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# The Fog of Victory

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 article uses the prism of victory to view the transformation of the goals, means, and targets of war, and assesses the applicability of the conventional Just War doctrine (through the traditional laws of war) to the modern battlefield. Specifically, the article 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 for a just modern war.*

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*.<sup>1</sup>

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.<sup>2</sup>

## 1 Introduction

Much has been written about the new battlefields of the 21st century, specifically in the context of counterinsurgency or counterterrorism operations, humanitarian interventions, and other non-traditional 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 article 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

\* Rita E. Hauser Professor of Human Rights and International Humanitarian Law, Harvard Law School; Berkowitz Fellow, the Tikvah Center, NYU Law School (2010–2011). I am indebted to the participants of the Just and Unjust Wars conference and the Tikvah Fellows for their comments and suggestions. I owe much to James Whitman and his work on victory and pitch battles, and to Azar Gat for his work on the evolution of war and strategy through the ages. Brian Itami and Natalie Lockwood provided excellent research assistance.

<sup>1</sup> C. von Clausewitz, *On War* (trans. and ed. M. Howard and P. Paret, 1989 edn), at 579.

<sup>2</sup> Churchill, ‘An Address to the House of Commons’ (13 May 1940), reprinted in D. Cannadine (ed.), *Blood, Toil, Tears and Sweat: The Speeches of Winston Churchill* (1989), at 149.

‘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*<sup>3</sup> – and then use these questions to re-evaluate 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 help explain why wars among non-democratic parties look different from those in which there is at least one liberal-democratic belligerent.

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.<sup>4</sup> 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 installation 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 the purposes of this article, 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 pre-existing state order intact. The goals of contemporary wars, conversely, are often long-term change. Rather than restoring the pre-existing 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 pushed the regime governing the conduct of hostilities (*jus in bello*) from a state-centred enterprise to a more cosmopolitan regime, in which individual human security is

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

<sup>4</sup> For some recent notable exceptions see P. Bobbitt, *Terror and Consent: The Wars of the Twenty-First Century* (2008); A. Gat, *Victorious and Vulnerable: Why Democracy Won in the 20th Century and How it is Still Imperiled* (2009); J.D. Lewis, *Nothing Less than Victory: Decisive Wars and the Lessons of History* (2010); W.C. Martel, *Victory in War: Foundations of Modern Strategy* (2011).

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 in 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. 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, and 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 non-state actor (insurgent, terrorist, transnational criminal network) 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, civilian, and political dimensions of war and victory were always inextricably intertwined (after all, war is famously the continuation of politics by other means<sup>5</sup>), they have become even more so in contemporary wars. With wars becoming about long-term change, requiring a mix of benevolence and aggression that is carefully tailored to individual targets, the political and civilian dimensions of victory have 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 no 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 article I turn to examine in greater detail the implications of the changing nature of victory for the existing doctrines of *jus ad bellum* and *jus in bello*. 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

<sup>5</sup> Clausewitz, *supra* note 1, at 87.

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 may have on the basic principles of military necessity, proportionality, and distinction.

## 2 What is Victory?

The origin of ‘victory’ is the Latin *victoria*, from *vinco*, or *victus*, meaning ‘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’.<sup>6</sup> In English, the word ‘victory’ first appeared in the 14th century, complementing pre-existing terms, such as ‘success’ or ‘vindication of rights’.<sup>7</sup>

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.<sup>8</sup>

A successful military campaign therefore is not a sufficient condition for victory, nor is it always a necessary one. Political, economic, and civic forces may 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 being 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.<sup>9</sup> Still, even

<sup>6</sup> *The Oxford English Dictionary* (2nd edn, 1989), xix, at 610 (hereinafter OED).

<sup>7</sup> *Ibid.*

<sup>8</sup> Clausewitz, *supra* note 1, at 94 (emphasis in original).

<sup>9</sup> 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 O’Connor, ‘Victory in Modern War’, 6 *J Peace Research* (1969) 367.

in the political science and military studies spheres there has been little systematic treatment of the concept of *victory*, and how it can or should be distinguished from corollary concepts of war termination, defeat, intervention, etc.<sup>10</sup> 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.<sup>11</sup>

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-20th 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 some circles.<sup>12</sup> More recently, the Tamil Tigers, who were thoroughly routed, admitted that the 'battle has reached its bitter end' but did not explicitly surrender.<sup>13</sup>

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

<sup>10</sup> Quite a bit of attention has been given specifically to the concept of war termination. See, e.g., D.J. Caraccilo, *Beyond Guns and Steel: A War Termination Strategy* (2011); F.C. Iklé, *Every War Must End* (1971); G. Rose, *How Wars End: Why We Always Fight the Last Battle* (2010); Slantchev, 'How Initiators End Their Wars: The Duration of Warfare and the Terms of Peace', *48 Am J Political Science* (2004) 813.

