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JUS POST BELLUM: ASSESSING JUST WAR THEORY THROUGH APPLICATION TO THE WAR IN BOSNIA

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MDS

***JUS POST BELLUM* – ASSESSING JUST WAR THEORY THROUGH APPLICATION
TO THE WAR IN BOSNIA**

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ABSTRACT

This paper discusses the development of just war theory and the recently proposed addition of post-conflict just war criteria, known as *jus post bellum*. The historical roots and traditions of just war theory as they relate to *jus post bellum* are discussed, and evidence is presented to suggest that *jus post bellum* considerations are as old as the first writings that form the basis of modern just war theory. The challenges to traditional just war theory presented by contemporary conflicts are discussed as evidence of the requirement for a new addition to the existing theories. Finally, this paper discusses the principles of *jus post bellum* as developed by Brian Orend, from the perspective of the 1992-1995 war in Bosnia Herzegovina.

This paper intends to demonstrate that, while there is a clear value to Orend's principle's further development is crucial before they can be applied to a complex, contemporary conflict such as the war in Bosnia.

SECTION ONE – INTRODUCTION

It is often challenging to imagine that established theories, ingrained in teaching and understood and refined over decades or centuries, can be developed or added to in contemporary society. Certainly some specific military concepts change and are updated as a matter of routine. Tactics, doctrine, procedures and processes are under constant scrutiny by their military employers, and are reconsidered, adjusted and rewritten when and as required. On occasion, however, more fundamental concepts are demonstrated to have become out of date or in need of correction or expansion to reflect contemporary realities.

Just war theory is an example of this type of basic theory that is undergoing a significant period of consideration. Just war theory is philosophy rooted in history. Evidence of philosophers thinking about just war theory is nearly as old as the earliest written words of the ancients. From Roman law to Christian theology to reformation secularism to twentieth and twenty-first century legality, just war theory has underwritten the actions of warriors for millennia. It may be challenging, then, to consider these ancient theories, framed by the concepts of *jus ad bellum* and *jus in bello* as requiring more than minor adjustments to fit contemporary realities.

Naturally, these concepts are not static. They have been revised over time to reflect the conflicts of the day. And they have been processed and developed significantly, from their initial place in generalized and religious philosophy, to legal theory and finally to tangible, employable tools such as rules of engagement and soldier's cards.

However, the theories of *jus ad bellum* and *jus in bello* have indeed reached a point where a significant addition is required to improve just war theory's applicability to modern conflict. Where *jus ad bellum* and *jus in bello* address the morality of war at its pre-conflict and in-conflict stages, post-Cold War challenges have more often related to the post-conflict stage. Ending wars and leaving conflicts in a just manner, the basic tenets of a new theory of *jus post bellum*, adds a bookend to a tripartite just war theory: a philosophical beginning, middle and end.

Indeed, the addition of *jus post bellum* represents a significant development to just war theory. As a contemporary addition to this school of thought, the philosophy of *jus post bellum* has not yet been subjected to the same tests of time and circumstance as traditional just war theory. However, the seeds of *jus post bellum* were planted at the same time as just war theory was taking root, some 1500 years ago in the writings of St. Augustine.

Jus post bellum is now growing as a natural development of just war theory, born not only of logical progression of philosophical thought, but also of necessity precipitated by contemporary conflicts. Contemporary challenges to traditional just war theory, as evidenced by the conflicts in Iraq and Afghanistan suggest that even established theories of just war are challenged. Furthermore, these conflicts in Afghanistan and Iraq also highlight the existence of a transition period that defines the beginning of the *post bellum* phase. Traditional wars have typically been marked by a clear end to hostilities, characterized by the defeat of one party and the victory of another. Such has not been the case since the end of the Cold War. The requirement for development of *jus post bellum* is supported by the evidence that, where contemporary conflicts have failed to secure a

more just peace than existed pre-conflict, these wars have stretched on far longer than expected, and rapidly deteriorated into prolonged counter-insurgency operations.

In addition to this requirement for an extension of just war theory into the post-conflict phase, the 1992 – 1995 war in Bosnia Herzegovina (BiH) provides evidence that further refinement of the basic tenets of just war theory is now necessary. Many of the criteria of just war theory were broken during this conflict. It may then be concluded that the war in BiH was unjust. But the challenge is deeper than a simple pronouncement of justice. Indeed, consideration of the actors, both state and non-state; definitions of states within the context of just war theory; and the right to self-determination versus the sanctity of state sovereignty all serve to illustrate that traditional just war theory is inadequate for application to contemporary conflict. The established theories of *jus ad bellum* and *jus in bello* do not adequately address the just war challenges of an intrastate war of succession such as is represented by BiH.

The criteria developed by Brian Orend in his 2007 article in the *Leiden Journal of International Law*, “*Jus Post Bellum: The Perspective of a Just-War Theorist*” have been developed through an evolution of just war theory. Dr. Orend is a professor and Director of International Studies in the Department of Philosophy at the University of Waterloo. He has written extensively on the development of *jus post bellum* and in particular on the importance of human rights as they related to just war theory.¹ He is, therefore, one of the leading academics in the development of this aspect of just war theory.

¹ University of Waterloo, “Philosophy Faculty Members: Professor Brian Orend” <http://philosophy.uwaterloo.ca/people/orend.html>; Internet; accessed 28 March 2010.

However, as Orend himself suggests, further refinement of his principles is required before they can be applied to contemporary, non-traditional conflict.² Although Orend also states that he believes “these principles...apply as well to non-classical wars, such as multifactional civil wars with foreign intervention,”³ in a number of ways these principles do not apply to the peace solution in BiH. Furthermore, adherence to one of Orend’s principles seems to have reduced the level of justice brought to the people of BiH, particularly the Bosnian Muslims who were targeted by the Serbian sponsored genocide.

Peace in BiH is marked by two distinct and unique features. The first is the Dayton Peace Agreement (DPA) that acted as the negotiated instrument to end the conflict. Negotiated settlements of contemporary conflicts are unique in that there is not necessarily a clear victor. Indeed, avoiding distinguishing the parties to a conflict as victor and vanquished may be crucial to negotiating a peace agreement in the first place. The dissolution of Yugoslavia, the resulting conflict in Bosnia and the outcome of the DPA offer a perspective for application and development of *jus post bellum* in a negotiated peace environment.

The second distinguishing feature of *post bellum* BiH is, despite its establishment in the early days of the war, the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY). The perilous beginnings of the ICTY caused many to question its relevance or ability to make a meaningful contribution to post conflict justice in BiH. However, its successes beginning with the 1997 conviction of Duško Tadić and subsequent high profile war crimes cases have necessitated a re-examination of the

² Brian Orend, "Justice after War," *Ethics and International Affairs* 16, no. 1 (2002): 56.

³ Brian Orend, "Jus Post Bellum: The Perspective of a Just-War Theorist," *Leiden Journal of International Law* 20 (2007): 56.

ICTY's importance to bringing justice to the people of BiH and to the overall concept of just war theory and *jus post bellum*. These two unique elements of post-conflict BiH, the DPA and the ICTY, are naturally suited for examination of *jus post bellum* within the context of Orend's principles.

Thus, through development and analysis of contemporary just war theory, and by examining its principles from within the context of the complex, contemporary conflict of the BiH war for independence from the former Yugoslavia, it is clear that, while the principles of *jus post bellum* are a valid evolution of just war theory which may be applied to classical warfare, further development of these principles is fundamentally required before they can be applied to the complex realities of a contemporary conflict.

SECTION 2 – *JUS POST BELLUM*

It is hard to deny the enduring nature of human society's obsession with warfare. War and warfare stretch far back into human prehistory.⁴ Ethics, justice and related social sciences surely stretch as far back. Wars and their methods have continuously evolved, as have Western society's notions of justice. From their earliest roots in prehistory, these two sociological schools, war and justice, began to merge in the Christian era two millennia ago.⁵

Over time, the merger of these schools of thought developed into the theories of just war. Defined historically as *jus ad bellum* and *jus in bello*, these philosophical concepts have transitioned into a legal framework that today defines the way in which modern warfare is examined, considered and executed. Indeed, while certainly still topics of philosophical thought, the concepts of *jus ad bellum* and *jus in bello*, have transitioned from pure theory, to legal principles to tangible tools most readily demonstrated in rules of engagement and soldier's cards.

And yet these two related theories seem to leave a gap in the logical progression of thought. A beginning, middle and end to all things temporal seems to be a natural order. *Jus ad bellum* has formed the basis of thought regarding just reasons for entering conflict. And *jus in bello* has lead the development of ethical behaviour considerations in the conduct of war. Only recently, however, has philosophical thought been directed towards the completion phase of war.

⁴ Brian Ferguson, "War Before History," in *The Ancient World At War*, Philip De Souza, ed. (London: Thames & Hudson, 2008) 16.

⁵ Serena K. Sharma, "Reconsidering the *Jus Ad Bellum/Jus in Bello Distinction*, in *Jus Post Bellum*, Carsten Stahn, Jann K. Kleffner, eds., 9-30 (The Hague: TMC Asser Press, 2008) 9.

Inspired by developments in recent conflicts, philosophy is beginning to broach this new concept. Past instances where *jus post bellum* theory may or may not have been applied, whether or not the theory was explicitly considered, give insight into what a *jus post bellum* theory might include.

In fact, some of the earliest philosophical thought on just war theory contains the basic elements of *jus post bellum* criteria. In addition, as the present conflicts in Iraq and Afghanistan stretch into the second decade of the 20th Century, much practical thought has been given to conflict conclusion. Since the theory of *jus post bellum* is comparatively new, the philosophy of this concept has not transitioned from theory to a legal framework to a tangible process as existing just war theories have.

However, this section will show that *jus post bellum* is a natural development of just war theory, born of not only of logical progression of philosophical thought, but also of necessity precipitated by contemporary conflicts. Finally, this section will specify potential criteria for a theory of *jus post bellum*, with a lineage in just war theory, and applicability not only to present conflicts but also to those past.

Augustinian Just War Theory

Philosophers and theologians first applied their thoughts to warfare and justice in an effort to reconcile each with the other. The opposition and conflict between theories of war and theories of justice are clear, particularly when considered in terms of historical western thought. Early theories regarding warfare are typified by the works of Sun Tzu and other ancient and classical thinkers. These earlier warrior-philosophers were most occupied with managing violence to achieve an end. The philosophy of justice, on the other hand, has historically focussed on keeping the peace. The development and spread

of the Judeo-Christian ethic included such ethical guidance as the Golden Rule and “turning the other cheek,” as evidence of evolving beliefs regarding justice.

While a central and defining tenet of its beliefs, Christianity was neither the first nor the last organized religion to institutionalize and to teach the Golden Rule.⁶ However, as Christianity developed into the *de facto* religion of the West, religious philosophers began analysing this founding principle in depth.⁷ These analyses lead to the development of early just war theory.

Based on his writings and teachings of the fourth and fifth centuries, St. Augustine has come to be known as the father of Western just war theory.⁸ While St. Augustine was not the first philosopher or theologian to consider the concept of justice as related to war, the complexity of his writings and the systematic nature of his approach have influenced this school of thought for the centuries that followed.⁹ Augustinian theory dealt with the nature of both human beings and of states. In fact, one of the key features of Augustinian just war theory is that it transcends the rise and fall of nations and states.¹⁰ However, it has also been suggested that he was writing in an effort to strengthen Rome’s rule as a Christian state at a time of fractures and division within the early Christian church.¹¹ Augustine’s synthesis of early Roman values with developing Christian ideals codified Christian participation in all facets of life in the Roman Empire, including those involving violence.¹²

⁶ Brian K. Burton and Michael Goldsby, “The Golden Rule and Business Ethics: An Examination,” *Journal of Business Ethics* 56 (2005): 372.

