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RESPONSE TO FIVE CRITICS

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ABSTRACT. In response to our critics, we explain why in spite of the ad bellum breach involved in the first use of force the war agreement is still binding; why the moral symmetry to which War by Agreement subscribes benefits all parties, weak and strong; why contractarianism leaves room the for moral option of not acting within one's rights and refusing to take part in a seemingly unjust war; why contractarianism is superior to rights-consequentialism as a theory of just war; and why contractarianism does not rule out reforms in international law and institutions.

I. INTRODUCTION

We are greatly indebted to Janina Dill and Cecile Fabre for organizing the Oxford symposium that began this discussion on War by Agreement [WBA] and to Arthur Ripstein for organizing a similar symposium in the University of Toronto. The papers presented on those occasions have provided the basis for the present discussion. We thank Janina and Cecile for also serving as guest editors of this issue of Law and Philosophy together with Alec Walen and Patrick Tomlin—to whom we also wish to express our gratitude. Finally, we are very thankful to the commentators for their excellent contributions that gave us a lot of food for thought

As each of the comments raises different arguments against WBA, we decided to deal with them separately. Nonetheless, since there is also a significant overlap between them, we thought it might help to start by mentioning briefly the main lines of criticism against WBA, often articulated in different ways by different commentators:

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1. WBA fails on its owns terms because the ad bellum breach that is necessary for any war to erupt automatically terminates the war contract. The in bello rules are never activated.
2. The in bello moral symmetry to which WBA subscribes works against the just side.
3. By closing the gap between the laws of war and deep morality, WBA wrongfully and dangerously rejects the validity of individual moral obligations.
4. While WBA relies on a contractarian framework, it would do better to ground its claims on consequentialist (probably rights-consequentialist) considerations.
5. By endowing moral validity to the current legal regime, WBA closes the door to much-needed reforms in international law and institutions.

These are challenging points. In what follows, we try to address them.

II. THE LIMITED MORAL SIGNIFICANCE OF CONTRACTUAL RIGHTS: A RESPONSE TO ARTHUR RIPSTEIN

A. Consequentialism and Rights

Is a state's use of force against another state morally impermissible, even when necessary to prevent a serious violation of political rights or to the elimination of serious distributive injustice? Do soldiers have a right to participate in unjust wars? Is civilian immunity mandatory even if civilians are culpable for the unjust war of their country and if killing them is necessary for victory?

Despite the disagreements among them, many revisionists tend to answer these questions in the negative, while both Arthur Ripstein (in *Rules for Wrongdoers)* and we (in WBA) answer in the positive. Yet, the reasons we offer are very different from Ripstein's.[1] According to Ripstein, war is a wrongful means for promoting any end because war decides everything through force; however unjust the status quo ante, it ought not to be changed by force. By contrast, in our view, the positive answer to the above questions is explained by the contractarian justification of the rules that govern the use of force in the international community.

[1] Arthur Ripstein, *Rules for Wrongdoers: Law, Morality, War* (New York, NY: Oxford University Press, 2021).

According to Ripstein's reading of WBA, violating the war agreement is wrong since "everyone does better in a world in which everyone complies with [it]", that is to say, the war agreement is justified in terms of consequences. If so, Ripstein insists, soldiers would get the right to follow the order to go to an unjust war "for free" just as culpable civilians will get the right against their pre-contractually justified killing. He stresses that the contractarian conditions of mutual benefit and fairness make the actual agreement into which states enter on behalf of their citizens redundant.

As we understand it, however, WBA is a rights-based theory. For us, launching non-defensive war is wrongful because it violates the attacked party's contractual right to territorial integrity. Soldiers have a contractual liberty-right to participate in such a war just as culpable civilians have a contractual claim-right against being targeted despite their involvement in an aggressive war. In our view, states generate these rights by the actual acceptance of the mutually beneficial and fair rules that constitute the war agreement. Indeed, as we elaborate in our responses to Eggert and Lang, our rights-based just war theory is very different from the consequentialist theory that Ripstein ascribes to us.

B. Rights, Justification and Transferred Responsibility

WBA likens Unjust Combatants (a technical expression for combatants fighting for the unjust side) to prison guards who deny the freedom of a falsely convicted person, or to executioners who kill a criminal whose crimes do not justify a death penalty. According to Ripstein's reading of our analogy, on our account, "the guard's faithful performance of the role is sufficient to justify acts that fall under it, such that the prisoner is not wronged by being wrongfully incarcerated or even executed." Ripstein rejects this claim, arguing that "even a fully justified institutional structure does not thereby give every official within it a full justification for everything they do." Thus, contra WBA, Ripstein argues that although soldiers can participate in an unjust war with impunity, their involvement is morally impermissible. Admittedly, some passages in WBA encourage Ripstein's reading, suggesting that Unjust Combatants are fully

justified in participating in an unjust war. This, however, is not what we had in mind.

Just Combatants lose their right not to be attacked by Unjust Combatants by accepting a regime that transfers the responsibility for the attacks from soldiers to the aggressive state and its leaders. Ripstein asks, ''Who killed an innocent person?'' and answers ''Well, the system did, but so did the executioner.'' We agree. But the question we ask is different: ''Who violates the victim's right against being unjustly killed?'' To which our answer is: ''The system, solely.''

This view raises a straightforward question. How does a shift in responsibility on one side of the bargain affect the rights of those on the other side? The answer we offer in WBA appeals to actual acceptance (which we liken to actual consent) and to bipolar rights. By accepting the war agreement, combatants (on both sides) transfer the responsibility for respecting their rights against being attacked in an unjust war to states, thereby releasing combatants from the duty to make sure that the war they fight is morally justified. Thus, it is aggressive states that violate the rights to life of Just Combatants rather than the Unjust Combatants who serve them. Under the agreement, Unjust Combatants acquire a liberty-right to participate in an unjust war so that, by killing Just Combatants, they violate no right held against them. Moreover, the war agreement does not distinguish between a combatant who knows that her war is unjust, and a combatant who fails to inquire whether it is unjust. Hence, the killing of an innocent soldier who justifiably defends his state involves no right violation by the combatant who kills him, even if the latter knew that she fights an aggressive war. The aggressive state is the violator of the right to life of the Just Combatant in question.

Having said that, we take it that Unjust Combatants collaborate with the state for which they fight, and that they are the agents of the unjust death of just combatants. Moreover, Unjust Combatant may reasonably believe that collaborating with an aggressive state is impermissible, even if it does not involve wronging the victims of their attack. As we point out in WBA, ''normal individuals engaged in the killing of human beings cannot avoid suffering the moral emotion famously described by Williams as 'agent-regret', an emotion that gives them further reason to check the justness of the war

they are called upon to fight'' (131; all page numbers in brackets are to WBA). Soldiers might refuse to be part of a war in which they kill Unjust Combatants, out of fear of (agent) regret. That makes our view quite close to Ripstein's reading of Grotius, whose final view is that the ''voluntary law of nations'' (what we call ''the war agreement'') does not mean that the unjust killings which soldiers commit are justified, since pre-contractual morality is still present, ''albeit in conscience''. Although Unjust Combatants have weighty moral reasons not to participate in a war they assume to be aggressive, their participation in it does not violate the rights of combatants on the other side.

