, nondefensive, wars commit serious wrongs, whether they do so knowingly and culpably, or unwittingly and so, perhaps, blamelessly. Shawcross's apparent assimilation of the killing of Allied combatants to the killing of "innocent, inoffensive men, women, and children, sleeping in their beds," together with his claim that "these murders are not to be distinguished from those of any other lawless robber band," suggests that they should be punished. More recent revisionist writers have conceded that punishment is inappropriate in these cases, but only on consequentialist grounds, according to which a general rule prohibiting such punishment is likely to be better for all concerned than a general rule permitting it. By characterizing it in this way, they represent it as an instance of Wolff's "voluntary law of nations" that I mentioned in Chapter 4.

Shawcross's claim was not that ordinary combatants can be tried or punished for the *ad bellum* wrong of aggression, that is, for moving nations from a condition of peace to a condition of war. Ordinary combatants participate in wars, but they do not initiate a condition of war. Only the political and military leadership of an aggressor nation commits that

[4] Peter Strawson, "Freedom and Resentment," *Proceedings of the British Academy* 48 (1962), 1–25. For a sophisticated contemporary development of this same family of ideas, see R. Jay Wallace, *The Moral Nexus* (Princeton: Princeton University Press, 2019).

distinctively international wrong.[5] Shawcross's challenge was that the aggressor's combatants commit the more ordinary crime of murder, "and these murders are not to be distinguished from those of any other lawless robber band."[6]

I will argue that, rather than representing a compromise with the morality that prohibits aggression, the prohibition on punishment is required by it: the same distinction that generates the prohibition of aggressive war, and the restrictions on the means that can be used in fighting a defensive one, also generates the prohibition on punishing an aggressor's combatants for fighting without a just cause. All of these ideas presuppose an idea of peace between independent legal orders.[7] But unlike the other *in bello* prohibitions, this is not a novel prohibition over and above those that apply outside of war. Instead, I will argue that punishment is prohibited because there is no basis for generating the power to punish. Punishment is not a universal power that individuals or legal orders have to deter wrongdoing or see to it that the wicked suffer. Like the rest of the morality governing juridical relations, it depends on how things stand between the parties. Kant's remarks about what happens after a war point to the more general structure within which individual combatants cannot be punished for fighting in an aggressive war. The independence of nations from each other entails that one state cannot punish another; as such, it cannot punish the other's officials for carrying out their official roles, properly demarcated. Kant introduces this thought in discussing the terms of peace:

[5] The statute of the International Criminal Court now includes aggression among the crimes with respect to which it has jurisdiction. The statute's wording limits its scope to those "in a position effectively to exercise control over or to direct the political or military action of a State." *Rome Statue of the International Criminal Court* Article 8 *bis* Crime of Aggression. Although aggression always takes place through ordinary combatants who are subject to military discipline and chain of command, they do not commit its distinctive wrong.

[6] *Proceedings of the Tribunal* (Nuremberg: International Military Tribunal 1948), vol. 19, at 458, available at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XIX.pdf.

[7] It may seem puzzling that someone can be attacked but not put on trial, since it is worse to be attacked than tried, and, it might be thought, if it is acceptable to do something to someone, then doing something less bad to that person must also be acceptable. This form of reasoning figures in the argument made by Frances Kamm that torture to save innocent lives is acceptable whenever killing someone to save the same lives would be acceptable, because being tortured is not as bad as being killed. Frances M. Kamm, *Ethics for Enemies: Torture Terror War* (Oxford: Oxford University Press, 2013), Ch. 1. See also Jeff McMahan, who writes that "even the most intense torture can be less bad for the victim than death, provided that the torture is of some sufficiently limited duration." Jeff McMahan, "Torture in Principle and In Practice," *Public Affairs Quarterly* 22(2) (April 2008), 120. The same combination of a redistributive theory of defense and a defensive theory of torture figures in the "torture memos" of the second Bush administration. For discussion, see Whitley Kaufman, "Torture and the 'Distributive Justice' Theory of Self-Defense: An Assessment," *Ethics and International Affairs* 22(1) (2008), 93–115.

> The right of a state after a war, that is, at the time of the peace treaty and with a view to its consequences, consists in this: the victor lays down the conditions on which it will come to an agreement with the vanquished and hold negotiations for concluding peace. The victor does not do this from any right he pretends to have because of the wrong his opponent is supposed to have done him; instead, he lets this question drop and relies on his own force.[8]

The fact that the victor prevailed does not resolve any question of right but depends instead on "his own force." Military success does not entitle one nation to stand in judgment of another. A remedial or punitive war is waged on the basis of some idea of accountability; a defensive war is not about accountability at all, but only prevention of a wrong. The defender does not have a general right of oversight in relation to the aggressor's legal system, and its victory in a war (even a defensive war) does not give it such right. That is why Kant goes on to say that

> [t]he victor can therefore not propose compensation for the costs of the 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 still cannot use it, since he would then be saying that he had been waging a punitive war and so, for his own part, committing an offense against the vanquished.[9]

The point is not just that the victor may think of the argument; it may be true that the opponent fought an unjust war. If the only ground for going to war is preventing a wrong, the injustice of the aggressor's aggression does not license the defender to punish that wrong or demand compensation for it.

As we saw in Chapter 2, nations are juridical equals in the sense that none is the superior and none the subordinate of the other. One consequence of this juridical equality is that none may appoint itself as the overseer of another; as we saw in Chapter 3, that rules out one state punishing another, even for the wrong of waging an aggressive war. We also saw that, as artificial persons, nations can only act through the natural persons who are its officials. Bringing these two ideas together, one nation cannot punish another nation's officials for acting within the scope of their offices.

[8] 6:348.
[9] 6:348.

## II. An Analogy: Diplomatic Immunity

A different restriction on one state's entitlement to punish the officials of another provides a helpful illustration of the form of the issues and the Kantian approach to them. In a recent discussion, Adil Haque has argued that soldiers fighting in a war enjoy an analog of the immunity that diplomats serving in foreign countries enjoy. Haque suggests that the point of diplomatic immunity is to make diplomacy go smoothly, preventing various types of hostage taking and reprisal and, more generally, limiting what would be the operation of the host country's criminal law power in the interests of broader international goods. Haque proposes a parallel understanding of a combatant's immunity to prosecution, suggesting that it rests

> on prosaic considerations of treaty and custom, reciprocity and impartiality, marginal incentives and aggregate consequences. No state wants its own soldiers prosecuted by its adversaries, and so all states agree not to prosecute the soldiers of their adversaries. In addition, such a legal immunity gives soldiers determined to fight an incentive to fight within the constraints of international law. If combatants will act less wrongfully if they obey the law than if they violate the law, then the law should create such incentives. . . . such prosaic considerations may be strong enough to ground a prohibition on criminally prosecuting foreign combatants.[10]

Haque's suggestion, then, is that such a system is justified because it works to the advantage of all states, which can see that they will do better if everyone complies with such a norm. This framing of the issue is analogous to the familiar voluntary-law-of-nations rationales for the *in bello* rules more generally, with their focus on the important goods to be achieved by compromising a general principle of morality in law. Unlike Wolff's argument, which says that the nations of the world have agreed to permit their combatants to be killed by those of their enemies, Haque's argument makes the narrower and more palatable claim that they have agreed only that they will not prosecute enemy combatants for those killings. The suggested agreement prohibits punishment, rather than permitting the acts that would otherwise be punishable.

In pointing to "treaty and custom, reciprocity and impartiality, marginal incentives and aggregate consequences," the argument combines an

[10] Adil Ahmad Haque, *Law and Morality at War* (Oxford: Oxford University Press, 2017), 28.

explanation of why states would comply with such a custom, that is, why it would appeal to a "nation of devils,"[11] with an account of its moral credentials. Haque couples these stability-focused arguments with the claim that with such a rule in place, "combatants will act less wrongfully" as measured by the reasons that apply to them independently of the rule. The rule itself is thus explained as a reliable guide, a practice that is valuable because widespread conformity with it will make it more likely that people will do what they should apart from it. Just as blanket diplomatic immunity prevents various dangerous forms of escalation and reprisal, a general practice in which all nations refrain from prosecuting enemy combatants who fight in conformity with the *in bello* rules make it more likely that people who are not responsible for conflict will not be targeted. Unjust combatants are exempt from punishment as part of a stable equilibrium that will make it more likely that just combatants will avoid targeting nonresponsible parties. So understood, the *in bello* rules, including the rule prohibiting punishment for participation in an unjust war, are prohibitions rather than permissions, but the rationale is very different from the Kantian rationale.

Instead of locating the prohibition on punishment in the value of an agreement entered into in the expectation of mutual advantage or justified by its expected consequences, I want to relate it instead to how things stand between independent nations, even when they are at war. Express and implied agreements shape those relations by providing common public articulations of moral ideas that are binding *lege*, that is, because of the form of the legal relationship, rather than on the basis of anything like Wolff's voluntary law of nations. As we saw in Chapter 2, shared public formulations stabilize moral norms by clarifying their content and creating fora for their application, as well as raising the reputational and strategic costs of violating them, but the rationale for *ius cogens* norms comes from the wrongfulness of the prohibited acts, rather than the prohibited act becoming wrongful because it is in violation of a mutually advantageous agreement. In this, the agreement is like a public official's oath of office, which includes a clause requiring faithful execution and avoiding conflicts of interest. The explicit undertaking reiterates and reinforces an already binding obligation; it is already wrong for an official to accept bribes independently of the oath. The same point applies to a rule against putting enemy combatants on trial.

[11] 8:366.

I will illustrate this broad structure by returning to the example of diplomatic immunity. A diplomat cannot be tried or punished because one nation cannot punish another, and a diplomat is the "sending" country's presence on the "receiving" country's territory. In accrediting them as official representatives of the sending country, the receiving country thereby treats them as subject to the sending country's public law, rather than its own. Just as the sending country's embassy is treated as the sending country's territory, its senior officials are subject only to the sending country's public law. The receiving country can revoke the accreditation of offending diplomats (or any other diplomats) and expel them, but it cannot try them before its courts. The exemption is general: the question of whether a particular act falls within the scope of diplomatic activity is not a question for the receiving country to answer, because the receiving country has no authority over the sending country; it is not allowed to tell it what to do. Because it cannot instruct the sending country, it cannot instruct its diplomats either. One nation is only able to act on the territory of another through its representatives if the representative is not subject to the judgment of the receiving country about what qualifies as a properly diplomatic activity. No one thinks that illegal parking is an essential part of diplomatic activity; it is protected because the classification of particular acts is beyond the reach of the receiving country's courts. The same point applies to more serious wrongs; diplomats do not need to get away with murder in order to do their job, but the receiving country's public law cannot apply the distinction between what is and is not part of their role. They can be expelled to the sending country, where they are supposed to be put on trial. That is the appropriate venue for trial because the diplomat is subject to its laws and is accused of violating them.[12]

Treating the diplomat as one country's presence in another may sound mysterious, but it rests on an entirely familiar thought. As we have seen, a state is an artificial person; like any artificial person, it can only act through natural persons. A diplomat is a natural person through which one legal order acts on the territory of another. The receiving country lacks the authority to conduct the sending country's foreign affairs; this lack of authority is so complete that it lacks the authority to determine whether particular acts fall within the sending country's conduct of its foreign affairs.

[12] By contrast, consular officials only enjoy immunity within the scope of their jobs, because in consular tasks—trade, visa matters, and matters of personal status such as marriage—officials are charged with providing for the portability of private legal relations rather than public law.

Understood in this way, diplomatic immunity is not an exception to the principle of territorial jurisdiction: it is an expression of its underlying rationale. If one legal order may not impose binding requirements on another, then it also may not impose such requirements on those through whom that other legal order acts, that is, its diplomats. If the receiving country cannot tell the sending country what to do, it cannot punish the sending country or the person through whom it acts. It cannot do so even though the two legal orders may contain the same prohibitions in relation to certain types of acts. If the diplomat violates the receiving country's criminal law, the diplomat can be expelled and put on trial in the sending country in which the same prohibition is on the books.

This brief description of diplomatic immunity provides a partial model for the moral and legal situation of combatants who fight in conformity with the *in bello* rules. The two cases are alike inasmuch as combatants, like diplomats, are natural persons through whom the artificial person of the state acts.[13] They are also alike inasmuch as neither can be punished for acts within the scope of their role, but they can be physically prevented from carrying out those acts. A diplomat can be stopped in the course of committing a crime, but not punished for its commission or attempted commission; so, too, an aggressor's soldiers can be the targets of lethal defensive force, but cannot be tried or punished for participating in aggression. The parallel between them is only partial because the diplomat's immunity from prosecution is general, while the combatant's is more restricted.

## III. Combatants as Minor Public Officials[14]

The diplomat's immunity is general because of the generality of the diplomatic role; the combatant's immunity is restricted because of the restricted nature of the combatant role. The receiving country is not in a position to ask whether

[13] Vienna Convention on Diplomats 39 s.2: "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

[14] My understanding of these issues has benefited from the insightful analysis in Malcolm Thorburn, "Kant and the Criminal Law of War," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

something falls within the diplomatic role, but a defender is in a position to ask whether a particular act falls within the role of combatant, which is itself structured by the fact that the scope of the authority under which the combatant acts is limited by the *in bello* rules. Each nation's independence entails that the question of whether to go to war is a question for it, not subject to oversight by any other nation. Its combatants are those through whom it acts in carrying out that decision. Their mandate is limited to using force against enemy combatants; any acts beyond this are outside the scope of their narrow role. They thus differ from accredited diplomats, who have an undifferentiated role. An aggressor's combatant who remains within those narrower confines is outside the scope of the defending country's legal system.

Those who violate the *in bello* rules act outside the scope of any possible authority: by acting in ways inconsistent with any possible future peace, they, as individuals, repudiate any distinction between ordering interaction by words and by force alone.[15] Even those fighting for a just cause could not have been entitled to do those things, and no combatant could either be entitled to do such things or to follow orders to do them. Combatants have a duty to disobey manifestly unlawful orders.[16] For all of the same reasons, the aggressor's soldiers can be punished by their own courts for *in bello* violations, but they cannot be punished by those courts for participating in an unjust war.

Other examples of limited roles of public officials are familiar: a legal system can only punish through the actions of people charged with carrying out punishments, such as prison wardens and guards. If a guard restrains a factually innocent[17] prisoner who has been wrongfully convicted, the prisoner has a complaint against the legal order but not against the guard through whom it acts. If the guard mistreats the prisoner, however, the prisoner has a

[15] David Estlund has recently argued that where the state going to war is sufficiently democratic, soldiers do not have a moral obligation to question the authority of their orders. David Estlund, "On Following Orders in an Unjust War," *The Journal of Political Philosophy* 15(2) (2007), 213–234. For a similar argument, see Massimo Renzo, "Democratic Authority and the Duty to Fight Unjust Wars," *Analysis* 73(4) (October 2013), 668–676. These arguments focus on the morality of obedience, from the point of view of the individual soldier. My point concerns instead the entitlement of another state to prohibit the soldier from deferring to authority about whether to participate in the war and applies even if the decision to go to war is undemocratic.

[16] Rule 154 of customary international law.

[17] I put to one side here distinctions between "fact-relative," "evidence-relative," and "belief-relative" accounts of reasons introduced by Derek Parfit in *On What Matters* Vol. I (Oxford: Oxford University Press, 2011), 160ff. None of the facts, the evidence available to the guard, or the guard's own beliefs entitle the prisoner's legal order to punish the guard. Perhaps a guard who correctly believes on sound evidence that the prisoner is innocent should protest or resign rather than carrying out the incarceration. But it does not follow that the prisoner's state can punish him for carrying it out.

claim against both the guard and the legal system. If the guard acts within the scope of his or her role, the act is just the act of the legal order, and no other legal order is in a position to oversee its operation. Nor is any other nation, including one whose citizen is wrongfully imprisoned, entitled to punish the guard. Just as the prisoner's legal order does not have the authority to tell the guard's legal order who to convict, it does not have the authority to demand that the guard disregard instructions of the guard's own legal order about who is to be punished. To characterize the guard's ineligibility for punishment in this way does not establish that what the guard does is morally justified, all things considered. The question to which the guard's role is relevant is not about what the guard should do but rather about what another legal order could be entitled to do in response to a morally unjustified act.[18] Even if the guard has a moral duty to release the wrongfully convicted prisoner, the prisoner's own legal order stands in the wrong relation to the guard's act to punish the guard's failure to do so.

This way of understanding the problem with punishing prisoners of war rests on two Kantian premises. The first concerns punishment: a legal order is only entitled to punish people over whom it has authority for doing things that it is entitled to forbid. Instead of thinking that the purpose of punishment is to be found in retribution or deterrence, and then asking whether punishment of a specific offender by this punisher in this particular case would realize retribution or serve deterrence, the Kantian account insists that retribution and deterrence must be secondary to two larger questions: whether the accused person has broken the law, and whether the public authority making the law and carrying out the punishment stands in the relevant relation to the wrongdoer.[19] This view of punishment sees it as a relation between a superior and a subordinate, something the superior does because of the subordinate's insubordination. That is the difference between legitimate punishment and vigilantism. A vigilante is a person who exercises punitive force without proper authority, acting as prosecutor, judge, and executioner

[18] Yuan Yuan offers the intriguing example of jurors who vote to convict a factually innocent person because the evidence is clear, and nobody has found any exonerating evidence. Yuan plausibly suggests that the jurors did nothing wrong, even though they produced an unjust result. See Yuan Yuan, "Public War: Restoring the Political Nature of Warfare," unpublished doctoral dissertation, Department of Philosophy, Yale University, 2020. I take no position here on whether or when combatants might be similarly situated, because my claim is that even if their participation in an unjust war of aggression is culpable, the defending state in not in a position to punish them.

[19] I explain the Kantian account of punishment in more detail in Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), Ch. 10.

of the verdict. If a group of vigilantes sets up a trial, its acts are more structured but no more acceptable, because it lacks the right kind of authority over the person it accuses. On some views, such as John Locke's conception of the "executive right" that everyone enjoys in a state of nature, vigilantism is problematic only because unreliable, and people transfer their rights to the state only to solve such problems.[20] On the Kantian view, by contrast, only a legitimate authority is entitled to punish. Even a reliable, evenhanded, and proportionate vigilante would punish wrongfully. This way of thinking about punishment is entirely consistent with insisting that only serious interpersonal moral wrongs can legitimately be criminalized, or that the measure of punishment be tied to its capacity to deter or the seriousness of the wrong.

This view of punishment explains why there cannot be a punitive war: no nation is the superior, and so no nation is the subordinate of another. If one nation cannot impose its legal order on another, even in response to past wrongs, it cannot punish the other, and so it cannot punish the natural persons through whom it acts. It cannot do so even if the other nation started the conflict. The aggressor's aggression does not give the defender a license to act as a vigilante against the aggressor's combatants.

The second premise, which makes this more general account of punishment relevant to the specific case of public officials, is that official roles are not simply creatures of positive law. As we saw in Chapter 4, the morality of roles is sometimes presented in a way that makes it deeply puzzling, supposing both that the official roles generate novel permissions and, at the same time, that their existence is fully determined by positive law or social practice. Critics have pointed out that a group of people cannot adopt a novel practice and thereby give its members permission to do things to people who are not members of the group, and that even if the introduction of a novel role is justified in general because of its good effects, that is not sufficient to warrant reliance on its permissions in cases in which other goods are at stake. Many of these critics go on to conclude that the very idea of role morality is suspect.[21] Others suppose that for roles to be morally significant, they would need to preempt all countervailing reasons, and so would need to give their occupants all-things-considered reasons to act in accordance with their demands.

[20] John Locke, *Two Treatises of Government*, Peter Laslett (ed.), (Cambridge: Cambridge University Press, 1988), Second Treatise, Ch. 13.

[21] Arthur Applbaum, *Ethics for Adversaries* (Princeton: Princeton University Press, 2000); David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: University Press, 1988).

We saw in Chapter 4 that this is the wrong way to think about the normative significance of at least some offices and social roles. Rather than generating new permissions by means of a group practice, normatively significant offices exist within a public authority charged with achieving a properly public purpose. The public authority can only act through natural persons, and so the powers of the public authority are exercised by those persons. The tax collector gets to collect taxes even though as a private person he or she could not. The judge gets to impose binding resolutions on disputes, the prison guard to detain people, and so on. In order to carry out any of these tasks, the official's opportunity to act on his or her own all-things-considered judgment is limited. Public officials exercise what Kant (using a vocabulary likely to strike contemporary readers as backward) refers to as "private" reason, in that they must act for the purposes of the institution and on its judgment, rather than on their own.[22] The judge must apply the law as written, the tax collector must collect the tax as specified, and the guard must imprison those who are duly convicted. Carrying out their roles requires that officials be precluded from acting on their own judgment about whether the laws they uphold are appropriate. This structure does not show that those who act in conformity with their roles never do anything wrong, or that the roles provide a positive justification for whatever they demand; institutions may have bad laws or apply good laws badly, and in those cases, officials will face difficult moral questions. The structure shows only that in so acting their acts are the acts of those institutions.

This idea of restricting the operation of individual judgment is sometimes presented as something quite alarming, but its opposite is more alarming. Someone charged with grading student essays is charged with evaluating the quality of the work, not with giving out the benefits that attach to good grades based on who is most worthy of those benefits overall. These limitations, these exclusions of people making all-things-considered determinations, are the precondition of the legal order acting at all. So, too, with tax collectors who take it upon themselves to decide what taxes to collect, and prison guards who take it to be their place to decide whether to free prisoners who have been convicted or to continue to hold those who have completed their sentences. Public right requires that all exercises of official power be done in accordance with law. This requirement does not eliminate the

[22] Immanuel Kant, "An Answer to the Question: What Is Enlightenment?" 8:37, in Kant, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996).

need for judgment, but it eliminates the role of any kind of prerogative or empowering of officials to act on what they believe to be the right thing to do, all things considered. These limits do not mean that anything the positive law says is morally acceptable, because lawmakers, too, have limited official roles and are charged only with making law that will help to maintain and improve the rightful condition for which they legislate.

There is no need for an exhaustive list of the proper exercises of public power to bring this familiar picture of institutional roles to bear on the case of war: one of the things that a state is entitled to do is defend itself, which in turn requires that it be able to determine when to fight and that it be able to deploy forces when it has determined that it must fight about something. Those forces—combatants—act under what Kant calls "private reason." The key point is that no other nation can prohibit that role in general, and so no nation can prohibit individual combatants from occupying it. Once more, this does not mean that the role of combatant can be constructed in whatever way the positive law of an aggressor state chooses to construct it. In particular, fighting in ways inconsistent with the possibility of a future peace is not a possible component of any morally possible role.

The defender's legal order does not stand in the right relation to enemy combatants to determine whether they are entitled to accept the determination by their nation's political leadership about whether to go to war. Even when the aggressor's soldiers are not morally permitted to kill, the defender stands in the wrong relation to enforce that prohibition. The point is not that the aggressor's political leadership is entitled to order its combatants to fight; it is that the defender's legal order is not entitled to enforce its determination that they must disobey their political leadership.[23]

On this understanding, the restriction on punishment does not rest on the thought that the aggressor's system of public law has conferred permission on its combatants to kill the defender's combatants. The aggressor's system of public law could do no such thing because the defender's combatants are not subject to it. The aggressor's officials cannot, through any official act, grant its combatants any permissions whatsoever in relation to them, and so cannot give its soldiers permission to kill the defender's soldiers. Nor does being

[23] Perhaps the recognition of this relationship explains the repeated remark in the Geneva Convention that "the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will." Convention (III) relative to the Treatment of Prisoners of War. Geneva, August 12, 1949, Ch. 3, Arts. 87 and 100.

subject to the aggressor's public law entail that an individual combatant always has an all-things-considered moral obligation to obey its political leadership, or never has a moral obligation to disobey. The aggressor's legal system cannot generate novel moral permissions, or legal permissions that bind the defender's legal system, just as the sending country cannot give its diplomats a novel moral permission to park illegally in the receiving country.

