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The Fog of Victory

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THE FOG OF VICTORY

By Gabriella Blum*

Abstract

What does victory mean today? How do we know who “won” the war and what does the winner win by winning?

This essay uses the prism of victory to view the transformation of the goals, means, and targets of war, and assess the applicability of the conventional Just War Doctrine (through the traditional laws of war) to the modern battlefield. Specifically, the essay claims that the military and civilian components of war have grown so intertwined in both the conduct and ending of hostilities, that the laws of war, with their emphasis on combat, are hard-pressed to offer a normative yardstick a for a just modern war.

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“No one starts a war – or rather, no one in his senses ought to do so – without first being clear in his mind what he intends to achieve by that war and how he intends to achieve it.” (Carl von Clausewitz, *On War*).¹

“What is our aim? Victory, victory at all costs, victory in spite of all terror; victory, however long and hard the road may be; for without victory, there is no survival.” (Winston Churchill, *Speeches to Parliament*, 1940).²

Introduction

Much has been written about the new battlefields of the twenty-first century, specifically, in the context of counterinsurgency or counterterrorism operations, humanitarian interventions, and other nontraditional forms of hostilities; much has also been surmised about how those new forms of hostilities require expansion, constriction or adaptation of existing legal doctrines.

In this essay I offer a particular lens through which to view the changing nature of war and its possible effects on the Just War doctrine. This lens is the concept of “victory” – and its mirror image, “defeat.” If war in its most immediate sense is intended to achieve victory, or at least to avoid defeat, we must know what victory is and what is necessary to achieve it in order to conceive what legal and moral principles best ought to govern it. Following James Whitman’s winning formulation, I ask *how do you know who won* and *what do you win by winning*,³ and then use these questions to reevaluate the criteria for the *jus ad bellum* and *jus in bello* as they currently stand.

My focus of attention is on victory in wars conducted by liberal democracies. It is highly possible that my arguments are less relevant, both descriptively and prescriptively, to wars waged by other parties. Even if so, however, I believe that these arguments helps explain why wars among non-democratic parties look different from those in which there is at least one liberal-democratic belligerent.

¹ CARL VON CLAUSEWITZ, *ON WAR* 579 (Michael Howard & Peter Paret, eds. & trans., Princeton Univ. Press 1989) (1832).

² WINSTON CHURCHILL, *AN ADDRESS TO THE HOUSE OF COMMONS* (May 13, 1940), *reprinted in* BLOOD, TOIL, TEARS AND SWEAT: THE SPEECHES OF WINSTON CHURCHILL 149 (David Cannadine, ed. 1989).

³ See James Whitman, final Chicago lecture notes (on file with the author).

With few notable exceptions, there has been little systematic treatment of what victory is, what it looks like, and what it entails for both the victors and vanquished.⁴ Victory is still frequently imagined in World War II terms: invasion, defeat of armed forces, capitulation of the defeated, capture of the capital and leaders and installment of a new government. Many earlier wars have taken a similar form, and some recent wars included certain elements that resemble this model. But not all wars require such elements for victory; nor is it that when these elements do present themselves (for instance, in Afghanistan or Iraq), we commonly think about these wars as having been decisively “won.”

To set the stage, I begin with a short historical survey of how “victory” was understood and how it exhibited itself traditionally. For purposes of this essay, I employ a value-neutral definition of victory that ties it to the goals of war as they are set at the beginning of the campaign and as they are redefined throughout it.

I then proceed to outline what I believe to be the three major developments that have shaped contemporary wars and contemporary conceptions of victory: in the goals of war, the rules of war, and the targets of war.

As for the goals of war, the restorative tradition of Just War theory viewed war as legitimate only if it promoted the peace; and peace was largely synonymous with stability. War was thus a mechanism to restore a disturbed status quo, leaving much of the preexisting state order intact. The goals of contemporary wars, conversely, are often long-term change. Rather than restoring the preexisting order, eliminating contemporary threats is often perceived as requiring a transformation in the political, social, civic, and economic structures of the territorial state from which the threat had materialized in the first place.

The rules of war, especially since 1945, increasingly restricted the means and methods that a party could use in war. A growing concern for the fate of individuals

⁴ For some recent notable exceptions, see PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS OF THE TWENTY-FIRST CENTURY* (2008); AZAR GAT, *VICTORIOUS AND VULNERABLE: WHY DEMOCRACY WON IN THE 20TH CENTURY AND HOW IT IS STILL IMPERILED* (2009); JOHN DAVID LEWIS, *NOTHING LESS THAN VICTORY: DECISIVE WARS AND THE LESSONS OF HISTORY* (2010); WILLIAM C. MARTEL, *VICTORY IN WAR: FOUNDATIONS OF MODERN STRATEGY* (2011).

pushed the regime governing the conduct of hostilities (*jus in bello*) from a state-centered enterprise to a more cosmopolitan regime, in which individual human security is paramount. A new and renewed interest in *jus post bellum* augmented expectations from victorious parties in terms of obligations they owe to the defeated. Human rights laws have come to be understood as applying times of war, complementing and expanding on the laws of war. Overall, international law and international morality have made war, in aspiration if not in practice, more difficult to wage and prosecute. They have also made winning wars more costly for the victors. This is especially true for those parties who, for whichever reason, are committed to the changing norms of the international community.

A third development affecting conceptions of victory has to do with the nature of the enemy, or the targets of war: traditional wars were conducted against states, and for the most part, the state, its government, and its people were treated as one unified entity. With the disintegration of the state into three distinct entities (government, population, state) and the greater focus on individuals' status and conduct, the modern enemy is almost never characterized as an enemy "State;" instead, it is identified as a nonstate actor (insurgents, terrorists, transnational criminal networks) or a rogue government (Iraq, Iran, Libya, or North Korea). Consequently, victory now demands to be formulated and achieved in a more nuanced way vis-à-vis different groups within the state, delivering harms or blessings to each according to its respective conduct. The "wars over hearts and minds" essentially view individuals as consumers of competing ideologies and the state as a competitor vendor in the marketplace for ideology.

All three developments—in the goals of war, the rules of war, and the targets of war—are driven by a mix of strategic, political, moral, and legal forces, and it would be impossible to point at a clear trend of influence. In some cases, what began as sound military strategy found subsequent expression in law, and in others, legal norms shaped public expectations about moral conduct, expectations that were subsequently translated into rules of engagement on the battlefield.

These developments, taken together, also mean that while the military, the civilian, and political dimensions of war and victory were always inextricably intertwined (after all, war is famously the continuation of politics by other means⁵), they have become even more so in contemporary wars. With wars becoming about long-term change, requiring a mix of benevolence and aggression that are carefully tailored to individual targets, the political and civilian dimension of victory has outgrown the military one. As the attempts to define what success looks like in Afghanistan or Iraq show, the formulation of victory now requires more long-term, abstract, and complex, less tangible and immediate terms. War, in other words, can now longer be reduced into a military campaign.

And yet, the conventional Just War doctrine is still very much oriented to war and victory as phenomena that present themselves on the battlefield. In the second half of the essay I turn to examine the implications of the changing nature of victory for the existing doctrines of *jus ad bellum* and *jus in bello* in greater detail. While there has been a new and renewed interest in *jus post bellum*—the law that pertains to the rights and obligations after the war—I argue that in contemporary wars, the *post bellum* is very much part of the conflict, from its very beginning. What was once a post-conflict effort (e.g., the Marshall Plan) is now part and parcel of what is demanded for victory *in* conflict. In fact, the *ad bellum*, *in bello* and *post bellum* have now become so enmeshed, that it is impossible to consider one without the others.

It is for this reason that I do not address *jus post bellum* as such. Instead, I focus on what the fog of victory means for the traditional *jus ad bellum* and *jus in bello*. In the *jus ad bellum* discussion, I concentrate on the problematics of understanding the customary principles of necessity and proportionality as governing the contemporary use of force and the ensuing problem of assessing these standards amidst the fog of victory. In the *jus in bello* discussion, I inquire what possible effects the changing face of victory might have on the basic principles of military necessity, proportionality, and distinction.

⁵ CLAUSEWITZ, *supra* note 1, at 87.

I. What is Victory?

The origin of ‘victory’ is the Latin *victoria*, from *vinco*, or *victus* which is to conquer. According to the Oxford English Dictionary, “victory” is “[t]he position or state of having overcome an enemy or adversary in combat, battle, or war; supremacy or superiority achieved as the result of armed conflict.”⁶ In English, the word “victory” first appeared in the fourteenth century, complementing preexisting terms, such as “success” or “vindication of rights.”⁷

The particular meaning of victory in any specific military campaign obviously depends on how the goals of that campaign are defined. Although commonly thought of as the campaigner of total wars, the great Prussian strategist, Carl von Clausewitz, observed,

In war many roads lead to success, and... they do not all involve the opponent’s outright defeat. They range from the destruction of the enemy’s forces, the conquest of his territory, to a temporary occupation or invasion, to projects with an immediate political purpose, and finally to passively awaiting the enemy’s attacks.⁸

A successful military campaign therefore is not a sufficient condition for victory, nor is it always a necessary one. Political, economic, and civic forces might all shape the longer-term outcome of the war so as to render it an overall success or failure. Moreover, if one’s goals are effective deterrence through a credible threat of retaliation, victory can be attained without one drop of blood spilt.

Military strategists, political scientists, and political leaders have employed and sometimes recruited the term ‘victory’ (or its synonyms) down the centuries in different ways. These expressions included the military, psychological, philosophical and political aspects of victory, how it was to be attained, and how preserved.⁹ Still, even in the political science or military studies spheres there has been little systematic treatment of

⁶ 19 THE OXFORD ENGLISH DICTIONARY 610 (2d ed. 1989) [hereinafter OED].).

⁷ *Id.*

⁸ CLAUSEWITZ, *supra* note 1, at 94 (emphasis in original).

⁹ For an enlightening study of how the concept of victory has been employed and understood since Sun Tzu, see Martel, *supra* note 4; and see also Raymond G. O’Connor, *Victory in Modern War*, 6 J. OF PEACE RESEARCH 367 (1969).

the concept of *victory*, and how it can or should be distinguished from corollary concepts of war termination, defeat, intervention, etc.¹⁰ Even less attention has been given to *victory* in contemporary legal and philosophical literature, outside the awakened interest in post-victory (or post-conflict) obligations under the *jus post bellum*. Even with regard to the latter, there is an ambiguity in the emerging literature on whether such norms follow victory or define it.¹¹

It is not only the conceptual treatment of victory that is problematic; with the conceptual fog of what victory means, *seeing* victory in action has also become more difficult. In ancient battles, both the initiation and end of wars were subject to some ceremonial regulation. Under traditional Just War theory, a war required a formal declaration, and ended with surrender, capitulation, or debellatio—a complete destruction of the defeated state. A formal surrender was sometimes followed by a peace agreement which anchored the victorious party's achievements and often included reparations by the defeated.

