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# Ending War Short of Victory? A Contractarian View of *Jus Ex Bello*\*

*Daniel Statman*

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In light of the enormous suffering brought about by war, war might be justified only if the benefit it yields is significant enough, namely, a clear and durable victory over the enemy. The logic of this argument leads to a Clausewitz-style war of “annihilation.” I argue that the best way to justify the ending of war short of such annihilation is by relying on a contractarian view of *jus ex bello*. I conclude by exploring the implications of this view to warfare in which no effective social contract is in place.

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An important benefit of this symposium is a much clearer distinction between the different topics that fall under the ethics of war. It now seems that just war theory is composed of three main parts: the first, *jus ad bellum*, dealing with the rules for initiating wars; the second, *jus in bello*, dealing with the rules concerning its conduct; and the third, *jus ex bello*, dealing with the rules for its termination. These are all distinct from questions regarding the justice of postwar arrangements (*jus post bellum*). Although such questions arise as a result of war and immediately after it, they are activated, so to say, only when the war, with all of its ethical complexity, is over. Of these different topics, the one dealing with the termination of wars has received the least attention in the philosophical literature, which is rather surprising given the intense interest in the topic by political scientists and by scholars working in the area of war studies.<sup>1</sup>

\* For helpful comments to earlier versions, I am very indebted to Yitzhak Benbaji, Charles Blattberg, Azar Gat, Jens Ohlin, Henry S. Richardson, Saul Smilansky, Jim Whitman, and two anonymous reviewers for *Ethics*.

1. See, e.g., Richard Hobbs, *The Myth of Victory: What Is Victory in War?* (Boulder, CO: Westview, 1979); Brian Bond, *The Pursuit of Victory: From Napoleon to Saddam Hussein* (Oxford: Oxford University Press, 1996); Stephen Biddle, *Military Power: Explaining Victory and Defeat in Modern Battle* (Princeton, NJ: Princeton University Press, 2004); Dominic Johnson

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My own ideas on the topic stem out of the thought that there is something problematic about fighting a war without clear determination to pursue it to its end, namely, to the unambiguous defeat of the enemy. Furthermore, from a moral point of view, a war that ends short of victory seems to lose any justification it might have had. This brings me to the idea of an ‘uncompromising war’ which I develop at length in Section I. I show there that the logic of this idea leads to an unbearable state of affairs which gives the impetus to the social contract defended in Section II and spelled out in more detail in Section III. In Section IV, I turn to discuss conflicts against groups that do not acknowledge the war convention, in particular the rules pertaining to the way wars should be ended. In such conflicts, so I argue, the warring sides fall back to the state of nature, which means back to some version of uncompromising war.

## I. THE LOGIC OF UNCOMPROMISING WAR

A distinction, repeatedly underlined in the treatment of war in the political science literature, is that between military victory and political triumph. When people go to war, defeat of the enemy army is almost never an end in itself but a means to some political end which is distinct from the destruction or disablement of the enemy army. This end could be security, strategic status, access to the sea, territory, economic benefits, or a variety of other gains. However, means often fail to achieve their ends, and this holds true for wars too; victory on the battlefield is not always sufficient to guarantee attainment of political aims. If the cost of victory is too high, in terms of casualties or dollars, the victor might come out of the war in a worse state than would have been the case had she refrained from fighting. Moreover, military victory is not even a necessary condition to achieve the ends of war. The ability to achieve these ends depends not only on objective facts such as the occupation of certain territory, or the number of enemy soldiers killed, but on subjective perceptions, namely, on which side is perceived as victor by the respective sides and by the international community. If the side defeated on the battlefield manages to create the impression that it fought heroically, brought havoc to the enemy side, and prevented it from achieving its aim, it might come out of the confrontation as the real winner and be in a better position in the postwar negotiations. The point is well made

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and Dominic Tierney, *Failing to Win: Perceptions of Victory and Defeat in International Politics* (Cambridge, MA: Harvard University Press, 2006); Robert Mandel, “Reassessing Victory in Warfare,” *Armed Forces and Security* 33 (2007): 461–95; William C. Martel, *Victory in War: Foundations of Modern Military Policy* (New York: Cambridge University Press, 2007); Jan Angstrom and Isabelle Duyvesteyn, eds., *Understanding Victory and Defeat in Contemporary War* (New York: Routledge, 2007).

by Johnson and Tierney: “In international relations, military victory, or indeed the gain of any tangible prize at all, is neither necessary nor sufficient for people to think a leader has won. Not necessary because victory can be obtained despite net losses; not sufficient because even substantial gains do not guarantee that people will view events as a success. . . . Quite often, one side can exploit geography, technology, and strategy to defeat an opponent militarily, yet still emerge as the perceived loser, with all the tribulations that this status involves.”<sup>2</sup> How common is it for wars to end without the military victors reaping the fruits of their victory? In Robert Mandel’s estimate, quite common indeed: “after the end of the Cold War, regardless of the margin of victory, it has been rare for military triumphs in battle to yield substantial postwar payoffs.”<sup>3</sup> Moreover, there is a decline “in the proportion of wars in which there is a clear-cut winner or loser,” thus casting doubt on the idea that wars necessarily end in either victory or defeat.<sup>4</sup>

The failure to translate success on the battlefield into political accomplishment is nowhere more prevalent than in attempts to intervene in civil wars, which have constituted the majority of wars since World War II.<sup>5</sup> According to Byman and Seybolt, “military interventions with the intention to bring about lasting peace in a violent communal conflict fail or even backfire far more often than they succeed.”<sup>6</sup>

It is hard to exaggerate the significance of these observations: many thousands of people killed and injured, enormous economic losses, destruction of infrastructure—all without being able to determine who the winners are and, even when the victors are agreed upon, without them reaping substantial payoffs. This indeed gives rise to the “riddle of war”: How can humans bring about such mayhem upon both their enemies and themselves, with so little gain?

Yet thus construed, the riddle seems to be a relatively new phenomenon. In the past, the failure of military victory to lead to political achievements (at least in the short run) was less common. The reason is

2. Dominic Johnson and Dominic Tierney, “Essence of Victory: Winning and Losing International Crises,” *Security Studies* 13 (2003–4): 350–81, 350, cited in Mandel, “Reassessing Victory in Warfare,” 464.

3. Mandel, “Reassessing Victory in Warfare,” 461.

4. *Ibid.*, 465–66.

5. According to Lotta Harbom and Peter Wallansteen, “Armed Conflict and Its International Dimensions, 1946–2004,” *Journal of Peace Research* 42 (2005): 623–35, 623, “a total of 228 armed conflicts have been recorded after World War II and 118 after the end of the Cold War. The vast majority of them have been fought within states.”

6. Daniel Byman and Taylor Seybolt, “Humanitarian Intervention and Communal Civil Wars,” *Security Studies* 13 (2003): 33–78, 33. I owe the last two references to Kersti Larsdotter, “Culture and Military Intervention,” in Angstrom and Duyvesteyn, *Understanding Victory and Defeat in Contemporary War*, 206–23.

that, in the past, wars often ended in a much clearer and harsher defeat of the enemy. Such defeat often meant that the adult males were put to death, the women were taken, and the children enslaved. The biblical commands for conduct in the war against Midian in Numbers 31:7–10 are typical in this respect:

And they warred against Midian, as the Lord commanded Moses; and they slew every male. And they slew the kings of Midian with the rest of their slain: Evi, and Rekem, and Zur, and Hur, and Reba, the five kings of Midian; Balaam also the son of Beor they slew with the sword. And the children of Israel took captive the women of Midian and their little ones; and all their cattle, and all their flocks, and all their goods, they took for a prey. And all their cities in the places wherein they dwelt, and all their encampments, they burnt with fire.

As pointed out by historian of war, Azar Gat, this story about the command of Moses to the Children of Israel “typifies victors’ conduct throughout history: kill the men, rape the women, and take the most young and beautiful as war trophies. If women could not be taken because of enemy’s opposition, or because of domestic opposition at home, they would often be killed like the men and children, in order to decrease the numbers of the enemy.”<sup>7</sup> This conduct seems to have made perfect sense. In a world of scarcity, there was a constant struggle for food and water and a pressing need to extend one’s family or clan either by procreation or by enslavement. Following the logic of escalation described by Thomas Hobbes, each group realized that those outside would attack it and take possession of its goods if only they could, and hence acted to remove any potential threat as quickly and as effectively as it could. Total annihilation of an enemy is harder to achieve than often thought—even the Midianites are reported to have attacked Israel again (Judges, chap. 6)—but the original attacks were nonetheless effective for many years, granting the victor an opportunity to strengthen his collective, enlarge his territory, make political alliances, and so on.