Instead, the independence of the two separate legal orders means that the defender's legal system can have no enforceable power over whether the aggressor's combatant accepts the decision of its military leadership about whether the war is justified. For the same reason, it can contain prisoners of war in a way that it would not be permitted to contain the aggressor's civilians who have not yet enlisted. But if it cannot impose an obligation on those combatants to disobey when the aggressor lacks a just cause, then it cannot punish them, because it can only punish people for things that it is entitled to prohibit those very people from doing.[24]

The fact that nobody can punish a combatant who fights without a just cause but in conformity with the *in bello* rules does not show that such a combatant does nothing wrong. Nor does it show that combatants should not ask themselves whether the cause for which they fight is just, or whether the acts that their role demands of them are morally justified. Conscientious soldiers who answer those questions in the negative will sometimes face further, even more difficult, questions about what they should do. Combatants who conclude that the war in which they fought was unjust may experience appropriate anger and resentment toward those who sent them to fight. These questions of what to do, all things considered, and how to deal with acts that seemed right at the time but turned out to have been wrong, were a central focus of medieval just war thinking, with its pastoral focus (whatever one makes of the answers given in specific cases). Despite their moral interest and importance, they are not the questions appropriate to a public authority

[24] Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals," *California Law Review* 31 (1943), 530, 549. "That a State violates international law if it punishes as a criminal, according to its national law, a member of the armed forces of the enemy for an act of legitimate warfare, can be explained only by the fact that the State by so doing makes an individual responsible for an act of another State." Kelsen explains this point in terms of imputation, continuing: "According to international law, the act in question must be imputed to the enemy State and not to the individual who in the service of his State has performed the act. It cannot be considered as a crime of the individual because it must not be considered as his act at all." Kelsen's formulation is consistent with the Kantian account but does not consider the possibility that something can be both the act of an individual and of the state. The Kantian account focuses on the impermissibility of one state punishing another; that is why it cannot punish an act of a state even if it is also an individual's act.

charged with punishment. The conclusion that something was the wrong thing to do does not license the further conclusion that others are entitled to punish that wrong.[25] Without the right relation between the wrongdoer and a punishing authority, the fact that someone should not have done something, or should have refused to do it, or regrets having done it, or that, in the medieval pastoral context in which just war theory developed, the person who did it should confess and give penance for a sin, does not entitle anyone else to punish that person. The prohibition of punishment is not a moral or legal compromise: like the prohibition of perfidy and the requirement of distinction, it preserves minimal elements of legality in the barbaric context of war by preserving the independence of legal orders who are at war with each other.

The same point applies within a war: the fact that the aggressor's combatants have been captured does not give the defender's legal system power of oversight in relation to their participation in the war. Those combatants do not owe the defender's legal system the duty to take its position on questions of who began the conflict. Punishing *in bello* violations does not consist in oversight of the aggressor's legal system, because the violators already had a duty to their own legal system not to commit them.

Framing the issue in terms of official roles also explains an important difference between combatants and mercenaries. In accepting employment as a soldier for hire, the mercenary does not represent a conflict between two independent legal orders; he acts exclusively on his own. Although he may do so in support of, and under the hire of, another legal order, he cannot do so under its authority. Although the mercenary does not literally start the war of aggression, he replaces law with force exclusively on his own initiative.

This focus on how things stand between the legal orders of opposed belligerents provides a fundamentally different conception of the legal situation of combatants than does the widely criticized defense of "superior orders." According to those who endorse such a defense, the fact that a soldier was acting pursuant to an order that was not manifestly unlawful provides a defense. So understood, such a defense has the opposite structure of that proposed here, because it presupposes that the legal systems of

[25] Here, as elsewhere, it is salutary to recall Bernard Williams's remark that "no conception of responsible agency can match exactly an ideal of maturity because, among other reasons, to hold oneself responsible only when the public could rightly hold one responsible is not a sign of maturity." See Bernard Williams, "Voluntary Acts and Responsible Agents," in Bernard Williams, *Making Sense of Humanity* (Cambridge: Cambridge University Press, 1995), 22–34. The converse point also holds: the public lacks standing to hold someone accountable for failures of virtue or maturity.

both defender and aggressor are already subject to each other; as a defense, it could only come up if someone was already on trial. But the thing that needs to be explained is not how a trial would end, but rather why the captured combatant cannot be put on trial at all. Conversely, superior orders would only qualify as an independent defense—that is, rather than a particular fact pattern within which something like standard excusing conditions such as duress and mistake arise—if it allowed a member of the aggressor's army to avoid punishment on the basis of an obligation imposed or a permission granted by the aggressor's government. As we have seen, the aggressor does not stand in the right relation to the defender's soldiers to confer on its own soldiers permission kill them. One nation's public law never binds another nation, so there is no permission to which the defender's court can attend.[26]

The same structure governs captured combatants who are members of organized insurgent groups that do not have the status of a state. As I will explain in more detail in Chapter 7, although such groups may have no legitimate claim to rule, those who fight for them may sometimes still be acting under their authority at least in the minimal sense of not acting under the authority of those against whom they fight. Members of such groups often do not fight in conformity with the laws and customs of war, as they target civilians, mistreat prisoners of war, and hide their combatant status. If they fight in conformity with the laws and customs of war, including avoiding perfidy by carrying their arms openly, they, too, are beyond the reach of punishment.

## IV. Conclusion

The *in bello* norms governing the conduct of war apply in the same way to both sides in a conflict, to defender and aggressor alike, or, as has historically more often been the case, to two aggressors fighting among themselves. Chapter 4 offered an account of what Kant regarded as the fundamental *in*

[26] The situation is again different with the aggressor's political leadership; the defender's courts do not have authority over them, but appropriate international institutions could. If those institutions outlaw aggressive war, they arguably thereby outlaw the decision to pursue it, making those who decide to do so subject to punishment by international institutions. On this understanding, the aggressor's political and military leadership violates the prohibition of moving from a condition of peace to one of war. The aggressor's individual combatants do not violate it, and the prohibition of aggressive war does not prohibit individual combatants from accepting the judgment of their national legal institutions.

*bello* norm, the prohibition on perfidy, paradigmatically but not exclusively false negotiation. Perfidy is wrongful because inconsistent with the possibility of a future peace; as such, either side in a war does wrong by committing it. Chapter 5 examined the principle of distinction, that is, the prohibition on targeting those who are not part of the war, as well as the prohibition on the use of excessive force, whether in the form of unnecessary force, indiscriminate weapons, or disproportionate force. These prohibitions are required to contain war, to protect those who are not part of the war in order to preserve a way out of war. Both sides in a war do wrong if they violate them. This chapter has taken up the prohibition on punishing prisoners of war for having participated in an unjust war. I have argued that the rationale for this prohibition can be found in the same peace-centered framework that explains the prohibition on initiating: each nation is entitled to political independence and territorial integrity. No nation is the superior, and none the subordinate of another. As we saw in Chapter 2, the status of nations as juridical equals means that no nation's system of public law is subject to that of any other nation. Even a nation defending itself against aggression is not in the right position to put the aggressor's combatants under an obligation to refuse to accept their nation's judgment about whether to go to war. As such, it does not stand in the right position to punish those who accept the aggressor's judgment.

# 7

# *Ius In Bello* IV

## New Types of War

For a century and a half after Kant wrote, many nations continued to conduct territorial wars of the type he condemned, with designated armed forces confronting each other to gain or hold political control of territory.

We live in a very different world. The middle part of the last century was a turning point: war between nations is no longer regarded as morally or legally acceptable, either as a means of resolving disputes or as a way of enforcing rights. Historians and scholars of international relations disagree among themselves about whether this is a permanent change, as well as whether it is the result of the legal changes brought about first by Kellogg-Briand and later by the UN Charter or whether instead it is to be tied to such things as the rise of nuclear weapons, or changes in trade or agricultural productivity that weaken the link between national prosperity and large amounts of arable land. Whatever the factors are, war among nations appears to be less effective as an instrument of national policy, and recent wars have usually not generated recognized territorial gains.

The apparent end of territorial war among nations has not marked the dawn of either a universal or a lasting peace; instead, it has coincided with a rise in new types of political armed conflict. In this short chapter, I explain why the Kantian distinctions still apply, in particular, clarifying the way in which they reflect the distinctive moral problem of war. Changed circumstances do not make war any less problematic. Misconceived instrumentalist accounts of the normative basis of the *in bello* rules creates the impression that changed circumstances should generate different rules. I do not deny the difficulties of applying the rules in different circumstances; I only argue that the rationale is the same.

## I. Asymmetrical Conflict

Civil wars have increased, and nonstate groups have often found armed conflict useful as an instrument for their purposes, whether political or economic. There have been distressingly many cases in which one part of the population, backed by government, makes war on another, leading to calls for humanitarian intervention. There have also been asymmetrical wars, fought by a state against a nonstate group, which may be more interested in generating political support by provoking an enemy rather than in imposing a political solution by controlling territory. Many of these conflicts involve groups that deliberately target civilians or use involuntary human shields. In addition, there have been cases in which state institutions have collapsed under the burdens of these many different types of war.

These changes might be thought to make the sharp distinctions drawn by the Geneva Conventions and the Kantian account of war outdated. Political leaders and some scholars have argued that the norms governing war must adapt to these changed circumstances, proposing new categories to replace the *in bello* rules. Others suggest that asymmetries in power between modern state militaries and rebel groups fighting against them should generate asymmetrical rules, to ensure that those who lack military means but have just cause for fighting have permissible means of doing so.[1] Such proposals purport to treat the legal ideas and institutions discussed in earlier chapters as a historical anomaly which enjoyed a brief period of attention and relevance from 1945 until about 1990.

I will argue instead that such proposals to abandon the Kantian concept of the wrongfulness of war and with it the Geneva Conventions rest on specific and indefensible assumptions about the nature and basis of the *ad bellum* and *in bello* rules. In particular, if the *in bello* rules are understood as either a sort of agreement among nations about how they will conduct themselves toward each other or, alternatively, as a legal technology designed to end wars quickly or minimize the total aggregate suffering they bring, then, in different circumstances, different rules might be more effective. So, too, if they are conditional norms that only apply when observed by both sides. I will illustrate the continued relevance of the Kantian categories through a very brief discussion of three ways in which they might appear to no longer be relevant and show that each rests on a misconception about the grounds of

[1] Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), Ch. 7.

the *in bello* prohibitions. I do not mean to suggest that these are the only ones that might be raised, but they are not only prominent but illustrate the hold of misunderstandings about the basis of the *in bello* prohibitions.

*First*, in some contemporary forms of war, the enemy is widely thought to hold out no prospect of a future peace. A war against an insurgency that is committed to dismembering an existing state is one example, as are wars against states that attack their own civilian population. In such conflicts, the idea that war will end with an agreed territorial settlement and the survival of both belligerents is neither realistic nor palatable. I will argue that the difficulty of conceiving acceptable terms of peace with an enemy does not make the prospect of peace any less relevant to the conduct of hostilities.

*Second*, in many contemporary armed conflicts, participants do not wear uniforms, making the distinction between combatants and civilians less straightforward. I will argue that the difficulty of applying the distinction makes such conflicts more difficult to fight, but that it does not render the distinction irrelevant.

*Third*, in many of those conflicts, one side openly rejects the *in bello* rules, for example, posting videos of barbaric killings of civilians and prisoners of war. I will argue that the obligation to conduct war in conformity with the *in bello* norms is not conditional on reciprocity. Cooperative obligations depend on compliance by others; the *in bello* rules are different because they are derived from the need to leave open the possibility of future co-operation and cannot depend for their binding force upon the fact that others already cooperate.

None of these changes are insignificant, but none of them deprives the Kantian account of its continuing relevance. If the *in bello* rules were either a technology to minimize death or end wars quickly, or if they were a kind of cooperative arrangement, some version of Wolff's "voluntary law of nations," then, in changed circumstances the technology might call for modification or the cooperative arrangement might not apply to those who failed to co-operate. Indeed, such proposals reveal the deficiencies of the suggestion that they are to be understood in these ways. I take these three apparent issues up in turn.

## II. Wars between Enemies That Do Not Acknowledge Each Other's Legitimacy

The thought that enemies who hold out no clear prospect of an acceptable peace somehow change the *in bello* rules of war rests on the assumption that their relation to peace is merely empirical and instrumental. If their rationale was instrumental, then, in changed circumstances, they might call for something different.

As we saw in Chapters 4 and 5, the requirement that war be conducted in a way that is consistent with a future peace is not a technology for ensuring that the current conflict ends quickly, which would need to be modified in circumstances in which the enemy holds out no prospect of peace. Instead, it is an unconditional restriction on the use of force. That is why it applies when fighting an aggressor, that is, an enemy who has repudiated peace already. An aggressor not only wrongs the nation it attacks; it also does wrong "in the highest degree" because it is prepared to substitute force for law when it takes it to be advantageous to do so. Its past readiness to resort to violence makes future peace uncertain (if it has repudiated peace once, why trust it?) but does not exempt those defending themselves against it from the *in bello* rules. So, too, with contemporary groups that are bent on the destruction of a legal order, whether in a civil war or insurgency or even a terrorist group that holds out no realistic prospect of setting up a state of its own. The requirement of restraint still applies, because the rationale is the same: you must not use force in a way inconsistent with a future peace. Once more, the contrast with a merely technical conception of the relation between peace and the norms of war—the approach taken by the "political moralist" Kant criticizes in *Toward Perpetual Peace*—makes this clear.[2] For the political moralist, anything that will bring a quick and decisive victory is acceptable. If slaughtering civilians will bring peace faster, doing so would be acceptable; the only questions would be further technical ones about whether this is manageable, what side effects it would have, and so on. So, too, with Francis Lieber's suggestion that "sharp wars are brief." It is unlikely that anyone in the contemporary world believes that targeting civilians leads to peace, but if the only rationale for restraint was the speedy termination of a particular conflict, the instrumental account would have to conclude that nothing succeeds like success. Again, if the requirement for self-restraint depended

[2] 8:372.

on a factual assessment of the prospects of peace, then there would be only pragmatic objections to wars of extermination, not principled ones.

The Kantian view differs from all of these forms of instrumentalism in its insistence that the *in bello* rules govern the way in which war is conducted because, as shown by the central case of the prohibition of perfidy, conducting a war in these ways is inconsistent with governing human interaction with words and law rather than through force. The same restraint applies for the same reason, even if, in the midst of a conflict, one can see no prospect of a peaceful conclusion to it.

## III. Challenges to Applying the Principle of Distinction

The Geneva Conventions codified at the end of World War II follow earlier agreements in marking the distinction between combatants and civilians in terms of the wearing of uniforms. Their provisions contemplate wars fought between full-time combatants, all of whom are subject to a chain of command and readily identifiable by their insignia. Anyone who is in a uniform (other than clearly marked medical and religious personnel) is a target; anyone who is not is a civilian. Requiring combatants to wear uniforms provides a straightforward way of making the distinction between those who are and those who are not part of the war clear in its application in the heat of battle; it demands that combatants make themselves identifiable, and respond to the clear insignia of opposing combatants. Combatants are permitted to use camouflage to hide their position and presence, but they are not permitted to hide their combatant status. Those who fight without insignia in such conflicts engage in perfidy by representing their belligerent activities as peaceful.

Many participants in contemporary armed conflict do not wear uniforms. Nonstate actors do not, but they are not alone: state-sponsored militias do the same, and some states hire private contractors to perform significant military tasks. Further, fighters in many armed conflicts operate within, and blend into, the surrounding civilian population. These changes have prompted two types of legal response.

First, the 1977 Additional Protocol to the Geneva Convention proposes to treat someone as a combatant if they carry their arms openly during participation in and on their way to participate in armed conflict. The

stated rationale for the change pointed to the difficulties, in the context of anti-colonial wars, of combatants clearly distinguishing themselves from noncombatants.

> In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> a) during each military engagement, and
> b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 c).[3]

The point of Article 44 is to maintain the traditional distinction between combatants and civilians in changed circumstances by specifying the manner in which combatants without uniforms or insignia can demarcate themselves from the civilian population, and so to honor both of the two distinctions that the Kantian account treats as fundamental to *ius in bello*: that between those who are and those who are not part of the war, and that between perfidious and nonperfidious conduct. In so doing, however, the Additional Protocol introduces a category of combatants without uniform, allowing a different marker of combatant status: carrying arms openly during military deployment while respecting the laws and customs of war.[4]

This breakdown of the identity between uniform-wearing and combatant status led a number of countries to reject it. The stated US grounds for rejection were that Article 44(3) "in a single subordinate clause, sweeps away

[3] Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977. Art. 44 s. 3.

[4] In this it treats them analogously to the treatment of participants in a *levée en masse*, who are granted prisoner-of-war status "provided they carry arms openly and respect the laws and customs of war." Article 4(A)(6) of the 1949 Geneva Convention III.

years of law by 'recognizing' that an armed irregular, 'cannot' always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States announced policy of combatting terrorism."[5]

This rejection runs together two different points at which the distinction between combatants and civilians is significant. The terrorist's distinctive criminality consists in targeting civilians; the distinction that the terrorist obliterates concerns the object of the terrorist's attack. Article 44 does not reject that distinction, nor does it give preferential treatment or prisoner of war status to those who do. Anyone who violates the principle of distinction can be punished for doing so, even if they are a uniformed combatant and otherwise entitled to prisoner of war status, because those who target civilians violate "the laws and customs of war." Article 44 concerns the different question of who is entitled to prisoner of war status, among those who participate in a war and target only combatants on the other side. That is, its exclusive focus is on those who otherwise fight in accordance with the "laws and customs of war." It specifies that distinction in terms of open, that is, nonperfidious participation in conflict.

The US rejection of Article 44 also quotes the opinion of the Joint Chiefs of Staff that "the Protocol grants guerrillas a legal status that often is superior to that accorded to regular forces. It also unreasonably restricts attacks against certain objects that traditionally have been considered legitimate military targets."[6] The concern is that members of organized armed groups are permitted to target soldiers of national armies even when those soldiers were not carrying weapons or awake, but do not themselves face the same vulnerability. The objection is that they can regain civilian status at will by putting down or hiding their weapons. Others have proposed the image of a revolving door, in which members of such groups could change their status strategically.[7]

[5] Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987), signed by Secretary of State George C. Schultz, Secretary of State to US Senate, January 29, 1987, https://casebook.icrc.org/case-study/united-states-president-rejects-protocol-i.

[6] Letter of Transmittal.

[7] W. Hays Parks, "Air War and the Law of War," *Air Force Law Review* 32 (1990), 118.

If the Additional Protocol is understood in terms of the broader Kantian approach to the *in bello* rules, however, it can be seen to preserve rather than obliterate the distinction between combatants and civilians. The only alternative to it would be a rule that says that fighters without uniforms who hide the fact that they are fighting and those who do not should be treated alike. That is, to reject something like the rule proposed in Article 44(3) is to reject the fundamental distinction at the heart of all *the bello* rules. The point is not that, without something like the rule, non-uninformed combatants will have no incentive to fight openly. That may or may not be true, since their actual incentives will depend on their beliefs about the likelihood of capture and the readiness of those against whom they fight to respect international law governing prisoners of war. Instead, the point is that the prohibition of perfidy is fundamental to the possibility of a future peace, and so international law and state practice must recognize it. The traditional requirement of uniforms serves to prevent those who are fighting for a party to the conflict from passing themselves off as those who are not; both the distinction between combatants and noncombatants and between perfidious and nonperfidious conduct rest on the distinction between peace and war. The UK *Armed Services Manual* marks this point by noting that the requirement to carry weapons openly on the way to deployment applies whenever the participant in hostilities is visible to the enemy, where visibility is construed broadly to include various technologies, noting that the appropriate test is generated by the relevant concepts, pointing out that "[t]he test is whether the adversary is able, using such devices, to distinguish a civilian from a combatant carrying a weapon."[8] Again, the question of what counts as a deployment also requires development and specification.[9] That is, the point of the distinction is precisely that participants in armed conflict do so openly. It prohibits concealed participation, classifying those who do so as perfidious.

The very real challenges of applying these distinctions in the absence of uniforms does not mean that the distinctions do not matter. Nor is the requirement properly understood as a way of somehow leveling the playing field, allowing an advantage to those who are militarily weaker. As a perfectly

[8] *Joint Service Manual of the Law of Armed Conflict* 4.5.3.

[9] See the discussion by President Aharon Barak of the Supreme Court of Israel in *Public Committee Against Torture in Israel v. Government of Israel*, Case No. HCJ 769/02 (2005). Barak considers targeted killings of members of terrorist groups that deliberately target civilians, but his analysis is focused on the fact that they are fighting as members of organized groups. It thus preserves the distinction between combatants and civilians by preserving the distinction between deployments and peaceful activities.

general matter, the *in bello* rules are not about creating a level playing field: as we saw in Chapter 4, the *in bello* rules govern the types of force that can be used, and against whom they can be used, but are silent on the degree, allowing a belligerent to deploy many more combatants and weapons than its enemy does and to use superior weaponry and superior ways of protecting its combatants. The same point applies to the suggestion that weaker parties should be given special permissions, or that they should be permitted to resort to force where stronger parties are not, or that a type of weapon may only be used against an enemy that has the same type of weapon.[10] All of these are inconsistent with the peace-focused structure of both the *ad bellum* and *in bello* rules. The point of those rules is not to see to it that all injustices are addressed or that the just party in a conflict prevails. Nor is their point to provide a level playing field or fair fight, or to make applicable any other metaphor drawn from sports; their sole point is to prohibit the initiation or continuation of a condition in which force decides by requiring that combatants conduct themselves in a way that is consistent with a future peace. The binary classification reflects the moral and legal requirement that at any given time, every person must be either a combatant or a civilian; the categories must be mutually exclusive and jointly exhaustive.

Once the rationale is understood as one of distinguishing between perfidy and fighting openly, the application of the Additional Protocol to particular cases must be governed by the requirement that it not be used in a way that makes the category of perfidy lack application. It does not permit someone to change their status at will, or to turn military installations into civilian ones or vice versa.

A different reaction to the emergence of non-uniformed combatants has been to propose a novel category of unlawful combatants. In one sense this is not a novel category; mercenaries are unlawful combatants who can be attacked but who are not entitled to prisoner of war status and so can be punished for their participation in a war. Civilians who participate in wars (outside of a *levée en masse*) also fall into this category. What has been more recently proposed, however, is a much wider conception of this category. A prominent argument in favor of a tripartite rather than binary distinction points to the challenges of applying the binary distinction, and the likelihood of its erosion in the context of wars against groups whose members do not

[10] Parks, *supra* note 7, at 218 mentions Togo's proposal during the negotiation of the Additional Protocols that air warfare against any state lacking an air force be prohibited.

wear uniforms. One proposed solution to this difficulty is to introduce an intermediate category of unlawful combatants, who can be both targeted and punished. To do so is to narrow the range of civilians but, according to the argument, the advantage of doing so is that those civilians who remain will be better protected under the tripartite regime.[11]

It is not my purpose to assess the factual premises on which such an argument rests. Instead, I want to focus on a structural problem: the *in bello* rules are not instruments designed to reduce the total number of civilian deaths or injuries. The rationale for the distinction between combatants and civilians is both simpler and more fundamental. Those who target civilians commit a distinctive kind of wrong by targeting someone who is not part of the war, even in circumstances in which granting permission to target them would increase compliance with the general prohibition on doing so, just as it is wrong to murder someone even when doing so would reduce the number of murders (by others) overall. You do not gain a novel permission to kill someone who is not part of the war just because granting permission to kill that person would make it less likely that some third person will be tempted to kill a fourth and a fifth person who are also not part of the war. As Thomas Nagel remarked, the murder of an innocent person is not just a bad outcome; you cannot "justify one such murder on the ground that it would prevent several others."[12] The *in bello* rules are not a technology for minimizing the number of civilian deaths: civilian deaths are not a bad outcome to be minimized; they are *in bello* wrongs because civilians are not part of the conflict.

Nor can a third category be introduced by the thought that members of insurgent groups are not fighting under a properly constituted legal authority. The authority under which they act may not be properly constituted, but the question of whether they qualify as participants in a war will depend instead on whether they are acting under some (extremely) defective form of political authority. If they are not, then no third category is required: they are just

[11] As Curtis Bradley puts the point, "although the two-category approach might seem at first glance to be the most protective approach for civil liberties, it is not clear that this is the case with respect to an armed conflict between a nation and a terrorist organization. If such a conflict is pushed into the civilian category, it is very likely that this category will be stretched in order to accommodate the security needs of the nation. The net result may be a reduction in protection for true noncombatants." Bradley sums up his position with the remark that "[t]he two-category approach thus seems to reward the very conduct that the laws of war are designed to prevent." Curtis A. Bradley, "The United States, Israel & Unlawful Combatants," *Green Bag Second Series* 12 (2009), 397–411, at 398. Bradley cites "Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay" (March 13, 2009), at 8, In re Guantanamo Bay Detainee Litigation (D.D.C.), available at https://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf.

