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# Distributive Justice, Human Rights, and Territorial Integrity\*

## A Contractarian Account of the Crime of Aggression

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### 7.1 Introduction

Essays in this volume are concerned with various moral issues that wars of national defence raise. Most of them seek to explain why a war whose goal is protecting the political independence of a legitimate state might be morally justified, despite the killing that they involve. This essay is concerned with two related, and yet importantly distinct, questions. It explores why *only* wars of national defence should be legally permissible, in light of the fact that, on the face of it, the deep morality that governs international relations implies that there are many other (possibly stronger) candidates for *casus belli*. The second question regards the special status of territorial integrity in contemporary international law. The UN Charter defines aggression and national defence in terms of territorial integrity. This is strange: why is it legally permissible to wage wars whose purpose is defending the borders of legitimate states, even in circumstances in which the borders themselves are unjustly drawn, and do not protect any other important rights or values? Let me explain the importance of these questions in more detail.

\* The first version of this essay was written at the Institute for Advanced Studies, Princeton where I discussed its main thesis with Michael Walzer and Eric Maskin. It was presented at the 2010 ELAC annual workshop at Oxford University (organized by Seth Lazar) and in the Hebrew University Institute for Advanced Studies. I am indebted to Eyal Benvenisti, Chaim Gans, Tsilly Dagan, Judith Lichtenberg, David Luban, Jeff McMahan, Danny Statman, Victor Tadros, and especially, the discussant of my paper in the ELAC workshop, Janina Dill, for thoughtful comments. I reserve special thanks for Seth Lazar and Cécile Fabre, the editors of this volume, who patiently read many versions of this essay and offered crucial substantive and editorial comments, in light of which the current version was shaped.

According to the orthodox and still widely accepted reading of the UN Charter

the use of force is prohibited as a choice of conduct toward another state, just as domestically the criminal law forbids individuals from violence toward one another. A monopoly on legal use of force rests with the supranational organization, the UN, not individual states, just as domestically the government controls the legitimate use of force.<sup>1</sup>

The domestic analogy, as summarized in the above quotation, suggests an exception to the blanket prohibition on using force by individual states. In domestic societies, individuals have the right to exercise violence in self-defence, where their basic rights are violated and the state is unable or unwilling to prevent or undo the rights violation in question. Similarly, states are entitled to eliminate imminent threats to their territorial integrity and/or political independence by using force against those who pose them. Article 51 to the UN Charter ‘copies the domestic system’s rule of self-defence in cases in which the government cannot bring its power to bear to prevent illegal violence.’<sup>2</sup> The analogy is simple and, on the face of it, appealing: domestic law criminalizes all violent harms committed by private individuals except those that are necessary for eliminating imminent unjust threats that aggressors pose. Likewise, the Charter criminalizes all wars except those which counter unjust use of force exercised by aggressive states.

The domestic-analogy-based conception of the just cause presumes a statist morality of international relations. An impressive version of this morality was developed by Michael Walzer and adopted by John Rawls. Statism asserts that legitimate states have fundamental sovereignty rights. These rights are fundamental in virtue of three features: they are moral (rather than merely legal or political); they are irreducible to the moral rights that individuals possess in the sense that violating a state’s sovereignty is not necessarily a violation of any moral right possessed by individuals; and, finally, they are basic: states must enjoy sovereignty rights in order to have the power to subject its citizens to various duties. These statist convictions seem to be the most plausible normative background of the attitude of international law to legitimate states in general and to their defensive rights in particular.<sup>3</sup> The UN charter exists, according to its statist interpretation, to protect fundamental sovereignty rights; in particular, the Charter condemns military threats to violate these rights as crimes of aggression and defines them as essentially evil, and as the capital crime under international law.

<sup>1</sup> John Yoo, ‘Using Force’, *University of Chicago Law Review*, 71 (2004), 738. Cf. Yoram Dinstein, *War, Aggression, and Self-Defence* (Cambridge: Cambridge University Press, 2011), chs 4–5, and Larry May, *Aggression and Crimes against Peace* (Cambridge: Cambridge University Press, 2008).

<sup>2</sup> Yoo, ‘Using Force’, 738. The domestic analogy underlies another important ruling of article 51, according to which individual or collective self-defensive acts can only occur until the UN acts. The UN is treated by the Charter as the sovereign state is treated by domestic law. See Yoram Dinstein, *War, Aggression, and Self-Defence*, 3rd edn (Cambridge: Cambridge University Press, 2001), ch. 7(D).

<sup>3</sup> Michael Walzer, ‘The Moral Standing of States: A Response to Four Critics’, *Philosophy & Public Affairs*, 9 (1980), 209–29. See also his *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th edn (New York: Basic Books, 2006), esp. chs 4–6. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) according to which, ‘Peoples are free and independent, and their

The scope of the defensive rights that the Charter confers on states is drawn by analogy to the defensive rights individuals possess in a society in which a sovereign monopolizes legitimate violence. That is, the Charter outlaws all wars except those that can be deemed analogous to permissible use of force in politically organized domestic societies. In particular, the Charter prohibits wars whose goal is elimination of distant/immature unjust threats, viz. preventive wars, and wars whose goal is just redistribution of vital resources, viz. distributive wars. (This essay does not touch upon the ethics of humanitarian interventions, which some interpreters believe to be permissible under international law. Nor does it address wars whose goal is a just regime change, i.e. a war whose goal is bringing down an undemocratic, illiberal, and oppressive regime.<sup>4</sup> According to most readings, the Charter—for some reason—prohibits these wars.)

The domestic analogy—and, in particular, the analogy between the bodily integrity of persons and territorial integrity of international persons—has another important implication. Namely: it underlies the definitions of aggression and of national defence. Paradigmatically, military aggression is a violation of the territorial integrity of a legitimate state whereas a war of national defence aims to maintain the territorial integrity of the victim of aggression. Yet, the territorial integrity of a state might have nothing to do with its political independence or with the political or human rights of its citizens. Still, subject to constraints like necessity and proportionality, the Charter allows a legitimate state to protect its internationally recognized borders by deadly force, however poorly—and unjustly—they have been drawn.

The difficulty this essay aims to address can be put as follows: the Charter—as it is usually read—seems to take the wrong model as the basis of its analogy. States cannot appeal to the domestic analogy in order to explain the prohibition on preventive/distributive wars; for the same reason, they cannot appeal to the domestic analogy in order to explain the nearly absolute right to use force in defence of a state's territorial integrity. International society is not a super-state; it is, rather, a decentralized society. Therefore, there is no reason to think about the morality of using force in a politically organized domestic society as the model for the morality of using force in international society. Moreover, despite Thomas Hobbes's and Hedley Bull's argument to the contrary, international society is not a state of nature.<sup>5</sup> The domestic analogy to a politically unorganized society might turn out to be unhelpful as well.

I shall further argue that abandoning the misleading analogical reasoning will enable us to realize that the two rival deep moralities of international relations—statism and cosmopolitanism—yield no conclusive verdict with respect to the justice of distributive and preventive wars. Further, the deep morality of international relations

freedom and independence are to be respected by other peoples....Peoples are to observe a duty of non-intervention....Peoples have the right of self-defense', (p. 37).

<sup>4</sup> On the former, see Yoram Dinstein, *War, Aggression, and Self-Defence*, ch. 3, and on the latter Kutz, chapter 10 in this volume.

<sup>5</sup> Thomas Hobbes, *Leviathan*, (1651) ch. 13; Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Oxford: Oxford University Press, 1977), 48.

does not conclusively entail that every war whose sole cause is maintaining the territorial integrity of a state is necessarily just.

This essay appeals to contractarianism in order to provide a moral argument for the Charter's *jus ad bellum* regime that prohibits preventive and distributive wars while allowing wars whose cause is defending the territorial integrity of a legitimate state. The argument challenges the division between statist and cosmopolitans otherwise the dominant views in this debate. The basic idea is that the Charter is morally valid because it embodies an optimal contract to which states actually subject themselves.

Hence, even if states do have a moral right to wage distributive and preventive wars, in likely circumstances—to be referred to as ‘minimally just symmetrical anarchy’—they ought to enter a contract, which commands waiving these rights. It follows that just distributive and preventive wars—hereafter, ‘pre-contractually just wars’—are, in some (rare) cases, *mala prohibita* rather than *mala in se*. States have no right to go to such wars because they voluntarily waived that right by entering a mutually beneficial and fair contract which prohibits such wars. The other side of this coin is that even if states have *no* pre-contractual right to use force in defence of their (unjustly drawn) borders, states in minimally just symmetrical anarchy ought to enter a contract that confers on them a right to wage such wars.