<sup>11</sup> See, e.g., M.J. Allman and T.L. Winright, *After the Smoke Clears: The Just War Tradition and Post War Justice* (2010).

<sup>12</sup> Note that South Vietnam did surrender to the North in April 1975.

<sup>13</sup> Sengupta and Mydans, 'Rebels Routed in Sri Lanka After 25 Years', *NY Times*, 18 May 2009, at A1. This was, of course, in the context of a non-international armed conflict.

all remaining US troops from Iraq by the end of 2011. All of this cannot be set aside as simply political-rhetorical manoeuvring. 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 the purposes of this article, 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.

### 3 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* (a version of present-day *jus post bellum*), with Just War theorists expounding on all three. Moreover, all three strands were also intertwined so that war was only just to the extent that 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.<sup>14</sup> 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 the 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,<sup>15</sup> 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.<sup>16</sup> Against

<sup>14</sup> See Bobbitt, *supra* note 4.

<sup>15</sup> See Thucydides, 'History of the Peloponnesian War', in R.B. Strassler (ed.), *The Landmark Thucydides: A Comprehensive Guide to The Peloponnesian War* (1998), at 193 (describing the razing of Plataea and the massacre and enslavement of its inhabitants following capture by Spartan allies).

<sup>16</sup> Polybius, *The Histories* (trans. W.R. Patton, 1922), ii, at 63–65. For an example of how Polybius conceived of victory see *ibid.*, at 219–223 (describing victory as requiring the total destruction of enemy forces and defection of any remaining civilian population to the side of the victors).

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.<sup>17</sup> Peace, however, often included change – mostly, in the religious affiliation of those conquered by war.

The 11th to 13th 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 300 years of war. Within Europe, however, the concept of war as a legitimate means for change declined through the Middle Ages. Instead of means of spreading religion and power, war came to be largely viewed as a procedural mechanism for settling disputes;<sup>18</sup> 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 16th and 17th centuries, Alberico Gentili, Francisco Suarez, Hugo Grotius, and others, all followed the Augustinian formulation of 'war for peace', ordering that war should not be sought for change, but only to enforce the initiator's pre-existing rights and obligations.<sup>19</sup> Often invoking the concept of war as (divine) punishment against transgressions from the *status quo*, these theorists argued that victory 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.<sup>20</sup> 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 pre-existing *status quo* was largely true for Western Europe and did not extend to 'barbarians' (and so the Spanish colonial wars from the 15th century onward 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 18th and 19th centuries, which sought French expansion and aggrandisement, 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

<sup>17</sup> Augustine of Hippo, *The Political Writings of St. Augustine* (ed. H. Paolucci, 1962), at 178–179; Gratian, *Gratianus in Jurisprudence* (ed. J.W. Somerville, 1934), at 23.

<sup>18</sup> See Whitman, 'The Verdict of Battle' (7 May 2009), available at: [www.law.uchicago.edu/audio/by/title/james\\_q\\_whitman\\_the\\_verdict\\_of\\_battle](http://www.law.uchicago.edu/audio/by/title/james_q_whitman_the_verdict_of_battle).

<sup>19</sup> See A. Gentili, *De Jure Belli Libri Tres* (1612), reprinted in *The Classics of International Law* (ed. J.S. Brown, trans. J.C. Rolfe, 1933); Stahn, 'Jus Post Bellum: Mapping the Discipline(s)', 23 *American U Int'l L Rev* (2008) 311, at 313.

<sup>20</sup> H. Grotius, *The Rights of War and Peace* (ed. R. Tuck, 2005), at 1477–1478. Kant, 'The Metaphysics of Morals, Part One: The Metaphysical Elements of the Doctrine of Right', in I. Kant, *Political Writings* (ed. H.S. Reiss, trans. B. Nisbet, 2005), at 168–171.

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

World War I, 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 envisaged 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'.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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'.<sup>24</sup> 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 that heralded the worst war in modern human history.

The 1945 UN 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 our lifetime has brought untold sorrow to mankind'.<sup>25</sup> Under the Charter's *jus ad bellum*, war was permitted only in defence 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 predecessor, the UN 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-aggrandisement 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 fulfilment of their right to self-determination had to follow the *uti possidetis* doctrine, by which newly

<sup>21</sup> League of Nations Covenant, Art. 11.

<sup>22</sup> *Ibid.*, Arts 12–13, 15.