⁷ *Ibid.*, 374.

⁸ John Mark Mattox, *Saint Augustine and the Theory of Just War* (New York: Continuum, 2006) 1.

⁹ *Ibid.*, 3.

¹⁰ Paul Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* 3rd ed. (Upper Saddle River: Pearson Education Inc., 2004) 32.

¹¹ *Ibid.*, 29.

¹² *Ibid.*, 22.

It has therefore been argued that Augustine's theories were set down in order to provide an "ethical guide for the practicing Christian who also had to render...his services as a soldier".¹³ As a result, Augustinian theory was generally focussed on *jus ad bellum* thought.¹⁴ As Augustine's apparent goal was to provide a moral path for a Christian reconciliation with the prospect of war and warfare, then his primary concern was for those factors that made going to war morally acceptable.

The nascent nature of just war theory in Augustine's writings is evident from at least one significant factor. As Augustine's supposition was that justice was assured if warfare were ordained by God's will, his theories may have contributed to the atrocities of the Crusades or the inquisitions that came hundreds of years later.¹⁵ If following God's will is always just, and the leader of a nation is God's representative on earth, any action declared by that leader, including war, must be just. Until justice could be considered from a less subjective perspective, any leader claiming God's authority could direct the state to undertake any actions and claim justice.

However, even in this early thought and nascent just war theory, the recognition of a need for a post-war justice can be seen. In fact, it has been shown that Augustine believed the "end state to which just war tends is not merely the restoration of 'order' but of God's order."¹⁶ That is, that just wars are fought to improve the human condition, rather than damage it. This concept is no less than profound – the destruction of war is acceptable only if that destruction leads to better things. Objectively measuring the betterment of society post-conflict is not a part of Augustine's theories. However, even in

¹³ Mattox, 7.

¹⁴ Sharma, 10.

¹⁵ Christopher, 42.

¹⁶ Mattox, 121.

these earliest roots from the father of modern just war theory, the requirement for such consideration is evident.

Development of Just War Theory

From its roots in Augustinian philosophy, just war thought developed over sixteen hundred years to provide a moral compass regarding war. St. Thomas Aquinas continued to develop Augustine's thoughts, primarily regarding restraints to behaviour in the traumatic physical and mental stresses of combat.¹⁷ Hugo Grotius added to just war theory by endeavouring to promote restrained behaviour in the conduct of war.¹⁸ These philosophical theories began to transition to a formal body of law following the establishment of the Westphalian state system.¹⁹ Over the hundreds of years since the Treaty of Westphalia, this body of law has been strengthened and tested.

However, despite Augustine's preliminary considerations of post-war justice, *jus post bellum* has only developed as an implicit subset of *jus ad bellum* and *jus in bello*. Only recently have philosophers sought to develop this aspect of these theories. These recent developments are the result of nature of contemporary warfare and the modern legalistic context in which wars are fought.

Modern Just War Theory

In the 20th Century, as a result of two global conflicts, effort was made to eliminate war altogether. The League of Nations and the United Nations share mandated prohibitions on the use of war. These prohibitions mark a transition in just war theory, in that they are based on a legal framework, rather than moral principles.²⁰ In contrast to the

¹⁷ Sharma, 12.

¹⁸ *Ibid.*, 15.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 17.

League of Nations, the UN attempts to balance the ideal of prohibiting war with the realistic acceptance of the use of force to ensure peace. While war is now illegal, the use of force may be authorized or mandated by the UN to oppose aggressor nations. The question, however, for the UN is not whether a war is just or unjust; the question today is whether a war is legal or illegal. This legalistic approach is the manifestation of the UN's commitment to the principles of *jus ad bellum*.

The International Military Tribunal (IMT) at Nuremberg following World War 2 has profoundly influenced the international community's approach to war criminals.²¹ It has been suggested, however, that the initial purpose of the IMT was to punish the Nazis for having violated the concepts of *jus ad bellum* by waging a war of aggression.²² The Morgenthau Plan developed and proposed by US treasury secretary Henry J. Morgenthau, Jr., advocated immediate death without trial for a UN approved list of Nazi leadership.²³ In the end, however, the legalist voice of US secretary of war Henry Stimson won the day, against both Morgenthau's and the British government's objections, and the terms of the now famous Nuremberg trials were drafted.²⁴ Despite persistent criticism of the IMT as a court of victor's justice, the Nuremberg trials were the first international criminal trials that assigned individual responsibility for violations of international law.²⁵

Ultimately, the IMT prosecuted those who broke the tenets of just war, and established

²¹ Michael J. Kelly and Timothy L.H. McCormack, "Contributions of the Nuremberg Trial to the Subsequent Development of International Law," in *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, ed. David A. Blumenthal and Timothy L.H. McCormack, 101-129 (Leiden and Boston: Martinus Nijhoff, 2008), 101.

²² Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton and Oxford: Princeton University Press, 2000): 204.

²³ *Ibid.*, 157.

²⁴ *Ibid.*, 181.

²⁵ Kelly, *et al.*, 104.

the principle of crimes against humanity, setting a precedent for the criminal trials of those accused of violating the principles of *jus in bello*.

***Jus ad bellum* criteria**

Through these years of development, modern just war theory has emerged into two sets of criteria regarding justice in warfare, and these criteria form the basis for the contemporary legalist approach to international justice. The first of these sets is the theory of *jus ad bellum*, or justice before war. The legalistic arguments against war, unless it is sanctioned by the UN, reflect the global community's subscription to the general principles of *jus ad bellum*. The criteria of *jus ad bellum* seek to outline those factors that must be satisfied before a nation may embark on a just and therefore legal war. These criteria have been identified as:

1. Just cause
2. Proper authority
3. Right intention
4. Proportionality
5. Last resort
6. Public declaration
7. Reasonable chance of success

***Jus in bello* criteria**

Associated with the theory and criteria of *jus ad bellum* is the theory of *jus in bello* or justice in war. These criteria seek to outline those factors that must be observed or maintained throughout warfare to preserve the just nature of war. These criteria have been identified as:

1. Proportionality
2. Discrimination (non-combatant immunity)

Applications of *jus ad bellum* and *jus post bello* criteria

There is no doubt that just war theory can be, and has been, applied inappropriately to give leaders the appearance of a moral imperative in bringing their state to war.²⁶ The benefit of ethical theory is its ethereal nature which allows it to be broken, but not discarded as a result.²⁷ In fact, what just war theory strives to do is provide a framework within which the decision to go to war can be made.²⁸ This is not to suggest that contemporary just war theory provides a checklist of sorts which, when satisfied, can assure a nation in its decision to go to war. Indeed, just war theory has been criticised for this kind of application.²⁹ This criticism is responded to with the explanation that the benefit of just war theory is not the answers it gives, but the questions it raises.³⁰

Furthermore, just war theory provides a structure by which wars may be evaluated after the fact, to provide illustrations of wars fought unjustly. Through such examination, and by such ethical consideration, the leaders of a state, and the people of a liberal democratic society, can better understand the causes and implications of the sometimes necessary but no less abhorrent idea of using violence and destruction to further or to protect the state's interests.³¹ This application has also been criticised as not recognizing

²⁶ Bill Rhodes, *An Introduction to Military Ethics: A Reference Handbook* (Santa Barbara, California: ABC-CLIO, 2009) 78.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Sharma, 24.

³⁰ *Ibid.*

³¹ Rhodes, 78.

the inherent injustice of war.³² However, there is a difference in application when criteria are applied post war and pre-war. In a post-war evaluation it should be expected that just war theory will provide some answers, and validate or invalidate past wars.

This temporal difference is crucial. Moral reflection in a pre-war context will give pause before the last resort of violence is applied. The apparent satisfaction of *jus ad bellum* criteria pre-war is vital not because it may justify the act of going to war. It is vital because it precipitates the moral considerations and introspection which, ideally, will slow a nation's descent into war.

Analysis of the morality of a conflict after war is just as beneficial as analysis using *jus ad bellum* criteria prior to the war. Naturally, academic interpretation and analysis may give debatable or unexpected results. But to disregard the outcome of *jus ad bellum* analysis post conflict is to ignore the potential addition to future moral deliberations. If, for instance, the US war in Iraq is spared from analysis within this framework, how will the lessons learned regarding the just or unjust nature of the invasion contribute to future deliberation?

These two sets of criteria have formed the basis for the development of international laws of war. The suspension of normative behaviours society condones during warfare is a challenging ethical dilemma, and thus it is no surprise that much thought has been given to these theories. However, what has not been included until recently is consideration of bringing conflict to an ethical end. This reflects the changed nature of warfare in the post-World War Two and post-Cold War era.

As the historic battlefields of western Europe continue through an unprecedented period of peace, other regions, many considered perpetual or recurring "hot-spots"

³² Sharma, 25.

continue to simmer and boil over. The end of the Cold War permitted the Great Powers to reconsider the when and how of war. In the 21st Century, two of these wars in particular, in Iraq and Afghanistan, have drawn on much longer than was initially estimated. Bringing these wars to a just end, in such a way as to minimize their potential for recurrence, has led to contemporary expansions of just war theory. Specifically, that expansion has been in the realm of *jus post bellum*, or justice after war.

Requirement for a theory of *Jus post bellum*

The theories of *jus post bellum* are, therefore relatively new. In contrast to the theories regarding behaviour during war, and the theories regarding reasons for going to war, little philosophical thought has been given to state behaviour after war. Certainly, some aspects have been studied in depth. The 1919 Treaty of Paris and its punitive reparation demands from a defeated Germany is often cited as a key contributor to the rise of the Nazi party and the eventual outbreak of the Second World War.

Furthermore, the pre-Iraq period of late 2002 and early 2003, during the run-up to the US led invasion, saw significant focus on the concept of *jus ad bellum*.³³ Buried within the logic of national security threats and the perceived existence of weapons of mass destruction was a feeling that the global security environment would be well-served by the fall of the Saddam Hussein regime.³⁴ So too was an implicit, if unstated, expectation of an improvement in the overall well-being of the Iraqi citizenry.³⁵ But the post-Sadam world and Iraq, and philosophical thought in their regard, took a back seat to

³³ Nicholas Rengger, "The judgement of war: on the idea of legitimate force in world politics," *Review of International Studies* 31 (2005): 143.

³⁴ Franklin Eric Wester, "Preemption and Just War: Considering the Case of Iraq," *Parameters* 34, no. 4 (2004/2005): 30.

³⁵ George W. Bush, "Transcript: George Bush's Speech on Iraq," *guardian.co.uk*, (1 May 2003) [newspaper on-line]; available from www.guardian.co.uk/world/2002/oct/07/usa.iraq; Internet; accessed 14 February 2010.

the discussions regarding pre-emptive self-defence.³⁶ This reflects a general trend to predict post-war situations as unrealistic fantasies (i.e. the spontaneous outbreak of democracy) or as an improvement in the narrowly considered national interests of the victor.³⁷

As the American adventure in Iraq has unfolded, at the same time as NATO's endeavours in Afghanistan, it is becoming apparent that the previously developed philosophical thought regarding justice in warfare is insufficient. Justice may or may not be found to have been served. Certainly the travesty of Abu Ghraib does not meet the standards of *jus in bello*. And it is arguable whether the Iraq invasion can stand up to scrutiny under the auspices of *jus ad bellum*. The British parliamentary inquiry into the decision to go to war is evidence that this is anything but assured.³⁸ The very fact that these events have and are coming under scrutiny is evidence of the practicality of the supported philosophical thought.

