

**THE EVOLUTION OF THE JUST WAR TRADITION:  
DEFINING JUS POST BELLUM**

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*We do not seek peace in order to be at war, but we go to  
war that we may have peace.*<sup>1</sup>

I. Introduction and Analytical Framework for the Article

The field of international law is replete with theories and paradigms regarding the systemic causes of war.<sup>2</sup> Regulations and manuals provide

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<sup>1</sup> JAMES TURNER JOHNSON, MORALITY AND CONTEMPORARY WARFARE 33 (1999) (quoting Letter from Saint Augustine to Count Boniface (A.D. 416), in SUMMA THEOLOGICA (Benziger Bros. Ed. 1947)).

<sup>2</sup> See JOHN NORTON MOORE, SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE (2004) (offering a contemporary paradigm on the cause of war, entitled Incentive Theory). Professor Moore, Professor of International Law at the University of Virginia

guidance on how a military must operate once thrust into a conflict.<sup>3</sup> Soldiers train repetitively on battle drills so they can understand and perform their wartime roles and responsibilities. In contrast to the voluminous material regarding causes of war and actions in war, there is a vacuum regarding proceedings after war termination. While the military forces of nations like the United States have clearly mastered how to fight and win wars, some people question what leaders know about achieving the peace.<sup>4</sup>

This article uses the framework of an influential and historical perspective on force and morality, known as the just war tradition, to analyze what a just peace, or a *jus post bellum*, should look like. The just war tradition has traditionally focused solely in two realms: the circumstances under which a nation is morally justified to go to war (*jus ad bellum*) and the moral restraints imposed once a nation engages in war (*jus in bello*).<sup>5</sup> There is, however, a third, largely historically neglected prong of the just war tradition, known as *jus post bellum*, which focuses on the issues regulating the end of war and the return from war to peace.<sup>6</sup>

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School of Law, posits that major wars arise as a result of the synergy between an absence of democracy and an absence of effective deterrence at the national and international levels against aggressive nondemocratic nations, along with a failure to provide a proper set of incentives to the individual decision makers leading those nondemocratic nations. *See id.* at xx. Professor Moore defines “major war” as a conflict incurring over 1000 total casualties. *Id.* at xviii.

<sup>3</sup> For an overview of U.S. doctrine on operations and legal support to operations, see U.S. DEP’T OF ARMY, FIELD MANUAL 1, THE ARMY (14 June 2001); U.S. DEP’T OF ARMY, FIELD MANUAL 3.0, OPERATIONS (June 2001); U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000). For more specific guidance on peace operations, see U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS (Feb. 2003); JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.3, JOINT TACTICS, TECHNIQUES AND PROCEDURES FOR PEACE OPERATIONS (12 Feb. 1999).

<sup>4</sup> Rear Admiral Louis V. Iasiello, the Twenty-Third Chief of Navy Chaplains, points to current problems in Iraq and Afghanistan. Despite the impressive and overwhelming military victories by the United States and Coalition partners, he wonders: “Why has the *post bellum* phase of these conflicts proved such a challenge to the victors of battle?” Rear Admiral Louis V. Iasiello, *Jus Post Bellum: The Moral Responsibilities of Victors in War*, 57 NAVAL WAR C. REV. 33, 33-34 (2004). Ekaterina Stepanova, a senior associate at the Center for International Security, Institute of World Economy and International Relations, in Moscow, adds: “The crisis in Iraq has . . . demonstrated the failure of unprecedented military might unconstrained by international legal norms and backed by technological and economic superiority to achieve a just and durable peace after the war – a challenge no less complex or ambitious than effectively waging war.” Ekaterina Stepanova, *War and Peace Building*, 27 WASH. Q. 127, 127-28 (2004).

<sup>5</sup> See JOHNSON, *supra* note 1, at 27.

<sup>6</sup> See Iasiello, *supra* note 4, at 34.

Unlike the first two prongs, which have defined criteria permitting moral discourse, the concept of jus post bellum is underdeveloped and does not yet contain established criteria for analyzing issues.

Section II of this article provides a general historical background on the development and framework of the just war tradition. This section places the just war tradition in context with realist and pacifist perspectives and analyzes its contemporary use and misuse. It then defines the existing jus ad bellum and jus in bello principles to provide a larger context by which to later understand jus post bellum.

After this introduction to the just war tradition, Section III offers a brief overview of the existing state of the law concerning post-conflict resolution. It highlights the paucity of guidance and the need for additional insight into post-war justice. Section III also examines the roots of jus post bellum in the just war tradition, noting the lack of defined criteria.

Section IV presents proposals for jus post bellum criteria proffered by three leading just war scholars and theorists. The first is by theologian Michael Schuck, who was the first to present jus post bellum criteria in the aftermath of the 1991 Persian Gulf War.<sup>7</sup> The second belongs to Professor Michael Walzer, widely viewed as the preeminent contemporary authority on just war.<sup>8</sup> Third, Section IV provides the principles offered by Professor Brian Orend, the author of the most comprehensive proposed jus post bellum criteria.<sup>9</sup>

Section V incorporates the overview of the just war tradition, the thoughts and proposals by the three scholars, international law, and recent lessons learned from military operations in Iraq and Afghanistan. The result is a proposal for three jus post bellum criteria. The first criterion recognizes a need to ensure that a post-war peace is, to the best extent possible, a lasting peace. It is of little moral value, and disproportionate to the costs of lives and resources expended, to permit a nation to justly engage in war and successfully terminate a conflict, and yet allow conditions to remain in place that would permit violence and aggression to erupt once again. The second standard seeks to deter future aggression by other leaders and provide closure for victims by

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<sup>7</sup> See *infra* Part IV.A (providing Professor Schuck's criteria).

<sup>8</sup> See *infra* Part IV.B (providing Professor Walzer's criteria).

<sup>9</sup> See *infra* Part IV.C (providing Professor Orend's criteria).

demonstrating, through war crimes tribunals, that there are individual consequences for morally abhorrent behavior. The final principle also seeks to deter aggression and provide closure by requiring appropriate post-war reparations.

This article seeks to help fill the current vacuum by using the general framework of the just war tradition to develop *jus post bellum* criteria to affect a just peace. As Rear Admiral Louis V. Iasiello, the Twenty-Third Chief of Navy Chaplains, notes:

In an era when military victories on the battlefield are virtually assured for the United States and its allies, we must recognize the critical nature of *post bellum* operations and devote more attention to the development of a theory that will drive operational concerns in the post-conflict stages of occupation, stabilization, restoration, and other aspects of nation building. Thorough planning for this sometimes neglected aspect of war may ultimately save thousands of combatant and noncombatant lives, and quite possibly billions of dollars. The lessons of recent U.S. operations and today's geopolitical realities demand nothing less.<sup>10</sup>

## II. Overview of the Just War Tradition

*Perhaps there never has been a totally just war. But then perhaps there never has been a totally virtuous person. Neither fact reduces the usefulness of clarifying the standards involved or having them in the first place.*<sup>11</sup>

### A. Background on the Just War Tradition

The just war tradition has been in perpetual evolution for nearly two thousand years; indeed, the very essence of the tradition requires constant scrutiny, appraisal, and refinement. Its origins were in early Christianity as a means to refute Christian pacifists and provide for certain, defined grounds under which a resort to warfare was both

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<sup>10</sup> Iasiello, *supra* note 4, at 34.

<sup>11</sup> W. L. LACROIX, *WAR AND INTERNATIONAL ETHICS: TRADITION AND TODAY* 141 (1988).

morally and religiously permissible.<sup>12</sup> In the fifth century A.D, Augustine of Hippo (Saint Augustine) searched for a means to reconcile traditional Christian pacifism with the need to defend the Holy Roman Empire from the approaching vandals by military means.<sup>13</sup> From Saint Augustine's initial writings providing for a limited justification for war, philosophers, theologians, theorists, and scholars including Saint Thomas Aquinas, Francisco de Victoria, Francisco Suarez, Hugo Grotious, and Immanuel Kant, have developed and advanced the theory, principles, and criteria over the course of nearly two millennia.<sup>14</sup> The expansion continues today as just war scholars continue to apply moral reasoning within historical and contemporary perspectives to the issues of war and peace.<sup>15</sup> This progression of ideas and debates, manifested today throughout religious writings, international laws, treaties and conventions, is collectively known as the just war tradition.<sup>16</sup>

Brian Orend, a professor of philosophy at the University of Waterloo in Ontario, Canada, and a prominent contemporary just war theorist, describes the just war tradition in the following manner:

Just war theory . . . offers rules to guide decision-makers on the appropriateness of their conduct during the resort to war, conduct during war and the termination phase of the conflict. Its over-all aim is to try and ensure that wars are begun only for a very narrow set of truly defensible reasons, that when wars break out they are

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<sup>12</sup> See MICHAEL WALZER, *ARGUING ABOUT WAR* 3 (2004).

<sup>13</sup> See JAMES TURNER JOHNSON, *CAN MODERN WAR BE JUST?* 1 (1984).

<sup>14</sup> See JOHNSON, *supra* note 1, at 14-15, 24; Brian Orend, *War*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2002), available at <http://plato.stanford.edu/entries/war/>. See generally PETER S. TEMES, *THE JUST WAR: AN AMERICAN REFLECTION ON THE MORALITY OF WAR IN OUR TIME* 41-75 (2003) (providing additional insight concerning the founders of the just war tradition). The just war tradition reached its peak of influence alongside the rise of the Roman Catholic Church in the Middle Ages. After the Peace of Westphalia in 1648, ending the Thirty Years War, the power of the Church to influence decisions on warfare began to wane, and with the emergence of the state as an independent sovereign and international actor, nations began to arbitrate independently about the justness of war, with predictable results. See JOHNSON, *supra* note 1, at 52-54.

<sup>15</sup> See JOHNSON, *supra* note 13, at 12. Professor James Turner Johnson argues that the just war tradition should not be viewed as "doctrine" requiring a positivist approach, but rather, it "requires active moral judgment within a historical context that includes not only the contemporary world but the significantly remembered past." *Id.*

<sup>16</sup> See Iasiello, *supra* note 4, at 36-37; see also JOHNSON, *supra* note 1, at 30 (linking just war principles to positivist international law).

fought in a responsibly controlled and targeted manner, and that parties to the dispute bring their war to an end in a speedy and responsible fashion that respects the requirements of justice.<sup>17</sup>

Michael Walzer, a Professor at the Institute of Advanced Studies at Princeton University, and author of the 1977 seminal work on just war theory, *Just and Unjust Wars*,<sup>18</sup> remarks on the enduring nature of the just war tradition: “Just war theory is not an apology for any particular war, and it is not a renunciation of war itself. It is designed to sustain a constant scrutiny and an immanent critique.”<sup>19</sup>

As an international paradigm, just war theory finds its niche squarely between the alternate extreme perspectives of realism and pacifism.<sup>20</sup> A realist believes that war “is an intractable part of an anarchical world system; that it ought to be resorted to only if it makes sense in terms of national self-interest; and that, once war has begun, a state ought to do whatever it can to win.”<sup>21</sup> From a realist’s vantage point, “if adhering to a set of just war constraints hinders a state in this regard, it ought to disregard them and stick soberly to attending to its fundamental interests in power and security.”<sup>22</sup> In short, for a realist, “[t]alk of the morality of warfare is pure bunk.”<sup>23</sup>

By contrast, pacifists find themselves on the opposite end of the use of force spectrum. A pacifist is of the persuasion “that no war is or could be just. . . . In short, pacifists categorically oppose war as such, though their reasons tend to vary.”<sup>24</sup> Professor Orend notes that a pacifist does not share a realist’s “moral skepticism”<sup>25</sup> concerning warfare and may agree with the just war tradition of applying ethical standards to conflict management. However, “pacifists differ from just war theorists by

<sup>17</sup> Orend, *supra* note 14.

<sup>18</sup> MICHAEL WALZER, *JUST AND UNJUST WARS* (1977).

<sup>19</sup> WALZER, *supra* note 12, at 22.

<sup>20</sup> See BRIAN OREND, *WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE* 44 (2000) (“There seem, at bottom, to be three basic perspectives on the ethics and legality of war and peace, with realism and pacifism at the extremes and just war theory in the middle.”).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Orend, *supra* note 14 (listing a number of prominent realists, to include Thucydides, Machiavelli, Hobbes, Hans Morgenthau, Henry Kissinger, and Kenneth Waltz).

<sup>24</sup> OREND, *supra* note 20, at 47.

<sup>25</sup> Orend, *supra* note 14.

contending that the substance of such moral judgments is always that we should never resort to war.”<sup>26</sup> Although pacifism is a morally judicious theory of conflict management, it, like realism, provides little practical value to the contemporary international law practitioner.

Some have claimed that the just war tradition embodies an inherently pacifistic presumption against war.<sup>27</sup> This is untrue and is an inversion of the moral analysis; maintaining justice under the just war tradition may actually necessitate a call to arms.<sup>28</sup> George Weigel, Senior Fellow of the Ethics and Public Policy Center in Washington, D.C., posits:

If the just war tradition is a theory of statecraft, to reduce it to a casuistry of means-tests that begins with a “presumption against violence” is to begin at the wrong place. The just war tradition begins by defining the moral responsibilities of governments, continues with the definition of morally appropriate political ends, and only then takes up the question of means. By reversing the analysis of means and ends, the “presumption against violence” starting point collapses *bellum* into *duellum*

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<sup>26</sup> OREND, *supra* note 20, at 47.