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

<sup>24</sup> Kellogg–Briand Pact, Art. 1, 27 Aug. 1928, 46 Stat. 2343, 94 LNTS 57.

<sup>25</sup> UN Charter, Preamble.

independent states could not alter pre-existing boundaries that were demarcated by colonial powers.<sup>26</sup>

The classical Just War tradition that justified war only if it promoted peace was thus revived under the UN 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.<sup>27</sup> 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, as a matter of principle, the post-war international order was generally preoccupied with peace more than with justice; it thus sought to protect the former to the fullest extent possible by anchoring the international order as it had been left following World War II. Change, if necessary, was to be pursued through peaceful means only.

The nuclear arms race between the two great powers, the US and the USSR, 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 the idea of 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. The *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.<sup>28</sup>

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.<sup>29</sup> But the experience in Iraq from 1991 to 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 break-up 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.

<sup>26</sup> See Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States', 90 *AJIL* (1996) 590, at 598.

<sup>27</sup> 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.

<sup>28</sup> Some of these efforts were covered by SC Res 687 and 688, which tied them to the WMD inspection regime and the protection of the Kurds: SC Res 688, UN Doc. S/RES/688 (5 Apr. 1991); SC Res. 687, paras 8–14. UN Doc S/RES/687 (3 Apr. 1991). Operation Desert Fox, however, was a subject of much international controversy, with Russia and France claiming it was a deviation from the Resolution.

<sup>29</sup> M. Walzer, *Just and Unjust Wars* (4th edn., 2006), at 121–122, 297.

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 toward the Kosovars. NATO's operation sought '[to support] the political aims 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'.<sup>30</sup> Once these goals were set, victory in Kosovo could not be limited to restoring a *status quo* of lawful behaviour by Milosevic's government towards an autonomous Kosovo; rather, the wake of the conflict saw Milosevic's indictment by the International Criminal Tribunal for the Former Yugoslavia, his electoral ouster following that indictment, and the beginnings of a change in Kosovo's political status. 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'.<sup>31</sup> 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 seek peace only if the violated rights that justified the commencement of hostilities have been adequately vindicated.<sup>32</sup>

The 9/11 terrorist attacks in 2001 led the US to hold that in a world of non-state actors and unconventional weapons, military strikes were insufficient to defuse the new threat to national security.<sup>33</sup> Because 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 until the threat had actually materialized or was even very imminent.<sup>34</sup> Instead, proactive action that blurred the lines between defence and aggression had to be pursued.

The proactive action could not be limited, the US doctrine held, to foiling individual attacks and disabling individual attackers. Rather, the conditions that allowed for attacks and attackers to threaten the US had to be changed, possibly by comprehensive overhaul of the domestic structures of territorial states.<sup>35</sup> 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 were pursued in both Iraq and Afghanistan.

<sup>30</sup> Statement on Kosovo issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, DC, at para. 3 (23 Apr. 1999), available at: [www.nato.int/cps/en/natolive/official\\_texts\\_27441.htm?selectedLocale=en](http://www.nato.int/cps/en/natolive/official_texts_27441.htm?selectedLocale=en).

<sup>31</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), at 39.

<sup>32</sup> B. Orend, *War and International Justice: A Kantian Perspective* (2000), at 232. See also Bass, 'Jus Post Bellum', 32 *Philosophy & Public Affairs* (2004) 384, at 386 (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).

<sup>33</sup> See *The National Security Strategy of the United States of America* (2002), at 7.

<sup>34</sup> *Ibid.*, at 13–16.

<sup>35</sup> *Ibid.*, at 6–7.

If the new paradigm of self-defence 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.<sup>36</sup> The spread of democracy, human rights, and economic development were added to reactive and anticipatory military strikes as measures of national defence, 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 codexes, both Western and Eastern, including the Laws of Manu, the Hammurabi Code, Greek and Roman edifices, the Bible, New Testament, and the Koran, as well as Medieval codes of warfare. A mix of moral and humanitarian considerations, strategic self-interest, notions of honour, chivalry, and self-identity, in addition to power structures that favoured 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.

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.<sup>37</sup> Undoubtedly building on earlier origins, Grotius and his contemporaries – reinforced by their successors of the Enlightenment period, who 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 posed to the adversary, thereby distinguishing those who carried arms, i.e., combatants, from the non-combatants 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.<sup>38</sup>

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 19th century, and war becoming a phenomenon to be explained, not judged, the *jus in bello* – the laws *in* war – received reinigorated attention. The ecclesiastic foundations of the Just War

<sup>36</sup> *Ibid.*, at 3–4, 17–23.

