

## Unsatisfying Wars: Degrees of Risk and the *Jus ex Bello*

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### **I. Introduction**

“Our ‘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>1</sup> This was the pledge made by President George W. Bush in the aftermath of the 9/11 attacks on the United States in 2001. The statement was undoubtedly hyperbole, and U.S. policies never aimed to defeat every terrorist group everywhere. And yet, the presidential declaration clearly presupposed a view that it would be just to keep fighting until American risk from international terrorism approached zero, even at the cost of shifting the risk from Americans in the United States onto others, including innocent civilians who were bound to suffer damage as the United States took its military fight to foreign lands.

It is an idea that still has defenders twelve years later. After terrorist threats led the United States to temporarily close some embassies in 2013, the *Washington Post* editorialized that “like all wars, this one will end only if one party is defeated or both agree to lay down their weapons.”<sup>2</sup> Like President Bush, the *Post*’s editors apparently assume it would be morally

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<sup>1</sup> “Transcript of President Bush’s address,” 20 September 2001. Available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

<sup>2</sup> Washington Post Editorial Board, “Wishful Thinking in the War on Terror,” *Wash. Post*, Aug. 5, 2013, available at [http://www.washingtonpost.com/opinions/wishful-thinking-on-the-war-on-terror/2013/08/05/3485e982-fde3-11e2-9711-3708310f6f4d\\_story.html](http://www.washingtonpost.com/opinions/wishful-thinking-on-the-war-on-terror/2013/08/05/3485e982-fde3-11e2-9711-3708310f6f4d_story.html).

legitimate to keep fighting until the risk of such threats is near zero. As Michael Walzer puts it, “In a just war, its goals properly limited, there is indeed nothing like winning. There are alternative outcomes, of course, but these are accepted only at some cost to basic human values.”<sup>3</sup>

But what are “goals properly limited”? The problem of determining when a just war must cease—when, in other words, continuing a war that was just in its beginning no longer is just, so that the war must stop—is the subject of the *jus ex bello*, sometimes called *jus terminatio*. (We will use the former term.) We approach the *jus ex bello* as a problem about the morality of risk transfer, in this case the morality of a state using military force to reduce its own risk of violent attack from outside enemies by means of, or at the cost of, increasing the risk to outsiders – both to enemies and the civilians around them.<sup>4</sup> The state at war reduces its risk *by means of* targeting enemies, and *at the cost of* endangering civilians who may be collaterally harmed. The morality of risk transfer is not a uniquely military topic, but we think it is a fruitful approach to topics in just war theory that include the *jus ex bello*.

Is it indeed legitimate for a country to declare that a war will not end until the very last of its enemies is found, stopped and defeated? We argue that the answer is no, at least under the realistic assumption that reducing risk to oneself transfers it to others, many of whom are innocent. We argue that there is a reasonable degree of risk that every country must live with, including the risk of attack by a nonstate actor.

International law, as well as most of just war theory, has more to say about the beginning of war than about its ending. In its modern formulation under the United Nations (UN) Charter,

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<sup>3</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 4<sup>th</sup> ed. (Basic Books: 2006), p. 122.

<sup>4</sup> [REMOVED FOR ANONYMITY] Our argument intersects in a few places with ideas in Christopher Coker, *War in an Age of Risk* (Polity, 2009), which we note.

the *jus ad bellum* rejects all unilateral threat or use of force except in states' exercise of their "inherent right of self-defense in the face of an armed attack."<sup>5</sup> Self-defense, paradigmatically against aggression, remains the sole just cause for war (although, as we shall see, the "inherent right" is a right of uncertain scope). So-called "revisionist" just war theorists reject the self-defense theory as either over- or under-inclusive.<sup>6</sup> However, for present purposes, we set the revisionist critique to one side and inquire into what, concretely, self-defense in response to an armed attack can include, or in other words, what the goals of fighting a lawful war in self-defense may be: Repelling aggressors? Inflicting additional harm to deter further aggression in the short, medium, or long term? Compelling surrender, conditional or unconditional? Conquering and disarming aggressors? Regime change?<sup>7</sup> These alternatives are ordered (roughly) from the least drastic to the most. Merely repelling aggression may leave the risk of future aggression very high; each subsequent step reduces that risk, but inflicts greater violence.

As we show in section II below, neither the UN Charter nor traditional just war theory offers a clear answer to these questions. Yet, these questions implicate the permissible goals of war, and therefore the question of *jus ex bello*: If self-defense is the only justification for starting a war, what type of security guarantee – or level of defense attained – must satisfy the defending state deciding whether to end it? Establishing a *modus vivendi* with the adversary, or something more ambitious, such as St. Augustine's assertion that the aim of war is a just and harmonious

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<sup>5</sup> UN Charter, art. 51. Even the inherent right of self-defense is qualified—under article 51, it permits unilateral use of force "until the Security Council has taken measures necessary to maintain international peace and security." The UN Charter does permit the threat and use of force so long as it is authorized by the Security Council.

<sup>6</sup> On David Rodin's account, it is over-inclusive, because wars of national self-defense are largely unjustified. See generally David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2004). On the accounts of those favoring humanitarian interventions, it is both over- and under-inclusive, because some states are not worth defending while some humanitarian interventions are.

<sup>7</sup> We want to emphasize that in discussing national self-defense we do not mean only the defense of states as such. Although the legal view embodied in the UN Charter undoubtedly addresses the defense of states, our view about the centrality of risk to defining the legitimate goals of self-defense also holds if one adopts human-rights-centered conceptions of self-defense. For here too, the question arises whether individuals are entitled to have risks to their basic rights reduced to zero or only to some higher baseline level.

peace?<sup>8</sup> Might an uneasy, long-term truce—perhaps punctuated by occasional violations—be the best that a state can rightfully hope for?

Our claim that warring states cannot equate successful self-defense with zero or near zero risk runs parallel to a similar and familiar claim in the *jus in bello*, which absolutely prohibits warring parties from engaging in certain acts, even when such acts may reduce the security risk and enhance security for themselves. If one believed that states have a right to demand zero risk, there would be no justification for a strict body of *jus in bello* that was not subordinate to considerations of military necessity. Nor would there be any limitation on the use of force in preemptive self-defense in an attempt to prevent future threats, whether imminent or merely possible.

From the claim that states cannot demand zero risk it follows that the legitimate goal of war cannot be the complete annihilation of the enemy's military capacity merely to remove the threat it poses. As a general principle, the defending state also cannot condition the end of war on peace in the active, Augustinian sense, nor even a formal agreement that anchors favorable security arrangements, but only peace as a kind of wary *modus vivendi*.<sup>9</sup> That is not to say that the *modus vivendi* could never ripen into something fuller and more harmonious—consider how the relationship between France and Germany has evolved from 1945 (or 1918, or 1815) until now. Our contention is merely that a warring party is not entitled to keep fighting after the *modus vivendi* has become attainable, even though the *modus vivendi* leaves the state in some

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<sup>8</sup> E.g., Augustine, “Letter 138 to Marcellinus,” in *Political Writings* vol. 38, eds. E.M. Atkins and R.J. Dodaro (New York: Cambridge University Press, 2001), bk. II, ch. 13; Augustine, *City of God*, bk. XIX, ch. 12 (New York: Cambridge University Press, 1998), 934.

<sup>9</sup> Even in a wary *modus vivendi*, states can reach agreements about discrete practical issues, even contentious ones—and this can be true even if the *modus vivendi* occasionally unravels into episodic violence. See generally [REMOVED FOR ANONYMITY]

continuing jeopardy, and possibly with some legitimate grievances unredressed. In many cases, the *beau ideal* will, alas, be more like the end of the Korean War than of World War II.

The uncertainty, subjectivity and context-dependence of risk perception create knotty problems for a risk-based approach to just war like ours. Put simply, risks are tricky to estimate and evaluate. Moreover, people notoriously tolerate higher risks in some areas of life than others. We acknowledge that differential tolerance for numerically similar risks need not be irrational. That can include far lower tolerance for violence from external enemies than for other forms of risk. We acknowledge as well that a primary rationale for states to exist is the protection of citizens from external enemies. But we shall argue that that focus on risks of violence from external enemies *can* be irrational and excessive, and we point out some reasons why people may incline toward this kind of irrationality. This is particularly dangerous because using force to defend against external enemies is a form of risk transfer to other people that may be disproportionate and unjust. We will therefore propose, as an epistemic rule of thumb, a presumption of *minimum consistency* between different forms of risk. If a state's inhabitants demand far stricter protection from the risks posed by external enemies than they do from other causes, such as crime, disease, or environmental hazards, the inconsistency is a likely sign of irrational risk valuation. This is the argument of section III.