The “annihilative” aspect of ancient warfare did not characterize all its forms but mainly the raid, “the most lethal and common form of warfare . . . using surprise and taking place mostly at night.”<sup>8</sup> Raids were a much safer means of warfare for the attackers than the alternative, which was open confrontation on the battlefield. Such confrontation was extremely dangerous for participants. Even those who were not killed faced the danger of being wounded, which had serious implications for an individual in a world based so heavily on the need for physical stamina in hunting, fighting, and

7. Azar Gat, *War in Human Civilization* (New York: Oxford University Press, 2006), 69.

8. *Ibid.*, 117.

so on, and of course there was little in the way of battlefield medicine. No wonder, then, that the preferred strategy was “asymmetrical, first-strike killing” via nightly raids, ambushes, or surprise attacks from the rear. The devastating effects that such attacks often caused are widely documented by Gat.<sup>9</sup> To be sure, most raiders in premodern societies, definitely in hunter-gatherer groups, did not have the resources to literally annihilate their enemies. But given that these societies were very small, a successful raid would often be sufficient to bring about serious harm to the attacked group, harm which would block threats from it for a significant time.

To conclude this point, then, in contrast to modern wars, especially those conducted since the end of World War II, in ancient wars there was a much tighter relation between military victory and political payoffs, payoffs which were often high and worthwhile. What guaranteed this relation was the uncompromising nature of warfare, aimed at the removal, once and forever (to the extent possible), of the threat from the defeated party and at benefiting as much as possible from the victory in terms of territory, natural resources, and so on. This difference between wars in the past and those in our present era is not so consistent and neat; not all premodern wars were uncompromising, and not all modern ones have been limited and contained. The expression “Pyrrhic victory” is, after all, not a new one. Nevertheless, the general picture outlined seems to be correct. From the time of the violent conflicts of prehistoric days through those between more organized societies and those fought by empires, the warring parties aimed at—and often achieved—unequivocal defeat of their enemies, which then made it possible for them to reap the fruits of victory with no interference. Which side was victorious was much less questionable than it is today, and a situation in which a victor failed to translate his military victory into political benefit was less common.

With this background, Clausewitz’s view about the aim—the “essence”—of war seems quite natural: “The very concept of war will permit us to make the following unequivocal statements: (1) Destruction of the enemy forces is the overriding principle of war . . . (2) Such destruction of forces can usually be accomplished only by war.”<sup>10</sup> “Admittedly, an

9. Ibid., 116–27, referring to historic evidence for warfare among the Aborigines in Australia, the Indians in the American northwest coast, the Eskimo in the Alaskan coast, and more. In all these cases, ambush and raid were the preferred tactics which sometimes “could annihilate the manpower of an enemy clan” (ibid., 127, citing Andrew Vayda, *War in Ecological Perspective* [New York: Plenum, 1976], 23).

10. Carl von Clausewitz, *On War*, trans. and ed. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976; originally published in 1832), 258; cited by Azar Gat, *The Origins of Military Thought: From the Enlightenment to Clausewitz* (New York: Oxford University Press, 1989), 206.

engagement at one point may be worth more than at another. . . . We do claim, however, that direct annihilation of the enemy's forces must always be the *dominant consideration*. We simply want to establish the dominance of the destructive principle."<sup>11</sup> As pointed out by James Whitman, some of Clausewitz's contemporaries conceded that annihilation was a valid aim, but only against "savages," not against civilized Europeans. To this Clausewitz explicitly objected, insisting that annihilation is the proper end of all wars, even against Europeans.<sup>12</sup> The claim, of course, is not a historical one, suggesting that all actual wars have been annihilative, but a conceptual one regarding the basic "logic" of war, followed by a normative claim about how wars ought to be fought.

Saying that the "very concept of war" entails the "principle" of annihilation might sound a bit odd to the current philosophical ear. But a charitable reading of it can be offered. As indicated earlier, fighting and winning are never ends in themselves. They are means to political goals, 'political' because they refer to goods for some collective.<sup>13</sup> Yet these intended goods—first and foremost defense from aggression—cannot be secured if the causes of aggression are left intact. Hence the need for a complete removal of these causes—for "annihilation"—whether in the form of a major and decisive battle (which was Clausewitz's view) or in some other configuration.<sup>14</sup> I put the term "annihilation" in inverted commas in order to indicate that I don't mean the destruction of the entire enemy group, as in the example of the battle against Midian,<sup>15</sup> but the destruction of its military ability and motivation, and even with respect to military might, the destruction need not be literally complete.

Because the kind of war supported by the above argument is not committed to the rejection of noncombatant immunity, calling it 'total war' might be misleading, as this expression has become almost synon-

11. Clausewitz, *On War*, 228; cited by Gat, *Origins of Military Thought*, 207 (slightly revising the standard translation).

12. James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* (Cambridge, MA: Harvard University Press, 2012), 233.

13. "The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose" (Clausewitz, *On War*, 87).

14. For the sake of the present discussion, I ignore the transformation in Clausewitz's thought in 1827 in which he gave space to the notion of limited war too. For this transformation and its meaning, see Gat, *Origins of Military Thought*, 217ff.

15. Nor did Clausewitz have such a destruction in mind, but rather annihilation of the enemy's army in some grand battle. However, if this goal required the attacking of civilians, he probably would not have seen this as a reason to refrain from or to moderate the strategic goal of annihilation. For Clausewitz, "armed force was subject to no rules except those of its own nature and those of the political purpose for which it was waged" (Martin van Creveld, "The Clausewitzian Universe and the Law of War," *Journal of Contemporary History* 26 [1991]: 403–29, 404).

ymous with such rejection. I have preferred, therefore, the expression 'uncompromising war', to signify the logic, which is at the center of the present section, of continuing wars until clear and unambiguous defeat of the enemy army is achieved. However, although uncompromising wars need not inflict more harm on the civilian population than 'compromising' wars, in the actual world they probably do; if the enemy army is pursued and fought against relentlessly, that naturally increases the risk to civilians as well. It also tends to impose more destruction on civilian infrastructure—on buildings, roads, bridges, industry, agriculture, and so on.

My proposal to limit the notion of uncompromising war to relentless fighting against the military rather than to the crushing of the entire enemy population is based on two assumptions: First, that such limitation would not prevent the victor from achieving an effective and durable defense. Second, that even if the defense achieved is less than perfect, there are moral constraints on what may be done to other human beings in order to make it even better. Here I side with Locke rather than with Hobbes: even in the state of nature people have fundamental rights, especially the right to life. Those who reject this view and prefer the Hobbesian one will endorse a much harsher position (again, in the state of nature).

Note, however, that even my moderate notion of uncompromising war runs against both commonsense morality and just war theory. The launching of war, most people believe, is permitted only under serious constraints, and once it achieves its main goal—the blocking of the aggression that triggered it—it must come to an end. If, to take the paradigmatic case of war, the enemy withdraws from the territory it has occupied and ceases its fire, there is no justification for continuing to fight against it with the aim of destroying its army. All the more so if the enemy supplements these actions on the ground with a clear announcement about the end of war or—a fortiori—by an announcement of its surrender.

What is the source of this disagreement between the way most of us think of ending war today and the way Clausewitz and many thinkers and politicians before him thought about this issue? In particular, is it an empirical disagreement about what is needed to remove a threat or a moral disagreement about the means that one may use to do so? I suspect that the instinctive answer for most of us would be the latter, namely, that what makes Clausewitz's position look so alien to us is our different morality, the esteem in which we hold moral rights and moral dignity. In other words, I estimate that most of us feel that Clausewitz must be rejected regardless of the empirical question about how aggression can be neutralized.



This, however, seems to me too hasty. If, as a matter of fact, limited wars fall short of removing the threat that triggered them, *how might they be morally justified in the first place?* The question stems from what I called elsewhere the success condition for legitimate self-defense;<sup>16</sup> if the probability of success is sufficiently low, the blood shed in war is in vain, and fighting must therefore be ruled out. What I hadn't realized was that there is no reason to limit the argument to failures to remove immediate threats. Suppose that Luxemburg could have heroically stopped the Germans in the morning of the Nazi invasion on May 10, 1940, but—predictably—would have been defeated a week or a month later. It is hard to see how this week or month would have made the required moral difference. The same with individual self-defense. If a person threatened by murder, assault, or rape estimated that at best she could postpone the attack by a week or by a month, it is hard to see how this extra aggression-free time could justify the use of lethal force against the would-be aggressor. At the end of my discussion on the success condition, I argue that it has different implications on the individual and the collective levels. While on the individual level defensive measures might be allowed even when they fail to block the direct attack (on one's life, bodily integrity, or property) because they protect the victim's honor, on the collective level honor may play a lesser role.

To focus on wars, then, suppose that, at  $t_1$ , state V, which is under threat from state A, estimates that whatever harm it causes state A at  $t_2$ , at  $t_3$  state A will have executed its unjust attack and occupied state V. Given these assumptions, state V's going to war would violate the success condition; hence, its war would be morally unacceptable. The big question concerns the time gap between  $t_2$  and  $t_3$ , namely, what duration of war-free time justifies resorting to war. It is impossible to make some determinations in the abstract because so much depends on the particular details of the case—the assumed nature of peace, the expected losses of war, and so on. Nonetheless it is reasonable to assume that while a peaceful period of ten years would usually justify war, a period of six months would most probably not. That is to say, if state V believed that even if it could block the current attack launched against it by state A, it would be painfully defeated by state A within six months, such short-term success would fall short of justifying the enormous sacrifice and would constitute a futile shedding of blood.

