Book Review

War by Agreement: A Contractarian Ethics of War, Yitzhak Benbaji and Daniel Statman (Oxford: Oxford University Press, 2019), 240 pp., $65 cloth, $52.99 eBook.

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Since the 1970s, when the Vietnam War sparked massive opposition across the United States, philosophers and other academics have written a great deal about the theory of war. At the same time, there has been a parallel flourishing of writing on contractarianism in philosophy and political theory. But there has been no systematic or sustained work that combines both areas of inquiry—a contractarian treatment of the laws of war—until now. Yitzhak Benbaji and Daniel Statman's *War by Agreement* is precisely that: a detailed attempt to justify and explain the morality and laws of war from the standpoint of contractarian theory.

Just war theory lends itself exceptionally well to a contractarian analysis. International humanitarian law, like the rest of international law, consists of a series of voluntary agreements and shared practices among nation-states, backed up by common values that appear to hold those agreements or habitual coordinative behaviors in place.

Yet a contractarian account of war is also bedeviled by a major challenge; namely, the need to explain how any set of norms could constrain the conduct of parties that are bent on mutual destruction, in the absence, in the words of Thomas Hobbes, of a common power "to keep them in awe." This is particularly challenging given that international law may be more respected in the breach than the observance. The great potential contribution of the contractarian model to the theory of war is that it may be able to explain the need to adhere to international norms among nations, without treating such norms as binding because they are independently morally mandated. The norms of international law are binding, a contractarian can say, because adherence to them is ultimately in the self-interest of the states that have implicitly or explicitly agreed to be bound by them.

According to Benbaji and Statman, the fundamental agreement to be explained is what they call the "war agreement"; namely, the set of reciprocal rules that govern *in bello* conduct among parties to a military conflict and that allow states to enforce their rights to independence and territorial integrity. These rules are largely captured

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by the UN Charter and the Geneva Conventions and ultimately help to ensure that war does not descend into unlimited chaos. Reminiscent of Hobbes's second law of nature, this agreement, they hypothesize, is sufficiently attractive that the parties will rationally agree to abandon their natural rights of self-defense in favor of a mutually beneficial act of self-constraint to achieve peace. Unlike the Hobbesian approach, in which the authority is transferred to a sovereign, the authors argue that it is more advantageous for states to abandon those rights they possess in the state of nature in favor of a legal system in which they are governed by a common normative framework.

How does the international community achieve compliance with the legal norms of war? Here the authors fill in the gap with a social practice theory, similar to the one advanced by H. L. A. Hart in *The Concept of Law*: Parties to the war agreement come to internalize the in bello norms. This willingness to regard the war agreement as having normative force is part and parcel of how the commitment to norms meets the conditions for self-interest: All parties are advantaged by a shared commitment to the international norms that prevent war from descending into a hell of unconstrained destruction, the unavoidable condition into which all wars descend, according to the famous theorist of war Carl von Clausewitz.

While I agree with the general structure of the account Benbaji and Statman offer, an alternate use of the contractarian heuristic would produce quite a different version of a contractarian approach to the laws of war, one that would be more in keeping with the way that contractarian accounts usually operate. In the standard contractarian account, for example, the item to which the parties agree is not a specific law or set of laws but a set of normative principles by which one can assess the adequacy of the laws. This should be clear, at the very least, from the fact that laws change over time to meet the demands of evolving and altered circumstances. Laws do not apply themselves, and often there is more than one possible law that applies. For contractarians, these principles provide the secondary norms by which debates about the first order rules and laws are resolved.

Consider, for example, the controversy over whether the Geneva Conventions apply to detainees captured by the United States in the War on Terror. The Bush administration famously avoided the strictures of Common Article 3 of the Conventions by insisting that members of al-Qaeda and the Taliban were "unlawful combatants," and that, therefore, the Law of Armed Conflict did not apply in their case. The results of this categorization were, of course, convenient and intended: Treating the detainees as unlawful combatants meant that international law did not bar the use of torture in interrogations; they were not entitled to insist on repatriation upon the cessation of hostilities; and they could be tried and sentenced by military commission or indeed not ever tried at all. But many disagreed with this categorization, and the lack of clarity surrounding the legal status of terrorists has bedeviled the military commissions and doomed them to failure. The threshold legal question that must be addressed—namely, whether the Geneva Conventions apply to violent nonstate actors—is one that cannot be answered by reference to the war agreement itself. Yet this threshold legal question is of profound importance for the approach the United States and other Western nations take to fighting terrorism and

dealing with threats from highly militarized nonstate adversaries.