C. Transferred Responsibility and Duels

Ripstein correctly remarks that in WBA we begin with rights but then argue that those rights can be changed by an agreement motivated by a recognition of the long-term benefits in terms of those very rights. Ripstein disagrees that rights are tradable in this way. In his view, rational people who are concerned about protecting their rights would not give up their right not to be murdered in order to reduce the overall level of murder.

This understanding of WBA contains two errors (for which we are probably responsible). First, strictly speaking, soldiers do not agree to be killed, just as innocent citizens do not agree to be unjustly imprisoned or executed. Instead, they agree (under specified conditions) to release soldiers/prison-guards/executioners from the duty to make sure that the orders that they are required to obey are justified. This point sheds light on another feature of the war agreement. Innocent citizens allow soldiers, prison guards and executioners to follow an order to attack them by transferring the responsibility for making sure that these attacks are justified to a (presumably) more capable entity. Thus, the right of innocents against being unjustly killed still stands. A respectful regime does not allow violations of rights without transferring the responsibility for such violations onto others. As WBA puts it, ''[i]f a decent regime allows one person to harm another unjustly, there is... some role-holder (judge) or public body (court) that could rightly be said to have violated the victim's right'' (64). We justify this claim—*con-*

servation as we call it—by the Lockean idea that certain rights cannot be waived. There are some rights that we have ''simply in virtue of being human'' and we cannot lose them as long as are still human. All we can do is to transfer the responsibility to respect them to others.

Conservation explains why, morally speaking, a regime that introduces duels is much more problematic than a regime that allows for soldiery, prisons, and executioners. We believe that Ripstein misreads us on this point. He cites a passage in which we imagine that the regular law-enforcing bodies are impotent or nonexistent and therefore the risk individuals undertake by agreeing to such rules would be smaller than the risk involved in living in a society that has no accepted way of resolving disputes. Ripstein seems to think that since the agreement that allows for duels in such an imagined state of affairs (and prohibits violence in any other context) is fair and mutually beneficial, the parties to a duel waive their right not to be killed by the other party.

But this reading ignores *conservation*. Even if, by entering the duel-agreement, the parties intended to free each other from the right not to be killed by the other, their agreement would be ineffective.[2] In entering a duel, the aggressor ('Aggressor') would be acting as a private individual advancing his own interests vis-à-vis an innocent adversary ('Innocent'). If Aggressor unjustly killed Innocent, it is Aggressor who would be wronging Innocent, since it is Aggressor against whom Victim has a claim-right that Aggressor doesn't unjustly kill him. There is nobody else responsible for this unjust killing.

D. Symmetrical Anarchy, Mutual Benefit and Actuality

According to WBA, the war agreement is effective only if a set of factual conditions are met, and we believe that they probably are. Nonetheless, it is beyond our expertise to decisively demonstrate the many issues of fact that are involved in claiming that a sweeping prohibition on (first) use of force is mutually beneficial or that a

[2] For Ripstein, the problem with dueling is that such a system ''hands everything over to savage violence, as if by law''. The problem with this explanation is that it comes to an end too early. Why is savage violence worse than an exploitative unjust legal system?

symmetrical *in bello* convention will not usually disadvantage defenders.

Ripstein finds our empirical assumptions unwarranted. In particular, he argues that the war agreement might not benefit strong parties: as he puts it, ''a nation can be strong enough (or have reason to believe that it is strong enough) that no foreseeable alliance of weak nations would be sufficient to overpower it.'' The paradigmatic example we use in justifying the multilateral agreement under which states agree not to use force in promoting pre-contractual justice is concerned with ''Weak'' and ''Strong''. The power differences between them are manifested by the fact that the probability that ''Weak will win the war is 0.3, while the probability of Strong's winning is 0.7'' (74). Following James Fearon, we argue that in typical circumstances, Strong and Weak may be equal, since possibly the costs of Strong's war might be so high that, ex ante, bargaining is better for both sides than fighting.[3] Now, in the so-called ''symmetrical anarchy'', there is a point in time (think of the time the UN was founded) where it is in the self-interest of all states to enter the war agreement. This is because, as far as they can know *ex ante*, for almost every war *w*, the parties to the war would be better off avoiding *w* by a peaceful compromise.

Can we *prove* that the states exist in a symmetrical anarchy? No, but we find this hypothesis very plausible. The wars fought by strong states have been very costly to them, e.g., the Soviet Union's adventure in Afghanistan or the US campaigns in Vietnam, Afghanistan and Iraq. Indeed, historians of war like Azar Gat argue that the fact that in the ninteenth century wars became relatively rare (compared to the eighteenth century) had to do with the economic advantages of peace. He explains the peace of our period in the same way—peace is by and large beneficial to all, strong states included.[4]

Moreover, the Hobbesian assumption that members in the society of states are equal in the relevant sense is quite plausible. Although strong states *can* exist forever, in reality many of them don't.

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[3] WBA, *ibid.*; cf., James Fearon, ''Rationalist Explanations for War'', *International Organization* 49 (1995), 379–414. The cost-benefit calculations do not focus merely on economic goods. In many circumstances, states interested in promoting (what they take to be) national or historical rights would find use of force ex ante undesirable, compared to peaceful compromise. Whatever the ends of the of the parties in the current war in the Ukraine, compromise still looks better to both, than the continuation of the war.

[4] Azar Gat, *War and Human Civilization* (New York, NY: Oxford University Press, 2006), Chap. 16.

Some of them disappear (Rome, the Ottoman Empire, the Soviet Union) and some become weak or much weaker (China in the ninteenth century, Great Britain after WWII) and vice versa; states become much stronger (the USA in the ninteenth century, China under the leadership of Deng Xiaoping and his followers). Hence, in the long run, the contract might be beneficial even to strong states that realistically fear becoming weak.

In personal communication,[5] Ripstein conceded that strong states concerned only with securing their own advantage and deliberating on whether to go to war ''should be careful, because wars are often unsuccessful and expensive''. He insists, however, that they might gain nothing from a contractual commitment to avoid wars. Strong and weak states ''would still be asymmetrically situated, because weak states could never make credible threats to attack strong ones.'' Here are two responses. First, weak states might be quite harmful and aggressive. Among other possibilities, they can outsource their wars to non-state organizations, use dirty bombs, launch cyber-attacks, or go to hybrid wars. Their threat to do so might be credible. Second, in too many circumstances, strong states suffer from the ''principal-agent problem,'' viz., a conflict in priorities between the state and the statesmen/politicians authorized to act on their behalf. A war might benefit political leaders while being harmful to the state itself. By introducing a rule that unconditionally prohibits non-defensive wars, the legal system (that WBA justifies) tries to prevent leaders from deliberating on whether the war would be beneficial or overall justified. This is because, when they enter the contract, states suspect that future politicians and statesmen might be tempted to use force in case of international disputes even when doing so is against the interests of the state they lead.[6]

Finally, in light of the fact that the norms of war are regularly violated, Ripstein wonders whether states actually accept the war agreement. Note however, that the criminal code is also regularly

[5] Cited with Arthur Ripstein's permission given on March 30, 2022.