Back, then, to my main point. The rejection of Clausewitz cannot rely solely on moral grounds, bracketing, as it were, questions concerning the effectiveness of compromising or limited wars, because if such

16. Daniel Statman, "The Success Condition for Legitimate Self-Defense," *Ethics* 118 (2008): 659–86.

wars are ineffective they should be morally ruled out for that very reason: “as the world has discovered to its regret in the past, half-measures are often the worst measures of all.”<sup>17</sup> The dilemma can also be formulated in terms of a tension between the success and the proportionality conditions for military action. According to the proportionality condition, a state’s response to attacks against it must not be disproportionate. The problem is that “proportionate” and constrained responses often fail to achieve the purpose of deterring the enemy and preventing future attacks—which means that they violate the success condition.

Moral considerations aside, then, is Clausewitz right in assuming that wars must aim at the “annihilation” of the enemy? Can’t states defend themselves in a less destructive manner? Of course, sometimes they can. But often they cannot, insofar as their goal is not limited to defense from a specific attack in a specific location but aims at guaranteeing long-term peace and security. If some group decides to launch war in spite of the costs and the risks involved, it must have a very good reason for doing so, a reason grounded either in the goods that they hope to reap (territory, resources, etc.) or in some ideology they hold (the desire to disseminate religious beliefs, to halt the spread of communism, etc.). This reason, whatever its exact nature, provides the attackers with powerful motivation to resort to war, and insofar as this motivation exists, the threatened party will not live in peace. Since it is almost never within the power of the threatened party to transform the fundamental motives of its enemy, what they can more realistically hope for is (a) to disable the military force of the enemy in a way that would make attacks in the near future much less feasible and (b) to strike the enemy so badly as to deter him from initiating another violent round. In other words, it is almost never possible to literally lower the risk from one’s actual and potential adversaries to zero,<sup>18</sup> though it is possible to lower it in a way that would make a reasonably peaceful existence possible for a significant period of time.

17. Byman and Seybolt, “Humanitarian Intervention and Communal Civil Wars,” 78. One can see how this line of thought might lead to pacifism. If limited war is ruled out because it is ineffective, hence an immoral waste of life, and uncompromising war is ruled out because it is too effective, so to say, achieving victory at an inflated moral cost, then, arguably, the only respectable option is no war at all.

18. Gabriella Blum and David Luban, “Unsatisfying Wars: Degrees of Risk and the *Jus ex Bello*,” in this issue, seem to be a bit unfair to the view they are criticizing when they interpret it as assuming that wars, and in particular ‘The War Against Terror’, aim at reducing the relevant risks to zero. Surely Obama would stop the war against al Qaeda if he were convinced that there was only one in a zillion risk of a future attack from it. At any rate, the citations in their article from both Obama and the *Washington Post* need not be read as expressing the view that the US must continue fighting until the risk of such threats is literally down to zero.

One might think that such a strike is unnecessary. Suffice that the threatened party shows the enemy that it has not lost its resolve and broadcasts the message, loud and clear, that by violence the enemy will not be able to achieve its goals. I don't deny that sometimes this might be sufficient. I suspect, however, that in the majority of cases it will not. The enemy must be shown not only that his odds of winning are low, but that the risk involved in going on trying is unbearably high.

My conclusion fits the one drawn by Isabelle Duyvesteyn at the end of her concluding thoughts on victory and defeat: "Without wanting to be accused of warmongering, we should not forget, as has been found time and again, that the most stable form of peace is achieved after a clear-cut military victory."<sup>19</sup> Interestingly, the basic logic of the above argument can be found in writers who definitely would not see themselves on Clausewitz's side. David Rodin, for instance, accepts the distinction made by McMahan and Robert McKim between 'sufficient just causes' for war, like self-defense against aggression, and 'contributing just causes' which are not sufficient by themselves to justify resort to war but are proper war aims given the presence of a sufficient just cause. The latter "may include such aims as *detering future aggression*, punishing those responsible for the initiation of aggression, degrading enemy forces *and disarming the enemy to make future acts of aggression less likely*."<sup>20</sup> This seems to indicate that, in Rodin's view, the aim of war is not only to provide defense from present aggression but to prevent the next war too, "to make *future acts of aggression less likely*." Michael Walzer too warns against ending wars too soon, arguing that if cease-fires do not create a better state of peace, "they may simply fix the conditions under which the fighting will be resumed, at a later time and with a new intensity. Or they may confirm the loss of values the avoidance of which was worth a war."<sup>21</sup>

A similar picture emerges out of Orend's claims about wars of humanitarian intervention. In his view, it is the winners who are responsible for the postwar reconstruction of the defeated country. But surely such reconstruction could work only if the defeated society underwent a deep value change; otherwise, the same motivation that led it to its unjust aggression will lead to the same—or more—aggression once the occupying forces leave the scene, which they will definitely do, sooner or later. Hence, Orend believes that the winning party should "embark on a

19. Isabelle Duyvesteyn, "Understanding Victory and Defeat: Some Conclusions," in Angstrom and Duyvesteyn, *Understanding Victory and Defeat in Contemporary War*, 224–34, 233.

20. David Rodin, "Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression," in *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace*, ed. Carsten Stahn and Jann K. Kleffner (The Hague: Asser, 2008), 53–76, 60, italics added.

21. Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic), 123.

'hearts and minds' campaign to win hold-outs over."<sup>22</sup> This seems to me unrealistic and, if I may say so, a bit presumptuous—by "this," I mean the assumption that the occupying, typically Western, country (or coalition of countries) has the ability to bring about a deep transformation in the values and worldview of the people in the occupied territory such as to ensure peace after the occupiers leave the scene. Such a transformation would be very hard to initiate even in one's own country, all the more so in a foreign country with a different culture, different values, different social institutions, and, on top of all that, profound resentment against the occupying forces. If the campaign over the hearts and minds of the occupied fails, what else can be done? After all, "one cannot allow the re-birth of a regime failing minimal justice—or else what was the point of the war?"<sup>23</sup> Indeed so, but insofar as preventing this rebirth cannot be achieved through a campaign over hearts, the only way to achieve it is by using further force. It is telling that the only examples Orend offers for successful pro-rights, postwar reconstruction, are those of post-World War II Germany and Japan,<sup>24</sup> but in both these cases the reconstruction followed uncompromising—indeed total—wars of the kind that Orend would no doubt resist.<sup>25</sup>

The need for a clear-cut defeat of the enemy—its "annihilation"—has also to do with the fact I mentioned earlier that what determines the postwar situation is not just objective events, such as the loss of soldiers, military posts, or territory, but the perception of defeat in the minds of the warring parties and of the international community.<sup>26</sup> If the enemy retreats with heavy casualties but manages to turn apparent failure into

22. Brian Orend, "Jus Post Bellum: A Just War Theory Perspective," in Stahn and Kleffner, *Jus Post Bellum*, 31–52, 51.

23. *Ibid.*; cf. Walzer's comment that the goal of humanitarian intervention "can't be to stop the killing and leave the killers, or the killer regime, in power. . . . In the case of humanitarian intervention, *jus post bellum* involves the creation of a new regime, which is, minimally, non-murderous" (Michael Walzer, "The Aftermath of War: Reflections on *Jus Post Bellum*," in *Ethics: Beyond War's End*, ed. Eric Patterson [Washington, DC: Georgetown University Press, 2012], 35–46, 38). But to change from murderous to nonmurderous, the unjust regime would have to undergo a fundamental reform in its values and social institutions.

24. Orend, "Jus Post Bellum," 52.

25. Note, however, that total as World War II was, it too proceeded within some minimal social contract—mainly the mutual acceptance of the surrender convention. Thanks to Henry S. Richardson for pressing me on this point.

26. Johnson and Tierney show the decisive role of the media in creating an "imagined victory" for the side that lost on the ground, as well as a sense of defeat for the side that won. They illustrate this claim by contrasting a case of military success perceived as a failure (Somalia) and a case of military failure perceived as success (Mayaguez). See Dominic Johnson and Dominic Tierney, "In the Eye of the Beholder: Victory and Defeat in US Military Operations," in Angstrom and Duyvesteyn, *Understanding Victory and Defeat in Contemporary War*, chap. 3.

a legend of heroism and sacrifice, the military defeat might fall short of deterring him from future aggression. Since the ways to manipulate data today, especially in nondemocratic societies, are rich and diverse,<sup>27</sup> there is a need for an unambiguous victory, one that will be impossible for the defeated party to deny or reinterpret.<sup>28</sup> Clausewitz's "destruction of the enemy forces" with its unavoidable effects on civilian life would seem to serve this goal very well.

I should add that harsh destruction of the enemy's military capacities might turn out to be insufficient to prevent the next war if the peace (or surrender) terms are not enforced with enough determination, which was the case with the Versailles treaty after World War I. This just reinforces my argument: if you go to war, you must be willing not only to fight it to the end but also to strictly enforce the settlement that follows it, otherwise your efforts and sacrifice will prove to be pointless. It is a bit like "fighting" with your children. If you estimate that you won't have the required determination to enforce the rules at stake ("only one hour of TV a day"), better to have neither the fight nor the rule.