[12] Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1(2) (Winter 1972), 123–144.

common criminals, who can be arrested, charged, tried, and punished by the state on whose territory they commit the crime, but who cannot be targeted when they are not in the process of committing a crime. No doubt it is much more difficult to capture, try, and convict a criminal in a conflict zone than it is to make a combatant a military target in a war zone. Once more, the distinction between combatants and civilians, even criminal civilians, is not an instrument for bringing about peace or addressing wrongdoing; it is a constitutive requirement of the possibility of peace.

On the Additional Protocol's definition of combatant status, there will be cases in which the question of whether someone is participating in hostilities at a specific time, and so is a legitimate target, will have no clear answer. Article 51(3) of Additional Protocol I denies civilians protection against the use of force "for such time as they take a direct part in hostilities," but questions of what counts as "taking part" (or "such time") may admit of no general answer. So, too, all the difficulties of specifying what counts as proportionality with respect to effects on those not taking part in hostilities arise when force is used against civilians who are taking part. There may be cases in which circumstances make it difficult or impossible to determine whether a particular person using violence is a criminal or a combatant. The solution to any such lack of clarity is not the introduction of a third category enjoying the protections of neither combatants nor civilians, someone who can be both targeted and punished for mere participation, but rather to develop positive law in a way that better articulates the core distinctions. Like questions of proportionality, such questions may not have any general, noncontextual answers. The key to moral clarity in this situation, however, is asking the right questions, rather than supposing that the only morally relevant questions must be ones that would have precise answers with complete information.

The call for the development of positive law in such a contentious area may seem to be more of an evasion than a solution. But many juridical issues have legal solutions rather than philosophical or moral ones. Philosophy has something to say about which categories are relevant, but it does not tell you how to apply those categories to particulars. The role of a philosopher in a democratic society is not to serve as a special sort of expert, charged with giving government officials detailed instruction on correct policy choices.[13] Political philosophy has the less visible but no less important role of making sense of the legitimate uses of political power. Making fundamental

[13] Kant's "Secret Article for Perpetual Peace" makes just this point: "The maxims of philosophers about the conditions under which public peace is possible shall be consulted by states armed for

distinctions applicable to particulars is one of the tasks of law, a task it carries out by working with dateable events: At what point had the contract been formed? At what point does title transfer in the sale of goods? When did the owner abandon the property? When did the statute take effect? When was the crime committed? In each case, the law specifies a determination, making the relevant moral concept apply in space and time. Sometimes it does so by identifying the person who will apply an abstract standard, asking whether one neighbor unduly interfered with another's use and enjoyment of land, or if the jury believes beyond a reasonable doubt that the accused person committed the crime, or if the officer had reasonable and probable grounds for the search or arrest, or if the official act was *ultra vires*. Moral concepts show how to frame the issue, but they do not specify a determinate implementation of that framing.

The role of public international law is to make a different set of ideas more determinate through processes of development, custom, adjudication, and treaty. I do not mean to suggest that this is a simple matter.[14] But a shared standpoint from which laws are to be articulated needs to be developed. This is a further instance of the Kantian argument that morality is defective because it is incomplete in the absence of public legal institutions. In the case of it is international conflicts, those institutions need to themselves constitute an international public standpoint.

## IV. Conflicts with Adversaries Who Do Not Accept the Rules of War

In the nineteenth century, John Stuart Mill contended that rules governing the initiation and conduct of war applied between European powers, but not to those he classified as "barbarians" who would not accept them. Seeking to distinguish British rule over India with the policy of nonintervention that

war." The article is secret because public officials do not receive their mandate from experts, and the maxims to which Kant refers are nothing more than requirements of human reason, available to all reflective beings. 8:368.

[14] The *Tallinn Manual* provides an example of such a development, proposing ways of mapping cyberattacks onto the traditional categories of *ad bellum* and *in bello* norms. Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge: Cambridge University Press, 2nd ed., 2017). The development is not enough; it also requires adoption by states to elevate it to the status of customary international law.

he advocated in relation to what he regarded as civilized European countries, Mill wrote that "the rules of ordinary morality imply reciprocity. But barbarians will not reciprocate. They cannot be depended on for observing any rules."[15] Similar claims were made by Canadian and US military leaders during the western expansion of those countries. Kant's remark about the far greater barbarism of "civilized, especially commercial states"[16] serves as a corrective to the eighteenth- and nineteenth-century version of these arguments.

The revival of the Millian argument in contemporary warfare might seem different, perhaps because in earlier conflicts, the rules were not the subjects of explicit international agreements, violations were not posted on social media, and express repudiation of the *in bello* rules was less common. Naz K. Modirzadeh forcefully describes the tension:

> I sat next to a senior military professional who had served multiple tours in the region and had recently spent a great deal of time training Arab coalition lawyers and officers who were part of the campaign against ISIS. . . . He began to tell me about what it was like to be in the room with Jordanian officers when they saw the video of one of their fellow airmen, who had recently been shot down by ISIS and captured, being burned alive in a metal cage. He was describing what it was like to instruct these officers that despite the fact that they knew that the enemy would not follow international legal rules regarding treatment of detainees, they nonetheless were required to treat ISIS detainees in line with Common Article 3 of the Geneva Conventions.[17]

The concern is not just that the Geneva Conventions seem to ask too much; the further problem is that it seems to be unfair as well as pointless, inconsistent with fundamental human moral orientation, to be bound by rules when confronted with someone who not only ignores but repudiates them.

[15] John Stuart Mill, "A Few Words on Non-Intervention," in J.S. Mill, *Essays on Equality, Law, and Education*, Vol. XXI, of *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1984), 118.

[16] 8:359. I discuss this in more detail in Chapter 8.

[17] Naz K. Modirzadeh, "Cut These Words: Passion and International Law of War Scholarship," *Harvard International Law Journal* 61(1) (Winter 2020), 1–64, at 3. Modirzadeh does not suggest imposing a requirement of reciprocity; I quote from her discussion (which occurs in introducing a broader discussion of the problems of dispassionate analysis) because it provides a particularly powerful statement of the issue.

As we have seen, the *in bello* norms are reciprocal in the sense of applying to both sides in a conflict because the wrongfulness of violating them does not depend on the justice of the cause in the service of which they are violated. They are not conditional on compliance by the other side. The structure is transparent in the cases of the prohibition of perfidy and targeting those who are not part of the war, as well as in the prohibitions of use of excessive force. If insurgents ignore the distinction between civilians and combatants, those fighting against them are not thereby entitled to suppose that they thereby waived, forfeited, or otherwise abandoned the protection of the civilians in whose midst they operate. The same point applies in the case of humanitarian intervention: the barbarism that justifies intervention does not deprive civilians of their entitlement to normal protection. A barbaric regime, illegitimate insurgency, or terrorist group does not have all the moral or legal powers of legitimate government, and it certainly does not have additional ones. In particular, it cannot deprive the inhabitants of territory that it controls (or attempts to control) of their right not to be targeted. Nor does its taxing them or providing services (such as policing, healthcare, or dispute resolution) turn them into participants in its activities. Nor, for that matter, does their acceptance of those services or their attitude toward the group turn them into participants.

Modirzadeh's example concerns the harder case of prisoners of war, fighters who had been part of the war, fighting for an armed group that rejected all ideas of restraint. As I explained in more detail in Chapter 6, the protected status of prisoners never depends on the assumption that they have done nothing wrong; an aggressor's soldiers fought in a wrongful war of aggression. The *in bello* rules prohibit punishing them, but not because what they did was permissible. Individual members of armed groups that commit war crimes such as killing prisoners can be punished, but they cannot be punished for being members of a group whose other members commit such crimes.

The *in bello* rules are nothing like other rules that are only binding against the background of compliance by others. Some norms are like this, such as a norm requiring people to line up in order to board a bus or an airplane. If others line up before boarding, you, too, must do so. If nobody, or almost nobody else does, you are under no obligation to do so. The problem is not just that if too few people line up there is no line for you to join; places in line might be marked clearly enough that there is no difficulty about where the norm would instruct you to stand. Instead, in the face of total or near-total

noncompliance, your obligation disappears. Lining up is a matter of doing your part in addressing a problem of coordinated interaction, but where there is no coordination, there is no part for you to play.

Many people think that property works in something like the same way as lining up for boarding. You do not need to suppose that property rights are just a useful social convention to think that they are not fully binding—Kant's word is "provisional"—until a system of property rights has been clearly articulated and reliably enforced. Kant's argument is that only law can provide the relevant shared order; your obligation to respect the property of others presupposes the assurance provided by a shared cooperative order with institutions of adjudication and enforcement. Indeed, Kant argues that the need for such assurance underwrites the requirement to enter a shared cooperative order, that is, a legal system.[18]

Neither the *ad bellum* or *in bello* rules are anything like places in line or property rights. The obligation to bring force under law is not an obligation to do your part in an ongoing cooperative activity, because, as we saw in Chapter 4, peace is the precondition of any type of cooperative activities. Violations of the prohibition of aggression entitle non-violators to defend themselves, but even in the face of widespread violations by others, those who engage in aggression do wrong in the highest degree. The same point applies to perfidy: the fact that others engage in false surrender or disguise their military installations as civilian ones does not make such actions permissible. The wrong of those actions is not that of taking unfair advantage of the good behavior of others or failing to do your part in a cooperative venture; that is why they are still wrongful even if others do the same things. Indeed, the idea that the wrong of noncompliance is anything like this turns on the thought that war is some type of cooperative activity, something that the parties engage in together. As we have seen, the regular war writers often represented war as the product of a voluntary agreement that worked to the advantage of all. But no amount of strategic reasoning could ever turn resolving disputes through violence into a cooperative activity in the relevant sense. That is why, as Lauterpacht remarked, a system that treats war as a cooperative mode of dispute resolution that either side can initiate through its unilateral choice has no law at all; it is finally just a system of force. So, too, with the conduct of war: war demands restraint because of its distinctive immorality; showing restraint is not a matter of being a good cooperator. Good cooperators do

[18] 6:256.

not resolve their disagreements through force; if they find themselves in a situation of armed conflict, they must conduct themselves in ways consistent with ending the conflict and entering a condition in which cooperation is possible, that is, with leaving the condition that "hands everything over to savage violence."

## V. Conclusion: The Categorical Duty to Seek Peace

If the duty to act in ways consistent with the possibility of a future peace was conditional on good conduct by others, or on clear signs that it was in reach, or on each side recognizing the legitimacy of the other's claims, nobody would have a duty to seek peace unless it had already been achieved. This is just another instance of the distinctive moral and legal status of peace. Peace is not a private right, and the conditions that apply with respect to private rights, such as the requirement of assurance for the bindingness of private rights in general, or the absence of duress for the bindingness of contractual rights, cannot be made to apply to it.[19] The distinctive wrongfulness of both *ad bellum* and *in bello* violations does not depend on the existence of a shared legal order. They are wrong because they make a shared legal order impossible, not because they violate the accepted terms of an already existing one.[20]

[19] Kant's assurance argument therefore applies only to rights that are "external and therefore contingent." 6:256.

[20] Many contemporary wars are fought with new types of weapons, but this, too, makes no difference to the fundamental juridical structure governing the conduct of war. The concept of a weapon is both empirical and juridical, but for the law and morality of war, the juridical category has priority over the empirical one. A weapon is something that is used in the initiation or conduct of conflict; it is a way of applying force. The moral status of specific types of weapons depends on how they are used, and against whom. That is why the wrong of perfidy is appropriately and not merely metaphorically described as using the possibility of peace as a weapon of war, even though the possibility of peace is not like a club, knife, or gun. New types of weapons, whether drones that can be operated from a place of complete safety halfway around the world from the place of deployment, or cyberweapons that interfere with an enemy's uses of other technologies must be understood in this same juridical way. Whether the use of the specific weapon is acceptable in a particular circumstance depends on whether it is used in keeping with the prohibition of perfidy, the principle of distinction, and the requirements of proportionality and necessity. Weapons and ways of using them that are indiscriminate—whether twentieth-century examples of chemical and biological weapons, or earlier examples of laying siege to an entire city or setting fire to it—are prohibited as such. The same point applies to newer weapons and ways of using them, such as targeting critical dual-use infrastructure such as power grids and sanitation systems.

New weapons also raise questions about the initiation of war, whether the use of cyberweapons could count as the initiation of armed conflict. If it is part of the course of conduct that seeks to replace law with force, such as an attack on critical infrastructure or military installations, then it could, in principle, constitute the juridical equivalent of an armed attack. These are difficult questions, which, once again, require legal development to have clear answers. See the discussion of the difference between resort to force and armed attack in the cyber context in Schmitt, *supra* note 14.

# 8

# *Ius Post Bellum*

## Kant's Juridical Critique of Colonialism

In this chapter I take up one aspect of *ius post bellum*, the legal rules governing what happens after a war. Kant's characterization of the nature and grounds of legitimate war in terms of "the concept of an antagonism in accordance with outer freedom by which each can preserve what belongs to it,"[1] already rules out the idea, common to the just war and regular war tradition, according to which the victor can demand that the vanquished pay the cost of the war. Such a demand for payment of costs would mean that the victor had been fighting a punitive or remedial war and that success in war had established the justice of the victor's cause. More generally, it would be inconsistent with the right of nations. Instead, the victor must let the matter drop,[2] precisely because victory in a war is not an indication of the merits of competing claims. As we saw in the discussion of the differences between treaties and contracts in Chapter 2, although war can never prove a claim of right, accepting the results of past wars is the starting point for right going forward: war resolves a dispute apart from its merits, but, going forward, the resolution binds the parties, in the sense that any violation of it is a new wrong. Might never makes right, but peace requires that the past effects of might be accepted as rightful.

My focus in this chapter is on the way in which many wars ended for much of human history, especially so during the period from the fifteenth through the twentieth centuries: through the acquisition of colonies. Focusing on colonialism shows not only that Kant was an early and persistent critic of something that is roundly condemned today. More systematically, it shows the ways in which concepts of public law figure in the very idea of right after war. Colonialism is the product of war, but, even though war is wrongful and is to be repudiated entirely, colonialism is importantly worse than other results

[1] 6:346.
[2] 6:348.

of war. It is also defective in practice, failing to conform to even the minimal standards that govern wrongful rule over others.

Kant's opposition to European colonialism in Africa, Asia, and the Americas is widely recognized.[3] Far from an apologist for or employee of empire in the way that other liberal thinkers such as Locke and Mill were, Kant is openly disdainful of European powers conquering other parts of the world. In the *Doctrine of Right*, he rejects as sophistry the claim that hunter-gatherer peoples do not own their land, and insists that even those whom he would characterize as "savages"[4] must be regarded, by those coming into contact with them for the first time, as already in a rightful condition, which those outsiders have no license to disturb. Although he insists that individual human beings in a state of nature are entitled to use force to bring others into a rightful condition together with them, he explicitly repudiates the idea that one group may force another group to share a rightful condition with them.[5] So, too, as we will see in more detail in Chapter 9, his discussion of why cosmopolitan right must be limited to the mere right of hospitality is critical of the expansive scholastic conception of cosmopolitan right that includes the right to engage in missionary activities, to construct settlements, and to defend, both when under attack and even prospectively, those activities. Part of his disdain is directed at hypocrisy and bad argument. But it also has deeper philosophical roots.

My aim in this chapter is to articulate Kant's systematic philosophical grounds for opposing colonialism. Kant does not treat colonialism as just

[3] With some notable exceptions; without textual citations, James Tully attributes to Kant the view that non-European peoples can only be recognized as equals once they submit to trade with Europeans and embrace European political institutions. James Tully, *Strange Multiplicity* (Cambridge, UK: Cambridge University Press, 1995), 81.

[4] For example, in his "Review of J. G. Herder's Ideas for the Philosophy of the History of Humanity. Parts 1 and 2," in Robert B. Louden and Günter Zöller (eds.) *Anthropology, History, and Education*. (Allen Wood trans., Cambridge: University Press, Cambridge, 2007), 142, (8:65). Kant writes of the "tranquil indolence" in which Tahitians live. In "The Idea of Universal History with a Cosmopolitan Aim," Kant seeks to explain the end of history in terms of the full development of rational capacities, Kant, "Idea for a Universal History with a Cosmopolitan Aim," in Amélie Oksenberg Rorty and James Schmidt (eds.), *Kant's Idea for a Universal History with a Cosmopolitan Aim* (Allen Wood trans., Cambridge: Cambridge University Press, 2009), 21. 8:29. Kant does not, however, subordinate right to teleology; as he makes clear in the *Critique of the Power of Judgment* (5:373–374), teleological judgment has a regulative rather than a constitutive use; in *Perpetual Peace*, he suggests mechanisms of nature including linguistic diversity, trade, and war through which peace might become possible (8:361–363); in the *Doctrine of Right*, he weakens this to the claim that we are morally obligated to hope for peace as long as "its impossibility cannot be demonstrated" (6:354). For discussion of Kant's changing attitudes towards non-European peoples, see the discussion in Pauline Kleingeld, "Kant's Second thoughts on Race," *The Philosophical Quarterly* 57(229) (2007), 573–592; and Lucy Allais, "Kant's Racism," *Philosophical Papers* 45(1–2) (2016), 1–36.

[5] 6:266.

another member of the catalog of terrible things that human beings have done to each other. Instead, he criticizes it in terms of its distinctively juridical defects, focusing on the ways in which it is contrary to requirements of right. Colonial conquest is an illicit ground for going to war, and colonization is an illicit mode of conduct after a war, even if the war itself was fought on other grounds.[6]

The broad contours of the argument are already implicit in Kant's understanding of the right to political independence and territorial integrity that was examined in Chapter 2. If nations can only stand in rightful relations to each other as separate juridical persons, in which one nation's public law is not subordinated to another's, then colonialism is juridically incoherent. A colony both is and is not part of the Metropole, both subject to its rule and (because it is not annexed as a part) supposedly making its own law.

The moral incoherence of colonialism manifests itself in the legal incoherence of colonial rule. Anthony Pagden has drawn attention to two anxieties that marked European empire from the fifteenth through the twentieth centuries: first, empires worried about the possibility of a coherent characterization of their own sovereignty, vacillating between seeing the law of nations as universal, and so having a possible ground of justification, and, alternatively, seeing it as a club whose members must elect anyone who might join, and so applying to their actual practice. Second, they worried that what they did in their colonies would corrupt or undermine their own internal systems of governance.[7] Both anxieties reflect the incoherent juridical status of a colony, and both are expressed powerfully in legal discussions of the application of colonial law in metropolitan disputes. A celebrated case in which an English court declined to apply colonial law, despite clear "choice of law rules" mandating its application, involved a Virginia planter who brought a slave with

[6] Kant's opposition can also be represented architectonically. Public right has three parts: the right of the state, which regulates the "vertical" relation between a state and its citizens; the right of nations, which regulates the "horizontal" relation between states; and cosmopolitan right, which regulates the vertical relation between a state and individuals who are not its citizens. This tripartite structure follows the form of all of Kant's groups of three: a distinction generates a division, which is then applied to itself. In the *Doctrine of Right*, Kant generates the titles of private right in terms of a right to a thing, a right against a person, and a right to a person considered as akin to a right to a thing. There he expressly notes that dividing a binary division seems to lead to four possibilities rather than three, but that the fourth is always a degenerate case. Although a plurality can be considered as a unity, a unity cannot be considered as a plurality. So, too, it is not possible to have a right against a thing. In the case of public right, cosmopolitan right is a vertical relation considered as horizontal. The degenerate case is colonialism, that is, a horizontal relation considered as vertical.

[7] See Anthony Pagden, "Empire and Its Anxieties," *The American Historical Review* 117(1) (February 2012), 141–148; see his more general discussion in *The Burdens of Empire: 1539 to the Present* (Cambridge: Cambridge University Press, 2015).

him to England. The slave brought a writ of *habeas corpus*; the planter's response was to insist on the standard rule in conflicts of law concerning property claims, that is, the application of the law of the place in which property had been acquired. Lord Mansfield refused to apply Virginia law on the grounds that slavery was "so odious" that it could only be made binding through positive law.[8] In so doing, Lord Mansfield avoided application of the law in question by appealing to the juridical *par in parem* idea that one nation is not subject to the public law of another. As an argument against Virginia exporting slavery to England, Lord Mansfield's judgment is both impeccably reasoned and fundamentally incoherent: as a colony, Virginia's public law was already fully subject to English public law. The positive law through which slavery was given effect in Virginia despite its odiousness was itself a product of English public law; in the vocabulary introduced in Chapter 2, as a colony, Virginia's legal system was not self-certifying. The second of the anxieties identified by Pagden—keeping the barbarism of the colonies in the colonies—could only be addressed by ignoring the first, and depriving the rules of the "club" of any justifying force.[9]

Rather than asking the single question of whether colonialism is justified, Kant asks (and answers) five separate ones:

> *First*, is acquiring territory or securing markets a legitimate ground for going to war? (Answer: No.) Kant rejects colonial conquest as an illicit mode of acquisition. In his discussion of Private Right, he argues that it is not an acceptable means of acquiring property and that the prospect of acquiring property in such a way cannot be used to generate a license to force others into a rightful condition, and in his discussion of Public Right, he argues that war is not an acceptable means for a nation to acquire territory, even if the war is itself justified. These arguments work in tandem to defeat the classic rationale according to which conquest is justified to protect the property of settlers. Wars of conquest face a further difficulty, because a war must be carried out in a way that is consistent with the continued existence of the belligerents. Although Kant characterizes war as barbaric, wars of conquest have an additional moral defect.

[8] *Somerset v. Stewart* (1772) 98 ER 499.
[9] I am grateful to Joanna Langille for discussion of this case.

*Second*, can war, even if unjust, give rise to territorial claims? (Answer: Yes.) The wrongfulness of offensive war is prospective only; Kant concedes that illicit means of acquisition have in the past given rise to good title. However, the permissive law that permits past acquisition through illicit means applies to cases in which a nation incorporates the territory as a part of it. Colonization is different in morally objectionable ways; although conquest is wrongful, colonization is a defective form of conquest.

*Third*, is one nation holding another as a colony a rightful result of war? (Answer: No.) Although war is already illicit as a mode of acquisition, what happens after war is subject to a further mode of moral evaluation. This argument seeks to show that colonizing a people and its territory is even worse morally than simply incorporating the territory into the conquering nation. To be a mere colony, even if granted a significant measure of self-rule, reduces the inhabitants of the colony to a position of dependence.

*Fourth*, if one nation does rule over another, does it face specific constraints on its conduct? (Answer: Yes. It must rule on behalf of the inhabitants, not for its own private purposes.) Colonial rule is not itself rightful, but nonetheless is subject to a standard of adequacy. An external power ruling over the inhabitants of the territory it has not incorporated must rule on behalf of the inhabitants of the territory, rather than for its own purposes. Colonial powers famously did not rule on behalf of the inhabitants of the territories they captured; indeed, the entire point of colonization was precisely to acquire territory, natural resources, workers, and markets in ways that worked to the advantage of the conquering country. Not only does this *animus possidendi* enter into the characterization of colonial conquest as wars of aggression: where successful, it makes the period of colonization itself wrongful along an additional dimension.

*Fifth*, what can be done about the wrongs of colonialism and who has juridical standing to do it? (Answer: Colonies must become independent.) Because colonialism is a defective mode of interaction, it must be abolished, but the moral importance of its abolition does not give outsiders a ground for going to war.

Kant's engagement with the first two questions turns on general features of war and contemplates war as taking place between juridical equals. The next three questions are specific to colonialism, because colonization is by its

nature a relation between superior and inferior, not between equals. That relation is wrongful as such, even if the colonizing power was initially engaged in a defensive war against a genuine aggressor. Having created a superior/inferior relation, however, a colonizing power does further wrong by exploiting the colony. Taken together, the five questions provide a sequenced account of the wrongs of colonialism: acquiring territory through war is wrongful; doing so and then holding the territory in question as a colony compounds that wrong; that already compounded wrong is compounded further by ruling a colony, but not on behalf of the inhabitants. The fifth question raises a general question about remainders.