[6] This theme reemerges in our response to Burri 3.II and to Finley, 4.II.

violated, and no one suspects that it does not exist, partly because, by and large, the criminal code enjoys habitual obedience, and partly because individuals and the society (as a whole) criticize its violation and sanction it. The status of the in bello code depends on its actual observance.[7] In our view, the fact that its violation is accompanied by constant criticism and by a persistent attempt to prevent it justifies the claim that the war agreement does after all satisfy the actuality condition.

III. CONTRACTARIAN DIVERGENCE: A RESPONSE TO LINDA EGGERT

Revisionism leaves a troubling gap between the (''deep'') morality of war and the laws of war: while morality forbids Unjust Combatants to kill Just Combatants, such killing is permitted under the laws of war. Assuming the primacy of moral considerations, the question that this gap raises is how the laws of war can be justified. We argue that on revisionist grounds they, indeed, cannot be justified. As an alternative, we offer a contractarian ethics of war that narrows this gap. In Eggert's view, the proposed narrowing is too tight; in principle, law and morality should *not* be so closely aligned: there is always more conceptual space between them than contractarianism allows. In its stead, she proposes justifying a law/morality gap based on a view she dubs ''DIVERGENCE.'' Her basic idea is that, in making legal rules, legislators must take not only moral reasons into consideration, but other reasons as well, especially those concerning feasibility and practicality. By contrast, *individuals* are subject to fundamental moral principles. In Section I, we argue that, like Ripstein, Eggert ascribes to us a tighter closure of the gap between law and morality than the one we had in mind. In Section II, we point to some difficulties with her own view regarding the relation between the optimal law and morality, DIVERGENCE. Finally, in Section III, we defend WBA's mild conservatism.

[7] Compare to George Mavrodes's stronger claim that the in bello code ''has little status except in its actual observance, and depends greatly on the mutual trust of the belligerents; hence it is especially vulnerable to abrogation by a few contrary acts'' (George Mavrodes, ''Convention and Morality of War'', *Philosophy and Public Affairs* 4 (1975): 117–131, at p. 128. Mavrodes' piece is an early expression of contractarianism.

A. *Contractarian Divergence*

On Eggert's understanding of WBA, ''to convince us that the law is justified, contractarianism argues that morally effective rules themselves are constitutive of individual morality.'' The in bello rules are both ''the source of the moral justification for enforcing laws and the source of people's obligation to obey the law.'' But, argues Eggert, as does Ripstein, to regard legal rules as constitutive of individual morality is to fail to take the latter seriously.

Admittedly, in arguing against the too wide gap between morality and law in revisionism, we created the impression that we opt for the other extreme of no gap at all. We should have been clearer: even on contractarian grounds, the gap between legal rules and morality is not entirely closed. WBA's main point is that when combatants attack combatants they do so *within their moral rights*, hence they wrong no one. As part of the war agreement, prior to carrying out such attacks, they are released from the duty they owe to their enemies to make sure that the war they fight is morally justified, or that the soldiers they attack pose a significant threat. Because they act within their rights, they are not merely excused if the combatants they kill turn out to be on the just side, or if they pointlessly kill Unjust Combatants. The gap between the optimal law and morality has been narrowed; since the legal rules that regulate warfare satisfy the moral conditions listed in WBA (mutual benefit, fairness and actuality), they are morally valid, which means that by following them soldiers do not violate the rights of their enemies.

However, the fact that one acts within one's rights in *phi*-ing is compatible with there being good moral reason to refrain from doing so. Thus, although Unjust Combatants have a right to attack Just Combatants, they might have good reasons not to take advantage of it.[8] And although soldiers do not wrong enemy soldiers by obeying the order to go to war without first making sure that the war is morally justified, they again might have good (moral) reasons not to take advantage of this right, and instead make an effort to find out whether the war is justified. This applies to other social contexts as well; prison guards have a right to lock inmates in their cells

[8] Compare Skerker's stronger claim that at present, military institutions are ''factually dependent on the general obedience of [their] members to function'' (Michael Skerker, *The Moral Status of Combatants* (New York, NY: Routledge, 2020), p. 18). The Israeli case shows that even during war, limited disobedience does not endanger the military.

without making sure that doing so is justified. But they might have moral reasons to check the order they receive if it seems suspicious to them or refuse to comply if they are pretty sure that the inmate is innocent. If the guards are part of a punitive system that by and large is decent, then, save for extreme circumstances, they do not violate their victim's bipolar right in following and order to lock her in his cell, even if she is an apparent innocent inmate.[9]

WBA, then, has its own version of DIVERGENCE which might be seen as a middle ground between two extremes: Eggert's view, according to which combatants ought uncompromisingly to follow deep morality and the law provides them only with an excuse if they fail to do so, and the view that the law of war exhausts the moral considerations pertinent to participation in war. According to contractarianism, combatants have a (moral) right to ignore deep morality and act within the privileges that the law grants them, but they are free to consult a host of moral considerations to decide whether or not to take advantage of this right in given circumstances.

B. Against Eggert's Divergence

We turn now to Eggert's DIVERGENCE. How can a legal system be justified although its addressees ought not to obey it? Eggert's answer is that the legal system is legitimate (insofar as it is) only in the weak sense of being justified in enforcing certain rules, not in the stronger sense of having the right to be obeyed. Eggert's claim is that while individuals are under the reign of moral principles, the law is justified in enforcing upon them rules that diverge from these principles if doing so benefits all and improves the protection of human rights. Despite this gap, legal rules do make a moral difference: "Insofar as the law is reasonably perceived as a source of moral guidance… combatants have an excuse for believing that it is permissible to do what is, in fact, morally impermissible."

We are not sure, however, that DIVERGENCE works. Let us start by distinguishing two forms of the gap between law and

[9] Is their disobedience supererogatory? Not necessarily! Suppose John's reasons for disobedience are very weighty. His participation in an unjust war will cause his mother to get sick. (She is a committed peace activist.) While neither Just Combatants nor his mother have a (bipolar) right that he won't participate in the war, he nevertheless should not do so.

morality: (a) Cases in which the law permits—namely, does not *forbid*—actions that are ruled out by deep morality, such as the killing of Just Combatants, the killing of Unjust Combatants whose contribution to the war effort is very low. (b) Cases in which the law forbids and punishes (at times severely) actions that are morally permitted, mainly the killing of unjust culpable civilians which might be necessary to protect innocent lives on the defender's side. Category (a) is obviously more troubling, and it is this category that worries us mostly, as well as Eggert, when we talk of the gap between deep morality and the laws of war.

That, in general, the law allows immoral behavior is well-known, yet the standard justifications for it seem unhelpful when it comes to wars. One such justification is that enforcing some kinds of moral behavior is costly in terms of other values such as autonomy or privacy. That would explain why the law allows people to cheat on their spouses even if doing so is immoral. But surely the permissive attitude of the law to adultery has also to do with the fact that it is perceived as a relatively minor moral sin, otherwise, the law might have intervened as it does in cases of incest—despite the violation of privacy and of autonomy. Since in wars the moral violations are a hundred times worse than in adultery, the legal permission to engage in them cannot be grounded in the rationale of protecting values like privacy or autonomy. After all, as Eggert herself admits, the law of war "condones masses of unjust killing."