The conclusion of this section with respect to *jus ex bello* is then, that, in a precontract world, if a war is just, it may continue until the enemy is completely destroyed. To the extent that principles of *jus ex bello* mirror those of *jus ad bellum*, this implies that, in terms of *jus ad bellum*, a destruction of the enemy's forces is a legitimate goal of war. As indicated earlier, such an understanding of *jus ad bellum* will most probably lead to compromises on the level of *jus in bello* too. Moreover, sometimes too moderate wars are not legitimate at all, as they provide too little benefit at too high a price. Such wars do have a just cause—defense from aggression—but since the defense they offer is so short and fragile, they

27. In the struggle over the subjective perception of victory, democracies are much inferior to nondemocratic societies. The wide freedom of expression coupled with the privatization of the media means that in times of war, and definitely in its aftermath, a lot of criticism is voiced against the war, which tends to weaken the public's confidence in the necessity and the justice of going to fight in the first place. Add to that the constant reports on casualties and the coverage of funerals and mourning, and it is small wonder that the public develops a less than positive attitude to the war. Now contrast this state of affairs with a society in which the media is controlled by the state.

28. This insight, however, posits the following catch for contemporary democracies: On the one hand, they cannot win without projecting a clear image of victory. On the other hand, projecting such an image necessitates the infliction of destruction of a magnitude that democracies could not bear. This relates to a thesis developed by several writers about the way strong states lose wars against much weaker adversaries. See Gil Merom, *How Democracies Lose Small Wars* (New York: Cambridge University Press, 2003), followed by Gat, *War in Human Civilization*, 627ff.; and Ivan Arreguín-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict* (New York: Cambridge University Press, 2005). On a more philosophical level, namely, on how morality might lose as a result of adherence to the (current) requirements of the morality of warfare, see Saul Smilansky, "When Does Morality Win?" *Ratio* 23 (2010): 102–10.

violate the condition of proportionality. How long a peace must be maintained in order to make the costs of war proportional to its achievement is again impossible to determine a priori. All I can say is that the length of the intervening time must be significant.

In its basic structure, my argument has been unmistakably Hobbesian. In the absence of a common power, each state must take care of its own interests and defend itself when these interests come under threat. As it becomes aware of the aggressive intentions of its neighbors—which mirror its own aggressive intentions—it has a strong incentive to attack first and grab whatever goods it can. To prevent an enemy counter-attack, it has a strong reason to conduct an uncompromising war which could guarantee a reasonably long period of peace. As shown by Azar Gat, this “philosophical” picture of human nature reflects better the actual history of humankind since the days of the hunter-gatherers than the alternative, Rousseau-like picture.<sup>29</sup>

Like with Hobbes’s analysis of the state of nature, the present section too leads to an impasse. The inner logic of war, the aim of which is to provide security and peace, leads to conflicts which are extremely destructive (“annihilative”), cruel, and open-ended, as it is difficult to determine at which point an enemy is completely destroyed. If all parties followed the Clausewitzian logic developed in this section, the world would be a much more dangerous and scary place to live in than if they didn’t: “The passions that incline men to peace are: fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them. And reason suggesteth convenient articles of peace upon which men may be drawn to agreement.”<sup>30</sup> What reason suggests is to adopt a social contract which could redeem us from this nasty state of nature. In the next section I show how this applies to the predicament of ending wars.

## II. A CONTRACTARIAN VIEW OF ENDING WARS

According to the contractarian understanding of just war theory, defended at length by Yitzhak Benbaji,<sup>31</sup> the rules that guide wars are anchored in a mutually beneficial agreement between states. The general form of the argument runs as follows: states have a strong interest in being able to defend themselves from unjust attacks against them; since they cannot be sure that they will always be the stronger party in such

29. Gat, *War in Human Civilization*, esp. chap. 2.

30. *Leviathan*, end of chap. 13.

31. See in particular Yitzhak Benbaji, “A Defense of the Traditional War Convention,” *Ethics* 118 (2008): 464–95, and “The War Convention and the Moral Division of Labour,” *Philosophical Quarterly* 59 (2009): 593–617.

conflicts, they have an interest in limited, rule-governed wars over unlimited, total ones; and since deciding on such rules would be impossible once war breaks out, they have an interest in agreeing on such rules *ex ante*. A central part of this agreement which will not occupy us here concerns the status of noncombatants, namely, that they are considered illegitimate targets regardless of their individual support for, or contribution to, the war effort. But the contractarian framework applies to other aspects of war too, including the way to end it. As we saw in Section I, the state of nature—the precontract state—leads to uncompromising war which has a bad outcome for all parties, whenever they find themselves on the losing side.

A crucial part of the contract about ending wars is a commitment to a distinction between military and political victory and an agreement that the end of war will be determined by military victory and not by the achievement of the relevant political aims. However, since there is no clear definition of military victory, there would have to be an agreement on conventions that would artificially provide such a definition and release the parties from the burden of going on fighting.

Although my proposal for a contractarian understanding of ending wars sits most conveniently with a general contractarian view of the morality of war, it need not assume such a view. After all, even non-contractarians about war admit that some parts of the war convention are based on an agreement aimed at minimizing the horrors of war, for example, the prohibition on shooting pilots bailing out of crippled aircraft,<sup>32</sup> with no similar rule restricting the shooting of soldiers attempting to escape from burning tanks. In other words, even if the central components of just war theory—the separation between *jus ad bellum* and *jus in bello*, the distinction between combatants and noncombatants, the moral equality of soldiers, and so on—are not grounded in an agreement between the warring parties, the part referring to ending wars might be so grounded.

According to legal historian James Whitman, eighteenth-century Europe is an excellent illustration of such an agreement for ending wars. It was “an age of exceptional military restraint,”<sup>33</sup> based on the mutual commitment of all parties to a set of rules regarding the ending of war and the definition of victory. The battle of Malplaquet between the French and the Spanish is one of Whitman’s central examples. In that

32. See Article 42 of the Protocol Addition to the Geneva Convention: “(1) No person parachuting from an aircraft in distress shall be made the object of attack during his descent. (2) Upon reaching the ground in territory controlled by an adverse party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.”

33. Whitman, *Verdict of Battle*, 172.



battle, the French lost 11,000 men while the Spanish lost 21,000. The campaign against France had effectively failed. Nevertheless, the battle was perceived as a Spanish victory even by the French themselves. How was that possible? “The answer belongs to the standard pre-modern law of victory, and it is an answer that suggests powerfully that there were rules in eighteenth-century warfare and that those rules mattered. Under the pre-modern law of victory, the French counted as the losers at Malplaquet because they were the ones who retreated. . . . Malplaquet was a complete victory for the Allies because they managed to gain control of the field of battle, despite the fact that they did so only at the cost of devastating and hugely disproportionate losses.”<sup>34</sup> In this particular battle, it might sound odd to say that the “rule of retreat” led to or expressed restraint.<sup>35</sup> After all, Malplaquet was one of the bloodiest battles of the century. Nevertheless, the alternative would have been even worse, namely, the continuation of fighting until the complete destruction of the enemy. All the more so in less bloody battles, in which the retreat of one party from the battlefield was sufficient to put an end to a war and determine who the victor was.

One might further wonder what significance this artificial definition of victory might have had, given that the Allies had almost twice as many casualties as the French. To this Whitman answers by showing “that people in the 18<sup>th</sup> century took the question of who counted as the loser very seriously.”<sup>36</sup> Being a loser in the technical sense of retreating from the field of battle had significant implications on the levels of propaganda, politics, and diplomacy. As a result, the losing party would be discouraged to launch war again in the near future, while with the victor the opposite would occur: under the impression that its superiority has been affirmed, it would be much more confident in reutilizing its military power in case it felt that doing so would advance its interests.

Defining victory in terms of driving the enemy from the battlefield makes warfare look like a game, an analogy that didn’t escape Whitman’s attention:

When we consider the long history of the practice of pitched battle, it can be hard to resist the impression that a battle was a kind of game. A pitched battle, unlike a raid, pits two armed teams against each other. This has the air of a lethal team sport rather than a hunt. The winner in pitched battles like Malplaquet and Chotusitz was the side that forced its opponent off the field, no matter how high the human cost. This surely has the sound of something like a sumo match or a football game: the goal was to capture and hold the field,

34. *Ibid.*, 174.

35. *Ibid.*

36. *Ibid.*, 175.



and your victory counted as victory even if your lineup was cruelly decimated. . . . It is also noteworthy that a pitched battle takes place on a special field, just as so many organized sporting events do. The very word pitch is still used for sports fields, just as it was once used for battles. . . . Pitched battle also includes one of the most striking features of organized sport: a kind of game clock, traditionally (if fictitiously) supposed to run from dawn to dusk.<sup>37</sup>

The idea of regarding pitched battles as a kind of lethal game is extremely helpful in illuminating their conventional nature.<sup>38</sup> It also connects to a standard analogy used by supporters of the contractarian view of the war convention, namely, the boxing analogy.<sup>39</sup> The point of the analogy is that people might lose (some of) their natural rights if they voluntarily enter into a rule-governed activity in which, on the basis of reciprocity, all participants give up some of their rights. This, according to the contractarian line, is what happens in war: When soldiers enter the battlefield, they thereby give up some fundamental rights, mainly the right not to be killed, and, in return, they gain the permission to kill the enemy soldiers without having to verify that each of their targets meets the standard conditions for liability to defensive attack. Whitman's analysis of the retreat rule helps to see how the boxing analogy could be widened to include the issue of ending wars too. Boxing rules determine not only what boxers are permitted to do to each other while the match goes on, in an apparent violation of their opponent's natural right not to be harmed, but also when these permissions lose their validity, when the game is over. Like with the rules of war, boxing rules apply to three phases: They define when and how the match begins, how it should be conducted, and when and how it ends.

