

Jus Post Bellum: Reflections on the Right Way to End a War

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*There can be no Justice in war if there are not, ultimately, responsible men and women.*¹

*If you break it you own it.*²

*Peace is not sought in order to provoke war, but war is waged in order to attain peace. Be a peacemaker, then, even by fighting, so that through your victory you might bring those whom you defeat to the advantages of peace.*³

War is tough stuff. It is, at the very least, the organized projection of death and mayhem by some group against another, generally for purposes of governance.⁴ Its justifications are myriad, running the gamut from self-defense, to humanitarian intervention, to national aggrandizement to whim and revenge. And yet, ironically, it is not the most heinous of human activities. As R. J. Rummel has noted in his discussion of *democide*, the murder of civilians by government agents acting authoritatively:

[I]n total, during the first eighty-eight years of this century [20th century], almost 170 million men, women, and children have been shot, beaten, tortured, knifed, burned, starved, frozen, crushed, or worked to death; buried alive, drowned, hung, bombed, or killed in any other of the myriad ways governments have inflicted death on unarmed, helpless citizens and foreigners. The dead could conceivably be nearly 360 million people. It is as though our species has been devastated by a modern Black Plague. And indeed it has, but a plague of Power, not germs.⁵

¹ Michael Waltzer, *Just and Unjust Wars*, A Moral Argument with Historical Illustrations 4th ed. (Basic Books:New York, 2006), 288.

² Secretary of State Colin Powell's advice to President Bush regarding the pending war in Iraq, 2002, referred to generally as the *Pottery Barn Rule*, as cited by Bob Woodward, *retrieved at* <http://www.buffalo.edu/ubreporter/archives/vol36n13/articles/Woodward.html>, 3/5/2010.

³ St. Augustine, Letter 189, to Boniface, in E.L. Fortin and D. Kries (eds.), *Augustine: Political Writings*, trans. M.W. Tkacz and D. Kries (Indianapolis: Hackett 1994) , 220.

⁴ Brian Orend, 'War,' *Stanford Encyclopedia of Philosophy* *retrieved at* <http://plato.stanford.edu/entries/war>, 03/26/2010, 1.

⁵ R.J. Rummel, *Death by Government* (New Brunswick: Transaction Publishers, 2000), 9. Rummel defines *democide* as the '...murder of any person or people by a government, including genocide, politicide, and mass murder.' 31. Rummel's statistics are chilling and bear repeating:

Not even considered thus far is the human cost of war-another way governments act as an agent of death. For the years 1740 to 1897 there were reportedly 230 international and revolutionary wars; according to one count, these wars killed 20,154,000 people. If with more tolerance for gross estimation we accept the calculations that have been made of those killed in all international wars since 30 B.C. we get the 40,457,000 dead shown in

Yet, a good deal of Rummel's *democide* has occurred in preparation for war, during war and, indeed, after war has officially ended.⁶ Whether one argues that war is *ever* a useful project in the conduct of affairs amongst men, it appears clear that humans have a long history of its use,⁷ that it is always terribly destructive,⁸ and recourse to arms does not appear to be going away any time soon. The good news is that there is a fairly robust articulation in both law and moral philosophy regarding a political entity's right to start a war-project and how war is to be conducted. On the other hand, these articulations have been confounded by a bewildering set of war paradigms that do not fit neatly into these old articulations. Further, these new types of force projections never seem to end. Finally, it appears clear that failure to end a war well, to win the peace, can

table 3.1. This is less than a third of the overall *democide* that we have been able to estimate. There should be little doubt that while pre-twentieth-century war has been of great historical interest and drama, governments have killed many times more people in cold blood than they have in the heat of battle.

Referring to the 20th century, including World Wars 1 and 11, Rummel continues:

Consider table 1.2 and figure 1.1: the list and its graph of this century's megamurderers-those states killing in cold blood, aside from warfare, 1 million or more men, women and children. These fifteen megamurderers have wiped out over 151 million people, almost four times the almost 38,500,000 battle dead from all this century's international and civil wars up to 1987,. The most absolute Powers-namely, communist USSR, China, and preceding-Mao guerrillas; Khmer Rouge Cambodia, Vietnam, and Yugoslavia, and fascist Nazi Germany-account for nearly 128 million of them, or 84 percent. 3.

⁶ Ibid. "I believe that war and *democide* can be understood within a common framework. They are part of the same social process: a balancing of power, where Power is supreme." 22.

⁷ See, for example, John Keegan, *A History of Warfare* (New York: Knopf 1993) and Donald Kagan, *On the Origins of War and the Preservations of Peace* (New York: Knopf Doubleday Publishing Group, 1996).

⁸ One is reminded of President Eisenhower's warnings regarding preparations for war in 1953:

Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who hunger and are not fed, those who are cold and are not clothed.

The cost of one modern heavy bomber is this: a modern brick school in more than 30 cities. It is two electric power plants, each serving a town of 60,000 population.

It is two fine, fully equipped hospitals. We pay for a single fighter plane with a half million bushels of wheat. We pay for a single destroyer with new homes that could have housed 8,000 people.

Retrieved at <http://www.quotedb.com/quotes/405>, 03/26/2010.

have catastrophic consequences and lead – even as the dead are buried, the monuments laid and the disabled march home – to future wars.⁹ Getting the peace *right*, then, must be considered as important as determining when and how to fight.

What is war?

The use of the term *war* occurs in many contexts and can, even with the best of intentions, lead to very sloppy discussions. At one level, there are the *wars on drugs, poverty* and the like which seem to connote an organized and focused effort at the eradication of a particular condition. Somewhere in the middle are a whole host of definitions which come out of domestic law and are meant to trigger certain legal ramifications such as trade restrictions, immigration procedures, emergency powers for governments in the area of civil rights, or rights and responsibilities under insurance contracts. On another level are definitions of war which speak to projections of force by states, each vying with the other in relative symmetry in order to obtain a peace which conforms to the aims and desires of the victor. Finally, there are those asymmetric contests which are fought by states and non-state actors and which arise out of guerrilla wars and insurgencies, wars of intervention, wars against terrorists and terror generally and proxy guerrilla wars.¹⁰

⁹ Even a cursory review of the manner in which World War 1 ended, for example, the failure to completely defeat the German army, the terms and conditions of the Treaty of Versailles, the lack of political will by the victors to enforce the terms of the Treaty, must bolster the argument that the peacemakers failed in their task of bringing World War 1 to a successful conclusion. See generally Margaret MacMillan, *Paris 1919* (New York: Random House 2003); Manfred F. Boemeke, Gerald D. Feldman, Elisabeth, eds., *The Treaty of Versailles, A reassessment after 75 Years* (Cambridge: Cambridge University Press, 1998).