Thus, the fact that, conceptually speaking, there could be a gap between law and morality (in either of the senses just mentioned) is insufficient to show that a specific gap concerning specific moral requirements is justified. When what the law licenses is significantly immoral and also seriously harmful, the onus is on those who support the law to show that it is justified.

Eggert tries to justify the current, symmetric in bello regime, by pointing to the potential harmful effects of an asymmetric one. Yet, note the difference between the way such effects figure in Eggert's view and how they figure in ours. For Eggert, the wish to prevent negative effects (cashed out in terms of attacks on innocents) justifies making a rule that permits masses of unjust killing which seems not to take seriously the moral status of all those killed. For us, by contrast, the fear of such effects is a prime consideration to justify

entering into a contract that would reduce them, thereby benefiting all sides. The voluntary undertaking of such a contract involves a waiver by soldiers of their pre-contractual right not to be killed by soldiers of the other side, hence when they are killed by the latter, they are not wronged by them.

Consider a second major problem with DIVERGENCE. According to Eggert, soldiers ought to follow the requirements of morality rather than the legal rules that diverge from them: they should go to war only if convinced that the war is just; they should refrain from attacking enemy soldiers unless reasonably certain that doing so is necessary, and from collaterally killing civilians. Admittedly, they would be excused if they failed to follow these moral demands, but this would only be an *excuse*.

WBA assumes a factual background against which if most Just Combatants behaved as Eggert expects them to behave, the result would be disastrous for them and for their country, especially given the high probability that Unjust Combatants would not subscribe to the same moral standards. A just army that would take Eggert's advice seriously and educate its personnel accordingly would put itself at a terrible disadvantage in the battlefield: it would have to convince each and every soldier that its war is justified. To this we should add that for Eggert the fact that an enemy violates fundamental moral principles does not grant others a permission to do so themselves.

In the circumstances imagined in WBA—the circumstances against which the war agreement is effective—the only way to avoid such a disaster would be to hide the revisionist truth from the soldiers (and definitely not to educate them in its light). But while for Plato, hiding the truth from the masses was meant to help society flourish and individuals live a better life, for Eggert such concealment would enable soldiers to commit moral crimes on a very large scale. This is not something she could accept. The idea of hiding the revisionist truth from soldiers would also confirm a central worry mentioned by Eggert at the outset: if revisionists prefer soldiers not to act upon their advice, they "face the charge of being ultimately irrelevant."[10]

[10] But see Victor Tadros's attempt to revise the laws of war in light of the revisionist just war theory in his *To Do, To Die, to Reason Why* (Oxford: Oxford University Press, 2020), pp. 269–300.

Moreover, DIVERGENCE is in tension with the revisionist principle of *continuity* that seems to imply that fundamental moral principles apply to individuals in any capacity or role they fulfill. If, qua soldier, a person is not allowed to kill enemy soldiers whose contribution to the war effort is marginal, then, qua legislator, she is subject to the same moral principle and is not allowed to permit such killing. Interestingly, Eggert says that it is "possible for the law to be justified [not *morally* justified] and for people nonetheless to be morally justified in breaching the law." But this distinction between justification and moral justification seems to muddy the waters. The challenge on the table is precisely to show how the in bello regime can be *morally* justified in permitting masses of unjust killing. We suspect that revisionism doesn't have the resources to meet this challenge.

C. Is WBA Conservative?

The idea of leaving the door open for future reforms in the laws of war is central to Eggert's criticism of WBA. She maintains that since, on WBA, the legal system determines moral obligations, WBA prohibits transgressions of the law in order to change it. Now, contractarianism does not completely rule out legal reforms in the laws of war. Yet, given the nature of international relations, we are much less optimistic about their feasibility. Hence, like Jeremy Waldron, we find it dangerous to undermine the current legal regime before being reasonably sure that the time is ripe for a reform.[11] If Eggert or others think that the time *is* ripe, it is for them to explain in some detail what rules they would propose revising, what they would change in the domain of ethical education in armies, and so on.

Social rules that are adhered to create expectations and influence our lives in many ways; hence, insofar as they are mutually beneficial and fair (compared to unregulated social reality, governed by pre-contractual morality) it is usually best to stick to them even if it is possible to imagine better ones. Serious reforms sometimes rock the boat and carry the risk of undermining existing rules—which, remember, are *good enough*—without being able to instill new ones

[11] See his "Civilians, Terrorism, and Deadly Serious Conventions", NYU School of Law, Public Law Research Paper No. 09-09 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346360).

instead. The concern is especially strong in the case of war. As McMahan himself notes after pointing out what he saw as fundamental moral flaws in the current laws of war: ''the stakes are too high to allow for much experimentation with alternatives.''[12] In this sense, then, WBA is conservative.

In a different sense it is not, as it ascribes no intrinsic value to the status quo and is not troubled if, in the course of time, social arrangements change. As Ripstein rightly observes, we concede that our account ''rests on factual assumptions and may require changes as the world changes.'' Rules that used to be fair or mutually beneficial in some circumstances might lack these features in other circumstances. And, as we showed in arguing for ''contractual divergence'', if transgressing the existing law is necessary to bring about the desirable change, agents have a weighty moral reason to disobey the law.

Finally, for us to experiment with the current rules concerning war is dangerous not only because of its potential effects on the conduct of wars, but because of its threat to the sovereignty of states (cf. WBA, Section 4.III). Insofar as the desired reforms seek to reduce wars by lending extra power to international bodies like the UN or the ICJ, it undermines the values of sovereignty and self-definition of states. The importance of these values, the danger of experimenting with alternatives, the fact that the current regime is by and large adhered to, and our suspicion that international bodies will fail to be impartial—all these considerations lead us to the conclusion that instead of bashing the current laws of war, presenting them as ultimately immoral, philosophers should convey the message that in this yet unredeemed world, these laws are a great achievement and all efforts should be made to strengthen respect for them and promote their enforcement. They are not perfect, but they are good enough for the time being, for the world we live in, given the risks of change.

[12] Jeff McMahan, ''The Ethics of Killing in War'' *Ethics* 114 (2004): 693–733, at p. 731. See Tadros *To Do, To Die, to Reason Why*, pp. 269–300, for a different view.

IV. SYMMETRY DEFENDED: A RESPONSE TO SUSANNE BURRI

A. Symmetry Challenged

For the sake of argument, Susanne Burri accepts two propositions defended in WBA: (1) States undertake an obligation not to fight non-defensive wars even if these wars are pre-contractually just. (2) Just and unjust States allow each other to go to wars of self-defense, viz., wars whose aim is to enforce their contractual right to sovereignty and territorial integrity. Yet, in her view, the importance assigned by WBA to the prevention of aggressive wars is incompatible with the symmetry it accepts at the in bello level. The reason is that if the aim of the contract is to deter the parties from starting wars, it should allow Just Combatants to make use of the entire range of pre-contractual enforcement rights while denying such use from Unjust Combatants. The parties should know that they'll pay for their aggression, inter alia by enjoying fewer and weaker privileges for using military force than those afforded to their victims.