I will examine these five questions in order.

## I. War and Conquest

Colonialism troubles us for many different reasons, but among these is a specifically Kantian one. Colonialism cannot be thought of as anything other than the continuation of the war that leads to it, as it is a way of acquiring territory through the use of force.[10] Worse, it is not just any form of war, but, to Kant's mind, a particularly troubling one, both because of the way in which barbarism presents itself as the advance of civilization and because it violates even the most minimal constraints on the conduct of war. In Kant's day, colonial powers rationalized their activities by claiming that they were protecting their own citizens who had decided to travel or settle abroad, or bringing people into properly rightful relations.[11] Kant's disdain for the dishonesty of such rationalizations is striking; in the *Doctrine of Right*, he notes that the ordinary rationale for uniting with others in a rightful condition does not apply in situations where "neither nature nor chance" but "our own will" has placed us in proximity to them;[12] in *Toward Perpetual Peace*, he uses the colonialist vocabulary of "savages" to draw attention to the fact that colonial powers behave badly in all of the ways in which they allege the savagery of others.[13]

[10] Kant acknowledges that a state may invite foreigners to settle on its territory (6:338), but this is not a power to invite another nation to rule over it.

[11] See Francisco de Vitoria (1539), "*De Indis Et De Jure Belli Relectiones*," in Vitoria, *Political Writings* (A. Pagden and J. Lawrence eds., Cambridge: Cambridge University Press, 1991), 293; Francisco Suárez (1612), "On Law and God the Lawgiver (De legibus, ac Deo legislatore)," in Francisco Suárez, *Selections from Three Works*, vol. 2 (G. Williams trans., Oxford: Oxford University Press, 1944).

[12] 6:266.

[13] 8:355.

Kant's objection, most fundamentally, is not that these aims are not genuine (though he doubts that they are), but rather that the use of force cannot be rendered legitimate by either worthy aims or beneficial outcomes: the ends sought could not justify the "stain of injustice in the means used for them."[14] To be in a rightful condition is to be in a condition where claims of right can be resolved on their merits, rather than through the use of force. To acquire territory through the use of force is to give up on the merits; to claim that such a repudiation of right is a way of establishing right is, for Kant, to compound the wrong.

Kant's position thus marks a significant departure from earlier positions taken in international law. The Spanish scholastics of Salamanca, especially Vitoria and Suárez, had sought to justify the Spanish conquest of the Americas by arguing that a state could send its citizens to colonize unoccupied or underoccupied areas, and that it could use military force to protect what they had acquired. They argued further that a state that had reason to suppose that colonists (or missionaries) would be resisted could act preemptively, subduing those from whom such resistance was feared.

Vattel, whose views were so different from the scholastics on many issues, gave the same argument, contending of those who fail to "cultivate the earth" that

> [t]heir unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies.[15]

Kant's reference to acquisition where "neither nature nor chance" has brought people into proximity underwrites his objection to the leveraging of illicitly acquired property into a basis for forcing others to enter a rightful condition on the conqueror's own terms.

The Kantian limitation on extraterritorial jurisdiction and resistance to the right to settle are expressions of a single underlying idea of the moral distinctiveness of states. Land can only be acquired conclusively in a rightful condition,

[14] 6:353.

[15] Emer de Vattel, *The Law of Nations* (1758), Bk. I, s. 209, edited and with an Introduction by Bela Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008). See the discussion in Jennifer Pitts, "Intervention and Sovereign Equality," in Stafano Recchiah and Jennifer M. Welsh (eds.), *Just and Unjust Military Interventions* (Cambridge: Cambridge University Press, 2013), 132–153.

and one state cannot export its jurisdiction onto the territory of another. Thus it can neither make the acquisition of land rightful nor enforce acquisition on another people's territory. These interlocking ideas stand out against the background assumption that, from the outside, any multitude of human beings must be assumed to be in a rightful condition.[16] Any uninvited colonial settlement is a wrong against the people on whose territory it takes place.

Kant's descriptions of non-European people draws on travel writers of his time and significantly understates their level of legal and political organization. But the point of his discussion is to reject Vattel's argument: those who do not "cultivate the earth," that is, hold land privately, cannot be forced into a rightful condition and system of private property with outsiders. Both Peter Niesen and Katrin Flikschuh have drawn attention to the tension between these discussions and the unconditional duty to enter a rightful condition, including the entitlement to compel others to do so.[17] Flikschuh concludes that this duty is not unconditional, but rather dependent upon the assertion of exclusive interpersonal property claims. The juridical interpretation of Kant's broader argument suggests a different interpretation: members of an already existing legal order who find themselves on foreign shores, "when neither nature nor chance but just [their] own will"[18] has brought them there are not authorized to force those others into a civil union even if they "hold out no prospect" of one, because war must not be a mode of acquisition. One person making property claims in a state of nature is entitled to force others who make property claims into a civil union, so that each may be secure in what is theirs. The visitors with whom Kant is concerned are already members of a civil condition in which their property rights are secure; they have no license to cross the earth in order to expand that condition. The authorization to force others to join you in a rightful condition does not empower those who are already in such a condition. Nor can peoples who do not hold land privately (Kant gives the example of Mongolia, where "since all the land belongs to the people, the use of it belongs to each individual"[19]) be

[16] I have benefitted from the discussion of this issue in Alice Pinheiro Walla, "Three Models of Territory: Arthur Ripstein on Territorial Rights," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

[17] Peter Niesen, "Colonialism and Hospitality," *Politics and Ethics Review* 3(1) (April 2007), 90–108; Katrin Flikschuh, *What Is Orientation in Global Thinking?* (Cambridge: Cambridge University Press, 2017). See also Sankar Muthu, *Enlightenment against Empire*, (Princeton: Princeton University Press, 2003).

[18] 6:266.

[19] 6:265; at 6:324, he writes: "All land belongs only to the people (and indeed to the people taken distributively, not collectively), except in the case of a nomadic people under a sovereign, with whom there is no private ownership of land."

so forced; the conquerors do not have the juridical standing to compel others to institute private property in land, because that would turn the use of force into a mode of acquisition.[20]

Kant does not disguise his contempt for those who seek to rationalize the use of force or fraud in establishing colonies by claiming that they will see to it that land is better used, the ends of creation better satisfied, or to bring "savages" into a rightful condition.[21] Even if such claims to savagery are accepted at face value, they could not license treating people as in anything other than a rightful condition. Kant rejects all of these claims on the grounds that they offer the wrong form of argument for any moral question, and would "sanction any means to good ends." He also disputes the ends themselves, insisting that people who are "shepherds or hunters" must be assumed to already be in a rightful condition, capable of making arrangements via contract.[22]

Kant does not offer this as an empirical or historical hypothesis about the inhabitants of the lands Europeans sought to colonize; his point is about the juridical relationship between colonizer and colonized. "When neither nature nor chance" but just their own will brings travelers "into the neighborhood of a people," they are not entitled to compel those others to join them in a civil condition.[23] The traveler is not faced with a question to be asked from some kind of third-person perspective about whether the inhabitants of those places are in a state of nature or a rightful condition, but rather the question of how the traveler's home legal order—the Metropole for any potential colony—should interact with those inhabitants. The question of whether they meet some satisfactory standard is not a question for the visitor's legal order, because it is not entitled to stand in a supervisory relation to another. Just as an individual encountering another individual is not entitled to treat the other's rights as conditional on some assessment of whether that person is living a virtuous or autonomous life, so, too, the would-be colonizer, arriving as a member or representative of some other state, must treat the inhabitants as already in a rightful condition. Just as, in the individual

[20] Kant's argument about the need to leave the state of nature does not turn on the actuality of property relations; his claim is that if acquisition in the state of nature was not possible, the civil condition would be impossible, not that if acquisition was not actual, the civil condition would be unnecessary. This does not provide a license for compelling nonstate peoples into a civil union. But that does not depend upon the non-actuality of proprietary claims. Colonial powers made actual proprietary claims; that was the problem.

[21] 6:266.

[22] 6:353.

[23] 6:266.

case, no empirical test shows that another human being is free, and so respect for the rights of others does not depend on empirical evidence, so, too, in the case of the traveler. Any perceived inadequacy of the way in which a people has organized itself does not entitle the visitor to conclude that the land on which they have settled is in a state of nature, or to cast doubt on their claims, whether individual or collective, with respect to land or movable objects.[24]

Kant repeatedly uses the phrase "people" to refer to those who are colonized. A people, that is, the union of a multitude of human beings,[25] has as its principle of unity a will uniting them, which in turn requires a constitution and political institutions. As he describes particular examples, it is not clear whether he supposes the Indigenous inhabitants of those regions to have such institutions. It is thus not clear whether he is supposing that they are best characterized as a people, a conjugal or paternal society that interacts in a manner compatible with right,[26] or a violent multitude that interacts barbarously. The key point is that from the standpoint of an outsider, none of these possibilities could license conquest or colonization; in each case the outsider must refrain from claiming the territory of others.

> If the settlement is made so far from where that people resides that there is no encroachment on anyone's use of his land, the right to settle is not open to doubt. But if these peoples are shepherds or hunters (like the Hottentots, the Tungusi, or most of the American Indian nations) who depend for their sustenance on great open regions, this settlement may not take place by force but only by contract, and indeed by a contract that does not take advantage of the ignorance of those inhabitants with respect to ceding their lands.[27]

Focusing on the need for a genuine agreement makes it clear that Kant is supposing that nomadic peoples, without a formal structure of government, are nonetheless to be treated by others as already in a rightful condition. His claim is not that anyone would be in a position to identify even the rudiments of the separation of powers characteristic of republican government, let alone any approximation to the idea of the original contract. Kant's point is that the obstacle to colonization does not depend on the internal

[24] 6:353.
[25] 6:311.
[26] 6:306.
[27] 6:353.

structure of such societies, but rather on the constraint that their existence imposes on others. *Others* must treat a nomadic or hunter-gatherer society as a rightful condition. That does not mean that outsiders are in a position to readily identify the people's representative in such cases; it means only that a foreign visitor must accept that, whatever uncertainty there is with respect to *who* may act on behalf of this people, the visitor must accept that the *visitor* is not so charged, and so must not take it upon himself to make arrangements for the inhabitants.[28]

These arguments are presented against the background assumption that every people is entitled to be in a rightful condition and that outsiders may not take it upon themselves to deprive others of the rightful condition that they are in.[29]

We saw in Chapter 3 that war cannot be rightfully used either to acquire new territory or to enforce a right where a court is absent. The only legitimate ground for going to war is self-defense. In order to preserve itself as a rightful condition, a state may use force against an actual aggressor; in the absence of public, legal institutions, it can only do what seems good and right in its own eyes[30] in determining whether its neighbor is about to attack. That is why Kant characterizes European powers as savage in all of the ways that they allege subjected peoples to be. Not only do they go to war, which is already "the way of savages."[31] Colonialism is not a response to an antecedent dispute with those with whom the colonizer found itself "living side by side." Instead, colonizers crossed the world in order to create disputes, with the express purpose of making war a means of acquisition.[32] The colonizers were not individuals in a state of nature; they were representatives of legal orders, who had no grounds for forcing others into any kind of arrangements with them, whether proprietary, contractual, or political. Colonial conquest typically operated through war or deception. But it would be no less wrongful

[28] In this passage, Kant does not explicitly consider how one might interact with human beings in a condition of barbarism, of "force without either freedom or law," and whether there might be grounds for what has come to be called "humanitarian intervention." In the fifth Preliminary Article of Perpetual Peace, Kant does not explicitly rule it out, but does not exactly rule it in either. But if it is justified, it is a matter of protecting human beings by bringing them into a rightful condition with each other, not taking it upon yourself to force them into one with you. In conditions of barbarism, an outsider might be entitled to intervene, but never to claim the people or its territory for itself.

[29] 6:350; 8:344.

[30] Peter Niesen, "Laws for which an External Legislation is Possible," unpublished paper presented at the Paton Colloquium, University of St. Andrews, 2012.

[31] 6:351.

[32] Pagden, *Burdens of Empire* supra n. 7 at 65, notes that Melchor Cano had made a similar point in 1546, writing that we would not "be prepared to describe Alexander the Great as a *peregrinus*."

if it operated merely by arriving and displacing existing social structures by exercising effective rule over an area.[33]

The putative grounds of colonial power are inadequate, and the actual grounds of conquest were no more respectable. But, as we shall see, even if colonization were to come about as a result of a legitimate defensive war, it would remain morally problematic. I take no position here on which, if any, conquests would fit this characterization: my point in mentioning it is that, although the wrong of colonization typically compounds the wrong of aggressive war, it is a distinct wrong, rather than merely a consequential wrong predicated on the wrongful nature of conquest.

## II. The Effects of War

Kant's rejection of the grounds of colonial conquest does not, however, lead him to the conclusion that wrongs of past conquest can be undone through the use of force. Instead, the possibility of peace turns on accepting that might has determined the contours of right in the past, but also that it must not do so in the future. The first "Preliminary Article" of *Toward Perpetual Peace* requires that a peace treaty impose closure between the parties. Kant's point is not that every detail must be worked out in order for a peace treaty to be possible, but rather that any peace treaty must involve both parties abandoning any residual claims. But that is to say that it is in the nature of a peace treaty that parties forswear any future consideration of the merits of their past dispute. Peace requires that those merits never be reopened. It thus requires the parties to accept both that the terms of the peace will reflect the result of the war that it brings to an end and that the war is indeed over.

That peace should require closure is in one way surprising, and in another way not. Kant conceives of peace as the condition in which every possible dispute is resolved on its merits, and never by resort to force. War is the condition in which might makes right; peace is the condition in which right directs might,[34] that is, one in which all uses of force are subject to public law. No human being is under any obligation to defer to the unilateral judgment of another private person, so the only way in which a dispute about rights can be resolved on its merits is if there is an appropriate public procedure for

[33] Traditional rationalizations in terms of *terra nullius* or the doctrine of discovery fare no better, because even on their stated premises they do not apply to inhabited regions.

[34] I am grateful to Jacob Weinrib for this lovely turn of phrase.

its resolution. Peace is a condition in which disputes are resolved through procedure, either domestically, by a court, or between nations, "as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war."[35] Peace is not merely marked by but consists in the availability of authoritative procedures to resolve disputes on their merits.

As we saw in Chapter 3, because peace is the condition in which disputes are resolved on their merits, the resolution of disputes on their merits cannot be a precondition of peace. Otherwise peace would need to always precede itself, and so be unattainable both in general and in every particular instance.

The same temporal asymmetry with respect to war animates the second, third, and fourth Preliminary Articles of *Toward Perpetual Peace*. These concern the abolition of patrimonial sale, bequest, marriage, and gift of territory, eliminating familiar *grounds of war*, standing armies, eliminating familiar *means of war*, and debts contracted preparing for war, eliminating familiar *incentives for war*. Kant treats each of them as preconditions of peace, but immediately goes on to characterize them as "permissive" and notes that their implementation can be postponed. Although this characterization engages with other issues, one implication of it is that such wrongful actions in the past can, nonetheless, have consequences for right. Territory that was acquired through conquest, purchase, or gift can be part of the rightful territory of a rightful condition. The end of acquiring territory could never *justify* the use of such means, but the fact that territory has been incorporated into a nation is sufficient to make it part of that nation's territory. Although it was wrongfully acquired, it would be wrongful to use force to dismember the now established rightful condition.

The requirement that peace impose closure, and so that belligerents accept results that were not decided on their merits, does not entail that aggression can be licensed by the prospect of future peace. The possibility of securing some objective through military means is inherent in the structure of war: the prospect of might making right is exactly what makes war appealing to those contemplating aggression; the prospect of might making right is what makes defensive force seem necessary and justified. When dealing with an aggressor, you defend yourself because the aggressor has disregarded the merits of your claim to political independence and territorial integrity, and your only hope of a result in conformity with your claim is to block force with force. Indeed, anyone thinking about using force must suppose it is capable of resolving an

[35] 6:351.

issue. Although those using force will often believe that they are right on the merits, and so suppose that the merits justify its use, nobody (at least now) thinks that prevailing in a dispute shows that you were right on the merits.

On this understanding, then, Kant's attitude toward conquest is parallel to his attitude toward revolution: adamant opposition, to the point of concluding that nothing can justify either, coupled with a firm insistence that if a revolution is successful and the new regime consolidates its power, then it becomes the legitimate legal regime, representing the people, and the (formerly) legitimate regime has no basis in right for using force to seek a restoration, or even for compensation for loss of property attendant on office. Indeed, Kant uses the same vocabulary to characterize each. Kant describes any state that uses force to conquer another, claiming to do so benevolently, in order to overcome its internal discord, as violating "the right of the people dependent upon no other and only struggling with its internal illness; that it would itself be a scandal given and would make the autonomy of all states insecure."[36] In *Theory and Practice*, discussing revolution, he writes that it would "make every rightful constitution insecure."[37]

The asymmetry between prohibiting war and accepting its results invites a familiar form of objection: it seems to justify, *ex post facto*, war and colonial rule. Even if the act in question, whether colonial conquest or revolution, is wrongful, nothing succeeds like success, and so, if a wrongful act can give rise to rights, it might be thought that the prohibition of such acts works well in theory but amounts to nothing in practice. If a right can be established through what is, at the time that it is committed, a wrongful act, political actors will be guided only by the prospect of successful consolidation of such wrongful acts, and so the claims of right will be heard but not heeded.

As an empirical hypothesis about how the "warped wood" of humanity is likely to conduct itself, the objection is not without plausibility. But the point of a philosophical theory of wrongdoing is not to prevent wrongdoing or deprive wrongdoers of rhetorical recourses with which to rationalize their wrong after the fact; the test of the adequacy of such a theory is not whether it manages to do so, not even whether it manages to prevent the very things that it identifies as wrongs. Indeed, one of Kant's signature contributions to

[36] 8:346.

[37] *Theory and Practice*, 8:301. This does not, on its own, rule out punishing a former ruler for theft from the public treasury, let alone crimes against humanity. It only rules out executing him, as Louis XVI was, for treason. To punish someone simply for having held power in the *ancien régime* is, as Kant puts it, "diametrically opposed to the law." 6:322.

political philosophy is his characterization of the sense in which institutions are essential, not just to the realization or stability of rightful relations between human beings, but to their very possibility. It is a mistaken objection to his theory of private right to point out that in a state of nature people would not honor their contracts or stay off the property of others, because Kant's point is that private right is inadequate to its own rationale in the absence of public legal institutions. So, too, it is not an objection to his account of revolution or of the nature of peace to note that someone who thought he could get away with it would not be dissuaded by the realization that his action was wrongful.

Kant's treatment of revolution is parallel to his treatment of the legal doctrine of *usucapio*, or adverse possession, as it is called in the common law world. Under this doctrine, a trespasser who stays long enough can acquire land from the original owner simply by the fact of long possession. Kant remarks that this is a necessary implication of the very possibility of secure property in land, because otherwise the previous owner could always come along and assert title. The legal rule can only operate with positive law to lay down a statute of limitations, but, once it is in place, a trespasser can become the true owner. Any alternative to such a system could only function if the new system was implemented by extinguishing all residual claims, and so saying "from this day forward, title will not be acquired through trespass." This is exactly Kant's point about "postponing" giving effect to the prohibition of acquisition through force. That prohibition can only take effect provided that it is not retroactive, that past disputes cannot be reopened because territory was acquired through force. Just as a system of title registration requires institutions capable of making determinations in disputed cases, and the jurisdiction to apply them to everyone, so, too, acquisition through war can only be prohibited through the development of legal institutions. That development, in turn, presupposes accepting borders between states, even if they are the result of past acts of violence. Aggression is never rightful, but the things to which individual human beings or nations have rights will often be as they are as a result of war.

Colonialism in not only objectionable because it is the result of war. If that were the only objection, the fact that the current rightful condition came about as a result of colonial conquest would be of no more relevance than any other historical feature of it. Kant remarks that "it is futile to inquire into the historical warrant of the mechanism of government, that is, one cannot reach back to the time at which civil society began (for savages draw up no

record of their submission to law; besides, we can already gather from the nature of uncivilized men that they were originally subjected to it by force)."[38] If a condition is rightful, and has the institutional capacity to protect freedom, however incompletely or despotically it does so, then no question can be raised about its authority. From this it follows that past conquest cannot be raised internally. Nor can it be raised externally.

This response may seem to simply give the objection more force. It appears to enable colonial powers to answer all challenges by saying "one cannot reach back to the time at which *our civil society* began in partnership with the colonies," or to contend that it is "futile to inquire into the historical warrant of the mechanism *internally*, within the colonial 'commonwealth.'" As we shall see, Kant's account has the resources to block this web of rationalization. From the standpoint of the right of nations, colonization is worse even than annexation. Annexation brings new territory and its inhabitants into an existing rightful condition; although colonization may set up institutions to protect the private rights of the inhabitants of a colony, it leaves the inhabitants of the colony both in and outside the conqueror's rightful condition. That difference does not justify either conquest or annexation, but we will see that it does mean that colonization cannot be treated as a juridically irrelevant feature of the past. Even by the standards of conquest, it is a wrongful and defective form of conquest.

## III. Colonization

The distinctive feature of colonialism from a juridical standpoint consists not in the fact of conquest but in the *post bellum* mode of governance. It consists in one nation ruling over another in a way that is inconsistent with the right of the inhabitants of the latter to rule themselves through their own institutions.

Rather than asking whether a war as a whole can be justified by its grounds or its actual, anticipated, or probable effects, or whether particular acts bear the right relation to those grounds, Kant always asks whether there are principles of right appropriate to a form of interaction, even if the form of interaction is itself already morally objectionable. Kant considers societies that are compatible with rights, though not themselves rightful;[39] in such societies, individual human beings cannot be fully secure in their rights, but,

[38] 6:339.
[39] 6:306.

nonetheless, it is possible to characterize the nature of the wrongs that they commit against each other.

The availability of concepts of right even when circumstances are inadequate to right has important implications for the grounds of war, its persecution, and its aftermath. As we saw in Chapters 4 and 5, permissible ways of fighting a war do not depend on which side is in the right, because the relevant prohibitions restrict acceptable means and methods of war. In the same way, the question of what is permissible at the end of a war does not depend upon whether the victorious party in the war was justified in going to war, or on how it conducted itself during the war. Even a defensive war does not give the victor any new rights against the vanquished, because war is not a means of acquisition:

> The right of a state *after a war*, that is, at the time of the peace treaty and with a view to its consequences, consists in this: The victor lays down the conditions on which it will come to an agreement with the vanquished and hold *negotiations* for concluding peace. The victor does not do this from any right he pretends to have because of the wrong his opponent is supposed to have done him; instead, he lets this question drop and relies on his own force. The victor can therefore not propose compensation for the costs of the 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 still cannot use it, since he would then be saying that he had been waging a punitive war and so, for his own part, committing an offense against the vanquished.[40]

Kant insists that the victor does not demand peace negotiations because of the wrong his opponent has done, but must let the question of wrong drop.

As we saw in Chapter 6, to suppose that at the end of the war the victor is entitled to act as prosecutor, judge, or punisher is to suppose that the war somehow resolves the issue in the victor's favor, and so to suppose that might makes right after all or, what perhaps comes to the same thing, to conceive it as a sort of trial by ordeal. Kant recognizes that just as the parties are symmetrically situated during the war, so, too, they are symmetrically situated after it. Thus, the victor may not demand or even propose compensation.

[40] 6:348.