<sup>27</sup> See JOHNSON, *supra* note 1, at 34-36 (mentioning and then refuting these claims).

<sup>28</sup> See Michael Novak, *The Rule of Law in Conflict and Post-Conflict Situations: Just Peace and the Asymmetric Threat: National Self Defense in Uncharted Waters*, 27 HARV. J.L. & PUB. POL’Y 817, 827-28 (2004). Novak, a theologian, author, and former U.S. Ambassador, notes:

According to St. Augustine, fallen human nature being what it is, there will always be a presumption that generation after generation some evil men will choose disorder, violence, and unjust aggression. At times, the only way to restore order will be to use war as a just instrument of statecraft.

*Id.* at 828. He adds that the just war tradition may even embrace a preemptive attack underpinning:

The just war tradition does not begin “with a presumption against war or violence,” but with the presumption that the protection of international order in every generation is likely to require either going to war for the sake of restoring justice, or (better) at least the intimidating and well-honed *capacity* to fight just wars successfully, in order to prevent them in advance.

*Id.* at 832-33.

and ends up conflating the ideas of “violence” and “war.”<sup>29</sup>

Professor James Turner Johnson, a prominent just war scholar, agrees that the presumption against war is misplaced and notes, instead, that the just war tradition has a “presumption against *injustice* focused on the need for responsible use of force in response to wrongdoing.”<sup>30</sup>

When one rejects the extremes of realism and pacifism, the just war tradition remains the appropriate paradigm for analysis of conflicts. That is not to say that the just war tradition is devoid of critics. Some claim that the just war tradition is no longer applicable in today’s strategic and legal environment.<sup>31</sup> Others argue that there is no place for a religious-philosophical theory since contemporary wars are no longer dominated by opposing nation-states, but instead, are often intrastate wars or conflicts against itinerant terrorist organizations who do not adhere to the norms of customary international law or to traditional notions of warfare.<sup>32</sup> Professor Orend refutes these claims and asserts that the just

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<sup>29</sup> George Weigel, *Moral Clarity in a Time of War*, 2003 FIRST THINGS 128, 20-27, available at <http://www.firstthings.com/ftissues/ft0301/articles/weigel.html>.

<sup>30</sup> JOHNSON, *supra* note 1, at 35.

<sup>31</sup> See OREND, *supra* note 20, at 8. Professor Orend discusses some of the skepticism facing just war theorists today:

There is, so to speak, a certain smell about just war theory that any defender of it must deal with, even prior to enunciating anything substantive. Three of the most commonly held beliefs of these skeptics, in this regard, are: 1) that just war theory is irredeemably tainted by its origins in Catholic doctrine; 2) that just war theory is dated and irrelevant; and 3) that just war theory is so liable to abuse as to be nothing more than a cloak with which to hide, or even justify, the commission of great evils, and by no less dubious an institution than the modern nation-state.

*Id.*; see also JOHNSON, *supra* note 1, at 223-27 (refuting the criticism that the just war tradition’s emphasis on placing limits on warfare is irrelevant in an age of nuclear weapons and total warfare); Yoram Dinstein, *The Rule of Law in Conflict and Post-Conflict Situations: Comments on War*, 27 HARV. J.L. & PUB. POL’Y 877, 879-80 (2004) (arguing that the just war tradition is irrelevant today because only the Security Council, acting under the authority of the Charter of the United Nations, may authorize the use of force). But see YEHUDA MELZER, CONCEPTS OF JUST WAR 39 (1975) (providing for a role for the just war tradition alongside the Charter by observing that “the aim of the United Nations is to secure peace. . . . It is not to achieve and maintain justice”).

<sup>32</sup> See OREND, *supra* note 20, at 8.



war theory is still quite applicable today, even in a world threatened by non-traditional actors:

With regard to the terrorist objection [by critics of just war theory], it should be noted that interstate armed conflict has hardly gone the way of the dinosaur. Consider the Persian Gulf War of 1991 and the multistate war raging in the heart of Africa—Zaire/Congo—in 1998/99. Second, terrorists are not literally nomads: they enjoy the protection (either tacit or explicit) of many of the states they inhabit. . . . As well, intrastate civil wars are still fought in what we might call a state-laden context: they are fought either over which group gets to control the existing state or over which group gets to have a new state. Thus, there are always state-to-state issues involved in contemporary armed conflict, even civil wars and terrorism. Finally, the norms of just war theory . . . are sufficiently flexible to apply in a meaningful way whenever political violence is employed.<sup>33</sup>

Moreover, the consistent insertion of just war concepts into political discourse underscores the contemporary vitality and relevance of the just war tradition. Unfortunately, this often leads to misunderstandings since politicians and military commanders often manipulate the tradition out of form through the persistent misuse of the terms in an effort to justify their political or military actions on moral grounds.<sup>34</sup> One need not look any further for an example than the three 2004 U.S. presidential debates between Republican President George W. Bush and Democratic presidential nominee Senator John Kerry. During the televised debates, both candidates repeatedly discussed the justification for going to war in

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<sup>33</sup> *Id.* at 9.

<sup>34</sup> *See id.* at 8. For example, it is common for leaders to use the jus ad bellum principles when referring to having a “just cause” for military actions or debating whether there was a situation of “last resort” requiring military intervention. *See infra* note 35; *see generally* Jimmy Carter, Editorial, *Just War—or a Just War?*, N.Y. TIMES, Mar. 9, 2003, § 4, at 13 (employing the jus ad bellum criteria to argue that the then impending war against Iraq would be unjust on every prong); William Jefferson Clinton, *A Just and Necessary War*, N.Y. TIMES, May 23, 1999, at W17 (utilizing just war terminology to portray the situation in Kosovo).

Iraq and directly referenced, generally incorrectly, the *jus ad bellum* term “last resort” no less than ten times.<sup>35</sup>

The use and misuse of the just war terms in political discourse are neither a weakness nor a failure of the just war tradition, but rather, recognition of the lasting power of the theory.<sup>36</sup> The tenets of just war

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<sup>35</sup> President George W. Bush and Senator John Kerry, Presidential Debate at St. Louis, Missouri (Oct. 8, 2004) (transcript available at <http://wid.ap.org/transcripts/debates/prez2.html>.) President Bush said: “I remember going down to the basement of the White House on the day we committed our troops as last resort . . . .” *Id.* Senator Kerry stated:

I believe the President made a huge mistake . . . not to live up to his own standard . . . and go to war as a last resort. I ask each of you just to look into your hearts, look into your guts. Gut-check time. Was this really going to war as a last resort?

*Id.*; see also President George W. Bush and Senator John Kerry, Presidential Debate at Coral Gables, Florida (Sept. 30, 2004) (transcript available at <http://wid.ap.org/transcripts/debates/prez1.html>.) President Bush said: “But a President must always be willing to use troops. It must – as a last resort.” *Id.* Senator Kerry replied:

[President Bush] promised America that he would go to war as a last resort. Those words mean something to me, as somebody who has been in combat. Last resort. You’ve got to be able to look in the eyes of families and say to those parents, I tried to do everything in my power to prevent the loss of your son and daughter. . . . [President Bush] misled the American people when he said we’d go to war as a last resort. We did not go as a last resort. And most Americans know the difference.

*Id.* Unfortunately, most politicians do not themselves understand the difference and the actual requirements of “last resort” under the just war tradition. Professor Johnson provides a clarification of this *jus ad bellum* criterion:

It is important to note that the criterion of last resort does not mean that all possible non-military options that may be conceived of must first be tried; rather, a prudential judgment must be made as to whether *only* a rightly authorized use of force can, in the given circumstances, achieve the goods defined by the ideas of just cause, right intervention, and the goal of peace, at a proportionate cost, and with reasonable hope of success. Other methods *may* be tried first, if time permits and if they also satisfy these moral criteria; yet this is not mandated by the criterion of last resort - and ‘last resort’ certainly does not mean that other methods must be tried indefinitely.

JAMES TURNER JOHNSON & GEORGE WEIGEL, *JUST WAR AND THE GULF WAR* 29 (1991).

<sup>36</sup> See generally WALZER, *supra* note 12, at 3-15. Professor Walzer observes how the success of the just war theory can unintentionally undermine its integrity. See *id.* Professor Walzer remarks that when politicians and military generals start defining their

theory are undeniably “slippery”<sup>37</sup> and subject to manipulation. However, while the semantics and theoretical bases for the theory continue to be debated and refined by politicians and scholars, the true strength of the just war tradition rests in providing at least some “minimally adequate theory”<sup>38</sup> with which to analyze conflict management.

## B. The First Two Prongs of the Just War Tradition

Just war discussions have traditionally focused upon only the two thematic branches of *jus ad bellum* and *jus in bello*, and have failed to discuss *jus post bellum* considerations. Before embarking on an analysis of *jus post bellum*, however, it is necessary to briefly mention the first two prongs in order to understand *jus post bellum* in the context of the larger just war construct.

The first category, *jus ad bellum*, encompasses the concept of whether nation-states should resort to warfare.<sup>39</sup> The second prong, *jus in bello*, focuses on the actions of the nation-states once warfare has commenced.<sup>40</sup> Professor Walzer summarizes the two concepts: “*Jus ad bellum* requires us to make judgments about aggression and self defense;

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actions in terms of just war principles, it can result in “a certain softening of the critical mind, a truce between theorists and soldiers” that can weaken the scrutiny that must be applied to the principals. *Id.* at 15. *But see* Weigel, *supra* note 29 (arguing that politicians must provide input into the just war tradition). Weigel states:

If the just war tradition is indeed a tradition of statecraft, then the proper role of religious leaders and public intellectuals is to do everything possible to clarify the moral issues at stake in a time of war, while recognizing that what we might call the “charism of responsibility” lies elsewhere – with duly constituted public authorities, who are more fully informed about the relevant facts and who must bear the weight of responsible decision-making and governance. It is simply clericalism to suggest that religious leaders and public intellectuals “own” the just war tradition in a singular way.

*Id.*

<sup>37</sup> OREND, *supra* note 20, at 10.

<sup>38</sup> *Id.* at 10. Professor Orend attributes this phrase to Professor Bonnie Kent of Columbia University’s Philosophy Department. *See id.* at 11 n.6.

<sup>39</sup> *See* BRIAN OREND, MICHAEL WALZER ON WAR AND JUSTICE 4 (2000).

<sup>40</sup> *See id.*

*jus in bello* about the observance or violation of the customary and positive rules of engagement.”<sup>41</sup>

Although scholars often mention and analyze *jus ad bellum* and *jus in bello* in conjunction, the just war tradition views these two prongs as separate and distinct. Professor Orend reminds a student of just war “that a war can begin for just reasons, yet be prosecuted in an unjust fashion. Similarly, though perhaps much less commonly, a war begun for unjust reasons might be fought with strict adherence to *jus in bello*.”<sup>42</sup>

### I. Jus ad Bellum

*Jus ad bellum* contains the principles used to articulate the just resort to war. According to the just war tradition, the *jus ad bellum* criteria “must be met by any state considering the resort to armed force”<sup>43</sup> before that state can declare its resort to force justified. The six factors traditionally used to analyze *jus ad bellum*, which the just war tradition addresses to the political leaders of states, are: (1) just cause; (2) right intention; (3) proper authority and public declaration; (4) last resort; (5) probability of success; and (6) macro proportionality (proportionality of good versus evil).<sup>44</sup>

Discussing each of the *jus ad bellum* criteria in depth would form a separate endeavor; therefore, Professor Orend’s summary of these

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<sup>41</sup> WALZER, *supra* note 18 at 21.

<sup>42</sup> OREND, *supra* note 20, at 50. Professor Orend adds that “the *jus ad bellum* criteria are thought to be the preserve and responsibility of political leaders whereas the *jus in bello* criteria are thought to be the province and responsibility of military commanders, officers and soldiers.” *Id.*

<sup>43</sup> *Id.* at 48-49.

<sup>44</sup> See OREND, *supra* note 39, at 87. There is no one authoritative list of the *jus ad bellum* criteria. The number and titles of the criteria vary slightly among scholars; however, these six are the most commonly used. Some just war theorists add a seventh criterion. Professor Orend lists these six criteria but adds a seventh factor of comparative justice. See OREND, *supra* note 20, at 49. “The idea here is that every state must acknowledge that each side to the war may well have some justice in its cause. Thus, all states are to acknowledge that there are limits to the justice of their own cause, thus forcing them to fight only limited wars.” *Id.*; see also JOHNSON, *supra* note 1, at 27-29 (including a seventh criterion requiring that a nation wage war for the “aim of peace”); Iasiello, *supra* note 4, at 37 (adding a seventh criterion of “a formal declaration of war”); Thomas A. Shannon, *What is ‘Just War’ Today?*, CATH. UPDATE (May 2004), available at <http://www.americancatholic.org/Newsletters/CU/ac0504.asp> (listing comparative justice as a seventh criterion).

criteria follows. A failure of any one leads to an entire jus ad bellum failure.<sup>45</sup>

*JWT 1. Just cause.* A state must have a just cause in launching a war. The causes most frequently mentioned by the just war tradition include: self-defence by a state from external attack; the protection of innocents within its borders; and, in general, vindication for any violation of its two core state rights: political sovereignty and territorial integrity.

*JWT 2. Right intention.* A state must intend to fight the war only for the sake of those just causes listed in JWT 1. It cannot legitimately employ the cloak of a just cause to advance other intentions it might have, such as ethnic hatred or the pursuit of national glory.