<sup>37</sup> Grotius, *supra* note 20, at 1438–1443, 1448–1450.

<sup>38</sup> J.-J. Rousseau, *The Social Contract*, bk. I, chap. 4, Sec. 9, in *The Social Contract and Other Later Political Writings* (ed. and trans. V. Gourevitch, 1997), at 46–47.

tradition gave way to a secular and (to some degree) humanist 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.<sup>39</sup> 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 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.<sup>40</sup> The Regulations further required occupiers to ‘ensure, as far as possible, public order and safety’<sup>41</sup> and to respect the laws of the occupied state to the greatest extent possible.<sup>42</sup> 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 had expressed their willingness, *de jure* and *de facto*, to be bound by similar norms.

While the UN 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 pre-existing rules and customs of warfare were ignored at least on some fronts. 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.

The Geneva conception of occupation seemed, however, more tolerant toward lengthy, even transformative occupations than the more restrictive Hague Convention regime,<sup>43</sup> probably due to the political environment in which the Geneva Conventions

<sup>39</sup> Declaration Respecting Maritime Law, Paris, 16 Apr. 856, 15 Martens 791.

<sup>40</sup> Hague Convention IV: Laws and Customs of War on Land, Arts 46–56, 18 Oct. 1907, 36 Stat. 2277, 205 Consol TS 277 (hereinafter Hague IV).

<sup>41</sup> *Ibid.*, Art. 43 (calling on occupying powers to respect the laws of the occupied territory).

<sup>42</sup> *Ibid.*

<sup>43</sup> Compare Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 47, 12 Aug. 1949, 6 UST 3316, 75 UNTS 85 (contemplating changes to ‘the institutions or government’ of an occupied territory) with Hague IV, *supra* note 40, Art. 43.

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' proscription against altering the rules and customs of occupied territories. 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.<sup>44</sup> 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 UN 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 henceforward.<sup>45</sup>

Still under the umbrella of the Cold War, and with the rise of non-state 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 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 – as a means of inducing compliance; parties' obligations to comply with international humanitarian law (IHL) thus became absolute, independent not only from the justness of their cause but also from their enemies' conduct.<sup>46</sup>

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 centre 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 to 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

<sup>44</sup> *The Mouse That Roared* (Open Road Films 1959).

<sup>45</sup> UN 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.'

<sup>46</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflicts (API), Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4), 12 Dec. 1977, 1125 UNTS 3.

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

Somewhat paradoxically, by making human rights violations within any single country a matter of international interest – and by deeming gross human rights violations a grave offence that implicate a duty to intervene on the part of the international community – 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’.

The revival and expansion of the project of international criminal law (ICL) further contributed to the limitations on warfare. Notwithstanding earlier origins of the idea of punishing individuals for violating the international law of war, the post-World War II Nuremberg Trials were widely considered to be 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 and 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 designed by the Rome Statute, with the aspiration of governing all conflicts around the globe. The Rome Statute expanded the list of war

<sup>47</sup> With regard to occupation, the ICJ ruled explicitly that human rights norms extended to inhabitants of occupied territories; see Cerone, ‘Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations’, 39 *Vanderbilt J Transnat’l L* (2006) 1447, at 1476–1477, citing *Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Uganda)* [2005] ICJ Rep 116, at para. 220 (hereinafter *DRC v. Uganda*).

crimes beyond what was stipulated in existing instruments and also largely 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 these norms' popular perception and ensuing public expectation that came to matter. And the latter now governed not only what was permitted *in* war, but also what was 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.<sup>48</sup> 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.<sup>49</sup> In this spirit, coalition forces implemented a broad range of changes to the Iraqi legal system even before an Iraqi interim government emerged.<sup>50</sup> *The Mouse that Roared* was now in the Middle East 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 least when it comes to war fought by the US.<sup>51</sup> 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. It applies even when there is a good claim for a war in self-defence. The participants in the UN's 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.<sup>52</sup>

<sup>48</sup> B. Woodward, *Plan of Attack* (2004), at 150.

<sup>49</sup> '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': N. Feldman, *What We Owe Iraq: War and the Ethics of National Building* (2004), at 80–81.

<sup>50</sup> Boon, 'Obligations of the New Occupier: The Contours of a *Jus Post Bellum*', 31 *Loyola LA Int'l & Comparative L Rev* (2009) 57, at 61–62.

<sup>51</sup> Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *AJIL* (2006) 580, at 582–583. Roberts argues (at 584) that even this prohibition does not appear to hold when examining state practice.

<sup>52</sup> See Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, 5 Dec. 2001, available at: [www.afghan-web.com/politics/bonn\\_agreement\\_2001.html](http://www.afghan-web.com/politics/bonn_agreement_2001.html).