To help clarify the point, Burri analyzes a case she calls *Neighbors*:

> You live on the edge of town. There is only one house close to yours, which is inhabited by Neighbor. You both prefer quiet over neighborly noise. Indeed, the pre-contractual moral reality is that you have a valid claim-right to peace and quiet after 10 p.m. Neighbor and you both like to throw parties that end around midnight. Accordingly, you and Neighbor reach the following agreement. First, you each grant the other a permission to keep noise levels high until midnight. Second, you each waive your right to call the police about noise-related matters even if noise levels remain high after midnight.

Burri concedes that you and Neighbor can effectively free each other from the pre-contractual moral duty to keep noise levels down after 10 p.m. as part of an agreement, which permits both of you to throw parties until midnight. She finds the second clause weird, though: Why would you and Neighbor undertake a duty not to call the police in case one of you violated the other's right to quiet after midnight? To deter each other from such a violation, it makes more sense for you to agree that the violating side should expect a police visit in the middle of the night. The analogy to wars is clear. Once the parties agree that a first use of force is always wrong, it makes no sense to disallow the victim of such use the opportunity to utilize all pre-contractual legitimate means to protect itself. The fear of such means being utilized will help to enforce the war contract.

Burri discusses three possible ways open to us to respond to this challenge. One is *maintaining friendly relations*, which we shall not

discuss here. The other is the *no escalation of violence* explanation, which we turn to in Section II. The third is the *good faith* explanation, which we discuss in Section III.

B. The Contractarian Basis of Fearful Symmetry

One rationale through which Burri thinks WBA can justify the symmetry within an in bello regime is the fear of escalation. Suppose that Neighbor informs you that he will take revenge on whoever calls the police, for instance, by poisoning their pet. In light of this piece of information, you decide never to call the police to complain about Neighbor because you care about your dog, Jax. Analogously, in a case where defenders fear retaliation, they would not target culpable civilians because the enemy would respond by targeting their own civilians.

In Burri's view, although this argument makes good sense, it is incompatible with contractarianism. In Neighbors, you care about Jax, and this is why you avoid calling the police. Yet the agreement with Neighbor plays no role in your decision. Similarly, states realize that the best way to defend the lives of their citizens is to avoid attacking enemy civilians, which is likely to escalate the hostilities. To see this more clearly, Burri imagines that, in Neighbors, Jax dies of natural causes and a few days later your neighbor hosts a party that shows no signs of dying down well beyond midnight. According to Burri, it is permissible to ignore the contract, because "by calling the police, you are making use of an enforcement right that you agreed to waive only because Neighbor threatened unjust harm."

Burri's argument admits of two readings. Under one reading, in Neighbors, your only reason not to call the police is that you care about Jax, hence no contractual duty can survive its death. Under this reading, armies in war ought to respect the immunity of culpable enemy civilians independently of the agreement but only as far as doing so can reasonably be expected to prevent escalation. Under a different reading of Burri's argument, the contract is redundant since defenders are allowed to ignore it when doing so is costless to defenders and advances their just cause.

We reject Burri's claim on both readings. True, the in bello rules are such that, ex ante, the parties have a reason to follow them

independently of the contract. After all, according to WBA, an effective war agreement must be mutually beneficial. Crucially, however, once the agreement is effective, soldiers have a weighty reason to respect the immunity of culpable civilians, whether or not targeting them would endanger civilians on their own side.[13] These civilians have a right against intentional attack, even in these circumstances. The same is true of Neighbors: in a case where you agreed not to call the police, and where the agreement is effective, you are under a moral duty not to do so, even where Jax is dead. As commonly assumed, a promise does not become null merely because the promisor's interest in it has vanished.

Burri seems to suspect that a contract that was signed because of fear of an explicit or implicit immoral threat is ineffective. But this seems wrong. Suppose that you and Neighbor know that when you are drunk, the very appearance of the police makes both of you angry and violent. To prevent such potential anger and the violence, you agree not to call the police. The agreement is valid, we contend, despite the implicit mutual threats that triggered it (''do not call the police, as this will make me violent''). Similarly, at the point of entering the agreement, states know that in armed conflicts, their deliberative capacities and moral restraints are significantly weakened. An agreement that aims to help them to overcome these weaknesses seems desirable and effective.

C. The Scope of Symmetry

Suppose, says Burri, that you and Neighbor realize that honest mistakes are predictable. You are both concerned about a situation in which ''the host to a lively party is confident that it is not yet past midnight, and where the sleep-deprived neighbor is equally confident that midnight must have come and passed.'' With such a scenario in mind, you and Neighbor agree not to call the police. Such an agreement would be ex ante beneficial for both sides *if*, on the one

[13] In his written comments to this paper, Alec Wallen challenges the contractarian reading of LOAC's Civilian Immunity. As he reads the Law of Armed Conflicts, Civilian Immunity is akin to the moral and legal immunity against torture; in both cases, the immunity is pre-contractual. According to WBA's reading of LOAC, the politicians and the scientists who are responsible for an unjust war should enjoy immunity, but only in order to remove the war from the cities to the battlefield. We further insist that, pre-contractually, the lives of innocent combatants are not less valuable than those of innocent civilians.

hand, calling the police is costly and, on the other, the parties' good faith will guarantee that neither abuses the rule against calling the police.

Similarly, the parties to the war agreement predict that honest mistakes will often be made in interpreting the intentions of the other side. They realize that as the tension in a geopolitical region rises, they are likely to show their military prowess in order to deter potential enemies, which might easily be misinterpreted as an act of aggression. Therefore, they start out assuming that any perceived breach is in good faith. Given the costs involved in utilizing pre-contractual rights (in particular the right to attack culpable unjust civilians), the parties undertake a rule forbidding such utilization.

Burri sees *good faith* as a promising argument for in bello symmetry, yet one that is much more limited than WBA assumes. This is because,

> …not all breaches of the war convention's first order rules happen in good faith. Where an aggressor acts culpably, there can be no valid contractual weakening of the victim's pre-contractual moral standing… This is not to say, of course, that a victim state ought to make use of its full range of pre-contractual enforcement rights… [it] may possibly even be morally *required* to abstain from using them… however, no such restraint can be required because the victim state has entered into a morally binding agreement that asks for such restraint. (italics added)

Yet, in our view, the good faith defense of contractarianism is stronger than Burri assumes. Let us look at Neighbors again. Burri states that, as rational agents, you and Neighbor would agree to allow each other to call the police in case one party *intentionally* violated the duty to avoid parties after midnight. Contra Burri, however, in some such cases, an agreement to avoid calling the police may make perfect sense because the cost of doing so could be very high even when the violation of the contract is intentional.

To clarify the point, suppose that you and Neighbor know in advance that from time to time you get drunk, and as a result, lose some of your moral restraints. In particular, you know that too much alcohol raises the risk that you will culpably continue a party after midnight. Assume further that the neighbors are clients of a private security company whose charges, per visit, are quite expensive. Against this background, you agree not to call the security hotline. But why do you and Neighbor need *an agreement* not to do so? Answer: if Neighbor does call the security hotline when you violate your duty not to be noisy after midnight, it would be too costly for *you* not to do so, in case Neighbor culpably violates this

duty. The fee falls on the violator, unless the violator can show that the victim violated the law in the past.