*JWT 3. Proper authority and public declaration.* A state may go to war only if the decision has been made by the appropriate authorities, according to the proper process, and made public, notably to its own citizens and to the enemy state(s).

*JWT 4. Last resort.* A state may resort to war only if it has exhausted all plausible, peaceful alternatives to resolving the conflict in question, in particular through diplomatic negotiation.

*JWT 5. Probability of success.* A state may not resort to war if it can reasonably foresee that doing so will have no measurable impact on the situation. The aim here is to block violence which is going to be futile.

*JWT 6. (Macro-) proportionality.* A state must, prior to initiating a war, weigh the expected universal good to accrue from its prosecuting the war against the expected universal evils that will result. Only if the benefits seem reasonably proportional to the costs may the war action proceed.<sup>46</sup>

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<sup>45</sup> See Orend, *supra* note 14.

<sup>46</sup> OREND, *supra* note 20, at 49.

As noted earlier, the modern political and military lexicon is replete with several of these *jus ad bellum* terms.<sup>47</sup> Additionally, many of the *jus ad bellum* principles have taken root during the past century in international law and through the United Nations Charter.<sup>48</sup>

## 2. *Jus in Bello*

In contrast to *jus ad bellum*, which focuses upon the moral justification to go to war, *jus in bello* analyzes the actions of a state already engaged in combat operations to determine if that state is fighting justly.<sup>49</sup> The two traditional *jus in bello* criteria, which fall primarily to the responsibility of the military leadership for adherence, are micro proportionality and discrimination.<sup>50</sup> Similar to the *jus ad*

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<sup>47</sup> See *supra* notes 34-36 and accompanying text (discussing the use of the *jus ad bellum* principles by politicians and military leaders).

<sup>48</sup> See JOHNSON, *supra* note 1, at 24. For example, the criterion of just cause permits a nation to respond in self-defense when confronted with an external armed attack. See *supra* note 46 and accompanying text (discussing just cause). This parallels the general concepts embodied in Articles 2 and 51 of the U.N. Charter. Article 2(3) of the U.N. Charter states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. Charter art. 2, para. 3. Article 2(4) notes: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.* art. 2, para. 4. The first sentence of Article 51 of the U.N. Charter, however, adds: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." *Id.* art. 51.

The concept of proper authority is interesting and debatable. Can the United States, acting unilaterally, be a proper authority? Must the United Nations Security Council sanction every action? See JOHNSON, *supra* note 1, at 58-63 (observing that the United Nations lacks the cohesion, sovereignty, and chain of command necessary to be a competent proper authority under the just war tradition); Weigel, *supra* note 29 (arguing that prior U.N. authority to use force is not required before a state acts); see also TEMES, *supra* note 14, at 15-16 (arguing that although the term proper authority may have once accounted "for the idea that a Just War might also be undertaken by, as examples, revolutionary movements, breakaway provinces, clans, tribal groups, or religious sects" the form of war today in some way always involves nations and nations have become the proper authorities). But see Dinstein, *supra* note 31, at 879 (arguing that the Security Council is the only proper authority absent self-defense).

<sup>49</sup> See OREND, *supra* note 20, at 50.

<sup>50</sup> See *id.*

bellum analysis, a violation of either of these two criteria leads to an entire failure in jus in bello.<sup>51</sup> A definition of these criteria is helpful.

*(Micro-) proportionality.* Similar to JWT 6 [the Jus ad Bellum criterion of Macro Proportionality], states are to weigh the expected universal goods/benefits against the expected universal evils/costs, not only in terms of the war as a whole but also in terms of each significant military tactic and manoeuvre employed within the war. Only if the goods/benefits of the proposed action seem reasonably proportional to the evils/costs, may a state's armed forces employ it. . . .

*Discrimination.* . . . The key distinction to be made here is between combatants and non-combatants. Non-combatant civilians, unlike combatant soldiers, may not be directly targeted by any military tactics or manoeuvres; non-combatants, thought to be innocent of the war, must have their human rights respected.<sup>52</sup>

Like the jus ad bellum criteria, these jus in bello concepts have found a home in positivist international law to include the Hague regulations, the Geneva Conventions, arms limitation treaties, military doctrine, and rules of engagement formulation.<sup>53</sup>

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<sup>51</sup> *See id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See* JOHNSON, *supra* note 1, at 24 (listing the connections between the just war tradition and positivist international law); *see, e.g.*, Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, para. 5b, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (stating that "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" would be considered an indiscriminate attack and violate the principle of proportionality); Hague Convention IV Respecting the Laws and Customs of War on Land art. 22, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations] ("The right of belligerents to adopt means of injuring the enemy is not unlimited."); U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 41 (18 July 1956) [hereinafter FM 27-10] ("[L]oss of life and damage to property must not be out of proportion to the military advantage to be gained."). The United States signed Additional Protocol I on December 12, 1977, subject to declarations, but never formally ratified Additional Protocol I. The United States, however, considers many of the provisions of Additional Protocol I, including Art. 51, para. 5b, customary international law. *See* Michael Matheson, *Session One: The United States Position on*

### III. Post-Conflict Resolution and Jus Post Bellum

#### A. The Current State of Post-Conflict Resolution

International law regarding proper actions after conflict is woefully inadequate. Rules abound regulating decisions to go to war and prescribing conduct once engaged in war; however, international law provides very little discussion concerning actions after the cessation of hostilities, and even less that ties in concepts of ethics and morality.<sup>54</sup> The antiquated Articles 32 through 41 of the Hague Convention (IV), drafted in 1907, contain the majority of available guidance on post-conflict resolution.<sup>55</sup> These Articles are, unfortunately, largely inapplicable for the demands of modern day conflict.<sup>56</sup> In the absence of law or guidance, a sense of “winner’s justice” can prevail.

Today, as the United States and her coalition partners are engaged in continuing operations in Iraq and Afghanistan, the need for direction in post-conflict resolution has never been greater. As Professor Orend notes, “the lack of rules regulating postwar conduct on the part of states creates serious problems of legal vacuum, political insecurity and profound injustice. The situation requires rectification, ideally through the establishment of international laws of war termination which are codified and effectively observed.”<sup>57</sup>

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*the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. POL’Y 419, 420 (1987).

<sup>54</sup> See generally CONFLICT TERMINATION AND MILITARY STRATEGY: COERCION, PERSUASION, AND WAR (Stephen J. Cimbala & Keith A. Dunn eds., 1987) (providing a general introduction to concepts of war termination); WAR AND MORALITY (Patrick Mileham, ed., 2004) (containing an excellent collection of contemporary articles discussing warfare and morality, focusing upon operations in Iraq and Afghanistan, compiled by the United Kingdom’s Royal United Services Institute for Defence and Security Studies).

<sup>55</sup> See OREND, *supra* note 20, at 218; Hague Regulations, *supra* note 53, arts. 32-41.

<sup>56</sup> Professor Orend remarks: “Those articles were ratified in 1907, and sound like it. Their quaint references to white flags and buglers, their vague commitments to military honour, their pedantic distinctions between general and local armistices, and the overwhelming emptiness of their nature renders these articles all but irrelevant in the current context.” OREND, *supra* note 20, at 218.

<sup>57</sup> *Id.* at 222. Professor Orend lists the benefits of having codified international laws regarding war termination:

1. At their most narrow, these laws would specify the content of minimally acceptable behaviour during war termination.



The lack of guidance in this area can cause nations to lengthen their strategic engagements, thereby escalating casualties and destruction. “Since [warring parties] have few assurances regarding the nature of the settlement, belligerents will be sorely tempted to keep using force to jockey for position.”<sup>58</sup> Additionally, the absence of standards may lead to inconsistent or disproportionate results, which can increase the chance of future aggression.

#### B. Jus Post Bellum in the Just War Tradition

The issue of a proper post-conflict resolution has also been elusive in the just war tradition. Just war theorists have traditionally been satisfied solely with analyzing and commenting on both the decision to go to war and the conduct within the war. They have historically neglected the discussion and scrutiny of a proper resolution to the war and the transfer from warfare back to peace.<sup>59</sup>

There is, however, historical precedent for jus post bellum considerations in the just war tradition. One can trace the roots of jus

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2. At their most broad, these laws would serve as shared standards of commitment and aspiration with regard to healing the wounds of war.

3. These laws would establish guidelines, or a kind of procedure, whereby belligerents could communicate to their opponents their intentions for action during postwar negotiations.

4. These laws would thereby help to stabilize and ground expectations of state behaviour during a very uncertain and delicate period, leading to shared modes of interpreting and evaluating peace treaties and mitigating reliance on prolonged fighting to strengthen position at the bargaining table.

5. In many instances, the laws will, if properly framed, express morally worthy aims, such as the protection of human rights, the minimization of postwar deprivation and suffering, the directing of punitive measures away from innocent non-combatants and the gradual transformation of the international system itself into one in which war is resorted to less frequently, with diminished rates of death and destruction.

*Id.* at 222-23.

<sup>58</sup> Brian Orend, *Justice after War*, 16 ETHICS & INT’L AFF. 43, 43 (2002).

<sup>59</sup> Perhaps this is because the majority of the intellectual debate among leaders, theologians and politicians usually occurs prior to initiation of hostilities and again during conflict. By the time the war concludes, the world focuses its attention on the next potential conflict arena.

post bellum back to the works of the German philosopher and just war theorist Immanuel Kant at the end of the eighteenth century.<sup>60</sup> Kant believed that any dialogue on war and morality must also logically encompass a discussion on post-conflict justice.<sup>61</sup> Kant recognized the existence of this third branch of the just war tradition and premised his jus post bellum analysis on the assumptions that the victor first engaged in and then fought a just war, or that jus ad bellum and jus in bello criteria were already satisfied.<sup>62</sup> Although he recognized the need to identify and discuss jus post bellum, Kant did not specify criteria for the category.

The discourse on jus post bellum seemingly disappeared after Kant's death only to resurface nearly two hundred years later. Although some just war scholars may point to prior vague references to war termination in their works or the works of others, the first unequivocal reference to jus post bellum, and accompanying distinguishable criteria, belonged to theologian Michael Schuck in 1994. Professor Schuck reintroduced the topic in a reflection upon the 1991 Persian Gulf War.<sup>63</sup>

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<sup>60</sup> See OREND, *supra* note 20, at 2, 217.

<sup>61</sup> See *id.* at 217.

<sup>62</sup> See *id.* at 223-24. The jus post bellum considerations are particularly linked to the jus ad bellum factors leading a nation to decide to embark upon war. Indeed, the very goal of going to war under jus ad bellum considerations is to obtain a better peace. See JOHNSON, *supra* note 13, at 3. While Kant believed that analysis of a proper war termination hinged on the victor first satisfying the jus ad bellum and jus in bello criteria, there is considerable value in analyzing jus post bellum considerations regardless of the successful satisfaction of the two prior prongs. This is especially true given the paucity of international guidance on postwar management.

Professor Brian Orend follows the Kantian approach, believing that one must premise a jus post bellum analysis upon the assumption that the victor already has satisfied the jus ad bellum and jus in bello prongs. He writes: "In my judgment, it is only when the victorious regime has fought a just and lawful war, as defined by international law and just war theory, that we can speak meaningfully of rights and duties, of both victor and vanquished, at the conclusion of armed conflict." Orend, *supra* note 58, at 44. However, even Professor Orend conducts his own application of his jus post bellum criteria to the 1991 Persian Gulf War after noting that he is not going to first concern himself about satisfying the prior Jus ad Bellum or Jus in Bello issues. See OREND, *supra* note 20, at 235. Thus, although he does not openly admit it, he too must see a value in analyzing jus post bellum regardless of satisfaction of the prior two prongs.

<sup>63</sup> See Michael J. Schuck, *When the Shooting Stops: Missing Elements in Just War Theory*, 3 CHRISTIAN CENTURY, Oct. 26, 1994, at 982. Professor Schuck became inspired to comment on jus post bellum after seeing a picture of U.S. General Norman Schwarzkopf, Commander of Central Command (CENTCOM) and of coalition forces during the 1991 Persian Gulf War, leading a postwar victory parade at Disneyworld alongside Mickey Mouse and Donald Duck. See *id.* Professor Schuck labeled the picture "a scandalous trivialization of war." *Id.*

After being largely absent during the preceding two thousand years of the just war tradition, the topic has received considerable attention and review as post-war operations continue in Iraq and Afghanistan. Because of the significant issues arising in connection with operations in those countries, many just war theorists are now discovering *jus post bellum* and offering their insights to illuminate and define this critically underdeveloped prong of the culture of war.

#### IV. Proposed *Jus Post Bellum* Criteria

This section presents and reviews ideas and criteria for analyzing *jus post bellum* proposed by three just war scholars.<sup>64</sup> The first set belongs to theologian Michael Schuck, who offered his criteria in the aftermath of the 1991 Persian Gulf War. The second is from Professor Michael Walzer, a prominent contemporary just war scholar. Although Professor Walzer has not yet succinctly itemized his criteria, his recent speeches and writings on the topic, predominantly reflecting on U.S. operations in Iraq and Afghanistan, sufficiently reveal his theories of *jus post bellum*. The third model is from Professor Brian Orend, who offers a detailed and comprehensive listing of *jus post bellum* criteria.