Contractarianism interprets the Charter's conception of just cause as a version of the just-war-as-law-enforcement view: a war is just only if it enforces the terms of a morally optimal contract which regulates the use of force in the international society. The role of the inherent right to self-defence which the Charter confers on states is to enforce a regime that, in privileged circumstances, benefits states, enhances the fulfilment of human and sovereignty rights and reduces injustice. Not *every* war which the Charter characterizes as ‘a war of national defence’ in fact protects political sovereignty of a legitimate state, or important rights of its citizens. Such wars might involve deadly force in order to protect unjustly drawn (and therefore, morally insignificant) borders.

I shall proceed as follows. Section 7.2 shows that, unlike the Charter, deep morality (whether it is statist or cosmopolitan) does not conclusively deny that just distribution and just prevention are just causes for war. Section 7.2 further shows that probably, deep morality will not treat all violations of territorial integrity as a crime of aggression. Section 7.3 argues that in ‘symmetrical anarchy’, waiving the right to resolve conflicts by resort to first-strike force, and establishing a self-help-based regime that enforces this arrangement by conferring a right to ‘national defence’, is mutually beneficial in terms of narrow self-interest. Section 7.4 describes circumstances in which the regime the Charter embodies not only benefits all parties but also reduces injustice. Section 7.5 observes that the moral standing of some of the prohibitions of the UN Charter—as it is portrayed by contractarianism—is context sensitive.

First, however, a methodological remark; like other authors in this volume, I take it that inter-personal moral dilemmas and thought experiments might shed light on complex political and inter-state relationships and actions. In particular, I assume that the morality of resorting to war is partly determined by the morality of harming

individuals in general; hence, the relevance of abstract principles that govern the prevention of threats posed by individuals, and of principles that govern the enforcement of just distribution of vital resources between individuals. As we shall see, contractarianism understands the deep morality of war as constituted by principles of individualistic morality; contractarianism assumes that the morality that actually governs war has another layer, which results from the fair and mutually beneficial regimes that states accept. I defend this conception of the relations between deep and contractual morality elsewhere.<sup>6</sup>

## 7.2 Deep Morality and the Charter's Conception of Just Cause for War

This section will offer some considerations which roughly support the suspicion that, unlike the Charter, deep morality implies that just distribution and just prevention are just causes for war. It will also offer considerations which roughly support the suspicion that deep morality would not treat armed violation of territorial integrity of a legitimate state as a just cause for war.

Consider principles of deep morality as cosmopolitanism conceives them. Cosmopolitanism denies that states' rights to their sovereignty and territorial integrity are fundamental. It asserts that like any moral right possessed by states, the moral right to national defence derives from rights possessed by individuals. Therefore, if states possess a derivative right to national defence, 'we should be able to define [this right] directly in terms of human rights, without the needless detour of talk about states . . . the rights of states are derived from the rights of humans, and are thus in a sense one kind of human rights.'<sup>7</sup> Taking individual rights seriously, cosmopolitans treat the Charter's notion of aggression as a superficial legal category, arguing that 'whether one has a just cause for war does not depend on whether one has been attacked, but on whether one lacks, or is being deprived of, certain fundamental goods one has a right to'.<sup>8</sup> For cosmopolitans, human rights that individuals possess are the only thing that fundamentally matters to the morality of war.

As recent cosmopolitan writings suggest, wars that enforce just prevention and just distribution would be justified by principles of cosmopolitan deep morality: Jeff McMahan argues that wars whose goal is just prevention of immature but deadly threats might be classified as self-defensive wars. Put in McMahan's words, 'just causes for war are limited to the prevention or correction of wrongs that are serious enough to make the perpetrators liable to be killed or maimed'.<sup>9</sup>

<sup>6</sup> See Yitzhak Benbaji, 'A Defense of the Traditional War-Convention', *Ethics*, 118/3 (2008), 464–95, and my 'The Moral Power of Soldiers to Undertake the Duty of Obedience', *Ethics*, 122/1 (2011), 43–73.

<sup>7</sup> David Luban, 'Just War and Human Rights', *Philosophy and Public Affairs*, 9 (1980), 160–81

<sup>8</sup> Laura Valentini, 'Just War, Distributive Justice and the Enforcement of Entitlements' (unpublished). Cf. Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), ch. 3.

<sup>9</sup> Jeff McMahan, 'Just Cause for War', *Ethics and International Affairs*, 19/3 (2005), 1–21: 11, cf. 14ff.

David Luban makes a similar point with respect to distributive wars. He offers a simple example: Poor and Wealthy are states that share a long border. The border that Wealthy does not share with Poor runs along the ocean; Wealthy, therefore, receives plentiful rainfall. Yet, Poor is relatively dry; mountains prevent rain clouds from crossing over to Poor, whose climate is consequently semi-arid. Several years of drought cause famine in Poor, threatening the lives of millions. The government and citizens of Wealthy could help their starving neighbours without incurring significant costs, but choose not to do so. Cosmopolitans like Luban would approach the failure of Wealthy to redress the famine in Poor as a potentially just cause for subsistence war; Cécile Fabre further argues that subject to constraints like necessity and proportionality, a war against Wealthy whose goal is securing subsistence might be overall justified.<sup>10</sup>

Interestingly, on this issue, the differences between the cosmopolitan deep morality and the statist deep morality of international relations (as it should be understood) seem slight. Consider the statist approach to prevention. Just prevention seems to be one of the most important protections a sovereign in a domestic society owes to its subjects. Most well-ordered political societies monopolize the authority to license people to carry weapons, and most of them are indeed very careful and picky in issuing these licenses. States' preventive policies take other forms: the authorities prevent people from entering areas in which they might harm others or be harmed by them. Many states (certainly Britain, the US, and Israel) impose control orders on suspected terrorists, ranging from house detention, having to wear an electronic tag, reporting to the police regularly, etc. A plausible statist approach to prevention would extend this to the international realm. By engaging in some of the practices described above, states fulfil their duty to protect the right of their citizens to safety. So, at least *prima facie*, states in a politically unorganized society are under duty to take measures in order to eliminate immature threats, before it becomes too costly. And, in rare cases, using force in addressing such threats is permissible. As an early statist jurist puts it: 'we ought not to wait for violence to be offered us, if it is safer to meet it halfway. . . . Those who desire to live without danger ought to meet impending evils and anticipate them.'<sup>11</sup>

Unlike cosmopolitanism, according to which moral facts are ultimately about individuals, a Rawlsian theory of global distributive justice might treat the inequalities between *states* (e.g., Wealthy and Poor) as unfair. Still, the unfairness of the inequalities between Wealthy and Poor might be consequential in terms of human lives. And, as an important commentator puts it, Rawls's statist morality of international relations might well support 'a global distribution principle, to rectify the history of exploitation, expropriation . . . endured by burdened people around the world.'<sup>12</sup> Statists might

<sup>10</sup> See David Luban, 'Just War and Human Rights', 179. Fabre, *Cosmopolitan War*, ch. 3.

<sup>11</sup> Alberico Gentili (an Oxford jurist of the sixteenth century) quoted in Whitley Kaufman 'What's Wrong in Preventive Wars', *Ethics in International Affairs*, 15 (2006), 23–38: 25. Cf. McMahan's quotes from Vattel and Vitoria at 'Just Cause for War', 14.

<sup>12</sup> Samuel Freeman 'Distributive Justice and *The Law of Peoples*', in Rex Martin and David A. Reidy (eds.) *Rawls's Law of Peoples* (Oxford: Blackwell, 2006), 250.

go a step further: burdened peoples whose right to vital resources was violated might have the right to use force in undoing the rights violation from which they suffer. It should come as no surprise, therefore, that early jurists like Vattel and Wolff, two statist theorists par excellence, argued that certain forms of subsistence wars could be just.<sup>13</sup>

Consider finally the approach of Walzerian statism to wars that the Charter characterizes as wars of national defence. Citing Hobbes, Walzer argues that an invasion of an empty land, or of land that is not sufficiently inhabited, should not be considered aggression ‘as far as the lives of the original natives are not threatened’. Moreover, there might be cases in which the original natives ought to move over to make room for the invaders: ‘Hobbes is right to set aside any consideration of territorial integrity-as-ownership and to focus instead on life.’<sup>14</sup> Even if a state has a moral claim that its borders will not be crossed without its consent, at best, this right is as weighty as property rights whose protection cannot justify killing and maiming. This is clearly inconsistent with the usual reading of the UN Charter, according to which the territorial integrity of states is always defensible by force: an invasion of an empty land is a crime against peace even if the invasion is necessary for the survival of the invaders.