Similarly, the costs of a war governed by pre-contractual morality might be so high that it would be beneficial for the parties to enter an agreement that replaces it, one that would apply even when the aggression is intentional. Suppose that when they enter the contract, states are concerned by what is known as the principle-agent problem. They worry that nations might fail to secure governments that promote the common good. Or they fear that future politicians might influence their nations to support a culpable violation of the contract. As Burri herself stresses, a war governed by pre-contractual morality is ex ante costlier to an intentional aggressor than a war governed by the war agreement.

Another problem in Burri's case for limited symmetry (that applies only to good faith violators) is that she does not explain why a war governed by the asymmetrical pre-contractual morality is better for *defenders*; she assumes (with no argument) that the symmetrical *in bello* rules weaken the enforcement dimension of the war agreement. The features of the war agreement that seemingly support Burri's assumption are many. Defenders should not target civilians even if these civilians are culpable aggressors (politicians, high officials in the Ministry of Defense, etc.), and even if the attack would promote their just aim. Defenders ought not to target civilian objects even if, pre-contractually, the evil that they cause is clearly a lesser evil, given the good that such attacks would promote. And, finally, Just Combatants allow Unjust Combatants to participate in the unjust war.

Still, we deny that the in bello code weakens ''the enforcement dimension'' of the war agreement. As noted above, in the circumstances described in WBA, states predict that wars governed by pre-contractual (asymmetrical) morality would tend to be materially and morally costlier than wars governed by symmetrical rules. We now further note that, in these circumstances, states predict that, mostly, wars fought according to in bello symmetrical rules would usually be as effective in protecting defenders' contractual rights as wars fought in accordance with the pre-contractual asymmetrical rules. To quote WBA, the aim of the contract ''is to maximize defense of the pre-contractual rights of individuals without compromising the chances

of the just side (the side whose contractual right not to be attacked has been violated) to win a contractually just (viz., defensive) war'' (112). Under the factual background against which the WBA's contract is designed, *if both sides respect civilian immunity*, the defender's chances of victory do not usually change because of the prohibition to target culpable civilians.[14] The same is true of the contractual right of soldiers to undertake the duty of obedience. In the circumstances imagined in WBA, the right of soldiers to fight a war without making sure that it is justified does *not* strengthen potential aggressors, because aggressive countries will be able to find effective ways to convince their soldiers (as well as their populace) that the war is justified.

V. JUST A PEACE RATHER THAN A JUST PEACE: A RESPONSE TO CHRISTOPHER FINLAY

A. Symmetry Challenged (Again)

Like Burri, Christopher Finlay finds the contract defended in WBA intrinsically unstable: ''by imagining the social contract not only as an agreement between decent states but also as a framework to regulate conflict between them, [WBA] supports an egalitarian *jus in bello* at the cost of deep contradictions in the theory of *jus ad bellum*.''

Finlay's argument runs as follows:

1. The factual background against which the war agreement is designed resembles the Lockean state of nature where the indeterminacy of (pre-contractual) rights is endemic, chronic and dangerous. As a result, decent states make many honest mistakes as to whether their rights have been violated, and as to whether, in response, it is permissible for them to go to war.
2. According to WBA, the agreement into which states enter removes the indeterminacy and uncertainty that characterize the state of nature. One essential aspect of this agreement is a sweeping prohibition on first use of force. Violating such a clear rule renders the violator indecent.
3. Therefore, according to WBA, any first use of force (namely, any contractually aggressive war) is a clear violation of the contract, which

[14] As emphasized in our response to Eggert, the factual background assumed in WBA is, by its nature, contingent, and this also applies to the assumption in the text that mutual acceptance of *Civilian Immunity* tends not to change the chances of victory.

entails that by any reasonable definition of decency, the violators are not decent.

4. Thus, despite WBA's argument to the contrary, the *in bello* code should mainly address wars between decent states and their indecent attackers. Since, according to WBA, decency is a condition for being a party to the war agreement, a conflict between a decent and an indecent party is necessarily asymmetrical, in contrast to an essential claim of WBA.

B. Decent Culpable Aggressors

Finlay asks, ''if you define aggression by a clear enforceable duty imposing rule not to use force, why does the war agreement treat aggressive states, and the soldiers who carry out their aggressions, as if they make an honest mistake?'' He believes that WBA leaves no room to honest mistakes and that first use of force is necessarily indecent.

In response let us concede that we might have over-emphasized the transparent nature of ad bellum violations. However, we never meant to suggest that the prohibition on first use of force is so clear that honest mistakes in applying it are impossible. True, the set of pre-contractual duty-imposing rules that govern the society of states resembles what H. L. A. Hart calls a ''simple social structure of primary rules''. As such, pre-contractual morality-based rules suffer from the defect that Hart calls ''uncertainty''.[15] In a healthy legal system, there would be ''a secondary rule'', known as ''the rule of recognition'' that specifies a ''feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group''.[16]

Inspired by the search for clearer rules, WBA argues that the duties that states undertook in entering the war agreement are clearer than those imposed upon them by pre-contractual morality. States aim to replace the fuzzy verdicts of pre-contractual morality with rules whose content and scope are well-defined and easily implementable. Yet WBA accepts Hart's view that ''all rules involve recognizing… particular cases as instances of general terms…

[15] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, Second Edition, 1994), at p. 92.

[16] Hart, p. 94.

[Hence] nothing can eliminate [the] duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or 'open texture'."[17] Thus, the rules that compose the contract advanced in WBA are clearer than the deep morality-based rules that revisionists offer; nevertheless, the residual vagueness of the WBA rules leaves room for reasonable disagreement as to their application in specific cases.

In WBA, we imagine decent aggressors of another type. To quote Finlay, the WBA's "schema permits us to envisage an anomalous case where a state [call it 'Passive Aggressive', or PA] honors pre-contractual rights but at the expense of contractual duties. … [hence] [PA] violates the *contractual* morality currently in force, [pursuing] a pre-contractually just war that is prohibited by the social contract." Unlike Finlay, we believe this so-called anomalous case is quite probable. True, as we interpret the jus ad bellum embedded in the UN Charter and in WBA, and as we think states should interpret it, PA ought not to use force to protect or enforce its pre-contractual rights. Still, there might be reasonable disagreements as to the meaning of the legal regime to which states subjected themselves. Leaders and citizens of PA might reasonably (but mistakenly) believe that, in the circumstances they face, the pre-contractual rights at stake are so important that their enforcement is justified even by committing a crime against peace. Alternatively, they might reasonably (but mistakenly) believe that, properly understood, the contract is not binding in (what they take to be) the "extreme" circumstances they face. Finally, PA might believe that, like any legal system, the war agreement is dynamic, and that, for example, the Bush doctrine that allows preventive wars did have an effect on the legal system, which PA accepted back in 1945.

A final remark on decent aggressors. In our responses to Ripstein and Burri, we argued that, in entering the war agreement, states might fear that *they* will become aggressive, due to the failure of their citizens to elect political leaders that care about their common good. Suppose, for the sake of argument, that Finlay is right, so that (contrary to our revisited conception of decency) intentional aggression renders the aggressive states indecent. As our response to

[17] *Ibid.,* p. 123.

Burri shows, fearing that they might *become* intentional aggressors, decent states may adhere to the egalitarian *in bello* contract if this may lessen the costs of the wars against such aggressors. As such (we further observe here) the war agreement becomes *the* legal system that governs the society of states. Any entity that belongs to this society, whatever its character, is subject to the war agreement, and has no moral power to exit it.