And yet, the wars in both Iraq and Afghanistan drag on for far longer than hoped or anticipated. Established philosophical thought, while addressing moral failures and striving to ensure ever more stringent justifications for resorting to war, have failed to help in reducing the length of contemporary conflicts. Nor has established ethical guidance succeeded in minimizing the likelihood of war's reoccurrence. Thus, while "there is general consensus that *jus post bellum* thinking is underdeveloped,"³⁹ there is now a growing body of study in its regard. *Jus post bellum* "provides a solid foundation on which to ground the standard for success – it is not enough to defeat the insurgents or

³⁶ Jeffrey Record, "The Bush Doctrine and War with Iraq," *Parameters* 33, no. 1 (2003), 15.

³⁷ Doug McCready, "Ending the War Right: Jus Post Bellum and the Just War Tradition," *Journal of Military Ethics* 8 no. 1 (2009): 68.

³⁸ Walter Pincus, "Ex-British envoy questions legitimacy of Iraq invasion," *The Washington Post*, 29 November 2009.

³⁹ McCready, 67.

elect a democratically elected government.”⁴⁰ As Augustine recognized, “the end state to which just war tends is not merely the restoration of ‘order.’”⁴¹ A just peace must also be sought.

International Acceptance of the Principles of *Jus Post Bellum*

There is clearly an international appetite for institutionalization of *jus post bellum*. The development of the international criminal court (ICC) suggests that the global society has some desire to see justice served in post-conflict regions. Presently the ICC prosecutes based primarily on human rights abuses perpetrated during conflict (*jus in bello*). The ICC may not be an institution suited for enforcing the principles of *jus post bellum*, but its very existence, and the fact that it does not seek revenge, but only to bring to call to account the perpetrators of these crimes, indicates that objective justice is global goal.

Furthermore, the existence of ad hoc tribunals and truth and reconciliation commissions (TRC) both before and after the establishment the ICC suggest that this appetite for lasting justice is well founded in international tradition. In writing about the South African TRC, Nevin Aiken observes that the processes that seek to return justice to fractured societies aim for reconciliation with the goal of “preventing the recurrence of violence and stabilizing post-conflict peace.”⁴² The South African TRC is representative of an internal mechanism aimed at healing the wounds of institutionalized racial injustice

⁴⁰ Rebecca Johnson, “*Jus Post Bellum* and Counterinsurgency,” *Journal of Military Ethics* 7 no. 3 (2008): 228.

⁴¹ Mattox, 121.

⁴² Nevin T. Aiken, “Post-Conflict Peacebuilding and the Politics of Identity: Insights for Restoration and Reconciliation in Transitional Justice,” *Peace Research: The Canadian Journal of Peace and Conflict Studies* 40 no. 2 (2008): 19.

and gross human rights violations of that nation's past.⁴³ However, its conditions and circumstances reflect many elements of intrastate warfare and traditional post-conflict scenarios; for, at the end of apartheid South Africa was "faced not only with a transition but also with an immense transformation...to a democratic government."⁴⁴ South Africa's relatively peaceful transition from oppression to democracy is evidence that institutionalizing the quest for post-conflict justice is supportive of lasting peace.

Development of a *Jus Post Bellum* theory

Regardless, however, of recent trends towards retributive and transitional justice, the true impetus for invigorated thought regarding *jus post bellum* is arguably the challenges the US and its allies have faced in concluding the conflicts in Iraq and Afghanistan. However, although the impetus for contemporary thought regarding *jus post bellum* has arguably been the Iraq war, philosophical efforts in this regard date to St. Augustine.⁴⁵ Retired US Army Reserve Chaplain Doug McCready has traced the contributions of several authors, philosophers, political theorists and theologians to the theory of *jus post bellum* from 1994 to 2009.⁴⁶ His work builds upon that of Michael Walzer and others who have "advocated creating a distinct third element of the just war tradition."⁴⁷ McCready suggests that to be of practical purpose, *jus post bellum* should have guiding principles general enough in scope to have universal applicability.⁴⁸ His list

⁴³ Jay A. Vora and Erika Vora, "The Effectiveness of South Africa's Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans," *Journal of Black Studies* 34 no. 3 (2004): 305.

⁴⁴ Vora, 304.

⁴⁵ McCready, 71.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, 67.

⁴⁸ *Ibid.*, 72.

is by no means authoritative, but includes: right intention; retributive justice; and, the reestablishment of political, social and economic stability.⁴⁹

The benefits of McCreeady's criteria are their simplicity, universality and practicality. However, McCreeady also notes that his criteria leave several unresolved issues regarding when the *post bellum* phase begins, and what the consequences of failing to meet the standards of *jus post bellum* should mean.⁵⁰ These shortfalls do not diminish the utility of McCreeady's criteria. Rather, they leave open areas for further study.

Defining “*post*” *bellum*

Certainly these so called shortfalls also lead to challenges to *jus post bellum*. A definition of the term “*post*” – that is, when these principles apply – is subject to significant scrutiny. It may be argued that the lines between conflict and post-conflict are not clear in contemporary warfare. The present conflict in Iraq may be cited as the primary example, supported by the conflict in Afghanistan, of the haziness between *in bello* and *post bellum* phases. Yet both conflicts had very similar turning points which marked transitions from relatively straight forward conventional conflicts to the more arcane and challenging aspects of nonconventional, counter-insurgency.

The US war in Iraq is famously marked by President George W. Bush's 1 May 2003 “mission accomplished” statement aboard the USS Abraham Lincoln. In that speech the president famously indicated an “end to major combat operations” and victory in the “battle for Iraq.”⁵¹ Nearly seven years and four thousand US casualties later it is clear that US forces remained in combat well beyond 1 May 2003.

⁴⁹ *Ibid.*, 74.

⁵⁰ *Ibid.*, 75.

⁵¹ George W. Bush, “Bush makes historic speech aboard warship.” 1 May 2003; www.cnn.com/2003/US/05/01/bush.transcript; Internet; accessed 14 February 2010.

However, the collapse of the Saddam Hussein government was a crucial turning point in the Iraq war. It was marked by a drop in US casualties as the occupation of Iraq stabilized, if only until April 2004 when the monthly casualty rate was three times that of the preceding 13 months.⁵² During this period, it has been suggested, the Iraqi people believed the US occupation may have provided them with an improvement in their standard of living or physical security and liberty.⁵³ At the time, the Iraqi people reportedly approved of the fall of the Saddam government.⁵⁴ The opportunity was ripe for transitioning immediately and completely to a counter-insurgency type operation to address discontent before it could build into resistance.⁵⁵

Unfortunately, the US and its coalition in Iraq failed to capitalize on this opportunity. Iraq sank back into violence, and transformed from the traditional, force-on-force combat as had been fought in 1991, into the so-called “new” war, in which civilians are the victims and asymmetric warfare is the norm.⁵⁶ Having not paid attention to *post-bellum* issues, indeed having no real plan on dealing with a post-Saddam Iraq, the US allowed Iraq to descend into the anarchy of armed insurgency battling an Iraqi government with little local legitimacy and in power only by the support of American military forces.

The international efforts in Afghanistan are marked by the so-called “missed opportunity” of 2002, following the fall of the Taliban and characterized by the international community’s failure to move sufficient reconstruction resources into that

⁵² Global Security, “US Casualties in Iraq,” www.globalsecurity.org/military/ops/iraq_casualties.htm; Internet; accessed 14 February 2010.

⁵³ Mary Kaldor, *New and Old Wars* (Stanford, California: Stanford University Press, 2007) 155.

⁵⁴ Michael E. O’Hanlon, “Iraq Without a Plan,” *Policy Review* 128 (2004/2005): 40.

⁵⁵ *Ibid.*

⁵⁶ Kaldor, 162.

country.⁵⁷ Either of these events makes a case that contemporary conflict is not necessarily homogeneous and protracted conflict. Rather, contemporary conflicts are marked by transition points of relatively short duration. It is true that these are not the dramatic 11 November 1918 or V-E days of the 20th Century global wars. But in these contemporary conflicts these transitions – from soldiers fighting for military objectives to stabilization operations – are no less profound or opportunity laden.

This transition from one type of operation to another is crucial to the *jus post bellum* concept. Indeed, both Iraq and Afghanistan serve as evidence that initial success in conventional or near-conventional operations is followed by a crucial period. During this time, the principles of *jus post bellum*, if applied, will aid in the transition from hostility to security, and ultimately to stability.

Application of *jus post bellum* Criteria

The ethical theories of *jus ad bellum* and *jus in bello* have, as previously illustrated, been translated into formal international law. The value and practicality of *jus ad bellum* is illustrated by the UN Charter and its prohibition on war, and the legal framework it outlines which authorizes the use of force. *Jus in bello* is present in the national development of rules of engagement and on international prohibitions on weapons that intentionally cause undue harm and suffering.

Jus post bello is too new as a moral concept to have undergone this transition. Indeed, it is a point of debate regarding the necessity for a “tripartite” body of

⁵⁷ Daniel Dombey and Demetri Sevastopulo, “NATO allies consider extra troops for Afghanistan,” *Financial Times*, January 18, 2010, 9.

international laws of war.⁵⁸ And yet, if previously accepted moral schools of thought have made this transition, why not developing concepts?

However, while the criteria for *jus ad bellum* and *jus post bello* have been codified into international law and may be applied as such, their concepts and ethical guidance – the criteria outlined above – struggle to retain their validity in application to modern conflict. The criteria for *jus post bello* are no different. Although these criteria were developed during and because of the post-2003 Iraq war, their value will be generated when they may be applied to conflict situations regardless of time, space and politics.

Jus post bellum is, therefore, a developing school of moral thought with its roots in the historic philosophy of just war theory. If its development continues, the theory of *jus post bello* is likely to eventually make the transition to international law. Prior to this transition, however, the criteria of *jus post bellum* must be developed. Through this development, they will become a valuable tool for analysis of previous conflicts and for suggesting alternative approaches which may have prevented further violence. Indeed, once these moral principles are refined, they may be applied to contemporary conflicts to provide some moral guidance for satisfactorily bringing these conflicts to a close.

This section has shown that *jus post bellum* should be applied to current and previous conflicts for a number of reasons. It is a logical progression of historical just war theory, developing ethical models for behaviour before, during and after conflict. *Jus post bellum* is undergoing a period of refinement, wherein consideration of contemporary conflicts within a *jus post bellum* context will further its development as an ethical framework. As it develops, the criteria for *jus post bello* will gain acceptance among

⁵⁸ Sharma, 30.

broad audiences, as the previous just war theories have before it. Refinement of these criteria will permit and encourage the crucial questions regarding justice after war in future conflicts that were not thoroughly considered prior to the major engagements of Afghanistan and Iraq. Ultimately, these criteria will transition into the codification of international law and conventions.

The challenge is that contemporary conflicts such as the 1992-1995 war in BiH present difficulties to applying not only the developing theory of *jus post bellum*, but also the traditional tenets of just war theory.

SECTION THREE – JUST WAR THEORY AND THE BOSNIA WAR

The end of the Cold War in 1989 held much promise for the world. The victorious superpower could look out over a globe and see no future threat to its dominance. The great powers of the world could envision a new era of unprecedented economic growth, unfettered by the prospect of global, nuclear war or the demands of massive defence budgets to contribute to their collective defence. But the world's transition to peace was marred by the terrible ethnic conflicts in the Balkans in the 1990s.

The dissolution of Yugoslavia is a tragic example of a failure of justice to reduce human suffering, enabled by the apathy of an international community disappointed that the expected peace dividend was not peaceful at all. Almost as immediately as ethnic conflict began in the former Yugoslavia, law of war based efforts to end the fighting began. These efforts eventually led to the negotiated peace of the DPA and the early efforts of the ICTY. But they did not lead to a lasting peace, as, shortly after the conclusion of open warfare in Bosnia, Serbian forces began their attack on Kosovo.