¹⁰ Michael L. Gross notes that the dilemmas of asymmetric warfare turn on their head the assumptions and conditions of traditional war between states.

In each type of conflict, assessments of military necessity, just cause, combatant liability, noncombatant immunity, reciprocity, and concern for future peace will vary. In general asymmetric conflicts differ as a function of the actors involved, participants' goals or war aims, and the means they use to achieve them. Actors range from guerrillas and terrorists on the weaker side to states, coalitions of states, and international forces under UN auspices on the stronger side. Goals range from maintaining the status quo to changing it, and from defeating an enemy decisively in pitched battle to simply staving off defeat in the hopes of setting incontestable conditions for a political settlement...The means of war vary considerably. Some are conventional (missile and artillery) but many other means are unconventional and include torture, assassination, blackmail, terror, and nonlethal weapons.

Michael L. Gross, *Moral Dilemmas of Modern War, Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (New York: Cambridge University Press, 2010), 14.

A standard definition of war, one that carries with it many of the assumptions upon which the UN Charter and subsequent articulations of international law regarding constraints on war generally, appears in L. Oppenheim's treatise on International Law in 1952:

War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.¹¹

Another commentator, Yoram Dinstein, notes that

In large measure, the classification of a military action as either war or a closed incident ('short of war') depends on the way in which the two antagonists appraise the situation. As long as both parties choose to consider what has transpired as a mere incident, and provided that the incident is rapidly closed, it is hard to gainsay that view. Once, however, one of the parties elects to engage in war, the other side is incapable of preventing that development...

There is a marked difference between war and peace: whereas it requires two States to conclude and to preserve peace...it takes a single State to embroil itself as well as its selected enemy in war.¹²

A third commentator, Christine Gray, eschews the term *war* altogether as she discusses international law (IL) and the *use of force* generally, noting that that is the term which is used by the UN Charter in its prohibition.

Article 2 The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

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.¹³

There is a recognition in the 21st century that the classical peace/war dichotomy '...has lost its *raison d'être* with the outlawry of war and the blurring of the boundaries between conflict and peace.'¹⁴ This is especially true in internal armed violence which is reported to form, for example, 95% of all armed violence between 1995 and 2005.¹⁵

Given that *wars, conflicts, projections of force, uses of force and activities short of war* all have varying war aims, tend to use multiple methods of conventional and unconventional violence, have different levels of respect

¹¹ L. Oppenheim, *International Law*, 7th ed. H. Lauterpacht ed. (London: Longmans Green & Co., 1952). (1952).

¹² Yoram Dinstein, *War, Aggression and Self-Defense*, 4th ed. (New York: Cambridge University Press, 2005), 11.

¹³ Christine Gray, *International Law and the Use of Force*, 2d ed. (Oxford: Oxford University Press, 2004), 3.

¹⁴ Carsten. Stahn, 'Chapter 5 JUS POST BELLUM: MAPPING THE DISCIPLINE(S)' in Carsten Stahn, Jann Kleffner eds. *JUS POST BELLUM Towards a Law of Transition from Conflict to Peace* (The Hague: T.M.C. Asser Press 2008), 99.

¹⁵ See Human Security Report 2005, *The Changing face of Global Violence*, 18.

for civilian targets, and are fought by different groups of actors, traditional definitions of war as an activity reserved to states and constrained by state authority would appear to be less and less relevant.¹⁶

This is not to say, however, that all these categories of violence do not have some things in common. They all, it would appear, comprise elements of violent advocacy; that is, they all use levels of violence to obtain certain goals. While those goals may differ, humanitarian intervention vs. terrorist bomb attacks, violence in one form or another is the primary tool. Further, these activities are carried on by political communities, those who seek to impose their will on other groups through the use of violence. Finally, these activities violate the rights of others for the purpose of changing the way others operate.

Brian Orend melds these different characteristics in his definition of war as follows:

War should be understood as an *actual, intentional* and *widespread* armed conflict between political communities...War is a phenomenon which occurs only between political communities, defined as those entities which either are states or intend to become states (in order to allow for civil war). Classical war is international war, a war between different states... [B]ut just as frequent is war within a state between rival groups or communities...Certain political pressure groups, like terrorist organizations, might also be considered 'political communities' in that they are associations of people with a political purpose and, indeed, many of them aspire to statehood or to influence the development of statehood in certain lands.

Indeed, it seems that *all warfare is precisely, and ultimately, about governance*. War is a violent way for determining who gets to say what goes on in a given territory, for example, regarding: who gets power, who gets wealth and resources, whose ideals prevail, who is a member and who is not, which laws get made, what gets taught in schools, where the border rests, how much tax is levied, and so on. War is the ultimate means for deciding these issues if a peaceful process or resolution can't be agreed upon.

War, indeed, is governance by bludgeon.¹⁷

What is peace?

Peace is not the absence of war. As the discussion above indicates, *war* is a delicate subject susceptible to multiple definitions and interpretations. The construct of *peace* appears to carry with it the same problems. Henry Kissinger, amongst others, cautioned in 1974 that '...two world wars and an era of involvement and conflict should now have taught us that peace is a process, not a condition.'¹⁸ This conclusion has been bolstered in recent years by the considerable violence experienced in

Iraq and Afghanistan as well as in multiple peacekeeping operations throughout the world.¹⁹ The cessation of widespread and organized violence, then, does not automatically signal peace and yet its achievement appears to be among humanity's highest values.²⁰ R.J. Rummel speaks to the fragility of peace:

...peace is a property of conflict systems and a homeostatic of cybernetic property that enables the system, in the course of its dynamic path, to remain in some stated boundary. Where the boundary is drawn is not so important as the machinery by which the system stays within it wherever it is drawn. Most conflict systems exhibit what might be called a 'Break boundary' at which the system suddenly changes into another or passes some point of no return in its dynamic process. Thus, marital conflict may lead to separation or divorce, industrial conflict may lead to strikes, personal conflicts may lead to fisticuffs at the lower end of the social scale or to litigation at the upper end, and international relations may degenerate into war.²¹

Finally, Rummel notes some of the characteristics of peace:

...peace as a social contract is active, not passive. It is created through negotiation, adjustment, resolution, decisions. It comprises predictions (expectations) about the future. It is manifested through cooperative interaction. Its existence depends on congruence with the balance of powers. It is a phase in the dynamics of the conflict helix.