Let us explain briefly why WBA needs a theory of decency and how it should be reconstructed. WBA's Lockean framework assumes that states can know *ex ante* that an agreement to which they enter will be generally respected even in case narrow self-interest dictates a violation of the contract. This assumption is crucial since if states suspected that the rules that compose the contract would not enjoy ''habitual obedience,'' entering it would be pointless. An indecent state expresses a *systematic* disrespect for the basic pre-contractual rights of individuals and of states, hence there is no point in reaching any agreement with it. Still, the expectation that the contract be generally respected is consistent with the realization that ad bellum violations might occur due (say) to a contingent political failure of civil society to secure a government that cares about the nation's common interest.

As we already made clear, after the legal system is in place, parties to an armed conflict should treat the dispute as if the other side is wrong due to an honest mistake, or due to a political failure that brought about intentionally aggressive government, that can and should be remedied. This *as if* reasoning entails that the war agreement regulates wars against indecent states as well. Indeed, the war agreement is *the* legal system on Earth, and like any legal system, it binds its subjects whatever their character might be. In explaining the fact that states entered the contract, WBA assumes that they take each other to be decent. But, except in supreme emergencies, the war agreement does not draw a distinction between decent and indecent aggressors; this difference makes no difference to the scope of the ad bellum and the in bello codes.

C. Peace and the Role of a Defensive War

Finlay's next question is whether contractarianism is an ideal theory or a non-ideal one. Our answer to this question will help us clarify the relation between justice and the war agreement thereby addressing Finlay's main objection to contractarianism.

Let us respond by posing our own question. Does Rawls's ideal theory of justice need a theory of just *policing*? On the one hand, an ideal theory assumes full compliance with the just legal system designed by Rawls. In circumstances of full compliance, coercive enforcement is unnecessary, hence there is no point in discussing just policing. On the other hand, Rawls's theory of justice aims to guide humans, not angels or saints. For *humans*, with all their partiality and biases, full compliance with the legal system can be expected only if a sufficiently powerful police force produces threats that motivate it. Thus, although an ideal theory of justice assumes full compliance, if compliance itself depends on the deterrence and enforcement abilities of the police, such a theory must include a part that describes the types of threats that the police is allowed to impose and the conditions for its use of force.[18]

In the same vein, the war contract that WBA develops can be seen as part of an ideal theory of justice. WBA assumes that stable peace is an essential feature of a just society of states. It further assumes that the securing of peace depends on the effectiveness of the deterrence created by obedient armies. This analogy between the role of an obedient army and the role of police forces is incomplete, however. The definitive aim of an army ought to be the protection of peace through the imposition of threats on potential aggressors. However, peace is merely a necessary condition for justice, not a sufficient one because the peace that armies protect might be unjust. The role of armies is not to bring about pre-contractual justice, but to ensure that states deal with perceived pre-contractual injustice by bargaining, rather than by fighting. In contrast, the role of police is to enable the institutions of the just society to realize *justice*. Ideal armies keep peace while ideal police forces promote contractual and pre-contractual justice.

[18] As Alec Walen comments, Rawls's justice as fairness can be given a weaker reading, according to which even in a perfectly just society, compliance is not full. Rather, it is characterized by the highest compliance that can be expected given human nature and the nature of society. In such a perfectly just society, then, there would be both police and criminal law.

Importantly, interpreting WBA as an ideal theory for the anarchical society of states is based on another assumption, namely, that a decentralized society of states is not inferior to a society of states with a political center. Consider a society of states that establishes a global ultra-minimal state, with a world monopoly of military force and a judicial mechanism for the resolution of international and internal disputes. We argue in WBA that the politics of such a state would be less participatory compared to the international politics in an anarchical society of states. Relatedly, the officials of the global state will have only limited success in transcending their own national loyalties. As a result, it will suffer from a chronic lack of trust on the part of both politicians and citizens. Thus, if the anarchical society of states is ideal (in the sense that there is no superior arrangement) then *obedient* armies (and the in bello code that enables them) are part of this ideal.

We are now in a position to discuss Finlay's final worry. He wonders how (contractually) just wars can promote justice. In the wars licensed by the contract, the militarily stronger party will probably win, and, sadly, there is no reason to assume that it will be the *just* one. Finlay therefore finds in WBA the defect that Kant found in the just war theories of his days: their authors "fail to grasp the fundamental moral problem with war: it resolves matters through force, and so determines results independently of the merits."

Where Finlay sees a bug, we see a feature. We assume that in an anarchical society of states, a symmetrical in bello code is desirable since obedient armies are the best mechanism for securing peace. Thus, the in bello code promotes justice only in a limited sense: it reduces aggression by allowing for the holding of obedient armies.

What is so great about the peace of the status quo ante that the symmetrical in bello code helps to preserve? Our Kantian answer is that peace is a pre-condition of justice. While for Kantians this is an a priori truth, we believe that it is based on the plausible empirical conjecture that the evil that wars bring about is so great, that they are unlikely to bring about a just outcome. Since states in conflict tend to ignore this conjecture and since, when they enter the contract, they are aware of this harmful tendency, they design a contract that prohibits a first use of force.

VI. THE WAR AGREEMENT AS A FOUNDATIONAL SOCIAL CONTRACT: RESPONSE TO GERALD LANG

In Gerald Lang's view, contractarianism fails to justify the validity of the in bello code and is best understood as offering a consequentialist justification of it. He further argues that once this move is taken at the in bello level, it can be broadened to the ad bellum level as well. The moral validity of the war agreement, Lang suggests, is rights-consequentialist. In Section I, we respond to Lang's argument about the in bello contract. In Section II, we deal with his suggestion to read our argument as based on a consequentialism of rights à la Sen and others.

A. Activation of the in Bello Regime

Lang's chief argument (hereafter: 'COLLAPSE') against the contractarian account of the in bello rules runs as follows:

1. The in bello rules are activated only when wars break out.
2. Wars can break out only if one party violates the contractarian prohibition on first use of force.
3. Such a violation is *major*.
4. Major violations lead to the dissolution of contracts.
5. Therefore, when wars break out, the parties to it are no longer subject to the war agreement.
6. Therefore, the in bello rules never get activated.
7. Therefore, insofar as the in bello rules *are* activated, their basis cannot be contractarian.

At times, Lang toys with a different argument, according to which the reason that the in bello rules are not activated is that this would be unjust, a case of rewarding the sinful; the side that illegitimately starts the war is rewarded by a permission to attack the soldiers of the (contractually) just side. Note, however, that if starting a war necessarily puts an end to the war contract, there is no conceptual room for the question of whether the application of the in bello contract is just or not. We will therefore take COLLAPSE as our main point of reference.

Our basic disagreement with COLLAPSE concerns premise 4, according to which contracts must dissolve in cases of major brea-

ches. First, we can't see why this is a *conceptual* truth. Contracts usually dissolve in face of major violations, but they don't have to. The contract can include reference to the consequences of all possible breaches, major and minor, with no time limit. In particular, there is no conceptual problem in parties agreeing that a major breach of one part of the contract will activate a whole set of rules in another part of it. In fact, contracts that survive major breaches seem quite common: infidelity is surely a major breach of most ''marriage contracts,'' but, plausibly, it activates other parts of that same contract without dissolving it. One might think that such a contract is unwise or unfair, but that's different from saying that it is conceptually impossible.