More strikingly, he writes: "A defeated state or its subjects do not lose their civil freedom through the conquest of their country, so that the state would be degraded to a colony and its subjects to bondage." He then offers a definition of "colony":

> A *colony* or province is a people that indeed has its own constitution, its own legislation, and its own land, on which those who belong to another state are only foreigners even though this other state has supreme executive authority over the colony or province. The state having that executive authority is called the *mother state*, and the daughter state, though ruled by it, still governs itself (by its own parliament, possibly with a viceroy presiding over it) (*civitas hybrida*). This was the relation Athens had with respect to various islands and that Great Britain now has with regard to Ireland.[41]

For individual citizens to lose their civil freedom would be for them to be subject to the rule of others, to fall into bondage, and so to be treated like prisoners. Responding perhaps to Grotius and Locke, Kant adds further that hereditary bondage cannot be derived from defeat in war.[42] With this in mind, we can now understand what Kant means in characterizing a state's becoming a colony as a loss of *its* civil freedom: that would mean for the people to be merely passive in relation to the rule over itself. Such passivity would be contrary to the "original right" of the people "to unite itself into a commonwealth," that is, to rule itself through its own institutions.[43]

Kant's characterization of passive citizens within a rightful condition makes this contrast clear: you are passive if someone else determines where you stand in relation to others, if you depend not on your management of your own business but on arrangements made by another, or are "under the direction or protection" of others.[44] A passive citizen does not participate in collective self-rule; the laws to which she is subject are imposed by others, even if those laws secure her private rights as against others. Indeed, in the domestic case, Kant characterizes passive citizens as ones who cannot act in their own name but must be represented by another, which is exactly the condition of the colony in relation to its mother country.

[41] 6:348.
[42] 6:349. Kant had earlier remarked that "hereditary bondage as such is absurd since guilt from someone's crime cannot be inherited." 6:330.
[43] 6:349.
[44] 6:315.

Still, this definition of a colony may seem unduly narrow, focusing as it does on executive authority, and seems to allow the colony to have its own constitution and even legislation. If it does, then its individual voting citizens are not passive in relation to the laws that govern them, but the people—the union of the multitude of human beings who inhabit the colony—is passive in relation to its own independence, as it is subject to the choice of the mother country. Colonialism illustrates the problem of "soulless despotism" that Kant says would characterize a world state.[45] A colony is ruled from outside, and such a condition is despotic, simply as such, because its people does not rule itself, and so the colony has a system of force and law but is lacking in freedom.[46] Such despotism is morally problematic, no matter how it is exercised. If the colonial power were to rule wisely, act exclusively on behalf of the citizens of the colony, and the citizens of the colony were satisfied to be ruled in this way, it would still be morally problematic, even if for a time there was no morally acceptable way of changing the situation.[47] Colonial rule deprives the people of the possibility of governing itself, and in so doing, treats the colonized people as a subordinate rather than as an equal.

Such a condition is soulless, not only because it extends "over vast regions,"[48] but because the public culture of the mother country is imposed on the daughter country. In a condition of colonialism, the mother country rules over the daughter country without reference to the particularity or choice of the latter. That does not mean that the Colonial Office pays no attention to the details of the history or internal conflicts of its territory. That may or may not be true of a particular colonial power in relation to any particular colony. Kant's point is juridical: the question of whether to do so is a question for the mother country to decide, not for the daughter country. A wise and benevolent (or strategically prudent) despot is still a despot.

Kant acknowledges that, in certain circumstances, passivity may be temporarily unavoidable; discussing right after war, he argues that a nation that constitutes an ongoing threat to its neighbors can be compelled to adopt a new constitution. During such a period, the people of the occupied territory would be rendered temporarily passive and unable to rule itself, making despotism unavoidable. But the transition itself is not conditional on the people

[45] 8:367.
[46] In *Anthropology*, despotism is defined as "Law and force without freedom." 7:330.
[47] 6:320; 8:372; see Jacob Weinrib, *Dimensions of Dignity* (Cambridge: Cambridge University Press, 2016).
[48] 6:350.

reaching a level of maturity (as Mill suggests in *On Liberty*)[49] but on the need to change institutional structures to prevent war so as to ensure the independence of all nations. Thus, unlike Mill's views of colonialism as a temporary expedient to civilize non-European peoples, Kant's approach to *ius post bellum* focuses exclusively on institutional structures to prevent future war. There is no ground for broader "civilizing" missions. As I will explain below, even in such circumstances, the fact of temporary passivity imposes obligations on the occupying power.

The passivity of a colony is most explicit in its relation to other nations. Even if the colony has its own internal parliament, it does not stand as a nation among nations, able to determine its relations to them. The most basic right that each state has under the right of nations is to avoid being drawn into a war by other nations.[50] A colony does not have this power, which is a juridical problem even if, as it turns out, the colony is too small to supply a significant number of troops to the mother country. The right is basic because it corresponds to the right of any nation to be a rightful condition for its citizens. It is entitled to go to war if it is threatened, or even if it believes itself to be threatened. But it alone is entitled to make that judgment. A colony's situation is fundamentally different: the decision to defend itself (or the mother country, or the mother country's allies) is a question for the mother country, not the colony. It is thereby subject not only to the choice of another but what must be, from the perspective of the colony, the merely private choice of the mother country. Defending the mother country, let alone aiding it in an aggressive war, is not an inherent feature of the daughter country providing a rightful condition for its citizens. Even when states are "called upon" to unite against an aggressor that threatens other nations, they are entitled to do so, but cannot be compelled to. Uniting against aggression is a permissible purpose for those who are not directly threatened by it, but not a mandatory one. To be required to go to war, or even be drawn into a war when not threatened, is inconsistent with each state's independence and "original right to avoid getting involved" in a state of war.[51]

The colony is therefore neither absorbed into the "mother country" as a proper part of it, nor independent of it. A part or province of a larger country

[49] John Stuart Mill, *On Liberty*, in *The Collected Works of John Stuart Mill, Volume XVIII - Essays on Politics and Society Part I,* ed. John M. Robson, (Toronto: University of Toronto Press, 1977), 224: "Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end."

[50] 6:344.

[51] 6:344.

might be disadvantaged in any number of ways—many countries have regional disparities in resources, wealth, expected lifespan, and political power. All of these should be repaired by the state, but, at the same time, none raises any issue about the state's rightful status. The colony is different, because it does not determine how it stands in relation to the mother state or to other states. That is the significance of lacking an executive branch and of the inability to determine its own relations with other states. This is so, as Kant notes, even if it has its own internal constitution. It is not fully a moral person, because it is entirely passive in its relations to others. Thus it merely "inheres."[52]

## IV. Colonialism on Its Own Terms

The mere *fact* of passivity captures what is wrong with colonialism, and why it cannot be the just outcome of a war, but it does not yet explain the specific form of wrong *within* colonialism. As always, the double structure of Kant's theory of war needs to be applied here. The further question of what can go wrong in colonization is not exhausted by an explanation of why it is unjust as such. Just as an offensive war, wrong in itself, can be waged in accordance with or contrary to the principles of *ius in bello*, so too colonization, which is unjust as such, can be carried out in a way that is in conformity with or contrary to the relevant moral principles. The morality of *ius ad bellum* does not resolve all of the questions of *ius in bello*; neither is sufficient to resolve the central question of *post bellum* wrongdoing.

No less significantly, colonialism, in historical fact, if not by nature, also violates the normative principle appropriate to it, which demands that a power rule on behalf of those who are subject to its rule. The European conquest of large areas of Asia, Africa, the Americas and Australasia took place with the ambition of acquiring resources, markets, or strategic assets for the colonial powers. Having succeeded in conquering and subduing the Indigenous populations, it is not surprising that the colonial powers subsequently used their colonies for the very ends for the sake of which they conquered them. The connection here is empirical, but nonetheless illuminates Kant's complaints about the spurious rationales for colonialism. The problem is not just that these ends could not justify war—though of course they could not—but further, that many such ends, such as getting rid of an unwelcome

[52] 6:314.

population from the "mother country," are also wrongful after the war is over. So the historical practice of colonialism is wrong at three distinct levels: the grounds of war are objectionable, the status of a colony is objectionable, and the historical practice of colonialism violates the normative standard appropriate to rule over others.

To characterize the nature of the wrong of colonial rule, I must first articulate the appropriate standard for evaluating it. In order to identify that standard, I will return to the example of belligerent occupation I mentioned in Chapter 4. The occupying power is subject to a duty to rule on behalf of the inhabitants. As we saw in Chapter 4, complying with the norms of belligerent occupation does not make occupation by an aggressor or an unnecessary occupation by a defender rightful, but failure to comply with those norms is wrongful even if the defender is occupying an aggressor's territory. Colonial conquest is like a long-term wrongful occupation. The fact that it is already wrongful does not mean that the colonial power does not commit additional wrongs if it fails to exercise power on behalf of those over whom it exercises it. Rather than simply telescoping the layers, and overlooking the distinctive aspects of colonialism, Kant's account has the resources to say instead that colonial rule is defective as such, but that there is a further defect in its wrongful execution.

I noted above that the inhabitants of a colony are passive in relation to the colonial power. I now want to suggest that there are two fundamentally different ways in which a colonial power can rule in a way that is treating the colonized people as merely passive, and so, in a sense, treating them like children. The first is to treat them paternalistically, which, contrary to Mill's claim, is objectionable, simply as such. The second is to rule in ways that violate their freedom and equality as human beings. The most basic of these is, whether in the case of the subjugated people or children, to use them as tools for purposes they have not chosen. Indeed, the mother/daughter vocabulary of colonialism invites exactly this thought: just as parents bring children into the world without their consent, on their own initiative, so, too, a conquering power puts itself in possession of a subjugated people, and so, as Kant remarks of the power parents have over their children, they cannot treat the people either as if it were "something they had made . . . or as if [it] were their property, nor even just abandon [it] to chance."[53]

Kant's claim is not that the inhabitants of this or that colony are in fact incapable of making arrangements for themselves: his objection to colonialism

[53] 6:281.

is precisely that the people of the colony are prevented from making such arrangements, not that they are incapable. Having forcibly deprived them of the possibility of making their own arrangements, (regardless of how well or badly they might have managed the task themselves), the colonial power is bound by the moral standard that always applies when one takes charge of the affairs of another: it must not do so for its own advantage, but must do so entirely on behalf of the others of whose affairs it has taken charge. This is how Kant conceives of relations between parents and children; the mother/daughter structure of the imperial/colonial relation demands the same norm apply to it, that is, that the imperial power must rule on behalf of the colonized, rather than treating them as so many resources to be used for advancing imperial purposes. The colony is not a child; its immaturity is neither natural nor self-imposed, but institutional and forcibly imposed from without. If the imperial power insists or pretends that the colony or its inhabitants are incapable of self-rule, it has obligations that are direct implications of its own insistence or pretension: it must rule on behalf of those over whom it exercises power. Mill was wrong to suppose that colonialism could be justified on paternalistic grounds, or that British rule in India was motivated in that way. A benevolent motive does not justify colonization. The obligations that follow from treating other human beings as merely passive do not provide a justification for so treating them. But those who rule over others have a duty of right to rule on behalf of them.

## V. Conclusion: Colonialism's Moral Remainders

Kant distinguishes three wrongs in colonialism: the wrongfulness of colonial conquest, the wrongfulness of the status of a colony, and the wrongfulness of the ways in which colonial rule is typically carried out. Each of these is independent of the others. A war of conquest is wrongful even if it ends up incorporating the conquered people into a superior rightful condition; creating a colony would be wrongful even if it was the result of an unquestionably defensive war; ruling over a people for purposes set from outside is wrongful regardless of how it came about, and regardless of whether it is done in a colony or in an independent state.

By distinguishing these three different wrongs implicated in colonialism, Kant's account makes it possible to distinguish between different legacies of colonialism, and the possibility or need to remedy them.

The prohibition on acquisition through conquest, like the prohibition on acquisition through marriage, sale, or gift, is forward looking but not backward looking. In *Perpetual Peace*, Kant writes that although the application of such "permissive laws" can be postponed in their effect, they cannot be postponed to a nonexistent date, and he gives the example of restoring the freedom of certain states deprived of it, only delaying implementation if "premature implementation would counteract its very purpose."[54] Kant's claim is not that past wrongful acquisitions create a legitimate cause for making war, but rather that if a previously independent political unit has been compromised through non-rightful transactions, its restoration, where possible, will bring its inhabitants into a condition more fully in conformity with right. That does not mean that those who lost sovereignty in the distant past can go to war to reclaim it, or that they can invade another nation's territory on the grounds that, prior to conquest, it had been part of their territory. But it does require independence for colonies, so as to bring them out of the juridical condition in which they find themselves. Other than that it can only justify differentiated rights. By now, versions of these ideas are familiar, including the protection of Indigenous rights and Indigenous governance in cases in which formerly colonized peoples have been displaced by settler populations, and differentiated minority rights in multicultural and multiethnic nations, and in limited circumstances, forms of secession.

But if colonial conquest as "a way of acquiring land is therefore to be repudiated,"[55] it nonetheless leaves significant remainders. Having wrongfully created systems of private property and a legal order, if the colonial power departs, it inevitably does not leave things as it found them, but rather leaves legal and political institutions in place. Those institutions, in turn, must come to terms with the effects of their colonial past, but the solution is not to return to a "fish and moose paradigm,"[56] but rather to develop a framework within which to come to terms with it.

These are all internal arrangements, all instances of what Kant calls the "idea of the original contract," that is, attempts to make existing states more fully institutions through which their inhabitants rule themselves. Where the boundaries of a rightful condition are the results of a history of conquest and colonialism, the resulting political units may be ones whose members are so

[54] 8:347.
[55] 6:266.
[56] Douglas Sanderson, "Residues of Imperium," *University of Toronto Law Journal* 68(3) (2018), 319–357.

deeply divided that different arrangements are required so that institutions are not merely the form through which some dominate others. These are all internal requirements; none of them gives rise to any kind of entitlement on the part of one nation to reclaim territory from another that would have belonged to it if not for past conquest or colonialism. Internal changes may need to be made to bring a nation more fully into conformity with its regulative principle, but they do not give any other nation the authorization to seize its territory or compromise its political independence.

# 9

# The Structure of Peace

## Global Institutions and Cosmopolitan Right

The earlier chapters of this book focused on how things stand between nations in abstraction from global legal institutions, arguing that the *ad bellum*, *in bello*, and *post bellum* rules of war demand that nations act in ways that enable the preservation and possibility of peace. They therefore focused on the bilateral interactions between nations and focused on the Kantian idea that no "further or other duties" between them are added by entry into a public international legal order. This concluding chapter takes up the nature and role of public international legal institutions. In *Toward Perpetual Peace*, the *ad bellum* and *in bello* rules are the focus of the "Preliminary Articles" governing those *inter se* relations between states; introducing what he describes as the "Definitive Articles," Kant argues that "[a] condition of peace must therefore be *established*; for suspension of hostilities is not yet assurance of peace."[1] Peace can only be established through international institutions. Kant's conception of an established peace has both a constitutive and a regulative role in his conception of the international order, through which norms governing war can be conceived. In its constitutive use, the principle of peaceful interaction provides the model through which interactions between and across nations can be understood as fully subject to law; in its regulative use, it generates the duties of states and international institutions to bring themselves more fully into conformity with it. Although global institutions create no new duties between nations *inter se*, they create public legal duties that the global legal order owes to its member states, and that each member of the international legal order owes to that order as a whole. They are requirements of right.[2]

[1] 8:349.

[2] As Kant remarks of cosmopolitan right, it is "not a philanthropic (ethical) principle but a principle *having to do with rights*." 6:352.

Global institutions have three roles: to prevent war by providing an alternative way in which states can resolve their disputes "as if by a lawsuit,"[3] to articulate standards of conduct, and to guarantee the political independence of each through the collective security of all. Those roles, in turn, require an additional form of legal order governing relations between individual human beings who are outside their own states or interact with others who are Cosmopolitan right provides the systematic realization of the "rational idea of a peaceful, even if not friendly, thoroughgoing community of all nations on the earth,"[4] by bringing all interactions under law.

This chapter begins by articulating the three forms of public right—the right of the state, the right of nations, and cosmopolitan right—as well as the relations between them, and the ways in which they jointly constitute a condition of peace. It then examines the distinctive powers that arise from the right of nations, understood as public international law, rather than as the merely private relations between them. Although public international law generates no "further or other" duties between nations than can be thought of in the absence of its institutions, new duties are owed to the international legal order. It then turns to cosmopolitan right, explaining the specific claims that individual human beings have against nations of which they are not members.

## I. Three Forms of Public Right

In the opening paragraph of the "Public Right" sections of the *Doctrine of Right* (s. 43), Kant introduces the three forms of public right—the right of the state, the right of nations, and cosmopolitan right—and concludes with the surprising claim that "if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse."[5] Kant's central claim is that all human interactions must be brought under public law. The ideal case of freedom under law is the case in which all human interaction is subject to public law; this ideal case both constitutes the possibility of an international legal order and serves as the regulative norm governing it. This organizing idea has fundamental implications

[3] 6:351.
[4] 6:352.
[5] 6:311.

for understanding the structure of the right of nations, and the powers and duties of international institutions. It also has implications, perhaps even more fundamentally, for cosmopolitan right.

Cosmopolitan right is a very old idea. Late medieval and early modern conceptions offered expansive interpretations of the ancient idea, attributed to the cynic Diogenes, that one could be a citizen of the world, a member of a single unified human community without being a member of any more specific one. The Salamanca scholastics understood it as an implication of the fact that God gave the earth to human beings in common for their use, and so understood it as providing a license to bring underutilized regions of the earth into proper use. Resisting the attempt to do so was grounds for war. Grotius also spoke of possession in common of the earth, arguing that the right to travel was an express reservation from the creation of private property,[6] which therefore demanded that all regions of the earth be open to trade and settlement, and concluded that the refusal to accommodate the demand to do so was grounds for war. Underlying those conceptions is the assumption that cosmopolitan right is founded on an immediate relation between individuals and the earth. Chapters 3 and 8 discussed the problems of scholastic and Grotian conceptions of cosmopolitan right as a ground for war; in this chapter the focus is on Kant's very different conception.

Many contemporary self-described cosmopolitans also read the stoic idea of a unified human community as the scholastics and Grotius did, based on an immediate relation between every individual human being and the earth's surface and resources. There are, to be sure, important differences: most contemporary cosmopolitans do not see cosmopolitan right as a ground for going to war,[7] and they typically interpret the idea of common possession in terms of distributive shares rather than in terms of a claim against interference with use rights.[8] Rather than defending colonialism, they advocate

[6] Hugo Grotius, *de jure belli ac pacis* (1625), translated by William Whewell as *On the Laws of War and Peace* (Cambridge: Cambridge University Press, 1853), Bk. II.II.xiii.1, at 74.

[7] Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), provides a contrast, although she doubts that what she calls "subsistence wars" could ever meet the other just war conditions. See also Kasper Lippert-Rasmussen, "Global Injustice and Redistributive Wars," in *Law, Ethics and Philosophy* (LEAP) 1(1) (2013), 65–86; Victor Tadros, "Resource Wars," *Law and Philosophy* 33(3) (2014), 361–389. Laura Valentini, "Just Wars and Global Justice," in David Held and Pietro Maffettone (eds.), *Global Political Theory* (Cambridge: Polity Press, 2016), 143–157. On the differences between Grotian and contemporary views about resource wars, see Johan Oltsthoorn, "Conceptualizing private rights of enforcement in revisionist just war theory: the case of human rights to subsistence," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

[8] Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University

redistribution from rich countries to poor ones, and open immigration in the opposite direction.

Despite the distance between contemporary views of cosmopolitanism and medieval and early modern conceptions, the Kantian view contrasts with both in the same way. On the Kantian view, cosmopolitan right can only be rightful if it is mediated by public law. The point of each of the right of the state, the right of nations, and cosmopolitan right is to bring human interactions under law. If all interactions can be brought under law in this mediated way, then the requirement that the moral structure of right, including private rights, "extends to the entire human race,"[9] is satisfied, making acquisition fully peremptory rather than provisional.

These three forms of public right correspond to the three definitive articles of perpetual peace: the right of the state corresponds to the requirement that all states have republican governments; the right of nations to the idea of the league of nations; and cosmopolitan right to the right to visit. The articles are definitive because they are not ways of bringing about a condition of perpetual peace; taken together they constitute such a condition. The full realization of the three forms of public right would be a condition of perpetual peace.

Each of the three forms is marked by the use of the ideal case to articulate the moral structure of cases that fall short of it. Kant fills this structure out most fully in the case of the right of the state: the factual existence of the state is only made intelligible as a legal order, however, by conceiving of it in terms of its ideal case; "[t]he act by which a people forms itself into a state is the original contract. Properly speaking the original contract is only the idea of this act, in terms of which alone we can think the legitimacy of a state."[10] That is, although not all governments are republican, and none is fully so, the idea of republican government, in which the people rule themselves through their laws, and the state acts only for properly public purposes, provides the norm against which all state action is to be judged. The same point applies to the other forms of public right: each of the right of nations and cosmopolitan right can only be understood through its ideal case. Each provides a structure

Press, 2009); Thomas W. Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989); Mathias Risse, *On Global Justice* (Princeton: Princeton University Press, 2012); Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004).

[9] 6:266.

[10] 6:315.

through which a type of interaction can be analyzed and a norm for that type of interaction.

The three forms of public right, and thus the three Definitive Articles of Perpetual Peace, contrast with the Preliminary Articles. The first Preliminary Article prohibits a secret reservation in a peace treaty; the fifth prohibits intervention in a nation's internal affairs; the sixth prohibits means of war inconsistent with a future peace. These are supposed to take effect immediately, "putting a stop to an abuse at once."[11] The implementation of the others—the second, prohibiting acquisition by sale, marriage, or gift (to eliminate familiar grounds of war), the third, prohibiting standing armies (to eliminate familiar means of war), and the fourth, prohibiting the contracting national debt to prepare for war (to eliminate familiar incentives for war), can be postponed, although not indefinitely. The Preliminary Articles mark the transition from a condition of barbarism, in which everything is decided through force, to one of mere anarchy—a state of nature as an idea of reason[12]—by describing a situation in which there is in fact no war. The absence of war, however, is purely private, consisting of bilateral arrangements between states, and therefore has no omnilateral or public content.

A condition of peace must be established[13] because it is a condition of public right, which is necessarily institutional. The ideal case of the right of the state (republican government) ensures that all interactions within a legal order, both between you and me and between each of us and the public authority that rules over us, be governed by law; the ideal case of the right of nations sees to it that, when disputes arise between nations, these, too, are governed by law; and the ideal case of cosmopolitan right sees to it that interactions between a nation and those who are not members of that nation are governed by law. Just as every existing state will be defective in relation to the idea of the original contract,[14] so, too, any institutional realization of the right of nations or cosmopolitan right will be defective in relation to its own pure case. But the ideal case remains regulative for those institutions.

[11] 8:347.

[12] *Anthropology*, 7:330.

[13] 8:349. Ariel Zylberman marks this contrast in terms of positive and negative conceptions of freedom in Ariel Zylberman, "The Public Form of Law: Kant on the Second-Personal Constitution of Freedom," *Kantian Review* 21(1) (2016), 101–126; in a forthcoming article, Pauline Kleingeld develops an account of each of the three forms of public right as a form of positive freedom understood as self-legislation. Pauline Kleingeld, "Independence and Kant's Positive Conception of Political Freedom', in Mark Timmons and Sorin Baiasu (eds.), *Kantian Citizenship: Grounds, Standards and Global Implications*. (London: Routledge, forthcoming).

[14] 6:371.

Understood in this way, the three forms of public right are coordinate; each governs a different set of relations, and none is reducible to the others. A universal and lasting peace requires that all three be fully realized. Each of the three is an instance of Kant's more general distinction between force and right. As we have seen in earlier chapters, this idea of the primacy of law is the full philosophical articulation of Kant's organizing insight that force can only be replaced with law by subordinating it to law: "no matter how good and right-loving human beings might be,"[15] legal institutions are required to exit the condition in which force or its prospect decides everything. That, in turn, requires not the elimination of force but bringing its use under legal institutions, charged with making, applying, and enforcing law. The only way that we can honor morally practical reason's "*irresistible veto: there is to be no war*"[16] is through them, and legal institutions must govern all interactions in order for disputes to be resolved through discussion rather than force.