We are particularly interested in inconclusive armed conflicts that state militaries fight, including undeclared slow-simmer conflicts between states (e.g., Pakistan and India), slow-simmer conflicts between states and sub-state entities with state-like properties (e.g., Israel and Hamas or Hezbollah), and conflicts between states and terrorist organizations (e.g., the United States and al Qaeda). In all these cases, the ending of war will likely have no formal expression in the form of official surrender or a peace treaty; it will consist only in a ceasefire, explicit or

tacit. The *jus ex bello* question then is how long the parties can continue to fight before they must cease fire, or on what conditions they must accept an invitation from their adversary to cease fire. With no formal surrender by the enemy, the onus lies on states to determine when their risk has shrunk to the point where they must stop.<sup>10</sup> This is a familiar and fraught issue, often framed as when a state must get off a war footing and stop treating its adversaries according to the rules of war, substituting instead the stricter rules of peacetime law enforcement.

One answer other than zero risk might be that the conflict must end (to be replaced with law enforcement) when the risk has been reduced to whatever background risk the state had experienced in the years before the conflict began. Call this level the *prior background risk*. It is not the only possibility, however. One could imagine that the prior background risk might leave life nearly unlivable in some unfortunate states that face perpetual conflict. So an alternative would be *bearable risk*. We will instead propose a conception of *morally legitimate bearable risk*, and explore some complications in establishing it. We call the principle that states may not shift risks onto outsiders once they have attained the morally legitimate bearable risk *Just Management of Military Risk*. States may not raise others' risks above that minimum in order to reduce their own risk below it. This is the argument of section IV below.

Section V explores some practical difficulties with risk assessment in the war context, while section VI notices that state may have non-military methods for reducing risks, which may imply moral constraints on risk reduction through military action—a point of importance in both the *jus ad bellum* and the *jus ex bello*.<sup>11</sup>

## II. Self-Defense and Risk

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<sup>10</sup> No doubt there are parallel issues for the non-state actor, but our focus in this paper is on states and state obligations.

<sup>11</sup> The alternatives may well have implications for the *jus in bello* as well, but we bracket those out in the present paper.

### *A. Debates over the Scope of Art. 51 as Debates over Risk*

Ever since the conclusion of the UN Charter in 1945, scholars and policy makers have found it impossible to agree on the exact scope of the Article 51 self-defense exception, including the conditions upon which states can begin, pursue, or must end wars. Controversies sparked over the threshold of an “armed attack” that justifies the use of force in self-defense,<sup>12</sup> whether a state may use force in the face of an armed attack that emanates from a non-state actor,<sup>13</sup> whether it may use force preemptively, before an attack has even materialized, whether self-defense includes other-defense as well,<sup>14</sup> the exact meaning of the temporal condition, “until the Security Council has taken measures,” and more.

Complicating these questions was not only the vague language of Article 51 itself, but the operation of the customary international law principles, namely *ad bellum* necessity and proportionality, that most commentators believe complement the Article.<sup>15</sup> Some argue that the customary scope of the “inherent right of self-defense” includes preventive war, and reading it that way broadens self-defense beyond what the literal language of Article 51 permits. Notably, this has been the official position of the United States government.<sup>16</sup> Other commentators,

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<sup>12</sup> In the Nicaragua case, the ICJ distinguished between “mere frontier incidents” and “armed attacks” on the basis of the scale and effects of the violent event. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 195 (June 27).

<sup>13</sup> The International Court of Justice says no: Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. at ¶ 147; and *Legal Consequences of the Construction of a Wall*, 2004 I.C.J., at ¶ 139. The United States has repeatedly invoked article 51 to justify its use of military force against Al Qaeda.

<sup>14</sup> George P. Fletcher and Jens Ohlin, *Defending Humanity: When Force is Justified and Why* (New York: Oxford University Press, 2008).

<sup>15</sup> *Nicaragua v. United States*, at ¶176; Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgments, I.C.J. Reports 2003 (November 6, 2003), ¶¶ 73-77.

<sup>16</sup> Norbert A. Schlei, OLC Memorandum to Dean Rusk, Lawful Alternatives for the U.S. in the Cuba Missile Crisis (August 30, 1962), reprinted as “Anticipatory Self-Defense,” *Green Bag 2d* 6 (2003), 195; Jay S. Bybee, OLC Memorandum to the Counsel for the President, Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, (October 23, 2002), 31-32.

conversely, hold that preemptive strikes are permissible only against highly imminent threats, while yet others deny the right to engage in any kind of anticipatory self-defense.<sup>17</sup>

Once force is used under Article 51, commentators disagree on its permissible scope: Some argue that legitimate self-defense is solely what it takes to repel the initial assault, a greater number think that self-defense may be exercised not only to repel the immediate threat, but also to deter future attacks, and a few hold that by attacking in the first place, the attacking state has opened itself up to complete overpowering by its enemy, including the toppling of its regime and long-term occupation.<sup>18</sup>

As indicated earlier, these various options correspond to different levels of risk reduction, and thus the question of which option counts as a legitimate exercise of self-defense corresponds with the question of what risk a state must accept as part of its existence in an international community that is devoid of central enforcement mechanisms, and the risk that no state must be expected to live with. We consider the risk of war (or other forms of political violence) that a country faces depends on two components: the capacity of the enemy to wage war (military power) and its motivation to do so (military will). Efforts to reduce the risk of war can target one or both components.<sup>19</sup>

That *jus ad bellum* debates about preventive strikes or anticipatory self-defense are fundamentally about risk seems clear enough. Indeed, early modern writers including Pufendorf

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<sup>17</sup> See The Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, ¶¶ 189-191, UN Doc A/59/565 (Dec. 2, 2004).

<sup>18</sup> See, e.g., Yoram Dinstein, *War, Aggression, and Self-Defence* (New York: Oxford University Press, 5th ed. 2012), 265; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (New York: Cambridge University Press, 2011), 161).

<sup>19</sup> We do not deny, of course, that targeting one component can be a means of targeting the other as well. As Clausewitz emphasized, destroying or degrading the enemy's military forces includes breaking the enemy's military will. Carl von Clausewitz, *On War*, ed. and trans. Michael Howard & Paul Paret (Princeton University Press, 1984), bk. 1, ch. 2, pp. 90-94, 97. Conversely, reducing an enemy's military will by—for example—making peace and establishing harmonious relations can induce the enemy to shrink its armies.

and Vattel explicitly framed the legitimacy of preventive war in the language of risk.<sup>20</sup> Less familiar, though, is framing the question about when wars must end as a question about risk. We hold that this is indeed the right way to think about responsive self-defense as well. The question “When has the goal of self-defense been reached?” translates into the question “When has the risk our adversary poses in terms of its capacity and/or will to launch attacks been reduced to a sufficient level?”—with the implication that continuing to fight past that point violates the *jus ex bello*.

In other words, where the legitimacy of preventive war is a question of how early states can preempt risk, the legitimacy of continuing a war is a question of how far they can prolong the fighting to reduce risk—or, equivalently, how much risk they must tolerate. The questions of preventive and responsive self-defense thus turn out to be mirror images.<sup>21</sup>

This is not to deny that states might have legitimate military goals beyond risk-reduction, like recovering territory seized by recent enemy aggression. But even this goal implicitly asks about risk. Recovering stolen territory entails more than taking it back. Recovery includes *securing* the recaptured territory, and that requires us to evaluate the risk of the enemy repeating the attack and seizure—and, if necessary, taking further military action to lower that risk.

### *B. The State’s Leviathan Functions*

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<sup>20</sup> Thus, Pufendorf thought preventive war could be legitimate, but only if there is a “very good moral certainty” that the adversary intends to harm us. Samuel von Pufendorf, *Of the Law of Nature and of Nations*, bk. VIII, ch. 6, § 5, trans. Basil Kennett (1710), 687. For Vattel, “one is justified in forestalling a danger in direct ratio to the degree of the probability attending to it, and to the seriousness of the evil with which it is threatened.” Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, bk. 3, ch. 3, § 44, trans. Charles G. Fenwick (New York: Oceana Publications), p. 243.

<sup>21</sup> That does not mean the risk evaluations are also mirror images. A state that has just suffered military defeat may be more reluctant to launch another war than its leaders and people were at the war’s onset, even if its military capabilities have not been significantly degraded. A few years later, its desire for vengeance and redemption of “national honor” may make it more eager to start another war than if the prior war had never been fought.