This doesn't mean that the war contract can never be dissolved. If a contract stops being adhered to and becomes a dead letter, it no longer exists, or is no longer binding. In our terms, in such circumstances the actuality condition is not satisfied. The point is that major breaches do not *necessarily* lead to this result and whether or not they do is, in any case, an empirical, rather than a conceptual question

More importantly, unlike usual contracts, the war agreement as we construe it, is ''constitutive.'' By committing themselves to the legal system embedded in the UN Charter, the parties founded a society of states under the rule of law; for the first time, the anarchical society of states is *fully* out of the state of nature.[19] WBA likens the UN Charter to the social contract as understood by major social contract theorists. Rousseau's contract, for instance, is a good example of a ''super elastic'' contract in Lang's sense. By committing the capital violation of the social contract—viz., murder—the violator does not abandon the contract. For Rousseau, the remedy for this violation is part of the contract: ''It is in order not to be the victim of an assassin that a man consents to die if he becomes one. In this contract, far from disposing of his own life, he thinks only of protecting it, and it is not to be supposed that any of the contracting parties contemplates at the time being hanged.''[20]

[19] Nonetheless, we do not go as far as some scholars to argue that the norms that governed international society prior to the UN Charter (norms that conferred on states the right to go to war) were not *legal*. (See, e.g., ''by failing to protect the fundamental interests of States, international law was not true law,'' Yoram Dinstein, *War and Self-Defense,* Cambridge: Cambridge University Press, 2001, at p. 72).

[20] *On the Social Contract*, Book 2, Chap. 5.

Indeed, in some social contract theories, the social contract is an ever-lasting one, from which the parties can never opt out. Whoever violates the terms of the contract, even when the violation is major, does not return to the state of nature, but is punished precisely by the terms set by the contract. Analogously, the war agreement renders the commitment of states to peace irreversible. They have no moral power to abandon it. Of course, as a matter of fact, individuals and states might fall back to lawlessness. But, as we read it, the war agreement does not allow them to stay there. The international community is required to ensure that all states will be members of the society of states governed by the UN Charter and that no individual is left stateless.

Super-elasticity and irreversibility are justified by two other features of the war agreement. First, the agreement is multilateral. The duty to which the defender is subject (to fight according to the in bello code) is owed not only to the aggressor, but to the society of states as a whole as well. Targeting culpable civilians, for instance, undermines civic life, which a well-ordered society of states aims to protect. Similarly, exempting Unjust Combatants from responsibility for the wars that they fight is important to all states, since holding obedient armies is essential to their ability to deter potential aggressors. Thus, as the goal of the contract is to regulate the conduct of war among all international players, it does not dissolve due to its breach, even if major, by one specific player.

The war agreement contains tensions that are typical to *relational* multilateral *contracts,* which are usually very long term and (therefore) super-elastic.[21] Here is one salient tension. The in bello code has a double duty in securing a peaceful society of states. On the one hand, it enables the holding of obedient armies, which deter potential aggressors and make the initiation of defensive war less costly. On the other hand, the in bello regime guides the behavior of politicians, civilians, and soldiers *within* wars. There are built-in tensions between these distinct roles. The first is ''enabling''; the parties enable just states to impose deterring threats (even threats to go to *disproportionate*, viz., *aggressive* wars), hoping they won't need to realize them. The second is ''restraining''; the in bello regime aims

[21] The literature on such contracts is huge. See, e.g., Charles J. Goetz & Robert E. Scott, *''Principles of Relational Contracts,'' Virginia Law Review* 67 (1981), 1089–1150. We won't be able to elaborate on this theme here.

to limit the killing of innocents and to minimize pre-contractual rights violation within wars. Such an arrangement cannot be based on standard contracting mechanism; ''future contingencies are peculiarly intricate or uncertain, [and] practical difficulties arise that impede the contracting parties' efforts to allocate optimally all risks at the time of contracting. Not surprisingly, parties who find it advantageous to enter into such cooperative exchange relationships seek specially adapted contractual devices''.[22] Again, one such devise is super-elasticity.

So far, we have argued that, contra Lang, the war agreement does not dissolve due to the ad bellum breach that started it. But suppose that Lang is right that the ad bellum breach terminates the contract within which it functions. The in bello rules would still be contractually binding, if, instead of treating the in bello and the ad bellum codes as elements of one agreement (as we do in WBA), they are treated as distinct. Under such an alternative reading, at the moment a war breaks out, the in bello rules are activated and become morally binding. This possibility coheres well with the *actuality* condition. If the in bello rules are adhered to, even imperfectly, by the international society, this condition is satisfied. And as the two other conditions for the validity of social agreements are also satisfied—the in bello regime is fair and is mutually beneficial—the rules are contractually binding. This might be a new agreement (or, in Lang's terms, ''self-renewing,'') rather than part of the original one, but there seems to be no real distinction here.

B. Contractarianism and Rights-Consequentialism

Noticing how central to WBA is the desire to reduce the violation of rights, and given his argument for the collapse of the war contract, Lang offers us a different way of formulating our theory, not as contractually-based but as based on a consequentialism of rights. According to this proposal, the reason that the in bello rules are morally binding is that they offer a better protection of human rights than those offered by a possible asymmetric legal regime. And since the duty to protect human rights is independent of any contract, it does not lose its binding force following a breach at the ad bellum

[22] *IBID., p.* 1090.

level. Thus, Lang concedes the connection between the in bello regime and the protection of rights but cuts out the contractarian part which he regards as redundant and harmful.

While Lang presses this proposal mainly with regard to the in bello rules, he applies it to the contractarian framework in general. In his view, the reasons we "advance for making contractarianism critically distinct from consequentialism dissolve under further scrutiny" (15).

In our view, however, consequentialism—be it of rights or of welfare—is far too permissive when it comes to intentionally harming individuals, or violating their rights, for the sake of maximizing desirable consequences (again, in terms of either welfare or the protection of rights). It justifies a rule that permits the intentional killing of thousands of innocent people (Just Combatants, Unjust Combatants whose contribution to the war effort is marginal, and civilians killed collaterally) and it morally permits—probably *recommends*—individual soldiers to follow this rule. In our resistance to such consequentialist approaches, we are in full agreement with revisionism.

Contrary to consequentialism, in our view, the permission granted to Unjust Combatants to kill Just Combatants (or that granted to Just Combatants to kill ineffective Unjust Combatants etc.) is not based on the fact that doing so would lead to better consequences but on the fact that the attacked soldiers waived their right not to be attacked by soldiers of the other side. It is just like with boxers; their permission to violate the right of their opponent to bodily integrity is not based on the good consequences of doing so, but on the fact that when they enter the ring, they waive their right vis-à-vis each other not to be hit.

To conclude, despite Lang's argument to the contrary, we maintain that the war contract doesn't collapse following the ad bellum breach that necessarily starts any war; even if it did, the in bello rules would still be contractually justified; and the rights-consequentialist alternative proposed by Lang is distinct from and inferior to the contractarian framework.

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