One might explain the Charter’s focus on territorial integrity through relating national defence to human rights: ‘once the lines are crossed, safety is gone . . . there is no certainty this side of the border, any more than there is safety . . . once a criminal has entered the house’. States that violate the territorial integrity of another state are not ‘under the ties of Common Law of Reason.’<sup>15</sup> Alas, this response strengthens the case against defining aggression and national defence in terms of territorial integrity. What really matters, according to this response, are the rights that national borders defend rather than these borders themselves. So we should define *jus ad bellum* directly in terms of those rights.<sup>16</sup>

It would be too hasty to infer that, in deep morality, just prevention and just distribution are just causes for war, or that defining aggression and national defence in terms of territorial integrity is inappropriate. My modest purpose in this section was to show that there are good reasons to suspect that the Charter does *not* copy the deep pre-contractual conception of *casus belli*. In the remainder of this chapter I will describe a factual and normative background against which decent states ought to enter a contract whose terms are articulated in the Charter. Contractarianism shows that even if states do have a pre-contractual moral right to wage pre-contractually just wars and have *no* pre-contractual right to defend their borders by force, against privileged circumstances, they will waive their right to go to pre-contractual wars and will

<sup>13</sup> See Fabre’s discussion of the approach of these thinkers to distributive (‘subsistence’) wars in *Cosmopolitan War*, ch. 3.

<sup>14</sup> Walzer, *Just and Unjust Wars*, 57. See also Luban, ‘Just Wars and Human Rights’, 177, and Charles R. Beitz, *Political Theory in International Relations* (Princeton: Princeton University Press, 1979), 175–6.

<sup>15</sup> David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), 186.

<sup>16</sup> See the quote from Luban’s ‘Just War and Human Rights’, circa fn. 7.

allow each other to defend their borders by force. That is, the following two sections describe one type of (hopefully realistic) circumstance in which it would be contractually justified to agree on a legal regime, which models the right to use force through the prism of the narrow scoped right to self-defence in politically organized societies.

### 7.3 A Contractarian Justification for the Charter's *jus ad bellum*

Let me begin by explaining what I mean by 'contractarianism' in more detail. As it is construed here, contractarianism presupposes a structure of 'pre-contractual' or 'natural' rights whose source is deep morality. One contractarian fundamental conviction is that, if certain conditions are met, subjects of these rights have the moral power to waive them in order to promote their narrow interests. In accepting a contractually justified arrangement, the parties place themselves under a moral duty to respect the contractual (usually legal) duties this arrangement imposes; moreover, by entering the contract, the parties waive those moral rights that would be violated by parties who take advantage of the entitlements the arrangement confers on them.

The account offered here does not dogmatically assume the moral fitness and authority of states as the bargaining agents and (therefore) is not vulnerable to the usual cosmopolitan objections to the moral standing of states. For the *jus ad bellum* contract the Charter embodies is morally valid only if the states that sign it successfully represent their subjects, that is, only by accepting it do states protect the narrow interests of their citizens. The *actual* contract the Charter embodies should pass two tests by which moral individualists validate *hypothetical* contracts, viz. it should be mutually beneficial and fair. A contract is *mutually beneficial* if and only if the outcome of nearly universal compliance with it is better—in terms of expected benefits to individuals (and to states)—than the outcome of following a code that merely copies the requirements of deep morality. The other test a morally valid contract passes is concerned with individuals as well. The contract is fair if and only if (a) it is not dictated by, nor does it create or maintain unfair power or welfare inequalities between, states or between individuals. To the contrary, compliance with the contract will reduce the violation of corrective/distributive justice; (b) compliance with the contract is expected to enhance protection of human rights, which individuals possess. Contractarianism leaves open the empirical question: do we live in the sort of circumstances—what I call a minimally just symmetrical anarchy—where the *jus ad bellum* regime is mutually beneficial and fair?

The model I develop here assumes that deep morality confers a right to wage wars whose aim is implementing pre-contractual justice. It asserts that if the contract embodied in the Charter meets the conditions presented above, by signing up to it, states waive these rights. Moreover, contractarianism assumes that in many circumstances, deep morality prohibits wars whose sole aim is to protect the borders of a



legitimate state, viz. wars the Charter defines as wars of national defence. Yet, it asserts that in privileged circumstances, by entering the contract, states waive the claim they hold against each other that they will not go to such wars in order to enforce the prohibition on implementing (pre-contractual) justice by force.

A first task for any contractual justification of a legal regime is characterizing the interests of the subjects that are supposed to benefit from it. I assume that the Charter is mutually beneficial in the relevant sense if and only if *partial and decent* states prefer an outcome in which the contract is accepted by the overwhelming majority of states to the outcome in which such states are governed by principles of deep morality. We should, then, characterize the partiality and the decency of states in order to describe those preferences.

States are partial in three distinct senses. They prefer promoting their own narrow interests to promoting the interests of other states (and therefore they prefer advancing the narrow interests of their subjects to advancing the interests of citizens of other states). Also, although they care about rights protection in virtue of their decency, they care about protecting their own rights more than they care about protecting others' rights. Finally, in circumstances of conflict, partial states tend to judge the normative as well as the factual issues at stake in a way that fits their own narrow interests. Contractarianism is committed to a related *normative* claim, namely: states are not subject to consequentialist duties, like the duty to maximize the good or to minimize evil; their partiality is, therefore, at least partly justified by the fact that they are under special duties towards their citizens.

Partiality is related to a further fundamental assumption of the model: errors about the requirement of justice (that states are bound to make in virtue of their partiality) are the source of conflicts between them. If the stakes are high enough, states are likely to use force in order to protect what they correctly or incorrectly conceive as a violation of their rights. Contractarianism assumes, in other words, that the possibility of armed conflicts is a permanent aspect of international life; this is one of the inconveniences of living in a decentralized society with no global government that enforces states' rights and entitlements. Lack of global political authority grounds a further normative fact about states: they ought to provide national security to their citizens.<sup>17</sup>

Turn now to decency. The model deals with decent states (or reasonable states in the Rawlsian sense); despite their partiality, such states do care about justice in general, and about the rights of individuals and of states in particular. They acknowledge that individuals are subject to rights and that other members in the international society are entitled to their sovereignty. States will not present themselves as violators of these rights; therefore, in circumstances of conflict, states put their claims against each other and their demands from one another in terms of rights and justice. States are decent in another sense: they tend to respect the contractual duties they undertake. The very fact

<sup>17</sup> The existence of one rogue state does not make a symmetrical anarchy into something else; the rogue state in question is not a legitimate member in the international community.

that they voluntarily placed themselves under a contractual duty is for them a weighty (although not decisive) motivational reason to respect it. This tendency will be ‘deconstructed’ later, by describing an institutional political structure that enables it.

As we shall see, decent but partial states might find themselves in circumstances in which they have a reason of narrow self-interest as well as a reason of justice to waive the moral right to wage justice-implementing wars. Or, put conditionally: in a minimally just symmetrical anarchy, even if states have the right to wage pre-contractually just war, they ought to institute a regime which commands waiving this right. And, in these circumstances, even if states have no pre-contractual right to wage wars of national defence against violators of their territorial integrity, they should agree on a contract which allows them to do so. I begin with describing circumstances (which I name ‘symmetrical anarchy’) against which the contract which the Charter embodies is mutually beneficial: decent but partial states have a prudential reason to subject themselves to it.

### 7.3.1 *Symmetrical anarchy*

The basic condition that symmetrical circumstances meet is the following: for almost every future conflict *C* between two partial/decent states, there is at least one peaceful resolution of *C* that is Pareto superior to a war whose aim is to resolve *C*. To see how this condition might be satisfied, consider conflicts of interests over divisible and commensurable goods. Assume that these conflicts can be represented by cardinals, just like domestic disagreement over a set of issues whose market value is, say, 10,000.<sup>18</sup> The parties in such conflicts can either bargain or fight, just as individuals in domestic society who can bargain or go to court in order to resolve their conflicts.