Philosophically, it may be suggested that the negotiated end to the fighting in Bosnia was an application of the traditional theories of just war. The question of *jus ad bellum* was left unaddressed, as the fighting had begun, and the justice of the war was a moot point. Enforcement of the tenets of *jus in bello* is evident in the early efforts of the UN tribunal in the Hague which sought to punish those responsible for violating the laws of war during the conflict.

A developed theory of *jus post bellum* would seek to improve upon this record. Considering the actions taken that finally ended the fighting in the Balkans from the perspective of post-war justice might suggest that an earlier, more concerted effort to

follow this moral path may have reduced suffering in both Bosnia and Kosovo. Only when the criteria of *jus post bellum* are adequately addressed, is a chance for lasting peace established.

And yet, the necessary *jus post bellum* tenets that might have underwritten the efforts to find justice in post-war BiH are only now being developed. Furthermore, their development is anything but straightforward. Indeed, the complexities of the war in BiH challenge traditional just war theory as much as they do the recently developed tenets of *jus post bellum*. This suggests that significant development of both theories, and certainly *jus post bellum*, is necessary before they can improve their record at alleviating or avoiding the suffering of war.

Background

Unification of Yugoslavia is not a new concept. However, as a unified state, only as a portion of a greater empire has any lasting peaceful solution been realised. This unification only as an element of a greater political entity had the profound effect on Bosnia of restricting its development as a nation-state.⁵⁹ Bosnia, as opposed to Serbia, Croatia and the other Balkan states, tended in the 19th and early 20th centuries to identify more readily with external nationalities, as opposed to forming a “distinct multinational tradition.”⁶⁰ The region was unified prior to World War I, but only as part of the Ottoman and Austro-Hungarian Empires, and the people there considered themselves as separate nationalities living in one political entity.

The assassination of the Arch Duke Ferdinand is the most famous example of conflict in the Balkans spreading and growing to disastrous proportions. As the marker of

⁵⁹ Stephen L. Burg and Paul S. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (New York: M.E. Sharpe, 1999): 18.

⁶⁰ *Ibid.*, 17.

the starting point of the Great War, Franz Ferdinand's death also precipitated a new, but short lived era in Yugoslav history as the Kingdom of Yugoslavia.⁶¹ Bosnia prior to this time continued to represent a political entity whose existence, it has been suggested, endured because of its usefulness in checking the power and influence of Serbia.⁶² This situation changed at the hand of Yugoslav King Alexander in 1929, with an attempted elimination of national divisions within the region. By 1939, this de-nationalization was replaced by a simple Croat-Serb partition, and, without the advent of World War 2, may have marked the disappearance of BiH.⁶³

World War 2 was marked by severe tension and "brutal armed conflict in Bosnia," at the hands of the "pro-Nazi Croatian puppet state."⁶⁴ Throughout World War 2 Croatia isolated, deported and killed as many as 250,000 Serbs. Bosnian Muslims, too, participated in atrocities directed at Serbs.⁶⁵ With the defeat of Nazism in 1945, the Croatian fascist Ustasha army, the perpetrators of these attacks against Serbs, was "summarily executed" by Marshal Tito's Serbian Partisan's, costing 100,000 captive soldiers their lives.⁶⁶ By the end of the war, Serbian anger, although repressed by the Tito regime to follow, was directed towards both Croatians and Bosnian Muslims.⁶⁷ This ethnically based violence and extremism laid much of the groundwork for the re-emergence of nationalism in the Balkans in the late 1980s and 1990s.

Marshal Tito's unwavering devotion to Yugoslav socialism suppressed any lingering nationalism that might have fractured the state of Yugoslavia from 1945 to

⁶¹ Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 27 no. 3 (2005): 929.

⁶² Burg *et al.*, 20.

⁶³ *Ibid.*, 21.

⁶⁴ Wilson, 929.

⁶⁵ Burg *et al.*, 38.

⁶⁶ Wilson, 929.

⁶⁷ Burg *et al.*, 38.

1990. In Bosnia, ethnic groups intermarried and the political region of Bosnia demonstrated the hallmarks of a unified state, if not a nation of one people. “Bosnians shared a common language, ethnic origin, and lifestyles.”⁶⁸ The power of the individual, and the ultimate failure of socialist dictatorships, however, seem evident in the correlation between Tito’s death in 1980 and the dissolution of Yugoslavia just ten years later, following 35 years of peaceful coexistence.

The relative ethnic peace of Tito’s regime began to collapse in the years following his death. Between the Yugoslav economic crisis of the 1980s, the leadership vacuum that existed following Tito’s death, and the collapse of Communism in 1989, by the beginning of the last decade of the 20th Century, the floodgates of nationalism were prepared to open in Yugoslavia.⁶⁹

Centuries old conflicts in the Balkans were thus exposed when the Soviet supported state of Yugoslavia dissolved in 1991. The ethnic variety among the population became apparent very close to the surface of the former republic. Rather than assist the population in moving past the atrocities of World War II, the oppressive Tito regime had only buried the resentment and hostility that was deeply ingrained.

BiH’s first democratic elections resulted in the rise of three major, nationalistic parties based on Bosnian Muslims, Bosnian Serbs and Bosnian Croats. It has been suggested that the victory of these parties in the 1990 election represented the general polarization of BiH society.⁷⁰ Furthermore, it seems that this polarization was intensified by the Serbian conflict within Croatia following the Croatian declaration of independence from Yugoslavia, and by the fear of BiH’s constituent societies of eventual dissolution of

⁶⁸ *Ibid.*, 17.

⁶⁹ Kaldor, 40.

⁷⁰ *Ibid.*, 58.

BiH and annexation by the neighbouring ex-Yugoslav republics.⁷¹ However, while the reasons for the people of BiH's slide away from multiculturalism and towards nationalist identities may be varied and nuanced, it is clear that once nationalist voices began to sound and gain footholds in the former Yugoslav state, the stage was set for a rapid descent into conflict.

Background – Post 1990

Slobodan Milosevic was a preeminent figure in giving voice to these ingrained prejudices. Indeed, his nationalist ambitions of a “Greater Serbia” are closely identified with this resurgence in ethnic division and hatred in the Balkans.⁷² Bosnian Serb President Radovan Karadzic fuelled this fire in his own region, promoted the Serbian nationalism and opposed any Bosnian independence from Yugoslavia.⁷³ Past atrocities were cited as evidence that Serbs were “again under threat.”⁷⁴

Some of these historical prejudices were centuries old – dating to the medieval Prince Lazar who was killed by the Ottomans in 1389 at the battle of Kosovo.⁷⁵ This battle had become a “pivotal point in Serb nationalist mythology.”⁷⁶ Six hundred years later the religion of the Ottoman Empire was employed to label Bosnian Muslims as “Turks.”⁷⁷ Burg and Shoup in their history of the Bosnian war detail how this association with “Turks” developed from a purely religious definition for the followers of Islam, to a cultural definition which created nationalist distinctions.⁷⁸ Milosevic's speech at the site

⁷¹ *Ibid.*, 56.

⁷² John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago: University of Chicago Press, 2003): 36.

⁷³ Burg *et al.*, 47.

⁷⁴ Nick Hawton, “Conflicting Truths,” *History Today* 59 no. 8 (2009): 57.

⁷⁵ *Ibid.*, 57.

⁷⁶ Wilson, 930.

⁷⁷ Hawton, 58.

⁷⁸ Burg *et al.*, 19.

of the six hundred year old battle of Kosovo has been attributed as a precipitating factor in the re-emergence of nationalism in post-Tito Yugoslavia.⁷⁹

Serbs were not alone in their use of rhetoric, but it is apparent that there was a feeling of a tidal change in the fortunes of the ethnic groups in the former Yugoslavia. Serbia, under the lead of Milosevic was striving to legitimize a continued Yugoslavian state centred on Belgrade. Radovan Karadzic, as leader of the Bosnian Serbs, supported Milosevic's intentions, and provided much of the ideological justification for the atrocities Serbs committed against Bosnian Muslims during the war.⁸⁰ Where Serbs were once the victims of Croatian atrocities during the Second World War, in 1991 Serbia had a powerful, relatively modern and Soviet equipped armed force with which to protect the Serbian people. Having stoked the fires of nationalism, Milosevic sought to prevent the dissolution of Yugoslavia through the use of force.

As the constituent nations of Yugoslavia began seeking their independence, Serbians found themselves in the position of authority, rather than as the oppressed nation of the past. Bosnians voted for independence from the Yugoslav federation, as did overwhelming majorities in Slovenia and Croatia. Macedonia, too sought independence from its former federated neighbours. However, this disintegration was mirrored by the declaration of so-called "Serb Autonomous Regions" in Croatia and the similar "*Republika Srpska*" in Bosnia.⁸¹

Serb forces struck at the independence of the former Yugoslav republics with significant force. The Yugoslav Army (JNA) had been transformed from a multiethnic

⁷⁹ Wilson, 930.

⁸⁰ Burg *et al.*, 65.

⁸¹ Wilson, 931.

force into one made of almost exclusively Serbians.⁸² By 1992, the Serbian controlled media in Bosnia was openly referencing the past atrocities of World War 2, aggressively proclaiming that Serbs were “about to be overwhelmed by Ustasha Croats and fundamentalist Muslims.”⁸³ This war, as urged by Serbian leaders in both Serbia and Bosnia was one of survival for all Serbs, and represented part of a “constant and unbroken line from the Battle of Kosovo in 1389, the Ottoman Empire to World War 2 to the present day.”⁸⁴ First attacking Slovenia and Croatia and then continuing with their onslaught into Bosnia, Serbians and Bosnian Serbs made use of their reinvigorated ethnic rivalries to perpetrate the genocide of Bosnian Muslims and Croats while suggesting the intent was to create a unified, greater Serbia.⁸⁵

Having witnessed the shockingly peaceful dissolution of the Soviet Union, Europe and the Western world found themselves unsure of how to react.⁸⁶ As Burg and Shoup outline in their history of the Bosnian conflict, Europe was committed to conflicting general principles: territorial *status quo*, peaceful resolution of disagreements, and support for self-determination.⁸⁷ The relationship to these principles and those of *jus ad bellum* is early evidence of traditional post-war justice challenges to post-Cold War conflict.

Defining and respecting self-determination when it came at odds with the territorial *status quo*, however, proved a challenging task. In addition, some have suggested that, given a lack of political will, NATO, the UN, the European Community

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*, 933.

⁸⁵ Bass, 210.

⁸⁶ Lenard J. Cohen, “The Balkans Ten Years After: From Dayton to the Edge of Democracy,” *Current History* 104 no. 685 (2005): 365.

⁸⁷ Burg *et al.*, 80.

and the United States actively ignored the growing crisis in the Balkans, occasionally stereotyping the Balkans as a region steeped in, and doomed to a future of, violent discord.^{88,89} As a result, neither a solution to hold Yugoslavia together, nor to peacefully transition to a regional organization of sovereign states was resolved prior to the resort to armed conflict.

The devastating results were millions displaced and hundreds of thousands dead. The war in Bosnia ended after four years in 1995 with the DPA. The dissolution of Yugoslavia continued in 1999 with Serbian attacks into Kosovo, the resultant NATO airstrikes against Serbia and the eventual fall of Slobodan Milosevic.