The practice of issuing a formal surrender, signifying victory for one side and defeat for the other, continued into the mid-twentieth century, up to and including the formal surrender of Germany and Japan following World War II (celebrated by a victory march down Pennsylvania Avenue). But formal acts of surrender then largely vanished from the world's stage. Saddam Hussein (1991) and Slobodan Milosevic (1999) withdrew their forces from Kuwait and Kosovo, respectively, and halted military operations but never admitted defeat. The Cold War ended with the Soviet disintegration (1990-1991), but with no explicit concession by Russia of having lost the war. Israel and Egypt both teach school children contradictory narratives about who won the 1973 war, and the question of who was in fact the loser in the Vietnam War remains contested, at least in

¹⁰ Quite a bit of attention has been given specifically to the concept of war termination. *See, e.g.*, DOMINIC J. CARACCILO: BEYOND GUNS AND STEEL: A WAR TERMINATION STRATEGY (2011); FRED CHARLES IKLE, EVER WAR MUST END (1971); GIDEON ROSE, HOW WARS END: WHY WE ALWAYS FIGHT THE LAST BATTLE (2010); Branislav L. Slantchev, *How Initiators End Their Wars: The Duration of Warfare and the Terms of Peace*, 48 AM. J. POL. SCI. 813-829 (2004).

¹¹ *See, e.g.*, MARK J. ALLMAN & TOBIAS L. WINRIGHT, AFTER THE SMOKE CLEARS: THE JUST WAR TRADITION AND POST WAR JUSTICE (2010).

some circles.¹² More recently, the Tamil Tigers, who were thoroughly routed, admitted that the “battle has reached its bitter end” but did not explicitly surrender.¹³

With the demise of the practice of formal surrender and greater debates over the classification of outcomes of war, victory has become more difficult to identify and to evaluate. This may be partly a consequence of the demise of total wars – one can lose a war, certainly a battle, without conceding total surrender. On the flip side, winning the battle now holds less promise of ‘victory’ than it ever has; consider President George W. Bush’s announcement on the end of “major combat” operations in Iraq in May 2003 or President Barack Obama’s announcement regarding the withdrawal of all remaining U.S. troops from Iraq by the end of 2011. All of this cannot be set aside as simply political-rhetorical maneuvering. Rather, the blurring lines between victory and defeat stand for the diminished importance and changing nature of military power as securing the goals of the war. I return to the implications of this argument later on.

For purposes of this essay, I define victory as the attainment of one’s goals as they are set at the beginning of a military campaign or as they are refined and redefined throughout it. The concept I suggest is value-neutral, in the sense that it does not assume any position with regard to the goals that the parties set for themselves. The concept does require some nexus between the military operation and the desired end-state; in other words, it assumes that the parties believe that military force has some positive utility for achieving the goals of the war, even if those goals cannot be achieved by military force alone.

II. How Wars and Victories Changed

A. The Changing Goals of War: What could be Achieved by Victory

Early Just War doctrine concerned itself with all three strands—the *jus ad bellum*, the *jus in bello*, and the *jus victoriae* (present-day *jus post bellum*), with just war theorists expounding on all three. Moreover, all three strands were also intertwined,

¹² Note that South Vietnam did surrender to the North in April 1975.

¹³ Somini Sengupta & Seth Mydans, *Rebels Routed in Sri Lanka After 25 Years*, N.Y. TIMES, May 18, 2009, at A1. This was, of course, in the context of a non-international armed conflict.

so that war was only just to the extent it was fought for just cause, was fought in a just manner, and produced a just settlement.

What makes war just as a normative matter, however, has changed over the ages. It was not a linear change; rather, it fluctuated through different eras with changing political, strategic, normative, and legal landscapes.¹⁴ There was also a marked difference between what the norms were understood to be and how states behaved in practice; there were always more unjust wars than just ones.

In thinking about the changing goals of war, I focus here on one particular dimension—what victory might bring the victors; or in other words, on the relationship between war and the status-quo ante, and what this relationship needed to be for the normative assessment of wars.

Under the Greek and Roman empires, victory was often measured in its ability of the victorious power to bring about change in the status quo ante; Thucydides, for instance, used the term ‘victory’ to describe the complete annihilation of another city state,¹⁵ and Polybius did the same when he described in his *Histories* a treaty between Rome and Carthage which ordered the latter to evacuate the whole of Sicily.¹⁶ Against the Roman imperial territorial expansion and enslavement of the vanquished, and with the spread of Christianity throughout the Roman Empire, Augustine argued that war was meant only to restore the peace and was just only if it could do so.¹⁷ Peace, however, often included change—mostly, in the religious affiliation of those conquered by war.

The eleventh to thirteenth centuries’ Crusades were the ultimate use of war for religious change. Their competition over Jerusalem and the faith of the inhabitants of Palestine became the ultimate goal of three hundred years of war. Within Europe, however, the concept of war as a legitimate means for change declined through the

¹⁴ See Bobbitt, *supra* note 4.

¹⁵ See Thucydides, *History of the Peloponnesian War*, in THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 193 (Robert B. Strassler, ed. 1998) (describing the razing of Plataea and the massacre and enslavement of its inhabitants following capture by Spartan allies).

¹⁶ POLYBIUS, 2 THE HISTORIES 63–65 (W.R. Patton trans. 1922). For an example of how Polybius conceived of victory, see *id.* at 219–23 (describing victory as requiring the total destruction of enemy forces and defection of any remaining civilian population to the side of the victors).

¹⁷ AUGUSTINE OF HIPPO, THE POLITICAL WRITINGS OF ST. AUGUSTINE 178–79 (Henry Paolucci, ed., 1962); GRATIAN, GRATIANUS IN JURISPRUDENCE 23 (James William Somerville ed., 1934).

Middle Ages. Instead of means of spreading religion and power, war became to be largely viewed as a procedural mechanism for settling disputes;¹⁸ and rather than seeking change, war was meant to correct against unlawful deviations from a given status quo of allocation of territory, property, and resources.

Building on this idea, the classical theorists of Just War in the sixteenth and seventeenth centuries, Alberico Gentili, Francisco Suarez, Hugo Grotius and others, all followed the Augustinian formulation of ‘war for peace,’ and ordered that war should not be sought for change, but only to enforce the initiator’s preexisting rights and obligations.¹⁹ Often invoking the concept of war as (divine) punishment against transgressions from the status quo, victory, they argued, should allow its beneficiaries only to restore what was rightfully theirs, and perhaps add a measure of deterrence, but not otherwise to benefit from war.²⁰ True to the notion of stability as a cardinal value of the international system, the 1648 Treaty of Westphalia ordered respect for boundaries and the territorial integrity of its members.

The commitment to some preexisting status quo was largely true for Western Europe and did not extend to ‘barbarians’ (and so the Spanish colonial wars from the 15th century onwards were still justified as means for proselytizing). Even to the extent that the constraints articulated by jurists and theologians had any practical effects on victors of the time, the view of war as just only for restoring peace was largely irrelevant in the wars of unification that followed the Westphalian agreements, or with colonial expansion in Africa, Asia, and South America.

The Napoleonic wars of the eighteenth and nineteenth centuries, which sought French expansion and aggrandizement, brought with them the rise of legal positivism, causing moral or legal claims about the constraints of legitimate war and victory to fall into desuetude. With state practice as the only determinant of what victory could legally

¹⁸ See James Q. Whitman, *The Verdict of Battle* (May 7, 2009), *available at* http://www.law.uchicago.edu/audio/by/title/james_q_whitman_the_verdict_of_battle.

¹⁹ See ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* (1612), *reprinted in* 2 *THE CLASSICS OF INTERNATIONAL LAW* (James Scott Brown, ed. John C. Rolfe, trans. 1933); Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 *AM. U. INT’L L. REV.* 311, 313 (2008).

²⁰ HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 1477–78 (Richard Tuck, ed. Liberty Fund 2005) (1625). Immanuel Kant, *The Metaphysics of Morals, Part One: The Metaphysical Elements of the Doctrine of Right*, in *KANT: POLITICAL WRITINGS* (H.S. Reiss, ed., B. Nisbet, trans. 2005) 168-71.

mean and how it could be attained, winning wars meant territorial acquisition, control over natural resources, and political and economic subjugation of the defeated.

The First World War, which exceeded all previous wars in its devastation, naturally renewed interest in the *jus ad bellum*, or in the permissible goals of war. The League of Nations was envisioned as the guardian of world peace, under the Westphalian principles of respect for territorial integrity and non-interference in internal affairs, which were incorporated into the League's 1919 founding Covenant. League Members agreed that "[a]ny war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."²¹ War, however, was not completely outlawed, but only subjected to some procedural requirements that were intended to find a peaceful resolution of the conflict; if those failed, a state could still engage lawfully in war.²² In this spirit, the 1931 General Convention to Improve the Means of Preventing War granted the Council of the League of Nations the power to order preventive means to avert war.²³

A more ambitious effort to regulate war took place outside the confines of the League of Nations Charter. The Kellogg-Briand Pact of 1928 condemned "recourse to war for the solution of international controversies" and renounced its use "as an instrument of national policy."²⁴ For all their good intentions, however, the efforts failed to thwart the undeclared wars of the next several years: the 1931 Japanese invasion of Manchuria, the 1935 Italian invasion of Abyssinia, the German invasion of Czechoslovakia in 1938, and its invasion of Poland a few months later, an act which heralded the worst war in human history.

The 1945 U.N. Charter that emerged at the close of that worst war sought, as its primary goal, to "save succeeding generations from the scourge of war, which twice in

²¹ League of Nations Covenant, art. 11.

²² *Id.* arts. 12–13, 15.

²³ *General Convention to Improve the Means of Preventing War*, at 1, League of Nations Doc. A.78.1931.IX (1931).

²⁴ Kellogg-Briand Pact art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

our lifetime has brought untold sorrow to mankind.”²⁵ Under the Charter’s *jus ad bellum*, war was permitted only in defense of self or others following an “armed attack” (under Article 51) or as authorized by the Security Council to address a threat to international peace and security (under Article 42).