Now, in *asymmetrical* circumstances the power inequalities between the two parties—‘Strong’ and ‘Weak’—are such that the probability that Strong would defeat Weak in most future armed conflicts is very high, and the cost of its using force is very low. Strong’s use of force is therefore its dominant strategy in most conflicts: whatever Weak does, fighting would be in Strong’s narrow interests. In contrast, in symmetrical circumstances, it is true of most conflicts *C* that a peaceful compromise (which involves dividing the issues at stake) is *ex-ante* preferable to both parties than fighting. Here is a simple illustration.<sup>19</sup> Suppose that the probability that Weak will win the war is 0.3, while the probability of Strong’s victory is 0.7. Suppose that the cost of the war for Weak is 2,000. Then, Weak’s expected benefit from the war is 1,000.<sup>20</sup> Therefore, any compromise or peaceful resolution of the conflict under which Weak accepts more than 1,000 is *ex ante* better for Weak than going to war. Suppose further that the cost of

<sup>18</sup> This assumes that the issues have the same value to both parties. This is a strong simplifying assumption, which is unlikely to be true in reality. I will relax it later.

<sup>19</sup> The analysis in the next three paragraphs is taken from James Fearon, ‘Rationalist Explanations for War’, *International Organization*, 49 (1995), 379–414.

<sup>20</sup>  $0.3 \times 10,000 = 3,000$ ;  $3,000$  minus the costs of the war is  $1,000$ .

the war for Strong is 3,000. Hence, the expected benefit of its war against Weak is 4,000. Therefore, any compromise under which Weak gets more than 1,000 and Strong gets more than 4,000 is *ex-ante* preferable to both parties than the costly war. Following James Fearon, I shall say that any agreement which commands Weak more than 1,000 and Strong more than 4,000 belongs to the ‘bargaining range’ of the conflict.

The basic condition, which symmetrical circumstances meet, can therefore be put as follows. (1a) Most conflicts that states in these circumstances will face have a positive bargaining range. Put differently, each party has a strategic set of options comprised of two elements: {fight, bargain}. The outcome <fight, fight>—where they resolve the conflict by fighting—is Pareto inferior to <bargain, bargain> where the conflict is resolved by bargaining. Moreover, (1b) states are aware of (1a); they know of most future conflicts that bargaining will end with an outcome which is better to both parties than fighting.

The commensurability assumption can be relaxed; conflicts might have a positive bargaining range even if the values that generate the conflict are incommensurable. Suppose, for example, that one side appeals to economic facts in arguing for its right to a certain piece of land, while the other side appeals to historical reasons and national values in order claim for its exclusive right on it. Even then, the war can be so costly to both parties that a certain division would be *ex ante* better to both of them. On the other hand, the divisibility assumption cannot be relaxed so easily. And it might be argued that, in reality, most conflicts between states are about indivisible issues. But this factual claim seems far-fetched. True, states in conflict tend to present what is at stake as if it is indivisible; they have an obvious strategic reason to do so. They attempt to present any compromise as very costly to them. I believe, in fact, that the basic conditions that symmetrical anarchy satisfies—(1a) and (1b)—are pretty realistic: wars are very costly in so many respects that a peaceful bargaining is likely to be *ex ante* preferable (to both sides) to fighting.

The third condition that circumstances meet in virtue of being symmetrical comes from Fearon’s game-theoretic explanation for why states go to war in order to resolve a symmetrical conflict. Even if a conflict between two states has a positive bargaining range, rationally-led states might resolve it by going to (Pareto inferior) war. This is because states in conflict (that are known to each other to) have an incentive to present themselves as more powerful than they actually are, and to present their use of force as less costly to them than it would actually be. The obvious reason is that a successful bluff might secure a party a better deal: if Weak is able to convince Strong that its chance of winning is .4, Strong would offer a compromise under which Weak gets more than 2,000. Thus, in symmetrical conflicts, both parties have a good reason to suspect that the other side is bluffing. This suspicion might lead them to erroneously believe that the conflict they face has no bargaining range: fighting is *ex ante* preferable to any feasible peaceful resolution of the conflict. Thus, lack of information might cause states that pursue their narrow self-interest to go to war even if, had they had all the relevant information, they would have bargained rather than fought. Thus, the

third symmetry condition: (1c) states in symmetrical circumstances—who are aware of (1a)—know that problems of information might nevertheless cause them to go to war against each other.

All other defining features of symmetrical circumstances regard the optimal treaty-based regime that rationally-led states ought to adopt in order to avoid Pareto inferior wars. The fourth condition follows immediately from the first three: (1d) as, usually, fighting is Pareto inferior to bargaining, states have a reason of self-interest to enter a contract which condemns first uses of force, if and only if other parties join the treaty and (at least partly) observe it. In particular, they have a reason of self-interest to enter a contract that prohibits pre-contractually just wars if others will join it, and the contract will be partly observed. Such a contract advances their narrow interests, in light of the statistical fact expressed in (1a).<sup>21</sup>

But, (1e) the previous condition (i.e., (1d)) is likely to be satisfied only if the contractual duties that the agreement contains—especially the contractual duty not to wage pre-contractually just wars—are enforceable. Alas, (1f) the society of states lacks a central government, hence contractual rights/duties conferred by an agreement can be enforced by self-help only. Thus, the optimal agreement allows states to treat preventive and distributive wars as crimes of aggression, and to go to ‘defensive wars’ against states that waged them. Eliminating by force the imminent threat imposed by wars which the contract prohibits is contractually permissible, whether or not the threats in question are pre-contractually just.

The final defining feature of symmetrical anarchy is supposed to explain why, in the circumstances imagined here, a contract which commits states to pacifism is morally ineffective, while a contract that confers an inherent right to (what the Charter defines as) wars of national defence is valid. The question this final condition addresses is simple: if mostly, bargaining is Pareto-superior to fighting, why ought decent states not commit themselves to pacifism? Why do they rule *out* preventive and distributive war while they rule *in* defence against aggression (where aggression is defined in terms of violation of territorial integrity)?

The answer appeals to problems of commitment and of collective action, which render a regime that outlaws all uses of force unattainable in practice. In the circumstances we imagine, states prefer a situation in which all are committed to pacifism. Yet, each of them is interested, first and foremost, in protecting its legitimate interests and the interests of its own citizens. So each party would prefer everyone *else* to be committed to pacifism, while it alone retains its right to go to pre-contractually just wars. This would enable it to easily enforce what it takes to be its rights. In the absence of a universally recognized authority to ensure that all parties respect their commitment, a pacifistic contract is unworkable.

<sup>21</sup> Moreover, errors in assessing how costly one’s use of force is, or how probable its victory, are usually underestimated, especially in light of fact that rule-governed wars might very quickly become total and hence much costlier than what they were initially thought to be.

Therefore, symmetrical anarchy satisfies (1g): the optimal contract to which states subject themselves in order to avoid inefficient wars would treat any violation of territorial integrity as a just cause for war (unless the violation in question is explicitly permitted by the contract). Defining national defence and the crime of aggression through territorial integrity has a clear rationale in symmetrical anarchy. In those circumstances, most wars that states try to avoid by entering the agreement involve imminent threats to states' territorial integrity, and, vice versa: most violations of territorial integrity are a link in a chain of events that ends with these inefficient wars. Moreover, threats to territorial integrity are the most visible link in the chains of events that lead to Pareto inferior wars. By defining aggression in terms of territorial integrity, the legislator solves a technical problem of positivization. Positive law must involve specification, or—as the natural lawyers called it—determination. Defining aggression as an illegal violation of territorial integrity, and determining it as the only just cause for war is the simplest and most efficient way to enforce the terms of the Charter (and therefore to minimize the occurrence of Pareto inferior wars).<sup>22</sup>

Still, the enforcement rule that (1f) and (1g) present might look ad hoc and arbitrary. Why restrict the status of just cause to defence against aggression? Would not expanding the status of just causes to prevention be better, especially where pre-emptive self-defence is much costlier than preventive self-defence? I will further clarify the rationale of an enforcement rule which focuses on national-defence narrowly construed after addressing four more basic objections.

### 7.3.2 Four objections

The analysis presented above faces four related difficulties, three of which are factual while the last one is normative.