Application of Just War Theory

Jus ad bellum

The challenge for just war theory is in sorting out the various reasons that Yugoslavia not only dissolved, but also degenerated into open conflict. Traditional just war theory developed from consideration of so-called classical, or state versus state warfare. In these cases, the criteria for *jus ad bellum* are relatively straight forward in their application. This is particularly so since the preponderance of literature on just war theory defines participants in conflict by aggressor or nonaggressor status. Walzer's defining book on the justice of war defines the judgement in *ad bellum* situations as one between "aggression and self-defense."⁹⁰

This definition, however, does not sufficiently consider justice in wars of secession. This is particularly evident in the Balkan wars of the 1990s. As a touchstone

⁸⁸ Michael Sells, "Religion, History and Genocide in Bosnia-Herzegovina," in *Religion and Justice in the War Over Bosnia*, ed. G. Scott Davis, 23-43 (New York: Routledge, 1996): 40.

⁸⁹ Kaldor, 36.

⁹⁰ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977): 21.

of just war theory, Walzer considers wars of secession only in terms of intervention by states external to the conflict. This, of course, is unsurprising given the lineage of Walzer's thinking in the immediate post-Vietnam era. As a result, however, Walzer examines civil conflict from the perspective of just reasoning for breaking the codified sanctity of state boundaries. Perhaps the NATO interventions against Serbia warrant consideration from this perspective. But this leaves the challenging question of Yugoslavia's disintegration.

More recent writings by authors such as Brian Orend suggest that Walzer's definition of resistance to aggression as a fundamental premise in fighting a just war is "founded, ultimately, upon individual human rights to life and liberty."⁹¹ Orend includes discussion of the importance Walzer places on the state as the guarantor of human liberty, and as a structure based ultimately on those liberties.⁹² As such, the state is identified as having rights ultimately derived from individual human rights.⁹³ The state is also characterized as "nothing more nor less than a political association, in a given territory, composed of both the people and their government."⁹⁴ Orend contends, based on Walzer's writings that only the state can provide individuals with the security necessary for the right to life and liberty.⁹⁵ These characterisations are crucial for the definition of states as aggressor or defender in a traditional just war analysis. None of this, however, adequately describes the dissolution of a state, or how the just war theory principles apply when the state does not fulfill the social contract with its citizens.

⁹¹ Orend, "Justice After War," 45.

⁹² Brian Orend, "Michael Walzer on Resorting to Force," *Canadian Journal of Political Science* 33 no. 3 (2000): 527.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, 528.

Walzer and Orend subscribe to a common opinion regarding a state that does not provide protection to its citizens, that is, a state that defies the “moral bond...that transcends all differences of interest, drawing its strength from history, culture, religion, language, and so on.”⁹⁶ Their opinion is that, in such a case, the moral legitimacy of that state is questionable. Indeed Orend contends that a state “riven by serious ethnic division...in which the government turns against its own people” in fact loses its right to non-interference from other states.⁹⁷

Thus, even in their most thorough discussions of intrastate conflict, neither Orend nor Walzer seriously consider a case representative of the cultural and ethnic divisions that fractured Yugoslavia. The cases they do consider, in practice and in theory, are primarily case studies of external actor intervention. Their applications of classical just war theory are predisposed to judge the justice of interventions by non-participants: i.e., the US actions in Vietnam or the invasion of Iraq in 2003.

How then do the principles of *jus ad bellum* apply to the Bosnian war of 1992 – 1995? Application of these principles shed the first light on the difficulty of applying traditional just war theory to intrastate conflict. The criteria for *jus ad bellum* are as follows:

⁹⁶ Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004) 65.

⁹⁷ Orend, “Michael Walzer on Resorting to Force,” 530.

1. Just cause
2. Proper authority
3. Right intention
4. Proportionality
5. Last resort
6. Public declaration
7. Reasonable chance of success

Analysis of these criteria from the perspective of Bosnia and Serbia illustrate the inherent difficulty of their application in this case.

Just Cause. Orend writes that “the unchallenged triumph of aggression...is a greater evil than war.”⁹⁸ To Walzer, there is no greater just cause than to resist aggression. But in the case of Bosnia’s declaration of independence from Yugoslavia and Serbia, how does the right of political sovereignty fit? Milosevic’s Serbia in 1991 was laying claim to a continued Yugoslav state. Following the withdrawal of Serbian forces from both Slovenia and Croatia, Serbia began seeking a way to create a greater Serbia, unifying the Serbs who lived outside the Serbian borders. From 1990 to 1992 the status of BiH and the other former Yugoslav republics was anything but clear, although Slovenian and Croatian independence certainly give evidence that the future was in a series of smaller, regional states formed from the remains of Yugoslavia.

However, as has been pointed out in studies of just war theory and the Bosnian war, BiH had not been fully integrated into the international community, despite recognition in April, 1992 by the United States and the European Community.⁹⁹ This has

⁹⁸ Orend, “Michael Walzer on Resorting to Force,” 530.

⁹⁹ Jean Bethke Elshtain, “Nationalism and Self-Determination: The Bosnian Tragedy,” in *Religion and Justice in the War Over Bosnia*, ed. G. Scott Davis, 23-43 (New York: Routledge, 1996): 46.

been defined in studies of post-conflict BiH as the difference between legality and legitimacy.¹⁰⁰ Given that formal recognition of BiH had been made, however, it has been suggested that the international community should have regarded Serbia's actions as a violation of international law.¹⁰¹ The fact that the embargo against the whole of the former Yugoslavia remained in place (which arguably tipped the scales of the initial conflict in BiH in favour of Serbia) suggests that the international community was not regarding Serbia and BiH as distinct, sovereign entities.¹⁰² While an embargo against Serbia for violating the principles of *jus ad bellum* might have been justified, once recognized as an independent state, the right for BiH's self-defence should have been preserved.

This dichotomy between formal declarations and international actions mirrors the contradiction in just war thinking, in that the vast majority of just war thought has been from the perspective of the international community's response to the war in Bosnia, both during its development and after it erupted into open hostility. The question of whether the international community (in any of its alliances or institutions) had just cause to take action in the former Yugoslavia is a separate question from the justice of Serbia's actions from 1990 to 1995.

Thus, the lack of clarity in the status of the former Yugoslav republics, the somewhat continuous representation from Belgrade by Milosevic as the successor to the Yugoslavian communist regime, the rise in nationalist parties in BiH, and the limited response from the international community left much to question regarding the legality

¹⁰⁰ Bose *Bosnia after Dayton* 47.

¹⁰¹ Scott G. Davis, "Bosnia, the United States, and Just War Tradition," in *Religion and Justice in the War Over Bosnia*, ed. G. Scott Davis, 23-43 (New York: Routledge, 1996): 114.

¹⁰² *Ibid.*

and justice of secession, the process of dissolution and how a peaceful solution might be worked out. As such, Yugoslavia and therefore Serbia (as it attempted to establish itself as the legal successor to the Yugoslav state) could lay claim to the right to shape domestic policies within its own borders.¹⁰³ On these grounds, Serbia could make a claim of just cause as a sovereign nation. And yet this flies in the face of Bosnian's right to self determination.

From a Bosnian perspective, the Serbian army actions at the start of the war constituted aggression from an external power.¹⁰⁴ This in turn, of course, conflicts with the perspective of Bosnian Serbs who, although arguably inflamed by Milosevic and Radovan Karadzic's nationalistic rhetoric, were expressing a desire to remain part of a Serbian led Yugoslavia. Certainly this was the argument made by Karadzic in the prelude to the war.¹⁰⁵ The benefit of just cause, then, is anything but clear.

In *Bosnia after Dayton*, Sumantra Bose classifies the war as a civil war with a "vital dimension that is external to Bosnia"¹⁰⁶ Bose uses this definition of civil war not to diminish the aggression that Serbia showed towards BiH, but to capture the involvement of all three ethnic nations with BiH.¹⁰⁷ Furthermore, Bose seeks to avoid the "aggressor/victim" labels often applied to the BiH war when it is considered as an interstate conflict.¹⁰⁸ His argument continues with a consideration of just war theory, in that he recognizes that labelling the BiH conflict as a civil war runs the risk of assigning all participants an equal degree of moral culpability, which is not the case in BiH.¹⁰⁹

¹⁰³ Orend, "Michael Walzer on Resorting to Force," 526.

¹⁰⁴ Sumantra Bose, *Bosnia after Dayton* (New York: Oxford University Press, 2002) 19.

¹⁰⁵ Burg, *et al.*, 71.

¹⁰⁶ Bose, *Bosnia after Dayton* 21.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, 22.

In Kimberley Hudson's 2009 evaluation of Walzer's formulation of just cause, she identifies three stages in Walzer's theory regarding secessionist wars. Walzer's theory is based on the test of "self-help." The first stage is one in which a secessionist movement has begun, but which the legitimate government is capable of countering on its own. In this case, international intervention is permitted. The second stage is that where the secessionist movement grows in strength to now meet its own test of "self-help." In this case, intervention by the international community would be unjust, as Walzer considers this a natural element of self-determination. The final stage is where the secessionist group now seems capable of winning the war, in which case intervention on the side of the secessionists is now considered just.¹¹⁰

Walzer and Hudson do not permit judgements regarding the merits of one side or the other in a secessionist or civil war. "A legitimate government is one that can fight its own internal wars."¹¹¹ The exceptions that Walzer makes to a legitimate government's right to sovereign self-determination are based on humanitarian interventionism. If a government "turns savagely on its own people," or the conflict is "shock[ing to] the moral conscience of mankind," intervention by the international community would be considered just.¹¹² These cases are the extreme, however, and for Walzer, as identified by Hudson, "domestic illegitimacy does not translate into international illegitimacy."¹¹³

Justice on one side or the other of secessionist or civil war, however, is not captured by these theories or their exceptions. David Luban, writing in response to Walzer in 1980 attempted to reconcile this omission, through analysis of the definitions of

¹¹⁰ Kimberly A. Hudson, *Justice, Intervention, and Force in International Relations, Reassessing just war theory in the 21st century* (New York: Routledge, 2009) 12.

¹¹¹ Walzer, *Just and Unjust Wars*, 101.

¹¹² Walzer, *Just and Unjust Wars*, 101, 107.

¹¹³ Hudson, 18.

states and nations. States, Luban contends, are the political entities that represent a political unit through a “vertical contract” wherein the citizens agree in some way to this representation.¹¹⁴ A nation, on the other hand, exists through a “horizontal contract” more enduring than a state.¹¹⁵

These two, nations and states, according to Luban, must not be confused. Indeed, “when nations and states do not characteristically coincide, a theory of *jus ad bellum* which equates unjust war with aggression, and aggression with violations of state sovereignty, removes itself from the historical reality of war.”¹¹⁶ Thus, some attempt to qualify the potential for just or unjust wars occurring between nations, rather than solely between states, has been made.

However, Luban’s article, “Just War and Human Rights” goes no further than identifying this difference between nations and states, and then drawing conclusions regarding interstate conflict and international intervention.¹¹⁷ Therefore, although much has been written regarding just cause as an element of *jus ad bellum*, the focus has remained on the interstate implications of intrastate conflict. To transition to a tripartite theory of just war, it is likely that the existing theories of *jus ad bellum* will require reconciliation with the intrastate complexities of contemporary conflict.

Proper Authority. Again, if the Serbian leadership was laying claim to sovereignty over the remnants of Yugoslavia, how can an argument be made against their authority to use military action to enforce their policies? *Jus ad bellum* is not well suited to consider the implications of a people, such as the Serbs and Bosnian Serbs, who empower their

¹¹⁴ David Luban, “Just War and Human Rights,” *Philosophy and Public Affairs* 9 no. 2 (1980), 167.

¹¹⁵ *Ibid.*, 168.

¹¹⁶ *Ibid.*, 173.

¹¹⁷ *Ibid.*, 176-178.

government to take military action, when the international community disagrees with their position.