¹⁹ Serena K. Sharma, 'Chapter 1: RECONSIDERING THE JUS AD BELLUM/JUS IN BELLO DISTINCTION' in *Jus Post Bellum*, 29.

²⁰ Rummel takes note of this occupation:

Consider: 'Peace at any price.' 'The most disadvantageous peace is better than the most just war.' 'Peace is more important than all justice.' 'I prefer the most unjust peace to the justest war that was every waged.' 'There never was a good war or a bad peace.' [footnotes omitted].

Yet, we agree little on what is peace. Perhaps the most popular (Western) view is as an absence of dissension, violence, or war, a meaning found in the *New Testament* and possibly an original meaning of the Greek word for peace *irene*...Peace, however, is also seen as concord, or harmony and tranquility. It is viewed as peace of mind or serenity, especially in the East. It is defined as a state of law or civil government, a state of justice or goodness, a balance or equilibrium.

Such meanings of peace function at different levels. Peace may be opposed to or an opposite of antagonistic conflict, violence, or war. It may refer to an internal state (of mind or of nations) or to external relations. Or it may be narrow in conception, referring to specific relations in a particular situation (like a peace treaty), or overarching, covering a whole society (as in a world peace). Peace may be a dichotomy (it exists or it does not) or continuous, passive or active, empirical or abstract, descriptive or normative, or positive or negative.

Rummel, *Understanding Conflict and War*, sec 2.1, 1-2.

²¹ Ibid, 28.

¹⁶ Gross, *Moral Dilemmas in Modern War*, 8-25.

¹⁷ Orend, 'War', 1-2.

¹⁸ Henry. Kissinger as cited in R.J. Rummel 'Chapter 2 What is Peace?' in *Understanding Conflict and War: v. 5 The Just Peace* retrieved at <http://www.hawaii.edu/powerkills/TJP.CHAP2HTM>, 03/26/2010.

By contrast, peace as the absence of violence or war is passive. True, it may be generated by negotiation and resolution. But the resulting peace is inactive, inert. It is a social void-something to build a wall around to protect and maintain. Any condition or structure or lack thereof constitutes such a peace as long as there is no social violence-even a desert without life.²²

Theorists from Aristotle to Michael Waltzer appear to agree that the aim of war must be peace, albeit a peace defined, at least in part, by the belligerents involved.²³ There is a good deal of literature regarding the rules which might apply to the making of peace and what goals peacemaking should have. These will be discussed below. It should be remembered, however, that most contemporary wars are fought by groups who have previously agreed to terms of peace in one form or another and that the '...average number of conflicts terminated per year in the 1990s was more than twice the average of all previous decades from 1946 onwards.'²⁴

What are the rules?

The big questions regarding war and peace have traditionally been articulated as follows:

When is war justified and who gets to do it? How should we conduct ourselves as we go about the business of war?

How should wars end and what does peace look like?

There are four traditions which dominate the response to these questions: *Just War Theory*, *International Law*, *Realist Theory*, and *Pacifism*. They all assume that war, however it is defined, is a scourge, an activity to be avoided if at all possible. Yet the first three

²² Ibid, 25-26.

²³ Brian Orend, 'JUST POST BELLUM: A JUST WAR THEORY PERSPECTIVE,' in *Jus Post Bellum*, 33.

²⁴ See Human Security Report 2005, *The Changing Face of Global Violence*, 53. Ironically, studies indicate that nationwide mortality rates overall appear to be dropping as well.

Several interrelated long-term changes have been driving this counterintuitive development:

- i) The average war today is fought by smaller armies and impacts less territory than conflicts of the Cold war era. Smaller wars mean fewer war deaths and less impact on nationwide mortality rates.
- ii) Dramatic long-term improvements in public health in the developing world have steadily reduced mortality rates in peacetime-and saved countless lives in wartime.
- iii) Major increases in the level, scope, and effectiveness of humanitarian assistance to war-affected populations in countries in conflict since the end of the Cold War have reduced wartime death tolls still further.

Human Security Report 2009, *The Shrinking Costs of War*, 1-3.

admit to the need to conduct war in various situations and articulate rules for the conduct of war as well.

Just War Theory

Just War Theory is a theory of ethics; it is a review of norms which seeks to determine when the inception of war is *just*, that is morally permitted; what conduct during a war is *just*, that is morally acceptable or constrained; and what are the conditions for a just peace, that is what *should* a peace look like. The question here is: what is mankind entitled to do *morally* when it comes to the conduct of war?²⁵ The history of Just War Theory is long, reaching back as far as Socrates and Aristotle, through Cicero and Augustine, Aquinas, Grotius, Suarez, Vattel and Vitorio to Michael Waltzer, considered the dean of contemporary Just War theorists.²⁶ Its origins are a synthesis between Greco-Roman and Christian values and as will be seen below, Just War Theory forms the basis for contemporary international law articulations. Its rules, as with much of Western moral philosophy, are found in theology or in the concept of natural law. And it can be said – without too much fear of contradiction and despite the carnage of the last 2500 years – to have influenced the conduct of war profoundly.

Just War Theory speaks to three often considered separate and distinct calculations regarding the conduct of war which answer the questions set out above. To begin a war (*jus ad bellum*), it must be considered *just*, that is the decision must conclude that there is a *just cause*; there must be a *right intention*; it must be conducted by *proper authorities*; it must be the *last resort*; and there must be a *probability of success*. Finally, and perhaps of considerable import to the question of how to end a war, there must be a determination of *proportionality*, the idea that the universal goods to be obtained outweigh the universal evils which can be foreseen.²⁷ These determinations are constraints in that they limit the use of war to a very discreet set of situations, such as self-defense, the defense of others, the protection of innocents and punishment of grievous wrong doing; define who can make the determination and who will be in charge of its conduct; and require some consideration of the results of the conduct before war is initiated. Together, these determinations constitute justification for unleashing the projection of force, committing what would otherwise be held to be murder and mayhem on others. They also

²⁵ A standard definition is as follows:

(adj) moral (concerned with principles of right and wrong or conforming to standards of behavior and character based on those principles) 'moral sense'; 'a moral scrutiny'; 'a moral lesson'; 'a moral quandary'; 'moral convictions'; 'a moral life.' wordnetweb.princeton.edu/perl/webwn, retrieved at <http://wordnetweb.princeton.edu/perl/webwn?s=moral>, 04/03/2010.