Of course, questions about risk are generic, and, at least at first glance, there is nothing special about Article 51 or the risks that states face from external attacks, a point we expand on below. We all live with risks. States, corporations, individuals – all face potential harms from myriad sources, whether natural disasters, crime, disease, or accidents. All but natural disasters and some diseases are par for the course of living in a society and having daily interactions with other members of society.

And yet, the problem for states that face violent threats from external enemies is exacerbated by two factors. First, the international system lacks central policing and enforcement mechanisms, which in effective state structures operate to reduce some level of risk to citizens from each other. In an important sense, this makes the international order a self-help system, and notwithstanding the UN Security Council, the allocation of risk is up to the immediate interested parties to determine and secure.

Second, states have a special obligation to protect their citizens from man-made harm, especially violence, both internal and external. Call these the internal and external *Leviathan functions* of the state. Following Hobbes and Weber, some might say the Leviathan functions are the most basic *raison d'être* of states, the common denominator they all share. A state that neglects these repressive obligations has failed morally; practically, it is bound to come under both internal and external pressures to change its form, government, or collapse altogether.

When a state faces threats to its national security or the security of its citizens, it must take defensive actions, some of which will entail harming some people for the benefit of others. When those harmed are foreign civilians and those benefitted are national citizens, the state is engaged in risk transfer onto outsiders. The extent to which considerations of global justice permit a state to privilege the welfare of its own citizens over the welfare of outsiders is an

ethical and political question that is almost impossible to answer in the abstract, and we do not propose to address it here. It implicates perennial debates over the differences between killing and letting die, acts and omissions, cosmopolitanism and communitarianism. It faces further complications in the Leviathan context, where the issue is not the just distribution of goods but redistribution of physical risks through the infliction of violence on others.

Nevertheless, even non-cosmopolitans should concede that there are limits to how much violence a state may inflict on outsiders in the name of its own security and that of its people. Conversely, even the most cosmopolitan view should concede the point we are arguing here, namely that a state that holds its fire in the face of violence to its own citizens has usually not lived up to its basic political obligation.

We stop well short of offering an “exchange rate” between the lives of our own citizens and the lives of others. Our point is merely to emphasize that this exchange rate, which governments conceivably may treat as greater than one, is far from infinite. And our concern is that within the framework of war, the reflex tendency to discount others’ lives becomes even greater than in other distributive settings.

### **III. Risk Perception and Acceptability**

#### *A. Peculiarities of risk perception*

We have suggested that the state’s internal and external Leviathan functions are legitimate reasons for states and their citizens to focus special attention on external threats of politically motivated violence, and invest them with special significance. Yet we also believe that the focus on terrorism and military enemies is often blown far out of any reasonable proportion that the arguments we have noted will support.

It is puzzling but true that in some contexts of our lives, we are content to live with perpetual and significant risk, while in others, we reject almost any, even where the resulting harm if it were to materialize is similar. The probability of harm from car accidents is far greater than the harm from plane crashes, even where adjusted to frequency of use. This is not an inherent feature of cars or planes, but a regulatory preference grounded in public sentiment. While no transportation ministry plans for or operates on the assumption of zero car accidents, the air travel industry and regulatory agencies are all geared towards zero plane crashes.

Pure economic analysis that weighs the benefits of the product/activity against the costs of prohibiting or restricting it altogether explains some of these differences, but not all. Numerous studies have shown that psychological, social, and cultural attitudes – often irrational in their assessment of the actual risk – account not only for personal attitudes but also for odd regulatory choices.<sup>22</sup> The availability heuristic, in particular, drives people to exaggerate the overall probability of salient harms. And dramatic events – such as plane crashes – tend to imprint themselves on our psyche far more than the more frequent, ordinary occurrences.

Terrorism is perhaps the most conspicuous case in point. Despite being far less deadly in terms of deaths per annum than any ordinary crime (and certainly less harmful than car accidents), terrorism, once it strikes, attracts the lion's share of public attention, law enforcement resources, and political focus – all intended to prevent the next attack.<sup>23</sup> This is, in fact, what

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<sup>22</sup> Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (New York: Routledge, 1992). Robert A. Pollak, "Imagined Risks and Cost-Benefit Analysis," *American Economic Review* 88 (1998): 376. It is not only the layperson who is biased in her risk perceptions; scientist risk-assessors might themselves be influenced by social and cultural biases as well as personal preferences. See, e.g., Roy A. Rappaport, "Risk and the Human Environment," *Annals of the American Academy of Social and Political Science* 545 (1996): 64-74. William R. Freudenburg argues that the entire enterprise of "risk assessment" is inherently political, value-laden, and far from purely mathematical. See William R. Freudenburg, "Risky Thinking: Irrational Fears about Risk and Society," *Annals of the American Academy of Social and Political Science* 545 (1996): 44-53.

<sup>23</sup> Mueller and Stewart calculate that for U.S. counterterrorism measures "to be deemed cost effective under a set of assumptions that substantially biases the consideration toward finding them cost effective, they would have to deter,

makes terrorism such an effective strategy: with very low costs in launching actual attacks, the terrorist succeeds in spreading irrational fear, which, in turn, results in impediments to normal life (screening in airports or public places) and an excessive depletion of valuable resources. John Mueller and Mark G. Stewart estimate, based on “extensive datasets on terrorism that have been generated over the last decades,” that the annual risk of an American dying in a terrorist attack is about one in 3.5 million. By contrast, the risk of becoming a homicide victim is one in 8,000, and the risk of dying from cancer is one in 500.<sup>24</sup> Of course deaths are not the only metric of the social costs of terrorism. But many of the disruptions terrorism causes flow from fears of death that may be exaggerated. For example, the uniquely U.S. practice of making airline passengers take off their shoes during security screening, inspired by the 2001 “shoe bomber,” adds significant delays without a provable benefit to safety. In this section, we argue that understandable fallacies in risk perception help account for the lopsided overemphasis on the risk of terrorism.

In addition to the availability heuristic, another important dynamic is in play in our overemphasis on the risks of terrorism. Forty years ago, nuclear expert Chauncy Starr noted that the public will accept “voluntary” risks a thousand times greater than “involuntary” ones.<sup>25</sup> That is one reason we demand far greater safety from buses and trains than automobiles: when we drive ourselves, we are the ones imposing the risks, but when we are mere passengers, the control lies in the hands of others. As Mark Sagoff explains Starr’s observation, “People want to determine the background level of risk; they do not want the working conditions of their lives to

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prevent, foil, or protect against 333 very large attacks that would otherwise have been successful every year. That would be about one a day.” John Mueller and Mark G. Stewart, “The Terrorism Delusion: America’s Overwrought Response to September 11,” *International Security* 37 (2012): 107.

<sup>23</sup> *Ibid.*, 96 n.30.

<sup>24</sup> *Ibid.* 95-96.

<sup>25</sup> Chauncy Starr, “Social Benefit Versus Technological Rule,” *Science* 165 (1969): 1237.

be determined by others. It does not matter how cost-beneficial risks are; it is a question, rather, of who controls them.”<sup>26</sup>

And, of course, nothing seems as out of our control as the stratagems and devices of sworn enemies who wish to do us harm. Likewise, very little enhances our sense of control more than being able to unleash our own military on those enemies. The malevolent and illegitimate (from our perspective) motivations of the enemy further distinguish the risk of war from the more impersonal risks of natural disasters, disease, or accidents. Small wonder, then, that terrorism is such a salient risk, and that waging war on terrorism seems like such a significant risk-reducer, even if our actuarial risk of terrorist violence is slight while our military attacks may recruit and provoke new enemies who make us even less safe, and even if more Americans end up dying in the course of prosecuting the war.

Still, rather than dismissing the overemphasis on terrorism as sheer irrationality, we must accept what it stands for: the fact that citizens worry more about politically-motivated attacks than other forms of harm, and that faced with the threat of such attacks, they demand that their leaders act in order to prevent them, even if such acts are irrational in terms of their simple costs and benefits.<sup>27</sup> Citizens, after all, are entitled to prefer some risks to others. And it is possible that no irrationality is in play: A person who fears death by heart attack more than death at the hands of a drunk driver—even if the probabilities were identical and both deaths nearly instantaneous—is not irrational per se. Neither is his neighbor whose preferences are just the reverse.

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<sup>26</sup> Mark Sagoff, “On Markets for Risk,” *Maryland Law Review* 41 (1982): 764.

