

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

Daniel Statman

dstatman@research.haifa.ac.il

I Introduction

The last ten to fifteen years have witnessed an explosion of philosophical and legal preoccupation with questions regarding the morality and the legality of wars and of warfare. Given this fact, it is quite surprising that so little attention has been given to the topic which is at the centre of the present conference, namely, the ending of wars. So much has been written about the question of when wars ought to begin, so many discussions have been held on how to conduct wars once they begin – but so little has been said about when to end them. It was only in 2008 that the last question was finally addressed by two writers independently, Darrel Moellendorf and David Rodin, each coining a term of his own to refer to this new sub-field of just war theory: *Jus ex bello* and *jus termination*, respectively.¹ The paucity of philosophical discussion on ending wars is even more surprising given the intense interest in the topic by political scientists and by scholars working in the area of war studies.²

In response, it might be said that I am ignoring the abundant material on jus post bellum in the last decade which does address the issue at hand. However, as emphasized by both Moellendorf and Rodin, the moral questions pertaining to the post-war reality are very different from those connected with the way wars should end. I would add briefly that although I see the logic of including post-bellum questions within just war theory, there is also something

¹ Darrel Moellendorf, “Jus ex Bello,” *Journal of Political Philosophy* 16 (2008): 123-136; David Rodin, “Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression” in Jann Kleffner and Carsten Stahn (eds.), *Jus Post Bellum: Reflections on a Law of Transition from Conflict to Peace*, The Hague: T.M.C. Asser Press, 2008, pp. 53-75.

² See, for example, Richard Hobbs, *The Myth of Victory: What is Victory in War?* Boulder, CO: Westview Press, 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 & 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): 461-495; William C. Martel, *Victory in War: Foundations of Modern Military Policy*, New York: Cambridge University Press, 2007; Jan Angstrom & Isabelle Duyvesteyn (eds.), *Understanding Victory and Defeat in Contemporary War*, New York: Routledge, 2007.

a bit unnatural in doing so. Since the only accepted justification for wars today is self- or other-defense, the main expertise that philosophers working in the field have developed is one built around these notions, namely, what merits defense, what the conditions for initiating defensive acts by individuals and by collectives are, and so on. Nothing in this expertise prepares those working in the field to discuss peace settlements, historic justice, reparations, reconciliation etc. To use a legal analogy, there is no reason to think that legal theorists of criminal law who specialize in self-defense are those most suitable to discuss questions regarding compensation or other ex post measures. By contrast, the questions that fall under jus ex bello are very clearly and naturally part of just war theory, which, accordingly, should be seen as comprised of three parts: The first dealing with the rules for initiating wars, the second dealing with the rules concerning its conduct, and the third with the rules dealing with its termination.

In section II, I explain and defend the logic of what I shall term 'uncompromising war', namely war aimed at the complete defeat of the enemy. I then show how this logic leads to an unbearable outcome which gives the impetus to a social contract which I spell out and defend 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 the warring sides fall back to the state of nature, which means back to some version of uncompromising war.

II The logic of uncompromising war

A distinction, repeatedly underlined in the treatment of war in political science, is the distinction 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. 'Political' is used here in a wide sense to refer to any goal distinct from destroying or disabling the enemy army. It could be security, strategic status, access to the sea, territory, economic benefits, and so on. I shall refer to such various goals as the *ends of war*. When states go to war they always have some end in mind – not always fully articulated – an end that they hope to accomplish via the use of military force. However, means often fail in achieving their ends, and this holds true for wars too; victory in the battlefield is not sufficient to guarantee attainment of the political aims. If the cost of such 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 he 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 number of enemy soldiers killed, or tanks destroyed, but on subjective perceptions, namely, which side is *conceived* as victor by the respective sides and by the international community. If the side defeated in the battlefield manages to create the impression that it fought heroically, brought about havoc to the enemy side and prevented it from achieving its goal, it might come out of the confrontation as the real winner, and be in a better position in the post war negotiations. The point is well made 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.³

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."⁴ 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.⁵

The failure to translate success in the battlefield into political accomplishment is nowhere more prevalent than in attempts to intervene in civil wars, which have constituted the majority of

³ Dominic Johnson and Dominic Tierney, "Essence of Victory: Winning and Losing International Crises," *Security Studies* 13 (2003-2004), p. 350, cited by Robert Mandel, "Reassessing Victory in Warfare," p. 464.

⁴ Mandel, "Reassessing Victory in Warfare," p. 461.

⁵ *Ibid.*, pp. 465-466.

wars since WWII.⁶ According to Byman & 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.”⁷

It is hard to exaggerate the significance of these observations: many thousands of people killed and injured, enormous economic losses, destruction of infrastructure and of forms of life – 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 be so irrational, bring about such mayhem upon both their enemies and themselves, with so little profit?