##### A. Professor Michael Schuck's Criteria

Michael Schuck, an associate professor of theology at Loyola University in Chicago, wrote a short article in *The Christian Century* in 1994, after the 1991 Persian Gulf War.<sup>65</sup> In the article, Professor Schuck asks: "If Christians are called upon to probe the moral propriety of entering and conducting war . . . should they not also be called upon to monitor the moral propriety of concluding a war through some set of *jus post bellum* principles?"<sup>66</sup> In response to his own query, Professor Schuck proposes the following *jus post bellum* principles: (1) repentance by the victor; (2) honorable surrender; and (3) restoration.<sup>67</sup> Professor

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<sup>64</sup> The author selected these three scholars for analysis based on the following reasons: Professor Michael Schuck was the first to propose distinguishable *jus post bellum* criteria; Professor Michael Walzer is widely regarded as the leading voice in just war theory; and Professor Brian Orend offers the most comprehensive proposal for *jus post bellum* criteria.

<sup>65</sup> See Schuck, *supra* note 63, at 982.

<sup>66</sup> *Id.*

<sup>67</sup> See *id.*

Schuck views his criteria “as a litmus test for the sincerity of the just war claims made before and during the conflict.”<sup>68</sup> Failure to comply with the jus post bellum requirements, according to Professor Schuck, undermines the prior jus ad bellum motives and rationale used by the victors.<sup>69</sup>

### 1. *Repentance*

The principle of repentance is the “centerpiece”<sup>70</sup> of Professor Schuck’s jus post bellum considerations. “Victors would be expected to conduct themselves humbly after a war. Where public display is called for, victors should show remorse for the price of war paid not only by their comrades but also by the vanquished.”<sup>71</sup> Professor Schuck permits celebrations honoring the return of victorious soldiers, but proscribes “ethnocentric celebrations of victory”<sup>72</sup> meant only to celebrate the defeat of the vanquished nation. Professor Schuck notes that although this type of distinction “may seem marginal . . . in morality, margins often make all the difference.”<sup>73</sup> Theologian Kenneth R. Himes adds: “[Schuck’s] principle of repentance requires a sense of humility and remorse by the victors for the suffering and death that was brought about even in a just struggle. An appropriate sense of mourning is needed when Christians kill even if the killing is judged legitimate.”<sup>74</sup>

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<sup>68</sup> *Id.* at 983.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 982.

<sup>71</sup> *Id.* Over two thousand years ago, the Greek philosopher Plato cast his thoughts towards repentance when he “urged Greeks not to construct monuments to honor the victors of war . . . fearing that such public observances might fuel hard feelings and thus impede the healing progress.” Iasiello, *supra* note 4, at 41.

<sup>72</sup> Schuck, *supra* note 63, at 982.

<sup>73</sup> *Id.*

<sup>74</sup> Kenneth R. Himes, *The Case of Iraq and the Just War Tradition*, (Dec. 3, 2002), available at <http://www/wtu.edu/news/TheologiansCorner/12-3-02-Himes-JustWar-Iraq.htm>. Professor Schuck elaborates: “[Saint] Augustine thought that anyone, Christian or not, could participate in a just war and escape legal culpability. But to escape divine culpability a soldier must conduct himself in a manner free of cruelty, enmity and lust.” Schuck, *supra* note 63, at 984. Rear Admiral Iasiello places a moral responsibility on belligerents to help heal the warriors’ mental and emotional wounds from war, and to assist the warriors and their families back into the normalcy of humanity and society. *See* Iasiello, *supra* note 4, at 48-51.

## 2. *Honorable Surrender*

The second criterion, honorable surrender, is reflective of Professor Schuck's requirement that the victorious nation "construct the terms and method of surrender in a manner that protects the fundamental human rights of the vanquished. Proscribed by such a principle would be punitive terms (such as those of the 1919 Versailles Treaty) as well as methods that degrade the defeated."<sup>75</sup>

Professor Schuck perceives a need to end a war in a manner that allows former adversaries to overcome prior sources of strife and build upon a more harmonious future. Professor Schuck uses Union Major General (MG) Joshua L. Chamberlain's legendary dignified salute and acceptance of the surrender of Confederate MG John B. Gordon and the Confederate troops at the conclusion of the U.S. Civil War at Appomattox on 12 April 1865, as an illustration of honorable surrender.<sup>76</sup>

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<sup>75</sup> Schuck, *supra* note 63, at 982. The Treaty of Versailles was signed on June 28, 1919, in the aftermath of World War I between Germany and the victorious Allied armies of the United States, Great Britain, and France. The Treaty required Germany to surrender its overseas empire and one-seventh of its territory in Europe, including the valuable Alsace-Lorraine region; dismantled Germany's armed forces and forbade Germany to station troops or erect fortifications; denied Germany entry into the newly formed League of Nations; and required Germany to pay a sizable reparations bill. See LARRY H. ADDINGTON, *THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY* 158-59 (1984).

Failure to permit honorable surrender may only hasten a subsequent conflict. The "stigma" of signing such an onerous treaty along with the severe reparations undermined the newly established German Weimar Republic, plunged Germany into depression, and paved the way for the rise of Adolf Hitler, Nazism, and World War II twenty years later. JAMES L. STOKESBURY, *A SHORT HISTORY OF WORLD WAR II* 37-38 (1980). Rear Admiral Iasiello adds, "The absence of postwar vision [at Versailles] negated, for all practical purposes, any hope of a just and lasting peace." Iasiello *supra* note 4, at 38.

<sup>76</sup> See Schuck, *supra* note 63, at 982-83. MG Chamberlain ordered his Union troops to salute the defeated Confederate force as it approached the Union line. Upon seeing this, MG Gordon then turned to his men and ordered his Confederates to return the salute as they marched past the Union soldiers. Major General Chamberlain later described the scene as "honor answering honor." *Id.*; see also Iasiello, *supra* note 4, at 40-41 (describing the poise and honor of the surrender at Appomattox). The formal signing of the articles of capitulation, which paroled the Confederate Army, had occurred at the Appomattox Courthouse three days earlier, on 9 April 1865, between Union Lieutenant General Ulysses S. Grant and Confederate General Robert E. Lee. See JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 482 (1982).

### 3. Restoration

Professor Schuck intertwines his requirement for an honorable surrender with his final principle of restoration. He supports his criterion of restoration on the notion that “for many innocent victims, the war continues after surrender.”<sup>77</sup> Most often it is those who are least able to fend for themselves who are affected the greatest in the aftermath of war—the children, the sick and the elderly.<sup>78</sup> Professor Schuck demands that the victors “return to the fields of battle and help remove the instruments of war,”<sup>79</sup> such as landmines, to prevent death and destruction from continuing long after the military forces have obtained their tactical and strategic objectives.<sup>80</sup> In some situations, Professor Schuck would also require that the victors assist in rebuilding the social infrastructure of the vanquished nation.<sup>81</sup>

#### B. Professor Michael Walzer’s Criteria

Although jus post bellum considerations are a recurring topic of his recent writings and speeches, Professor Walzer has not yet succinctly proposed criteria for the matter. An analysis of his contemporary works, however, yields helpful insights into his beliefs on a just peace.<sup>82</sup>

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<sup>77</sup> Schuck, *supra* note 63, at 983; *see also* Iasiello, *supra* note 4, at 44-45 (noting that children and other noncombatants not only suffer directly as a result of losing families, homes, life support means, and a sense of normalcy, but, also, indirectly through the lingering effects of uranium munitions and defoliating agents).

<sup>78</sup> *See* Iasiello, *supra* note 4, at 44-45. Rear Admiral Iasiello comments that in post-war situations when basic resources and life sustaining objects are scarce, children, the sick, and the elderly suffer and die in “disproportionate numbers” in comparison to the “more influential or powerful segments of society.” *Id.* at 45.

<sup>79</sup> Schuck, *supra* note 63, at 983.

<sup>80</sup> *See* Iasiello, *supra* note 4, at 45-47 (arguing that belligerent nations share a duty, and the international community should hold these countries accountable, to restore the environment to a condition that existed ante bellum).

<sup>81</sup> *See* Schuck, *supra* note 63, at 983; *see also* Himes, *supra* note 74 (analyzing Professor Schuck’s criteria and suggesting a fourth principle of “establishing a civil society” to accompany Professor Schuck’s principle of restoration). “The principle of establishing a civil society complements the principle of restoration by extending ‘basic infrastructure’ to include not just the material infrastructure of roads, electricity, and communication but the human infrastructure for peaceful communal life” such as police and judicial functions. Himes, *supra* note 74.

<sup>82</sup> The majority of the analysis of Professor Walzer’s beliefs evolves from the text of a speech Professor Walzer presented to the Heinrich Böll Foundation in Berlin, Germany, on July 2, 2002. *See* Michael Walzer, Address Given at the Heinrich Böll Foundation, Berlin, Germany: Judging War (July 2, 2002), available at [http://www.boell.de/downloads/aussen/walzer\\_judging\\_war.pdf](http://www.boell.de/downloads/aussen/walzer_judging_war.pdf) [hereinafter Walzer Address]. The analysis also relies heavily upon Professor Walzer’s book, *Arguing About War*, published in 2004,

For Professor Walzer, a sensible baseline for defining the existence of a just peace is when “the unjust aggression [is] defeated and the status quo ante restored.”<sup>83</sup> Professor Walzer, however, is not satisfied with simply restoring conditions to their pre-conflict status, observing that, “[t]he object in war is a *better* state of peace.”<sup>84</sup> Professor Walzer remarks that the term “better, within the confines of the argument for justice, means more secure than the *status quo ante bellum*, less vulnerable to territorial expansion, safer for ordinary men and women and for their domestic self-determinations.”<sup>85</sup> Not only is returning to a status quo prior to the beginning of the conflict likely impossible as a result of the physical devastation of war, a return to prior conditions would be of little practical use since the prior setting was such that war was deemed justified and initiated.

After moving beyond the conclusion that the status quo ante bellum is insufficient, Professor Walzer’s writings focus on the necessity of reconstruction.<sup>86</sup> One may capture Professor Walzer’s framework on reconstruction and, in essence, his thoughts on jus post bellum, by using his concepts of local legitimacy and closure.<sup>87</sup>

### 1. Local Legitimacy

For Professor Walzer, one important aspect of reconstruction and jus post bellum is ensuring the government in the vanquished, former aggressor nation, is legitimate.<sup>88</sup> In discussing legitimacy, Professor Walzer notes:

The goal of reconstruction is local legitimacy. The new regime has to be non-aggressive and non-murderous,

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which contains several of his recent essays on Iraq and Afghanistan. *See generally* WALZER, *supra* note 12. Professor Walzer is a vocal opponent of the U.S. decision to go to war with Iraq in 2003, and is critical of the U.S. postwar plans for Iraq. *See id.* at 165. Professor Walzer exhorts warring nations to engage in jus post bellum considerations at the beginning of hostilities and notes, “occupying powers are morally bound to think seriously about what they are going to do in someone else’s country.” *Id.*

<sup>83</sup> Walzer Address, *supra* note 82.

<sup>84</sup> WALZER, *supra* note 18, at 121 (quoting B.H. LIDDELL HART, STRATEGY 338 (1974)) (emphasis added).

<sup>85</sup> *Id.* at 121-22.

<sup>86</sup> *See* Walzer Address, *supra* note 82.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

obviously, but it also has to command sufficient support among its own people so that it isn't dependent on the coercive power of the occupying army.<sup>89</sup>

Professor Walzer emphasizes that a victor nation may not use the requirement for local legitimacy as subterfuge to impose democracy upon non-democratic vanquished nations: "Democracy is the strongest form of local legitimacy, but not the only one."<sup>90</sup>

Professor Walzer attaches great importance to freedom of choice and existing national sovereignty and believes that jus post bellum permits installing a new regime in a vanquished nation only under extreme circumstances.<sup>91</sup> It is more important to Professor Walzer that the government that exists after the war in the vanquished nation be one that its citizens recognize and accept as legitimate. Professor Walzer adds: "We want wars to end with governments in power in the defeated states that are chosen by the people they rule—or at least recognized by them as legitimate—and that are visibly committed to the welfare of those same people (all of them)."<sup>92</sup>

## 2. Closure

The second important jus post bellum tenant for Professor Walzer is closure. On one level, closure implies simply "impos[ing] some constraints on the future war-making capacity of the aggressor state."<sup>93</sup> Denying the defeated aggressor the ability to wage future war may appear as an effective means to create a lasting peace.<sup>94</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* Professor Walzer believes that the government of a vanquished nation can forfeit its right to rule when that government has embarked on repeated acts of aggression or is a murderous regime. *See id.* Professor Orend believes that Professor Walzer does not advocate an "expansive view on forcible rehabilitation . . . because of the great value he attaches to political sovereignty, to shared ways of life, and to free collective choice—even if these end up failing to express the degree of domestic human rights fulfillment that we in Western liberal democracies might prefer." Orend, *supra* note 58, at 51.

<sup>92</sup> WALZER, *supra* note 12, at 164.

<sup>93</sup> Walzer Address, *supra* note 82.

<sup>94</sup> As shown by the Treaty of Versailles, however, subjecting a defeated Germany to overly oppressive and unrealistic military limitations had the opposite effect. *See supra* note 75 and accompanying text (discussing the terms of the Treaty of Versailles).