Right Intention. Orend uses the example of the Bosnian war to highlight the importance of right intention in determining the justice of going to war. Orend's contention is that the atrocities committed by the Serbs while prosecuting the war are evidence that Serbia did not have a morally right intention at the outset of war.¹¹⁸ However, the difficulty in applying this evidence in retrospect is that it blurs the lines between *jus in bello* and *jus ad bellum*.

Other wars, entered justly, have eventually employed unjust means. This is the very reason for the distinction between these elements of just war theory. Furthermore, if the intention of Serbia were to prevent the breakup of Yugoslavia in order to protect all its citizens, then a moral argument could successfully be made. Again, however, even this hypothetical supposition conflicts with the Bosnian's right to self determination. Right intention is often criticised as a criteria for *jus ad bellum*.¹¹⁹ It is not surprising, then, that it seems inadequate in its application to the complexities of the Bosnian war.

Proportionality, Last Resort and Public Declaration. In these cases the argument for justice in the Bosnian war seems clearer. On the heels of the growing nationalist rhetoric, the resort to war seems premature and disproportionate. This is particularly so given the peaceful dissolution of both the Soviet Union and Czechoslovakia, as well as the transition of Romania closer to representative democracy.

A public declaration as well seems a moot point, given the ambiguity of the previous criteria for *jus ad bellum*. Did the state of Yugoslavia (assuming Serbia was its

¹¹⁸ Orend, "Michael Walzer on Resorting to Force," 532.

¹¹⁹ Orend, "Michael Walzer on Resorting to Force," 532.

legal representative) require any public declaration regarding its intent to forestall the dissolution of the country? Regardless of whether this is the case, both Serbia and Bosnia made formal statements regarding their intention to enter into hostilities if their demands were not met.

Reasonable Chance of Success. Again, the complexity of the Bosnian war illuminate the limitations of classical just war theory. Probably Bosnia felt it enjoyed a reasonable chance of success in declaring independence from Serbia. If self determination is the hallmark of liberty, it may be suggested that the international community might have been expected to act earlier in support of Bosnian's desire for independence. Conversely, Serbia held the larger armed force with more modern equipment. Furthermore, Serbia may have expected international complicity regarding what could have been argued as the internal matters of a sovereign state.

The principles of *jus ad bellum* are, therefore, significantly challenged in their application to the Bosnian war with Serbia. Ultimately, the goal of any conflict must be reconciled with its potential divergence from existing theory. A civil war of independence is no different. If, however, existing pre-conflict just war theory struggles to describe the dissolution of Yugoslavia, how does the developing theory of post war justice cope with the same circumstances?

Jus in bello

Existing theories of intraconflict just war theory seem to apply more effectively to the internal conflict in the former Yugoslavia. Indeed, the greater simplicity of *jus in bello* is perhaps one reason why these criteria are more easily applied. In fact, it is based

on violations of the principles of *jus in bello* that the international community has sought to prosecute the perpetrators of these crimes.

Proportionality and Discrimination. Of the many atrocities committed during the war in Bosnia from 1992 to 1995, it is unlikely that any resonate as profoundly as that of Srebrenica. Srebrenica suffered a lengthy siege prior to its invasion. Siege warfare can have just war applications and the targeting of cities to strike at the will-to-fight and government support of the citizenry has *jus in bello* precedents.¹²⁰ However, the case has been made that the siege of Srebrenica violated these traditions, through the indiscriminate and direct targeting of non-combatant personnel.¹²¹ And, now an infamous event, two years after having been declared a UN protected city, Srebrenica was invaded by Serbian forces, and thousands of Bosnian Muslims under siege there were massacred. As a result of the systematic murder of thousands of Bosnian Muslims an entire community was extinguished.¹²² As a crime against humanity, the violation of the tenets of *jus in bello* manifested by the siege, shelling, invasion and massacre at Srebrenica is clear.

The investigation of the massacre and the subsequent trial of Bosnian Serb General Radislav Krstic lasted five years.¹²³ As a result of this gruesome work, however, the international community was provided indisputable evidence of the horrors of Srebrenica. Krstic's conviction on the charge of genocide affirmed the international community's adherence to the *jus in bello* principles of proportionality and discrimination. These two principles of just war were demonstrated to have been

¹²⁰ James Turner Johnson, "War for Cities and Noncombatant Immunity," in *Religion and Justice in the War Over Bosnia*, ed. G. Scott Davis, 23-43 (New York: Routledge, 1996) 82.

¹²¹ *Ibid.*

¹²² Hagan, 172.

¹²³ *Ibid.*, 133.

flagrantly ignored by Krstic, as well as *Republika Srpska* president Radovan Karadzic and Krstic's superior officer General Mladic.¹²⁴

***Jus in bello* revised as a result of the Bosnian war**

In fact, the principles of *jus in bello* seem to have been so clearly broken that the principles themselves were developed within the context of the war crimes committed in Bosnia. The ICTY established to investigate and prosecute war crimes committed in the former Yugoslavia played the crucial role in the development of the legal application of just war theory. Regarding the siege of Sarajevo, the commission organized three projects: "a pilot study of systematic rape; a 'law of war' study of a shelling incident; and an analytical survey of the siege of Sarajevo."¹²⁵ These investigations established the case for war crimes trials regarding the siege.¹²⁶

In addition, these studies in 1993 during the war, contributed to traditional laws of war by establishing that it was not necessary to start from the bottom up when investigating war crimes. That is, there was no requirement to identify particular individual acts and then tie them to the chain of command. Indeed, it was sufficient that a commander be expected to know what his troops are doing. A "weak personality" or "uncontrollable troops" are not sufficient arguments of defence against war crimes charges against commanders.¹²⁷ Indeed, this was a significant addition to the traditional theory of *jus in bello*.

¹²⁴ *Ibid.*, 166.

¹²⁵ *Ibid.*, 42.

¹²⁶ *Ibid.*, 43.

¹²⁷ *Ibid.*, 44.

Jus post bellum

Brian Orend's set of *jus post bellum* principles were developed as an extension of Michael Walzer's writings on traditional just war theory. Orend contends that his set of principles, although developed through examination of classical warfare, is generic enough to apply to the much more complicated cases of intrastate warfare such as the dissolution of Yugoslavia.¹²⁸ However, just as the traditional principles of just war theory struggle to adapt in their application to Bosnia, Orend's *jus post bello* principles also are limited in their applicability.

In his articles "Justice after War" and "*Jus Post Bellum: The Perspective of a Just-War Theorist*," Orend suggests the following principles for a theory of *jus post bello*:

1. Proportionality and Publicity – "The peace settlement should be both measured and reasonable, and publicly proclaimed."
2. Rights Vindication – "The settlement should secure those basic rights whose violation triggered the justified war."
3. Discrimination – Distinction between leaders, soldiers and civilians and a prohibition on sweeping socioeconomic reforms as part of a post war settlement.
4. Punishment – For both leaders and soldiers guilty of war crimes.
5. Compensation – With the caveat that "to beggar thy neighbour is to pick future fights."
6. Rehabilitation – To provide an opportunity to reform decrepit institutions in an aggressor regime.^{129,130}

Orend argues that in his tripartite theory of just war there are links between the pre-, intra-, and post-war phases. Once morality has been sacrificed or lost in one phase, the morality of the other phases no longer matters. According to Orend, a war that began

¹²⁸ Orend, "Justice after War," 44.

¹²⁹ Orend, "Justice after War."

¹³⁰ Orend, "*Jus Post Bellum: The Perspective of a Just-War Theorist*."

unjustly cannot be fought by just means, even if the *jus in bello* criteria are strictly adhered to. It follows by this reasoning then that a war without justice in one of the first two phases cannot be exited justly, either. The implication could be, then, that there is no value in applying the criteria of *jus in bello* to a war that has either begun or been fought unjustly.

Furthermore, is there value to applying the principles of *jus post bello* to a conflict such as the Bosnian war in which the established principles of just war are challenged in their own application? Do the principles of just war require continuity from beginning to end in terms of the adherence to these moral codes?

In fact, consideration of the principles of *jus post bello* may be especially suited to exiting a conflict that has been morally compromised in some way. There is a critical distinction between the ending of a conflict failing to adhere to the principles of justice as outlined by Paul Orend, and the failure of his principles to adequately describe a workable theory of *jus post bello*. Therefore, through examination of Orend's principles as they apply to the Bosnian war, deficiencies in these principles may be revealed.

The Dayton Peace Agreement

The instrument that ended the war in Bosnia was the DPA, signed in November 1995. The DPA was the outcome of intense diplomatic effort from the United States.¹³¹ However, while diplomatic efforts to end the war had been ongoing since 1992, they were not backed with any significant military power until 1995.¹³² In that year, however, domestic pressures on the Clinton administration in the United States shifted, and the deployment of and associated risk to military forces to alleviate a humanitarian crisis

¹³¹ Cohen, 366.

¹³² Jutta Paczulla, "The long, difficult road to Dayton: Peace efforts in Bosnia-Herzegovina," *International Journal*, (2004/2005): 257.

gained both acceptance and political achievability.¹³³ In addition, Bosnian Serb demonstrations of contempt for UN forces engendered a feeling in the US and in Europe that the guiding principle of impartiality of UN forces was not only ineffective but was also enabling the continuation of hostilities in Bosnia.¹³⁴

The withdrawal of the UNPROFOR units in Bosnian Serb held territory permitted NATO to begin the airstrike campaign against Bosnian Serb military targets in Operation *Deliberate Force*, independent of the UN chain of command.¹³⁵ *Deliberate Force* followed, overlapped and ultimately facilitated significant Bosnian Croatian Federation military successes against the Bosnian Serbs.¹³⁶ As a result, the territorial questions surrounding much of the fighting in Bosnia were settled through military action prior to the commencement of the Dayton discussions.¹³⁷ Although Bosnian Army successes in gaining territory were crucial to establishing the conditions that ultimately brought the Serbs to the negotiating table, Ambassador Richard Holbrooke, the chief architect behind the agreement, identified in 1996 the air strikes as the “decisive factor” in the eventual Serbian agreement to participate in the talks.¹³⁸

These developments and the efforts of the negotiating teams in Dayton set the conditions for peace in Bosnia. These conditions included a new political architecture, the deployment of the UN implementation force and the NATO stabilization force.¹³⁹ The use of interventionist military force, in particular the air strikes, but also including covert military support of Bosnia and Croatia to balance the military situation against

¹³³ *Ibid.*, 272.

¹³⁴ Paul C. Forage, “Bombs for Peace: A Comparative Study of the Use of Air Power in the Balkans,” *Armed Forces & Society* 28 no. 2 (2002): 215.

¹³⁵ Paczulla, 262.

¹³⁶ Forage, 215, 219.

¹³⁷ Paczulla, 262.

¹³⁸ Forage, 224.

¹³⁹ Cohen, 366.

Serbian forces evened the playing field in the background of the Dayton peace negotiations.¹⁴⁰ This redistribution of power, achieved through the use of NATO and American military force, motivated both the Serbs and the Bosnians to remain at the peace table.¹⁴¹ As such, the DPA provides a unique opportunity to examine a written, recorded attempt to end a conflict that was drafted while the parties to the conflict were still engaged, and neither had been clearly defeated or victorious.

Since its implementation in 1995, the DPA has been the central, defining document in BiH. It established the state itself as independent from Serbia and the former Yugoslavia. It recognized two entities within BiH, the Serb controlled *Republika Srpska* and the Muslim-Croat Federation. And it imposed the cease fire that halted the war.¹⁴² The DPA represents the vital dividing line between conflict and peace. It is, therefore of particular interest in examination from a just war theory perspective.