<sup>27</sup> See Leoni Huddy, Stanley Feldman and Christopher Weber, “The Political Consequence of Perceived Threat and Felt Insecurity,” *Annals of the American Academy of Political and Social Studies* 614 (2007):131-153; Leoni Huddy, Stanley Feldman, C. Taber and G. Lahav, “Threat, Anxiety, and Support of Anti-Terrorism Policies,” *American Journal of Political Science* 49 (2005): 610-625.

However, risk preferences, like risk perceptions, are not givens; they can be shaped and manipulated by data, policies, and expectations.<sup>28</sup> Consequently, while it is undoubtedly the leader's responsibility to protect her citizens from the threats of terrorism or war, it is also her obligation to educate her public about manageable and unmanageable threats, and—as we shall argue—just and unjust preference rankings.

It is clearly politically difficult for a leader to concede that not all terrorism, nor all wars, can be prevented, and that the public must learn to live with some degree of political violence.<sup>29</sup> One might also argue that democracy demands that a leader be attentive to the public's preferences, including non-rational or even irrational preferences. The extent to which a leader must educate the public rather than cater to its wishes, however misguided, is a difficult question in political theory. And yet, where catering to the public's wishes based on mistaken risk perceptions imposes significant dangers to those outside that public, we think that the leader's obligation cannot be merely to act as an agent for the popular will.

What of the argument that states' external Leviathan function—providing security against external violence—justifies giving special salience to military risks? In response, we note that modern states are no longer pure Leviathan states whose focus must be principally on reducing the risk of violence. Modern states accept responsibility for managing other risks as well: health and safety risks, economic risks, and risks from natural disasters. While security may be the *sine qua non* for all the other functions of the modern state, we now recognize that managing the other risks is very much the state's business. Indeed, in a world where enemies might aim to

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<sup>28</sup> In the context of health hazards, W. Kip Viscusi and Richard J. Zeckhauser, "Hazard Communication: Warnings and Risk," 545 *Annals of the American Academy of Political and Social Studies* 545 (1996): 114, argue that "policymakers should convey information about very small probabilities without encouraging alarmist responses."

<sup>29</sup> It is not impossible; in his May 2013 national security speech, U.S. President Obama did exactly that. "Remarks by the President at the National Defense University," May 23, 2013, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

bring a nation's economy to its knees with cyber attacks, or launch biological attacks against its food supply, even the traditional security-focused Leviathan must branch out from the study of war to the studies of public health and bank security. Further still from the traditional security function, states regularly screen persons and goods that enter the country in order to avoid pandemics.

This observation suggests that while states and their citizens undoubtedly may rank security risks as more important than others without being guilty of irrationality, their attitudes toward risk should not grossly inflate the difference between risks of the same (relative) magnitude.<sup>30</sup> Call this maxim *Minimum Consistency Toward Risks*.

We do not consider Minimum Consistency Toward Risks to be either a legal or a moral requirement of just war theory. It would, after all, be very strange if the moral requirement for ceasing or foregoing war against others were regulated by the attacker's risk preferences about food safety or clean air. Rather, it is a useful heuristic to guard against an unjust preference for overemphasizing security risks. In other words, we acknowledge that people may have a legitimate preference for preventing terrorism or war over preventing equally dangerous pandemics or even crimes; our concern is that the ability to shift the costs of prevention of terrorism or war onto a foreign population makes it a more attractive target for risk reduction than earthquakes or pandemics or any other that demand greater domestic sacrifices. The Minimum Consistency heuristic is intended to make states and their citizens question their motivations in their choice of resource allocation.

In the following section, we elaborate on the difference between our attitudes toward risk in the "war on terror" and the "war on crime," to illustrate further the discrepant treatment of

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<sup>30</sup> We say "relative magnitude" because large states like Russia or the United States could better tolerate a nuclear attack than a small state; what counts as an existential threat to the latter need not to the former.

similar risks by national policies. The comparison is especially illuminating as both type of risks are “illegitimate,” i.e., are generated by actors who are ill-intentioned and who seek to inflict intentional harm, and both are the concern of the traditional Leviathan functions of states.

### *B. Crime and War*

The term “war” has been adopted for various spheres outside of its original signified of political violence among organized groups. It is now used to describe public campaigns to fight crime, drugs, poverty, global warming, and even obesity.<sup>31</sup> Of all these, the most natural comparison for our present purposes is the “war on crime.” Crime threatens the safety and wellbeing of the citizens of a state, and on a statistical scale, and in terms of human toll, it may inflict a greater harm than most modern wars, at least for stronger countries. The Leviathan state is under an obligation, moral and political, to protect citizens from the effects of crime. The adoption of public compensation schemes for victims of violent crime by various countries evidences the view that by allowing citizens to fall victim to crime, the state has failed to discharge its obligation.<sup>32</sup>

And yet, it is obvious to all those concerned – government and citizens alike – that some degree of crime will always be present and that the risk of violent crime will never be reduced to zero. This is true for both democracies and autocracies.<sup>33</sup> With this in mind, compare President Bush’s announcement of the goals of the war on terrorism, quoted in the introduction, with the

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<sup>31</sup> This is a predominantly American phenomenon, but it does appear to present itself internationally, as well. See Heinz Steinert, “The Indispensable Metaphor of War: On Populist Politics and the State’s Monopoly of Force,” *Theoretical Criminology* 7 (August 2003), 265-266.

<sup>32</sup> Crime Victim Compensation: An Overview, National Association of Crime Victim Compensation Boards, available at: <http://nacvcb.org/index.asp?bid=14>

<sup>33</sup> Gary LaFree and Andromachi Tseloni, “Democracy and Crime: A Multilevel Analysis of Homicide Trends in Forty-Four Countries, 1950-2000,” *Annals of the American Academy of Political and Social Science*, Vol. 605, *Democracy, Crime, and Justice* (May, 2006), pp. 26-49.

American policy in its “war on drugs” (a phrase introduced by President Nixon in 1971) where the stated goal is only to “reduce illicit drug use and its consequences in the United States.”<sup>34</sup>

Why is it that there is a greater willingness, by both citizens and governments, to live with the risk of crime than with the risk of war or terrorism?

The foregoing analysis answers this question, at least to some degree. Psychological biases overestimate the spectacular attack by an enemy over the mundane series of familiar crimes. Some people mistakenly believe that they can avoid crime, but not random terrorism, and certainly not war. They thus overestimate the impact of terrorism or potential war, and underestimate the everyday crime. Note that in the United States, around 15,000 people die annually from murder and non-negligent manslaughter, while the average fatality rate for terrorism per year, controlling for the attacks of 2001, is around 65.<sup>35</sup> Although it is true that most victims know their assailant, it would be a mistake to deduce that most are in some way “responsible” or have contributed to the attack.

In addition, while crime is thought to belong, together with accidents or disease, to the ordinary course of living in an open society, citizens are less willing to accept war as inevitable. To borrow contractarian language, the domestic social contract always leaves some room for crime, which we should aim to reduce but not at all costs. To the extent that an international

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<sup>34</sup> See “2012 National Drug Control Strategy,” Office of National Drug Control Policy, The White House, accessed January 17, 2013, <http://www.whitehouse.gov/ondcp/2012-national-drug-control-strategy>.

<sup>35</sup> See Federal Bureau of Investigations, Uniform Crime Reports, Crime in the United States 2012, available here: [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadecoverviewpdf/table\\_1\\_crime\\_in\\_the\\_united\\_states\\_by\\_volume\\_and\\_rate\\_per\\_100000\\_inhabitants\\_1993-2012.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls); David B. Muhlhausen, Ph.D. and Jena Baker McNeill, Terror Trends: 40 Years' Data on International and Domestic Terrorism, The Heritage Foundation Special Report #93 on Terrorism, May 20, 2011, available here: <http://www.heritage.org/research/reports/2011/05/terror-trends-40-years-data-on-international-and-domestic-terrorism>. If one includes those killed on 9/11, the annual rate between 1969 and 2009 jumps to 140 – one percent of the annual homicide rate.

social contract exists, its terms are far less clear. How much latitude states must give each other to pose dangerous threats is radically unsettled.