On another level, closure also requires personal accountability for actions and decisions. Professor Walzer believes that closure and personal accountability may occur through the conduct of war tribunals. "There can be no justice in war if there are not, ultimately, responsible men and women."<sup>95</sup> Professor Walzer, however, does not view war tribunals as a necessity for a just peace, and instead, offers a proportionality test. He favors the trial and punishment of aggressive political leaders, but only so long as those proceedings do not extend the war in terms of either time or costs.<sup>96</sup> He believes that in some circumstances, lengthening the war may create disproportionate costs and effects upon the civilian populations that outweigh the value of conducting war tribunals.<sup>97</sup>

### C. Professor Brian Orend's Criteria

Professor Brian Orend, in his book, *War and International Justice: A Kantian Perspective*, provides a comprehensive contemporary proposal for jus post bellum criteria.<sup>98</sup> Professor Orend begins his analysis with the general proposition that a just ending to a conflict must encompass the following objectives: "1) rolling back aggression and reestablishing the integrity of the victim of aggression as a rights-bearing political community; 2) punishing the aggressor; and 3) in some sense deterring future aggression, notably with regard to the actual aggressor but perhaps also, to some extent, other, would-be aggressors."<sup>99</sup>

Professor Orend links his concept of jus post bellum closely to the existing rubric of the just war tradition. The titles of his five jus post bellum criteria are similar to the traditional jus ad bellum and jus in bello criteria, although the substances vary.<sup>100</sup> Professor Orend's jus post bellum criteria include: just cause for termination; right intention; public declaration, legitimate authority and domestic rights-protection;

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<sup>95</sup> WALZER, *supra* note 41, at 288.

<sup>96</sup> See Walzer Address, *supra* note 82.

<sup>97</sup> See *id.*

<sup>98</sup> See OREND, *supra* note 20, at 217-63.

<sup>99</sup> *Id.* at 226.

<sup>100</sup> The six traditional jus ad bellum criteria are just cause, right intention, proper authority and public declaration, last resort, probability of success, and macro proportionality (proportionality of good versus evil). See *supra* note 46 and accompanying text (providing a definition of the jus ad bellum criteria). The two traditional jus in bello criteria are micro proportionality and discrimination. See *supra* note 52 and accompanying text (defining the jus in bello criteria).

discrimination; and proportionality.<sup>101</sup> Professor Orend also ties into the existing just war tradition by asserting that a serious violation of any one of his five jus post bellum criteria can undermine the entire jus ad bellum rationale for going to war.<sup>102</sup> In extreme cases, he argues, the violation can provide a just cause for the aggrieved party to resume hostilities.<sup>103</sup>

### *1. Just Cause for Termination*

Professor Orend's first criterion is a just cause for termination. It is his most substantive principle, and his other criteria are principally devolved from it. This criterion encompasses Professor Schuck's notion of restoration, along with many of Professor Walzer's ideas on local legitimacy and closure.<sup>104</sup> Professor Orend believes that a warring nation must cease fighting once there is vindication of the prior underlying causes leading to the just resort to war.<sup>105</sup> "To go beyond that limit would itself become aggression: men and women would die for no just cause."<sup>106</sup> Professor Orend adds:

A state has just cause to seek termination of the just war in question if there has been a reasonable vindication of those rights whose violation grounded the resort to war in the first place. Not only have most, if not all, unjust gains from aggression been eliminated and the objects of

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<sup>101</sup> See OREND, *supra* note 20, at 232-33.

<sup>102</sup> See *id.* at 233.

<sup>103</sup> See Orend, *supra* note 58, at 56. Professor Orend posits:

Any serious defection, by any participant, from these principles of just war settlement should be seen as a violation of the rules of just war termination, and so should be punished. At the least, violation of such principles mandates a new round of diplomatic negotiations – even binding international arbitration – between the relevant parties to the dispute. At the very most, such violation may give the aggrieved party a just cause – *but no more than a just cause* – for resuming hostilities. Full recourse to the resumption of hostilities may be made only if all the other traditional criteria of *jus ad bellum* are satisfied in addition to just cause.

*Id.*

<sup>104</sup> See *supra* Parts IV.A.3 and IV.B.1-2 (discussing Professor Schuck's notion of restoration and Professor Walzer's theories on local legitimacy and closure).

<sup>105</sup> See Orend, *supra* note 58, at 46.

<sup>106</sup> *Id.*

Victim's rights been reasonably restored, but Aggressor is now willing to accept terms of surrender which include not only the cessation of hostilities and its renouncing the gains of its aggression but also its submission to reasonable principles of punishment, including compensation, *jus ad bellum* and *jus in bello* war crimes trials, and perhaps rehabilitation.<sup>107</sup>

Professor Orend incorporates the idea of rehabilitation into his criterion of a just cause for termination. Rehabilitation, according to Professor Orend, can "require some demilitarization and political rehabilitation [of the aggressor], depending on the nature and severity of the aggression it committed and the threat it would continue to pose in the absence of such measures."<sup>108</sup> Rehabilitation can encompass total political restructuring for the aggressor, although Professor Orend believes that complete restructuring is only necessary in the most severe cases.<sup>109</sup> In those instances, the victim and vindicator nation must contribute in paying the costs of the rehabilitation of the aggressor.<sup>110</sup> Professor Orend, however, is less cautious than Professor Walzer in the area of rehabilitation and allows for the piercing of national sovereignty for minor political restructuring, while noting that any rehabilitation still "need[s] to be proportional to the degree of depravity inherent in the [aggressor's existing] political structure."<sup>111</sup>

Additionally, Professor Orend links his concept of punishment to his criterion of a just cause for termination. For Professor Orend, proper punishment includes requiring that an aggressor nation provide

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<sup>107</sup> OREND, *supra* note 20, at 232.

<sup>108</sup> Orend, *supra* note 58, at 47.

<sup>109</sup> *See id.* at 50. Professor Orend points to World War II and Nazi Germany as an aggressor nation and regime warranting complete political rehabilitation. *See id.* He also states that the rehabilitation efforts of the Allies after World War II in both Japan and West Germany are illustrative of the scope and commitment required by the victorious side. *See id.* at 50-51; *see also infra* notes 143-144 and accompanying text (discussing several examples of rehabilitation).

<sup>110</sup> *See* Orend, *supra* note 58, at 50.

<sup>111</sup> *Id.* at 51. In some instances, Professor Orend believes that minor rehabilitation may suffice such as instituting basic human rights programs, reforming the military, police and judiciary, and verifying election proceedings. *See id.* Professor Walzer is more concerned with violating national sovereignty and focuses more on the local legitimacy of the government in the aggressor nation rather than the degree of depravity, reserving political restructuring for only the most heinous regimes. *See supra* Part IV.B.1 (discussing Professor Walzer's concepts of national sovereignty and local legitimacy).

restitution to the victim nation for “at least some of the costs incurred during the fight for its rights.”<sup>112</sup> Professor Orend cautions, however, against overreaching and attempting to exact too much from the aggressor nation.<sup>113</sup> He reminds his reader that “to beggar thy neighbor is to pick future fights,”<sup>114</sup> as demonstrated by the punitive terms placed on Germany after World War I.<sup>115</sup> Professor Orend also cautions that one must balance the desire to make a victim whole with the need to preserve the basic human rights of the citizens of the aggressor nation.<sup>116</sup> Professor Orend’s concept of punishment also encompasses war crimes tribunals; however, he discusses this mechanism under his second criterion of right intention.<sup>117</sup>

## 2. *Right Intention*

Continuing his desire to place his jus post bellum criteria under the existing just war framework, Professor Orend titles his second criterion right intention. He notes: “A state must intend to carry out the process of war termination only in terms of those principles contained in the other *jus post bellum* rules. Revenge is strictly ruled out as an animating force.”<sup>118</sup>

Professor Orend’s second principle, however, has little to do with the jus ad bellum criterion of the same name<sup>119</sup> and instead, focuses primarily on war crimes tribunals. Professor Orend draws a distinction between jus ad bellum and jus in bello violations when discussing tribunals. He agrees with Professor Walzer that one must weigh the benefit of conducting a war crimes tribunal for a jus ad bellum violation against the potential for additional destruction and suffering.<sup>120</sup> For jus in bello violations, Professor Orend is less cautious, emphasizing only that the vindicator nation must look inward, as well as outward, to

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<sup>112</sup> Orend, *supra* note 58, at 47.

<sup>113</sup> *See id.* at 48.

<sup>114</sup> *Id.*

<sup>115</sup> *See supra* note 75 (discussing the terms of the Treaty of Versailles).

<sup>116</sup> *See* Orend, *supra* note 58, at 47.

<sup>117</sup> *See* OREND, *supra* note 20, at 232.

<sup>118</sup> *Id.*

<sup>119</sup> The jus ad bellum criterion of right intention states that a nation must fight a war only for a just cause. *See supra* note 46 and accompanying text (defining the jus ad bellum criterion of right intention).

<sup>120</sup> *See* Orend, *supra* note 58, at 53; *see also supra* Part IV.B.2 (discussing Professor Walzer’s thoughts on war tribunals).

investigate war crimes. “[T]he just state in question must commit itself to symmetry and equal application with regard to the investigation and prosecution of any jus in bello war crimes.”<sup>121</sup>

### 3. *Public Declaration, Legitimate Authority, Domestic Rights-Protection*

Professor Orend’s third criterion is very straightforward. “The terms of the peace must be publicly proclaimed by a legitimate authority . . . and domestic rights must be fulfilled just as readily as external rights.”<sup>122</sup> There must be a public presentation stating the parameters of the peace to the people who have suffered through the destruction and turmoil of warfare.<sup>123</sup> Professor Orend does not require the populace to endorse the peace settlement, nor does he dictate a proscribed form or treaty for presentation, only that the proclamation by the legitimate authority is public.<sup>124</sup>

### 4. *Discrimination*

Traditional just war lexicon uses the jus in bello term “discrimination” to differentiate between combatants and non-combatants.<sup>125</sup> Professor Orend uses this same term in his jus post bellum discussion to differentiate between the moral culpability of the aggressor elites and the innocence of the civilian population. He writes:

In setting the terms of the peace, the just and victorious state is to differentiate between the political and military leaders, the soldiers and the civilian population within

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<sup>121</sup> OREND, *supra* note 20, at 232. Professor Orend recommends that “an impartially constructed international tribunal” try all violations of jus in bello, regardless of whether they occur on the side of the aggressor or vindicator. Orend, *supra* note 58, at 54.

<sup>122</sup> OREND, *supra* note 20, at 232.

<sup>123</sup> See Orend, *supra* note 58, at 55. Professor Orend concedes that occasionally there is a need for secrecy in diplomatic negotiations (such as the Cuban missile crisis); however, this need for secrecy does not exist after a full-scale war. See *id.* at 54-55.

<sup>124</sup> See *id.* at 54-55. The jus ad bellum criterion of proper authority and public declaration likewise requires that the appropriate authority make the decision to go to war public. See *supra* note 46 and accompanying text (defining the jus ad bellum criterion of proper authority and public declaration).

<sup>125</sup> See *supra* note 52 and accompanying text (defining the jus in bello criterion of discrimination).

Aggressor. Undue and unfair hardship is not to be brought upon the civilian population in particular: punitive measures are to be focused upon those elites most responsible for the aggression.<sup>126</sup>

This principle correlates with Professor Orend's concept of compensation mentioned in his first criterion of a just cause for termination.<sup>127</sup> "Respect for discrimination entails taking a reasonable amount of compensation only from those sources that can afford it *and* that were materially linked to the aggression in a morally culpable way."<sup>128</sup> The monetary compensation that the aggressor is required to provide to the victim "ought to come, first and foremost, from the personal wealth of those political and military elites in Aggressor who were most responsible for the crime of aggression."<sup>129</sup>

### 5. *Proportionality*

Professor Orend again uses a familiar just war term for his final criterion.<sup>130</sup> He advocates for an element of proportionality in a just peace while linking rights vindication to his first principle of a just cause for termination. "Any terms of peace must be proportional to the end of reasonable rights vindication. Absolutist crusades against, and/or draconian punishments for, aggression are especially to be avoided. The people of the defeated Aggressor never forfeit their human rights."<sup>131</sup>

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<sup>126</sup> OREND, *supra* note 20, at 232.

<sup>127</sup> In his first jus post bellum criterion, Professor Orend states that one factor to use in determining if a just cause for termination exists, is whether the aggressor nation is willing to provide compensation to victims. *See id.*

<sup>128</sup> Orend, *supra* note 58, at 48.

<sup>129</sup> *Id.* Professor Orend feels that this is feasible since the regime elites in aggressor nations historically tend to be wealthy, often as a direct result of abusing their leadership positions. *See id.*

<sup>130</sup> The just war tradition employs the term proportionality in both jus ad bellum and jus in bello. In jus ad bellum, it is the requirement for a state to weigh the potential good that can occur from using force to stop an evil from occurring or continuing to occur, against the potential for harm and destruction that can occur from the use of force. *See supra* note 46 and accompanying text (defining the jus ad bellum use of the term proportionality); *see also* JOHNSON, *supra* note 1, at 28, 34-35 (providing additional insight into the application of this criterion in jus ad bellum). In jus in bello, proportionality refers to weighing the potential military benefit of an action against the potential for harm done to non-combatants and property. *See supra* note 52 and accompanying text (defining the jus in bello use of the term proportionality).