## II. The Architectonic Structure of the *Doctrine of Right*

In the introduction to the *Doctrine of Right*, Kant notes that he has worked through the later sections less carefully than the earlier ones, that is, he has paid more attention to private right than to public right. He reassures his readers that the later sections "can be easily inferred from the earlier ones, and partly, too, because the later sections (dealing with public right) are currently subject to so much discussion, and still so important, that they can well justify postponing a decisive judgement for some time."[17] Although questions of public right, especially cosmopolitan right, remain subject to discussion, that makes it more rather than less important to fill out Kant's "easy" inference, which, I will argue, concerns the relation between the three forms of public right and the three forms of private right. As always with Kantian analogies, the relevant analogy is between sets of relations, not between their relata.[18] Although each title of private right, like each form of public right, must have a manner of acquisition, in both cases the characterization of the forms is conceptually prior to the mode of acquisition. As I will

[15] 6:312.
[16] 6:354.
[17] 6:209.
[18] See the discussion in Chapter 2 of, among other texts, *Critique of Pure Reason,* (A179/B222); *Critique of the Power of Judgement*, 5:464; *Prolegomena to Any Future Metaphysics*, 5:357.

explain, their respective modes of acquisition also correspond to the modes of acquisition of the three titles of private right, *facto* (deed), *pacto* (agreement), and *lege* (law).[19]

Kant famously groups categories in threes, and the *Doctrine of Right* is no exception. As he explains in introducing the three titles of private right, each of them can be understood as the product of the distinction between a person and a thing. Property is a right to a thing; contract is a right against a person; and, applying the distinction to itself, status rights are a matter of a right to a person, akin to a right to a thing.[20] Applying a binary distinction to itself generates four possibilities, but Kant notes that the fourth, a right against a thing akin to a right against a person, is incoherent because a thing cannot be subject to any duties.[21] Kant's argument here gives categorical form to the intuitive argument that he had made in "On the Common Saying," that a slave contract could never be binding, because it would be a contract that turned the slave party into a mere thing, which could not be subject to an obligation.[22] The problem with the fourth category, then, is that it is inconsistent with the structure of right.

Each of these three forms of private legal relations generates the mode of acquisition appropriate to it; although property can be acquired from another person, initial acquisition of property—taking an object out of an unowned condition—must be a matter of a unilateral act by the person acquiring that thing (*facto*). Contract rights are bilateral, as between the parties to them, and so can only be consistent with the freedom of the parties if they are acquired consensually, through a bilateral transaction (*pacto*). Status rights arise in situations in which people interact interdependently, but not consensually, typically because one party governs some aspect of the other's affairs that the other is factually or legally incapable of managing, and so is not in a position to consent to the specific terms of that interaction. Such a relationship must be governed by strict terms, dictated not by the agreement of the parties, but rather determined by law (*lege*).

The same structure of the categories of relation shapes the three forms of public right. Just as Kant notes that the three titles of private right correspond

[19] 6:276.
[20] 6:260.
[21] 6:358.
[22] "On the common saying: that may be correct in theory, but it is of no use in practice." 8:292. See also 6:330.

to the three categories of relation—substance, causality, community—so, too, do the three forms of public right.

1. The "matter" of the right of the state corresponds to the category of substance because the state must be conceived as existing in perpetuity,[23] that is, as that which persists through change. Its "form" is as a self-governing entity; its mode of acquisition—how it comes into being—can only be through "which an actual deed (taking control) the condition and the basis for a right," that is, *facto*.[24] The creation of a legal order is an extralegal act; as we have seen, a peace treaty as between two nations is binding even though it will often be the product of duress, that is, force.
2. The right of nations corresponds to the category of causality; its "matter" must be the performance of treaty obligations by other nations, which, for right, manifests itself through the category of contract, that is, through voluntary bilateral relations between states. As we shall see, the right of nations is marked by treaties—public contracts[25]—and that is why the discussion of the right of nations is filled with contractual language. This is not the ideal contractual language of possible agreement that figures in the idea of republican government, but rather that of actual agreement. When Kant identifies the violation of public contracts as a ground for war, he is concerned with ones actually entered into; actual contracts are the subject matter of an ideal model of the litigation of bilateral agreements "as if by a lawsuit." The mode of acquisition of the right of nations is acquisition by agreement, which corresponds to the Roman-legal concept of *pacto*. That is, the right of nations understood as an idea of reason is the idea of a plurality of nations choosing to bring their interactions under shared public law. But the league is voluntary and can be "revoked at any time," precisely because it is a matter of independent nations coming to an agreement. The requirement of voluntariness also explains why the league of nations cannot be created through force. At the same time, it does not collapse into Wolff's "voluntary law of nations," because it does not suppose that states can agree to just anything; most prominently, as we saw in Chapter 2, nations cannot enter into binding treaties that preclude any one of them from providing

[23] 6:326.
[24] 6:371.
[25] 6:349, 6:351.

a rightful condition to human beings on their territory; as we saw in Chapters 4 and 5, they could not agree to permit perfidy or to have their citizens murdered by an aggressor.

3. Cosmopolitan right is described in terms of a "thoroughgoing community," which is a sufficient basis to suppose that it matches the category of community. In the *Critique of Pure Reason*, Kant explains that community is to be understood through the idea of *commercium*, that is, possible interaction. Its "matter" is a status relation, its form is the exercise of authority by a legal order over those who are not members of it, and, for reasons to be explained in detail below, it is also acquired *lege*: it is a situation that can only be made rightful by having a certain form.

As is always the case with Kantian triads, the third member incorporates the first two: cosmopolitan right is the right of nations understood as the right of the state. In the right of the state, public law must take the form of the "sum of laws which need to be promulgated generally in order to bring about a rightful condition, a system of laws for the union of a multitude of human beings";[26] the right of nations is a "universal *association of states*,"[27] that is, a system of laws for a union of a multitude of states; cosmopolitan right is a system of laws for the union of a multitude of human beings and states, "the rational idea of a peaceful, even if not friendly, thoroughgoing community of all nations on the earth,"[28] that is, the way in which freedom under law is extended to all interactions, including those of travelers with their hosts, encompassing "not only the relation of one state toward another as a whole, but also the relation of individual persons of one state towards the individuals of another, as well as toward another state as a whole."[29]

Just as, in the case of the three titles of private right, the fourth category is empty because normatively impossible, so, too, is the fourth conceptually possible category of public right (generated by understanding the right of nations as the right of a state) normatively impossible. The right of the state governs relations between a legal order and its members; the right of nations governs relations between a plurality of independent legal orders; and cosmopolitan right between the members of a plurality of legal orders in relation to other legal orders. The fourth possibility generated by this distinction

[26] 6:311.
[27] 6:350.
[28] 6:352.
[29] 6:344.

would be the relation between one nation and another, in which one legal order is subject to the public law of another legal order. Like the conceptually possible but morally impossible fourth title of private right, that fourth case would be degenerate: colonialism, of which, as we saw in Chapter 8, Kant was an early and severe critic.[30]

## III. The Right of the State

With this architectonic structure on display, I now turn to each of the three forms of public right. I will say only a few words about the right of the state, treating the discussion in Chapter 2 as sufficient and bypassing important questions about the precise role of property, including property in land, in Kant's argument for the state. The role of the state is to create a situation in which the problems of the state of nature—the problems of unilateral duty imposition, judgment, and enforcement—are all subject to law. The right of the state does this by creating a distinctive practical standpoint from which all claims of right are subject to law. This, in turn, requires institutions charged with making, applying, and enforcing law. These institutions, taken together, provide closure with respect to all possible interactions between individual human beings. They determine private claims as between them. In the absence of such institutions, each person can only do what seems right and good[31] in their own eyes; within such institutions, the question of whether I am permitted to do something—to acquire some seemingly unowned object, to refrain from doing something others expect me to do, or to demand compliance or loyalty from you—is subject to authoritative jurisdiction.

[30] As we saw in Chapter 2, in his *Pure Theory of Law*, Hans Kelsen suggests that the unity of the international legal order requires the supposition that national law is subordinate, and international law is superior. Kelsen offers an argument by elimination for this primacy. After rejecting any "dualism" between the right of the state and the right of nations on the grounds that there could be no finality, and without finality, no law, he sees two remaining possibilities. Either the law of nations is the discretionary product of each legal order (a version of the "voluntary law of nations" view) or else it is superior, and legal powers exercised by states are nothing more than powers conferred on them by international law.

Kant's account of the three forms of public law shows where Kelsen goes wrong. The attempt to treat national legal orders as merely exercising delegated powers fails to consider the possibility that the three forms are coordinate, rather than subordinate, reflecting different legal and moral relations. Kelsen overlooks this possibility because he treats any horizontal legal relations as a product of some antecedent vertical one. Stated in the vocabulary of the Kantian categories, Kelsen mistakenly assumes that the relation between domestic and international law must be modeled on the category of substance/accident.

[31] 6:312.

As we saw in Chapter 2, these public institutions must be properly public in order to solve the problems of the state of nature. If you and I have a dispute in a state of nature, we might wisely decide to submit it to binding arbitration, and it may be, as a matter of fact, that our disputes will be such that all of us in all of our disputes can see the advantages of doing so. That would not fully solve the problem of right; there must be an authority of general and mandatory jurisdiction, before which anyone can bring anyone else, as of right, that is, without the agreement of the other party. The creation of such institutions must do more than resolve private disputes; to bring the relations of the right of a state fully under law, relations between individual human beings and the state that exercises power over them must also be brought under law, so that an individual human being can make a claim of right in his or her own name for a wrong committed by the state. The state must be conceived as acting exclusively for the distinctively legal purpose of providing a rightful condition on its territory. Further, in the ideal case, lawmaking itself must be fully public, so that the people, through their representatives, give themselves laws, so that each person is subject only to laws that are, via institutions, self-imposed.

Actual states fall short of this ideal by acting for the private purposes of their rulers or members or failing to have laws that are properly self-imposed, but they are under a duty to reform themselves to make themselves more fully legal. Kant does not develop any specific institutional apparatus through which this improvement is to be carried out, but the idea is already implicit in the idea of public right, that is, that all official conduct be subject to public legal oversight in light of properly promulgated rules.

## IV. The Right of Nations: Outgrowing the Need for Coercion—A Voluntary League

Kant was an early advocate of a league of nations, and some have gone so far as to describe the UN Charter as the realization of Kant's arguments in positive law.[32] But Kant's strategy in arguing for international institutions is puzzling. The argument seems to be leading toward the conclusion that states

[32] See, e.g., Ingeborg Maus, "Kant's Reasons Against a Global State: Popular Sovereignty as a Principle of International Law," in Luigi Caranti (ed.), *Kant's Perpetual Peace: New Interpretive Essays* (Rome: Luiss University Press, 2006), 35–54.

can be forced into a league of states, which he then expressly repudiates. Kant draws a parallel between the situation of individual human beings in a state of nature and the situation of nations standing in relation to each other in three steps:

1. States in external relation to each other are in a non-rightful condition "like lawless savages."[33]
2. The non-rightful condition is a condition of war, because each is subject to the choice of others, even if hostilities do not break out. It is, as he writes of the parallel situation of individual human beings in a state of nature, "wrong in the highest degree."[34] That is, it is contrary to the "right of human beings as such."[35]
3. Nations must exit this non-rightful condition and enter into a "league of Nations in accordance with the idea of an original social contract" in order to protect themselves against each other.[36]

Each step is strictly parallel to the argument of the concluding section of private right, which characterizes the individual obligation to leave the state of nature. That argument concludes not only with the claim that there is a duty to leave the state of nature, but with three additional ones: first, that entry into a rightful condition introduces "no further or other duties"[37] among human beings than can be conceived in a state of nature; second, that force may be used to compel others to leave the state of nature; and third, that exit from the state of nature leads to a rightful condition that has legislative, executive, and judicial functions. In the case of nations, Kant appears to accept the first implication, but he rejects the latter two. Rather than concluding that nations must enter into a nation of nations or state of states, Kant reaches a much narrower conclusion, apparently leaving out clear analogs of legislative or executive functions. In place of the claim that force can be used to bring other nations into a rightful condition, Kant offers a fourth claim instead, saying that the league of nations "must, however, involve no sovereign authority (as in a civil constitution) but only an association (federation); it must be an alliance that can be dissolved at any time."[38]

[33] 6:344.
[34] 6:307.
[35] 6:240.
[36] 6:344.
[37] 6:306.
[38] 6:351.

Architectonically, this may seem to be no more than an instance of Kant trying to squeeze the three forms of public right to the categories of relation or the Roman-legal categories of *facto*, *pacto*, and *lege*. But the analogs of the Roman-legal categories apply because, in the case of the right of nations, law is already present. The right of the state could only be created through some extralegal deed; where no law is in place, there cannot be a legally regulated procedure for putting one in place. By contrast, Kant writes that "as states, they already have a rightful constitution internally and hence have outgrown the constraint of others to bring them under a more extended law-governed constitution in accordance with their concepts of right"[39] precisely because they already have law.

Many readers have taken Kant's claim that states "do not want" to form a state of nations and that they have "outgrown" the need for coercion, as well as his claim that a state of states would be a "soulless despotism," as empirical concessions to the morally imperfect world.[40] Others point out that Kant seems to endorse a state of states *in thesi* (in theory) but reject it *in hypothesi* (in practice),[41] a contrast that he elsewhere disparages.[42] Yet if he supposed the measure of acceptability for international arrangements was a matter of what an actual ruler would "want," Kant would have had to conclude, at least in his day, the "negative surrogate"[43] of a nonbinding federation is also something sovereigns would "not want." But that is not the point at all.

In keeping with Kant's declared purpose of providing a metaphysics rather than an anthropology of morals, I will propose a different interpretation, building on the way in which the analogy between individual human beings and nations operates. As we saw in Chapter 2, the point of that analogy is not that nations are like individual human beings, but rather that they stand in formally analogous relations, that is, that each is entitled, as of right, to be independent of all of the others. In the individual case, that independence can

[39] 8:355.

[40] As argued by, e.g., Japa Pallikkathayil, "Kant and the Limits of Global Governance," in Margit Ruffing et al. (eds.), *Kant Und Die Philosophie in Weltbürgerlicher Absicht: Akten des XI. Kant-Kongresses 2010* (Berlin: De Gruyter, 2013), 885–892; Louis-Philippe Hodgson, "Realizing External Freedom: The Kantian Argument for a World State," in Elisabeth Ellis (ed.), *Kant's Political Theory: Interpretations and Applications* (University Park: Pennsylvania State University Press, 2012); Christian F. Rostbøll, "Freedom in the External Relation of All Human Beings: On Kant's Cosmopolitanism," *Kantian Review* 25(2) (2020), 243–265. For a forceful argument against, see Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge: Cambridge University Press, 2012).

[41] 6:357.

[42] "On the Common Saying," 8:276.

[43] 8:357.

only be secured in a rightful condition, because only in such a condition can public legal procedures determine the law of external mine and thine, that is, the law of property.

Nations have a different moral nature and a different claim to independence, however. Each is entitled to independence as a system of public law.[44] A federation of free states must be "an alliance that can be renounced at any time and so must be renewed from time to time. This is a right *in subsidium* of another and original right, to avoid getting involved in a state of actual war among the other members."[45] The "original right" to which Kant refers follows from the status of each nation as a legal order, charged exclusively with providing a rightful condition for those who reside on its territory. As we saw in Chapter 2, this status as rightful conditions precludes states from entering into agreements contrary to it; the examples considered there were *ius cogens* norms prohibiting slavery or genocide. They lay beyond any nation's rightful power because they would abolish it as a rightful condition. Undertaking a binding and enforceable obligation to involve itself in a state of actual war among the other members of a federation would commit it to entering a condition in which force decides apart from its own assessment of either the merits or prospect of success, and so make its own rightful condition vulnerable in an unacceptable way. As a public legal condition, each nation must be entitled to decide for itself whether to get involved in a war with others.[46] The international legal order cannot conscript a nation to become the analog of an international police officer. The possibility of renouncing the agreement follows from the fact that its terms cannot be externally enforced. Each member state's right to independence must be formal rather than material, and so not subject to compulsion from without. A nation must be able to refuse to get involved, and so cannot be compelled to get involved. Nations cannot be compelled to join a federation that they can leave at any time.

[44] As Katrin Flikschuh puts it: "The reason why we cannot do with states as we can do with individuals is that, in contrast to individuals, the juridical compulsion of states would compromise their moral personality." Katrin Flikschuh, "Kant's Sovereignty Dilemma: A Contemporary Analysis," *The Journal of Political Philosophy* 18(4) (2010), 469–493, 480.

[45] 6:344.

[46] See Helga Varden, "Diversity and Unity: An Attempt at Drawing a Justifiable Line," *Archiv für Rechts- und Sozialphilosophie /Archives for Philosophy of Law and Social Philosophy* 94(1) (2008), 1–25, at 21. See Ester Herlin-Karnell, "EU Solidarity as Collective Self-defence? Constitutionalism and the Public Uses of Coercion and Force," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021) for a discussion of the EU's stronger requirement of mutual defense.

If the only ground of going to war is defensive, each state must reserve to itself the question of whether to intervene in defense of another nation. As we saw in Chapter 8, one of the problems of colonialism is that a colony is necessarily passive in relation to the Metropole of which it is a colony. A mandatory coercive world federation would reduce all nations to that passive status; the question of whether to participate in a war would be decided by others; this would be the "soulless despotism"[47] of colonialism without a Metropole.

The argument against a compulsory world state does not show that a single state spanning the habitable areas of the earth is internally incoherent; the problem is with the compulsory federal structure a state of states would have to have. Because states already have a "law-governed constitution in accordance with their concepts of right,"[48] forcing them into a larger federation is non-rightful, and the larger federation is itself not a mandatory end for them. Thus, there is no permissible ground for compelling entry into such a condition. If a single world state were to arise, either through non-rightful means or as a result of an environmental catastrophe that left only a small portion of the earth's surface habitable, the Kantian account would not demand its dissolution. Here as elsewhere, its status as a rightful condition does not depend on its origins. It would be a rightful condition, and force could not be used to dissolve it. From this perspective, the reason that nations "do not want" to submit to a coercive authority is that they do want to continue to exist as the nations that they are, that is, as rightful conditions, through which their citizens rule themselves. The federation must therefore be nonbinding with respect to enforcement.

We saw in Chapter 2 that in the individual case, exiting the state of nature and entering a rightful condition replaces force with right by providing a public standpoint from within which there must always be a way of answering every question about how things stand between private persons. Institutions for making and applying law are empowered to formulate and apply general rules, including rules about who gets to decide about what question, and further procedural rules about how things stand vertically between the legal order and those who are subject to its authority. That provision of closure must itself be closed with respect to outside claimants to authority, including other nations that claim authority either with respect to private claims or with respect to how things stand between the legal order

[47] 8:367.
[48] 8:356.

and private claimants. We also saw that this structure then introduces a new form of horizontal relation between nations, with respect to which the same questions of independence recur. Therefore, just as individual human beings must leave the state of nature, so, too, must nations exit the state of nature in which they find themselves, which is a "non-rightful condition." As in the individual case, entry into a public rightful condition introduces "no further or other duties of human beings among themselves than can be conceived"[49] in a state of nature. An international legal order replaces the private-legal concept of "an antagonism in accordance with outer freedom by which each can preserve what belongs to it, but not a way of acquiring,"[50] with the "rational idea of a peaceful, even if not friendly, thoroughgoing community of all nations on the earth,"[51] making it possible for disputes to be decided "in a civil way, as if by a lawsuit, rather than in a barbaric way."[52]

In the case of individual human beings, the distinction between private and public judgment requires centralized enforcement; without it, there can be nothing more than a plurality of different standpoints, each contending for the status of properly public authority. The question of whether to limit your own behavior in light of shared norms must be, in the absence of the assurance that others will participate in those same shared norms, merely strategic. Put more starkly, in the individual case, norms are only shared in the relevant sense if people can have assurance with respect to the conduct of others. The only thing that could establish that distinction in the individual case is sufficient assurance that the collective will is both "common and powerful."[53] That need generates the authorization for individual human beings in a state of nature to force each other into a rightful condition: that is the only way in which they can render their interactions rightful. In the international case, by contrast, the distinction between public and private judgment as between nations already applies, because each nation has its own public officials, charged with acting in a public capacity on behalf of the inhabitants of that nation rather than for private purposes. Their voluntary participation in international legal institutions is sufficient to create a unique international standpoint, one that is public as between the participants.

[49] 6:306.
[50] 6:347.
[51] 6:352.
[52] 6:351.
[53] 6:256.

Kant's claim is not that any nation can be confident that other nations will not violate this standpoint or view it strategically. Instead, the crucial point is that the distinction between the public standpoint and the (in comparative terms, that is, as against each other nation) private standpoint of each nation is already established by the creation of common institutions even without a single enforcer. Nations have outgrown the need for coercion because the distinction between public and private can be established through voluntary agreement between public legal orders in a way that it could not be established through voluntary agreement between private persons.

The absence of centralized enforcement in the right of nations does not sever the connection between right and coercion as reciprocal limits on each other that Kant articulates in the introduction to the *Doctrine of Right*.[54] That reciprocal relation does not entail that requirements of right must always be subject to coercive enforcement; it entails the importantly different claim that all uses of force must be subject to right. The only way to bring force under right is to enter a legal condition. In the case of the right of the state, force can be used to bring about such a condition, because there can be no law governing the initial creation of a public authority; it must be an extralegal act; it would be impossible to ever leave a state of nature if the unilateral force used to do so required institutional authorization. But Kant's conclusion that "the subject must also be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another's to enter along with him into a civil constitution"[55] applies only to entry into a civil condition. Like his insistence that it does not matter "[w]hether a state began with an actual contract of submission (*pactum subiectionis civilis*) as a fact, or whether power came first and law arrived only afterwards, or even whether they should have followed in this order,"[56] the point is that, until force is brought under law, all force can only be unilateral, and so talk of whether it is publicly justified can have no answer. A state is required as the precondition of "coercion through public law."[57]

States, which already create the distinction between force and law, and with it a public standpoint, can act from that standpoint and enter into public rather than private arrangements with each other. As such, the creation of a league of states does not need to be an extralegal act. Therefore, the use

[54] 6:232.
[55] 6:256.
[56] 6:339.
[57] 6:312.

of force to create it cannot be authorized prospectively. The wrongfulness of using force to create global institutions does not entail that the legitimacy of global institutions depends on them having come about in the right way; if institutions that constitute a global public standpoint exist as a result of war, the alternative to war that they present is nonetheless binding.

Although an international legal order creates no new duties between nations, nations are, at the same time, subject to it. As we saw in Chapter 2, *ius cogens* norms limit the arrangements states can make by treaty; *erga omnes* norms entitle all states to demand conformity with the basic structure of the international legal order, so that they do not act in ways inconsistent with their status as rightful conditions. A state cannot make laws or treaties that would violate its status as a rightful condition. The international legal order therefore treats the basic norms governing the internal operation of states, including human rights norms, as *ius cogens*, from which no state may willingly derogate, and so, indirectly, become part of each nation's own legal order and operate juridically as a limitation on its lawmaking power. We saw in Chapter 2 that the most prominent *ius cogens* norms figure as restrictions on treaty-making power and specify the minimal requirements of a rightful condition, such as the prohibition of slavery and genocide; others go to the minimal conditions of political independence and territorial integrity, such as the prohibition of aggression. Still others prohibit a nation from contracting out of its fundamental duties to its citizens, such as providing consular services.[58] States necessarily lack the legal power to exempt themselves from these norms because membership in the international order is mandatory.[59]

## V. The Right of Nations: Upholding International Norms

The Kantian argument for a noncoercive federation of states raises a question about the difference between an international order in which participation is voluntary and a mere moral admonition to behave in certain ways. The

[58] In his classic discussion, Verdross also includes the protection of citizens while they are abroad. Alfred von Verdross, "Forbidden Treaties in International Law: Comments on Professor Garner's Report on 'The Law of Treaties,'" *American Journal of International Law* 31(4) (October 1937), 571–577.

[59] Basic human rights norms are also said to be *ius cogens*. They are aspects of the idea of the original contract, and so already regulative for states. See Ariel Zylberman, "Why Human Rights? Because of *You*," *The Journal of Political Philosophy* 24(3) (2016), 321–343.

difference is fundamentally juridical: with an international order in place, there is a shared mechanism for providing a determinate answer to the question of who is entitled to impose binding resolutions on disputes. The existence of such institutions and the distinctive perspective they can provide thus provides closure, even though nations cannot be compelled into membership in them or acceptance of their judgments. In order to provide closure, the relevant institutions charged with a certain class of question must be unique. International legal institutions and legal norms exist through the custom of nations—international customary law—not because the law of nations is voluntary in Wolff's sense, or because nations could have agreed to any set of rules whatsoever. Instead, the mandatory rules are given by each nation's right to political independence and territorial integrity. Like the broadly analogous parts of interpersonal morality, they are defective unless given effect through positive, that is, institutional, law, which provides a determinate specification of who is charged with answering particular questions and on what grounds. Such requirements need to be realized through functioning institutions—an international body must be able to convene its courts, and its offices must be filled in accordance with its procedures, and its officials must act in accordance with their mandates, so they can provide closure with respect to particular disputes between nations, and so bring them under law rather than the right of the stronger.