Yet thus construed, the riddle seems to be a new phenomenon. In the past, the failure of military victory to lead to political achievements (at least in the short run) was much less common. The reason is that, in the past, wars often ended in the total destruction of the defeated party, which usually meant that all the adult males were put to death, the women were taken and the children enslaved. The biblical commandments for 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 Azar Gat, this story about the command of Moses to the Children of Israel –

⁶ According to Lotta Harbom and Peter Wallansteen, “Armed Conflict and Its International Dimensions, 1946-2004,” *Journal of Peace Research* 42 (2005), p. 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.”

⁷ Daniel Byman and Taylor Seybolt, “Humanitarian Intervention and Communal Civil Wars,” *Security Studies* 13 (2003), p. 33. I owe the last two references to Kersti Larsson, “Culture and Military Intervention,” in Angstrom & Duyvesteyn (eds.), *Understanding Victory and Defeat in Contemporary War*, p. 206.

typifies victors' conduct through-out 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 the 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.⁸

This conduct 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 Hobbes, each group realized that those outside their group would attack them and take possession of their 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*, ch. 6), but such devastating attacks were nonetheless effective for many years, granting the victor safety and peace to strengthen his collective, enlarge his territory, make political alliances and so on. In the period of *Judges*, when victories managed to guarantee peace for forty years, that was a great achievement. A longer period of peace would belong only to the Messianic era.

The uncompromising and cruel character of ancient warfare had to do with a fact pointed out by Gat, namely, that “the most lethal and common form of warfare was the raid, using surprise and taking place mostly at night.”⁹ This was so because raids were a much safer means of warfare for the attackers than the alternative, which would have been open confrontation in 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 so on. At times there were open confrontations too, but these were regulated by tacitly accepted rules and resulted in very few casualties. Consider, for example, the following description of an open battle from the highlands of New Guinea:

Sometimes ‘nothing fights’ could escalate to ‘true fights’ involving close-quarter weapons such as spears and axes. Still, the combatants rarely closed in to come to grips

⁸ Azar Gat, *War and Human Civilization*, New York: Oxford University Press, 2006, p. 69.

⁹ *Ibid.*, p. 117.

with each other in a true *mêlée*. The battle remained static, with the sides exchanging blows behind their shields, while keeping back and taking care not to expose themselves or to be caught isolated. Thus warfare could proceed for weeks or even months without heavy casualties. Battles would be abandoned when it rained or when the combatants felt that they needed a rest.¹⁰

Given the high risk of getting close to one's enemy in such confrontations, no wonder that the preferred strategy was "asymmetrical, first-strike killing" via nightly raids, ambushes, or surprise attacks from the rear. Very little mercy was granted either in the planning or in the execution of warfare. The desirable end of each side to the violent clash was to totally neutralize the threat posed by the other side by killing the adult males, seizing their women and children and looting their possessions. Having mercy upon one's enemy would have meant a need – sooner or later – to fight against them again.¹¹

To conclude this point, then, in contrast to modern wars, especially those conducted since the end of WWII, in ancient wars there existed a much tighter relation between military victory and political payoffs than in postwar reality, 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 threat from the defeated party, and at benefiting as much as possible from the victory in terms of territory, natural resources, etc. This difference between wars in the past and modern wars is not so consistent and neat; not all pre-modern wars were uncompromising, and not all modern ones are limited and contained. The expression Pyrrhic Victory is, after all, not a new one. Nevertheless, the general picture outlined seems to be correct. Since the violent conflicts of pre-historic (hunters and gatherers) days through those between more organized societies and those fought by empires, the parties aimed at – and

¹⁰ Ibid., p. 124.

¹¹ Cf. the biblical warning in Numbers 33, 55: "But if ye will not drive out the inhabitants of the land from before you, then shall those that ye let remain of them be as thorns in your eyes, and as pricks in your sides, and they shall harass you in the land wherein ye dwell." The Rabbis could not easily swallow this policy and found their ways to protest against it or re-interpret its practical meaning. For example, instead of condemning Joshua for sparing Rahab and her family, in apparent contrast to the above biblical commandment, they said that among her descendants were ten prominent priests and prophets, including Ezekiel and Jeremiah (*Yalkut Shimoni*, Numbers, 148). That would mean that Joshua made a wise decision by keeping her alive.

often achieved – complete defeat of their enemies, which then made it possible for them to reap the fruits of victory with no interruption. Which side was victorious was 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 most 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...¹²

Admittedly, an 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.¹³

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.¹⁴

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 easily be offered. As indicated earlier, fighting and winning are never ends in themselves.¹⁵ They are means to non-military or political goals, ‘political’ because they refer to goods for some collective. 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, in other

¹² Carl von Clausewitz, *On War*, translated and edited by Michael Howard & Peter Paret, Princeton, NJ: Princeton University Press, 1976, p. 258, cited by Azar Gat, *The Origins of Military Thought: From the Enlightenment to Clausewitz*, New York: Oxford University Press, 1989, p. 206.