²⁶ See generally, James Turner Johnson, *The Just War Tradition and the Restraint of War* (Princeton, NJ: Princeton University Press, 1981); Walzer, *Just and Unjust Wars*.

²⁷ Orend, *War*, 5-9; see also, Dinstein, *War, Aggression and Self-defense*, 63-71.

provide *legitimacy* for the actor in that the violence can be said to be *minimally just*.

Even if a war is determined to be *just*, there are constraints on how the war *ought* to be fought (*Jus in bello*). A just actor must project violence within the constraints of morally acceptable behavior in order to insure that the violence is projected only on those who are identified as participating in the war with that degree of force necessary to accomplish the tactical and strategic tasks necessary to accomplish the just goals of the conflict. Terms such as *military necessity*, *discretion*, and *proportionality* in the use of violence help to frame this discussion. An actor, then, can be justified in the decision to project force and yet become an unjust actor by the manner in which it prosecutes that projection of force. Interestingly, there is a disturbing thread in Just War Theory that deemphasizes the rules regarding the conduct of war and emphasizes the reasons for going to war. The term *jus in bello*, for example, has little currency before the Enlightenment and really only moves to the forefront in the twentieth century.²⁸ There is an argument that ignores, or at least deemphasizes, the methodologies of war in the furtherance of a just cause. This argument implies that 1) if an actor's cause is *just*, it should not be constrained as to how it fights²⁹; and 2) the best way to bring a just war to an end is to direct all necessary force towards the destruction the

unjust enemy's ability to fight.³⁰ *Jus in bello* conduct has received most of its articulation as it became conflated with international law principles discussed below.

Just War theory does speak to the outcome of wars when it requires actors, as part of their calculus regarding the projection of force, to determine that the results reflect '...at least a *proportionality* of benefits to costs.'³¹ In order to make this determination, however, the question must be answered what is the purpose of a just war? How does one know whether the results are so terrible as to render the original purposes of the projection of force unjustified? Some traditionally have answered that the purpose of a just war is to reestablish the *status quo ante bellum*, that set of circumstances which existed before the war began. Waltzer, and others, disagree and argue for a result which is more secure and which reflects a more just state of affairs than existed before the war began.³² The rights of a community which have been violated and thus justify the use of force in defense of those rights should, it is argued, at the least, be capable of vindication. This formulation, of course, constrains the aggrieved party from taking actions which do more than vindicate rights lest that actor become an aggressor-unjust actor- as well. This is consistent with the overall purpose of just war theory, that being the setting of moral constraints on the aims, conduct, and results of war.³³

International Law (IL).

With the growth of the nation-state system, IL has come to the forefront in order to answer the important questions and regulate the conduct of war. First, it must be emphasized that IL is *positivist* rather than *normative*; it speaks, at its best, to the utilitarian purpose of making

²⁸ As one commentator notes:

...neither term [*just ad bellum* or *jus in bello*] can be found in the texts produced by other major publicists during the interwar years, nor, according to our investigations, were they used in the courses on war and peace given at the Hague Academy of International Law or in any other courses. The breakthrough occurred only after the Second World War, when Paul Guggenheim, another disciple of the School of Vienna, drew the terminological distinction in one of the first major international law treatises of the postwar era. A number of monographs subsequently took up the terms, which soon gained widespread acceptance and were launched on their exceptionally successful career. In a thesis written under Guggenheim's supervision and published in 1956, Kotsch gave them pride of place, treating them in a manner to which we have grown accustomed and which we now take for granted.

Robert Kolb, "Origin of the Twin Terms *just ad bellum*/*jus in bello*." *International Review of the Red Cross*, 1997 no. 320, 555 retrieved at <http://www.icrc.org/web/eng/siteeng0.nsf/iwplist163/d9dad4e8533daefc1256b66005affef,03/31/2010>.

²⁹ Ian Clark puts the question this way:

In a case where it is believed that there is only one just party to the conflict, that is, one party whose cause is just, why should that party be restrained in its prosecution of the war in the same manner as the unjust party? Since war is not a game, and we are not indifferent to its outcome in devising the rules which govern it, why should we prejudice the result by expecting the party which is fighting for a just cause to fight in such a way that it may lose?

Ian Clark, *Waging War: A Philosophical Introduction* (Oxford: Oxford University Press, 1990) 36.

³⁰ These arguments continue to have currency in the 21st century. Michael Gross, for example notes:

...there is preliminary evidence that targeted killings, aggressive interrogation, nonlethal weapons, and attacks on participating civilians (by either side) reflect emerging norms of warfare. Whether these norms are new rules or acceptable exceptions, they are far from the prohibitions and severe restrictions that currently characterize the laws of war.

Gross, *Moral Dilemmas of Modern War*, 238. See also General Colin Powell's proscriptions regarding the use of force wherein he contended that forces should only be deployed when national interest, commitment, and support have been established, but then there should be use of overwhelming force in the military encounter-rather than proportional response. Regarding the Iraqi Army in 1991, for example, he noted the war aim, 'first we're going to cut it off, then we're going to kill it.' Doug DuBrin, 'Military Strategy: POWELL DOCTRINE, Background, Application and Critical Analysis,' *Newshour Extra*, retrieved at http://www.pbs.org/newshour/extra/teachers/lessonplans/iraq/powelldoctrine_short.html, 03/31/2010; Ruth Wedgwood *Legal and Ethical Lessons of NATO's Kosovo Campaign* (Newport, Naval College 2002) 434-435; and Sharma, "Chapter 1 RECONSIDERING THE JUS AD BELLUM/JUS IN BELLO DISTINCTION," 28-29.

³¹ Brian Orend, "Justice after War," *Ethics and International Affairs*, v. 16.1 (Spring 2002).

³² Waltzer, *Just and Unjust Wars*, 119.