Like its League of Nations predecessor, the U.N. Charter said little on the *jus post bellum*; but through its regulation of *jus ad bellum*, the reiteration of the principles of territorial integrity and political independence as fundamental norms and the incorporation of self-determination and human rights as basic principles of the international system, it operated to limit significantly what could be won by war: war was now lawful only in the face of a threat of aggression and impermissible for self-aggrandizement or any other tangible benefit. Any acquisition of territory through the use of force was unlawful. Even the emergence of colonized territories as independent in fulfillment of their right to self-determination had to follow the *uti possidetis* doctrine, by which newly independent states could not alter preexisting boundaries that were demarcated by colonial powers.²⁶

The classical Just War tradition that justified war only if it promoted peace was thus revived under the U.N. Charter. Throughout much of the post-World War II era, aggression was considered a deviation from a stable and peaceful existence among independent states, an existence which war was only justified in securing or restoring.²⁷ Victory, therefore, could only be rightfully defined in correlation with repelling threats or returning to a status quo ante. Of course, what would count as a “status quo ante” would depend on the level of generality with which we would define it as well as on the temporal point we would choose as a benchmark for comparison. Still, the general observation is that as a matter of principle, the postwar international order was preoccupied with peace more than with justice, and sought to protect the former to the

²⁵ UN Charter, Preamble.

²⁶ See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT’L L. 590, 598 (1996).

²⁷ The post-war reconstruction and transformation efforts in Japan and Germany, which followed the conclusion of the Charter, were in some tension with the Charter’s protection of sovereignty and status quo. Still, rather than a pernicious goal of war, they were viewed as necessary preparations for the aggressor states as able and willing participants in the new international system.

fullest extent possible through anchoring the existing international order. Change, if necessary, was to be pursued through peaceful means only.

The nuclear arms race between the two great powers, the United States and the U.S.S.R, ensured that interstate wars were less frequent and more limited. Instability erupted as war began to occur within states more frequently than among them. As late as 1991, the international community coalesced around driving Saddam Hussein out of Kuwait and restoring the status quo that had existed before the Iraqi invasion. The decision not to press on to Baghdad was a reaffirmation of the limits of war.

But even as the invasion ended and Hussein's force retreated, coalition forces' presence and activities continued in the form of 'stability,' 'protection', or 'humanitarian' operations, including the intensive bombing in the December 1998 Operation Desert Fox. Status quo was thus not entirely restored; conditions and limitations were added on Hussein's reign, all subject to close strictures overseen by the international community.²⁸

Some of these prolonged efforts were compatible with Michael Walzer's vision of war for a just peace, which included punishment of the aggressor, reparations, and a limitation on the capacity of the aggressor to wage war.²⁹ But the experience in Iraq from 1991–2003 also demonstrated that the lines between war and post-war or peace have become increasingly blurred; so much so, that under some arguments, the 2003 invasion was merely a continuation of that same war that began in 1991.

The violent breakup of the former Yugoslavia in the early 1990s was a shock to the vision of a stable and peaceful world that would reign with the end of the Cold War. Instead of stability, war brought about change in Europe's backyard. The 1999 NATO military operation in Serbia (following up on the 1995 bombings in Bosnia) responded to the ripple effects of this change and to the rise of Milosevic's dangerous and criminal conduct towards the Kosovars. NATO's operation sought "[to support] the political aims

²⁸ Some of these efforts were covered by Security Council Resolutions 687 and 688, which tied them to the WMD inspection regime and the protection of the Kurds. S.C. Res 688, U.N. Doc. S/RES/688 (April 5, 1991); S.C. Res. 687, ¶¶ 8–14, U.N. Doc S/RES/687 (April 3, 1991). Operation Desert Fox, however, was a subject of much international controversy, with Russia and France claiming it was a deviation from the Resolution.

²⁹ MICHAEL WALZER, JUST AND UNJUST WARS 121–22, 297 (4th ed. 2006).

of the international community...: a peaceful, multi-ethnic and democratic Kosovo where all of its people can live in security and enjoy universal human rights and freedoms on an equal basis.”³⁰ Once these goals were set, victory in Kosovo could not be limited to restoring a status quo of lawful behavior by Milosevic’s government towards an autonomous Kosovo; following his indictment by the International Criminal Tribunal for it predictably led to toppling Milosevic (in elections that followed his indictment at the International Criminal Tribunal for the Former Yugoslavia) and to a track of change in the political status of Kosovo. In fact, the independent International Commission on Intervention and State Sovereignty determined in 2001 that any humanitarian intervention must not only prevent or react, but also follow through and rebuild, including in “promoting good governance and sustainable development.”³¹ And Brian Orend claimed that humanitarian interventions must demand a change in the domestic protection of human rights as a precondition for terminating the war, under the logic that a state may only seek peace if the violated rights that justified the commencement of hostilities have been adequately vindicated.³²

The terrorist attack on the United States on 9/11/2001 led the U.S. to hold that in a world of nonstate actors and unconventional weapons, military strikes were insufficient to effectively defuse the new threat to national security.³³ Moreover, as the threat was no longer an organized armed invasion into another territory, but remotely-delivered attacks or clandestinely-infiltrated attackers, a potential victim state could not wait till the threat had actually materialized or was even very imminent.³⁴ Instead, proactive action that blurred the lines between defense and aggression had to be pursued.

³⁰ Statement on Kosovo issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C. para. 3 (Apr. 23, 1999) *available at* http://www.nato.int/cps/en/natolive/official_texts_27441.htm?selectedLocale=en.

³¹ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 39 (2001).

³² BRIAN OREND, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE 232 (2000). *See also* Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384, 386 (2004) (contending that a failure to achieve a peace that sufficiently vindicates the injured rights destroys the legitimacy of the use of force by the vindicating state).

³³ *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 7 (2002).

³⁴ *Id.* 13–16.

The proactive action could not, so the U.S. doctrine held, be limited to foiling individual attacks and disabling individual attackers. Rather, the conditions that allowed for attacks and attackers to threaten the United States had to be changed, including by a comprehensive overhaul of the domestic structures of territorial states.³⁵ While the Iraqi invasion of Kuwait could be reversed and Saddam Hussein's regime could be spared, combating the threat of rogue regimes or transnational terrorism could not allow for the existing domestic territorial structures to endure; instead, an invasion, long-term occupation, and regime change was pursued in both Iraq and Afghanistan.

If the new paradigm of self-defense requires change, rather than restoration of some status-quo, this requires an articulation of victory that goes well beyond military terms. Indeed, the first National Defense Strategy issued under President Bush included political, economic, and social goals no less than military ones.³⁶ The spread of democracy, human rights, and economic development were added to reactive and anticipatory military strikes as measures of national defense, and therefore also as weapons of war. As I shall demonstrate later on, they have also become a measure of what "success" means in contemporary war.

B. The Changing Rules of War: International Law and Constraints on How Victory can be Achieved

Some constraints on the just prosecution of war have been part of numerous ancient, classical and early modern codex, both Western and Eastern, including the Laws of Manu, the Hammurabi Code, Greek and Roman edifices, the Bible, New Testament and the Koran, and Medieval codes of warfare. A mix of moral and humanitarian considerations, strategic self-interest, notions of honor, chivalry, and self-identity, as well as power structures that favored some rules over others drove these constraints. All these rules tended to apply to and among particular communities, limited by religion, class, or geography. Ultimately, it was the Christian tradition that set the stage for much of the future development of the laws of war.

³⁵ *Id.* 6–7.

³⁶ *Id.* 3–4, 17–23.

Perhaps the most fundamental development of these laws was advanced by Grotius' treatise *On the Law of War and Peace*, which disassociated the justness of the conduct of war from the justness of the cause of war.³⁷ Undoubtedly building on earlier origins, Grotius and his contemporaries—reinforced by their successors of the Enlightenment period—that gave less weight to religion and more to secularized reason—ordered that the fate of people in war would depend not on their *guilt* (by association with a wrongdoing sovereign), but on the *threat* they individually pose to the adversary, thereby distinguishing those who carried arms, i.e., combatants, from the noncombatants who posed no threat. A century and half later, Rousseau developed the distinction between the state and its people, contributing to the further development of a secular law of war.³⁸

Alongside religious and secular teachings that either anchored existing customs or sought to introduce new ones, a plethora of bilateral reciprocal exchanges between warring or would-be warring sovereigns further served to develop the law. Such exchanges covered issues as diverse as the treatment of Prisoners of War (POWs), maritime warfare, the regulation of certain types of weapons, and more.

With the enterprise of a *jus ad bellum* all but collapsing in the nineteenth century, and war becoming a phenomenon to be explained, not judged, the *jus in bello*—the laws *in* war—received reinvigorated attention. The ecclesiastic foundations of the Just War tradition gave way to a secular, humanist (to some degree) conception of permissible conduct in war. From the amalgamation of bilateral treaties, customary norms, and scholarly teachings, universal rules – which, for the first time in history aspired to transcend class, religion, and geography – were promulgated. In 1856, the first multilateral treaty ever to be negotiated and open to accession by all independent countries established rules on naval warfare.³⁹ In 1863, the Lieber Code offered the first manual on the laws of war on land. Although not a treaty, it proved immensely influential for generations to come. Subsequent multilateral treaties limited the means

³⁷ GROTIUS, *supra* note 20, at 1438–43, 1448–50.

³⁸ JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, bk. I, chap. 4 Sec. 9, *in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 46-47 (Victor Gourevitch ed. and trans., 1997).

³⁹ Declaration Respecting Maritime Law, Paris, Apr. 16, 1856, 15 Martens 791.

and methods of land warfare, granted protection to civilians, *hors de combat* (those combatants who have been incapacitated due to death, injury or capture), and neutrals, and entailed some affirmative duties of care on those engaged in hostilities.

Among the codified obligations were those pertaining to the occupiers of territory: the 1874 Brussels Declaration, followed by the 1899 and 1907 Hague Regulations introduced the idea that occupation was a temporary administration of a hostile territory and limited the right of the occupier to extract resources and funds from the occupied state.⁴⁰ The Regulations further required occupiers to “ensure, as far as possible, public order and safety”⁴¹ and to respect the laws of the occupied state to the greatest extent possible.⁴² Limitations on the occupier’s powers were thus coupled with some affirmative obligations towards the occupied.

Although not limited by class, religion, or geography, compliance with the negotiated norms still depended on the reciprocal acceptance of and compliance with these same norms by the adversary. The *jus in bello* thus applied only between or among parties that have expressed their willingness, *de jure* and *de facto*, to be bound by similar norms.

While the U.N. Charter tended to the *jus ad bellum*, the four Geneva Conventions concluded in 1949 were the *jus in bello* response to World War II, in which most of the preexisting rules and customs of warfare were ignored. The Conventions codified, reiterated and developed a broad array of norms pertaining to the immediate victims of war, notably *hors de combat* and civilians in the hands of an enemy power.