Moreover, fighting crime requires curtailing civil liberties of the domestic population. Fighting war entails a greater infringement of the rights of perceived or constructed enemies, even if it still imposes some costs on the domestic population. The “war on crime” is a commitment to dedicate resources and effort to curtailing crime, within the acceptable limits of the domestic constitutional order.<sup>36</sup> A war on terrorism, or a war on a nation, even if fought within the acceptable limits of the international laws of war, gives the state extraordinary powers against the enemy and allows the state, by and large, to be less cautious in harming foreigners on foreign land than domestically (or even domestically, against those perceived as foreigners or outsiders). While those who are or might be affected by crime control measures are commonly citizens who participate (however indirectly) in the domestic political decision-making, foreigners most commonly do not, diminishing incentives for political accountability for the use of wartime measures.

#### **IV. Managing Risks Justly**

Our overall conclusion is that there may be legitimate reasons for states and their citizens to emphasize the risks of politically-motivated violence by enemies over other risks, even where such preference cannot be explained merely by looking at the number of lives spent or saved. And yet, at least in some instances (including the U.S. war on terror) the emphasis on political violence has likely been exaggerated far beyond what those reasons will support. Those reasons,

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<sup>36</sup> Although note James Forman’s observation that the war on terrorism derived much of its legitimacy from the “war on crime.” James Forman, Jr., “Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible,” *N.Y.U. Review of Law and Social Change* 33 (2009): 331.

recall, are that the international system, even in the UN era, remains at bottom a system of self-help, and that the state's Leviathan functions are its most basic *raison d'être*. Each of these gives special salience to military risks over other forms of risk. But, as we suggested, that salience should be viewed with caution.

#### *A. Just Management of Military Risk*

That the international system is a self-help system does not grant states a license to do anything their people or leaders perceive useful in self-defense, or to transfer all risk from themselves to the people of other nations. Life is inherently risky business, and nations must accept that some background risk is inevitable. No matter how cautiously states manage risks, the very existence of arms, armies, and reasons to use them creates security risks that states cannot eliminate without inflicting high levels of violence on their potential or actual adversaries. A useful analogy here is, once again, domestic crime. The costs of preventing all crime would be unbearable for any society, let alone a society that believes in liberties and freedoms. For this reason, even when people manage their daily lives prudently and take as many precautions as possible, and even if they live in states that have well-functioning police forces and courts, they are still exposed to a perpetual risk of violent crime.

The bare existence of risk does not, of course, tell us what degree of background risk is inevitable or justified, and, consequently, what a just management of risk could be. In what follows we consider three possibilities, which we label 'prior background risk', 'bearable risk', and 'morally legitimate bearable risk'.

As we indicated earlier, prior background risk derives the baseline from pre-conflict ("peacetime") experience. An example may be found in U.S. President Barack Obama's widely-reported speech on national security in May 2013. There, the president compared the risk of

terrorism by Al Qaeda to “the types of attacks we faced before 9/11,” and reminded his audience of attacks in the 1980s and 1990s that—terrible as they were—did not place the country on a war footing. His conclusion was that if the risk of terrorism could be held “below the level that we saw on the eve of 9/11” it is time to declare the armed conflict over.<sup>37</sup> It is hard to see, though, why a concept that merely describes pre-conflict risk should have innate normative significance.

A better try might be to define tolerable and intolerable risks in terms of how disruptive security risks are to people’s and states’ daily lives. We call this *the bearable risk* at which our lives are not disrupted to a degree that is incompatible with fundamental notions of liberty, freedom, and functioning government. One might then propose that once risk has been reduced to what is bearable in this sense, it would be immoral to further reduce it by shifting risks onto others.

There can be at least two objections to assigning this normative significance to bearable risk. One is that the objective standard is hardly objective. What is bearable for one person or collective may be unbearable to others. Prior experience, the neighborhood one lives in, and the expected levels of liberty and freedom one enjoys as a general matter in her state all affect what risks feel bearable. Citizens of states such as the Democratic Republic of Congo, who have long lived with war, in a perilous region, and with a standard of living that hardly ensures liberty or freedom may have a very different conception of bearable risks than the citizens of Switzerland.

What to make of regional disparities in background risk raises knotty moral problems. There is something undeniably repugnant about the idea that populations in tough neighborhoods must simply live with higher risks than their more fortunate counterparts, merely because their conceptions of the bearable have been shaped by the prior background risk they have learned to

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<sup>37</sup> Obama, “Remarks by the President at the National Defense University.”

live with. That simply gives too much moral weight to the prior background risk—exactly the problem that invoking the concept of bearable risk was intended to solve. Concretely, that might imply that Lebanese must simply suck up greater risks of urban car bombings without military responses than residents of New Zealand would have to. The cognate proposition (equally repugnant) is that people geopolitically insulated from political violence are always entitled to use force elsewhere in the world to maintain their enviable status quo of minimum risk, and to keep fighting until their risk has diminished to the level that they find bearable. Rather, as a moral matter, it seems plausible that the Congolese and Lebanese are entitled to higher expectations of what risks of violence are bearable than their current level, just as the residents of safe Swiss cities may not have a legitimate expectation to be forever secure if their security can only be achieved by shunting risk onto outsiders.

So, as a moral matter, the different levels of background risk in different areas of the world should converge to a narrower range than now exists. Let us call the ideal range toward which they would converge the *morally legitimate bearable risk*. One attractive approach to giving content to “moral legitimacy” is through the familiar thought-experiment of the veil of ignorance—used, in this case, not to discover principles of justice, but rather to explore conceptions of a bearable life. Supposing that one has no knowledge of which geographical location one will find oneself in when the veil is lifted, what risks would one find unbearable, keeping in mind that unbearable risks can justify inflicting harms on others? Conceivably, agreement on what is a bearable life under risk of attack could emerge from this thought experiment, which is intended to eliminate elevated or diminished expectations based solely on geography. This would be a conception of how everyday life should be led without perpetual worry that the bullets will start flying, that a knapsack bomb will detonate in café or a subway,

that the militias will come to rape the women, or that the drones buzzing perpetually overhead will launch a missile into the house next door. In the thought experiment, one would imagine the precautions necessary to live under different levels and forms of risk—the precautions that would plausibly allow a person to “keep calm and carry on”—and judge whether the distortions they impose on everyday life as experienced in a similar society during peacetime could be accepted under any plausible conception of a decent life.

We will not pursue the thought experiment here. Whatever its conclusion, it sets one benchmark: the top of the range of legitimate bearable risk, such that any greater risk would make everyday life unbearable to the affected population. Starting from that benchmark, the bottom of the range becomes clearer: it is the lowest risk that a society (for example, the United States) can achieve without raising the risk to people in another society (for example, the tribal areas of Pakistan) beyond what is legitimately bearable in the moral sense just defined.

Of course, morally legitimate bearable risk will be a range and not a numerical pinpoint, particularly given the vagaries of risk perception we discussed above, which might lead people to take onerous precautions for reasons that are not rationally defensible. It is also a qualitative, not a quantitative standard. Perhaps the best we will do at expressing it is through the two conditions we just mentioned: fortunate societies that enjoy high levels of security cannot expect to keep them if they can be maintained only by military action that exposes outsiders (other than those directly threatening the state<sup>38</sup>) to unbearable risks; conversely, unfortunate societies whose residents’ lives are unbearable even by tough-neighborhood standards can use military means to reduce their risks only to local levels of bearable risk, not to levels enjoyed by the most fortunate societies.

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<sup>38</sup> Taking into account that even actions directed at sources of threat might harm innocents around them.

We call the principle that states may not shift risks onto innocent outsiders once they have attained the morally legitimate bearable risk *Just Management of Military Risk*. States may not raise others' risks above that minimum (or, in the case the others are already above that minimum, to make matters even worse for them) in order to reduce their own risk below it.

Hobbes, of course, argued that man is a wolf toward man, so that the background risk posed by others in the state of nature—including the international state of nature—knows no upper limit and can never be contained to a tolerable level. Yet even Hobbes accepted the proposition that “a man...[must] be so contented with so much liberty against other men, as he would allow other men against himself”—the “Second Law of Nature,” in Hobbes’s vernacular.<sup>39</sup> That Second Law is a reciprocity principle very close in spirit to our own proposal of *Just Management of Military Risk*. In any event, as Hobbes’s great seventeenth century critic Pufendorf argued, international affairs in fact does not present a record of unbounded aggression and violence in the state of nature that would make it suicidal for states to tolerate risk from others.<sup>40</sup>

However, even if we identify background risk with morally legitimate bearable risk, a second objection presents itself, which has to do with the morality of being exposed to risk. Earlier we observed that military risks arise from a potential adversary’s military capacity coupled with their will to fight. One factor in the will to fight is a sense of grievance. States, peoples, or non-state actors with intense grievances will inevitably pose heightened risk to those they believe have wronged them. Whether that heightened risk is part of the morally legitimate risk their adversaries must accept depends on whether the perceived grievances are justified.