The question then arises: Are Benbaji and Statman truly offering a contractarian account? The authors give several reasons why they think they are. They argue, first, that their account does not produce or offer a moral theory; instead, their account assumes one. But notice that the moral theory that is presupposed—namely, the Lockean conception of the natural rights of states to self-defense—is partially abandoned for the sake of the war agreement. The presupposition of a set of natural rights in fact strains with the contractarian impulse. For instead of being the product of a voluntary abandonment or transference of rights, the commitment to the various parts of international law is accomplished by the force of the underlying normative principles that dictate which laws are acceptable against the background of the common aim of maximizing peace. In other words, the Lockean natural rights that determine the position from which the parties will choose specific laws constrain the parties' choices so severely that we cannot say that the law is voluntarily chosen. A true contractarian system cannot constrain what its members agree to as part of the defense of their own interests. A legal theory that severely constrains the choices the parties can make among available options for normative reasons should not be considered a true contractarian theory.

In addition, Benbaji and Statman maintain that a contractarian theory is superior because its focus on mutual benefit results in a high likelihood of Pareto improvements—the results of the invisible hand of voluntary choice. However, the focus on Pareto improvements is at odds with the role the Lockean constraints play in directing and limiting choices from the initial position. This is simultaneously an argument against Locke and the natural rights version of contractarianism: it is an argument to the effect that if rights constrain the initial position of the laws the parties are able to select, then the theory expressed cannot be a true contractarian theory.

Benbaji and Statman may take their first step away from a contractarian account by beginning with the assumption that what states are trying to achieve is peace. Most contractarian accounts, by contrast, begin with the premise that the parties are first and foremost interested in their own survival. While states fear war, it may be that they prefer war to domination. If the state of nature is a prisoner's dilemma, as many have argued, then it is better to risk war than to submit to one's own likely destruction. A war of all against all is bad, but it may be preferable to slavery.

Once we posit survival as the aim of rational states, and we remove any normative constraints from the initial bargaining position, the rest of the contractarian structure follows quite naturally. If we treat states like their individual counterparts—namely, human beings—nation-states interested in their own survival will reason instrumentally in the service of these ends. That is to say, states will be rational maximizers. The next step is to say that while some may be larger, some stronger, some richer, and some more strategic, states are in a position of approximate equality relative to one another. The explanation for this is the same one Hobbes offers for human beings—namely, that the weakest, most insignificant of states can make trouble for the most powerful. If they cannot do it on their own, they can band together with other weaker nations to threaten the security of the strong. It follows that all states have reason to fear for their own security

at the hands of every other state, making the international arena fundamentally a place of mistrust and danger, as states attempt to simultaneously secure their own improvement and defend against threats from outside. The international state of nature is better characterized as a low-level state of war, punctuated by transitory and precarious alliances among nations entered into for mutual advantage and just as quickly deserted when advantage dictates otherwise. It thus provides not only a conceptual representation of a Hobbesian state of nature but a perfect empirical test of Hobbes's theory.

Hobbes himself thought international law an impossibility, by hypothesis, due to the absence of a common power to enforce agreements. Yet he was convinced that law could emerge in the domestic case; that is, within a single nation. What the history of international law teaches us is that Hobbes's picture of the emergence of law in a single state may also hold for the international arena. The actual emergence of international law through a series of cooperative practices suggests that states left in a condition of a "war of all against all" did come to see cooperation with other nations as mutually beneficial, an incremental development that began long before there were international treaties. The emergence of international customary practices and informal norms is thus more foundational than formal treaty obligations of later codified international law. These cooperative practices often formed the basis for the treaties that later codified the cooperation on which they were based. Thus, a better place to look for foundational principles than the Geneva Conventions or other particular laws themselves would be the notion of reciprocity, a concept that is both descriptive and prescriptive for states in the international arena.

Benbaji and Statman have performed a tremendous service by articulating the outlines of a contractarian account of war. They have also opened up an important avenue for defending the concept of laws of war, given that a contractarian account may win over skeptics in a way that natural law theory could not. Their impressive book, however, is just the beginning of that conversation. More work will need to be done by theorists and practitioners alike to defend the concept of constraint within destruction, law within lawlessness, order within chaos. Mutual benefit gives us a way of making sense of such contradictions, and ultimately of ourselves.

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