³³ Orend, "Justice after War," 46.

man-made rules which aid mankind in the conduct of war. It does not speak to what *ought* to be appropriate behavior amongst actors; rather it provides minimal standards of conduct which are adjudged by the community of international actors to be in their interest and to be useful in the constraint of the project of war. It assumes that war will occur and seeks to criminalize behavior in order to protect, where possible, the potential for peaceful relations. It is not *universal* except to the extent that all actors agree to its terms and it is not *immutable* because it accepts changes to the rules as the international community deems them appropriate through treaty agreements or customary practice.³⁴ As Carsten Stahns notes:

Moral theory and legal science share distinct origins and rationales and approach the relationship between *jus ad bellum*, *jus in bello* and *jus post bellum* from different angles. Moral philosophy is primarily concerned with the moral justification of warfare, under which the operation of the principles of *jus ad bellum*, *jus in bello* and *jus post bellum* is closely connected to the overall (just or unjust) cause of the recourse to force. International lawyers, by contrast, tend to view each of these categories as autonomous rules of behavior, with the aim of maximizing compliance and respect for human dignity. It is therefore not contradictory to construe *jus post bellum* differently in each discipline.³⁵

IL has, however, become conflated with just war principles as well as a whole host of other articulated human rights articulations. Just war theorists, then, are often bogged down in suggesting best practices for

actors which will be *useful* and IL commentators are often heard to speak in terms of *what is fair and right*.³⁶

The history of IL as it pertains to war is instructive. As nation-states eschewed normative and theological justifications for their existence and actions in the 17th and 18th centuries, states accepted their right to conduct war as a responsibility of statehood. The justice of a state's cause in the projection of force, then, lost a good deal of its validity; rather states conducted war as a matter of right in the exercise of their responsibility to pursue national policy.³⁷ How war was to be conducted, however, began to take preeminence, reflecting as it did age-old customary practices of warriors in the field. Purely utilitarian concerns abounded; treatment of fallen soldiers, prisoners of war, uninvolved civilians, destruction of non-military targets, use of new technologies. This movement acknowledged that *de facto* wars would continue but that if they were conducted in a particularly barbaric manner, the peaces to be obtained would not last. Revenge, rising out of the ashes of a particular conflict, might well stoke the fires of the next conflict, especially where armies were becoming democratized and ideological, and states lost the ability to turn the violence on and off at will. Thus, the exhortations of Abraham Lincoln during the American Civil War that

[w]ith malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds, to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may be achieved and cherish a just and lasting peace among ourselves, and with all nations.³⁸

A similar exhortation signed in St. Petersburg in 1868 recognized the purposes of war and the need to restrict certain weapons based on the following considerations:

Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war:

That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

³⁴ A standard definition reads as follows:

[L]aw is that element which binds the member of the community together in their adherence to recognized values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations...

The rules of international law must be distinguished from what is called international comity, or practices such as saluting the flags of foreign warships at sea, which are implemented solely through courtesy and are not regarded as legally binding. Similarly, the mistake of confusing international law with international morality must be avoided. While they may meet at certain points, the former discipline is a legal one both as regards its content and its form while the concept of international morality is a branch of ethics. This does not mean that international law can be divorced from its values.

Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 2.

³⁵ Stahn, "Chapter 5, Jus Post Bellum: Mapping the Disciplines" in *Just Post Bellum*, 112.

³⁶ Jack L. Goldsmith, Erick A. Posner, *The Limitations of International Law* (Oxford: Oxford University Press, 2005), 14-17.

³⁷ Thomas W. Smith, "The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence" *International Studies Quarterly*, v. 46, n. 3 (Sep., 2002), 358-59; Kolb, "Origins of the twin terms *jus ad bellum*/*jus in bello*," 554; James Turner Johnson, "The Just War Idea: The State of the Question," 23 *Social Philosophy & Policy* (2006).

³⁸ Abraham Lincoln's Second Inaugural Address (March 4, 1865) retrieved at <http://libertyonline.hypermall.com/Lincoln.lincoln-2.html>, 03/31/2010.

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity...³⁹

Thereafter, Conventions of various kinds and with various participants occurred to address a myriad of issues including what was called the *law of land warfare*. Through the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1864, 1928, 1929, 1949 and 1975, an extremely robust set of rules and proscriptions regarding conduct were enacted and ultimately agreed upon in part by most states forming the international community. Aligned with but separate from a set of rules dealing with personal human rights, this body of law has been denominated *international humanitarian law* (IHL). There are enforcement mechanisms as well including originally the Nuremberg Court system, multiple international courts and ultimately the International Criminal Court.⁴⁰

On a separate track, and primarily as a result of the catastrophes of World Wars One and Two, IL developed a response to the question regarding the justification for an actor's projection of force. Indeed, IL went well beyond the reasoning of just war theory and attempted to outlaw war altogether. Beginning with the League of Nation's Charter, through the Kellogg-Briand Treaty and finally the United Nation's Charter, IL outlawed war between states except in situations of self-defense or where the international community, through the U.N. Security Council, sanctioned it.⁴¹

Like all systems of constraint, especially on the international stage where there are minimal means to

enforce proscriptions, IL has had its failures.⁴² It struggles, for example, with the reality that all actors are not sovereign states and that evolving definitions of *war* are rarely covered by its articulations. Further, in a globalized world, conflicts that have previously been considered *domestic* now clearly affect the entire global community.⁴³ As Bill Nash, the American General responsible for peacekeeping operations in Bosnia-Herzegovina, noted, '[T]he first rule of nation-building is that everything is related to everything, and it's all political.'⁴⁴ An entire human rights regime has grown up since World War Two, which demands vindication not only of state's rights but also individual rights during and after war is conducted and there is a growing recognition that economic and social rights are entitled to equal pride of place with political and security rights. Finally, there are a whole host of actors who refuse to pay even lip service to the proscriptions of IL as they conduct force projection on the international stage. Post War conduct of actors is rarely addressed in IL. There are some discussions about the Responsibility to Protect (R2P)⁴⁵ and a fairly robust set of IL requirements for states in the law of belligerent occupation, but these have not found their way into binding treaties or custom or apply to only a very discreet set of circumstances.⁴⁶

⁴² Goldsmith, *the Limitations of International Law*, 225-26; David Kennedy, "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal* v.15 (Spring 2002).

⁴³ See for example, G. R. Lucas Jr., "From *Jus ad bellum* to *Jus Ad Pacem*: Rethinking Just War Criteria for the use of Military Force for Humanitarian Ends," in D. Chatterjee and D. Scheid (eds), *Ethics and Foreign Interventions* (Cambridge, Cambridge University Press, 2003).