Although the retreat rule played a crucial role in shaping eighteenth-century wars, it was not an invention of that time. As Whitman says, "in one way or another it was something of a Western universal for centuries."<sup>40</sup> All the more so with the general phenomenon of rule-governed battles. I mentioned above Gat's view about the high risk that was involved in face-to-face confrontation in prehistorical societies and the preference for the raid and the ambush as tactics of warfare. No wonder that when direct confrontation did take place, it was constrained by rules that sig-

37. *Ibid.*, 181–82.

38. Whitman adds that "it is a striking fact that humans sometimes literally do play games to resolve conflicts that could be resolved through war" (*ibid.*, 181).

39. See, e.g., Benbaji, "Defense of the Traditional War Convention," 487; and Thomas Hurka, "Proportionality and Necessity," in *War: Essays in Political Philosophy*, ed. Larry May (New York: Cambridge University Press, 2008), 127–44, 136. The boxing analogy is rejected by Jeff McMahan, "On the Moral Equality of Combatants," *Journal of Political Philosophy* 14 (2006): 377–93, 381.

40. Whitman, *Verdict of Battle*, 183.

nificantly limited the violence, sometimes to the point of making victory merely ceremonial. Here is how Gat describes such confrontations in the hunter-gatherer era: "Conflict between clans or tribes could lead to face-to-face confrontations, or battles, the place and time of which were normally agreed upon in advance. . . . The two opposing dispersed lines stood at a spear-throwing distance, about 50 feet, hurling spears at one another while dodging the enemy's spears. In some cases, such battles were intended in advance to put an end to a conflict and were thus truly 'ceremonial', with the spear throwing restrained and mixed with ceremonial dances. Once blood was spilt, or even before, the grievances were seen as settled, and the battle was terminated."<sup>41</sup> Just to reiterate: in Gat's view, this mutual acceptance of rules regulating the conduct of battles and their endings had nothing to do with moral sensitivity or with abhorrence from shedding blood. When some group estimated that it could crush its enemy, usually through a nightly raid, but at times also in the open, it did so mercilessly. Rather, self-restraint in battle had to do with the high risk involved in direct confrontation and with a rational cost-benefit calculation according to which it is better to avoid fatal injuries even at the cost of not completely defeating the enemy. As Whitman succinctly put it, "it was in the interest of all the parties to accept conventions that defined victory in ways that stopped short of annihilation."<sup>42</sup>

The ceremonial and gamelike aspects of wars are less common nowadays than they were in the eighteenth century or in older wars, but they nonetheless still exist.<sup>43</sup> A good illustration is found in the rules of surrender, commonly in the form of waving a white flag or the raising of open hands above the head. When such symbolic acts are committed, the other side is expected to cease its fire immediately and be willing to negotiate a truce. The point I wish to emphasize is that these ceremonial acts of surrender impose inescapable limitations upon the side receiv-

41. Gat, *War in Human Civilization*, 117. See also 185: "Formal battles were largely demonstrative, often producing more noise than blood."

42. Whitman, *Verdict of Battle*, 197. See also his illuminating remark there, that Pufendorf regarded the law of war as a branch of contract law.

43. A central purpose of Whitman's *Verdict of Battle* is to explain why conventions like the retreat rule gradually lost their appeal in the course of the nineteenth century and vanished altogether in the twentieth and twenty-first centuries. Part of the explanation he offers has to do with the fact that in the eighteenth century, as in most of human history, war was thought of primarily not as a horror but as a legitimate procedure for resolving legal disputes. Because of this understanding of war, it was possible for the warring parties to restrain war according to well-defined rules, including rules that determined its ending. For various reasons, this understanding was abandoned during the nineteenth century and replaced by a completely different one according to which wars are not fought to settle disputes over property but to settle issues that have "world-historical stakes." When the stakes are so high—a war against evil—there seems to be little room for self-imposed restrictions that might allow evil to continue flourishing.

ing them, even if it has a strong interest to continue the war in order to reap the political fruits of its military success. Ex ante, however, the rules about surrender fit well the interests of all sides. Since no side knows in advance whether it will prevail in war, all would prefer an arrangement that enabled losing parties to enforce a cease-fire on their rivals, even if that meant that if they were the triumphant side, they too would have to abide by these rules.

My claim, then, is that it is rational to accept an agreement to end wars short of victory, by which I mean an agreement to end wars short of destroying the enemy army and, a fortiori, short of achieving all the relevant political goals. Like with all versions of the social contract, this one too guarantees the parties protection from some unwanted results in exchange for self-imposed restrictions on bringing about such results to others.<sup>44</sup> In the next section, this agreement is spelled out in more detail.

### III. EIGHT FEATURES OF THE CONTRACTARIAN VIEW

First, on the contractarian view of ending war, the parties agree not to continue the fighting just in order to prevent the next war. This means that the successful blocking of the enemy attack is a sufficient reason to cease fire. In wars against invasion, once the enemy is thrown out of the territory it managed to occupy, or once it has given up its attempt to occupy it, the war should come to an end.

Second, the conditions for just war—success, necessity, and proportionality—should be tested in reference to military success rather than in reference to political ends. If these conditions applied to the political aims, their application would be close to impossible. It is very hard to assess the causal contribution of some specific act of warfare to the general (i.e., political) aims of war and, thus, to satisfy the success condition. It is even harder to determine that the selected acts of warfare are necessary in the required sense, namely, that they advance these political aims in the least harmful way. And it is even harder to test the proportionality between the harm brought about by specific acts of warfare and the expected benefits construed in terms of overall political aims. These difficulties are eased if the point of reference is military success, and they are further eased if military success itself is context-

44. As in Locke, the parties to the contract care not only about their self-interest but also about morality; they wish to reduce unjust wars and to reduce the violation of human rights that wars tend to bring about. On the way that both partiality and concern for rights play a role in the war contract, see recently Yitzhak Benbaji, "Distributive Justice, Human Rights and Territorial Integrity: A Contractarian Account of the Crime of Aggression," in *The Morality of Defensive War*, ed. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014), 153–77.

alized, or localized, in the sense that the point of reference for the above conditions is not overall victory but victory in the specific operation to which a specific act of warfare is meant to contribute. If the mission of a platoon is to gain control over some strategic point, it need not establish that doing so would advance the overall campaign of the army, and definitely not that it would do so in the least harmful way.

Third, the contractarian view of ending wars enables the parties to bracket the questions of which results count in assessing victory, and within what time span. These questions are notoriously difficult to answer and cast ambiguity and indeterminateness over attempts to determine who the real winners in war are and the closely connected issue of when wars should come to an end.<sup>45</sup> According to the contractarian view, however, success in war is defined more modestly. It does not refer to the long-term success in improving the state's political and economical status but to the short-term military success in blocking the enemy's aggression.

Fourth, the contract about ending wars would exempt the parties from the requirement to make sure anew every day that the war is still necessary to achieve the political aims that justified launching it in the first place.<sup>46</sup> Elsewhere I have shown that a requirement to satisfy the standard conditions of legitimate self-defense—success, necessity, and proportionality—for every act of warfare would be impossible to meet and, consequently, would render most wars illegitimate. Hence, so I argued, to acquire a right to effective self-defense, states would mutually agree on exempting each other from such a requirement.<sup>47</sup> This exemption would mean that states are not required to establish that every act of warfare is necessary for achieving the political aims of the war and, moreover, are not required to show that it is necessary for overall military victory over the enemy. This explains why the permission to attack enemy soldiers and bases whenever and wherever one side sees fit is wide and subject to very few constraints, mainly having to do with the kinds of weapons which its army is permitted to use. What I am adding here is that this kind of *ex ante* agreement applies not only to individual acts of warfare but to the war in general. That is to say, once war breaks

45. In Mandel's view, "it is quite difficult . . . for most recent wars to generate widespread consensus that they ended unambiguously in either victory or defeat" ("Reassessing Victory in Warfare," 16). For a survey of the main puzzles in this area, see Angstrom's introduction to Angstrom and Duyvesteyn, *Understanding Victory and Defeat in Contemporary War*.

46. For such a requirement, see, e.g., Cécile Fabre, "War Exit," in this issue.

47. See Daniel Statman, "Can Wars Be Fought Justly? The Necessity Condition Put to the Test," *Journal of Moral Philosophy* 8 (2011): 435–51.

out, the warring parties are permitted to focus on military success, while disregarding the ultimate political aims of the war.