As the constraints on how to win wars or defend against them expanded over the following decades, so did the limitations on what victors could do to the vanquished – or what one could win by winning. The Fourth Geneva Convention of 1949 addressed, *inter alia*, the matter of occupation and added further limitations and obligations to those stipulated under the Hague Regulations.

⁴⁰ Hague Convention IV: Laws and Customs of War on Land, arts. 46-56, Oct. 18, 1907, 36 Stat. 2277, 205 Consol T.S. 277 [hereinafter Hague IV].

⁴¹ *Id.*, art. 43 (calling on occupying powers to respect the laws of the occupied territory).

⁴² *Id.*

The Geneva conception of occupation seemed, however, more tolerant towards lengthy, even transformative occupations than the more restrictive Hague Convention regime,⁴³ likely due to the political environment in which the Geneva Conventions were drafted. After all, the occupations of Germany and, more so, of Japan were nothing if not transformative, in clear violation of the Hague Regulations' prescription to leave the rules and customs of the occupied intact. In a 1959 movie classic, *The Mouse that Roared*, Peter Sellers leads a small, impoverished European country in an invasion of New York City, hoping to lose the war and win reconstruction by America.⁴⁴ Things begin to go south when he inadvertently wins. This satire was not intended, of course, to be taken as a good case for war or for occupation; but it did reflect the notion that Western occupation could be beneficial to the occupied. What occupation could bring with it—democracy and reconstruction versus the oppressive occupation by the Soviet Union—became the symbol of difference between the Free World and Communism.

Unable to take a clear stance vis-à-vis the competing political projects of the Allies in Germany, the U.N. Charter itself treated the post-war actions in Japan and Germany as *sui generis*, not to be judged under those same rules that the international community was formulating for its conduct hence onwards.⁴⁵

Still under the umbrella of the Cold War, and with the rise of nonstate actors fighting for self-determination, the 1977 Additional Protocols further limited hostile parties' choice of means and methods of warfare and codified the protection of civilians, now expanding these protections to the civilians who are in the adversary's territory, from any intentional or indiscriminate harm. They also made foreign occupation a legitimate cause for war by those fighting for national liberation.

The Additional Protocols also included a dramatic development in their prohibition of almost all forms of belligerent reprisals—the reciprocal violation of law—

⁴³ Compare Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 47, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 85 (contemplating changes to “the institutions or government” of an occupied territory) with Hague IV, *supra* note 40, art. 43.

⁴⁴ THE MOUSE THAT ROARED (Open Road Films 1959).

⁴⁵ U.N. Charter, art. 107: “Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.”

as a means of inducing compliance; parties' obligations to comply with international humanitarian law thus became absolute, independent not only from the justness of their cause but also from their enemies' conduct.⁴⁶

The ban on reprisals reflected more than anything else the infusion of the laws of war with human rights norms. Alongside humanitarian obligations, and beginning in 1948, a host of human rights instruments was dedicated to a wide array of civil, political, economic and social rights which governments owed to individuals in their territory. The project of human rights laws, commensurate with liberal ideals, was to place individuals at the center of international concern, at the expense of the previously sacrosanct concept of state sovereignty.

These human rights obligations are, under the laws on state responsibility, *erga omnes*—owed to the entire international community and not just national citizens. Although the project of human rights was originally conceived as a separate and distinct regime from IHL, to be applied predominantly between a state and its own citizens, the 1977 Protocols incorporated human rights ideals as to the treatment of enemy nationals. The ban on reprisals was but one manifestation of such ideals, namely the notion that the right not be harmed belonged to the protected individual and not to her state to bargain over or trade in. In the decades that followed, and despite some objections by the United States and several other democracies, a broad consensus developed around the notion that even human rights that were not incorporated into IHL instruments, but remained anchored in separate dedicated human rights treaties, also extended to the treatment of enemy nationals during wartime, complementing and elaborating on IHL.

Moreover, the rise and spread of liberal norms, especially after the end of the cold War, alongside accessibility and availability of media, contributed to the growth of what Charles Taylor has termed “universal benevolence,” especially among the publics of liberal democracies. This universal benevolence manifests itself in weaker tolerance for civilian casualties, a greater concern over the abuse of human rights everywhere, and a

⁴⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflicts, arts. 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4), Dec. 12, 1977, 1125 U.N.T.S. 3.

demand from national governments to take a stance and fight against deliberate harm to individuals anywhere around the globe.⁴⁷

Somewhat paradoxically, by making the violation of human rights within any single country a matter of international interest, and deeming gross human rights violations a grave offense which must be stopped by the international community as a matter of duty, human rights came to operate as both a limitation on war and a cause for war. They limited the targets and scope of deliberate harm in war, but also revived an earlier interest in the plight of individuals as a just cause for waging wars of “humanitarian interventions.”

A closely-related development that further contributed to the limitations on warfare has been the revival and expansion of the project of international criminal law (ICL). Notwithstanding earlier origins of the idea of punishing individuals for violating the international law of war, it was the Nuremberg Trials post World War II that were widely considered as the first manifestation of the modern ICL project. The 1949 Geneva Conventions ordered all parties to punish or extradite those who committed grave breaches of the Conventions, regardless of these parties’ own involvement in the war, as did the subsequent Additional Protocols of 1977. These treaties, alongside other conventions (such as the Genocide Convention or the Convention Against Torture) codified the concept of universal jurisdiction – the right, even obligation, of every state to punish the enemies of mankind, including those committing grave human rights and humanitarian violations.

Largely dormant in the decades that followed, the ICL project was revived in the mid-1990s, with the establishment (by the UNSC) of two dedicated international criminal tribunals, one for the Former Yugoslavia and the other for Rwanda. By 1998, the International Criminal Court was established by the Rome Statute, with the aspiration of governing all conflicts around the globe. The Rome Statute expanded the list of war crimes beyond what was stipulated in existing instruments and also largely

⁴⁷ With regard to occupation, the ICJ ruled explicitly that human rights norms extended to inhabitants of occupied territories; see John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANSNAT’L L. 1447, 1476-77 (2006), citing *Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 220 [hereinafter *DRC v. Uganda*].

equated crimes committed in non-international armed conflicts with crimes in international armed conflicts.

All these developments, taken together, resulted in the dramatic transformation of what is allowed in war, as a matter of both law and politics, at least for liberal democracies: mass civilian casualties, torture, famine, collective punishments and reprisals—all endemic to previous wars—are now, even if not eliminated in practice, considered war crimes and are the site of heated international and domestic debates.

As law shaped public morality and public morality shaped law, the exact content of humanitarian or human rights norms became less important; it was their perception and ensuing public expectation that came to matter. And the latter now governed not only what is permitted *in* war, but also what is expected *after* the war, or as the result of the war. If the earlier restrictions on belligerent occupation were meant to limit what the occupier could obtain from the occupied, organized around the idea of doing no harm, the modern expectation is that the occupier will reconstruct the country and improve the lives of its inhabitants. This is what Colin Powell meant when he warned President Bush of the “Pottery Barn Rule” – you break it (Iraq), you own it.⁴⁸ And ‘owning’ Iraq meant, as Noah Feldman argued, long-term care for the population, including the rebuilding of infrastructure, stabilizing inter-factional tensions, introducing democracy and the rule of law and ensuring the protection of human rights throughout the country.⁴⁹ In this spirit, coalition forces implemented a broad range of changes to the Iraqi legal system even before an Iraqi interim government emerged.⁵⁰ *The Mouse that Roared* was now not in Europe and no longer a fantastic satire.

Ultimately, the only uniform restraint upon present-day occupations seems to be the ban on annexation; transformative occupation that brings about reconstruction, democracy, the rule of law, and protection of human rights is now the evolving norm, at

⁴⁸ BOB WOODWARD, *PLAN OF ATTACK* 150 (2004).

⁴⁹ “The United States now has no ethical choice but to remain until an Iraqi security force, safely under the civilian control of the government of a legitimate, democratic state, can be brought into existence.” NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATIONAL BUILDING* (2004), 80-81.

⁵⁰ Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, 31 *LOY. L.A. INT’L & COMP. L. REV.* 57, 61-62 (2009).

least when it comes to was fought by the United States.⁵¹ This host of post-conflict obligations is not limited to humanitarian interventions as in Kosovo, or even to wars that may be thought of as wars of choice, such as the 2003 invasion of Iraq. They apply even when there is a good claim for a war in self-defense. The participants of the United Nations' 2001 talks on Afghanistan unilaterally determined the conditions for peace and established a reconstruction plan for the country through the Bonn Agreement, which included a democratic government, protection of human rights, and long-term development.⁵² Undoubtedly driven by an American self-interest in the transformation of the country, the lines between transformation as self-interest and transformation as a matter of domestic and international expectations become blurred.

In fact, according to some observers, there is an emerging norm of post-conflict nation-building which now seems to assume a legal status beyond self-interest or expediency.⁵³ If so, this duty may extend even when there is no actual occupation, but merely devastation brought about by military action, as in Libya. And even if it is not a clearly legal obligation, Western public expectation is that this duty will be fulfilled.

All in all, from a communitarian, nationalist project, the regulation of wartime conduct has turned into an individualized-cosmopolitan effort, removing the monopoly of the *state* as the unit whose interests must be fulfilled. This means that victory can no longer be articulated (solely) in terms of national interests, but must include a component of individual human security, of people both at home and in targeted territories.

⁵¹ Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 582-583 (2006). Roberts argues that even this prohibition does not appear to hold when examining state practice (at 584).

⁵² See Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, Dec. 5, 2001, available at http://www.afghan-web.com/politics/bonn_agreement_2001.html.

⁵³ On the moral and legal status of a duty to reconstruct, see Alexandra Gheciu and Jennifer Welsh, *The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction*, 8 ETHICS AND INT. AFFAIRS 121 (2009). See also William Martel, who argues that "The scale of post-conflict obligations is related directly to the level of victory pursued and, thus, to the level of devastation wrought and the level of rebuilding necessary." MARTEL, *supra* note 4, at 102.

C. The Changing Targets in War: Victory over Whom?

When the U.N. Charter set as its goal to “save succeeding generations from the scourge of war” it was very much the horrors of the two World Wars that were on the framers’ mind, as is evident from the Preamble to the Charter.⁵⁴ It was the image of massive interstate conflicts among comparable armies, with only nuclear weapons functioning as a real tie-breaker—the paradigmatic Clausewitzian total war—that influenced the design of the Charter’s regulation of the use of force. It was those total wars, and the advent of a new superpower rivalry between the United States and the Soviet Union, that the Charter intended to guard against.