⁴⁴ Nash, quoted in Orend, "Jus Post Bellum: A Just War theory Perspective," in *Jus Post bellum*, 48.

⁴⁵ The responsibility to protect (R2P) Doctrine appears to be an emerging norm which requires that when a state is either unwilling or unable to fulfill its responsibility to protect its own populations, UN members are obligated to take action to minimize human suffering. Most important, it involves the responsibility to prevent such atrocities from occurring, and if prevention fails, it requires states to react and rebuild. See generally, Gareth Evans, *the Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington D.C.: Brookings Institution Press, 2008).

⁴⁶ See generally, Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009).

The authority of an Occupying Power is not derived from the will of the people, and democracy is not of any functional relevance to the running of an occupied territory. Belligerent occupation is not designed to win the hearts and minds of the local inhabitants; it has military-or security-objectives, and its foundation is the 'power of the bayonet.' The jurisdictional rights of the military government in an occupied territory...stem from effective control alone. LOIAC [The Law of International Armed Conflict] offers the inhabitants of the territory vital safeguards against possible maltreatment by the Occupying Power. But belligerent occupation must be acknowledged for what it is and for what it is not. 35.

³⁹ Declaration of St. Petersburg: November 29, 1868 *retrieved at* http://avalon.law.yale.edu/19th_century/decpeter.asp, 04/02/2010.

⁴⁰ See, for example, Richard J. Goldstone, *For Humanity, Reflections of a War Crimes Investigator* (New Haven, Ct.: Yale University Press, 2000); Omer Bartov, Atina Grossman, Mary Nolan ed. *Crimes of War, Guilt and Denial in the Twentieth Century* (New York: The New Press, 2002); Gary Johnathan Bass, *Stay the Hand of Vengeance, The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000).

⁴¹ The UN Charter reads in pertinent part:

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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore peace and security.

Charter of the United Nations, CHAPTER V11: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION, Article 51 (1945) *retrieved at* <http://www.un.org/en/documents/charter/chapter7.shtml>, 03/30/2010.

Realism

While realism has had many twists and turns in its explanations over the years, for purposes of this paper it can be said that the doctrine has two purposes 1) to provide an explanation regarding how actors, especially states, act on the international stage and 2) to explain a set of assumptions upon which realist statesmen operate when they make decisions about when to go to war, how to conduct war, and how wars end. The doctrine has a long history ranging from Thucydides, Machiavelli and Hobbes to Hans Morgenthau, George Kennan, Reinhold Niebuhr, Henry Kissinger and Kenneth Waltz. Traditional realism speaks to power and security issues, the ability of states to survive and prosper in an anarchical world. Realists assume the appropriateness of war *if and only if* it is necessary to obtain a *national interest* and find it unreasonable for states to constrain themselves regarding the tools used to conduct wars or the ways that wars should end. Constraints and responsibilities found in just war theory and IL hold little cachet when measured against the absolute requirement for states to survive and prosper. The logic of Hobbes's dictum *Bellum omnium contra omnes*, the war of all against all, is often cited by realists to describe the state of the international community where there is no overarching governance to reign in the natural requirements of states to survive, one against the other.⁴⁷

There is a strain of realism, however, that speaks to the efficacy of restraints in war. In a globalized international environment where states find it more and more difficult to operate unilaterally, there is an interest in developing *soft* as well as *hard* power in order to survive and prosper. Charles Krauthammer, for example, notes the problem when dealing with the domestic political debate between realists [conservatives] and idealists [liberals] in the United States:

But here we come up against the limits of realism: You cannot live by power alone. Realism is a valuable antidote to the woolly internationalism of the 1990s. But realism can only take you so far.

Its basic problem lies in its definition of national interest as classically offered by its great theorist, Hans Morgenthau: interest defined as power. Morgenthau postulated that what drives nations, what motivates their foreign policy, is the will to power-to keep it and expand it.

For most Americans, will to power might be a correct description of the world-of what motivates

other countries-but it cannot be a prescription for America. It cannot be our purpose. America cannot and will not live by *realpolitik* alone. Our foreign policy must be driven by something beyond power. Unless conservatives present ideals to challenge the liberal ideal of a domesticated international community, they will lose the debate.

Which is why amongst American conservatives, another, more idealist, school has arisen that sees America's national interest as an expression of values.⁴⁸

In essence, there are benefits to cooperation – to the adherence to multilateral organizations and international law regimes – which are either too difficult to obtain or which cannot be obtained in a unilateral fashion. Going to war within the framework of UN constraints, conducting war within the legal proscriptions of the various Conventions, and even finishing a war by a long and expensive round of nation-building and development aid all have ramifications which unilateral action often cannot produce. Joseph Nye argues that *soft power*, which arises from the attractiveness of a country's culture, political ideals, and policies, is the ability of a state to persuade other states and actors to share its objectives or desired outcomes.⁴⁹ Adherence to restraints regarding conduct during war, for example, often benefits soldiers on the ground; adherence to treaties which ban certain types of weapons such as weapons of mass destruction can aid in the security of the domestic and foreign battlefield; and ensuring that states who have lost wars are able to reenter the international community on terms beneficial to both the victor and the defeated can lessen the possibility of war for the next generation. For realists, adherence to these restraints is not based on the *normative* philosophy of how states *ought* to act, nor is state conduct restrained by the legalisms of IL. Rather, adherence is based on the assumption that cooperation with other states coupled with *hard* power is in the national interest, leading to the state's ability to provide security and prosperity for its citizens.⁵⁰

Pacifism

Pacifism is a doctrine which objects to war outright, specifically to the kinds and degrees of violence that war involves, e.g. mass killing for political reasons. It references Gandhi's campaign against the British in India in the 1940's and Martin Luther King Jr.'s non-violent

⁴⁷ Victor Hanson, *Carthage and Culture: Landmark Battles in the Rise to Western Power* (New York: Random House, 2002); Henry Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994); Stephen M. Walt, "International Relations: One World, Many Theories," *Foreign Policy*, n. 110 (Spring 1998); H. J. Morgenthau, *Politics among Nations*, 7th ed. (New York: McGraw-Hill Companies, 2005); Kenneth Waltz "Realist Thought and Neorealist Theory," in *Controversies in International Relations Theory: Realism and the Neoliberal Challenge*, ed. Charles Kegley (New York: St. Martin's Press, 1995); John Mearsheimer, "The False Promise of International Institutions," *International Security* 19:3 (Winter 1994-95).