Fifth, this permission to focus on success has implications for the understanding of the proportionality condition as well. This brings me to a question which is at the center of many discussions in this symposium, namely, what the moral significance of “sunk costs” in war is.<sup>48</sup> Suppose that, at  $t_1$ , state A estimates that going to war against state B would cost X casualties among its own civilians and soldiers and among the enemy civilians, as well as an H level of harm to its own country and to the enemy’s civilians, and judges that these expected casualties and harms are proportionate to the goals of war. However, the war does not go according to plan. At  $t_2$ , X and H have been brought about, but the goals of war are not yet achieved. In what McMahan calls the “Quota View,” at  $t_2$  the war loses its moral justification and must come to an end. Since it is impermissible to fight a disproportionate war and since, ex hypothesi, the continuation of this war would make the entire war disproportionate—would exceed its “quota,” as it were—it must stop. While McMahan rejects this view, I believe Fabre is right in regarding it as a necessary implication of the deep morality of war. If all killing in war must satisfy the standard conditions for legitimate self-defense, then, insofar as the killing of any number of people beyond X is in violation of the condition of proportionality, such killing must be impermissible.<sup>49</sup> The alternative view (the “Prospective View”),<sup>50</sup> according to which the proportionality calculus is future oriented, comparing estimated future casualties with estimated future gains, would make proportionality “lose most of its bite as a constraint against killing.”<sup>51</sup>

The general notion of sunk costs and its relevance to the morality and rationality of war merit more discussion than I can offer here.<sup>52</sup> For the sake of the present discussion, suffice it to say that if the Quota View is indeed the inevitable implication of precontractual, individualistic morality, then, since it is “implausibly restrictive,”<sup>53</sup> the players on the

48. See Jeff McMahan, “Proportionality and Time”; Fabre, “War Exit”; Darrel Moellendorf, “Two Doctrines of *Jus ex Bello*”; and David Rodin, “The War Trap,” all in this issue.

49. For Fabre’s criticism of McMahan, see n. 11 of “War Exit.” McMahan concedes that his view is “paradoxical,” namely, that it might be permissible to kill human beings under the heading of war in spite of the fact that the war as a whole is disproportionate and therefore morally illegitimate. He nevertheless believes that this view is supported by good enough arguments.

50. McMahan, “Proportionality and War,” sec. 2.

51. Fabre, “War Exit,” 637.

52. Let me just state that it is false to assume that rationality always requires ignoring sunk costs. See R. Preston McFee, Hugo M. Mialon, and Sue H. Mialon, “Do Sunk Costs Matter?” *Economic Inquiry* 48 (2010): 323–36.

53. As pointed out by McMahan, “Proportionality and Time,” 702.

international level have a strong reason to seek exemption from it in order to make room for effective self-defense. Such an exemption is gained on the basis of reciprocity: all players agree that the proportionality test at any point of time during war will be purely prospective, exempting each other from the need to take past losses into consideration as well.

Note that this agreement about the nature of the proportionality test that must be employed during war does not amount to an agreement to give up this test at the *jus ad bellum* level. Rather, it implies a distinction between proportionality as a condition for the very launching of war and proportionality as a condition for going on fighting a war whose initiation satisfied all *jus ad bellum* conditions and was morally justified. On the one hand, it is in the interest of all states to agree on serious constraints on the resort to war, including that of proportionality (but see point 7 below). They are happy to gain immunity from disproportionate wars waged against them at the price of avoiding such wars themselves. On the other hand, they agree that once the war breaks out, the calculations of proportionality may always be forward-looking, ignoring the “quota” that was spelled out as a result of the proportionality calculation before the initiation of the war. In other words, contractarianism offers the best explanation for the permission to behave against the counsel of the Quota View, a permission without which the conduct of war would be too restrictive.

According to the picture outlined here, the (justified) decision to go to war makes a huge moral difference. Once the decision is made, a whole new set of rules and rights is set in motion which replaces (so long as the war goes on) those that apply in times of peace. It will be no exaggeration to say that the moral landscape is fundamentally transformed inasmuch as the conduct of war is concerned. Now compare this picture with the opposite one which demands constant reevaluation of the severity of the unjust threat, the extent of expected success in meeting it, the necessity of the military measures used, and the proportionality between the benefits of the war and its price in human life and in dollars. On this picture, the decision to go on war has nothing of this transformative nature. In fact, since the decision will be reviewed the following day, it is doubtful whether referring to it as a decision “to go to war” is at all appropriate. It would be better described as a decision to use limited force for one day or so, which would then be followed—or maybe not—by a similar decision to use force for another day or so, and so on. The main problem with the latter view lies in its underestimation of the practical constraints that it imposes on the conduct of war. A full-scale war involves such an extensive mobilization of forces, such a moving around of military equipment, and such reorganizing of military and civilian infrastructure, that doing so just for one or two days would be unrealistic. More accu-

rately, and in terms of the contractarian view I'm trying to advance here, in order to guarantee for themselves an effective right to defense from aggression, states have an interest—which is *ex ante* mutually beneficial—to agree that a decision to go to war would change the moral landscape in the ways just explained.<sup>54</sup>

One might nonetheless object that the permission to focus on military success together with the permissive interpretation of the necessity and the proportionality conditions are too costly because they might bring states to lose sight of the cumulative cost of the war and of alternatives to its continuation. To deal with this objection, let me rely on the distinction between what one has a right to do and what is overall justified from an impartial point of view. That subject S has a right to do X in circumstances C does not entail that X is the most satisfying course of action. For instance, the fact that S has a right of self-defense against an innocent attacker does not entail that using it is the most desirable moral action. It might be better if he or she forgoes the right and refrains from shedding innocent blood (especially if there is more than one such attacker)—and similarly with the permission at hand. That states have a right to focus on military success does not entail that such focus is the best policy, overall, for them to adopt, either in terms of their responsibility to their own people, or—more important in the present context—in terms of their responsibility toward the people on the enemy side.

Sixth, as Benbaji has shown in detail, contractarianism is closely connected to the idea of a moral division of labor.<sup>55</sup> If each policeman were morally required to review all the relevant evidence before going out to arrest a suspect, the police would fail in providing security to the citizens. Hence, there is the need for a division of labor inside the police force between those in charge of gathering intelligence and those in charge of arresting suspects and outside—between the police and the district attorney, the police and the prison system, and so on. These arrangements about what individuals are supposed to do in their various capacities are best understood as based on a tacit contract between the members of society in which they give up some potential privileges (e.g., not to be arrested unless each of the people involved in the decision and the execution of the arrest was convinced by the evidence that it was warranted) in return for significant benefits (a well-functioning police system). The division of moral labor determines what individuals are allowed to do within their capacities, what they are forbidden to do, and what is left to their discretion.

54. That a decision to go to war makes such a normative difference is not that surprising given the way decisions function in practical reasoning in general. See Joseph Raz, "Reasons for Action, Decisions and Norms," *Mind* 84 (1975): 481–99.

55. Benbaji, "War Convention and the Moral Division of Labour," esp. sec. 4.3.



Regarding the morality of war, this view confirms the traditional distinction between *jus ad bellum* and *jus in bello*, a distinction which assigns different moral (and legal) responsibilities to politicians and to soldiers. As Walzer famously put it, “we draw a line between the war itself, for which soldiers are not responsible, and the conduct of the war, for which they are responsible, at least within their own sphere of activity.”<sup>56</sup> If each soldier were morally (and maybe legally) required to review all the relevant evidence before she agreed to go to battle, states could no longer rely on their armies to be effective tools against aggression. Hence, there is the need for an agreement that exempts soldiers from such a requirement and allows them—or even demands from them<sup>57</sup>—to obey orders to use lethal force (unless they are manifestly immoral).<sup>58</sup>

One can easily see the implications of this view to the issue at hand, namely, the ending of wars. Just as the initiation of wars is the job of politicians and not of the army, so is their ending. It is not the role of the military, certainly not the role of individual soldiers, to decide on the termination of hostilities (though it is their role to present their view on the matter before the relevant political bodies). The only thing that soldiers must care about in fighting is that they follow the rules of *jus in bello*. Morally they need not—and usually they ought not—ask themselves whether the aims of war have been realized. Certainly they ought not to make their continued participation in war depend on their answer to this question. In the moral division of labor, the responsibility to end wars is allocated to the politicians.