Undoubtedly driven by American self-interest in the transformation of Afghanistan, these plans demonstrate that the line between transformation as self-interest and transformation as a matter of domestic and international expectations has become blurred.

In fact, according to some observers, there is an emerging norm of post-conflict nation-building that now seems to assume a legal status beyond self-interest or expediency.<sup>53</sup> If so, this duty may extend even when there is no actual occupation but merely devastation brought about by military action, as was the case 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.

### *C The Changing Targets in War: Victory over Whom?*

The horrors of the two World Wars loomed large over the framing of the UN Charter, as was evident in the Preamble's vow to 'save succeeding generations from the scourge of war'.<sup>54</sup> 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 US and the Soviet Union, that the Charter intended to avoid.

Geopolitical trends since the conclusion of the Charter, however, made some states weaker and some non-state actors stronger. The incidence of interstate wars declined, as intrastate wars and wars with non-state actors of various forms (terrorists, insurgents, guerillas, or criminal networks) grew. Technology made weapons cheaper, more readily available – including for non-state actors – and more destructive. 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 non-state actors grew more dispersed and assumed more variegated forms, the more amorphous became the 'defence' against them. While traditional conflicts against states were centred 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

<sup>53</sup> On the moral and legal status of a duty to reconstruct see Gheciu and Welsh, 'The Imperative to Rebuild: Assessing the Normative Case for Postconflict Reconstruction', 8 *Ethics and Int'l Affairs* (2009) 121. See also William Martel, who argues that '[t]he 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.

<sup>54</sup> See UN Charter, *supra* note 25, preamble.

against non-state 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 '[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.'<sup>55</sup>

Moreover, the lack of an accountable and controlling leadership, which is frequently the case with non-state 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 non-state actors often involved military strikes against states harbouring 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-defence justification for its use of force against rebels in the territory of the Democratic Republic of Congo.<sup>56</sup> Notwithstanding those critiques, as a matter of practice the use of armed force against insurgents and terrorists continued, often pre-emptively 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 non-state actors amidst a civilian population, especially one that had mixed allegiances and preferences with regard to the insurgent forces.<sup>57</sup> 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 fighting forces to minimize civilian casualties.<sup>58</sup> A complex strategy now requires a greater differentiation among subjects (combatants, leaders, supporters, opposition, uninvolved, etc.) and a mixture of aggression and beneficence 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,

<sup>55</sup> President George W. Bush, Speech to Congress (20 Sept. 2001), available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

<sup>56</sup> *DRC v. Uganda*, *supra* note 46, at para. 345.

<sup>57</sup> On the constraints facing liberal democracies in fighting non-state actors see Gat, *supra* note 4.

<sup>58</sup> See *The U.S. Army – Marine Corps Counterinsurgency Field Manual* (2007), at 37–39, 42–52.

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.

#### 4 Demonstrating the Shift: Iraq and Afghanistan

The inherent difficulty in 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’,<sup>59</sup> 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, US General Stanley A. McChrystal, then Commander of the International Security Assistance Force, Afghanistan (ISAF), labelled the conflict ‘a year-round struggle, often conducted with little apparent violence, to win the support of the people’.<sup>60</sup> But how is this ‘winning’ to be measured? By opinion polls among the local population? By installing a sympathetic local government? By enhancing the participation of the local population in a political process or the adoption of a constitution that is favoured 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’,<sup>61</sup> 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, is now a central part of defining what constitutes success in these wars.<sup>62</sup> 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.<sup>63</sup> Efforts often include partner states, multilateral organizations, and non-governmental organizations, further complicating data collection and evaluation.<sup>64</sup>

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 theatres. The Obama Administration set out to define success in both

<sup>59</sup> See R. Smith, *The Utility of Force: The Art of War in the Modern World* (2007), at 381.

<sup>60</sup> S.A. McChrystal, *Commander’s Initial Assessment* (2009), at 1–2. 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: *ibid.*, at 2–4.

<sup>61</sup> *Ibid.*, at 2–20.

<sup>62</sup> See, e.g., A.H. Cordesman, *The Afghanistan Campaign: Can We Win?* (2009), at 15–16.

<sup>63</sup> See A. Exum, *Leverage: Designing a Political Campaign for Afghanistan* (2010), at 10.

<sup>64</sup> See J. Campbell, M. O’Hanlon, and J. Shapiro, *Assessing Counterinsurgency and Stabilization Missions* (2009), at 13.