<sup>131</sup> OREND, *supra* note 20, at 232-33

Proportionality in a just peace, according to Professor Orend, rarely permits a vindicator nation to seek unconditional surrender.<sup>132</sup> “Such a discriminating policy on surrender may be defensible in extreme cases, involving truly abhorrent regimes, but is generally impermissible.”<sup>133</sup> Professor Orend is concerned that such an inflexible standard can cause fighting to continue beyond what is necessary to achieve the original rights vindication, leading to unjustified deaths and destruction.<sup>134</sup>

## V. The Author’s Criteria

The *jus post bellum* criteria proposed in this section incorporate many of the ideas of Professor Schuck, Professor Walzer, and Professor Orend; include concepts from international law; and draw from lessons learned from recent military operations. The intent is to provide criteria for a general application within the just war framework, rather than make specific recommendations pertinent to the contemporary situation in Iraq or Afghanistan. The criteria are entitled: (1) seek a lasting peace; (2) hold morally culpable individuals accountable; and (3) extract reparations. These *jus post bellum* criteria are a political responsibility, similar to the *jus ad bellum* criteria. Therefore, although military leadership may assist, accomplishment of these criteria falls within the power and prerogative of political leadership.<sup>135</sup>

### A. Seek a Lasting Peace (Political Restructuring)

Succinctly stated, a just peace must also aim to be a lasting peace. It is of little practical value and disproportionate to the cost of lives and resources expended to permit a nation to justly engage in war and successfully terminate a conflict, yet allow conditions to remain that permit violence and aggression to again erupt. Just war theory is ultimately about the “responsible use of force in response to

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<sup>132</sup> See Orend, *supra* note 58, at 46.

<sup>133</sup> *Id.*

<sup>134</sup> See *id.*

<sup>135</sup> For the United States, responsibility for conducting peace operations and coordinating the activities for U.S. executive branch employees statutorily falls under the purview of the U.S. Department of State through the Chief of Mission. See 22 U.S.C. § 3927 (2000). The statute, however, specifically excludes individuals under the command of the area U.S. military commander from the direct control of the Chief of Mission. See *id.*

wrongdoing.”<sup>136</sup> It is, therefore, irresponsible to fail to finish properly what a vindicator nation justly began as a means of last resort.

Gary J. Bass, Assistant Professor of Politics and International Affairs at Princeton University, advocates for an even more aggressive stance in circumstances in which a vindicator nation embarks on a just war in response to genocide.<sup>137</sup> In those situations, Professor Bass argues that the failure to accomplish *jus post bellum* successfully might act retrospectively to negate the previous *jus ad bellum* rationale.<sup>138</sup> “If a state wages war to remove a genocidal regime, but then leaves the conquered country awash with weapons and grievances, and without a security apparatus, then it may relinquish by its postwar actions the justice it might otherwise have claimed in waging the war.”<sup>139</sup>

How does the vindicator nation satisfy this criterion and seek a lasting peace? Conditions in the aggressor state that existed ante bellum leading to the unjustified actions must be altered, but states do not create wars; people, and in particular, regime elites, initiate them.<sup>140</sup> Thus, a

<sup>136</sup> JOHNSON, *supra* note 1, at 35.

<sup>137</sup> See Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384, 386 (2004).

<sup>138</sup> See *id.*

<sup>139</sup> *Id.* Professor Bass, however, limits his arguments to a situation involving genocide and remarks that in general “there should be a presumption against any right of the victors to reconstruct a defeated country.” *Id.* at 396.

<sup>140</sup> Professor Moore notes a logical, yet significant, distinction between regime elites in democracies and nondemocracies. A democratic leader will more easily conclude that a failed or imprudent war or aggressive act is, in simplest terms, not worth it because of the prospect that the democratic electorate will vote him out of office. “Democracy internalizes these costs in a variety of ways including displeasure of the electorate at having war imposed upon it by its own government. And deterrence either prevents achievement of the objective altogether or imposes punishing costs making the gamble not worth the risk.” MOORE, *supra* note 2, at 43.

In contrast, the leader of a nondemocratic regime does not share that self-preservation concern. “Decision elites in nondemocratic nations, then, may be far more disposed to high risk aggressive actions risking major war and other disasters for their people.” *Id.* at 11. Professor Moore often uses a classroom analogy of a “heads-I-win, tails-I-lose” situation for a democratically elected leader who engages in international conflict. If the war effort succeeds, the democratic leader’s popularity soars (as did U.S. President George H.W. Bush’s immediately after the 1991 Persian Gulf War). If the war effort suffers, the democratic leader will suffer detrimental effects (as did U.S. President Lyndon Johnson with regard to Vietnam). By contrast, the leader of a nondemocratic nation faces a “heads-I-win, tails-you-lose” scenario and only the citizens in his country who may potentially die or lose their well-being experience the loss. See Steven Geoffrey Gieseler, *Debate on the ‘Democratic Peace,’* AM. DIPL. (Mar. 3, 2004), available at [http://www.unc.edu/depts/diplomat/archives\\_roll/2004\\_01-03/gieseler\\_de-bate/gieseler\\_debate.html](http://www.unc.edu/depts/diplomat/archives_roll/2004_01-03/gieseler_de-bate/gieseler_debate.html).



realization of a more lasting peace may require replacing regime elites and politically restructuring the aggressor nation. Calling for political restructuring, however, creates three pressing issues.

The first issue asks when is it permissible to change the political structure of the aggressor state. To answer this, consider the historical causes of war. Data shows that nations that respect the rule of law, have a representative form of government, and foster fundamental human rights<sup>141</sup> are less likely to engage in major international warfare.<sup>142</sup> Thus, to the extent that the prior government in the aggressor nation did not respect the rule of law, was unrepresentative of its people, and did not foster fundamental human rights, the criterion of seeking a lasting peace allows for some form of political restructuring.<sup>143</sup>

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<sup>141</sup> Although there is no definitive list of what is encompassed in the term “fundamental human rights,” the most informative is the Restatement (Third) of Foreign Relations Law of the United States (2003). See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (2003). The Restatement provides the U.S. position that certain fundamental rights have risen to the level of customary international law. See *id.* A state violates international law if, as a matter of policy, it “practices, encourages, or condones” any of the following: genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; violence to life or limb; hostage taking; punishment without fair trial; prolonged arbitrary detention; failure to care for and collect the wounded and sick; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights. *Id.*

<sup>142</sup> See MOORE, *supra* note 2, at 1-25. In support of the democratic peace theory, which posits that major war occurs rarely if at all between liberal democracies, Professor Moore cites to a study by Professors Rudy Rummel and Bruce Russett showing that between 1816 and 1991 there were 353 pairings of nations fighting in international wars, yet none of these wars was between democracies. See *id.* at 2. One may view Kant’s writings as the beginnings of the democratic peace paradigm. Kant, who introduced *jus post bellum* into the just war tradition, envisioned a republic where free people would naturally desire avoidance of war and as voting members could control the actions of the state. See Gieseler, *supra* note 140.

A separate study of democracies and dictatorships that were in existence from 1955 through 2002 “found that economic, ethnic, and regional effects have only a modest impact on a country’s risk of political instability. Rather, stability is overwhelmingly determined by a country’s patterns of political competition and political authority.” Jack A. Goldstone & Jay Ulfelder, *How to Construct Stable Democracies*, 28 WASH. Q. 9, 9 (2004). The study concluded that “the key to maintaining stability appears to lie in the development of democratic institutions that promote fair and open competition, avoid political polarization and factionalism, and impose substantial constraints on executive authority.” *Id.* at 10.

<sup>143</sup> One can point to several successful recent examples of political restructuring following conflict: Panama after the U.S. invasion, in 1989 (codenamed Operation Just Cause utilizing the *jus ad bellum* criterion), Bosnia-Herzegovina after the 1996 Dayton peace accords and Kosovo in 1999. See Daniel L. Byman & Kenneth M. Pollack,

The second issue concerns the scope of permissible restructuring. Professor Orend's theory of scaling the restructuring to "be proportional to the degree of depravity inherent in the [aggressor's existing] political structure"<sup>144</sup> is an appropriate solution for this issue. Professor Walzer is

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*Democracy in Iraq?*, 26 WASH. Q. 119, 126 (2003). The study of nations between 1955 through 2002, referenced by Goldstone and Ulfelder, suggested that all nations, regardless of wealth and internal tensions, have the potential for democratic institutions and stability. See Goldstone & Ulfelder, *supra* at 10. But see Janusz Bugajski, *Balkan in Dependence?*, 23 WASH. Q. 177, 177 (2000) (arguing that both Bosnia and Kosovo have become too reliant upon international institutions and risk a permanent dependence on the international community that will impede national self-determination).

<sup>144</sup> Orend, *supra* note 58, at 51. A recent example of a situation permitting major restructuring was Afghanistan after the fall of the Taliban regime in November 2001. The Taliban regime, a collection of former mujahedin and fundamental Islamic militia, took advantage of a power vacuum within Afghanistan that existed after the withdrawal of Soviet troops in 1989 and began seizing control over the country in 1994. See Zalmay Khalilzad & Daniel Byman, *Afghanistan: The Consolidation of a Rogue State*, 23 WASH. Q. 65, 66-67 (2000). The Taliban, Arabic for "religious students," imposed their version of strict Islamic rule upon Afghanistan by banning outside influences to include television, cameras and music. See Christopher L. Gadoury, Comment, *Should the United States Officially Recognize the Taliban? The International and Political Considerations*, 23 HOUS. J. INT'L L. 385, 386, 392 (2001). The Taliban condoned public tortures and executions, required men to wear beards, and stripped woman of nearly all rights, to include education. See *id.* at 392-93. In the months leading up to the September 11, 2001, attacks on the United States, only three nations, Pakistan, Saudi Arabia, and the United Arab Emirates officially recognized the Taliban as the government of Afghanistan. See *id.* at 386. The rest of the world refused to recognize the Taliban, citing to human rights abuses, involvement in drug production and trading, and harboring of terrorists. See *id.* at 386-87. On December 7, 2004, following the ouster of the Taliban and a three-year occupation by a coalition of international nations led by the United States, Hamid Karzai was inaugurated as President of Afghanistan, the nation's first democratically elected leader. See Eric Schmitt & Carlotta Gall, *Karzai is Sworn In, Citing a "New Chapter" for Afghanistan*, N.Y. TIMES, Dec. 8, 2004, at A8.

After World War II, complete political restructuring also occurred in Allied controlled Germany and in Japan. In Germany, an April 1945 Directive issued by the U.S. Department of State to the Supreme Allied Commander, General Dwight D. Eisenhower, outlined the basic objectives of the post-war military occupation in Germany:

The principal Allied objective is to prevent Germany from ever again becoming a threat to the peace of the world. Essential steps in the accomplishment of this objective are the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and demilitarization of Germany, with continuing control over Germany's capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis.

right to caution against overreach, and there is a legitimate concern that accomplishing restructuring risks prolongs fighting and increased human and economic costs.<sup>145</sup> Professor Walzer is reluctant to pierce the veil of national sovereignty, except for the most heinous regimes.<sup>146</sup> This approach, however, is overly cautious. There is an essence of injustice, and a greater evil, to fight a just war risking lives, only to undermine the opportunity to obtain a long-term peace. When a failure to change will only revert to a status quo preceding the war, it brings the very *jus ad bellum* justification for the war into question.

The third pressing issue poses the question who is responsible for enacting restructuring, if it is indeed necessary. The answer is that there may be, and likely should be, several responsible parties. Clearly, there is a role for the victor's military if it becomes an occupying force.<sup>147</sup> The

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Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, April 1945, <http://usa.usembassy.de/etexts/ga3-450426.pdf>.

In Japan, U.S. General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan, directed a six-year military occupation that oversaw a revision of the country's laws, a new constitution focusing upon human rights and social justice and the creation of a new Japanese legislature, the Diet. See David B. Rivkin Jr. & Darin R. Bartram, *Military Occupation: Legally Ensuring a Lasting Peace*, 26 WASH. Q. 87, 94-95 (2003).

<sup>145</sup> Concerning Operation Iraqi Freedom, critics outside of the just war tradition usually focused on other objections to political restructuring and planned democratization. Among the claims asserted were: Iraq was not ready for democracy; the Iraqi society was too fragmented; the ideological makeup of the country would taint the results; and the internal community would not provide the long-term commitment of support to Iraq. See Byman & Pollack, *supra* note 143, at 119-34 (refuting these objections and providing historical counter-points).

<sup>146</sup> See *supra* note 91 and accompanying text (discussing Professor Walzer's reluctance to intrude on national sovereignty). The struggle between enforcing principles such as fundamental human rights and self-determination while restraining from interfering in the internal affairs of a sovereign state is complex and even exists in the Charter of the United Nations. Article 1 of the Charter lists "self-determination," "human rights," and "fundamental freedoms" as purposes and goals of the United Nations. U.N. Charter art. 2, paras. 2-3. Article 2, paragraph 7, of the Charter, however, prohibits nations from "interven[ing] in matters which are essentially within the domestic jurisdiction of any state." U.N. Charter art. 2, para. 7; see also Pascal Boniface, *What Justifies Regime Change?*, 26 WASH. Q. 61, 63 (2003) (discussing the historical basis in the Charter of the United Nations for this balance between self-determination and sovereignty).

<sup>147</sup> If there is an occupation, the occupying force is obligated to take certain measures within the occupied territory. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Hague Regulations, *supra* note 53, art. 42; FM 27-10, *supra* note 53, para. 351. A military occupation "does

leaders of the local populace, private agencies, non-governmental organizations (NGOs), and perhaps a coalition assembled under the banner of the United Nations will also have substantial roles and functions in this process.<sup>148</sup> The ability of these various entities to work together, understanding their conflicting missions, visions and requirements, will determine success or failure.<sup>149</sup>

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not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.” FM 27-10, *supra* note 53, para. 358.