¹³ Clausewitz, *On War*, p. 228, cited by Gat, *ibid.*, p. 207.

¹⁴ James Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War*, Cambridge, MA: Harvard University Press, 2012 [in press], ch. 6.

¹⁵ “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*, p. 87)

words for “annihilation,” whether in the form of a major and decisive battle (which was Clausewitz’s view), or in some other form.¹⁶ 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,¹⁷ 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 for us almost synonymous 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. 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 chances of civilians being hurt too.

This understanding of war, it seems to me, runs against both commonsense morality today and just war theory. The launching of war, most of us 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 withdrew from the territory it had occupied and ceased its fire, there would be no justification for continuing to fight against it with the aim of completely destroying its army. All the more so if the enemy supplemented these actions on the ground with a clear public announcement about the end of war, or – a fortiori – by an announcement of its surrender. In light of this widespread view on

¹⁶ 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, *The Origins of Military Thought: From the Enlightenment to Clausewitz*, p. 217 ff.

¹⁷ 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], p. 404).

the moral demand for limited wars, no wonder that Clausewitz is sometimes seen, as, for example, by Little-Hard, as “the Mahdi of mass and mutual massacre.”¹⁸

What is the source of this disagreement between the way most of us think of war today and the way Clausewitz and so many thinkers and politicians before him thought about war? In particular, is it an empirical disagreement about what is needed to remove a threat, or a moral disagreement about the legitimate means that might be used 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, namely, 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 inevitably from what I named elsewhere the success condition for war and for individual self-defense.¹⁹ The point I made there was that if the probability of success is low enough, 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 invasion, 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 estimates 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 defensive force against the would-be aggressor. At the end of my discussion on the success condition, I argued that this condition 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

¹⁸ Cited by Paul Cornish, “Clausewitz and the Ethics of Armed Force: Five Propositions,” *Journal of Military Ethics* 2 (2003), p. 214.

¹⁹ See my “The Success Condition for Legitimate Self-Defense,” *Ethics* 118 (2008): 659-686.

attack (on one's life, bodily integrity, or property) because they might be seen as protecting the victim's honor, on the collective level honor plays a lesser role.

To focus on wars, then, suppose that, at t1, state V, which is under threat from state A, estimates that whatever harm it causes state A at t2, at t3 state A will have executed its unjust attack and occupied state V. Given these assumptions, state A's launching war would violate the success condition, hence would be morally unacceptable. The big question concerns the time gap between t2 and t3. In my previous discussion I implicitly assumed that it was very short, but this assumption now seems to me unwarranted. A time gap of a hundred years would definitely be significant, namely, would allow state A to go to war at t2 against state V. But with such a large time gap, state A would in any case be unable to predict reliably what would happen to her, hence could not be said to reasonably believe that at t3 (=in a hundred years) it will be defeated. By contrast, a time gap of two years seems to me completely reasonable. If state V believes that even if it can block, within two months, the attack launched against it by state V, it will be painfully defeated by it within two years, this two month campaign would be a futile shedding of blood, a pointless exercise in mayhem and misery.

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 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."²⁰ (One can see how this 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 one might conclude that the only respectable option is no-war at all, namely pacifism.)

Elsewhere I presented a similar dilemma in terms of a tension between the success and the proportionality conditions for military action.²¹ According to the proportionality condition, the response of a state to attacks against it, for instance the firing of rockets at its cities, must be

²⁰ Byman & Seybolt, "Humanitarian Intervention and Communal Civil Wars," p. 78.

²¹ Daniel Statman, "Can Wars Be Fought Justly? The Necessity Condition Put to the Test," *Journal of Moral Philosophy* 8 (2011): 435-451.

constrained and not “disproportionate.” The problem is that such a response often fails to deter the enemy and to prevent future attacks, which means that it violates 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 some specific attack in a specific location, but a significant removal of the threat posed to them, a removal which would guarantee a state of enduring 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 to the extent that 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, the only thing it can hope to do is to hit the enemy so badly as to deter him from carrying out any attack in the foreseeable future, or disable him in a way that would make any such attack unfeasible.²² As Isabelle Duyvesteyn says 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.²³

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 & Mckim between ‘sufficient just cases’ for war, like self-defense

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²³ Isabelle Duyvesteyn, “Some Conclusions,” in Angstrom & Duyvesteyn (eds.), *Understanding Victory and Defeat in Contemporary War*, p. 233. See also Mandel, “Reassessing Victory in Warfare,” 471, who argues that the “postwar deterrence effort needs to confront the major challenge that during the last decade, only half of the attempts to stabilize a post-conflict situation... have been successful.” The way to confront this message seems to make the deterring message much louder and clearer.

against aggression, and ‘contributing just cases’ 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 *deterring 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*.”²⁴ 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*.” My point is that it is hard to see how this can be done without continuing to fight until the causes for aggression and the ability to express it are removed or transformed.