First, one might require a more detailed account of how, by entering the contract that the Charter embodies, states are able to avoid Pareto inferior wars. The dilemma is straightforward. Suppose states in a conflict C can cooperate in light of the statistical fact expressed in (1a): they avoid fighting because they realize that probably, resolving the conflict by <fight, fight> is Pareto inferior to resolving it by <bargain, bargain>. Then, the law that prohibits uses of force is redundant. The other horn of the dilemma assumes that states in C cannot cooperate because of problems of information. But then they will fight, whether or not the legal system condemns wars; the *ex ante* agreement will be ignored *ex post*. Either way, the legal regime that condemns uses of force would not have an impact on the tendency of states to opt for <bargain, bargain> rather than <fight, fight>.

The solution I offer will show that this either/or statement is not necessarily true, by further specifying the circumstances I have called symmetrical anarchy. In symmetrical circumstances, the contractual duty states undertake might give them a reason

<sup>22</sup> Jeremy Waldron, 'Civilians, Terrorism, and Deadly Serious Conventions' in his *Torture, Terror, and Trade-Offs* (New York: Oxford University Press, 2010), ch. 4.

against fighting, whose source is the mere fact that they undertook the duty to comply with the Charter's terms. It is the acceptance of the Charter *ex ante* that will enable states in conflict to cooperate (bargain) rather than to defect (fight). For their tendency to act in light of the statistical fact expressed in (1a)—that most wars that they will fight in the future are symmetrical—is strengthened thanks to their consent to a regime that outlaws use of force.

To see how this might happen I will substantiate the notion of decent partiality of states. Decent partiality, I stipulate, is concretized through the following facts about factors that influence public opinion in these states, and about how public opinion affects the political leadership that carries out political decisions. Politicians weigh positively public sentiment in their choices, whereas the public weighs positively international legal agreements. There might be a divergence between political and public sentiment toward a possible war; they may either agree or disagree on whether fighting is a good idea. Divergences are related to (1a), (1b), and (1c). Having no access to the information which leads decision-makers to prefer fighting, citizens might suspect that, due to problems of information, it would be better to bargain. And vice versa: the political leadership might suspect that going to war is a mistake even if the public supports the war. The public does not have access to the facts which justify the suspicion that problems of information speak against the war.

In cases in which both the political leadership and the public are for (or against) resolving a conflict by fighting, the war will be waged (or avoided) irrespective of whether a state subjected itself to the prohibitive Charter. An *ex ante* agreement that condemns resort to force is of no consequence in such cases because of the lack of a global sovereign that can enforce the agreement. However, in cases of divergence, where the political leadership is against the war and the public opinion is for it, politicians will be interested in a (strategic) use of the Charter; they will appeal to legal considerations in arguing against the war since public opinion is sensitive to them. This is important to the politicians because, as noted, they weigh positively public sentiment in their choices.

The reverse direction is possible as well. Suppose the public oppose the war because many citizens do not trust the politicians' judgment; they tend to believe that problems of information distort it. International law is a tool for transmitting the mistrust to the political leadership (which, we assume, takes this sentiment seriously). NGOs and international actors appeal to the Charter in order to express their objection to the coming war; public opinion will support the legal arguments they express. Public opinion becomes visible to the politicians thanks to the popular support in legal arguments advanced and voiced by non-state actors. In short, symmetrical circumstances are such that the legal regime imposed by the Charter might be obeyed thanks to the sensitivity of public opinion to the law that condemns justice implementing war.

A second interesting difficulty is why, given the *ex post* expected effects of such a legal agreement, politicians, who act on behalf of the state they lead, commit their state to it. After all, in the unusual situation in which fighting is preferable to

bargaining, what is usually the case makes no difference. So, why would politicians limit their power to act in accordance with their best judgment, in case they believe they face an unusual situation? The answer is simple: the politicians who acted on behalf of the Charter's restrictive conception of the just cause do not intend to limit their own power to act (on behalf of their state) according to their best judgment. They limit the power of the politicians that will follow them.

This explication of the limited impact of the Charter is important in order to relax a third worry. Observe that, under the contractarian account, the final end of the regime that the Charter embodies is *not* to prevent wars from coming about, but to enable states to achieve optimal resolutions to the conflicts they face. Distributive and preventive wars are Pareto inferior only to those peaceful resolutions which belong to the bargaining range. But war is preferable to an outcome that does not belong to the bargaining range of the conflict. The worry is that if the regime the Charter imposes is in place, outcomes that do not belong to the bargaining range will come about. For the Charter denies states the use of self-help as a means to enforce distributive justice and to protect themselves against immature threats. But if states cannot threaten to engage in distributive or preventive wars, their ability to bargain diminishes.

As my response to the first objection makes clear, the presumption that motivates this second objection is mistaken. Actually, the regime the Charter embodies does not eliminate the war option. In cases in which all relevant actors *within* a state support resolving a conflict by going to war, the state will violate its contractual duty not to do so. The Charter strengthens those actors within a state which object to the war, but if no such actor exists, war will be waged whether or not the international law prohibits it viz. whether or not the state in question has a moral right to go to war. It follows that states will bargain as if war is an available option, even if the Charter is in place.

Let me mention a fourth normative worry, which is familiar in the broader context of the social contract tradition. It regards the moral validity of (*ex ante*) mutually beneficial contracts. Suppose a state goes to a pre-contractually just war in one of the rare cases where fighting is *not* Pareto inferior to bargaining. Is it under moral duty to avoid this war? Hobbes famously claims that individuals never lose the permission to defend their own lives, even from the sovereign whose authority over them stems precisely from their desire for *self*-preservation. This very reasoning (that Hobbes accepts in the context of the right to self-defence) underlies the major objection against his contractarianism in general (an objection which he attributes to a fictional 'fool'<sup>23</sup>). We have no reason to be bound by the requirement of justice, which we undertake in order to advance our interests *ex ante*, if violating them is in our interest *ex post*. This is because we are not under a moral duty to act unreasonably.

<sup>23</sup> Hobbes, *Leviathan*, ch. 15

As my aim here is to bring contractarianism to bear on (one area of) war ethics, I will assume—following most contractarians—that Hobbesian identification of morality and narrow-interest-based rationality fails. Even if mutual benefit underlies the moral validity of the contract that the Charter embodies, its moral standing is independent of its promoting the parties' interests in each and every case. A contract into which we enter largely out of self-interested reasons can be binding, even if it does not benefit us *ex post*. Contracts operate like promises: promises generate rights and duties because, as a social institution, promises are beneficial. But, it is almost uncontroversial that promises might generate claims and correlative duties even where they benefit no one. Likewise, by entering a mutually beneficial contract, states might generate moral duties and correlative claims; when this happens, the duties are rigid—they do not disappear in cases where respecting them does not benefit one of the parties.

The analogy to the normativity of promises clarifies another aspect of the account advanced here. It is more or less accepted that one may sometimes break one's promise, when one's fundamental interest would otherwise be comprised. Similarly, if the stakes are especially high, a violation of the moral duty to avoid pre-contractually just wars might be overall justified: the reason a duty provides can be defeated by other moral and non-moral reasons. Contractarianism merely asserts that in privileged circumstances, by subjecting themselves to the terms of the Charter, states undertake certain moral duties and waive certain moral rights. It says nothing about the weight of these rights and duties.

Turn now to the accusation with which the previous section ended: the Charter's enforcement rule—which allows only wars of national defence (wars whose goal is protecting the borders of a state from an illegal armed invasion)—is arbitrary. True, thanks to (1g), it is clear why use of force is not ruled out altogether, but it is still unclear, the objector argues, why only wars that the Charter defines as wars of national defence are the best means for reducing the amount of Pareto inferior wars in symmetrical circumstances.

Note first that, compared to preventive wars, distributive wars are less of a challenge. Peace—from which all sides benefit—might well be unjust; states might waive their right to wage distributive wars, in order to avoid the costs of implementing justice by force. A contract that perpetuates an unjust peace might be unfair (and therefore invalid), but this is irrelevant to its *ex ante* efficiency. In terms of narrow interests, it is easy to imagine circumstances in which states benefit from waiving the right to go to distributive war even if, by doing so, they perpetuate distributive injustice.