Geopolitical trends since the conclusion of the Charter, however, made some states weaker and some nonstate actors stronger. The incidence of interstate wars declined, as intrastate wars and wars with nonstate actors of various forms (terrorists, insurgents, guerillas, or criminal networks) grew. Technology made weapons cheaper, more readily available, and more destructive, including for nonstate actors. Globalization and interdependence made targets all over the world more accessible and vulnerable to threats from anywhere and by anyone. Overall, individuals and groups have taken their position alongside states as capable of inflicting armed attacks, in a magnitude previously reserved to states alone.

As the threats emanating from violent nonstate actors grew more dispersed and assumed more variegated forms, the more amorphous became the “defense” against them. While traditional conflicts against states were centered mostly on positive, ascertainable objectives, such as the surrender of German and Japanese forces, the repulsion of Communist forces from South Korea, or the liberation of Kuwait, the fight against nonstate actors has often been articulated in negative and relative terms, such as frustrating terrorist attacks or reducing support for insurgency. Often, the nature of the threat was such that any broad affirmative goal would be clearly impossible to attain: consider President Bush’s announcement that, “Our war on terror begins with al Qaeda,

⁵⁴ See UN Charter, *supra*, note 25, preamble.

but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”⁵⁵

Moreover, the lack of an accountable and controlling leadership, which is frequently the case with nonstate actors (who represents all of Al Qaida today?), means that both deterrence and bargaining—previously, effective means of achieving stability on the international plane—are of less relevance.

Repelling threats from nonstate actors often involved military strikes against states harboring them, such as the 1986 American strikes in Libya or the 1998 strikes on Sudan and Afghanistan. Such strikes frequently invited criticisms from other states, and in 2005, the International Court of Justice rejected Uganda’s self-defense justification for its use of force against rebels in the territory of the Democratic Republic of Congo.⁵⁶ Notwithstanding those critiques, as a matter of practice, the use of armed force against insurgents and terrorists continued, often preemptively or in an ongoing armed conflict that had no clear beginning and no end date.

Even if armed force continued, however, it did assume a different nature and a different goal from the traditional battlefield. Whatever harm could conceivably be accepted, even reluctantly, in a state-to-state traditional war became harder to sustain when fighting nonstate actors amidst a civilian population, especially one that had mixed allegiances and preferences with regard to the insurgent forces.⁵⁷ This was a matter of strategy no less than morality or legal prescription of human rights.

In those particular types of wars, which under conventional wisdom require, even as a tactical matter, to win over the “hearts and minds” of the local population, sympathy is won not through violence but through benevolence and long-term structural change in the domestic environment. The American Counterinsurgency Doctrine (COIN) now holds, not as a matter of law but as self-interested policy, that greater constraints than those stipulated by the laws of war must be assumed by the

⁵⁵ President George W. Bush, Speech to Congress (Sept. 20, 2001).

⁵⁶ DRC v. Uganda, *supra* note 47, ¶ 345.

⁵⁷ On the constraints facing liberal democracies in fighting nonstate actors, see AZAR GAT, VICTORIOUS AND VULNERABLE: WHY DEMOCRACY WON IN THE 20TH CENTURY AND HOW IT IS STILL IMPERILED (2009).

fighting forces to minimize civilian casualties.⁵⁸ A complex strategy now requires a greater differentiation among subjects (combatants, leaders, supporters, opposition, uninvolved, etc.) and a mixture of aggression and beneficence that is carefully tailored to each group. Technological capabilities of western states, in both intelligence gathering and targeting, carry with them the expectation, sometimes exaggerated, that such careful tailoring can always be executed effectively.

Whether or not such strategy would ultimately prove effective is almost irrelevant, as there seems at present to be no viable alternative. The types of violence that might have been acceptable or tolerated by domestic and international audiences (who now, through the media, have an increasing access to the “battlefield”) only a few decades ago are inconceivable today, other than in the case of a catastrophic threat. Victory thus requires less violence, more reconstruction, and a longer-term differentiated engagement with governments and citizens, combatants and civilians, supporters and oppositionists.

III. Demonstrating the Shift: Iraq and Afghanistan

The inherent difficulty of defining victory in contemporary conflicts and the changing nature of the goals, rules, and targets of war are most apparent when one follows the attempts to define success in Iraq and Afghanistan. These conflicts have been termed “wars amongst the people,”⁵⁹ in which the main goal of the campaign is to win the sympathy and allegiance of the local population and reduce the moral support of any threatening force. In his initial assessment, U.S. General Stanley A. McChrystal, then-Commander of the International Security Assistance Force, Afghanistan (ISAF), labeled the conflict “a year-round struggle, often conducted with little apparent violence, to win the support of the people.”⁶⁰ But how is this “winning” to be measured? By opinion polls among the local population? By installing a sympathetic local

⁵⁸ See The U.S. Army – Marine Corps Counterinsurgency Field Manual 37–39, 42–52 (Univ. of Chi. Press 2007).

⁵⁹ See RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* 381 (2007).

⁶⁰ STANLEY A. MCCHRYSTAL, *COMMANDER’S INITIAL ASSESSMENT* 1-2 (2009). McChrystal goes on to describe the Afghan government’s ability to provide for the Afghan people as a Clausewitzian “center of gravity” for the conflict. *Id.* at 2-4.

government? By enhancing the participation of the local population in a political process or the adoption of a constitution that is favored by the ‘defending power’? Or is it by suppression of any element of threat? McChrystal’s report merely noted that “ISAF must also develop clear metrics to assess progress in governance,”⁶¹ but did not reveal what those metrics might be and what would constitute success.

As counterinsurgency action often seeks long-term structural changes, political and economic developments are necessary components of victory, not merely optional post-war missions. Capacity-building of civilian governmental agencies, as well as bolstering civilian confidence in the national government, are now a central part of defining what constitutes success in these wars.⁶² Indicators of success and their relative importance in an overall assessment of the campaign vary and evolve as the conflict does, leading to contradictory objectives and strategies.⁶³ Efforts often include partner states, multilateral organizations, and nongovernmental organizations, further complicating data collection and evaluation.⁶⁴

The difficulty of defining victory in Iraq or Afghanistan became increasingly apparent as decision-makers and interested observers grappled with offering metrics of success in both theaters. The Obama Administration set out to define success in both Afghanistan and Pakistan, relying on a mixture of quantitative benchmarks (e.g., “[l]evel of militant-initiated violence,” “[p]ercent of population living in districts/areas under insurgent control,” and “Afghanistan’s economic stability and development with emphasis on agriculture”) and qualitative assessments (“[a]bility of the ANSF to assume lead security responsibility,” “[p]ublic perceptions of security,” and “[s]tatus of relations between Afghanistan and Pakistan”).⁶⁵

⁶¹ *Id.*, at 2-20.

⁶² See, e.g., ANTHONY H. CORDESMAN, THE AFGHANISTAN CAMPAIGN: CAN WE WIN? 15-16 (2009).

⁶³ See ANDREW EXUM, LEVERAGE: DESIGNING A POLITICAL CAMPAIGN FOR AFGHANISTAN 10 (2010).

⁶⁴ See JASON CAMPBELL, MICHAEL O’HANLON & JEREMY SHAPIRO, ASSESSING COUNTERINSURGENCY AND STABILIZATION MISSIONS 13 (2009).

⁶⁵ *Evaluating Progress in Afghanistan-Pakistan: The Obama Administration’s Draft Metrics for Afghanistan and Pakistan, as Obtained by Foreign Policy*, FOREIGN POLICY, Sept. 16, 2009 http://www.foreignpolicy.com/articles/2009/09/16/evaluating_progress_in_afghanistan_pakistan?print=yes&hidecomments=yes&page=full.

The 2010 National Security Strategy (NSS) offered less ambitious goals than a prior NSS,⁶⁶ dropping economic development, and limiting the strategy objectives to more narrowly-tailored security components:

“deny[ing] al-Qa’ida safe haven, deny[ing] the Taliban the ability to overthrow the government, and strengthen[ing] the capacity of Afghanistan’s security forces and government so that they can take lead responsibility for Afghanistan’s future.”⁶⁷

It is still not readily apparent how one would measure the qualitative benchmarks in assessing ISAF’s progress, nor is this narrower tailoring accepted generally as a convincing measure of success. For many outside observers, civilian aspects remain part and parcel of what the objectives of the ongoing campaigns must be. As late as 2009, the Center for Strategic and International Studies (CSIS), an influential Washington, D.C.-based think tank, set out to define the objectives in Iraq as

[E]ffective governance, economic security and development, and... something approaching a rule of law. . . . find[ing] a workable approach to revitalizing Iraq’s petroleum sector...and creating the patterns of investment that can both develop the country and help unify it. It is a struggle to find security in dealing with neighbors like Iran, Syria, and Turkey, and to create a strategic partnership between Iraq and the United States that serves both countries without compromising Iraqi sovereignty.⁶⁸

Yet when President Obama announced the removal of all troops from Iraq by the end of 2011, he noted that there was still much to be done:

With our diplomats and civilian advisors in the lead, we’ll help Iraqis strengthen institutions that are just, representative, and accountable. We’ll build new ties of trade and of commerce, culture and education, that unleash the potential of the Iraqi people. We’ll partner with an Iraq that contributes to regional security and peace, just as we insist that other nations respect Iraq’s sovereignty...we will continue discussions on how we might help train and equip its forces—again, just as we offer training and assistance to countries

⁶⁶ See GEORGE W. BUSH, NATIONAL SECURITY STRATEGY 7 (2002)

⁶⁷ BARACK OBAMA, NATIONAL SECURITY STRATEGY 20 (2010).

⁶⁸ Anthony Cordesman, *Iraq: Security and the Challenges of Lasting “Victory,”* CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, Oct. 26, 2009, <http://csis.org/publication/iraq-security-and-challenges-lasting-victory>.

around the world. After all, there will be some difficult days ahead for Iraq, and the United States will continue to have an interest in an Iraq that is stable, secure, and self-reliant.⁶⁹

All of this shows the difficulties of measuring success. But it also shows the difficulties of achieving success. It is obvious that to achieve a wide array of military, political, economic, and civilian goals, a military campaign is insufficient, and for some purposes, unnecessary. What is necessary is a modern and carefully-tailored Marshall Plan. But while the Marshall Plan was introduced after the end of military hostilities and faced little armed resistance, the process of change in Iraq and Afghanistan requires an overall mix of military and nonmilitary strategies, not easily distinguishable from one another on substantive, temporal or spatial dimensions.