Once again, it might be helpful to contrast this view with the opposing one that rejects such a division of labor together with the idea of a contract that goes with it. This would be a “purist” view of morality in general and of the morality of war in particular.<sup>59</sup> Since purists reject the moral division of labor between politicians and soldiers, they impose on each individual soldier the responsibility to continuously consult the

56. Walzer, *Just and Unjust Wars*, 38–39.

57. See David Estlund, “On Following Orders in an Unjust War,” *Journal of Political Philosophy* 15 (2007): 213–34.

58. See Yitzhak Benbaji, “The Moral Power of Soldiers to Undertake the Duty of Obedience,” *Ethics* 122 (2011): 43–73.

59. See Benbaji, “War Convention and the Moral Division of Labour,” sec. 1 (“The Purist Challenge”). The term ‘purist’ is intended here with no pejorative connotation. It tries to capture the view according to which the moral duty incumbent on each person to respect the fundamental human rights of all other persons does not depend on the national, religious, or other affiliation of the person or of the right-bearer, or on the social role that any of them happens to have (qua citizen of a specific state, soldier of a particular army, policewoman, mayor, judge, banker, etc.).



principles of *jus ad bellum* and make sure that each act of warfare she is ordered to carry out is justified by these principles. The same applies to *jus ex bello*: the decision of individual soldiers to continue fighting should be subject to the same principles governing the initiation of war, namely, *jus ad bellum*. This burden imposed upon members of the military might seem attractive if one believed, with James Pattison, that “if only a few more individuals begin to question the permissibility of their contribution, this would be a positive development.”<sup>60</sup> Nonpurists, however, are less impressed. An individual soldier who stops fighting because she believes that the war should come to its end is no more attractive than a prison guard who decides to let some murderer go free because, in his estimation, she has suffered enough or a policeman who disobeys an order to arrest a suspect because he believes her to be innocent. Social life would be simply impossible if purist advice was taken seriously.

There is another reason for skepticism about the assumed positive outcome of soldiers relying on principles of individual morality in deciding whether to participate in war (to begin or to end it). True, in some cases, this might lead some soldiers to refuse to participate in wars which, objectively speaking, happen to be unjust. But such purist morality might just as well lead to the opposite outcome—to soldiers initiating acts of warfare which happen to be unjust or to continuing an unjust war even when their government has decided to cease fire. Actually, given the “deeply ingrained can-do attitude that often leads [professional soldiers] to believe that ‘one more push’ can turn around a situation,”<sup>61</sup> leaving decisions about the continuation of war in the hands of each individual soldier runs a higher risk of continuing unjust wars than if such decisions were allocated to the politicians. There is thus no reason to think that the spread of individual morality would reduce rather than increase the number and the duration of unjust wars.

When I said that usually people are not under an obligation to transcend the responsibilities assigned to them qua soldiers, police officers, bankers, or prison guards, I meant to leave open the possibility that in extreme cases they would incur such an obligation, namely, when carrying out such responsibilities would be unmistakably and severely immoral. That would be the moral analogue to the category of “manifestly illegal” and would constitute a requirement to reason and to act as if any given individual were a “pure” agent of morality, not as if she were a member of a particular society bound by the arrangements agreed upon among its own members as well as by those agreed between all

60. James Pattison, “When Is It Right to Fight? Just War Theory and the Individual-Centric Approach,” *Ethical Theory and Moral Practice* 16 (2013): 35–54, 53.

61. David Rodin, “Ending War,” *Ethics and International Affairs* 3 (2011): 359–67, 361.

states. But the purpose of this article is not to discuss exceptions to the rules that govern the conduct of war and its termination but to identify those rules that apply in most cases, the rules that states would ex ante mutually commit themselves to in order to minimize the horrors of war without thereby denying themselves the option of effective self-defense.

Seventh, although the contract imposes crucial constraints on the ending of wars, the constraints are nonetheless less restrictive than those imposed by purists such as Fabre, who holds that insofar as the just side estimates that the prospects of their citizens for “a minimally decent life” have been secured, the just cause for war is lost, and, therefore, it must (other things being equal) cease its fire.<sup>62</sup> Indeed this seems an inevitable corollary of a purist-individualist view of war, according to which the mass killing in war can be justified only as a necessary means to save the lives of many innocent people on the attacked side (or something of similar value to their lives, such as their bodily integrity).<sup>63</sup> However, on the contractarian view of wars, it is agreed—obviously on the basis of mutuality—to extend the notion of just cause beyond that of ensuring a minimally decent life to individuals to that of guaranteeing a decent existence of the state. In Benbaji’s words, “Even if states do have a pre-contractual moral right to wage pre-contractually just wars and have no pre-contractual right to defend their borders by force, against privileged circumstances, they will waive their right to go to pre-contractual wars and will allow each other to defend their borders by force.”<sup>64</sup> And why would states accept such a contract? Because, once again, without it, their right to defense from aggression would be too constrained. Therefore, they consent to a more permissive understanding of this right at the price of granting it to all other players too. States acquire the right to launch war against aggressive states (or nonstate actors), even when their own citizens face no real threat to a minimally decent life, at the price of making themselves morally (and legally) vulnerable to such defensive measures by others.<sup>65</sup>

Finally, without a contractarian framework, it is hard to justify the permissive character of the rules governing wars in comparison to those governing the struggle against other kinds of illegitimate violence, namely,

62. Fabre, “War Exit,” Sec. II.

63. This view is best articulated by David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002).

64. Benbaji, “Distributive Justice, Human Rights and Territorial Integrity,” 158–59.

65. For a much more elaborate and detailed development of this answer, see *ibid.* The contractarian view of *jus ad bellum* seems to me the best response to the challenge posed by Rodin about the moral legitimacy of national-defense wars. For Rodin’s own attempt to face it, see *War and Self-Defense*, 197–99. For criticism, see Daniel Statman, “Moral Tragedies, Supreme Emergencies and National-Defense,” *Journal of Applied Philosophy* 23 (2006): 311–22, sec. 3.

regular, nonpolitical crime. In particular, there is nothing analogous in the rules governing the struggle against crime to the *in bello* permission to bring about collateral damage, certainly nothing analogous to the permission to *kill* human beings as an unintentional yet foreseeable side effect of seeking legitimate aims.<sup>66</sup> The best way of justifying this permission is by anchoring it in an (ex ante) agreement between the warring parties to loosen the regular, that is, the domestic restrictions on the use of violence when it comes to conflicts between collectives, in order to grant states the possibility of effective self-defense; if no collateral harm was allowed, almost all contemporary wars would be morally ruled out.

This view of the morality of initiating wars has immediate implications for the morality of ending them. Since, contra Fabre, wars may be initiated even if the citizens of a country are not under significant threat of losing the conditions for a minimally decent life, wars need not end once these conditions have been secured. Although, given the above contract, states are not permitted to go on fighting until they completely defeat their enemies, they do have a right to pursue a reestablishment of the status quo antebellum, certainly in terms of their territorial integrity and probably (but in more limited ways) in terms of other parameters as well.

To conclude, then, while in the precontract, state-of-nature world, uncompromising war in the sense alluded to above is reasonable and natural, this is not so in the postcontract world, in which all parties have a strong reason to adhere to a set of rules restricting the legitimacy of going on fighting until the enemy is decisively defeated. To the extent that just war theory endorses such restraint in the ending of wars, the contractarian framework helps to explain what the justification for it might be.

#### IV. ENDING WAR WITH THOSE OUTSIDE THE CONTRACT

I relied earlier on Gat's work to claim that the need to agree on conventions for ending wars had to do with the elevated risk of face-to-face confrontation on the battlefield. This meant that while on the old kind of battlefield the parties were impressively self-restrained, in other forms of warfare—the raid and the ambush—they were much less so. Moving forward in history to the twenty-first century, we find a similar distinction between these two forms of warfare, which now belong to different kinds of warring organizations. National armies meet their enemies on the bat-

66. See Jeremy Waldron, *Torture, Terror and Trade-Offs: Philosophy for the White House* (New York: Oxford University Press, 2010), n. 61, who emphasizes that “much of what we call ‘collateral damage’ would be murder, for legally and morally the category of murder is not confined to intentional killings.”

tlefield and by and large follow the accepted war convention, while irregular armies and organizations avoid open confrontation and adopt modern analogues to the ancient ambush and raid.

What is implied by this difference with regard to the conventions for ending war between states and such irregular forces? Insofar as the latter use tactics like raid and ambush, they have no incentive to accept limitations on such use, limitations which would tie their hands without effectively tying the hands of their opponents. Neither would the regular armies have an incentive to agree on rules that would limit fighting in the open, because they expect clear superiority in such a situation. From either point of view, then, we seem to be back in the state of nature. All the more so with organizations that make use of terror, by which I mean deliberate attacks on noncombatants, as a way of advancing their political goals. Their disregard for the basic principles of *ius in bello* places them outside the war contract.

The impossibility of confronting irregular armies in the open makes it very hard to defeat them, and the war against them thus tends to be long and tedious. This leads to a somewhat paradoxical result. While wars between regular armies are often very destructive and lethal, they are typically limited in time and place for the reasons mentioned in Section II: all parties have an incentive to agree on rules that would help to end wars as fast as possible (provided that such rules don't prevent them from exercising effective defense against their attackers). In contrast, wars against irregular military organizations involve nothing even close to the bloodshed and destruction brought about in grand battles, but they can go on for much longer, hindering normal life in many ways and on many different levels.