In a similar way, Michael Walzer warns against ending wars too soon. 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.”²⁵ Once again, how late a time is impossible to define a priori, but surely a time span of several years would count; ending wars which might resume within a few years would be a mistake. That seems not so far from Clausewitz because the best (the only?) way to prevent this future war is to destroy the enemy's motivation to attack.

Contrary to the allegation made by some writers, then, what often prolongs wars is not a fanatic crusade for *justice*, but the inner logic of war aiming at a stable and enduring peace, which can be achieved only as a result of an unambiguous victory.²⁶ Stopping short of such victory makes the sacrifices already made pointless.

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 post-war 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

²⁴ Rodin, “Two Emerging Issues of Jus Post Bellum,” p. 60, italics added.

²⁵ Michael Walzer, *Just and Unjust Wars*, 4th edition, New York: Basic Books, p. 123.

²⁶ See Walzer, *Just and Unjust Wars*, p. 110 ff., who discusses the view of some “realists” who argued that “the pursuit of justice was deeply implicated in the horrors of 20th century war,” and Whitman, *The Verdict of Battle*, ch. 6.

definitely do, sooner or later. Hence Orend believes that the winning party should “embark on a ‘hearts and minds’ campaign to win hold-outs over.”²⁷ This seems to me unrealistic and, if I may say so, a bit presumptuous, 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, “[o]ne cannot allow the re-birth of a regime failing minimal justice – *or else what was the point of the war?*”²⁸ Indeed so, but insofar as preventing this re-birth 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, post-war reconstruction, are those of post-WWII Germany and Japan,²⁹ but in both these cases the reconstruction followed total wars of the kind that Orend would no doubt resist.

A tacit inclination towards unlimited (or less limited) war also comes out of the way Orend defines the aim of a just war as “the resistance of aggression and the vindication of the fundamental rights of societies.”³⁰ Resistance of aggression is of course an obvious aim of a just war and is more or less clearly defined. “Vindication of rights,” however, is a much looser and vaguer notion. It refers to the way human and political rights are *perceived*, especially among members of the aggressive collective and possibly among others too. To vindicate rights is thus to bring about a transformation in the minds of many individuals regarding the importance of

²⁷ Brian Orend, “Jus Post Bellum: A Just War Theory Perspective,” in Stahn & Kleffner (eds.), *Jus Post Bellum*, p. 51.

²⁸ 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 Eric Patterson (ed.), *Ethics: Beyond War’s End*, Georgetown University Press, 2012, p. 38). Obviously, to change from murderous to non-murderous the unjust regime would have to undergo a very fundamental reform in its values and social institutions.

²⁹ Orend, *ibid.*, p. 52.

³⁰ Orend, “Jus Post Bellum: A Just War Theory Perspective,” p. 39.

respecting rights, an outcome that cannot be achieved by merely resisting the aggression and returning to the status quo ante.

The need for a clear-cut defeat of the enemy – its “annihilation” – has also to do with the fact I already mentioned that what determines the post-war 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.³¹ If the enemy retreats with heavy casualties but manages to turn his apparent failure into 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 non-democratic societies, are rich and diverse, there is a need for an unambiguous victory that will make it impossible for the defeated party to deny or re-interpret.³² Clausewitz’s “destruction of the enemy forces” would serve this goal very well.

The conclusion of this section with respect to jus ex bello is then, that, in a pre-contract 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,³³ 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

³¹ 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 & Duyvesteyn (eds.), *Understanding Victory and Defeat in Contemporary War*, ch. 3.

³² In the struggle over the subjective perception of victory, democracies are much inferior to non-democratic 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 scenario with a society in which the media is controlled by the state. The way for democracies to win this battle over the image of victory is to inflict such a level of destruction that it is hard to interpret it any other way. But doing so would often be more than democracies can 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 and Ivan Arreguín-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, New York, Cambridge University Press, 2005.

³³ See Rodin, “Two Emerging Issues of Jus Post Bellum,” p. 55, and Moellendorf, “Jus ex Bello,” section II.

bello too. Moreover, our discussion led to the conclusion that sometimes too moderate wars are not legitimate goals of war, insofar as they provide too little benefit at too high a price. To be more accurate, such wars do have a just cause – defense from aggression – but since the defense they offer is so brief and fragile, they 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 impossible to determine a priori. All I can say is that the length of the intervening time must be *significant*.

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 in case 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 the enemy from a 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 represents better the actual history of humankind since the days of the hunters-gatherers than the alternative, Rousseautic picture.³⁴

Like Hobbes’s analysis of the state of nature in the *Leviathan*, the present section too leads to an impasse. The inner logic of wars, the aim of which is to provide security and peace, leads to conflicts which are extremely destructive (“annihilative”), cruel, and often 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.³⁵

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 too.