Furthermore, the DPA is the outcome of the process that sought to transition from conflict to peace, and is the guiding document that shapes that peace. The DPA and the ICTY represent the international community's efforts to ensure the end of the Bosnian conflict represented not only a cessation of hostilities, but also the deliverance of justice to those hurt most by the violence and atrocities that defined the war. The DPA, therefore, is directly related to the philosophy of *jus post bellum*. And the application and consideration of the nascent principles of *jus post bellum* will help shape and develop these principles, and provide an analysis framework of the peace agreement itself.

¹⁴⁰ Paczulla, 263.

¹⁴¹ *Ibid.*, 268.

¹⁴² Peter Lippman, "On 10th Anniversary of Dayton Accord: Are Changes in Bosnia Real or Rhetorical?," *The Washington Report Report on Middle East Affairs* 25 no. 1 (2006): 38.

ICTY

The ICTY was established by the UNSC in May 1993 to contribute to the “restoration and maintenance of peace in recognition of an explicit link between international criminal justice and international peace and security.”¹⁴³ It has been suggested that the creation of the ICTY was a response by the international community to make amends for its failure in preventing the war crimes in the first place.¹⁴⁴ However, it has also been suggested that, regardless of the true or fundamental motivation of the international community in forming the ICTY, a lasting peace would not be possible without some form of accountability for the ordering and commission of the atrocities in Bosnia.¹⁴⁵

Furthermore, the ICTY represents the international community’s commitment to ending a suggested feeling of impunity that pervaded the immediate post-Cold War environment. That is, prior to the establishment of the ICTY, there was a growing belief that international relations were characterised by a marginalization of justice for the primacy of “mainstream pragmatism.”¹⁴⁶ However, the establishment of the ICTY, particularly while the war was ongoing and with a mandate to deter future crimes against humanity (regardless of its success in that element of its purpose) marked a commitment by the UN and its member nations to establish a new, moral legalism to the world order. This commitment to the growing importance of international peace and stability relative to the sanctity of sovereignty exceeds the impact of the specific cases heard and judged by the ICTY.

¹⁴³ Rachel Kerr, “The Road from Dayton to Brussels? The International Criminal Tribunal for the Former Yugoslavia and the Politics of War Crimes in Bosnia,” *European Security* 14 no. 3 (2005): 322.

¹⁴⁴ Wilson, 923.

¹⁴⁵ Kerr, 322.

¹⁴⁶ Payam Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal,” *Human Rights Quarterly* 20 (1998): 742.

Judgements and trials of the ICTY include: the controversial plea bargain sentencing of 11 years for Biljana Plavsic,¹⁴⁷ the trial and conviction of Momcilo Krajisnik,¹⁴⁸ and the trial and conviction of genocide of Radislav Krstic.¹⁴⁹ In May 1997, despite early concerns that the ICTY lacked the will or resources to make a meaningful contribution, Duško Tadić was convicted for crimes against humanity.¹⁵⁰ Not only was this conviction important in marking a positive step in confirming the relevance of the ICTY, but also it set the precedent that “a single act could be considered a crime against humanity if it is linked to a systematic program of persecution of a population.”¹⁵¹

Any international tribunal is likely to be subjected to concerns or criticisms that it is merely a court of victor’s justice at which the accused are solely representative of a defeated state and the convictions and punishments are not based on the legal principles of fairness and impartiality. The ICTY is no exception.¹⁵² James Meernik examined in 2003 this criticism made specifically against the ICTY. His study examined the cases prosecuted and the judgements passed by the tribunal in a statistical analysis that included: the individuals tried by the ICTY; the crime they were tried for; their relative power in the region; their ethnicity; and their sentences and acquittal rates.¹⁵³ This study presented significant evidence that supported his conclusion that “the ICTY judges follow widely accepted legal criteria found in key international agreements in making their

¹⁴⁷ Kerr, 324.

¹⁴⁸ Marlise Simons, “Bosnian Serb sentenced to 27 years Top-ranking politician guilty of war crimes,” *International Herald Tribune* 3rd ed. (28 September, 2006).

¹⁴⁹ Kerr, 324.

¹⁵⁰ Wilson, 924.

¹⁵¹ *Ibid.*

¹⁵² Diana Johnstone, *Fool’s Crusade: Yugoslavia, NATO and Western Delusions* (New York: Monthly Review Press, 2002) 32.

¹⁵³ James Meernik, “Victor’s Justice or the Law? Judging and punishing at the international criminal tribunal for the former Yugoslavia,” *The Journal of Conflict Resolution* 47 no. 2 (2003): 154.

determinations.”¹⁵⁴ The ICTY is not, therefore, simply a manufactured product of the international community established to arbitrarily punish one side to a conflict. In fact, the ICTY has continued to build its credibility since its founding through justice based findings, acquittals and convictions.

As with the DPA, the ICTY is a defining element of the post conflict justice of the Balkans region. Consideration of the ICTY from a *jus post bellum* perspective permits development both of an understanding of the first international tribunal for war crimes since Nuremburg and of the principles that form the basis of post-war justice. Taking each of Orend’s criteria for *jus post bellum* and applying them to these two fundamental elements of Bosnia’s transition to sustainable peace and eventual prosperity permits, therefore, critical analysis of these criteria and their utility and applicability.

Proportionality and Publicity – “The peace settlement should be both measured and reasonable, and publicly proclaimed.”

The very first of Orend’s criteria is challenged by the specifics of post-conflict Bosnia. It is difficult to gauge proportionality when faced with the end of a conflict marked by extreme cases of war crimes. However, both elements of the post-conflict Bosnia, the DPA and the ICTY seem to at least seek proportionality in their distribution of justice. The DPA sought no dramatic redrawing of borders or redistribution of the complex ethnic populations of Bosnia. Indeed, when the Bosnian army was reorganized under the auspices of the agreement, the three ethnically divided armies were integrated into one multiethnic structure with three ethnically based battalions, suggesting, perhaps a

¹⁵⁴ Meernik, 159.

metaphor for Bosnia and the Balkans region as a whole.¹⁵⁵ That the DPA sought this type of reconciliation, however fanciful some may argue it is, is evidence that the agreement was in proportion to the catastrophe that it sought to end. That is, when an entire society is pushed to the brink of destruction, as the Bosnian Muslims were from 1992 to 1995, a peace agreement, or post-conflict justice, must seek measures of the same dramatic scale. Reorganizing an army along ethnic lines is demonstrably just such a dramatic scheme.

Another proportionality argument maybe made, however. That is, that the DPA was out of proportion to the scale and viciousness of the atrocities committed during the conflict. The DPA is, arguably, a relatively mild-mannered peace agreement when compared to the atrocities committed during the war. An agreement in proportion to the Bosnian war might have sought greater protections for those targeted by the genocides. A proportional agreement might have created a more stable structure from within which to rebuild the Bosnian Muslim society, rather than one where the Bosniaks are seen as an equal party to the conflict, and are required to cooperate with those who sought their destruction in order to rebuild the state of Bosnia. Clearly, given these competing characterisations of the Dayton Agreement – one that argues that it is entirely proportional to the scale of the conflict and one that argues that the agreement did not go far enough to address the severity of the damage done to Bosniak society – there is some doubt regarding the proportionality of the agreement itself.

There is, however, little doubt regarding the publicity of both the DPA and the ICTY. American public opinion was significantly split on deploying troops to Bosnia in

¹⁵⁵ Patrice C. McMahon and Jon Western, “The Death of Dayton: How to Stop Bosnia From Falling Apart,” *Foreign Affairs* 88 no. 5 (2009).

1995, while the issue in part defined the election campaign of President Bill Clinton.¹⁵⁶ This is evidence of at least awareness in the United States, if not understanding, that a peace agreement had been reached and was going to be enforced. Furthermore, both the DPA political structure (including the office of the UN High Representative) and the ICTY (and associated developments of regional criminal courts seeking to accept and try some of the accused)^{157,158} have been election issues in Bosnia, and are likely to remain so as Bosnia continues to seek membership in the European Union.¹⁵⁹ Therefore, the interventionist state was at least aware in passing of the peace agreement, and the parties directly involved in the conflict have access to and remain politically cognisant of the issue.

Rights Vindication – “*The settlement should secure those basic rights whose violation triggered the justified war.*” Arguably both the ICTY and the DPA contributed to significant degrees to vindicate the rights of all parties involved in the conflict. While neither process could claim perfection, the institution and support of a criminal tribunal dispensing justice reflects the best practices of internationally accepted means of assessing facts and acquitting or convicting the accused.¹⁶⁰ The fact that the Dayton Agreement simply ended the fighting and the ethnic-based atrocities that were occurring suggests that the right to life of all those living in Bosnia had been, if only tenuously, re-established.

¹⁵⁶ *The Economist*, “America in Bosnia: Gambling the presidency,” 2 December 1995: 22-23.

¹⁵⁷ John Hagan and Sanja Kutnak Ivkovic, “War Crimes, Democracy, and the Rule of Law in Belgrade, the Former Yugoslavia, and Beyond,” *Annals of the American Academy of Political and Social Science* 605 (2006): 131.

¹⁵⁸ Akhavan, 770.

¹⁵⁹ *Oxford Economic Briefings*, “Bosnia and Herzegovina” (2009): 2.

¹⁶⁰ Akhavan, 774.

Furthermore, the ICTY and the ICJ give Bosnians outlets from which to restore their national and state rights. That Bosnia has been active in pursuing international cases against other states at the ICJ is evidence that Bosnia's rights as an internationally recognized political entity have been vindicated. Certainly some of the findings in these cases have demonstrated questionable justice in their outcomes, but the vindication is arguable in the right of Bosnia to have these cases heard.

As for individual rights the DPA certainly sought the means for their protection. The complex system of government and significant international support and oversight is evidence that the rights of individuals living in Bosnia were held paramount in the drafting of the agreement.¹⁶¹ And yet, what of the rights of those targeted by the genocide? Recently, Bosniak political entities have developed a more nationalistic stance.¹⁶² This rise of Bosniak political entities mirrors the persistence of Bosnian Serb and Bosnian Croatian nationalist political parties.¹⁶³ These developments suggest that Bosnian Muslims feel their individual rights are again under threat. Individuals confident of their government's ability to protect their individual rights are unlikely to group together by nationalising political parties, or strengthening existing nationalist associations, but this has and is occurring in BiH under the DPA.

In addition, the structure of the BiH government is such that significant deadlocks occur, and many acts of governance are extremely challenging.¹⁶⁴ The inability of the Bosnian government (consisting of BiH, the *Republika Srpska*, and the Bosniac-Croat Federation) and to work through the endless ethnic stalemates is significantly related to

¹⁶¹ Kaldor, 70.

¹⁶² McMahon, *et al.*, 69.

¹⁶³ Bose, *Bosnia after Dayton* 8.

¹⁶⁴ Bose, *Bosnia after Dayton* 63.

the allocation of the levers of power in BiH, designed by the DPA to ensure no one ethnic group is able to rise above the others.¹⁶⁵ This structure, which denies all citizens of Bosnia the privilege of a functioning, democratically representative government focussed on protecting and improving the lives of its people, is evidence that the rights of Bosnian Muslims who were targeted by the Serbian aggression have been subjected to an apparent “reset” wherein all parties in Bosnia are treated equally from the starting point of the Dayton Agreement, with the history of the prior three years forgotten and unaccounted for.

Discrimination – Distinction between leaders, soldiers and civilians and a prohibition on sweeping socioeconomic reforms as part of a post war settlement. Evidence of discrimination as described by Orend exists in the crucial difference between the establishment of the ICTY and Bosnia’s case before the ICJ against Serbia Montenegro. Through the ICTY, Bosnia and the international community have the opportunity to seek justice in the cases against the individuals who committed, facilitated or directed the atrocities. While an apparently slow process, and one that clearly experienced a rocky start,¹⁶⁶ the ICTY has made crucial findings against those who committed war crimes during the Bosnia war.