The fact that the war against irregular armies is not subject to the logic described at the end of Section I, namely, to a reciprocal commitment to limited war, means that the logic that applies to war against them is the Clausewitzian one: either don't go to war at all, because it is too costly in human lives and in dollars, or do go to war—but then pursue it to its end, until a reasonable duration of security and normality is guaranteed. As explained above, such pursuit of victory is expected to demand a high toll from the enemy, in terms of casualties among combatants, collateral damage to civilians, and serious destruction of civilian infrastructure.<sup>67</sup> To carry it out, leaders might need what Michael Slote

67. I would like to believe that such measures fall short of what Gil Merom called "extreme brutality" which, in his view, was how superior parties routinely won in the past. See Gil Merom, "The Origins and Implications of Western Counterinsurgency Failures," in Angstrom and Duyvesteyn, *Understanding Victory and Defeat in Contemporary War*, 168–86, 171. See also Merom, *How Democracies Lose Small Wars*, 35–42.

called a “moral stomach,” namely, “the ability to overcome personal aversion and pangs of conscience.”<sup>68</sup> If they lack such ability, it is often better, both morally and prudentially, that they do nothing, rather than drag their countries into hesitant and eventually futile military campaigns.

How strong the leaders’ stomachs must be depends on the sort of actions that they would be required to carry out. As you recall, the view I committed myself to was the Lockean one, according to which people have moral rights even in the state of nature. On this view, it is not the case that “anything goes” even when fighting against an aggressor who is not part of the social contract. By contrast, those who hold a Hobbesian view of the social contract believe that in the state of nature there are no moral constraints on what may be done to the enemy.

The high costs involved in launching war against irregular organizations, coupled with the lingering uncertainty about the outcomes of such war, provide an excellent reason to avoid it as far as possible.<sup>69</sup> For the sake of its own interests, a state subject to attacks by such an organization would do better to invest in defense—in good shelters, anti-rocket systems, effective checkpoints—than in a large military campaign against this organization. Such defensive measures should be supplemented by targeted attacks which might have some deterrent effect on such organizations and might satisfy the public’s desire to see “something done” in response to attacks on their country.<sup>70</sup> The option of a large military campaign should be delayed to the extent possible and selected only when absolutely necessary and when it has a reasonable hope of success. But when this option is chosen, the manifestation of military superiority must be clear-cut and undeniable, leaving no other way to interpret the outcome of the conflict but as a painful defeat of the irregular organization.

However, such a military campaign carries a chance of success only if the organization fought against finds shelter among some collective that provides it with material and ideological support and whose alleged protection is the organization’s *raison d’être*, like Hamas in Gaza or the Viet Cong in Vietnam. In cases like these, the heavy destruction inflicted

68. Michael Slote, *Goods and Virtues* (Oxford: Clarendon, 1983), 99.

69. As argued by Rodin, “The War Trap,” this general advice applies to all wars. Given the likelihood of strategic and moral escalation in its course, “the barriers to commencing war must be commensurately strengthened” (695). But it is especially troubling with respect to asymmetric wars in which clear victory is even harder to achieve.

70. For a justification of targeted killing, see my “Targeted Killing,” *Theoretical Inquiries in Law* 5 (2003): 63–82, and, more recently, “Can Just War Theory Justify Targeted Killing? An Investigation into Three Models,” in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein, Jens David Ohlin, and Andrew Altman (New York: Oxford University Press, 2012), 90–111.

in the course of the hostilities might convince the relevant organizations to cease their attacks for a reasonable period of time.<sup>71</sup> It might, but it also might not—as evidenced by the failure of the American campaign against the Viet Cong and by the fragility of the cease-fire signed with Hamas after the Israeli “Cast Lead” operation in Gaza at the beginning of 2009. However, with organizations like al Qaeda that are not clearly identified with any national or ethnic group and are not located within it, wide military campaigns will probably be ineffective. With such organizations, the harm meted out to the civilian population that is only loosely associated with them would just invite retaliation and would fail to convince the organizations to be more restrained. With no accepted rules for ending the war with al Qaeda, with no field of battle on which it could be defeated, and with no military targets or civilian ones (i.e., civilian infrastructure) the destruction of which could deter it, the right strategy against al Qaeda could only be a patient though persistent attempt to weaken it—by targeting its members, cutting off its financial support, and using any other measure to impede its activities—I mean any measure short of a wide military campaign.

## V. CONCLUSION

In the state of nature, players regularly resort to violence and war to promote their interests and to defend themselves against real or imagined adversaries. For their fighting to be effective, players attempt to destroy their foes altogether, thus guaranteeing for themselves the political and economical benefits of their military success. The logic of this argument is hard to resist. It fits the basic principle posed by Clausewitz, to wit, wars, by their very essence, aim at the annihilation of the enemy.

But a world characterized by uncompromising war would be unbearable. Therefore, reason recommends the mutual acceptance of principles aimed at saving the warring parties from this grim prospect. These principles underlie the rules determining *jus ad bellum*, *jus in bello* and—at the center of the present study—*jus ex bello*. In essence, this means that for the sake of their long-term interests, the parties give up the option of completely destroying their enemies and agree to separate military victory from political success. An agreement to end war short of reaping its political benefits, and even short of a clear military victory, is ex ante mutually beneficial to all parties, hence binding, even if ex post it runs against the interests of one of the sides. The focus on military victory has significant implications for just war theory in general, mainly for the understanding of the conditions of success, necessity, and proportionality.

71. See Statman, “Can Wars Be Fought Justly?” sec. 2.

For readers who are not yet convinced by the necessity of the contractarian argument to ground the rules for ending wars, I suggest they think again about the institution of surrender. If an army signifies its surrender by one of the accepted ceremonial ways of doing so, its enemy is obliged to accept the surrender immediately, even if doing so is against its strategic interests and even if it has good reason to suspect that the cessation of hostilities is only temporary. The best way to justify this obligation is to regard it as based on mutual agreement between all warring parties who appreciate the overall advantage of a rule that makes possible an instant end to war by any of the parties.

Like with all contractarian arguments, this one applies only to those who are parties to the contract and who accept the constraints embodied in it. For those who are not, the logic of the state of nature applies (or reapplies) in all its harshness. This conclusion is especially relevant for wars aimed at stopping rogue states from committing large-scale crimes against their own citizens or against citizens of other countries. If some third party is willing to intervene in such cases in spite of the price it will have to pay, it should do so only if it is ready to persist in fighting until the enemy is clearly defeated and the unjust regime replaced. If, due to moral or prudential reasons, this third party is unwilling to take such thoroughgoing action, then refraining from military intervention might be better than doing "half the work." There is no point in risking the lives of many thousands of people, and in spending billions of dollars, for only temporary relief which will come to an end shortly after the occupiers leave the scene. If a military intervention is ever justified in the face of some humanitarian crisis, the crisis must be very serious indeed, but if it is that serious, it will usually not be resolved without a thorough transformation of the unjust regime.

This is similarly true with the struggle against terror organizations which have nothing but contempt for the war convention and for whom the conventions for ending war explicated above hardly make sense. Here too, the price of setting off a war is high and the outcome uncertain; hence, there are good reasons to refrain from such a step and to invest instead in limited operations of prevention and obstruction, on the one hand, and in the improvement of measures to protect the nation on the other. If such measures are insufficient and the threat to normal life becomes unbearable, there might be no alternative to a wide military campaign. But this option makes sense only if the threatened country is prepared to continue the war until the terror organization is clearly defeated and the threat it poses unambiguously removed for a significant length of time. In the actual world, where such organizations depend on the support and material assistance of some large social group, such a defeat will not be possible without inflicting serious harm on this group, either by unintentionally causing death and injury to its members



or by even intentionally bringing destruction on its infrastructure. If these outcomes seem too frightful—and frightful they definitely are—the alternative is to pursue the two tactics just mentioned (limited operations and improved defense) and to get used to living with a certain level of terror, just as we have got used to living with a certain level of (regular) crime and of traffic accidents.

This conclusion converges with that of Blum and Luban who similarly suggest that states should “invest in defensive weapons systems, shelters, evacuation and response, and any other means that would lower the magnitude of harm.”<sup>72</sup> Moreover, our articles agree that part of the reason for doing so has to do with the disproportionate (hence “frightful”) harm involved in the alternative, namely, in large military campaigns against terror organizations. There is, however, a difference in emphasis: while for Blum and Luban, the main worry is disproportionate harm, for me the main worry is futile harm. Getting involved in military campaigns that fall short of achieving their ends—and which at times lead to results which are even worse than the status quo ante—is a paradigmatic case of shedding blood in vain.

It might seem disappointing to close my article with these comments about the harshness of wars against rogue states and against terror organizations. After all, the main point of the article was to offer justification for limited—“compromising”—war, for the possibility that wars stop short of victory. Indeed it was. However, in the real world, wars increasingly involve at least one party uncommitted to the war convention, to whom agreements about ending war do not apply. Such wars are typically less destructive than wars between regular armies (unless, heaven forbid, weapons of mass destruction enter the scene),<sup>73</sup> but, unlike regular wars, they tend to continue for a long time with no clear agreement on how to end them. Whether this new state of nature will produce a new kind of contract regarding the ending of war remains to be seen.

72. Blum and Luban, “Unsatisfying Wars,” 778.

73. If Gat is right in his analysis, there is much to fear in this respect. In his estimation, the prospect of weapons of mass destruction being used in one form or another by terrorists is “a matter of when rather than if” (*War in Human Civilization*, 656).