³⁴ Gat, *War and Human Civilization*, esp. ch. 2.

³⁵ *Leviathan*, end of ch. 13.

III A Contractarian view of ending wars

According to the contractarian understanding of just war theory, defended at length by Yitzhak Benbaji,³⁶ 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 conflicts, they have an interest in limited, rule-governed wars over unlimited, total ones; and since deciding on such rules would be impossible once a 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 at the end of the previous section, the state of nature – the pre-contract state – inevitably leads to an uncompromising war which is a bad result for all sides.

The kind of consent I just assumed to the war contract was hypothetical as it was given under a veil of ignorance and refers to what states would have agreed upon had they been thus ignorant. I assumed that in such a situation, in which states didn't know whether they'd be on the strong or on the weak side, their risk-aversion would incline them to opt for an agreement that would limit the liberty of the warring sides to conduct Clausewitzian-like wars. But the contractarian argument could also be formulated without assuming such a veil of ignorance. We could assume that in the actual world some state is more powerful than most or even all other states, and still argue that it has an interest in committing itself to an agreement aimed at the reduction of wars and of their disastrous outcomes. The reason that even if at present some state is overwhelmingly powerful, history teaches that such supremacy is temporary and lasts only until some other state gains power, or allies with a group of smaller states to form a

³⁶ See in particular Yitzhak Benbaji, "A Defense of the Traditional War Convention," *Ethics* 118 (2008), 464-495, and "The War Convention and the Moral Division of Labor," *Philosophical Quarterly* 59 (2009), 593-617.

powerful counter-power. I'll remain neutral between these two versions of contractarianism, with some preference for the latter which will have to be established elsewhere.³⁷

A crucial part of the contract about ending wars is a commitment to a clear 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 some conventions that would artificially provide such a definition and release the parties from the burden of going on fighting.

According to legal historian James Whitman, 18th century Europe is an excellent illustration of such an agreement for ending wars. It was “an age of exceptional military restraint,”³⁸ 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 battle, the French lost 11,000 men while their enemies lost 21,000. The campaign against France had effectively failed. Nevertheless, the battle was considered to be a victory for the Spanish and their allies, not only by the Allies and third parties following the events, but also by France itself. 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.³⁹

In this particular battle, it might sound odd to say that the “rule of retreat” led to or expressed *restraint*. After all, Malplaquet was one of the bloodiest battles of the century. Nevertheless,

³⁷ Cf. Benbaji, “A Defense of the Traditional War Convention,” p. 487, who argues that just combatants lose their right to life in war “by virtue of their (very indirect) consent,” not by virtue of their *hypothetical* consent.

³⁸ Whitman, *The Verdict of Battle*, ch. 5.

³⁹ *Ibid.*

the alternative looks much 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 18th century took the question of who counted as the loser very seriously.” As he demonstrates at length, 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 re-utilizing 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 warring 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, 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.⁴⁰

⁴⁰ Ibid.

The idea of regarding pitched battles as a kind of *lethal game* is extremely helpful in illuminating their conventional nature.⁴¹ It also connects to a standard analogy used by supporters of the contractarian view of the war convention, namely, the boxing analogy.⁴² The point of the analogy is that people might lose their natural rights if they voluntarily enter into a rule-governed activity in which all other participants also give up some of their rights on the basis of reciprocity. This, according to the contractarian line, is what happens in war: When soldiers enter into 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, in an apparent violation of their opponent's natural right not to be harmed, but also what they are *prohibited* from doing to each other once the game is over. These rules define when and how the match starts, how it should be conducted and how it ends – and similarly with the rules of war.

Although the retreat rule played a crucial role in shaping – in limiting – 18th 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.”⁴³ All the more so with the general phenomenon of rule-governed battles. I mentioned above Gat's view about the high risk that was usually involved in face-to-face confrontation in pre-historical societies and the preference for the raid and the ambush as the main tactics of warfare. No wonder that when direct confrontation did take place, it was constrained by rules that significantly limited the violence, sometimes to the point of making victory merely ceremonial. Here is how Gat describes such confrontations in the hunters-gatherers era:

⁴¹ Whitman adds that “it is a striking fact that humans sometimes literally do play games to resolve conflicts that could be resolved through war.”

⁴² See e.g. Benbaji, “A Defense of the Traditional War Convention,” p. 487, and Thomas Hurka, “Proportionality and Necessity” in Larry May (ed.), *War: Essays in Political Philosophy*, New York: Cambridge University Press, 2008, p. 136. The boxing analogy is rejected by Jeff McMahan, “On the Moral Equality of Combatants,” *Journal of Political Philosophy* 14 (2006), 381.