This lack of compulsion is less puzzling than it might appear. Leaving the state of nature requires bringing all uses of force under law, by subjecting all of those uses to public legal oversight, so that force is only used on behalf of the citizens considered as a collective body. Implementing this idea requires an executive power, including police officers, prosecutors, jailers, and bailiffs. All of these public officials are subject to law, and, in a properly functioning state, they will be subject to coercion if they use force beyond that authorized by law. Any such oversight, however, will be limited by the fact that the sense in which an enforcer is subject to law cannot be exhausted by it being subject to still further coercion. Thus, as Kant puts it, "the executive power of the supreme ruler (*summi rectoris*) is irresistible."[60] He goes on to draw the unavoidable implication: public legal enforcement is always "an act of the executive authority, which has the supreme capacity to exercise coercion in conformity with the law," so that it "would be self-contradictory for him to be subject to coercion."[61] There must therefore be,

[60] 6:316.
[61] 6:317.

within the system, an office that is charged with using force that is subject to law—empowered to "exercise coercion in conformity with the law," but that is not itself subject to force.

The opposite claim—that law must always be subject to enforcement—would relate force and law in the wrong way. Your right against arbitrary force by the state depends on its agents being subject to law, not on the existence of some meta-enforcer charged with using force against any enforcer who does not act in conformity with law; that meta-enforcer would have to be subject to a still higher level of enforcement. Kant's claim is not that public officials cannot be subject to oversight, including enforcement; there can be multiple levels of oversight and overlapping powers of enforcement. The supremacy of law requires that force be brought under law; whatever level of enforcement is final answers to the law, rather than to some other, more final enforcer. That is the sense in which the three "authorities within the state," legislative, executive, and judicial, are both coordinate and subordinate, because none can rightfully usurp the other's role. Neither the legislature nor the judiciary can directly coerce the executive; the separation of the legislature from the executive, and of both from the judiciary, in a republican government leaves the executive to enforce law or the verdict of a court. Conversely, the legislature cannot directly use force against the executive. The legislature and the judiciary do not have their own enforcers; the executive branch is the enforcer of both legislation and the judgment of a court.

In the international case, the absence of the unitary enforcement mechanism leaves enforcement in the hands of states. This does not show that force has not been brought under law, or that it is not subject to duties of right but only of virtue, any more than the fact that at some point in a domestic legal order there will be public officials whom no one is authorized to coerce shows that it is only subject to duties of virtue.

The league of states as Kant conceives it thus shares the feature with the contemporary international legal order that leads many to characterize it as having "weak" institutions: it lacks any form of centralized enforcement mechanism. When the permanent International Court of Justice addresses a question, or the World Trade Organization resolves a trade dispute, neither organization can send bailiffs to ensure compliance. Instead, they depend upon the parties. As we saw in Chapter 3, both the just war and regular war traditions understand war as a mode of enforcement: just war writers see it as an instance of policing or punishment with the nation with just cause acting as prosecutor, judge, and executioner of the verdict; regular war writers see

it as a procedure for dispute resolution which already includes its own execution. We also saw that Kant repudiates both accounts on the ground that there can be no mode of dispute resolution or enforcement not structured by the right to be beyond reproach.

The absence of centralized enforcement mechanisms means that there are some claims of right which, according to Kant, are necessarily enforceable, that, nonetheless, nobody is in a position to enforce. The situation is more complicated, however. No person or institution is entitled to compel officials to engage in enforcement, but it does not follow either that international law is a matter of goodwill on the part of nations,[62] or that the only form of enforcement is unilateral self-help. Suppose, for example, that one nation seizes territory from another and refuses to accept the adverse decision of an international tribunal. Other nations would be entitled to use defensive force against it. If it simply refused the jurisdiction of the tribunal, declaring itself an outlaw in such a situation, other nations could act together to defend the international order by using force against it, because such a state would be

> an enemy whose publicly expressed will (whether by word or deed) reveals a maxim which, if it were made a universal rule, any condition of peace among nations would be impossible, and, instead, a state of nature would be perpetuated. . . . Since this can be assumed to be a matter of concern to all nations whose freedom is threatened by it, they are called upon to unite against such misconduct in order to deprive the state of its power to do it.[63]

Although nations are "called upon to unite against such misconduct," no state or institution is entitled to *compel* any other nation to heed such a call.

## VI. The Right of Nations: Alternatives to War as Enforcement

Enforcement mechanisms must repudiate war, leaving only the possibility of economic pressure on wrongdoers. Any such exertion of economic pressure

[62] "There is no solution here to the problems of common interpretation and assurance to settle disputes over territory, immigration, asylum, international trade and the like. To say that, because it is internally rightful, a state is obliged to follow moral principle externally or internationally is like saying that a moral person is obliged to act rightfully toward other persons. But in the state of nature among individuals Kant rejects this idea." Rostbøll, *supra* note 40, at 257.

[63] 6:349.

must be a matter of public international law, rather than of the private choice of particular nations. In an important recent book, Oona Hathaway and Scott Shapiro have argued that the post-1928 international legal order has replaced the Grotian idea that war is the enforcement procedure for international law with what they call "outcasting," in which wrongdoers, including those who use unauthorized force, are sanctioned by other states that refuse to engage in various forms of trade with them.[64] Hathaway and Shapiro trace the significance of this mode of enforcement to the Kellogg-Briand Pact, under which nonbelligerent states no longer have a duty of neutrality. Hathaway and Shapiro note that the use of economic sanctions has, in recent years, become increasingly fine-grained, targeting not only trade with an entire nation but also, more significantly, with particular political leaders and the organizations that they control.

Hathaway and Shapiro compare outcasting to forms of law enforcement in societies that lacked a strong centralized state, including medieval Iceland. Such decentralized enforcement approaches enforcement of right only if four further conditions are satisfied. First, enforcement must be the outcome of omnilateral decision-making; otherwise, it is just more unilateral pressure, with economic and political might replacing military might. That is, outcasting, which is carried out by other nations rather than a unitary global enforcer, only counts as law enforcement if it acts on the judgments of a shared standpoint, rather than the unilateral judgment of the particular nation carrying it out. Otherwise, it is force without law. The second requirement also reflects the requirement of bringing force under law: it must be used to enforce right, rather than, for example, to put personal pressure on officials of international institutions in order to influence the way in which they do their jobs.

Hathaway and Shapiro say less about the third and fourth features of outcasting as a mode of enforcement: third, that it requires a background of a rules-based international trade regime in which the imposition of sanctions is exceptional rather than just an ordinary instrument of national policy. If sanctions are to replace war as an enforcement mechanism, they cannot be used as a bargaining tool in trade negotiations (even if countervailing duties can be used as a remedy in trade disputes). If refusal to trade in conformity with the background rules of an international order is an ordinary

[64] Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon and Schuster, 2017).

instrument of national policy, it ceases to be a tool for the enforcement of international right. It becomes instead a tool through which might—in this instance trade might rather than military might—overwhelms right. "Trade wars" are better than military wars because they do not hand everything over to savage violence; they lack a distinctive feature of actual wars, that is, they are not fully self-executing. In war, force determines the outcome; in a conflict over trade, economic power allows the stronger party to extract concessions. Such uses of pressure interfere in negotiation without displacing it entirely. They remain objectionable because their outcome reflects strength rather than the merits of their claim. Only in a rules-based international trade regime can the relative bargaining position of states be reconciled with the idea of freedom under law.[65] A system in which trade is not generally rules-based is one in which interactions are not all subject to law, because in order to have a legal system, its enforcement mechanism must be different from anything that can be done entirely at the prerogative of any individual party to it.

Fourth, if outcasting holds out the possibility of subjecting disputes to law rather than force, the system remains ultimately decentralized; a nation concerned with providing a rightful condition to its own inhabitants might decline to participate in sanctions against a powerful neighbor. Taken together, the lack of a unitary enforcement mechanism and perils of institutional corruption entail, unsurprisingly, that the international legal order will inevitably be defective in relation to its own ideal principle. In this case there are two such limitations, one specific to sanctions, and the other more general. The specific difficulty is that sanctions can either be indiscriminate or precisely targeted, neither of which is fully adequate to the idea of enforcing the right of nations. Nor is a position between those extremes any more adequate. If sanctions are indiscriminate, they bring people into a conflict who

[65] Characterizing international trade as subject to law on a Kantian view may seem to be at odds with Kant's claim that China behaved prudently in barring foreign traders, and Japan in allowing access only to the Dutch. These are examples of a prudent response to colonialism: they occur in the middle of a discussion of the inhospitable behavior of "civilized, especially commercial states," who have claimed much more than a right to visit, and not only use war as an instrument of national policy but as the primary instrument of interaction. The entitlement to refuse to trade with those who have shown themselves to be dangerous and warlike is not the same as a general prerogative to refuse to trade whenever there is some advantage to be expected from doing so. 8:359. I am grateful to Peter Niesen, "Cosmopolitan Right: From Grotius to Ripstein to Kant," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021) for correcting my earlier misconceptions about this point. As I explain in my reply in the same volume, I would not put this point in terms of the contrast he introduced in Peter Niesen, "What Kant Would Have Said in the Refugee Crisis," *Danish Yearbook of Philosophy* 50(1) (2017), 83–106, between a provisional form of cosmopolitan right, awaiting final, conclusive, or peremptory form when global institutions are properly developed.

are not part of it, in the way that sieges of cities did in earlier centuries. Many contemporary critics of the use of sanctions to enforce international law emphasize that indiscriminate sanctions are often ineffective or even counterproductive and hurt the opponents of the oppressive regimes at which they are directed. The Kantian objection is different: indiscriminate sanctions, like indiscriminate weapons, bring people into a conflict who are not themselves a part of it, and so would be objectionable even if they were effective in leading an oppressive government to change its policies in response to mass protests against it. If they are narrowly directed at those responsible for international aggression or other wrongdoing, they avoid that problem, but they are still not discriminate in the way in which the use of force in war is supposed to be. Instead, they are tied to some idea of responsibility, and so they potentially have a punitive dimension, something that has no proper place in relations between nations. The only solution to this problem is international multilateral authorization.

The more general problem for a decentralized system of sanctions accompanies any form of enforcement: some nations may be powerful enough that they will believe that they can act with impunity, either by openly violating international law or by imposing indiscriminate sanctions on other states, in order to achieve international goals or satisfy domestic audiences. Sometimes they will be correct in their assessment. This is an instance of the difficulty of any enforcement mechanism: its efficacy is empirical, and so there can be no guarantee that those subject to it will never suppose themselves to be powerful or devious enough to ignore it. If there were a league of states that had its own army—a role briefly contemplated for the United Nations' "blue helmets"—its efficacy would be limited by its own strength, which would turn in part on the willingness of member states to bear the costs of war, both financial and diplomatic, both of which depend in part on the aggressor's military and economic strength. That is, once again, the fundamental feature of enforcement: it is ultimately a matter of might, even when it is disciplined by right. International institutions make right available, and so make it possible for relations between nations to be governed by law rather than force, even if they cannot guarantee their own efficacy.

## VII. Cosmopolitan Right

The third form of public right can be triangulated as the second conceived as the first, that is, as the right of nations conceived as the right of the state. The same point can be put in the more contemporary vocabulary in which relations between individuals are thought of as horizontal, and those between a state and its members as vertical. On this view, the right of the state is vertical, the right of nations horizontal, and cosmopolitan right would then be a horizontal relation between nation-states conceived as the vertical relation between a state and those who are not members of it but nonetheless subject to it.

In introducing cosmopolitan right in *Toward Perpetual Peace*, Kant characterizes it in terms of the situation of individual human beings, as "the right of possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely but must finally put up with being near one another; but originally no one had more right than another to be on a place on the earth."[66] In the *Doctrine of Right*, the initial focus is not on individual common possession of the earth's surface, but rather on the fact that "all nations on the earth can come into relations affecting one another" because "nature has enclosed them altogether within determinate limits (by the spherical shape of the place they live in, a *globus terraqueus*)." Kant then immediately shifts back to individuals, speaking of "possession of the land, on which an inhabitant of the earth can live."[67]

Individual possession of the earth's habitable surface is disjunctive in Kant's technical sense of that term, that is, the mutual exclusion that forms the logical analog of the category of community in *Critique of Pure Reason*.[68] Applied to the case of the earth's surface, disjunctive possession in common entails that each of us is entitled to be wherever nature or chance has placed us, that is, wherever another person is not. It is the spatial instantiation of the right of each of us to be independent of each of the others, and also of the right of each of us to be *sui iuris* (to not require another person's leave to be where we are) and of the right to be beyond reproach, that is, to have our

[66] 8:358.
[67] 6:352.
[68] The category of disjunction is introduced in the table of judgments, *Critique of Pure Reason*, A70/B95; the category of community is shown to occupy the same place in the table of categories at A80/B106.

occupation of space not be a wrongful act. That is why you do no wrong by being wherever nature or chance happens to have placed you.

This individual possession in common is not common ownership. It is merely disjunctive possession—your right as a person to be wherever nature or chance has placed you, provided that no one else is there. Kant explicitly distinguishes it from a Grotian community of property. Such a community would require that the group already exist as a group in the relevant sense, and it would need to have some kind of authority over the individuals who comprise it. The starting point for right is the assumption that every human being is entitled to be independent of the determining choice of every other. This relational structure is a system of negative authority: you or I are not in charge of each other. Nor is any group of individuals in charge of both of us. Instead, a public legal order must be established in order to secure everyone's rights.

In addition to this individual disjunctive possession, Kant also thinks that states are in disjunctive possession of the earth's habitable surface. This is, as Kant remarks, a matter of all nations standing "originally in a community of land, though not of rightful community of possession (*communio*) and so of use of it, or of property in it; instead, they stand in the community of possible physical interaction (*commercium*)."[69] No nation does another wrong by exercising jurisdiction over its own territory. Although the specific contours of borders between nations will inevitably be the product of past wars and other wrongdoing, if the right of nations has concluded a peace, none does any wrong by occupying the region of the earth's surface where it exercises jurisdiction. Nations possess the earth disjunctively because each one is entitled to be wherever others are not.

Taken together, these two forms of disjunctive common possession generate the problem to which cosmopolitan right is the solution. Nations, conceived as legal orders, that is, as systems of public law exercising jurisdiction in particular locations, are by their nature immovable.[70] Human beings, by contrast, are movable. If individual human beings do no wrong by being wherever nature or chance has placed them, then the possibility of someone who is a member of one legal order finding himself or herself on the territory of another legal order raises the problem of cosmopolitan right.

[69] 6:352.

[70] I do not mean to deny that a ship flying the flag of a nation can go to various different points on the high seas; the point is rather that the right of nations conceives of each nation as a rightful condition on its own territory, the *terra* part of the *globus terraqueus*.

Suppose that you are visiting a state of which you are not a member. On Kant's account, all private claims are secured through the existence of a public legal order. More than that, they are secured through the law of the public legal order in which they are created; property can be conceived in a state of nature, but people only have property rights in things in a civil condition. Yet ownership rights transcend the legal order that guarantees them: the goods that you carry with you—goods to which you have a right because you own them, which requires the existence of the legal order of which you are a member—remain yours when you travel. So, too, do your contractual rights remain yours, as, in addition, do your rights to relations of status—with non-trivial exceptions, your marriage is still valid when you are in another nation, even though, according to Kant, marriage right only becomes peremptory rather than merely provisional as a result of the spouses being in a rightful condition. The first thing that cosmopolitan right must do—analytically first, if not morally—is make it possible for private rights to travel. A thief wrongs you by stealing your coat in another country, your debtors must still pay you, your marriage remains valid, and you cannot be arbitrarily separated from your children or wards.

The fact that private rights can travel does not, however, entail that you get to carry your own legal order with you wherever you go. Through the middle of the nineteenth century, European colonial powers imposed what they called the law of "consular jurisdiction" on their colonies, laws which entitled European travelers to be subject to their own legal order and their own courts while they were traveling to regions of the earth that their home countries regarded as uncivilized.[71] The difficulty with this model is that it secures the rights of individual travelers by undermining the ability of the places they visited to realize the principle of freedom under law for their own inhabitants, because it effectively permits the traveler, by traveling, to export his or her own system of public law into the host state. As we saw in Chapter 8, notorious cases came up in which, for example, visitors from slave-owning jurisdictions sought to bring their slaves with them to those that had abolished slavery. Cosmopolitan right requires a way in which one person can travel to another region of the earth without losing private

[71] Paweł Czubik and Piotr Szwedo, "Consular Jurisdiction," *Max Planck Encyclopedia of International Law*, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e914.

rights but also without exporting his or her own legal order as a system of public law.[72]

That is not all: because public law is the only way in which private rights can be secured, it is also the only way in which private rights can cross borders. The bindingness of portable private rights requires that they be brought under a public procedure, a procedure that is public in the relevant way in relation to the parties. Not only can you not import your own system of public law when you travel to another nation, but also, however exactly that nation's legal order deals with your proprietary, contractual, and status claims, it must do so in a way that is public in relation to you with respect to the particular interpersonal transactions that are the subject matter of private right. The host country's enforcement of its law is public in relation to the visitor if it is mediated through the visitor's home country's legal order. That mediation must include recognition of claims originating in the home country and bringing them under a system that secures the rights of everyone, including both the visitor and the person with whom the visitor is interacting. This does not mean that the law of the visitor's country is part of the host country's law, only that the host country's law must apply the law of the visitor's country with respect to private law claims so long as they do not violate the host country's public law.

The possibility of law being public in relation to the visitor requires a distinctive form of right that is neither the right of nations nor the right of the state. We have a model for what it would be for the visitor to travel exclusively under the right of nations: as we saw in Chapter 6, diplomats are exempt from the public law of the country that receives them, because they are representatives of the country that sends them. As such, they are not only not subject to the receiving country's system of public law: they are fully immune to it. Diplomats park illegally with impunity not because doing so is important to the ability of one nation to conduct its business in another; they are able to do so because a nation conducting its business in another must not be subject to the other nation's public law in any way whatsoever.[73]

Cosmopolitan right is nothing like diplomatic immunity; a diplomat is conceived as an exclusively public representative under the law of nations.

[72] On the European Union as a partial realization of cosmopolitanism, see "Bertjan Wolthuis and Luigi Corrias, "Europe's Cosmopolitan Constitution. A Kantian Reading of the EU Internal Market and the Refugee Crisis," in Ester Herlin-Karnell and Enzo Rossi (eds.), *The Public Uses of Coercion and Force: From Constitutionalism to War* (Oxford: Oxford University Press, 2021).

[73] Although they are not subject to public law, they are subject to private law and to defensive force if attacking someone.

By contrast, cosmopolitan right requires that the visitor be conceived to be already a member of some rightful condition, and so as a bearer of rights, but not as the public legal representative of that rightful condition. The visitor must be secure in his or her private rights, but not exempt from the public law of the visited state.

The dual requirements that private rights must follow the traveler, but public law must not, entails that cosmopolitan right is limited to the right to visit. As visitor, you get to propose terms to your intended host, which the host is free to accept, but can only accept on terms consistent with your status as a right holder and the status of the nation you visit as a public authority, in relation to which you, as visitor, are a passive citizen, whose rights are secured consistently with your freedom and equality as a human being.[74] The right to visit carries with it several structuring features, which reflect each human being's standing as a free and equal person.[75] The structuring features are, not coincidently, correlates of the structuring features of what Kant, in the introduction to the *Doctrine of Right*, calls your "innate right of humanity" in your own person. As a visitor, you must continue to be *sui iuris*, that is, your own master, not in the sense of self-mastery but rather in the sense of having no other master to whom you are subject. To be *sui iuris* contrasts with being *alieni iuris*, that is, subject to another in the way in which a child needs someone else as his or her legal representative, not merely as a matter of fact (in the way in which someone might require a legal representative if in a coma or while traveling and unable to appear in proceedings) but as a matter of right. As a visitor, you are entitled to make a claim in your own name for any wrongs that are personal to you. As we saw in Chapter 2, the idea that every human being is *sui iuris* is the most fundamental feature of legal personality.

The right to visit also includes what Kant calls "the right to be beyond reproach," that is, the right that, prior to any affirmative act, one is presumed to have done no wrong. Merely showing up on another nation's territory to propose interactions is not, as such, wrongful. The visitor must be free of violence because the only thing that could justify violence in a legal order would be some wrong committed by the person against whom the violence is visited. Some visitors may indeed be up to no good, but cosmopolitan right requires that wrongdoing be established. In talking about being free

[74] 6:315.
[75] 6:314.

of violence, Kant is not merely talking about being free of individual vigilante violence but also, more importantly, being free of legally structured violence, either directly in the form of official policies of punishing visitors or indirectly in the form of declining to prosecute cases of private violence. The right to be beyond reproach goes further than the prohibition of both private and official violence; it also requires that before any proceeding against the visitor, the burden lies with those who seek to proceed to establish that the visitor has done wrong, and so to have a properly structured legal proceeding. That is the sense in which the right to be beyond reproach and the status as *sui iuris* are not, as Kant remarks, "really distinct from" the principle of innate freedom, "as if they were members of the division of some higher concept of a right."[76] Instead, they are just the same idea, implications of the fact that no person can bind another in a way that the other cannot bind the first, which entails that no person or official's private judgment is sufficient to subject you to force. Instead, all uses of force must be authorized by a public procedure, a procedure that is public in relation to you; anything else would be nothing more than an instance of private violence.

Cosmopolitan right also includes the right to communicate, which is yet another implication of innate right, the authorization "to do to others anything that does not in itself diminish what is theirs . . . such things as merely communicating his thoughts to them." That it includes this is, once again, not a separate authorization but one that is already contained in the right to be beyond reproach. Saying what you think and proposing terms of interaction to others with whom you seek to interact is not a wrong against those others, although it remains up to them to decide for themselves whether to accept your proposal. This is yet another instance of Cicero's distinction between the two ways in which human beings might interact, through discussion or through force. Proposing nonviolent terms to others is not wrongful.

## VIII. The Three Forms as Mutually Supporting

We are now in a position to understand why Kant concludes that the realization of the principle of freedom under law in each of the three forms of public right depends upon its realization in the others.

[76] 6:237.

*The Right of the State and the Right of Nations*. The case of the relation between the right of the state and the right of nations is straightforward: the right of nations governs how things stand between separate nations. Each is entitled to be independent of all of the others—not subject to the determining choice of another. The right of nations further requires institutionalization in the form of a federation of independent nations, which voluntarily subject themselves to the authority of the federation so that any disputes that arise between them can be resolved peacefully and in accordance with laws that those nations have collectively and institutionally imposed upon themselves, as Kant puts it "as if by a lawsuit."[77] Nations cannot compel each other to enter into this condition, but the possibility of bringing all interactions under law requires that they do so voluntarily.

As we saw in Chapter 2, legal order requires that properly public institutions make, apply, and enforce law in order to provide closure. The principle of closure must itself be closed; it cannot be subject to the choice of another nation. If one nation unilaterally exports its public law into another nation, as is the case with colonialism and the idea of a right of conquest, then each nation's provision of closure on its own territory is defective because entirely contingent on the choice—the constellation of forces and ends—of other nations. The principle of freedom under law may be stable for an extended period within a particular nation because its neighbors either lack the inclination or the means to export their system of public law into it. Without the right of nations, each nation's own framework of freedom under law is not secure because it remains vulnerable. The transition from the right of the state to the right of nations is driven by the structure and rationale of the right of the state.