This intertwining of civilian and military strategies presents itself in every aspect of Coalition operations in Afghanistan and Iraq, from drone strikes to local police training, from the earlier mentioned COIN to financial and political assistance to President Karzai, from military and defense contractors operations to those of the United States Agency for International Development.

This mixed strategy thus defines what victory is, what is necessary to achieve it, and what is or might be won by it.

IV. Victory and the *Jus ad Bellum*

It is hardly surprising that the concept of victory, even if by other names, has played a crucial part in Christian Just War theory. Whatever was considered to be a legitimate justification for resorting to war, once at war, the point was to win. In fact, under the classical Just War doctrine, a war could be legitimately waged only where there was a reasonable prospect of success. Hugo Grotius thus warned that “[n]o Prince should ever make War upon another, who is of equal Strength with himself, on the

⁶⁹ President Barack Obama, Remarks by the President on Ending the War in Iraq (Oct. 21, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/10/21/remarks-president-ending-war-iraq>.

Account of inflicting Punishment. To do so would be for the prince to do his own people an injustice by unreasonably subjecting them to the dangers of war.”⁷⁰

When transposed to the present, the problem becomes obvious: without a clear idea of what “success” is, how can we weigh the chances of attaining it? Moreover, if a reasonable prospect of success is a precondition for a just war, it follows that once success is articulated in vague or unattainable terms, the war is doomed to be unjust to begin with.⁷¹

Arguably, a reasonable prospect of success has not survived as an element of Just War doctrine under modern international law. A present-day victim of aggression has the right to respond in armed force even if it has no real prospects of success in repelling it, but only for inflicting costs on the aggressor. Still, even if the *prospect* of victory is not a formal component of the law, the *definition* of victory plays a central role in the contemporary doctrine that governs the use of force, even if indirectly. Others have already observed that the *jus post bellum* and the *jus ad bellum* are closely intertwined, in the sense that the end state of the war must affect its beginning.⁷² Consider the customary principles of necessity and proportionality:⁷³ Both require an articulation of the threat against which force is used and of the nexus between the force and the threat. Moreover, both principles cannot be construed except in some relation to a definition of success: The necessity of the use force depends on what a successful use of force is designed to achieve; the proportionality of actions and damages depends on what would be achieved through success.

As earlier noted, I proceed here on the assumption that some measure of military force is required to repel modern threats to peace and security. The questions remain,

⁷⁰ GROTIUS, *supra* note 20, at 1145.. See also S. Pufendorf, *De iure naturae et gentium libri octo* 1293-94, trans. C. H. & W. A. Oldfather (2 vols., Oxford, 1934) (agreeing with Grotius). This is similar to Vitoria's requirement of reasonableness in the decision to go to war. See Vitoria, *De Indis et de Iure Belli Relectiones*, 175.

⁷¹ Walzer, *supra* note 29, at 110. This is one of the points which lead Larry May to advocate contingent pacifism. See Larry May, Proportionality in the Fog of War, in this symposium.

⁷² Bass, *supra* note 32..

⁷³ I bracket out the question whether these principles apply equally to the use of force as authorized by the Security Council under Chapter VII. See Judith Gardam, “Necessity and Proportionality in *jus ad bellum* and *jus in bello*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 275-292, 276 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

how much and what type of force is required. To flesh out these questions, I examine how the principles of necessity and proportionality can be applied on a battlefield which, due to the three developments outlined above, is expanding far beyond military combat.

A. Necessity

The principle of necessity dictates that armed force is just where it is actually required to repel a threat to self or others. From the early days of the Charter, and over the ensuing decades, debates over what necessity is and how it is to be judged have been rife. In particular, two questions have grown increasingly controversial: the right to use force preemptively, that is, before an armed attack had actually occurred; and the right to use force against nontraditional threats, such as those emanating from extraterritorial armed groups or from abusive regimes.

Complicating these debates is the fact that legal judgments of necessity are made ex-ante, before force is used, and yet, it is often the ultimate success of the campaign that influences the post-facto assessment of its necessity. Especially when dealing with nontraditional threats, if the use of force fails to produce the desired outcome, this failure often invites criticisms over the initial justification for using military force.

The wars in Afghanistan and Iraq (as well as the Israeli wars in Lebanon and Gaza), and even more so, the American “global war on terrorism,” ignited exactly such wide-spread controversies over the necessity of armed force as compared with possible alternatives. Was military force the correct answer to the threat posed by Al Qaida, especially where it exceeded any territorial boundaries and where the definition of what was ‘Al Qaida’ was becoming increasingly questionable? Was preemptive war against Iraq’s alleged program of weapons of mass destruction truly justified or were there other effective means that were not exhausted first?

The debates over the use of force exacerbated, as the American doctrine held that military force in both Afghanistan and Iraq was necessary not only in the conventional military sense, but also as a means of changing the conditions that allowed for the threat in each theater to materialize in the first place. Once long-term political and domestic changes in the target territories were sought, the military and political aspects of war

became intertwined. For the United States, this meant that ‘necessity’ could not be judged solely by reference to military aims, but had to include the necessity of bringing about a domestic change in the targeted territories. Somewhat ironically, the humanitarian and civic aspects of the war were in part aimed at assuaging those who objected to the use of military force. In other words, promoting the human security of the people of Iraq and Afghanistan was offered as the contractual consideration for promoting the national security of Americans.

It is exactly around this point that Americans and continental Europeans diverged, especially during the Bush Administration era. The American neo-conservatives’ approach was one of exporting liberal-democratic values by hook or by crook; where such export was viewed as especially urgent to combat a threat of terrorism, using force in its support was legitimate. On the eastern side of the Atlantic, Europeans shared the goal of spreading democracy and human rights, but only through a process of dialogue and positive inducements.⁷⁴

At the heart of this debate was a broader controversy around the morality and utility of military force.⁷⁵ Present-day Europe is largely averse to the use of force (even though it did participate in NATO’s operations in Kosovo and Libya and also supported the initial invasion of Afghanistan). For the United States, argued Robert Kagan, armed with the hammer of military force, every problem seemed like a nail.⁷⁶

Although this controversy is ultimately ideological, it is also manifested through and affected by how one understands what success—or victory—in contemporary conflicts is. Recall that the OED definition refers to overcoming an adversary in “combat, battle, or war,” or demonstrating superiority in an “armed conflict.”⁷⁷ This is a military-oriented definition, one that assumes a significant military force as part of the campaign. As earlier noted, however, success on the modern battlefield may require

⁷⁴ See ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 3, 5 (2003). It is unclear what the implications of NATO’s recent intervention in Libya are. While the United States provided critical aerial and logistical support, NATO’s European members—particularly France—played a very active role in Operation Unified Protector. See *Libya: French Plane Fires on Military Vehicle*, BBC (Mar. 19, 2011, 3:57 PM), <http://www.bbc.co.uk/news/world-africa-12795971>.

⁷⁵ SMITH, *supra* note 59, at 272.

⁷⁶ KAGAN, *supra* note 74, at 27.

⁷⁷ OED, *supra* note 6, at 610.

much more than a military campaign, and will be judged much more broadly than by the outcome of any combat or battle. The question remains whether military force can be taken out of the equation altogether; or even if not completely avoided, can be employed in a way that sufficiently heeds the concerns about the welfare of individuals far beyond our own national borders.

B. Proportionality

The *jus ad bellum* proportionality principle mandates that the use of force must not only be necessary, but also proportionate in the harm it inflicts in relation to the harm it seeks to abate. Unlike the principle of necessity, which is legally judged ex-ante, proportionality requires an ongoing assessment throughout the hostilities.⁷⁸

There are longstanding debates about how proportionality should be measured and, especially, in relation to what. One controversy arises with regard to weighing the actual harm caused by war against a threat that the war was meant to repel, but that has not yet materialized or has not fully materialized. The Goldstone report on the Israeli-Gaza war of 2008-2009 became part of this controversy when it compared the actual Palestinian deaths (over 1,000) to the actual Israeli deaths (three) during the war to find that Israel had employed disproportionate force.⁷⁹ Similar arguments have been made in condemning the war in Afghanistan as having inflicted tens of thousands of casualties in comparison to the 3,000 that died on 9/11.⁸⁰ On the other side of the debates, commentators emphasize the threat of further attacks as well as the disruption of life

⁷⁸ 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* 58–59 (Carsten Stahn & Jann K. Kleffner, eds 2008); cf. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (2002).

⁷⁹ Human Rights in Palestine and Other Occupied Arab Territories, U.N. Fact-Finding Mission on the Gaza Conflict, 12th Sess, Sept. 14–Oct. 2, 2009, 17, 408, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

⁸⁰ See Stephen R. Shalom, *Far From Infinite Justice: Just War Theory and Operation Enduring Freedom*, 26 ARIZ. J. INT'L & COMP. LAW 623, 670–71, 677 (2009) (arguing that a strict comparison between the number of civilian casualties would be “ludicrous,” but that a comparison of orders of magnitude of civilian deaths would suggest a “morally significant toll”).

instigated by past attacks as a better benchmark for the proportionality of force than actual casualties.⁸¹

Obviously, as threats become more dispersed and more variegated, proportionality assessment becomes trickier and more uncertain. As in the case of necessity, there is ground to argue that proportionality today cannot and should not be measured solely in reference to an immediate and tangible violent threat, but must include the positive goals that the war seeks to bring about, such as democratic and liberal reforms. Gender equality in Afghanistan may now be as relevant to proportionality calculations as the number of Al Qaida members operating in the country.

These developments, however, do not necessarily stand for extending the goals of war far enough to justify any measure of violence. Overwhelming military might used to be essential for conquering territory and controlling it for a long period of time, or for fending off invasions or other state-based threats. A decisive force could eventually bring the enemy into complete submission up to the point of official surrender, concession of claims, or cessation of all hostile acts.

The modern nature of wars, however, makes military force both less sufficient and less determinative than in the past. Military strikes are unlikely to bring to a decisive victory in the sense of enemy submission or deterrence against future attacks where the enemy is a nonstate actor uncontrollable by any particular state (see the Soviet blundering in Afghanistan throughout the 1980s; although compare the defeat of the Tamil Tigers). Even if overwhelming force could bring about such a victory—a proposition hotly debated in comparisons of the experience of the post-World War II occupations of Germany and Japan to those of Afghanistan and Iraq—the contemporary law and morality of Western liberal democracies would not tolerate such force and its collateral consequences, absent a catastrophic event.

⁸¹ See Michael C. Bonafede, Note, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks*, 88 CORNELL L. REV. 155, 188–92 (2002).