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<sup>39</sup> *Leviathan*, bk. I, ch. 14.

<sup>40</sup> Pufendorf, *Of the Law of Nature and Nations*, bk. II, ch. 2, §8, p. 91; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 1999), p. 150.

Thus, for example, there is no doubt that many Germans during World War II faced unbearable risks imposed by the Allies, but the fact that it was German aggression that provoked the war rendered many of these risks morally legitimate. By analogy, one might object that our criterion of morally legitimate bearable risk is flawed because it omits consideration of whether a state's exposure to risk is its own fault.

This objection is related to the international system being a self-help system: In the domestic context, we assume that violent acts (absent any recognized justification or excuse) are immoral, precisely because of the existence of a state apparatus that can resolve disputes and protect rights. The lack of such apparatus on the international level suggests that some use of force may be necessary and morally justified as a measure of self-help.

The self-help structure means that states or peoples sometimes face risks because they have wronged—or are perceived to have wronged—their adversary; and conceivably they could lower those risks by giving in to their adversaries.<sup>41</sup> And if they have indeed wronged their adversary, it would be morally just to give in. But since they reject their adversary's claims of justice (or so we may suppose), they refuse to give in. How one evaluates morally legitimate risk thus turns crucially on how one assesses the underlying justice claims of the warring parties—for, absent such an assessment, it is impossible to tell which risks arising from others' grievances states or peoples are morally entitled to be free of. For example, does India have the right to station troops in an aggressive posture on the Line of Control in Kashmir? Not in the eyes of Pakistan, and as a result, Kashmir is a perpetual flash-point of risk to India. India could eliminate those risks by pulling out of Kashmir; but India rejects the claim that its presence in Kashmir is

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<sup>41</sup> Again, this might be true with regard to domestic crime too, but we assume that even if far from perfect, the existing legal system does factor in such circumstances in deciding which crimes to prosecute, when to convict, and what sentences to impose.

unjust. The same is true the other way around. Whether the risk Pakistan and India pose to each other is morally legitimate turns in large part on who has a just claim to Kashmir.

We believe that this objection misses the point of the *jus ex bello* question. For God or the ideal observer, ascertaining fault presents no problem. God and the ideal observer know whose claim of justice is right. But if the aim of the *jus ex bello* is establishing usable principles for deciding when warring parties must accept a truce (even if not a complete one), we need a baseline conception of morally legitimate risk that can be explored through the veil-of-ignorance thought experiment described earlier without having first to determine the all-in morality of world politics. After all, what the *jus ex bello* asks is how much risk states and peoples at war must legitimately tolerate as a condition for accepting a ceasefire and stopping their fight, even without a just, all-in settlement of legitimate underlying grievances. A ceasefire is like many other discrete practical agreements that parties locked in long-term conflicts are able to negotiate, what one of us has labeled “islands of agreement.”<sup>42</sup> It will very likely be attainable only if the underlying grievances remain unsettled, for promoting it as a step toward long-term settlement inevitably leads militants on one side or the other to sabotage it. And the alternative to ceasefire is a fight to a horrendously bloody finish.

Thus, in answering the *ex bello* question, the ideal of an all-in morally justified settlement that removes risks provoked by underlying grievances is not a usable standard. It gives the competing and possibly inscrutable justice-claims of the parties too much weight in determining the risks they must live with.

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<sup>42</sup> [REMOVED FOR ANONYMITY] To put matters in Avishai Margalit’s terms, a ceasefire may be a compromise, but must not be a rotten compromise. Margalit, *On Compromise and Rotten Compromises* (Princeton University Press, 2009).

By a “usable” moral principle we mean one that can guide the practical activities of agents whose rationality is bounded by limited time and information. Central among those practical activities are deliberating *ex ante* about what to do and judging *ex post* whether we or others have acted rightly—for judging, just as much as deliberating, is a practical activity of situated agents with limited time and information.<sup>43</sup> One might object that the criterion for evaluating moral principles is truth, not usability; we think that objection misses the distinctive roots of moral principles in practical rather than theoretical reasoning. A moral principle useless for deliberating and judging seems to us language on a holiday.

One form of unusability is *epistemic*: the principle requires knowledge that is too hard to obtain in the circumstances of action or judgment. This may be factual knowledge (in a border clash between states, who started it?), but it includes cases when using a principle to resolve a normative question would require resolving a prior normative question that is harder and the answer to which is unsettled and perhaps unseizable.<sup>44</sup> Paradigmatically, these include disputes

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<sup>43</sup> We share Bernard Williams’s skepticism of a “model [in which] I, as theorist, can occupy, if only temporarily and imperfectly, the point of view of the universe, and see everything from the outside...; and from that outside view, I can assign to them a value.” Williams, “The Point of View of the Universe: Sidgwick and the Ambitions of Ethics,” in *Making Sense of Humanity and Other Philosophical Papers 1982-1993* (Cambridge University Press, 2010), p. 169. Williams rejects judging “from the point of view of the universe” because in ethics there is no such thing as “a view from no point of view at all.” Judging no less than deliberating must be done “from within the substance of my own life.” *Ibid.*, p. 170. That substance, it seems to us, includes the constraints of bounded rationality.

<sup>44</sup> For example, a familiar criticism of Jeff McMahan’s view that soldiers must decide whether killing in war is justified by deciding whether the war is just (he calls this the “Permissibility of Participation” doctrine) is that the *ad bellum* question may be more than soldiers can be expected to answer. In our terminology, this criticism objects that the Permissibility of Participation doctrine is epistemically unusable by the soldiers who must apply it. In response, McMahan has proposed a *jus ad bellum* court or expert body to provide an epistemic authority on which soldiers could rely. Jeff McMahan, “The Prevention of Unjust Wars,” in Benbaji and Sussmann, eds., *Reading Walzer*, pp. 241-52. Whether McMahan’s proposal could work is debatable, given the difficulty of real-time fact investigation in war zones. We have our doubts. Regardless of who is right, the noteworthy point is that McMahan’s proposal takes seriously the requirement of epistemic usability.

Although this is not the place for a full-fledged discussion of usability as a requirement on moral principles, we note that the requirement of usability is a demanding one with strong implications. Notoriously, the act-utilitarian injunction to do that which maximizes expected utility is often epistemically unusable. To determine which course of action maximizes expected utility requires assignments of payoffs and probabilities to all possible courses of action; for obvious reasons, a genuine utility calculation of this sort is impossible. Instead we simplify by

over religion or other incompatible comprehensive doctrines. These are disputes all the way down to first premises; furthermore, they are disputes about something that matters a great deal to the disputing parties. Such disputes are, we will say, *essentially intractable*.

Epistemic unusability is the issue in our Kashmir example. The question of who has the right to Kashmir is intractable on normative as well as epistemic grounds: India and Pakistan disagree not only over who did what to whom during the decades of sporadic armed conflict, but also over the democratic bona fides of the 1947 legal instrument giving Kashmir to India and, possibly also, over whether a Muslim-majority region can legitimately be governed by India—a question that implicates theological issues. A conception of morally acceptable risk that requires answering the essentially intractable question of who has the right to Kashmir is an unusable conception.

When a principle is unusable, we must find a usable surrogate. Of course, concluding that a principle is unusable does not show that the best surrogate is one that brackets essentially intractable questions and pretends they are off the table. But we think such a strategy can be attractive on roughly contractualist grounds. A principled resolution of the question of legitimate risk should be one that no party could reasonably reject. But any party can reasonably reject a concession on essentially intractable issues. Mutual recognition of this fact supports the bracketing strategy.

What we have labeled “morally legitimate bearable risk” follows the bracketing strategy, and offers a standard that does not assume the existing status quo of risk is justified, nor that all- in claims of justice and morality are necessary determinants of a just risk management regime.

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examining only a small number of options, arbitrarily limiting time horizons, guessing the known unknowns, ignoring the unknown unknowns, and hoping for the best. That is, the principle of maximizing expected utility is usable only in a dramatically simplified surrogate form, which is very likely over- or under-inclusive.

Instead, the morally justified bearable risk demands that parties at war temper their claims of justice with the realities of an anarchic and conflicted international system and accept some degree of risk as inevitable and full justice as unattainable (of course, our principle says nothing about the parties' right to redress their grievances through means other than the use of force). In short, it is morally incumbent on parties in conflict to accept a ceasefire that does not address all their underlying grievances nor eliminates all future risks to security – but merely reduces the military risk to a mutually bearable level.