⁴⁸ Charles Krauthammer, "Democratic Realism, An American Foreign Policy for a Unipolar World," (Washington D.C. 2004), 13.

⁴⁹ Joseph Nye, *Soft Power: The Means to Success in World Politics* (New York: Perseus Books Group, 2004), 5-6.

⁵⁰ Krauthammer speaks in terms of democratic realism, for example:

And this is its axiom: We will support democracy everywhere, but we will commit blood and treasure only in places where there is a strategic necessity-meaning, places central to the larger war against the existential enemy, the enemy that poses a global mortal threat to freedom.

Krauthammer, "Democratic Realism," 16.

civil rights activities in the 1960s. It proposes that war is such a terrible human activity that it should be outlawed in all its forms and argues that the other theories which purport to constrain its conduct are routinely manipulated and distorted to make their restraints meaningless. Finally, it implores individuals to renounce the use of the projection of force as a matter of conscience. There is a long Eastern, as well as Western, tradition of the doctrine, in addition to religious and secular justifications for its arguments. In its purest form, however, it can be said that pacifism rejects any argument for the projection of force by states or other actors. It, therefore, does not need to concern itself with conduct during war or obligations which may attend the victor.⁵¹

THE RIGHT WAY TO END A WAR

Given the discussion above, it may be concluded that there is *no one right* way to end a war. The wide divergence in the justifications for the projection of force, e.g. response to a terrorist event or invasion of a state, for example; the nature of the conflict, e.g. conventional or unconventional asymmetric warfare; the practices used to prosecute the war, e.g. targeted killing, enhanced interrogation techniques or strict compliance with the *jus in bello* requirements of international humanitarian law (IHL) by one or both sides; and the manner in which the conflict is concluded, swift capitulation by a state, regime change, continued insurgency, aggressor victory etc. These and multiple other variables influence how the parties will act *post bellum*. And yet, the manner in which a conflict is concluded can make all the difference.

Principles regarding *jus post bellum* are at present incomplete and subject to considerable argument,⁵² yet the basic premise, found in *jus ad bellum* seems to apply. Before states can *morally* project force they must determine the *proportionality* of the results, that is does the foreseeable end outweigh the damage which the projection of force will inevitably cause? This just war

⁵¹ See, for example M. Ghandi, *Non-Violence in Peace and War, 1942-1949* (New York: Garland Publishing, 1972); Martin Luther King, *A Testament of Hope: the Essential Writing of Martin Luther King, Jr.* ed. J. Washington (New York: HarperOne, 1990); Bertrand Russell, "The Future of Pacifism," *The American Scholar* (13: 7-13 1943); Jenny Teichman, *Pacifism and the Just War* (Oxford: Oxford University Press, 1986).

⁵² M. Freeman, D. Djukie, "Chapter 11, JUST POST BELLUM AND TRANSITIONAL JUSTICE," in Stahn et al eds. *Jus Post Bellum*, 224. See also T. Seybolt, *Humanitarian Military Intervention, The Conditions for Success and Failure* (Oxford: Oxford University Press, 2008).

A great deal of ink has been spilled on this topic [human security as a justification for military intervention] already, much of it by international lawyers and moral philosophers whose legal and moral debates have shifted ground considerably since the end of the Cold War but whose arguments remain in a state of 'vincible ignorance' of empirical support. p.3.

See also, J. L. Holzgrefe, Robert Keohane eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).

theory requirement seems to imply that conflict can only be initiated where an actor determines that the end result will be less traumatic, especially to the innocent who will be affected, than the benefits to be obtained. There is a further implication here; should an actor determine the necessity for conflict, it must be prepared to, and indeed has a *moral* obligation to, right the economic, social, and political trauma which its conflict will create.⁵³

Brian Orend asks the question, what are the ends or goals of a just war? He provides the following answer:

The general answer is a more secure possession of our rights, both individual and collective. The aim of a just and lawful war, we know, is the resistance of aggression and the vindication of the fundamental rights of societies, ultimately on behalf of the human rights of their individual citizens. These values revolve around the concept of a minimally just and hence legitimate community. Such a community is one which does all it reasonably can to: (i) gain recognition as being legitimate in the eyes of its own people and the international community: (ii) adhere to basic rules of international justice and good international citizenship, notably non-aggression: and (iii) satisfy the human rights of its individual member (to security, subsistence, liberty, equality and recognition).⁵⁴

He suggests a number of principles which would be '...at least permissible with regard to a just settlement of a just war': (1) Rights vindication, (2) Proportionality and publicity, (3) Discrimination, (4) Punishment, (5) Compensation and (6) Rehabilitation.⁵⁵ He goes on to suggest some concrete guidance in order to affect a just result.

1. Adhere diligently to the laws of war during the regime take-down and occupation;
2. Purge much of the old regime and prosecute its war criminals;
3. Disarm and demilitarize the society;
4. Provide effective military and police security for the whole country. Work with a cross-section of locals on a new rights-respecting constitution which features checks and balances;
5. Allow other, non-state associations, or 'civil society,' to flourish;
6. Forego compensation and sanctions in favor of investing in and re-building the economy;
7. If necessary, revamp educational curricula to purge past propaganda and cement new values;
8. Ensure that the benefits of the new order will be; (i) concrete; and (ii) widely, not narrowly distributed; and

⁵³ Michael Waltzer, "Just and Unjust Occupation," *Dissent* (Winter 2004) and "Regime Change and Just War," *Dissent* (Summer 2006); Sharma, "RECONSIDERING THE JUS AD BELLUM/ JUS IN BELLO DISTINCTION," in *Just Post Bellum*, 29.

⁵⁴ Orend, 'JUS POST BELLUM: A JUST WAR THEORY PERSPECTIVE,' in *Jus Post Bellum*, 39.

⁵⁵ Ibid, 40-45.