Moreover, when a war is waged for “the hearts and minds” of the local population, the moderation counseled by the classical Just War theory for purposes of restoring peaceful relations is now, more than ever before, not only an ethical prescription, but a matter of self-serving strategy. For example, former U.S. Defense Secretary Robert Gates often called for increases in the State Department’s funding, noting that full funding for the civilian agency was critical to maintaining military gains in Iraq.⁸² In support of his argument, Gates warned the Senate Armed Services Committee by citing the rise of the Taliban after the United States lost interest in Afghanistan following the Soviet defeat.⁸³ This is not an argument based upon feelings of what is owed to the Iraqis after the U.S. invasion—it is one fueled by the desire to prevent Iraq from presenting a threat to U.S. security by becoming too insecure and unstable itself. A degree of force must be employed to ensure the possibility of bringing and sustaining change, and for protecting the local population. But bringing the entire society to its knees may prove not merely disproportionate but also counterproductive.

On the flip side, the enterprise of nation-building in a hostile environment requires a longer-term use of violence. This is fundamentally what makes present reconstruction efforts so very different from those undertaken by the Allies in Germany or Japan. As the shadow of victory lengthens to include a democratic government, human rights, and economic reconstruction—all under violent opposition from sections of the local population and armed groups—some degree of constant, trickling force is required throughout the effort. This is the possibility Michael Walzer warned against when he argued that it was incumbent on the victorious party to undertake the reconstruction of the defeated state in a way that gains local legitimacy, unless to do so would require lengthening the conflict.⁸⁴

Debates over whether such longer-term violence is best classified as an armed conflict, counterinsurgency, stability operations, peacekeeping or law enforcement demonstrate the uneasiness about treating such operations as traditional wars. But it

⁸² Lisa Daniel, *State Department Needs Iraq Funding, Gates Says*, U.S. DEPARTMENT OF DEFENSE (Feb. 17, 2011) <http://www.defense.gov/news/newsarticle.aspx?id=62858>.

⁸³ *Id.*

⁸⁴ Michael Walzer, Speech at the Heinrich Böll Foundation (July 2, 2003), *available at* http://www.boell.de/alt/downloads/aussen/walzer_judging_war.pdf.

also expresses an understanding that some degree of violence, even if of lower intensity, is necessary for longer periods of time in support of the non-military components of victory.

V. Victory and *Jus in Bello*

In this section, I demonstrate how the *jus post bellum* and the *jus in bello* interact so that the goals of the war, broadly defined, affect the conduct of war while it is prosecuted.

A. Military Necessity

Military necessity is at once an enabling and a limiting principle of war. It permits “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely *the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources*.”⁸⁵ “Military necessity” thus justifies not only what is required to win the war, but also what reduces the risks of losses or costs of the war.⁸⁶ Rather than true necessity, in the narrow sense, military necessity often stands for mere convenience.

Even more than the *ad bellum* necessity, the *in bello* necessity is preoccupied with the military aspects of the conflict. It permits, in the words of the Lieber Code, “those measures which are indispensable for securing the ends of the war, and which are

⁸⁵ UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT para. 2.2 (2004). *See also* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK, 149 (2008) (describing, by reference to the Lieber Code, necessity as “those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war”).

⁸⁶ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 14 (Apr. 24, 1863). *See also* the decision by the American Military Tribunal in Nuremberg in the “Hostage Case,” proclaiming that “Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel, the complete submission of the enemy with the least possible expenditure of time, life, and money.” USA v. List et al., 11 NMT 1230, 1253 (American Military Tribunals, Nuremberg, 1948).

lawful according to the modern law and usages of war.”⁸⁷ In Lieber’s time, these measures included “all direct destruction of life and limb of armed enemies, and of other persons whose destruction is incidentally unavoidable.... it allows of the capturing of every armed enemy...; it allows of all destruction of property and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy....”⁸⁸

Francis Lieber intended the Code to govern the American Civil War, a war between two massive armies that continued for four years and brought about over a million deaths from violence and disease. The need to kill enemy forces, destroy channels of transport and communication, and withhold sustenance from the enemy was all an evident part of military necessity.

In wars over “hearts and minds,” fought against nonstate actors who are embedded in the civilian population, mass destruction does not seem to further the goals of the war. Even if it somewhat promotes the military campaign in terms of disabling the ability of enemy forces to engage in hostilities, such destruction stands to frustrate the civilian and political campaign of contemporary wars. Destroying infrastructure simply means a greater subsequent cost of reconstructing that same infrastructure.

This is not simply a strategic point to be weighed by each warring party within its own utility function. It raises questions about whether ‘military necessity’ is a relevant yardstick for weighing the costs and benefits of armed force today. In some circumstances, as noted above, present-day necessity might counsel against the use of military force. But under other circumstances, the phrase *military* necessity might be overly-restrictive when considering tactical necessity in contemporary wars. Consider, for instance, the confiscation of public or private property for the building and operation of a girls’ school in Kandahar. Such confiscation is only allowed for “military necessity.”⁸⁹ And yet, once gender equality, aid, and reconstruction are made part of the goals of the war, no less so than chasing after Al Qaida operatives, it is unclear why

⁸⁷ Lieber Code, art. 14.

⁸⁸ *Id.* art. 15 (italics added).

⁸⁹ GCIV, arts. 53, 64.

confiscation of property for the latter should be allowed, while for the former it should not. Nor, for that matter, is it clear why that same goal of gender equality would not justify the use of armed force against those who are fighting against it.

B. Distinction

Described as “cardinal” by the International Court of Justice,⁹⁰ the principle of distinction forms the foundation of much of the current laws of war. Together with the principle of military necessity, it seeks to channel most harm in war towards combatants, while shielding as much as possible civilians and civilian objects.

The exact scope of the principle of distinction has been the center of a centuries-long religious, philosophical, and legal debate. For present purposes, however, the principle can be summed up as follows: combatants are allowed to kill enemy combatants, with few limitations. In exchange for the right to fight and kill others, they assume the risk of being killed themselves. Civilians, on the other hand, must not partake in hostilities, and if they do, may be punished (and under some circumstances, targeted). In return for their abstention from fighting, they enjoy immunity from deliberate attack and must be protected to the extent possible from inadvertent harm.

Civilian immunity in war is not a derivative of moral innocence, but of the lack of threat civilians generally pose. Combatants are all presumed dangerous, as agents of an enemy power or organization, even when they do not pose a direct threat at a particular moment. For this reason, there are few limitations on targeting able enemy combatants,⁹¹ and very little has changed since the Lieber Code’s permission of “all direct destruction of life and limb of armed enemies.” The U.S. Army Field Manual, for instance, accepts, as a general matter, that “[t]he law of war places limits on employing any kind or degree of violence that is not actually necessary for military purposes” (Dept. of the Army 2003) but in its operational section, it instructs that “Wartime ROE [Rules of Engagement – G.B.] permit U.S. forces to open fire upon all identified enemy

⁹⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8).

⁹¹ For a critique of current IHL on this point, see generally Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. OF LEGAL ANALYSIS 115 (2010).

targets, regardless of whether those targets represent actual, immediate threats” (Dept. of the Army 2000).⁹²

Civilians, conversely, are all presumed innocent, unless proven threatening; this is why civilians enjoy immunity, unless and for such time that they take direct part in hostilities.⁹³ In case of doubt, an individual must be presumed to be an innocent civilian.⁹⁴

The particular design of the principle of distinction—which has remained fairly static over the past century and a half—reflected not only humanitarian intuitions, but also a view of war as an inter-collective, organized violence. Combatants could be told apart from civilians through their uniform, and civilians could be presumed to be largely tangential to the direct war effort.

Given the modern nature of war, however, and as in the case of the principle of military necessity, it is questionable whether it is still correct to assume that all members of the enemy forces are threatening, or that all those who are not direct members of the enemy forces are unthreatening.

Killing as many soldiers as possible made sense when wars were fought for control of territory defended by a mass army. Mass enemy casualties and popular response to them then swayed leaders’ choices and brought them to capitulate or withdraw. It is not at all clear that chasing after every member of a nonstate armed group leads to subsequent capitulation by that armed group. A special problem is presented by the use of child soldiers in many contemporary armed groups. Moreover, as a strategic matter, once the security apparatus of the targeted state is rebuilt, many of the same members of previously-targeted armed groups are often encouraged to “cross the lines” and participate in the new project of nation building. This suggests that an attempt to “reconcile” or capture the less-threatening members of armed groups might be more beneficial and more justified than killing them en masse (see the negative

⁹² HEADQUARTERS, DEPARTMENT OF THE ARMY, FM 27-100: LEGAL SUPPORT TO OPERATIONS 8.2.5 (2000). The Manual then proceeds to instruct, that once a threat has been declared a hostile force, U.S. units and individual soldiers may engage without observing a hostile act or demonstration of hostile intent. The basis for engagement becomes *status* rather than *conduct*. *Id.* at 8.3.

⁹³ API, art. 51(3).

⁹⁴ API, art. 50(1).

repercussions of dismantling the Iraqi army in 2003⁹⁵). In addition, where military infrastructure and supplies can be targeted without killing individuals, this course of action should be considered favorably.⁹⁶

On the flip side, the imperative of not targeting anyone who is not a member of an enemy force and who is not otherwise directly participating in hostilities, is now also under increasing tension. For one thing, military and civilian personnel increasingly perform similar functions both within standing militaries and nonstate armed groups. For another, as wars become more about political and civic change, it is political power that may be more threatening and a better distinguishing feature of “enmity” than affiliation with an armed group. The legal and political controversies that surrounded the ICRC Interpretive Guidance on Direct Participation in Hostilities⁹⁷—a document intended to identify what type of involvement in hostilities would strip civilians from their immunity—demonstrates the immense difficulties in drawing lines between the present-day threatening and unthreatening.

Consider, for instance, the practice of targeting leaders. The immunity of political leaders has been a longstanding customary norm. Even during World War II, the Allies refrained from targeting the Emperor’s palace and did not make any special effort to kill Hitler or his deputies.⁹⁸ Similarly, in the post-World War II era, there have been few attempts at targeting leaders: in 1986, the U.S. fired missiles at Libyan dictator Moammar Qaddafi’s tent,⁹⁹ Israel reputedly aborted a plan to assassinate Saddam Hussein following a disastrous training accident,¹⁰⁰ and U.S. Admiral Samuel Locklear,

⁹⁵ See Edmund L. Andrews, *Envoy’s Letter Counters Bush on Dismantling of Iraq Army*, N.Y. TIMES (Sept. 4, 2007), at A1, available at <http://www.nytimes.com/2007/09/04/washington/04bremer.html>.

⁹⁶ On the question of the justification of targeting enemy forces, see generally Blum, *supra* note 91.