For that reason, warring parties that begin in environments with above-average prior background risk may, under a risk-based *jus ex bello*, have to settle for a bearable but still above-average background risk. It does not follow, however, that parties enjoying below-average prior background risk can insist on fighting until their antebellum level of safety has been restored—at least when doing so shunts the risk onto innocent others.

Consider a prominent example, operations by the United States and its coalition partners in Afghanistan since 2001. We will stipulate that, in the aftermath of 9/11, the United States had a just self-defensive objective in invading Afghanistan to demolish the Al Qaeda enclaves it was sheltering. Doing so may have saved thousands of U.S. lives and vast amounts of U.S. property. We also stipulate that pulling out of Afghanistan too soon may well have left the United States in even greater jeopardy than before 9/11. At the same time, however, the risk to Afghan civilians rose; the invasion is a paradigm example of a state transferring risk from its own people to other people. Since the United Nations began keeping statistics in 2007, close to twelve thousand Afghan civilian deaths have been reported; obviously, there were a significant number of civilian

deaths from 2001 to 2006 as well.<sup>45</sup> Many of the casualties were not inflicted by the coalition, but they were caused by the conflict. It seems clear that by now the United States has greatly reduced the risk of attacks against the homeland by Al Qaeda units in Afghanistan and Pakistan. But the war continues, at a civilian casualty rate of roughly 200 deaths and 350 wounded per month. Arguably, the Afghan conflict has passed what the *jus ex bello* permits: small marginal gains in risk reduction for Americans are purchased at significant costs to Afghan civilians, in order to bring U.S. risk down to something closer to zero.

Taken together, the principles of just management and minimum consistency have important consequences in thinking about both preventive war and *jus ex bello*. Just Management of Military Risks means that a state cannot keep fighting until “all the terrorists are dead or captured” or anything comparable (unless there are very few terrorists); they cannot, in other words, declare that self-defense is achieved only when the risk posed by the adversary is zero. It likewise means that preventive force cannot be used merely because a state is subjected to the background risk adversaries inevitably pose to each other in the international order.

Minimum Consistency Toward Risks suggests that states should not adopt grossly inconsistent policies toward military and non-military risks. Suppose, for example, that two propositions are true: that someday terrorists might get a nuclear weapon and that would be very bad; and that someday climate change might make the world barely habitable, and that too would be very bad. If the state proves unwilling to do much about the climate risk, because it’s too costly, or too inconvenient, or some technical fix will be found, or “in the long run we’re all dead,” then it should hesitate to demand the right to launch wars or continue wars because of the terrorist nuclear risk.

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<sup>45</sup> See Susan Chessler, *Afghanistan Casualties: Military Forces and Civilians*, Congressional Research Service, Dec. 6, 2012, available at <http://www.fas.org/sgp/crs/natsec/R41084.pdf>, Table 4.

It also follows that legal analyses of the “inherent right of self-defense” are mistaken if they maintain that after an enemy has used force against a state, the state can keep fighting until the risk the enemy poses is fully neutralized (although certainly, the fact that an enemy has manifested its hostile intents makes the case for defense stronger than in the case of prevention against a future theoretical threat).

## **V. Risk Assessment**

The simplest way to assess risk is by reference to its expected harm, that is, the probability of a bad event happening multiplied by the magnitude of harm such an event would bring about. In the context of war, this would mean the probability of an attack multiplied by the harm such an attack would inflict.

While the mathematical concept is simple, its execution in practice proves incredibly difficult. Risks analysts have long lamented the weakness of this exercise. Some experts attribute this weakness to the inherent irrationality of the assessors (discussed above in our observations about risk perception), while others blame it on the insurmountable uncertainties and unknowns that prohibit us from evaluating either the probabilities or the anticipated harms.<sup>46</sup>

In the realm of international relations, and war in particular, risk assessment has been notoriously inaccurate, with both optimism and pessimism plaguing the exercise. Pessimism is perhaps more understandable, given that the experts whose business it is to assess security threats – the military establishment, the defense industry, even the press – also have an interest in playing these threats up. The greater the supposed risk, the easier it becomes to attract attention,

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<sup>46</sup> See Robert A. Pollak, “Government Risk Regulation,” *Annals of the American Academy of Political and Social Sciences* 545 (1996): 25-34.

resources, and power. It is therefore not surprising that many ominous prophecies about security threats have turned out to be false. No WMDs were ever found in Iraq in the aftermath of the American invasion, there has been no other large-scale terrorist attack on the United States since 9/11/2001, and the world has not been exposed to biological or chemical terrorism of the kind predicted by security experts for decades. Of course, whether these threats were frustrated or deterred by vast investment in intelligence and defense budgets or else were never real threats to begin with is impossible to tell. The same is true of the only existential military threat the world ever faced, thermonuclear war. Nuclear strategists erected elaborate intellectual cathedrals of deterrence theory, but we will never know whether vast nuclear arsenals prevented Armageddon or needlessly brought us to its brink.

But errors in risk assessment are not always in the direction of alarmism, and indeed there are always constituencies that would seek to downplay risks. In numerous cases, over-confidence, complacency, or simply a misunderstanding of the enemy caused analysts to underestimate the risks of violence, notwithstanding enormous investments in intelligence collection and analysis. Obvious examples include the Japanese attack on Pearl Harbor in 1942, the al-Qaeda attacks on the United States in 2001, the Egyptian surprise attack on Israel in October 1973, or the Israeli surprise strike against an Iraqi nuclear facility in 1981. Iraq surprised the whole world when it invaded Kuwait in 1990.

One obvious problem in military risk assessment, as compared with fields like public health or insurance, is the lack of a large body of actuarial data. Insurers have data on millions of people with similar demographic, medical, and behavioral histories. They can estimate with great accuracy the odds that an obese fifty-year-old woman of Pacific Islander descent will contract type 2 diabetes, or that an unmarried eighteen year old male driving a Jetta in Oxford will get in

an accident. But military and political predictions are small- $N$  efforts with little agreement on the risk-relevant factors, further complicated because potential adversaries have an interest in concealing their intentions. Mother Nature may be pitiless, but she has no interest in fooling us.

Other problems exist as well. One is the accumulation of risk. Suppose the likelihood of an enemy attack is 10 percent per year. In that case, the likelihood of an attack within the next fifteen years is 80 percent.<sup>47</sup> That means the risk evaluation will be extremely sensitive to the evaluators' time horizons. Ten percent may not be high enough risk to be extremely alarmed, but 80 percent surely is.

Most important, however, is what one makes of quantitative information. What is the decision rule? Famously, former U.S. Vice-President Dick Cheney advocated a “one percent doctrine”: if there was even a one percent chance of Osama bin Laden getting a nuclear weapon, the U.S. was to treat it as a certainty, because the consequences would be so devastating.<sup>48</sup> Thus, almost anything was permissible to ward off that one percent chance. Cheney's nightmare scenario is an example of what risk analysts label “zero-infinity dilemmas”—a near-zero chance of an infinitely bad outcome, for example a major nuclear meltdown. Mathematical expected value is, as is well-known in the literature, a deeply problematic guide in zero-infinity dilemmas, where a rule of catastrophe-avoidance (minimax) may be more appropriate. Or not: we evidently have not used minimax in the thermonuclear arms race or the siting of nuclear reactors—but neither have we built policies on mathematical expected value; rather, we have simply rolled the dice and counted on the favorable odds.

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<sup>47</sup> The probability of no attack each year is 0.9, and  $0.9^{15}$  (the probability of no attack in fifteen years) is about 20 percent. Of course, this computation treats the years as independent events, which will not always be true.

<sup>48</sup> Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (New York: Simon & Schuster, 2006).

The conclusion of all of this should not be that risk assessment is an inherently indeterminate exercise that we should forego. For one thing, focusing on the well-known examples where risk assessment got it wrong begs the question of how often risk assessment got it right, and far fewer headlines are made because states were able to prevent the risk from materializing. For another, we could not allocate the annual defense budgets, decide what technologies to invest or where to position military units, or, indeed, devise any political strategy on any issues of importance without assessing the risks involved.

Nor should the conclusion be that in every case, the tangible and concrete harms of force must override any uncertain advantage that may arise from using force. Instead, it must be that parties who seek to use force to meet uncertain threats must invest a great deal in better assessment of the expected harms of the risk, in averting these harms in other possible ways, and in ensuring that force is used only to the extent justified by those expected harms.