The pressing question regards a certain kind of preventive war. Let us call a preventive war *W* 'optimal' if the total expected harm (to innocents) caused by *W* is smaller than the harm that a permissible pre-emptive war *W*<sup>\*</sup> would cause, multiplied by the probability that *W*<sup>\*</sup> will erupt. Contractarianism should answer a simple question. Namely: how a code that permits (a defensive war) *W*<sup>\*</sup> could prohibit *W*, if *W* prevents *W*<sup>\*</sup>, and *W* is less costly to both sides than *W*<sup>\*</sup> (in terms of expected utilities and expected violation of rights). Shouldn't states in symmetrical anarchy agree on an



enforcement rule, which permits wars ( $W^*$ s) that enforce the contractual duty not to use force, *and* optimal wars ( $W$ s) whose goal is preventing  $W^*$ s, with less costs to both sides?<sup>24</sup>

The answer is as follows: the aim of the contract the Charter embodies is to reduce the impact of the problems of information that cause inefficient wars. Hence the enforcement rule it contains, which allows wars, must pass an epistemic test: its correct application should not cause further problems of information. Threats that the Charter defines as just causes for war—that is, violation of, or imminent threats to, the territorial integrity of states—pass this epistemic test. In contrast, the information needed in order to determine whether a war is optimal is hard to obtain. States need an access to facts about probability of future events. Errors in assessing risks are frequent, and partial states with conflicting interests are bound to commit them.

This response explicates a crucial difference between rule consequentialism and contractarianism. Philosophers tend to appeal to rule consequentialism in order to explain the blanket prohibition on preventive wars.<sup>25</sup> Compared to a rule that allows optimal wars, a total prohibition on prevention would bring better results (if followed by the overwhelming majority). Compliance with the restrictive rule has maximum expected value in terms of well-being and rights fulfilment. This is because states are likely to mistake non-optimal wars as optimal. The rule consequentialist argument concedes, however, that in some cases, wars fought early might be less costly in every respect.<sup>26</sup>

The contractarian justification for the blanket prohibition on preventive wars is based on a similar factual insight: states are likely to judge many non-optimal wars to be optimal. And yet, contractarianism rejects the rule consequentialist's normative claim, asserting, quite plausibly, that from a moral standpoint, waging an optimal war is pre-contractually permissible. States are under a duty to avoid truly optimal wars if and only if they entered a contract that prohibits them and the contract is mutually beneficial and fair.

This has an important—and admittedly—troubling implication. For consider: state A is developing a threat to state B which will not eventuate for some time but is certain to be devastating. B is denied the right to fight an optimal war to avert that threat. However, B does so anyway. A therefore has the contractual right to use force against B. Thus, A can precipitate a (contractual) just cause to fight by developing a pre-contractually unjust threat to an enemy. Contractarianism should bite this bullet.

<sup>24</sup> See, Eric Posner and Alan Sykes, 'Optimal War and Jus Ad Bellum', *Georgetown Law Journal*, 93 (2005), 993–1015.

<sup>25</sup> See, e.g., David Luban, 'Preventive War', *Philosophy & Public Affairs*, 32/3 (2004), 207–48.

<sup>26</sup> Luban recognizes that 'no evidence can show that a ban on preventive war would save lives'; this, he believes, does not undermine his argument. For, 'no evidence can show that *any* doctrine of just war saves lives, simply because states so frequently disregard moral and legal norms'. He argues, that 'the right test for a moral norm should not be whether the norm will be efficacious, but rather whether it would be efficacious if states generally complied with it' (David Luban, 'Preventive War', 226). This, however, seems to me implausible.

And in light of the possibility of a justified violation of the duty imposed by the contract this is not that implausible: the regime is contractually justified in virtue of the benefits states gain from it in the long run. In rare cases, a state might be justified in violating it.

### 7.3.3 *Minimally just symmetrical anarchy*

To be morally valid, contracts ought to be mutually beneficial. But mutual benefit is not all that matters; as noted, the contract the Charter embodies ought to be fair. This further condition is based on a self-evident moral truth: states have the moral power to waive their right to wage pre-contractually just wars only if, by subjecting themselves to the terms of the Charter, they promote justice rather than solidify injustice.<sup>27</sup>

What is it for the contract to be fair? I will present the relevant notion of fairness through another important objection to the analysis developed in the previous section. According to this analysis, states accepted the regime that the Charter imposes in order to advance their expected self-interest. They agreed to avoid pre-contractually just wars because most future conflicts have a positive bargaining range. Alas, by its very definition, the bargaining range of a conflict is determined by might rather than right, i.e., by the probability that one of the parties will win the war and by the costs of the war to each of them. Both factors are mainly a function of military power: the peaceful resolution which the Charter prefers to fighting will reflect the power of states rather than their justice. In other words, the worry is that even if a contract that condemns justice-implementing wars is expected to benefit all parties—i.e. the peaceful resolution that will be reached under this regime is Pareto superior to war—this peaceful resolution might be unjust. Put more generally, the worry is that the contractarian approach stabilizes, or props up, the status quo—especially of power relations—and fails to account for ruptures in the international system, or ruptures which should happen but won't be authorized under this account. How, then, can we hold states to such a contract?

Yet, against privileged but nevertheless realistic circumstances—which I call 'minimally just symmetrical anarchy'—a contract that condemns justice-implementing uses of force does promote justice. As the name suggests, circumstances are 'minimally just' if they satisfy some minimalist criteria of justice. So, I shall assume, following most theories of justice, that facts about differences in welfare and/or power and/or resources and/or capabilities between states and between individuals determine how just certain circumstances are. Circumstances might be 'minimally just' in virtue of various features: the unfair differences are not that large, and the historical process that produced the unfair differences is not clearly unfair. In addition, circumstances might

<sup>27</sup> States are motivated to institute the arrangement that the Charter imposes by the benefits they expect to gain from the new arrangement. But they have the moral power to enter this contract, and to waive the relevant pre-contractual moral rights only if the regime they institute is fair.

be minimally just because the better off individuals/states are not clearly culpable for the unfair inequalities from which they benefit.

At a first glance, minimal justice seems irrelevant to the worry under discussion: whatever the circumstances, the inherently conservative contract the Charter embodies, which outlaws *all* pre-contractually just wars, will preserve injustice. After all, by their very definition, wars that enforce just distribution promote justice, and optimal wars minimize the violation of human rights.

But minimal justice has another important consequence: it creates normative uncertainty, which will probably cause partial states to misapply their defensive (pre-contractual) rights. In these circumstances, most future pre-contractually just wars are such that states should be uncertain as to whether they are overall justified in going to war. The normative facts the knowledge of which is necessary for applying principles of deep morality are hard to obtain. Hence, even if states were totally impartial, they would not be able to determine with enough certainty whether or not preventive and distributive wars are overall justified. In effect, circumstances are 'minimally just' if impartial states would avoid most pre-contractually just wars because of the uncertainties they confront.

Now, the requirement of fairness as I understand it here is satisfied because the Charter which prohibits pre-contractually just wars promotes justice: it causes partial states to behave *as if* they are more impartial than they actually are. By entering the contract, states create a mechanism (described in the previous section) that prevents some (Pareto inferior) wars. In minimally just circumstances, most wars that will be prevented through this mechanism would not be fought by impartial states for reasons of normative uncertainty.

In the remainder of this section I will develop this argument in three steps: (i) I will present the uncertainties states confront in minimally just circumstances, (ii) I will explain how normative uncertainty would affect the behaviour of totally impartial states. (iii) I then will argue that *most* (but not all) wars prevented thanks to the Charter would not be fought by impartial states and suggest that this feature of the Charter makes it fair.

(i) The most basic uncertainty regards what we might call 'the means principle'. A war which consequentialism would support in virtue of the fact that its good effects outweigh its bad effects might be overall impermissible merely because of the means by which the good effects have been achieved. Indeed, like other moral agents who are less than omniscient with respect to the moral truth, impartial states would have been uncertain as to the exact scope of the means principle. Even if, say, the distribution of resources is clearly unjust, impartial states will have reasonable doubt as to whether a war whose goal is eliminating it is overall justified.

Consider more specific uncertainties that states in minimally just circumstances confront. In the real world billions of people live in starvation or on its fringes, while a few hundred million are very well off. Whatever one's theory of distributive justice, this is clearly wrong; indeed, it is impossible to believe anybody could regard the current

distribution of wealth as being remotely just. As it stands, however, this fact about the injustice of global distribution of resources does not entail anything decisive about the morality of using force. In minimally just circumstances, facts about where lies the culpability for the unfair resource inequalities cannot be known for sure. But a substantive argument for the justice of distributive war should identify an agent who is responsible for the wrongness of the distribution or at least an agent whose duty is to eliminate this wrong. Under conditions of minimal justice this knowledge is hard to obtain.