The same coordination between the right of the state of the right of nations operates in the opposite direction: the structure of an international legal order is always vulnerable if particular states are not internally governed by the principle of freedom under law. The warlike nature of systems of organized violence that have fallen into barbarism—force with neither freedom nor law[78]—is obvious enough. The organizers of barbaric violence only accept limits of prudence on their pursuit of their private purposes and would regard any claims of the right of nations as parameters around which to plan rather than as constraints on their conduct. Nations that are despotic,

[77] 6:351.
[78] 7:330.

although not barbaric, also render the possibility of peaceful interaction with other nations vulnerable, because they act for the private purposes of those who exercise power. As such, whether they acknowledge the claims of other nations will be a matter of political prudence, a realpolitik calculation of the benefits and costs. That is, a despotic state is ruled by the character Kant identified in the appendix to *Perpetual Peace* as the "political moralist,"[79] who will treat morality and legality as instruments. Kant's claim in the first Definitive Article of Perpetual Peace is not that republics (let alone democracies) do not go to war;[80] he makes the more plausible claim that lawful states can be law-abiding in a way that despotic ones cannot be, because the latter are pulled in two directions. On the one hand, despotic states are ruled by law, and so they are pulled toward generality in both their procedures and their external conduct; on the other hand, their despotism consists in the fact that their deployment of law is in support of private purposes, and so is always potentially subject to exceptions.

*Cosmopolitan Right and the Right of Nations*. Given the conceptions of cosmopolitan right to which Kant was responding, it is not surprising that the main focus of his attention is the violation of cosmopolitan right in one direction rather than the other. In *Toward Perpetual Peace*, Kant writes that "cosmopolitan right must be limited to the right to visit." A more expansive cosmopolitan right, as proposed by the Salamanca scholastics, would be inconsistent with both the right of the state and the right of nations. A right that included the scholastics' "right to settle" would allow visitors to bring their own system of public law to the distant lands that they visit. This is the model of cosmopolitan right that Vitoria and Suárez used to justify the Spanish conquest of the Americas and, in a slightly different form, that John Stuart Mill used to justify British rule in India. It is inconsistent with the right of nations because it conceives the subject nation as just that, subject to the choice of the colonizing nation. It is also inconsistent with the right of the state, not only of the right of the state that is visited but also with the principle of freedom under law in the colonial power.

As we saw in Chapter 8, Anthony Pagden has identified two "anxieties of empire," that is, two ways in which imperial powers had internal difficulties

[79] 8:372.

[80] As argued most prominently by Michael Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy & Public Affairs* 12(3) (Summer 1983), 205–235, and "Kant, Liberal Legacies, and Foreign Affairs, Part 2," *Philosophy & Public Affairs* 12(4) (Autumn 1983), 323–353. For a contrasting reading, see also Georg Cavallar, "Kantian Perspectives on Democratic Peace: Alternatives to Doyle," *Review of International Studies* 27(2) (April 2001), 229–248.

managing their relations with those over whom they exercised power.[81] The first anxiety was that other colonial powers would treat them as they treated their colonies, and so not recognize their sovereignty or the claims of their public law. This is an anxiety at the level of the right of nations. Second, they worried about the way in which their colonies would come back to haunt them, because of the incoherence of the relation between Metropole and colony. It is not an accident that a colonial power's attempts to uphold the principle of legality internally is always fraught; the problem is implicit in the colonial power's claim of a right to settle rather than merely a right to visit. If the right to export one's legal order is available to the colonizing power, it is inevitably available against it, and others can forcibly impose their law on it. A more expansive conception of cosmopolitan right is therefore inconsistent with the principle of freedom under law for both the right of the state and the right of nations.

*Cosmopolitan Right and the Right of the State*. The wrongs of European colonialism show how the idea of cosmopolitan right that allows for more than the right to visit is inconsistent with the principle of freedom under law; from the opposite direction, the prohibition of any right to visit is also inconsistent with it. In a world without the right to visit, there would be no such thing as cosmopolitan right, but rather just a plurality of nations that did not interact with each other. For this to be a juridical rather than a merely factual alternative to cosmopolitan right, it would have to be a situation in which there was not even a right to visit and propose terms, that is, a situation in which the visitor could be treated with hostility, as a wrongdoer as such, and subject to violence, merely for showing up. The juridical problem with such a possibility does not depend on assuming that nations would always be hostile; cosmopolitan right is a matter of right rather than mere philanthropy[82] precisely because it must not be an open question for the visited state whether to treat the visitor with hostility.

We have already seen how treating a visitor with hostility is inconsistent with each human being's right of humanity in their own person; my focus for now is on the way in which it fundamentally undermines the idea of a right of nations and even the right of the state. A state that treated a visitor as a wrongdoer simply for showing up would be treating a human being as subject to

[81] See Anthony Pagden, "Empire and Its Anxieties," *The American Historical Review* 117(1) (February 2012), 141–148; see his more general discussion in *The Burdens of Empire: 1539 to the Present* (Cambridge: Cambridge University Press, 2015).

[82] 6:352.

no law, and in so doing treating its own relation to that human being not as a legal order dealing with a member of another legal order but rather as a purely private transaction in a state of nature. In so doing, it would be acting contrary to the principle of public right, understood as the right of the state. It would thus be a form of barbarism, force with neither freedom nor law, since the state that purported to do so would exercise force without law and would do so even if it used the vocabulary of law and order to explain its concern with deterring unwanted migrants. The minimal requirement of legality—the recognition of the visitor's right to be beyond reproach—must structure every legal interaction; a legal order cannot treat human beings that arrive on its territory as if they are in a state of nature. A condition of barbarism—even partial barbarism with respect to foreigners—is inconsistent with the right of the state for the reasons that it always is, that is, that it entirely repudiates the principle of freedom under law, and so makes interactions between individual human beings subject to force alone.

Understood in this way, the unity of the three forms of public law is by its nature a mediated unity, that is, the relation between one legal person and any other legal person, whether natural or artificial, is always mediated by law. The right of the state means that relations between you and me are mediated by law; the right of nations means that relations between one nation understood as a moral person and another are always mediated by law; so understood, the principle of cosmopolitan right is the principle that relations between an individual human being and a nation of which that human being is not a member are mediated by law, and in particular mediated by the public legal order of which that individual is a member. Although the authorizations contained in cosmopolitan right are themselves ramifications of the innate right of humanity in one's own person, the relation is nonetheless mediated by both the home and the visited legal orders.

Conversely, as I will explain in more detail below, precisely because the relation of cosmopolitan right is always mediated rather than immediate, cosmopolitan right does not generate an entitlement of everyone in the world to open borders or to membership of the state that they would most like to join. The right of refuge is not a right to be in any specified factual situation; it is a juridical right to be a member of some rightful condition somewhere.

## IX. Cosmopolitan Right: Members of the Global Public and Citizens of the World

In an important recent discussion, Aravind Ganesh has pointed to striking parallels between Kant's conception of cosmopolitan right as the right of hospitality or merely to visit, and the Roman law of innkeepers, which required them to accept all travelers. After quoting a passage from Ulpian recorded in Justinian's *Digest*, "For an innkeeper or liveryman is not regarded as choosing his own traveller and cannot refuse those making a journey; but in a way, the innkeeper does select his permanent residents, since he does not reject them, and so should be answerable for what they do," Ganesh explains,

> Ulpian's distinction between passing travelers, whom the innkeeper cannot refuse, and permanent residents, whom the innkeeper does select, seems to foreshadow Kant's contrast between the "right to visit," which a receiving state cannot refuse, and the "right to be a guest," which requires a "special beneficent pact." Moreover, the innkeeper's inability to refuse travelers seems mirrored in a receiving state's obligation under cosmopolitan right to take in visitors who will be destroyed if turned away.[83]

The parallel that Ganesh identifies reflects the distinctive juridical status that cosmopolitan right gives to every human being as a citizen of the world: just as the right of nations has its domestic analog in the status of every legal order as *sui iuris*, so, too, the rights that individuals enjoy under cosmopolitan right have their analogs in the rights that every human being in a domestic legal order has as a member of the public.

The rights that you have as a member of the public are different in kind from the rights that you have as a private person. Although they are often protected by claims as against other private persons, your entitlement to them is an entitlement to be a full participant in the legal order of which you are a member. As we saw in Chapter 2, private rights are purely horizontal—they relate the power of choice of one human being to that of another, and can be conceived, though not properly realized or protected, in a state of nature, that is, in the absence of public legal institutions. Your rights as a member of the public, by contrast, cannot be conceived in a state of nature. Although many

[83] Aravind Ganesh, "*Wirtbarkeit*: Cosmopolitan Right and Innkeeping," *Legal Theory* 24 (2018), 159–190, at 166.

of the specific actions characterized by those rights—moving from one location to another on a path made out of a particular material, marking a piece of paper in a particular way, describing where you were at such and such a time—might be done in the absence of a public legal order, they do not, and cannot, exist juridically in its absence. You cannot exercise your right to travel on public roads, vote, run for office, or enjoy your right to a fair trial in the absence of public legal institutions.

The paradigmatic instances of the rights of a member of the public include the right to stay in a public inn, the right to be accommodated by a ferry across a river with no bridge, and, most fundamentally, the right to use public roads and buy and sell in a public market. As I have argued elsewhere, the entitlement to use public roads is itself an inherent concomitant of a system in which free persons interact and land is subject to private ownership. The formal structure can be laid out quite simply: if all land is privately owned, then in order for the resident of one plot of land get to any nonadjacent plot of land to interact with its residents, the "traveler" would need the permission of everyone owning land in between those two plots in order to travel. The requirement of seeking such permission is a direct implication of the basic right of property in land, a right which guarantees the proprietor the right to exclude others, that is, to determine who is entitled to use or enter the land. The problem is perfectly general; it does not depend upon the "matter" of different plots of land. Nor does it depend upon the specific purposes of the traveler or of the intervening landowners. If all the plots of land are indistinguishable, except for who happens to be on them, the problem arises in just the same way, because the problem is posed by the fact that land is always a specific location. The problem is general because it is formal: every person faces it because intervening others have discretion over their ability to get to any other plot of land. It is not merely an instance of changing the context in which people find themselves, because it is general and systematic; it is that the owner of every intermediate location has a right to subordinate the traveler's travel to his or her choice.

In the history of Western legal thought there have been two formal models of the solution to this problem. One, explicit in Grotius, is to include a "right of harmless use," entitling each person to use what belongs to another provided that it is not thereby diminished. Grotius's own example is lighting my fire from yours; it does not consume your fire or in any way interfere with it, so I must be permitted to do so.[84] Applied to the case at hand, such a model

[84] Whewell, *supra* note 6, Bk. II, Ch. 1, Para. 11, at 73.

would permit the traveler to cross another's land whenever this could be done without interfering with the owner's use of it. The harmlessness condition makes the permissibility of use depend on the particularities of the owner's use. Indeed, some uses might actually depend on exclusion even though there is no harm to the land itself: perhaps I have no immediate interest in putting up a building the full width of my land but want to leave open the possibility of doing so, and so do not make it available as a path. The more general problem is not that some particular use might face difficulties: instead, it is that Grotius's solution is material and therefore contingent. The problem that it is supposed to solve is formal: the basic form of property in land is the right to determine the purposes for which it will be used. By enforcing property rights, the state makes the permissibility of each person's entry into relations with others subject to the choice of those who own the land between them. The problem is perfectly general and cannot be solved by allowing crossings that do not interfere with the particular purposes of the landowner, because the proposed solution still leaves the traveler subject to the choice of the owners of all intermediate locations.

A second formal model is implicit in Kant's characterization of the state as "supreme proprietor of the land," according to which land ownership proceeds by a principle of "division rather than aggregation."[85] Kant is not saying that the state does not have to recognize private property claims, or that it can redivide them entirely at will. The point is conceptual: the division of land can only be public and so binding on all if it is a formal problem of right. The solution is to protect each person's ownership of land while also guaranteeing each access in purely formal terms: the solution is a system of public rights of way, that is, roads. Every member of the public has a right to pass and repass on public roads, and has that right purely as a member of the public.

A private person can wrongfully interfere with the rights to which members of the public are entitled. One familiar example is putting a pole across the road—a classic example of what in common-law systems is called a "public nuisance." In those jurisdictions, it gives rise to a private action. The type of right enjoyed is not a purely private right, but one enjoyed only as a member of the public.

Drawing on the place of innkeeping in a system of public rights of way, Ganesh points out that by the late Middle Ages, innkeepers were recognized as public servants. The duty to take all comers was then brought further

[85] 6:323.

into focus by that status. The right that a traveler had against an innkeeper was, then, what in Kantian terms must be understood not as a private right (though obviously connected to the traveler's general capacity for rights, which is grounded in the innate right of humanity) but rather as a right that the traveler has as a member of the public.

The same principle makes all nations the guardians of the high seas. Rather than developing the Grotian argument that the high seas are part of the common heritage of mankind, and so a kind of property,[86] Kant frames the seas as a question of cosmopolitan right, in terms of the possibility of *commercium*, that is, interaction. The traditional question of whether the seas can be owned, to which Kant gives a traditional answer in terms of the impossibility of taking possession of them in private right, is not even a question for cosmopolitan right, because nations do not own their territory; they exercise jurisdiction over it. No nation can assert a territorial or jurisdictional claim over the high seas because the power to limit travel on them would enable one nation to determine how another interacted with a third. Like the problem to which roads are the solution, the problem is general, as its solution must be.

The rights under cosmopolitan right are the rights that every human being has as a member of the global public, that is, the right as Kant puts it to participate in a "peaceful, even if not friendly, thoroughgoing community of all nations on the earth . . . has a right to make this attempt without the other being authorized to behave toward it as an enemy because it has made this attempt."[87] Every nation is entitled to determine whether to invite others in. From its general power to exclude follows the converse duty to uphold the thoroughgoing community of nations by not interfering in the ability of other nations or their members to interact with each other. Just as a private landowner in exclusive control of a specific location must contribute to the creation and upkeep of a system of public roads, and refrain from interfering with them, so, too, must the nations of the world do their part to provide the conditions of the right to visit. The rights of a citizen of the world are parallel to those of a member of the public: to participate in the possibility of *commercium*, going from one place to another without fear of violence.

The examples of ferry operators and innkeepers provide illustrations of the way in which the rights of members of the public extend to those providing

[86] Hugo Grotius, *Mare Liberum* (Leiden: Elzevier, 1609), translated by Richard Hakluyt (1916) as *The Free Sea*, with an introduction by David Armitage (Indianapolis: Liberty Fund, 2004), 30 ff.
[87] 6:352.

relevant aspects of the public system of roads. The innkeeper needs to take you in, because when you are traveling, there is someplace you are going, but, when night falls, you have nowhere else to go. So, too, with the ferry operator: having taken up the position of ferry operator, the operator must serve all travelers. Otherwise, the provision of the service would amount to a license to prevent one person from interacting with others, based not on something that the operator owned but rather on the presence of an unfordable river. The duty to carry travelers and their goods applies because of the place of the ferry in the system of public rights of way, not because people are under any general obligation to assist others or to enable them to cross waterways in particular.

So, too, the innkeeper needs to accept guests, not because they need some place to sleep—an obligation that private homeowners do not owe to passing strangers—but because they are travelers and the innkeeper keeps an inn and so invites members of the public, just as such.

Moving from the right of the state to the right of nations, a nation's border officials are, like innkeepers and ferry operators, not only public officials of their own legal order; they are, further, public officials of the global legal order, because they are charged with upholding the five incidents of cosmopolitan right that make it possible to bring *commercium* across borders under law: that both visitor and resident will be secure in what they have; that leaving your home state does not deprive you of your rights to bodily security and movable possessions; that what you bring with you is protected by right; that all of this is accomplished without subordinating the legal order which you visit to your home legal order; and that human beings are free to communicate with each other—to engage in *commercium*, arranging their interactions through words rather than force. Their powers are not merely delegated by the voluntary law of nations for the convenience of mankind; they are inherent in the very possibility of a system governed by the principle of outer freedom limited by law.

## X. Cosmopolitan Right: Stateless Persons

Cosmopolitan right governs how things stand between a legal order and an individual human being who is not a member of it. Cosmopolitan right assumes that everyone is always already a member of some legal order. That assumption is required in order to bring interactions between states and

those who are not their members under public law, relating the visitor to the nation visited thought the visitor's membership in some other legal order. States are under a duty of right to act in conformity with this assumption, even if it is not always true in fact. This is the correlate of the requirement that a visitor arriving in an inhabited region of the earth must seek the permission of its inhabitants to visit, that the visitor must take every precaution to have interactions with those inhabitants governed by discussion rather than force. Just as the principle of freedom under law requires the presumption that the inhabited region of the earth that you visit is always already a legal order, so, too, it requires that any visitor be presumed to always already be a member of some legal order. That is the only way in which the visited state's interactions with the visitor can be public in relation to that visitor; the visitor's private rights are guaranteed by the visitor's home country's system of public law, which is (at least in the ideal case) non-despotic and self-imposed.

Unfortunately, the juridical presumption that everyone is always already a member of some legal order is not always factually true of all visitors; regimes throughout the world frequently not only fail or refuse to protect the rights of their inhabitants but actively violate them. In such circumstances some of those inhabitants flee and seek refuge in other nations. When such refugees flee, fearing for their lives or their other basic rights, they do not visit as members of their home state. There is no legal order that is properly public in relation to these people. Kant does not discuss this situation, though he does speak briefly of those who must be permitted to stay if they would "otherwise perish." Perishing can be read narrowly as in the case of a shipwrecked sailor whose life is in peril if sent back out to sea. The idea that someone cannot be refused entry if they might otherwise perish has broader application. The point is not that the loss of juridical personality is morally equivalent to, or continuous with, indistinguishable from, or even analogous to the loss of life. More significantly, because the principle of freedom under law requires that all human interactions be governed by law, and because the operation of law is by its nature always jurisdictional, if there is a person who has been deprived of citizenship by his or her home country, then whatever other country on whose shores or at whose airport that person safely arrives must interact with the visitor, the refugee, on terms of right. In other cases, the visitor is a member of his or her home legal order. That is not on option for refugees fleeing legal orders that are unwilling or unable to protect their rights; those legal orders are (at least for the refugee) conditions of private violence. The nation where the visitor arrives cannot permit that person to

remain without legal status; its manner of dealing with and processing that person must be public in relation to that person; the only way it can do so is to take that person in. It cannot treat that person as an outlaw, in relation to whom it is in a state of nature.

The receiving state's duty to take in the visitor does not depend on an unmediated claim to safety. It is founded instead on the fact that no claims of right are unmediated; if you are in a state of nature in relation to someone, you must bring that person into a legal order with you, because only then can law replace force. Although visitors to foreign lands cannot take it upon themselves to decide which legal system applies there, the legal order finding refugees at its door must, having made the determination that these persons have no legal order to which they can safely return, treat them as coming under its own legal protection. Otherwise those human beings would be outside the law, a situation that is intolerable from the standpoint of right because inconsistent with the right that power exercised over you be properly public in relation to you, something that is only possible if you are always a member of some legal order, wherever on the earth's surface you find yourself. The refugee's right against refoulement is therefore founded in cosmopolitan right and mediated through its principles. It is a right that every human being has as a member of a global public, as a citizen of the world. Like the rights enjoyed by members of the public within a domestic legal order, it is not conceivable in the absence of public legal institutions; conversely, public institutions are under a duty of right to see to its realization.

That does not mean that everyone who declares themselves to be fleeing for their lives is automatically entitled to citizenship; it means instead that every human being's status as *sui iuris* and concomitant right to be beyond reproach always applies. That person is entitled to a hearing under the presumption of having done no wrong. As such, the refugee is not subject to punishment or detention simply for seeking refuge. Nor is such a person available to be used for the purpose of deterring others. Conversely, precisely because the relation of cosmopolitan right is always mediated rather than immediate, cosmopolitan right does not generate an entitlement of everyone in the world to open borders or to membership of the state that they would most like to join. The right of refuge is not a welfare right; it is a juridical right, the right to be a member of some rightful condition somewhere.

Cosmopolitan right's requirement of bringing all interactions under law leads directly to the prohibition of what have come to be called "legal black

holes," after a widely cited speech[88] by the UK Supreme Court justice, Lord Steyn. Contemporary readers often suppose that the idea of a black hole is borrowed from astrophysics, and the legal extension of it to be metaphorical, but it actually is a legal concept which was adopted by physicists,[89] using the notorious "Black Hole of Calcutta"[90] to explain the way in which there could be something from which there was no possibility of escape. Lord Steyn's use of the concept of a black hole is more specific; he is concerned with situations in which there is no escape for a specific reason: because there is no law. The US detention facility at Guantánamo Bay was his central example; sadly, in the years since he offered his analysis, examples have grown, including the migrant detention centers in Papua New Guinea and in Nauru. (The US naval base at Guantánamo Bay was indeed first used as a migrant detention and processing center in the early 1990s during the first Bush presidency.) In the case of Guantánamo Bay, there is a relevant legal instrument—the 1899 treaty leasing the land to the United States—but it is used to circumscribe a location in which no nation's legal system applies, so that someone is detained and subject to another's say-so with no possible means of contestation.

The problem posed by each of these examples of legal black holes is not merely that something is absent that we think ought to be present. Instead, it is the systematic result of a particular structure of interaction. They are all conditions in which the law of the territory on which they operate does not apply, because they have been leased to a foreign power.[91] Conversely, the foreign power claims that its own law does not apply, because it is outside its territory. That structure further entails that those who are detained have no access to consular services, because consular and other diplomatic relations can only obtain between legal orders, and no specific legal order obtains.[92]

[88] Johann Steyn, the Twenty-Seventh F.A. Mann Lecture: November 25, 2003, published in *The International and Comparative Law Quarterly* 53(1) (January 2004), 1–15. The term was reintroduced in *R v. Secretary of State for Foreign and Commonwealth Affairs*, *ex parte* Abbasi (November 6, 2002, CA), at para. 64. See the discussion in Mark Walters, "The Common Law Constitution and Legal Cosmopolitanism," in David Dyzenhaus (ed.), *The Unity of Public Law* (Oxford: Hart, 2004), and David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

[89] https://www.sciencenews.org/blog/context/50-years-later-its-hard-say-who-named-black-holes.

[90] A prison in which 123 British soldiers died while imprisoned by Bengali forces in 1756.

[91] Article III of the 1903 Treaty between Cuba and the United States, which is incorporated by express reference into the lease agreement, specified that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba . . . the United States shall exercise complete jurisdiction and control."

[92] No doubt these claims that neither nation's law applies are disingenuous, since the nation denies that the procedural protections of its law, particularly the right of *habeas corpus*, applies at the same time as it claims to be entitled to forcibly detain people, put them on trial if it decides to do so, more

The requirement that all interaction be brought under law does not permit the existence of a place in which force against individual detainees is authorized by one nation's public law, in this case the United States, but those against whom it is authorized have no right of *habeas corpus* and can be indefinitely detained without having been found guilty by a court that is public in relation to them. The other examples, the migrant detention centers operated by Australia, are subject to neither the law of the territories on which they are located nor the law of Australia. Once again, this is inconsistent with cosmopolitan right, because the persons detained there are entitled to be members of a rightful condition, subject to a system of public law.

In defense of some of these detention centers, it is sometimes said that people in them are in a condition of relative safety, better off than they would be in the countries from which they have fled. Even if this were to turn out to be true—an assertion about which I will not express my doubts here—it is beside the point, because cosmopolitan right requires juridical status, not mere physical safety. It is not enough to be safe as a result of the particular choices of those who exercise power over you; rightful freedom under law requires that everyone be subject to law rather than force, even if the force is benevolent and beneficial.

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The *Doctrine of Right* concludes with the claim that "morally practical reason pronounces in us an irresistible *veto: there is to be no war*, neither war between you and me in the state of nature or war between us as states."[93] Kant continues, "It can be said that establishing 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."[94] The status of peace as a final end does not turn it into an external goal for which other things might be sacrificed; it makes it the principle that determines the rightfulness of every possible means that might be used. War is wrongful because it is the condition in which might makes right; peace is the condition in which right

generally, claims a right to rule, that is, to exercise control over the conduct of those it has brought onto the territory.

[93] 6:354.

[94] 6:355.

disciplines might. The end of peace thus generates the prohibition on war, and the possibility of peace limits the way in which war can be conducted, in terms of the possibility of a future and lasting peace. A lasting peace is a condition of law, which requires bringing the principle of freedom under law to relations between nations as well as between human beings, and between human beings and nations of which they are not members. As the final end of the doctrine of right, the requirement of a lasting peace commands also that the freedom of everyone everywhere on this globe of earth and water be secured under laws.

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