⁴³ Whitman, ch. 5.

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.⁴⁴

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 one's enemy. As Whitman put it, "it was in the interest of all the parties to accept conventions that defined victory in ways that stopped short of annihilation."⁴⁵

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 completely 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. It is time to spell out this agreement in more detail.

First, in wars of self-defense, the successful blocking of the enemy attack provides a powerful reason to cease one's fire, either unilaterally or, preferably, within some kind of agreement. In wars against invasion, this means that 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. In

⁴⁴ Gat, *War and Human Civilization*, p. 117.

⁴⁵ Whitman, ch. 5. See also his interesting comment that Pufendorf regarded the law of war as a branch of *contract law*.

other words, the parties would agree not to continue the fighting just in order to prevent the *next war*.

Second, on the contractarian view of ending war, the direct aim of fighting is *military* success rather than various political ends. This means that the conditions for just war – success, necessity and proportionality – should be tested in reference to the former rather than in reference to the latter. 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, 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 probably 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 rather than political success. And they are even further eased if military success itself is contextualized, or localized, in the following sense: the point of reference for the above conditions is not overall victory, but victory in the specific operation to which some 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, 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.⁴⁶ The wider and longer the results that must be taken into consideration in determining victory and defeat, the harder it is to know when to end war – *if* the justification for doing so depended on the achievement of overall victory.

According to the contractarian view, however, success in war is defined more modestly. It does

⁴⁶ 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," p. 16). For a survey of the main puzzles in this area, see Angstorm's introduction to Angstrom & Duyvesteyn (eds.), *Understanding Victory and Defeat in Contemporary War*.

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.

The ceremonial and game-like aspects of wars are less common nowadays than they were in the 18th century or in older wars, but they nonetheless still exist.⁴⁷ 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 which would, more or less, re-establish the status quo ante. The point I wish to emphasize is that these ceremonial acts of surrender impose inescapable limitations upon the side receiving 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 or not, all would prefer an agreement that enabled losing parties to enforce a cease fire on their rivals even if that meant that even if they are the triumphant side, they too would have to abide to those rules.

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 it in the first place.⁴⁸ Such a requirement would be very hard to follow in practice, because it is extremely difficult to determine at any given point of time whether and to what extent the threat posed by the enemy is still valid and how much the continuation of war contributes to its neutralization. This difficulty explains why the sides to the contract would

⁴⁷ 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 19th century and vanished altogether in the 20th and 21st centuries. Part of the explanation he offers has to do with the fact that in the 18th century, as in most of human history, war was not thought of primarily 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 19th century and replaced by a completely different one according to which wars are not fought to settle minor 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.

⁴⁸ Such a requirement seems to be made by Moellendorf, "Jus ex Bello," p. 126, who says that there is a need for an "ongoing assessment of the likelihood of success." See also Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004), p. 713, suggesting that "the requirement of just cause, and indeed all the other *jus ad bellum* requirements as well, must be continuously reapplied to the continuation of war as circumstances evolve throughout the course of a war."

agree, obviously on the basis of reciprocity, to exempt the warring sides from the above requirement. Once wars break out, the warring parties are allowed to focus on military success while disregarding the ultimate political aims of the war. They are allowed to continue fighting as long as the attacks against them go on, and as long as the enemy's achievements, especially in terms of the occupation of territory, are still in effect. While the parties are *permitted* to disregard the large political aims when they decide to continue the fighting, they are *obliged* to disregard them in case the other side offers surrender.

Fifth and finally, as Benbaji has shown in detail, contractarianism is closely connected to the idea of a moral division of labor.⁴⁹ If each policeman were morally required to review all the relevant evidence before going out to arrest some suspect, the police would fail in providing security to the citizens. Hence the need for a division of labor inside the police 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). The division of moral labor determines what individuals ought to do within their capacities, what they ought not to do, and what is left to their discretion.

Regarding the morality of wars, 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.”⁵⁰ If each soldier was 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 the

⁴⁹ Benbaji, “The War Convention and the Moral Division of Labor.”

⁵⁰ Walzer, *Just and Unjust Wars*, pp. 38-39.

need for an agreement that exempts soldiers from such a requirement and allows them – or even demands from them⁵¹ – to obey orders to use lethal force (unless they are manifestly immoral).⁵²

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 – we would dread a state of affairs in which based on its own assessment of the information available, some military unit decided to launch an attack on a neighboring country – so is their *ending*. It is not the role of the military, certainly not the role of individual soldiers, to make this decision. The only thing that soldiers must care about in fighting is that they follow the rules of *jus in bello*, in particular with regard to the protection of noncombatants of the other side. Morally they need not – most probably they ought not – ask themselves whether the aims of war have been realized or not. 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.