9. Follow an orderly, not-too-hasty exit strategy when the new regime can stand on its own two feet.⁵⁶

Anyone who has spent any time working at peace-keeping, peace-making, nation-building or the provision of humanitarian aid knows that the devil is in the details. The above represent a fair checklist of discreet areas to be addressed should one actor intend to involve itself in the project of wholesale transition of a society from one set of values and political mechanisms to another. These are not inexpensive undertakings. As U.S. actions in Iraq and Afghanistan have demonstrated, accomplishing the above goals can take decades, contribute to multiple additional deaths and destruction and cause cultural collisions, which may never be healed. They represent, one might argue, very Western constructions of what a minimally just society *ought* to look like. Finally, they are open to the criticism that the enumerated responsibilities are akin to requiring actor A, who has been assaulted by actor B, to pay not only for the court proceedings used to vindicate his rights, but the psychological counseling necessary to cure the malady that caused actor B to act-out in the first place. Yet, the question remains, is an actor which has prosecuted a just war required to undertake these types of activities in order to be judged *moral*? Ethicists have yet to come to a consensus on this issue.⁵⁷

To date, international law does not specifically address conduct, post bellum, except in the area of IHL. Here, parties to conflicts argue that their ability to regulate the conduct of actors post-conflict is limited by the conditions on the ground, the emergent and often chaotic nature of the environment, the breakdown in civil authority, the lack of resources to create a robust civil society and other legal and actual constraints. There is considerable disagreement as to whether occupiers are bound to enforce the expansive human rights found in the various human rights treaties that bind, generally, signers of these treaties to treatment of individuals within their jurisdictions.⁵⁸ And international criminal courts, as a rule, restrict their prosecutorial jurisdiction to *grave* breaches of IHL, leaving lesser breaches of IHL

to the domestic criminal codes of actors. Yet occupiers, in a general sense, are staying longer, projecting force in and among civilians, and assuming responsibilities for the administration of civil society that were not originally contemplated by IHL. This legal *black hole* has been described by Charles Garraway as follows:

But not only are the actors on the battlefield changing, so is the battlefield itself. Soldiers are no frequently involved in post-conflict situations where the international rules are far from clear. What is the entitlement to use force during a period of occupation? Do 'combat rules' apply [IHL] or have we moved to a more threat based regime? And what is the position where 'major combat operations' may have ceased but violence persists? In Helmand province, some years after the initial intervention, United Kingdom and other NATO forces have been involved in what one senior officer described as the most intense fighting since the Korean War. But what law applies to the actions of those soldiers? On what basis are targeting decisions taken? The stark difference between status based and threat based legal regimes causes inevitable difficulties when operating in the grey area that is post-conflict...Indeed does the Convention-or the International Covenant on Civil and Political Rights-even apply in situations of this nature where troops are operating outside their national boundaries? These are issues over which there is strong disagreement, particularly within the United States, and yet for members of the armed forces, they are critical. They may represent the difference between a gallantry medal and a prosecution for murder.⁵⁹

While the realist tradition might well embrace Colin Powell's maxim that an immediate and clean exit strategy after the projection of force is appropriate to the vindication of the national interest, the reality on the ground is that in a globalized international environment definitions of national interest are less clear than they have been in the past and the ramifications of force projection, no matter how small, affect multiple sets of international actors now and in the future. What is the national interest, for example, for the invasion of Iraq? There are multiple answers. One might be the destruction of Saddam Hussein's ability to foster international terrorism and the proliferation of weapons of mass destruction. Another might be regime change in order to ensure that this particular dictator could no longer play havoc with the regional political order and thus disrupt the free-flow of energy, etc. A third interest might be the creation of the first Arab democracy in order to begin the development of a reasonably secure and peaceful region. Each of these tasks requires different levels of force projection, time-tables and commitments of blood and treasure. The same analysis holds for force projection in Sierra Leone, Bosnia-Herzegovina, the Democratic Republic of Congo, Rwanda, or Sudan.

⁵⁶ Ibid, 45-49.

⁵⁷ Interestingly, Orend moves beyond the question of morality and into the field of utility (realism?) and international law as he describes the above responsibilities.

I reply that war-winners, war-losers and the international community could all profit from clear standards, guidelines and benchmarks for behavior in difficult post-war scenarios. It is in all our interests to regulate behavior in post-war moments, and to channel it in the direction of minimal justice and political legitimacy. 52.

⁵⁸ Ralph Wilde, "ARE HUMAN RIGHTS NORMS PART OF THE JUST POST BELLUM, AND SHOULD THEY BE?" in *Jus Post Bellum*.

The question of the applicability of international human rights norms to situations of foreign occupation/administration, thereby forming part of the *jus post bellum* is as important as it is under-evaluated. 185.

⁵⁹ Charles Garraway, "THE RELEVANCE OF JUS POST BELLUM: A PRACTITIONER'S PERSPECTIVE," in *Jus Post Bellum*, 157.

How to use force, it is recognized, also carries with its ramifications for the future as well. No longer is the mission of the infantry always to 'close with and destroy the enemy.' The U.S. Army's Field Manual regarding the proper application of force notes:

Section V1-Rules of Engagement 2-66 The proper application of force is a critical component to any successful counterinsurgency operation. In a counterinsurgency, the center of gravity is public support. In order to defeat an insurgent force, US forces must be able to separate insurgents from the population. At the same time, US forces must conduct themselves in a manner that enables them to maintain popular domestic support. Excessive or indiscriminant use of force is likely to alienate the local populace, thereby increasing support for insurgent forces. Insufficient use of force results in increased risks to US and multinational forces and perceived weaknesses that can jeopardize the mission by emboldening insurgents and undermining domestic popular support. Achieving the appropriate balance requires a thorough understanding of the nature and causes of the insurgency, the end state, and the military's role in a counterinsurgency operation.⁶⁰

The lesson here is that while all politics is local, increasingly all politics is international as well; especially for those, like the United States, which benefit the most from the interconnectiveness of the global economic environment.

How to Judge a Successful End to Conflict?

While *just war theorists* seek conditions in a *post bellum* environment which outweigh the harms caused by war (constraints on starting a war) and *international law* speaks primarily to the conduct of actors in war, it may be the *utilitarians* or *realists* that stretch the continuum of responsibilities required of victors in the future (after the war).

Redefining national interest, then, may well require leaving the battlefield in a state that will not require a return for the next generation; cleaning up the battle space of weapons, setting conditions for security and economic growth, and insuring that those left behind are capable of joining the international community with a degree of domestic tranquility that permits global integration. Since these projects take time, hasty judgment adds little to meaningful analysis. Actors who would wage war need to remember, however, that war, no matter how it is defined, has never been cheap. Yet in a global world, the price of a failed peace can be even more expensive.

⁶⁰ FMI 3-07-22 Counterinsurgency Operations *retrieved at* <http://www.fas.org/irp/dodir/army/fm13-07-22.pdf>, 04/02.2010.