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').<sup>65</sup>

The 2010 National Security Strategy (NSS) offered less ambitious goals than a prior NSS,<sup>66</sup> 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.<sup>67</sup>

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, DC-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.<sup>68</sup>

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 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.<sup>69</sup>

<sup>65</sup> 'Evaluating Progress in Afghanistan-Pakistan: The Obama Administration's Draft Metrics for Afghanistan and Pakistan, as Obtained by *Foreign Policy*', *Foreign Policy*, 16 Sept. 2009, available at: [www.foreignpolicy.com/articles/2009/09/16/evaluating\\_progress\\_in\\_afghanistan\\_pakistan?print=yes&hidecomments=yes&page=full](http://www.foreignpolicy.com/articles/2009/09/16/evaluating_progress_in_afghanistan_pakistan?print=yes&hidecomments=yes&page=full).

<sup>66</sup> See G.W. Bush, *National Security Strategy* (2002), at 7.

<sup>67</sup> B. Obama, *National Security Strategy* (2010), at 20.

<sup>68</sup> Cordesman, 'Iraq: Security and the Challenges of Lasting "Victory"', Center for Strategic & International Studies, 26 Oct. 2009, available at: <http://csis.org/publication/iraq-security-and-challenges-lasting-victory>.

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

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, even counterproductive. 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 non-military strategies, not easily distinguishable from one another on substantive, temporal, or spatial dimensions.

This intertwining of civilian and military strategies presented 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 defence contractors' operations to those of the US 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.

## 5 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 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.'<sup>70</sup>

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.<sup>71</sup>

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, if only for the sake of 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, however 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.<sup>72</sup>

<sup>70</sup> Grotius, *supra* note 20, at 1145. See also S. Pufendorf, *De iure naturae et gentium libri octo* (trans. C.H. & W.A. Oldfather, 2 vols, 1934), at 1293–1294 (agreeing with Grotius).

<sup>71</sup> Walzer, *supra* note 29, at 110. This is one of the points which led Larry May to advocate contingent pacifism: see Larry May, 'Proportionality in the Fog of War', in this symposium.

<sup>72</sup> Bass, *supra* note 32.

Consider the customary principles of necessity and proportionality:<sup>73</sup> 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 of 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, 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 pre-emptively, that is, before an armed attack had actually occurred; and the right to use force against non-traditional threats, such as those emanating from extraterritorial armed groups or from abusive regimes.

Complicating these debates is the fact that legal judgements 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 non-traditional threats, if the use of force fails to produce the desired outcome this failure often invites criticisms of 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 widespread 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 'Al Qaida' was was becoming increasingly questionable? Was pre-emptive war against Iraq's alleged programme 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 theatre to materialize in the first place. Once long-term political and domestic changes in the target territories were sought, the

<sup>73</sup> I bracket out the question whether these principles apply equally to the use of force as authorized by the SC under Chap. VII. See Gardam, 'Necessity and Proportionality in *jus ad bellum* and *jus in bello*', in L. Boisson de Chazournes and P. Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999), at 275–292, 276.

military and political aspects of war became intertwined. For the US, 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 this point at which 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.<sup>74</sup>

At the heart of this debate was a broader controversy around the morality and utility of military force.<sup>75</sup> 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 US, argued Robert Kagan, armed with the hammer of military force, every problem seemed like a nail.<sup>76</sup>

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’.<sup>77</sup> 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 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

<sup>74</sup> See R. Kagan, *Of Paradise and Power: America and Europe in the New World Order* (2009), at 3, 5. It is unclear what the implications of NATO’s recent intervention in Libya are. While the US 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, 19 Mar. 2011, 3:57 p.m., available at: [www.bbc.co.uk/news/world-africa-12795971](http://www.bbc.co.uk/news/world-africa-12795971).

<sup>75</sup> Smith, *supra* note 58, at 272.

<sup>76</sup> Kagan, *supra* note 74, at 27.

<sup>77</sup> OED, *supra* note 6, at 610.

it seeks to abate. Unlike the principle of necessity, which is legally judged *ex ante*, proportionality requires an ongoing assessment throughout the hostilities.<sup>78</sup>

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.<sup>79</sup> 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 who died on 9/11.<sup>80</sup> On the other side of the debates, commentators emphasize the threat of further attacks as well as the disruption of life instigated by past attacks as a better benchmark for the proportionality of force than actual casualties.<sup>81</sup>

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 by 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 end in a decisive victory in the sense of enemy submission or deterrence against future attacks where the enemy is a non-state 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

<sup>78</sup> Rodin, 'Two Emerging Issues of Jus Post Bellum: War Termination and the Liability of Soldiers for Crimes of Aggression', in C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (2008), at 58–59; cf. Y. Dinstein, *War, Aggression and Self-Defence* (2002).