The occupying force has several obligations to administer as the government in the occupied country as noted in the 1907 Hague Regulations and the 1949 Geneva Convention Relative to the Protection of Civilian Personnel in Time of War. *See* Hague Regulations, *supra* note 53, arts. 42-56; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, arts. 47-48, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)]. “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Hague Regulations, *supra* note 53, art. 43. Subsequent Articles 44-56 in the Hague Regulation impose additional requirements upon the occupying force. *See id.* arts. 44-56.

Additionally, Section III of Geneva Convention (IV) adds provisions requiring the occupying state to take measures including: devoting special care for children, see Geneva Convention (IV), *supra*, art. 50; providing food and medical supplies to the local population, see *id.* art. 55; maintaining proper medical and hospital services, see *id.* art. 56; and ensuring the proper administration of justice, see *id.* arts. 64-78.

The law of occupation provided in the Hague Regulations and Geneva Conventions is severely dated and its applicability and validity in the modern landscape is questionable. *See generally* Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985) (stating that occupation law must become more contemporary and should borrow concepts from modern human rights law); David Scheffer, *Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT’L L. 842 (2003) (noting that the scope of modern day occupations exceed what existing occupation law envisioned); Robert D. Tadlock, *Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations*, 39 U.S.F. L. REV. 227 (2004) (arguing that existing occupation law prevents the occupier from changing foreign investment law to the benefit of the occupied nation).

<sup>148</sup> Not only will the magnitude of restructuring necessitate the involvement of many agencies and actors, allowing others to participate in the restructuring can reduce “the fear of imperial hegemony” that some critics currently possess regarding the “altruistic motives” of the United States in Iraq. Boniface, *supra* note 146, at 71; *see also* William J. Durch, *Picking Up the Peaces: The UN’s Evolving Postconflict Roles*, 26 WASH. Q. 195 (2003) (extolling the benefits of involving the United Nations in post-conflict situations).

<sup>149</sup> In particular, the desires of NGOs and the military are often at odds in post-conflict areas. The NGOs often request that the military provide general security such that there

As a model for post-war restoration, Rear Admiral Iasiello proposes a three-step process. The first step is that of a “protectorship,”<sup>150</sup> in which the victor provides security and basic life support to the populace of the occupied country, to prevent suffering or death. The second step is “partnership,”<sup>151</sup> in which the victor works with the forming local government to rebuild the economy and the society. The third step is “ownership,”<sup>152</sup> which represents the restoration of the vanquished nation’s “sovereignty and reentry into the community of nations. . . . [A]ll aspects of political, economic, and social life are returned to the control of the indigenous population. Interim political authorities are eventually replaced by elected officials, and these political figures assume full responsibility for security, critical infrastructure, and nation building.”<sup>153</sup>

Regardless of the process or the parties involved in the restructuring, the resulting government must be legitimate in the eyes of the world and

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is freedom to circulate amongst the population to reach out and accomplish their humanitarian missions. The NGOs wish to balance this assistance, however, with a need for the local populace to view them as politically neutral and impartial. They do not desire to associate with a certain military or political agenda. Militaries, by contrast, want to be able to control and monitor movement throughout their area of operations and may be reluctant to provide classified security and route information to those outside of direct military channels. The military may often look to utilize NGOs as a force multiplier in accomplishing its post-conflict stabilization objectives. The ability of the NGOs and the military to cooperate without compromising either’s objectives is often a difficult hurdle to clear. See WAR AND MORALITY, *supra* note 54, at 151-53 (discussing the relationship between NGOs and the military). For additional reading on the interactions between NGOs and the military in post-conflict situations, from the perspective of NGOs, see Jean-Michel Piedagnel, *Humanitarian Space*, in WAR AND MORALITY, *supra* note 54, at 143-45 (discussing the interaction of Médecins Sans Frontières (Doctors Without Borders) with the military in humanitarian operations); Roger Yates, *Relief—A Human Right*, in WAR AND MORALITY, *supra* note 54, at 139-41 (contrasting the NGOs role in stabilization operations with that of the military); Tim Yates, *Stabilization—For Real People*, in WAR AND MORALITY, *supra* note 54, at 147-50 (discussing the complexity of stabilization operations).

<sup>150</sup> Iasiello, *supra* note 4, at 42-43.

<sup>151</sup> *Id.* at 43-44.

<sup>152</sup> *Id.* at 44.

<sup>153</sup> *Id.* The difficult part may be for the victor and international community to provide a proper level of security and supervision during the “protectorship” and “partnership” stages without impeding the advancement of the national security apparatus and local government framework, thereby creating a situation of long-term dependency that will preclude “ownership.” See Bugajski, *supra* note 143, at 192 (arguing that “institutional dependence on foreign actors” is undermining long-term stability and self-determination in the Balkans).

its populace.<sup>154</sup> This requires establishing a government that abides by both international norms and the rule of law, while still embodying national standards and practices. To accomplish legitimacy, all parties must work together under a common vision to rebuild and repair the aggressor country as necessary.<sup>155</sup>

#### B. Hold Morally Culpable Individuals Accountable (War Crimes Tribunals)

Citizens of the aggressor nation, and indeed of the entire world, must see that there are direct, individual consequences for morally abhorrent behavior. Failure to pursue justice against morally culpable individuals after war may result in a peace that lacks a sense of closure. This failure is also counter to the first criterion of seeking a lasting peace. As Professor Walzer noted: “There can be no justice in war if there are not, ultimately, responsible men and women.”<sup>156</sup> Further, the failure to act may invalidate the government in an aggressor nation if aggressive leaders remain in power. If indeed, as Professor Walzer remarks, the

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<sup>154</sup> Professor Walzer’s requirement for local legitimacy in reconstruction is critical for stability. See *supra* Part IV.B.1 (discussing Professor Walzer’s requirement for local legitimacy). Professor Bass notes that creating a post-war government in a vanquished nation that the defeated populace both recognize and accept is not only “an obligation of justice,” but also an act of “political prudence.” Bass, *supra* note 137, at 392. Professor Bass points to the post World War I government in Germany, and quotes Winston Churchill: “The Weimar Republic, with all its liberal trappings and blessings, was regarded as an imposition of the enemy. It could not hold the loyalties or the imagination of the German people.” *Id.* at 393 (quoting WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: THE GATHERING STORM* 11 (1948)).

<sup>155</sup> This process will often require support for many years from the international community. In countries such as Iraq, where Saddam Hussein’s Ba’th regime facilitated the rule by the privileged Sunni minority over the Shi’a majority, even greater obstacles to embracing democratic principles abound. See Byman & Pollack, *supra* note 143, at 127, 129-32 (declaring that political stability in Iraq rests with the international community supporting a new Iraqi government, encouraging ideologically opposed representatives to work towards compromise, protecting Iraq from meddling neighbors, minimizing internal civil strife and ensuring domestic security).

Economic revitalization is often a necessary connected corollary to political restructuring. See Bathsheba Crocker, *Reconstructing Iraq’s Economy*, 27 WASH. Q. 73 (2004) (discussing the challenges of rebuilding Iraq’s economy in the aftermath of Operation Iraqi Freedom).

<sup>156</sup> WALZER, *supra* note 18, at 288.

general “object in war is a better state of peace,”<sup>157</sup> then one should view war crime proceedings as furthering this same goal.<sup>158</sup>

Holding morally culpable individuals responsible for their actions through tribunals is necessary for two primary reasons. First, conducting war crime proceedings provides a remedy for *jus ad bellum* and *jus in bello* violations. If the just war tradition offers certain criteria that a nation must meet before going to war, and other criteria that nations must abide by in warfare, it must also articulate a mechanism to hold those nations accountable that do not abide by the *jus ad bellum* and *jus in bello* criteria. Dr. Davida Kellogg, Adjunct Professor of Military Science at the University of Maine at Orono, uses a chess analogy to illustrate this point.

If Just War is undertaken to right wrongs done by a group or groups of people to another – if in fact the only acceptable reason for going to war is, as Michael Walzer and other Just War theorists contend, to do justice – then stopping short of trying and punishing those most responsible for war crimes and crimes against humanity which either led to war or were committed in its prosecution may be likened to declaring “checkmate” and then declining to take your opponent’s king. It makes no strategic sense, since the purpose for which war was undertaken is never achieved.<sup>159</sup>

To be complete and relevant, the just war tradition must integrate standards and principles of going to war and engaging in war with appropriate remedies for violations.

Secondly, war crimes tribunals may possess a deterrent effect, both for those who may seek unjustified war as well as for those who might otherwise seek retribution. As Professor Bass notes: “War crimes trials represent a powerful instantiation of the principles of just war theory, formally calling leaders to account for their violations of those tenets at

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<sup>157</sup> *Id.* at 121 (quoting B.H. LIDDELL HART, STRATEGY 338 (1974)).

<sup>158</sup> Professor Johnson adds that the establishment of war crime proceedings helps to institute the “rule of law” and to aid the “reconstruction of a civil society torn by conflict.” JOHNSON, *supra* note 1, at 206.

<sup>159</sup> Davida E. Kellogg, *Jus Post Bellum: The Importance of War Crimes Trials*, PARAMETERS, Autumn 2002, at 88.

the heart of *jus ad bellum* and *jus in bello*.”<sup>160</sup> The proceedings place other regime elites on notice of the potential ramifications of their actions. Tribunals can also generate public confidence in governmental institutions and in the orderly process of justice, while deterring victimized groups from seeking retribution on their own.<sup>161</sup> To that end, tribunals can aid in the healing and reconciliation process and validate the experiences of the victims.<sup>162</sup>

What should the scope and conduct of these trials be? The international policy on war crimes, the distinctions between grave and simple breaches, and the jurisdictional issues are complex and exceed the scope of this article.<sup>163</sup> There is, however, significant established

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<sup>160</sup> Bass, *supra* note 137, at 406. Moreover, meritorious prosecutions ensure that these leaders do not return to power.

<sup>161</sup> The process also aids civilians in the aggressor nation, who were the targets of national propaganda and misinformation, to understand the evils committed by the aggressor’s regime elites that prompted a resort to just war. See Major Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96, 154 (2001) (noting that tribunals can provide a powerful and positive introduction to civilians in formerly aggressive regimes on the role of justice and the rule of law).

Whether recent war crimes tribunals have been effective in generating public confidence in the legitimate process of justice is debatable. Unfortunately, negative views by the ruling government in a nation that is undergoing tribunals can undermine public confidence in the process. This has occurred in both Rwanda and Serbia as those national governments have taken actions to criticize and undermine the legitimacy of the international tribunal process. See INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? 83-100 (Steven R. Ratner & James L. Bischoff eds., 2004) [hereinafter MAKING A DIFFERENCE?]; Ambassador Manzi Bakuramutsa, *Identifying and Prosecuting War Criminals: Two Case Studies—the Former Yugoslavia and Rwanda*, 12 N.Y. L. SCH. J. HUM. RTS. 631, 643 (1995) (noting that in November 1994, when the U.N. Security Council adopted Resolution 955 establishing the Rwanda Tribunal, Rwanda, which was coincidentally an at-large member of the Security Council at the time, was the only one of the fifteen nations on the Security Council to vote against the resolution). As a result of negative actions by their own governments, citizens may not view the process as a means towards reconciliation, but rather “as an unavoidable and enforced precondition for . . . full return to the world community.” MAKING A DIFFERENCE?, *supra*, at 93.

<sup>162</sup> See generally MAKING A DIFFERENCE?, *supra* note 161, at 76-106 (discussing international tribunals and their impact on national reconciliation).

<sup>163</sup> The definition of a war crime is complex and hinges upon the multiple definitions for both war and crime. The term “war crime” is often generally defined as “a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.” FM 27-10, *supra* note 53, para. 499. War crimes are further broken down into grave breaches and simple breaches. Grave breaches differ from simple breaches in that grave breaches are those violations of the law of war that occur



precedent for pursuing war crimes tribunals. Several mechanisms exist to prosecute war crimes, to include the establishment of independent tribunals created by special arrangement for unique circumstances such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda,<sup>164</sup> and the International Criminal Court (ICC).<sup>165</sup> One can use these existing apparatuses as a template to construct a specific forum and procedure tailored to the precise post-war issues presented.<sup>166</sup>

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during international armed conflict and are committed against a protected person under one of the Geneva Conventions. The four Geneva Conventions list the categories of grave breaches which include offenses such as willful killing, torture, hostage taking and compelling a prisoner of war to serve in the armed forces of his enemy. The contracting parties to the Geneva Conventions are required to try individuals suspected of committing grave breaches. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-50, 6 U.S.T. 3114, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50-51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 129-30, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV), *supra* note 147, arts. 146-47.

<sup>164</sup> *See generally* GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE, THE POLITICS OF WAR CRIMES TRIBUNALS* (2000) (discussing the establishment and politics of five separate war crimes tribunals including: St. Helena in 1815 for the Bonapartists; tribunals in Leipzig and in Constantinople following World War I; Nuremberg following World War II; and the International Criminal Tribunal for the Former Yugoslavia); TIMOTHY P. MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS* (2001) (focusing on the tribunals for Japanese soldiers and officers, to include General Tomoyuki Yamashita, after World War II); *MAKING A DIFFERENCE?*, *supra* note 161 (focusing upon the tribunals for the Former Yugoslavia and Rwanda).