BiH’s case against Serbia and Montenegro at the ICJ presented an opportunity to prosecute crimes against humanity in a forum separate from that directed at individuals.¹⁶⁷ In this way, a reasoned judgement could have been levelled that had the potential to end the cycle of rhetorical victimisation that fuelled the ethnic nationalism

¹⁶⁵ *Ibid.*, 61.

¹⁶⁶ Bass, 207.

¹⁶⁷ Richard J. Goldstone and Rebecca Hamilton, “*Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia*,” *Leiden Journal of International Law* 21 (2008): 96.

during the dissolution of Yugoslavia. However, ensuring that a judgement against a state does not represent an indiscriminate ruling against all citizens of that state is a challenging proposition. Unfortunately, the ICJ ruling in February 2007 avoided tackling this challenge.

The ruling of the ICJ in February 2007 illustrates that adherence to the principle of discrimination in *jus post bellum* does not necessarily represent the most just outcome. The ICJ ruling that Serbia was not responsible for the genocide in Bosnia “left thousands of victims without judicial redress.”¹⁶⁸ In a defence of the ruling, it has been suggested that the politicization of the ruling was begotten of the political reasons for bringing forth the case in the first place.¹⁶⁹ Regrettably, this “good politics” of preserving Serbia’s fragile state is given precedence over compensation for the non-material damages suffered by the victims of the genocide themselves. As Andrea Gattini suggests, “in the light of the exceptional gravity of the crimes...the Court could have shown more creativity and sensitivity with regard to the ‘non-material damage suffered by the surviving [victims and their successors].’”¹⁷⁰ As Christian Tomuschat pointedly states, the finding “does not appear to do justice to the moral harm inflicted on the victims and their next of kin.”¹⁷¹ Thus, while the ruling cannot be accused of indiscriminate against the people of Serbia, or Bosnian Serbs, it is hardly an example of the distribution of justice in a post-conflict setting. If adherence to a principle contradicts a more just outcome, then the utility of the principle itself must be questioned.

¹⁶⁸ Nikolas Rajkovic, “On ‘Bad Law’ and ‘Good Politics’: The Politics of the ICJ Genocide Case and Its Interpretation,” *Leiden Journal of International Law* 21 (2008): 888.

¹⁶⁹ Rajkovic, 889.

¹⁷⁰ Andrea Gattini, “Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment,” *The European Journal of International Law* 18 no. 4 (2007): 711.

¹⁷¹ Christian Tomuschat, “Reparation in Cases of Genocide,” *Journal of International Criminal Justice* 5 (2007): 910.

Punishment – For both leaders and soldiers guilty of war crimes. The ICTY at least seeks to punish the leaders and soldiers guilty of war crimes, without discrimination based on ethnicity. It is true that some of the most notorious of the accused and indicted remain at large or took years to be brought to face the court. Inefficiency or even failure in the application of a principle, however, does not invalidate the principle.

Compensation – With the caveat that “to beggar thy neighbour is to pick future fights.” Neither the DPA nor the ICTY seem to provide much in the way of compensation to Bosniaks. The ICTY, of course, targeted individuals for their crimes, so the most likely form of compensation that could be provided is the moral satisfaction that the wrong doers are being convicted for their crimes. The ICTY’s purpose was not to directly compensate Bosnia or its people for the crimes committed against them. The ICJ had the opportunity to provide compensation to the Bosniaks, but, as was discussed in the previous sections, failed to do so.

The DPA also had the possibility of providing a means for compensation, but was challenged in that it was not only the document that shaped the future of the former Yugoslavia, but also was the document designed to actually stop the fighting through a negotiated truce.¹⁷² A significant challenge for the DPA when considered from a *jus post bello* perspective, however, is its fundamental acceptance of the wartime territorial possessions of the parties to the conflict.¹⁷³ By accepting these issues, the DPA served to legitimize their creation as a result of the war and their roots in the ethnic hatred that had

¹⁷² Carl Bildt, *Peace Journey: The Struggle for Peace in Bosnia* (London: Weidenfeld and Nicolson, 1998) 392.

¹⁷³ Sumantra Bose, “The Bosnian State a Decade after Dayton,” *International Peacekeeping* 12 no. 3 (2005): 324.

been so exploited.¹⁷⁴ Although given in defence of the Agreement, Sumantra Bose develops an apt analogy for the establishment of the post-conflict Bosnian state as reflective of the second Yugoslavia (1945-1991) only with liberal internationalism holding it together rather than a communist regime.¹⁷⁵ Compensating those affected by the atrocities of the war was sacrificed, it would seem, for the sake of ending the violence and instituting a multi-ethnic regime that the global community could oversee and, ideally, develop as a peaceful and prosperous state.

Rehabilitation – To provide an opportunity to reform decrepit institutions in an aggressor regime. The institutions of Bosnia were not necessarily decrepit at the beginning of the war, nor could Bosnia be classified as the aggressor regime. Indeed, the political regimes that existed during the war were left intact by the Dayton Agreement.¹⁷⁶ In fact, arguably the DPA created decrepit institutions through the rationalization of the territorial and ethnic distribution established through the violence and atrocities of the war.¹⁷⁷ These institutions arguably operate in a political gridlock, are threatened by corruption and discourage political moderates.¹⁷⁸

However, regardless of its flaws, the political structure established by the DPA was given an opportunity to succeed through the application of US and NATO military force. In fact, while somewhat critical of many aspects of the international community's involvement in BiH, during all phases of the conflict, one expert on the region and the war identifies the international community as “pivotal” in the establishment and

¹⁷⁴ Norman Cigar and Paul Williams, *Indictment at the Hague: The Milosovic Regime and Crimes of the Balkan War* (New York and London: New York University Press, 2002) 20.

¹⁷⁵ Bose 330.

¹⁷⁶ Charles B. Philpott, “From the Right of Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina,” *International Journal of Refugee Law* 18 no. 1 (2006): 31.

¹⁷⁷ Bose, *Bosnia after Dayton* 244.

¹⁷⁸ McMahan *et al.*

maintenance of the political structure defined by the DPA.¹⁷⁹ Deploying 60,000 NATO IFOR and SFOR troops to the region arguably satisfies the “opportunity” portion of Orend’s criteria. The longevity or workability of the institutions these forces supported remains to be seen.

¹⁷⁹ Bose, *Bosnia after Dayton* 6.

SECTION FOUR – CONCLUSION

Clearly, Orend's principles for *jus post bellum* are not yet adequate for application to a challenging conflict such as the Bosnian war. Several of these criteria either do not adequately consider the complexities of contemporary conflict, or, when they may be applied tend to yield contradictory results. It may be argued that some of these principles could hold some validity, but in the case of the Bosnian war they simply were not applied, or were not applied well. The principles of proportion and publicity, rights vindication and compensation were either questionable in their application, such as finding an adequate definition of proportionality for the DPA; only partially applied, such as rights vindication in which the rights of the Bosnian state were arguably vindicated, but without vindication for the rights of the Bosniak individuals; or were simply not addressed, either financially or morally, such as the principle of compensation.

Orend's principle of discrimination probably was adequately applied. The peace agreement and the post-conflict tribunals and criminal and legal findings have arguably demonstrated a high degree of discrimination in that no finding was passed down against the state of Serbia, and only individuals have been tried and convicted at the ICTY. Furthermore, the ICTY has heard cases from all sides to the conflict, and at all levels of command and responsibility, providing further evidence of the discrimination between those guilty of war crimes and those who may have been legal combatants or innocent pawns.

And yet, this discrimination has left thousands of people affected and targeted by the genocide in Bosnia without the moral satisfaction of justice. Indeed, both the DPA and the outcome of BiH's case against Serbia and Montenegro at the ICJ illustrate that application of Orend's principle of discrimination, in this case, has reduced the justice of

the post-conflict peace. The post-conflict system in place in Bosnia treats victim and aggressor equally, as though the war crimes committed were somehow attributable in some way to the victims. Clearly, the principle of discrimination in a theory of *jus post bellum* requires refinement, if its application is going to promote post-conflict justice rather than impede it.

Orend's principle of punishment is probably the strongest example of his criteria in their application to BiH. As Orend's principle seeks to punish both leaders and soldiers guilty of war crimes, the ICTY has arguably been successful in pursuing this policy. In addition, the establishment of local courts in the states of the former Yugoslavia indicate a willingness to seek justice at home, with the cultural sensitivities and national ownership that implies. While state punishment has not been sought against Serbia by the international community, Orend does not argue in favour of state punishment as part of this criterion.

Orend's principle of rehabilitation, on the other hand, seems to have been applied backwards in BiH. Certainly the total war that existed in BiH from 1992 to 1995 left the state without functioning institutions. But this should not imply that the preconflict institutions were decrepit, as Orend's criterion suggests. Furthermore, the institutions that have been put into place as a function of the DPA, while arguably successful in preventing further conflict in BiH, have become hotbeds of corruption and political stalemate. It is difficult to demonstrate that the two nations in one state model, propped up by international support and resources, and implemented by international force of arms, is evidence of a rehabilitated national governance structure.

In addition, while the DPA, IFOR and SFOR brought peace to BiH, the Serbian actions in Kosovo with the resultant NATO air strike campaign, is further evidence of a

failure of rehabilitation. Although the divisions within BiH were addressed by the DPA, peace and security in the surrounding region was only temporarily and tenuously established.

However, it's difficult to expect significant success in application of these newly developed criteria. Given that their development is as contemporary as the conflict to which they have been applied, it is unsurprising that they are, in several instances, challenged to demonstrate how they either describe a just settlement, or indeed were applied to improve the justice of the post-conflict situation. Traditional just war theory has been the subject of generations of development and refinement. And yet, traditional and accepted criteria for *jus ad bellum* and *jus in bello* suffer from very similar challenges as Orend's criteria for *jus post bellum*. These challenges are not restricted to instances where they were not applied, but, as has been shown for *jus post bellum*, are also related to instances where their application or adherence has reduced the overall justice of the conflict, in its lead-up, application and ultimate settlement.

None the less, these challenges to Orend's principles or criteria for *jus post bellum* should not restrict them from further development. The post-Cold War era has been defined by conflicts in which the transition to peace has been strained. Indeed, in most of these major conflicts, stabilization to enduring peace is not yet assured. Afghanistan and Iraq are the starkest examples of a failure to ensure post-conflict justice leading to continued fighting. BiH, while still peaceful fifteen years after Dayton, remains so because of significant support from the international community, and not because of any natural up swell of stability through justice. Thus, if recent challenges are any indication, there seems to be a requirement to develop a theory of post-conflict justice, to complement the existing theories of *jus ad bellum* and *jus in bello*.

Furthermore, post-conflict justice is a natural development of just war theory. A theory of justice before followed by a theory of justice during conflict, lead naturally into a theory of justice after a conflict. Furthermore, these theories of just war did not develop in isolation or over short periods, or without reason. Augustinian just war theory, as the established preceptor of modern just war theory was developed specifically for the contemporary challenges of its day. Furthermore, despite largely ignoring post conflict justice as outside the contemporary requirement for a theory of just war, Augustine's writings contain the initial elements, the first seeds, of a requirement for *jus post bellum*. So, while much of contemporary just war theory has undergone centuries of refinement, it is only recently that the final elements of both Augustine's early writings on the subject have been exposed to the same sort of development and consideration.

Post-war justice seems likely to continue to be developed and refined, just as previous just-war theories have been. It took these theories thousands of years to transition into legal standards. But as the globe becomes more focused on legality, as institutions designed to uphold international law and dispense justice grow and mature, so too will these developing theories be put into practice. And as they are, they will begin the transition from philosophy to legality to everyday use and application.

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