⁹⁷ See, e.g., W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010) (discussing the divide between academics and military experts on the propriety of Part IX of the Interpretive Guidance).

⁹⁸ According to a recent report by an ex-Russian general, Stalin himself blocked two assassination attempts aimed at Hitler, fearing that a successor to Hitler will make peace with the Western Allies. See *Stalin Blocked Two Attempts to Kill Hitler, Russian General Says*, DAILY TELEGRAPH (May 26, 2010), <http://www.telegraph.co.uk/news/newstopics/world-war-2/7765731/Stalin-blocked-two-attempts-to-kill-Hitler-Russian-general-says.html>.

⁹⁹ Edward Schumacher, *Wide Damage Seen; Daughter of Qaddafi is Said to Have Died*, N.Y. TIMES, Apr. 15, 1986, at A1.

¹⁰⁰ *Ya’alon: Publicizing Plan to Eliminate Saddam ‘Irresponsible,’* HAARETZ, (Dec. 16, 2003, 12:00 AM), <http://www.haaretz.com/news/ya-alon-publicizing-plan-to-eliminate-saddam-irresponsible-1.108868>.

Commander of the NATO Joint Operations Command acknowledged that NATO forces sought to kill Qaddafi during the 2011 Libyan Civil War.¹⁰¹ In both cases, the would-be targeted leader wore uniform and held a military rank; these are the exception, rather than the rule. In general, leaving the enemy regime intact was compatible with the notion that victory required (merely) the disablement of the capabilities and/or motivations for war and that restoring the status quo ante would include future dealings with the same regime.

As wars have altered, targeting leaders has become a more frequent practice (as in the invasion of Afghanistan in 2001 and of Iraq in 2003; Israel's reported attempts at targeting Hezbollah's Secretary-General, Hassan Nasrallah, during the Lebanon War; and NATO bombings came very close to Qaddafi in 2011). Even though in each of these cases the leader held a military rank as well, this development does correspond with the idea that whatever else victory entails, it must also include a transformation of the political structures of the enemy entity.

Even more controversially (not to say paradoxically), if "winning hearts and minds" is the goal, amorphous as it is, of some modern wars, this may push in the direction of the removal (that is, the killing) not of combatants but of those who are in a position to sway popular opinion in adverse ways: political, religious, and even prominent cultural figures. If the rationale of the principle of the distinction in previous wars was that combatants had the right to bear arms and were therefore by definition threatening to the adversary, bearing arms may no longer be as threatening as a religious address to followers, encouraging them to violently oppose the adversary and providing support.¹⁰²

Killing non-military leaders (other than the highest-level political leaders) would, of course, be in tension with the same professed commitment to human rights and

¹⁰¹ Josh Rogin, *Exclusive: Top U.S. Admiral Admits We are Trying to Kill Qaddafi*, FOREIGN POLICY: THE CABLE (June 24, 2011, 2:19 PM), http://thecable.foreignpolicy.com/posts/2011/06/24/exclusive_top_us_admiral_admits_we_are_trying_to_kill_qaddafi.

¹⁰² See for example the targeted killing of Anwar al-Awlaqi, a cleric suspected of providing both inspiration for a number of terrorists and organizational support to the operations of Al Qaida in the Arabian Peninsula. Benjamin Wittes, *On Due Process and Targeting Citizens*, LAWFARE (Oct. 1, 2011, 11:47 AM), <http://www.lawfareblog.com/2011/10/on-due-process-and-targeting-citizens/>.

freedoms (of association, of expression) that the democratic “change” promises. But as a general matter, distinction on the modern battlefield no longer makes sense solely on the basis of the status-based distinction between combatants and civilians. Contemporary “threat” must be analyzed and met through finer-grained, case-by-case assessments.

C. Proportionality

The principle of proportionality in *jus in bello* prohibits military operations which inflict excessive harm on civilians or civilian targets. “Excessive” is measured against the military advantage that is to be gained from the attack.

The principle of proportionality has been a subject of growing debates and criticisms for its indeterminacy (in judging how many casualties are “excessive”), malleability (different circumstances lend themselves to different proportionality analyses), and possible political and military exploitation (through, for instance, the practice of shielding). These critiques are not surprising, especially given the trends of the modern battlefield: the intermingling of civilians and combatants, a greater sensitivity to any and all civilian casualties, the unrealistic expectation that modern technology could eliminate all civilian casualties, and the frequent rhetorical employment of the proportionality principle in allegations of wartime misconduct. Criticism has been so fierce as to bring some commentators in the United States to advocate the abrogation of the principle altogether.¹⁰³

In the present context, I wish to focus on one element of the proportionality principle, which heretofore has not received much treatment—the element of “military advantage.” Military advantage has always been an amorphous concept, especially when compared to very concrete and vivid civilian casualties or property damage. One longstanding debate has been over whether civilian casualties should be weighed against the “concrete and direct” military advantage or the “overall” military advantage that is to

¹⁰³ Jonathan F. Keiler, *The End of Proportionality*, Parameters, Spring 2009.

be gained from the attack.¹⁰⁴ The Additional Protocol used the first formula,¹⁰⁵ and its Commentary explained that this choice was intended to indicate that the advantage must be “substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.”¹⁰⁶ The Rome Statute of the ICC, however, added the words “clearly” before the word “excessive” and “overall” after the words “concrete and direct” in spelling out the crime of disproportionate attacks.

Whether broad or narrow, “concrete and direct” or “overall,” the words “military advantage” themselves suggest that the context is clearly a military one. It may thus encompass taking control over territory, disabling enemy capabilities, or protecting one’s own forces.¹⁰⁷ But as victory loses some of its military stripes, and becomes more dependent on political or social criteria, military advantage stands to lose its exclusivity as the yardstick against which collateral harm should be measured. Consider, for instance, the “war over hearts and minds.” To the extent that such a war exists, why would it make sense to weigh collateral harm against military advantage? Why would it not be weighed against popular perceptions of good and bad, the just and the unjust?

Naturally, with the extension of the war into the political and civilian realm, the principle of proportionality—if weighed against those interests—risks becoming meaningless. After all, how can one weigh how many lives the rights of women in Afghanistan are worth? Still, the point here is that if the military campaign continues so as to allow the introduction and enforcement of women’s rights in Afghanistan, “military advantage” can no longer be purely *military* advantage.

¹⁰⁴ See also ICRC study on Customary Law, Rule 14, which explains that “Several States have stated that the expression “military advantage” refers to the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack.” CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 49 (Jean-Marie Henckaerts, Louise Doswald-Beck & Carolin Alvermann eds., 2005).

¹⁰⁵ See also *id.*

¹⁰⁶ Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 2209.

¹⁰⁷ On the latter, see Australia and New Zealand’s submissions to the Commentary on the Additional Protocols, *id.* at §§329, 336.

Conclusions and Implications

Sir Winston Churchill once remarked, "The problems of victory are more agreeable than those of defeat, but they are no less difficult."¹⁰⁸ To know what the problems of victory are, however, we are in dire need of a better understanding of what victory entails, what it looks like, and what it takes to achieve it.

Contemporary conflicts blur the traditional lines between war and peace and between public and private. Citizenship, nationality, and borders become increasingly unimportant for them. These conflicts have no clear end-state, and they require a mix of tools – military, economic, political, and civilian – to manage them. Particularly for western liberal democracies, the tension between the values they seek to uphold and promote and the inherent evils of wars, however just, has meant an articulation of victory in vaguer, broader, and more malleable terms that challenge contemporary Just War doctrines.

Moreover, liberal ideology has made individuals the bearers of rights and freedoms and conditioned the legitimacy of the state on promoting the rights and freedoms of its individual citizens, and increasingly – of those who are not its immediate citizens as well. At the same time, technology and globalization have made individuals (or groups of individuals) capable of inflicting harm in a magnitude previously reserved for large organized armed forces. With individuals becoming at once the unmediated subject of care and the unmediated source of threat, war has been stripped of much of its inter-collective logic. One could imagine a growing trend towards "international policing" that sees individual wrongdoers – rather than distinct collectives – as its target.

All of this means that the existing Just War doctrine, which is mainly focused on the military components and collective features of armed conflicts, may be inadequate to encompass the full panoply and increasingly intertwined ethical, legal, and strategic aspects of contemporary conflicts. For the latter, we need a more comprehensive ethical theory of international relations and of the regulation of violence within it.

¹⁰⁸ Prime Minister Winston Churchill, Speech to the House of Commons (Nov. 11 1942).

Undoubtedly, it is still very fashionable to invoke the terminology of victory. At the advice of Peter D. Feaver, a Duke University political scientist who had joined the National Security Council as a special adviser, President Bush began invoking the language of “success” and “victory” more often in his speeches.¹⁰⁹ Feaver's research on casualty aversion suggested that Americans would support a war with mounting soldiers casualties if they believed it would ultimately succeed.¹¹⁰ The President was thus pressed to convince the public that it would.

President Obama, conversely, told ABC news that he was “always worried about using the word ‘victory,’ because, you know, it invokes this notion of Emperor Hirohito coming down and signing a surrender to MacArthur.”¹¹¹

The inability of both presidents to articulate a clear goal for the wars in Afghanistan and Iraq left the military floundering, designing strategy under great uncertainty and with tools that it may not be best equipped to handle. This point suggests that the problem of the fog of victory extends not only to international relations but also to domestic civil-military relations.

Finally, much of the foregoing analysis has built on the American experience in Iraq and Afghanistan. As I noted in the introduction, one might argue that it is these wars that are the outliers, and that there is not much chance that we will see these types of massive interventions on the ground of foreign territories any time soon. This is possible; but it is also possible that we will witness a plethora of different types of conflict—interstate, intrastate, humanitarian interventions, counterinsurgencies, etc.—that might make a coherent just war doctrine even more complicated to articulate and apply. As the involvement of U.S. forces in In any case, and given any type of conflict, the changing face of victory will persist: the success of present-day campaigns fought by liberal democracies will not be judged solely on the basis of their ability to deter the immediate threats; instead, a longer and deeper change in the domestic structures of government and governance will be sought.

¹⁰⁹ Scott Shane, *Bush's Speech on Iraq War Echoes Voice of an Analyst*, NY TIMES (Dec. 4, 2005) <http://www.nytimes.com/2005/12/04/politics/04strategy.html?pagewanted=all>.

¹¹⁰ *Id.*

¹¹¹ *Obama: ‘Victory’ Not Necessarily Goal in Afghanistan*, FOXNEWS.COM (July 23, 2009), <http://www.foxnews.com/politics/2009/07/23/obama-victory-necessarily-goal-afghanistan/>