<sup>165</sup> *See generally* David L. Herman, *A Dish Best Served Not at All: How Foreign Military War Crimes Suspects Lack Protection Under the United States and International Law*, 172 MIL. L. REV. 40 (2002) (examining the sources of law for defining and prosecuting war crimes and providing a critique of the ICC); Lieutenant Colonel (LTC) Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001) (providing a critique of the principle of complementarity in the ICC that allows the ICC to impinge upon state sovereignty and complement any domestic trials for war crimes with an international tribunal); Major Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence*, 167 MIL. L. REV. 156 (2001) (noting concerns about the ICC and arguing that a move towards the ICC is a threat to U.S. national interests and may weaken the potential ability to use more effective military power).

<sup>166</sup> Major Spears advocates tailoring a system to try war criminals that is unique to each conflict: “[A] post-conflict system of justice must be tailored to meet the needs of the unique populations and consistencies that present themselves. Failure to do so will miss an opportunity to reconcile competing interests, while possibly setting the stage for future international armed conflict or civil war.” *See* Spears, *supra* note 161, at 153.

Regardless of the precise method used, the prosecution of war crimes tribunals should occur through a mechanism open to public scrutiny<sup>167</sup> and protective of the defendant's rights. Involvement by local judicial institutions is preferable, especially in high-level cases, since it strengthens the domestic legitimacy and acceptance of the process and results, and can help rebuild and reunite a divided nation.<sup>168</sup> As a practical matter, international involvement may be necessary since the local judicial system can be dysfunctional or seen as an unjust instrument of the former regime elites.<sup>169</sup> The international process, however, must actively incorporate local institutions and individuals to build a suitable judicial foundation and ensure continuity and sustainability.<sup>170</sup>

Professors Walzer and Orend advocate in favor of conducting a proportionality analysis before conducting war crimes trials.<sup>171</sup> They recommend balancing the benefit from the justice served by the trial, versus the potential for lengthening the conflict and additional bloodshed.<sup>172</sup> But that tradeoff fails to acknowledge that "justice is

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<sup>167</sup> One criticism of the rules for the International Criminal Tribunal for the Former Yugoslavia is that disclosure of the terms of a plea agreement is conducted in a closed judicial session outside of the view of the public and any victims. See MAKING A DIFFERENCE?, *supra* note 161, at 25-26.

<sup>168</sup> See Major Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, 70-76 (2002) (advocating for domestic enforcement measures in lieu of international criminal tribunals out of a concern that international tribunals politicize prosecutions, "de-legitimize already chaotic states," and lessen the domestic credibility of the final judgment); Rivkin & Bartram, *supra* note 144, at 98 (arguing that allowing Iraqi courts to prosecute former Iraqi regime elites for jus ad bellum and jus in bello violations would strengthen the legitimacy of the decisions in the Arab world); see generally Spears, *supra* note 161, at 154-55 (arguing that national commissions, courts-martial or domestic courts are appropriate and speedier forums for lower-level cases or cases that more appropriately, because of subject matter, fall under the jurisdiction of those forums).

<sup>169</sup> In Iraq, for example, the law enforcement and judicial institutions are often viewed by Iraqis merely as repressive instruments of the former Saddam Hussein regime. See Frederick D. Barton & Bathsheba Crocker, *Winning the Peace in Iraq*, 26 WASH. Q. 7, 9, 16-17 (2003).

<sup>170</sup> See Michele Flournoy & Michael Pan, *Dealing with Demons: Justice and Reconciliation*, 25 WASH. Q. 111, 112 (2002).

<sup>171</sup> See *supra* notes 96, 120 and accompanying text (discussing Professor Walzer and Professor Orend's views on war crimes tribunals).

<sup>172</sup> See *id.* Professor Bass also views the decision on war crimes tribunals as a proportionality analysis. "The duty of peace must outweigh the duty of justice . . . legal justice is one political good among many – like peace, stability, democracy, and distributive justice." Bass, *supra* note 137, at 384, 405. Professor Bass further notes that this compromise occurred in U.S. foreign policy as recently as Operation Iraqi Freedom. "Before the Iraq war, Donald Rumsfeld, the U.S. secretary of defense, floated the idea of

rarely served by ignoring injustice.”<sup>173</sup> The requirement to enforce jus ad bellum and jus in bello violations, the potential deterrent effects on other regime elites and victimized groups, and the ability to aid in the restoration of a war-torn society are all strong points advocating for the tribunals.

### C. Extract Reparations

In warfare, all sides to the conflict inevitably destroy property. After the war, society must rebuild, often at tremendous cost and effort. Where should the money necessary for reconstruction come from?

One should seek to have the costs imposed upon those who caused the war. Similar to the rationale behind conducting war crimes tribunals, requiring appropriate post-war reparations would deter those who would otherwise engage in aggressive warfare and deter victims’ individual acts of retribution. Additionally, requiring just reparations for victims can assist in providing closure. And, as Professor Bass logically concludes: “[t]he costs of economic restoration must be paid by someone, after all; it might as well be the aggressors.”<sup>174</sup>

Who exactly should pay the bill, and how can one create such a system? As to the first question, ideally a system of reparation would directly target those most responsible for the aggression. Professor Bass posits:

Ideally, the bill would be footed directly from the bank accounts of the aggressor leaders, but that will be difficult practically, and anyway would not be anywhere

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exiling Saddam and other top Ba’thists with *de facto* impunity from war crimes prosecutions as a ‘fair trade to avoid a war.’” *Id.* at 405; *see also* Steve R. Weisman, *Exile for Hussein May Be an Option, U.S. Officials Hint*, N.Y. TIMES, Jan. 20, 2003, at A1.

Professor Johnson argues that war crime proceedings should only occur in cases where there is “a pattern of atrocious conduct” since ongoing proceedings may prolong the road to peace. JOHNSON, *supra* note 1, at 204. Professor Johnson notes that “[w]ithin the framework of just war reasoning, the test of last resort needs to be passed before resort to force is finally warranted in moral terms, and it may also be well to think of the institution of war crimes proceedings in this way.” *Id.*

<sup>173</sup> Iasiello, *supra* note 4, at 48.

<sup>174</sup> Bass, *supra* note 137, at 408.

near enough. So some kind of broader taxation will be required. Since the defeated aggressor state retains its sovereignty, this could be seen as a partial national price for that sovereignty. The burden should fall as much as possible on war supporters and profiteers . . . . If a dictatorship has fallen, then the bank accounts of the thugs, probably lined by the exploitation of state power, could also properly be turned over to the freed public. Economic restoration must be kept within limits: there would be little point in taxing Afghans to pay for the reconstruction of lower Manhattan . . . .<sup>175</sup>

Professor Orend, in his criterion of a just cause for termination, recommends that a victor utilize a proportionality analysis to determine the ability of the aggressor to pay war reparations.<sup>176</sup> This is a sensible compromise that would ensure retributions are neither merely vindictive nor adverse to the establishment of a legitimate government.

Regarding the enactment of such a system, one can look to the United Nations under its Chapter VII authority<sup>177</sup> for historical experience and assistance. United Nations Security Council Resolution 687, adopted on 3 April 1991, established a reparations system after the

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<sup>175</sup> *Id.* at 408-09. The 1907 Hague Regulations permit an occupying force to “take possession of cash, funds, and realizable securities which are strictly the property of the [occupied] State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for military operations.” Hague Regulations, *supra* note 53, art. 53.

<sup>176</sup> See *supra* notes 113-114, 116 and accompanying text (discussing Professor Orend’s views on extracting restitution from aggressor nations); see also FM 27-10, *supra* note 53, art. 364 (“The economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.”).

<sup>177</sup> Chapter VII of the Charter of the United Nations, entitled, “Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,” encompasses Articles 39 through 51 of the Charter and grants the Security Council the power to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.” U.N. Charter art. 39. The Security Council may authorize measures short of force, to include “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” U.N. Charter art. 41. The Security Council may also authorize member States to employ military force should the lesser means provided for in Article 41 be inadequate. See U.N. Charter art. 42.

1991 Persian Gulf War through a claims adjudication process.<sup>178</sup> The reparations system affirmed Iraq's liability under international law for its unlawful invasion and occupation of Kuwait and established a system to compensate victims by creating a fund financed from Iraqi oil exports.<sup>179</sup>

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<sup>178</sup> See S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

<sup>179</sup> The relevant paragraphs of Resolution 687 state:

16. Reaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait;

17. Decides that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt;

18. Decides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund;

19. Directs the Secretary-General to develop and present to the Security Council for decision, no later than thirty days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 above and for a programme to implement the decisions in paragraphs 16, 17 and 18 above, including: administration of the fund; mechanisms for determining the appropriate level of Iraq's contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability as specified in paragraph 16 above; and the composition of the Commission designated above.

S.C. Res. 687, *supra* note 178. Security Council Resolution 687 is a lengthy and comprehensive resolution. "It is known amongst diplomats and lawyers as the 'mother of

As of May 2004, the fund, administered by the United Nations Compensation Commission, had resolved over 2.6 million claims from over eighty nations and awarded compensation of over \$48 billion.<sup>180</sup>

A more recent example from Iraq and Afghanistan is the Commander's Emergency Response Program (CERP). The CERP, originally funded from seized Iraqi Ba'athist funds and Iraqi oil sales proceeds, and later financed with U.S. Treasury Department appropriated funds, is used to provide money for humanitarian assistance and reconstruction efforts in Iraq and Afghanistan.<sup>181</sup> While the prior corruption of Iraq's regime elites, along with proceeds from oil sales,<sup>182</sup>

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all resolutions,' the longest resolution at the time." Christopher Greenwood, *Legal Justification for the Resort to Force*, in *WAR AND MORALITY*, *supra* note 54, at 44.

In August 1991, the Security Council passed Security Council Resolution 705, which allocated a cap of thirty percent of the annual value of Iraq's exports of petroleum and petroleum products to the reparations fund. *See* S.C. Res. 705, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/705 (1991).

<sup>180</sup> *See* David D. Caron, *The Reconstruction of Iraq: Dealing with Debt*, 11 U.C. DAVIS J. INT'L L. & POL'Y 123, 134-35 (2004). The status of the United Nations Compensation Commission (UNCC) claims processing as of May 7, 2004, was:

No. of claims left to be resolved	44,270
Compensation sought by claims left to be resolved (US\$ approx.)	82,620,139,000
No. of claims resolved	2,604,482
Compensation sought by claims resolved (US\$)	265,992,097,839
No. of resolved claims awarded compensation	1,507,374
Compensation awarded (US\$)	48,170,438,256

*See id.* at 135. As shown above, of the 2,604,482 claims resolved, the UNCC provided compensation on only 1,507,374 claims. This is a result of the UNCC both denying unsubstantiated claims as well as excluding claims that did not meet the definitional and jurisdictional requirements of paragraph 16 of Resolution 687. *See id.*

<sup>181</sup> *See* Major Kevin Huyser et al., *Contract and Fiscal Law Developments of 2003—The Year in Review*, ARMY LAW., Jan. 2004, at 195, 204; Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1. The initial funding for the CERP came from more than \$750 million (U.S.) hidden in caches by Ba'athist leaders and seized by U.S. soldiers in the days after the fall of Baghdad. *See* Martins, *supra*, at 3. Through coordination with the U.S. Treasury Department, the U.S. Department of Defense, the U.S. Office of Management and Budget, and the Coalition Provisional Authority, military commanders use these funds for vital reconstruction assistance projects in Iraq and Afghanistan. These funds not only assist in rebuilding those countries, but also, provide a means to employ numerous local national personnel and companies and infuse capital into their economies. *See id.* at 3-9.

<sup>182</sup> *See* Rivkin & Bartram, *supra* note 144, at 99 (arguing that the occupying powers may use Iraqi oil assets to recoup all costs for reconstruction following Operation Iraqi

offered a uniquely viable avenue with which to provide compensation, other novel avenues for reparations can be pursued in the future with aggressor nations.

## VI. Conclusion

For nearly two thousand years, the just war tradition has provided critical moral guidance on the initiation of war and on conduct during warfare. Today, the tradition must evolve to analyze and develop criteria to apply to *jus post bellum*. The author proposes three *jus post bellum* criteria: (1) seek a lasting peace (political restructuring); (2) hold morally culpable individuals accountable (war crimes tribunals); and (3) extract reparations. These criteria are an attempt to define the parameters of a just peace under the general framework of the just war tradition. The just war tradition should not be viewed as a mathematical formula by which to calculate the legality or permissibility of actions, but rather, as a tool to stimulate thought and debate about the morality of a given conflict. One must analyze and apply these *jus post bellum* criteria in a similar manner.

Arguably, the principles underlying *jus ad bellum* and *jus in bello* in the just war tradition fit most neatly when applied to a conventional armed conflict between states. There is, however, applicability of the criteria to all conflicts. Likewise, although the *jus post bellum* criteria are analyzed in terms of conventional armed conflict, they are also broad enough in scope to be applicable to the seemingly indefinite global war on terrorism. Indeed, it is precisely in this type of conflict that the need for post-conflict resolution criteria is most manifest. The alternative is to maintain the status quo of “winner’s justice.” That is much less desirable, especially if a nation finds itself on the “losing” side.

It is imprudent to debate the justness and morality of warfare without concerning oneself with the status of post-war justice. The post-war results must be morally consistent with the initial reasons for going to war. Technological might and superiority in battle may lead to military

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Freedom). The Hague Regulations support the ability of the occupying power to utilize the natural resources of the occupied nation: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.” Hague Regulations, *supra* note 53, art. 55.

victory, but the final judgment on winning the war will result from the attainment of a just and sustainable peace.