To be sure, there are cases in which the agents of poverty are identifiable but even in such cases it might be very hard to know whether there is a pre-contractually just cause for war. Illustration might be helpful. Suppose you are a citizen of Poor. In negotiating the borders of your country, generations before you were born, the founding fathers forfeited Water-Land: an area rich with perennial water springs. In their water-rich world, forfeiting Water-Land was dictated by prudence; the founding fathers of Poor could not have predicted how valuable Water-Land would become. Of course, water has always been an essential resource, but they had other water resources to rely on, which disappeared over the generations.

Does the ancient deal block Poor's claim on Water-Land? It can be argued that states are authorized to act on behalf of the expected interests of their future citizens; they have the authority to enter into an agreement that redistributes the rights of the individuals that they represent. Therefore, Poor has no valid claim on Water-Land. A counterargument supporting the reverse position would start off by observing that current citizens of Poor have never authorized its founding fathers to alienate their rights, and that the founding fathers have never done that. Poor's founding fathers waived their claim on Water-Land-in-1776, Water-Land-in-1777, etc. The legal status of Water-Land-in-2040 was not determined by this agreement and hence should be renegotiated; the factual conditions are so different that the contracting parties could not have intended to deal with them.<sup>28</sup>

In sum, even in the cases where the agent of (what seems to be) unjust poverty is identifiable, it is uncertain whether Poor has a claim against Wealthy for the water in its territory. This judgment might be consistent with another moral judgment that the wealthy nations are under duty to assist poor nations. But this fact, as we have noted, cannot constitute a just cause for war.

Preventive wars raise similar difficulties. They are morally superior to wars of national defence if fighting early is less costly to both sides. However, to determine whether a future war is a war of just prevention, states have to assess whether or not a change in the balance of power is an encroaching unjust threat. Their judgment must appeal to an indication of intent and the political tendencies of the relevant state. That is, 'characterizing [changes in the balance of power] as threats is to characterize them

<sup>28</sup> This is based on Allan Gibbard, 'Natural Property Rights', *Nous*, 10 (1976), 77–86.

in a moral way'.<sup>29</sup> Now, what makes circumstances 'minimally just' is, among other things, the complex institutional structure of states. Attributing intentions to such complex entities involves speculating and guessing. True, intentions of states *qua* states are one thing, while intentions of political leaders can be perfectly perspicuous; still, the checks and balances a decent state imposes on any important political decision-making renders the intentions of particular political leaders less relevant. Cases in which aggressive intentions of states are transparent are rare.

(ii) So much for the normative uncertainties states confront in minimally just circumstances. Another element of the definition of minimally just circumstances is this: the normative uncertainty that follows from minimal justice will bring impartial states to avoid most pre-contractually just wars. To explain why, we should answer a normative question: what ought a state to do in cases of normative uncertainty? Arguably, the morality of collective decisions and actions under normative uncertainty, where one person counts for one vote, is governed by something like Sepielli's Expected Objective Value (EOV).<sup>30</sup> So let me quickly present EOV through one of Sepielli's examples. Suppose that the degree to which you believe that the extreme 'meat-is-murder vegetarianism' is true is quite small (0.3). It turns out, however, that meals with meat are, on the whole, only slightly tastier than their vegetarian alternatives. Hence, what one has most reason to do, according to EOV, is to avoid eating meat. If, unlikely, eating meat is murder, then doing so is deeply wrong, whereas, if not, what one misses is merely the experience of eating meat. Since the vegetarian alternatives are presumably quite good, EOV would command behaving as if one believes in extreme vegetarianism.

In minimally just circumstances, impartial states would avoid fighting most wars because of the killing that they involve. Indeed, most wars would be unjustified under normative uncertainty even if, as a matter of fact, the cause of some of these wars are (objectively) just, the violence they would exercise is necessary for achieving the cause, and the harm to innocents that they cause is proportionate, in light of the means principle. Impartial states would prefer bargaining to fighting because of the normative uncertainty with respect to the exact scope of the means principle and with respect of the justice of their cause. These uncertainties, on the one hand, and the certainty with respect to the huge moral cost of all wars, on the other, would bring them to avoid most wars in minimally just circumstances.

<sup>29</sup> Walzer, *Just and Unjust Wars*, 79. Churchill's recommended policy in 1936 is a good example: 'he insisted that Britain would manoeuvre against Germany rather than France, on the ground that France, although apparently the strongest power on the continent had no aggressive intentions, while Germany was possessed by a will to dominate', Marshall Cohen, 'Moral Skepticism and International Relation', in Charles Beitz, Marshall Cohen, Thomas Scanlon, and A. John Simmons (eds.), *International Ethics* (Princeton, NJ: Princeton University Press, 1985), 19.

<sup>30</sup> I follow here Andrew Sepielli, *Along an Imperfect Lighted Path: Practical Rationality and Normative Uncertainty*, PhD Dissertation (Rutgers University, 2010) 66 ff.

(iii) The Charter is fair because it promotes justice in the following sense: thanks to accepting the Charter, states behave as if they are more impartial than they actually are. States create a mechanism (described in the previous section) that prevents some (Pareto inferior) wars. And, in minimally just circumstances EOV implies of most wars that will be prevented by this mechanism that they are unjustified.<sup>31</sup> States have no interest to be more impartial than they actually are, and they do not sign to the Charter in order to promote justice. They sign a contract in order to promote their narrow self-interest. Still, the system which emerges from this exchange of rights is better in terms of justice: states behave as if they are more impartial than they actually are.

This is the core argument for the fairness of the Charter in minimally just symmetrical anarchy. Contrary to the objection with which we began this section, contractarianism is not conservative; it is, rather, conservative with respect to *using force* whose aim is converting minimally just circumstances to moderately or maximally just circumstances. Given the normative uncertainties involved in such circumstances, use of force is morally risky. EOV entails that we ought to improve global justice by other means.

It might be thought that, as far as the above argument goes, clear injustices might constitute a just cause for war, whatever the terms of the Charter are. For example, consider a burdened society C(olonized)-Poor, which suffers from the greediness of a rich superpower that exploits its citizens and its land. C-Poor is a victim of manifest distributive injustice, especially if the rich state colonized C-Poor's land in recent history. C-Poor might use force in order to stop the exploitation and eliminate the distributive injustice imposed by it, even if the former colonizer does not violate its territorial integrity. By consenting to the UN Charter, C-Poor perpetuates the status quo which systematically discriminates against it, but this does not come to a true waiver of its right to go to a just distributive war.

This misses an important feature of the contractarian argument. The Charter might be effective in denying a right to wage a certain war even where there is no uncertainty about its pre-contractual justice. The argument starts off from the following insight: other things being equal, robust norms have a higher level of compliance compared to more subtle and complex norms. Had a proviso that explicitly permits manifestly just distributive wars been an element of the Charter's prohibitive *jus ad bellum*, it would have been open to too many interpretations. And, partial states will appeal to the interpretation that best fits their narrow interest. Therefore, it is the shared interest of the contracting parties that the treaty based *jus ad bellum* would consist of robust, generic rules. Hence, the Charter condemns all justice-implementing violence.

What would EOV say of wars that the Charter defines as a war of 'national defence'? Do these wars differ from other varieties of conflict, and why? According to the analysis

<sup>31</sup> Would EOV not prove too much? Would it not show that all wars are unjustified? Perhaps. Yet, the contract the Charter embodies is fair if, by subjecting themselves to it, states enhance the fulfilment of EOV justice. They don't have to reach the ideal outcome.

I offer here, there is one deep difference between pre-contractually just wars and the Charter's defensive wars. States are less vulnerable to errors in applying the rights and duties that the Charter confers on them; there is, in particular, much less uncertainty with respect to the justice of the cause of wars of national defence.