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.⁵³ Since purists reject the moral division of labor between politicians and soldiers, they impose on each individual soldier the responsibility to consult continuously the principles of *jus ad bellum* and make sure that each act of warfare she is ordered to carry out is justified by these principles.⁵⁴ The same applies to *jus ex bello*: The decision of individual soldiers to continue fighting “should be subject to principles similar to that the individual *jus ad bellum*.”⁵⁵ This burden imposed upon members of

⁵¹ See David Estland, “On Following Orders in an Unjust War,” *Journal of Political Philosophy* 15 (2007): 213-234.

⁵² See Yitzhak Benbaji, “The Moral Power of Soldiers to Undertake the Duty of Obedience,” *Ethics* 122 (2011): 43-73.

⁵³ See Benbaji, “The War Convention and the Moral Division of Labor” Section I (“The Purist Challenge”).

⁵⁴ See especially James Pattison, “When Is It Right to Fight? Just War Theory and the Individual-Centric Approach,” *Ethical Theory and Moral Practice* 15 (2012), p. 12 (“The principles of individual *jus ad bellum* should also determine when it is acceptable for an individual to use force during war”).

⁵⁵ *Ibid.*

the military might seem attractive if one believes, with James Pattison, that “even if a few more individuals begin to question the permissibility of their contribution, this would be a positive development.”⁵⁶ Non-purists, 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 or not 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 that imposes upon each individual soldier the responsibility to decide whether or not war is morally appropriate might just as well lead to the opposite outcome – to soldiers initiating acts of warfare which happen to be *unjust*, or to continue fighting 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,”⁵⁷ leaving decisions about the continuation of war in the hands of each individual soldier runs a higher risk on 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.

To conclude, then, while in the pre-contract, state-of-nature world, uncompromising war is justified and reasonable, this is not so in the post-contract world, in which all parties have a strong reason to undertake 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 argument helps to see why such endorsement is justified.

⁵⁶ Ibid.

⁵⁷ David Rodin, “Ending War,” *Ethics & International Affairs* 3 (2011), p. 361. Rodin does not regard this psychological fact as a reason in favor of the moral division of labor and he explicitly refers later in his paper to “the combatant” (in the singular) who must decide whether to stay in places like Iraq or Afghanistan or to leave. I assume he would say the same about any war, to wit, it is the responsibility of the each individual combatant to decide every day anew whether or not to continue fighting.

IV Ending war with those outside the contract

I relied earlier on Gat's work to claim that the rational need to agree on conventions for ending wars had to do with the elevated risk of face-to-face confrontation in the battlefield. This meant that while in the battlefield the parties were impressively self-restrained, in other and more prevalent forms of warfare – the raid and the ambush – they were much less so. Moving forward in history to the 20th and 21st centuries, 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 in the battlefield and by and large follow the war convention, while irregular armies and organizations avoid open confrontation and adopt various modern analogues to the ancient ambush and raid.

What does this difference imply regarding the conventions for ending war between them? The irregular forces that use tactics such as raid and ambush have no incentive to accept limitations on their use, which would tie their hands without tying the hands of their opponents who are usually not as good as they are in utilizing them. Neither would the regular armies have an incentive to agree on rules that would limit fighting in the open, because they expect to have 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 *jus in bello* places them clearly outside the war contract.

The impossibility of confronting irregular armies in the open makes it extremely hard to defeat them, and the war against them is therefore inevitably long and tedious. This leads to a somewhat paradoxical result. While wars between armies in the field of battle (the "field" might be in the air or in the sea too) are often very destructive and lethal, they are typically limited in time and place because of the reasons mentioned in the previous section: 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 different levels, as in Hobbes' famous description of war in the state of nature (*Leviathan*, ch. 13).

The fact that the war against irregular armies is not subject to the logic described at the end of section II, 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. The accomplishment of this aim might require harsh measures, but, in Gil Merom's estimation, there is clear evidence from the past that this is how insurgency can be defeated: “[Superior parties] have routinely won by resorting to extreme brutality.”⁵⁸ To carry out such policy, the leaders might need what Michael Slote called a “moral stomach,” namely, “the ability to overcome personal aversion and pangs of conscience,”⁵⁹ and it is possible that they lack such ability. In that case, it is both morally and prudentially better that they do nothing than drag their country into a hesitant and eventually futile military campaign.

The high costs involved in launching war against irregular organizations, coupled with the lingering uncertainty about the outcomes of such war, indeed provide an excellent reason to avoid it as far as possible. For the sake of its own interests, a state subject to attacks by an organization that resides outside it would do better to invest in defense – in anti-rocket systems, good shelters, effective checkpoints – than in a large military campaign against this organization. Such defensive measures should be supplemented by targeted attacks using drones or special forces,⁶⁰ attacks which might have some deterring effect on such organizations and also might satisfy the public's desire to see “something done” in response to attacks on their country. The option of a large military campaign should be delayed to the extent possible and selected only when absolutely necessary and when there is a more than

⁵⁸ Gil Merom, “The Origins and Implications of Western Counterinsurgency Failures,” in Angstrom & Duyvesteyn, *Understanding Victory and Defeat in Contemporary War*, p. 171. See also Idem., *How Democracies Lose Small Wars*, New York: Cambridge University Press, 2003, pp. 35-42.