Our earlier principles may in fact help reduce the sources of indeterminacy. Consider the problem of time-horizons, exemplified by the point that a 10% annual risk of attack implies an 80% likelihood of an attack within fifteen years. Are analysts entitled to use the 80% figure in deciding whether to launch a preventive attack? Here, one should begin by noticing that the same arithmetic holds for all risks, military and non-military. The principle we labeled Minimum Consistency Toward Risks suggests using a fifteen-year time horizon in this policy only if we do so in other policies as well.<sup>49</sup>

And the “one percent doctrine,” used as justification for otherwise-unjustified military action, violates Just Management of Military Risks because it permits the United States to treat a small probability of harm as a large probability, and thus to insist on the U.S. right to use

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<sup>49</sup> [REMOVED FOR ANONYMITY]

military force to diminish a small probability to zero or near zero without granting reciprocal liberty to others. After all, the United States plainly would not permit others to use force against U.S. military assets because there is a one percent chance that the United States will invade.

Wrong assessments might also be checked, to some extent, by expanding the circle of assessors beyond those immediately concerned. A significant challenge here is that the costs of managing the risk will often be shifted onto foreigners and away from those making the assessment. This warrants some form of consultation with other countries and/or intelligence agencies in assessing potential threats. A consultation process is far from offering a definite remedy: some of the most professional western intelligence agencies (CIA, MI6, Mossad) were united in the belief that Iraq was developing WMDs in the lead-up to the U.S. invasion, while no major intelligence agency reportedly anticipated the Arab Spring that was sparked off in Tunisia.<sup>50</sup> Nor are other countries and their intelligence agencies neutral assessors of political risks, or candid reporters of their own assessments.

The UN Security Council could, as Thomas Franck suggested, perform a jury-like function that would assess the evidence of risk and recommend an appropriate response to it.<sup>51</sup> We are not confident that this function should be exercised only by the Security Council, given its structure and frequent deadlock. In addition, information made available to the Security Council is necessarily public and open, and a threatened country might not want to share all its intelligence with the public. And still, as a general principle, it seems to us an appropriate cautionary procedure to require some form of external review process prior to the use of military

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<sup>50</sup> Robert Jervis, "Reports, Politics, and Intelligence Failures: The Case of Iraq," *The Journal of Strategic Studies* Vol. 29, No. 1, (February 2006) 3–52; Jeff Goodwin, "Why we were Surprised (Again) by the Arab Spring?", *Swiss Political Science Review* 17(4) (200), 452–456.

<sup>51</sup> For similar suggestions, see Jeff McMahan, "Individual Responsibility and the Law of *Jus ad Bellum*," in Benbaji and Sussmann; Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20 (December 2006), 405-437.

force, or its decision to continue using force past the point where, arguably, it has succeeded in repelling the enemy and degrading the threat it continues to pose.

## **VI. Risk Allocation and Manipulation**

Here we wish to expand on an idea alluded to earlier, namely that there are steps prudent states can take to reduce their own risks, prior to the resort to force. These will suggest two additional limitations on the use of force in addition to those we have presented so far.

Neither the probabilities of risk nor the magnitude of harms if it materializes are generally fixed. Like perceptions, probabilities and harms can be manipulated in a way that either increases or decreases them. The probability of getting cancer can be reduced by avoiding smoking and handling hazardous materials. The harm of cancer can be reduced by early detection and better treatments. In some cases, the probability is fixed, such as in the case of earthquakes, but the harm can be reduced by preventing people from living in earthquake-prone regions, enforcing more stringent building codes, employing some early warning systems, and improving first-response systems to disaster-stricken areas. In other cases, it is the harm that is fixed, for instance, the harm from consuming poisonous food, but one can reduce the probability of such consumption by enforcing strict safety standards on the food industry.

In the context of war, too, expected harm is subject to manipulation. Unlike earthquakes, the risk of war is not exogenous: A victim or potentially-victim state can affect the probability of war through its own actions, be they diplomatic or military. A concerned state might threaten an enemy and deter it from action, incapacitate the enemy, or reach a negotiated compromise that would reduce the probability of war. A victim or potentially-victim state can also affect the

potential harm that might ensue from war. It can invest in defensive weapons systems, shelters, evacuation and response, and any other means that would lower the magnitude of harm. It can also preemptively strike at weapons depots, high-level commanders, or other valuable resources that would be necessary for the enemy if it were to launch destructive strikes.

Risk manipulation is essentially a reallocation of costs. In the food example, the reduction of risk to consumers entails greater costs on the food industry in conducting safety checks and ensuring product quality. Most of these costs will ultimately be rolled back onto consumers (as reflected in the price of the product); but these costs will be spread more evenly than if, absent such regulatory obligations, several individuals were to consume bad food and suffer the full consequences of it.

In the war case, early warning systems or shelters distribute costs within the state (using public funds to reduce the risk to those who might otherwise be struck), while a preemptive strike seeks to shift the costs of a future war from the striking state to the attacked state.

An obvious concern here is that left to their own devices, and absent special relationship between those concerned, parties have a natural interest in shifting risk away from themselves, even where the consequences are harm to someone else. Especially in the context of war, a potential victim would be only too happy to shift the risks to itself onto its enemies, and even onto foreign citizens who are not enemies. Recent American counterterrorism strategies demonstrate this concern. On September 3, 2012, a U.S. targeted killing operation in Yemen left twelve civilians dead. A year earlier, a targeted killing operation in Pakistan killed four militants and thirty-eight civilians. Unless one believes that each of these operations prevented real and comparable harm to the United States, these are classic examples of risk aversion that results in serious harm to others for an unclear and remote marginal benefit. Certainly, it is hard to believe

that the government would have been willing to kill as many U.S. civilians to gain the same benefit.

Another obvious problem is that the true effects of any of these strategies on the expected harm from war are uncertain. An aggressive response to an armed attack might serve to deter the attacker from future violence, but might also help the attacker rally domestic and international constituencies for further attacks. Negotiations can culminate in a mutually-beneficial agreement significantly reducing the risk of war, but might also turn out to be costlier for the would-be victim than a military operation.

Faced with uncertainty, and a natural inclination to shift risk onto others, a guiding principle must be that states must invest in defensive systems as a precondition for any use of force against others. This investment should signal the willingness of the threatened state to absorb some of the costs of risk itself.

A more contentious possibility would be to demand that the state take no violent measure against an external threat that it would not be willing to take against a comparable internal one.<sup>52</sup> If this demand were met, it would serve as a strong check on the interest of shifting costs and discounting the harm to enemy nationals. Indeed, one might consider an even stronger, and perhaps more counter-intuitive principle: that states can permissibly do more to reduce internal risks than external risks. That is, first, because using force against external risks violates the international order of sovereign states more than using force against internal risks, and second, because internal constituencies are in a better position than foreigners to hold a government accountable for harms inflicted in the name of risk-reduction. While we find these possibilities intriguing, we do not discuss them here.

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<sup>52</sup> This is a view defended in Lea Brilmayer, *Justifying International Acts* (Ithaca: Cornell University Press, 1989).

## **VII. Conclusions**

Above all else, we have argued for a risk-based approach to thinking about vexed questions in just war theory and the law of war, including issues of when wars must rightly terminate. Even readers who disagree with our specific conclusions will, we hope, find the approach helpful or even illuminating.

Our most important substantive conclusion is that for anyone seeking guaranteed safety, just wars will be inherently unsatisfying, because guaranteed safety is more than we are entitled to demand. We must live with risk. The level of safety we can demand will be limited by the principle of Just Management of Military Risk, according to which we cannot demand more safety than the morally legitimate bearable risk, and checked by the maxim of Minimum Consistency Toward Risks, which requires states to justify the criteria they use to justify risk reduction through military force comparatively with the criteria they use in managing other forms of risk.

As additional checks on state's paranoid or self-serving risk assessments, we emphasize the importance of convincing others—be it the Security Council or other members of the international community—of the significance of the risk that might trigger preventive use of force or continuation of warfare.

We also propose a further limiting or checking principle. Before states can use force preventively, or continue ongoing warfare, they must have invested in defensive systems as a form of risk reduction. We suggest that states must not be biased toward violent methods of risk reduction over more boring and perhaps irritating measures such as civil defense.

Above all, we are arguing that states and their citizens must accept that wars will be unsatisfying. Living with military risks is not merely the human condition, it is a condition that the *jus ex bello* must acknowledge.