Let us repeat the major objection to this line of thought: wars of national defence might be fought against 'aggressive' states that wage preventive or distributive wars. If there is uncertainty over whether it is justified to fight these wars, there must be the same uncertainty over whether the defensive war in response is justified. Our analysis allows for a simple answer to this worry: impartial states in minimally just circumstances suffer from uncertainty about principles of *pre-contractual* justice. There is much less uncertainty with respect to the terms that the Charter embodies. Where the contract is in place, the aggressiveness of states which violate it by going to preventive or distributive wars is clear: they impose an imminent threat to violate the territorial integrity of the victim state contrary to the terms of a binding contract. Consequently, there is no doubt that the victim state has a just cause for war.<sup>32</sup>

To recapitulate, circumstances are minimally just if they satisfy minimal standards of justice. Minimal justice generates normative uncertainty with respect to the justice of distributive and preventive wars such that (2a) most (but not all) pre-contractually just wars will not be fought by impartial states, whereas partial states are likely to go to such wars mainly because they are susceptible to errors in applying their (pre-contractual) defensive rights. Moreover, (2b) instituting a regime that prevents some justice-implementing wars will reduce injustice under normative uncertainty. Therefore, (2c) by accepting the terms of the Charter, states bring about an outcome in which the overall violation of (EOV) justice is reduced.

Deep, pre-contractual, morality is an essential part of the contractarian story: the UN Charter is presented there as an 'approximation to the moral truth', as 'the closest we can feasibly get [to international morality] in the circumstances of uncertainty and disagreement'.<sup>33</sup> Yet, presenting the Charter's *jus ad bellum* as an approximation of the moral truth, the contractarian analysis suggests that wars whose cause is optimal prevention or just distribution of vital resources might be *mala prohibita* rather than *mala in se*. These rare pre-contractually just wars are prohibited under the Charter even when EOV justice permits them. They are prohibited solely because states place themselves under duty not to exercise justice-implementing violence.

<sup>32</sup> Admittedly, in one important respect, the justice of wars of national defence might be as doubtful as the justice of wars whose cause is pre-contractually just: they might well be disproportionate (however 'disproportionate' is defined in the optimal contract) because of the harms they inflict on innocents. And, due to the vagueness of the notion of proportionality, and objective difficulties in assessing future casualties, partial states would tend to judge such wars as proportionate nevertheless. This is a strong argument for not including proportionality as a further condition on the legality of war.

<sup>33</sup> Waldron, 'Civilians, Terrorism, and Deadly Serious Conventions', ch. 4.

## 7.4 The Context-Dependency of the UN Charter Regime under Contractarianism

The fact that some pre-contractually just wars are *mala prohibita* restricts the scope of the Charter's prohibitive *jus ad bellum* in various ways. Most importantly, a state is under duty to avoid *mala prohibita* wars only if the agreement that prohibits these wars is *ex ante* mutually beneficial, and its acceptance by nearly all relevant parties is expected, under normative uncertainty, to reduce injustice. Thus, in exploring whether a party is subject to the contractual duty to avoid *mala prohibita* wars, three questions should be answered: did the party in question actually consent to the terms of the agreement? Does the agreement protect the narrow interests of this party? And, most importantly, is the agreement fair to it?

The contract embodied in the Charter would fail the first condition if one of the parties is radically indecent. One example of an indecent party would be a state or non-state organization that wages a war whose declared aim is ethnic cleansing or religious oppression. Another example is an aggressor that denies the right of an enemy state to exist, and/or the right of the citizens of that state to political independence and religious freedom. Or consider a dehumanizing aggressor, whose aim in waging war is implementing the belief that its enemies are not subject to human rights. These agents are not party to the agreement that underlie the UN Charter, and hence the contract the Charter embodies does not govern uses of force against them.

Another aspect of the context dependency of the Charter is related to the right-claim against a violation of territorial integrity the Charter confers on legitimate states, by which the Charter enable states to enforce its terms.<sup>34</sup> Consider a conflict between a colonizing state and a stateless nation (hereafter, 'Stateless') whose right to political independence is systematically denied by the colonizer. The Charter's blanket prohibition on violations of territorial integrity is a *de facto* denial of Stateless's right to use force in its struggle for political independence. This reading presents the Charter as unfair: it allows nations whose right to self-determination is realized by owning a state to use force in defence of their political independence. But, it denies stateless nations the parallel right to struggle for political autonomy by waging wars of independence. In contrast, the contractarian analysis entails that the Charter is morally ineffective in contexts in which it systematically discriminates against one of the parties. Hence, it leaves room for wars of independence: they might be permissible in virtue of being pre-contractually just.

It does not immediately follow that, in cases in which the contract between two actors is invalid, the morality that governs uses of force is purely pre-contractual. It might be argued that the very fact that decent states exercise justice-implementing violence will erode the standing of the contract even in contexts in which the contract is valid.

<sup>34</sup> I develop the theme of this paragraph in Yitzhak Benbaji, 'Justice in Asymmetric Wars: A Contractarian Analysis', forthcoming in *Law and Ethics of Human Rights*.



The Charter, under its conventionalist reading, ‘has little status except in its actual observance, and depends greatly on the mutual trust [of states] . . . hence it is especially vulnerable to abrogation by a few contrary acts. . . . for convention-dependent obligations, what one’s opponent does, what “everyone is doing,” etc., are facts of great moral importance. Such facts help to determine within what convention, if any, one is operating’<sup>35</sup> This feature of conventionality might explain the tendency to apply the current *jus ad bellum* in a mechanical and indiscriminating way. The underlying thought is that by waging justice-implementing wars, a decent state might violate a duty towards other parties to the contract, even if the decent state in question and the immediate target of its war are not subject to the contract that the Charter embodies.

A different (and initially plausible) approach to such cases would appeal to the fact that strong states dominate international life, and their behaviour has a tremendous impact on customary norms. When a strong state violates a contract that condemns implementing justice through war then its war will not necessarily be condemned as illegal. Instead, rather frequently, the law itself might change. Therefore, by waging justice-enforcing wars against an actor that is not party to the contract, strong states violate their duty towards those states that are parties to the contract. According to this approach, dominant states are under a contractual duty not to initiate pre-contractually just wars, even if the aggressor against which they fight is indecent. Weak states or non-state organizations are not subject to this duty, because their behaviour has no such impact. Hence, a pre-contractually just war against an actor that is not party to the contract might be morally permissible. Whether this approach can be defended remains to be seen.

These (and other) context-dependencies notwithstanding, I believe that, at least according to the Walzer/Rawls statism, the normative standing of the Charter is context-insensitive in one important respect. The conjecture I would like to put forward is this. According to statism, the society of states (as a whole) ought to bring about and to maintain a minimally just symmetrical anarchy. It is, as it were, the statist ‘background justice’ requirement.

Under the Walzer/Rawls construal, statist international morality commands protecting human rights and enhancing the fulfilment of the rights of peoples to self-determination. The *jus ad bellum* protections that the Charter embodies are far from being sufficient for the realization of the right to self-determination, however. To enjoy substantive thick political autonomy, states need to have effective ‘control over internal socioeconomic dynamics’ alongside ‘reasonable freedom from external interference.’ The control-over-internal-socioeconomic-dynamics condition should be met if ‘coexistence of, and interaction between, independent states can be . . . [described as] effective sovereignty’<sup>36</sup> And this further condition, I conjecture, requires minimally

<sup>35</sup> George I. Mavrodes, ‘Convention and the Morality of War’, in Charles Beitz, Marshall Cohen, Thomas Scanlon, A. John Simmons (eds.), (Princeton, NJ: Princeton University Press, 1985), 125.

<sup>36</sup> Miriam Ronzoni, ‘The Global Order: A Case of Background Injustice? A Practice-Dependent Account’, *Philosophy & Public Affairs*, 37/3 (2009), 229–56: 248–9, 256.

just symmetrical anarchy. If this conjecture is true, states ought to bring about and maintain circumstances in which they ought to subject themselves to the UN Charter. A full argument to this effect goes far beyond the scope of this chapter.

## 7.5 Conclusion

This essay offered a contractarian answer to two pressing questions. First, why are just distribution and just prevention not just causes for war? Second, why do states have a right to protect their borders, even if these borders are morally insignificant? Contractarianism shows that even if states do have a moral right to wage distributive and preventive wars, in realistic circumstances, they ought to enter a contract that commands waiving these rights. The contract is valid because by instituting a regime under which states have no right to wage pre-contractual just wars, states further their narrow self-interest as well as reduce overall violations of international justice. It follows that states might face overall justified wars that they have no right to fight merely because they subjected themselves to a morally valid contract that prohibits them. These wars will be *mala prohibita* rather than *mala in se*.