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

<sup>80</sup> See Shalom, 'Far From Infinite Justice: Just War Theory and Operation Enduring Freedom', 26 *Arizona J Int'l & Comp L* (2009) 623, at 670–671, 677 (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').

<sup>81</sup> See 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* (2002) 155, at 188–192.

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.

Moreover, when a war is waged for ‘the hearts and minds’ of the local population, the moderation counselled 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 US 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.<sup>82</sup> In support of his argument, Gates warned the Senate Armed Services Committee by citing the rise of the Taliban after the US lost interest in Afghanistan following the Soviet defeat.<sup>83</sup> This is not an argument based upon feelings of what is owed to the Iraqis after the US invasion – it is one fuelled by the desire to prevent Iraq from presenting a threat to US security by becoming too insecure and unstable itself. A degree of force must be employed to ensure the possibility of bringing about 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.<sup>84</sup>

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

## 6 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.

<sup>82</sup> Daniel, ‘State Department Needs Iraq Funding, Gates Says’, US Department of Defense (17 Feb. 2011), available at: [www.defense.gov/news/newsarticle.aspx?id=62858](http://www.defense.gov/news/newsarticle.aspx?id=62858).

<sup>83</sup> *Ibid.*

<sup>84</sup> Walzer, Speech at the Heinrich Böll Foundation (2 July 2003), available at: [www.boell.de/alt/downloads/aussen/walzer\\_judging\\_war.pdf](http://www.boell.de/alt/downloads/aussen/walzer_judging_war.pdf).

## 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*'.<sup>85</sup> '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.<sup>86</sup> 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 lawful according to the modern law and usages of war'.<sup>87</sup> 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'.<sup>88</sup>

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 non-state 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

<sup>85</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at para. 2.2. See also International and Operational Law Department, The Judge Advocate General's Legal Center & School, *U.S. Army, Operational Law Handbook* (2008), at 149 (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').

<sup>86</sup> Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 14 (24 Apr. 1863). See also the decision by the American Military Tribunal in Nuremberg in the 'Hostage Case', proclaiming that '[m]ilitary 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).

<sup>87</sup> Lieber Code, Art. 14.

<sup>88</sup> *Ibid.*, Art. 15.

circumstances, as noted above, present-day necessity may counsel against the use of military force. But under other circumstances, the phrase *military* necessity may 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 allowed only for 'military necessity'.<sup>89</sup> 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 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,<sup>90</sup> 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 centre 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 fullest 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,<sup>91</sup> and very little has changed since the Lieber Code's permission of 'all direct destruction of life and limb of armed enemies'. The US 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', but in its operational section, it instructs that 'Wartime ROE [Rules of Engagement] permit U.S. forces to open fire upon all identified enemy targets, regardless of whether those targets represent actual, immediate threats'.<sup>92</sup>

<sup>89</sup> Convention (IV) relative to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention), 12 Aug. 1949, 75 UNTS 973, Arts 53, 64.

<sup>90</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Rep 226, at para. 78.

<sup>91</sup> For a critique of current IHL on this point see generally Blum, 'The Dispensable Lives of Soldiers', 2 *J Legal Analysis* (2010) 115.

<sup>92</sup> 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, US 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*: *ibid.*, at 8.3.

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.<sup>93</sup> In case of doubt, an individual must be presumed to be an innocent civilian.<sup>94</sup>

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 non-state 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 repercussions of dismantling the Iraqi army in 2003<sup>95</sup>). In addition, where military infrastructure and supplies can be targeted without killing individuals, this course of action should be considered favourably.<sup>96</sup>

On the flip side, the imperative not to target 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 within both standing militaries and non-state 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 Hostilities<sup>97</sup> – 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.

<sup>93</sup> API, *supra* note 46, Art. 51(3).

<sup>94</sup> *Ibid.*, Art. 50(1).

<sup>95</sup> See Andrews, 'Envoy's Letter Counters Bush on Dismantling of Iraq Army', *NY Times*, 4 Sept. 2007, at A1, available at: [www.nytimes.com/2007/09/04/washington/04bremer.html](http://www.nytimes.com/2007/09/04/washington/04bremer.html).

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

<sup>97</sup> See, e.g., W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', 42 *NYU J Int'l L & Politics* (2010) 769 (discussing the divide between academics and military experts on the propriety of Part IX of the Interpretive Guidance).