⁵⁹ Michael Slote, *Goods and Virtues*, Oxford: Clarendon Press, 1983, p. 99.

⁶⁰ I defend the tactic of targeted killing in “Targeted Killing,” *Theoretical Inquiries in Law* 5 (2003): 63-82 and, more recently, in “Can Just War Theory Justify Targeted Killing? An Investigation into Three Models,” in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds.), *Targeted Killings: Law and Morality in an Asymmetrical World*, New York: Oxford University Press, 2012, pp. 90-111.

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. If the war stops short of achieving this outcome, it will have been a waste of life and a waste of money. As if that's not enough, the state of affairs ensuing from such an ending might be even worse for the state because of the boost to the enemy's morale and the problematic message broadcast to other hostile groups.

However, such a military campaign might be effective 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 Hizbullah in southern Lebanon. In cases like these, the heavy destruction inflicted in the course of the hostilities might convince the relevant organizations to cease their attacks for a reasonable period of time.⁶¹ However, with organizations like Al-Qaeda, that is 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 loosely associated with them would only invite retaliation and fail in convincing the organizations to be more restrained. With no accepted rules for ending the war with Al-Qaeda, with no field of battle in which it could be defeated, and with no military targets or civilian ones (i.e. civilian *infrastructure*) the destruction of which could deter it, Al-Qaeda should be treated much more as a criminal gang than as a military organization.⁶² Accordingly, the right strategy is 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. Like with the war against the Mafia, the war against Al-

⁶¹ In "Can Wars Be Fought Justly? The Necessity Condition Put to the Test," I mention a statement made by Hizbullah leader Hassan Nasrallah in 2006 as an illustration of the at least short-term success of following this advice. Nasrallah's response shortly after the Lebanese war was that "he would not have ordered the capture of two Israeli soldiers had he known it would lead to such a response" (*Jerusalem Post*, August 28, 2006). It is hard to predict how long the deterring effect of the war will last – so far it has lasted for six years and survived the Cast Lead Operation in Gaza – but it does seem reasonable to assume that a less harsh response would have hardly had any effect.

⁶² Cf. Ivan Arreguín-Toft, "How to Lose a War on Terror," in Angstrom & Duyvesteyn, *Understanding Victory and Defeat in Contemporary War*, p. 161: "Defeating terrorists... is most properly understood as maintaining violence at low levels – thus making the violence purely criminal."

Qaeda cannot be brought to an end by victory in some impressive battle. In both cases, all that can be rationally hoped for is to weaken the movement and obstruct its activities so that violence is minimized to a bearable level.

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 *constant* and *uncompromising* war would be unbearable.

Therefore, reason recommends the mutual acceptance of a set 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. 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. 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 happens to run against the interests of one of the sides.

For readers who are not yet convinced by the necessity of the contractarian argument to ground the rules for ending wars, I would 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 so doing is against its strategic interests and even if it has good reason to suspect that the ceasing of fire is only temporary. The only 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 too applies only to those who are sides to the contract and who accept the constraints embodied in it. For those who do not, the logic of the state of nature applies (or re-applies) in all its harshness and severity. 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. With “rotten” regimes, as Avishai Margalit puts it, there is no room for compromise.⁶³ 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.” No point in risking the lives of many thousands of people, and in spending billions of dollars, for only a temporary relief which will be upset 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 not be resolved without a thorough transformation of the unjust regime.

Similarly 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 against them 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 on the improvement of measures to protect the nation on the other. If, however, such measures are insufficient and the threat to normal life becomes unbearable, there might be no alternative to a wide military campaign. But it makes sense for a threatened country to opt for this option only if it is prepared to continue the war until the terror organization is clearly defeated and the threat it poses unambiguously removed for at least the near future. In the actual world, where such

⁶³ Avishai Margalit, *On Compromise and Rotten Compromise*, Princeton, NJ: Princeton University Press. 2010.

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 yet foreseeably bringing about death and injury to its members, or by unintentionally and even intentionally bringing about destruction to 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.

It might seem disappointing to close my paper with these comments about the harshness of wars against rogue states and against terror organizations. After all, the main point of the paper was to offer justification for *limited war*, for the possibility that wars stop short of victory. Indeed it was. However, in the actual 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, WMD enter the scene⁶⁴), 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.

⁶⁴ If Gat is right in his analysis, there is much to fear in this respect. In his estimation, the prospect of WMD being used in one form or another by terrorists is “a matter of when rather than if” (*War in Human Civilization*, 656).