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.<sup>98</sup> Similarly, in the post-World War II era, there have been few attempts at targeting leaders: in 1986, the US fired missiles at Libyan dictator Moammar Qaddafi's tent,<sup>99</sup> Israel reputedly aborted a plan to assassinate Saddam Hussein following a disastrous training accident,<sup>100</sup> and US Admiral Samuel Locklear, Commander of the NATO Joint Operations Command, acknowledged that NATO forces sought to kill Qaddafi during the 2011 Libyan Civil War.<sup>101</sup> 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 the Navy Seals' assassination of Bin Laden 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 violently to oppose the adversary and providing support.<sup>102</sup>

<sup>98</sup> 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 would make peace with the Western Allies: see 'Stalin Blocked Two Attempts to Kill Hitler, Russian General Says', *Daily Telegraph*, 26 May 2010, available at: [www.telegraph.co.uk/news/newstopics/world-war-2/7765731/Stalin-blocked-two-attempts-to-kill-Hitler-Russian-general-says.html](http://www.telegraph.co.uk/news/newstopics/world-war-2/7765731/Stalin-blocked-two-attempts-to-kill-Hitler-Russian-general-says.html).

<sup>99</sup> Schumacher, 'Wide Damage Seen; Daughter of Qaddafi is Said to Have Died', *NY Times*, 15 Apr. 1986, at A1.

<sup>100</sup> 'Ya'alon: Publicizing Plan to Eliminate Saddam "Irresponsible"', *Haaretz*, 16 Dec. 2003, 12:00 a.m., available at: [www.haaretz.com/news/ya-alon-publicizing-plan-to-eliminate-saddam-irresponsible-1.108868](http://www.haaretz.com/news/ya-alon-publicizing-plan-to-eliminate-saddam-irresponsible-1.108868).

<sup>101</sup> Rogin, 'Exclusive: Top U.S. Admiral Admits We are Trying to Kill Qaddafi', *Foreign Policy: The Cable*, 24 June 2011, 2:19 p.m. available at: [http://thecable.foreignpolicy.com/posts/2011/06/24/exclusive\\_top\\_us\\_admiral\\_admits\\_we\\_are\\_trying\\_to\\_kill\\_qaddafi](http://thecable.foreignpolicy.com/posts/2011/06/24/exclusive_top_us_admiral_admits_we_are_trying_to_kill_qaddafi).

<sup>102</sup> See, e.g., 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: Wittes, 'On Due Process and Targeting Citizens', *Lawfare*, 1 Oct. 2011, 11:47 a.m., available at: [www.lawfareblog.com/2011/10/on-due-process-and-targeting-citizens/](http://www.lawfareblog.com/2011/10/on-due-process-and-targeting-citizens/).

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 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 analysed and met through finer-grained, case-by-case assessments.

### C *Proportionality*

The principle of proportionality in *jus in bello* prohibits military operations that inflict excessive harm on civilians or civilian targets. Harm deemed '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 US to advocate the abrogation of the principle altogether.<sup>103</sup>

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 be gained from the attack.<sup>104</sup> The Additional Protocol used the first formula,<sup>105</sup> 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'.<sup>106</sup> 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

<sup>103</sup> Keiler, 'The End of Proportionality', *Parameters*, Spring 2009.

<sup>104</sup> See also the ICRC study on Customary Law, Rule 14, which explains that '[s]everal 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': J.-M. Henckaerts, L. Doswald-Beck, and C. Alvermann (eds), *Customary International Humanitarian Law* (2005), at 49.

<sup>105</sup> See also *ibid.*

<sup>106</sup> Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), *Commentary on the Additional Protocols* (1987), at sect. 2209.

encompass taking control over territory, disabling enemy capabilities, or protecting one's own forces.<sup>107</sup> 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.

## 7 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.'<sup>108</sup> 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

<sup>107</sup> On the latter, see Australia and New Zealand's submissions to the Commentary on the Additional Protocols, *ibid.* at §§ 329, 336.

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

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.

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 using the language of 'success' and 'victory' more often in his speeches.<sup>109</sup> Feaver's research on casualty aversion suggested that Americans would support a war with mounting soldier casualties if they believed it would ultimately succeed.<sup>110</sup> 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'.<sup>111</sup>

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 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 US forces confront these myriad conflict scenarios, 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 immediate threats, but perhaps rather on the longer and deeper change they effect in domestic structures of government and governance; on their promise not only of national security, but of human security as well.

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

<sup>110</sup> *Ibid.*

<sup>111</sup> 'Obama: "Victory" Not Necessarily Goal in Afghanistan', *Foxnews.com*, 23 July 2009, available at: [www.foxnews.com/politics/2009/07/23/obama-victory-necessarily-goal-afghanistan/](http://www.foxnews.com/politics/2009/07/23/obama-victory-necessarily-goal-afghanistan/).